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Orphans' Property and the Judicial Treasury in Medieval Islam

A dissertation submitted in partial satisfaction of the

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by

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ABSTRACT OF THE DISSERTATION

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Professor Khaled M. Abou El Fadl, Chair

This is a history of Muslim legal institutions dedicated to preserving and investing the property of orphans in Egypt and Syria in the Islamic Middle Period. These institutions coalesced into centralized treasuries under the control of the judiciary in Cairo and Damascus and accumulated enough resources to fund large-scale military campaigns. In Cairo, this institution was known as the *mūdaʿ al-ḥukm*; in Damascus, it was called the *dīwān al-aytām* or *makhzan al-aytām*. Orphans' property rights were the subject of legislation since the Ancient Period in the Near East and a significant topic in both the Qur'an and early Arabic poetry. Although the emergence of Islamic legal texts played a central role in the creation of legal practices for preserving and investing orphans' property studied in this dissertation, an analysis of Arabic chronicles and prosopography indicates that the creation and perpetuation of the judicial treasuries in Cairo and

Damascus was a product of the efforts of both political rulers and Muslim jurists and judges. The eventual decline in the fortunes of these institutions in the early 15th century A.D. was due to the combination of the economic woes of the Mamluk Sultanate and the adoption of alternative, diffuse methods of preserving and investing orphans' property. These alternative methods relied less on the centralized political power of the state but, rather, on networks of trust and authoritative fixed-texts of law. The employment of decentralized legal practices was facilitated by the increasing authority of particular legal texts favored by the legal school (*madhhab*). A study of Shāfi'ī legal commentaries on some of the most important texts of positive law (*furū'*) shows that Muslim jurists in the Mamluk Period nevertheless continued to authorize divergent legal opinions within chapters on *ḥajr*, which is the chapter that that most explicitly discusses orphans and their property. Thus, gradual change and innovation was countenanced within the framework of a relatively stable set of widely-recognized rules regarding the preservation and investment of orphans' property.

The dissertation of Evan McKibbin Metzger is approved.

Michael David Cooperson

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Biographical Sketch

Evan Metzger graduated in 2011 from the University of California, San Diego where he majored in Philosophy and studied Arabic. Prior to starting graduate school at the University of California, Los Angeles, he worked as an English teacher in Cairo, Egypt and studied Arabic at the American University in Cairo. In 2019, he was awarded the Fulbright-Hays Doctoral Dissertation Research Abroad fellowship.

Introduction

For much of the Islamic Middle Period in Cairo and Damascus, reputable people in good standing could acquire a loan on interest from an institution that strikes the modern human being as rather curious.[1] For this institution's formal purpose was not, as a matter of fact, to provide loans but to preserve the property rights of orphans along with a smaller category of individuals known as the "absent people" (*al-ghuyyāb*)—i.e., people who were not present to claim their property. In Cairo, it was called the *Mūdaʿ al-ḥukm* (literally "the depository of the law" or "the depository of the court," but I will refer to it throughout this dissertation as "the Judicial Treasury"); in Damascus, the *dīwān al-aytām* (the Orphans' Bureau) or the *makhzan al-aytām* (the Orphans' Treasury). One would be excused for assuming that an institution established for such a noble purpose might have a primarily charitable function. In fact, as this dissertation will show, these institutions were established to protect the rights of propertied orphans and provided an important source of funds in times of need—even funding military campaigns.

This phenomenon of accumulating and reinvesting orphans' property was not limited to Cairo and Damascus. There were likely similar institutions in other cities. In chapter Five, for example, I document the existence of similar legal institutions in Upper Egypt and in Baghdad. But beyond these centralized institutions, judges and their trustees—referred to as *umanāʾ al-ḥukm* (singular: *amīn al-ḥukm*) in the sources—supervised orphans' property in a more diffuse

[1] The Islamic Middle Period is periodization introduced to Islamic Studies by Marshall Hodgson in order to conceptualize the historical period between 945-1500. It is separated into a Earlier Middle Period (945-1250) and a Later Middle Period (1250-1500). This period is characterized by the waning-and eventual disappearance-of a strong central caliphate, the emergence of smaller, regional powers, the Islamicization of much of the Near East, and a high culture shared by elites and litterateurs, despite certain region differences, throughout the Nile-to-Oxus region. See Marshall Hodgson, *The Venture of Islam Volume 2: The Expansion of Islam in the Middle Periods* (Chicago: University of Chicago Press, 1977), 3-11.

manner. Even in Cairo and Damascus the centralized institutions for preserving orphans' property existed alongside a network of individuals who were involved in distributing, preserving and investing orphans' property, as will be seen in Chapters Four and Five.

The purpose of this study is twofold. Its primary goal is to provide an empirical study of the emergence of these institutions in Islamic history and their eventual decline in the 15th century. Although most of the information about these institutions arrives to us from sources produced during the Mamlūk Period (1250-1517), and these sources are explored in detail in Chapters Four and Five, these institutions were neither the original creations of the sulṭāns, scholars or judges of the Mamlūk Period nor where they perceived as such by contemporaries of the period. Rather, the judiciary's supervision of orphans' property was seen as a fundamental part of the judge's practice of the law at this time. For this reason, Chapter Three details the expansion of the judiciary's control over orphans' property starting in the 2nd/8th century as this history created a precedent for the institutional arrangements in the Mamlūk Period.

The second purpose of this study is to understand the relationship between these practices of supervising and investing orphans' property to Muslim jurists' understanding of divine law, or *Sharī'a*, as expressed in the textual tradition known as *fiqh*. These practices, I argue throughout the dissertation, can be seen as an attempt to uphold the rights and duties towards orphans elaborated by Muslim jurists in *fiqh.* As will be seen in Chapter Four, accusations of mishandling orphans' property were seen as a serious violation of the law. Moreover, Muslim jurists in the Middle Period transmitted a legal maxim (*qā'ida*) that stated that leaders of the community should act in regards to the wealth entrusted to them in the same way that a guardian acts towards the orphan in his care. For example, in the book of legal maxims composed by the

Shāfi'ī legal scholar and judge, 'Izz al-Dīn Ibn 'Abd al-Salām al-Sulamī (d. 660/1262), one reads:

"The leaders (*wulāt*) and their deputies are to only take actions...according to what is of more benefit to whoever is under their jurisdiction, thereby preventing harm and corruption and bringing benefit and guidance."

According to Ibn 'Abd al-Salām, the textual basis for this rule is the Qur'ānic verse, "And do not approach the orphan's property except in a way that is best until he reaches maturity." Thus, he states, "If that is the case for the rights of the orphans, then *a fortiori,* it must be valid for the rights of all Muslims in regards to how the *imām*s use general funds."[2] This model for the legitimate use of state funds was employed at times by jurists during the Mamlūk Period to challenge appropriations of property by the sulṭān that they deemed illegitimate. For instance, the Ḥanafī legal scholar Kamāl al-Dīn Ibn Humām (d. 1457 A.D.) argued that the Mamlūk state's practice of controlling most agricultural land and selling it to private individuals was a violation of this maxim.[3] Similarly, the Shāfi'ī legal scholar and Chief Judge 'Alam al-Dīn al-Bulqīnī (d. 868/1465), one of whose texts is studied in Chapter Six, argued in a council convened to review Sultan Barsbāy's purchase of land from the state treasury (*bayt al-māl*) that such a purchase is invalid because "the ruler in regards to his people is in the position of a guardian to his orphan's property."[4] Thus, the property rights of orphans were a grave legal matter and the guardian's

[2] Ibn 'Abd al-Salām, *Qawā'id al-Ahkām fi Iṣlāḥ al-Anām*, vol. 2 (Jadda: Dār al-Qalam, 2000), 158.

[3] "It is not permissible for the Imam to buy or sell anything from the Treasury, because responsibility for caring for Muslims' money is like the responsibility of an orphan's guardian. He is not allowed to sell from (his ward's) property except in times of greatest need and there being no other way to support him," Bethany Walker, "Popular Responses to Mamlūk Fiscal Reforms in Syria," *Bulletin d'Études Orientales* 58 (2009), 67.

[4] Shihāb al-Dīn Aḥmad Ibn Ḥajar, *Inbā' al-ghumr bi-abnā' al-'umr,* ed. Ḥasan Ḥabashī (Cairo: Lajnat Iḥyā' al-Turāth al-Islāmī, 1969), 3/478.

protection of those rights was seen as a model for good governance. It seems reasonable, therefore, that the judges and administrators tasked with supervising orphans' property grounded their practice in the legal norms developed in *fiqh*. This dissertation will substantiate this assumption by tracing the emergence of orphanhood as a legal attribute starting with the Qur'ān and early Muslim jurists' development of the concept of legal interdiction (*ḥajr*) in order to conceptualize the authority of guardians and judges over the property of orphans. I argue that these legal concepts were important steps towards the creation of a legal discourse that jurists and judges employed to justify their control of orphans' property.

Modern scholars of Islamic law have tended to leave aside the question of the relationship between legal practice and the study of the *fiqh* in premodern Muslim societies. In part, this is due to the paucity of archival and court records prior to 16th century Ottoman practice. Yet, over forty years ago, Abraham Udovitch revealed the salience of *fiqh* to commercial practice by relying almost exclusively on legal manuals.[5] Arguing directly against Hurgronje and others who held that "all classes of the Muslim community have exhibited in practice an indifference to the sacred law in all its fullness," Udovitch showed that commercial laws developed in the "formative period" (7th - the middle of the 10th centuries A.D.) continued to provide the basic vocabulary and legal framework for commercial transactions as late as the 12th century.[6] Nevertheless, even Udovitch limited himself to the legal manuals of the formative period, based on the assumption that *fiqh* failed to develop after this period. Since the publication

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

[6] *Ibid*. 256-260, quoting Snouck Hurgronje, *Selected Works* (Leiden: Brill, 1957), 290. For the definition of the "formative period" in Islamic law, see Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2004), 2-3.

of Udovitch's study, the supposed inability of Islamic law, in all its varieties and geospatial expressions, to adapt and develop has been thoroughly challenged and disproved (much of this literature is discussed in Chapter Six). However, the most of these studies have chosen to examine legal texts, largely neglecting *fiqh*'s relationship to the social world and other genres of writing produced in the post-formative period. As a result, the extent to which Islamic law shaped legal institutions and legal practice is poorly understood in the Islamic Middle Period.

Despite this, scholars have shown in recent years that premodern Muslim legal scholars developed a concept of the "rule of law" based on legal precedent and the moral framework introduced by the Qur'ān. For example, according to Hallaq, the Qur'ān is a "structuring event" in Islamic constitutional history which provided a moral grounding for the development of ideas of justice and law in Muslim societies; its role in introducing the rule of law in Muslim societies is equivalent in many regards to the role of the Magna Carta in English legal history.[7] Hallaq, Khaled Abou El Fadl, and Noah Feldman have all argued that a strong commitment to the rule of law in premodern Muslim societies emerged due to the role of the *'ulamā'* as keepers of the law and defenders of justice and the moral order, often in direct opposition to the will of a sulṭān, caliph or emir.[8] Similarly, Intisar Rabb has argued that Muslim jurists in the formative period elaborated a concept of "divine legislative supremacy," which stipulates that coercion and

[7] Hallaq, "Quranic Magna Carta: On the Origins of the Rule of Law in Islamdom," *Magna Carta, Religion and the Rule of Law* (Cambridge: Cambridge University Press, 2015), 157-176.

[8] Hallaq, *The Origins and Evolution of Islam Law* 205; Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001) 23-3; Noah Feldman, *The Fall and Rise of the Islamic State*, Reissue (Princeton: Princeton University Press, 2012) 21-55; Mark David Welton, "Islam, the West, and the Rule of Law," *Pace International Law Review* 19, no. 2 (2007), 169-194.

governance must be based on the rule of god and not men.[9] Sherman Jackson, in his study of the Mamlūk-era jurist al-Qarāfī's constitutional jurisprudence, has argued that "the very concept of the 'rule of law' (for al-Qarāfī) connotes the ability to countenance a plurality of equally authoritative legal interpretations."[10] These authoritative legal interpretations, in al-Qarāfī's day, were those endorsed by the four Sunnī *madhāhib*, or schools of law, each of which had their own courts and judges.[11] According to Mathieu Tillier, it was the autonomy of the judges, achieved in the mid-9th century, and the existence of "fixed-texts" of law that allowed them to insist on "a political model that was…no less than what is now called 'the rule of law.'"[12]

This indicates that jurists and judges by the Islamic Middle Period aspired to ensure law's supremacy over individual whim and the tyranny of the state. It remains to be seen, however, how judges, governors and other powerful actors created meaningful connections within the social sphere to the texts purporting to convey and elaborate "God's law." Was this merely an elusive vision, elaborated at length in formal texts of law as a purely intellectual pursuit, or was this something that was translated into legal practice? In order provide a preliminary answer to this question, this dissertation will seek to understand how conceptions of orphanhood and legal interdiction developed by jurists enabled the creation of the unique legal institutions and practices described in Chapters Three, Four and Five.

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[9] Intisar Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretations, and Islamic Criminal Law* (New York: Cambridge University Press, 2015), 27-28.
[10] Sherman Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: Brill, 1996), 142.

[11] These are discussed in Chapters Four and Six of this dissertation.

[12] Mathieu Tillier, "Judicial Authority and *Qāḍī*s' Autonomy under the 'Abbāsids," *al-Masāq* 26, no. 2 (2014), 131.

It is useful to introduce here a distinction made by Abou El Fadl between "juristic discourses, Islamic law, and Muslim law" in order to clarify the purpose of the engagement of this study with *fiqh*, especially in Chapters Two and Six. According to this distinction, Islamic law indicates "a set of authoritative or canonical rules," whereas Muslim juristic discourses, while still incorporating the rules of Islamic law, "also engage in a rhetorical dynamic through which the jurists adjudicate, advocate, protests and aspire for certain goals."[13] In this dissertation, Islamic law in this sense is not studied—no attempt is made to discover standards according to which particular canonical rules should be applied. Muslim juristic discourses, however, are studied in Chapters Two and Six for two different reasons. In Chapter Two, the purpose is to understand the ways in which early Muslim jurists in the 8th and 9th centuries A.D. developed legal concepts of orphanhood and legal interdiction. In Chapter Six, on the other hand, my goal is to understand the extent to which Shāfi'ī Muslim jurists continued to adapt the laws they advocated for in a particular set of texts to the social circumstances of the 13th-15th centuries A.D. Recognizing the discourse in these texts as an aspirational framing of the law is critical for understanding the way in which these texts advocated for change—or protested against it—within the legal tradition. Chapters Three, Four and Five (and, to some extent, Chapter Two as well), however, are attempts to understand "Muslim law"—specific historical and social practices of supervising, investing and accumulating orphans' property that was engaged in by Muslims. As documented in these chapters, these practices were often framed as justified by *fiqh*.

Although most modern historians of Islamic law study the normative discourses of law in relative isolation from the social context or application of these laws, there is value in studying

[13] Abou El Fadl, 2.

"Muslim law" alongside the juristic discourses. One can, for example, study the forums in which a legal tradition reveals itself as relevant (such as a court whose *raison d'être* is the promotion of *shar'ī* legal norms) and the ways in which individuals use the legal interpretations of the jurists as guides for their behavior. This perspective has rarely been pursued. Christian Müller, in his assessment of the study of law in the Mamlūk empire, remarks that recent interest in the Mamlūk Period has produced studies on "crime, punishment and justice," yet not on the function of law and the jurists' relationship to broader historical trends. "Studies on Islamic law...deal mainly with legal theory and doctrine that was not directly linked to Mamluk social and political history."[14] The exceptions to this last remark are evidence of the value of studies of Muslim juristic discourses in particular social and institutional contexts; Müller's own work on the collection of documents known as the "Ḥaram" documents (a collection of 900 documents related to the court in Jerusalem, most of which originate from the tenure of a single judge during the years 1391-1395 AD) is one such contribution to our knowledge of the everyday practice of Islamic law in the Mamlūk Period[15]. In his own words, "The Haram documents testify to the functioning of the *qāḍī* judiciary on the basis of Islamic evidentiary law and in cooperation with other state institutions, whether in the form of the Mamluk governor, the police, or the escheat office."[16] In addition to his study, Donald Little, Muhammad Amin, Nial Christie, and George

[14] Christian Müller, "Mamluk Law: a reassessment," in *Ubi Sumus? Quo Vademus?: Mamluk Studies – State of the Art*, ed. Stephan Connerman (Göttingen: V&R Unipress, 2013. *eBook Collection*, EBSCO*host*, accessed April 23, 2017), 263.

[15] Müller, "The Ḥaram Al-Šarīf Collection of Arabic Legal Documents in Jerusalem: A Mamlūk Court Archive?" *Al-Qantara* 32, no. 2. (2011), 435-459; "A Legal Instrument in the Service of People and Institutions: Endowments in Mamluk Jerusalem as Mirrored in the Ḥaram Documents." *Mamluk Studies Review* 12, no.1 (2008): 173-191.

[16] Müller, *Der Kadi und seine Zeugen: Studie der mamlukischen Haram-Documente aus Jerusalem*, Abhandlungen für die Kunde des Morgenlandes (Wiesbaden: Harrassowitz Verlag, 2013), 529.

Makdisi have all used legal documents from the period to study the relationship between Islamic legal concepts and social practice.[17]

However, no scholar has yet made a comprehensive study of the history and development of the *mūda' al-ḥukm* and those involved in its establishment and maintenance, although some scholars have touched on aspects of it. The first modern scholar to write about the *mūda' al-ḥukm* was Etienne Marc Quatremère, who wrote a long footnote on it in his translation of al-Maqrīzī's chronicle, *al-Sulūk li-ma'rifat duwal al-mulūk.*[18] His remarks are remarkably useful, yet brief. Adam Sabra discussed the *mūda' al-ḥukm* briefly in his study on poverty and charity. However, like Quatremère, his focus is exclusively on the Mamlūk Period, and limited to Cairo. Moreover, due to his focus on charity, he seems to have seen this institution as an example of such charity rather than the legal institution for preserving propertied orphans' rights that it was. Thus, he remarked that the state's intervention into the supervision of orphans' property was one of the "exceptions that prove the rule" that the state generally did not intervene in the practice of almsgiving.[19] This, however, confuses *charity* towards (needy) orphans with the legal protections extended to orphans (and others) by means of the office of the *amīn al-ḥukm* and the *mūda' al-ḥukm*. Christian Müller has studied the role and function of the *amīn al-ḥukm* as this official

[17] Muḥammad Muḥammad Amīn, *Al-awqāf wa-l-ḥayāt al-ijtimā'iyya fi miṣr 648-923 h./1250-1517 m.* (Cairo: Dār al-Nahḍa al-'arabiyya, 1980); Niall Christie, "A Rental Document from 8th/14th Century Egypt*," Journal of the American Research Center in Egypt* 41 (2004) 161-172; George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh, Edinburgh University Press, 1981), 35-74; Émile Tyan, *Histoire de l'organisation judiciaire en pays d'Islam. Tome II* (Harissa: Imprimerie de Saint Paul) 1943, 130 ff; Annemarie Schimmel, "Kalif und Kadi im spätmittelalterlichen Ägypten," *Die Welt des Islams* 24 (1942), pp. 1-128.

[18] Etienne Marc Quatremère, *Histoire des Sultans Mamlouks de l'Égypte, Tome Second* (Paris: Oriental Translation Fund of Great Britain and Ireland, 1845), 107-108.

[19] Adam Sabra *Poverty and Charity in Medieval Islam: Mamluk Egypt, 1250-1517* (Cambridge: Cambridge University Press, 2000) 4.

appears in the Ḥaram Documents of Jerusalem.[20] His work has been fundamental for my understanding of the meaning of official titles in Damascus. In his study of scribes and the position of the witness investigator (*sāḥib al-masā'il*) during the first four centuries of Islamic rule in Egypt, Tillier stated that the history of other types of auxiliary judicial offices, including that of the *amīn,* remains, "still to be written." His 2017 monograph on the development of the Muslim judiciary in the 7th and 8th centuries elucidates some of the early parts of this story, and I have referred to this study in Chapter Three.[21] Similarly, a recent book published by Yaacov Lev on the judicial administration in Egypt up to the Fāṭimid period also studies the judiciary's supervision of orphans' property; as far as I can tell, he is the only scholar to have recognized that judges were involved in investing—and not just preserving—this property at an early date.[22]

This study will contribute to the growing scholarship on the history of Muslim law, legal institutions and judicial personnel by charting the development of the offices of the *umanā' al-ḥukm*, the *mūda' al-ḥukm* and the *dīwān al-aytām*. However, I do not limit myself to tracing the fortunes of the formal, central locations in which orphans' property was accumulated. This is because, has Ebrahim Moosa writes, "Muslim law was really a nomocratic order - one regulated by norms arrived at consensually, enforced by a theocentric moral authority and regulated by individuals and communities of coercion."[23] To focus exclusively on the formal institutions

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[20] Christian Müller, *Der Kadi und seine Zeugen*, 319-323.

[21] Tillier, *L'invention du cadi: La justice des musulmans, des juifs et des chrétiens aux premiers siècles de l'Islam.* Paris: Éditions de la Sorbonee, 2017.

[22] Yaacov Lev, *The Administration of Justice in Medieval Egypt from the Seventh to the Twelfth Century*. Edinburgh Studies in Classical Islamic History and Culture. Edinburgh: Edinburgh University Press: 2020.

[23] Ebrahim Moosa, "Colonialism and Islamic Law," *Islam and Modernity: Key Issues and Debates,* ed. Muhammad Khalid Masud, et. al. (Edinburgh: Edinburgh University Press, 2009), 166.

supported by the state—in this case, the *umanā' al-ḥukm*, the *mūda' al-ḥukm* and the *dīwān al-aytām*—would be a mistake, for the rule of law in premodern Muslim societies did not rely exclusively on the enforcement of the state in the first place.[24] As I describe in Chapter One, the rights of orphans was a major moral and political concern in Late Antiquity and early Muslim societies, and this concern was developed by early Muslim exegetes and legal scholars into a set of rights of orphans and duties towards them that did assume the intervention of a caliph, a governor or a judge. This nomocratic order was independent of any particular legal institution. It is for this reason that I pay close attention in Chapters Four and Five to what I have termed decentralized legal practices of distributing, accumulating and investing orphans' property. By including these practices in my study, I attempt to avoid a teleological approach to understanding legal practices and institutions. Thus, rather than arguing that the decline in the fortunes of the *mūda' al-ḥukm* and the *dīwān al-aytām* represents an overall failure in the efforts to preserve orphans' property, I suggest that the move to decentralized practices may have been a strategy to protect this property from the hands of the state.

Overview of Chapters

Chapter One: Orphanhood in Late Antiquity and Early Islam: From Moral Quality to Legal Attribute

This chapter demonstrates that the concern for the rights of orphans in the Qur'ān and in early Arabic poetry emerged from a common concern in the Late Antique Near East for the legal status of the orphan. It also shows that orphans were represented in pre-Islamic and early Arabic

[24] By the rule of law, I mean an aspirational concept that justifies legal actions by referring to authoritative texts over which a special class of individuals—legal scholars—have a monopoly of interpretation. A fuller definition of this conception of the rule of law is discussed in Chapter Two.

poetry as ambiguous: potentially either dangerous or socially creative due to their fragmented social status as fatherless (and potentially also motherless) individuals. They were, I argue, not just a matter of concern due their vulnerability but also because they were unmoored individuals that threatened to disrupt society. This helps explain why orphans were politically significant in Late Antique Arabia: to care for orphans was an expression of strength and upheld the social order. Although both the Qur'ān and pre-Islamic poetry represent orphans as both a moral and social problem, the Qur'ān also introduces legislation on the property rights of orphans and the duties of guardians towards orphans in their care. This was a first step towards the conceptualization of orphanhood as an abstract legal category rather than a moral attribute. Similarly, this chapter argues that the concept of *safah* underwent a semantic shift from connotating a moral quality in pre-Islamic literature to indicating a legal attribute that indicated a lack of *rushd*, or reasonableness. Early Muslim legal scholars interpreted lack of *rushd* as the common ground for the legal interdiction of both the *sufahā'* and orphans (and all minors more generally).

Chapter Two: *The Emergence of* Ḥajr *as a Standardized Legal Concept*

An analysis of early *ḥadīth*, or tradition-reports about the Prophet, Companions, Successors or prominent scholars and transmitted over generations, shows that *ḥajr* was controversial and rejected by many early scholars. Eventually, the voices of opposition were drowned out by the increasingly forceful insistence on the similarity of the legal status of orphans, *sufahā'*, and the insane. This was not to occur, however, until the 9th century A.D., the same time that judges began to exhibit autonomy from both caliphs and regional governors. This chapter shows how early debates regarding *ḥajr* and handling orphans' property, as recorded in

the book of traditions by the Iraqi scholar Ibn Abī Shayba, reveal a geographical disparity. Scholars in the Ḥijāz, for example, overwhelmingly supported extracting *zakat* from an orphan's property, whereas this was a matter of debate in Iraq. Importantly, these debates indicate that judges in the first century and a half of Islam do not appear to have anything to do with orphans' property. The regional diversity on the topic of *ḥajr* was soon subjected to a process of standardization after the emergence of personal schools in the 2nd/8th century and, especially, after the followers of the eponyms of these schools elaborated these opinions. The earliest "fixed-text" lawbooks provide evidence of both this regional diversity and an increasing standardization of terminology starting in the 9th century. Evidence from the biographies of early judges also indicates that the term *ḥajr* was first introduced widely in Iraq, and may have been inherited from the administrative practice of the Umayyads. Iraq was also the location of the greatest resistance to public authority placing a free adult under *ḥajr*. Eventually, both the interdiction of an adult and the legal term were accepted by all four post-formative Sunni schools.

Chapter Three: Supervision of Orphans' Property and the Mūdaʿ al-Ḥukm *up to the Ayyūbids*

This chapter charts the appearance of trustees (*umanāʾ*) who were tasked with supervising orphans' property and the increasing centralization of the control of orphans' property under the judiciary during the centuries prior to the Ayyūbid and Mamlūk Periods in Egypt. Since developments in the judiciary in Egypt prior to the arrival of the Fāṭimids in 969 C.E. are closely related to the history of the judiciary in Iraq, I first analyze the reports found in the history of the

judiciary written by Wakī‘ (d. 306/917) before turning to a discussion of Egypt.[25] This analysis shows that judges in Basra began appoint trustees to supervise orphans property as part of an expansion in the powers of the judge in the early Abbasid-era. In Egypt, a similar timeline can be established on the basis of al-Kindī’s biographical history of judges. Whereas oversight of guardians was made the responsibility of tribal *‘urafā’* in or shortly after 86/705, it was during the tenure of Khayr b. Nu‘aym that orphans’ property was taken away from the tribal *‘urafā’* and placed under the supervision of the state treasury (*bayt al-māl*). Although this occurred on the order of the Abbasid caliph al-Manṣūr, judges began initiating their own reforms in this matter starting in the early 9th century. The judge ‘Abd al-Raḥmān al-‘Umarī (in office 185-194/801-810) spent his own money to create a special chest for the property of orphans and estates with no inheritors. This is identified by al-Kindī as the first *mūda‘*. There is also evidence that orphans’ property was used for profit-bearing investments starting with al-‘Umarī’s tenure. After the arrival of the Fāṭimids in Egypt, a new home for the *mūda‘ al-ḥukm* was created in the busiest market in Fusṭāṭ. The location suggests that these funds were used to provide loans to merchants, as was the case in Mamlūk Cairo and Damascus. A final reform in the Fāṭimid period prevented the *umanā’* from taking 2.5% of orphans’ property in return for their services. This reform was instigated by the Sunnī jurist al-Ṭurṭūshī and implemented by the Fāṭimid vizier. Following this reform, the *umanā’* were to receive a fixed salary from the state. This reform, similar to the establishment of the new *mūda‘*, indicates the extent to which the establishment of successful legal institutions intended to preserve legal rights developed in *fiqh* relied on both the efforts of legal scholars *along* with the state.

[25] On Wakī‘ and his history of the judiciary, see Muhammad Khalid Masud, “A Study of Wakī‘’s (d. 306/917) *Akhbār al-quḍāt*,” in *The Law Applied: Contextualizing the Islamic Shari‘a. A volume in Honor of Frank E. Vogel*, ed. P. Bearman et. al. (New York: I. B. Tauris, 2008), 116-127; A.K. Reinhart, “Wakī‘,” *Encyclopaedia of Islam, Second Edition.*

Chapter Four: The Supervision of Orphans' Property and the Mūda' al-Ḥukm in Cairo in the Ayyūbid and Mamlūk Periods (1171-1517)

This chapter charts the history of the *mūda' al-ḥukm* in the Ayyūbid and Mamlūk periods in Cairo. It begins with an introduction to the history of the period and introduces a critical approach to the idea of a distinct "Mamlūk Period," arguing that many of the institutions of the period, including those related to the judiciary, were older than the establishment of the Cairo Sultanate in Egypt. These introductory remarks are intended to liberate the investigation from the search for a particularly "Mamlūk" identity of the legal system. Rather, as the previous chapters show, the *mūda' al-ḥukm* was a legal institution that had existed in Egypt for at least four hundred years prior to the arrival of either the Ayyūbids or the Mamlūks. Nevertheless, in a way similar to the pattern seen in the Fāṭimid period, both sulṭāns and judges collaborated during this period to introduce important reforms. Baybars forced his military officers, or emirs, to allow the Shāfi'īs to audit the property of orphans in their possession. Later, a new *mūda'* was established during the rule of Sulṭān Lājīn, and its management was made the responsibility of the Shāfi'ī Chief Judge of the time, Ibn Daqīq al-'Īd. The choice for the *mūda'*'s location was a bustling caravansary, once again located in the central market. In the first three-quarters of the 8th/14th century, this *mūda'* accumulated a large amount of wealth. This is likely because the administrators of this *mūda'*, along with their counterparts in Damascus, provided interest-bearing loans on a regular basis to merchants. In the late 14th century, however, sulṭāns and emirs began making a series of onerous demands for exorbitant sums from the *mūda'* as a result of the economic and political crises that the Cairo Sultanate faced. This, along with the decrease in trade following Tamerlane's occupation of Damascus, marked the beginning of the end of the *mūda'*'s fortunes. After the year 1445 A.D., the *mūda'* no longer appears in the sources. Nevertheless, *umanā' al-ḥukm* continued to exist until after the Ottoman occupation of Egypt. I

argue that it is likely that orphans' property was supervised starting in the early 15th century in a more decentralized manner, possibly as a conscious reaction to the series of raids on orphans' property at the end of the 14th century.

This chapter also documents the resistance of the Ḥanafīs to the Shāfi'īs' exclusive control of the *mūda'* and orphans' property. Ḥanafīs during the 14th century, when the coffers of the *mūda'* were overflowing, protested that exclusive Shāfi'ī control of orphans' property meant that *zakāt* was extracted from orphans even if they (or their guardians) were Ḥanafī. Their resistance occurred on two levels: they both petitioned sulṭāns to receive their own *mūda'* and appoint their own *umanā'* and, simultaneously, blocked the extraction of *zakāt* on an individual level in courts of law. Although the first avenue of resistance was ultimately unsuccessful, the latter appears to have been successful at times. It is also significant that the Ḥanafīs only attempted to acquire a *mūda'* of their own during the last half of the 14th century, which is a further indication of the decline of the *mūda'* in the 15th century. Although the *mūda'* slowly faded into nonexistence in the 15th century, its flourishing throughout the 14th century as a place for safekeeping and investing property of orphans and absent individuals is a testament to the relative success of implementing the rule of law via this institution. Its eventual decline after it had been used by sulṭāns and emirs as an emergency fund on several occasions is also an important indication of the dependence of successful legal institutions on political and economic conditions.

Chapter Five: Orphans' Property in the Provinces: Cairo and Damascus

This chapter continues the previous chapter's investigation into the legal practices of preserving orphans' property during the Mamlūk Period. The focus in this chapter is on two

provincial urban centers: Qūṣ in Upper Egypt and Damascus in Syria. These urban centers were chosen for study due to the existence of chronicles and biographical dictionaries written during the Mamlūk period that provide information about titles and individuals involved in the preservation and investment of orphans' property, as well as occasional notices about attempts by the agents of the sulṭān or individual emirs to appropriate some of this property. The main argument of this chapter is that both provincial centers had a much more decentralized and diffuse system of preserving orphans' property than was seen in Cairo. The reasons for this are different in each case, and it appears that the decentralized system in Damascus only began to dominate following a number of forced loans from the central orphans' fund in the first half of the 8th/14th century.

In Upper Egypt, judges were able to resist the demands by the state for orphans' property in part due to the diffuse methods of preserving orphans' property but also due to the distance between the main urban center, Qūṣ, and Cairo. In Damascus, on the other hand, orphans' property was accumulated from the Ayyūbid period in a centralized location, making it more vulnerable to demands by the sulṭān or emirs. Although there is limited evidence for the location of this place, at one point it was in a caravansary, as in Cairo. In Damascus, the terms *makhzan al-aytām* and *dīwān al-aytām* were used rather than *mūdaʿ al-ḥukm*. The biographical literature from the period provides plenty of information about the administrators of the *dīwān al-aytām*, and from this we can conclude that it was a relatively prestigious job. The chapter concludes with an analysis of a unique "ego-document," the diary-like chronicle of Ibn Ṭawq. This provides rare information about the decentralized ways in which orphans' property was preserved, distributed and invested by individuals who were part of the Shāfiʿī judiciary but not formally attached to either the *dīwān al-aytām* or the *makhzan al-aytām*.

Chapter Six: Legal Stability and Innovation in the Kitāb al-Ḥajr *in the Mamlūk Period*

This chapter establishes the centrality and authority of a particular body of Shāfi'ī texts of substantive law (*furū'*) for legal practice in the Mamlūk period. It is argued here that (1) the importance of these texts was reinforced by the Mamlūk leadership's commitment to Islamic legal (*shar'ī*) norms in theory and, often, in practice. Furthermore, this chapter shows that (2) common accounts of the authority of al-Nawawī and al-Rāfi'ī, the "two shaykhs" within the Shāfi'ī madhhab, do not account for the importance of divergent opinions (*ikhtilāf*) during this period, and the existence of a large body of texts on substantive law that either bypassed or directly challenged the opinions of al-Nawawī and al-Rāfi'ī. This leads to a working hypothesis that authoritative opinions in the Shāfi'ī madhhab can be studied via careful attention to change, restructuring, and disagreement within the texts identified in Section A. Section B of this chapter then applies this hypothesis to the chapters on *hajr* found within the aforementioned texts of substantive law. I then argue on the basis of this analysis that the rules developed by jurists in chapters on *ḥajr* at times reflect actual legal practice. Moreover, they continued to allow for such a diversity of opinions—with prominent jurists disagreeing entirely with each other regarding the authoritative position of the *madhhab*—that the legal practice of supervising and investing orphans' property in the Mamlūk Period was formed due to a combination of the jurists' authorizing discourse on what is legal (*shar'ī*) in addition to the historical application of *siyāsa* by sulṭāns and judges. Legal practice, therefore, in the Mamlūk Period was determined by a combination of the weight of perduring institutions, *fiqh,* and the discretionary authority of both judges and sulṭāns.

Chapter One

Orphanhood in Late Antiquity and Early Islam: From Moral Quality to Legal Attribute

Overview of Chapter

Long before orphanhood became a politically charged concept harnessed by statesmen, jurists and scholars in Egypt and Greater Syria in the late Middle Period in order to stake claims to authority and impress upon others their piety and righteousness, the peoples of the Near-East took an interest in the plight of orphans and, more broadly, legally incapacitated individuals. Moreover, some of the earliest Arabic texts—poetry (pre-Islamic and Umayyad), the Qur'ān, *ḥadīth* and *sīra*—convey the epic and moral connotations of orphanhood as a signifier of fertility, growth, and (dangerous) potential. These early texts reveal that orphans and orphanhood were a mode of a larger discourse on agency and social belonging. To be a benefactor or protector of orphans was not just to do justice, but to make a public claim to full adulthood and the right to make responsible political decisions. To be an orphan, on the other hand, was not necessarily to be weak or downtrodden (although, as we will see, this was always present as a potential and sometimes actualized outcome), but to embody an unmoored energy that could either lead to the destruction of the self and others, or could transform oneself or others who come into contact with this energy into an ideal, often mythic, socially-responsible member and leader of the community.

This chapter will first survey pre-Islamic Near Eastern legal and religious texts to establish that the concept of orphanhood as a legal category, and the rights and duties it gave rise to, were a part of the common law of the geographical and cultural milieu from which Islamic law emerged. It will then be shown that pre-Islamic poetry and the *sīra* (biography) of

Muḥammad share a similar mythic attitude to orphans as an instance of liminal personality that gives rise to the dangerous potentiality mentioned above. The material from the Qur'ān is also compared to this early Arabic poetry in order to show how the rich epic and ritual semantic layers of the material on orphanhood became universalized and generalizable to any person fitting a particular category. Orphans appear in the Qur'ān as a legal and social category, generalizable to any person who is a minor without a father, and not just a literary figure. Orphanhood and guardianship become "character masks," to use a term developed by Marx, that abstracted from the moral individuality of the orphans in question to become faceless legal persons. A further sign of this universalization and abstraction of the concept of orphanhood is the development of a new legal concept, *hajr* (or legal interdiction). In the earliest Islamic legal texts, orphans, spendthrifts (*sufahā'*) and bankruptcy were often discussed separately. However, jurists soon developed a new category, *hajr* (legal interdiction), to standardize legal approaches to these previously different categories. This standardization was enabled by a shift in the meaning associated with *safah* in legal discourse. Whereas the root *s-f-h* in pre-Islamic poetry was associated with a range of moral ideas, some of them heroic, the term in legal literature became used to indicate the opposite of *rushd*, or reasonableness. This semantic shift from *safah* representing a moral quality to a legal attribute with a restricted range of meaning was an important step in the creation of a legal discourse on legal incapacity.

Orphans in the Ancient Near East

Millenia before Muslim judges asserted their duty to supervise orphans and their property, orphans were already the focus of substantial legislation and moralizing literature in the Near East. In fact, the mention of orphans as a symbol of just governance and good laws is so

replete in the historical record that it can be stated with confidence that this was part of a common legal culture in the ancient Near East that maintained a striking amount of continuity up until and after the emergence of Islam.[26] Despite the linguistic and cultural diversity within the Ancient Near East, legal historians have argued that a common "legal ontology" characterized much of the law, particularly in its emphasis on the justice due to the orphan, widow and the indebted.[27] Raymond Westbrook, remarking on this shared legal culture, has argued that part of the reason for the focus on these downtrodden individuals, and their importance as a symbol of justice, was because of the challenge that judges faced in trying to establish an appearance of objectivity and fairness:

> The qualities of a judge included not only probity, but also a heightened sense of right and justice, and a special regard for the weaker elements of society. Indeed, a greater stress was laid upon these qualities than in modern society, and for good reason. Modern law relies upon the absence of personal interest and adherence to the letter of the law to ensure the objectivity of its judges. Ancient judges, often administrators and wealthy local landowners, were not shielded from personal interest in disputes or from acquaintance with the parties, and could not seek refuge in the strict wording of legal texts. It therefore fell to personal qualities to achieve the same ends.[28]

Unlike modern judges, and, eventually, Muslim judges, who can, in the course of issuing a legal decision, claim to rely on a developed theory of legality and an established set of texts relevant to each legal issues, ancient judges did not, according to Westbrook, have this advantage. Entangled in a web of personal interests, judges, administrators and kings appear to have gone to

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[26] On the common legal culture of the ancient Near East, see Raymond Westbrook, "Introduction: the Character of Ancient Near Eastern Law," in *A History of Ancient Near Eastern Law*, ed. Raymond Westbrook, vol. 1 (Brill: Leiden and Boston, 2003) 22-24.

[27] Brian R. Doak, "The Origins of Social Justice in the Ancient Mesopotamian Religious Traditions" (2006), *Faculty Publications - George Fox School of Theology* 185, https://digitalcommons.georgefox.edu/ccs/185, 1.

[28] Westbrook 87.

lengths to publicly display their "special regard" for the vulnerable, thereby buffering them from accusations of crude bias.

Such a concern for the orphan can be found starting with the oldest known law code to have survived the toils of history. The Laws of Ur-Namma (ca. 2100 B.C.E.) are a Sumerian collection of laws with a prologue describing how the King of Ur, with the help of his deities, established justice, allowed peaceful trade, and liberated cities from wicked rule. It is the first of a series of legal texts produced in Mesopotamia between *circa* 2000 – 1550 B.C. that claimed to restore justice and reform the legal practice of the land.[29] Among the claims in this short prologue is the following boast:

> I did not deliver the orphan to the rich. I did not deliver the widow to the mighty. I did not deliver the man with but one shekel to the man with one mina (i.e., 60 shekels). I did not deliver the man with but one sheep to the man with one ox.[30]

Orphans appear as one social group among several that the Laws of Ur-Namma highlight as having received some kind of protection, probably from debt slavery.[31] While the last two categories are examples of poor individuals who needed protection from the rich, the orphan and widow are united by something other than poverty: they lacked a male protector who could represent their claims in court.

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[29] Benjamin R. Foster, "Social Reform in Ancient Mesopotamia," in *Social Justice in the Ancient World*, ed. K.D. Irania and Morris Silver (Greenwood Press: Westport and London, 1995), 165-177, 165. This is not, however the first text claiming legal reform and upholding the protection of the orphan and widow from the rich and mighty; that had already been proclaimed by Urukagina of Lagash in the Ur I period (ca. 2400 B.C.), i.e., approximately 300 years before the law code of Ur-Namma was produced. See F. Charles Fensham, "Widow, Orphan, and the Poor in Ancient Near Eastern Legal and Wisdom Literature," *Journal of Near Eastern Studies* vol. 21, no. 2 (1962), 129-139, 130.

[30] Martha T. Roth, *Law Collections from Mesopotamia and Asia Minor,* 2nd ed., (Scholars Press, Atlanta: 1997), 16.

[31] Fensham, 129.

The pairing of the widow and orphan is, of course, a cliché, but it is important to pause and note that this concern for the two categories as "the common policy of the ancient Near East…was not started by the spirit of Israelite propheticism or by the spirit of propheticism as such."[32] Long before concern for the orphan and widow became emblematic of Muslim piety, it was already "seen as a virtue of gods, kings and judges."[33] There is, therefore, no need to search for the "origins" of Islamic laws and guidance on the ethical treatment of the orphan, the widow, or their analogous category, the indebted.[34]

A little over a century after the Laws of Ur-Namma were written, another Sumerian set of laws were published. While this set of laws, the Laws of Lipit Ishtar (ca. 1930 B.C.), does not mention orphans in its prologue, the self-proclaimed "pious shepherd of the city of Nippur" Lipit Isthar did include several laws intended to protect the rights of orphans, particularly fatherless women. These laws include the right of an unmarried daughter to inherit from her father if he has

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[32] Fensham, 8.

[33] *Ibid*. 8.

[34] Hence one can bypass entirely the concerns raised and rebuked in by Lena Salaymeh about Islamic Studies' supposed "positivist" tendency to search for origins. Whether "beginnings" is a more useful and less sinful term than "origins," as Salaymeh insists, is also entirely irrelevant for my purposes. There are no beginnings or origins to the general concern for orphans and other legally incapacitated individuals because (1) many of the laws were already part of the general legal culture and (2) early Arabic and Islamic sources, including the Qur'ān, already expect their audience to accept the moral and legal normativity of giving special care to orphans. C.f. Lena Salaymeh, *The Beginnings of Islamic Law: Late Antique Islamicate Legal Traditions* (Cambridge: Cambridge University Press, 2016), 1-42. This also avoids the circularity inherit in trying to define Islamic law as "'Islamic' because it is generated by an interpretive process anchored in Islamic sources" (*Ibid*. 8). Instead, this study leaves aside issues of identity and essence in order to study the laws, legal institutions and processes that sustained and produced the legal practice of guardianship of orphans, their property, and the broader category of *ḥajr* (legal interdiction).

no male offspring,[35] the requirement that boys who were promised an apprenticeship from a man but did not receive it be returned to their mothers, and the requirement that a fatherless woman's brothers give her in marriage if her father did not before his death.[36] We also see here the involvement of judges, for the first time, in the arrangement of orphans' affairs: if the orphan's apprenticeship fell through, this needed to be confirmed before a judge before the mother resumed custody.[37] Official involvement in the lives of orphans is, however, still rather limited; the assumption appears to have been that the welfare of orphans, and orphaned women in particular, was to be supervised by male relatives.

In the famous stela on which were inscribed the Laws of Hammurabi (ca. 1750 BC), we see another pairing of the themes of justice and the protection of widows and orphans. The prologue describes Hammurabi as a god-appointed protector of the weak and powerless, a guardian for his people, and a pious patron of the deities' cults in his cities. With the sun-god Shamash ruling "over all humankind," and Hammurabi his chosen shepherd ruling on earth, justice was restored, and, he claims, the people's well-being was enhanced.[38] In the code's epilogue, Hammurabi circles back to this theme, but this time he adds that protecting the widow and orphan was a primary motive for the announcement of the new laws:

> In order that the mighty not wrong the weak, to provide just ways for the waif and the widow, I have inscribed my precious pronouncements upon my stela and set it up before the statue of me, the king of justice, in the city of Babylon, the city which the gods Anu

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[35] We will see that the unmarried, but propertied, woman without a father was a matter of concern for some early Muslim jurists as well.

[36] Roth, 25-26, 30.

[37] *Ibid*. 30.

[38] Roth 76-81.

> and Enlil have elevated, within the Esagil, the temple whose foundations are fixed as are heaven and earth, in order to render the judgements of the land, to give the verdicts of the land, and provide just ways for the wronged.[39]

Establishing means for the orphan and widow, the paradigmatic categories of "weak people," to access justice is portrayed as the final cause of the legal code which stood in alignment with the king's image, the temple to the gods, and, ultimately, the gods in heaven overseeing the fortune of the city. Within the body of laws in the code, moreover, we find specific rules that apply to orphans (here defined as fatherless children):

> If a widow whose children are still young should decide to enter another's house, she will not enter without (the prior approval of) the judges. When she enters another's house, the judges shall investigate the estate of her former husband, and they shall entrust the estate of her former husband to her later husband and to that woman, and they shall have them record a tablet (inventorying the estate). They shall safeguard the estate and they shall raise the young children; they will not sell the household goods. Any buyer who buys the household goods of the children of a widow shall forfeit his silver; the property shall revert to its owner.[40]

Like the rule in the Laws of Lipit Ishtar, this is apparently a case of judges asserting their authority over orphans. Yet whereas the previous case was a matter of validating the existence of a contract and its non-fulfillment, Hammurabi's stela describes a much greater remit for judicial authority. We can infer two important points from this passage: (1) judges were not expected to supervise the person or property of orphaned children if their mother was alive but unmarried and (2) judges were supposed to keep an account of orphans' property if the mother remarried. While the new father would be entrusted with the estate and act as a guardian to the children, the judges were supposed to prevent the sale of the children's estate. Although it is impossible to

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[39] *Ibid*. 133-134.

[40] *Ibid*. 116.

know the extent to which these laws were followed in practice (at least for the author of this study), it is significant that judges were tasked with overseeing orphans' property in a way similar to what we see later in the Islamic Near East. It is a further indication that the institutions that Muslim judges oversaw were likely grounded in practices and ideas about law, authority and morality that were well-established prior to the 7th century A.D.

This was not limited, moreover, to Mesopotamia. In Syro-Palestine, two epic poems in Ugaritic also emphasize concern for orphans and widows as a central mode of dispensing justice. In the Aqhat Epic, Daniel, a just king, is described as sitting before a gate on a threshing floor where "he judges the cause of the widow(s)" and "[a]djudicates the case of the fatherless."[41] More dramatically, the Krt Epic tells how the king, Krt, has fallen into sickness and is challenged by his son, who claims that his father is no longer fit to rule and should abdicate in favor of the son. As part of his charges, the son declares,

> Thou has let thy hands fall into *negligence*
> Thou dost not judge the case of the widow
> Nor adjudicate the cause of the broken in spirit
> Nor drive away *those who prey* upon the poor!
> Before thee thou dost not feed the fatherless
> Nor behind thy back the widow.
> For thou art a brother of the bed of sickness
> Yea a *companion* of the bed of disease.[42]

Here we observe that judging the case of the widow and feeding orphans (the fatherless) are not only examples of just rulership but also indications of the ruler's power. The inability to perform these quintessential duties is a sign of weakness, and the king thus faces his son's (apparently

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[41] Cyrus H. Gordon, *Ugaritic Literature: A Comprehensive Translation of the Poetic and Prose* Texts (Rome: Pontificium Institutum Biblicum, 1949), 88.

[42] *Ibid*. 82. Italics are not the authors but indicate the translator's doubt about the translation.

partially justified) betrayal. In the Aqhat Epic, however, Daniel upholds the rights of the orphans and the weak shortly after being blessed with a son by the gods; tying justice for these downtrodden groups with fertility. As we will see shortly, the semantic association of justice towards orphans with health and fertility appears with force in pre-Islamic poetry, the Qur'ān and the Prophet's biography.

In addition to the texts cited above, Biblical material, particularly the legal texts in Deuteronomy, are replete with exhortations and commands to act justly towards orphans. This material, too, links divine favor and justice with special concern for these particular individuals. In Exodus 22:21-24 and 23:6, the Israelites are commanded to avoid oppressing foreigners, widows, orphans and the poor.[43] These groups appear to be singled out due to their inability to voice their complaints and be heard: "If you do abuse them," the Hebrew god declares, "when they cry out to me, I will surely heed their cry; my wrath will burn, and I will kill you with the sword, and your wives shall become widows and your children orphans."[44] The moral and legal duties towards orphans are further expanded upon in Deuteronomy, which presents itself as a "second law" in which Moses transmits again the laws revealed to him at Mount Horeb/Sinai.[45] In a study of the social context and impact of these laws, Harold Bennett has argued that the injunctions to provide tithes was part of a program initiated by the Omrides between 922 and 722

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[43] Richard D. Patterson, "The Widow, Orphan, and the Poor in the Old Testament and the Extra-Biblical Literature," *Bibliotheca Sacra* 130 (1973), 228. One author has pointed out that the "dyadic" formula which paired widows and orphans was widespread in the Ancient Near East, as we have also documented above, but that the "triadic formula," coupling widows, orphans and foreigners was unique during the period to the Hebrews. The reasons for this difference are beyond the scope of this introductory chapter. See Mark Sneed, "Israelite Concern for the Alien, Orphan, and Widow: Altruism or Ideology?," *Zeitschrift für Alttestamentliche Wissenschaft* 111, no. 4 (1999).

[44] Exod. 22:22-24 (NRSV).

[45] Dennis T. Olson, "Book of Deuteronomy: Hebrew Bible/Old Testament," in *Encyclopedia of the Bible and its Reception*, ed. Hans-Josef Klauck, et. al., vol. 6 (Berlin and Boston: De Gruyter), 654.

B.C. of public assistance in order to stave off potential rebellions by farmers and herders impacted by a resurgent market economy and a rapidly centralizing state.[46] Whereas households formed local communities that took responsibility for orphans in their community, social disruption instigated by the Omrides' economic policies weakened these local support networks.[47] While this author cannot evaluate the validity of Bennett's historical argument, it is entirely sensible that laws regulating the treatment of orphans and other marginal social groups may in fact address a breakdown of previous forms of social support or, even, the intervention of a powerful group into local, heterogeneous and spontaneous ways of organizing social life and distributing property. In other words, the establishment of laws that appear in favor of orphans may point to a more complex process of political and legal centralization that should not be mistaken by the careful researcher as purely the result of altruism or a vague pious sentiment expressing itself, suddenly, in institutional form. This insight, as will be shown in future chapters, resonates with this study's findings about the supervision of orphans' and absentee property in the Islamic Late Middle Period.

It can be concluded at this point that one of the reasons that orphans appear as a specific concern for the powerful was the potent metaphor of just political power giving a voice to the voiceless. In Biblical literature, we see this in the metaphors depicting God, the Law-giver, as someone who listens to the oppressed, including the poor, the orphan and the widow, whose voice rises up in pain; unjust and mighty individuals will be punished by God when He hears

[46] Bennett 127, 129, 151.

[47] Bennett 151.

their cries.[48] Psalm 68:5 further emphasizes the juridical significance of the relationship of God to these oppressed individuals: "Father of orphans and protector of widows is God in his holy habitation."[49] The theme of God giving a voice to the orphan is stated most clearly in the Sayings of the Wise, where God is said to plea the cause of the poor and the fatherless.[50] In a similar fashion, in Isaiah's vision, in which God exhorts His wicked, disobedient people to return to the path of justice, God enjoins them to "learn to do good; seek justice, rescue the oppressed, defend the orphan, plead for the widow."[51] Speaking up for the orphan and the widow are part of a transformation in which the "scarlet" and "crimson" sins of the unjust are transformed, becoming white as snow or wool.[52] Doing this is not just an act of piety that produces an internal transformation; it will also lead to an external change in circumstances ("you shall eat the good of the land").[53] In another passage, doing justice to the widow and orphan is mentioned as a condition required for the return to the Promised Land.[54]

Similarly, in Ancient Egypt, texts emphasized the virtue of the powerful speaking up for the otherwise voiceless orphans. This relationship between orphanhood and the inability to be heard reached such an extent that the linguistic classifier used for the orphan, a child pointing to his mouth (possibly indicating their need for food or, alternatively, their yet unintelligible

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[48] See also Job 24.

[49] Psalm 68:5; see also Psalm 82:3-4.

[50] Patterson 230.

[51] Isaiah 1:17.

[52] Isaiah 1:18.

[53] Isaiah 1:19. See also Isaiah 1:21-26.

[54] Jeremiah 7:5-7.

speech), became by the Twelfth Dynasty a word indicating any weak and powerless person in need of the protection of someone who could voice their needs.[55] One funerary stela from the Twelfth Dynasty declared that its owner had been "the herald of the orphans" during his life.[56] In a direct parallel to Biblical texts, a Middle Kingdom dialogue, *A Farmer and the Courts*, likewise portrays a farmer praising the Egyptian chief steward in the following way:

> You father the orphan.
> You husband the widow.
> You brother the divorced,
> You mother the motherless.
> I will extol your name throughout the land,
> I will proclaim you a just judge.[57]

As voiceless individuals, orphans were (and arguably still are) paradigmatic cases of marginalized individuals within society. In societies that relied on kinship to determine status, as all premodern societies in the Near East were, lacking a father implied the loss of one's status and support network. For this reason, orphans are also exemplars of liminal individuals, those entities that the anthropologist Victor Turner described as "neither here nor there; they are betwixt and between the positions assigned and arrayed by law, custom, convention, and ceremonial."[58] Orphans, like all liminal entities, were ambiguous and, for that very reason, potentially evocative of a multiplicity of emotions and ideas.[59] It is for this reason that they

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[55] Arlette David, "The NMH and the Paradox of the Voiceless in the Eloquent Peasant," *The Journal of Egyptian Archaeology* 97 (2011).

[56] *Ibid*. 74.

[57] Victor H. Matthews and Don C. Benjamin, *Old Testament Parallels: Laws and Stories from the Ancient Near East*, 2nd ed. (New York and Mahwah: Paulist Press, 1997), 217.

[58] Victor Turner, *The Ritual Process: Structure and Anti-Structure* (Ithaca: Cornell University Press, 1977), 95.

[59] Turner, 42-43.

demand the attention of those at the top of the social hierarchy. While Bennett may be right that economic forces are an important factor in producing legislation regarding orphans (as well as widows and foreigners, two other cases of liminality), it would appear that something more basic than economic exigencies made orphans a perpetual source of literary creativity and legislation for those at the top of the social hierarchy in the Ancient Near East and, as will be seen shortly, during Late Antiquity and after the appearance of Islam. What, beyond material causes, can account for the enduring attention given to this topic?

Orphans did not necessarily have a set of responsibilities and duties defined by the social hierarchy; they could, at times, give rise to the specter of a breakdown in the social and political hierarchy. This can be seen even in the case of literature: in the *Epic of Gilgamesh*, Enkidu was both a fatherless person and a foreigner who traveled to the gates of Uruk to challenge the injustices of its king, Gilgamesh.[60] And yet, rather than topple Gilgamesh's control of the city, Enkidu joined forces with him to achieve more glory for him (and the city) than ever before. The potent, yet possibly dangerous, liminal character of orphans is a theme which we will see appears with force in the early Arabic and Islamic sources. Surprisingly, it is also an idea that appears in *fiqh*. Before turning to the early Islamic political and legal representation of orphans, I will discuss the laws of guardianship in Late Antiquity, the period between antiquity and the 2nd/9th

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[60] Enkidu was created by the goddess Aruru to be a match for Gilgamesh, the "shepherd of ramparted Uruk," who had betrayed his duties to his people by harassing young men and stealing people's wives. See *The Epic of Gilgamesh*, 2nd edition, trans. and ed. by Benjamin R. Foster (New York and London: W.W. Norton & Company, 2019), 6-7. Enkidu is later adopted by the goddess Ninsun, who describes him as a "foundling" and a "foster child" (*ibid.*, 26). Later, the monster Humbaba taunts Enkidu as one "who does not know his father" (*ibid*. 40). After his death, Gilgamesh amid his lament for Enkidu, exclaims, "May foundlings and orphans weep for you/Like brothers may they weep for you/Like sisters may they loosen their hair for your sake" (*ibid*. 64). In a much later version of the Gilgamesh Epic told by the Roman historian Aelian (ca. 170-235 A.D.), Gilgamesh himself is said to be a foundling that became the king of Babylon after having been raised by an eagle (*ibid*. 171).

century, in the two legal traditions that existed in the areas in which Islamic legal practice and thought first developed – Roman, including provincial, law and Jewish law.

Orphans in Late Antiquity

Historians of early Islam increasingly emphasize that the emergence of the first Muslim polity, the Qur'ān, and the religious movement of Islam does not represent a complete break with the cultures and civilizations in the Near East before the early 7th century, but, rather, in many ways, a new synthesis of ideas, images and practices that had wide circulation throughout the Mediterranean littoral, Mesopotamia, and the Iranian plateau. Great religious and philosophical traditions cherished today in the West, like Hellenism and Christianity, stood alongside and mixed freely with other intellectual and spiritual currents, such as Mazdaism and Manicheism. This rich cosmopolitan coagulation of various currents – cultural, religious, economic and political – should not be seen as isolated from life in the Arabian Peninsula. Serious scholarship on Islam no longer accepts the idea that the Hijaz, the cradle of Islam, was a cultural vacuum.[61] The so-called "empty Hijaz" thesis has been proved untenable, and scholars now speak of a "pre-Islamic polyphony" of diverse religious, cultural, and philosophical ideas that many of the inhabitants of the Arabian Peninsula, like their contemporaries to the North in Syria and Iraq, would have had some familiarity with.[62] Therefore, if we want to gain a better understanding of the genesis of a legal institution, as this chapter aims to do, it is vital that one takes stock of the

[61] Chase Robinson, "Introduction," *The New Cambridge History of Islam*, vol. 1 (Cambridge: Cambridge University Press, 2010), 9.

[62] See especially James Montgomery, "The Empty Hijaz," in *Arabic Theology, Arabic Philosophy. From the Many to the One: Essays in Celebration of Richard M. Frank,* ed. J.E. Montgomery (Dudley: Leuven, 2006). For the term "pre-Islamic polyphony" see Garth Fowden, *Before and After Muhammad: The First Millennium Refocused* (Princeton and Oxford: Princeton University Press, 2014), 5.

most relevant ideas and institutional possibilities in which the Islamic rules of guardianship, concern for orphans, and, eventually, concept of *ḥajr*, were implicit. By far the most salient of these for our purposes here, due to their obvious similarities to the Islamic treatment of guardianship, and their general currency in the Near East, were Judaism, Christianity, and Roman law. A brief overview of the legal position of the orphan in these three traditions during Late Antiquity also has the additional benefit of allowing us to see what is unique about the ethical stance of the Qur'ān and the Islamic legal institutions that emerge between the 7th and 10th centuries.

Roman Law

In his *Culturgeschichte des Orients Unter den Chalifen,* Alfred von Kremer argued that the Islamic laws of guardianship were derived from Roman law indirectly via a "Jewish source," citing verses five and six of *Surat al-Nisā'*.[63] Guardianship laws, in both late Antiquity and in modern legal systems, tended to focus on two main groups of people: orphaned minors and people deemed unable to manage their own affairs.[64] The following section will analyze von Kremer's claim. I will show that, on the face of it, the claim does have some merit, but, when we consider the hybrid nature of the early Muslim community, the interconnectedness of the Near East in Late Antiquity, and the existence of a number of laws concerning the welfare of orphans

[63] Alfred von Kremer, *Culturgeschichte des Orients Unter den Chalifen, Erster Band* (Wien: Wilhelm Braumüller, 1875), 540.

[64] Recently, guardianship laws have become the subject of much media attention due to the case of Britney Spears, who has been under a "conservatorship" (a form of guardianship in the State of California) since 2008 and has recently challenged the suitability of the conservatorship in court. Spears was an adult when she was placed under a conservatorship due to alleged concerns about her mental health.

(and their property) going back all the way to the Ur-Namma, there is no reason to assume a single origin for either the institution of guardianship or the "affectionate concern for orphans and minors"—to quote Von Kremer again—expressed by the Qur'ān.[65]

By the time Justinian's *Corpus of Civil Law* (*Corpus iuris civilis*) was compiled in the early sixth century A.D., Roman law could already be regarded as ancient, having a written history going back to the Twelve Tables, a code drawn up in 451-50 B.C.[66] Within the vast world of the Roman Empire, it enjoyed no rival, but, even on the peripheries and bordering regions, such as Iraq, it was an influential model and source for legal concepts, particularly via their Greek translation, as we will see shortly in the Talmudic treatment of guardianship. There are also a number of clear similarities between Islamic legal concepts and Roman law which earlier scholars, such as Schacht and Goldziher, interpreted as evidence of "borrowings" directly from Roman legal sources.[67] In a monograph on the relationship between the Islamic legal institution of *walā'*, or patronage, Crone rightly rejected Schacht's and Goldziher's positions as untenable given the lack of evidence for any actual borrowings and the unlikelihood that the study of Greek rhetoric by individuals in Iraq implied their transmission of Roman law into Iraq, a region that she deemed largely "Persian."[68] Unfortunately, Crone's hypothesis that elements of what she vaguely describes as "provincial Roman law" were absorbed into Islamic law not in Iraq but,

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[65] Von Kremer, 540.

[66] Fowden, 166.

[67] On Goldziher's views on the relationship between Islamic law and Roman law, see the useful summary by Patricia Crone in *Roman, provincial, and Islamic law: The origins of the Islamic patronate* (Cambridge: Cambridge University Press, 1987), 102-106. For Schacht's view that much of Islamic law is "borrowings" from Roman law, see Joseph Schacht, "Foreign Elements in Ancient Islamic Law," *Journal of Comparative Legislation and International Law* 32 (1950).

[68] Crone, 3-12.

rather, in Syria is also untenable. As Wael Hallaq has argued in a lengthy review of Crone's contribution, the entire thesis that similar laws must necessarily imply later borrowings is based on the false assumption that the Arabs were uncultured "barbarians" isolated from the high culture to their North, and that they had no cultural contributions, certainly not in the field of law, to Late Antiquity.[69] Intensive research over the past three decades on the myriad economic, cultural and political interconnections between pre-Islamic Arabia (from the Syrian Desert to Southern Arabia) and the peoples and civilizations surrounding them on nearly all sides makes this assumption hard to believe.[70] There were no black and white, clearly demarcated cultural zones in Late Antiquity, and laws of guardianship were so widespread that it is likely futile to try and pin down a single source for their appearance in Islamic *fiqh* and legal practice.

I have no intention of entering directly into this contentious debate about the origins of Islamic law, but, on the other hand, I raise it to note three things: (1) regardless of the obvious similarities, there is not enough evidence to argue that rules of guardianship are actual "transplants" or "borrowings" from Roman law, and (2) it is unnecessary to look for sources given that the concern for the welfare of orphans, and the provision of a guardian of some kind, was so common as to not need any particular foreign legal tradition to establish its normativity and desirability as a part of the law. This last point is in addition to the argument noted above regarding the participation of many Arabs into Hellenistic, Sassanian, and Jewish cultures of

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[69] Wael Hallaq, "The Use and Abuse of Evidence: The Question of Provincial and Roman Influences on Early Islamic Law," *Journal of the American Oriental Society* 110, no. 1 (1990), 80. Hallaq, quoting her own words, shows that Crone's work evidences a hostile assumption that pre-Islamic Arabia was "Impoverished," "barbarian," and, when its inhabitants conquered the areas to the North, "culturally destructive" (*ibid*.).

[70] Much of this research is based on archaeological finds and involves languages unfamiliar to most Islamicists, but the most important conclusions can now be easily accessed in Robert Hoyland, *Arabia and the Arabs* (New York: Routledge, 2001).

Late Antiquity. Moreover, a look at early Arabic sources shows that pre-Islamic Arabic culture emphasized the need to protect and support orphans. If anything (at all) was directly modeled on Roman or Talmudic law, it was the later grouping of a number of legal concepts under the meta-concept of *ḥajr*. However, this happened at such a late time in the history of the Muslim community that the basic laws concerning orphans were already well-established legal practices, as I will show shortly. But first, what were the Roman laws on orphans? Some familiarity with these latter will help us recognize what is distinctive about the Islamic legal treatment of orphans discussed at the end of this chapter.

Roman guardianship was originally a product of the agnatic family system of rights and duties which allotted control over all members of the family to the *paterfamilias* whose *patria potestas*, or right over the life of his family members, ended upon his death.[71] Guardianship over the property of minors, all women, and those deemed mentally underdeveloped was implemented as a means to ensure the protection of their property; it did not extend, in its earliest and most basic conception, to physical custody (in later Roman law in the Byzantine Empire, the guardianship of women was eventually abolished).[72] In fact, three kinds of guardianship were developed over a period of centuries in Roman law: *tutela legitima*, *tutela testamentaria*, and *tutela Atiliana*. The first and oldest, the *tutela legitima*, gave the right of guardianship to the family of a deceased man. If the man's father (i.e., the grandfather) was still alive, he assumed

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[71] On *patria potestas*, see Max Kaser, *Roman Private Law*, 4th ed., trans. Rolf Dannenbring (Pretoria: University of South Africa, 1984), 304-307.

[72] Emmanuelle Chevreau, "The Evolution of Roman Guardianship through the Mechanism of *excusatio tutelae*," in *Legal Documents in Ancient Societies VI. Ancient Guardianship: Legal Incapacities in the Ancient World* (Trieste: EUT Edizioni Università di Trieste, 2017), 190; for the abolishment of guardianship over women, see Timothy Miller, *The Orphans of Byzantium: Child Welfare in the Christian Empire* (Washington, D.C.: The Catholic University Press of America, 2003), 38.

guardianship of their property. Technically, the grandfather was not actually deemed a guardian, but acquired legal responsibility over the children in place of their father. If the grandfather was not alive (a very common phenomenon), then guardianship became the responsibility first of the oldest adult male siblings, then to paternal uncles, and then to paternal cousins. Finally, if none of these relatives existed, the father's Roman clan, the *gens*, was required to select one of its members as guardian.[73] Following the order of inheritance, this order of guardianship was deemed to be in the interest of both the ward and the guardian, who was in line to inherit the property he managed if his ward died.[74] Eventually, self-interest as a motivation for carrying the burdens of guardianship was replaced by the idea of duty, and by the time of the Empire, guardianship was described as a compulsory burden (*munus*).[75]

The rule of defaulting to particular male relatives is assumed to be older than the second form of guardian, but by the time of the promulgation of the Twelve Tables (*c.* 450 B.C.), most Roman civilians appear to have preferred the second form of appointing guardians, the *tutela testamentaria*.[76] According to this mode of appointment, a man could write a will before his death in which he named a specific man to act as guardian for his minor children.[77] Because men could not appoint the children's mother as guardian, many Roman men in the third century A.D. found a way around this by disinheriting their children, bequeathing all their property to their wives, and instructing them in their will to give the property to their children at the age of full

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[73] Miller 32.

[74] Kaser, 317-318.

[75] *Ibid*. 317;

[76] Miller 33.

[77] Kaser, 318-319.

adulthood, twenty-five.[78] Later, especially in the provinces, it appears that mothers often did act as guardians for their children. This is particularly evident in Egyptian papyri from the Ptolemaic period, in which women were appointed as guardian for their children despite the protests of Roman jurists.[79] It was not until 390 A.D., under Emperors Theodosius I and Valentinian II, that the ban on women serving as guardians was officially lifted in the Eastern Roman Empire, according to which the mother could serve as guardian as long as she promised to never remarry, in cases where no male relative or testamentary guardian was found.[80] Despite this official ban, however, recent research on documentary evidence suggests that women did, in fact, serve as guardians or alongside guardians in both Rome and, especially, in Egypt and the Roman province of Arabia up to the third century A.D. This research suggests that the law in 390 A.D. recognized an already common situation and created a new requirement that women swear not to marry when serving as guardians.[81]

The *tutela Ateliana* was the final form of appointing a guardian in Roman law, established by the *lex Atilia* (c. 210 B.C.). This was a magisterial appointment: in cases where no testamentary or legitimate (i.e., one of the agnates mentioned above) was available, the *praetor urbanus* in Rome along with a majority of the plebeian tribunes were required to appoint a guardian (in the provinces, this appointment was made by local governors). Because guardianship was conceived of as a public burden, guardians could only refuse this appointment

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[78] Miller 39.

[79] Miller, 38-39.

[80] *Ibid*., 74.

[81] Lorenzo Gangliardi, "The Mother as Guardian of her Children in Rome and in the Oriental Provinces of the Empire," in *Legal Documents in Ancient Societies VI. Ancient Guardianship: Legal Incapacities in the Ancient World* (Trieste: EUT Edizioni Università di Trieste, 2017), 221-242, esp. pp. 225.

under specific grounds, such as age, sickness, location, having a number of children under their care, or public and military duties.[82] Eventually, under Marcus Aurelius (r. 161-180 A.D.), a special kind of official, known as the *praetor tutelarius*, responsible for overseeing appointments of guardians and settling legal disputes involving guardians and their wards.[83] This responsibility was eventually transferred to the urban prefects in the late fourth century A.D.[84] It is fascinating that the duty of the *praetor tutelarius* overlapped with that of the *amīn al-ḥukm*, the legal functionary tasked with preserving and investing the property of orphans in the Islamic Middle Periods.[85] However, there is no reason to believe that the two legal offices share a genetic relationship, for the *amīn al-ḥukm* does not appear to have existed as a distinct office until the 10th century, and this as a result of a process of professionalization of the judicial system, whereas Islamic legal rules on orphans and guardianship are already evident in the Qur'ān. The resemblance here would seem to be primarily a result of nearly identical problems related to biological development and human mortality leading to similar solutions.

Nevertheless, one cannot turn a blind eye to other compelling evidence that some parts of Islamic *fiqh* regarding orphans and guardianship appears to be a kind of legal transplant from Roman law. The stages of minority and tutorship that Roman law prescribed appear to have some resemblance to Islamic legal discourse on legal majority, and it is likely that this is why von Kremer perceived some Roman influence on verses five and six in *Sūrat al-Nisā'*, which

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[82] Kaser 319.

[83] *Idem.*

[84] Miller 74.

[85] The *amīn al-ḥukm*, his functions, and the development of this often overlooked Islamic legal administrator will be explored in detailed in Chapters 3-5.

command the believers not to give property to *al-sufahā'* (imbeciles, but often glossed as spendthrifts) and to "test the orphans (*wa-abtalū al-yatāmā*)" at the age of marriage (i.e., puberty) before handing over their property. The Roman legal concept which must have inspired von Kremer's suggestion of a genetic relationship is the *cura*, a kind of legal disability that was distinguished starting from the period of the Twelve Tables from *tutela*, the guardianship of minors discussed above. *Cura* was first a form of guardianship that applied to lunatics and prodigals under interdiction; eventually, around 200 B.C., this *cura* was also extended to people above the age of puberty but under the age of 25. All three categories, lunatics, prodigals and young adults under 25, were required to have a curator in order to dispose of any property (exceptions were made for actions that benefited the person subject to *cura*, such as receiving gifts). By Justinian's age, the *tutela* of minors and the *cura* were largely indistinguishable, although Roman law continued to employ the two terms.[86] During the period of *cura*, young adults could initiate financial transactions, but they were subject to the approval of the *curator*.

These laws present a *prima facie* similarity to Islamic legal material in both the Qur'ān and, later, in *fiqh*. First, the two verses that von Kremer mentioned address the issue of when to turn property over to the *safīh*, often – but not always – glossed by Islamic legal scholars as the prodigal, and the orphaned minor. Moreover, the insane, the prodigal, and the orphan, in addition to slaves, are the primary categories of people that Islamic legal scholars include under the concept of *ḥajr 'alā insān li-ḥaqq nafsih*, or interdiction of a person for their own sake.[87] This

[86] Kaser 81-84, 326-328.

[87] As opposed to *ḥajr 'alā insān li-ḥaqq ghayrih*, or interdiction of a person for another's sake, such as interdiction due to bankruptcy (*iflās*), a kind of interdiction that was often treated separately from the former. See Muwaffaq al-Dīn Ibn Qudāma, *al-Mughnī*, 6 vol., ed. 'Abd Allāh b. 'Abd al-Muḥsin al-Turkī

might suggest a relationship between Roman and Islamic legal approaches. Moreover, if a child acquired maturity but not yet puberty, he or she was considered by most jurists of the Islamic Middle Periods to have some special rights – he or she could be given permission by the guardian to distribute charity, to give permission to people to enter the household, or even create valid testaments (*waṣāyā*).[88] In some ways this also resembles the period in Roman law of the *cura*, although substantial differences exist since the Muslim jurists did not allow the guardian to give permission to the child to dispose of his or her wealth, whereas the *cura* allowed the guardian to permit such transactions as sales, purchases, and loans.

For much of these resemblances, what we are probably noticing is a phenomenon commented on by the legal historian, Reuven Yaron, in his comparative study of Roman and Jewish laws regarding gifts *causa mortis*: "similar problems tend to be tackled in similar or at any rate comparable ways even in systems which are completely independent of each other."[89] We have already seen that, from a very early period, orphans were seen as liminal figures and their passage from childhood to adulthood would certainly require special attention from jurists trying to determine an elusive border between, on the one hand, youth and legal incapacity, and, on the other, adulthood and full legal capacity. Moreover, the tests that Muslim jurists

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and ʻAbd al-Fattāḥ Muḥammad al-Ḥulw (Riyadh: Dār ʻĀlim al-Kutub, 1986), 6/593 and Chapter 6 of this dissertation.

[88] There are some exceptions to this. The Ḥanafis did not agree that the rational child could make a valid testament, and al-Shāfiʻī did not hold that the rational child could acquire any additional rights over the nonrational child. Later Shāfiʻīs, however, would hold that testaments were valid. For a comparison of the four *madhhabs* positions, see al-Kāsānī, *Badā'iʻ al-ṣāniʻ fī tartīb al-sharā'iʻ*, 10 vol., ed. ʻAlī Muḥammad Muʻawwid and ʻĀdil Aḥmad ʻAbd al-Mawjūd (Beirut: Dār al-kutub al-ʻilmiyya, 2003), 10/87-89. See also Abū Isḥāq al-Shīrāzī, *al-Muhadhdhab fī fiqh al-imām al-shāfiʻī*, 6 vol., ed. Muḥammad al-Zuḥaylī (Beirut and Damascus: Dār al-Shāmiyya and Dār al-Qalam, 1997), 3/707-708; Mālik b. Anas, *al-Muwaṭṭa'*, 2 vol., ed. Muḥammad Fu'ād ʻAbd al-Bāqī (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1985) 1/762; Ibn Qudāma, 8/508-510.

[89] Reuven Yaron, *Gifts in Contemplation of Death in Jewish and Roman Law* (Oxford: The Clarendon Press, 1960), viii.

recommend for determining whether a minor has reached maturity (*rushd*) are reflective of the mercantile environment in which the early jurists of the 8th and 9th centuries A.D. were writing. The idea of testing orphans is found already in the Qur'ān in verse six of *Sūrat al-Nisā'*– one of the verses mentioned by von Kremer as indicating borrowing from Roman law – which stipulates that orphans should be tested as to their competence before their property is given to them: "Make trial (*wa-ibtalū al-yatāmā*) of orphans until they reach the age of marriage; if then ye find sound judgment in them, release their property to them."[90] For al-Shāfi'ī (d. 820 A.D.), this verse implied that both young men and women should be subject to a test (*ikhtibār*) to determine their mental maturity. He notes that it is easier to do this in the case of men and women who go to the market, but that women usually did this rarely.[91] Mālik is also reported to have held that a person subject to legal interdiction (*ḥajr*) could be given some of their property to engage in trade in order to test them (*yakhtabiruh*), but that any profit from this trade would still revert to the guardian's control. Moreover, the minor or *safīh* would not be liable for any debt acquired during their undertaking.[92] The famous Ḥanbalī *faqīh* of the post-formative period, Ibn Qudāma, details the way in which these "tests" should be adjusted according to the expected social status of the minor. For merchants, they should be introduced to trading in the market, but for the sons of prominent people (*al-kubarā'*) and owners of large estates (*al-dahāqīn*), "the likes of whom are

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[90] Q. 4:6. The entire verse, as translated by Yusuf Ali, reads: "Make trial of orphans until they reach the age of marriage; if then ye find sound judgment in them, release their property to them; but consume it not wastefully, nor in haste against their growing up. If the guardian is well-off, let him claim no remuneration, but if he is poor, let him have for himself what is just and reasonable. When ye release their property to them, take witnesses in their presence: But all-sufficient is Allah in taking account." Ali, >>

[91] Muḥammad b. Idrīs al-Shāfi'ī, *al-Umm*, 11 vol., ed. Rif'at Fawzī 'Abd al-Muṭallib (Mansoura: Dār al-Wafā', 2001), 4/459.

[92] Saḥnūn b. Sa'īd al-Tanūkhī, *al-Mudawwana al-kubrā*, 16 vol. (Cairo: Dār al-Sa'āda, 2014), 13/71.

shielded from the markets," he recommends that they be given a stipend for them to spend on their needs and that they should hire an agent (*wakīl*) that they hold accountable. Women of such a high social position also were to prove themselves as a competent "lady of the household (*rabbat al-bayt*)," whose duties included hiring weavers, sending an agent to buy linen, and making the agent give an account of their spending.[93] As we will see shortly, the idea of testing minors, particularly orphans, was not only present Qur'ān and, later, in Muslim *fiqh*, but was also a salient theme in early Arabic poetry as well as the *sīra*. In short, the first part of Q 4:6 was understood by Muslim jurists in the terms of social situations that seemed possible in their own societies, and the wording itself seems to bear no relationship with Roman law.

Moreover, similar conclusions can be said for the other parts of the verse. The following lines—an admonition to avoid wasteful consumption and permission for poor guardians to use their wards' property to sustain themselves in times of need—are of such a general nature that looking for any origin beyond the context of the Qur'ān's production appears futile. Such rules could potentially have occurred to anyone, but, as will be shown at a later point in this chapter, the ability of guardians to consume part of the orphans' property in case of poverty appears to be an appeasement of some Arabs' pre-Islamic practice of sharing property. Furthermore, Roman law, far from giving guardians such a broad license to use some of their wards' property for their own uses, took a completely opposite stance. Guardians were required to make an account of the

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[93] Ibn Qudāma, 6/608. In the post-formative Shāfi'ī legal tradition, there are also recommendations to see if the women being tested are capable, in the words of al-Nawawī of "protecting food from cats and similar things," on which the late Mamluk qāḍī, faqīh, and historian comments: "This is because this shows resolve (*al-ḍabṭ*), (the ability to) preserve property, and that she will not be tricked. All of that is the very meaning of maturity (*rushd*). His words 'and similar things' refers to things like cats, such as mice, chickens and other things related to household chores." Badr al-Dīn Ibn Qāḍī Shuhba, *Bidāyat al-muḥtāj fī sharḥ al-minhāj*, 4 vol., ed. Anwar b. Abī Bakr al-Shaykhī al-Dāghistānī (Jeddah: Dār al-Minhāj, 2011), 2/186.

property of their wards before and after the period of guardianship, and, in the early 4th century, Constantine went so far as to place a lien over guardians' property for the period during which guardians undertook their duties. According to Miller, this resulted in a general reluctance to assume the burden of guardianship throughout the late Roman Empire.[94]

This leaves the final part of verse six of *Sūrat al-Nisā'*: "When ye release their property to them, take witnesses in their presence: But all-sufficient is Allah in taking account." On the face of it, this verse seems to convey a fairly straightforward command: guardians should have witnesses attest when giving their (now adult and mature) former wards their property. In fact, jurists and Qur'ānic commentators did not agree on this interpretation. Although, as the Qur'ānic commentator al-Qurṭubī (d. 1272 AD) notes, "the apparent meaning of the verse (*ẓāhir al-āya*)" is that taking witnesses is a "duty (*farḍ*)", a group of jurists saw it as only "recommended (*mustaḥabb*)."[95] Part of the reason for this disagreement about the meaning of the verse can be seen already in the *tafsīr* of the 2nd/8th century commentator, Muqātil b. Sulaymān (d. 767 A.D.), who remarks that the "take witnesses in their presence" clause refers "to paying them (*bi'l-daf' ilayhim*)," but then continues to note that the final phrase of the verse ("But all-sufficient is Allah in taking account"), "means as a witness, so there is no better witness than Allah between you and them."[96] Is this to mean that Allah, alone, as a witness is sufficient without also enlisting humans to witness handing over the property? It might appear that the majority of Middle Period

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[94] Miller 69. Miller argues that this lien (called a *hypotheca*) resulted in a general unwillingness to assume the duties of guardianship since the lien could potentially continue to be in effect for more than two decades.

[95] Abū 'Abd Allāh al-Qurṭubī, *al-Jāmi' li-aḥkām al-qur'ān wa'l-mubīn li-mā taḍammanah min al-sunna wa-āy al-furqān*, 24 vol., ed. 'Abd Allāh al-Turkī (Beirut: Mu'assasat al-Risāla, 2006), 6/76-77.

[96] Muqātil b. Sulaymān, *Tafsīr muqātil b. sulaymān*, 5 vol. ed. 'Abd Allāh Maḥmūd Shaḥāta (Beirut: Mu'assasat al-Tārīkh al-'Arabī, 2002), 1/358.

jurists understood the verse in this way since of the four Sunnī schools of law only the Mālikīs understood this clause as conveying a requirement that all guardians take witnesses.[97] However, there are two important other factors that caused this divergences on the issue of having witnesses present during the hand-off. First, Mālikīs, unlike the other three law schools, believed that the legal interdiction on orphans could only be removed with a judicial ruling (*ḥukm*).[98] For the other schools, only the case of a *safīh* required a ruling to effect a change of legal status because a *safīh* was originally placed under legal interdiction by means of a ruling, whereas the case of orphans, as minors, did not necessitate the intervention of a judge but were automatically under legal interdiction.[99] Hence, since their legal incapacity was acquired without the intervention of a judge, it could also be removed without any judge's ruling. Second, these jurists argued that the guardian of an orphan held the orphans' property as a form of trust (*amāna*), and so while witnesses might be useful as a precaution in case of any dispute about the guardians' handling of the property, the guardian, as a trustee (*amīn*) was in principle to be taken for his or

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[97] Maryam ʻĀṭā Ḥāmid Qawzaḥ, "Aḥkām māl al-yatīm fī al-fiqh al-islāmī" (master's thesis, An-Najah National University, 2011), 116.

[98] *Idem.*; Muḥammad b. ʻAbd Allāh al-Raymī, *al-Maʻānī al-badīʻa fī maʻrifat ikhtilāf ahl al-sharīʻa*, 2 vol., ed. Sayyid Muḥammad Muhannā (Beirut: Dār al-Kutub al-ʻIlmiyya, 1999), 1/533. There is important evidence of how the students of Mālik handled this process in a template-style document preserved in a 4th/10th century text. According to the text, a guardian could come to the judge and claim that a person who was a ward in his care "was now mentally mature (*qad rushid*), and I am handing over his property to him, so record this for me." The judge should not do this, however, until it is proved to him that the man truly is the orphan's guardian *and* that the orphan had reached maturity. ʻAbd Allāh b. ʻAbd al-Raḥmān Abī Zayd al-Qayrawānī, *al-Nawādir wa'l-ziyādāt ʻalā mā fī al-mudawwana min ghayrihā min al-ummahhāt*, 15 vol., ed. Muḥammad al-Amīn Būkhubza and ʻAbd al-Fattāḥ al-Ḥulw (Beirut: Dār al-Gharb al-Islāmī, 1999), 10/99.

[99] Although this was the position of Abū Yūsuf (d. 798 A.D.), not all Ḥanafīs agreed with this. According to Muḥammad al-Shaybānī (d. 805 A.D.), the *safīh* was to be considered under legal interdiction as soon as he started to spend prodigally. Muḥammad al-Shaybānī, *Al-Aṣl*, 13 vol., ed. Muḥammad Būynūkālin (Beirut: Dār Ibn Ḥazm, 2012), 8/470-471, 487; Shams al-Dīn al-Sarakhsī, *al-Mabsūṭ*, 32 vol. (Beirut: Dār al-Maʻrifa, n.d.) 24/163; Ibn Qudāma, 6/610; al-Raymī 1/533.

her word in the absence of contrary evidence.[100] If, however, the guardian had taken a loan from the orphans' property (something that not all early jurists agreed was legal), then the guardian would be required to take witnesses.[101]

In sum, there was no agreement among early Qur'ānic commentators or jurists about the legal content of this verse. As seen above, Roman law required that guardians create an account of their wards' belongings before assuming guardianship and again once their duties came to an end. Beyond the divergences documented in the previous paragraph from this position, it must be noted that Q 4:6 does not indicate that guardians should make an account of their wards' property before assuming guardianship duties. If the verse were truly a reference to Roman law, whether directly or via a Jewish intermediary, as von Kremer suggested, it is hard to see how this important stipulation could have been missed.

Contrary to Von Kremer's claims, if there is one place where one might argue that a clear "borrowing" from Roman law appears to have occurs, it is not, in fact, in *Sūrat al-Nisā'* but in a legal opinion attributed to Abū Ḥanīfa (d. 767 A.D.). According to this opinion, recorded in numerous legal texts, legal incapacity could not persist beyond the age of twenty-five except in

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[100] Al-Kāsānī, 6/588; ʻAlī b. Muḥammad al-Māwardī, *Al-Ḥāwī al-kabīr fī fiqh madhhab al-imām al-shāfiʻī raḍiy allāh ʻanhu wa-huwa sharḥ mukhtaṣar al-muzanī*, 19 vol. ed. ʻAlī Muḥammad Muʻawwiḍ and ʻĀdil Aḥmad ʻAbd al-Mawjūd (Beirut: Dār al-Kutub al-ʻIlmiyya, 1994), 6/363. A minority Shāfiʻī view held, however, that removing legal interdiction on an orphan *did* require a jurist's ruling because its removal "requires contemplation (*naẓar*) and testing (*ikhtibār*)." See al-Shīrāzī, *al-Muhadhdhab*, 4/283. See also: ʻAbd al-Wāḥid al-Ruwayānī, *Baḥr al-madhhab fī furūʻ al-madhhab al-shāfiʻī*, 14 vol., ed. Ṭāriq Fatḥī al-Sayyid (Beirut: Dār al-Kutub al-ʻIlmiyya, 2009), 5/390. Mālik is reported to have held that the guardian (*waṣī*) was to be believed if he said that he spent his wards' property for their benefit unless someone else took care of them like their mother or brother, in which case the guardian would need to provide evidence. In support of this opinion, Saḥnūn cites the witnessing clause in Q 4:6 (Saḥnūn, 15/25).

[101] Qawzaḥ, 116.

extreme cases of mental disability (namely, insanity).[102] After reaching the age of twenty-five, a *safīh*'s property could not be withheld from him. Roman law, as seen above, also held that all forms of legal incapacity due to minority came to an end at the age of twenty-five. However, here the similarities come to an end, for Abū Ḥanīfa's opinion did not apply to the case of minors, but to spendthrifts. Moreover, unlike both Roman law and the majority of early Muslim jurists, Abū Ḥanīfa did not hold that the *safīh* could be withheld from making oral transactions, which meant, as later jurists would conclude, that "it is of no use to prohibit (the *safīh* from possessing) the property (*lā yufīd man' al-māl shay'an*)."[103]

Jewish and Christian Laws on Orphans and Guardianship

Up to this point, a direct comparison of Roman and early Islamic laws on orphans' property and guardianship has shown that only a very weak case, if any, can be made that either the Qur'ān or early Muslims looked to a Roman model for their laws. But von Kremer suggested that Roman law came to the early Muslim community via Jewish law, and Crone, as seen above, argued that Roman provincial law, much of it known today from Christian sources, had some kind of influence on early Islamic law. The following section will not only consider these claims in regards to orphans' property and guardianship but also introduce some of the developments in Jewish and Christian treatment of these subjects in order to gain a better understanding of the Late Antique legal milieu in which early Islamic law and ethics emerged.

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[102] He nevertheless still allowed legal interdiction to be imposed partially on "the shameless jurisprudent" (*al-muftī al-mājin*), "the ignorant physician (*al-ṭabīb al-jāhil*)," and "the insolvent renter (*al-mukārī al-muflis*)," but these are all partial forms of interdiction that did not imply the near complete legal incapacity that minors, spendthrifts and insane people had. See al-Kāsānī 10/82; al-Sarakhsī, 24/157.

[103] Al-Sarakhsī 24/158.

First, it should be noted that Talmudic law between the 2nd and 5th centuries shows a clear relationship to Roman law. Like Roman legal documents in late Roman Egypt, Talmudic law employs the Greek term for guardian, *epitropos*.[104] Many of the rules in the *Mishnah* and *Tosefta* are similar to those we have already seen in Roman law: the father is expected to appoint a guardian, but the court will do so if no one has been appointed. Usually, the mother is not expected to be the guardian, and court-appointed guardians are always free men, but the father, if he chooses, can appoint a woman or a slave as a guardian.[105] Like Roman and Islamic law, the main duty of the guardian is to protect and preserve the wealth of his or her ward. Just as we saw in the case of Roman law, this duty is unpaid and not expected to be profitable, something that marks a major difference from Islamic law, as will be seen shortly.[106] Unlike in Roman law, the guardian is also expected to separate tithes from the orphans' property and provide them access to the Torah, something, we will see, some Muslim jurists also believed.[107] Moreover, the court took an increased interest in positioning itself as a replacement of the father, epitomized in the maxim, repeated often in medieval texts: "the court acts as the parents of the orphan" and "the judge of the widows."[108] Talmudic laws' adoption of Greek and Roman legal concepts of guardianship, coupled with the Biblical interest in the welfare of poor orphans discussed above,

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[104] Gagliardi, 231-232.

[105] Amihai Radzyner, "Guardianship for Orphans in Talmudic law," in *Legal Documents in Ancient Societies VI. Ancient Guardianship: Legal Incapacities in the Ancient World* (Trieste: EUT Edizioni Università di Trieste, 2017), 247, 256-257.

[106] The *epitropos* of the court was considered a "paid bailee," but apparently the payment only referred to the profit of being acknowledged as a trustworthy person by the court. *Ibid*. 263.

[107] *Ibid*. 259.

[108] *Ibid*. 249-250; Mark R. Cohen, *Poverty and Charity in the Jewish Community of Medieval Egypt* (Princeton: Princeton University Press, 2005), 43, 142, 147, 237.

meant in practice that the Jewish court was not only interested in preserving successful transfers of property to orphans, but also in helping those orphans without property through the distribution of alms and the provision of clothing and education. In an earlier period, in the second century B.C., it seems that Jewish priests had also stored some of the movable wealth of orphans in the Temple.[109] This central location for preserving wealth, associated with a religious or spiritual power, is similar to the institution in medieval Egypt and Syria that will be discussed in Chapters Three, Four and Five. Finally, in the first century A.D., a dispute emerged about whether guardians should give an account at the end of their duties as guardian.[110] Since this opinion was disputed, just as in Islamic law, it seems hard to make the case that Jewish law provided a direct model for either Q 4:6 or Islamic laws of guardianship.

The interest in the spiritual welfare of the orphan and the good of all orphans, whether wealthy or destitute, is paralleled by Christian attitudes to orphans. By the middle of the second century, bishops supervised the distribution of food and money to orphans, widows and others in need.[111] Peter Brown has argued that this inclusion of these poor figures in the bishops' "flocks" was an important means by which Christian leaders in late Antiquity extended their power and legitimacy in the Near East. As bishops and clerics rose to positions of leadership in late Roman society, they made claims to speak in the name of "the poor," demanding and receiving support and recognition from the emperors and the urban populace alike. Prior to the rise of Christian authority, public giving was not imagined or represented as help for the down-and-out; it was first and foremost a gift to one's fellow citizens, both rich and poor, out of civic virtue and the

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[109] Miller, 43.

[110] Radzyner, 264-265.

[111] Miller, 45

desire to impress the public with one's generosity.[112] According to Brown, "in a sense, it was the Christian bishops who invented the poor."[113] In this way, new forms of authority were created, such as the *episcopalis audentia* and church officials strengthened local communities by reaching out to the disadvantaged, a category which largely referred to the "middling" poor—those people who supported the Church through tithing, but were also constantly under the threat of suddenly being thrown into destitution.[114] This new category of poor was the result of the adoption of the Near Eastern model of society in the late Roman Empire, in which the poor were "a judicial, not an economic category. They were plaintiffs, not beggars. To give 'justice' to the 'poor' was a sign of royal energy."[115] In accordance with this model, Byzantine emperors, while largely keeping Roman laws of guardianship intact except for the small modifications discussed above, introduced a new institution: the orphanage, which soon became an important symbol of the Emperor's righteousness and dedication to justice.[116]

Both Jewish and Christian communities in the centuries before the emergence of the early Muslim communities, due to the longstanding Biblical significance of the plight of the orphan and the widow, manifested an increased interest, compared to Roman law, in the welfare of poor orphans. The focus in Roman law was on propertied orphans and contains little in regards to the

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[112] Peter Brown, *Poverty and Leadership in the Later Roman Empire* in "The Menahem Stern Jerusalem Lectures" (Hanover: University Press of New England, 2002), 4-5.

[113] *Ibid*., 8-9.

[114] *Ibid*., 49-48; 67.

[115] *Ibid*., 69.

[116] Miller 51, *passim.* In addition to the orphanage, the enrollment of fatherless children in monasteries appears to have been a way to attract new members and staff to religious institutions. See Richard Greenfield, "Children in Byzantine Monasteries: Innocent Hearts or Vessels in the Harbor of the Devil?" in *Becoming Byzantine Children and Childhood in Byzantium*, ed. Arrieta Papaconstantinou and Alice-Mary Talbot (Washington: Dumbarton Oaks, 2009), 275.

majority of orphaned individuals—those without estates and property needing a special guardian to oversee its management. This is a common commitment that, as will be seen shortly, is present in pre-Islamic poetry, the Qur'ān, and early Islamic sources like the Prophet's biography and the *athār* works. After this comparative overview of the treatment of orphans in those legal communities active in the Near East upon the appearance of Muslim communities, three points can be drawn in conclusion. First, little direct "borrowing" can be seen. Even in cases where we seem to have a very obvious insertion of Roman legal ideas in Islamic law, as in the case of Abū Ḥanīfa's opinion that interdiction of the *safīh* ends at age twenty-five, these similarities upon closer inspection appear superficial. Much like Jewish incorporation of Roman and Greek legal concepts, any initial borrowing that did occur soon acquired a life of its own in the new context. (And, moreover, Abū Ḥanīfa's opinion on this matter never gained dominance among Muslim jurists.) Second, the general similarity between these different communities' laws points to an extensive diffusion of shared expectations and assumptions about the community's responsibility for orphans' persons and property. These expectations, moreover, had been in enshrined in laws and legal institutions so ancient that it is likely that general knowledge of them existed in areas like Syria, Iraq, and Egypt. One probably did not need to speak to a legal expert or look at a law book in those areas to know that some authority, whether a governor, judge or religious scholar, was expected to be involved in guardianship appointments in the case that none was appointed by the father. Most guardians were male, but women could also be appointed, particularly in the Roman provinces, including Arabia.[117]

[117] Hannah Cotton, "The Guardianship of Jesus Son of Babatha: Roman and Local Law in the Province of Arabia," *The Journal of Roman Studies* 83 (1993), 94-108.

Why do we see so many suggestive parallels between the legal cultures of Late Antiquity? The answer, mentioned above, appears to be that similar problems led to similar legal solutions. Orphans were by all estimates extremely common in premodern times, even without the added turbulence of pestilence and war. Documents from Roman Egypt and Byzantine tax records, while limited in scope, suggest that anywhere between 25 to 45 percent of children experienced orphanhood before reaching adulthood.[118] Another study, based on a microsimulation of Roman mortality, suggests "that just over one-third of Roman children lost their fathers before puberty, and another third then lost their fathers before age twenty-five."[119] In medieval Egypt, the numbers of orphans were likely similar, if not higher. According to Eve Krakowski in her study of Geniza documents relating to young Jewish women in Egypt between the 10th and 13th centuries, 40 percent of the 381 marriage documents she studies indicate that the women were fatherless at the time of marriage.[120] This would suggest that orphanhood throughout the Near East was a common experience, and often a likelihood, rather than an exception as it has become today.

Orphans, Guardianship, and Social Responsibility in Pre-Islamic and Early Islamic Culture

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[118] Miller 21.

[119] Richard P. Saller, *Patriarchy, Property and Death in the Roman Family*," Cambridge Studies in Population, Economy, and Society in Past Time, (Cambridge: Cambridge University Press, 1994), 189. Significantly due to its temporal and spatial remoteness from the surveys cited above, a study of English manorial court records between 1279-1410 showed that between 26.6 and 35.3 percent of all heirs in the records are identified as orphans. See Elain Clark, "The Custody of Children in English Manor Courts," *Law and History Review* 3, no. 2 (1985), 335.

[120] Eve Krakowski, *Coming of Age in Medieval Egypt: Female Adolescence, Jewish Law, and Ordinary Culture* (Princeton: Princeton University Press, 2018), 2.

The Qur'ān mentions orphans directly in 21 different verses, each time using either the singular noun *yatīm* or the plural *yatāmā*. The plural *aytām*, common in later Muslim legal writings, is never used. Out of these 21 verses, all but one (*al-Kahf* 82) make a clear reference to the ethical or legal duties owed to orphans. Taken together, these verses constitute a distinct minor theme in the Qur'ān that indicates the importance of taking care of orphans, both propertied and destitute, to the early Muslim community and can help explain, in part, the continued significance of orphans to Islamic law and conceptions of justice well into the medieval period. Moreover, the orphan appears as a conduit of dangerous, but potentially astonishing and positive, energy. Nourished and protected, the orphan can achieve or help one achieve greatness; denied his or her rights and neglected, the spurned orphan can be a sign or cause of one's downfall.

In the previous pages, it was seen that this dangerous energy embodied in the orphan was a common Near Eastern theme. It is for this reason that Sūra 93, an apparently biographical reference to the prophet and often understood as such by both Muslims and Orientalists, can also be seen as fitting a model of representing the Near Eastern hero as an orphan, a theme expanded on in the biography assembled by Ibn Isḥāq.[121] The Qur'ānic verses that mention orphans also bear a strong resemblance to some of the Biblical verses mentioned above, and some of them, as

[121] "The story of Muḥammad the orphan seems patterned along other legends of heroes, with the difference that his figure was both heroic and hieratic, but is not necessarily untrue on this score alone," Aziz Al-Azmeh, *The Emergence of Islam in Late Antiquity: Allāh and his People* (Cambridge: Cambridge University Press, 2014), 376. Although not referencing his orphanhood directly, Izustu makes a similar remark that "in the pictures of Muḥammad which the pious Muslim writers of later ages have left, we often see a typical hero of the Arabian desert," Thoshihiko Izutso, *Ethico-Religious Concepts in the Qur'ān* (Montreal: McGill-Queen's University Press, 2002), 75.

we will see, are a conscious reworking and response to the Bible.[122] In the following pages, I will show that the Qur'ānic material on orphans, regardless of its similarity to Biblical material and Near Eastern law, is best understood in relation to the culture and literature of pre-Islamic and early Islamic Arabia (6th-8th centuries). Using poetry, the most significant cultural artifact from the period alongside the Qur'ān, it will be shown that the ideas of the orphan's ambiguous nature, the ethical and legal significance of orphans, and the relationship between the *safīh* and ideas of responsible social action were familiar parts of Arabic and early Islamic culture by the time jurists began writing about legal interdiction and guardianship in the 8th and 9th centuries A.D.

Before turning to material related to orphans and their property in early Arabic and Islamic culture, it must be noted that the sources here are not discussed just because they reveal something about how Islamic legal institutions developed, but also, and more importantly for the current study, because these materials continued to be cherished, read and meditated upon throughout the Mamlūk period. Both the Qur'ān and pre-Islamic/early-Islamic poetry were transmitted and read to a greater extent than any other kind of literature throughout the 13th and 15th centuries (and beyond, of course) throughout Egypt and Syria, including *ḥadīth* (although *ḥadīth* will not be entirely ignored in this chapter). While the prominence of the Qur'ān and *adab*, particularly poetry, is in itself unsurprising to anyone vaguely familiar with late medieval Arabic and Islamic culture, the extent to which pre-Islamic and early-Islamic poetry, in

[122] Incorporation of Biblical themes is of course not evidence that the biographical material on Muhammad's orphanhood needs to be dismissed as ahistorical. In fact, just the opposite conclusion can as readily be made from the Qur'ānic evidence. As Speyer noted, Muhammad's own experience of orphanhood, referenced in Q 93, would have likely heightened his sympathy and concern for the plight of the orphan. Speyer even suggests that Muhammad's experience as a child may help explain the Qur'ān's remarkable interest in Mūsā (Moses). Heinrich Speyer, *Die Biblischen Erzählungen im Qoran* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1961), 199, 308.

particular, was preserved and read during this period has only come to light recently. In his masterful study of the Ashrafīya library catalogue—the only complete catalogue of a library from this period—Konrad Hirschler notes that the catalogue of this "run-of-the-mill library" at the Ashrafīya (a mausoleum and *madrasa* built in Ayyūbid Damascus) allows us to get a better glimpse of what books were available and read during the period than any other source due to the library's average ("or perhaps even below" average) character.[123] Hirschler's study shows us that 32% of all works in the library fall into the thematic category of "poetry," whereas the thematic category of "transmitted sciences," including prayer books, *ḥadīth*, Qur'ān, and much else, constitutes only 20% of the collection.[124] This contrast becomes even starker when one turns to books that were held in multiple copies, a sure sign of the work's popularity: out of the 163 works held in multiple copies in the Ashrafīya, poetry has a lion's share of 47%.[125] Turning to pre-Islamic poetry, Hirschler shows that these works "are better represented in the collection than virtually any field within the transmitted sciences," with many authors having more than one copy of their work in the library, indicating that they must have been "among the most frequently lent out works in this library."[126] While this astounding popularity can be partially accounted for by the importance of pre-Islamic poetry for grammatical and exegetical studies at the time, their salience is not simply a result of scholars' interest in recherché lexicology and grammar. Rather, recent research indicates that the poetry and lives of some of these poets, at

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[123] Konrad Hirschler, *Medieval Damascus—Plurality and Diversity in an Arabic Library: The Ashrafīya Library Catalogue* (Edinburgh: Edinburgh University Press, 2016), 1,3.

[124] *Ibid.*, 106.

[125] *Ibid*., 108.

[126] *Ibid*., 110-111.

least, provided material for moralizing and entertaining reflections of a quasi-historical nature.[127] Given this outsized importance of poetry, and pre-Islamic poetry in particular, in late medieval Arabic culture, one should not exclude the attitude and ethics reflected in early Islamic poetry and focus entirely on the Qur'ānic material.

Orphans as Liminal Figures with Ambiguous Power

While the word "orphan" often today calls to mind the bleak lives of those wretched souls in a Dickens novel, early Arabic literature placed less stress on their helplessness than their displaced existence. Most Middle Period Arabic lexicographers emphasized that the original meaning of *yatīm*, the Arabic word for orphan, was *fard* (alone, single, sole, or an individual), and the noun *yutm* indicated *infirād* (isolation or the state of being alone).[128] On the basis of this understanding of the word comes the Arabic phrase *durra yatīma*, or "unique pearl," which was employed especially to refer to highly-prized literary works, such as the epistle on wisdom by Ibn al-Muqaffa' (d. *circa* 139/756), *Al-Durra al-yatīma*, or the highly influential literary anthology by Abū Manṣūr al-Tha'ālibī (d. 429/1039), *Yatīmat al-dahr fī maḥāsin ahl al-'aṣr* (The Unique Pearl Concerning the Elegant Achievements of Contemporary People).[129] Ibn

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[127] Guy Ron-Gilboa, "Pre-Islamic Brigands in Mamluk Historiography," *Annales islamologiques* 49 (2015): 7-32.

[128] Ibn Manẓūr, *Lisān al-'arab*, 15 vol. (Beirut: Dār Ṣādir, 1955-1956), 12/645-646; Muḥammad Murtaḍā al-Ḥusaynī al-Zabīdī, *Tāj al-'arūs min jawāhir al-qāmūs*, 15 vol., ed. 'Alī al-Hilālī (Kuwait: al-Turāth al-'Arabī, 2001), 34/134-137; Abū Manṣūr Muḥammad b. Aḥmad al-Azharī, *Tahdhīb al-lugha*, 16 vol., ed. Muḥammad 'Alī al-Najjār, et. al. (Cairo: al-Dār al-miṣriyya li'l-ta'lif wa'l-tarjima, 1967), 14/339-340; Éric Chaumont, "Yatīm," *Encyclopaedia of Islam, Second Edition*.

[129] Ibn Manẓūr 12/646 ; 'Abd Allāh b. al-Muqaffa', *Āthār ibn al-muqaffa'* (Beirut: Dār al-Kutub al-'Ilmiyya, 1989), 325-330; Muḥammad Ibn Isḥāq al-Nadīm, *Kitāb al-fihrist li'l-nadīm*, ed. Riḍā Tajaddud (Tehran: Ibn Sīnā, 1964), 132 (where Ibn al-Muqaffa''s work is referred to as "Kitāb al-yatīma fī al-rasā'il"). On Ibn al-Muqaffa', see Francesco Gabrieli, "Ibn al-Muḳaffa'," *Encyclopaedia of Islam, Second*

Manẓūr does, however, include some variant opinions about the meaning of *yatīm* and *yutm*. The Kufan philologist and famed transmitter of poetry and proverbs, al-Mufaḍḍal al-Ḍabbī (d. between 164/781-170/787), held that the origin of the word was *al-ghafla* (negligence, inattention, or indifference), and "it was for this (meaning) that the *yatīm* was called a *yatīm*, since piety towards him (*birrih*) is neglected."[130] For similar reasons, another early philologist, one Abū ʻAmrū, claimed that the original meaning of *yutm* was *ibṭā'* (slowing down or holding back).[131]

In Arabic and in Muslim *fiqh*, *yatīm* refers to a fatherless child, and the word is not usually used, except figuratively, for fatherless adults, as will be discussed below.[132] This contrasts with animals, in which motherless offspring, rather than fatherless, can be called *yatīm*. Ibn Khālawayh (d. 370/980-1) argued, however, that birds were an exception to this: "*Yutm* in birds depends on (the loss of) both the father and the mother, for they both feed their chicks."[133] This argument reveals an important assumption about the nature of *yutm*: the deciding factor was loss of a provider of material sustenance, not the absence of a caregiver. This is reflected in the discussion of orphans in *fiqh*, as well, where the overriding concern is for the management of whatever property the orphan may own and to ensure that they are able to manage their own

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Edition. For al-Thaʻālibī and his anthology, see Bilal Orfali, *The Anthologist's Art: Abū Manṣūr al-Thaʿālibī and His* Yatīmat al-dahr (Leiden: Brill, 2016). I rely here on Orfali's translation of the title; see *ibid*. 6.

130 Ibn Manẓūr, 12/645. On al-Mufaḍḍal al-Ḍabbī, see Ilse Lichtenstädter, "al- Mufaḍḍal b. Muḥammad b. Yaʿlā b. ʿĀmir b. Sālim b. al-Rammāl al-Ḍabbī," *Encyclopaedia of Islam, Second Edition.*

131 Ibn Manẓūr, 12/645; al-Azharī 14/340.

132 Al-Khalīl b. Aḥmad al-Farāhīdī, *Kitāb al-ʻayn murattaban ʻalā ḥurūf al-muʻjam*, 4 vol., ed. ʻAbd al-Ḥamīd Hindāwī (Beirut: Dār al-kutub al-ʻilmiyya, 2002), 4/409.

133 Al-Zabīdī, 34/134. On Ibn Khālawayh, see Anton Spitaler, "Ibn Khālawayh," *Encyclopaedia of Islam, Second Edition*.

economic affairs before their property is turned over to them. The lexicographers also mentioned the minority opinion, held by Abū ʻUbayda b. al-Jarrāḥ (d. 18/639) that women, unlike men, remain in a state of *yutm* until marriage.[134] This opinion was likewise held by Mālik and later became a dominant opinion in the Mālikī *madhhab*, but was never accepted by the other three Sunni *madhhabs* that had jurisdiction during the Mamlūk Period.[135]

The Prophet Muḥammad is by far the best known example of an exceptionally unique orphan in Islamic and Arabic literature. The biographical material collected in Ibn Isḥāq highlights not only the difficulty that being first fatherless and, later, motherless presented, but, also the uncertainty that his social dislocation provoked. In the story describing Ḥalīma's decision to foster him as a child, Ḥalīma relates that "each woman refused him when she was told that he was an orphan, because we hoped to get payment from the child's father." Ḥalīma too refuses, but, after not finding a child to suckle, she tells her husband that she will take the orphan. Her husband tells her to do as she pleases, for "perhaps God will bless us on his account." Of course, this is what happens: no sooner do they take the young apostle under their wing than Ḥalīma's bosom overflows with milk, so do the udders of their weary old camel, and their previously lethargic donkey now outpaces all her companions. When they return to their (previously) barren abode, miracles of abundance persist.[136] Ḥalīma's companions' reluctance to waste their time on an orphan proves, in the end, to be unjustified. In addition to Muḥammad, Mary is also identified in the *Sīra* as an orphan who was chosen "above the women of the

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[134] Ibn Manẓūr, 12/645; al-Azharī, 14/340. On Abu ʻUbayda b. al-Jarrāḥ, see Ibn Saʻd 3/379-384; 9/388-389.

[135] Ibn Qudāma, 6/602-603.

[136] Alfred Guillaume, *The Life of Muhammad: A Translation of Isḥāq's* Sīrat Rasūl Allāh (1955; reis., Karachi: Oxford University Press, 1967), 71.

world."[137] Like Joseph and Moses, these prophetic figures' social and familial dislocation is a prelude to their becoming bearers of fertility and prosperity to their people.

Orphans are not always associated with growth and positivity in the early Arabic tradition, but were also at times portrayed to be vessels of terrible destruction. A tradition quoted by the Qur'ānic exegetes, for example, claimed that an unknown Israelite man dreamt that "the Temple (*bayt al-maqdis*) and the people of Israel would be destroyed at the hands of an orphan boy (*ghulām yatīm*), the son of a widow, from the people of Babel, and he is called Nebuchadnezzar." The man set off to find the boy, who happened to be collecting wood to support himself and his mother. After feeding the poor boy for three days, the man requested that the boy grant him safety when he becomes king, which he was granted.[138] This man's calculated kindness towards the orphan may have saved himself, but the destruction wrought by the orphan against the man's people would still come to pass.

This story of Nebuchadnezzar as an orphan boy shares a narrative schema that can also be found in some of the stories related about pre-Islamic poets in Abū al-Faraj al-Iṣbahānī's (d. 362/972-3) *Book of Songs* (*Kitāb al-Aghānī*).[139] During the bloody War of Basūs, Humām b. Murra found an orphaned boy laying on the ground, and he took the boy and raised him as his

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[137] *Ibid*. 275.

[138] Abū Ja'far al-Ṭabarī, *Tafsīr al-ṭabarī: jāmi' al-bayān 'an ta'wīl āy al-qur'ān*, 25 vol., ed. 'Abd Allāh b. 'Abd al-Muḥsin al-Turkī (Giza: Dār Hijr, 2001), 14/479; *Tārīkh al-ṭabarī: tārīkh al-Rusul wa'l-mulūk*, 11 vol., ed. Muḥammad Abū al-Faḍl Ibrāhīm, (Cairo: Dār al-Ma'ārif, 1967), 1/586-588; Abū Isḥāq al-Tha'labī, *al-Kashf wa'l-bayān al-ma'rūf tafsīr al-tha'labī*, 10 vol., ed. Abū Muḥammad b. 'Āshūr and Naẓīr al-Sā'idī (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 2002), 6/77.

[139] For al-Iṣbahānī's life and the context of the book's composition, see Hilary Kilpatrick, *Making the Great Book of Songs: Compilation and the Author's Craft in Abū l-Faraj al-Iṣbahānī'* Kitāb al-Aghānī (London: RoutledgeCurzon, 2003).

own, naming him Nāshira.[140] After a time, the boy realized that he was actually a son of the Banū Taghlib, the tribe at war with Humām's people. So, when Humām took a reprieve during the battle known as "the Day of al-Quṣaybāt, putting aside his arms in order to quench his thirst, the orphan Nāshira grabbed a short spear and killed him, after which he went and joined the Banū Taghlib.[141]

There is a nearly identical tale of an orphan's revenge in *The Book of Songs* that also takes place during the War of Basūs, but this time it was Humām's brother, Jassās, who met his demise at the hands of the orphaned son of his sworn enemy, Kulayb. After killing the latter, Jassās had fostered the man's son, al-Hijris, (who also happened to be Jassās's nephew), raising him like a son and even giving the boy his own daughter in marriage. After the dust of war had settled and peace was made, al-Hijris, now a young man, discovered that Jassās was actually the murderer of his father. When he returned home to his wife that night, his lust for vengeance was such that his breath burned his wife's bosom as they slept. The young man tricked Jassās into giving him a horse and a knight's equipment, after which he turned on him, spearing his adoptive father to death.[142]

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[140] The name is from the root *n-sh-r*, which has a strong semantic relationship to scattering rain or win and the rejuvenation of life, both vegetation and human, as in "*arḍ nāshira*," which means according to Lane, "Land having herbage, or pasturage, which has dried up and then become green in consequence of rain in the end of summer." Edward W. Lane, *An Arabic-English Lexicon* (London: Williams and Norgate, 1863), 1/2795. It is possible that the name is supposed to indicate Humām's belief that his good-will towards the orphan would bring fertility and restore prosperity to his battle-beleaguered tribe. Yet the root is also semantically related to the act of cutting, and so his name in the story also hints at the Humām's demise from the boy's blade.

[141] Abū al-Faraj al-Iṣbahānī, *Kitāb al-Aghānī*, 3rd ed., ed. Iḥsān ʻAbbās, Ibrāhīm al-Saʻāfīn, and Bakr ʻAbbās (Beirut: Dār Ṣādir, 2008), 5/30.

[142] *Ibid*. 5/39-40.

Finally, the famed *ṣu'lūk* (brigand) poet al-Shanfarā is said to have also wrecked vengeance on his adoptive clan, the Banū Salāmān. There are three different versions of this story in the *Book of Songs*, but they all agree that his adoptive father treated him as his own. In two of the three versions, al-Shanfarā swears not to rest until he gets vengeance by killing 100 men of the Banū Salāmān. Moreover, in two versions it is also explicitly stated that his own father was killed by al-Shanfarā's adoptive tribe prior to being ransomed to the Banū Salāmān.[143] According to Stetkevych, these anecdotes highlight the liminal and ambiguous nature of al-Shanfarā, and they are intended to help explain why he turned on his own tribe, the Banū Fahm, who had abandoned him to their enemies as a form of ransom.[144] Given the morbid similarities to the previous stories, including the one about Nebuchadnezzar, it would also seem that orphanhood accentuated the sense of liminality and disruption of the status quo. There is a semantic logic to these stories that resonates with the story of Muḥammad and Moses—two orphans who also found themselves at odds with the customs and rules of the people they had been raised by. These parallels suggest that the potentially disruptive power of orphans, in particular, was a common idea in early Arabic literature familiar across literary and religious genres.

Yet not all stories in the *Book of Songs* about orphans are quite this antinomian. The legendary ruler of Mecca, Quṣayy b. Kilāb, who reunited the Quraysh in Mecca and was an ancestor of Muḥammad, was also said to have been raised as an orphan by his mother in

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[143] *Ibid*. 128, 131-132, 138.

[144] Suzanne P. Stetkevych, *The Mute Immortals Speak: Pre-Islamic Poetry and the Poetics of Ritual* (Ithaca: Cornell University Press, 1993), 125-128.

Mecca.[145] As in some of the previous orphan stories, a stranger informs him after a time that he is not actually one of the Khuzā‘, the dominant tribe in Mecca at the time. When he asked his mother who he really was, she informed him of his honorable lineage and told him, “Your people are the family of God (*āl allāh*),” after which he went on a quest to find his people and reclaim his patrimony.[146] Another heroic orphan story from pagan Arabia can be found in the anecdotes about Imru’ al-Qays. These stories indicate that it was the regicide of his father, the Kindite king, and the burden of vengeance that he accepted, which rattled him out of his youthful precocity and immaturity.[147] Stetkevych has argued convincingly that in pre-Islamic poetics, “to avenge is to inherit,” and it is after a final drinking bout that Imru’ al-Qays foreswore wine, meat, anointing himself with oil, washing his head and touching women.[148] According to Stetkevych, his *mu‘allaqa* portrays in its initial *nasīb* section his decision “to abandon the quest for mature manhood in pursuit of puerile pastimes” by deciding to slaughter his she-camel, typically used by the Arab hero to overcome the terrors and dangers of the *raḥīl*.[149] His wasteful behavior is typical of the kind of prodigality (*isrāf*) that Muslim jurists associated with the behavior of the

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[145] Ibn Ḥazm, *Jamharat ansāb al-‘arab*, 9th ed., ed. ‘Abd al-Salām Muḥammad Hārūn (Cairo: Dār al-Ma‘ārif, 2020), 14.

[146] Abū Bakr al-Anbārī, *Sharḥ al-qaṣā’id al-sab‘ al-ṭiwāl al-jāhiliyyāt*, 9th ed., ed. ‘Abd al-Salām Muḥammad Hārūn (Cairo: Dār al-Ma‘ārif, 2019), 258-260.

[147] Imru’ al-Qays is portrayed in *The Book of Songs* as living a fairly typical *ṣu‘lūk* lifestyle prior to his father’s murder. His father had exiled him because of he wrote poetry, and Ibn Kalbī reports after that that “he would wander among the Arabs’ settlements with an assortment of Arab outcasts (*shudhdhādh al-‘arab*) from Ṭayyi’, Kalb and Bakr b. Wā’il. If he came upon a stream, pool of water, or hunting ground, he would stay awhile and slaughter something for the people with him each day. Then he would go hunt, and when he would catch something he would return and eat, and they would eat with him. He would drink, and he serve them with him as his slave girls sung to him. He would keep this up until the water of the stream would dry up, then he would move on to another one,” Al-Iṣbahānī, 9/66.

[148] Stetkevych, 245, 248.

[149] *Ibid*. 263-270.

safīh. This behavior was likewise typical of the brigand-poets (*ṣa'ālīk*).[150] In the *Book of Songs*, then, it is Imru' al-Qays' sudden orphanhood upon his father's murder (in one version, he is still living with his wet nurse) that inspires his endeavor to enter adulthood and shed his socially irresponsible behavior.[151]

The Ethical and Legal Significance of Orphans

The excessive behavior (*isrāf*) of pre-Islamic Arabs was not always so frivolous as Imru' al-Qays'. In plenty of verse, we find both brigand-poets and other, less rebellious poets not identified as social outcasts, taking pride in what might be called careless generosity, slaughtering all they have for the sake of a guest or person in need. In many cases, these recipients of carefree generosity are orphans and widows.[152] For example, the poet 'Abīd b. al-Abraṣ of Asad, the tribe against which Imru' al-Qays swore vengeance for his father's death, states in a poem boasting of his tribe's route of Kinda:

> We shield from harm all our weak ones, and defend the stranger,
> And provide for the needs of the widows with orphan children (*arāmil al-aytām*).[153]

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[150] Yūsuf Khulayf, *al-Shu'rā' al-ṣa'ālīk fī al-'aṣr al-jāhilī*, 5th ed. (Cairo: Dār al-Ma'ārif, 2019), 38-39.

[151] Al-Iṣbahānī, 9/67. It is only an attempt because, as Stetkevych argues, he "ultimately abandons his patrimony" and continues in his excessive behavior by never cease thirsting for more blood to quench his desire for vengeance (Stetkevych 248).

[152] In his ethnography of the Rwala, Lancaster observed similar acts of generosity towards widows, orphans and other vulnerable members of society. He suggested that doing this "is not just to fulfill religious obligations, but is, in itself, a political statement of autonomy and a means of spreading reputation and gathering information." William Lancaster, *The Rwala Bedouin Today*, 2nd ed. (Prospect Heights: Waveland Press, 1997), 94. Moreover, he suggested that this could at times act as an "insurance policy," since "tomorrow's beggar might be you." This latter observation resonates with the poem of and anecdote about Ḥujayya, discussed below. *Ibid*. 95.

[153] 'Abīd b. al-Abraṣ, *The Dīwān of 'Abīd Ibn al-'Abraṣ, of Asad*, ed. and trans. Charles Lyall and Muḥammad 'Awny 'Abd al-Ra'ūf (Cairo: National Library Press, 2020), 9.

Or, in a poem in the *Dīwān al-Hudhaliyyīn*, the poet Sā ʻida b. Ju'ayya in an ode about his regrets in old age that begins:

> If only I could know: is there any escape from old-age?
> Does one feel regret for life's passing after one's hairs grey?
> (*Yā-layta shiʻrī ʻalā manjā min al-haramī*
> *'am hal ʻalā al-ʻayshi baʻda l-shaybi min nadamī?*)

After describing his aching joints and a journey on his reliable she-camel, he returns to his interrogation of mortality:

> Have fate's days preserved those people
> at Maʻyaṭ? They were neither weak nor cowardly.
> (*hal aqtanā ḥadathānu l-dahri min anasin*
> *kānū bi-maʻyaṭa lā wakhshin wa-lā qazamī*)

The poet continues to describe these brave folk who were fated to meet their deaths in Maʻyaṭ, even though they were forewarned about their inevitable demise and even if they had had armies as mighty as a mountain. Then the poet describes individual warriors lying on the battlefield, among whose number are:

> (And) a noble man of ancient lineage perishing,
> who sheltered the orphan spurned by others.
> (*wa-khiḍrimin zākhirin aʻrāquhu talifin*
> *yu'wiy al-yatīma 'idhā mā ḍunna bi'l-dhimamī*)[154]

The poet's ruminations on the inevitability of fate and death, themes common in Pre-Islamic poetry, is mixed here with the glorification of the fallen warrior by recalling his care for orphans

[154] *Dīwān al-hudhaliyyīn* (Cairo: Maṭbaʻat Dār al-Kutub wa'l-Wathā'iq al-Qawmiyya bi'l-Qāhira, 2019), 1/191-205.

in times when no one else would. More examples of such behavior to orphans and widows can easily be found in early Arabic poetry.[155]

Taking care of orphans was not always so boastful nor did it always imply prodigality (*isrāf*) in pre-Islamic poetry. Probably the most resonant image of generosity to orphans under one's care is found in a poem of al-Shanfarā in which he describes his friend and fellow brigand Ta'abbaṭa Sharran, whom he calls "*umm 'iyāl* (mother of children):"

> And I have watched the mother of children feeding them
> And she gave sparingly, just doling out a few morsels.
> She fears, were she to give freely, that famine would strike us.
> We remain hungry, but this is the way she manages.[156]

Stetkevych argues that this sobriquet (*umm 'iyāl*) is a symmetrical inversion of tribal values of the liberality towards the poor and needy: whereas the typical Arab tribal chieftain prides himself in providing overflowing pots and surfeit in times of need, Ta'abbaṭa Sharran is here portrayed as stingy, barely able to feed his own children, thereby highlighting his inversion of social norms. We can also add that the feminine here appears to indicate as well the animal (and uncivilized) nature of Ta'abbaṭa Sharran, for while human orphans were considered to be fatherless, the Arabic lexicographers inform us that it was believed that animals were orphans if

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[155] E.g., Abū Sa'īd al-Aṣma'ī, *al-Aṣma'iyyāt: ikhtiyār al-aṣma'ī,* ed. Aḥmad Muḥammad Shākir and 'Abd al-Salām Hārūn, 8th ed. (Cairo: Dār al-Ma'ārif, 2021), 104; Al-Mufaḍḍal b. Muḥammad al-Ḍabbī, *al-Mufaḍḍalīyāt,* 18th ed., ed. Aḥmad Muḥammad Shākir and 'Abd al-Salām Hārūn (Cairo: Dār al-Ma'ārif, 2019), 368 (feeding hungry women); *ibid*. 172 (feeding the mother of two and an emaciated woman wandering at night while nursing her infant); *ibid.* 160 (the poet condemns his cousin for not feeding the poet's dependents in time of hunger); *Dīwān al-Hudhaliyyīn* 2/244 ("Father of the orphans and the guests in the hour no father could be found"); *ibid*. 2/148-49 (praise for the poet's fallen friend, who gave refuge to widows and opened his house to strangers and the poor in winter).

[156] al-Ḍabbī, 110. Like all other translations (unless otherwise stated), this is my own. However, I did consult the translation by Lyall. See Charles Lyall, *The Mufaḍḍalīyāt: An Anthology of Ancient Arabic Ode, Volume II: Translation and Notes* (Oxford: Clarendon Press, 1918), 70.

they were motherless.[157] Hence, this underscores another point that Stetkevych makes: "the image of the indigent mother trying to feed her large brood suggests a widow and her orphaned offspring, who, like the *ṣa'ālīk*, are cut off from tribal sustenance and protection."[158] Here, the outcast brigands are portrayed as having recreated the norms of society among themselves: having found a (not-so-human) mother, they have been alleviated of the worst hardships associated with orphanhood not despite their wildness but because of it.

This inversion of social norms of prodigality towards orphans into sparing, calculated management by the mother stands as a literary allusion to the harsh reality of orphanhood. As noted above, premodern societies likely experienced an exceptionally high level of fatherless children. Other early Arabic poems emphasize the near ubiquity of these phenomenon. For example, the pre-Islamic poet al-Muraqqish al-Akbar proclaims in an elegy for a cousin slain in the War of Basūs:

> Longevity's elusiveness is no cause for regret,
> For a man knows what he faces in life.
> A father perishes and a newborn stays behind.
> And everyone with a father is eventually orphaned.
>
> (*laysa 'alā ṭūli l-ḥayāti nadam/wa-min warā'i l-mar'i mā ya'lam*
> *yahliku wālidun wa-yakhlufu maw/lūdun wa-kullu dhī 'abin yaytam*)[159]

Life's ephemerality, stated in no oblique terms in the first line, is stressed doubly so in the second line: by the time fathers die, their children are yet recently born (*mawlūd*). As everyone is said to experience orphanhood, it might be thought that the poet's choice of words is a mere

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[157] Al-Azharī ,14/340; for a literal use of *yatīm* to refer to a motherless onager, see al-Ḍabbī 50 (line 10).

[158] Stetkevych, 139.

[159] Al-Ḍabbī, 239.

hyperbole, yet the use of both *yaytam* (becomes and orphan) along with *mawlūd* is surely intended to emphasize not just the brevity of life but the experience of losing a parent early in life. *Yatīm*, according to the lexicographers, was only used for a person as long as they had not reached maturity. Even the exception to this that they mention—its figurative use to refer to Muḥammad even in adulthood as *Yatīm Abī Ṭālib*—refers to a previous period in which he experienced orphanhood as a child.[160] These lines likely had greater resonance in a premodern context because orphanhood was a common experience.

Further evidence that orphanhood was a widespread phenomenon can be found in a poem included in the collection of early Arabic poetry compiled by Abū Tammām (d. 845 A.D.), the *Dīwān al-ḥamāsa.* The poem was attributed to Yazīd b. al-Ḥakam al-Thaqafī and was composed in the form of a series of wise sayings (*amthāl*) for his son. One of these lines reads:

> It is unknown to one with a child—
> will he lose him or will the child be an orphan?
> (*mā ʻilmu dhī waladin ayath—*
> *kaluhu ʼam al-waladu l-yatīmū*)[161]

Carefree generosity towards orphans was not just a virtue of the social outcast, however, but appears in non-*suʻlūk* poetry as well, as in the elegy attributed to the sister of al-Muqaṣṣaṣ al-Bāhiliyya, also in *Dīwān al-ḥamāsa:*

1. So lengthy was that day of mine at Al-Qalīb, that even a veil could hardly shield the noontime sun.

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[160] Al-Azharī 14/339; al-Manẓūr 12/646; al-Zubaydī 34/135. Another man (not mentioned by these lexicographers) who continued to be referred to as *yatīm* even after adulthood and becoming a parent is the *muḥaddith* Abū al-Aswad Muḥammad b. ʻAbd al-Raḥmān (d. late Umayyad period), known as *Yatīm ʻUrwa*. See Muḥammad b. Saʻd, *Ṭabaqāt b. Saʻd*, ed. ʻAlī Muḥammad ʻUmar (Cairo: Maktabat khanjī, 2001), 7/451.

[161] Al-Khaṭīb al-Tabrīzī, *Sharḥ dīwān al-ḥamāsa li-abī tamām al-tabrīzī,* ed. Aḥmad Shams al-Dīn and Gharīd al-Shaykh (Beirut: Dār al-Kutub al-ʻIlmiyya, 2000), 1/731.

2. And how many men you saw that had downplayed your reputation, but they caught a glimpse of you before they had time to think twice.
3. Then you'd plunder savory meat bountiful as a torrent of rain, and many a camel that had been fattened on freshly gathered clover.
4. But al-Muqaṣṣaṣ is yours to claim, not ours, if you are not met by a people with many honorable deeds to their name.
5. Cheerful and reclining next to the table even if an unexpected gale uprooted an entrenched tent peg,
6. and father of the orphans, who would spring up at his door like larva in a bed of lush foliage.

1. *Yā ṭūla yawmī bil-qalībi falam takad/ shamsu ẓ-ẓahiyrati tuttaqā bi-ḥijābī*
2. *wa-murajjimin 'anka ẓ-ẓunūna ra'aytahu/ wa-ra'āka qabla ta'ammuli l-murtābī*
3. *fa'afa'ta 'udman kal-hiḍābi wa-jāmilan/ qad 'udna mithla 'alā'ifi l-miqḍābī*
4. *lakumu l-muqaṣṣaṣu lā lanā 'in 'antumu/ lam ya'tikum qawmun dhawū 'aḥsābī*
5. *fakihun 'ilā janbi l-khiwāni 'idhā ghadat/ nakbā'u taqla'u thābita l-'aṭnābī*
6. *wa-'abū l-yatāmā yanbutūna bi-bābihi/ nabta l-firākhi bi-kāli'in mi'shābī*[162]

Feeding the orphans has the fertile effects of springtime: orphans spring up like larva in the fresh foliage of springtime.[163] His sister's lack of protection, indicated in the opening complaint about exposure to the sun, is contrasted to life springing up around the "father of the orphans." Moreover, his serenity in times of hardship (line five) indicates that he was a master of the Arab virtue of *ḥilm*, and not a social outcast. The language of this elegy is evocative of the encomiastic poem to Muḥammad said to have been composed and performed in his honor by his (pagan) guardian and uncle, Abū Ṭālib, in which he praises him as "A noble man, for whose sake the clouds drop rain,/ The support of orphans (lit. "the springtime for the orphans"), the defense of

[162] Al-Khaṭīb al-Tabrīzī, 1/679-680.

[163] For the relationship between the root *'-sh-b* and springtime foliage, see Ibn al-Manẓūr, 2/950.

widows!"[164] Again we see an intimate semantic connection between protection and care for orphans, patrimony, and springtime.

Early Islamic and Arabic culture, then, at times recognized a strong connection between the Islamic emphasis on charity and goodwill towards orphans and the virtues of the pagan Arabs. This recognition of a continuity of ethics, rather than the kind of break proposed by Goldziher in a famous essay on *muruwwa* (chivalry) and *dīn* (faith or religion), is also related in *The Book of Songs* about a poem by the *mukhaḍrim*[165] Ḥujayya b. al-Muḍarrab:[166]

1. We insisted, and this woman persisted in getting angrier, shutting the curtain on us, and covering her face.
2. She was scolding me about wealth whose existence made me seem pleasing to you, so scold and rage all you want.
3. I saw that the orphans' needs would not be fulfilled by just some gifts of food in brittle wooden pots.
4. So I said to our two slaves, "Drive the camels to them. I'll make our home as another that's lost its camels.
5. My children are more deserving to be hunger-stricken and have only turbid water any time they drink."

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[164] Guillaume, 124. This line was also memorialized in Mamluk-era biographies of the Prophet. See, for example, Taqī al-Dīn al-Maqrīzī, *Imtā' al-asmā' bi-mā li'l-nabī min al-aḥwāl wa'l-amwāl wa'l-ḥafada wa'l-matā'*, ed. Muḥammad 'Abd al-Hamīd al-Namīsī (Beirut: Dār al-kutub al-'ilmiyya, 1999), 5/126; Shams al-Dīn al-Dhahabī, *Siyar a'lām al-nubalā'*, ed. Shu'ayb al-Arnā'ūṭ, et. al. (Beirut: Mu'assasat al-Risāla, 1985), 1/56. The line of poetry was not always attributed to Abū Ṭālib, as in al-Dhahabī, *Mīzān al-i'tidāl fī naqd al-rijāl*, ed. 'Alī Muḥammad al-Bijāwī (Beirut: Dār al-Ma'rifa li'l-Ṭibā' wa'l-Nashr, 1963), 3/129 (The verse there is recited by Ā'isha bt. Abū Bakr while her father was adjudicating, and Abū Bakr says the verse describes the Prophet); Shihāb al-Dīn al-Nuwayri, *Nihāyat al-arab fī funūn al-adab* (Cairo: Dār al-Kutub al-Miṣriyya, 1933), 18/241 (The verse is attributed to the Prophet's uncle al-'Abbās).

[165] On the term *mukhaḍrim*. Montgomery has argued that these poets and their artistic production are evidence of cultural continuity between pre-Islamic Arabian culture and the Umayyad Caliphate despite the social, religious and political upheavals of the time. Due to their combination of pre-Islamic and Islamic aesthetic values, Montgomery considers the question regarding whether they were written before or after the poet joined the Muslim community as unnecessary. See James Montgomery, *The Vagaries of the Qaṣīdah: The Tradition and Practice of Early Arabic Poetry* (Gibb Memorial Trust, 1997), 220-222.

[166] Ignaz Goldziher, *Muslim Studies*, ed. S.M. Stern, transl. C.R. Barber and S.M. Stern (Albany: State University of New York Press, 1967), 11-44.

6. They[167] recall to me the bones of someone who would have given me any of his mounts had I come to him robbed of mine—
7. my brother. When I called upon him when calamity struck, he answered. And if I was angered, he drew his sword in anger.
8. So do not think that I, the one you married, am noxious, for I am Ḥujayya b. al-Muḍarrab.

1. *lajijnā wa-lajjat hādhihī fī t-taghaḍḍubī/ wa-laṭṭi l-ḥijābi dūnanā wa-t-tanaqqubī*
2. *talūmu ʻalā mālin shafāniy makānuhū/ ʼilayki fa-lawmiy mā badā laki wa-ghdabī*
3. *raʼaytu l-yatāmā lā tasuddu fuqūrahum/ hadāyā lahum fī kulli qaʻbin mushaʻʻabī*
4. *fa-qultu li-ʻabdaynā ʼarīḥā ʻalayhimī/ saʼajʻalu baytī mithla ʼākhara muʻzibī*
5. *baniyya ʼaḥaqqu ʼan yanālū saghābatan/ wa-ʼan yashrabū ranqan ladā kulli mashrabī*
6. *dhakartu bihim ʻiẓāma man law ʼataytuhū/ ḥarīban laʼāsāniy ladā kulli markabī*
7. *ʼakhiy wa-lladhī ʼin ʼadʻuhū li-mulimmatin/ yujibniy wa-ʼin ʼaghḍab ʼilā s-sayfi yaghḍabī*
8. *fa-lā taḥsibiyniy baldaman ʼin nakaḥtihī/ wa-lākinnanī ḥujayyatu -bnu l-muḍarrabī*[168]

This is a fairly typical example of socially approved *isrāf* (prodigality) in Arabic verse– recognizing the debt he owed to his deceased brother, Ḥujayya sends his most precious possessions to his brother's orphans despite his wife's scolding. This act of taking care of orphans, as a father would, is again semantically related with rejuvenation and life: the orphans themselves recall to him the bones of his dead brother. According to *The Book of Songs*, it was ʻĀʼisha who memorialized the anecdote about Ḥujayya and his poetry when she quoted them to her brother, ʻAbd al-Raḥmān b. Abū Bakr, exhorting him to follow the poet's example. This happened after the ʻĀʼisha took care of her nephew al-Qāsim b. Muḥammad b. Abī Bakr and his sister after their father's death in Egypt when they were still small children. After seeing that they were no longer small children, ʻĀʼisha entrusted them to the care of her brother ʻAbd al-Raḥman, saying "Be to them as Ḥujayya b. al-Muḍarrab, Kindah's brother, was (to Kindah's children)." Another report in *The Book of Songs* indicates that this goodwill towards orphans was

[167] I.e., the orphans.

[168] This is the version included in *Dīwān al-Ḥamāsa* (al-Khaṭīb al-Tabrīzī, 1/721-722).

not associated with any particular religion. The report tells that Ḥujayya's wife was so upset with her husband that she left him, eventually coming to al-Madīna and becoming a Muslim during the caliphate of 'Umar b. al-Khaṭṭab. Yet when Ḥujayya came to al-Madīna to ask his wife to return, he found himself unable to follow through with his plan because he was a Christian.[169]

While the importance of orphans in pre-Islamic poetry as both liminal figures and people who are deserving of the attention and care of the powerful is undeniable, it is unclear how widespread this may have been practiced in daily life, and it is even more uncertain whether the property rights of orphans were respected as a rule. On the one hand, the communal nature of some property in nomadic society would have likely suspended any individual claims of an orphaned child.[170] In settled areas, like the towns of Yathrib, Thaqīf and al-Ḥīra, some rule for preserving orphaned minors' property likely existed, but it is impossible to say without more evidence. It is likely in many cases where nothing resembling a state existed that much depended on the ability of an orphan to gain an able protector, as in the anecdote told about Imru' al-Qays's sister, Hind. After their father's murder, Hind and some of her father's followers sought refuge with a man named 'Uwayr b. Shajna, but his tribe said to him "their property will be eaten" (i.e., they will take it for themselves). In order to fulfill what he considered his duty, 'Uwayr helped them make an escape with their property until they reached their own people in Najrān.[171]

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[169] Al-Iṣbahānī 20/200-202.

[170] William Robertson Smith, *Lectures on the Religion of the Semites* (London: Adam and Charles Black, 1894), 94, 105.

[171] Al-Iṣbahānī, 9/67.

This concern for orphans and their property in pre-Islamic Arabia provides important context for the Qur'ānic legislation on the subject in the later Medinan verses. The early Meccan verses regarding orphans are general commands to consider the plight of the orphan. We have already seen the biographical verse in Q 93, and we can add here that the *sūra*, after asking the receiver of the revelation to remember his own time as an orphan, then follows this up with a command not to spurn the orphan. Another Meccan *sūra*, *Sūrat al-Balad*, describes the "people of the right (*asḥāb al-maymana*)" – those people who, unlike the people of the left, have God's signs revealed to them and will not burn in hellfire – as those who free a slave, provide food in times of famine to an orphan who is a relative (*yatīman dhā maqraba*), or a poor person in distress.[172] The emphasis on helping orphans, particularly those related to one, during times of famine is reminiscent of the chivalric values glorified in pre-Islamic poetry. *Sūrat al-Fajr* condemns those who do not honor the orphan nor urge each other to feed the poor, but this time follows up with an accusation that these unjust people "consume (peoples') inheritance greedily," indicating that stealing inheritances was part of the dishonorable conduct towards orphans.[173] A very similar series of verses, which could be considered a variation on the verses in al-Fajr, can be found in the Meccan *ṣūra*, *al-Ma'ūn*: "Have you observed those who deny the Judgment? That is he who repels the orphan, and does not urge the feeding of the poor."[174]

[172] Q 90:13-16, 19.

[173] Q 89:17-19.

[174] Q 107:1-3.

In *al-An'ām* and *al-Isrā'* one finds the same command regarding orphans' property: "And approach not the wealth of the orphan save with that which is better, till he reach maturity."[175] The repetition is suggestive of the gravity of the issue for the Arabs at the time of the Qur'ān's revelation. This verse would also become critical for Muslim legal scholars' understanding of guardianship because some scholars took it as permission to trade with the orphans' wealth if this would bring profit for the orphans or ensure that *zakāt* would not eat up their wards' property.[176]

A series of Medinan verses determine specific rights of orphans and duties that Muslims owe to orphans. We have already seen that the plight of the orphan was a matter of grave concern in pre-Islamic society, and that the Meccan verses exhorted Believers to respect the orphans' rights. In the later Medinan verses, one does not find the personal plight of the orphans emphasized, as in Q 93:6 in which the listener is directly reminded of his orphanhood and God's sheltering him, but they are now dealt with as a social group with specific legal rights. Q 8:41 and 59:7 set aside a portion of spoils of war for the orphans. Q 76:8 resembles the Meccan verses insofar as it encourages feeding the poor, the orphan and the captive, but this time emphasizes (in the following verse) that it is "for the sake of Allah only" and no thanks or reward is sought.[177]

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[175] Q 6:152; 17:34. These verses are traditionally thought to be Meccan, but some have held 6:152 to be Medinan. Jalāl al-Dīn al-Asyūṭī, *al-Itqān fī 'ulūm al-qur'ān*, ed. Shu'ayb al-Arnu'ūṭ and Muṣṭafā Shaykh Muṣṭafā (Beirut: Mu'assasat al-Risāla, 2008), 42. Nöldeke, however, held this to be mistaken. Theodor Nöldeke and Friedrich Schwally, *Geschichte des Qorāns* (Leipzig: Dieterich'sche Verlagsbuchhandlung, 1909), 1/162.

[176] 'Abd Allāh Ibn Abī Shayba, *al-Muṣannaf*, ed. Ḥamad b. 'Abd Allāh al-Jum'a and Muḥammad b. Ibrāhīm al-Laḥīdān (Riyad: Maktabat al-Rushd, 2004), 7/399.

[177] Q 76:8-9.

This contrasts, thus, with the personal glory that the pagan Arabs expected from a boastful show of generosity towards orphans.[178] This verse is also almost identical to Q 2:177.

In *Sūrat al-Nisā'* and *al-Baqara*, we find a new emphasis on the importance of treating orphans well and respecting their property rights as part of the Covenant with God. In al-Baqara, charity towards orphans is explicitly mentioned as part of the Covenant that God made with the Israelites:

> And (remember) when We made a covenant with the Children of Israel, (saying): Worship none save Allah (only), and be good to parents and to kindred and to orphans and the needy, and speak kindly to mankind, and establish worship and pay the poor-due. Then, after that, you turned away, save a few of you, and were averse.[179]

Al-Baqara 215 adds that legal alms should be given to orphans, and Qur'ānic commentators saw this verse (along with Q 2:177) as indicating that orphans, after needy relatives, were the *most deserving* of charity.[180] Q 2:215 was also seen to be further condition by 2:219, which limits charity and obligatory alms to *al-'afw*, or excess wealth, and along with Q 17:26-27, 29 and Q 25:27 admonishes prodigality (*isrāf*) when giving charity.[181] The next verse, 2:220, was read by

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[178] In Isutzu's words, Muslims are encouraged to do acts of generosity out of love for God, and not because they want to prove themselves "a true dandy of the desert" (Izutsu, 76).

[179] Q 2:83 (translation modified from Pickthall).

[180] Fakhr al-Dīn al-Rāzī, *Al-Tafsīr al-kabīr aw mafātīḥ al-ghayb*, ed. Sayyid 'Umrān (Cairo: Dār al-Ḥadīth, 2012), 3/46, 252.

[181] *Ibid*. 3/275-276; Bravmann has also argued that the idea of giving up one's surplus as charity in the Qur'ān "presuppose the existence of a social custom in Arabian society which was an expression of this idea." Meïr M. Bravmann and Andrew Rippin, *The Spiritual Background of Early Islam: Studies in Ancient Arab Concepts*, Brill Classics in Islam (Leiden: Brill, 2009), 245.

Qur'ānic commentators as responding to hardships caused by the warning in *al-Nisā'* about people who consume orphans' property (see below).[182]

> And they ask you about the orphans. Say: To improve their lot is best. And if you mingle your affairs with theirs, then (they are) your brothers. Allah knows who pursues harm and who seeks good. Had Allah willed, He could have overburdened you. Allah is Mighty and Wise.

According to several reports in al-Ṭabarī's Qur'ānic exegesis, the Believers started to separate orphans' property from their own, even giving them their own food and sometimes their own homes out of fear of the punishment threatened in *al-Nisā'* for those who consume orphans' property or due to *al-An'ām* 152. This led to not just hardship but a lot of waste – food would be thrown away rather than eaten to avoid unlawful consumption.[183] Not all reports agree with this, however. Some people held, rather, that it was the pagan Arabs who had a habit of refusing to use or eat anything owned or inherited by an orphan, an idea which must have seemed just as plausible given the importance of the orphan in pre-Islamic Arabia.[184] Yet, this was a matter of some contention for Qur'ānic commentators; al-Rāzī states, quite to the contrary, in his commentary on this verse that "The People of Jāhiliyya had taken it as a habit to make use of orphans' property."[185] It is possible that the confusion about how, exactly, Arabs prior to Islam treated orphans and their property is a result of heterogeneous customary law and varying degrees of acceptance of various legal traditions, Roman, Jewish and Sassanian, among the Arabs prior to Islam.

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[182] *Ibid*., 3/278.

[183] Al-Ṭabarī, *Jāmi' al-bayān*, 3/698-703. See also al-Rāzī 3/278

[184] Al-Ṭabarī, *Jāmi' al-bayān*, 3/703-705.

[185] Al-Rāzī, 3/278.

Of all the Qur'ānic chapters, *Sūrat al-Nisā'* presents the most sustained and richest material on how Muslims should treat orphans and their property. It also suggests, due to the order and similarity of some verses, that orphans are legally similar to the *sufahā'*. These verses are:

- Give unto orphans their wealth. Exchange not the good for the bad (in your management therof) nor absorb their wealth into your own wealth. Lo! that would be a great sin. (Q 4:2)
- And if you fear that you will not deal fairly by the orphans, marry of the women, who seem good to you, two or three or four; and if you fear that you cannot do justice (to so many) then one (only) or (the captives) that your right hand possess. Thus it is more likely that you will not do injustice. (Q 4:3)
- Give not unto the foolish (*al-sufahā'*) your wealth (or: their wealth in your possession), which Allah has given you to maintain; but feed and clothe them from it, and speak kindly unto them" (Q:4:5).
- Test orphans till they reach the age of marriage; then, if you find them of sound judgment, deliver over unto them their fortune; and devour it not by squandering (*isrāfan*) it in haste lest they should grow up. Whosoever (of the guardians) is rich, let him abstain generously (from taking the property of orphans); and whosoever is poor let him take thereof reasonably. And when you deliver up their fortune to the orphans, have (it) witnessed in their presence. Allah suffices as a Reckoner. (Q 4:6)
- And when kinsfolk and orphans and the needy are present at the division (of the heritage), bestow on them therefrom and speak kindly to them (Q 4:8).
- And let those fear who if they left behind them weak offspring would be afraid for them. So let them mind their duty to Allah, and speak justly (Q 4:9).
- Lo! Those who devour the wealth of orphans wrongfully, they do but swallow fire into their bellies, and they will be exposed to burning flame (Q 4:10)
- They consult you concerning women. Say: Allah gives you a decree concerning them, and the Scripture which has been recited unto you, concerning female orphans and those unto whom you give not that which is ordained for them though you desire to marry them, and (concerning) the weak among the children, and that you deal justly with the orphans (Q 4:127).

These verses present much more than either a general ethical injunction to do good to orphans or, as seen in *al-Baqara*, a determination of orphans' as recipients of charity. What unites these verses, including Q 4:5, which does not mention orphans at all but only the *sufahā'*, is their treatment of property and vulnerable individuals. Q 4:3 and 4:127 are, on the face of it, just about

marrying orphaned women, but both also appear to be attempts to prevent men from squandering orphaned girls' property.[186]

In this *sūra*, orphans appear not just as a distinct legal category, but they are also compared to other two groups seen as vulnerable – women and the *sufahā'*. This anticipates the later subordination in the books of *fiqh* of these groups under the concept of *ḥajr*, and the juxtaposition of these groups indicates that the generalization of the concept of legal incapacity via grouping orphans, women and the *sufahā* is something that commences with Qur'ānic legislation. Nevertheless, the use of *ḥajr* as a legal concept does not appear in the Qur'ān. As the next chapter shows, the comparability of orphans and *sufahā'* is something that was a matter of debate among 2nd/8th century Muslim jurists and would eventually become accepted even in the Ḥanafī *madhhab* whose eponym most vehemently opposed the legality of *ḥajr*.

This section of the Qur'ān in *Sūrat al-Nisā'* also includes the following striking imagery about consuming orphans' property: those who do this are not just destined for hellfire, but literally consume fire in their bellies in place of food. This imagery shares a similar semantic logic to that noted above: speaking kindly to orphans, protecting their persons and property, and giving them shelter leads to fertility and prosperity, whereas robbing them of their property leads to destruction. Early Qur'ānic commentators invoked a Prophetic *ḥadīth* to add further description to this verse. The Companion Sa'īd al-Khudriyy reported that the Prophet told him about his Night Journey, during which he saw the marvels of Paradise and the torments of Hell:

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[186] Q 4:3 is the subject of much debate, but almost all the opinions cited by al-Ṭabarī about the meaning of "marry of the women" involve either a case of men marrying women in order to take their property or marrying vulnerable women (orphans) in order to avoid paying a fair marriage gift. Another opinion, one favored by al-Ṭabarī argues that this verse builds on the previous verse. According to this reading, Q 4:3 exhorts men to do justice to the women that they marry just as they should do justice to orphans, per Q 4:2 (al-Ṭabarī 6/358-374)

"I looked, and I found myself in front of a group of people who had lips like those of camels (*mashāfir ka-mashāfir al-ibl*), and a person had been assigned to them to take hold of their lips *(mashāfirihim*), then put in their mouths a rock made of fire that would come out their posteriors. I said, 'Who are those people, Jibrīl?' He replied, 'Those are the ones who consume orphans' profit unjustly, they do but swallow fire into their bellies.'"[187]

As an embodiment and literalization of their greed, these people do not have human lips, but instead are described as having *mashāfir*—a word used to describe the lips of non-human animals, particularly camels, with their large lips, the upper portion of which is cleft open.[188] In early Arabic poetry, it was also used as an invective for *zanjī* or *'abd*.[189] In the context of stealing orphans' property, it is suggestive of greed and covetousness. The mutation of their lips into *mashāfir* also intimates a symmetrical inversion of Arab chivalry; whereas the most generous Arab would slaughter not just any animal but a precious camel to feed the orphan, these wicked folk have begun to turn into the very thing they ate (sinfully). Such a reading is supported by what appears to be a borrowing of the Qur'ānic image in a long poem written by the *mukhaḍrim* poet Muzarrid b. Ḍirār al-Dhubyānī. This poem is about a young boy named Khālid from his clan, the Banū Tha'lab b. Sa'd b. Dhubyān, who, in his foolishness (*safāha*) was tricked into selling his clan's camels for the paltry price of a few goats and dogs. To add insult to injury, Ibn Thawb, the man who conned the boy, was from the Banū 'Abd Allāh b. Ghaṭafān, who had given the Banū Tha'lab refuge. Upon hearing the complaint of the boy's parents, Muzarrad guaranteed

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[187] Al-Ṭabarī, *Tafsīr*, 6/454. According to Muqātil, the lips of these people are even longer than the *mashāfir* of camels (Muqātil, 1/360).

[188] Ibn Manẓūr 4/419; for the split upper-lift in pre-Islamic poetry, used metaphorically for a large wound capacious enough to allow wind to pass through, see al-Anbārī, 340-342.

[189] As in a line by al-Farazdaq (al-Anbārī, 145). See also Ibn Manẓūr, 4/419.

them that he would have the camels returned to them, so he composed this poem to insult and threaten Ibn Thawb:

1. You people! Foolishness (*al-safāha*) is as bad as it sounds. Are visitors in sickness the only result from loving Salma?
2. I wept for Salma at those familiar places—from Suwayqat Balbāl to nearby Falajāt, and at Dhū al-Ramth.
3. When she stood by the curtain, her sorrow would have annihilated me, were it not for watching eyes.
4. Familiar places where graze every flock of ostriches—black in color, like barefoot, agile Indians.
5. They nibble a thicket's roots alongside a rooster[190] who seems to pluck the *ṭalḥ* fruit without even biting.
6. And she asked, "Won't you stay Abū Ḥasan to take what you desire from us, and come as you promised?"
7. I heard it from behind the corrals, when my people from Juhayna were encamped between Nis‘ and Raḍwā:
8. the wail of an impotent old man and his feeble wife, robbed of their belongs at al-Ṣal‘ā', the vipers' abode,
9. They were destitute and desperate for milk, having sold—for some goats and two dogs—rugged camels: strong as boulders,
10. red and white, plump and sheening, like pebbles in red mud used for bathing, their colors that of saffron-dyed robes.
11. For a drink of Yam'ud's water, their thick, brawny haunches could snap any keeper's switch.
12. Zur‘a Ibn Thawb! The women your tribe swore to protect are starving, while you've been kept busy slurping up fresh milk.
13. Meanwhile Ibn Thawb's own women have become bloated from the evil that is roasting them like strips of meat.
14. I left Ibn Thawb with nothing to shield him from my words, and if I have the whim, I'll have my young slave girls sing to me about Thawb.
15. I gave Ibn Thawb a smack he won't recover from; his doctors and visitors are still wailing from it.
16. So return the Tha‘labī's milk camels, for giving them up is more scrupulous and safer for you than a thousand blows.
17. But if you do not return them you will hear about it forever, like an eternal medallion placed around your neck.
18. Khālid is within our reach, even were he to settle with you in either of the two Abān mountains.

[190] I.e., a male ostrich.

19. You duped him of his wealth (*tasaffahtahu*), for you thought of him as a boy tender like a branch of the Bāna tree.
20. The Tha‘labī’s milk camels now long for the pastures in Ghayqa and in al-Fadfād.
21. But Ibn Thawb bleated at the shepherds for the sake of one herd of mares, yet to foal, and another just having given birth, but yet to return to their stallion.
22. But let’s hail the milk camels whose groans in your barren lands will guide a visitor in the night, or let’s hail the steeds of the warrior.
23. Some of them, bred at the season’s first coming, shared a pasture with ostriches; the others are the offspring of noble, untamed beasts.
24. So listen, clan of Thawb! Khālid’s little herd are like the scorching fire of Hell. No good will come of Khālid’s herd!
25. They are covered in protuberances from camelpox and lung disease; their buboes stand like swollen breasts.
26. Mangy, they only bathe in the putrid leaves of the Ghalqa tree and the piss of women past the age of childbearing.
27. Never have I witnessed such a misfortunate acquisition, nor such a present gifted.
28. What a pity they were not protected by an honorable oath from Ibn Dāra!
29. For then a group of men, resembling the cubs of a long-legged lion from Bīsha, would take them back.
30. And had al-Lajjāj been their protector, or the Ba‘ith family, then never would they have run into the hunter’s trap.
31. And had they been under the protection of the Musāfi‘ clan, then they would have been returned safe and sound to their waterholes.
32. Or had they settled by the Tharmā’ family, then they would have been guarded by long-tipped spears.
33. Those men, sharp and devastating as swords, would handle it before retiring to bashful women whose bodies sway like nimble spears.
34. But now the camels are ensconced on an ominous peak, a vile place that gnashes their hides like a cricket stripping leaves.
35. So then I could not help but exclaim, “Rizām b. Māzin! This is a shame that dishonors noblewomen!”
36. And I swear by the anus of a man whose heart’s desire was to mock me but was unprepared for the fight,
37. a bird lifted its tailfeathers and sprayed him with excrement, raining down on him turmoil and disaster.
38. So, run and seek help from Ibn Wāqi‘’s donkey. He saw you by Mt. ’Īr, so he preceded you to the hills of ‘Utā’id.
39. Chomping on fresh vegetation was easy for a donkey grazing on a hill alongside his mother, uninterested in her.
40. But he is born of your mother and your father, just like the client of Zumayt or Za’id.[191]
41. And they said to him, “Be sensible! *(uq‘ud rusdhan*),” but he replied, “If my milk camels do not return, then I will not be sensible (*rāshid*).”

[191] This verse apparently refers to previous events, which are unexplained by the commentators on this poem.

42. Are there four, like bashful women, who leave the Waḥīd clan and have not roamed in every place?[192]
43. Last I heard, you are reclining on cushions with your guests while you sate your camel lips with pure milk.[193]

Lines 1-6, the *nasīb*, commence with a direct reference to the foolishness of the people he is condemning. Although later, in line 19, Muzarrid states that Ibn Thawb made a *safīh* out of Khālid, it is also clear, by the end of the poem, that the foolishness is as much shared by Ibn Thawb and his people for failing to consider the troubling consequences of Ibn Thawb's action. The *nasīb* in the following five and a half lines, while apparently an unrelated nostalgic recollection of the poet's beloved, also has the effect of heightening the contrast between the harmony prior to the old couple's cry (line 7) and the disruption of relations that follows. Just as the camels become a cause of sickness for Ibn Thawb's people, the poet's memory of meeting his beloved in a fertile wilderness—where ostriches and gazelles graze freely—only visits him in sickness.

Ibn Thawb's crime of taking advantage of a foolish youth has immediate consequences. Although the camels in lines 9 and 10 are described as rugged, prized camels, by the time they have reached Ibn Thawb's people, they have become sickly, mangy beasts (lines 25 and 26). Their cries for their homes will lead the Banū Tha'lab's warriors to their location, which is a barren land (line 22). That these camels are a curse, rather than a source of profit or nourishment for the Banū 'Abd Allāh Ghaṭafān is underscored in lines 13, 24 and 43. Line 13 states, in a perversion of the imagery of generosity, that the women under Ibn Thawb's protection (*jārāt ibn*

[192] Lyall notes that this verse is "entirely obscure" and, like the rest of the lines after #35, not retained in all recension of the poem (Lyall, 48). Al-Anbārī and al-Tabrīzī include the line but leave it entirely unglossed.

[193] Al-Ḍabbī 75-81.

thawb), now imagined by the poet to be consuming the unlawfully acquired camels, are themselves being roasted like strips of meat. Employing Qur'ānic vocabulary, the poet then claims in line 24 that the camels are like hellfire (*nār al-laẓā*).[194] Finally, the concluding line attempts to undermine any social benefit that Ibn Thawb and his people might gain from their deception: if they are sitting on cushions entertaining guests, they do it while engorging themselves using their *mashāfir*.

The relationship between the safīh *and ideas of responsible action*

Muzarrid's poem also highlights another important aspect of early Arabic discourse on the *safīh*: it was seen as a duty to strive to protect this vulnerable individual and to avoid taking advantage of him. This, along with the arrangement of laws regarding the property of the orphan and the *safīh* in *al-Nisā'*, suggests that the two categories at an early period where seen as comparable. In Muzarrid's poem, the boy is told in line 41 to act rationally – literally, to sit and remain a person of *rushd* (discretion). And yet the insult is such that he responds that he cannot wait for the help of other tribes to take back his milk camels – apparently the wiser decision – and is anxious to head out on his own, even if it is not the decision of a discerning person (*rashīd*). The clear semantic references to misappropriation of orphans' wealth in the poem, the use of *s-f-h* complex of meanings, and the exhortation to act with *rushd* are all signs of the poem's intertextual relationship with the Qur'ān and the developing discourse in *fiqh* on legal incapacity, orphanhood and interdiction (*ḥajr*). In the following, it will be seen how Muzarrid's poem represents an intermediate stage in the understanding of *safah*. While *safah* before and after this semantic shift continues to refer to both foolishness and irresponsible social activity,

[194] See Q 70:15.

the Qur'ān juxtaposes *safah* to *rushd*, a connection that was developed in legal literature. Previous to the introduction of this new standard of legal capacity and, even after but outside of remit of legal literature, *safah* continued to be juxtaposed to *ḥilm*.

The semantic field of *safah* in early Arabic poetry and literature is wider than how the majority of Muslim legal scholars would come to describe the *safīh*. As in the poetry of Muzarrid, acting as a *safīh* is not just making poor financial decisions but also acting in an unbefitting or foolish way, such as rushing to take revenge. *Safah* in this sense is not just prodigality but thoughtless behavior that is often compared to *ḥilm.* As Charles Pellat pointed out, this latter virtue, highly prized by Arabs in the *Jāhiliyya*, is "a complex and delicate notion which includes a certain number of qualities of character or moral attitudes, ranging from serene justice and moderation to forbearance and leniency, with self-mastery and dignity of bearing standing between these extremes."[195] In the Qur'ān and in later centuries the term would become associated more with the qualities of patience and leniency than the serenity and dignity of the chivalrous warrior.[196] There is a clear connection between age in several uses of the term in early Arabic poetry and later ethical writers, who portray the virtue of *ḥilm* as an ideal quality for men between the adolescence and middle age. The connection between *sufahā',* orphans and *ḥilm*, thus, is not incidental. A very early example of this close semantic connection can be seen in a poem by al-Muhalhil:

1. O Ḥārith, don't act impulsively with our elders. We are people of honor and reason (*aḥlām*).
2. Among us, as soon as a boy is weened, he handles affairs and makes war with the tribes.

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[195] Charles Pellat, "Ḥilm," *EI*[2].

[196] *Ibid*. Thomas Hefter, "Ḥilm," *EI*[3].

3. They murdered Kulayb then said, “Stand down!” But, by the Lord of the Sacred and Profane, what they said will not occur
4. until we exterminate them, tribe by tribe, in conquest, and we cleave their skulls with our swords,
5. and the concealed ladies stand with their heads bared and wipe the side of orphans’ forelocks.

1. *Yā ḥāri lā tajhal ‘alā ’ashyākhinā/’innā dhawū ’as-sawrāti wa-l-’aḥlāmī*
2. *wa-minnā ’idhā balagha ṣ-ṣabiyyu fiṭāmahu/ sāsa l-’umūra wa-ḥāraba l-’aqwāmī*
3. *qatalū kulayban thumma qālaw irba‘ū/ kadhabū wa-rabbi l-ḥilli wa’l-iḥrāmī*
4. *ḥattā nubīda qabīlatan/ qahran wa-nafliqa bi’s-suyūfi l-hāmī*
5. *wa-yaqumna rabbātu l-khudūri ḥawāsiran/ yamsaḥna ‘arḍa dhawā’ibi l-’aytāmī*

The poem, directed to al-Muhalhil’s enemy al-Ḥārith b. ‘Abbād, plays on a number of opposites. Al-Ḥārith is warned not to act impulsively; the word used shares a root with *jahl* or *jāhiliyya*. This would be unwise because al-Muhalhil’s tribe, the Banū Taghlib, are noble and people of *aḥlām*, the plural of *ḥilm*. Al-Ḥārith’s poor decisions will lead to the decimation of his tribe and their children will become orphaned. The implication is that his inability to act with *ḥilm* makes him an impotent protector of those needing protection among his people. Contrasted with this are the precocious youth of the Banū Taghlib who are ready to act decisively and courageously at an unnaturally young age. There is no transition between infancy and manhood for the Banū Taghlib. The ability of the tribe to avenge and protect their own is again juxtaposed to the women of Bakr b. Wā’il, who will stand exposed with their heads bared alongside their orphaned children.

Ebrahim Moosa has argued that *safah* began to be constricted by Muslim scholars to a narrower, more stable and ultimately “logocentric” meaning. Whereas the word previously had all of the complexity noted by Pellat, Moosa holds that by the 5th century A.H. a semantic shift occurred in the meaning of the word to indicate a lack of *‘ilm*—knowledge—whereas it had previously shared the pre-Islamic meaning of *jahl*. As Goldziher showed using pre-Islamic

poetry, *jahl* once indicated a range of meanings that had little to do with "ignorance" or lack of '*ilm*, but rather was used to mean barbarity, ferociousness, cruelty or the impetuousness of youth.[197] It is the impulsive behavior al-Muhalhil warns his enemy's to refrain from and also the mirror image of *ḥilm* as described by Pellat above. While it was not a exactly a virtue, poets indicated that there were times when acting with *jahl* had its practical merits, such as a ruthless reaction to being wronged by another.[198] Whereas *jahl* is the temperament of the inexperienced youth and the knave, *ḥilm* is a noble virtue befitting mature, chivalrous leaders who have the fortitude, knowledge and courage to protect and preserve their social group. Moosa largely accepts Goldziher's argument about the shift in *jahl*'s meaning, and argues that the word *sufahā'*—the plural of *safīh*—as it appears in verse five of *Sūrat al-Nisā'* also underwent a semantic shift as it became restricted in meaning. In the first two Islamic centuries, Moosa argues, it was taken by most early Muslim scholars to mean women and children or women exclusively. Moosa's explanation for why the word was interpreted as women is, however, not entirely satisfactory. According to him, women in pre-Islamic poetry referred to their husbands as *sufahā'* because they squandered wealth in extravagant shows of generosity and prodigality. In return, poets accused their wives of failing to understand the social benefit of excessive spending and consumption. But the Qur'ān and Islamic ethics both condemned prodigality and wasteful generosity, so this behavior was no longer a matter of pride. As a result, Moosa argues, men began to refer to women as *sufahā'* in a reversal of the previous connection between being a

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[197] Ignaz Goldzhier, *Muslim Studies*, vol. 1, ed. S.M Stern (Albany: State University of New York Press, 1966), 201-208.

[198] Goldziher, 205. Note, however, that Jaroslav Stetkevych pushed back against Goldziher on this point, arguing that *jahl*, while note a virtue, was part of the psychological and adrenergic "heroic" attributes of the Bedouin warrior. See Jaroslav Stetkevych, *Muḥammad and the Golden Bough: Reconstructing Arabian Myth* (Bloomington and Indianapolis: Indiana University Press, 1996).

spendthrift and femininity: "[t]hus, when the word *safah* was used in the Qur'ān, it is not at all surprising that the social memory of its Arab male readers denoted it as a feminine and negative trait."[199] The issue with this argument is that there is very little evidence that the dominant social memory of *safah*'s use in pre-Islamic Arabia was that wives called their husbands *sufahā'*. The source Moosa cites only mentions one verse in which this is the case; the other examples of wives scolding their husbands for wasteful consumption or spending do not use the root *s-f-h*.[200] Given the frequency of this misogynistic theme in early Arabic poetry, more than a single occurrence of a word sharing the *s-f-h* root is not enough to establish a strong semantic connection between scolding wives and *safāha*.[201]

Secondly, there is very little evidence for the *kind* of semantic shift that Moosa claims to have found. According to Moosa, by the fifth century A.H. the word no longer participated in the wide-ranging complex of meaning indicated by *jahl*. Early commentators applied the negative attributes associated with *safah*, he claims, to women for the reasons discussed above. But by the fifth century, he also maintains, Qur'ānic exegetes had managed to stabilize the meaning of *sufahā'* and equate it with lack of intelligence. This occurred through a process of suppression of the previous diverse referent, thereby forcing the word to be read univocally.[202] Yet his argument here, too, does not fit well with the evidence. First, as Moosa recognizes himself, there was no early consensus that the word *sufahā'* referred to women exclusively or even women and

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[199] Moosa 23.

[200] Aḥmad Muḥammad al-Ḥūfī, *Al-Ḥayāt al-'arabiyya min al-shi'r al-jāhilī*, 2nd ed. (Cairo: Maktabat Nahḍat Miṣr wa-Maṭba'athā, n.d.), 253-257.

[201] On this theme see, in addition to al-Ḥūfī, Montgomery, *The Vagaries of the Qaṣīdah*, 75-76, 112.

[202] Moosa 11, 14-27.

children together.[203] Second, lexicographers continued to cite a range of meanings for *safah, safīh,* and *sufahā'* much longer than the 5th century. Ibn Manẓūr, for example, initially defines *al-safah, al-safāh* or *al-safāha* as *khiffat al-ḥilm* or *naqīḍ al-'ilm*. He quotes Abū 'Ubayda as interpreting the phrase *safiha nafsah* to mean "he destroyed himself or was the cause of his own demise (*ahlaka nafsahu aw-awbaqahu*)," and also quotes the grammarian and lexicographer al-Zajjāj (d. 311/923) as claiming that the same phrase means "he did not think of himself (*lam yufakkir fī nafsih*)." Only then does Ibn Manẓūr quote "some of the linguists (*ba'ḍ ahl al-'ilm*)" as interpreting the word *safah* to mean *khiffat al-'aql*.[204] The verb *safiha* could also mean, Ibn Manẓūr notes, to drink again and again without being sated. This meaning appears closely related to the interpretation of the *sufahā'* as individuals who consume their wealth prodigiously. Given the reading habits discussed above of people in the Mamlūk period, it would be surprising if the semantic range of the word *safah* was entirely repressed. Pre-Islamic poetry continued to be cherished, and the linguists continued to look to it to understand the meanings of words they encountered.

This continued diversity in meanings well beyond the fifth century is likewise reflected in the two works of *tafsīr* that Moosa cites as well. In other Qur'ānic uses of the word, for example, al-Ṭabarī interprets it to mean *ḍalāla,* and al-Rāzī cites the definition mentioned implying losing oneself or perishing.[205] One also sees the continued affirmation of a wide range of meanings for the word in al-Qurṭubī's commentary on the Qur'ān, *al-Jāmi' li-aḥkām al-qur'ān* when he

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[203] *Ibid*. 13-14, 24. See al-Ṭabarī 6/391-393 for opinions from the first two centuries that *sufahā'* refers to children, orphans or a man's children who also happen to be *sufahā'*.

[204] Ibn Manẓūr 13/497-498. On al-Zajjāj see C.H.M. Versteegh, "al-Zadjdjādj," *EI*^{2}.

[205] Moosa 19.

defines the term's use in *Sūrat al-Baqara*, verse 13, including that it refers to the opposite of *ḥilm*.[206] These examples suggest that the semantic shift from a multivocal, heteroglossic usage of the term to a univocal, logocentric understanding of the term was never as complete as Moosa suggests.[207]

And yet Moosa is correct that a semantic shift of some kind occurred, but this shift's locus was restricted to a particular textual genre and for different reasons than he considered. Verse five of *Sūrat al-Nisā'* is the critical verse for his argument, in which he rightly identified a new rigidity, or logocentrism, in the way the term *sufahā'* was interpreted by the 11th/5th century. Moosa accurately notes that the commentators on this verse created a standardized, universal definition of *sufahā'* based on the cognitive ability of the individual to make rational decisions, particularly in financial and commercial situations. As al-Ṭabarī writes:

> In my opinion, the correct interpretation of that (i.e., Q 4:5) is that God, Exalted in Name, generalized when he said, "Give not unto the foolish their wealth (*al-sufahā*')," for he did not specify a certain fool and not another. Thus, it is impermissible for anyone to give a fool their property, be they a young boy or an old man, male or female. This fool to whom his guardian cannot turn over his property deserves to be under interdiction by reason of wasting his property, his corrupt state and corruption, and his poor management of it (*huwa al-mustaḥiqq al-ḥajr bi-taḍīy'ih mālah wa-fasādih wa-ifsādih wa-sū' tadbīrih dhālik*)."[208]

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[206] Al-Qurṭubī 1/311-312.

[207] See also Oussam Arabi, "The Interdiction of the Spendthrift (al-Safīh): A Human Rights Debate in Classical Fiqh," *Islamic Law and Society* 7, no. 3 (2000), 300-324. Arabi arrives at similar conclusions regarding Moosa's suggestion about a semantic shift and suppression of *al-sufahā*'s diverse referents, but he concludes this for different reasons than given here.

[208] Al-Ṭabarī 6/394. *Fasād* and *ifsād* in this context must refer to the *safīh*'s inability to manage his own property and his destruction of material wealth because al-Ṭabarī only held that *rushd fī al-māl* and not *al-rushd fī al-dīn* were required for a person to gain legal capacity (al-Ṭabarī 6/407).

For al-Ṭabarī, the key for unlocking the meaning of *al-sufahā'* in Q 4:5 is the following verse commanding believers to test orphans when they reach puberty and only give them legal capacity over their property if they have acquired discretion – *rushd*.[209] For both orphans and *sufahā'*, the criterion for full legal capacity is *rushd*. Anyone, moreover, is potentially a person with *rushd*. It is in this sense a character mask – a social and legal category that any individual, regardless of their individual merits, personal and social status, or, for the majority of scholars by al-Ṭabarī's time, gender. Thus, Moosa is correct that a form of logocentrism has occurred, but because he did not pay attention to legal practice and legal discourse, he failed to understand the causes and nature of this semantic shift. *Sūrat al-Nisā'*, particularly the verses regarding inheritance, orphans and the *sufahā'*, are part of "a dense web of legislation."[210] The shift in *al-sufahā'*s use in a legal context, as opposed to other appearances in the Qur'ān or literature, began with this verse. But what did it shift away from?

It was seen earlier that al-Muhalhil made a connection between leadership, orphans and *sufahā'*. Returning to this poem can help reveal the kind of semantic shift that occurred between pre-and-early Islamic understanding of the word *sufahā'* and its use in Muslim legal discourse. In that poem, *safah* is opposed to *ḥilm*, an opposition that continued in the lexicographer's work. But in the context of *Sūrat al-Nisā'* and the discourse in *fiqh* whose point of departure was this verse, *safah* is opposed to *rushd*. It should be obvious that *rushd* is a much lower standard than possession of *ḥilm*. Whereas it is enough in the Muzarrid's poem for the youth to sit in his place to be a person of *rushd* and allow his social superiors (like the poet himself) to take matters into

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[209] Al-Ṭabarī 6/394.

[210] Joseph Lowry, "Reading the Qur'an as a Law Book," (Yale, Dallah Al-Baraka Lectures on Islamic Law and Civilization, March 15, 2015, available online in the *Yale Law School Occasional Papers*: https://openyls.law.yale.edu/handle/20.500.13051/17672), 22.

their own hands on behalf of the misguided youth, *ḥilm* in al-Muhalhil's poem is a matter of knowing when and where to strike most effectively. Whereas *rushd* is a characteristic of potentially any person, *ḥilm* as used in heroic poetry is a virtue of the noble and chivalrous. To expect the average person to obtain this attribute would, then, defeat the purpose of celebrating it.

The difference is one, therefore, between a *legal attribute* and a *moral virtue*. The Qur'ān introduces the use of *s-f-h* and *r-sh-d* in the context of describing legal personhood. The particular attributes of the person who obtains *rushd* are unimportant to this personhood, hence the abstract nature of the orphan, the person with *rushd*, or the *safīh*. As the legal theorist Alexander Somek writes, "With an appeal to law, we become all of a sudden faceless. From then on, we interact as instantiations of 'spouses,' 'employers,' 'employees,' 'parents.' Relations become cold and distant when they are perceived as exemplars of the legal relation."[211] This nature of legal discourse, as opposed to literary or moral narrative, can help account for the semantic shift noted above. Whereas in other genres, and even within the Qur'ān itself, *safah* continued to connote a moral attribute, the *sufahā'* mentioned in *Sūrat al-Nisā'*, alongside the orphans, were interpreted in a legal, rather than biographical or moral, context. As al-Rāzī writes in his discussion of Q 4:5:

> *Al-Safah* as attributed to those people is not an attribute intended to vilify, nor does it indicate that they disobeyed God, Exalted is He. Rather, they were named "*sufahā'*" due to their insufficient reason (*khiffat 'uqūlihim*) and their insufficient discernment to preserve their wealth.[212]

[211] Somek, 7.

[212] Al-Rāzī, 5:179.

This position was shared by al-Ṭabarī as well: *rushd* meant only intelligence (*al-ʿaql*) and the ability to make sound financial decisions (*al-iṣlāḥ fī al-māl*).[213] Al-Ṭabarī claimed that it had become a matter of consensus (*ijmāʿ*) that a person with these two attributes does not deserve to be placed under legal interdiction (*al-ḥajr*). It is not clear what kind of consensus he was referring to. Likely, he is indicating that the legal practice *of his time* in the early 4th/10th century considered financial probity determinative for *rushd* since he also quotes—only a few paragraphs previous to this remark—earlier dissenting voices that insisted that *rushd* also indicated a moral content.[214] Other early Muslim scholars, left unmentioned by al-Ṭabarī, also held that *rushd* referred to a moral or religious state as well as the ability to deal independently with one's property. This was, for example, Muqātil's position.[215] More famously, al-Shāfiʿī also held a similar view about the moral nature of *rushd*: "Rushd, and God knows best, is probity of religion (*al-ṣalāḥ fī al-dīn*) in order that the testimony (of the person) is valid and doing right with their property (*wa-iṣlāḥ al-māl*)."[216]

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[213] Al-Ṭabarī 6/407.

[214] He notes that Qatāda (d. 117/735) claimed that *rushd* referred here to "*ṣalāḥan fī ʿaqlih wa-dīnih*", or "soundness of mind and religion." Ḥasan al-Baṣrī (d. 110/728) held that it *rushd* meant *"rushdan fī al-dīn wa-ṣalāḥan wa-ḥifẓan li'l-māl*," or "discernment in religion; dealing properly with and preserving wealth." Ibn ʿAbbās (d. 68/686-8) claimed that *rushd* referred to being rushd "*fī ḥālihim wa'l-iṣlāḥ fī amwālihim*," which might be translated as sound "in their temperament and doing right with their property" (Al-Ṭabarī 6/405-406). On Qatāda, see Pellat, "Ḳatāda b. ʿDiʿāma," *Encyclopaedia of Islam, Second Edition*; for Ḥasan, see Helmut Ritter, "Ḥasan al-Baṣrī," *idem* and Christopher Melchert, "ḤASAN BAṢRĪ," *Encyclopedia Iranica,* XII/1, pp. 29-31, available online at http://www.iranicaonline.org/articles/hasan-basri-abu-said-b-abil-hasan-yasar (accessed on 4/15/2022); for Ibn al-ʿAbbās, see L. Veccia Vaglieri, " ʿAbd Allāh b. al-ʿAbbās," *Encyclopedia of Islam, Second Edition*.

[215] Muqātil b. Sulaymān, 1/358.

[216] Al-Shāfiʿī, 4/451.

Nevertheless, later Shāfi‘īs expressed discomfort with this view. By the Late Middle Period, the dominant opinion in Egypt and Greater Syria (i.e., during the Mamlūk period), Shāfi‘īs adopted the majority opinion that only sound financial discretion was a condition for *rushd* when considering legal capacity of adults. According to al-Rāfi‘ī (d. 623/1226), some Shāfi‘ī scholars held, contrary to the founder's opinion and in agreement with Mālik and Abū Ḥanīfa, that *al-ṣalāḥ fī al-dīn* should not be taken into consideration for determining *rushd.* Furthermore, if an adult returns to a state of dissolution (*fisq*) the correct (*al-aṣaḥḥ*) opinion of the *madhhab* was that the judge should not place the person back under legal interdiction.[217] This opinion is preferable, al-Rāfi‘ī continues, "because the predecessors (*al-awwalīn*) did not place dissolute people under legal interdiction."[218] This latter rationalization is shared by the late-Ayyubid/early-Mamluk legal giant and chief *qāḍī*, ‘Izz al-Dīn Ibn ‘Abd al-Salām: "the predecessors (*al-salaf*) did not do it."[219] The late Mamluk-era chief *qāḍī* and author-jurist Walī al-Dīn Abū Zur‘a (d. 826/1423) confirmed in his work on the authorized positions of the Shāfi‘ī *madhhab* that this was still the dominant opinion in the early 15th century.[220]

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[217] Abū al-Qāsim al-Rāfi‘ī, *al-‘Azīz Sharḥ al-Wajīz*, ed. ‘Alī Muḥammad Mu‘awwaḍ and ‘Ādil Aḥmad ‘Abd al-Wujūd (Beirut: Dār al-Kutub al-‘Ilmiyya, 1997), 5:75. See Chapter Four of this dissertation for the importance of this work, in particular, for Shāfi‘ī *fiqh* in the Mamluk period. More generally, see A. Arioli, "Al-Rāfi‘ī," *EI*^{2}.

[218] *Idem*.

[219] ‘Izz al-Dīn ‘Abd al-Azīz b. ‘Abd al-Salām, *Al-Ghāya fī ikhtiṣār al-nihāya*, ed. Iyād Khālid al-Ṭabbā‘ (Beirut: Dār al-Nawādir, 2016), 56

[220] Walī al-Dīn Aḥmad b. ‘Abd al-Raḥim Abū Zur‘a, *Taḥrīr al-fatāwā ‘alā al-tanbīh wa'l-minhāj wa'l-ḥāwī al-musammā al-nukat ‘alā al-mukhtaṣarāt al-thalāth*, ed. ‘Abd al-Raḥmān Fahmī Muḥammad al-Zawāwī (Jiddah: Dār al-Minhāj, 2011), 2/39. For his biography, see Ibn Qāḍī Shuhba, *Ṭabaqāt al-shāfi‘iyya*, ed. ‘Abd al-Ḥalīm Khān (Hyderabad: Dā'irat al-Ma‘ārif al-Uthmāniyya, 1980), 103-105.

These authors were elaborating on Abū Isḥāq al-Shīrāzī's attempt in the 5th/11th century to ameliorate al-Shāfi'ī's opinion about *rushd* with the majority holding that *ṣalāḥ al-dīn* is not a necessary condition for attaining legal capacity. According to al-Shīrāzī,

> If a person reaches the age of majority with sound financial discretion but is religiously dissolute (*fāsiqan fī al-dīn*), then they remain subject to interdiction because of His words, Exalted is He, "then, if you find them of sound judgment, deliver over unto them their fortune (Q 4:6)." The dissolute person (*al-fāsiq*) is not someone who has been found to be of sound judgment. Since his preservation of his wealth (*ḥifẓih li'l-māl*) is not guaranteed in his state of dissolution—for one cannot be sure if dissolution will bring him to wasteful spending (*al-tabdhīr*)—the interdiction is not removed from him. And it is also for this reason that his testimony is not accepted, even if he is known to be honest, because we cannot be sure if dissolution will bring him to lie.[221]

Al-Shīrāzī's justification for why moral considerations are relevant for legal interdiction collapses the distinction between religious and financial probity drawn by al-Shāfi'ī and the 2nd/8th century scholars that agreed with him. The only reason that *rushd* is conditioned on a certain level of moral probity is because there is a probability that the dissolute individual will mismanage their property through excessive spending. Hence, the determinative cause of removing legal interdiction and enjoying legal capacity is the ability to exercise practical reason in financial matters, and nothing more.

Rushd, safah, and *ḥajr* became legal terms that scholars used to define legal relations between individuals. Just as *ḥilm* as a signifier of chivalrous virtue was a poor standard for determining abstract legal personhood, so too did religious probity become less important over time as a condition for legal capacity. Even al-Shāfi'ī did not elaborate on how *al-ṣalāḥ fī al-dīn* was to be determined, but rather detailed the different ways that individuals, depending on their gender, social class, and expected means of making a living, should be tested for their discretion

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[221] Al-Shīrāzī, *al-Muhadhdhab* 3/282.

in financial matters.[222] Tellingly, he claims that he has witnessed judges testing people's discretion by giving them a small amount of their property and waiting to see what they do with it; no such concrete detail concerning a moral or religious test is mentioned.[223]

By the end of the formative period of Islamic law, then, the discourse on legal capacity had become almost completely abstracted from considerations of virtue or moral or religious probity. The *yatīm* and the *safīh*, the two cases of incomplete maturity upon which Muslim legal scholars built the law of interdiction and legal capacity, entered legal discussions as people *in abstracto*: what mattered was not their individual desires, flaws, virtues or relationships with their kin or community, but their ability to act as a landowner, a merchant, or a farmer.[224] Relations of power between jurists, judges and these liminal individuals placed them in a position of social dependence. We have seen how the responsibility for these individuals transformed into a discourse on legal personhood within legal literature. This is an indication of the increasing presence of the rule of law as a major aspirational commitment by the end of the formative period—the combination of a written legal discourse, a common commitment to values, and "methodical apprenticeship" which helped transmit and universalize these values both geographically and temporally.[225] The next chapter will show how *ḥajr*, the legal concept of interdiction which built on the status of abstract character masks of the *yatīm* and the *safīh*, emerged in *fiqh* at the same time that the judiciary was going through a process of

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[222] Al-Shāfi'ī 4/451-452, 459-460.

[223] *Ibid*. 460.

[224] On the importance of discourse on persons *in abstracto* for the emergence of legality, see Somek 156, 167.

[225] Pierre Bourdieu, "The Force of the Law: Toward a Sociology of the Juridical Field," *The Hastings Law Journal*, 38 (1987), 844.

professionalization, textualization and universalization of legal rulings. It was at this historical moment, moreover, that judges began exercising control over these two categories of individuals. The centralization of judicial power, the extension of this power over orphans and the *sufahā'*, and the successful elaboration of the legal concept of *ḥajr* helped produce, in turn, the *mūda' al-ḥukm*, or judicial treasury.

Conclusion

This chapter began with a survey of Near Eastern, Roman and Abrahamic laws and ethics pertaining to orphans and their property. It was seen that a commitment to preserving orphans' property and representing rulers and judges as giving a voice to them are as old as written law itself. At the same time, it was seen that orphans may have been a common subject of legislation and the representation of justice because they not only provided a justification for elites to claim tithes or alms, but also because of the liminal nature of orphans within society. A common theme that extends to early Islamic poetry and religious literature is the representation of the orphan as an ambiguous individual with potentially destructive or aggregative power. Early Arabic poetry, in particular, shows that orphans and their property were a recurrent them. Given the differences between Roman law and Islamic *fiqh* of guardianship and interdiction, therefore, it is unnecessary to presume direct borrowings from Roman law.

A comparison of early Arabic poetry with the juxtaposition of the *safīh* and the *yatāmā* in the Qur'ān indicates that *Sūrat al-Nisā'* introduces a reconfiguration in the meaning of *safīh* that would later be taken up by early Muslim scholars as they interpreted the word as indicating legal status. This semantic shift redefined *safīh* in the context of law as referring to a spendthrift (*mubadhdhir*) and positioned *rushd*, rather than *ḥilm*, as its antonym, thereby separating *safīh*

from its epic and ritual context and placing it into a standardized, abstracted and logocentric discourse suitable to law. As *safīh*, *rushd*, and *yatīm* became used as character masks that referred primarily to one's relationship to property, scholars were able to create a legal discourse on legal capacity subordinated under the concept of *ḥajr*, or legal interdiction. The term *ḥajr* in this sense, however, does not appear in the Qur'ān nor does it seem to have been used by the earliest *fuqahā'*. The next chapter will show how this term slowly gained currency among Muslim scholars, not without considerable resistance, and entered texts of *fiqh* after it had already been introduced as an administrative sanction.

Chapter Two: The Emergence of *Ḥajr* as a Standardized Legal Concept

Introduction

The Qur'ān has much to say about orphans, their rights, and the legal and ethical duties owed them—more, at least, than many other legal topics in the Qur'ān—but this material is no match for the detail one finds in later *fiqh* texts starting in the late 8th century with Mālik's *Muwaṭṭa'*. The Qur'ān, as we have seen, does treat orphans as a distinct class of individuals, but it is ambiguous at times whether the orphans referred to are the universal "character masks" indicative of legal discourse or, rather, relatives and acquaintances to which one owes a personal duty, such as in the case of Ḥujayya. In later *fiqh* texts, orphans are one class of individuals with limited legal capacity, just like the *sufahā'*, slaves and the insane. They are subject to *ḥajr*, or legal interdiction, and it is standard for post-formative works of all four Sunni *madhhabs* to include a chapter on *ḥajr* elaborating these cases. The abstraction and generalization one finds in these later legal texts is a reflection not just of the seriousness with which early Muslim jurists and judges took the verses relate to orphans and the *sufahā'*, but it is also an indication of developments in the way law was practiced during the first two centuries of Islam. In fact, by looking at early texts of *fiqh* alongside biographies of jurists, one can see that the use of the term "*ḥajr*" to refer to the status of orphans and the *sufahā'* first appears as a legal term in the cities of Iraq before becoming accepted by all jurists. An analysis of early *ḥadīth*, or tradition-reports about the Prophet, Companions, Successors or prominent scholars and transmitted over generations, also shows that *ḥajr* was controversial and rejected by many as a legal concept that could be applied to adults. Eventually, the voices of opposition were drowned out by the increasingly forceful insistence on the similarity of the legal status of orphans, *sufahā'*, and the

insane. This chapter will show how Muslim jurists in the first three centuries of Islam gradually accepted a standard legal terminology for conceptualizing legal incapacity. It argues that the term *ḥajr* was likely first used in the sense of legal interdiction in Iraq and may have been used first as a term to describe an order from a governor (*wālī*). Regardless of its origins, the term was adopted as a standardized legal term by the 9th century, and orphans were thereafter conceptualized by Muslim scholars as subject to *ḥajr*.

The Emergence of Early Islamic Jurisprudence *(fiqh*)

To see how the legal status of orphans in Islamic legal discourse (*fiqh*) became subordinated under a general legal concept of *ḥajr*, it is important to understand first how Islamic law developed in its formative period (7th-11th centuries A.D.).[226] Contemporary historians of Islamic law have developed competing theories about how the four Sunni schools of law, or *madhāhib*, emerged. According to Schacht, whose theory dominated Western scholarship until the end of the 20th century, the formation of the Ḥanafi, Ḥanbalī, Mālikī and Shāfi'ī schools was preceded by two stages: first, the emergence of geographical schools in the 8th century A.D. and then, later in the 9th and 10th centuries, a number of different "personal schools," based on an eponymous founder, whose multiplicity was eventually diminished in Sunni Islam to the four schools that remain today. Before the emergence of the geographical schools, Schacht argued, the rules applied by judges were largely based on the discretion of governors and judges who did

[226] On the formative period of Islamic law, see Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), 2-3; Ahmed El Shamsy, *The Canonization of Islamic Law: A Social and Intellectual History* (New York: Cambridge University Press, 2013), 2-4; Sherman Jackson, "Taqlīd, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory," *Islamic Law and Society* 3, no. 2 (1996), 168.

not look to the Qur'ān or the Prophet's *sunna* (exemplary words and deeds) for inspiration.[227] Only after this initial period were the "ancient schools," as he called the geographical schools, characterized by anonymous legal doctrines that differed according to region: Hijazi, Iraqi, and Syrian, with some internal variation among these regions. The non-religious law developed by Umayyad administrators, governors and judges was thus incorporated into the doctrine of the ancient and then personal schools of law.[228] Christopher Melchert accepted Schacht's theory of geographical "ancient schools," but also argued, building on George Makdisi's work, that the emergence of the post-formative legal schools was the result of the development of a standard curriculum for training new students in the doctrine and methodology of the eponym's legal school.[229] In the same book, Melchert argued that personal schools first emerged out of the ancient, geographical schools due to pressure from the Traditionists, those individuals who demanded that law be derived not from considered opinion (*ra'y*) but primarily from revelation or traditions transmitted about the Prophet's sayings or actions.[230] A recognized master scholar, like Abū Ḥanīfa, helped bolster the authority of legal doctrine circulating regionally that was previously defended via use of *ra'y.* Whereas, according to Melchert, the earlier geographical schools were characterized by vague and anonymous legal doctrine, starting in the 9th century A.D., specific legal opinions were attributed to authoritative individuals.[231] However, Melchert

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[227] Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1982), 19-27.

[228] *Ibid*. 31-68.

[229] Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries C.E.* (Leiden: Brill, 1997), xxii, 32-33.

[230] *Ibid*. 32.

[231] *Ibid*. 38-39, 48.

later abandoned his position that the "traditionist-jurisprudents" pressured the regional schools to reshape themselves into personal schools, arguing rather that this was a result of the prominence of Shāfiʿī and his followers' insistence on the primacy of Prophetic *ḥadīth* over the consensus of Medina.[232]

The idea of a geographical school, however, has been forcefully challenged by Wael Hallaq, who argued that *specific* legal opinions from at least the early 8th century A.D. were already ascribed to *individual* scholars.[233] Moreover, geographical regions, even cities, were home to extreme differences of opinion. Hence, legal thought, Hallaq contended, was neither organized according to a geographical school, nor was it vague at this time. Hallaq did not argue, it should be noted, that geographical variation did not exist; on the contrary, he maintained that this was a feature throughout Islamic legal history, even after the founding of the post-formative schools of Islamic law.[234] For Hallaq, the emergence of these schools of law was, nevertheless, the result of a transformation that occurred in the 8th and 9th centuries, just not one from geographical to personal schools. Prior to this time, "the early schools…were personal in the sense that their followers, who were mostly judges, *mufti*s and the legally-minded, adhered to, or adopted, the doctrines of a particular leading jurist."[235] Nevertheless, followers still combined the

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[232] Melchert, "Traditionist-Jurisprudents and the Framing of Islamic Law," *Islamic Law and Society* 8, no. 3 (2001), 400-401.

[233] Hallaq, "From Regional to Personal Schools of Law: A Reevaluation," *Islamic Law and Society* 8, no. 1 (2001). Nimrod Hurvitz also dismissed the existence of ancient schools embedded in specific geographical centers, arguing that "the shift from geographical to personal *madhāhib* never took place," in part "because the unifying factors of these *madhāhib*, i.e., geography, can at best account for a limited number of shared local customs." See Nimrod Hurvitz, "Schools of Law and Historical Context: Re-Examining the Formation of the Ḥanbalī Madhhab," *Islamic Law and Society*, vol. 7, no. 1 (2000), 44.

[234] *Ibid*., 16 n. 60; 19.

[235] *Ibid.*, 20.

legal methodology and doctrine of different legal scholars. Hallaq dates the rise of legal schools proper to the later 9th century and 10th century, at which time the *madhhab* emerged as both "an established and authorized body of doctrine and as a delimited hermeneutical enterprise."[236]

For his part, Harald Motzki has also challenged Schacht's thesis about the ancient schools, but from another approach and with different results. Studying the legal scholarship of Mecca by means of a microanalysis of the *Muṣannaf* of ʻAbd al-Razzāq al-Ṣanāʻī (d. 211/827), Motzki argued that "[r]egional schools of legal and religious scholarship can already be discerned in the last decades of the first/seventh century, even if their differences probably were consciously recognized as dependent on 'schools' only at the beginning of the second/eighth century."[237] Hence, while he accepts that ancient, geographically distinct schools existed in some form, he does not emphasize the corporate nature of these schools or their embrace of a clearly delineated body of doctrine or hermeneutical method. Nevertheless, Motzki does show that jurists during the seventh century A.D. were already referring to scripture and the example of the Prophet—his *sunna*—as sources of law.[238] This pushes back Schacht's timeline for the development of *ḥadīth* by a century.

In his study of the Abbasid judiciary in Iraq, Mathieu Tillier also argues for the existence of regional variation in early Islamic law and challenges Hallaq's strongest claims against the existence of ancient regional schools. According to Hallaq, the early usage of the word *madhhab* in relation to a region or people of a region (i.e., *madhhab al-ʻIrāqiyyīn*) does not refer to either a

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[236] *Ibid*., 21.

[237] Harald Motzki, *The Origins of Islamic Jurisprudence: Meccan Fiqh before the Classical Schools*, trans. Marion. H. Katz (Leiden: Brill, 2002), 296-297.

[238] *Ibid*., 129, 157-167, 295.

legal methodology or shared legal doctrine. Rather, in the words of Hallaq, "[t]hese labels were convenient ways to refer to a particular school of jurists who had little in common other than their presence in an unchanging geographical locale."[239] Tillier accuses Hallaq here of willingly turning a blind-eye to the word *madhhab* when it is used in relation to Iraq and the Hijaz, particularly Medina. Tillier not only documents the use of the term *madhhab* with a specific geographical location in judicial appointments, but he also shows that the terms *ahl al-ʻIrāq* and *ahl al-Ḥijāz* were used by Ibn al-Muqaffaʻ (d. 139/757) in the early Abbasid period to refer to two opposing groups of jurists who upheld different legal norms.[240] Moreover, evidence suggests that the Abbasids, who early in their rule turned primarily to Hijazi scholars to serve in the judiciary, soon realized that these scholars were unprepared to deal with some situations that were more familiar to the jurists of Iraq. The differences visible in legal doctrine to the contemporaries of these jurists in the 8th century does not entail, Tillier adds, that they were anonymous (as opposed to personal); rather, "the infrastructure of those major tendencies," within each region was the teaching circles that formed around a recognized master jurist or scholar.[241]

Ahmed El Shamsy makes a useful point that can help clear up some of the differences between perspectives on the early history of the Islamic schools of law: where one draws the line between types of schools and when they exist depends fundamentally on the definition of "school of law." For him, the full-fledged *madhhab* in its post-formative form includes

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[239] Hallaq, "From Regional to Personal Schools of Law," 16.

[240] Mathieu Tillier, *Les Cadis D'Iraq et L'État Abbasside (132/750-334/945)* (Damascus: Presses de l'Ifpo, 2009), 138-186.

[241] *Ibid*.

attachment to the scholarship of the founder, a developed legal hermeneutics, a complex social structure for educating students and conferring authority within the school, and a means of controlling and permitting for doctrinal change.[242] Drawing on Thomas Kuhn's theory of normal science and the productive role of paradigms for intellectual achievement in the sciences, El Shamsy argues that Shāfi'ism in the 9th century A.D. became a "*paradigmatic* school," due to the efforts of al-Shāfi'ī himself to canonize the Qur'ān and *ḥadīth* and via his production of an unprecedented interpretive framework for approaching these sources. His students took up the task of elaborating this framework, thereby marking a shift away from "the old model of schools justified in terms of locality-based normative traditions."[243] Mālikīs, Ḥanafīs and Ḥanbalīs soon developed similar frameworks.[244] Throughout his study of canonization and school-formation in Islamic law, El Shamsy emphasizes that the emergence of writing on a large scale in Muslim scholarly circles played a key role in the process of textual canonization, an insight that will help us explain the adoption of *ḥajr* as a widely-accepted term. The spread of writing allowed for the standardization of legal thought and the development of the post-formative schools of law that possessed astounding uniformity across time and space, something that the previous, regional legal traditions were not capable of due to their reliance on the memory and scholarly culture of each generation of scholars.[245]

The process of canonization via adoption of canonized, written texts (not just written notes intended to aid the memory) and the development of a hermeneutical framework is a

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[242] El Shamsy, *The Canonization of Islamic Law*, 168-169, 182-183.

[243] *Ibid*. 183

[244] *Ibid*. 194-220.

[245] *Ibid*. 40-43, 148, 182-183, 221-225

fundamental step towards establishing the rule of law. As the social theorist Pierre Bourdieu wrote:

> The rule of law presupposes the coming together of commitment to common values (which are marked, at the level of custom, by the presence of spontaneous and collective sanctions such as moral disapproval) and of the existence of explicit rules and sanctions and normalized procedures. This latter factor, which cannot be separated from the emergence of writing, plays a decisive role. Writing adds the possibility of universalizing commentary, which discovers 'universal' rules and, above all, principles; and writing adds the possibility of transmission. Such transmission must be objective—depending for its success upon a methodical apprenticeship. It must also be generalized—able to reach beyond geographical (territorial) and temporal (generational) frontiers.[246]

A textual tradition of written law allows for the communication of specific laws beyond the time and locale in which they were enacted; it produces, in the words of Jack Goody, the "partial autonomy of the text."[247] This, in turn, entails the need for interpretation due to the fact that the stable texts require application in unexpected contexts and new linguistic environments.[248] This partial autonomy is essential to the notion of the law. As we know from experience, it is possible for state interests or social conventions to clash with the law as interpreted by the legal professionals. Moreover, legal professionals can maintain a legal defense of interests not entirely their own. Bourdieu's point is that it is only once a status group of legal professionals emerges as interpreters of texts that the rule of law emerges as an aspirational concept.[249] While El Shamsy

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[246] Pierre Bourdieu, "The Force of the Law: Toward a Sociology of the Juridical Field," *The Hastings Law Journal*, 38 (1987), 844.

[247] Jack Goody, *The Logic of Writing and the Organization of Society*, Studies in Literacy, Family, Culture and the State (Cambridge: Cambridge University Press, 1986), 129, 132, 142-143.

[248] *Ibid*. 130.

[249] In the case of Islamic law, Mathieu Tillier has made similar claims about the relationship between the emergence of the *'ulamā'*, the production of legal texts and the concept of legality, arguing that by the tenth century A.D. "jurists and scholars developed a highly sophisticated theoretical discourse proving that *qādī*s were magistrates whose authority could not be abolished by rulers. This theory reflected a

has shown how the possibility of the rule of law as regulated by the paradigmatic *madhhab* appeared in the 3rd/9th century, the specific mechanisms by which this possibility was implemented—even if surely, in fits and starts and never to be a bygone conclusion—remains in many cases as yet understudied. It was shown in the previous chapter that orphans and the spendthrift began to be understood as universal categories with the legal discourse in *Sūrat al-Nisā'*, yet the question of how these rules were understood and transformed into legal practice remains to be answered. The remainder of this chapter will trace the formation of the these rules in the first three centuries of Islam.

Even before the emergence of the full-fledged doctrinal schools of law, we have some evidence of the ways in which early Muslims managed orphans' property and the affairs of the *safīh*. As was argued in the previous chapter, concern for the orphans' well-being on a moral level, the property rights of orphans, and the social responsibility for preventing the *safīh* from harming themselves or others were all significant concerns of Arab society. The emergence of judicial instruments to handle the affairs of the orphan and the *safīh*, however, and the development of *fiqh* did not occur immediately during the life of Muḥammad or even in the first hundred years following his death. The following will show how the early debates about how best to handle orphans' property, as recorded in the book of traditions by the Iraqi scholar Ibn Abī Shayba, reveal a geographical disparity in approaches to this topic. In this sense, the results support Tillier's arguments about the existence of regional schools noted above. Nevertheless, the regional diversity was soon subjected to a process of standardization after the emergence of personal schools in the 2nd/8th century and, especially, after the followers of the eponyms of these

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political model that was the exact opposite of the so-called "oriental despotism" and was no less than what is now called the 'rule of law'." See Tillier, "Judicial Authority and *Qādī*s' Autonomy under the 'Abbāsids," *Al-Masāq* 26, no. 2 (2014), 131.

schools elaborated these opinions. Following this, a comparison of biographical literature with the traditions and jurisprudence of the scholars will reveal that the legal term of *ḥajr*, under which the majority of rules regarding orphans' property and the *sufahā'* was subsumed in post-formative *fiqh* of the four *madhhabs*, did not seem to be used in the scholarship of the earliest legal thinkers. Rather, it would seem that the term was first introduced widely in Iraq, and may have been inherited from the administrative practice of the Umayyads.

Early Debates about Orphans' Property in Islamic Jurisprudence

The *Muṣannaf* of Ibn Abī al-Shayba (d. 235/849) is one of several surviving compilations of *athār*, or reports about what the Prophet, the Companions, Successors or prominent Caliphs, judges and scholars said or did.[250] They are, as one recent scholar has noted, "our main source for the study of the first 150 years of Islam."[251] A *muṣannaf* refers to a work that is arranged according to topics, such as *ṣalāt* (ritual prayers), *ṭalāq* (divorce), or *buyū'* (sales), and this type of text represents a fairly developed form of compiling *ḥadīth* and *athār* into texts that a scholar or jurist could easily peruse to find individual traditions relevant to what they were seeking.[252] While not all of the reports in these texts are about legal material, law is a significant topic in the *Muṣannaf* of Ibn Abī al-Shayba. Most of the reports with legal content, moreover, cite authorities

[250] Scott Lucas, "Ibn Abī Shayba," *Encyclopaedia of Islam, THREE*.

[251] Behnam Sadeghi, "The Traveling Tradition Test: A Method for Dating Traditions." *Der Islam* 85, no. 1 (2008), 203.

[252] Fuat Sezgin, *Geschichte des arabischen Schriftums: Band I* (Leiden: Brill, 1967), 55; Motzki, 51.

other than the Prophet.[253] The value of the reports in this *Muṣannaf* to the current topic at hand is that it, like the *Muṣannaf* of ʻAbd al-Razzāq al-Ṣanāʻī, to which we will have occasion to return to later, most likely contains an overall accurate, if partial, portrayal of Islamic legal debates in the 2nd/8th century, if not in the mid-to-late 1st/7th centuries.[254] The work of Harold Motzki and Fuat Sezgin, in particular, have placed the authenticity of the *Muṣannaf* texts on firm grounding.[255] This does not mean, of course, that every word of every single report is an authentic transmission from the purported authority. In any case, here we are less interested in discovering an authentic text than understanding, based on one of the largest and most informative legal sources available for the history of early Islamic law, of how Muslim scholars and jurists approached the issue of orphans, their wealth, and legal interdiction (*ḥajr*) in order to understand the development of a legal institution whose primary purpose was to uphold the rule

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[253] Only about one out of every eleven reports of the *Muṣannaf* cite the Prophet as an authority, out of nearly 39,000 reports total. See Scott Lucas, "Where are the Legal 'Ḥadīth?' A Study of the 'Muṣannaf' of Ibn Abī Shayba," *Islamic Law and Society*, 15, no. 3 (2008), 286.

[254] As Lucas argues, "the importance of the *Muṣannaf* derives from the fact that all of its reports date to the 2nd/8th century and are contemporary with the great jurists Abū Yūsuf, Muḥammad b. al-Ḥasan al-Shaybānī, and al-Shāfiʻī," *ibid*. 308.

[255] Sezgin showed that several modern historians of Islamic law and *ḥadīth* had underestimated the use of writing from even before the rise of Islam and also misunderstood the complexity of *taḥammul al-ʻilm* (lit. "carrying knowledge," which is the term for seeking, studying and transmitting *ḥadīth*) as a social practice of primary importance in premodern Muslim civilization. Whereas some scholars had assumed that this practice of transmission was primarily oral until the 3rd/9th century, Sezgin was able to show that even oral transmission was almost always accompanied by written texts. See Sezgin, 53-84. Similar conclusions were drawn by Nabia Abbott in her contemporaneous studies of literary papyrological documents, which indicated that Arabia before the Prophet was awash in literate individuals and that the Umayyad period showed a steady increase and adoption in the use of written transmission. Like Sezgin, she emphasized that oral transmission was often accompanied by written transmission of texts. See Nabia Abbot, *Studies in Arabic Literary Papyri*, 3 vols. (Chicago: University of Chicago, 1957-1969). The results of these groundbreaking studies have been further elaborated by Gregor Schoeler, who was able to show that many of the "books" from the first two Islamic centuries that Sezgin referred to in his work took the form of "*hypomnēma*," or written reminders intended to aid the memory, rather than "*syngramma* (written composition, systematic work." See Schoeler, *The Genesis of Literature in Islam: From the Aural to the Read*, ed. and trans. Shawkat M. Toorawa (Edinburgh: Edinburgh University Press, 2009), 6-8.

of law. The fact that these reports may in some cases likely contain a kernel of authenticity only makes the results we can obtain from the *Muṣannaf* that much more compelling.

The proceeding section follows the following methodology. All of the reports regarding three main topics regarding orphans and legal interdiction were collected from the *Muṣannaf*:

(1) Should orphans pay *zakat*?

(2) If guardians consume a part of an orphan's property, should that be considered a loan?

(3) Is the legal interdiction (*ḥajr*) of slaves or of free people a valid act, and, if so, what are the consequences?

After collecting the traditions relating to these topics from the *Muṣannaf*, the transmitters within the *isnād*, or chain of transmission, were all identified according to the region or regions in which they were active. This was done by referring to the biographical literature, particularly Shams al-Dīn al-Dhahabī's (d. 748/1348) *Siyar a'lām al-nubalā'*, which was selected due to the comprehensiveness of its coverage of Muslim scholars and, especially, due to the author's "love of precision."[256] Other biographical texts, as noted in the footnotes, were used when *Siyar a'lām al-nubalā'* does not include an entry on the individual or provides insufficient information. Comparing the content of the traditions with the location of the transmitters allows us to see where a particular tradition was being transmitted, which is a good indication that this was a topic of interest in the region. This analysis is also supplemented with occasional references to another early extant *muṣannaf* work, that of al-Ṣanā'ī, the purpose of which is to ensure that no major debate or position on our topics is elided in this analysis. Since al-Ṣanā'ī cited Hijazi

[256] For this assessment of al-Dhahabī, see Caterina Bori, "al-Dhahabī," *Encyclopaedia of Islam, THREE*. I refer here to the edition of the *Siyar* edited by Shu'ayb al-Arnā'ūṭ: *Siyar A'lām al-Nubalā'*, ed. Shu'ayb al-Arnā'ūṭ (Beirut: al-Risāla, 1981-1988).

scholars significantly more than Ibn Abī Shayba, it is possible that there are opinions that appear in one text and not the other.[257] Following the analysis of the legal debates as reflected in the *Muṣannaf*, the positions on orphans and legal interdiction of the early author-jurists—Mālik, Abū Ḥanīfa and al-Shāfi'ī—and their students are analyzed with reference to the results from the initial analysis of the *Muṣannaf*. In this way, it will be shown how jurists began to agree upon a standardized legal language for the topics under consideration which resulted in the legal status of orphans being subordinated under *ḥajr* both conceptually and organizationally in works of *furū'* (Islamic positive law).

*Those Who Held that Orphans Are Liable for Z*akāt[258]

1. Sharīk b. 'Abd Allāh (d. 177-179 A.H.), Kufan[259] < Abū Yaqaẓān (d. unknown), Kufan[260] < Ibn 'Abī Laylā (d. 82 or 83 A.H.), Kufan[261]: "'Alī purified (*zakkā*, i.e., extracted alms from) the property of the Banū Abī Rāfi'—orphans in his care—and said, "Do you think that I would supervise wealth and not purify it?"

[257] On this point, see Tillier, *L'invention du cadi : La justice des musulmans, des juifs et des chrétiens aux premiers siècles de l'Islam* (Paris: Éditions de la Sorbonne, 2017), Web, Ch. 3, Paragraph 34. Tillier argues that Iraqi legal debate, by the 9th century, did not need to refer to debates in the Hijaz, hence the minimal reference to Hijazi scholars in Ibn Abī Shayba's *Muṣannaf*.

[258] The traditions in this subsection are found in Abū Bakr Ibn Abī Shayba, *al-Muṣannaf*, ed. Ḥamad b. 'Abd Allāh al-Jum'a and Muḥammad b. Ibrāhīm al-Luḥaydān (Riyadh: Maktabat al-Rushd, 2004), 4/231-232.

[259] Al-Dhahabī *Siyar*, 8/200; Nurit Tsafrir, "Semi-Ḥanafīs and Ḥanafī Biographical Sources," *Studia Islamica*, no. 84 (1996), 69-70.

[260] Al-Dhahabī, *Siyar*, 7/232.

[261] *Ibid.* 4/262-267.

2. ‘Alī b. Mushir (d. 120 A.H.), Kufan[262] < Yaḥyā b. Sa‘īd (d. 143 A.H.), Medinan[263] < al-Qāsim b. Muḥammad b. Abū Bakr al-Ṣadīq (d. 105-108 A.H.), Medinan[264]: “We were orphans in the care of ‘Ā’isha, and she used to purify our property and trade with it across the sea (*kānat tuzakkī amwālina wa-tubḍi‘uhā fī al-baḥr*).”
3. ‘Abd al-Raḥmān b. Sulaymān Ibn al-Ghasīl (d. 171 A.H.), Medinan[265] < al-Ash‘ath (d. 136 A.H.), Kufan[266] < Abū al-Zubayr Muḥammad b. Muslim (d. 128 A.H.), Meccan[267] < Jābir b. ‘Abd Allāh Al-Salimī (d. 77 or 78 A.H.), Medinan:[268] “*Zakāt* is due on the orphan’s property.”
4. ‘Alī b. Mushir (d. 120 A.H.), Kufan[269] < al-Layth b. Sa‘d b. ‘Abd al-Raḥmān al-Fahmī (d. 175 A.H.), born in Egypt but traveled widely, including to Damascus, Mecca, Medina and Baghdad[270] < Abū ‘Abd Allāh Nāfi‘ al-Qurashī (d. 117 A.H. or 119 A.H.),

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[262] *Ibid*. 8/484-487.

[263] *Ibid*. 5/468-481.

[264] *Ibid*. 5/53-60.

[265] *Ibid.* 7/323-325.

[266] *Ibid*. 6/275-277.

[267] *Ibid*. 5/380-386.

[268] *Ibid*. 3/189-194.

[269] See Tradition #2 above.

[270] Al-Dhahabī, *Siyar*, 8/136-163.

Medinan[271] < ‘Abd Allāh Ibn ‘Umar b. al-Khaṭṭāb (d. 73 or 74 A.H.), Meccan and Medinan:[272] “He (i.e., Ibn ‘Umar) used to purify the orphan’s property.”

5. ‘Abd Allāh b. Idrīs b. Yazīd (d. 192. A.H.), Kufan, but also known, according to al-Dhahabī for often taking the position of Medina and opposing the Kufans. He was also a friend of Mālik.[273] < Muḥammad b. Isḥāq b. Yasār b. Khiyār al-Akhbārī (d. 150-152 A.H.), Medinan, but also traveled widely in al-Jazīra, Kūfa, Baghdad and al-Ḥīra[274] < Muḥammad b. Muslim al-Zuhrī (d. 123-125 A.H.), Medinan but also moved to Damascus:[275] “ ‘Umar (Ibn al-Khaṭṭāb) said: Strive on behalf of the orphans to increase their wealth so that *zakat* does not deplete it.”
6. Abū Khālid Sulaymān b. Ḥayān al-Aḥmar (d. 189 A.H.), Kufan[276] < Yaḥyā—probably Yaḥyā b. Sa‘īd (d. 143 A.H.), Medinan[277] < Ḥanẓala b. Abū Sufyān al-Jumaḥī (d. 151 A.H.), Meccan[278] < Ḥumayd b. Abū Ḥumayd al-Ṭawīl (d. 142 or 143 A.H.), Basran[279] <

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[271] *Ibid*. 5/95.

[272] *Ibid*. 3/ 203.

[273] *Ibid*. 9/42-48.

[274] *Ibid*. 7/33-55.

[275] *Ibid*. 5/326-350.

[276] *Ibid*. 9/19-21.

[277] See Tradition #2 above.

[278] Al-Dhahabī, 6/336

[279] *Ibid*. 6/163-169.

al-Qāsim b. Muḥammad (d. 105-108 A.H.), Medinan:[280] "'Ā'isha used trade with our property across the sea and purify it."

7. Ismā'īl b. Ibrāhīm Ibn 'Ulayya (d. 193 A.H.), Basran, Kufan and Baghdadian[281] < Abū Bakr Ayyūb al-Sakhtiyānī (d. 131 A.H.), Basran[282] < Abū Muḥammad 'Amr b. Dīnār al-Jumaḥī (d. 126 A.H.), Meccan[283] < Abū Ayyūb Makḥūl Al-Dimashqī (d. 112-114, 116, or 118 A.H.), Damascene, but captured in Central Asia and manumitted in Egypt. He also traveled widely in the Hijaz and Iraq:[284] "'Umar said: Strive on behalf of the orphans to increase their wealth so that charity (*ṣadaqa*) does not deplete it."
8. Wakī' b. al-Jarrāḥ (d. 197 A.H.), Kufan[285] < al-Ḥassan b. Ṣalīh b. Ṣāliḥ b. Ḥayy al-Hamadhānī (d. 169), Kufan[286] < Abū Farwa 'Urwa b. al-Ḥārith al-Hamadhānī (d. unknown), Kufan[287] < al-Sha'bī 'Āmir b. Sharāḥīl (d. 104 A.H.), Kufan, but stayed in Mecca for a time to escape al-Mukhtār[288]: "*Zakāt* is due on the orphan's property."

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[280] See Tradition #2 above.

[281] Al-Dhahabī, *Siyar,* 9/107-120.

[282] *Ibid*. 6/15-26.

[283] *Ibid*. 5/300-307; Ibn Sa'd, 8/40-41.

[284] Al-Dhahabī, *Siyar,* 5/155-160.

[285] *Ibid*. 9/140-168.

[286] *Ibid*. 7/361-371.

[287] Shihāb al-Dīn Ibn Ḥajar, *Tahdhīb al-Tahdhīb* (Haiderabad: Dā'irat al-Ma'ārif, 1325/1907-1909), 7/178.

[288] Al-Dhahabī, *Siyar*, 4/294-319.

9. Abū Usāma Ḥammād b. Usāma b. Zayd (d. 201 A.H.), Kufan[289] < Hishām b. ‘Urwa b. al-Zubayr Ibn al-‘Awwām (d. 146 A.H.), Medinan, but traveled to Kufa and Baghdad[290] < Muḥammad Ibn Sīrīn al-Anṣārī (d. 110 A.H.), Basran:[291] “The orphan has a right to his property, and there is a right due to others in it. What I say is nothing other than what God the Exalted said.”
10. Abū Zakariyyā Yaḥyā b. Yamān al-‘Ijlī (d. 189 A.H.), Kufan[292] < al-Ḥasan b. Yazīd (d. unknown), Kufan, but originally from Mecca[293] < Ṭāwūs b. Kaysān al-Fārisī (d. 106 A.H.), Yemeni and Meccan:[294] “Purify the orphan’s property; otherwise, it is a debt you are liable for (lit.: attached to your neck).”
11. Wakī‘ b. al-Jarrāḥ (d. 197 A.H.), Kufan[295] < Mūsa b. ‘Ubayda (d. 153 A.H.), Medinan[296] < ‘Abd Allāh b. Dīnār al-‘Adawī al-‘Udawī (d. 127 A.H.), Medinan:[297] “Ibn ‘Umar was called to (care for) an orphan’s property. He said: If it is your will, I will take responsibility for it on the condition that I purify it year after year.”

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[289] *Ibid*. 9/277-279.

[290] *Ibid*. 6/34-47.

[291] *Ibid*. 4/606-622.

[292] *Ibid*. 8/356-357

[293] Ibn Ḥajar, *Tahdhīb al-Tahdhīb*, 2/327-328.

[294] Al-Dhahabī, *Siyar*, 5/38-49; Ibn Sa‘d, 8/97-102.

[295] See Tradition #8.

[296] Ibn Sa‘d, 7/555.

[297] Al-Dhahabī, *Siyar*, 5/253-255.

12. Abū Hishām ‘Abd Allāh Ibn Numayr al-Hamadhānī (d. 199 A.H.), Kufan[298] < Mālik b. Mighwal b. ‘Āṣim b. Ghaziyya al-Bajalī (d. 158 or 159 A.H.), Medinan[299] < ‘Aṭā’ b. Abī Rabbāḥ al-Qurashī (d. 115 A.H.), Medinan:[300] “He held (i.e., ‘Aṭā’) that *zakāt* is due on the orphan’s property.”

Those Who Held Orphans Do Not Pay Zakāt:[301]

1. ‘Abd Allāh b. Idrīs b. Yazīd (d. 192. A.H.), Kufan[302] < al-Layth b. Sa‘d b. ‘Abd al-Raḥmān al-Fahmī (d. 175 A.H.)[303] < Abū al-Ḥajjāj Mujāhid b. Jabr (d. 102-104 or 107-108 A.H.), Meccan and Kufan, but also traveled widely[304] < ‘Abd Allāh b. Mas‘ūd al-Hudhalī (d. 32 or 33 A.H.), Medinan, but reported to have been sent by ‘Umar b. al-Khaṭṭāb to teach in Kufa:[305] “He (i.e., Ibn Mas‘ūd) used to say: Calculate what is owed for *zakāt* of the orphan’s property. Then if he reaches maturity and you find them of sound judgment (*fa-idhā balagha wa-unisa minhu al-rushd*), let him know (how much is owed). If he wants, he will purify it, or if he wants, he will not.

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[298] *Ibid*. 9/244-245.

[299] *Ibid*. 7/174-179.

[300] *Ibid*. 5/78.

[301] The traditions in this subsection are found in Ibn Abī Shayba, 4/243-244.

[302] See Tradition #5 in Section A.

[303] See Tradition #4 in Section A.

[304] Al-Dhahabī, *Siyar*, 4/449-457.

[305] *Ibid*. 1/461-500.

2. Jarīr b. ʻAbd al-Ḥamīd Yazīd al-Ḍabbī (d. 188 A.H.), Kufan[306] < Abū ʻAttāb Manṣūr b. al-Muʻtamir al-Sulamī (d. 132 or 133 A.H.), Kufan[307] < Abū ʻImrān Ibrāhīm b. Yazīd al-Nakhaʻī (d. 96 A.H.), Kufan:[308] "There is no *zakāt* of the orphan's property."
3. Wakīʻ b. al-Jarrāḥ (d. 197 A.H.), Kufan[309] < Sulaymān al-Aʻmash b. Mihrān al-Kāhilī (d. 148 A.D.), Kufan[310] < Ibrāhīm b. Yazīd al-Nakhaʻī (d. 96 A.H.), Kufan:[311] "Something like it (*mithlahu*)."
4. Abū Usāma Ḥammād b. Usāma b. Zayd (d. 201 A.H.), Kufan[312] < Abū ʻAbd Allāh Hishām b. Ḥassān al-Qurdūsī (d. 146-148 A.H.), Basran, although it was doubted whether he actually reported from Ḥasan al-Baṣrī[313] < Abū Saʻīd al-Ḥasan al-Baṣrī (d. 148 A.H.), Basran:[314] "There is no *zakāt* of the orphan's property until he reaches puberty (*ḥattā yaḥtalim*).
5. Wakīʻ b. al-Jarrāḥ (d. 197 A.H.), Kufan[315] < Sufyān b. Saʻīd b. Masrūq al-Thawrī (d. 161 A.H.), Kufan[316] < Abū Saʻīd al-Ḥasan al-Baṣrī:[317] "He (i.e., al-Baṣrī) had in his

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[306] *Ibid*. 9/9-18.

[307] *Ibid*. 5/402-412

[308] *Ibid*. 4/520-529.

[309] See Tradition #8 in Section A..

[310] Al-Dhahabī, *Siyar*, 5/226-249.

[311] See previous tradition.

[312] See Tradition #9 in Section A.

[313] Al-Dhahabī, *Siyar*, 6/355-363.

[314] *Ibid*. 4/563-588.

[315] See Tradition #8 in Section A..

possession property that belonged to one of his brothers' children who were orphans, and he did not purify it (*fa-lā yuzakkiyuh*).

6. Ḥafṣ b. Ghiyāth b. Ṭalq b. Mu'āwiya al-Nakha'ī (d. 194-196 A.H.), Kufan[318] < Ḥajjāj b. Arṭāh b. Thawr b. Hubayra al-Nakha'ī (d. 145 or 149 A.H.), Kufan[319] < al-Ḥakam b. 'Utayba al-Kindī (d. 115 A.H.), Kufan[320] < Abū Umayya Shurayḥ al-Qāḍī b. al-Ḥārith al-Kindī (d. 78 or 80 A.H.), Kufan:[321] "He (i.e., Shurayḥ said about the orphan's property: If I take a camel or two[322] from the orphan's property soon nothing will be left."
7. Wakī' b. al-Jarrāḥ (d. 197 A.H.), Kufan[323] < Sufyān b. Sa'īd b. Masrūq al-Thawrī (d. 161 A.H.), Kufan[324] < Jābir b. Yazīd al-Nakha'ī (d. 127, 128 or 132 A.H.), Kufan[325] < al-Sha'bī 'Āmir b. Sharāḥīl (d. 104 A.H.), Kufan:[326] "There is no *zakāt* of the orphan's property."

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[316] Al-Dhahabī, *Siyar*, 7/229-279.

[317] See the previous tradition.

[318] Al-Dhahabī, *Siyar*, 9/22-34.

[319] *Ibid*. 7/69-75.

[320] *Ibid*. 5/208-213.

[321] *Ibid*. 4/100-106.

[322] Lit.: "*al-dhawd aw al-dhawdayn*."

[323] See Tradition #8 in Section A.

[324] See Tradition #5 in Section B.

[325] Ibn Ḥajar, *Tahdhīb al-tahdhīb*, 2/46-51.

[326] See Tradition #8 in Section A.

8. Wakī‘ b. al-Jarrāḥ (d. 197 A.H.), Kufan[327] < Sa‘īd b. Dīnār (d. unknown), location unknown:[328] “I asked al-Sha‘bī regarding the orphan’s property, ‘Is there *zakāt* due on it?’ He said, ‘Yes, but if it was in my possession, I would not purify it (*mā-zakkaytuh*).’”
9. Abū Zakariyyā Yaḥyā b. Yamān al-‘Ijlī (d. 189 A.H.), Kufan[329] < al-Ḥasan b. Yazīd (d. unknown), Kufan, but originally from Mecca:[330] I heard Mujāhid (Kufan) say:[331] “Calculate it. If you know, then purify it (*fa-idhā ‘alamt fa-zakkih*).”[332]
10. Abū Usāma Ḥammād b. Usāma b. Zayd (d. 201 A.H.), Kufan[333] < Sa‘īd, Basran[334] < Qatāda b. Du‘āma b. Qatāda al-Sadūsī (d. 118 A.H.), Basran < al-Ḥasan al-Baṣrī, (d. 148 A.H.), Basran:[335] “It is taken from date palms and livestock. As for money, not until he reaches puberty (*fa-ammā al-māl, fa-ḥattā yaḥtalim*).” He meant: the orphan’s money.

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[327] See Tradition #8 in Section A.

[328] Not much is known about this individual beyond that he transmitted from al-Sha‘bī. See Ibn Abī Ḥātim al-Rāzī, *Al-Jarḥ wa’l-ta‘dīl* (Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī, 1952), 4/18; Abū Ḥātim Ibn Ḥibbān, *Al-Thiqāt* (Hyderabad: Dār al-Ma‘ārif al-‘Uthmāniyya, 1973), 6/360.

[329] See Tradition #10 in Section A.

[330] See Tradition #10 in Section A.

[331] See Tradition #1 in Section B.

[332] It seems that “If you know” was interpreted by Ibn Abī Shayba as referring to knowledge of the orphan reaching majority.

[333] See Tradition #9 in Section A.

[334] It is unclear who this individual is. He could either be Abū Mas‘ūd Sa‘īd al-Jurayrī b. Iyās (d. 144 A.H.) or Abū ‘Abd al-Raḥmān Sa‘īd b. Bashīr al-Azdī. See al-Dhahabī, *Siyar*, 6/153-156 and 7/304-305, respectively. In either case, the result for this study is the same since both were active in the same city.

[335] See Tradition #4 in Section B.

11. Abū Bakr b. ‘Ayyāsh al-Asadī (d. 193 A.H.), Kufan[336] < ‘Āṣim b. Abī al-Najūd al-Asadī (d. 127 or 128 A.H.), Kufan[337] < Abū Wā’il Shaqīq b. Salama al-Asadī al-Kūfī (d. 82 A.H.), Kufan:[338] He used to say: “An orphan was in my care who owned 8,000 (dirhems), and I did not purify it until he reached puberty (*ḥattā lammā balagh*), then I handed it over to him.”
12. Sufyān b. ‘Uyayna al-Hilālī (d. 198), Kufan, but moved to Mecca[339] < Abū Muḥammad ‘Amr b. Dīnār al-Jumaḥī (d. 126 A.H.), Meccan[340] < ‘Abd al-Raḥmān b. al-Sā’ib, (d. unknown), Hijazi:[341] “Ibn ‘Umar was in the possession of orphan’s property. He borrowed from it so as to avoid paying *zakāt* from it.”

Consuming the Property of Orphans as a Loan[342]

1. ‘Abd Allāh b. al-Mubārak Wāḍiḥ al-Ḥanẓalī (d. 181 A.H.), Marwazī[343] < al-Rabī‘ b. Anas b. Ziyād al-Bakrī al-Khurāsānī (d. 139 A.H.), Basran and Marwaẓī[344] < Abū al-

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[336] Al-Dhahabī, *Siyar*, 8/495-508.

[337] *Ibid*. 5/256-261.

[338] *Ibid*. 4/161

[339] *Ibid*. 8/454-475.

[340] See Tradition #7 in Section A.

[341] Ibn Ḥajar, al-Mizzī and Ibn Ḥibbān only mention his Ḥijāzī roots, and they do not mention dates for this individual’s life. See Ibn Ḥajar, *Tahdhīb al-tahdhīb*, 3/449 and 6/182; Jamāl al-Dīn Yūsuf al-Mizzī, *Tahdhīb al-kamāl fī asmā’ al-rijāl* (Beirut: al-Risāla, 1980-1992), 17/128; Ibn Ḥibbān, 5/91.

[342] The traditions in this subsection are found in Ibn Abī Shayba, 7/399-400.

[343] Al-Dhahabī, *Siyar*, 8/378-421.

[344] *Ibid*. 6/169.

‘Āliyya Rufaya‘ b. Mihrān al-Riyāḥī al-Baṣrī (d. 90 or 93 A.H.), Basran:[345] “He (i.e., Abū al-‘Āliyya) said: Whatever you consume of the orphan’s property is a loan in your name. Do you not see that He said, “And when you deliver up their fortune to the orphans, have (it) witnessed in their presence.”

2. Ismā‘īl b. Ibrāhīm Ibn ‘Ulayya (d. 193 A.H.), Basran, Kufan and Baghdadian[346] < Abū Bishr Salama b. ‘Alqama al-Tamīmī (d. before 140 A.H.), Basran[347] < Muḥammad Ibn Sīrīn al-Anṣārī (d. 110 A.H.), Basran:[348] “He (i.e., Ibn Sīrīn said): I asked ‘Abīda[349] about His words, ‘Whosoever (of the guardians) is rich, let him abstain generously (from taking the property of orphans); and whosoever is poor let him take thereof reasonably.’ He replied: It is then a loan. Do you not see that He said, ‘And when you deliver up their fortune to the orphans, have (it) witnessed in their presence.’”
3. Ismā‘īl b. Ibrāhīm Ibn ‘Ulayya (d. 193 A.H.), Basran, Kufan and Baghdadian[350] < Abū Yasār ‘Abd Allāh b. Abī Nujayḥ (d. 131), Meccan[351] < Abū al-Ḥajjāj Mujāhid b. Jabr (d. 102-104 or 107-108 A.H.), Meccan and Kufan, but also traveled widely:[352] “Regarding His words ‘Whosoever (of the guardians) is rich, let him abstain magnanimously (from

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[345] *Ibid*. 4/207-213.

[346] See Tradition #7 in Section A.

[347] Ibn Ḥajar, *Tahdhīb al-tahdhīb*, 4/150.

[348] See Tradition #9 in Section A.

[349] ‘Abīda b. ‘Amr al-Salmānī (d. 72 A.H.), Kufan. See al-Dhahabī, *Siyar*, 4/40-44.

[350] See Tradition #7 in Section A.

[351] Al-Dhahabī, *Siyar*, 6/125-126.

[352] See Tradition #1 in Section B.

taking the property of orphans); and whosoever is poor let him take thereof reasonably'—borrow from it and trade with it."

4. All the following *isnāds* conveyed a content of a single word: "*bi'l-qarḍ* (as a loan)."
    a. Wakī' b. al-Jarrāḥ (d. 197 A.H.), Kufan[353] < Abū Ja'far 'Īsā b. Māhān al-Rāzī (d. *circa* 160 A.H.), Basran and Rāzī (i.e., from Rayy)[354] < al-Rabī' b. Anas b. Ziyād al-Bakrī al-Khurāsānī (d. 139 A.H.), Basran and Marwaẓī[355] < Abū al-'Āliyya Rufaya' b. Mihrān al-Riyāḥī al-Baṣrī (d. 90 or 93 A.H.), Basran.[356]
    b. Sufyān b. Sa'īd b. Masrūq al-Thawrī (d. 161 A.H.), Kufan[357] < Ḥammād b. Abī Sulaymān al-Kūfī (d. 120 A.H.), Kufan[358] < Sa'īd b. Jubayr b. Hishām al-Wālibī (d. 95 A.H.), Kufan.[359]
    c. Sufyān b. Sa'īd b. Masrūq al-Thawrī (d. 161 A.H.), Kufan[360] < 'Āṣim b. Abī al-Najūd al-Asadī (d. 127 or 128 A.H.), Kufan[361] < Abū Wā'il Shaqīq b. Salama al-

[353] See Tradition #8 in Section A.

[354] Al-Dhahabī, *Siyar*, 7/346.

[355] See Tradition #1 in this section.

[356] See Tradition #1 in this section.

[357] See Tradition #5 in Section B.

[358] Al-Dhahabī, *Siyar*, 5/231-239.

[359] See Tradition #11 in Section C.

[360] See Tradition #11 in Section B.

[361] *Ibid*. 5/256-261.

Asadī al-Kūfī (d. 82 A.H.), Kufan.[362]

Regarding a Man Who Interdicts His Slave (fī al-rajul yaḥjur ʻalā ghulāmih)[363]

1. Muḥammad b. Abī ʻAdī (d. 194 A.H.), Basran[364] < Ṣāliḥ b. Abī al-Akhḍar[365] (d. before 160 A.H.), Basran[366] < ʻAbbād b. Saʻīd b. ʻAbbād (d. unknown), location unknown[367] < ʻUmar b. ʻAbd al-ʻAzīz (d. 101 A.H.), Umayyad Caliph[368]: "Whosoever sells a slave or man under interdiction (*maḥjūran ʻalayh*), his property is thereby forfeit."
2. Hushaym b. Bashīr al-Salamī (d. 183 A.H.), Baghdadī [369] < Mughīra b. Muqsim al-Ḍabbī (d. 133 or 134 A.H.), Kufan[370] < Abū ʻImrān Ibrāhīm b. Yazīd al-Nakhaʻī (d. 96 A.H.), Kufan:[371] "If he comes to the people of his market and informs theme that he interdicted

[362] *Ibid*. 4/161

[363] The traditions in this subsection are found in Ibn Abī Shayba, 7/339.

[364] Al-Dhahabī, *Siyar,* 9/220-221.

[365] The published text states his name as "al-Aḥmar," which appears to be a mistake.

[366] *Ibid*. 7/303-304

[367] Al-Dhahabī, *Mīzān al-ʻitidāl fī naqd al-rijāl*, ed. ʻAlī Muḥammad al-Bijāwī (Beirut: Dār al-Maʻrifa, 1963), 2/366.

[368] P.M. Cobb, "'Umar (II) b. ʻAbd al-ʻAzīz," *Encyclopaedia of Islam, Second Edition*.

[369] Al-Dhahabī, *Siyar,* 8/287-294; *Mīzān al-ʻitidāl* 4/308.

[370] Al-Dhahabī, *Siyar,* 6/10-13

[371] See Tradition #2 in Section B.

him,[372] then no one is permitted to enter into affairs with him (*fa-lays li-aḥad an yukhāliṭuh*)."

3. Abū Usāma Ḥammād b. Usāma b. Zayd (d. 201 A.H.), Kufan[373] < Abū ʻAbd Allāh Hishām b. Ḥassān al-Qurdūsī (d. 146-148 A.H.), Basran[374] < al-Ḥasan al-Baṣrī (d. 148 A.H.), Basran:[375] If a man places his slave under interdiction (*idhā ḥajar al-rajul ʻalā ʻabdih*) among the people of his market, then nothing is permitted for him."
4. Hushaym b. Bashīr al-Salamī (d. 183 A.H.), Baghdadian[376] < ʻAbd Allāh b. ʻAwn al-Muzanī (d. 151 A.H.), Basran[377] < Muḥammad Ibn Sīrīn al-Anṣārī (d. 110 A.H.), Basran:[378] "He (i.e. Ibn Sīrīn) thought nothing of *ḥajr*."
5. Abū Zakariyyā Yaḥyā b. Yamān al-ʻIjlī (d. 189 A.H.), Kufan[379] < Muḥammad b. Qays (d. unknown), Kufan[380] < Bakkār al-ʻItbī (d. unknown), Kufan:[381] < "A man placed a slave

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[372] I.e., if a man comes to the market and informs the people there that he placed his slave under interdiction. Alternatively, this verbal phrase could be read in the passive voice (*ḥujir ʻalayh*), which would then mean that the man came and informed the people that his slave has been placed under interdiction.

[373] See Tradition #9 in Section A.

[374] See Tradition #4 in Section B.

[375] See Tradition #4 in Section B.

[376] See Tradition #2 in this section.

[377] Al-Dhahabī, *Siyar*, 6/364-375.

[378] See Tradition #9 in Section A.

[379] See Tradition #10 in Section A.

[380] Ibn Ḥajar, *Tahdhīb al-Tahdhīb*, 9/412-413.

[381] This individual seems to only be known in the context of this tradition. See Muḥammad b. Ismāʻīl al-Bukhārī, *al-Tārīkh al-kabīr*, ed. Muḥammad b. Ṣāliḥ al-Dibāsī (Riyad: al-Nāshir al-Mutamayyaz, 2019), 2/529.

belonging to him under interdiction (*ḥajar ʻalā ghulām lahu*), so the matter was brought to ʻAlī. He said, ʻWere you going to send him to the market with a dirhem to buy some meat with it?' The man replied, ʻYes.' So, he said, ʻThen make him *maʼdhūn* to do this (i.e., give him permission to do this.)'"

Those Who Disapproved of Interdiction of the Free Person (al-ḥajr ʻalā al-ḥurr) *and Those Who Allowed It*[382]

1. ʻAbd Allāh b. Idrīs b. Yazīd (d. 192. A.H.), Kufan[383] < Shuʻba b. al-Ḥajjāj al-Azdī (d. 160 A.H.), Basran[384] < Mughīra b. Muqsim al-Ḍabbī (d. 133 or 134 A.H.), Kufan[385] < Ibrāhīm al-Nakhaʻī (d. 96 A.H.), Kufan:[386] "A free person cannot be placed under interdiction (*lā yuḥjar ʻalā ḥurr*)."
2. Muḥammad b. Fuḍayl al-Ḍabbī (d. 195 A.H.), Kufan[387] < Ḥuṣayn b. ʻAbd al-Raḥmān al-Sulamī (d. 136 A.H.):[388] "I saw Shurayḥ when a man came to him along with his nephew (*ibn akhīh*), having requested him (Shurayḥ) to force the nephew to come to court. Then the man said, ʻmy nephew drinks *sukkar* excessively,' by which he meant wine. Shurayḥ said, ʻTake possession of his property and spend on him from it according to what is fair *(biʼl-maʻrūf)*.'" Al-Sulamī said, "His nephew's beard had already grown."

[382] The traditions in this subsection are found in Ibn Abī Shayba, 7/339-340.

[383] See Tradition #5 in Section A.

[384] Al-Dhahabī, *Siyar*, 7/202-228.

[385] See Tradition #2 in Section D.

[386] See Tradition #2 in Section B.

[387] Al-Dhahabī, *Siyar*, 9/173-175.

[388] See Tradition #6 in Section B.

3. Ḥafṣ b. Ghiyāth b. Ṭalq b. Muʻāwiya al-Nakhaʻī (d. 194-196 A.H.), Kufan[389] < Ḥajjāj b. Arṭāh b. Thawr b. Hubayra al-Nakhaʻī (d. 145 or 149 A.H.), Kufan[390] < ʻAbd al-Malik Ibn al-Mughīra (d. 99-101 A.H.), Medinan:[391] "Najda[392] wrote to Ibn ʻAbbās (d. 68 A.H.) to ask him about an old man who had lost his mind or abandoned his mind. So he wrote back to him, 'If his mind is lost or he abandoned his mind, then he should be placed under interdiction (*ḥujir ʻalayh*).'"
4. Yaḥyā b. Zakariyyā b. Abī Zāʼid al-Wādiʻī (d. 183 or 184 A.H.), Kufan[393] < Ḥajjāj b. Arṭāh b. Thawr b. Hubayra al-Nakhaʻī (d. 145 or 149 A.H.), Kufan[394] < ʻAṭāʼ b. Abī Rabbāḥ al-Qurashī (d. 115 A.H.), Medinan[395] < Ibn ʻAbbās (d. 68 A.H.), Basran and Meccan:[396] "Something similar (i.e., as the immediately preceding tradition)."

Analysis

First, on the topic of whether or not orphans are liable for paying *zakāt* while they are still minors, the opinion upholding this as a duty is represented in both Iraq and the Ḥijāz. The twelve reports have, either as authorities or transmitters, individuals from all major cities during the first

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[389] See Tradition #6 in Section B.

[390] See Tradition #6 in Section B.

[391] Ibn Ḥajar, *Tahdhīb al-tahdhīb*, 6/425-526.

[392] Not much seems to be known about this individual. See *ibid*. 10/419.

[393] Al-Dhahabī, *Siyar*, 8/337-341.

[394] See Tradition #6 in Section B.

[395] See Tradition #12 in Section A.

[396] L. Veccia Vaglieri, "'Abd Allāh b. al-'Abbās," *Encyclopaedia of Islam, Second Edition*.

150 years of Islam from these areas: Mecca, Medina, Basra and Kufa. Half of the twelve reports in support of *zakāt* of orphans' property refer back unequivocally to Medinan authorities, and another three refer to Meccan authorities, or people who spent some time in Mecca. In comparison, only two of the twelve reports against taking *zakāt* from orphans' property refer back to a non-Iraqi authority (Ibn Mas'ūd and Ibn 'Umar), and even here the former settled in Kufa while the latter's tradition appears to suggest that *zakāt* might be a duty. It claims that Ibn 'Umar borrowed from orphans' wealth in order to avoid paying *zakāt* on it. The implication seems to be that either Ibn 'Umar believed that *zakāt* would otherwise be due, or he believed that others would pressure or coerce him to pay *zakāt* on behalf of the orphans, regardless of his own position.

In a recent article, Lena Salaymeh has made the argument that the debate about minors paying *zakāt* in early Islam was part of a debate about whether *zakāt*, which she terms the "charity tax," was a "for-the-divine" act or "for-the-polity" act.[397] According to this argument, in the period of "late antique Islam," Muslims viewed *zakāt* as a "for-the-polity" act that jurists employed in order to articulate "Muslim identity."[398] Unlike later, orthodox understandings of *zakāt* which viewed it as a primarily "for-the-divine" act like *ṣalāt*, paying the charity tax was, according to Salaymeh, a marker of citizenship in the emerging Islamic empire.[399] This charity

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[397] She uses these terms to avoid what she terms "orthodox assumptions" about *zakāt* and to avoid the words "religious" versus "secular," the former being to burdened in modern understandings of religion as associated with charity, spirituality, and piety and devoid of political content. See Salaymeh, "Taxing Citizens: Socio-legal Constructions of Late Antique Muslim Identity," *Islamic Law and Society* 23, no. 4 (2016), 335. For the term "charity tax," see pp. 338.

[398] *Ibid*. 338.

[399] By citizeship, Salaymeh means "membership in a political society," an example of which is Roman citizenship (*ibid*. 339).

tax was enforced by the state, and, unlike other acts which like prayer, it was requisite of all individuals, including those without legal capacity like slaves and minors.[400] Salaymeh's argument about the political nature of taxation is compelling, yet it is unclear whether, as she states, the opinion that *zakāt* is obligatory on orphans was the "majority opinion" among jurists.[401] What is certain, however, is that early Hijazi authorities overwhelmingly took the position that orphans' property was subject to *zakāt* while this was a matter of debate in Iraq in the mid-2nd/8th centuries, if not earlier.

In addition to the possibility raised by Salaymeh that this debate about *zakāt* was inflected by ideas about political belonging, some of the traditions about *zakāt* appear to be entwined in a debate about the legality of trading with orphans' property. For example, Traditions A2 and A6 are two versions of the same statement by al-Qāsim b. Muḥammad that ʻĀ'isha used to trade with their property when they were orphans in her care in addition to taking *zakāt* from it.[402] In some cases, later authors explain that the kind of trade ʻĀ'isha engaged in was a *muḍāraba* contract.[403] One tradition included in al-Ṣanāʻī's *Muṣannaf* explicitly states that

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[400] *Ibid*. 345.

[401] She does note on the same page, however, that there "is no clear consensus in late antique sources as to if minors must pay the charity tax" (*ibid*. 349).

[402] For other versions of the tradition, see al-Ṣanāʻī 3/500; al-Shāfiʻī, *al-Umm*, 2/69; al-Shaybānī, *al-Aṣl* 3/155; Abū Bakr al-Bayhaqī, *al-Sunan al-kubra*, ed. Muḥammad al-Qādir ʻAṭā' (Beirut: Dār al-Kutub al-ʻIlmiyya, 2003), 6/4; Abū al-Qāsim Ibn al-Simnānī, *Rawḍat al-quḍāt wa-ṭarīq al-najāt*, ed. Ṣalāḥ al-Dīn al-Nāhī (Beirut: al-Risāla, 1984), 2/579.

[403] Ibn al-Simnānī, 2/579. *Muḍāraba* in its basic form is a contract in which an investor provides capital to an individual who would provide the labor to create profit. See Jeanette A. Watkin, "Muḍāraba," *Encyclopaedia of Islam, Second Edition*.

‘Ā‘isha invested orphans’ property in this kind of contract.[404] Although the Sunni schools of law would eventually all recognize this form of contract as legitimate, al-Ṣanā‘ī preserved two traditions dissenting to the use of orphans’ property to provide loans of any sort.[405] Due to the sensitivity of orphans’ property in early Islam noted in the previous chapter, it is unsurprising that there would have been some discomfort among the early Muslim community about entering into risky yet potentially profitable investments with orphans’ property. Given this fact and the connection between *zakāt* of orphans’ property and trading with it, it is entirely possible that traditions about the *zakāt* of orphans circulated as much, if not more, for concerns about the morality and legality of turning a profit from orphans’ wealth as for demarcating boundaries of political belonging. The connection between *zakāt* and trade is even clearer in Tradition A7, attributed to ‘Umar b. al-Khaṭṭāb, which explicitly proposes a causal relation between *zakāt* and trading with orphans’ property: “Strive on behalf of the orphans to increase their wealth so that charity (*ṣadaqa*) does not deplete it.[406] These words were attributed by other transmitters directly to the Prophet.[407] Some scholars also transmitted a similar Prophetic report but with slightly different wording: “May whoever has become the guardian of property belonging to an orphan

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[404] Al-Ṣanā‘ī, 3/500 (where the term *muqārada*, an equivalent term in Shāfi‘ī and Mālikī sources is used). In another version, it is said that ‘Ā’isha traded with it in al-Baḥrayn (al-Bayhaqī 6/466).

[405] *Ibid*. 7/357. For other traditions against trading or giving loans with orphans’ property, see al-Bayhaqī 6/4-5.

[406] See other versions of this tradition in al-Bayhaqī, 6/3.

[407] Al-Shāfi‘ī, 2/69; al-Sarakhsī, 2/162, 22/20; ‘Alā al-Dīn ‘Alī b. Qāḍī Khān al-Muttaqī al-Hindī, *Kanz al-‘ummāl*, ed. Bakrī al-Ḥayānī (Beirut: al-Risāla, 1981), 15/177; al-Māwardī, *al-Ḥāwī*, 3/153. Al-Tirmidhī also transmitted this *ḥadīth*, noting that he considered it “slightly weak (*fīh maqāl*). See Abū ‘Īsā al-Tirmidhī, *al-Jāmi‘ al-kabīr*, ed. Bashshār ‘Awwād Ma‘rūf (Beirut: Dār al-Gharb al-Islāmī, 1996), 2/25.

trade with it (*yattajar bih*) and do not let it be eaten up by charity (*al-ṣadaqa*)."[408] In all of these cases, *zakāt* is a justification for trade. Not all of the profit, moreover, would be returned to the orphans, since a *muḍāraba* contract would set aside a prefixed portion of the profit for the person providing the labor.

Another conclusion that can be draw from the opposing sets of traditions in Sections A and B above is that judges do not appear to involved in the process of separating *zakāt* from the property of orphans. Tradition A11, for example, portrays Ibn 'Umar as being approached to supervise orphans' property, and there is no indication that this is part of an official job or judicial post. Similarly, the instructions in Traditions B1 and B9 appear to be instructions for private individuals. The clearest example of the private nature of guardianship of orphans' property is B5, which reports that al-Baṣrī was responsible for his nephews' property and chose not to purify their wealth. It will be seen later in this chapter and in the following one that this conclusion is supported not only by the other reports in the *Muṣannaf* but also by the early biographical literature of judges which allows us to date the transfer of this power to the judiciary. In Chapter Four, moreover, we will see that the judges' power over orphans' property and *zakāt* in the Mamlūk period gave rise to specific litigation attempting to thwart this.

Turning to the set of traditions in Section C, it can be observed that these traditions in favor of treating the consumption of orphans' property by the guardian as a loan are all of Iraqi origin, and no opposing opinion is cited in the *Muṣannaf,* indicating that this was a popular position in Kufa and Basra. One of these traditions cites the clause of Q 4:6 instructing the

[408] Al-Muttaqī al-Hindī, 15/77; Al-Bayhaqī 6/3; al-Māwardī, *al-Ḥāwī,* 3/153.

transfer of property to the orphans to be witnessed,[409] and two of these traditions cite the clause of the same verse that appears to give license to poor guardians to consume orphans' wealth according to *al-ma'rūf*.[410] Since this latter word can have a range of meanings, including "what is approved by reason," "the law," "the right," "the good," or even "with moderation," it is unsurprising that early Muslims disagreed about the conditions under which a poor guardian could avail themselves of an orphan's property.[411] As Michael Cook noted in his study of the related phrase, *al-amr bi'l-ma'rūf wa'l-nahī 'an al-munkar* ("commanding right and forbidding wrong"), the Qur'ānic exegetes' "glossing of the term 'right' (*ma'rūf*)…vary widely with the context, yielding a proliferation of meanings."[412] Within the context of Q 4:6, al-Ṭabarī cites the following five groups of opinions about the meaning of *bi'l-ma'rūf*:

(1) Orphans' property can be consumed in need, but it is a loan.
(2) The guardian can only eat of the orphan's food with the tips of their fingers, but cannot clothe themselves from the orphan's property
(3) The guardian can eat enough to stave off their hunger and to clothe oneself to hide their privates (*al-'awra*).
(4) The guardian may eat the fruits of the orphans' property and drink the milk of their livestock in return for taking care of them, but as for silver and gold, the guardian shall not take anything of them except as a loan.
(5) It is permissible for the poor guardian to consume any of the property as long as they are taking care of it, even if this depletes the property. The guardian is not required to repay it.[413]

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[409] "And when you deliver up their fortune to the orphans, have (it) witnessed in their presence."

[410] "Whosoever (of the guardians) is rich, let him abstain generously (from taking the property of orphans); and whosoever is poor let him take thereof reasonably'— borrow from it and trade with it."

[411] Lane, 1/2014.

[412] Michael Cook, *Commanding Right and Forbidding Wrong in Islamic Thought* (Cambridge: Cambridge University Press, 2001), 25.

[413] Al-Ṭabarī, *Tafsīr al-ṭabarī*, 6/411-426. Al-Ṭabarī's own opinion falls into the first group.

The transmitters of the twenty-four reports that constitute the first group of opinions—that *bi'l-ma'rūf* means "as a loan,"—are overwhelmingly Kufan or Basran.[414] While Iraqis do transmit

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[414] (1) Abū Kurayb (d. 247 or 248 A.H.), Kufan (al-Dhahabī, *Siyar,* 11/394-396) < Wakī', Kufan < Sufyān al-Thawrī, Kufan and Isrā'īl b. Yūnus (d. 160-162 A.H.), Kufan (*Ibid*. 7/355-361) < Abū Isḥāq al-Sabī'ī (d. 127), Kufan (*Ibid*. 5/392-401) < Ḥāritha b. Muḍarrab (d. unknown), Kufan (Ibn Ḥajar, *Tahdhīb al-tahdhīb*, 2/166-167). (2) Abū Kurayb (Kufan) < Ibn 'Ulayya (Basran) < Zuhayr b. Mu'āwiyya (d. 173 A.H.), Kufan (al-Dhahabī, *Siyar,* 8/181) < al-'Alā' b. al-Musayyab (d. unknown), Kufan (*Ibid*. 6/339) < Ḥammād b. Abī Sulaymān, Kufan < Sa'īd b. Jubayr, Kufan < Ibn 'Abbās, Basran and Meccan. (3) Muḥammad b. 'Abd al-A'lā (d. 245 A.H.), Basran (Ibn Ḥajar, *Tahdhīb al-tahdhīb*, 9/289 < al-Mu'tamir b. Sulaymān al-Taymī (d. 187 A.H.), Basran (al-Dhahabī, *Siyar*, 8/477-479) < Yūnus b. 'Ubayd (d. 139 or 140 A.H.), Basran (*Ibid*. 6/288-295) < Ibn Sīrīn, Basran < 'Abīda al-Salmānī, Kufan. (4) Ya'qūb b. Shayba (d. 262 A.H.), Basran (*Ibid*. 12/476) < Ibn 'Ulayya, Basran < Salama b. 'Alqama, Basran < Ibn Sīrīn, Basran < 'Abīda al-Salmānī, Kufan. (5) al-Ḥasan b. Yaḥyā (d. 263 A.H.), Jurjānī and Baghdadī (Ibn Ḥajar, *Tahdhīb al-tahdhīb*, 2/324 < 'Abd al-Razzāq al-Ṣan'ā'ī, Yemeni < Hishām b. 'Urwa, Medinan < Ibn Sīrīn, Basran < 'Abīda al-Salmānī, Kufan. (6) Ya'qūb b. Shayba, Basran < Hushaym b. Bashīr, Baghdādī < Salama b. 'Alqama, Basran < Ibn Sīrīn, Basran < 'Abīda al-Salmānī, Kufan. (7) al-Ḥasan b. Yaḥyā, Jurjānī and Baghdadī < 'Abd al-Razzāq al-Ṣan'ā'ī, Yemeni < Ma'mar b. Rāshid (d. 153 A.H.), Basran settled in Yemen (al-Dhahabī, *Siyar,* 7/5-18) < Ayyūb a-Sakhtiyānī, Basran < Ibn Sīrīn, Basran < 'Abīda al-Salmānī, Kufan. (8) al-Muthanna b. Ibrāhīm (d. unknown), location unknown [See Akram b. Muḥammad Ziyāda al-Fālūjī al-Atharī, *Mu'jam shuyūkh al-ṭabarī* (Cairo: Dār Ibn 'Affān, 2005), 420] < Abū Ṣāliḥ 'Abd Allāh al-Juhanī (d. 223), Egyptian (al-Dhahabī, *Siyar,* 10/405-415) < Mu'āwiya b. Ṣāliḥ (d. 158 A.H.), Andalusian (al-Dhahabī, *Siyar,* 7/158-163 < 'Alī b. 'Abd Allāh b. al-'Abbās (d. 118 A.H.), Medinan (Ibn Ḥajar, *Tahdhīb al-tahdhīb*, 7/357-358) < Ibn 'Abbās, Basran and Meccan. (9) al-Ḥasan b. Yaḥyā, Jurjānī and Baghdadī < 'Abd al-Razzāq al-Ṣan'ā'ī, Yemeni < Ma'mar b. Rāshid, Basran settled in Yemen < Ayyūb a-Sakhtiyānī, Basran < Ibn Sīrīn, Basran < 'Abīda al-Salmānī, Kufan. (10) Muḥammad b. Sa'd al-'Awfī (d. 276), Baghdad < his father < his uncle < his father < his father. It is unclear where these people lived [see al-Khaṭīb al-Baghdādī, *Tārikh baghdād*, ed. Bashshār 'Awwād Ma'rūf (Beirut: Dār al-Gharb al-Islāmī, 2002), 3/268; c.f. Heribert Horst, "Zur Überlieferung im Korankommentar aṭ-Ṭabarīs," *Zeitschrift der Deutschen Morgenländischen Gesellschaft* 103, no. 2 (1953), 294, where the author confuses this Ibn Sa'd with his namesake, Ibn Sa'd, the author of the famous *al-Ṭabaqāt al-kubrā*. (11) Abū Kurayb, Kufan < Ibn Idrīs, Kufan < Hushaym b. Bashīr, Baghdādī < Ḥajjāj b. Arṭāh, Kufan < Sa'īd b. Jubayr, Kufan. (12) Ya'qūb b. Ibrāhīm (d. 208 A.H.), Medinan and Baghdādī (al-Dhahabī, *Siyar,* 9/491-492 < Hushaym b. Bashīr, Baghdādī < Ḥajjāj b. Arṭāh, Kufan < Sa'īd b. Jubayr, Kufan. (13) Ya'qūb b. Shayba, Basran < Ibn 'Ulayya, Basran < Hishām al-Dastuwā'ī (d. 154 A.H.), Basran (al-Dhahabī, *Siyar,* 7/149-155) < Ḥammād b. Abī Sulaymān, Kufan < Sa'īd b. Jubayr, Kufan. (14) Muḥammad b. al-Muthanna (d. 252 A.H.), Basran (Ibn Ḥajar, *Tahdhīb al-tahdhīb*, 9/425-426) < Muḥammad b. Ja'far al-Hudhalī (d. 194 A.H.), Basran (*ibid*. 9/96-98) < Shu'ba, Basran < Ḥammād b. Usāma, Kufan < Sa'īd b. Jubayr, Kufan. (15) Abū Aḥmad Ḥamīd b. Zanjuwayh (d. 249 or 251 A.H.), Khurāsānī but traveled widely (al-Dhahabī, *Siyar,* 12/19-21; al-Khaṭīb al-Baghdādī, 9/24) < Ḥakkām b. Salm (d. 190 A.H.), Baghdādī (al-Dhahabī, *Siyar*, 9/88) < 'Amr b. Abī Qays (d. unknown), Kufan (Ibn Ḥajar, *Tahdhīb al-tahdhīb*, 8/93-94) < 'Aṭṭā' b. al-Sā'ib (d. 136 A.H.), Kufan (al-Dhahabī, *Siyar,* 6/110-114) < al-Sha'bī, Kufan. (16) Ḥamīd b. Mas'ada (d. *ca.* 240 A.H.) Basran (Ibn Ḥajar, *Tahdhīb al-tahdhīb*, 3/49) < Bishr b. al-Mufaḍḍal al-Raqqāshī (d. 186 A.H.), Basran (al-Dhahabī, *Siyar*, 9/36) < Shu'ba, Basran < Ibn Abī Nujayḥ, Meccan < Mujāhid, Meccan and Kufan. (17) Ibn al-Muthanna, Basran < Muḥammad b. Ja'far Basran < Shu'ba, Basran < Ibn Abī Nujayḥ, Meccan < Mujāhid, Meccan and Kufan.

the other opinions, no transmitter from the Hijaz after the first generation is mentioned in the *isnāds* of group number one. The evidence from Mālik's *Muwaṭṭa'* also suggests that the poor guardian's consumption of his orphan's property was not considered a loan. Although he does not discuss this opinion directly, the recension of the *Muwaṭṭa'* transmitted by Yaḥyā b. Yaḥyā al-Maṣmūdī (d. 234/849) includes the following tradition:[415]

> Mālik related to me on the authority of Yaḥyā b. Sa'īd, who said: I heard al-Qāsim b. Muḥammad say, "A man came to 'Abd Allāh b. 'Abbās and said to him, 'I have an orphan who has camels. Should I drink the camels milk?.' Ibn al-'Abbas replied to him, 'If you seek out stray camels, feed the mangy ones, mend their watering trough, give them water when they need it, then drink without either harming their offspring or depleting their milk."[416]

This tradition supports the third group of opinions in al-Ṭabarī's *Tafsīr* that hold that the guardian can consume some of the orphans' property (here, limited to milk) as long as the guardian is scrupulous in his care of the orphan's camels. Although Mālik did not elaborate here

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(18) Muḥammad b. 'Amr b. al-'Abbās (d. 249 A.H.), Basran (al-Atharī, 556) < Abū 'Āṣim al-Ḍaḥḥāk b. Makhlad (d. 212 A.H.), Basran (al-Dhahabī, *Siyar*, 9/480-483) < 'Īsā b. Maymūn Ibn Dāya (d. 164 A.H.), Meccan < Ibn Abī Nujayḥ, Meccan < Mujāhid, Meccan and Kufan. (19) al-Ḥasan b. Yaḥyā, Jurjānī and Baghdādī < 'Abd al-Razzāq al-Ṣan'ā'ī, Yemeni < Sufyān al-Thawrī, Kufan < Ibn Abī Nujayḥ, Meccan < (a) Mujāhid, Meccan and Kufan and (b) Ḥammād b. Abī Sulaymān, Kufan < Sa'īd b. Jubayr, Kufan. (20) Ya'qūb b. Ibrāhīm, Medinan and Baghdādī < Hushaym b. Bashīr, Baghdādī < Ḥajjāj b. Arṭāh, Kufan < Mujāhid, Meccan and Kufan. (21) Ibrāhīm b. Wakī' (d. unknown), location unknown < Wakī', Kufan < Sufyān al-Thawrī, Kufan < 'Āṣim b. Abī al-Najūd al-Asadī, Kufan < Abū Wā'il, Kufan. (22) Muḥammad b. Ḥumayd al-Rāzī (d. 248 A.H.), Rāzī (*ibid*. 11/503-506) < Jarīr b. 'Abd al-Ḥamīd (d. 188 A.H.), Kufan (*ibid*. 9/9-18) < Manṣūr b. al-Mu'tamir, Kufan < al-Ḥakam b. 'Utayba, Kufan < Sa'īd b. Jubayr, Kufan. (23) Ya'qūb b. Shayba, Basran < Ibn 'Ulayya, Basran < Ibn Abī Nujayḥ, Meccan < Mujāhid, Meccan and Kufan. (24) Abū Zayd Sa'īd b. al-Rabī' (d. 211 A.H.), Basran (*ibid*. 9:496-497) < Sufyān al-Thawrī, Kufan < Ibn Abī Nujayḥ, Meccan < Mujāhid, Meccan and Kufan.

[415] On Ibn Yaḥyā's life and role in the transmission of Mālik's *fiqh* in North Africa and Andalusia, see Burhān al-Dīn Ibn Farḥūn, *al-Ḍībāj al-mudhahhab fī ma'rifat a'yān al-madhhab,* ed. Muḥammad al-Aḥmadī (Cairo: Dār al-Turāth li'l-Ṭab' wa'l-Nashr, 2011), 2/352-353 and Mālik b. Anas, *al-Muwaṭṭa'*, ed. Muḥammad Fu'ād 'Abd al-Bāqī (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1985), x.

[416] *Ibid*. 2/934. See also al-Bayhaqī, 6/6, 465.

on the tradition, it is likely that this extended to parallel cases (i.e., eating the fruit of the orphans' orchards if the guardian takes care of them).[417]

Turning to Sections D and E, it can be seen that the use of the term *ḥajr* in these early traditions does not refer to the case of the orphan but rather either to a person placing his slave under interdiction or a free (adult) person. The traditions in section D are particularly revealing of how this term was first understood. Tradition D1 is a report that Caliph 'Umar II declared that any person who traded with a person placed under legal interdiction would forfeit his property. It is probable that this means that that person was liable for all losses they might incur, although the tradition may be referring to an actual sanction against the individual. We also learn that Ibrāhīm al-Nakha'ī and Ḥasan al-Baṣrī allowed slaves to be placed under *ḥajr*, but Ibn Sīrīn apparently did not see any validity to *ḥajr*. The placement of this tradition in Section D suggests that Ibn Sīrīn did not believe *ḥajr* to be a proper legal tool even for the case of slaves, otherwise one would expect this tradition to be grouped with the other anti-*ḥajr* traditions in Section E. This latter section indicates that Ibrāhīm al-Nakha'ī did not allow *ḥajr* on free adults, whereas Shurayḥ and Ibn 'Abbās appear to recognize the legitimacy of this. In the case of Ibn 'Abbās, however, it is unclear if this is only allowable in the case of a man of advanced years.

These traditions about *ḥajr* indicate that the debate was primarily occurring in the cities of Kufa and Basra, as every tradition cites an Iraqi authority (even Ibn 'Abbās moved to Kufa and became a major source for Kufan exegesis and legal traditions.)[418] The debate was also clearly understood as conceptually related to a master's authority over slaves. Later Muslim

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[417] C.f. Abū Bakr Ibn al-'Arabī, *Aḥkām al-qur'ān*, ed. Muḥammad 'Abd al-Qādir 'Aṭṭā (Beirut: Dār al-Kutub al-'Ilmiyya, 2003), 422-423.

[418] L. Veccia Vaglieri, "'Abd Allāh b. al-'Abbās," *EI*^{2}.

jurists would consider slavery (*al-riqq*) as one of the legal causes for *ḥajr*, but, as just seen, it would appear that even in the case of slaves early Muslim jurists did not unanimously accept that the master's power over his slave was a case of *ḥajr*.[419] As Tradition E5 also notes, the early debate about *ḥajr* of slaves was closely related to the issue of *al-'abd al-ma'dhūn*, or the slave who has received permission (to trade.).[420] The Sunni schools of law all accepted this as a valid legal act, either for a specific purpose or as an absolute permission to trade, and it was seen as a temporary lifting of the legal incapacity (*ḥajr*) of the slave.[421] In other words, later scholars saw *ḥajr* as the default legal status of a slave, whereas this does not seem to be the case in the first two centuries.

From the analysis of the traditions about orphans and *ḥajr* in the *Muṣannaf* of Ibn Abī Shayba, it is clear that positions within the debates discussed above are often distributed regionally. *Ḥajr*, moreover, appears to be a legal concept whose remit was limited to the circles of Iraqi scholars in the 2nd/8th centuries. The word as a legal concept does not appear in the Qur'ān, and the debate among Iraqi scholars themselves suggests that the use of the word *ḥajr* was relatively novel. The regional discrepancy that we have noticed raises several questions. What is the possible origin of this term, and what legal practice did it refer to as it was being introduced into legal language? What alternative legal concepts were used by Medinan scholars if not *ḥajr*? Finally, what might account for the ultimate acceptance of the term and concept by all four of the Sunni post-formative schools of law? It is to these questions that we turn next.

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[419] See, for example, Shihāb al-Dīn al-Qarāfī, *al-Dhakhīra*, ed. Muḥammad Ḥajjī (Beirut: Dār al-Gharb al-Islāmī, 1994), 8/229.

[421] Ibn Qudāma, 7/193.

Evidence about the Development of *Ḥajr* from Early Texts on *Fiqh*

Medinans and Early Mālikīs

Mālik's *Muwaṭṭa'* is the best evidence we have of the legal practice and jurisprudence of Medinan scholars in the 2nd/8th century. It is the oldest extant fixed text on Islamic law, and it is organized according to topical chapters that cite both *ḥadīth* and considered opinion (*ra'y*).[422] The determination of law is not, however, entirely reliant on these sources, but is, rather, above all a result of the normative *'amal*, or praxis, of Medina. It is by means of this diverse yet authoritative praxis that received texts are interpreted, hence the title of the work: *al-Muwaṭṭa'* ("the well-trodden path").[423]

There is only a single case in the *Muwaṭṭa'* in which the term *maḥjūr 'alayh* (placed under legal interdiction) is used, and there it does not refer to a person but to the property of a slave.[424] The other derivatives of the term *ḥajr* are never mentioned. This is not, however, because topics related to these concepts are entirely ignored in the *Muwaṭṭa*. We already saw that Mālik includes a tradition about a guardian consuming part of the orphan's property, but this is in a general section on the ethics of food and drink. Similarly, his discussion of the case of a man who becomes bankrupt after buying a slave or animal that gives birth makes no mention of *ḥajr*,

[422] Umar F. Abd-Allah Wymann-Landgraf, *Mālik and Medina: Islamic Legal Reasoning in the Formative Period* (Leiden and Boston: Brill, 2013), 52-65.

[423] *Ibid*. 75, 110.

[424] Mālik, 2/797.

even though bankruptcy was commonly perceived as a form of *ḥajr* in post-formative *fiqh* and the two topics were regularly placed adjacent to each other.[425]

The foundational text of early Mālikī law compiled by Saḥnūn b. Sa'īd (d. 854) provides an important glimpse into how Mālik discussed cases of legal incapacity and the way in which *ḥajr* entered into Mālikī legal discourse as a widely-accepted legal term. Saḥnūn was the son of a Syrian soldier and was born in North Africa at the end of the eighth century A.D. where he began his legal training before traveling to the Islamic East in search of *'ilm,* eventually teaching in Egypt and Kairouan.[426] His compilation of Mālik's legal opinions, *al-Mudawwana,* is traditionally considered to be the result of a conversation between the scholar and his student Ibn al-Qāsim.[427] However, there is some evidence that the opinions attributed to Mālik are the result of other teachers' or authors' contributions.[428] Despite some previous scholars' misgivings about the authenticity of the *Mudawwana*'s attribution to Saḥnūn, evidence from a manuscript in Kairouan clearly indicates that Saḥnūn read the text with his students in 850 A.D.[429] The text, therefore, allows us to witness Mālikī legal scholarship as it was developing in the first half of the 9th century A.D.

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[425] For adjacency in Mālikī texts, see Abū 'Abd Allāh al-Kharashī, *Sharḥ al-kharashī 'alā mukhtaṣar khalīl* (Cairo: al-Ṭab'a al-Kubrā al-Amīriyya bi-Būlāq, 1900), 5/263-307; Abū al-Walīd Ibn Rushd, *Bidāyat al-Mujtahid wa-nihāyat al-muqtaṣid*, ed. Mājid al-Ḥamawī (Beirut: Dār Ibn Ḥazm, 1995), 1443-1466); al-Qarāfī, *al-Dhakhīra,* 8/157-255. For *iflās* as a cause of *ḥajr*, see al-Kharashī 5/263.

[426] Jonathan Brockopp, "Contradictory Evidence and the Exemplary Scholar: the Lives of Sahnun b. Sa'id (d. 854)," *International Journal of Middle East Studies* 43, no. 1 (2011), 115-132.

[427] Abū 'Abd Allāh Ibn al-Qāsim (d. 191/806) was a luminary scholar of his time who studied with both al-Layth b. Sa'd (d. 175/791) in Egypt and Mālik in Medina. He was renowned for his knowledge of *buyū'*, or business transactions. See Brockopp, "Ibn al-Qāsim," *Encyclopaedia of Islam, THREE*.

[428] Brockopp, "Contradictory Evidence," 120, n. 35.

[429] *Ibid*. 118;

Discussions of those categories of people who would come to be understood as subject to *ḥajr* are scattered throughout the *Mudawwana*. Studying them allows us to observe a process of linguistic reinterpretation in which *ḥajr* was only beginning to be applied as a standard legal concept. The absence of a chapter on *ḥajr* should come as no surprise—Brockopp has described this text as "an utterly impractical text" due to its avoidance of a clear exposition of law.[430] Yet the apparently haphazard organization of the text is nevertheless useful as it also presents to the reader "a reflection of developing thought about rules."[431] In the case at hand, it is possible to see how Saḥnūn, or possibly in some cases a later editor of the text, glossed Mālik's discussion of people without full legal capacity as a case of *ḥajr*.

Instead of *al-maḥjūr ʻalayh*, the *Mudawwana* often uses the term *al-mūlā ʻalayh*. For example, in a discussion on whether a contract that a guardian of an orphan entered into on behalf of the orphan is binding on the orphan after reaching puberty, the term *al-mūlā ʻalayh* is used where a student of post-formative *fiqh* would expect *al-maḥjūr ʻalayh*.[432] Later in the same passage, both terms are used together:

> Others said: It is not right for the testamentary guardian (*waṣī*) of the person under guardianship (*al-mūlā ʻalayh*) to rent these things of his for several years, but it is possible for him to do that for a year or something similar because it is expected that he will come to his reason any day. Renting for a year or something similar is the way people enter into rental agreements between themselves, but several years is an extraordinary affair that does not accord with the way people enter into rental agreements between themselves. It is not permitted for him (i.e., the testamentary guardian) to rent out his ward's land, houses, slaves or herds except according to the way the majority of

[430] Brockopp, "Saḥnūn's *Mudawwanah* and the Piety of the '*Sharīʻah*-Minded,'" in *Islamic Law in Theory: Studies on Jurisprudence in Honor of Bernard Weiss*, eds. Kevin Reinhart and Robert Gleave (Leiden: Brill, 2014), 137.

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

[432] Saḥnūn b. Saʻīd, *al-Mudawwana al-kubrā* (Riyad: Wizārat al-Shu'ūn al-Islāmiyya wa'l-Awqāf wa'l-Daʻwa wa'l-Irshād, 1906), 11/98.

> people do this among themselves since it is expected that he will come to his reason any day. But if the testamentary guardian rented out his property for many years and then the other came to his reason afterwards, he has in effect interdicted his property (*kān qad ḥajar ʻalayh mālah*) after he came to his reason, so this is not permitted for him, and he (the ward) has the right to negate it.[433]

Here we see that the term *mūlā ʻalayh*—which had been employed previously in the discussion when Saḥnūn purported to report Mālik's opinion—is equated with a form of *ḥajr*. Other examples of this abound. Similarly, in a section on the case of a person under legal interdiction who receives property as a gift or via commerce, Saḥnūn asks Ibn al-Qāsim if this new property "becomes part of the interdicted property (*al-māl al-maḥjūr ʻalayh*). He responds: "Yes, because Malik said, 'If a *safīh* traded and profited from it then he is interdicted in this property (*yuḥjar ʻalayh fīh*).'" While it appears that this is a direct quotation from Mālik, and therefore evidence that he used this terminology, the following sentence places this initial assumption in doubt:

> "We had indeed asked Mālik regarding the *mūlā ʻalayh* whether his guardian (*walī*) should give his property to him in order for him to trade with it as a way to test him, thereby allowing him to enter into commerce and acquire debt. (He said) that he is not liable to pay for any of this debt, neither with property currently in his possession nor with anything else which is withheld from him." He continued, "So we asked Mālik, 'But he was permitted to enter into commerce?' He (Mālik) replied, "'He is *mūlā ʻalayh*, and nothing of that debt passes to him.'"[434]

The report of the exchange with Mālik serves as an explanation for why Ibn al-Qāsim reported that Mālik considered gifts or profits acquired by an interdicted person as still subject to the interdiction. What first appeared as a direct quotation is revealed to be a conclusion about Mālik's position, attributed directly to him. The terminology in the actual exchange reported between Ibn al-Qāsim and Mālik turns out to not invoke *ḥajr* or its derivatives whatsoever but

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[433] *Ibid*.

[434] *Ibid*. 13/71.

uses the term *mūlā ʻalayh*.[435] One other case in which Mālik is reported to refer to interdicted property (*al-māl al-maḥjūr ʻalayh*) may also be case of indirect reporting.[436] It is interesting that even in these two cases, Mālik is not reported to have considered the *person* to be *maḥjūr ʻalayh* but rather the *property*, just as was seen in the case of *al-Muwaṭṭaʼ*.

It appears that Saḥnūn was quite comfortable using the terms *maḥjūr ʻalayh* and *mūlā ʻalayh* interchangeably, and most of the uses of the former term in the *Mudawwana*, excluding the section headings which could be a later interpolation, are used by him as part of a question for his teachers.[437] This is even the case in an exchange between Saḥnūn and Ibn al-Qāsim in which the former asks about which free adults are subject to legal interdiction. In Ibn al-Qāsim's response, no quotation of Mālik's position uses the term *ḥajr* or its derivatives.[438] The only place where Mālik does seem to use the term unequivocally in this work is in the case in which a person goes to a *qāḍī* to place an adult under *ḥajr*, even if it is his own son.[439] If this is a direct quotation from Mālik, it provides critical support for where the term may have first emerged to refer to people, as will be discussed momentarily.

It would seem, therefore, that *al-mūlā ʻalayh* was used by Mālik to refer to free adults under the guardianship of another person due to an impediment preventing the person from exercising full legal capacity. While *maḥjūr ʻalayh* was also used by Mālik, the only example of his use of the term refers to property and not persons. Orphans, however, are never described by

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[435] For a similar legal discussion that uses the term *al-mūlā ʻalayh* exclusively, see *Ibid*. 13/ 72.

[436] *Ibid*. 13/73.

[437] *Ibid*. 13/72-73; 15/32-33

[438] *Ibid*. 13/74.

[439] *Ibid*. 13/75.

Mālik as subject to *ḥajr*, although their cases are clearly seen as similar to the *sufahā'*, who are discussed alongside the orphans.[440] This juxtaposition of the *sufahā'* and orphans (and, of course, minors more generally, orphans being the usual test case for the rights and duties of all minors) is, it will be remembered from Chapter 1, Qur'ānic in origin if not pre-Islamic. What the *Mudawwana* shows is a middle-stage in Islamic legal terminology as scholars began juxtaposing orphans and the *sufahā'* with other cases deemed similar in some aspect. For example, the testamentary guardian was not deemed competent to distribute an inheritance among adult but absent inheritors. Instead, this was stated to require the intervention of *al-sulṭān* (i.e., any representative of the state, including the judge) who should decide in whose hand it should be left for safekeeping.[441] This case is discussed in the same section as the case of selling orphans' real estate, indicating that these forms of trusteeship were seen as similar. This treatment of absentee property alongside orphans' property anticipates the establishment of the *mūda' al-ḥukm* which acted as a treasury for both of these properties, as will be seen in the next two chapters of this dissertation.

Further evidence that Mālik and his students used the term *mūlā 'alayh* rather than *maḥjūr 'alayh* to describe people can be found in the 4th/10th century text by the prolific author and influential teacher and jurist-author Abū Muḥammad 'Abd al-Allāh b. Abī Zayd al-Qayrawānī (d. 386/996), *al-Nawādir wa'l-ziyādāt 'alā mā fī al-mudawwana min ghayrihā min al-ummahāt*, a North African legal compendium that, as its name suggests, preserves legal

[440] *Ibid*. 11/98, 12/149, 13/70-71, 14/186-187, 15/20, 25.

[441] *Ibid*. 14/187.

opinions not found in *al-Mudawwana*.[442] His biographer al-Qāḍī ʻIyāḍ informs us that this text, along with his abridgment of the *Mudawwana*, constituted the primary resource (*al-muʻawwal*) for Mālikī *fiqh* in North Africa at the time he wrote in the first half of the 5th/12th century.[443] It is a valuable indication, therefore, of Mālikī legal terminology at the time, and it also preserves the voices of generations of earlier scholars.

In a section on the validity of the *safīh*'s sales and purchases, for example, al-Qayrawānī writes:

> ʻĪsā[444] said about the *safīh*: he can sell before he is placed under guardianship (*qabl an yūlā ʻalayh*). Ibn Kināna[445] and Ibn Nāfiʻ[446] and all of Mālik's associates said: his sales are valid until he is placed under guardianship (*ḥattā yūlā ʻalayh*). The exception is Ibn al-Qāsim, who said: his sales and his payments are not permissible, because he is still under a guardianship as soon as he becomes *safīh* since the state is the guardian of whoever does not have a guardian (*al-sulṭān walī man lā walī lahu*), so he is under its guardianship (*wilāyatih*) until he is placed under the guardianship of a guardian who takes care of him (*ḥattā yūlā ʻalayh walīyan yaqūm bi-amrih*).[447]

In later Mālikī texts, this discussion of the *safīh* would be a clear-cut example of someone subject to *ḥajr*, but no use of the term appears in this passage. As with the *Mudawanna*, we see in

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[442] For al-Qayrawānī's biography, see Abū Muḥammad al-Qayrawānī, *al-Nawādir wa'l-ziyādāt ʻalā mā fī al-mudawwana min ghayrihā min al-ummahāt*, ed. Muḥammad al-Amīn Būkhubza (Beirut: Dār al-Gharb al-Islāmī, 1999), 7-37; al-Qāḍī ʻIyāḍ b. Mūsā, *Tartīb al-madārik wa-taqrīb al-masālik li-maʻrifat aʻlām madhhab mālik*, ed. Muḥammad Sālim Hāshim (Beirut: Dār al-Kutub al-ʻIlmiyya, 1998), 2/141-145; Ibn Farḥūn, 1/427-430.

[443] Al-Qāḍī ʻIyāḍ, 2/142

[444] ʻĪsā b. Dīnār (d. 212/827-828) was an Andalusian scholar who studied with Ibn al-Qāsim and considered to have been the highest legal authority in Cordoba during his time, although he died in Toledo (*Ibid.* 1/372-375; Ibn Farḥūn, *al-Dībāj al-mudhahhab*, 2/64-65).

[445] ʻUthman b. ʻĪsā b. Kināna (d. 185/801-802 or 186/802) was one of the "*fuqahā'* of Medina" who studied with Mālik and is said to have inherited his study-circle after Mālik's death (Al-Qāḍī ʻIyāḍ 1/164.

[446] ʻAbd al-Allāh b. Nāfiʻ al-Ṣā'igh (d. 186/802) was a Medinan and a dedicated student of Mālik. He was also Saḥnūn's teacher (Ibn Farḥūn, *al-Dībāj al-mudhahhab* 1/409-410).

[447] Al-Qayrawānī 10/92.

al-Qayrawānī's text a process of translating terms into the discourse of *ḥajr*. For example, after Saḥnūn's statement "the actions of the *safīh* who has no guardian (*lā waṣiyy 'alayh*)," al-Qayrawānī glosses this statement: "he means: there is no interdiction on him (*ya'nī lā ḥajr 'alayh*)."[448] It is clear that in the case of the *safīh*, if not the orphan, Mālikīs had begun to accept *ḥajr* as the standard legal term for the restriction of legal capacity. For example, al-Qayrawānī preserves the following exchange:

> It was asked, "What about the adult *safīh* who has no father and no testamentary guardian (*waṣiyy*), or someone who has not been declared mentally sound (*ghayr murashshad*), should they be placed under interdiction (*a-yuḥjar 'alayh*)?" Ashhab[449] said, "I don't think so, except for the one who is obviously profligate with his money, or in the case of one who cannot restrain himself."[450]

Nevertheless, al-Qayrawānī does not use *ḥajr* or cite an authority who uses it for the case of the orphan. For these individuals, the term still remains *mūlā 'alayh*. It seems, then, that what might be called the "natural legal incapacity" of an orphan (and minors by extension) was even at this stage not regularly considered to be a case of *ḥajr* for many Mālikīs.

The evidence from the *Muwaṭṭa'*, the *Mudawwana* and *al-Nawādir wa'l-ziyādāt* indicates that *ḥajr* was not used as a legal term with any regularity by Mālik to describe a person's legal status but was used with increasing frequency by his students and followers. This supports the evidence from the *Muṣannaf* of Ibn 'Abī Shayba that this term was introduced first in Iraq into legal discourse. Since the term was used with a greater frequency in Kufan and proto-Ḥanafī sources, it is likely that the increased use of it in the *Mudawwana* is the result of the "cross-

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[448] *Ibid*. 10/92.

[449] Abū 'Amr al-Ashhab (d. Rajab 204/819-820) was a student and transmitter of Mālik who is said to have assumed the leadership of the scholars in Egypt after Ibn al-Qāsim's death (Al-Qāḍī 'Iyāḍ 1/259-263).

[450] *Ibid*. 10/97.

fertilization" of the Medinan legal tradition with that of the Kufans, a phenomenon that has been previously commented on by other scholars.[451] In the next section, early Ḥanafī texts will be analyzed in order to get a better understanding of how this term was first used. One piece of evidence from the Mālikī texts about this process is the use of the term to refer specifically to an action by a master over his slave or that of a judge over the property of an individual. Is it possible, then, that *ḥajr* first referred to specific judicial ruling rather than the natural legal incapacity of minors and orphans?

Kufans and Early Ḥanafīs

The Ḥanafī school takes its name from the Kufan scholar Abū Ḥanīfa b. Thābit al-Nu'mān, the son of a successful silk merchant who is said to have begun his studies in theology (*'ilm al-kalām*) but eventually gravitated towards the study circles where *fiqh* was discussed.[452] The methodology of the Iraqis took the form of a dialectic method of debate, in which oral debates of successive propositions and their counter-positions served to extend assumptions held by the interlocuters into hypothetical situations until one of their positions was deemed inconsistent.[453] This reliance on a particular form of *ra'y* to probe legal questions does not mean that traditions, or *ḥadīth*, were unimportant for the intellectual circles in Kufa and Basra. Rather, they were regional in scope. Whereas Mālik's *Muwaṭṭa'* was grounded in the normative practice of Medina, the jurisprudence of Abū Ḥanīfa (d. 150/767) was anchored in the "authoritative

[451] Wymann-Landgraf, 68-70 (additional sources cited therein).

[452] Muḥammad Abū Zuhra, *Abū ḥanīfa: ḥayātuh wa-'aṣruh—ārā'uh wa-fiqhuh*, 2nd ed. (Cairo: Dār al-Fikr al-'Arabī, 1955), 22-29.

[453] El Shamsy, *Canonization*, 23-25.

precedent of prominent Kufa-based Companions, particularly ʻAlī b. Abī Ṭālib and Ibn Masʻūd.[454] Although Abū Ḥanīfa gave his name to the Ḥanafī school which emerged out of the lively legal circles in of Iraq in the 2nd/8th century, the school also relied on the positions and writings of the other legal scholars from the region, with particular authority given to Zufar (d. 158/774), Abū Yūsuf (d. 182/798) and al-Shaybānī (d. 187/802).[455] As with many other issues, proto-Ḥanafīs (or semi-Ḥanafīs, as Tsafrir calls them) did not all agree on the legitimacy and permittable extent of *ḥajr*. We have already seen above that *ḥajr* was controversial in Iraq, with scholars' opinions ranging from outright rejection, to seeing it as permissible in the case of slaves, or considering it permissible even in the case of free individuals. The evidence from al-Shaybānī's *Kitāb al-aṣl* and Abū Yūsuf's works reveals that *ḥajr* was controversial because of its implications about the ability of the state to restrict the actions of a free Muslim.

Abū Yūsuf refers explicitly to the practice of *ḥajr* in two places: once in *Kitāb al-kharāj* in reference to slaves and once in *Ikhtilāf abī ḥanīfa wa-ibn abī laylā*, which refers to the legal practice of *ḥajr* in the case of a slave and in the case of bankruptcy (*al-taflīs*). The first case parallels Tradition E5 discussed above:

> Abū Yūsuf said: "If a slave who has not been given permission to trade or has been interdicted (*ghayr ma'dhūn lahu fī al-tijāra aw maḥjūr 'alayh*) admits to killing a man intentionally, to defamation, to theft that requires a punishment of amputation, or to fornication, then his admission of that is to be accepted from him because that (i.e., his legal incapacity) inheres in his self, but defamation, theft and fornication inhere in his body, so he is not subject to a disqualifying accusation regarding these. Rather, he is subject to a disqualifying accusation in regards to property and to felonies which do not result in physical punishment, for if his master believed what he said about those, then his master would be told, 'Pay for it, pay his ransom, cover his debt, or sell him to cover

[454] El Shamsy, *Canonization*, 47.

[455] Nurit Tsafrir, *The History of an Islamic School of Law: The Early Spread of Hanafism* (Cambridge: Islamic Legal Studies Program, Harvard Law School, 2004), x.

it.’”[456]

Abū Yūsuf’s assumption in this argument is that a master who did not give his slave permission to trade or interdicted his slave should not be financially responsible if the slave agrees to a financial transaction or acquires debt. It is not clear in this case if Abū Yūsuf saw a difference between *ghayr ma’dhūn* and *maḥjūr ‘alayh*. In light of Tradition D2 above, it is possible that *maḥjūr ‘alayh* refers here to the revocation of a permission previously given in which a master announced in some form at the local market that no one should engage in trade with his slave.

The other case of interdiction mentioned by Abū Yūsuf, referring to bankruptcy, has a strong similarity to the previous case, and it provides us with a hint about what early forms of *ḥajr* may have looked like. This case is part of a debate about *taflīs*, or declaring someone bankrupt, in *Ikhtilāf abī ḥanīfa wa-ibn abī laylā*, a text which, as its name indicates, is an exposition of legal topics on which Abū Ḥanīfa and the prominent Kufan judge and jurist Ibn Abī Laylā (d. 148/765) disagreed[457] Abū Yūsuf first states Abū Ḥanīfa’s position on the matter:

> If a man was jailed on account of a debt and the judge declares him bankrupt, but while in jail he sells, buys, manumits, gives charity, or bestows a gift, Abū Ḥanīfa, may Allāh be pleased with him, used to say, “All of that is permissible, and nothing of his property should be sold to settle the debt, and (the judge) declaring bankruptcy amounts to nothing. Do you not see that man could be bankrupt today but make a profit tomorrow?” Ibn Abī Laylā, Allāh have mercy on him, used to say, “His sale, purchase, manumission, gifts, and charity are all impermissible following a declaration of bankruptcy, so his property is to be sold and his creditors repaid.” Abū Yūsuf, Allāh have mercy on him, said something similar to Ibn Abī Layla, except for manumission under interdiction

[456] Abū Yūsuf Ya‘qūb b. Ibrāhīm, *al-Kharāj*, ed. Ṭaha ‘Abd al-Ra’ūf Sa‘d and Sa‘d Ḥasan Muḥammad (Cairo: al-Maktaba al-Azhariyya li’l-Turāth, 2010), 185.

[457] The text is attributed to Abū Yūsuf but has obviously been edited or reworked by a later individual, as can be seen from the quotation below. On Ibn Abī Layla, see J. Schacht, “Ibn Abī Laylā, II.,” *Encyclopaedia of Islam, Second Edition*; Tsafrir, *History of an Islamic School of Law*, 22-23.

(*khalā al-ʿatāqa fī al-ḥajr*), which is not a part of bankruptcy.[458]

Beyond the use of the term *ḥajr*, the similarity found here with the discussion in *Kitāb al-kharāj* is the portrayal of a use of authority with a public dimension to limit the legal capacity of an individual. The master's announcement in the public sphere of the market constitutes a speech act in which his power to limit his slave's legal capacity was deemed legitimate.[459] A judge imprisoning a free individual for bankruptcy is a more obvious public act. Legal traditions in the *Muṣannaf* of ʿAbd al-Razzāq indicate that *ḥajr* as a kind of speech act is separable from the act of imprisonment. One tradition reports that Ibn Abī Laylā would stand the bankrupt individual in public view (*yuqīmuh li'l-nās*) if he was told that the bankrupt individual was withholding property and not handing it over. Similarly, ʿUmar b. ʿAbd al-ʿAzīz is said to have made the bankrupt person labor for wages "in the most visible work in order to reprimand him in that way." Maʿmar reports that he heard that the effects of bankruptcy had no validity "until it is shouted out (*mā lam yuṣaḥ bih*)." Similarly, al-Thawrī states that the bankrupt person can continue to buy "as long as the public authority (*al-sulṭān*) does not declare his bankruptcy." A Prophetic report also states that the Prophet stood the Companion Muʿādh in front of the public (*al-nās*) and declared "whoever sells anything to him, that sale is invalid."[460]

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[458] Abū Yūsuf, *Ikhtilāf abī ḥanīfa wa-ibn abī laylā*, ed. Abū al-Wafā al-Afghānī (Hyderabad: Lajnat Iḥyā' al-Maʿārif al-Nuʿmāniyya, 2012), 23-24.

[459] A speech act is an illocutionary statement that rather than claiming to describe reality produces an act. Beyond the case at hand of master interdicting his slave, other examples can include making a promise, resigning from a job, or making a request. See Mitchell Green, "Speech Acts," *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, (2020), WEB, https://plato.stanford.edu/archives/fall2021/entries/speech-acts.

[460] For these traditions, see ʿAbd al-Razzāq al-Ṣanʿānī, 7/56-57.

For Kufans like Abū Ḥanīfa, these speech acts had no validity. Ibrāhīm al-Nakha'ī shared this opinion, as did it seems al-Thawrī who, despite the statement above, is also reported to have held that "a Muslim cannot be interdicted."[461] Whereas Abū Ḥanīfa and al-Nakha'ī were both private scholars and not judges, the former having died in prison likely due to his opposition to Abbasid power, the position that the public authority (i.e., the state) can legitimately limit legal capacity was associated with representatives of that authority. Ibn 'Abī Laylā was a judge in Kufa for over twenty years and 'Umar II was, of course, an Umayyad caliph. The debate about the legitimacy of *ḥajr* in Kufa in the mid-8th century appears, therefore, to be a debate about the ability of public authority to compel Muslims. Whereas this kind of authority was largely viewed as legitimate when exercised by a master over a slave, the transfer of this same power to the state—by which is meant here nothing more than the caliph and his representatives—troubled scholars like Abū Ḥanīfa.

Although *ḥajr* appears to have first referred to a public speech act, al-Shaybānī (d. 189/805) took the position that *ḥajr* was automatic, without the intervention of a judge, if a mature person no longer acted with financial responsibility.[462] Unlike their teacher Abū Ḥanīfa, both al-Shaybānī and Abū Yūsuf accepted *ḥajr* of free adults, not just slaves.[463] Abū Ḥanīfa did think that it was up to the testamentary guardian or the judge to prevent a person who reached physical maturity without showing signs of discretion from taking their property into their possession. Nevertheless, this was the limit of their power: if the person sold any of it or

[461] *Ibid*. 56.

[462] Al-Shaybānī, *al-Aṣl*, 8/487

[463] *Ibid*. 8/353.

acknowledged a debt, these were valid acts that no authority could intervene in.[464] Yet even this half-measure was deemed distasteful after the age of 25; Abū Ḥanīfa is said to have reasoned about this in the following way:

> Do you not see that if he reached seventy years or eighty years of age and had children who became judges for Muslims that he would be interdicted (*yuḥjar ʻalayh*) even though he is their father? Even if his own son were the judge who interdicts him? I find it to be an ugly thing for me to interdict such a one even if he were corrupt. Therefore, if he reaches twenty-five years of age, I would hand his wealth over to him, whether he is corrupt or responsible.[465]

It should not be assumed that this argument about the reprehensibility of an old man being subject to interdiction was Abū Ḥanīfa's only reason for rejecting *ḥajr*. We have already seen that he also rejected the temporary interdiction of the financial transactions of a person declared bankrupt. Given the dialectic nature of *raʼy*-style arguments of the period in Iraq, Abū Ḥanīfa's opposition to the interdiction of the bankrupt and the *safīh* was justified according to different arguments depending on his interlocuter. Thus, it is altogether likely that he opposed interdiction for a number of reasons, including the ugliness of children having authority over their parents as well as apprehensiveness about recognizing the power of the state to limit the freedom of an individual Muslim. Indeed, a later Ḥanafī author-jurist, Shams al-Aʼimma al-Sarakhsī (d. 483/1090) attributes other arguments against *ḥajr* to Abū Ḥanīfa. In one place al-Sarakhsī writes:

> As for Abū Ḥanīfa, Allāh have mercy on him, he deduced from the Sublime's words ("and devour it not by squandering (*isrāfan*) it in haste lest they should grow up") that He forbade the guardian (*walī*) from squandering his (i.e., the orphan's) property out of fear that the orphan would grow up at which point the guardianship over his property would no longer remain for him. The stipulation that guardianship is dissolved after maturity is a stipulation that the interdiction (*al-ḥajr*) on him dissolves after maturity since his guardianship is due to a need, but this need is nonexistent if he becomes fully capable of

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[464] *Ibid*. 8/466.

[465] *Ibid*. 467.

acting himself."[466]

Al-Sarakhsī then states that Abū Ḥanīfa also argued for the invalidity of *ḥajr* on the basis of the Qur'ānic verses that stipulate expiation (*kafāra*) in cases like murder and *ẓihār*.[467] This is because, as Abū Ḥanīfa supposedly reasoned, even the *safīh* is liable for these expiations, "and voluntarily committing the causes (i.e., committing the actions that necessitate these expiations) is a kind of foolishness (*safah*)." Thus, it is conceivable that the *safīh* can waste their property by repeatedly making expiations for their sins, which means that interdiction (*al-ḥajr*) "does not have much of a benefit." Since the *safīh* is both free (*ḥurr*) and responsible for these actions, al-Sarakhsī adds, there is no reason for interdiction. In a compelling continuation of this argument, al-Sarakhsī also makes the argument that *ḥajr* consists in "removing the effects of his speech" when making financial transactions. This amounts to delegating the person to the status of "beasts and the insane, in which case the harm is greater than the (benefits) of the supervision that accumulates to him when his actions are interdicted because the human being (*al-ādamī*) differs from all other animals in consideration of his speech giving rise to actions (*qawluh fī al-taṣarrufāt*)."[468] While it is impossible to know if Abū Ḥanīfa ever conceived of his objection to *ḥajr* exactly in these terms, it does seem that part of Abū Ḥanīfa's stance was due to a firm belief in the inviolability of a free adult's freedom to dispose of his or her property without the

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[466] Al-Sarakhsī 24/159.

[467] *Ẓihār* was a form of divorce—apparently practiced in Arabia before Islam since it is mentioned in the Qur'ān (58:3)—in which a man said to his wife, "You are like my mother's back to me" (some *madhhabs* also held that a *ẓihār* divorce would occur if the husband mentioned other parts of the body or, instead of his mother, likened his wife to other unmarriable people). Expiation for this divorce required freeing a slave, fasting for two months, or feeding sixty of the poor (in that order, depending on the man's possessions and abilities). See Ibn Rushd, 1121-1126, 1132.

[468] Al-Sarakhsī 24/160.

intervention of an outside authority. Given the association of *ḥajr* with a master's authority over a slave, allowing a governor or judge to exercise this authority was a kind of perversion of power of the kind he imagined could occur when a son interdicts his own father.

Al-Shāfi'ī's Defense of Ḥajr

By the time al-Shāfi'ī entered this debate, the position of the Medinans on *wilāya* along with the conflicting ideas of the Iraqis about the validity of *ḥajr* had already taken shape. A student of both Mālik and al-Shaybānī, al-Shāfi'ī challenged Mālik's and Abū Ḥanīfa's positions while simultaneously also weaving some of their ideas together in order to promote a wide-ranging conception of *ḥajr*.[469] In his masterpiece, *Kitāb al-umm*, a multi-volume text composed of several different books, al-Shāfi'ī argued against Mālik's position that women do not enjoy full exercise of their property. (Young women who had never been married, Mālik held, did not have the right to dispose of their property as they wished. Married women were only able to give up to a third away at a loss, such as for charity, but they could trade with it profitably with or without their husband's permission.)[470] In the process, al-Shāfi'ī rehearses what presents itself as the reworked and polished record of a real exchange between Mālik or one of his students:

> A husband has no path to guardianship (*wilāya*) over his wife's property, and I do not know a single person among the people of knowledge (*min ahl al-'ilm*) who disagrees that a man and a woman are equal (*sawā'*) insofar as their property must be handed over to them if they acquire both physical maturity and discernment (*al-bulūgh wa'l-rushd*) because they are orphans.[471] Therefore, if they are eventually released from guardianship,

[469] On al-Shāfi'ī's teachers and intellectual development, see Kecia Ali, *Imam Shafi'i: Scholar and Saint* (Oxford: Oneworld Publications, 2011); El Shamsy, *Canonization*, 17-21, 44-87.

[470] Saḥnūn, 13/134.

[471] I.e., the command in Qur'ān 4:6 to hand property over to orphans when they reach physical and mental maturity applies to both men and women since the word orphans refers to both.

> then they are like any other—what is permitted for either of them in their property is what is permitted for any other person not under a guardianship (*li-kull man lā yūlā ʻalayh*).
>
> But if someone said, "The case of a woman with a husband is different from the case of a man. Such a woman cannot give away her property without her husband's consent," then it would be said to him, "The Book of God Almighty commands that orphans receive their property when they become discerning. This contradicts what you said, for no one can assume guardianship of anyone that God Almighty releases from guardianship (*al-wilāya*) unless they enter a state of stupidity (*safah*) or corruption (*fasād*)—this applies to men and women—or, in the case that they owe something of their property to a Muslim. But in any other case, men and women are equal (*sawā'*), and if you distinguish between them, then you must come with evidence for distinguishing what is otherwise one and the same.
>
> But if someone said, "It has been told that a woman cannot give away anything of her property without her husband's consent," then it would be replied, "We have heard this, but it is unproven, so we must stick to what we have said. Moreover, it is contradicted by the Qur'ān, then the *Sunna*, then the traditions (*al-athar*), then reason (*al-maʻqūl*).[472]

Al-Shāfiʻī equated the Qur'ānic command to hand property over to orphans with the orphans' right to dispose of this property. Since this applies to both men and women, no form of guardianship (*wilāya*) can remain for women who have reached mental and physical maturity. Throughout this entire passage, al-Shāfiʻī met the Medinans on their own terms: he exclusively used the term *wilāya* and its derivatives and never uses *ḥajr* or its derivatives. At the same time, he stipulated an expansive determination of the causes of *wilāya*: orphanhood/minority, *safah/fasād*, and bankruptcy (owing "something of their property to Muslims"). These are all categories of *ḥajr*, as it was coming to be defined.[473] In effect, al-Shāfiʻī pushed his opponents to recognize that the *wilāya* they claimed a husband had over part of his wife's property was an (invalid) form of *ḥajr*.

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[472] Al-Shāfiʻī, 4/452-453.

[473] *Ibid*. 4/431.

When debating the followers of Abū Ḥanīfa's anti-*ḥajr* position, al-Shāfi'ī switches his terminology, now using *maḥjūr* and *muwalla 'alayh* interchangeably, although usually opting for the former.[474] In a complete rejection of Abū Ḥanīfa's worry about degrading the freedom of an adult Muslim, al-Shāfi'ī embraces the comparison of the *safīh* with a slave's status: both are causes for a limitation of financial transactions. The evidence for this, he argued, is not only found in the Qur'ān but also provided by the Sunna and analogic reasoning (*qiyās*). As for the Sunna, al-Shāfi'ī claims that the traditions are narrated by "your own companions." When his interlocuter asks, "And which companion is that?" al-Shāfi'ī narrates:

> I was informed by Muḥammad b. al-Ḥasan (al-Shaybānī) or some other person of honesty in *ḥadīth*, on the authority of Abū Yūsuf, on the authority of Hishām b. 'Urwa, on the authority of his father, who said: "'Abd Allāh b. Ja'far made a purchase, so 'Alī, May God be Pleased with Him, said, 'I will go to 'Uthmān and interdict you. Ibn Ja'far al-Zubayr got word of this, so al-Zubayr said, 'I am your partner in the transaction.' Then 'Alī went to 'Uthmān and said, 'Interdict this one,' but al-Zubayr said, 'I am his partner.' So 'Uthmān said, 'How can I interdict a man whose partner is al-Zubayr?'"[475]

As in the case of al-Shāfi'ī's dialogue with his Medinan interlocuter, we see him engaging with the Kufans according to their terms. The above tradition has a Kufan chain of transmitters, including two of the highest authorities in the Ḥanafī school. Since Kufan jurisprudence relied on traditions narrated by Companions and scholars with close ties to their locality, al-Shāfi'ī's statement that "your own companions" related this was a calculated reminder that this was not an unknown tradition to the Kufans, but one that should have fulfilled their standards for acceptance in a *ra'y* debate.[476] This careful attention to the style and terminology employed by both the

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[474] *Ibid*. 4/459.

[475] *Ibid*. 4/461. See also al-Ṣanā'ī, 7/56; al-Bayhaqī, 6/101-102.

[476] El Shamsy, *Canonization*, 47.

Kufans and Medinans in order to argue for a generalized concept of interdiction that could subsume the power of a master of his slave, the guardians' authority over minors, orphans and *sufahā'*, and the judge's authority over a bankrupt individual is a testament to the increasing standardization and universalization of legal concepts by the early 9th century. The next section will show how this development in the discourse of *ḥajr* was closely related to advancements in Islamic jurisprudence more generally as well as the changing relationship of Islamic legal scholars and judges with the state.

Ḥajr: From Governors to *Quḍāt*

Little is known about the judicial practice of the Islamic judges, or *qūḍāt* (s. *qāḍī*) prior to the 9th century A.D. The reason for this is not just because we have no documentary evidence of courts at this time. Even the biographical histories of the judiciary that emerge in the late 9th or early 10th century—Wakī''s (d. 306/918) history of judges in Arabia and Iraq and al-Kindī's (d. 340/961) history of judges in Egypt—tell mostly anecdotal narratives about the judges of the early period that serve to exemplify normative legal practice. Much of this material seems to reflect the situation and perspective of the authors' societies, in which judges had achieved an impressive amount of independence from both governors and caliphs.[477] This partial autonomy undoubtedly received a boost from the failure of the Abbasid attempt during the *Miḥna* (218/833-237/852-3) to force the *'ulamā'*, including judges and anyone who wanted to remain qualified to testify at court, to accept that the Qur'ān was created.[478] But also fundamental to the

[477] Tillier, "Judicial Authority," 120.

[478] Muhammad Qasim Zaman, *Religion and Politics Under the Early 'Abbasids: The Emergence of the Proto-Sunni Elite* (Leiden: Brill, 1997), 106-118; Martin Hinds, "*Miḥna*," *EI*[2]. It is important to note that

achievement of this autonomy was the legal scholars' production of fixed texts of law on which judges could rely in court and hold up as a legitimate interpretations of God's law against the whims of a temporal ruler.[479] While judges were appointed by the caliph at this point, they nevertheless did not deport themselves as bureaucrats of an imperial administration.

If this form of the rule of law existed by the mid-9th century, judges in the Umayyad period and the Abbasid era up to the 9th century seem to have had much less independent authority. In fact, in a recent comparison of the biographical literature with the papyrological sources, Tillier has concluded that the *qāḍī* is completely absent from Umayyad papyrology "and justice is above all that of the governor and the pagarch."[480] This changes, he argues at the end of the 2nd/8th century and the beginning of the 3rd/9th century when the *quḍāt* appear simultaneously in both the papyrological documents and the literary narratives.[481] In the beginning of this period, the *quḍāt* are almost exclusively appointed by the governors and appear to be an extension of his power. It is only in the latter part of the second Abbasid caliph's reign, al-Manṣūr (r. 136-158/754-775) that the appointment of the *qāḍī* becomes the prerogative of the caliph. This occurs as part of "a major administrative reform of the judiciary," which both centralized and professionalized it.[482]

Zaman shows that the Abbasids before, during and after the *Miḥna* never entirely relinquished a role discovering the law, via *ijtihad*, nor did the end of the *Miḥna* indicate, as previous scholars had argued, a separation of church and state in medieval Islamic societies. It did, however, put an end to any hopes on the part of the Abbasids or their advisors that the caliph, by nature of his office, could define the law. See also Zaman, 208-213.

[479] Tillier, "Judicial Authority," 127-131.

[480] Tillier, *L'invention du cadi*, Ch. 1, Paragraph 219.

[481] *Ibid*., Ch. 2.

[482] *Ibid*.

What meager evidence the literary sources divulge regarding *ḥajr* appears to conform to the timeline proposed by Tillier. In Wakī‘’s history of the judiciary in Iraq and the Hijaz, *ḥajr* is first mentioned in the case of a judge, Muḥammad b. ‘Abd Allāh al-Anṣārī (d. 215/830-831), who, upon being appointed by Hārūn al-Rashīd the judgeship of Basra in 191/806-807, interdicted (*ḥajar ‘alā*) his predecessor Mu‘ādh b. Mu‘ādh, who been accused of robbing orphans of their property.[483] In response, Mu‘ādh fled to Baghdad and worked on getting his property returned. As a result of his petitioning, al-Anṣārī was replaced by ‘Abd Allāh b. Sawwār yet the new judge apparently did not lift the indictment immediately from Mu‘ādh’s property. Mu‘ādh returned to Basra and confronted Ibn Sawwār about the matter, asking him, “Is it not curious that you inhibit my property but remove the interdiction (*al-ḥajr*) on Kaskāb, a man who was *safīh*?” His plea was successful as al-Anṣārī was forced to return Mu‘ādh’s property, and Ibn Sawwār is said to have asked Mu‘ādh, “How then should I punish you?”[484] The point seems to be not so much that handing a *safīh*’s property over to him was surprising, since, as we’ve seen many scholars held this to be legitimate, but that Ibn Sawwār could rule according to this position while also upholding the *ḥajr* of a judge.

This anecdote indicates that the term *ḥajr* may have referred at one point to an administrative practice, possibly originating with governors and the judges they nominated. At the very least, it can be said that the debate about preventing *sufahā’* from disposing of their property as they wish was embedded in controversies about the legitimacy of the governor or the judge exercising such authority over free Muslims. Indeed, Wakī‘ mentions this debate a second

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[483] Muḥammad b. Khalaf Wakī‘, *Akhbār al-quḍāt* (Beirut: ‘Ālam al-Kutub, n.d.), 2/154.

[484] *Ibid*. 2/155.

time, again alluding to the authority of a judge to interdict an official. ʻĪsā b. Abān (appointed in Rabīʻ al-Awwal 211/826, d. Muḥarram 220/835) was said to have been extremely prodigal to the point that he left no inheritance for his son, and Wakīʻ writes that he said about himself, "If I had authority over a man who did with his money what I do with my money, I would interdict him (*ḥajart ʻalayh*)."[485] The historian of the Egyptian judiciary, al-Kindī, includes a similar anecdote in his chronicle. According to al-Kindī, the judge Tawba b. Namir al-Ḥadramī (in office Ṣafar 115-120/733-738, d. 120/738) was extremely munificent, giving away anything he owned as soon as it came into his possession. When he assumed the office of *qāḍī*, he was of the opinion that the *safīh* and the prodigal (*al-mubadhdhir*) should be interdicted (*yuḥjar ʻalā*). When a prodigal youth was brought to his court to his court, he said, "I think I should interdict you (*aḥjur ʻalayk*) my son." The youth replied, "But then who will interdict you (*fa-man yaḥjur ʻalayk*), your honor? By God, our property doesn't equal a tenth of a tenth of what you squander." Al-Kindī states that Tawba never again interdicted a *safīh*.[486] The similarity of the two anecdotes indicates that their value to the modern historian is less the reality of the incidents, which cannot be confirmed, but their moral content. They both appear to stress the independence of the judiciary from a higher power, such as the local governor or the caliph, who could interdict the judges, and can be read as a protest against judges using their power to interdict free Muslims.

Given that judges in the first two Islamic centuries held office as agents of regional governors, however, it is likely that the situation was quite the opposite before the mid-9th century: governors did have the power to interdict. In fact, Abū Ḥanīfa, the most famous

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[485] *Ibid*. 2/172.

[486] Muḥammad b. Yūsuf al-Kindī, *Kitāb al-wulāt wa-kitāb al-quḍāt*, ed. Rhuvon Guest (Leiden, Brill: 1912), 347.

opponent of an expansive power to limit an adult freedom over their property, is said to have been interdicted by the governor of Kufa. This occurred after the *qāḍī* Ibn Abī Laylā complained to the governor that Abū Ḥanīfa had publicly criticized one of his official judicial rulings. Notably, this form of *ḥajr* had nothing to do with property; rather, it was an interdiction on Abū Ḥanīfa's ability to issue reasoned legal opinions *(fatāwā*).[487] Abū Ḥanīfa appears to have perceived this form of interdiction to be legitimate as he abided by the ban until the governor lifted it. Indeed, later *fiqh* texts report that the only kind of *ḥajr* that Abū Ḥanīfa recognized—due to the great harm (*al-ḍarar al-fāḥish*) that might otherwise result—were the following three: the brazen jurisconsult (*al-muftī al-mājin*), the ignorant physician (*al-mutaṭabbib al-jāhil*), and the bankrupt hirer of beasts of carriage (*al-mukārī al-muflis*).[488] These limited forms of *ḥajr*—what might be called orders to cease practicing a profession due to malpractice or the inability to assume liability—are substantively of a different order from the cases discussed above. It is possible that the term *ḥajr* was first used to refer to these prohibitions issued by the governor or his judicial agent against an individual. This would adhere to a pattern noticed by Tillier: what origins that Islamic *fiqh* does have in Umayyad administrative practice is above all lexical in nature. Terminology, like *ḥajr*, may have been inherited by religious and legal scholars, but the nature of legal practices indicated by these terms was fundamentally different.[489] Without further evidence, however, the applicability of this to the term *ḥajr* will remain but a hypothesis.

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[487] Al-Baghdādī, 15/473.

[488] Al-Sarakhsī, 24/157.

[489] Tillier, *L'invention du cadi*, Ch. 1, Paragraph 218.

Conclusion

An analysis of the *Muṣannaf* of Ibn Abī Shayba indicates that debates about orphans' property and the validity of *ḥajr* on adults in the 2nd/8th century manifest regional differences. The latter, in particular, appears to be a debate exclusive to Iraq, which suggests that the term was first used there. This conclusion is supported by the earliest *fiqh* texts, with Medinan and early Mālikī texts rarely using the term *ḥajr* and Kufan and early Ḥanafī texts using it, although at times questioning its legitimacy. The later acceptance of this terminology by all four Sunni *madhhabs* was due in part to the spread of writing and, especially, "fixed texts," as authors like Saḥnūn and al-Shāfi'ī drew comparisons between Medinan and Iraqi terminology and legal opinions on interdiction.

The term *ḥajr* was Iraqi in origin and appears to have first referred to the exercise of public authority over an individual. This includes the public announcement of a master that his slave is restricted from trading. I have suggested that the term may have been used first to refer to specific rulings undertaken by Umayyad governors in order to restrict an individual. Whether or not this is the case, once the term entered the legal discourse of Muslim scholars, *ḥajr* was used not just to refer to the interdiction of an adult but to the interdiction of orphans (and minors) due to their lack of *rushd*. *Ḥajr* became the concept under which the legal status of both the *safīh* and the orphan—already juxtaposed in the Qur'ān as seen in the last chapter—were subsumed. This was a critical step in the creation of a standard and universalized legal language which judges and jurists could refer to in order to uphold their vision of the law.

This universalization of the legal terminology intensified alongside the centralization and professionalization of the judiciary, especially during the second part of the 2nd/8th century. As

judges inherited roles previously filled by governors and their representatives, their use of *ḥajr* appears to have been met with some discomfort. *Ḥajr* from the beginning was associated with authority, either that of the master over his slave or a governor or judge over an individual adult Muslim. It is notable that the opposite appears to have been the case with orphans: early reports about orphans and their property, as seen in the those traditions cited above, assume that guardianship of orphans is a private matter. When, then, did judges begin supervising orphans' property? The next chapter will answer this question.

Chapter Three
The Supervision of Orphans' Property and the *Mūda' al-Ḥukm* up to the Ayyūbids

Introduction

> *The laws and conditions that govern the institution (of the judiciary) are known from works on jurisprudence and, especially, from books on administration (*al-Aḥkām al-sulṭāniyya*). In the period of the caliphs, the duty of the judge was merely to settle suits between litigants. Gradually, later on, other matters were referred to them more and more often as the preoccupation of the caliphs and rulers with high policy grew. Finally, the office of judge came to include, in addition to the settling of suits, certain general concerns of the Muslims, such as supervision of the property of insane persons, orphans, bankrupts, and incompetents who are under the care of guardians; supervision of wills and waqfs and of the marrying of marriageable women without a guardian to give them away according to the opinion of some authorities; supervision of (public) roads and buildings; examination of witnesses, attorneys, and court substitutes, to acquire complete knowledge and full acquaintance relative to their reliability or unreliability. All these things have become part of the position and duties of a judge.*[490]

This summary of the historical development of the *qāḍī's* office, penned by Ibn Khaldun, writing in North Africa in the late 8th/14th century, cannot be accepted in its entirety.[491] Western scholarship on the history of the *qāḍī* has shown that in many ways the history of the office is quite the opposite to Ibn Khaldun's account of its gradual accumulation of greater responsibilities. Early *qāḍīs* at different times and places doubled as regional administrators,

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[490] This is an adapted version of Franz Rosenthal's translation: Ibn Khaldūn, *The Muqaddimah: An Introduction to History*, trans. Franz Rosenthal, 2nd ed. (Princeton: Princeton University Press, 1967) 1/455.

[491] On the years when Ibn Khaldun wrote the *Muqadimma*, see Muhsin Mahdi, *Ibn Khaldûn's Philosophy of History: A Study of the Philosophical Foundation of the Science of Culture*, reprint (London: George Allen & Unwin Ltd., 1957; Abindgon and New York: Routledge, 2016), 47-49. Citations refer to the Routledge edition.

treasurers, storytellers, and educators. In fact, because of the different nature of the early *qāḍī*'s tasks to modern judges, Tillier has avoided using the (French) term "juge" altogether to refer to *qāḍīs*, arguing that doing so conjures up an entirely different semantic universe than was intended by the term.[492] Tillier's preference for *cadi* rather than judge may be gaining traction.[493] Although this author is sympathetic with Tillier's approach, it is not followed rigidly here, if only because *qāḍīs* did, among other things, sit at court in issue legal judgements.[494]

In any case, Ibn Khaldūn's historical model is, despite its flawed description of an initial period in which they were only concerned with settling suits, accurate in its description of the accumulations to the office of the *qāḍī* of several specific duties that the literary sources indicate are new, one of which was the direct supervision of orphans' property. In addition to the duties indicated by Ibn Khaldūn, this process was accomplished via the expansion of and specialization within the judge's personnel. The accumulation of new responsibilities and a larger staff has been read by recent authors as a key factor in the professionalization and centralization of the Islamic judiciary.[495] Starting with the Abbasid Caliph al-Manṣūr (r. 136-158/754-775) and up to the weakening of caliphal power at the end of the 9th century, *qāḍī*s were overwhelmingly

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[492] Tillier, *Les cadis d'Iraq*, 82-83.

[493] Yaacov Lev, *The Administration of Justice in Medieval Egypt From the Seventh to the Twelfth Century* (Edinburgh: Edinburgh University Press, 2020), esp. 37-40.

[494] It seems reasonable to expect readers of this dissertation to keep in mind that the Muslim judge in many times and places did not have the exact range of responsibilities as modern judges in Western legal systems or those modelled after them. Additionally, Ibn Khaldūn's anachronistic description of the *qāḍī* as, first and foremost, a person who settles disputes between litigants indicates that the semantic field of the term *qāḍī*, at least following the formation of the Islamic schools of law, is in fact quite similar to the meaning-bearing intentionality of the locution "judge." To insist otherwise might run the risk of exotifying a legal culture that is already fraught with otherization in Western discourse.

[495] El Shamsy, *Canonization* 103-112; Tillier,; *L'invention du cadi*, Ch. 3. Hallaq dates the centralization of the judiciary even earlier to the first half of the 2nd/8th century. See Hallaq, *Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), 57-63.

appointed directly by the caliph in Baghdad, rather than by the provincial governors (*wulāt*), apart from a short break during the civil war following al-Rashīd's death.[496] Just as judges were gaining increasing power and independence from local governors, they were also acquiring new functions such as overseeing *waqf* property, supervision of orphans' guardians and property, and appointing professional witnesses. This chapter will focus specifically on the history of the Islamic judiciary's increasing control over orphans' property, leading up to the institutionalization of this function via the creation of a dedicated space to store movable property and the routinization of managing, selling, and lending this property on behalf of orphans.

The biographical sources indicate that in both Egypt and Iraq, the areas for which we have the most information due to the works of Wakī' and al-Kindī, judges' direct control of orphans property followed the increasing sophistication of record keeping. According to al-Kindī, the first *sijill*, or record of court cases and legal rights registered with the judge, in Egypt was adopted by Sulaym b. 'Itr (in office 40-60/660 or 661- 680).[497] Hallaq has made a reasonable case for the historical accuracy of this early adoption of written records by a Muslim judge, although the report is impossible to verify.[498] Similar early reports of judicial staff in Kufa and Basra appear in Wakī''s history–there one reads of a herald and *jilwāz* (a person responsible for maintaining order) working for the legendary judge Shurayḥ as well as a scribe and auxiliaries

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[496] Tillier, *L'cadis d'Iraq*, Ch. 2.

[497] Muḥammad b. Yūsuf al-Kindī, *The Governors and Judges of Egypt or Kitâb El 'Umarâ' (El Wulâh) wa Kitâb el Quḍâh of El Kindî*, ed. Rhuvon Guest (Leiden: Brill, 1912), 310; On the *sijill*, which would become one part of the judge's records, collectively known as the *dīwān*, see Hallaq, "The 'qāḍī's dīwān (sijill)' before the Ottomans," *Bulletin of the School of Oriental and African Studies*, 61, no. 3 (1998), 415-436.

[498] *Ibid*. 432.

serving at the time of Abū Mūsā al-Ash'arī.[499] Tillier has noted that some of this could be a back projection, and, as in the case of the early report regarding Ibn 'Itr, it is impossible to say one way or another. Apart from these reports of the early adoption of record keeping by Ibn 'Itr in Egypt and judicial staff in Iraq, both al-Kindī and al-Wakī' begin reporting increasing complexity in written records, judicial staff, and involvement in trusteeships in the 2nd/8th century. By the middle of the 9th century A.D. in Egypt, at least, the common form of the Muslim court that would continue into the Islamic Middle Periods appears to have taken shape in all the central cities: record-keeping, scribes, a herald and chamberlain to help with the court's daily functions, and judicial trustees (*umanā'*) appointed by the judge and tasked with supervising orphans' property and overseeing charitable and familial trusts (*awqāf*).[500] In the following pages, I will chart the appearance of trustees (*umanā'*) and the increasing centralization of the control of orphans' property under the judiciary during the centuries prior to the Ayyūbid and Mamlūk Periods in Egypt. Since developments in the judiciary in Egypt prior to the arrival of the Fāṭimids in 969 C.E. are closely related to the history of the judiciary in Iraq, I first analyze the reports found in the history of the judiciary written by Wakī' (d. 306/917) before turning to a discussion of Egypt.[501]

Basra

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[499] Tillier, *L'cadis d'Iraq*, Chapter 3, Paragraphs 42-46; Muḥammad b. Khalaf Wakī', *Akhbār al-quḍāt*, 3 vol. (Beirut : 'Ālam al-Kutub, nd), 2/283,307, 317; 1/285-286.

[500] Tillier, *L'cadis d'Iraq*, Chapter 3, Paragraph 60.

[501] On Wakī' and his history of the judiciary, see Muhammad Khalid Masud, "A Study of Wakī''s (d. 306/917) *Akhbār al-quḍāt*," in *The Law Applied: Contextualizing the Islamic Shari'a. A volume in Honor of Frank E. Vogel*, ed. P. Bearman et. al. (New York: I. B. Tauris, 2008), 116-127; A.K. Reinhart, "Wakī'," *Encyclopaedia of Islam, Second Edition.*

The judicial trustee, or *amīn* (pl. *umanā'*) is first mentioned by Wakī‘ as someone who was charged by the *qāḍī* Iyās b. Mu‘āwiya (appointed in 99/718 by ‘Umar b. ‘Abd al-‘Azīz in consultation with his governor in Basra, ‘Adī b. Arṭāt) to set aside a place in his home for the safekeeping of property that had been entrusted as a deposit (*wadī‘a*) to Ibn Mu‘āwiya.[502] Although this trustee is named as "his trustee (*amīnah*)," it is unclear if this is a professional moniker or rather refers to someone who was simply considered trustworthy. The latter option is likely given the context: Ibn Mu‘āwiya first asks him, "Is your house secure?" before asking him to return in a few days after making preparations to assume possession of the property the judge held in trust. It is possible that some of this property belonged to orphans—Ibn Mu‘āwiya was initially instigated to make this request after an unnamed man complained that he had entrusted an inheritance (*mīrāth*) to another man who then denied ever taking it. It could be that this inheritance was being held in trust on behalf of an orphan, a *safīh*, or an absent person who could not claim it. If this is the case, and the story is historically accurate, then Ibn Mu‘āwiya's *amīn* created something like an early prototype of the judicial treasury (*mūda‘ al-ḥukm*) that would later appear in Egypt.

From this point on, judges in Basra are said to have been increasingly involved in the affairs of orphans. Al-Ḥasan al-Baṣrī, according to Wakī‘, entrusted money to a man, after asking someone to vouch for him, on behalf of an orphan. It is unclear from the context whether this money was orphans' property or alms given in charity to a needy orphan.[503] Wakī‘ states explicitly, nevertheless, that it was Sawwār b. ‘Abd Allāh (d. 156/772-773, appointed by al-Manṣūr in 137/754-55) who "was the first to act with vigor as judge, and he aggrandized the

[502] Wakī‘ 1/371; Ch. Pellat, "Iyās b. Mu‘āwiya," *EI*^{2}.

[503] Wakī‘, 2/7.

position. He appointed trustees (*umanā'*) and paid them a salary…and he had the trustees oversee the testamentary guardians (*al-awṣiyā'*)."[504] These trustees appear to have been responsible for a range of duties in support of the *qāḍī*. For example, when the local governor stole a precious stone from a man and simultaneously imprisoned him without cause, Sawwār is said to have sent his *umanā'* to plea with the governor on behalf of the man.[505] In addition to appointing trustees, Sawwār also took control of the *awqāf* and of ownerless property, and although unstated, one imagines that the trustees were involved in the financial oversight of these two forms of property as well. It is probably due to this judicial expansion that Sawwār is also said to have increased the length of the records (*al-sijillāt*).

As he expanded his court's control over orphans' property, it is also likely not a coincidence that he is said to have confronted Caliph al-Manṣūr when the latter wanted to dam a river in Basra by threatening him with "the prayer of the orphan, the widow, and the powerless."[506] Surely the expansion of the judiciary's authority to include for the first time the power to review, as part of its regular duties, the decisions of private guardians was not entirely welcomed by all parties. Indeed, the burden of judging and overseeing orphans' property were explicitly linked in a Prophetic *ḥadīth* quoted by Wakī' in his introduction to his history of the judiciary.[507] The utility of the above anecdote for legitimizing an increasingly powerful administration is underscored by the existence of a second version of this confrontation between

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[504] *Ibid*. 2/58.

[505] *Ibid*. 2/59.

[506] *Ibid*. 2/58.

[507] "O Abū Dharr, I see that you are weak, and I wish for you what I wish for myself: Do not assume authority between two people, and do not take responsibility for an orphan's property," *Ibid*. 1/21.

Sawwār and al-Manṣūr, this time weaving together in a single narrative the expansion of state authority over private property during Sawwār's tenure and the sacred duty of the powerful towards the orphan, the widow and the weak. According to this anecdote, the confrontation occurred when Sawwār objected to al-Manṣūr's plan to have the private records of the Basrans sent to him in Baghdad. Faced with Sawwār's objections, al-Manṣūr threatened to have the populace slaughtered in the streets, to which Sawwār responded with a veiled threat of his own: "I just hate to see you confront the widow, the orphan, the frail elder, and the weak newborn." Al-Manṣūr's response was to insist that he, as "a husband to the widow, a father to the orphan, a brother to the elder, and an uncle to the weak," wanted to review the private records to take from the wealthy what they had robbed from the poor.[508] After hearing of the caliph's good intentions, Sawwār agreed, leaving the reader wondering if the expansions of the court's powers were actually instigated by the caliph.

This latter account of the expansion of judicial power in Basra may have been an attempt to shift the blame for this away from Sawwār. This hypothesis is supported by the existence of conflicting poems either celebrating or castigating Sawwār. One of his detractors composed the following two lines:

> He introduced to us customs inherited from tyrants.
> He fed his own people from orphans' property and charity.
> *sanna fīnā sunanan kānat mawārīth al-ṭughāt*
> *aṭ'ama amwāl al-yatāma/qawmahu wa'l-ṣadaqāt.*[509]

Another poem, however, describes him as "a treasure for the orphans that saved them from poverty (*fa-qad kāna kinzan li'l-yatāma min al-faqr*)."[510] These poems, combined with the

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[508] *Ibid*. 2/61.

[509] *Ibid*. 71

anecdotes discussed above, indicate that Sawwār's legacy, and especially his introduction of new powers over guardians of orphans and *waqfs,* was a controversial assumption of authority that had previously been left in the hands of private individuals or families. Sawwār's reforms should not be seen as entirely stable, however, and it is possible that guardians were not always subject to the same kind of supervision by the judge's trustees. It is also not clear the extent to which the Abbasid caliphs interfered in these properties. Wakī' does write that Caliph al-Mahdī (r. 158/775-169/785) ordered the presiding judge of Basra, 'Ubayd Allāh al-'Anbarī (d. 168/784-5), to send the property with unknown ownership, which as we saw had been targeted in Sawwār's reforms, to the state treasury (*bayt al-māl*).[511] Al-'Anbarī refused this request, which lead to his removal from the judiciary.[512] It is unclear if al-Mahdī pursued the matter, or if (and for how long) this kind of property, or orphans' property for that matter, remained under the control of the Basran judiciary.

It would seem that orphans' property remained under the control of the Basran judge and his *umanā'*, or, at least, was later returned to their control, for we read that Mu'ādh b. Mu'ādh (d. Rabī' I 196/811), appointed by al-Rashīd, was accused of mishandling this property.[513] Wakī' states that he was twice warned about letting the people he trusts embezzle this property: once by one of his predecessors in office and a second time by a poet, who said:

> They hang around our mosque desperate for his sustenance.
> He who once shunned fasting now fasts for your sake.

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[510] *Ibid*. 85.

[511] On al-'Anbarī, who defied al-Mahdī on several occasions and was seen as standing up for the independence of the judiciary, see Tillier, "al-'Anbarī, 'Ubaydallāh b. al-Ḥasan," *EI*[3].

[512] Wakī', 2/95-96.

[513] *Ibid.* 2/154. On Mu'ādh's life, see Al-Dhahabī, *Siyar*, 9/54-57.

But he is really a wolf in wait for a new moon in the black of night.[514]
They all hope that he will entrust them with the orphan's property.
lazamū masjidanā ma'a ḍay'atihi 'aya luzūm
ṣāma min ajlaka man lam yaku minhum la-yaṣūm
huwwa dhi'bun yarqubu l-ghurrati fi'l-layli l-bahīm
kulluhumu ya'malu 'an yūdi'ahu māla yatīm[515]

Despite these warnings, Ibn Mu'ādh was still accused of misappropriating orphans' property, although it is unclear whether he himself did this or the opportunists the poet warned him about. The *umanā'* seem to have developed a bad reputation for taking advantage of their positions of trust; Wakī' relates that a later judge, Ismā'īl b. Ḥammād (in office Rabī' II 210/825-211/826) referred to the *umanā'* as "*kumanā'*" or "those lying in wait."[516] The expression is reminiscent of the poet's warning of the wolf, pretending to be pious, but really waiting for the judge to let his guard down. Although this comparison and Ibn Mu'ādh's biography seems to imply continuity in the handling of orphans' property into the 9th century following Sawwār's reforms, the information is too paltry to state this with any confidence. All that can be said with certainty is that the judge in Basra and his *'umanā'* had some kind of authority over orphans' property starting with Sawwār's tenure, but the details remain, alas, obscure.

Kufa

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[514] This is a play on words: the *ghurra* can mean, among a range of meanings, both a white spot prized in horses, the light of a new moon but also the best or most excellent kind of any property. Pronounced slightly differently, as *ghirra*, the word indicates negligence, inattention, or inexperience. Since *bahīm*, the modifier of "night" in the line, also described a horse of a single color with no *ghurra*, it is almost certain that the word was vocalized as *ghurra*, but with *ghirra* as an intentionally implied possibility. See Lane I/260, 2238-2239.

[515] Wakī', 2/147.

[516] Wakī' 2/168.

Tillier has observed that it is impossible to determine when the *qāḍīs* of Kufa began supervising orphans property.[517] Unlike both Basra and, as will be seen shortly, Egypt, there is no explicit mention of the first judge to extend his authority over this kind of property. However, one must keep in mind that the reports about Basra and Egypt do not imply continuity of this supervision or the establishment of the kind of institution that existed for this purpose in Cairo in the later Middle Period. Moreover, it was shown in the last chapter that judges were not assumed to have direct authority over orphans' property nor the property of *sufahā'* people well into the 2nd/8th century. Given the resistance in Kufa, in particular, to extending the authority of judge to interdict people, it is unlikely that judges there assumed responsibility for orphans' property before their counterparts in Basra.

At the time of Shurayḥ (d. 76/695-6), orphans and their property do not appear to have been under any direct supervision from the judiciary.[518] Wakī' records in four different places that Shurayḥ recommended that guardians should spend generously on the orphans in their care.[519] Another tradition, discussed in the last chapter, indicates that Shurayḥ told a man with an orphan in his care who was prone to excessive drinking that the man could withhold the orphan's property.[520] There is no indication that Shurayḥ made these statements in his role as *qāḍī*; rather, they appear to be reports of his legal opinion on these cases. In any case, whether or not he was serving as judge at the time, the narratives appear to assume that the people responsible for orphans' property are guardians and not Shurayḥ or his assistants.

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[517] Tillier, *L'cadis d'Iraq*, Chapter 3, Paragraph 56.

[518] On Shurayḥ, a person portrayed as the "ideal judge," see E. Kohlberg, "Shurayḥ," *EI*^{2}.

[519] Wakī', 2/273, 275, 279, 295.

[520] *Ibid*. 2/294, 305-306.

At what point in time the trustees (*umanā'*) appear on the scene in Kufa is also unclear, as is their exact function once they do make an appearance. Ibn Abī Laylā is said to have sent two of his trustees (*amīnayn min umanā'ih*) to escort Abū Ḥanīfa to each teaching circle in Kufa where they were to announce that Abū Ḥanīfa repented from his belief in a created Qur'ān.[521] It would seem that the specialization of duties associated with the *umanā'* in later periods did not exist at this time in Kufa. Indeed, Wakī' also records that Ibn Abī Laylā told a mother from Sind with a fatherless child, "Orphans' property is not to be left in the hands of a woman, and it must be removed from your possession and given to a trusted man (*rajul thiqa*).[522] No mention is made of a professional trustee appointed by the court who could fulfill this role. Similarly, Ibn Abī Laylā is said to have asked two men to hold two thousand dinars in trust, and they refused his request.[523] Had there been a professional cadre of *umanā'*, as in Basra, one would think that Ibn Abī Laylā would not need to make this request of private individuals who had the ability to refuse him. Indeed, Tillier notes that "apart from his scribe and one or two other occasional employees, the *cadi* of Kūfa seems to have relied above all on a non-professional entourage and on his social network."[524] The case of Kūfa cautions against concluding that the kinds of extensions of judicial power in Basra and Egypt were empire-wide reforms, even if they were put in motion by the Abbasid caliph. This extension of judicial power in Egypt will be documented in the following section.

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[521] *Ibid*. 3/142.

[522] *Ibid*. 3/135.

[523] *Ibid*. 3/134.

[524] Tillier, *L'cadis d'Iraq*, Chapter 3, Paragraph 56.

Egypt

Up until the mid-8th century, the judicial staff in Egypt consisted of merely a single scribe.[525] As noted above, a written record of the *qāḍī*'s decisions appears to have been kept since the second half of the 1st/7th century in Egypt, and Egypt was also a forerunner in the extension of judicial supervision over orphans' property. At first, this was accomplished not through the expansion of the court staff but rather by using the existing organization of the Arab conquerors and their descendants into tribes in order to facilitate oversight of orphans' property.[526] As al-Kindī reports, the judge ʻAbd al-Raḥmān b. Muʻāwiya b. Ḥudayj, a member of a leading Arab family, after being appointed *qāḍī* in Rabīʻ I 86/705, ordered a review of orphans' property and made the *ʻarīf* (pl.: *ʻurafā'*) of each tribe (*qawm*) liable for this property.[527] The *ʻarīf* at this time referred to a person who was responsible for collecting taxes from the Arab tribes and distributing to them a stipend (*ʻaṭā'*).[528] This official was also already responsible for recording the births and deaths of members of the tribe, which would have allowed him to identify orphans more easily than the *qāḍī* on his own.[529] Despite Ibn Muʻāwiya only lasting six months as *qāḍī*, the *ʻurafā'* seem to have continued to have some control over orphans' property. For example, during the tenure of the judge Yaḥyā b. Maymūn al-Ḥaḍramī (in office Ramadan

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[525] Hallaq, "The qāḍī's dīwān," 422, n. 39.

[526] The *jund*, or soldiers, who settled in Egypt following the Muslim conquest starting in 639 or 640, see Hugh Kennedy, "Egypt as a province in the Islamic caliphate, 641-868," in *The Cambridge History of Egypt Volume 1: Islamic Egypt, 640-1517*, ed. Carl F. Petry (Cambridge: Cambridge University Press, 1998), 1/62-85.

[527] Al-Kindī, 325.

[528] Salih A. el-Ali and Cl. Cahen, "'Arīf," *EI*^{2}.

[529] Maged S.A. Mikhail, "Egypt from Late Antiquity to Early Islam: Copts, Melkites, and Muslims Shaping a New Society," PhD diss., (University of California, Los Angeles, 2004), 246-247.

105/724 – 114/732-733), an orphan from the tribe of Murād was under the guardianship (*wilāya*) of this *qāḍī*, possible because no natural or testamentary guardian could be found. The judge assigned him to the *ʿarīf* of his tribe, but, after reaching maturity, he came to Yaḥyā b. Maymūn and complained about the *ʿarīf* (for unclear reasons). Not only did the judge not hold the *ʿarīf* in question responsible, but he imprisoned the orphan instead. In response, the orphan complained to the Umayyad caliph Hishām, who wrote a letter to the local governor ordering the judge's dismissal.[530] The anecdote indicates both that the *ʿurafāʾ* were at least sometimes responsible for orphans' property but also that this may not have been as routinized as the reports about Ibn Muʿāwiya seem to indicate. Otherwise, why would the judge have to order the *ʿarīf* to take responsibility for the orphan in the first place? Whether or not this responsibility was routinized, it is noteworthy that *ʿurafāʾ* performed a task that would later be assigned to the *umanāʾ*. In their article on the role of the *ʿarīf*, el-Ali and Cahen note that "the most frequent use of the title of *ʿarīf* in the mediaeval Arabic-speaking Orient is to denote the head of a guild," and that the term "fell into disuse during the Ottoman period, and in the west was usually replaced by *amīn*."[531] By guild, the authors were referring to groups of a particular profession, which at various times and places in premodern Arabic-speaking countries were represented by a single individual, such *amīn al-tujjār*.[532] Hence, the transition from the *ʿurafāʾ* to *ʿumanāʾ* as the title of individuals responsible for, among other things, orphans' property appears to have been part of a broader transition in Arabic terminology. Since the *ʿurafāʾ* were, literally, "those who know" the *ʿurf*, or customary law, it might be that this terminological transition was due to the gradual replacement

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[530] Al-Kindī, 341.

[531] Salih A. el-Ali and Cl. Cahen, "ʿArīf."

[532] A. Raymond, "Ṣinf," *EI*^{2}.

of traditional law with the (increasingly written and therefore more stable) *fiqh* developed by the *'ulamā'*.

The end of the responsibility of the *'urafā'* for orphans' property appears to have come during the second term as *qāḍī* of Khayr b. Nu'aym (Ramadan 133/751 – Sha'bān 135/753), who, according to al-Kindī, was the first *qāḍī* to place orphans' property in the state treasury (*bayt al-māl*) by order of the Abbasid caliph al-Manṣūr. This shift in control of orphans' property occurred during the early years of the Abbasid period, when the Abbasid caliphs were increasingly centralizing the judiciary, although Khayr b. Nu'aym is said to have been appointed by the local governor and not, as would soon become the norm, by the Abbasid caliph.[533] Removing control of this property from the hands of the tribal *'urafā'* was facilitated by the decreasing importance of tribal loyalties in Egyptian politics, a process that had been accelerated by the transfer of Qaysī Arabs from Syria under the Umayyads in the first half of the 8th century (previous tribes in Egypt from the time of the conquest had been Yemeni or south Arabian).[534] Already in 118/736, the judge Tawba b. Namir (in office 115/733-120/738) had transferred supervision of the *awqāf* to the control of the judiciary.[535] Another blow to the autonomy of Muslim society in Egypt occurred in during judgeship of al-Mufaḍḍal b. Faḍāla who created a new position, the *ṣāḥib al-masā'il*, who was tasked with examining the credibility of witnesses, thereby standardizing a process that had begun on an informal basis by the same judge, Khayr b.

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[533] On the centralization of the *quḍāt*, see Tillier, "Judicial Authority," and El Shamsy, *Canonization*, 103-112.

[534] Kennedy, 74-75.

[535] El Shamsy, 104.

Nu‘aym, who had removed control of orphans’ property from the *‘urafā’*.[536] Seen in light of these steps towards increasing the judiciary’s control over various positions of trust, Ibn Nu‘aym’s decision to place orphans’ property in the *bayt al-māl*—where a separate record *sijill* was created for each estate including “what was spent and what was gained”—appears to be part of a larger process of increasing judicial authority in the mid-to-late 8th century. Moreover, control of orphans’ property was centralized at nearly the same time (within two decades at most) as in Basra. As was seen in the last chapter, the second half of the eighth century and the early 9th century was also the period in which the category of *ḥajr* was increasingly adopted by Muslim legal scholars, and al-Shāfi‘ī explicitly referred to orphans as people subject to *ḥajr*. Tillier has also pointed out that al-Shaybānī was the earliest scholar to mention the *qāḍī*’s responsibility for managing orphans’ property.[537] In both legal practice and in legal scholarship, then, the latter part of the 8th century witnessed a marked increase in the willingness of Muslim scholars and judges to consider the supervision of orphans’ property as a duty falling to the judiciary.

As in Basra, the expansion of the judge’s power over orphans’ property was not without its detractors as the community witnessed its autonomy over handling this property diminish. Although it was said of the Mālikī jurist al-Mufaḍḍal that “no one else among our judges was more vigorous in defending the orphans than al-Mufaḍḍal,” the poet Isḥāq b. Mu‘ādh wrote scathing verses accusing this judge’s expert witnesses of being thieves after al-Mufaḍḍal had

[536] *Ibid*. 103-107; al-Kindī 385, 394.

[537] Tillier, *L’invention du cadi,* Chapter 3, Paragraph 56.

appointed ten of them.[538] It is possible that this accusation was in part a reaction to the judge's willingness to uphold the rights of orphans against their guardians, whom he thought should act "like the father" of the orphan.[539] A clearer example of this fear of loss of local control over orphans' property occurred during the tenure of Muḥammad b. Masrūq al-Kindī (in office Ṣafar 176-184/792-800) who was appointed by al-Rashīd and made a point of his independence from local Egyptian politics by ending the practice of attending the court of the local governor.[540] He also is said to be the first judge to use the *qimaṭr*—a kind of bag or case used to store keep judicial records in one place—continuing the pattern of increasing archival sophistication by the judiciary at this time.[541] Ibn Masrūq did not encounter a welcoming population. When he held a public ceremony to appoint professional witnesses from among the Egyptians, the event deteriorated into a mutual exchange of insults between himself and the people who were not selected.[542] Then a rumor was spread that Ibn Masrūq had taken it upon himself to send the property of *awqāf,* orphans and absent people—which had previously been held in the local treasury (*bayt al-māl*) apparently since the time of Ibn Nu'aym—to al-Rashīd in Baghdad.[543]

Whether there was any truth behind this fear, this transfer of property, even if it was eventually returned to Egypt upon the request of the legitimate recipients, would have nevertheless deprived the people of Egypt of access to a large amount of capital that could be

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[538] Al-Kindī 386.

[539] *Ibid*. 386.

[540] *Ibid*. 388.

[541] *Ibid*. 391; Hallaq, The 'qāḍī's dīwān," 434.

[542] *Ibid*. 389.

[543] *Ibid*. 390.

used for trade. Although it is not explicitly mentioned in al-Kindī's history that merchants were trading with orphans' property, it was almost certainly occurring on a regular basis. As we saw in Chapter Two, *zakāt* of orphans' property in the 8th century was often used to justify trading with orphans' property, and several reports indicate that 'Ā'isha did this on a regular basis. All of the four Sunnī schools of law, moreover, would agree on legitimacy of this practice (in fact, some scholars argued that it was either encouraged or required), and the opinion attributed to al-Ḥasan al-Baṣrī, discussed in the previous chapter, appears to be the only recorded opinion of a scholar who discouraged the practice.[544] In fact, although al-Kindī does not explicitly name loss of profits from commerce with orphans' property as a reason for the anger towards Ibn Masrūq, he does report that his son was the one who "exposed him (*faḍaḥah*)" because the son would go to "whoever had in his possession property held as a deposit (*min al-wadā'i'*) and say, 'Give it to me so that I can trade with it and keep the profits.'" The son apparently did not return what he borrowed in this way.[545] It is possible that some of this property was orphans' property. As was seen earlier, in Basra at least some people had a practice of entrusting private individuals with orphans' property. Nor should it be thought that the reports about orphans' property being placed in the state treasury implied that *all* such property was thereby taken out of the hands of individuals, as will be seen now.

The reforms of another *qāḍī* appointed by al-Rashīd, 'Abd al-Raḥmān b. 'Abd Allāh al-'Umarī (in office 185-194/801-810) and their legacy are an indication that the attempts to extend judicial authority over the property of orphans did not always last beyond the tenure of the judge who implemented the reforms. Like Ibn Masrūq, al-'Umarī relied on a select group of

[544] This was the conclusion arrived at by Ibn Qudāma. Ibn Qudāma 6/339; Qawzaḥ, 55-58.

[545] Al-Kindī, 391.

professional witnesses, excluding others from testifying in court, something that al-Kindī notes continued into his day.[546] His witnesses were said to have reached around one hundred in number, and a poet of the time accused them of robbing orphans of their wealth.[547] At some point, al-'Umarī appointed a single person to oversee orphans' property. It is not clear if this was in response to the accusations of his witnesses' corruption or a cause of those accusations. In any case, the man invested the orphans' property to buy houses and palm orchards. These were fruitful investments, and the man used the profits to satisfy the needs of the orphans. However, when they reached maturity and asked for their property back, the man refused, claiming that they had consumed the equivalent of the principle capital, so the estates were now rightfully his. After bringing the issue to al-'Umarī, the judge took his side, stating "I do not think he did you any wrong; it was your property that you consumed."[548] But when al-'Umarī was eventually replaced, his successor, Hāshim b. Abī Bakr al-Bakrī punished the man severally for his mishandling of the property, tying him to a column where he was left to be publicly shamed for days.[549] The problem here was not, as we have seen, that the man was investing orphans' property but that he kept the principle for himself.

In another report about al-'Umarī's tenure as judge, we read for the first time the term *mūda'* to refer to a place in which orphans' property and intestate property was collected. The report in al-Kindī's history states:

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[546] Al-Kindī, 394.

[547] *Ibid*. 396.

[548] *Ibid*. 404.

[549] On the al-Bakrī, see *Ibid*. 411-417. C.f. Lev, *Administration of Justice in Medieval Egypt*, 54, where the punishment is erroneously attributed to al-'Umarī.

> Ibrāhīm b. Abī Ayyūb said, "al-'Umarī was the first to create the judge's chest (*tābūt al-quḍāt*) which was in the treasury (*bayt al-māl*)." He also said, "He spent four dinars on it." Muḥammad b. Yūsuf (al-Kindī) was asked about that chest (*tābūt*) that was mentioned. He said, "The property of orphans and those with no inheritor was collected in it, and it was the depository of the Egyptian judges (*mūda' quḍāt miṣr*)."[550]

Ibrāhīm b. Abī Ayyūb, the originator of this report, is identified by the editor of al-Kindī's history as a source "of minor importance" who was alive in the mid-9th century.[551] It is unclear if he was aware that Ibn Nu'aym had previously placed orphans' property in the state treasury (*bayt al-māl*) half a century prior to al-'Umarī. If he was, then he must have meant that al-'Umarī was the first to create a specific chest for orphan's property. It is possible that at al-Kindī's time, a chest was no longer used, but it seems certain that the Egyptian judiciary still had a practice of keeping orphans' property, and probably other property held in trust, in a particular place or places under their control. This would explain why he was asked what the *tābūt* was for, and why he glossed it as *mūda' quḍāt miṣr*. In light of the complaints about how al-'Umarī's notaries (*shuhūd*) handled orphans' property, it is possible that he purchased the chest as a way to decrease the likelihood that this property would be mishandled. However, it should not be assumed that the assignment of a specific chest in the treasury implies that this property did not also circulate in the community. On the contrary, the evidence we have seen above indicates that this property was regularly lent out, and it is likely that one or more of the professional witnesses would have been involved in the process of lending and keeping track of the property.

It is also certain that al-'Umarī's creation of the *tābūt* did not put an end, once and for all, to private individuals holding orphans' property in trust. When Hārūn b. 'Abd Allāh (in office

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[550] Al-Kindī, 405.

[551] Al-Kindī, 28.

Ramadan 217/832 - Ṣafar 226/840) was appointed *qāḍī* of Egypt by al-Ma'mūn, one of his first actions was to personally review all matters relating to his office, including orphans' property. Because one guardian's treatment of his orphaned ward was not to the new judge's satisfaction, the latter had the guardian beaten and publicly shamed. It is not clear if the guardian's mistreatment related to property or to some other part of the guardian's responsibilities towards the orphan. However, al-Kindī also reports that Ibn 'Abd Allāh also ordered at this time that intestate property and absentee property be sent to the state treasury (*bayt al-māl*), which indicates that not all of al-'Umarī's reforms had remained in place in the twenty-two years since his time in office.[552]

Nor were Ibn 'Abd Allāh's attempts to force centralized control over this property entirely successful. His successor, Ibn Abī al-Layth (in office 226-235/841-850) sent his herald (*munādī*) to announce that anyone who had orphans' property or absentee property in their possessions would be forsaken by the law unless they immediately turned it over. After the people raced to do this less they lose the protection of the court, Ibn Abī al-Layth deposited this in the state treasury (*bayt al-māl*).[553] The *tābūt* was still in use—something we learn only because Ibn Abī al-Layth accused his predecessor—Hārūn b. 'Abd Allāh—of embezzling the funds in the treasury, and the latter eventually admitted after being questioned relentlessly that he gave the key to the *tābūt* to an unscrupulous man who helped himself to what was inside.[554] The new *qāḍī* is also said to have sought out the inheritance of a girl that was stolen by the guardians

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[552] Al-Kindī, 444.

[553] *Ibid*. 450.

[554] *Idem*.

appointed by her father, an act for which he was praised in poetry.[555] Rather than the start of a new era of justice, however, Ibn Abī al-Layth was remembered as an overbearing judge who enforced the disliked *Miḥna*-era policies with zeal. He prevented the followers of Mālik and al-Shāfi'ī from even approaching the central mosque, let alone sitting or teaching in it, and he also made an effort to hallow his office with the exclusive right to wear the long *qalansuwa*, a kind of shawl draped over the head like a cowl which was favored by the Egyptian *fuqahā'* at the time. Those who refused to stop wearing it were beaten.[556] Eventually, Ibn Abī al-Layth was accused of stealing from the treasury (*bayt al-māl*) around 120,000 dinars (for comparison, his yearly salary was 1,000 dinars, which was a considerable increase from the salary of previous judges, and during his tenure he auctioned a slave for one dinar).[557] In what must have seemed by this time a predictable script, his successor, al-Ḥārith b. Miskīn (in office 237-245/851-859), after holding a trial for Ibn Abī al-Layth, later faced accusations himself that his brothers had also stolen from the treasury (*bayt al-māl*) after the judge took the key to it out of his *qimaṭr* and entrusted it to them.[558]

The repeated reports of increased centralization of property belonging to orphans, absent people, and intestate estates followed by accusations of embezzlements indicates that the extension of the judge's authority over these properties and the routinization of its oversight via the creation of professional witnesses and the *tābūt* created new opportunities for corruption that

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[555] Ibn Ḥajar, *Raf' al-iṣr 'an quḍāt miṣr*, ed. 'Alī Muḥammad 'Umar (Cairo: Maktabat al-Khānjī, 1988), 410.

[556] *Ibid*. 451, 460.

[557] *Ibid*. 457, 466.

[558] *Ibid*. 470.

these very reforms were intended, at least outwardly, to prevent. It is impossible to discern with complete certainty why these reforms instituted by the Egyptian judges, whether on their own initiative or by order of the Caliph, appear to have often been abandoned. Part of the problem must have been the mistrust with which the local population regarded the judges themselves. If embezzlement seemed to be a high likelihood, then people certainly had an incentive to resist turning over orphans' property. Another problem seems to have been that judges were not always appointed immediately after their predecessors were removed from office. Two months separated the end of Ibn 'Abd Allāh's tenure and the start of Ibn Abī al-Layth's, and more than two years passed after the latter's removal from power and the beginning of his successor's time in office. Another reason for the repeated reforms seems to be that judges were experimenting with new techniques for supervising and accounting for this property. For example, al-Ḥārith assigned a single individual responsibility for property belonging to absent people along with money intended for travelers (*amwāl al-sabīl*).[559] Similarly, in Rabī' II 331/943, the judge of Egypt and Syria, al-Ḥusayn b. 'Īsā b. Hārūn, sent an individual to Egypt to be the general guardian (*walī*) of both orphans' stipends (*nafaqat al-aytām*)—i.e., how much should be given to the guardians each month of the orphans' property for the latter's maintenance—and charitable endowments. A separate person was made responsible for issuing rulings at court on behalf of the judge.[560] This innovation was probably due to the *qāḍī*'s distance from Egypt at the time,

[559] *Ibid*. 468.

[560] *Ibid*. 490. During this period, following the fall of the short-lived Tulūnid dynasty, the ruler of Egypt and part of Syria, Muḥammad b. Ṭughj al-Ikhshīd, does not seem to have always appointed judges directly himself. At least nominally, local judges were appointed by al-Ḥusayn Ibn Hārūn who, in turn, received his appointment from the Abbasid court in Baghdad. See *ibid*. 490-491; 'Alī b. al-Ḥasan Ibn 'Asākir, *Tārīkh damashq*, ed. 'Amr b. Gharāma al-'Amrawī (Beirut: Dār al-Fikr, 1995), 14/286. On al-

which prevented him from making decisions himself about orphans' stipends or finding trustworthy local individuals with whom he could entrust this responsibility.

But despite these minor shifts in responsibility for property belonging to orphans, absent individuals, and endowments, by the 4th/10th century the *mūda' al-ḥukm,* or judicial treasury, was an integral part of the infrastructure of the law in Egypt. Key evidence for this is provided by the history of the judiciary in Egypt penned by Abū Muḥammad Ibn Zūlāq (d. 386/996) who wrote a continuation (*dhayl*) of al-Kindī's history on the same subject.[561] Although this work has not survived on its own, it was a major source for Ibn Ḥajar's (d. 852/1449) own history of the Egyptian judiciary, *Raf' al-iṣr 'an quḍāt miṣr*. For example, Ibn Zūlāq wrote that when the judge Ibrāhīm Ibn Kurayz (in office 312-313/924-925) arrived in Egypt to assume the judgeship, he first went to pray at the congressional mosque where his letter of appointment was read aloud, after which he went to the governor's residence and took possession of the contents of the *mūda'*. While the wording in Ibn Ḥajar's history suggests that the *mūda'* was located at the governor's residence, it seems that it was the conveyance of responsibility for its contents that occurred there, for Ibn Ḥajar states, quoting Ibn Zūlāq, that the *mūda'* was "in the hands of a group of *umanā'*," one of whom had "50,000 dinars that he buried under a staircase."[562] It would seem that, at this time, part of the contents of the judicial treasury, or possibly documents that registered property held elsewhere, was kept in the state treasury (*bayt al-māl*) in the governor's residence. Ibn Zūlāq also mentions that, despite Ibn Kurayz spending a portion of what was in

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Ikhshīd's delicate relationship with the Abbasid court, see Jere L. Bacharach, "The Career of Muḥammad Ibn Ṭughj al-Ikhshīd, a Tenth-Century Governor of Egypt," *Speculum* 50, no. 4 (1975), 586-612.

[561] P. Bearman, et. al., "Ibn Zūlāḳ," *EI²*; Ḥājī Khalīfa, *Kashf al-Ẓunūn 'an asmā' al-kutub wa'l-funūn* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 2008), 2/1352.

[562] *Ibid*. 34.

the *mūda'*, his predecessor 'Abd al-Raḥmān b. Isḥāq (in office 313-314/925-926) found 80,000 dinars in the *mūda'* when he began his tenure. He did not approach these funds, and apparently passed the entire contents of the *mūda'* to his successor.[563] Although it is unstated where this property was kept, it is clear that at this point in the early 4th/10th century, the *mūda'* was an institution dedicated to holding property in trust under the care of *umanā'*. It seems likely that the judge or his assistants were often able to choose the location of the *mūda'*. For example, in an entry on the judge 'Īsā b. al-Munkadir (in office 212-214/827-829), Ibn Ḥajar relates that Ibn al-Munkadir rented a residence (*manzil*) in the house built by 'Amr b. al-'Ās in which he would place his *qimaṭr* and have the door sealed after finishing his duties each day.[564] It seems possible that orphans' properties, or at least an accounting of them, were kept in the residence as well. In the time of Kāfūr, the *mūda'* was under the control of professional witnesses or notaries (*shuhūd*) and not in the governor's residence. According to Ibn Ḥajar, when the judge 'Umar b. al-Ḥasan al-Hāshimī was appointed by Kāfūr as *qāḍī* of Egypt, the *mūda'* was in the possession of two witnesses (it is unstated whether they were considered *umanā'* or not).[565] As part of the transfer of the responsibilities of the judgeship to the new *qāḍī*, the two men broke the seal of the previous judge and replaced it with the seal of al-Hāshimī.[566] This process of centralization

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[563] *Ibid*. 213.

[564] *Ibid*. 297.

[565] These were probably *umanā'* since *umanā'* did exist during these years in Egypt; the judge that al-Hāshimī replaced used to refer despairingly to the *umanā'* as *kuhanā'* (the soothsayers or priests), probably a reflection of their growing power in this period due to their control over the property of orphans and absent people. *Ibid*. 213.

[566] *Ibid*. 185.

would only continue in the latter half of the century after the Fāṭimid Empire was established in Egypt.

The success of the *quḍāt* in establishing regular control over orphans' property, absentee property, and the endowments was due to a combination of two factors: the declining fortunes of the traditional notables in Fusṭāṭ and the increasing professionalization of the legal profession. It was seen above that control of orphans' property was shifted away from the *'urafā'* as Arab tribes lost political power in Egypt. As argued in the previous chapter, the 9th century also saw the emergence of a universalized concept of legal interdiction (*ḥajr*) within Islamic jurisprudence. It is significant that the subordination of orphans' legal status under a universalized conception of legal interdiction emerged in the same century that al-'Umarī is said to have established the first *mūda'*. The existence of "a widely accepted body of rules and norms," in the 9th century, as Tillier as argued, appears to have increased the ability of the judges to impose their vision of the law on both populace and rulers.[567] As will be seen now, the appearance of the Fāṭimids in the mid-10th century led to an increase in the centralization and standardization of the supervision of orphans' property in (urban) Egypt.

Egypt under the Fāṭimids

After establishing a caliphate in Tunisia in the beginning of the 10th century, the Fāṭimids, who were a messianic movement that transformed themselves into a state, set their eyes on Egypt. After several failed attempts, the combination of careful planning, the disintegration of the short-lived Ikhshīdid dynasty, and a discrete effort to proselytize the Fāṭimid

[567] Tillier, "Judicial Authority," 9.

cause within Egypt culminated in the conquest of Egypt in 969.[568] The leader of that successful campaign, Jawhar, also established in the same year the city of Cairo as a royal city adjacent to the older urban center Fusṭāṭ along the banks of the Nile. Although the Fāṭimids were a branch of the Ismā'īlī movement and therefore were not adherents to any of the Sunni schools of law, their arrival in Egypt did not result in a major upheaval of the legal practice of the country. Rather, they made the calculated decision to retain the *qāḍī* of Fusṭāṭ, Abū Ṭāhir al-Dhuhlī (d. 363/973), as a vital link between themselves and their new subjects.[569] The only change in the practice of the law that the Fāṭimids compelled him to make was to judge according to Ismā'īlī law in cases of inheritance and divorce as well as when determining the time of the new month.[570] Although the family of the Fāṭimid legal scholar and confidant of the caliph al-Mu'izz, al-Nu'mān b. Muḥammad's (d. 363/978), would come to dominate the head of the judiciary for a time, even under the powerful ruler al-Ḥākim a Ḥanbalī (i.e., Sunni) judge was appointed. Sunni law continued to be taught and studied in the study circles, and when the fiercely anti-Ismā'īlī vizier Kutayfāt decided to nominate four judges in 525/1130-1 belonging to the Shāfi'ī, Mālikī, Imāmī and Fāṭimid schools of law, he had no problem finding capable judges trained in the Sunni legal schools.[571] Despite the continued existence of Sunnī judges and scholars in Fatimid Egypt, S.M.

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[568] Lev, *State and Society in Fatimid Egypt* (Leiden: Brill, 1991), 11-12.

[569] Lev, *State and Society in Fatimid Egypt*, 19. Allouche's claim that al-Nu'mān acted "as *de facto qāḍī*" should be qualified. He cites one case in Ibn Ḥajar's *Raf' al-iṣr* in which a ruling of al-Nu'mān was sustained by Abū Ṭāhir. Moreover, al-Nu'mān was only in Egypt for about a year before his death, whereas Abū Ṭāhir ruled as *qāḍī* prior to al-Nu'mān's arrival and after the latter's death until 366/976, i.e., for seven years of Fāṭimid rule. See Adel Allouche, "The Establishment of Four Chief Judgeships in Fāṭimid Egypt, *Journal of the American Oriental Society*, (1985), 105, no. 2, 317; al-Kindī 586 (Allouche's source for the reference in *Raf' al-iṣr*); Lev, *State and Society in Fatimid Egypt*, 133-134.

[570] Ibn Ḥajar, *Raf' al-iṣr* 328.

[571] *Ibid*. 138; Allouche 317-320.

Stern claimed that Ismā'īlism's "legal doctrines were applied by the judiciary."[572] Until now, there has been little study of how law was applied on a day-to-day basis in Fatimid Egypt. Studying practices of preserving and supervising orphans' property allows us to observe the extent to which the introduction of Ismā'īlism in Egypt affected the application of the law.

The Fāṭimids appear not to have immediately interfered in the supervision of the property of orphans or absent people, leaving it in the hands of the judges. Just as in the Abbasid period in Egypt, access to large amounts of wealth led to accusations of misappropriation, whether founded or unfounded. After the death of Muḥammad b. al-Nu'mān in Ṣafar 386/996, it was discovered that he owed 300,000 dinars to "the orphans and others" whose property was under the control of the judiciary. In response, his estate was sold off to help cover the debt and the witnesses who were entrusted with the deposits (*wadā'i'*) were fined unless they were able to provide a document for the missing property with the deceased *qāḍī*'s signature on it. Only half the debt was recovered in this manner. According to one version of these events preserved in Ibn Ḥajar's *Raf' al-iṣr*, the caliph al-Ḥākim responded to the discovery of the *qāḍī*'s misappropriation of such an enormous sum by dedicating a specific place in Zuqāq al-Qanādīl. In his history of the Fāṭimid caliphate, al-Maqrīzī also states that it was al-Ḥākim who took the decision to create a specific place for orphans' property in Zuqāq al-Qanādīl.[573] But in another version of the events found in *Raf' al-iṣr*, it was not al-Ḥākim but the grandson of the al-Nu'mān, al-Ḥusayn b. 'Alī b. al-Nu'mān (in office 389-395/999-1005), recently appointed *qāḍī* in place of his deceased uncle, who took the initiative of moving all orphans' property to a

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[572] S.M. Stern, *Studies in Early Ismā'īlism* (Jerusalem: Magnus Press, 1983), 236.

[573] Taqī al-Dīn Aḥmad al-Maqrīzī, *Itti'āẓ al-ḥunafā bi-akhbār al-a'imma al-fāṭimiyyīn al-khulafā*, ed. Jamāl al-Dīn al-Shayyāl (Cairo: Lajnat Iḥyā' al-Turāth al-Islāmī, 1967-1973), 2/21.

centralized location in Zuqāq al-Qanādil. According to this version, found in Ibn Ḥajar's biography of al-Ḥusayn b. ʻAlī, the new *qāḍī* ordered all people responsible for orphans' property to keep records of that property, indicating that this may not have been a standard practice at the time.[574] At some point in his judgeship, a group of people presented themselves at al-Ḥusayn's court and claimed they had funds deposited in the judicial treasury (referred to here as "*al-diwān al-ḥukmī*").

It is unclear what the nature of these deposits were – were they held in trust because the people were orphans, because they were abroad or absent when the property came into their name, or did they themselves give the property to the judiciary for safekeeping? In any case, when al-Ḥusayn inquired about the deposits, he was informed that his predecessor, Muḥammad b. al-Nuʻmān had taken the property as a loan. As a result, al-Ḥusayn forced the son of the previous judge, ʻAbd al-ʻAzīz b. Muḥammad, to sell his father's estate, and enlisted the help of the *wazīr* Barjawān's secretary to search for anything left of the property Ibn al-Nuʻmān borrowed. After returning the property to the depositors, al-Ḥusayn set aside a location in Zuqāq al-Qanādīl for court deposits (*li'l-wadā'iʻ al-hukmiyya*) and established five professional witnesses to keep account of deposits and withdrawals. Ibn Ḥajar remarks that al-Ḥusayn "was the first to set aside a specific place for the judicial treasury (*al-mūdaʻ al-ḥukmī*), but before that property was deposited with the judges or their trustees (*umanā'*)."[575] This comment confirms that orphans' property and other property held in trust by the judiciary did not at this time have a set location, which is unsurprising given that much of our information for this conclusion comes

[574] Ibn Ḥajar, *Rafʻ al-iṣr*, 140.

[575] *Ibid*. 141.

from Ibn Ḥajar himself or al-Kindī, a source which the former also read and drew on heavily in his own history of the judges of Egypt.

Regardless of whether the creation of a specific place for the judicial treasury was initiated by al-Ḥusayn or al-Ḥākim, its location in Zuqāq al-Qanādīl, or Alley of the Lamps, is indicative of the expectations regarding the way the property would be used. Zuqāq al-Qanādīl was a bustling market lying immediately north of the Mosque of ʻAmr b. al-ʻĀṣ in Fusṭāṭ, the original Muslim settlement in Egypt. Several prominent Muslims of the first century—including ʻAmr b. al-ʻĀṣ, the general who conquered Egypt—constructed residences along this street. For this reason, it was first known as "Zuqāq al-Ashrāf," or "Alley of the Nobles."[576] The historian al-Maqrīzī (d. 845/1442) relates in his seminal topographical history of Egypt that the area acquired its new name because lamps were hung from the door of each residence – one hundred in total, according to one of his sources. In the mid-13th century when the powerful vizier Bahā' al-Dīn Ibn Ḥinna (d. Dhū al-Ḥijja 677/1279) chose the area as the location for his *madrasa*, it was "the most populous neighborhood in Egypt," although by the time al-Maqrīzī was writing in the 15th century it had lost its prominence as a commercial center and the judicial treasury had long-since been moved elsewhere.[577] Zuqāq al-Qanādīl's zenith as a commercial hub may very well have started in the late 10th century, when the Fāṭimid economy rapidly expanded due to the

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[576] Besides ʻAmr b. al-ʻĀṣ, the sources mention the Companion and early *qāḍī* Kaʻb. b. Yasār b. Ḍinna, the Companion Abū Dharr al-Ghifārī, Zakariyyā' b. al-Jahm (a nephew of the Prophet's wife Māriyya), and the Companion ʻAbd al-Raḥmān b. Shuraḥbīl b. Ḥasana. See Abū ʻUbayd al-Bakrī, *al-Masālik wa'l-mamālik* (Beirut: Dār al-Gharb al-Islāmī, 1992), 2/604; Abū al-Qāsim Ibn ʻAbd al-Ḥakam, *Futūḥ miṣr wa'l-maghrib*, ed. ʻAlī Muḥammad ʻUmar (Cairo: Maktabat al-Thaqāfa al-Dīniyya, 2004), 135, 137.

[577] Al-Maqrīzī, *al-Mawāʻiẓ wa'l-iʻtibār fī dhikr al-khiṭaṭ wa'l-āthār*, ed. Ayman Fu'ād Sayyid (London: al-Furqān li'l-Turāth al-Islāmī, 2003), 4/473. On Bahā' al-Dīn Ibn Ḥinna, see *ibid*. 4/473-475; Muḥammad b. Shākir al-Kutubī, *Fawāt al-wafayāt wa'l-dhayl ʻalayhā*, ed. Iḥsān ʻAbbās (Beirut: Dār Ṣādir, 1973), 3/76-78.

combination of low tariffs, an efficient and sophisticated bureaucracy, and relatively peaceful relations with other Mediterranean powers.[578] The poet and traveler Nāṣir Khusraw, who visited the twin cities of Cairo and Fusṭāṭ in the year 439/1048, wrote that "no market like it is known in any country, and in it is every curiosity found in the world," pausing to note some of the things he saw: luxury items made of nacre, skilled craftsman working wonders with crystal from the Maghreb and the Red Sea, ebony from Zanzibar, and sandals made of hides imported from Ethiopia.[579] The late 10th century geographer al-Muqaddasī (d. *circa* 380/990) reserved a briefer yet still potent comment about the famous market by invoking a Qur'ānic rhetorical format that underscores the impossibility of human comprehension of matters of divine wisdom: "What could convey to you what Zuqāq al-Qanādīl is?"[580]

Placing the judicial treasury in the richest market of the time had several advantages. Money in the treasury could easily be loaned to reliable merchants who frequented the market and were in need of capital. Familiarity with the merchants, their business, and the extent of their wealth marked them as credible recipients of this loan, which was not just a financial but a sacred trust. Moreover, it is possible that some of the loans at this time, as was the case in the Mamlūk period, took the form of delayed payments for a sale, in which case access to goods that could be sold in return for a deferred payment would help facilitate the creation of these (all-but-

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[578] S.D. Goitein, *A Mediterranean Society: The Jewish Communities of the Arab World as Portrayed in the Documents of the Cairo Geniza, Volume 1: Economic Foundations* (Berkeley and Los Angeles: University of California Press, 1967), 33-35.

[579] Nāṣir Khusraw, *Safarnāma*, trans. Yaḥyā al-Khashshāb (Cairo: al-Hay'a al-'Āmma li'l-Kitāb, 1993), 118.

[580] Shams al-Dīn Muḥammad al-Muqaddasī, *Aḥsan al-taqāsīm fī ma'rifat al-aqālīm*, ed. M.J. de Goeje (Leiden: Brill, 1906), 199. On his life and approximate year of death, see A. Miquel, "al-Muḳaddasī," *EI*^{2}.

in-name) loans.[581] Finally, the new location of the judicial treasury was in close proximity to the Mosque of ʻAmr b. al-ʻĀṣ, which was where the chief *qāḍī* had his court in during this period.[582] This adjacency to the court would have facilitated record-keeping and the *qāḍī*'s supervision of the *umanā'* charged with the property's safekeeping.

How extensive was this centralization of orphans' property during al-Ḥākim's reign? Al-Maqrīzī's version of the events in *Itti'āẓ al-ḥunafā* implies that the control of this property was total. According to him:

> Al-Ḥākim ordered that nothing of the orphans' property shall be entrusted to a trusted person (*'adl*) or a trustee (*amīn*), but they shall rent a storeroom in Zuqāq al-Qanādīl in which the orphans' property shall be placed. Then if they want to release any of the orphans' property, four people trusted by the *qāḍī* (*min thiqāt al-qāḍī*) must be present. Then, each *amīn* came and a stipend was released for each person in his care after the *qāḍī* was consulted, and a document was written attesting to what property the *amīn* had received in the name of each person in his care.[583]

It is unclear if this refers to a singular event or refers to a protocol that continued throughout al-Ḥākim's reign. Given that judicial reforms pertaining to the control of this property have been seen to be limited in extent, it would not be surprising if the *umanā'* eventually regained some of their independence. On the other hand, the *umanā'* in Cairo and Fusṭāṭ do appear during the reign of al-Ḥākim, at least, to continue to have been integrated into the state apparatus. For example, the Ḥanafī *qāḍī* Ibn Abī al-ʻAwwām upon his appointment on the 20th of Shaʻbān 405/1015, some sixteen years after the establishment of the *mūda'* in Zuqāq al-Qanādīl, was paraded through the streets of Cairo with the professional witnesses and *umanā'* proceeding in front of

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[581] On these loans offered by the judicial treasury in the early Mamluk period, see the next chapter of this dissertation.

[582] Khusraw 118; Ibn al-Ṭuwayr, *Nuzhat al-muqlatayn fī akhbār al-dawlatayn*, ed. Ayman Fu'ād al-Sayyid (Stuttgart: Franz Steiner, 1992), 107.

[583] Al-Maqrīzī, *Itti'āẓ al-ḥunafā*, 2/21.

him. Every Saturday, he would present to al-Ḥākim an account of the judiciary, including what the witnesses and *umanā'* had done.[584] Further evidence that the *umanā'* continued to be treated as employees of the Caliphate—rather than as agents of an independent judiciary—comes from an interesting encounter between a Mālikī *faqīh* and a Fatimid vizier in the early 12th century.

Orphans' Property at the End of the Fāṭimid Period: The *faqīh*'s intervention

Beginning in the end of the 10th century, Sunni jurists became more confident in their position in Egypt vis-à-vis the Fāṭimid Caliphate. Even before the establishment of four chief judges, including two Sunni judges—a Mālikī and Shāfi'ī—in 525/1130-1131, the civilian viziers who came to dominate Fāṭimid politics began making certain grants to the Sunni *'ulamā'*.[585] As part of this trend, the Mālikī scholar Abū Bakr al-Ṭurṭūshī (d. 520/1126) made a request to the vizier al-Ma'mūn al-Baṭā'iḥī in 516/1122-1123 to allow the inheritances of Sunnis to be divided according to Sunni law and that the *umanā' al-ḥukm* refrain from taking 2.5% of the orphans' property in their control. After discussing with al-Ṭurṭūshī, the vizier agreed to his request. No longer would the *umanā'* receive payment for their services directly from the orphans' estates. Instead, the vizier issued a decree that they would receive a monthly salary directly from the *mawārīth al-ḥashriyya*, i.e., the bureau which took ownership of property from estates with no inheritors.[586] In other words, the *umanā' al-ḥukm* at this time were paid directly from the Fātimid administration for their services. Moreover, given that al-Ṭurṭūshī travelled

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[584] Ibn Ḥajar, *Raf' al-iṣr* 73.

[585] Lev, *Saladin in Egypt* (Leiden, Boston, and Köln: Brill, 1999), 118.

[586] Al-Maqrīzī, *al-Muqaffā al-kabīr*, ed. Muḥammad al-Ya'lāwī (Beirut: Dār al-Gharb al-Islāmī, 1991), 7/409-416.

from Alexandria, his place of residence, to Cairo to make his complaint about inheritances and orphans' property, it would appear that the *umanā'* had jurisdiction of orphans' property not just in Cairo but also in Alexandria. Did this system continue after the Fāṭimid Period? The next chapter will address this question directly.

Conclusion

This chapter has charted the increasing control exerted by the judiciary over orphans' property in the centuries prior to the Ayyūbid and Mamlūk periods, with a focus on Egypt. Evidence from two cities in Iraq, Basra and Kufa, was also included due to its availability and because this evidence showed that the process of centralizing control over orphans' property in the Abbasid period occurred through the combined efforts of caliphs and judges. In Egypt, as well, it was seen that the centralization of orphans' property in the state treasury (*bayt al-māl*) occurred on the order of the Abbasid caliph al-Manṣūr. As judges and their assistants increased their oversight of this property, accusations of mishandling this property appear more often in the sources, a trend that continued into the Fāṭimid period. In the 9th century, the judge al-'Umarī establish a *mūda'*, or judicial treasury, for orphans' property and unclaimed property for the first time, on his own initiative. I argued that this increase in the power of the judiciary over this property is intimately related to the increasing independence of the judiciary and the emergence of a standardized legal concept of *ḥajr* outlined in the previous chapter.

Although the Fāṭimids introduced a new political and legal tradition to Egypt, judges nevertheless continued to control orphans' property directly. Eventually the caliph al-Ḥākim (or his chief judge) set aside a specific location for the *mūda' al-ḥukm* in the heart of the busiest market in Fusṭāṭ. The ability of the *umanā'* to remove wealth from this judicial treasury was

regulated and withdrawals were required to be documented and witnessed. The Fāṭimid reforms appear to have been implemented through the cooperation of both caliphs and judges. Later, in the period when caliphs no longer ruled independently, a major reform was instituted by the Fāṭimid vizier al-Ma'mūn al-Baṭā'iḥī upon the request of the Mālikī jurist, al-Ṭurṭūshī. The *umanā' al-ḥukm* responsible for supervising orphans' property received salaries from the state, ending a period in which they charged 2.5% of an orphans' estate in return for their services. In the following two chapters, it will be seen that this pattern of cooperation between rulers and jurists in the Fāṭimid period in establishing and maintaining legal institutions for managing orphans' property would continue into the early Mamlūk period, although both the judges and the *umanā'* had much more independence from the state. Moreover, as enormous sums began to accumulate in the new *mūda' al-ḥukm* and in the hands of individual *umanā'*, this cooperation would soon turn into conflict as rulers attempted to appropriate this wealth in times of emergency.

Chapter Four
The *Mūda‘ al-Ḥukm* and Orphans’ Property in Cairo in the Ayyūbid and Mamlūk Periods (1171-1517)

Introduction

Ṣalāḥ al-Dīn al-Ayyūbī’s establishment of a new Sunnī dynasty in 567/1171 in place of the previous Ismā‘īlī Fāṭimid caliphate was in many ways a gradual transition from one regime to anther in which places, institutions, practices and rites associated with political power remained in place. In fact, the Caliphate had been dominated by powerful, foreign military generals since al-Mustanṣir (d. 487/1094) appealed to Badr al-Jamālī for help governing the country in 466/1073.[587] Many of these generals had been Sunni themselves, and the Muslim population of Egypt had even been permitted access to four chief judges, including one Shāfi‘ī and one Mālikī, for a brief period in 525/1130.[588] Even the removal of the Fāṭimid caliphate came about not via revolution or military action. Rather, Ṣalāḥ al-Dīn simply failed to recognize Caliph al-‘Āḍid’s (r. 555-567/1160-1171) son as caliph following the former’s death, instead seeking and receiving legitimization of his rule over Egypt from the ‘Abbāsid caliph in Baghdad.[589] Local resistance from supporters of the Fāṭimids, particularly the regiment of Black soldiers that constituted the Fāṭimid’s main military force, was quickly and violently squashed by Ṣalāḥ al-Dīn’s generals even before al-Āḍid’s demise.[590]

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[587] Lev, “The Fātimid caliphate (348-567/969-1171) and the Ayyūbids in Egypt (567-648/1171-1250),” in *The New Cambridge History of Islam, Volume 2: The Western Islamic World, Eleventh to Eighteenth Centuries*, ed. Maribel Fierro (Cambridge: Cambridge University Press, 2010), 206-208.

[588] Ibid. 209; *Saladin in Egypt* (Leiden, Boston, and Köln: Brill, 1999), 118; Al-Sayyid al-Bāz al-‘Uraynī, *Al-Ayyūbiyyūn*, ed. Mustafā Wajīh Mustafā and Ayman Fu’ād Sayyid (Cairo: al-Dār al-Misriyya al-Lubnāniyya, 2022), 51.

[589] *Ibid*. 54.

[590] Lev, *Saladin in Egypt*, 81-84.

Nevertheless, the fall of the Fāṭimid dynasty and the emergence of a new political regime dominated by Ṣalāḥ al-Dīn, and, after his death, his sons, brothers and nephews, introduced significant changes that would continue to mark political ideas, relationships between rulers and the urban populace, and social institutions until the end of the Mamlūk regime in 1517. Many of these institutions – such as the *madrasa* and the *khānqāh* – emerged in the century prior to Ṣalāḥ al-Dīn under Seljuk auspices in Iran. Ṣalāḥ al-Dīn's former master, Nūr al-Dīn al-Zankī (r. 541-569/1146-1174) had already introduced this style of organized legal and religious education in Damascus by the time the Ayyūbids began building their own in Cairo and Damascus.[591] Although *madrasas* had, in fact, been built in Alexandria prior to the Ayyūbids, Ṣalāḥ al-Dīn's arrival intensified this process: he built five in Cairo and Fusṭāṭ, including the first in the capital city.[592] Relying on *awqāf*, or endowments that, among other things, provided stipends in exchange for educational and ritual duties, these institutions attracted Sunnī scholars to immigrate to urban centers like Cairo, Qūṣ in Upper Egypt, and Damascus and encouraged new generations of students to seek education and appointments, thereby creating strong ties between rulers and the elite urban populace.[593] Many of the graduates of the new religious colleges, the *madāris*, would also seek and receive employment in the state bureaucracy as accountants, scribes, and financial officers. The combination of an emboldened military class embracing

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[591] N. Elisséef, "Nūr al-Dīn Mahmūd b. Zankī," *Encyclopaedia of Islam, Second Edition*.

[592] Michael Chamberlain, "The Crusader Era and the Ayyūbid Dynasty," *The Cambridge History of Egypt, Volume I Islamic Egypt, 640-1517,* ed. Carl F. Petry, 231-233.

[593] Ira Lapidus, *Muslim Cities in the Later Middle Ages* (Cambridge: Cambridge University Press, 1967), xiii-xiv.

Sunnism, the emergence of new institutions of learning, and the close ties between urban populace and rulers is often referred to as "the Sunnī Revival."[594]

Another major shift introduced in Egypt and Syria during the 12th century, this time in political and military power, was the reliance on Turkish military slaves as the main unit of warfare. These military slaves were referred to as *mamālīk* (sing.: *mamlūk*), and they would come in the following centuries to occupy positions in the administration and state, eventually becoming sulṭāns of Egypt and Syria. Whereas military slaves had been employed widely by Muslim rulers since the 9th century, the institution had played a peripheral role in Egypt and Syria up until the establishment of the Ayyūbid state. Many of the elite officers and soldiers of the Ayyūbids came from the ranks of Turkish *mamālīk*, although the Ayyūbid armies would remain multi-ethnic, including large numbers of Kurdish officers and soldiers, until the end of their dynasty.[595] Reliance on *mamlūk*s was intensified by Sulṭān al-Ṣāliḥ Ayyūb (603 – 647/1206 or 1207 – 1249), who ruled both Egypt and, for a time, Damascus. He established a barracks for his new troops on the Rawḍa island across from Fusṭāṭ; from its waterside location, the elite corps trained at the barrack's took the name *Bahriyya*.[596] Its members would play a key role in

[594] The term "Sunni Revival" is in many ways a misnomer due to the fact that the changes in Islamicate societies the witnessed starting in the fifth/eleventh century were unprecedented. Examples of these innovations include the *madrasa* and the *khānqāh* but also the emergence of a shared cultural and educational milieu between bureaucrats and religious scholars. See Daphna Ephrat, *A Learned Society in a Period of Transition: The Sunni 'Ulama' of Eleventh-Century Baghdad* (Albany: State University of New York Press, 2000). See also the groundbreaking studies by Gary Leiser, "The Restoration of Sunnism in Egypt: Madrasas and Mudarrisun 495-657/1101-1249," PhD diss., (University of Pennsylvania, 1976) and "The Madrasa and the Islamization of the Middle East The Case of Egypt," *Journal of the American Research Center in Egypt* 22 (1985), 29-47.

[595] Robert Irwin, *The Middle East in the Middle Ages: The Early Mamluk Sultanate, 1250-1382* (Beckenham: Croom Helm Ltd., 1986), 12.

[596] R. Stephen Humphreys, *From Saladin to the Mongols: The Ayyubids of Damascus, 1193-1260* (Albany: State University of New York Press, 1977), 299-301; "The Emergence of the Mamluk Army,"

the establishment of the state that has come to be known in modern scholarship as the Mamlūk Sultanate or Empire. During the period of this latter sultanate, the *mamālīk* would continue not only to be the main fighting force but also dominate politics.

During the so-called "Mamlūk Period" (1250-1517), rituals and places established by the Ayyūbids continued to be held in reverence. One of these was the *ghāshiya*, or saddle cover, which was carried in front of the sulṭān during state processions as a symbol of his sovereignty throughout the entire period.[597] The Madrasa and Mausoleum of al-Ṣāliḥ Ayyūb was a particularly significant site and highlights the continuity between Fāṭimid, Ayyūbid and Mamlūk periods in Cairo. Following the fall of the Fāṭimid Caliph, many of the sites of royal buildings in the capital were transformed into residences, *madrasa*s and other religious buildings.[598] Al-Ṣālih Ayyūb continued this trend when he demolished part of the Fāṭimid Eastern Palace in 639/1242 and began constructing a *madrasa* that would host classes, for the first time in Egypt, for all four Sunni *madhhabs*.[599] Following his death, al-Ṣālih's wife, Shajar al-Durr (r. 648/1250) – the first *sulṭāna* whose rule marks the definitive beginning of the Mamlūk period—constructed a mausoleum for her late husband attached to the *madrasa*; this combination of a *madrasa* with a mausoleum was also unprecedented in Egypt but would soon be imitated by later Mamlūk

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Studia Islamica no. 45 (1977), 67-99, 94; "al-Malik al-Ṣālih Nadjm al-Dīn Ayyūb," *Encylopaedia of Islam, Second Edition*.

[597] P.M. Holt, "The Position and Power of the Mamlūk Sultan," *Bulletin of the School of Oriental and African Studies* (1975), vol. 38., no. 2, 241-243.

[598] Lev, *Saladin in Egypt*, 124-132.

[599] Al-Maqrīzī, *al-Khiṭat*, 4/485.

sulṭāns.[600] Under the second Mamlūk sulṭān, ‘Izz al-Dīn Aybak (r. 648-655/1250-1257), this madrasa-mausoleum complex was chosen as the site for the *mazālim* court, where individuals could petition the sulṭān’s representative for justice.[601] Aybak also instituted a practice that bound each new Mamlūk emir with the memory of al-Ṣāliḥ; after receiving a commission from the Sulṭān in the citadel, the freshly-minted emir would proceed through from the citadel through Cairo, which was specially illuminated for the occasion, to the tomb where he swore an oath in the presence of al-Ṣāliḥ’s body, following which a banquet was served. After the death of Qalāwūn (r. 678-689/1279-1290), who had built a similar mausoleum-madrasa across the street from that of al-Ṣāliḥ, this formal ceremony of investiture was moved to Qālāwūn’s tomb.[602]

This did not, however, mark an end to the prominence of this complex in the Mamlūk period as it continued to be used as a site of public justice where the state and public interacted. It functioned, throughout the Mamlūk period, as a kind of supreme court in which the four chief *qāḍī*s of each *madhhab* held court and deliberated on high-profile cases. Its position in the heart of the city, moreover, as well as its significance as the main courthouse in Cairo, seems to have made it an ideal place for public audiences. For example, when rioters complained in 1481 about Qaytbāy’s new exchange rate policy, the sulṭān ordered a discussion of the policy in the *madrasa*

[600] *Ibid*. 4/492. On Shajar al-Durr’s reign, see L. Ammann, “Shadjar al-Durr,” *Encyclopaedia of Islam, Second Edition*. On her reign as the definitive mark of the end of Ayyubid rule in Egypt, see Humphreys, *From Saladin to the Mongols*, 304.

[601] Al-Maqrīzī, *al-Khiṭat*, 4/486. On Aybak’s rule, see Amalia Levanoni, “Aybak, al-Mu‘izz ‘Izz al-Dīn,” *Encyclopaedia of Islam, THREE*.

[602] It would appear that this ceremony ended altogether in the second period of the Mamluk Sultanate, the Circassian period. See al-Maqrīzī, *al-Khitat*, 4/521-522. On the Circassian period, see Carl F. Petry, “Circassians, Mamlūk,” *Encyclopaedia of Islam, Three*.

where deliberations were likely attended or witnessed by non-elites.[603] Even following the conquest of Egypt by the Ottomans in 1517, the sacred nature of the place as a hall of justice was immediately recognized by the invaders. Initially, Selim appointed a single *qāḍī*, who was called *qāḍī al-ʻarab* (Judge of the Arabs); he was given complete jurisdiction over all legal matters and held court in the Ṣāliḥiyya Madrasa.[604] Even after Selim reinstated the four *qāḍī*s of Egypt—whom he had captured following his decisive victory of the Mamlūks in Syria—the new Ottoman *qāḍī* continued to hold court in in the Ṣāliḥiyya and hear public petitions.[605] In sum, this complex symbolized both the legitimacy of the early Mamlūks as inheritors of al-Ṣāliḥ's legacy and their commitment to the rule of law as determined by the four Sunni *madhhabs*. Other places, such as the citadel or the Saʻīd al-Suʻadā' *khānqāh*, both constructed by Ṣalāḥ al-Dīn and both sites of complex rites and symbols of legitimate rule, similarly indicated the Mamlūks' commitment to the rites, sites and royal practices established by the Ayyūbids.[606]

Due to the continued reverence and commemoration of Ayyūbid sulṭāns, places and practices during the Mamlūk period, scholars have long argued that the Mamlūk state was intimately connected to their Ayyūbid predecessors. In Holt's words, "The Mamlūk sultan was in an obvious sense the successor to the Ayyūbid rulers of Egypt and Syria."[607] Similarly, David

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[603] On this, see Amina ElBendary, *Crowds and Sultans: Urban Protest in Late Medieval Egypt and Syria* (Cairo and New York: The American University in Cairo Press, 2015), 28-29.

[604] Ibn Īyās, *Badā'iʻ al-zuhūr fī waqā'iʻ al-duhūr*, ed. Muhammad Muṣṭafā (Cairo: al-Hay'a al-miṣriyya al-ʻāmma li'l-kitāb, 1984), 5/165.

[605] *Ibid*. 5/233.

[606] On the citadel, see Nasr O. Rabbat, *The Citadel of Cairo: A New Interpretation of Royal Mamluk Architecture*, Islamic History and Civilization, Studies and Texts (Leiden: Brill, 1995). On *Saʻīd al-Suʻadāt*, see Nathan Hofer, *The Popularization of Sufism in Ayyubid and Mamluk Egypt, 1173-1325* (Edinburgh: Edinburgh University Press, 2015), especially pp. 35-60.

[607] Holt, 238.

Ayalon, the doyen of Mamlukology, noted that the author of the classic work on Mamlūk chancellery practice, al-Qalqashandī, wrote: "The Ayyūbid reign, which is the origin of the Mamlūk reign."[608] Baybars I (r. 658-676/1260-1277), often considered the founder of the Mamlūk state due to the impact of his long reign and the success of his reforms, consciously drew on Ayyūbid precedents, and his official biographer Ibn ʻAbd al-Ẓāhir portrayed him as a restorer of Ayyūbid state practices following the chaos of the coup against the last Ayyūbid sultan, the war with the al-Nāṣir Yūsuf of Damascus, and the invasion and defeat of the Mongols.[609]

There are three specific types of continuity between the Ayyūbids and Mamlūks relevant to the topic at hand, namely the history of the *mūdaʻ al-ḥukm* and the care of orphans' wealth in the Ayyūbid and Mamlūk periods. First, the prominence given to Shāfiʻī judges under Ṣalāḥ al-Dīn was preserved even after Baybars created a system of four chief judges—one from each school—in 663/1265. Specifically, the Shāfiʻīs continued to control the judicial treasury (*mūdaʻ al-ḥukm*) and orphans' property, a prerogative that, as will be shown in this chapter, did not go unchallenged.[610] Second, the geographical extent of the Mamlūk Sultanate was almost identical to the empire established by Ṣalāḥ al-Dīn, with Cairo at the center and Greater Syria as an integral, if less politically important, province. Cairo continued to be distinguished, as it had

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[608] David Ayalon, "Aspects of the Mamluk Phenomenon," *Der Islam*, vol. 54, no. 1 (1977), 32.

[609] On Baybars reforms, see Peter Thorau, *The Lion of Egypt: Sultan Baybars I & the Near East in the Thirteenth Century*, trans. P.M. Holt (New York: Longman Inc., 1992), 98-103. Ibn ʻAbd al-Ẓāhir states in his biography that Baybars "began to restore the regime of as-Salih with its laws and regulations (*nawāmīs wa-rusūm*)." The passage is quoted and analyzed in Humphreys, "The Emergence of the Mamluk Army (Conclusion)," *Studia Islamica* no. 46 (1977), 147-182, esp. 153-155.

[610] Yossef Rapoport, "Legal Diversity in the Age of *Taqlīd:* The Four Chief *Qāḍīs* under the Mamluks," *Islamic Law and Society* 10, no. 2 (2003), 210-228, 210. This legal regime as it existed under the Mamluks is discussed in more detail in Chapter 6.

under the Fāṭimids, by an elaborate, hierarchical and highly sophisticated bureaucracy, something that was never imported or replicated in either the Ayyūbid or Mamlūk periods in Syria.[611] It will be seen in this chapter and the next that this is also the case with the care of orphans' wealth: whereas a centralized judicial treasury had a long history in Egypt prior to the Mamlūks, practices of investing, preserving and distributing orphans' wealth do not seem to have been so formalized in Syria. Finally, the Ayyūbids legitimized their rule, as indicated earlier, via symbolic and material support for Sunnism and the rule of *shar'ī* law. As shown in Chapters One and Two, care for orphans, and their wealth, was a universalized aspect of *fiqh* and a sign of legitimate rule in Islamic law. The Ayyūbids, themselves following the precedent of the Nūr al-Dīn Zangī, built schools for orphans in Syria and, for the first time, in Egypt.[612] This phenomenon was not limited to sulṭāns; the eminent epistolographer and bureaucrat, al-Qāḍī al-Fāḍil also established orphan schools.[613] Schools for orphans, often paired with a public fountain (*sabīl*) were established by a number of elites throughout the Mamlūk Period. Adam Sabra has identified 52 distinct schools for orphans established during this period.[614] Since these schools are not directly related to the topic at hand (orphans' wealth) and likely provided for poor orphans, they will not be studied in this chapter. However, their proliferation during the period is an important indication of the seriousness with which care for orphans, monied or not, was taken in the Mamlūk period.

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[611] Anne-Marie Eddé, "Ayyūbids," *Encyclopaedia of Islam, Three*.

[612] Lev, *Saladin in Egypt*, 7, 128.

[613] Lev, *Saladin in Egypt*, 24.

[614] Adam Sabra, *Poverty and Charity in Medieval Islam: Mamluk Egypt, 1250-1517*, Cambridge Studies in Islamic Civilization (Cambridge: Cambridge University Press, 2000), 80-83.

The Ayyūbids ruled but a short time in Egypt and Syria (eighty-six years) compared to the Fāṭimids or Mamlūks. Nevertheless, they played a fundamental role in transitioning between the former to the latter regime. Due to their short rule, however, I will only make a few points about the care of orphans' property during the Ayyūbid period. As seen in the previous chapter, a central judicial treasury already existed in the Fāṭimid period in Zuqāq al-Qanādīl, as did a group of professional trustees (*umanā'*). There is no evidence that I have found that indicates that the Ayyūbids modified or changed any of this. In the case of the judicial personnel, it is likely that the functioning of *umanā'* was too trifling to catch the attention of the Ayyūbid sultans.[615] As for the *mūda'* located in Zuqāq al-Qanādīl, it is possible that its location was lost or permanently damaged during the great fire started in Fusṭāṭ by the Fāṭimid vizier, Shāwar, in his futile attempt to stop an invasion of Crusaders in Ṣafar 565/November 1168.[616]

Should this hypothesis be true, it in no way implies that care for orphans' property or the day-to-day functioning of the *umanā'* vanished. The legal institution of supervising orphans' wealth, as was seen in the previous two chapters, did not rely on a particular building or location. By the Ayyūbid period, judicial supervision of orphans' wealth was a long-established practice and a legal norm. Much like the *madrasa* or the judge's court (*majlis al-ḥukm*), the critical factor in the standardization of this legal practice was a combination of the universalization of a legal discourse granting this power to judges and their auxiliaries (see Ch. 2) and the historical

[615] As Lev writes, "the purge (of judges appointed by the Fatimids) was carried out with leniency" (Lev, *Saladin in Egypt*, 86). It is entirely possible, therefore, that some of the *umanā'*, particularly in the provinces, continued their work without interruption.

[616] D.S. Richards, "Shāwar," *Encyclopaedia of Islam, Second Edition*.

facticity of the judiciary's involvement in the supervision, distribution and investment of orphans' property (see Ch. 3).[617]

Indeed, we have textual evidence that the judiciary continued to control orphans' wealth after 1168. According to al-Maqrīzī, Ṣalāḥ al-Dīn borrowed 30,000 dinars from the orphans' fund to bankroll his unsuccessful attempt to defend Acre in 587/1191 against the Franks during the Third Crusade.[618] Most of this sum was never returned.[619] Even the absence of this large sum, however, appears not to have bankrupted the fund, for a similar request was made by Ṣalāḥ al-Dīn's son al-Malik al-'Azīz in 591/1194. The Shāfi'ī Chief Judge of the time, Zayn al-Dīn 'Alī b. Yūsuf (d. 622/1225) agreed to loan al-'Azīz 14,000 dinars—apparently the entire sum of cash belonging to orphans under his control at the time.[620] To guarantee the loan, al-'Azīz signed his name in the presence of witnesses and instructed the state treasury (*bayt al-māl*) to repay the amount to Zayn al-Dīn 'Alī. It is worth noting that al-Maqrīzī does not mention in regards to either of these two loans the term *mūda'* nor does he refer to a specific location where orphans' property was kept. This may reflect the fact that al-Maqrīzī, or his source, did not know where

[617] On the *madrasa* as an institution see Jonathan P. Berkey, *The Transmission of Knowledge in Medieval Cairo: A Social History of Islamic Education* (Princeton: Princeton University Press, 1992), 16-23. On the *majlis al-ḥukm*, see Wael Hallaq, Sharī'a: Theory, Practice, Transformations (New York: Cambridge University Press, 2009), 219, and Mathieu Tillier, "Un espace judiciare entre public et privé. Audiences de cadis à l'époque 'abbāside," *Annales Islamologiques* 38 (2004), 491-512.

[618] Al-Maqrīzī, *al-Sulūk*, 1/235. On the reconquest of Acre by the Franks, see Holt, *The Age of the Crusades*, 58.

[619] Al-Maqrīzī, *al-Sulūk*, 1/235. Ṣalāḥ al-Dīn's financial troubles and draining of the Egyptian treasury's hard currency as a result of the constant warfare of the period is well-known. See, for example, Andrew S. Ehrenkreutz, "The Crisis of Dīnār in the Egypt of Saladin," *Journal of the American Oriental Society* 76, no. 3 (1956), 178-184.

[620] On Zayn al-Dīn 'Alī, see al-Ṣafadī, 22/209. For more on the political context in which this loan was made, see Gerald Hawting, "Al-Afḍal the Son of Saladin and His Reputation," *Journal of the Royal Asiatic Society, Third Series* 36, no. 1 & 2 (2016), 19-32. See esp. pp. 30-32, where these loans are briefly discussed.

the property was kept at the time. In any case, these two loans confirm both that (1) the judiciary continued to control orphans' property—including large amounts of cash—and (2) that this control was in the hands of the Shāfi'īs in the Ayyūbid period.

The *Mūda'* and Orphans Property in Cairo during the Mamluk Period (1250-1517)

The remainder of this dissertation provides an analysis of the preservation of orphans' property and the legal institutions and officials involved in supervising, distributing and investing orphans' property. The evidence is presented according to three geographical regions of the Mamlūk Sultanate: (1) Cairo, (2) Upper Egypt, and (3) the Syrian Provinces. This chapter focuses on Cairo, with the provincial regions of Upper Egypt and Syria discussed separately in the subsequent chapter. These regions were selected on the availability of source material. For Cairo, the material is so plentiful and rich that it is possible to establish a long-term pattern in the growth and eventual decline of the capital's *mūda'*. Upper Egypt is included in a separate chapter due to the existence of a unique history of the region, al-Udfuwī's *al-Ṭāliʿ al-saʿīd al-jāmiʿ asmāʾ nujabāʾ al-ṣaʿīd*, from which it is clear that supervision of orphans' funds varied significantly from the situation in Cairo. Chronicles for Damascus, like Cairo, are also abundantly available and again permit us to draw comparisons with the situation in Cairo.

Before turning to the analysis of the *mūda' al-ḥukm* in Cairo, a word of caution must be said about periodization. As noted earlier in this chapter, the Ayyūbid period in many ways created the political, social and cultural conditions of the Mamlūk period, and sulṭāns and scholars of the time also saw themselves as intimately linked to their Ayyūbid predecessors. In his famous chronicle *Kitāb al-sulūk fī maʿrifat al-mulūk*, al-Maqrīzī also stitches his annalistic narrative of the two periods together seamlessly; for him, as for al-Qalqashandī, they formed a

single period following the fall of the Fāṭimid Caliphate. In fact, despite the long use of the term "Mamlūk Period" to refer to the history of Egypt and Syria between 1250 and 1517, recent scholarship as proved definitively that such a term is a modern invention, if not a misleading misnomer. Koby Yosef, for example, has shown that "Mamluk authors almost always refer to the political regime that ruled Egypt, Syria and adjacent areas for two-and-a-half centuries…as 'the state of the Turks' (*dawlat al-atrāk/dawlat al-turk/al-dawlah al-turkīyah*."[621] Whereas a previous generation of scholars, beginning with David Ayalon, considered slave-status (i.e., being a *mamlūk*) as a requirement for entrance into the ruling elite, Yosef has pointed out that sulṭāns and elite emirs of the period were neither proud of their slave-status nor does it appear to have been an effective requirement until the 15th century. Rather, political elites held pride in their ethnic status as Turks (and, later, Circassians) and attempted to exclude people of other ethnic origins from prestigious higher military and political positions.[622]

Jo Van Steenbergen has argued that a consequence of this traditional view of the Mamlūk Sultanate is that the majority of the so-called Mamlūk Period was characterized by decline in the political and social order.[623] By default, it would seem, most of the period becomes a deviation from a supposed norm. After all, sulṭāns down until the 15th century were more often than not members of a dynasty and *not* of slave origin. The troubles of the 14th century, particularly the Black Death in the mid-century, weakened this supposed ideal regime established by the battle-

[621] Koby Yosef, "The Term *Mamlūk* and Slave Status in the Mamluk Sultanate," *Al-Qantara* 34, no. 1 (2013), 7-34, 8; "*Dawlat al-Atrāk* or *Dawlat al-Mamālīk*? Ethnic Origin or Slave Origin as the Defining Characteristic of the Ruling Elite in the Mamluk Sultanate," *Jerusalem Studies in Arabic and Islam* 39 (2017), 387-410.

[622] Yosef, "The Term *Mamlūk* and Slave Status in the Mamluk Sultanate," 13-14, 26-27.

[623] Jo Van Steenbergen, Patrick Wing, and Kristof D'hulster, "The Mamlukization of the Mamluk Sultanate? State Formation and the History of Fifteenth Century Egypt and Syria: Part I – Old Problems and New Trends," *History Compass* 14, no. 11 (2016), 549.

hardened Mamluks that effaced the Frankish presence from the Levant and bested the Mongols at Ain Jalut. In Amalia Levanoni's estimation, this decline was even earlier than the Black Death, tracing the "point of no return" all the way to the reign of al-Nāṣir, whose lavish spending, permissiveness in advancing young and underqualified—but loyal—mamlūks to high positions, and tolerance of "professional and moral laxity in the Mamluk army" dissolved the old ways established by Baybars and Qalāwūn.[624] If decline set in so early into the period, it would appear that the traditional conception of the "Mamlūk Period" is a failed paradigm.

In an attempt to develop an alternative paradigm, Van Steenbergen, Patrick Wing and Kristof D'hulster suggest that the 15th century can be viewed as period which witnessed the appearance of a new political formation: a highly bureaucratized, centralized state in which members of the sultān's entourage—mamlūks, in particular—had a stake in the resources of the state.[625] This shift away from the dynastic principle that characterized much of the earlier period constituted a process of "Mamlukization"—the creation of a state that placed power previously monopolized by the dynasty into the hands of rank-and-file mamlūks as well as civilian clients. However, this was not a linear process—centralizing and decentralizing forces were continually present, and so research into the emergence of new social forces and changes in economic power

[624] Amalia Levanoni, *A Turning Point in Mamluk History: The Third Reign of al-Nāṣir Muḥammad Ibn Qalāwūn (1310-1341*), Islamic History and Civilization, Studies and Texts (Leiden: Brill, 1995), 3, 31, 98-99.

[625] Jo Van Steenbergen, Patrick Wing, and Kristof D'hulster, "The Mamlukization of the Mamluk Sultanate? State Formation and the History of Fifteenth Century Egypt and Syria: Part I – Old Problems and New Trends," 549-559; "The Mamlukization of the Mamluk Sultanate? State Formation and the History of Fifteenth Century Egypt and Syria: Part II—Comparative Solutions and a New Research Agenda," *History Compass* 14, no. 11 (2016), 560-569.

are not required to follow either a paradigm of decline or trace a course of inevitable centralization.[626]

This shift away from an essentialist view of the Mamluk period to a more dynamic understanding of the nature of state and society is promising for my study of the development and emergence of legal practices and institutions dealing with orphans' property. There is no reason, once the Mamlūk paradigm is discarded, to limit a historical study to the years 1250-1517. This is particularly true once one recognizes, as the above authors do, that "the Sultanate's key institutions and sites of power and its main resources and value systems had their origins in the late 12th century, and they continued into and beyond the 15th century."[627] Similarly, we can note here that the mythical, legal, political and economic significance of orphans and their property was established, as has been seen in previous chapters, well before the Mamlūk Sultanate. The objective of the remainder of this chapter, then, is not to identify an essential type of "Mamlūk" legal institution or legal practice but rather to continue to understand how previously existing legal practices, discourses and attitudes towards orphans and their property underwent change and adaptation in a period characterized by a centralizing state, economic ups and downs, and the proliferation of new, private interests and factions.[628]

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[626] A recent work that takes such an approach to society and politics in the 15th century Amina Elbendary's recent study of protest movements. See Elbendary, *Crowds and Sultans: Urban Protest in Late Medieval Egypt and Syria* (Cairo and New York: The American University in Cairo Press, 2015). Like Van Steenbergen, Wing and D'hulster, Elbendary avoids the decline paradigm—while nevertheless recognizing the undeniable signs of economic woes of the day.

[627] Van Steenbergen, Wing, and D'hulster, "The Mamlukization of the Mamluk Sultanate? State Formation and the History of Fifteenth Century Egypt and Syria: Part II," 564.

[628] These new forces, though present in previous periods, have been shown by recent scholars to have increased markedly in the 15th century. See Sabra, 'The Rise of a New Class? Land Tenure in Fifteenth-

The Sources for Cairo

The sources for Cairo during this period are so rich that a diligent researcher cannot aspire to cover every single source. I have chosen here therefore to focus on two sets of sources: (1) major historical texts from the period and (2) legal and administrative works. In the first set of texts, I have chosen to focus on the works of the following authors in particular: Taqī al-Dīn Aḥmad b. ʻAlī al-Maqrīzī (766/1364-845/1442), Shihāb al-Dīn Aḥmad Ibn al-Ḥajar al-ʻAsqalānī (773-852/1372-1449), Jamāl al-Dīn Yūsuf b. Taghrībirdī (d. 874/1470), Shams al-Dīn Muḥammad al-Sakhāwī (830-902/1427-1497), and Zayn al-Dīn Muḥammad Ibn Iyās (852-930/1448-1524).[629] Few medieval Muslim authors have enjoyed as much attention by modern scholars as al-Maqrīzī, an Egyptian historian and polymath who produced an immense collection of writings, including works of chronology, topography, economic history and prosopography.[630] Due to his popularity and influence on historians both medieval and modern, he has been referred to as the "dean of all previous historians" and "the Sheikh" of fifteenth-century Arab historians.[631] Three works of his are particularly useful for the study of orphans' property in Mamluk Egypt. First, *al-Sulūk li-maʻrifat duwal al-mulūk*—his annalistic chronicle of the Ayyubid and Mamluk periods up to Shawwāl of 844/1441—provides critical information, among other things, on the Shāfiʻīs' control of the *mūdaʻ al-ḥukm*, the attempts of emirs and sulṭāns to

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Century Egypt: A Review Article', *Mamlūk Studies Review* 8, no. 2 (2004), 203–10; Miura, "Urban Society in Damascus," 188.

[629] For a brief summary of the lives and major works of these authors, see the following articles in the *Encylopaedia of Islam, Second Edition*: W.M. Brinner, "Ibn Iyās"; C.F. Petry, "al-Sakhāwī"; W. Popper, "Abu'l-Maḥāsin Djamāl al-Dīamāl al-Dīn Yūsuf b. Taghrībirdī"; F. Rosenthal, "al-Maḳrīzī."

[630] Nasser Rabbat, "Who Was al-Maqrīzī? A Biographical Sketch," *Mamluk Studies Review* 7, no. 2 (2003), 1-19.

[631] Muhammad Mustafā Ziyāda, *Dirāsāt ʻan al-maqrīzī*, ed. Muhammad Muṣṭafā Ziyāda (Cairo: al-Hay'a al-Miṣriyya al-ʻĀmma li'l-Kitāb, 1971), 6, 8.

borrow or confiscate orphans' property, and the Ḥanafīs' struggle to receive permission to establish a *mūda'* of their own. Second, his topographical history of Egypt, *al-Mawā'iẓ wa'l-i'tibār bi-dhikr al-khiṭaṭ wa'l-āthār*, includes both a sketch of Egypt's geography and a detailed historical survey of Cairo, which reveals an intense attachment to his city but also reads in many places as a lament of—in his opinion—its past glory.[632] This text is invaluable for this study as it allows us to locate the *mūda'* in Cairo during this period. Finally, his massive biographical dictionary, *al-Muqaffā al-kabīr*, is an important resource on the lives of many of the key scholars, emirs and sulṭāns of the period.

Ibn Ḥajar, a student of al-Maqrīzī, is most famous today for his extensive commentary on the Ḥadīth collection of al-Bukhārī, *Fatḥ al-bārī bi-ṣaḥīḥ al-bukhārī*. In addition to his scholarship, he was also a successful spice trader, professor and served as the Chief Shāfi'ī judge on several occasions in Cairo for a combined total of around twenty-one years.[633] Three historical works of his are used in this chapter: (1) *Raf' al-iṣr 'an quḍāt miṣr*, a history of judges in Egypt, (2) *al-Durar al-kāmina fī a'yān al-mi'a al-thāmina*, a biographical history of prominent individuals who died in the 8th/14th century, and (3) *Inbā' al-ghumr bi-abnā' al-'umr*, an annalistic history of events between the year of his birth in 773/1372 down to 850/1446. Due to Ibn Ḥajar's precision as a scholar, his relationship to the court in Cairo, and his practical knowledge of the day-to-day working of the judiciary of his day, his historiographical works are rich sources for this chapter.

Ibn Taghrībirdī, a student of Ibn Ḥajar, was the son of a powerful emir who served both Sultan Barqūq and al-Nāṣir Faraj, acting as a close advisor and commander of the Egyptian

[632] Rabbat, "Khiṭaṭ," *Encylopaedia of Islam, THREE*.

[633] Ibn Taghrībirdī, *al-Manhal al-ṣāfī wa'l-mustawfī ba'd al-wāfī*, ed. Muḥammad Muḥammad Amīn (Cairo: al-Hay'a al-Miṣriyya al-'Āmma li'l-Kitāb, 1984), 2/17-36; Rosenthal, "Ibn Ḥadjar al-'Asḳalānī."

armies for the latter. Orphaned at a young age, Ibn Taghrībirdī was raised by his sister, who was married to two chief judges, including the Shāfi'ī Jalāl al-Dīn 'Abd al-Raḥmān al-Bulqīn, who was a member of a family of prominent judges and scholars in Cairo.[634] Like many scholars of his day, Ibn Taghrībirdī was interested in a surprising variety of subjects: music, languages, military exercises and history. As an eyewitness of many critical events of his day, two of his historical works are particularly important here: (1) *al-Nujūm al-zāhira fī mulūk miṣr wa'l-qāhira*, a history of Egypt from 20/641 to 872/1467 and (2) *Ḥawādith al-duhūr fī madā al-ayām wa'l-shuhūr*, which is a continuation of al-Maqrīzī's chronicle, *al-Sulūk,* picking up in the year 845/1441 and continuing to Muḥarram 874/1469. Due to his intimate knowledge the royal court and his close connections with major scholars and judges of his time, these historical works supply important information about the state of the judicial system of his day.[635]

Al-Sakhāwī was an Egyptian scholar of ḥadīth and an admiring student of Ibn Ḥajar.[636] Like his teacher, he also wrote a centennial biographical history, focusing on the 9th/15th century: *al-Ḍaw' al-lāmi' fī a'yān al-qarn al-tāsi'*. This massive history (the printed edition runs to twelve volumes) is valuable not only as a kind of continuation of Ibn Ḥajar's prosopographical work but also due to the information it gives us on individuals who worked as *umanā'*, information that is otherwise hard to come by.

Ibn Iyās came from a long line of Mamlūk emirs and soldiers—his great-grandfather al-'Umarī al-Nāṣirī al-Khāzindār (d. 771/1370) served Sulṭān Ḥasan and Sulṭān al-Ashraf Sha'bān,

[634] Popper, "Abu'l-Maḥāsin Djamāl al-Dīn Yūsuf b. Taghrībirdī."

[635] A third major historical work, a biographical dictionary entitled *al-Manhal al-ṣāfī wa'l-mustawfī ba'd al-wāfī* is only referred to occasionally in this chapter.

[636] His respect and adoration for Ibn Ḥajar can be seen most clearly in the long biography al-Sakhāwī wrote for his teacher, *al-Jawāhir wa'l-durar fī tarjamat shaykh al-islām ibn al-ḥajar*, ed. Ibrāhīm Bājis 'Abd al-Majīd (Beirut: Dār Ibn al-Ḥāzim, 1999).

and his father served as a free-born soldier but retained links with many prominent emirs during the late 15th century.[637] As an eyewitness to many of the events at the end of the Mamlūk period, Ibn Iyās is a vital resource for the twilight of the Sultanate. His chronicle, *Badā'i' al-zuhūr fī waqā'i' al-duhur* is a long history of Egypt, beginning in the Pharaonic era down to the year 928/1522, i.e., after the Ottoman conquest. This text is used here as the primary source for information about orphans' property during the late 15th and early 16th centuries.

As for the legal and administrative texts, while these texts are written with the prescriptive intention of showing a normative way of doing something, they are also useful insofar as they help reveal how the judicial administration of orphans' property was supposed to work and, at times, address specific titles and offices that are mentioned by the historians only in passing. There are three authors who concern us here: Taqī al-Dīn 'Alī b. 'Abd al-Kāfī al-Subkī (683-756/1284-1355), Tāj al-Dīn 'Abd al-Wahhāb b. 'Alī al-Subkī (727-771/1327-1370) and Shihāb al-Dīn Aḥmad b. 'Alī al-Qalqashandī (756-821/1355-1418).

Taqī al-Dīn al-Subkī was a Shāfi'ī legal scholar, professor of *ḥadīth*, a prolific author of works ranging from *fiqh* to poetry, and a Chief Judge in Damascus. He lived in both Damascus and in Cairo, where he passed away.[638] While several of his works have been published, the one that concerns us in this chapter is his collection of legal opinions (*Fatāwā al-subkī*) because it includes a rare description of the functioning of the *mūda'* in Cairo and the *dīwān al-aytām* in Damascus.

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[637] Brinner, "Ibn Iyās."

[638] Shihāb al-Dīn 'Abd al-Ḥayy Ibn al-'Imād, *Shadharāt al-dhahab fī akhbār man dhahab*, ed. 'Abd al-Qādir al-Arnā'ūṭ and Maḥmūd al-Arnā'ūt (Beirut: Dār Ibn Kathīr, 1986) 8/308-310; Tāj al-Dīn 'Abd al-Wahhāb al-Subkī, *Tabaqāt al-shāfi'iyya al-kubrā*, ed. 'Abd al-Fattāḥ Muhammad al-Ḥiluw and Maḥmūd Muḥammad al-Tanāhī (Cairo: Īsā al-Bābī al-Halabī, 1964-1976), 10/139-239; C.E. Bosworth and J. Schacht, "al-Subkī," *Encyclopaedia of Islam, Second Edition*.

Tāj al-Dīn al-Subkī, the son of the aforementioned Taqī al-Dīn, assumed his father's position as Chief Judge in Damascus following the former's death, yet he was also active in Cairo, where he was a student for some time.[639] While his most famous work is his massive biographical dictionary of Shāfi'ī scholars, *Ṭabaqāt al-shāfi'iyya al-kubrā*, only occasional reference will be made to that work here. More valuable information for the topic at hand can be found in his treatise on professions, trades and officials of his day, *Mu'īd al-ni'am wa-mubīd al-niqam*, which includes a short description of the work expected of the *umanā'*.

The final author in this group, al-Qalqashandī, spent his professional life as a secretary and scribe in the royal chancery (*dīwān al-inshā'*) in Cairo.[640] A Shāfi'ī jurist, he produced works on *fiqh*, *adab*, and *ansāb* (genealogies), yet his most famous and invaluable composition for historians of the Mamlūk Period is his encyclopedic secretarial manual that not only serves as a comprehensive practical guide for a scribe of the period (down to the types of ink, bits and spacing appropriate for various documents), but is also a vital source for copies of complete official documents. For this study, the value of this text is its programmatic description of the prerogatives and responsibilities of the various judicial offices during his time.

A New Mūda' *and the Centralization of Control over Testamentary Guardians (*Awṣiyā'*)*

As has been seen above, the supervision and care for orphans' property in the Ayyūbid period was placed in the hands of the Shāfi'ī Chief Judge. Baybars I, who was the first Mamlūk Sultan to enjoy enough time and stability as sulṭān to enact any meaningful reforms, confirmed the Shāfi'ī judge's control of orphans in 663/1265 when he decided to appoint a chief judge from

[639] Ibn al-'Imād, 8/378-380; Ibn Taghrībirdī, *al-Manhal al-ṣāfī*, 1/408-414; Bosworth and Schacht, "al-Subkī."

[640] Ibn al-'Imād, 9/218-219; Bosworth, "al-Ḳalḳashandī," *Encyclopaedia of Islam, Second Edition*.

each of the four Sunni schools of law.[641] The Shāfi'īs would retain for the remainder of the Mamlūk Period the exclusive privilege of controlling and investing orphans property as well as jurisdiction over issues concerning the public treasury (*bayt al-māl*).[642] This is a well-known development in the history of Islamic law as it created a working legal system in which all four of the Sunni legal schools had equal validity; individuals throughout the Mamlūk period had freedom to choose which *madhhab* to petition, allowing for a kind of flexibility and choice unknown to many legal cultures.[643]

Yet, Baybars did not just confirm a previously existing prerogative of the Shāfi'ī Chief Judge. In the year previous to his appointment of four chief judges, he instituted a change that increased the Shāfi'īs involvement in the supervision of orphans' wealth dramatically. In Rajab 662/1264 while hearing petitions at the royal court of justice (*Dār al-'Adl*), a soldier accompanying an orphan approached him. The soldier claimed that he was the testamentary guardian of the orphan (*waṣīh*) and complained to the sulṭān about his ward's financial situation. This prompted the sulṭān to turn to the Chief Qāḍī of time, Tāj al-Dīn 'Abd al-Wahhāb Ibn Bint al-A'azz, and state:

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[641] Amalia Levanoni, "The Mamluks in Egypt and Syria: the Turkish Mamlūk sultanate (648-784/1250-1382) and the Circassian Mamlūk sultanate (784-923/1382-1517)," in *The New Cambridge History of Islam, Volume Two: The Western Islamic World Eleventh to Eighteenth Centuries*, ed. Maribel Fierro (Cambridge: Cambridge University Press, 2010), 241.

[642] Ibn 'Abd al-Ẓāhir, *al-Rawḍ al-zāhir fī sīrat al-malik al-zāhir*, ed. 'Abd al-'Azīz Khuwayṭir (Riyad: 1976), 182. Al-Maqrīzī, *al-Sulūk*, 2/28.

[643] Several studies have been written on the reasons and consequences of Baybars' empowerment of four chief judges. See Rapoport, "Legal Diversity in the Age of Taqlīd,"; Joseph Escovitz, "The Establishment of four Chief Judgeships in the Mamluk Empire," *Journal of the American Oriental Society*, 102 (1982), 529-531; Jørgen Nielsen, "Sultan al-Ẓāhir Baybars and the Appointment of four chief *Qāḍī*s, 663/1265," *Studia Islamica*, 60 (1984), 167-76; Sherman Jackson, "The Primacy of Domestic Politics: Ibn Bint al-A'azz and the Establishment of the Four Chief Judgeships in Mamluk Egypt," *Journal of the American Oriental Society*, 115 (1995), 52-65).

> When one of the soldiers die, his comrades (*khushdāshiyyatuh*) seize his property, and the orphan is made to serve as one of the *awshāqiyya.*[644] Then, if the orphan dies, the guardian takes his property, or if the orphan grows up, he finds nothing nor does he have proof of his property. Or, if the guardian dies, the orphan's property is considered part of the property of the guardian. It is our opinion that none of these guardians should be independently responsible for a testament (*waṣiyya*). Rather, let the supervision of the law be absolute (*la-yakun naẓar al-shar' shāmilan*), so that orphans' property will be accounted for, and the trustees of the court (*umanā' al-ḥukm*) will audit what is spent."[645]

Baybars then ordered the army to follow these instructions. Apparently, this arrangement continued into the 15th century, for al-Maqrīzī writes, "This situation continued to exist."[646] The consequences of this must have been great. By ordering the army to follow the rule of law (*al-shar'*) and ordering them to submit to the investigations of the *umanā'*, Baybars integrated the wealth acquired by soldiers into the existing legal system in Egypt. This order, moreover, does not seem to have been limited to Egypt, but may have included the provinces as well. Nevertheless, at this point the property of orphaned soldiers remained in the hands of the military—Baybars' order only instructed that this property be jointly supervised by the trustees.

Soon, however, even this wealth would be placed directly in the hands of the judiciary. This occurred after the next major development in the supervision and care of orphans' property—the founding of at least one new *mūda'*—in the tumultuous period following al-Nāṣir Muḥammad b. Qalāwūn's first of three reigns as sulṭān (693-694/1293-1294). Still a young boy, al-Nāṣir had no real power and his reign was dominated by powerful emirs representing

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[644] The *awshāqiyya* (s. *awshāqī* and also written in the Arabic sources of the period as *awjāqī*) were responsible for training and exercising horses. See al-Qalqashandī, *Subḥ al-a'shā fī kitābat al-inshā* (Cairo: Dār al-Kutub, 1922), 5/545.

[645] Al-Maqrīzī, *al-Sulūk*, 2/8; Shihāb al-Dīn Ahmad al-Nuwayrī, *Nihāyat al-arab fī funūn al-adab* (Cairo: Dār al-Kutub wa'l-Wathā'iq al-Qawmiyya, 2002), 30/99.

[646] Al-Maqrīzī, *al-Sulūk*, 2/8.

opposing factions of mamlūks.[647] After less than a year, the faction of al-Nāṣir's viceregent (*nā'ib al-ṣalṭana*), Kitbughā, prevailed, and the latter assumed the throne for himself, taking the royal epithet, "The Just" (*al-'Ādil*)—probably in the hopes that relating himself to justice would help remove some of the opprobrium associated with his being both a usurper and an ethnic Mongol rather than a Turk.[648] Yet Kitbughā's reign was not to last. After a mere two years, another emir, Lājīn al-Manṣūrī, seized the throne, naming himself *al-Malik al-Manṣūr*, the regnal title of the highly venerated sultan, Qalāwūn (r. 1279-1290).[649] During his brief reign, Lājīn managed to establish a *mūda'* as part of a show of reverence for the rule of law (*al-shar'*). It is possible, however, that another reform of the system of supervising orphans' property was instituted during the reign of al-'Ādil Kitbughā. The reason for this uncertainty is due to two potentially conflicting reports, one in the *Sulūk* of al-Maqrīzī—which focuses above all on political history—and another in the biographical history *al-Durar al-kāmina* by Ibn Ḥajar. The passage in the *Sulūk* states:

> Lājīn exalted the law (*al-shar'*) and the people of the law (*wa-ahlah*) and carried out its commands. An example of this is that he demanded the emirs hand over the orphans' property—which was at that time in their possession—and he moved it to a new *mūda'* for orphans' property that he created. Then he wrote a decree (*tawqī'*)[650] that whenever someone dies who has minor inheritors (*waratha ṣughār*), their inheritance shall be transferred to the judicial treasury (*mūda' al-ḥukm*) which the Shāfi'ī Chief Judge will

[647] Holt, *The Age of the Crusades*, 107; "al-Nāṣir," *Encyclopaedia of Islam, Second Edition*.

[648] *Idem*.; al-Maqrīzī, *al-Sulūk*, 2/259. He also was remembered for honoring the *'ulamā'* and his charity to the poor. See Ibn Taghrībirdī, *al-Manhal al-ṣāfī*, 9/115-118.

[649] Baybars al-Manṣūrī al-Dawādār, *Zubdat al-fikra fī tārīkh al-Hijra*, ed. D.S. Richards (Berlin: Das Arab. Buch, 1998) 313-324; al-Maqrīzī, *al-Sulūk*, 2/272-273; Ibn Taghrībirdī, *al-Manhal al-sāfī*, 9/166-173.

[650] For examples of decrees from the Mamluk Period, see S.M. Stern, "Petitions from the Mamlūk Period (Notes on the Mamlūk Documents from Sinai)," *Bulletin of the School of Oriental and African Studies*, 29, no. 2 (1966), 233-276.

> oversee. However, if the deceased appointed a testamentary guardian (*waṣiyy*), then the Shāfi'ī judge shall appoint people of trust (*'udūl*) of his choosing.[651]

Read on its own, this passage might be taken to imply that Sultan Lājīn created an unprecedented treasury for the preservation of orphans' property. [652] With the benefit of the context provided in the previous chapters, we know that the existence of a specific place where judges accumulated orphans' property was nothing new. Moreover, we cannot say with complete certainty that this was the only *mūda'* in existence at this period. It has already been seen that the *umanā'* continued to supervise orphans property, and that Baybars had asked them to keep accounts on the property in the possession of members of the army. In fact, the passage above does not seem to indicate that Lājīn created a *mūda'* for the property of *all* orphans in Egypt or even Cairo. Rather, the only certainty is that he created one for the orphans' property that had been in the hands of the emirs. Was there a separate *mūda'* already in existence for civilian property?

The possibility of the existence of a parallel system for orphans' property of civilian origin receives some support from a passage a in Ibn Ḥajar's biographical dictionary of prominent individuals who died in the 8th/14th century: *al-Durar al-kāmina fī a'yān al-mi'a al-thāmina*. In the biography of the Shāfi'ī jurisconsult and chief judge, Taqī al-Dīn Ibn Daqīq al-'Īd (d. 702/1302), Ibn Ḥajar writes:

> He made the judicial treasury (*'amal al-mūda' al-ḥukmī*), and he decreed that whoever dies and has an adult inheritor, then they shall take possession of their share (of the inheritance), but if the inheritor is a minor, then the property will be deposited in the *mūda'*. If the deceased has a personal testamentary guardian (*waṣiyy khāṣṣ*) and he has people of trust (*'udul*, apparently to testify to the character of the guardian), the judge shall instruct them so that the capital (*aṣl al-māl*) is consistently kept account of.[653]

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[651] Al-Maqrīzī, *al-Sulūk*, 2/306.

[652] This is the interpretation given by Adam Sabra to the passage, who claimed that the "Mamluk Sultans" created the *mūda' al-ḥukm*. See Sabra, *Poverty and Charity in Medieval Islam* (Cambridge: Cambridge University Press, 2000) 62.

[653] Ibn Ḥajar, *al-Durar al-kāmina*, 4/96.

Another biographer, al-Udfuwī (748/1347), also attributes a reform of the supervision of orphans' property to Ibn Daqīq al-'Īd.[654] According to al-Udfuwī, of Ibn Daqīq al-'Īd "appointed an official (*mubāshir*) on his behalf over the testamentary guardians (*al-awṣiyā'*).[655] Is this referring to a different reform—possibly another *mūda'*—or the same one that al-Maqrīzī attributed to Sulṭān Lājīn? If it is the same *mūda'*, then we have two competing claims about who originated the idea. Ibn Daqīq al-'Īd was initially appointed as chief judge by al-'Ādil Kitbughā in Jamādā I 695/1296, i.e., about eight months prior to Lājīn's accession to the throne.[656] If Ibn Daqīq al-'Īd created a *mūda'* during the reign of Kitbughā, then it could be that Ibn Daqīq al-'Īd first instituted a reform that only applied to inheritances of civilians. It was only later, in this case, that Lājīn extended the same reform to include orphans' estates in the possession of emirs.

On the other hand, if the two textual traditions are referring to a single reform, the competing claims recorded in the historiographical tradition may be literary traces of a late-13th century power struggle between the jurists and the sulṭān. Certainly it is plausible to think that Lājīn would have needed to enlist the help of Ibn Daqīq al-'Īd in order to implement the reform. Not only would he need to assign functionaries to implement the reform, but he was known for jealously guarding the realm of the law from the encroachments of the Mamlūks. His primary

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[654] Al-Udfuwī is discussed in more detail in the next chapter as he is the primary source for the history of Upper Egypt during the early Mamlūk Period.

[655] Al-Udfuwī, *al-Ṭāliʿa al-saʿīd al-jāmiʿ asmāʾ nujabāʾ al-ṣaʿīd*, ed. Saʿīd Ḥassan (Cairo: Al-Dār al-Miṣriyya liʾl-Taʾlīf wa'l-Tarjama: 1966), 597.

[656] Al-Maqrīzī, *al-Sulūk*, 2/274.

biographers claim, for example, that he often resigned or threatened to resign in protest over what he perceived as Mamlūk overreach.[657]

There is further evidence that the two traditions refer to the same event. One of the effects of the new system of four chief judges was that Mamlūk elites could now obtain permission to buy and sell endowments by submitting petitions solely to judges of the Ḥanafī rite. As Chief Qāḍī, Ibn Daqīq al-'Īd confiscated many endowments which had had been appropriated and divided up as property rewarded to Mamlūk emirs for their maintenance (*iqṭāʿāt*).[658] In al-Maqrīzī's narration of Lājīn's reverence for the law (*al-shar'*), Lājīn is also said to have returned several properties to their rightful owners and to have ordered *awqāf* land restored to its proper use. This included "Qarāqūsh's *waqf* for the poor (*al-fuqarā'*) which had been turned into an *iqtā'*[659] several years prior. The Shāfi'ī chief judge took control of the *waqf*, and he received 10,000 dirhems from it yearly."[660] In other words, there are two traditions—both intended to represent the subject's veneration for the law—that attribute (1) the creation of a *mūda'* under the control of the Shāfi'ī chief judge and increased supervision over testamentary

[657] Al-Udfuwī, 596; Al-Ṣafaḍī, 4:148; al-Subkī, 9:212. Ibn Ḥajar al-ʿAsqalānī only mentions one resignation, on the Fourth of Rabīʿ al-Ākhir, 696/1297. See Ibn Ḥajar al-'Asqalānī, *Raf' al-iṣr 'an quḍāt miṣr,* 395).

[658] Al-Udfuwī, 597; Ibn Ḥajar al-'Asqalānī, *Rafʿ al-iṣr,* 397.

[659] An *iqtā'* refers to "a form of administrative grant," often for the rights to the revenue of land. Under Baybars, the size of the *iqtā'* was linked to a military hierarchy based on rank (Baybars system). Later, following al-Nāṣir Qalāwūn's reforms, *iqtās* were reduced and the share of the sultan increased. After al-Nāṣir, many of the soldiers in the *ḥalqa* – a kind of auxiliary army considered less prestigious than main mamluk army—could no longer survive on their grants and began to sell the rights to the *iqṭā'* for payment. Throughout the Ayyubid and Mamluk Periods, *iqṭā*s were also referred to as "*khubz*," or "bread." See Cl. Cahen, "*ikṭā'*," *Encylopaedia of Islam, Second Edition*; Levanoni, "The Mamlūks in Egypt and Syria," 251-253; Tsugitaka Sato, "The Evolution of the *Iqṭā'* System under the Mamlūks—An Analysis of *al-Rawk al-Ḥusāmī and al-Rawk al-Nāṣirī*," *Memoirs of the Research Department of the Toyo Bunko* 37 (1979), 99-131; Felicita Tramontana, "*Khubz as Iqṭā'* in Four Authors from the Ayyubid and Early Mamluk Periods," *Mamluk Studies Review* 17 (2012), 103-122.

[660] Al-Maqrīzī 2/307.

guardians and (2) the return of revenues from *waqf* land to their lawful recipients. It is safe to assume, therefore, that these two competing traditions are referring to the same reforms, but with different actors at the center of attention.

It is not hard to see why this may have been attributed solely to Ibn Daqīq al-‘Īd in the biographical tradition. First, even in the tradition in al-Maqrīzī, Lājīn is not said to have acted alone, but rather enlisted the help of the Shāfi‘ī Chief Qāḍī, who may be seen as a beneficiary of the reform due to the increase in funds at his disposal. Second, Ibn Daqīq al-‘Īd left behind a memory in the biographical literature as not only a highly respected scholar and professor of law, but also as someone who refused to accept the right of the Mamlūk sulṭāns and emirs to make demands of the judiciary.

The evidence transmitted by his biographers indicates that Ibn Daqīq al-ʿĪd found the limitation on the authority of the Shāfiʿī judges constrictive and considered it an encroachment of the independence of the judiciary. He first studied the Mālikī *madhhab* under his father, ‘Alī b. Wahb, a respected scholar and judge in Upper Egypt. Later, Ibn Daqīq al-‘Īd studied with ‘Izz al-Dīn Ibn ‘Abd al-Salām Al-Sulamī, the prominent Shāfi‘ī judge and jurisconsult. Having mastered two *madhhabs*—the Mālikī and the Shāfi‘ī—he would continue to write on both *madhhabs* throughout his life and claim status as a *mujtahid* not bound by *taqlīd*. He seems to have been unsatisfied with the restrictions of the new system of four chief judges In this new system, the rulings of minority schools could not be overturned by the Shāfiʿī chief qāḍī (or any other judge for that matter), and this in itself represented a major blow to the power and prestige of the Shāfiʿī chief judge. As Sherman Jackson has argued, Baybars’ inspiration for establishing the other three *madhhabs* on an independent basis—in which they were not reliant for the enforcement of their judicial rulings on the whim of the Shāfiʿī chief qāḍī—may have been to

mollify the political clout of one Shāfiʿī judge in particular, Tāj al-Dīn ʻAbd al-Wahhāb Ibn Bint al-Aʿazz. Apparently, the latter refused to enforce the rulings of judges that contradicted the positions of the Shāfiʿī school.[661] Baybars' actions should thus be read as an attempt weaken the authority of a single judge or *madhhab*. Importantly, Jackson has also shown that Ibn ʻAbd al-Salām, Ibn Daqīq al-ʿĪd's mentor, argued in a *fatwā* that a Shāfiʿī can only approve of "a ruling which he does not believe to be permissible" if he recognizes the legal authority of the one issuing the dissenting ruling.[662] In other words, a Shāfiʿī jurist did not have to enforce legal rulings that contradicted his own *madhhab*. This position of Ibn Daqīq al-ʿĪd's mentor may have influenced his position towards the Mamlūks' attempts to structure the judicial system according to *madhhab*.

His early biographers also report that Ibn Daqīq al-ʻĪd rejected the *madhhab*-based judicial titles established during his day. According to his student and colleague, the famous traditionist and poet Fatḥ al-Dīn Ibn Sayyid al-Nās: "He did not like when someone called him 'Shāfiʿī Chief Qāḍī.' If we ever said (to him), 'Shāfiʿī Chief Qāḍī,' he would reply, 'What is that?' (*Ayh hādhā?*)."[663] His dislike for the honorific may have been because he considered himself a *mujtahid* who could cross *madhhab* boundaries. Certainly, al-Ṣafadī's placement of Ibn Sayyid al-Nās's account immediately following the discussion of Ibn Daqīq al-ʿĪd's status as a *mujtahid* would support this idea. Other evidence supports the idea that his issue with the title was that he rejected the authority of foreign-born Mamlūk rulers to impose a system of four *qāḍī*s on the '*ulamā'* in Egypt (and Syria). We are told by al-Subkī, for example, that "he would

[661] Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: Brill, 1996), 164; "The Primacy of Domestic Politics," 61-64.

[662] *Ibid*. 63.

[663] Al-Ṣafadī 4:140.

address the common people, the sulṭān, and everyone below him with the words: 'O, human!' (*yā insān*). But if his addressee was an important *faqīh*, he said, 'O, *faqīh*!'"[664] Similarly, we are told that when the sulṭān attempted to return Ibn Daqīq al-ʿĪd to the chief judgeship after he had resigned in protest, he refused to show any deference to the authority of the sulṭān:

> Sulṭān Lājīn stood up for him when he came close, so he began walking at a leisurely pace (*qalīlan qalīlan*). Those around him were saying to him, "The Sulṭān is standing," but he replied, "Aren't I walking? (*A-dīnī amshī*)." Then he (Ibn Daqīq al-ʿĪd) sat next to him on the dais in order to avoid sitting below him. Afterwards, he came down and washed what he was wearing then bathed his entire body (*ightasal*).[665]

Here, Ibn Daqīq al-ʿĪd seems to have reveled in his opportunity to display his disdain for royal ceremony. Not only did he slow his gait when the sulṭān stood for him, but he performed the ritual wash associated with major defilements.

In all, Ibn Daqīq al-ʿĪd was remembered as a towering figure—a *mujtahid* in two *madhhab*s, a beloved teacher, and a judge unafraid to stand up to encroachments of the law by the sulṭān. Given Ibn Daqīq al-ʿĪd's personality and opinion of the Mamlūks, it seems unlikely that Lājīn could have established the *mūda'* without the willing cooperation of Ibn Daqīq al-ʿĪd. Both Lājīn and Ibn Daqīq al-'Id are said to have instituted two similar reforms—the creation of the *mūda'* and the restitution of *waqf* land. These reports can be safely assumed to refer to the same event, and the historical reports that attribute these reforms to only one of the individuals should not distract from the fact that neither the formidable Chief Qāḍī nor the Sulṭān could institute a *mūda'* without the cooperation of the other. The former could not, on his own, force the emirs to hand over the orphans' property in their control, nor could the Sulṭān effect the legal

[664] Al-Subkī 9:212.

[665] Al-Udfuwī notes that he heard this story from several people who attended the sulṭān's council and were eyewitness to the events. Al-Udfuwī 572.

reform without the cooperation of numerous judicial officials—from the Chief Qāḍī to the *'umanā'* and *shuhūd* (professional witness or notaries) tasked with accounting for the property.

By the end of the 7th/13th century, then, a new centralized system of supervising orphans' wealth had been established in Cairo. Importantly, both textual traditions analyzed above agree that a single *mūda'* was created in which property belonging to orphans without testamentary guardians would be placed. Moreover, testamentary guardians would now need to be supervised directly by the Shāfi'ī judiciary, increasing the administrative power of the judiciary over private wealth. How did this system work in practice?

How the Mūda' *Worked*

The normative sources from the period provide some evidence about how the system was supposed to work following the reforms of Lājīn and Ibn Daqīq al-'Īd. In *Mu'īd al-ni'am,* a treatise on professions and officials of his day, Tāj al-Dīn al-Subkī includes a short section on the judge's trustees, *umanā' al-qāḍī*:

> They are responsible for the safekeeping of the property of orphans and absent individuals. (*'alayhim al-taḥaffuẓ fī amwāl al-aytām wa'l-ghā'ibīn*). And the correct opinion among us (*al-ṣaḥīḥ 'indinā*), following the (opinion of) the Shaykh and Imām (i.e., al-Shāfi'ī) is that the *qāḍī* cannot lend the property of the orphan (*lā-yajūz li'l-qāḍī iqrāḍ māl al-yatīm*). If the *qāḍī* instructs *zakāt* to be taken from the orphan, then the *umanā'* are to give it to whoever he specifies, when the property meets the conditions requiring *zakāt*. It cannot be taken before the passing of a year. Also, whoever forces the mother of an orphan to come to their door in order to receive the orphan's allowance has committed a great injustice.[666]

Taken at face value, this description of the duties of the *umanā'* indicates that their primary duty is preserving orphans' property, paying *zakāt* when appropriate and instructed by the judge, and

[666] Tāj al-Dīn al-Subkī, *Mu'īd al-ni'am wa-mubīd al-niqam* (Beirut: Mu'assasat al-Kutub al-Thiqāfiyya, 1986), 53.

ensuring that mothers do not have to come knocking in search of the allotted allowances from their children's property. It is also stated that it is impermissible for the *qāḍī* to initiate a loan from the orphans' property, implying that the *umanā'*, as his agents, are also forbidden by the *madhhab* from doing so. This, as will be seen in Chapter Six, is an oversimplification of the Shāfi'ī *madhhab*'s position on loans. Tāj al-Dīn al-Subkī emphatic rejection of loans upon further investigation appears to be a veiled protest against the practice of the day. In fact, the officials employed at the *mūda' al-ḥukm* and its counterpart in Damascus, the *makhzan al-aytām*, loaned orphans' property on a regular basis.

This can be seen from four interconnected *fatwā*s written by Tāj al-Dīn's father, Taqī al-Dīn al-Subkī which, except for the first, I have translated in their entirety due to the relevance of their contents for understanding the work of the *mūda'*:

> (1)
> Our colleagues have differed regards trading with an orphan's property (*al-tijāra bi-māl al-yatīm*): is it a duty or preferred (*hal hiya wājiba aw mustaḥabba*)? The correct opinion of the *madhhab* is that it is a duty to do so to cover the allowance (of the orphan) and *zakāt* (of his or her property). The intention of our colleagues in (stating) this must be that (generating) a surplus is not required and the duty is restricted to (providing) this amount. Undoubtedly, this is conditional on the possibility, facilitation and ease of doing so. But making this an absolute requirement for the guardian is an impossible position to hold, for we see that skilled merchants with large fortunes exhaust themselves in pursuit of their own gain and are usually not able to profit more than they expend. Where did this (idea) come from? Maybe some of our colleagues said this when profit was effortless and there was neither *maks*,[667] injustice, nor fear. As for today, it is one of the rarest things, and many merchants suffer a loss. If everyone who had some capital were able to increase it to cover their necessary expenses (*nafaqatih*), then they would all prosper. Yet, we see that most of them are in hardship. Every person pities himself more than any other, so if it were possible to do this, then they would. How, then, can the guardian of an orphan be charged with doing so? Rather, our colleagues' words are to be interpreted as meaning that it is a duty when it is easy to do so, and (generating) a surplus is not required (even) when it is easy to do so, nor when it is hard. They derived this from the

[667] Customary taxes or dues that were often seen by authors in the Mamluk Period as illegal taxes in violation of the *shar'*. See Linda T. Darling, "Customs dues, historical," *Encyclopaedia of Islam, THREE*.

Prophet's words, Peace and Blessings Be Upon Him: "Trade with the orphans' property lest the alms tax (*al-ṣadaqa*) and the allowance for their upkeep (*al-nafaqa*) consume it," or however he stated it.

Our colleagues placed conditions on the permissibility of trading on behalf of the orphan. Nevertheless, even when all the conditions are fulfilled, it is a risk because prices are unreliable. A product could be purchased only to lose its value—but the orphan needs his allowance, so one is forced to sell at a loss. Or, he (i.e., the orphan) might reach maturity and accuse the guardian of purchasing it when that was not in his interest. Or, unjust people may coerce the guardian to buy for the orphan things of their property that they usually offer to people who are accustomed to buying, but he is unable to pay them. So, it is necessary that the orphan's guardian exert effort, and when he reaches a preponderance of opinion regarding the strength of the orphan's interest, which is stipulated by the Lawgiver (*al-shāri'*) (as a condition for trading with his property), then he must act on that opinion. Yet, even so, he is subject to this Earthly risk, and God will assist him depending on his intention.

As for the opinion that, under these conditions, it is preferable (*al-istiḥbāb*) (to engage in trade): it is acceptable. The opinion that it is a duty (*al-wujūb*) is based on the *prima facie* circumstance (*ẓāhir al-amr*), and it is apodictically conditioned on what we have stated above. Yet, the circumstances are (now) dangerous, and God distinguishes the evil-doers from the just. This is one of the difficulties that managing orphans' property entails which were indicated by the Lawgiver via the Prophet's words (Peace and Blessings Upon Him) to Abū Dharr: "I see that you are weak, and I prefer for you what I prefer for myself. Do not make me judge between two nor make me responsible for an orphan's property."

I prefer trading on behalf of the orphan according to the way I described and the aforementioned conditions. This is unequivocally lawful (*ḥalāl*) according to the consensus of Muslims (*ijmā' al-muslimīn*). As for the transaction that they implement in this age, it is as follows: A person comes to the Orphans' Bureau (*dīwān al-aytām*) and requests from them, for example, 1,000, and he agrees with them that the interest will be two hundred, or more or less. Then he comes with a commodity that is worth 1,000, and they purchase it from him on behalf of the orphan for 1,000. Then he receives it as his property and gives them that product. Then he purchases it from them for 1,200 to be paid at a certain date (*ilā ajal*) in exchange for a pledge (*rahn*) that he gives to them, thereby attaining his goal: to take the 1,000 in exchange for 1,200 in his name (*fī dhimmatih*) to be paid at a certain date. They use this exchange (*mu'āmala*) as a precaution against usury (*al-ribā*). Or, they buy a commodity from a third party for 1,000 and pay him 1,000 and take possession of the commodity. Then they sell it to the one requesting (a loan) for 1,200 to be paid at a certain date. Next, he sells it to its (original) owner in exchange for that 1,000 that he received. In this way they attain their goal as well. This *mu'āmala* is void (*bāṭila*) according to the Mālikīs, the Ḥanbalīs, and some of our colleagues, but it is valid according to us and some of the Ḥanafīs. However, despite its validity for us, it is reprehensible (*makrūha karāhat tanzīh*). Those who hold that it is void among our colleagues are of two groups. One of them holds that a sale on credit (*bay' al-'īna*) is void; the other holds that orphan's property should not be sold in

exchange for payment at a later date (*nasī'a*) unless the value of the capital will be paid in a short time, and that is made known.[668] Therefore, the jurists (*al-fuqahā'*) did not stipulate that this must be done with the orphan's property; rather the Orphan's Bureau (*dīwān al-aytām*) made it their practice because they know what profit will be made from it. However, there is some risk in it because most who receive (such a loan) do not pay it back at the determined time. Many of them delay and postpone, and the profit is lost to them. Some of them present a pledge that is not their property or do other kinds of corrupt things. There is another danger in this transaction, and that is that a Mālikī or Ḥanbalī judge could rule that this transaction is void, and then the orphan will lose the profit, and the capital will be at risk….(25th of Ṣafar 747).

(2)

One of the things that will clarify the truth of what we have said concerning the *mu'āmala* is that we have never seen anyone but a few use it in order to protect the orphan's property. Rather, it is most frequently to the advantage of the one requesting (the loan), and he involves other people and employs intercessions and his social capital (*jāh*) in order to take from the orphans' property. Along with this, there is an advantage for the Orphans' Bureau, because they receive one fourth of the profit. So, the Bureau and the requesting party get a reward with no risk, but the poor orphan now has a definite risk: his property was alienated without anything in compensation becoming his property. It is unknown whether his capital will come back to him in the future along with interest, in which case he profits, or if some or all of it will disappear, in which case he loses. This is the reality of the situation. And let not a human being lead himself astray, for God is privy to each and every heart and knows of it what no other knows, not even oneself. Therefore, the scrupulous in faith should have recourse to his heart. If it finds repose because that is in the interest of the orphan, and his intention in doing so is pure for God, then he should do it. But if not, then he should refrain. And God knows best. (27th of Ṣafar 747).

(3)

One of the of strangest occurrences that has happened was when a prominent person in Egypt asked for some orphans' property, and it was given to him. He returned it quickly, and he started to praise the one who gave it to him, who was the Supervisor of the Orphans (*nāẓir al-aytām*). In doing so, he gained esteem (*ḥaẓwa*). Then it happened that this prominent person asked in Syria for the same amount or something similar to it, so it was given to him because his *mu'āmala* had been tried and praised. Then he delayed its repayment for some time and caused some distress. Upon this, I said to myself, "The first payment was free of corruption, but his corruption came out in the end," for he was the cause of the corruption. This kind of thing is rarely without corruption. And God knows best.

(4) Know that, despite all of that, there is something that prevented me from taking the position that this *mu'āmala* is forbidden. For though it would be beneficial were I to state that refraining from it is absolutely the correct opinion, yet I also hold that this should be

[668] On *bay' al-'īna*, see J. Schacht, "Bay'," *Encyclopaedia of Islam, Second Edition*.

left up to the judgment of the guardian, his faith, and his knowledge. It depends a great deal depending on the particulars and (its legality) cannot be predetermined. So, he must make an account: if the property of the orphan is very great, and refraining from engaging in *mu'āmala* with it would not diminish it, then in this case it is either preferrable or a duty to refrain from *mu'āmala*. But if the property is but a little, and it is thought likely that were he not to engage in *mu'āmala* it will be depleted and the orphan will perish; and we have found a safe and quick *mu'āmala*, then in this case the *mu'āmala* is either preferred or a duty. In this case, it is possible for the *shubha*[669] to retreat in the face of this benefit, and that is not to be denied. I will give you an another example of this. Eating carrion is a duty for a person faced with no other option; approaching carrion is thus admitted even though it is apodictically forbidden in a state of plentitude out of protection for life (*ḥifẓan li'l-maniyya*). Thus, if a less-than-necessary need to engage in a *shubha* arises, it is likely that that engaging in it would be preferrable, thereby ensuring the fulfillment of the need by outweighing the benefit of avoiding the *shubha*. A similar case is if a person has dependents and he knows, or its probability becomes apparent to him, that if he does not take acquire some property for them from a *shubha*, then they will perish. Since providing for dependents is a duty, in this case it appears that we must say that the interest of the dependents—which he is commanded by the law (*al-shar'*) to protect—outweighs refraining from *shubahāt* (pl. of *shubha*). In this way, the case of the orphan is like the case of the dependents, and it is possible out of need or necessity to commit a *shubha*. It is excused by the Law (*shar'an*), and it is elevated to the point where committing it is more preferrable in the eyes of the Law (*al-sharī'a*) than avoiding it. Yet these are things that only one who contemplates the Law without ulterior motive can realize. And God knows best. (27th of Ṣafar, 747)

The result of all this is that I do not forbid the *mu'āmala*. Neither do I instruct others to do it. As for me, were it asked of me, then I hope to seek my best judgment about it and do that to which God guides me, God willing.[670]

The first *fatwā* in this group details the way in which the supervisors of orphans' property invested orphans' property on a regular basis: the *mu'āmala.* This transaction provided formal legality to interest-bearing loans of orphans' property. Although al-Subkī argues that it is best to refrain from this practice, the fourth *fatwā* is actually an argument in favor of its legitimacy

[669] *Shubha* literally means "resemblance," and is used in Islamic legal discourse to refer to forbidden acts that resemble permissible acts. It is often used to refer to doubt in *ḥudūd* cases regarding culpability, such as when a person who first confesses to the offense later withdraws their confession. In this case, it refers to the apparently licit act—a contract of sale or, below, eating meat—that actually is reprehensible or forbidden. See Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oxford: Oneworld Publications, 2008), 183; Intisar A. Rabb, "Confession," *Encyclopaedia of Islam, THREE*; E.K. Rowson, "Shubha," *Encyclopaedia of Islam, Second Edition*.

[670] Taqī al-Dīn al-Subkī, *Fatāwā al-subkī*, 2 vol. (Beirut: Dār al-Ma'rifa, 1937), 1/326-330.

under certain conditions. The second and third *fatwā*s together show that access to orphans' property depended in practice not only on the fulfillment of the formal legal requirements—selling a commodity and buying it back on pledge for a higher amount—but also on the existence of a social network that could intercede and use their social capital (*jāh*) to help an individual secure a loan. Historians of the Mamlūk Period have long known that "non-formal patronage relationships that functioned under the auspices of formal institutions existed on a broad state-wide scale."[671] The intercession of these networks on behalf of loan-seeking individuals, while criticized by al-Subkī, on the flipside appear to have acted as a form of securing credit. Clearly, the creditworthiness of an individual was a major problem for the supervisors of orphans' property; people rarely paid on time in al-Subkī's estimation.[672]

Although reliant on an informal networks of patron and clients, the system of preserving and investing orphans' property was, nevertheless, standardized between Cairo and Damascus to a surprising extent. Al-Subkī's story about a man who gained influence in Cairo by paying back his debt to the orphans' fund reveals that this loan transaction was not only standard practice in both Cairo and Damascus, but that one's credit was potentially transferrable between the two urban centers. This does not mean that the judicial treasury was identical in both places. In fact, al-Subkī uses the term *dīwān al-aytām* and *nāẓir al-aytām* in his *fatwā* rather than *mūdaʿ al-ḥukm* or *amīn al-ḥukm*. As will be seen in the next chapter, these terms were in use in Damascus

[671] Levanoni, "The al-Nashw Episode: A Case Study of 'Moral Economy'," *Mamluk Studies Review* 9, no. 1 (2005), 220. See also Chamberlain, *Knowledge and Social Practice*, 113-116; Lapidus, *Muslim Cities*, 107-114; Carl F. Petry, *Protectors or Praetorians? The Last Mamluk Sultans and Egypt's Waning as a Great Power* (New York: State University of New York Press, 1994), 131–89.

[672] Ibn Ḥajar preserved the case of another individual, the son of a Ḥanbalī chief qāḍī, who used his father's influence to borrow a large amount of money from the *mūdaʿ al-ḥukm* in Cairo. Eventually, the matter was brough to the Sulṭān's attention, who removed the father from his judgeship. See Ibn Ḥajar, *al-Durar al-Kāmina*, 2/298.

in the Ayyūbid and Mamlūk Periods to refer to the institution and head official responsible for orphans' property in Syria. It is notable that al-Subkī did not use the terms *mūda' al-ḥukm* or *amīn al-ḥukm* even when referring to Egypt. The same phenomenon can be seen in a passage in Ibn Ḥajar's history of the judges of Egypt. Whereas al-Subkī spent most of his professional career in Damascus and therefore used the terms in use there, the Egyptian author Ibn Ḥajar writes that upon Burhān al-Din Ibrāhīm Ibn Jamā'a's (d. 796/1394) nomination to the position of chief judge in Syria by al-Barqūq, he "accepted and excelled in his performance to the point that even though he found nothing in *al-mūda' al-ḥukmī,* he developed it and made it flourish until it had more than 2,000,000 pure silver dirhems."[673] Thus, terms may often reflect the position and location of the author rather than the actual title of the institution or office.

The routinization of the work of at *mūda',* and its subsequent separation from the supervision of the judges, appears to have been a cause of discomfort for al-Subkī. As he notes in the second *fatwā* above, loans of orphans' property were often not made for the advantage of the orphan but for the advantage of the institution. Moreover, appointments to work in the *mūda'* were not dependent on the term of a single judge, and it was probably a lifelong career for many. Thus, when Shams al-Dīn al-Qāyātī became the Shāfi'ī chief judge in Cairo in 849/1445, for example, he walked from the tomb of al-Ṣāliḥ to al-Azhar Mosque where "he called for everyone who had an appointment in the *mūda'* or in the *awqāf,* so the people rushed to greet him and his predecessor."[674] The employees of the *mūda'* in Cairo, moreover, were not just the *umanā'*. For instance, Ibn Ḥajar writes that one Shiḥāb al-Dīn Aḥmad b. Ṣāliḥ al-Shanṭūfī (d. 841/1438) was

[673] Ibn Ḥajar, *Raf' al-iṣr*, 31.

[674] Ibn Ḥajar, *Inbā' al-ghumr bi-abnā' al-'umr*, 4 vol., ed. Ḥasan Ḥabashī (Cairo: Lajnat Iḥyā' al-Turāth al-Islāmī, 1969), 4/235.

"the worker (*al-ʿāmil*) at the *mūdaʿ al-ḥukm* in Cairo."[675] Likewise, al-Sakhāwī mentions that Jalāl al-Dīn Muḥammad b. Aḥmad al-Jarawānī (d. 882/1478), a *faqīh* and one-time deputy judge, "worked (*ʿamal*) for a time in the *mūdaʿ*."[676] Another position in the *mūdaʿ* was that of the expert witnesses or notaries (*shuhūd mūdaʿ al-ḥukm*).[677] Probably for the reasons mentioned by al-Subkī, working in the *mūdaʿ* was perceived as morally problematic. According to Ibn Ḥajar, one Shāfiʿī jurist, Taqī al-Dīn Muḥammad b. Muḥammad al-Dijjawī (d. 809/1406) was responsible for "the administration of the judicial treasury (*ʿimālat al-mūdaʿ al-ḥukmī*), and this job disgraced him."[678]

While these workers were still under the supervision of the Shāfiʿī chief judge, the increasing specialization and differentiation of functions within the *mūdaʿ* solved a problem that many Shāfiʿī judges must have faced.[679] Judges were appointed not for their knowledge of business and commerce but, at least in theory, due to their knowledge of the law and standing among the community of jurists. As al-Subkī makes clear in the first *fatwā* translated above, successful investment of orphans' property required specialized knowledge of markets that only a person with experience in commerce would be able to acquire. While some judges like Ibn Ḥajar—raised by his step-father, a wealthy Kārimī merchant—may have had this knowledge, it

[675] *Ibid*. 4/76

[676] Al-Sakhāwī, 7/75.

[677] Ibn Ḥajar, *Inbāʾ al-ghumr*, 4/163; al-Sakhāwī, 1/244, 307.

[678] Ibn Ḥajar 2/374; al-Sakhāwī, 9/91.

[679] See al-Sakhāwī 10/11, where a man is said to have "persisted in serving him (Ibn Ḥajar) in the *mūdaʿ*."

was neither a requirement for the job nor could it have been expected that a judge would have acquired this kind of know-how.[680]

This gap between the responsibilities of the Shāfi‘ī chief judge and his training as a jurist may also help explain an incident in the life of Ibn Daqīq al-‘Īd. As noted above, the new *mūda‘* was established during the tenure of Ibn Daqīq al-‘Īd as Shāfi‘ī Chief Judge, which was accompanied by a new effort to centralize control over the orphans' wealth in the hands of private testamentary guardians. Given Ibn Daqīq al-‘Īd's role in the establishment of this new system, one might find it surprising to read in al-Udfuwī's biography of Ibn Daqīq al-‘Īd that he was accused of misappropriating orphans' funds:

> Our shaykh, the Chief Judge Abū ‘Abd Allāh Muḥammad b. Jamā‘a told me that the *amīn al-ḥukm* of Cairo was staying with him, and he was struggling to make an account of the orphans' property. Then our shaykh said, "At one point he summoned Shaykh Taqī al-Dīn (Ibn Daqīq al-‘Īd) and claimed that he owed a debt to the orphans. So, I mediated between them, and I decided with him that the stipend from al-Kāmiliyya (would be set aside for the debt and (the stipend from) al-Fāḍiliyya would be for his own expenditure." Then I said to him, "I covet you more than this debt." So, he replied, "Only my love of books drove me to it!"[681]

There is no reason to doubt that al-Udfuwī, a zealous admirer of Ibn Daqīq al-‘Īd who dedicated more space to him in his biographical dictionary than any other individual, reported this embarrassing story accurately as he heard it. However, the episode did strike Ibn Ḥajar, while commenting on this exchange in his history of Egyptian judges, as flabbergasting. But the cause of his amazement was not that Ibn Daqīq al-‘Īd was in debt to the orphans, but rather Ibn Jamā‘a's attempt to recover the debt from of Ibn Daqīq al-‘Īd's stipends:

> One is bewildered at such a thing occurring at a time when the judge's coffers were flowing with what he received from administrative sinecures and stipends from the entire

[680] Rosenthal, "Ibn Ḥadjar al-‘Asḳalānī."

[681] Al-Udfuwī, 595.

> Kingdom. If he was just given the *zakāt* of a single orphan, the debt would have been fulfilled. How could he have overlooked such a thing and chosen to rebuke him? By God, this is a strange thing![682]

The episode reveals two important points about the system of supervising orphans' property following Lājīn's reforms. First, judges relied on their auxiliaries—the *umanā'* and the officials of the *mūda'*—in order to account for orphans' property. Second, despite the existence of specialists handling loans from orphans' property and the preservation of their estates, judges were still able to dispose of orphans' property. Thus, it can be concluded that as the control of the judiciary over orphans' property was expanded and became more sophisticated, so too did the opportunities to misappropriate—whether through oversight or ill intention—this accumulated wealth. As we will see now, this was an opportunity that sulṭāns and emirs in the fourteenth and fifteenth centuries C.E. were only too willing to take advantage of.

The Location of the Mūda' *and Its Disappearance*

At some point, the *mūda' al-ḥukm* in Cairo was placed in a fixed location. While it is probable that this occurred when Lājīn and Ibn Daqīq al-'Īd created a new *mūda'*, the sources do not allow us to make this judgment with absolute certainty. Our source for the location of the *mūda'* is al-Maqrīzī's topological history of Egypt, *al-Khiṭaṭ,* which includes a description of the caravansary (*funduq*) which was home to the *mūda' al-ḥukm*, Khān Masrūr:

> Khān Masrūr refers to two places—one big, the other small. The big one is located to your left as you approach the Silk Makers' Market from the direction of Bāb al-Zuhūma. It once was the location of the Shield Depot (*khizānat al-daraq*) which I previously mentioned along with the other (Fāṭimid) Palace Depots….I saw Masrūr Caravansary (*funduq*) when it was yet at the height of its flourishing (*ghāyat al-'imāra*). Elite Syrian merchants would lodge in it with their wares. It also contained the *mūda' al-ḥukm* which holds the property of orphans and absent people (*amwāl al-yatāma wa'l-ghuyyāb*). It was

[682] Ibn Ḥajar, *Raf' al-iṣr,* 346.

> one of the grandest and loftiest caravansaries (*kān min ajall al-khānāt wa-a'ẓamihā*), but when the calamities spread due to the destruction of Syria since the time of Tamerlane, and the condition of Egypt's realm came to ruin, the merchants decreased and the *mūda' al-ḥukm* came to nought (*baṭal mūda' al-ḥukm*). Then the prestige (*mahāba*) of the caravansary decreased and its sanctity (*ḥurma*) evaporated. Several places in it have since become dilapidated. It is now in the hands of the judges (*al-quḍāt*).[683]

This passage reveals important information about (1) the location of the *mūda'*, (2) its relationship to regional trade, and (3) its decline. I will address the first two points briefly before providing an explanation, based on the history of the 14th/early 15th century, of its decline and eventual abandonment.

First, Khān Masrūr's location was in the heart of the city. Bāb al-Zuhūma was the location of the Ṣāliḥiyya tomb and *madrasa* mentioned above, around which had been built not only the grandest sultanic buildings of the age—e.g., the Qalāwūnid complexes—but also was surrounded by rich and bustling markets.[684] It would have been an ideal place for merchants to rest and store their wares as they conducted their business in the capital city.

Second, the success of the *mūda'* appears to have been directly related, in al-Maqrīzī's estimate, to the presence of wealthy merchants arriving from abroad. Since, as we learned from al-Subkī, the officials at the *mūda'* were initiating loans on the basis of the property in the *mūda'* on a regular basis, a sudden decrease in the amount of merchants known for their creditworthiness (the 'elite' merchants mentioned by al-Maqrīzī) would have made it difficult for officials at the *mūda'* to make loans on orphans' property. Moreover, part of the property held in the *mūda'* was property owed to absent people, e.g., property of a deceased person who had inheritors that were not present to receive the property. If regional trade decreased, it is safe to

[683] Al-Maqrīzī, *al-Khiṭaṭ*, 3/304-305.

[684] *Ibid*. 3/323.

assume that less property was owed to the descendants of individuals who had died in Cairo while conducting business.

In all, the *mūda'* appears to have flourished as in institution until sometime in the early-to-mid 15th century. Al-Maqrīzī died in 845/1442, and Tamerlane's occupation of Syria and short-lived conquest of Damascus occurred in 803/late 1400 - early 1401.[685] While the damage inflicted on Syria and regional trade arriving in Egypt cannot be discounted as a factor, an analysis of the history of the *mūda'* and the supervision of orphans' property in the 8th/14th century indicates that the decline in the *mūda'* of Cairo's fortune was likely in the making well before Tamerlane arrived. In fact, as will be seen shortly, Tamerlane used it as a *casus belli* for his war against the Mamlūks.

The Mūda' *of Cairo: Accumulation and Appropriation*

Just as the centralization and accumulation of orphans' property led to accusations of mishandling by the Shāfi'ī judges, so too did its presence in a known location whet the appetites of sulṭāns and emirs in times of hardship. The first report of the Mamlūk state's interest in the wealth accumulated in the *mūda'* comes from the third reign of al-Nāṣir Muḥammad b. Qalāwūn. During Ibn Qalāwūn's third reign (709-741/1310-1341), Egypt's economy flourished and the Cairo Sultanate experienced a period of stability due to the sulṭān's long rule and the end of the wars with the Frankish Crusaders states and the Mongols. Yet, al-Nāṣir Muḥammad nevertheless drove the state fisc to the brink of disaster due to his lavish spending and his massive construction projects. Due to the budget deficit, in 729/1328 al-Nāṣir commenced personally

[685] Anne F. Braodbridge, *Kingship and Ideology in the Islamic and Mongol Worlds*, Cambridge Studies in Islamic Civilization (Cambridge: Cambridge University Press, 2008), 187-192.

reviewing governed expenditure and began seeking alternative income sources.[686] In 723/1331, al-Nāṣir appointed Shams al-Dīn Ibn Faḍl Allāh "al-Nashw" as the *nāẓir al-khāṣṣ*, or inspector of the sulṭān's private treasury. Between taking the job in 1333 A.D. and his fall and demise under torture in 740/1339, al-Nashw engaged in a number of unpopular and shocking practices due their intensity, illegality and indiscriminate nature: confiscating property (*muṣādara*), forcing merchants to purchase items, raiding the *awqāf*, and appropriating orphans' property.[687] In Ramadan 736/1336, al-Nāṣir made a request to al-Nashw of 10,000 dinars. However, al-Nashw demurred and provided some excuse, but the sulṭān rejected this excuse and berated him. Upon this,

> Al-Nashw went out and forced the *amīn al-ḥukm* to write down everything that was in his possession of the orphans' property. Then he demanded from him a loan of 10,000 dinars, so he (the *amīn al-ḥukm*) informed him that there were 400,000 dirhem belonging to the orphans of al-Dawādārī that had been sealed by Bahā' al-Dīn, *shāhid al-jimāl*,[688] so he took it from him and compensated him with some commodities. Then al-Nashw sent a request to the Mālikī Chief Judge Taqī al-Dīn Muḥammad b. Abī Bakr 'Īsā al-Ikhnā'ī asking him to grant him access to the property belonging to the children of the viceregent Emir Arghūn, which amounted to 6,000 dinars. The children were under his guardianship at the time, and he refused, saying, "It is illegal for the Sulṭān to take orphans' property (*al-ṣulṭān mā yaḥill la-hu akhdh māl al-aytām*)." So he said in response to him, "The Sulṭān is only requesting the property that your brother stole from the Private Treasury when he was its supervisor because the accounts testify against him that he stole it from the treasury." Then he (al-Nashw) returned in a fit to the Sultan and kept at him until the Sulṭān sent to the judge to demand that he bring the money that his brother stole from the treasury.[689]

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[686] Levanoni, "The al-Nashw Episode: A Case Study of 'Moral Economy'," *Mamluk Studies Review* 9, no. 1 (2005), 209.

[687] On al-Nashw's rise and fall, see *ibid*. and Levanoni, *A Turning Point in Mamluk History*, 73-80.

[688] Apparently, he was an official who, at the time of these events, was responsible for accounting for camels.

[689] Al-Maqrīzī, *al-Sulūk*, 3/199.

The exchange between al-Nashw and the Mālikī chief judge, who had apparently been made testamentary guardian over the late Arghūn's children, underscores the willingness of judges to protect orphans' property even in the face of the raw power of the Mamlūk sulṭān and his agents. Yet the episode also reveals another important point about orphans' property at the time. No mention is made of the *mūda'*, and the 400,000 dirhems that the *amīn al-ḥukm* forfeited may not even have been held in the *mūda'*. It is also significant that al-Nashw did not go to the Shāfi'ī chief judge to demand orphans' property, instead heading directly to the *amīn al-ḥukm*. This supports the conclusion, indicated above, that supervision of orphans' property was largely, if not entirely, managed by specialists in Cairo by this point.

Al-Nashw also appears to have known about orphans' property held by emirs or owed to their children. In 737/1336, due to another deficit, al-Nashw ordered his agents to rob the merchants' stores in the markets in order to provide money, clothing and supplies for the Royal Mamlūks. Then, al-Nashw confiscated the estate of a deceased emir from his descendants, which included 50,000 dirhems that the emir had been holding on behalf of some orphans in his care.[690] Al-Nashw probably knew about the cash because Baybars had previously ordered, as seen above, that orphans' property in the hands of emirs must be audited by the judicial trustees.

In Muḥarram 739/1338, al-Nashw clashed again with one of the *umanā' al-ḥukm*. The cause this time was a purchase of real estate that the *amīn al-ḥukm* had made on behalf of an orphan. An official charged with collecting the *qarārīṭ* tax—a non-*shar'ī* tax imposed by the sulṭān—demanded that the *amīn al-ḥukm* pay the tax due on the purchase. When he refused, the matter ended up at the court of the Shāfi'ī Chief Qāḍī of the time, 'Izz al-Dīn Ibn al-Jamā'a. The tax collector let his tongue slip and said something that the judge decided he should be punished

[690] *Ibid*. 3/216.

for. After carrying out the (unnamed) punishment, the tax collector complained to al-Nashw, who, in turn, brought the matter to al-Nāṣir, adding for good measure that the *amīn al-ḥukm* took the royal decree that had al-Nāṣir's name on it, threw it on the ground and stomped on it while saying, "You would turn error into truth at a court of law in order to take orphans' property." In response, the sulṭān had him beaten in front of al-Nashw, paraded around the city, and forced to pay 20,000 dirhems.[691]

Eventually, al-Nashw's appropriations aroused the anger not just of the populace but also the emirs, whose wealth had become targets for his confiscations as well. As the anger against al-Nashw reached a boiling point in Ṣafar 740/1339, a group of people, including widows, orphans, people with disabilities and blind people gathered at the Citadel in Cairo in protest against al-Nashw.[692] Many of them had had their stipends provided by the state cut as part of al-Nashw's fiscal policy. Within a few days, al-Nashw was arrested and turned over to be tortured. The events of "The al-Nashw Episode," to use Levanoni's apt phrase, although extraordinary for the use of brute force to extract resources from the entire population, nevertheless set a pattern that would intensify in the late 14th and early 15th centuries: turning to the orphans' property accumulated under the supervision of the *amīn al-ḥukm* and in the *mūda'* as a reserve in times of need.

Following the death of al-Nāṣir Muḥammad in 741/1341, his descendants continued to hold on to the Cairo sultanate. Yet while their names were mentioned at Friday prayers and appeared on newly minted coins, the effective power behind the throne consisted of factions of

[691] *Ibid*. 252.

[692] *Ibid*. 267.

Mamlūks who struggled both behind the scenes and in the streets for dominance.[693] In many cases, such as with Shaykhū or Yalbughā al-Khāṣṣakī, a single power-holder emerged who relied on flexible networks of patron-client relationships between individuals attached to his household as a vehicle to power.[694] Starting from Shaykhū in 1354, the effective powerholder behind the throne began taking the title *atābak al-ʻaskar* and acted as sulṭān in all but name, until Barqūq (not a descendant of al-Nāṣir) finally broke this cycle and claimed the throne for himself in 784/1382.[695] Between al-Nāṣir's death and the rise of the new, Circassian period marked by Barqūq's accession, eight of the twelve sulṭāns who reigned were orphaned minors.[696] When Sulṭān Ḥasan took the throne as a young boy, Shaykhū allotted him an allowance termed "*nafaqat al-ṣulṭān*," preventing the sulṭān thereafter from managing his own finances.[697]

During this period, there is evidence that the Mamlūk emirs running the state began to turn more often to accumulated orphans' property in order to meet critical budgetary needs in times of a shortfall. First, in 750 A.H. during the early years of al-Ḥasan's reign, several Mamlūk emirs accompanied the annual Ḥajj caravan from Cairo, bringing with them "money from the state treasury (*bayt al-māl*) and from the *mūdaʻ al-ḥukm* for the development of ʻAyn Jūbā in Mecca along with 10,000 dirhems for the Bedouin for the sake of the aforementioned spring."[698]

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[693] Holt, *The Age of the Crusades*, 121-129.

[694] Van Steenbergen, *Order Out of Chao: Patronage, Conflict and Mamluk Socio-Political Culture, 1340-1382*, The Medieval Mediterranean (Leiden: Brill, 2006), 97-98.

[695] Van Steenbergen, *Order Out of Chaos*, 44.

[696] Levanoni, "The Mamluk Conception of the Sultanate," 381.

[697] Van Steenbergen, *Order Out of Chaos*, 32-33.

[698] Al-Maqrīzī, *al-Sulūk*, 4/108.

An attempt had been made in the previous year to make the spring flow again using the money from the *waqf* earmarked for Mecca and Medina, but the Mamlūk officer sent to oversee the renovations was attacked by Bedouin and only managed to coerce a trickle out of the spring. As Mecca suffered from plague and drought, the decision was made to use orphans' property—we are not told how much—to avert a crisis.[699]

Following the rebellion against al-Ashraf Sha'bān and his subsequent murder, the Mamlūk emirs faced a new fiscal crisis in 779/1377. Again, they turned to the *mūda'*. Immediately before his capture and murder, Sha'bān had deposited a large amount of property in the *mūda'*, apparently in the hopes that the sanctity of the institution would deter its appropriation (remember al-Maqrīzī's description of Khān Masrūr has a place of *ḥurma*). Following the enthronement of Sha'bān's underage son, however, "the emirs in charge of state affairs took what al-Malik al-Ashraf had placed of his property in the *mūda' al-ḥukm* in Cairo, and it was carried away on twenty-eight camels."[700] While we do not know the exact value of what al-Ashraf Sha'bān deposited in the *mūda'*, the sheer number of camel-loads required to move it indicates that it was a very large sum.

The same year, the emirs, facing a revolt of rank-and-file *mamālīk* demanding the traditional payment to them on the ascension of a new sulṭān, again looked to the *mūda'*. This time, the *amīn al-ḥukm* was summoned and asked to provide a loan from the orphans' property of 200,000 dinars. If he refused, he was told they would plunder the *mūda'*. This is the first time that such a great demand was made of the *mūda'* on threat of violence. Al-Maqrīzī writes that "at that time there was a massive amount of money in it," but after the emirs took what they wanted,

[699] *Ibid*. 4/101.

[700] *Ibid*. 5/17.

the sum was never returned to the orphans.[701] Although the emirs averted a crisis, making such a great demand on the *mūda'* and failing to return the money, was an unprecedented event.

The Cairo Sultanate was now in a state of perpetual financial deficit, and it was not long until demands were made yet again on the *mūda'*. In 784/1382, Barqūq, now in full control of the Sultanate in all but name, asked the Shāfi'ī Chief Judge to give him the estate of a recently deceased wealthy merchant. Since the merchants' inheritors were absent (*waratha ghā'ibīn*), the judiciary had followed protocol by placing property in the *mūda' al-ḥukm*. When the chief judge Burhān al-Dīn Ibn al-Jamā'a refused, stating, "It has been proven to me that he has inheritors, so there is no way that I can turn the property over to anyone but his inheritors," Barqūq decided to replace him. His first choice, knowing Barqūq's intentions, hid somewhere in the city.[702] Eventually Barqūq found a willing candidate—Badr al-Dīn Ibn Abī al-Baqā'—who immediately replaced the *amīn al-ḥukm* with a man of his own choosing, one Shihāb al-Dīn Aḥmad al-Zarkashī. One gets the sense that al-Zarkashī did not realize he was being used as a scapegoat. When he died four years later, "he was accused of having poisoned himself because under his watch 500,000 dirhems went missing, gone with the wind (*dhahabat ka-ams al-dhāhib*).[703]

In 789/1387, Barqūq began making preparations to face Tamerlane's first invasion of the Mamlūk Sultanate. In a special council convened with the chief judges and the prominent *'ulamā'* of the day, it was agreed that he could take an amount equivalent to one year's rent from all of the religious endowments (*awqāf*). Six days later, upon hearing of a massive fortune held in "one of the caravansaries in Cairo," Barqūq had the *amīn al-ḥukm* of Cairo beaten when the

[701] *Ibid*. 5/18.

[702] *Ibid*. 5/18.

[703] *Ibid*. 5/192.

latter denied having 5,000 dinars that were rumored to be in his possession from the estate. The chief judge also denied having knowledge of this money, and Barqūq decided to replace him.[704] The narrative of this event incidentally reveals that the judiciary did not store orphans' property exclusively at Khān Masrūr. A month later, Barqūq appointed a new chief judge, Nāṣir al-Dīn Ibn al-Maylaq. Three days after assuming office, Ibn Maylaq "went to the *mūda' al-ḥukm* in Khān Masrūr and inspected the accumulated property of the orphans. Then he dismissed the Qāḍī Muḥibb al-Dīn al-Shamasṭā'ī[705] and replaced him in the *amānat al-ḥukm* with al-Qamūlī."[706] Thus, Barqūq replaced a judge and an *amīn al-ḥukm* twice in order to get access to the resources in the *mūda'*.

The floodgates were now open. In an effort to fund an army to fight the (momentarily) deposed Barqūq in 791/1389, the emir Minṭāsh asked the Shāfi'ī Chief Judge Ṣadr al-Dīn al-Mināwī for a loan from the orphans' property. Although the latter at first refused, eventually Minṭāsh prevailed, "and the orphans' treasuries (*mawādi' al-aytām*) were emptied, although they had been full at that time."[707] It is notable sign of the resilience of the institution that even though the resources of the *mūda'* had already been appropriated only seven years prior, enough had accumulated by this time to attract the attention of Minṭāsh. Only a few months later, Minṭāsh reinstated Ibn Abī al-Baqā' to his position as Shāfi'ī chief judge on the condition that "he turn

[704] Nāṣir al-Dīn Ibn al-Furāt, *Tārīkh ibn al-furāt*, ed. Constantin Zurayk (Beirut: al-Amīrkāniyya, 1936), 9/11-12.

[705] I am unsure of the vocalization of this name.

[706] Al-Maqrīzī. *al-Sulūk*, 9/16.

[707] *Ibid*. 5/18. It is unclear here if the use of the plural *mawādi'* is referring to several places within Khān al-Masrūr or other places which may have been used to store orphans' property in Cairo.

over the orphan's property and pay 100,000 dirhems of his own money."[708] Ibn Abī al-Baqā' fulfilled his promise. As al-Maqrīzī writes:

> The vizier Muwaffaq al-Dīn Abū al-Faraj and the emir Nāṣir al-Dīn Muḥammad b. al-Ḥusām set out for Khān Masrūr in Cairo where the orphans' *mūda'* is, taking from it 300,000 dirhems. They also forced the *amīn al-ḥukm* of Cairo to turn over a total of 500,000 dirhems, the *amīn al-ḥukm* of Fusṭāṭ to turn over 100,000 dirhems, and the *amīn al-ḥukm* of al-Ḥusayniyya to turn over 100,000 dirhems as a loan authorized by the Chief Judge Badr al-Dīn Muḥammad Ibn Abī al-Baqā'.[709]

It is unclear whether these loans were repaid. However, this incident confirms that, in addition to the *mūda'* in Khān Masrūr, there were three *umanā' al-ḥukm* in Cairo and its suburbs who had access to orphans' property not kept in the *mūda'*. One wonders if these *umanā'* had begun accumulating wealth outside of the *mūda'* out of fear that it would be taken were they to deposit it in the *mūda'*.

Reliance on orphans' property did not end after Barqūq reclaimed the sultanate. In 794/1391, Barqūq "forced the supervisors of the orphans' treasuries (*mawādi' al-ḥukm*) to make an account of the (property of) the orphans and to notify him of any neglected inheritances, and he detained the *umanā' al-ḥukm* and the collectors of *waqf* funds." It is not mentioned whether he proceeded at this time to take orphans' property or if his demand was just for the records.

This series of raids on the *mūda'* and orphans' wealth starting in 1377 was not just noticed by Egyptian historians. It will be remembered that some of the property held in the *mūda'* belonged to people who were "absent," i.e., not present in Cairo and so unable to claim their wealth. The resources of the *mūda'*, moreover, were used to fund regional and, possibly, international trade. In any case, it appears that someone informed Tamerlane of what had been

[708] *Ibid*. 5/266.

[709] *Ibid*. 5/267.

happening in the Sultanate, and he, or his advisors, thought they could use this to their advantage. Anne Broadbridge has argued the Tamerlane "used Islam to justify both his rule and his military campaigns, which he did by asserting a desire to restore and safeguard religious order as well as Chingizid order."[710] Given the importance of protecting orphans and their property in Islamic law and ethics, news that the Mamlūks were robbing the orphans' under their protection must have been greeted at Tamerlane's court with both contempt and satisfaction. In his letter to Barqūq, which arrived in 796/1394 accompanied by a sword and quiver as gifts intended to indicate his intention to go to war, Tamerlane wrote:

> Know that we are the soldiers of God, created from his wrath, given dominion over those on whom His anger has descended…We do not feel tenderness for the one who complains, nor do we have mercy on the tear(s) of the one who weeps, for verily God has torn mercy from our hearts. Woe unto those who are not of our party nor stand with us, for we have decimated lands, orphaned children and manifested corruption on Earth…
>
> How could God hear your prayer when you have consumed what is forbidden, devasted the people, taken the orphans' property, and accepted bribes from judges. You have stoked the fires of Hell with your own hands and earned a terrible fate. "Lo! Those who devour the wealth of orphans wrongfully, they do but swallow fire into their bellies, and they will be exposed to burning flame."[711]

Tamerlane's threats did not stop Barqūq from continuing to rely on orphans' property. In the same month that the letter arrived, Barqūq received a loan from Ibn Abī al-Baqā' of 560,000 dirhems from the orphans' property in order to fund a new campaign against Tamerlane. As before, Barqūq had appointed Ibn Abī al-Baqā' specifically for the purpose of facilitating such a loan.[712] This money, however, was soon returned. On the 9th of Sha'bān 797/1395: "The Sulṭān

[710] Broadbridge, 170.

[711] Al-Maqrīzī, *al-Sulūk*, 5/350. I followed Broadbridge's translation of the first part of this letter (up to "mercy from our hearts"). Broadbridge, 182.

[712] Al-Maqrīzī, *al-Sulūk*, 5/354.

returned to the orphans the money that he had borrowed from the *mūda'* which amounted to 1,150,000 dirhems, including 550,000 owed to the *mūda'* of Cairo and 600,000 owed to the *mūda'* of Syria (*mūda' al-shām*)."[713] While it is unclear why Barqūq returned the money, it is possible it was due the combined force of Tamerlane's mocking letter and his realization that continuously draining the *mūda'* would spell an end for an institution that had become a vital source of cash during fiscal crises.

After Barqūq's death, his son, Sulṭān al-Nāṣir Faraj also borrowed orphans' property to fund military campaigns. First, in 803/1401, the emirs in control of the state (the sulṭān being as yet a young boy), appropriated an unnamed sum from the endowments and orphans in order to prepare another campaign against Tamerlane.[714] In 807/1405, in order to fund a campaign to quell rebellion in Syria, Faraj borrowed 10,000 *mithqals* of gold from the orphaned children of an emir. In exchange for the gold, al-Nāṣir Faraj gave a jewel as a pledge. In exchange for around 16,000 more *mithqals*, he sold the orphans a village in the Giza. A wealthy trader's estate was less fortunate; he appropriated an unnamed large amount of property from it with apparently nothing in return. At the same time, the Shāfi'ī chief *qāḍī* supplied him with 500,000 dirhems from estates in his control but "outside of the *mūda'*."[715]

It is significant that these large sums were extracted from the *mūda' al-ḥukm*. As suggested earlier it seems that the central location of the *mūda'* began to be seen as a disadvantage to the judicial officials charged with protection and investing this property. Too

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[713] *Ibid*. 5/373.

[714] Ibn Taghrībirdī, *al-Nujūm al-zāhira,* 2/140.

[715] Al-Maqrīzī, *al-Sulūk,* 6/126-127; Ibn Taghrībirdī, *al-Nujūm al-zāhira,* 12/317.

many times had demands been made on it, and Barqūq's repayment of what he borrowed appears to be an exceptional case during this period. Is it possible that the *umanā'* began distributing orphans' property among themselves and their trusted acquaintances in order to evade the hands of the state? As will be shown in the next chapter on orphans' property in the Mamlūk provinces, this may have been a successful strategy employed in Upper Egypt and Damascus.

What is certain is that the *ḥurma* of the *mūda' al-ḥukm* at Khān Masrūr had been violated several decades before al-Maqrīzī completed the *Khiṭaṭ*.[716] After this point, the *mūda'* must no longer have been used by the judiciary for accumulating wealth, if it existed at all. Had the *mūda'* continued to be replenished with new inheritances belonging to orphans and absentee property, it is hard to believe that the political elite of the Cairo Sultanate would have refrained from relying on these resources for emergency funds. During the 15th and early 16th century, the Cairo Sultanate was in a constant struggle to cover state expenses, and rulers were increasingly searching for new sources of income. Sales of office, confiscation of property and inheritances, and privatization of state property were increasingly common during the 15th century.[717] Whereas modern scholars previously focused on greed and corruption among the elite as a major factor in the response to economic crisis, recent scholarship has increasingly emphasized the transformations in revenue collection as "as rational response to economic necessity."[718]

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[716] The final version was completed a short time after 1428. See Frédéric Bauden, "Al-Maqrīzī," in *Christian-Muslim Relations: A Bibliographical History, Volume 5 (1350-1500)*, ed. D. Thomas, et. al. (Leiden: Brill, 2013), 386.

[717] ElBendary, 30-41; Bernadette Martel-Thoumian, "The Sale of Office and Its Economic Consequences during the Rule of the Last Circassians (872-922/1468-1516)," *Mamluk Studies Review* 9, no. 2 (2005), 49-83.

[718] Bethany Walker, "Popular Responses to Mamluk Fiscal Reforms in Syria," *Bulletin d'études orientales*, 58 (2009), 51-58, 51.

Examples of this include sales of state property and offices, the creation of income-generating *awqāf*, new non-*shar'ī* taxes, and the creation of a new financial bureau, the *Dīwān al-Mufrad*, independent of the traditional financial machinery of the state.[719]

Among all this restructuring of economic policy by the sulṭāns and emirs, and the increasing reliance on confiscation of property in the 15th century, it would seem that orphans' property could no longer be appropriated or borrowed with the ease of the fourteenth and early-fifteenth centuries. The Egyptian chronicler Ibn Iyās makes no mention of the *mūda' al-ḥukm* or forced loans from the *umanā'* between the years 872-928/1467-1522. He does mention Khān Masrūr in his narration of the events of 927/1521, but he only does so in order to describe the beginning of the path that was covered in silk for a state procession.[720] It is also unlikely that the lack of any mention of forced loans or appropriations at this time was either because the sulṭāns were too abashed to take this action or because Ibn Iyās chose not to record them. In fact, Ibn Iyās mentions that Qaytbāy (r. 872-901/1468-1496), in an unprecedented move, began cutting the stipends of orphans, women and the elderly, a move that the author perceived as morally repugnant.[721] There is also some evidence that Khān Masrūr was renovated after Rabī'a I 831/1427 . According to Ibn Ḥajar, Sulṭān Barsbāy rebuilt the Khan after it had been demolished

[719] 'Imād Badr al-Dīn Abū Ghāzī, *Taṭawwur al-ḥiyāza al-zirā'iyya zaman al-mamālīk al-jarākisa (dirāsa fī bī' amlāk bayt al-māl*) (Alharam: Ein for Human and Social Studies, 2000); Igarashi Daisuke, "The Establishment and Development of al-Dīwān al-Mufrad," *Mamluk Studies Review* 10, no. 1 (2006), 117-140; John L. Meloy, "The Privatization of Protection: Extortion and the State in the Circassian Mamluk Period," *Journal of the Economic and Social History of the Orient* 47, no. 2 (2004), 195-212; Toru Miura, "Administrative Networks in the Mamluk Period: Taxation, Legal Execution, and Bribery," in *Islamic Urbanism in Human History: Political Power and Social Networks*, ed. T. Sato (London and New York: Kegal Paul International, 1997), 39-76;

[720] Muḥammad Ibn Iyās, *Badā'i' al-zuhūr fī waqā'i' al-duhūr*, 5 vol., ed. Muḥammad Muṣṭafā (Cairo: al-Hay'a al-Miṣriyya al-'Āmma li'l-Kitāb, 1984), 5/385.
[721] Ibid. 3/24.

for the benefit of the children of a deceased emir (apparently they received income from rent).[722] While it is unclear if this is the "big" or "little" Khān Masrūr mentioned by al-Maqrīzī, this evidence does support al-Maqrīzī's judgment that the *mūda'* and the Khān had lost their former glory. Two final pieces of evidence provided by Ibn Ḥajar supports this conclusion that the *mūda'* waned in importance. First, in his biography of Shihāb al-Dīn Aḥmad b. Ṣāliḥ al-Shaṭanūfī (d. 841/1437), who he identifies as "the employee (*al-'āmil*) of the *mūda' al-ḥukm* in Cairo," Ibn Ḥajar writes that "the condition (of the *mūda'*) deteriorated greatly after him."[723] While we cannot tell when al-Shaṭanūfī stopped working at the *mūda'*, it can be said with confidence that his death in 841/1437 marks a definitive decline in the fortunes of the *mūda' al-ḥukm* in Cairo. Second, in another biography, this time of Aḥmad b. Ismā'īl al-Qalqashandī (d. 844/1440-1441), Ibn Ḥajar writes that this man was "the oldest one who remained of the notaries (*shuhūd*) of the *mūda' al-ḥukm*."[724] Although this might be understood to imply that by the death of this man the *mūda'* no longer existed, Ibn Ḥajar mentions that in 849/1445, the newly appointed Shāfi'ī Chief Qāḍī requested the presence of "those who had an appointment (*mubāshira*) in the *mūda'* or in the *awqāf*."[725] So, it must be concluded that the *mūda' al-ḥukm* did continue to exist after 1441, although in a perfunctory form and possibly with a reduced staff.

Yet while the *mūda' al-ḥukm* was but a ghost of its former self by the mid-fifteenth century, *umanā' al-ḥukm* continued to exist, at least in title, until the fall of the Cairo Sultanate to the Ottomans. In Rajab 892/1487, Sulṭān Qaytbāy ordered the arrest of the clients and associates

[722] Ibn Ḥajar, *Inbā' al-ghumr*, 3/408.

[723] *Ibid*. 4/76.

[724] *Ibid*. 4/163.

[725] *Ibid*. 4/235.

(*jamā'a*) of the Shāfi'ī chief *qāḍī*—the famed *Shaykh al-Islām* Zayn al-Dīn Zakariyyā' al-Anṣārī (d. 926/1520)—in order to force them to make an account of the *awqāf* under the supervision of the Shāfi'īs. Among those arrested was an *amīn al-ḥukm*.[726] Years later, after the Ottoman conquest of Egypt, Ibn Iyās also reports that one of the many administrators and officials who were ordered to travel to Istanbul was a Shāfi'ī deputy judge by the name of Shams al-Dīn al-Dumyāṭī who "had been responsible for the judicial trusteeship (*amānat al-ḥukm*)."[727] Unfortunately, it is impossible to tell from these notices alone whether these two trustees were able to command the large sums that their predecessors had. However, given that no mention of a forced loan from orphans' property is mentioned in regards to the *umanā'* after the first half of the fourteenth century, it seems unlikely that they ever had such extraordinary amounts in their possession. This may have been partly because individuals no longer accumulated vast fortunes that could be passed to their descendants. But it would also seem that the Mamlūks' reliance on confiscations of property to stave off financial crises may have also had a large effect. According to Ibn Iyās, Sulṭān Qānṣawh al-Ghawrī (r. 906-922/1501-1516) made confiscation of inheritances a policy of state: "One of his bad deeds was that he used to appropriate the property of civil estates and take the property of orphans unjustly. And if a deceased had children, whether male or female, he would withhold their inheritance from them, and he would violate the command of the noble *Shar'* (*wa-yukhālif amr al-shar' al-sharīf*)."[728] By the end of the 15th century, therefore, it can be stated with confidence that the system of preserving and investing

[726] Ibid. 3/241. On al-Anṣārī, see Richard J. McGregor, "al-Anṣārī, Zakariyyā'," *Encyclopaedia of Islam, THREE*.

[727] Ibn Iyās, 5/398.

[728] Ibn Iyās, 5/90.

orphans' property that had finally come undone. The legal practices that had effectively upheld the rule of law for inheritances and property rights were no match for the multiple economic and political crisis at the twilight of the Cairo Sultanate.

The Ḥanafīs Strike Back: Orphans' *Zakāt* and the *Mūda' al-Ḥukm*

The Shāfi'īs' control of the *mūda' al-ḥukm* did not go unchallenged; during the 14th century the Ḥanafīs made two attempts to obtain the right to establish a *mūda'* of their own in Cairo. These tensions reached their apex during the rough transition from the Baḥrī to Burjī periods. At the time, Barqūq, soon to seize the throne for himself and put an end to the Qalāwūnid dynasty, was already in effective power, holding the new title of *amīr kabīr* (senior emir) and *atābak al-'askar*.[729] Previously, the well-respected Ḥanafī chief *qāḍī* Sirāj al-Dīn al-Hindī (d. 773/1372) had attempted to establish a separate Ḥanafī *mūda'*, but his sudden death prevented this from occurring.[730] When his son-in-law, Jār Allāh, attempted the same, it caused an uproar:

> The Chief Qāḍī Jalāl Al-Dīn Jār Allāh al-Ḥanafī was granted a robe of honor (*khuli' 'alā*) and was then ordered to wear the *ṭarḥa* during the days he was in the service of the Sulṭān just as the Shāfi'ī chief *qāḍī* wears it, to have Ḥanafī judges act as his deputies in the southern and northern provinces of Egypt, and to establish for the Ḥanafī orphans a depository (*mūda'*) in which would be deposited their property so that *zakāt* would not be taken from it. This was unacceptable for Burhān al-Dīn Ibrāhīm b. Jamā'a, and he spoke about putting an end to that. Then a council was held in the presence of Barqūq, the Senior Emir, regarding that on Monday the 15th (of Jumāda I), and the *umarā', quḍāt* and *mashāyikh al-'ilm*, except for al-Bulqīnī,

729 Steenbergen, *Order Out of Chaos*, 44.

730 Al-Maqrīzī, *al-Sulūk*, 4/345; Ibn Ḥajar, *al-Durar al-Kāmina*, 3/154-155; *Inbā' al-ghumr*, 1/14; Ibn Qāḍī Shuhba, *Tārīkh ibn qāḍī shuhba*, 4 vol., ed. 'Adnān Darwīsh (Damascus: Institut Français de Damas, 1994), 3/405-406; Sirāj al-Dīn was also granted the right to wear the *ṭarḥa*—the headgear reserved for the Shāfi'ī chief *qāḍī*—and the right to appoint deputies in the Egyptian provinces. Ibn Ḥajar writes that his sudden death "was considered to be a blessing (*baraka*) from the Imām al-Shāfi'ī. See Ibn Ḥajar, *al-Durar al-Kāmina*, 155.

> attended it. Then Shaykh Akmal al-Dīn, the head of the *Khānkāh Shaykhū* intervened with the Senior Emir to put an end to what al-Jār (Jār Allāh) wanted to innovate. Some inappropriate words were exchanged between him and al-Jār regarding this. Then what al-Akmal desired was accomplished, and it was ordered that al-Jār would not be allowed what he sought. The *faqīr* al-Mu'taqad Khalaf al-Ṭūkhī had (also) met with the Senior Emir, Barqūq, and spoken with him about putting an end to that. He went to great lengths in this with him, even saying, "If you do not go back (in your decision), then all that will remain between us is the arrow of the night (*sihām al-layl*).[731] The Senior Emir became very upset about what he said, and he feared its consequence. On Monday the 22nd of the month, he bestowed a robe of honor on Chief Qāḍī Burhān al-Din Ibrāhīm b. Jamā'a, who settled in office according to custom, and (it was ordered) that nothing would be removed from his jurisdiction. This was the second time that the Easterners (*al-'ajam*) sought the creation of a distinct depository (*mūda'*) for the Ḥanafīs and the appointment of Ḥanafī judges in the provinces of Egypt. Their first attempt did not succeed during the tenure of al-Sirāj al-Hindī. His illness prevented him from completing it until he died. The second attempt was this, and so they were severely vilified for wanting to hinder the *zakāt.* Much poetry was composed about this.[732]

This passage is revealing for a number of reasons. First, it confirms that the *mūda' al-ḥukm*, although in the hands of the Shāfi'īs, encompassed the wealth of non-Shāfi'ī orphans, including Ḥanafī orphans.[733] Second, the narrative's focus on only one of the three Shāfi'ī-exclusive privileges—the *mūda'* and the *zakāt* that was taken from it—is indicative of the extent to which this depository was viewed as a symbolic and material source of prestige. The protest at Barqūq's council was a joint undertaking of the leading religious scholars; Burhān al-Dīn b. Jamā'a, who as the sitting Shāfi'ī chief *qāḍī* presumably had the most at stake, did not have to

[731] Al-Ṭūkhī is threatening Barqūq here with invocations directed against Barqūq. The nighttime prayers of the scholars and Ṣūfīs were portrayed as potent weapons and a counterpart to the military. See for example the poetry in the *Tafsīr* of al-Nīsābūrī : "Do you jest with prayer (*al-du'ā'*) and mock it? What could inform you of what prayer creates?/ The arrow of the night never misses, and though it may take time, that time will come." One also finds in *al-Sulūk* the metaphor of "two armies" employed by the aforementioned judge Ibn Abī al-Baqā': "They are two armies, the Army of the Night and the Army of the Day." See Niẓām al-Dīn al-Ḥasan al-Nīsābūrī, *Gharā'ib al-qur'ān wa-raghā'ib al-furqān*, 6 vol., ed. Zakariyyā al-'Umayrāt (Beirut: Dār al-Kutub al-'Ilmiyya, 1996), 1/390; al-Maqrīzī 5/57.

[732] Al-Maqrīzī, *al-Sulūk*, 5/67.

[733] The narrative of this event in *Inbā' al-ghumr* also notes that Jār Allāh established a *mūda'* at a determined location, but he also appointed a person to be the *amīn al-ḥukm*. This information confirms that the *umanā' al-ḥukm* were only appointed by the Shāfi'īs. See Ibn Ḥajar, *Inbā' al-ghumr*, 1/193.

represent his interests alone. These were shared interests among a group of religious scholars and *fuqarā'*, and something more than the Shāfi'ī chief *qāḍī*'s traditional preeminence appears to have been threatened. This brings us to another important aspect of this passage: the request of Jalāl al-Dīn Jār Allāh was interpreted by some (at least for the purposes of propaganda) as an attempt to prevent *zakāt*, the obligatory alms-tax that constitutes one of the five pillars of Islam.

Why was the focus of the critics on the taking of *zakāt*, and to what extent were these critics' concerns related to the reality of the Ḥanafī judicial practice? Was the control of *zakāt* otherwise a matter of interest for the Shāfi'īs, or are we reading a propagandistic exaggeration of their interest, provoked by another concern, such as personal or factional hatred of Jār Allāh? This section will answer these questions by describing the relationship of the Mamlūk judiciary to the collection and distribution of the *zakāt* and by investigating the multiple attempts of the Ḥanafīs during this period to acquire their own *mūda' al-ḥukm*.

The struggle between Jār Allāh and the Shāfi'īs reflects a fundamental disagreement between the Ḥanafīs and the Shāfi'īs regarding the nature of *zakāt*. This disagreement, in turn, led to opposing positions on the liability of minors (and the mentally insane) for payment of *zakāt*. It should be noted first, however, that a number of details regarding *zakāt* were matters of unanimous agreement. According to all jurists, *zakāt* is the payment of a portion of property that has reached a minimum amount (*niṣāb*) for the benefit of several categories of individuals mentioned in Qur'ān 9:60, including the poor (*al-fuqarā'*). It may also refer to the amount paid in order to satisfy this obligation.[734] Its obligatory nature is attested to by numerous Qur'anic

[734] Aron Zysow, "Zakāt," *Encyclopaedia of Islam, Second Edition*; Badr al-Dīn al-'Aynī, *al-Bināya Sharḥ al-Hidāya*, ed. A. Sha'ban (Beirut: Dar al-Kutub al-'Ilmiyya, 2000), 3/287-290; Kamāl al-Din Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, ed. A. al-Mahdī (Beirut: Dār al-Kutub al-'Ilmiyya, 2003), 2/163; Muwaffaq al-Dīn Ibn Qudāma, *al-Mughnī*, ed. A. al-Turkī and A. al-Ḥalw (Riyāḍ: Dār 'Alam al-Kutub,

verses and Ḥadīth, such as Qur'ān 2:43 and 98:5, both of which imply that *ṣalāt* (ritual prayer) and *zakāt* are related and necessary practices for correct religion.[735] For the Ḥanafīs, who distinguish between acts that are merely *wājib* (necessary) and those that constitute a *farḍ* (obligation), *zakāt* is a *farḍ*.[736] Because it is a basic requirement for Muslims on which there is a consensus, a person who denies its obligatory nature is considered an infidel.[737]

Zakāt is payable when an individual (or, in some cases, joint owners) possesses property above a minimum amount (*niṣāb*) for an entire year (*ḥawl*). Although the individual is responsible for making the payment, whether or not a person should give it to the leader of the community, the *imām*, is a subject of disagreement (*khilāf*) among the *madhhab*s. All *madhhab*s do agree on that the category of wealth known as *al-amwāl al-bāṭina* (concealable wealth), which includes gold, silver, and other concealable objects, cannot be demanded by the *imām* or his representatives, although the believer can willingly give it to the *imām*.[738] In practice, however, as will be discussed shortly, concealable wealth was often taxed. There is some evidence that Mamlūk jurists attempted to justify this practice.[739] As for unconcealable wealth (*al-amwāl al-ẓāhira*), which includes taxable livestock and agriculture, it was "the ancient (*al-qadīm*)" opinion of al-Shāfi'ī, the opinion of the Ḥanafīs, and one opinion of Mālik that the

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1986), 4/5; Najm al-Dīn Ibn al-Rif'a, *Kifāya al-Nabīh Sharḥ al-Tanbīh*, ed. M. Bāsallūm (Beirut: Dār al-Kutub al-'Ilmiyya, 2009), 5/184.

[735] Ibn Qudāma, 4/5; Ibn al-Rif'a, 5/184-5.

[736] Al-'Aynī 3/288-291.

[737] *Ibid*., 3/290.

[738] Al-Māwardī, *al-Aḥkām al-sulṭāniyya wa'l-wilāyat al-dīniyya*, ed. A. al-Baghdādī (Kuwait: Maktabat Dār Ibn Qutayba, 1989), 145.

[739] Zysow (quoting Ibn al-Humām, *Fatḥ al-Qadīr*).

individual should hand it over to the *imām* for distribution. Nevertheless, the Shāfiʿīs preferred the "new" opinion that the individual has the right to distribute their own *zakāt* although it is preferable to hand it over to the *imām* if he is just. The justification for this is that the *imām* is more knowledgeable of those in need.[740] If the imam is unjust, then it is preferable to distribute the *zakāt* oneself.[741] The Ḥanbalīs held that it is preferable for individuals to distribute both concealable and unconcealable wealth themselves although it is also acceptable to hand it over to the *imām*.[742] However, if the *imām* is unjust, Ibn Qudāma wrote that is still acceptable for believers to pay both concealable and unconcealable wealth to the *imām* "because the *imām* is their legal representative, so their duty is absolved upon paying it to him, just as in the case of the guardian of the orphan if he appropriates it on behalf of his ward."[743] In other words, the *imām* absolves the duty of the believer to pay *zakāt* to one of the legal recipients because he takes on this duty, just as the guardian of the orphan assumes the duty to give the *zakāt* to its beneficiaries when he removes the amount to be paid from the wealth of his ward.

This issue of representation was at the heart of the major legal disagreement related to *zakāt* between the Shāfiʿīs and Ḥanafīs. Are minors and other people without full mental capacity obligated to pay *zakāt*, and could a representative do this for them? The problem was not just that there is no clear textual proof regarding this matter on which the jurists agreed. Rather, there was a deeper disagreement about the nature of *zakāt* itself. According to the

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[740] Abū al-Qāsim al-Rāfiʿī, *al-ʿAzīz sharḥ al-wajīz*, ed. A. Muʿawwaḍ and A. ʿAbd al-Mawjūd (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), 3/3-5.

[741] *Ibid*., 3/5.

[742] Ibn Qudāma, 4/92-95.

[743] *Ibid*., 4/95.

Ḥanafīs, payment of *zakāt* was a form of worship (*'ibāda*) and, like prayer, it required the correct intention (*niyya*) to be correctly performed.[744] Until an individual reached mental maturity, they could not be demanded to perform these ritual acts. Interestingly, this absence of an obligation to pay does not extend to the *zakāt* of fruits and crops and the *zakāt al-fiṭr*, which all legal schools, including the Ḥanafis, agreed was obligatory on all believers regardless of their mental capacity.[745] The Shāfi'īs, on the other hand, argued that *zakāt* must be paid from the property of minors and the mentally impaired. They did not challenge the Ḥanafīs on the importance of *niyya* for the performance of ritual acts. Rather, they argue that the Qur'ānic verses are general commands which should be interpreted as applying to every believer; they also pointed to several early reports from the Prophet or his companions which seem to indicate that *zakāt* must be paid on minors' property, such as the following: "Be vigilant with the property of the orphans so that *zakāt* does not consume it."[746]

As a result, guardians of orphans (the only relatively common circumstance in which a minor would be in the possession of enough wealth to meet the *niṣāb*) are required to take the *zakāt* from the property of the orphan as their legal representatives. This does not clash with the principle that ritual obligatory acts require *niyya* because the legal recipients of *zakāt* have a legal claim to Muslims' property when it reaches the *niṣāb*.[747] The *niyya* in this case is required

[744] Ibn al-Humām, 2/166-168.

[745] Zysow; Ibn al-Rif'a, 5/187.

[746] Muḥammad b. Idrīs al-Shāfi'ī, *Kitāb al-umm*, ed. R. 'Abd al-Muttalib (Al-Manṣūra: Dār al-Wafā' li'l-Tabā'a wa'l-Nashr wa'l-Tawzī', 2001), 3/69; Ibn al-Rif'a, 5/186.

[747] Al-Shāfi'ī, 3/68.

of the representative, the minor's guardian.[748] Some Shāfi'īs defended this point by arguing that obligation to pay resided in the property and not in the person.[749] In any case, the Shāfi'īs were in agreement that it was the responsibility of the legal guardian of a minor or mentally impaired individual to take the amount owed for *zakāt* from his ward's property. *Zakāt* is like the maintenance of a spouse (*nafaqa*) or the land tax (*kharāj*) insofar an individual is liable for its payment regardless of their mental capacity.[750]

But to whom could the guardian pay the *zakāt*? As indicated above, there is no clear ruling in the legal schools of how *zakāt* should be collected and distributed. On the one hand, the jurists were all aware that Abū Bakr, the second Caliph, forced the Bedouin tribes that had stopped paying *zakāt* to Medina to pay it, and this was seen as a precedent which allowed the *imām* to send tax collectors to take the *zakāt*.[751] However, according to Ibn Humām, this practice was ended by 'Uthmān when he realized that people had changed and that he did not want to send the tax collectors (*su'āt*) to search people's belongings. The *imām*, nevertheless, still has the right to demand *zakāt* from a group of people whom he finds out are no longer paying it themselves.

It would seem that by this time, jurists held that *zakāt* should be paid willingly to the *imām* (or sulṭān) even if he was unjust, but most jurists made no clear ruling that it had to be paid to the *imām*. One prominent exception is Jalāl al-Dīn al-Maḥallī, a 9th/15th century Shāfi'ī jurist, who argued that "paying one's *zakāt* to the *imām* is apodictically preferrable," but "if the *imām*

[748] Al-Rāfi'ī, 3/8.

[749] Ibn Rif'a, 5/187.

[750] Al-Shāfi'ī, 3/68; Ibn al-Humām, 2/166-169.

[751] Ibn al-Humām, 2/172; al-Māwardī, 145-146; Ibn Qudāma, 4/5-6.

demands the *zakāt* of unconcealable wealth then giving it to him is obligatory, which is not subject to any (juridical) disagreement."[752] This raises an important question relevant to our understanding of how *zakāt*, and the *zakāt* of orphans in particular, was dealt with in practice during the Mamlūk period. To what extent does al-Maḥallī's claim reflect general practice in the Mamlūk period?

Historians of Fāṭimid, Ayyūbid and Mamlūk Egypt have long bemoaned the paltry information on *zakāt* collection in the sources.[753] On the basis of pre-Fāṭimid practice, Rabie suggested that *zakāt* was likely paid directly to the legal beneficiaries "without any interference on the part of the state."[754] Lev notes that there seems to be no information whatsoever from the Fāṭimid sources on *zakāt* collection, but also observes that Ibn Mammātī's administrative manual, written between 1182 and 1193, in which he describes the correct administrative method of extracting *zakāt* by the state, may reflect Fāṭimid practice.[755] This information can be supplemented with the useful chronicle written by the Fāṭimid and Ayyūbid-era administrator Ibn al-Ṭuwayr (d. 617/1220).[756] Ibn al-Ṭuwayr writes that shortly after the arrest of the vizier al-

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[752] Jalāl al-Dīn al-Maḥallī, *Kanz al-Raghibīn Sharḥ Minhāj al-Ṭalibīn*, ed. M. al-Ḥadīdī (Jedda: Dār al-Minhāj li'l-Nashr wa'l-Tawzī', 2013), 1/440.

[753] Hassanein Rabie, *The Financial System of Egypt A.H. 564-741/A.D. 1169-1341* (London: Oxford University Press, 1972), 96; Yaacov Lev, *Charity, Endowments, and Charitable Institutions in Medieval Islam* (Gainesville: University Press of Florida, 2005), 6-8; Adam Sabra, *Poverty and Charity in Medieval Islam: Mamluk Egypt, 1250-1517* (Cambridge: Cambridge University Press, 2000), 39-40; Baki Tezcan, "Hanafism and the Turks in al-Ṭarasūsī's Gift for the Turks (1352)," *Mamluk Studies Review* 15 (2011), 67-86, 75.

[754] Rabie, 96.

[755] Lev 6-7; Abū al-Ḥasan 'Alī Ibn al-Makhzūmī, *Kitāb al-minhāj fī 'ilm kharāj miṣr*, ed. C. Cahen and Y. Raghib (Cairo: L'Institut français d'Archéologie orientale, 1986), 42.

[756] Abū Muḥammad 'Abd al-Salām Ibn al-Ṭuwayr, *Nuzhat al-Muqlatayn fi Akhbār al-Dawlatayn*, ed. A. Fu'ād Sayyid (Cairo: Matba'at Dar al-Kutub wa'l-Watha'iq al-Qawmiyya bi'l-Qāhira, 2010).

Ma'mūn al-Baṭā'iḥī in 515/1121, a Muslim and a Samaritan were appointed as "heads of a *dīwān* to extract what is owed to God of *zakāt* from the people's property and what has been assigned as *mukūs*."[757] Despite the Caliph al-Āmir bi-Aḥkām Allāh forcing them to repeatedly swear on the Qur'ān and a Torah, respectively, the two, along with a Christian *mustawfī* whose help they enlisted, apparently botched the job by extracting huge amounts of wealth, up to 70% in one case, and the culprits were duly dealt with and punished.[758] Although this anecdote does not tell us if the collection of *zakāt* was a previous practice or continued after this fact, it is notable that the issue Ibn al-Ṭuwayr focuses on in this episode is *not* the collection of the *zakāt* but the exorbitant extraction of wealth well beyond the accustomed amounts.

For the Ayyūbid and Mamlūk period, we stand on firmer ground. Salāḥ al-Dīn's administration in Egypt had a *Dīwān al-Zakāt*, and state collection of *zakāt* appears to have continued for at least much of the Ayyūbid period.[759] In the Mamlūk period, things get a little murkier. Ibn 'Abd al-Ẓāhir, in his biography of Baybars, includes a list of people and places that Baybars levied *zakāt* on: merchants entering Egypt, the pastoral people of Barqa in Libya, and merchants arriving in the Holy Cities in Arabia, Yemen and Sawākin on the Red Sea.[760] Based in part on evidence from al-Qalqashandī's famous administrative manual and evidence from the chronicles, historians have argued that people were generally left to pay their own *zakāt* except in the few cases mentioned above at most.[761] However, this evidence from al-Qalqashandī's

[757] *Ibid*. 19.

[758] Ibn al-Ṭuwayr, 20-21.

[759] Rabie, 96-98; Sabra, 39-40; Lev, 6-7.

[760] Ibn 'Abd al-Ẓāhir, 275-276.

[761] Rabie 100; Sabra 40.

manual cannot be considered a complete description of *zakāt* collection in the Mamlūk Period. First, this does not include *zakāt* collected from orphans. Second, one must remember that the terms *zakāt* and *maks* were not always used in the same way by the same people. This was noted by Rabie, who noted that "[i]t is necessary to distinguish, from a comparatively early time onwards, between the real *shar'ī zakāt* and taxes, such as customs duties, etc., which were referred to as *zakāt* merely to provide them with a cover of *shar'ī* legality."[762] One case of this that has already been recognized is the so-called *zakāt al-dawlaba* which was abolished by al-Manṣūr Qalāwūn upon his accession to the throne in 678/1279. This "*zakāt*" was actually a rather burdensome tax on the urban population that "had taken them well beyond the bounds of *shar'ī* laws."[763] But the inverse of Rabie's warning is also true: taxes and dues that were not officially termed "*zakāt*" appear to have been considered by some of the *'ulamā'* as a replacement for *zakāt*, or, at least, so exorbitant as to make its collection an unbearable burden. This line of reasoning appears clearly in the following narrative of an attempt by the Mamlūk emirs to collect the *zakāt*:

> On Wednesday the fourth of (Jumāda al-Ākhira), the *qāḍī*s and religious scholars were gathered together. It had been decreed that *zakāt* would be taken from the property of the people for the sulṭān. They agreed that he does not have the right to take it in this era, for the coins are (made) of gold and silver and people are protected thereby from the extraction of their wealth.[764] As for the goods (*'urūḍ*) consisting of cloth and similar things in the hands of the merchants, the *mukūs* were first taken from them on the basis that it was *zakāt*, then the *mukūs* taken from them grew exponentially until things came to

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[762] Rabie 96.

[763] Baybars al-Manṣūrī al-Dāwādār, *Zubdat al-fikra fī tā'rīkh al-hijra*, ed. D.S. Richards (Beirut: Das Arabische Buch Berlin, 1998), 178; Rabie 99; Sabra 40.

[764] In other words, since people exchange wealth in gold and silver coins, they cannot be forced to pay *zakāt* to the state, since (as explained above) concealable wealth cannot be demanded by the Sultan.

> where they are now. As for livestock consisting of camels, sheep and goats, they are not left to graze in the land of Egypt but are fed by paying money, so they are not subject to *zakāt*.[765] As for produce and agriculture, it is well-known what the condition of the peasants has become from the levies." They dispersed on that note, and what they (the emirs) were going to do was stopped.[766]

It is possible that others, including the overtaxed peasants, may have had a similar approach to *zakāt*. Some may have even considered the taxes, fees and imposts that transgressed the rules and recommendations described in *fiqh* texts as acceptable means of fulfilling the obligation to pay *zakāt*. Since the preferable method of paying *zakāt* was to the *imām*, all that would be required of a person in this case to fulfill payment of *zakāt* would be to have the intention (*niyya*) of paying *zakāt* when he or she handed over a payment to the tax collectors. Hence, while the *zakāt* of most individuals was likely not collected by the state for most of the Mamlūk period, the heavy taxes and imposts extracted by the state made the collection of *zakat* in many ways superfluous.

Yet the same cannot be said of the *zakāt* of orphans. Since the property of all orphans was directly supervised by the Shāfi'ī chief qāḍī, his deputies, and his court trustees (*umanā' al-ḥukm*), all orphans' property was potentially subject to *zakāt*. If we define the state as *only* the representatives of the sulṭān and his emirs, then it is true in a trivial sense that *zakāt* was not officially collected by the state from individuals residing within Egypt (with the exception of merchants trading abroad and re-entering Egypt). The judiciary, while relatively independent of the sulṭān, were nevertheless capable of wielding coercive power. In this sense, *zakāt* was indeed levied by the state. In any case, *zakāt* went straight to Shāfi'ī *qāḍī*s and not into the sulṭān's

[765] This part refers to the unanimous legal ruling that only camels, sheep and goats (the kinds of animals which are potentially subject to *zakāt*, horses being excluded) that are left to graze freely are subject to *zakāt*. Animals whose feed is purchased do not figure in the calculation of *zakāt*.

[766] Al-Maqrīzī, *al-Sulūk*, 7/98.

coffers. As one might expect, this led to some real conflict between representatives of the sulṭān and the judiciary. One of these will be discussed in the next chapter in the discussion of orphans' property in Upper Egypt.

Another clash of interests regarding *zakāt* collections appears in a *fatwā* penned by ʻIzz al-Dīn Ibn ʻAbd al-Salām al-Sulamī (d. 660/1262). In the *fatwā*, he is asked if the command of the sulṭān to a Shāfiʻī guardian not to extract *zakāt* from the wealth of a child is valid. His reply is:

> It is impermissible for the Sultan to prevent the extraction of the orphan's *zakāt*, and he is not to be obeyed except out of fear of his power. If the guardian can do it secretly, then he should. If he is unable to, then let him inform the child when he comes of age so that he can extract it himself.

The sulṭān here is portrayed as trying to *prevent* the collection of *zakāt* rather than take the *zakāt* for himself. Why might this be?

It turns out there is a very good reason for this. One major concern of the Mamlūk military, who were, of course, threatened with an untimely death as an occupational hazard, was ensuring the passage of wealth to their children. If minors upon the death of their father, these children would be considered orphans, and so their guardian would take control of the wealth of his ward. As seen at the beginning of this chapter, just after the death of Ibn ʻAbd al-Salām, Baybars placed the maintenance of the property of the orphaned children of his army under the control of the Shāfiʻī judiciary. In Baybars' words, the immediate cause for this was that "when the one of the soldiers dies, his *khushdāsh* appropriates his property."[767] The Mamlūk military had a material interest in the property of the orphans under their supervision. One way to legally appropriate the property would be to take *zakāt* from the property, at which point the guardian would be able to distribute it themselves. It is possible that the sulṭān in the aforementioned

[767] Ibn ʻAbd al-Ẓāhir, 197.

fatwā is Baybars and that he was attempting to preserve the inheritances of his Mamlūks by ordering the guardians of his soldiers' orphaned children to stop extracting *zakāt*.

Once we realize that the Mamlūks had a stake in the wealth of orphans, whether their own potentially orphaned children or the orphans in their households, we are in a better position to understand the appeal of the Ḥanafī position on the *zakāt* of orphans to the Mamluks. This can also help us explain the interesting argument of the Ḥanafī Chief Qāḍī of Damascus Najm al-Dīn al-Ṭarasūsī (d. 758/1357) in his *Tuḥfat al-turk fī-mā yajib an yuʿmal fī al-mulk*. Tezcan has shown that this work was written "in a deep effort to 'sell' Hanafism to the Mamlūk sultanate as the official law of the state."[768] In the work, al-Ṭarasūsī argues that the Ḥanafī judge should take responsibility for the orphans' property since that would prevent *zakāt* from being extracted. Tezcan fails to understand the significance of this argument, arguing that "the Hanafi stance is more disadvantageous for the public treasury."[769] However, as I have argued here, the *zakāt* of orphans' property did not go to the public treasury but ended up directly in the hands of the Shāfiʿī judiciary. Moreover, the Ḥanafī position would be more advantageous to the Mamlūk class, although maybe not for the public treasury, since it would ensure that the property of the military class's offspring was not subject to a tax (albeit a small one) levied by the judiciary.

Hence, the attempts by Sirāj al-Dīn al-Hindī and Jār Allāh to create a separate judicial depository for the property of Ḥanafī orphans were actually in line with the interests of the ruling class. And, indeed, the poetry that al-Maqrīzī referred to above identified this endeavor as a

[768] Tezcan, 68.

[769] *Ibid*., 76.

project of the "Turks." The poet and encomiast of the judiciary, Shihāb al-Dīn Ibn al-'Aṭṭār,[770] wrote:

> Our Turks decreed a *mūda' ḥukm*
> for the Ḥanafīs to prevent the *zakat.*
> O Lord! Take them, for if they succeed
> we fear they'll decree the end of prayer (*ṣalāt*).
>
> *amarat turkunā bi-mūda' ḥukm*
> *ḥanafī li-ajl man' al-zakāt*
> *rabb khudhhum fa-annahum in aqāmū*
> *nakhshā an ya'murū bi-tark al-ṣalāt*[771]

While the Ḥanafīs certainly had much to gain in having their own *mūda'*, the move was perceived as beneficial to the Mamlūks, if not perceived as having come directly on their orders. The force of the critics' attacks on this move can be seen Ibn al-'Aṭṭār's coupling of *zakāt* and *ṣalāt*, which derives, as seen above, from the coupling of the two in both the Qur'ān and, conceptually, in discussions of *zakāt* in *fiqh*. In the end, this was too much for Barqūq's precarious hold on effective power to maintain, and he chose to relinquish his interests in preventing *zakāt* in order to preserve the good will of the Shāfi'ī establishment.

On a final note regarding the attempts of the Ḥanafīs to establish their own *mūda'*, it must be stated that this was one event in a broader struggle between the Shāfi'īs and the Ḥanafīs over privileges, resources and appointments. The transition to the new, Circassian regime appears to have been a time in which this struggle became particularly fierce.[772] Although unstated in the sources, it is possible that the Ḥanafīs made two attempts to acquire their own *mūda'* at this time

[770] See his biography in Ibn Ḥajar, *Inbā' al-ghumr*, 1/441.

[771] *Ibid*., *Inbā' al-ghumr*, 1/194.

[772] On this, see Levanoni, "A Supplementary Source for the Study of Mamluk Social History: The *Taqārīẓ*," *Arabica* 60 (2013), 146-177 , esp. 158-159. I am grateful to Professor Luke Yarbrough for reminding me of the relevance of this study to the topic at hand.

due to a combination of the large amount of wealth flowing into the coffers of the Shāfi'ī *mūda'* during the late fourteenth century and the difficulties that Barqūq experienced in acquiring loans from this property (it will be remembered from the discussion above that he had to appoint Ibn Maylaq and Ibn Abī al-Baqā' to the judgeship in order to acquire loans of orphans' property from them). It is also significant that the Ḥanafīs do not seem to have made any noticeable attempt to acquire their own *mūda'* in Cairo following the final attempt by Jār Allāh. This, in itself, is further evidence for the decreasing importance of the *mūda'* in the 15th century.

Both al-Ṭarasūsī's attempt to sell Ḥanafism to the Turks and the attempt to receive a *mūda'* were top-down approaches to overcome Shāfi'ī dominance in the Mamlūk Period. Their existence should not blind us to the existence of other avenues through which this struggle over power and privilege between the *madhhabs* was carried out. One of these that I have identified is the use of the plural court system in order to force a ruling that would have prevented *zakāt* from being collected from a minor or orphan whose property is under the supervision of the judiciary. This stratagem was suggested by al-Ṭarasūsī in a legal opinion that was part of a collection of *fatwās* or legal responsa, that were not like the normal form of a *fatwā* written in response to a question but which, rather, he composed on his own initiative. According to his own introduction, he did this in order to bring the practice of the courts in line with the legal norms of the Ḥanafī *madhhab*.[773] It is sometimes referred to as *al-Fatāwā fī al-fiqh*, but was named by the author *Anfa' al-wasā'il fī taḥrīr al-masā'il*, or *The Most Productive Means of Elucidating Legal Problems*. The stratagem is written as an answer to the following set of questions:

> *Zakāt* is not required from the property of a male or female minor according to what is (commonly) known. But, if it is not required, then is it permissible for the Ḥanafī judge

[773] Najm al-Dīn Ibrāhīm Al-Ṭarasūsī, *al-Fatāwā al-ṭarasūsiyya aw anfa' al-wasā'il fī taḥrīr al-masā'il*, ed. Muṣṭafā Muḥammad al-Khafājī (Maṭba'at al-Sharq, 1926), 3-4.

> (*al-qādī al-ḥanafī*) to rule in favor it being dismissed (as an obligation) before they reach majority, or not? And does such a ruling remove the disagreement (*khilāf*) about the issue, or not? Also, is this conditional on (the presentation of) a legal claim, or not? And if it is conditional (on the presentation of such a claim), then who is the adversary in it? Is the legal claim of a needy person (*faqīr*) against the guardian of a minor valid, or not?[774]

In his lengthy response to these questions, which I have translated and included here as Appendix A, al-Ṭarasūsī mentions that "this ruling—I mean, ruling in favor of it (*zakāt*) being dismissed—has been given by a number of the *madhhab*'s judges, and it is valid and removes (the effect of) the disagreement."[775] In other words, Ḥanafī judges were *blocking* Shāfi'īs from extracting *zakāt* from orphans via a judicial ruling (*ḥukm*). The only issue with the ruling, according to al-Ṭarasūsī, is that it requires a legitimate adversary (*khaṣm shar'ī*) who can sue for *zakāt*. In the cases that al-Ṭarasūsī was aware of, a needy person (*faqīr*) was brought by the guardian of the orphan to a Ḥanafī judge. The needy person would submit a claim for the *zakāt* of the orphan, and the judge would then dismiss the obligation to pay *zakāt*. According to al-Ṭarasūsī, however, only the *Imām* has the right to submit this claim. His suggestion is to enlist the help of the *Imām* or one of his agents to petition the court for the *zakāt's* dismissal.[776]

This *fatwā* shows that the struggle over orphans' *zakāt* between the Shāfi'īs and the Ḥanafīs did not only occur at the upper echelons of the judiciary. Individual judges and guardians used the judicial system in order to submit legal claims that limited the ability of the Shāfi'īs to implement their vision of the *shar'ī* duty to extract the *zakāt* of minors. Although these petitions were successful, al-Ṭarasūsī nevertheless considered them invalid and offered an alternative solution. Whether or not his solution was ever adopted, it is nevertheless an important

[774] *Ibid*. 4.

[775] *Ibid*. 4-5.

[776] *Ibid*. 5-9.

testament to the ability of individual legal scholars to create novel legal solutions in reaction to the legal practice of the Mamlūk Period.

Conclusion

The new *mūda'* established by Lājīn and Ibn Daqīq al-'Īd succeeded in creating a centralized place in which orphans' property could be kept safe and invested—at least for a time. This created a vital resource that seems to have been used for most of the 14th century to its intended purpose: to make the resources available for investment in the heart of the city and prevent embezzlement. The supervision of the testamentary guardians also centralized control over the estates in their control. This centralization of control of orphans' property in the hands of the Shāfi'īs was challenged on multiple levels by the Ḥanafīs, who attempted to block the extraction of *zakāt* from orphans at in individual level at the courts and to receive permission to create a *mūda'* of their own. Although the latter effort was never solution, it does appear that the former solution had some success.

When the Cairo Sultanate began facing increasingly serious financial and military crisis at the end of the 14th century, the *mūda'* was a critical emergency fund that emirs and sulṭāns eagerly exploited. Thus, the very reforms that centralized control over orphans' property enabled its exploitation. Al-Maqrīzī wrote that the decline in the fortunes of the *mūda'* was due to Tamerlane's destruction of Syria and the collapse of interregional trade. While this probably was a factor in its decline, the analysis above indicates that the series of loans, many of which were never returned, demanded of the *mūda'* and the *umanā'* created a crisis of confidence: the place had lost its sanctity (*ḥurma*), to use al-Maqrīzī's term, before Tamerlane's occupation of Damascus. It is significant that the *umanā' al-ḥukm* continue to make brief appearances in the

narrative sources even after the Ottoman invasion. This seems to indicate that Shāfi‘īs continued to supervise orphans’ property and testamentary guardians in a more decentralized manner. One wonders if this was a conscious decision on the part of some of the Shāfi‘īs in order to conceal the wealth and make its confiscation more difficult. In the next chapter, it will be seen that such a decentralized system was, indeed, in place in Upper Egypt and, at least by the late fifteenth century, in Damascus as well.

Appendix A

Translation of Najm al-Dīn al-Ṭarasūsī, *Fatāwā al-ṭarasūsī aw anfa‘ al-wasā’il fī taḥrīr al-masā’il* (Cairo: Maṭba‘at al-Sharq, 1926), 4-9.

The Question:

Zakāt is not required from the property of the male or female minor according to what is (commonly) known. But, if it is not required, then is it permissible for the Ḥanafī judge (*al-qāḍī al-ḥanafī*) to rule in favor it being dismissed (as an obligation) before they reach majority, or not? And does such a ruling remove the disagreement (*khilāf*) about the issue, or not? Also, is this conditional on (the presentation of) a legal claim, or not? And if it is conditional (on the presentation of such a claim), then who is the adversary in it? Is the legal claim of a needy person (*faqīr*) against the guardian of a minor valid, or not?

The Response:

This was mentioned in *al-Hidāya.* He said: “*Zakāt* is not required for the child or the insane, in contrast to (the position of) al-Shāfi‘ī, God Have Mercy on Him, for he says that it (i.e. *zakāt*) is an obligatory payment on property (*gharāma māliyya*), so it is considered to be like all (obligatory) payments of support, such as the maintenance of wives. Hence, it becomes like the *kharāj* or *‘ushr*. For us, it is an act of worship (*‘ibāda*); thus, it is only valid if it is chosen, in order to realize the meaning of ‘being tested (*al-ibtilā’*).’ They (i.e., the child and the insane) have no choice due to the absence of intellect (*al-‘aql*). This is different from (the case of) the *kharāj* because it is a payment for support of the land (*mu’nat al-arḍ*). Likewise, the concept of

‘payment of support (*al-mu’na*)’ is preponderant in the *‘ushr* and the concept of worship (*al-‘ibāda*) is subordinate.” Those were the words of *al-Hidāya*.

I say: The issue is well-known, and there is no disagreement among the *aṣḥāb*[777] as far as I know that *zakāt* is not required for the male or female minor. So, there is no benefit in occupying ourselves by quoting the statements of the rest of the *aṣḥāb* regarding the matter. This ruling — I mean, ruling in favor of it being dismissed — has been given by a number of the *madhhab*’s judges, and it is valid and removes (the effect of) the disagreement. It is conditional on a legal claim from a legitimate adversary (*khaṣm shar‘ī*). However, the way to do it is in need of some consideration because it requires a valid legal claim on behalf of a legitimate adversary. Otherwise, the ruling will have the sense of a nonbinding legal opinion (*‘alā wijh al-fatwā*), and its goal of nullifying (the effect of) the disagreement will not be met. This is because a judge (*qāḍī)* who disagrees may summon the guardian and require him to pay *zakāt* to the needy person (*faqīr*). What I have seen from the judges (*quḍāt*) who rule in favor of it being dismissed is that they take the following course. The guardian of an orphan would present himself along with a needy person (*faqīr*) to the judge (*qāḍī*). Then the needy person (*faqīr*) would submit a claim against the guardian of the orphan that (1) the latter has in his possession a certain amount of the orphan John Doe’s property, (2) a lunar year has passed on it (i.e., it has been in the full possession of the guardian for a year), (3) he is needy (*faqīr*), and (4) that he is requesting from him ten dirhems, for example, of the *zakāt*.[778] Then the orphan’s guardian would reply, ‘The property is in my possession. But this orphan has not yet reached maturity, so z*akāt* is not

[777] *al-asḥāb*: lit., the companions. Here, it refers to Ḥanafī authors of authoritative legal compendiums.

[778] Numerals added by me.

obligatory for him." So, he would ask the judge (*al-hākim)* to rule in favor of dismissing it (i.e., the *zakāt*) for the orphan as long as he is a minor and has not reached majority. Then, the judge (*al-hākim*) would rule according to that.

In my opinion, this legal claim is invalid, for no other reason but that the needy person (*faqīr*) does not have the legitimate right to petition (*wilāyat al-ṭalab)* and the right (to demand *zakāt*) is not his. Rather, he is a recipient of the standing right determined from *zakāt*. The Sun of the Imāms (i.e., al-Sarakhsī) stated in *al-Mabsūṭ*, "For us, it is considered an act of worship because it is one of the pillars of faith since he (i.e., the Prophet Muḥammad), Peace Be Upon Him, said, 'Islam has been built on five things,' and he counted among them *zakāt*. Moreover, the purpose of faith is worship, so it is included among the pillars of faith. That is because the one who gives charity (*al-mutaṣaddiq*) turns what is his into something for God Almighty by disbursing it to the needy (*al-faqīr*), to be sustenance for him from God. God has said, 'Did they not know that it is God who accepts repentance from His servants and receives the alms?'[779] The Almighty has also said, 'Who is it that will lend Allah a beautiful loan?'[780] By doing so, he makes his property solely His to be entirely for worship, and, for this, receives by means of it purification. Thus, it has become clear that humans have no right to it (i.e., to property given to God as charity) because sharing (*al-shirka*) contradicts the idea of worship."

These were his words. The gist of it is that he (i.e., *al-mutaṣaddiq*) transfers the right to God Almighty; by paying it to the needy (*al-faqīr*), he has acted sufficiently and he is no longer under an obligation for it (i.e., no longer under an obligation to pay *zakāt* for his property). This is because the needy (*al-faqīr*) is a recipient and not a possessor of the right. But, if the needy

[779] Q 9:104.

[780] Q 2:245 and 57:11

(*al-faqīr*) does not possess the right, then the legal claim made by him is invalid. What al-Zāhidī has stated in *al-Qunya* supports this, for he states, "As for the one delays (his payment of) *zakāt,* it is not for the needy (*al-faqīr*) to demand it, nor to take his property without his knowledge. If he takes it, he is liable for it." Support for this was also mentioned in al-Khāṣṣī's *al-Fatāwā al-kubrā*, where he stated, "If a wealthy individual has an obligation of *zakāt*, but he is not paying it, it is not permissible for the needy (*al-faqīr*) to take it from his property without his knowledge. If he were to take it, and the property were still in existence, he would have the right to have it returned if it. If it has since been consumed, he is liable for it because the right is not that particular needy person's (*al-faqīr bi-'aynih*)." (Al-Sarakhsī) said in another place in *al-Mabsūṭ* regarding the difference between *zakāt* and *'ushr* that it (i.e., *'ushr*) is a kind of property that one is obliged to pay due to the existence of land that produces revenue. In light of the principle — which is productive land — it is considered to be a payment of support (*mu'na*), as he explains in *al-Uṣūl*, and the concept of worship is subordinate because that is (only) out of consideration of the fact that the recipient is the needy (*al-faqīr*). Something similar to what al-Khāṣṣī said is mentioned in the text of *al-Baḥr al-Muḥīṭ*.[781] Also, the following was mentioned in *al-Dhakhīra*: (Ibn Māza) said, "Such is the case if *'ushr* land produced food, but he consumed it and so was held liable for a debt in cash worth its value. However, this was before the dirhems had been in his possession for a full lunar year. After a full lunar year passes on the dirhems, he does not owe *zakāt* on them because they are a debt demanded by someone of him on behalf of humanity, and that someone is the *imām*." It is also mentioned in al-Zāhidī's commentary on al-Qudūrī, "A debt of *zakāt* impedes the obligation to pay *zakāt* for both apparent and unapparent

[781] A text by al-Zarkashī.

property (*al-amwāl al-ẓāhira wa'l-bāṭina*), whether or not the *zakāt* is to be paid from property still in his possession or has become a liability because he consumed it (i.e., he consumed the property on which *zakāt* was due)." According to the latter two and according to Abū Yūsuf, if it is to be paid from the (original) property, then it impedes (the obligation to pay *zakāt*) out of consideration of justice (*istiḥsānan),* but if it is something he is liable for (with the original property no longer in his possession), then it does not impede (the obligation to pay *zakāt*). However, Zufar held that it does not impede this at all because it is a form of worship, similar to owing a debt during pilgrimage. Our position is that this debt has someone among humanity who demands it: in the case of livestock, it is the *imām*; in the case of commercial transactions, gold, or silver coins, it is his representatives, who are the owners (of that property).

(Al-Kāsānī) also stated in *al-Badā'i'*,[782] "The *imām* may not forcibly take *zakāt* from the owner of property without the latter's consideration. If he were to take it, then (the obligation to pay) *zakāt* is not dropped." He mentioned previous to this statement — in the course of his debate with al-Shāfi'ī regarding the consumption of property on which *zakāt* is owed after the passing of a lunar year and when the person is capable of paying — that (the obligation to pay) is dropped according to us Ḥanafīs, contrary to what al-Shāfi'ī argued. He provided evidence for this position, and said, among other things, "If he did not pay until the minimum amount of property on which *zakāt* is due was consumed, then the disagreement stands whether it was demanded by the needy (*al-faqīr*) or by the official collector (*al-sā'ī*)." Then he stated, "For us, the owner is responsible either for the original property on which *zakāt* is due or for its equivalent value…as for his (al-Shāfi'ī's) position that he impeded a right after it was demanded of him, we respond that that needy individual (*al-faqīr*) has not been specified as the one who

[782] *Badā'i' al-ṣanā'i' fī tartīb al-sharā'i'* by 'Alā' al-Din al-Kāsāni.

deserves that right because the owner of the property could give it to a different needy person (*faqīr*).” At another point, he stated regarding a debt of *zakāt*, “According to Abū Yūsuf and Muḥammad, for any debt which is demanded by someone on behalf of humanity, the obligation to pay *zakāt* is impeded. For *zakāt* on livestock, this is because it is demanded by the sulṭān, either in kind or as a debt equal to its value. That is why a person is asked to take an oath if he denies that a year has passed, that he intends to use it for trade, or something of the kind. It is considered to be a debt owed to all humans. As for *zakāt* on commercial property, its payment is also demanded in a figurative sense (*taqdīran*) because the sulṭān has the right to take it, and the Prophet of God, Abū Bakr, and ‘Umar did take it — up to the time of ‘Uthmān, when wealth became abundant in his era, and he realized that keeping track of it would put great hardship on its owners, so he thought it was for the better to delegate fulfillment of its payment to its owners, in accordance with the consensus of the Companions. Thus, the owners of property became like delegates of the *imām*. Consider his statement, “Whoever is liable for a debt, let him pay it, and let him pay *zakāt* on what remains of his property,” for that amounts to a delegation to the owners of property to extract *zakāt.* Therefore, the right of the *imām* to receive (*zakāt*) is not invalidated, which is why our *asḥāb* say that the *imām*, if he discovers that the people of a town no longer pay *zakāt* on concealable property (*al-amwāl al-bāṭina*), may demand it of them, but, if he wants to take it from them on his own accord without an accusation that it is not being paid by its owners, then he may not do this because it violates the consensus of the Companions. (The following example is) an explanation of that: If a man had 200 dirhems but did not pay their *zakāt* for two years, then he would be held liable for the first year but owe nothing for the second according to our *ashāb*.

I say: What emerges clearly from all of that is that the needy person (*al-faqīr*) does not have the right to demand (*wilāyat al-muṭālaba*), but, rather, it is for the *imām* to demand unapparent property (*al-amwāl al-bāṭina*) if he discovers the property owners' abandonment of paying *zakāt.* If the needy person (*al-faqīr*) came under these circumstances and requested from the minor's guardian the *zakāt* of the minor's property, and made such a claim in the presence of the judge (*al-qādī*), then this claim is invalid because he does not have the legal authority (*li-'adm al-wilāya lahu shar'an*). Thus, the ruling of the judge appointed for the case (*ḥukm al-qāḍī al-murattab 'alayhā*) is a non-binding legal opinion (*fatwā*), and it does not nullify (the effect of) the legal disagreement. And it may not be said that, because the needy person (*al-faqīr*) deserves the *zakāt* — and thus his request amounts to the request of someone who has a right and demands that his right to be fulfilled — it should be accepted. That is because we say that the needy person (*al-faqīr*) is someone who is deserving — without a doubt—but that the right to demand cannot be inferred from "being deserving." This is similar to what we say about the deserving recipients of a *waqf*: they do not have the right to petition for the *waqf*'s property, nor do they have the right to rent or farm. Rather, all of that is for the administrator (of the *waqf*), even if the revenue is their right. Moreover, what indicates to us the baseless nature of this legal claim and that the needy person (*al-faqīr*) has no right to demand *zakāt* is that, were he to go to a wealthy adult, summon him to the judge (*al-qāḍī*), request from him *zakāt* from his property which has been in his possession for a full lunar year, and claim that this is true about him (i.e., that the wealthy adult does indeed have property in his possession on which he owes *zakāt*); and were (the wealthy adult) to admit that he is both wealthy and he has had his possessions for a full lunar year, but said, "I will not give him anything," then the judge (*al-ḥākim*) could not make him pay. However, if this were a valid legal claim, he would make him pay because the defendant in a

valid legal claim is in a position to be forced to do what the plaintiff sues for. Thus, since it has been established that he would neither be forced nor required (to do so), we know that the legal claim for *zakāt* originating from the needy person (*al-faqīr*) is invalid whether it is made against an adult or the guardian of a minor. What supports this is that our position on *zakāt* is that it is a right of God Almighty, and the needy person (*al-faqīr*), by paying him, acts as a means of deliverance from his liability. It is indubitable that the representative of God Almighty who is tasked with receiving His rights is none other than the highest leader of the community (*al-imām al-aʿẓam*). In the time of the Prophet, the authority to receive *zakāt*, was his; after him, it was Abū Bakr's, then 'Umar's, then 'Uthmān's, but when he thought it was for the better to delegate (collecting) the *zakāt* of concealable property (*al-amwāl al-bāṭina*) to its owners, and the Companions agreed with him, then that became a right of the owners by the authority of the *imām*. They became representatives of the *imām* in distributing it to the needy (*al-fuqarāʾ*), so it is as if they became both the ones requesting (payment) and the ones requested (to pay). How, then, could the needy person (*al-faqīr*) request (*zakāt)*? He is neither a representative of the *imām* nor does he have a principle right to make a request legally. It is thus impossible for us to hear his claim.

I thought about a way for a legal claim to be valid in this case, and I did not see any way to do it except for the *imām* or his agent to request in the presence of the judge (*al-qāḍī*) that the minor's guardian pay *zakāt.* Then the minor's guardian should reply that *zakāt* is not yet obligatory for him because he is still a minor, and the guardian should then request the judge (*al-qāḍī*) to drop (the obligation to pay) *zakāt* for the minor until the time he reaches maturity and to drop it for his property, due to the divergent opinion of the Ḥanbalīs. Then he (i.e., the judge) should fulfill his (i.e., the guardian's) request after establishing the lawful guardianship of the

guardian, his actual possession of the property, the passing of a full lunar year on its ownership, and the minority of the child; and he should rule accordingly. That is what came to me as an explanation of a valid form for a legal claim in this case. This legal claim is also similar to the petition to invalidate a lease upon the death (of the lessee), for in that case the lessor presents himself to court and requests the rent from the inheritors of the lessee, who then reply, "The lease he is petitioning for is valid, but the person from whom we have inherited has died. The lease has been invalidated by his death, so we are no longer liable for this claim." Then the judge (*al-qāḍī*) rules in favor of its invalidation, and the (effects of) the legal disagreement are avoided. Many legal claims take a similar path.

Thus, it is beyond a doubt that the *imām* has the primary right to petition, so a legal claim made by him is the legal claim of a person who has the authority to do this. It should be heard (at court). (A legal claim) made by someone else, however, is impermissible because the authority is restricted to him and his representatives. This is all that has come to my mind regarding the explication of this case. Whoever has a found a different way to make a legal claim in this case that is valid in regards to who has the legal authority — after reflecting on what I have written in these lines and what I clarified regarding the case of the needy person's petition — let him write it on the margin because it would be of immense benefit.

Chapter 5
Orphans' Property in the Provinces: Upper Egypt and Damascus

Introduction:

This chapter continues the previous chapter's investigation into the legal practices of preserving orphans' property during the Mamlūk Period. The focus in this chapter is on two provincial urban centers: Qūṣ in Upper Egypt and Damascus in Syria. These urban centers were chosen for study due to the existence of chronicles and biographical dictionaries written during the Mamlūk period that provide information about titles and individuals involved in the preservation and investment of orphans' property, as well as occasional notices about attempts by the agents of the sulṭān or individual emirs to appropriate some of this property. The main argument of this chapter is that both provincial centers had a much more decentralized and diffuse system of preserving orphans' property than was seen in Cairo. The reasons for this are different in each case, and it appears that the decentralized system in Damascus only began to dominate following a number of forced loans from the central orphans' fund in the first half of the 8th/14th century.

Upper Egypt:

From the end of the 11th century (*circa* 1070 A.D.), the regional capital of Upper Egypt (*al-Ṣa'īd*) was the city of Qūṣ.[783] For the next two-and-a-half centuries, the city flourished as an economic hub, second in importance in Egypt only to Cairo and Alexandria. The reasons for the

[783] On Qūṣ, see the classic study by Jean-Claude Garcin, *Un Centre Musulman de la Haute-Égypt Médiévale : Qūṣ*, Textes Arabes et Études Islamiques (Cairo : Institut Français d'Archéologie Orientale du Caire, 1976). For a useful summary of the development and decline of the city and its environs, see Garcin, "Ḳūṣ," *Enyclopaedia of Islam, Second Edition*.

growth of this city were political, economic and religious. First, the establishment of the Crusader kingdoms after 1092 A.D. diverted the pilgrimage route from Egypt to the south due to the insecurity of the land route and the northern reaches of the Red Sea. Pilgrims instead sailed the Nile to Qūṣ where they embarked on a land journey either to the port of ʻAydhāb or Quṣayr. Second, the expulsion of troops from Cairo after 459/1067 and their flight to Aswan along with a revolt of Arab tribes deterred merchants from unloading their wares in Aswan; instead, they began preferring to do so in Qūṣ. Moreover, after the fall of the Fatimids, increasing number of Maghribī scholars and Sufis began settling in Qūṣ and its environs, a critical factor in the growth of a Sunni population in a region that had been majority Christian with a sizable Shīʻī minority. Although funded by a local of Qūṣ, the first *madrasa* of the region—and likely the first in all of Upper Egypt—was built in 607/1210 due to the efforts of one of these émigré Sufis and his students.[784] Majd al-Dīn ʻAlī b. Wahb al-Qushayrī (d. 667/1268), the father of Ibn Daqīq al-ʻĪd—who we met in the previous chapter as the chief judge responsible for reforming the oversight of testamentary guardians and orphans' property—was the first supervisor of this new *madrasa,* and he played a key role in the spread of Sunnism in the region.[785] A number of Sufi prayer halls were also built in Qūṣ and its environs, again through independent efforts. The role of the state in the religious and social life of the region was, therefore, quite limited, and the agents of the

[784] The Sufi was ʻAbd al-Raḥīm al-Qinā'ī (d. 592/1196), a native of Targha and a highly revered Egyptian saint. See Denis Gril, "'Abd al-Raḥīm al-Qinā'ī," *Encyclopaedia of Islam, THREE*. On his role in the founding of the *madrasa,* see Hofer, 211-212.

[785] Al-Udfuwī, 331

Ayyūbid and Mamlūk sulṭāns were usually occupied either in suppressing revolt or collecting taxes.[786]

The distance from Cairo provided the *'ulamā'* of Upper Egypt some autonomy from the central government. In his study of the popularization of Sufism in the Ayyūbid and early-Mamluk periods, Nathan Hofer has shown that whereas Sufism in Cairo was regulated and fostered by the state, the Sufis in Upper Egypt received no support from the sulṭāns or emirs. Hofer argues that the state viewed these Sufis as "unruly," and the latter, in turn, critiqued "the state's inability to regulate the moral economy of the Ṣa'īd."[787] This socioreligious milieu along with the distance from Cairo provided a greater measure of independence for the *'ulamā'* of Upper Egypt.

Similarly, an analysis of the supervision of orphans' property in Upper Egypt reveals the limits of the sultan's ability to regulate or interfere in the judiciary's control of these resources. The evidence on which the following analysis relies comes from a single source: Kamāl al-Dīn Ja'far b. Tha'lab al-Udfuwī's (d. 748/1347) *al-Ṭāli' al-sa'īd al-jāmi' asmā' nujabā' al-ṣa'īd*, a wonderfully rich biographical dictionary of scholars, students, poets, judges and Sufis from Upper Egypt.[788] This is the sole text devoted specifically to the history of Upper Egypt from the period, and its existence allows us to gain insight into the ways in which the supervision of orphans' property in a provincial context differed from the capital. The analysis here will

[786] Hofer, 204-206. For these rebellions, see Rapoport, "Invisible Peasants, Marauding Nomads: Taxation, Tribalism and Rebellion in Mamluk Egypt," *Mamluk Studies Review* 8, no. 2 (2004), 1-2, 14-15.

[787] Hofer, 202.

[788] On this text and its author, see my study "Historical Representation as Resurrection: Al-Udfuwī and the Imitation of Allāh," in *New Readings in Arabic Historiography from Late Medieval Egypt and Syria: Proceedings of the Themed day of the Fifth Conference of the School of Mamluk Studies*, ed. Jo Van Steenbergen and Maya Termonia (Leiden and Boston, Brill, 2021), 429-465.

proceed in two parts. First, I examine the evidence for hierarchy and specialization in the judiciary's supervision of orphans' property. Second, I turn to the accounts in *al-Ṭāli' al-sa'īd* regarding the ways in which orphans' property was preserved, distributed and consumed during the period. Given that al-Udfuwī died in 1347, the results of this section are limited in temporal scope; unlike Cairo, one cannot make conclusions about diachronic change about how orphans' property was preserved or invested. However, since Upper Egypt experienced a noticeable economic decline in the late 14th century A.D.—due to the reopening of the northern trade and pilgrimage routes and the severity of the Black Death in the region—it is not likely that either the state or the judiciary instituted major changes in the decentralized system of Upper Egypt following the mid-14th century.[789]

Orphan's Property in Upper Egypt: Hierarchy and Specialization

Although there were four chief judges in Cairo following Baybars' reform (see Chapter Four), only the Shāfi'ī chief judge in Cairo had the prerogative to appoint deputies in the Egyptian provinces—the Delta and Upper Egypt.[790] Every judge in the provinces was, at least in theory, an agent of the chief judge in Cairo. For this reason, control of orphans' property was not a matter of *madhhab* rivalry in Upper Egypt—the entire judiciary and not just the specialists tasked with overseeing orphans' property were answerable to the chief judge in Cairo. Al-Udfuwī recorded a story in the biography of the Shāfi'ī *faqīh* and judge 'Alī b. 'Abd al-Raḥmān

[789] Garcin, "Ḳūṣ." On the effect of the Black Death on Upper Egypt, see Michael W. Dols, *The Black Death in the Middle East* (Princeton: Princeton University Press, 1977), 161-169.

[790] Al-Qalqashandī, 4/36. This does not include the city of Alexandria.

al-Armantī that elucidates the relationship between the chief *qāḍī* in Cairo, his deputies in Upper Egypt, and the *umanā' al-ḥukm*:

> The *qāḍī* Zayn al-Dīn Abū al-Ṭāhir Ismā'īl b. Mūsā Ibn 'Abd al-Khāliq al-Safṭī, the Qāḍī of Qūṣ, told me, "Shaykh Taqī al-Dīn Ibn Daqīq al-'Īd had resigned but was then reappointed to the judiciary when he assigned me to (be *qāḍī* of) Bulbays. He said to me, 'Do not inform anyone, and make haste there directly.' So on the second day of my appointment I headed there without anyone noticing. Upon sitting to commence court, the matter reached al-Kamāl al-Armantī, who had been the *qāḍī* of Bulbays, and he refused to believe it. He sent word to the companions of the Shaykh asking about the matter, so they asked the Shaykh: 'Did you dismiss him?' He replied, 'I did not dismiss him.' So they wrote this to him (i.e., to al-Armantī), and he commenced issuing rulings (again). When this reached the Shaykh, he said, 'I did not dismiss him. Rather, he was dismissed when I resigned, and I did not reappoint him.' Then when I requested the inventories (*al-ḥawāṣil*) from the *amīn al-ḥukm*, he claimed that the (previous) *qāḍī* had borrowed something. So, I said, 'I only know you, so get it back!'"[791]

The story appears to indicate that Upper Egyptian deputy judges (*nuwwāb*) were not, as a matter of practice, automatically dismissed upon the appointment of a new chief judge in Cairo. Ibn Daqīq al-'Īd's actions would seem to be intended as a reminder of both the autonomy of the judiciary from the sulṭān and the hierarchy within the judiciary. By insisting that al-Safṭī was dismissed upon his resignation, Ibn Daqīq al-'Īd indicated that his deputies served at the pleasure of the chief judge. At the same time, he reaffirmed the right of the chief judge to appoint his own deputies independently of either the sultan or the previous judge.

More importantly for the purposes of this chapter, the story also illuminates the relationship between the *umanā'* and the deputy judges. The deputy judge was following protocol by asking to review the orphans' property upon assuming the judgeship.[792] Yet ultimately, the previous judge was not held directly responsible for the missing funds that he had

[791] Al-Udfuwī, 388-389.

[792] Hallaq, "The *qāḍī's dīwān* (*sijill*) before the Ottomans," *Bulletin of the School of Oriental and African Studies* 61, no. 3 (1998), 426-429.

borrowed from the orphans. Rather, the *amīn al-ḥukm* assumed liability for these loans. This differentiation and specialization of duties shifted liability from the deputy judge to the *amīn al-ḥukm*. While the latter was still under the supervision of the deputy judge, who could presumably also request loans from orphans' property, the *amīn al-ḥukm*'s assumption of responsibility for orphans' property provided some relief to the judge from the risks involved in preserving, distributing and investing orphans' property. While these risks have been discussed in the context of Cairo in the previous chapter, al-Udfuwī's prosopographical history of Upper Egypt also provides important evidence of these responsibilities in a provincial context in which agricultural wealth was much more prominent than in the capital.

Orphans' Property in Upper Egypt: Preservation, Distribution and Investment

Just as in the capital, the religious culture of Upper Egypt reserved a special reverence for the rights and welfare of orphans. We read in al-Udfuwī's biographical history, for example, that the brother of Ibn Daqīq al-'Īd, Aḥmad b. 'Alī (d. 723/1323), was known for taking care of orphans' needs (*kān yakful al-aytām*).[793] Similarly, a student of Majd al-Dīn al-Qushayrī acquired the nickname "Father of the Wretched (*Abū al-Matā'īs*) because he made it a habit of gathering the orphans every morning to feed them breakfast.[794] Undoubtedly, the cultural association of taking care of orphans with piety raised the stakes for officials of the judiciary tasked with supervising orphans' property—even legal consumption of orphans' property was worth avoiding in order to avoid suspicion of abuse of power. Thus, al-Udfuwī writes that the judge Muḥammad b. 'Abd al-Raḥīm al-Armantī (d. 733/1332-1333) "used to manage the

[793] Al-Udfuwī, 104.

[794] *Ibid*. 338.

dwellings and orchards of the orphans in Qūṣ. When he visited an orchard, he tied his mount so that it would not eat anything."[795] In al-Udfuwī's estimation, however, this ultra-scrupulous behavior was a superficial performance, as he wrote immediately after the above statement: "Yet he pursued his own fortune and loved flattery and being called 'a righteous man (*rājul ṣāliḥ*).' But if he realized that someone did not believe this about him, he would resent him and seek his harm." Nevertheless, al-Udfuwī was not skeptical of the intentions behind all such scrupulousness towards orphans' property. For example, in the biography of another individual who served for a time as the *amīn al-ḥukm* in Asnā and Qūṣ, Hibat Allāh b. 'Abd Allāh al-Qifṭī (d. 797/1394-1395), al-Udfuwī writes, "One time he made an account and found he could not account for eight hundred dirhems belonging to the orphans. He did not know the reason it had been spent. So, he made up his mind to sell his own residence and pay it back from the profit. Then one of the witnesses said to him, 'such-and-such expense (*al-naqda al-fulāniyya*),' upon which he remembered it."[796]

This anecdote indicates that the *amīn al-ḥukm* does not appear to have undertaken his tasks alone in Upper Egypt at this time but had the help of professional witnesses (*shuhūd*). Al-Udfuwī includes biographies of two other Upper Egyptians who were said to have assumed responsibility for witnessing for the orphans (*waliya shahādat al-aytām*): Ismā'īl b. Muḥammad al-Tanūkhī (d. 739/1338) and Muẓaffar b. Ḥasan al-Asnā'ī (d. 709/1309).[797] Assuming that these are not exceptional cases, the hierarchy of officials tasked with overseeing orphans' property in Upper Egypt in the 14th century was the following: (1) the Chief Qāḍī in Cairo, (2) the deputy

[795] Al-Udfuwī, 528-529.

[796] *Ibid*. 692.

[797] *Ibid*. 164; 647-648.

judge, (3) the *amīn al-ḥukm*, and (4) the professional witness (*al-shuhūd*). Although this hierarchy suggests a parallel with the judicial organization in Cairo, there does not appear to have been a well-known central location where movable orphans' property was kept in Qūṣ, as in the case of the *mūda'* in Cairo. While this more decentralized system of preserving orphans' property may have increased the chances that a single official might embezzle or misplace orphans' property—as al-Qifṭī feared he had—it also had the advantage of making it more difficult for the agents of the Cairo Sultanate to appropriate the property accumulated in the hands of the judiciary in Upper Egypt. Al-Udfuwī records two instances that supports this proposition.

One of these events occurred when al-Nāṣir Muḥammad b. Qalāwūn (r. 693-694/1293-1294, 698-708/1299-1309, 709-741/1310-1341) came to visit Upper Egypt, apparently to raise funds. Ibrāhīm b. Hibbat Allāh (d. 721/1321), the *Qāḍī* of Qūṣ and its environs, experienced in person the growing confidence of Al-Nāṣir's regime. The latter had brought along with him al-Akram Karīm al-Dīn al-Kabīr 'Abd al-Karīm, the *nāẓir al-khāṣṣ* (personal financial minister for the sulṭān's household).[798] He was the most powerful administrator at the time and a personal favorite of the Sulṭān due to his knack for producing lavish sums at the Sulṭān's command.[799] Al-Udfuwī notes that Ibrāhīm b. Hibbat Allāh "was a high-minded and ambitious man," (*kān 'indahu himma*)," and upon the arrival of the Sulṭān and al-Akram in Qūṣ, 'Abd al-Karīm

[798] The incident involving Ibn Hibbat Allāh must have occurred shortly after 1310, for this was when 'Abd al-Karim became the *nāẓir al-khāṣṣ* of al-Nāṣir b. Qalāwūn: Donald Little, "Notes on the Early *naẓar al-khāṣṣ*," *The Mamluks in Egyptian Politics and Society*, ed. Thomas Phillip and Ulrich Haarmann (Cambridge: Cambridge University Press, 1998), 242-247.

[799] al-Ṣafadī, 19:66-70.

> ...demanded an amount for *zakāt* from the orphan's funds. So he (Ibrāhīm) told him that the custom regarding this is that it is distributed among the poor (*fa-dhakar lahu anna hādhihi al-'āda an tufarraq 'alā al-fuqarā'*). Then, when he insisted upon his demand, Ibrāhīm rode off and met with 'Alā' al-Dīn Ibn al-Athīr, reporting to him in confidence in order to let him know what happened. When the news reached our Lord, the Sulṭān, he ordered that the (property of the) orphans should not be approached. This was difficult for al-Akram ('Abd al-Karīm) to accept, and he worked against him (*wa-'amila 'alayh*). He went to great lengths to try and get our *shaykh*, Chief Qāḍī Badr al-Dīn ibn Jamā'a, to remove him (from the judiciary).[800]

While al-Akram was apparently unsuccessful and Al-Nāṣir relinquished, it is clear that in Upper Egypt orphans' *zakāt* was not only separated from their property by the Shāfi'i judiciary, but the latter maintained control of it up until its distribution. Moreover, it is likely that al-Nāṣir did not press for the orphans' *zakat*—even if a legal case could be made that the sulṭān should collect and distribute *zakat*—due both to the moral repugnance of being accused of illicitly consuming orphans' property and the difficulty of compelling the obedience of unwilling judges in the provinces. It is also significant that the judge, Ibrāhīm b. Hibbat Allāh, was able to meet in secret with 'Alā' al-Dīn Ibn al-Athīr (d. 730/1329), the head of al-Nāṣir's chancery and a close confidant of the Ṣulṭān.[801] One assumes that the intervention of this latter official was also critical for persuading al-Nāṣir to order al-Akram to desist.

This was not an isolated incident, and the legal practice of the Shāfi'ī community in Upper Egypt appears to have been genuinely at odds with the Mamlūks' attempt to stake a claim to right of control over orphans' property. Another trace of this clash, also recorded by al-Udfuwī in his history of the region, makes the contrast even starker. In the biography of a Shāfi'ī

[800] Al-Udfuwī, 70-71.

[801] On 'Alā' al-Dīn 'Alī b. Aḥmad Ibn al-Athīr, see Aybak al-Dawādārī, *Kinz al-durar wa-jāmi' al-ghurar*, ed. Bern Radtke, et. al. (Cairo, Beirut and Wiesbaden: F. Steiner-Verlag, 1960-1982), 1/241, 9/351; al-Ṣafadī, *A'yān al-'aṣr wa-a'wān al-naṣr*, ed. 'Alī Abū Zayd, et. al. (Beirut: Dār al-Fikr al-Mu'āṣir, 1998), 3/266-270.

judge, one Zayn al-Dīn Muḥammad b. Muḥammad al-'Uthmānī (d. 705/1306), al-Udfuwī relates the formers' first-person narrative of the event:

> The orphans in Udfū owed nearly one hundred *irdabbs*[802] of dates to the Treasury. Of this, I was liable for nine *irdabbs*. The judges were not able to absolve the debt—neither the principle nor the interest (*wa-mā qadar al-quḍāt 'alā izālatihā lā al-furū' wa-lā al-uṣūl*). Our town was under the dominion of the Viceregent (*nā'ib al-sulṭān*) Sayf al-Dīn Salār.[803] Ibn Muḥammad took the orphans' dates, placed them in a house, and sealed it (*wa-khatam 'alayh*). He then traveled to Aswan. Then the Majordomo (*ustadār*) 'Izz al-Dīn Aydamur al-Rashīdī arrived in town. When he requested the dates, they informed him of what had happened (*'arrafūh al-ḥāl*), so he sent him a message.[804] Ibn Muḥammad's letter[805] (in response) was: "It is impermissible for me to hand over the orphans' property (*innī mā yaḥill lī an usallim māl al-aytām*." He continued to rebut him until al-Rashīdī departed. He said that he would remove Ibn Muḥammad from the village and cause him distress (*yushawwish 'alayh*). Despite all that, due to God's grace he continued (in the judiciary), and al-Rashīdī[806] gave up on taking the dates.[807]

Like the previous event, at the heart of this one resides a tension, unsurprising in itself, between a representative of the central, military-dominated and hierarchical power and the provincial judiciary. What is more striking, though, are the competing legal claims of right over orphans' property in both cases. Both the Mamlūk executive—the sulṭān and his men—and the Upper Egyptian judge proposed a legal right to control the orphans' funds based on *shar'ī* norms.

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[802] The *irdabb*, a unit of measurement, seems to have been about 70 kg, see E. Ashtor, "Mikāyīl (A)," *Encyclopaedia of Islam, Second Edition*. C.f. Ira Lapidus, *Muslim Cities*, 16, where the author equates the measure during the period with an English bushel.

[803] The emir Sayf al-Dīn Salār was one of the richest men in the Baḥri state. Having recently helped al-Nāṣir Muḥammad regain the throne, Salār became viceroy (*nā'ib sulṭān*) during al-Nāṣir's second reign (1299-1309) and remained in the position during the brief reign of Baybars al-Jāshnakīr. Salār accumulated a massive fortune that the state acquired after al-Nāsir had him thrown in prison, where Salār subsequently starved to death. Ibn Taghribirdi, *al-Manhal al-ṣāfī*, 6:5-13.

[804] Presumably, 'Izz al-Dīn Aydamur wrote to Ibn Muḥammad.

[805] Originally, "His letter," but I have altered it for clarity's sake.

[806] Altered from "he".

[807] Al-Udfuwī, 626.

Here, we see reflected nothing resembling the relationship often discussed by modern scholars between Muslim jurists who are responsible for transmission and interpretation of the *Sharī'a*, on the one hand, and the central political power, on the other, who relies primarily on discretionary authority (one sense of the term *siyāsa*) in order to regulate the affairs of the country.[808] Rather, what appears in these events are two claims to discretionary authority over the correct fulfilment of legal duties (observing the property rights of orphans and ensuring the payment of *zakāt*). There could be a variety of reasons for the different interpretations of the legal duties and powers of a judge versus an emir, such as differing interpretations of the legal rights of the executive government (especially in regards to the collection and distribution of *zakāt*), the morality of the Sulṭān's government (since some Shāfi'ī jurists held that *zakāt* did not need to be delivered to an unjust ruler),[809] or the usual suspect, personal interest.

It is also notable that the local judiciary appealed to custom (*al-āda*). Both Ibn Hibbat Allāh and our source, al-Udfuwī, reveal no scruples over hiding the dates from the sultan even though. Rather, Ibn Hibbat Allāh invokes "the custom (*al-'ādat*)" of local *zakāt* distribution of orphans' wealth as a justification for refusing delivery of the *zakāt* upon demand. This is a

[808] For *siyāsa* as discretionary authority (in reference to Ibn Muqaffā): C.E. Bosworth, "Siyāsa (1)," *Encyclopaedia of Islam, Second Edition*.

[809] Patricia Crone, *God's Rule: Government and Islam* (New York: Columbia University Press, 2005), 291-292. Failure to pay zakāt is a grave sin (A. Zysow, "Zakāt," *Encyclopaedia of Islam, Second Edition*), but it is clear that the jurists involved in these incidents did not seem themselves as violating the law on zakāt. Indeed, the appeal to the authority of the customary local supervision of the *zakāt*'s distribution would imply the importance of *zakāt*'s normative status in the canon to the Upper Egyptian jurists. Al-Māwardī, in his book on "constitutional law," stated that an individual could conceal his property to avoid zakāt if the *zakāt*-collector (*al-'āmil*) is unjust. This suggests that the conception and implementation of legal limitations or "checks and balances" were not based on a reading of al-Māwardi, but primarily on local customs and authorities. However, al-Māwardi only addressed the case in which an individual—not a state-appointed judge—refused to deliver *zakāt* a government official. In any case, it is clear that these judges in both events were confident that their decision would not be challenged by another local jurist. Al-Māwardi, *al-Aḥkām al-Sultāniyya wa al-walāyāt al-dīniyya*, ed. Aḥmad Mubārak al-Baghdādī (Kuwait City: Dār Ibn Qutayba, 1989), 154. For the term "constitutional law," see Crone, 222.

"canon-blind" justification for a legal action, insofar as it explicitly cites an authority outside the canon of sources recognized by Sunni jurists as authoritative sources of law.[810] Why the recourse to custom, even in apparent defiance of the canon? It is tempting to attribute this to the importance of the Mālikī *madhhab* in Qūṣ, given Mālik's own citation of Medinan praxis in his legal opinions as a source of law.[811] However, I would like to suggest an alternative explanation. It has been shown in the previous two chapters that the judiciary's control over orphans' property resulted from the cooperation of individual judges and scholars with governors, caliphs and sulṭāns. Some of the clearest examples of this is the appointment of *umanā'* as salaried officials by the Fāṭimid state, the establishment of the *mūda'* in Zuqāq al-Qanādīl and, later, in Khān Masrūr, and the conferral of authority over orphans' property to the Shāfi'īs by Ṣalāḥ al-Dīn and Baybars. The institutional arrangements resulting from these critical moments were not the direct result of a scripture, Ḥadīth or legal reasoning but a combination of the importance given to orphans' rights by all three along with the existence of political will to empower a particular group of scholars (the Shāfi'īs). The accumulation of capital from orphans' property—whether in trust or in the form of *zakāt*—was a customary privilege both in Cairo and in Upper Egypt. Ibn

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[810] I am using the word "canon" and the term "canon-blind law" in the sense used by Behnam Sadeghi in *The Logic of Law Making in Islam: Women and Prayer in the Legal Tradition* (Cambridge: Cambridge University Press, 2013) 13, 15. Canon refers to the foundational texts in a tradition which are accepted by members in the tradition as binding and authoritative. Canon-blind law, therefore, refers to laws which are not derived, directly or indirectly, from the foundational texts.

[811] For praxis in Mālik's legal reasoning, see Umar F. Abd-Allah Wymann-Landgraf, *Mālik and Medīna: Islamic Legal Reasoning in the Formative Period* (Leiden: Brill, 2013), who argues that Medinese praxis ('amal) is "a distinctive non-textual source of law which lay at the foundation of Medinese and subsequent Māliki legal reasoning" (*Ibid*. 3). The Māliki *madhhab* was only second to the Shāfi'i *madhhab* in importance in Qus. Ibn Daqiq al- 'Id, the most prominent jurist from the area, studied in the Māliki *madhhab*, like his father, before switching to the Shāfi'ī maddhab. He continued to be recognized by his peers as qualified to give legal opinions in both schools: Tāj al-Dīn ʿAbd al-Wahhāb b. ʿAlī al-Subkī, *Tabaqāt al-Shāfiʿiyya al-Kubrā,* 9/207-249; al-Udfuwī, 567-599.

Hibbat Allāh's appeal to custom, therefore, was an appeal to the normativity of the standing arrangements between the judiciary and the sulṭāns.

The distance from the capital was one key factor in the success of both Ibn Hibat Allāh's and Ibn Muḥammad's refusal to submit to the novel demands of the sulṭāns' agents. Another was the decentralized nature of the judiciary's supervision of orphans' property in Upper Egypt. Whereas the central location of the *mūda'* in Cairo made it a target for the Mamlūks in times of financial need throughout the 14th and early 15th century, the decentralized accumulation of orphans' property under the judiciary in Upper Egypt facilitated its concealment from the state. The contrast between the two regions appears even starker when it is remembered that the judiciary in Cairo had trouble refusing forced loans from orphans' property whereas the Upper Egyptian judiciary were able to refuse to repay a debt that the orphans' owed the state. While it is possible that this debt was based on a non-*shar'ī* tax considered illegitimate by the jurists, it is also notable that the report about this debt states that the "judges were not able to absolve the debt," indicating that they may not have been able to cite a specific rule for why the orphans' debt should be forgiven.

The absence of a central location for orphans' property in Upper Egypt is evidence for an alternative system of preserving orphans' wealth in which control of this property was decentralized and distributed among the several officials noted above—the deputy judges, the *umanā'*, and the notaries (*shuhūd*). Rather than allow wealth to accumulate in a well-known location—such as the *mūda'* in Cairo—this strategy of preservation made it harder for any one individual or party, such as a member of the judiciary or an agent of the sulṭān—to appropriate a significant amount of orphans' property without the cooperation of multiple individuals. This decentralized system appears in many ways to be similar to the archival practices of the Mamlūk

state described by Tamer el-Leithy and Konrad Hirschler.[812] Arguing against the common assumption that an "archive" should be a central, stable location in which documents are kept, these authors in separate articles show that documents were preserved in many, smaller locations, some of them private, rather than in a single institution. Their research suggests that historians of the medieval Middle East should shift their focus away from trying to explain the lack of a surviving central archive from the Mamlūk period and, instead, account for hybrid and decentralized "archival practices" that had their own social logic. One of the results of these archival practices was that the Mamlūk empire was "resilient against the effects of documentary loss in the center" because "the bulk of the material was situated at hundreds of small-scale sites, most importantly the secretaries' and officers' households."[813] It has already been noted in the previous chapter that property and documents were kept by the *umanā' al-ḥukm* in Cairo in locations separate from the *mūda'* in Khān Masrūr. It seems, therefore, that the existence of several, smaller caches of orphans' property was a common practice in both Upper Egypt and the capital and that the central *mūda'* was in some ways an exceptional institution.

Decentralized practices of preserving orphans' property did allow for corruption in individual cases. Thus, al-Udfuwī writes that Quṭayna, a poet known for his "brazen (*mājin*)" verses, married an orphaned girl who was under legal interdiction (*ḥajr*) at the time of the marriage. The *amīn al-ḥukm* had sold her house and, in an obvious legal ruse to take possession

[812] Tamer el-Leithy, "Living Documents, Dying Archives: Towards a Historical Anthropology of Medieval Arabic Archives," *Al-Qanṭara* 32, no. 2 (2011), 389-434; Konrad Hirschler, "From Archive to Archival Practices: Rethinking the Preservation of Mamluk Administrative Documents," *Journal of the American Oriental Society* 136, no. 1 (2016), 1-28.

[813] Hirschler, "From Archive to Archival Practices," 27.

of the property, had the buyer sell it back to him. Quṭayna took the case to the governor of Qūṣ and Akhmīm, presenting to the latter the case in verse, part of which is worth quoting here:

> Come down to Usfūn and investigate her case
> And put the notaries involved back in their place/
> I have a Turkish orphan girl that I managed to get,[814]
> And to whom God has granted walls for shelter./
> But they conspired with the *amīn al-ḥukm* and pilfered
> Then concealed documents containing their signature,/
> So that her half of the house was sold from under her.
> What can avail me when the *amīn al-ḥukm* is the buyer?/
> I searched and searched for those documents,
> my Lord, until God revealed their place of concealment./
> Here they are with me now, and they have been registered.[815]
> So bring to those who harmed her the authority you were granted.
>
> Wa-nzil bi-'usfūn wa-kshif 'an qaḍiyyatahā
> Wa-kuffa kaffa shuhūdin aṣbaḥū fīhā/
> 'indī yatīmatu turkiyyin ẓafartu bihā
> La-hā min allāhi judrānun tuwārīhā/
> ta'āwanū ma' amīn al-ḥukm wa-ghtaṣabū
> wa-'akhfa(w) wathā'iqa faḥwā khaṭṭihim fī-ḥā/
> ḥattā 'ubī'at 'alayhā niṣfu ḥiṣṣatihā
> mā ḥīlatī wa-'amīn al-ḥukmi shārīhā/
> mā ziltu 'afḥaṣu 'an tilka l-wathā'iqa yā-
> mawlāyā ḥattā 'abāna -llāhu khāfīhā/
> wa-hā hiyya -l'ān 'indī wa-hiya thābitatun
> fa-mḍi -l-wilāyata fī-man kāna yu'dhīhā.[816]

The poem is evidence of the way in which decentralized practices of preserving not just property but also *documents* could both support and weaken the protection of orphans and individuals

[814] The poem also begins with a militaristic theme of conquest: an enchanting girl has "captured my heart (*sabat fu'ādī*)" and the governor has "vanquished a group in the North (*qaharta bi'l-jānib al-baḥriyy ṭā'ifatan*)."

[815] *Wa-hiya thābita*. On *ithbāt* as an administrative practice of registering official documents, see Hirschler, "From Archive to Archival Practices," 13.

[816] Al-Udfuwī, 228.

under legal interdiction (*ḥajr*). On the one hand, the (alleged!) conspiracy of the *amīn al-ḥukm* with the notaries was foiled because the poet was able to produce documents after a long search that revealed the scheme for what it was. One can only wonder where the poet found the documents—in his wife's possession or, possibly, in a private collection of documents held by a notary? On the other hand, the lack of a central location in which documents that could prove the property rights of orphans or people under legal interdiction may have made it more difficult for the poet to make his legal case.

In sum, Upper Egypt as it appears in the biographical dictionary of al-Udfuwī reveals how a shared commitment to protecting the legal rights of orphans manifested in very different ways from Cairo. Due to the distance of the sulṭāns from Qūṣ and its environs, there was no interest and little ability to create the kind of central location that was established in Cairo in both the Fāṭimid and Mamlūk periods. This also appears to have helped the local judiciary resist attempts by the authorities in the capital to appropriate orphans' property. Nevertheless, the provincial judiciary still served in principle at the whim of the Shāfi'ī chief *qāḍī* in Cairo, and the hierarchy within the local judiciary mirrored that in Cairo. As in the capital, a specialist—the *amīn al-ḥukm*, was tasked with supervising orphans' property. Even so, preservation of this property appears to have been much more decentralized than in Cairo up to the mid-14th century. Unfortunately, it is unknown whether and how the decentralized system changed following the death of al-Udfuwī in 748/1347.

Damascus

Unlike both Cairo and Upper Egypt, Damascus during the Mamlūk Period does not seem to have had an *amīn al-ḥukm*. Rather, the individuals in the judiciary tasked with overseeing

orphans' property were referred to as *nāẓir al-aytām* (Supervisor of the Orphans) or *nāẓir makhzan al-aytām* (Supervisor of the Orphans' Treasury) (see Table 1). Another major difference is that the sources from the period recorded information about the lives of many of these individuals; I was able to identify twenty-one different individuals who served in these two positions, two people who served as lower administrators in the Orphans' Bureau (*dīwān al-aytām*), and two individuals were are identified as *nāẓir al-awṣiyā'*.[817] These individuals served from the late-Ayyūbid period into the early-Ottoman period, indicating a notable continuity of formal titles before and after the Mamlūk Period. The reason for this longevity appears to be, first, the prestige of the position and, second, the decentralized nature of supervision of orphans' property. Although a centralized treasury for orphans' property did exist—referred to as the *makhzan al-aytām* rather than the *mūda' al-ḥukm*—it does not appear to have been as important in the preservation of orphans' property as the *mūda'* following the mid 8th/14th century. Before making this case, I will discuss the terminology used in our sources from the period, suggest a possible foreign origin for these terms, analyze the importance of the role in the careers of those who held it, and then present evidence regarding the location of the *makhzan* and what the sources reveal about its use and contents.

The following analysis is primarily based on the rich Syrian historiographical tradition. In particular, I rely on the chronicles and biographical dictionaries authored by 'Alam al-Dīn al-

[817] See Table 1 below. Another position, "the supervision of estates and supervision of the orphans (*naẓar al-ribā' al-dīwāniyya wa-mubasharat al-aytām*)" appears in a copy of a decree (*tawqī'*) in al-Qalqashandī's administrative manual. The person filling this office was mainly responsible for ensuring the profitability of these estates on behalf of orphans. It seems like this is a separate office from the *naẓar al-aytām* or *naẓar makhzan al-aytām* since these estates are identified as being managed or granted by the state (*al-ribā' al-dīwāniyya*). It is possible that this refers to *iqṭā'* land granted to orphans. See al-Qalqashandī, 12/397.

Birzālī (d. 739/1339),[818] Shams al-Dīn al-Dhahabī (d. 748/1348),[819] ʻImād al-Dīn Ibn Kathīr (d. 774/1373),[820] Aḥmad Ibn Ḥijjī al-Ḥusbānī (d. 816/1413),[821] Shams al-Dīn Ibn Ṭūlūn (d. 955/1548),[822] and ʻAbd al-Ḥayy Ibn al-ʻImād (d. 1089/1679).[823] For these sources, I focused on identifying individuals involved in the supervision of orphans' property, their titles, and the location where the property of orphans and absent people was kept. I also include evidence from one document from the Ḥaram Documents, a collection of legal documents produced in Jerusalem, which is described in more detail below. In addition to these sources, I have also made use of the unique, diary-like text produced by the notary Ibn Ṭawq (d. 915/1509).[824] Unlike the other texts, this does not provide information about the titles of officials involved in orphans' property. In fact, as I argue at the end of this chapter, it is the combination of the *presence* of orphans' property along with the *absence* of specific official titles or a centralized treasury for preserving orphans' property that stands out most starkly in the analysis of this text. As in the case of Upper Egypt (and Cairo in the 9th/15th century), the evidence from Ibn Ṭawq's text indicates that orphans' property was preserved in a decentralized manner in Damascus,

[818] F. Rosenthal, "al-Birzālī," *Encyclopaedia of Islam, Second Edition*.

[819] Moh. Ben Cheneb and J. de Somogyi, "al-Dhahabī," *Encyclopaedia of Islam, Second Edition*.

[820] H. Laoust, "Ibn Kathīr," *Encyclopaedia of Islam, Second Edition*.

[821] Sami G. Massoud, "Ibn Ḥijjī, » *Encyclopaedia of Islam, THREE*.

[822] Stephan Conermann, "Ibn Ṭūlūn (d. 955/1548): Life and Works," *Mamluk Studies Review* 8, no. 1 (2004), 115-139.

[823] F. Rosenthal, "Ibn al-ʻImād," *Encyclopaedia of Islam, Second Edition*.

[824] Stephan Conermann and Tilman Seidensticker, "Some Remarks on Ibn Ṭawq's (d. 915/1509) Journal *Al-Taʻlīq*, vol. 1 (885/1480 to 890/1485)," *Mamluk Studies Review* 11, no. 2 (2007), 121-135; Boaz Shoshan, *Damascus Life 1480-1500: A Report of a Local Notary*, Islamic History and Civilization (Leiden: Brill, 2020).

especially following the events of the mid-8th/14th century.

The Titles of Officials Responsible for Orphans' Property in Damascus

First, it must be noted that the title *amīn al-ḥukm* is not used in the historical sources surveyed. Instead, the official titles used are the *nāẓir al-aytām* (Supervisor of the Orphans) or *nāzir makhzan al-aytām* (Supervisor of the Orphans' Treasury).[825] The first question to consider is whether these titles refer to the same position. There is evidence that they do, in fact, refer to the same position. Thus, Ibn al-Mufarraj, Ibn al-Ḥubūbī, and Ibn Hilāl are referred to as both responsible for "*naẓar al-aytām*" and for the "*makhzan al-aytām*." It might be supposed that these were two offices that happened to be filled by the same individual. These three individuals all lived in the 13th century, and so it could be that the offices were later held by separate individuals. This does not, however, seem to be the case: the historian and deputy judge Ibn Ḥijjī writes that he accompanied in Rajab 796/1394 a number of individuals, including one "Shihāb al-Dīn," to the orphans' treasury (*makhzan al-aytām*) and witnessed the transfer of responsibility from Ibn al-Amāsī to the aforementioned Shihāb al-Dīn.[826] Ibn al-Amāsī is identified elsewhere as the *nāẓir al-aytām*, indicating that this position still included in its responsibilities oversight of the *makhzan al-aytām*. The terms appear, therefore, interchangeable, and so the responsibilities of the *nāẓir al-aytām* included accounting for the property in the orphans' treasury.

Two individuals are recorded as having served in the administration of the orphans' treasury as employees of a lesser standing (i.e., not as the *nāẓir*). Surely there were many more rank-and-file employees who went unnoticed by the historians of the period. As noted in the previous

[825] For these and all further references, see Table 1.

[826] Aḥmad Ibn Ḥijjī, *Tārīkh ibn ḥijjī*, 2 vol., ed. Abū Yaḥyā 'Abd Allāh al-Kundurī (Beirut: Dār Ibn Ḥazm, 2003), 1/59.

chapter, Taqī al-Dīn al-Subkī in his collection of *fatāwā* describes the "Orphans' Bureau" (*dīwan al-aytām*) in Damascus as providing loans. In one of the *fatāwā* translated above, he refers to the individuals working in the Bureau in the plural: "them" (*humma*)," indicating that the Bureau was not a one-man job but likely employed several individuals. It will be remembered that even in Upper Egypt, which did not have a Bureau or even a centralized treasury for orphans' property, there were several individuals, including notaries or professional witnesses (*shuhūd*), involved in the preservation of orphans' property. Given the larger population and economy of Damascus relative to Qūṣ, it is possible that many individuals served under the supervision of the *nāẓir al-aytām*.

The Possible Foreign Origin of the Orphans' Bureau in Damascus

What could be the cause for the difference in official titles between Egypt and Syria? In Egypt, the existence of *umanā'* tasked with supervising orphans' property was practically an ancient tradition by the time of the reforms initiated by Baybars, Lājīn, and Ibn Daqīq al-'Īd. This was shown in Chapter Three with the help of two exceptional sources: the histories of the judiciaries written by al-Kindī and Ibn Ḥajar. I am aware of no such source in existence for Damascus or Greater Syria, and so other sources must be used to answer this question. The biographical literature hints at a possible answer. In al-Dhahabī's *Siyar a'lām al-nubalā'*, there is a short entry about an individual who lived in Baghdad in the early 6th/12th century, Abū Manṣūr 'Alī b. 'Alī b. 'Ubayd Allāh (d. 532/1138), who served as "*nāẓir al-aytām*."[827] In another work penned by al-Dhahabī, this time his abridgement of al-Dubaythī's (d. 637/1239) continuation of the *Tārīkh Baghdād*, one finds another brief mention of the same position. Abū al-'Abbās

[827] Al-Dhahabī, *Siyar a'lām al-nubalā'*, 20/50.

Aḥmad b. Ibrāhīm b. Abī Yāsir al-Ḥanbalī (d. 594/1197-1198) is identified there as the *nāẓir al-aytām*. He was accused of violating this trust, leading to his imprisonment for several years.[828] Both of these individuals worked in Baghdad about a century prior to the time of the first officials in Damascus that I identified as holding this title. Was the title introduced to Damascus from Baghdad? This must remain but a hypothesis until further research is accomplished on the history of the judiciary in Baghdad and Damascus in the Early Middle Period.

In any case, the terms *umanā'* were in use in Baghdad to refer to individuals charged with overseeing orphans' property both prior to and after the lives of these two *nāẓirs*. Al-Qalqashandī includes in his secretary's manual three copies of appointment letters (*'uhūd*) for judges (*quḍāt*) issued by three Abbasid caliphs in Baghdad: al-Ṭā'i' (r. 363-81/974-991), al-Mustarshid (r. 512-29/1118-1135), and al-Nāṣir (r. 575-622/1180-1225).[829] The appointment letter issued in al-Mustarshid's name does not mention *umanā'* in the context of orphans, instead ordering the judge to rely on "*al-thiqāt al-a'fā' wa'l-kufāt al-atqiyā'* (trusted, upright people and effective, pious individuals)."[830] The judge is also instructed to insure that deeds, wills, and other legal documents should be kept by a "*khazzān* (an archivist)" known for "trustworthiness (*al-amāna*)."[831] This archive should be preserved according to what "*amāna*" dictates, and, in a passage that could pass for a near description of Ibn Ḥijjī's narration of transferring

[828] Al-Dhahabī, *al-Mukhtaṣar al-muḥtāj ilayh min tārīkh ibn al-dubayth*, ed. Muṣṭafā 'Abd al-Qādir 'Aṭā, vol. 15 (Beirut: Dār al-Kutub al-'Ilmiyya, 2004), 100.

[829] C.E. Bosworth and K.V. Zetterstéen, "al-Ṭā'i' Li-Amr Allāh," *Encylopaedia of Islam, Second Edition*; Angelika Hartmann, "al-Nāṣir Li-Dīn Allāh," *Encylopaedia of Islam, Second Edition*; Carole Hillenbrand, "al-Mustarshid," *Encylopaedia of Islam, Second Edition*.

[830] Al-Qalqashandī, 10/271.

[831] *Ibid*. 10/274.

responsibility of the *makhzan al-aytām* from one supervisor to the next, the transference of the contents of the *khizāna* must be done in the presence of trusted individuals (*'udūl*).[832] In the appointment letter issued in the name of al-Ṭā'i', the judge is instructed to appoint *umanā'* to supervise those endowments (*awqāf*) which have been registered in his *dīwān*. This letter also specifies that the judge should place the records and documents in his possession in a "*bayt* (house)." Among the documents that should be preserved in this *bayt*, are "the testamentary wills (*waṣāyā*)" and "acknowledgments of rights (*iqrārāt*)" in his *dīwān*. Trustworthy archivists ("*al-khuzzān al-ma'mūnīn*") should be appointed to preserve these documents. Since these wills and acknowledgements would certainly effect inheritances, this *bayt* appears to have fulfilled some of the functions of the *makhzan* or *mūda' al-ḥukm*. It is only in the letter issued in al-Nāṣir li-Dīn Allāh's name that *umanā'* are mentioned in direct reference to orphans. The judge there is instructed "to appoint in order to arrange the orphans' interests *al-thiqāt al-a'fā' wa'l-umanā' al-atqiyā'* (trusted, upright people and pious trustees)."[833] Although the term *umanā' al-hukm* is not used in any of the three letters, it is clear that the term "*amīn*" could be used to refer to individuals tasked with overseeing orphans' property in Baghdad.

There is further evidence for the existence of the title *amīn al-ḥukm* during the late Īlkhānid period (*circa* 1260-*circa* 1335 C.E.)/early Jalayarid period (late 1330s-early 15th century C.E.) in Baghdad, *i.e.* after the time in when the two individuals in Baghdad mentioned above served as the *nāẓir al-aytām*.[834] The evidence is found in *Dastūr al-kātib fī ta'yīn al-marātib*, a

[832] *Ibid*. 10/274.

[833] *Ibid*. 289.

[834] On these two dynasties, both of Mongol origin, see Reuven Amitai, "Il-Khanids i: Dynastic History," *Encyclopaedia Iranica*; Marshall Hodgson, *The Venture of Islam: Conscience and History in a World Civilization, Volume Two: The Expansion of Islam in the Middle Periods* (Chicago and London: The

Persian administrative manual that describes in detail the offices, titles, and legal procedures of government during the end of the Mongol period of rule in Iran. The author, Muḥammad Nakhjavānī, was commissioned by the vizier Ghiyāth al-Dīn Muḥammad (son of the famous vizier Rashīd al-Dīn Faḍl Allāh) during the reign of Abū Sa'īd (r. 716-736/1316-1335), although he did not complete the work until 761/1360.[835]

The text includes a model appointment letter for an *amīn al-ḥukm* for the court of Baghdad. According to the letter, the individual assumed "the judicial trusteeship of the Courthouse of Baghdad (*amānat al-ḥukm-i dār al-qaḍā'-i baghdād*)."[836] He would serve as "the *amīn* of the property of the orphans, the absent (*ghuyyab*), and the *sufahā'*." He was required to "expend his utmost effort in preserving and growing that (property), to covet the interest (*ghibṭa*) of the children and the absentees." If loans are given, he should also "ensure that the people who have sought a loan from the property of the orphans and the absentees to be paid at an appointed time will fulfill those (loans)." When the property was not engaged in a loan, "since it is his lawful duty to invest and grow it, it must be used for something (*wa-illā chūn uw bi-istithmār wa-istinmā'-i ān kah shar'an bar-ū wājib-ast bi-wajhī mashghūl gardad*)."[837] The responsibilities of the *amīn al-ḥukm*, therefore, in Baghdad during the mid-8th/14th century were

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University of Chicago Press, 1974), 410-417; Peter Jackson, "Jalayerids," *Enyclopaedia Iranica*; Patrick Wing, *The Jalayirids: Dynastic State Formation in the Mongol Middle East* (Edinburgh: Edinburgh University Press, 2016).

[835] On the text and author, see David O. Morgan, "Dastūr al-Kāteb fī ta'yīn al-marāteb," *Encyclopaedia Iranica*; István Vásáry, "The Preconditions to Becoming a Judge (Yarġuči) in Mongol Iran," *Journal of the Royal Asiatic Society, Series 3*, 26, no. 1-2 (2016), 157-169, esp. 157-159.

[836] Muḥammad Hindūshāh Nakhjavānī, *Dastūr al-kātib fī ta'yīn al-marātib*, 2 vol. in 3 parts, ed., A. A. Alī-zādah (Moscow: Izdatelstvo Nauka, 1964-1971), 2/238-239.

[837] *Ibid*. 2/239.

identical to the *amīn al-ḥukm* in Egypt or the *nāẓir al-aytām* in Damascus. Although the latter title may have had its origin in Baghdad, the evidence from Nakhjavānī's administrative manual indicates that the title *amīn al-ḥukm* was also in use in Baghdad. It must remain uncertain, therefore, where the title *nāẓir al-aytām* came from.

What's in a title? A Lesson from the Haram Documents

Further clarity about the use of the terms *nāẓir al-aytām* and *amīn al-ḥukm* can be found in evidence from the court documents from Jerusalem, known in contemporary literature as the "Ḥaram Documents" due to their discovery within the al-Ḥaram al-Sharīf (the al-Aqṣā Mosque compound in Jerusalem). The bulk of the 900 documents found in this collection are related to the Shāfi'ī judge of Jerusalem, Sharaf al-Dīn 'Īsā al-Khazrajī (d. 797/1395). Christian Müller, who has studied these documents extensively, has shown that the documents were not collected as an archive but rather most likely as part of an investigation into the activities of al-Khazrajī during his tenure as judge.[838]

Müller notes that individuals with the title *amīn al-ḥukm* appear in several documents and that their regular duty is to pay maintenance from the inheritance of orphans' to the guardians of those orphans. He also notes that one *amīn al-ḥukm* in particular, Shams al-Dīn Muḥammad b. Jamāl al-Dīn 'Abd Allāh b. Sharaf al-Dīn Yaḥyā al-Adhra'ī, is mentioned multiple times but not always with the same title. His titles include: *amīn al-ḥukm*, *nāẓir al-aytām*, *wakīl al-aytām* (legal agent for the orphans), *waṣiyy 'alā awlād fulān* (testamentary guardian for so-and-so's

[838] Christian Müller, "The Ḥaram al-Ŝarīf Collection of Arabic Legal Documents in Jerusalem: A Mamlūk Court Archive?" *Al-Qanṭara* 32, no. 2 (2011), 435-459; *Der Kadi und seine Zeugen: Studie der mamlukischen Ḥaram-Dokumente aus Jerusalem,* Abhandlungen für die Kunde des Morgenlandes (Wiesbaden: Harrassowitz Verlag, 2013), 509-527.

children), and *mutakallim ʻalā tarka* (the one speaking on behalf of an estate).[839] The various titles that al-Adhraʻī assumes in the documents leads Müller to speculate that the *amīn al-ḥukm* may be simply a "person of trust" rather than an official office.[840] This may be why, he suggests, that more than one *amīn al-ḥukm* was employed in Jerusalem at the same time.[841] However, the existence of multiple *umanāʼ* at the same time, as has been seen in Cairo, is not unusual in the period, and there is no question that by the late 14th century the *amīn al-ḥukm* was the title of a specific office within the judiciary with customary duties that included not just paying maintenance to the guardians' of orphans but also preserving and investing property. Two documents—an acknowledgement of a debt and an acknowledgement payment of the debt—in the Haram Documents appear to be evidence of this last activity of the *amīn al-ḥukm*. Document No. 16.1 states that one Zayn al-Dīn Maḥmūd received a loan of 140 silver dirhems from the orphans of Burhān al-Dīn Ibrāḥīm al-Nāṣirī, "who are under the interdiction of the noble Law (*al-maḥjūr ʻalayhim ḥajr al-sharʻ al-sharīf*)," via the *amīn al-ḥukm* al-Adhraʻī.[842] The loan was to be paid back within four months.[843] One would expect, given al-Subkī's *fatwās* translated and discussed in Chapter 4, that a pledge would be offered in return for the loan. Oddly, however, no pledge is mentioned. How did the *amīn al-ḥukm* issue an unsecured loan from orphans'

[839] *Ibid*. 320. One further title, *jābī al-waqf madrasat al-ṣāliḥiyya*, appears to be an unrelated position also held by al-Adhraʻī.

[840] "Läst sich hieraus schließen, die Position des *amīn al-ḥukm* sei eine Vertrauensposition innherhalb der Verwaltung, nicht jedoch ein spezifisches Amt gewesen?" Müller, *Der Kadi und seine Zeugen*, 320-321.

[841] *Ibid*. 321.

[842] Ḥaram Document No. 16.1, Islamic Museum, Jerusalem.

[843] I was unable to read the date on the document of remittance, but Müller states that the remittance was "a few months later," indicating the loan was paid back on time. Müller, *Der Kadi und seine Zeugen*, 321.

property? One assumes that these documents are only part of a larger set of legal actions that would guarantee a profit for the orphans via a *mu'āmala* transaction like the one described by al-Subkī. However, since the Ḥaram documents are not an archive and are incomplete, it is impossible to know if this transaction was to the benefit of the orphans at all.

In any case, the terminological equivalency of the titles *nāẓir al-aytām* and *amīn al-ḥukm* during this period receives further support from Shams al-Dīn al-Asyūṭī's (d. 880/1475) guide to drafting legal documents, *Jawāhir al-'uqūd wa-mu'īn al-quḍāt wa'l-shuhūd*.[844] Al-Asyūṭī includes a model appointment letter for a person to supervise orphans and their property in exchange for a certain sum ("*ṣūrat tafwīḍ mubāshira 'alā aytām wa-amwālihim bi-ma'lūm minhā*").[845] This person is charged with both issuing their allowance and administering their property (*al-'amal fī amwālihim*), which includes selling, buying, making loans on their behalf, and any other transaction that will profit the orphans ("*wa-fi'l mā yaqtaḍīh al-maṣlaḥa la-hum min sā'ir al-af'āl al-shar'iyya wa'l-taṣarrufāt al-mu'tabara 'alā wajh al-ghibṭa al-wāfira la-hum fī dhālik*").[846] In return for his efforts, the person is permitted to take a certain (undefined) amount of the profits made on behalf of the orphans on a monthly basis. The model letter states that the appointment could be for the orphans under the court's jurisdiction in a particular city or for the orphans of a particular individual. In addition, a *nāẓir*, or supervisor, is to be appointed over the person taking care of the orphans who will review all financial transaction.[847] It is

[844] On Shams al-Dīn Muḥammad b. Aḥmad al-Asyūṭī, see Khayr al-Dīn al-Ziriklī, *al-A'lām*, 15th ed. (Beirut: Dār al-'Ilm li'l-Malāyīn, 2002), 5/334-335.

[845] Shams al-Dīn al-Asyūṭī, *Jawāhir al-'uqūd wa-mu'īn al-quḍāt wa'l-shuhūd*, ed. Abū 'Āṣim Ḥasan b. 'Abbās b. Qutb (Mecca: al-Maktaba al-Makkiyya, 2011), 4/178.

[846] *Ibid*. 4/179.

[847] *Ibid*. 4/179.

possible that this latter individual corresponds to either the *amīn al-ḥukm*, the *nāẓir al-aytām* or the *nāẓir al-awṣiyā'*. No further conclusions can be made on the basis of this work alone.

The text does indicate, however, that the *amīn al-ḥukm* and the *nāẓir al-aytām* performed the same functions. In another place in al-Asyūṭī's work, there is a model appointment letter for a woman to act as caretaker for orphans who have no living relative. This woman is charged with raising them, feeding them, giving them water, changing their clothes, cleaning them, putting oil on their head and body, and providing a bed for them. The letter also states that the *qāḍī* issuing the appointment instructs the "*amīn al-ḥukm al-'azīz* or *al-nāẓir fī amr al-aytām*" to pay a certain amount to the women from the orphans' property held "in the Orphans' Bureau (*dīwān al-aytām*)" on a monthly basis.[848] Although the term used here as an apparent equivalent to the *amīn al-ḥukm* is *al-nāẓir fī amr al-aytām* and not *nāẓir al-aytām*, this does indicate the author's recognition that more than one title could refer to the same position. Based on the evidence from this text and the Ḥaram documents, therefore, it stands to reason that the terms *nāẓir al-aytām* and *amīn al-ḥukm* were likely interchangeable.

The Makhzan al-Aytām *of Damascus*

The *makhzan al-aytām* in Damascus appears to have performed a similar function to the *mūda' al-ḥukm* in Cairo. While the name clearly indicates that orphans' property was kept there, it also leaves uncertain the fate of absentee property: was this also held in the *makhzan al-aytām*? I have been unable to find any evidence regarding this. However, there is evidence of a specific place—possibly the same location—known as the *makhzan al-aytām* in Damascus starting in the Ayyūbid era down to the 15th century A.D. The following section will discuss the evidence for

[848] *Ibid*. 3/454.

the *makhzan al-aytām*, what it reveals about its contents, and the function it performed in the city.

The first mention of the *makhzan al-aytām* is in al-Dhahabī's *Tārīkh al-islām*. Al-Dhahabī records that in the year 600/1203-1204:

> the famous coinage (*al-'umla al-mashhūra*) was taken from the *makhzan al-aytām* of Qaysāriyyat al-Farsh, which belonged to the orphans of Emir Sayf al-Dīn al-Sallār, and it's amount was 16,000 dinars. It remained (hidden) for years before it showed up in the possession of Ibn al-Dukhayna, although several people had been jailed because of it.[849]

There are several intriguing phrases in this passage that one wishes to understand, but, alas, remain unclear to me. What is this *al-'umla al-mashhūra*? The word *'umla* according to the Mamlūk lexicographer Ibn Manẓūr refers to wages or payment in return for labor.[850] Yet it is clearly referring here to money which amounts to 16,000 dinars—it is apparent that al-Dhahabī is not referring to *value* but *amount* because he uses the words "*wa-mablaghuhā*." In another place, al-Dhahabī mentions that it was "gold (*dhahab*)." But having settled that *'umla* refers here to an amount of gold, why is it famous ("*mashhūra*")? One wonders if it is the existence of such a large inheritance in the *makhzan al-aytām* that became well-known. Ibn Sallār, a powerful vizier who took the royal title al-Malik al-'Ādil while serving the Fāṭimid caliph al-Ẓāfir (r. 544-549/1149-1154), was murdered in Cairo in Muḥarram 548/1153.[851] Why was a fortune belonging to his orphans—presumably his orphaned children—still held in the *makhzan* nearly half a century later? Is it, perhaps, that this was an accumulated surplus generated from property

[849] Al-Dhahabī, *Tārīkh al-islām*, 52 vol., 'Umar 'Abd al-Salām al-Tadmurī (Beirut: Dār al-Kitāb al-'Arabī, 1993), 42/52.

[850] Ibn Manẓūr, 11/476.

[851] Aḥmad b. Muḥammad Ibn Khallikān, *Wafayāt al-a'yān wa-anbā' abnā' al-zamān*, 8 vols., ed. Iḥsān 'Abbās (Beirut: Dār Ṣādir, 1968-1972), 3/416-419; Leila S. Al-Imad, "al-'Ādil b. al-Sallār," *Encylopaedia of Islam, THREE*.

belonging to his children? This might explain the use of the odd term *'umla* in this context. Unfortunately, I am unable to answer these questions.

The final important piece of information in this passage is the location of the *makhzan al-aytām*: *Qaysāriyyat al-Farsh*, or the Farsh Caravansary. This is the only information about the location of the *makhzan*, and it is impossible to know if it remained after this time in Qaysāriyyat al-Farsh. It is significant, nevertheless, that orphans' property was stored at a caravansary, the same kind of multi-use building that was selected in Cairo as well for the *mūda' al-ḥukm* and likely for the same reasons: a ready stream of merchants with whom mutually-beneficial commercial transactions could be entered in order to invest the capital accumulated in the *makhzan al-aytām*. This caravansary stood in the Darb 'Ujlān neighborhood of Damascus, about which very little is known as well.[852] This obscurity in the sources regarding the caravansary and Darb 'Ujlān suggests that the caravansary may have disappeared at some time after this event. Al-Nuwayrī mentions a fire that began in a cotton merchant's shop on "The Road of Qaysariyyat al-Farsh" in 728/1328, and it may be that the caravansary was affected in the event.[853]

Seven years after its disappearance, the stolen gold was discovered. One Ibn al-Dukhayna, after an extended period of imprisonment and torture, was found to have buried 10,200 dinars under his jail cell. Interestingly, al-Dhahabī mentions that someone named Manṣūr Ibn al-Sallār was the one who searched for and discovered the missing amount "because he had been jailed on account of it." This would seem to be a relative of Sayf al-Dīn Ibn Sallār, but no further information is provided in the sources about his identity. Al-Dhahabī's entry ends by

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[852] Ibn 'Asākir, *Tārīkh Dimashq* 2/303; Qutayba al-Shihābī *Mu'jam dimashq al-tārīkhī li'l-amākin wa'l-aḥyā' wa'l-mushīdāt wa-mawāqi'uhā wa-tārīkhuhā kamā waradat fī nuṣūṣ al-mu'arrakhīn*, 3. Vol. (Damascus: Manshūrāt Wizārat al-Thiqāfa, 1999), 1/299, 3/139.

[853] Al-Nuwayrī, 33/267.

noting that the thief's lifeless body, after he died in jail, was crucified at the location of the crime, Qaysāriyyat al-Farsh.

The *makhzan al-aytām* appears again in the sources in the year 742/1341 during the political instability and factional power struggles following the death of al-Nāṣir Muḥammad b. Qalāwūn. Although the latter's son and heir Abū Bakr was first placed on the throne, the emir Qawṣūn—who was the effective ruler in Cairo at the time—removed Abū Bakr after only fifty-nine days on the throne, replacing him with his five-year old brother, Kujuk.[854] Qawṣūn then dispatched the emir Quṭlūbughā al-Fakhrī (d. 743/1342) to capture and bring to Cairo another son of al-Nāṣir Muḥammad, al-Nāṣir Aḥmad, who had ensconced himself in the impregnable desert castle of Karak.[855] After a short period, Quṭlūbughā had a change of heart, and joined Aḥmad's rebellion against the faction in Cairo led by Qawṣūn.[856] Previously, the viceregent in Damascus, Alṭinbughā al-Ṣāliḥī (d. 742/1341) had marched to Aleppo to confront its governor, who had also taken Aḥmad's side.[857] This left Damascus unguarded and without troops, allowing Quṭlūbughā to enter the city, upon which he commenced mulcting the populace for money to raise a new army. According to al-Maqrīzī, this included forcing the Chief Shāfi'ī Judge, Taqī al-Dīn al-Subkī, to hand over the orphans' property in Damascus.[858] And, according to Shihāb al-

[854] Al-Maqrīzī, *al-Sulūk,* 3/322-338.

[855] Ibn Taghrībirdī, *al-Manhal al-ṣāfī,* 9/82-86.

[856] Al-Maqrīzī, *al-Sulūk,* 3/346.

[857] Ibn Taghrībirdī, *al-Manhal al-ṣāfī,* 3/53-56.

[858] Al-Maqrīzī, *al-Sulūk,* 3/349. According to Ibn Ḥajar, the Chief Judge was Taqī al-Dīn al-Subkī. Later, the viceregent of Syria (*nā'ib al-shām*) Aydugmish al-Nāṣirī (d. 743/1342) tried to receive *fatwā*s condemning al-Subkī for handing orphans' property to Quṭlūbughā. See Ibn Ḥajar, *al-Durar al-kāmina,* 1/426-428.

Dīn Ibn Faḍl Allāh al-‘Umarī (d. 749/1349)—who, as a contemporary resident of Damascus was presumably well-informed of these events— Quṭlūbughā took an amount of 400,000 dirhems from the *makhzan al-aytām*. Moreover, Ibn Faḍl Allāh adds, “Alṭinbughā had (previously) borrowed 100,000 dirhems from it—God destroy him!—so he is the one who opened this door.”[859] While it is not mentioned by either author whether this money was ever returned, it does appear that Quṭlūbughā had the intention of returning this vast sum. According to Ibn Taghrībirdī, when the armies commanded by Quṭlūbughā and Alṭinbughā finally met at al-Quṭayfa, a town east of Damascus, Quṭlūbughā’s army was vastly outnumbered. So, he offered to make peace with Alṭinbughā on two conditions: (1) that the latter repay on Quṭlūbughā’s behalf the money that he borrowed from the orphans and (2) that Quṭlūbughā remain at his rank without suffering a demotion.[860] Although the two did not end up agreeing to these terms, it is a significant indication of the importance of orphans’ rights at this time that Quṭlūbughā sought to secure repayment of the loan he took as a condition for submitting to the opposite party.

Only two years later, another hefty loan was demanded from the *makhzan al-aytām*. This event is significant not only as evidence that the state continued to rely on the *makhzan* for emergency funds, but also because it confirms that absentees’ property was held in the *makhzan*, just like its counterpart in Cairo. According to al-Dhahabī, on the 13th of Rabī‘ II of the year 744/1343:

> The *qāḍī* Taqī al-Dīn al-Subkī, the Shāfi‘ī Chief Qāḍī, was asked to loan the Sulṭān’s Bureau (*dīwān al-ṣulṭān*) something from the absentees’ property (*amwāl al-ghuyyāb*) under his control, but he refused this adamantly. So then the Comptroller of the Bureaus (*Shādd al-Dawāwīn*) came along with some people from the Viceregent’s retinue and

[859] Shihāb al-Dīn Ibn Faḍl Āllāh al-‘Umarī, *Masālik al-abṣār fī mamālik al-amṣār*, 27 vol., ed. ‘Abdallāh b. Yaḥyā al-Sarīḥī, et. al. (Abu Dhabi: Al-Mujamma‘ al-Thiqāfī, 2001), 27/560. On this text and its author, see Elias I. Muhanna, “Ibn Faḍlallāh al-‘Umarī,” *Encyclopaedia of Islam, THREE*.

[860] Ibn Taghrībirdī, *al-Manhal al-ṣāfī*, 9/84.

> opened the *makhzan al-aytām*. They took 50,000 dirhems from it by force (*qahran*). Then they paid it to one of the Arabs (*ba'ḍ al-'arab*) to cover what was owed him from the Sulṭān's Bureau (*al-dīwān al-sulṭānī*). This was a significant event the likes of which was unknown.[861]

The reasons for this forced loan are not entirely certain. What is clear, however, is that the state in Damascus was encountering trouble covering its expenses. There could be many reasons for this. According to al-Maqrīzī, 744 A.H. "was one of the most onerous and hardest years."[862] Certainly, from an administrative and budgetary perspective, the year was disastrous. The Cairo Sultanate sent seven separate expeditions to Karak in an attempt to dislodge al-Nāṣir Aḥmad. Two other military campaigns were organized in Northern Syria: one to Little Armenia and another miserably unsuccessful campaign to confront the Beylik of Dulkadir in Armenia.[863] Moreover, the Arab tribes of Syria—usually clients of the Mamlūk State—rebelled in this year only a short while after the Comptroller forced the loan from the *makhzan al-aytām*.[864] It seems possible, therefore, that the immediate reason for forcing the loan was the premonition of rebellion among these clients.

I have identified no other record of any further loans or forced handouts from the *makhzan al-aytām* in the sources. As Table 1 shows, however, the position of *nāẓir al-aytām* was extant until after the arrival of the Ottomans in Syria in 1516. Moreover, the *makhzan* certainly continued to exist after the mid-8th/14th century—Ibn Ḥijjī mentions it in Rajab 796 (when he visited it personally), Shawwāl 796, and Dhū al-Qa'da 797 A.H. (again, when he visited it in

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[861] Abū al-Fidā' Ismā'īl Ibn Kathīr, *al-Bidāya wa'l-nihāya*, 21 vol., ed. 'Abdallāh b. 'Abd al-Muḥsin al-Turkī (Giza: Dār Hajr li'l-Ṭabā'a wa'l-Nashr wa'l-Tawzī' wa'l-I'lān, 1997), 18/466.

[862] Al-Maqrīzī, *al-Sulūk*, 3/408.

[863] *Ibid*. 402, 407.

[864] *Ibid*. 403, 407-408.

person).[865] On the occasion of the first of these visits to the *makhzan*, Ibn Ḥijjī provides a rare glance into the contents of the *makhzan*: "In it was about 6,000 *mithqals* of gold and more than 32,000 dirhems, in addition to the jewelry and copper in it. It also contained two *raṭl*s of rhubarb and two horns of butter (*qarnā zubād*)."[866] Because most of our information about the contents of the *makhzan al-aytām* (and the *mūda' al-ḥukm* for that matter) originates in narratives about attempts to acquire forced loans, it is easy to assume that it contained only cash. This description, however, shows that other valuables—including small amounts of food—were stored there on behalf of orphans or absent individuals. One can only wonder how long and for what purpose these items were kept in the *makhzan*.

The Nāẓir al-Aytām *in Damascus*

This section will briefly discuss the careers of the individuals identified in Table 1 as serving either as the *nāẓir al-aytām* or the *nāẓir makhzan al-aytām*. Several of these individuals are identified in the sources as either possessing a large fortune or acquiring other prestigious positions, indicating that the position of *nāẓir al-aytām* or *nāẓir al-makhzan* was either a stepping stone to wealth, prestige, or both. This appears to have been the case throughout the Mamlūk Period.

[865] Ibn Ḥijjī, 1/59, 1/129, 1/134.

[866] *Ibid*. 1/59. A *mithqāl* in the Mamluk Period referred to both a measurement of weight and to gold coins. One *mithqal* was equal to between 4.29 and 4.33 grams in this period. See Warren C. Shultz, "Mamlūk Metrology and the Numismatic Evidence," *Al-Masāq: Islam and the Medieval Mediterranean* 15, no. 1 (2003), 59-75. The *raṭl* varied according to country, province and even city throughout the Mamluk Period. The Damascene *raṭl* was equal to either 1.85 kilograms or 1.8072 kilograms. See E. Ashtor and J. Burton-Page, "*Makāyil*," *Encyclopaedia of Islam, Second Edition*. I admit that I am uncertain of the translation of *qarnā zubād*.

Ibn Ḥubūbī for example, went on to become the *muḥtasib* (market inspector) then the *wakīl bayt al-māl* (Agent of the Treasury).[867] Another *nāẓir al-aytām* who passed away in the early years of the Mamlūk Sultanate was wealthy enough to turn his house into an educational endowment that functioned both as a law college (*madrasa*) and a place where *ḥadīth* was taught (*dār ḥadīth*).[868] Similarly, Najm al-Dīn al-Azdī—who held the position "several times" before his death in 729/1329—was one of the well-known notables of Damascus ("*aḥad ru'asā' dimashq al-mashhūrīn*"). People were said to have become addicted to the sweet treats that he made at his home for gifts (the famous poet Ibn Nubāta wrote verses about desiring some).[869] The position of *nāẓir al-aytām* could also be combined with other employment within the judiciary: in the 8th/14th century Jamāl al-Dīn al-Zura'ī held the position while he served as a deputy judge to the Shāfi'ī chief *qāḍī*.[870] Al-Zura'ī would go on to reach the pinnacle of success in the judiciary, serving at different times as chief *qāḍī* of Cairo and the chief *qāḍī* of Damascus.

The prestige of the position does not seem to have decreased throughout the Mamlūk period. Only about four years prior to the Ottoman invasion and occupation of Syria in 917/1512, the current *nāẓir al-aytām*, Muḥibb al-Dīn al-Dusūqī was part of a successful plot to remove the Shāfi'ī chief *qāḍī*.[871] Following the arrival of the Ottomans, he appears to have remained in his

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[867] Quṭb al-Dīn al-Yūnīnī, *Dhayl mir'āt al-zamān*, 4 vol. (Cairo: Dār al-Kutub al-Islāmiyya, 1992), 3/27.

[868] 'Alam al-Dīn al-Birzālī, *al-Muqtafī li-tārikh ibn shāma: al-ma'rūf bi-tārīkh al-birzālī*, 4 vol., ed. 'Umar 'Abd al-Salām Tadmurī (Beirut: al-Maktaba al-'Aṣriyya, 2006), 1/53; al-Dhahabī, *Tārīkh al-Islām*, 52/295.

[869] Ibn Ḥajar, *al-Durar al-kāmina*, 4/136; al-Ṣafaḍī, *A'yān al-'aṣr wa-a'wān al-naṣr*, 5 vol., ed. 'Alī Abū Zayd, et. al. (Beirut: Dār al-Fikr al-Mu'āṣir, 1998), 3/505-506.

[870] al-Birzālī, *al-Muqtafī li-tārikh ibn shāma*, 2/529.

[871] Shams al-Dīn Ibn Ṭūlūn, *Mufākihat al-khillān fī ḥawādith al-zamān*, ed. Khalīl al-Manṣūr (Beirut: Dār al-Kutub al-'Ilmiyya, 1998), 296.

position and even enjoyed special status with the Ottoman viceregent. In the year 926/1520, he traveled to Aleppo along with a messenger for the local judge on behalf of the viceregent. Later that year, he was summoned to meet with the viceregent and, upon the latter's return to Damascus, walked ahead of him in procession along with the deputy judges of the city.[872]

In sum, the position of *nāẓir al-aytām* or *nāẓir makhzan al-aytām* appears to have been an important position within the social and political life of Damascus throughout the Mamlūk Period. It seems that this was seen as a position of great trust and responsibility. This does not mean that the position carried no moral risk. For example, Ibn Ḥajar writes that Shams al-Dīn al-Jazarī (the grandson of the historian al-Jazarī) is said to have carried out his duties "with humility, purity of tongue and a calm disposition," yet nevertheless suffered from serving under "bad judges (*quḍāt al-su'*)."[873] Another *nāẓir*, Ḍiyā' al-Dīn Ibn Tammām, is said to have resigned "out of fear for his faith and trustworthiness (*khawfan 'alā dīnih wa-amānatih*)."[874] The position, then, was not without risk even if a person was known for their honesty, likely due to the ability of the Mamlūk authorities or the Shāfi'ī chief judge to intervene. In addition, as we saw in Chapter Four, one required knowledge of accounting to do the job properly. It is probably for this reason that the famed jurist Ibn Taymiyya wrote that only a person who is not only trustworthy (*amīn*) but also "strong and an expert on what he is made responsible for (*illā man*

[872] *Ibid*. 400-401.

[873] Ibn Ḥajar, *Inbā' al-ghumr*, 2/471.

[874] Al-Dhahabī, *Tārīkh al-islām*, 50/318.

kān qawiyyan khabīran bi-mā wuliya ʻalayh)" should be appointed as a guardian of orphans' property.[875]

A Decentralized System for Preserving Orphans' Property?

The sources surveyed do not mention any forced loans or expropriations from the *makhzan al-aytām* after 744/1343. Yet, the economic woes of the Mamlūk Sultanate would only continue—the mid-14th century A.D. was the height of the economic power of the Sultanate.[876] Political factionalism also continued to be an inveterate problem. Why, then, is there no mention of a forced loan after this point? It is certainly possible that the sources simply failed to mention further occasions, but I would also like to submit an alternative explanation: the judiciary began using alternative methods of preserving and investing wealth that avoided accumulating the property of orphans and absent individuals in a central location. These decentralized practices of preserving wealth allowed the judiciary to continue to invest the property while simultaneously making it a much harder target for the central authorities.

The first bit of evidence for this hypothesis comes from a note in Ibn Ḥajar's biography of Tāj al-Dīn al-Subkī (d. 771/1370), the famed jurist, historian and judge. While serving as Shāfiʻī Chief *qāḍī* in Damascus, he experienced several hardships that led to either his resignation or removal from the judiciary, after which he was asked to return. Ibn Ḥajar writes that the circumstances for his final removal from the judiciary involved an investigation by the sulṭān (or his administrators) into orphans' property:

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[875] Taqī al-Dīn Aḥmad Ibn Taymiyya, *Majmūʻat al-fatāwā*, 37 vol., ed. ʻĀmir al-Jazzār and Anwar al-Bāz (Mansoura: Dār al-Wafā', 1997), 30/29.

[876] On the economic decline in Egypt and Syria, see Eliyahu Ashtor, *Levant Trade in the Middle Ages* (Princeton: Princeton University Press, 1983).

> One of the strongest reasons for the last occasion on which he was removed (from the judiciary) was that when the Sulṭān ordered that *zakāt* be collected from the merchants in Jumādā I of the year 69 (1367 A.D.), it was found that a great amount (of wealth) was in the possession of the testamentary guardians (*al-awṣiyā'*). However, it had been dispersed with the *Qāḍī*'s knowledge in exchange for receipts (*wuṣūlāt*) that did not indicate the name of the recipient. So it was demanded of the *nāẓir al-aytām* that he admit that they were received by the *Qāḍī*, but he refused. The matter ended with the removal of the *Qāḍī*.[877]

On the face of this, the report is evidence that al-Subkī embezzled a large amount of orphans' property which he had the testamentary guardians hand over to him. Yet the refusal of the *nāẓir al-aytām* to cooperate with the Sulṭān's inquiry indicates that the judiciary in Damascus was cooperating in the matter to hide the property from the Sulṭān. Given that large loans had previously been demanded of the *nāẓir al-aytām* in Damascus, this may have been a stratagem employed by the judiciary to hide the location of the property. Clearly the guardians were registered with the court, allowing them to be easily identified in case of a state inquiry like the one in 1369 A.D. Keeping track of these guardians was likely the role of the *nāẓir al-awṣiyā*, or Supervisor of the Testamentary Guardians, a position mentioned by Ibn Ḥijjī as being filled by a different person than occupied the position of *nāẓir makhzan al-aytām* in 797/1395.[878] So, keeping wealth in the hands of the guardians rather than the *makhzan* would not, in itself, protect the property from the hands of the Sulṭān or a rogue emir. Rather, in this case, the guardians only had blank receipts to show the state's agents. Where could the property have gone?

Al-Subkī may have simply embezzled the funds, but it is also possible that the money was given to third parties as deposits, loans or investments. This kind of complex network of financial obligations appears clearly in the unique diary-like text produced by the Damascene

[877] Ibn Ḥajar, *al-Durar al-Kāmina*, 3/234.

[878] Ibn Ḥijjī, 1/129-130.

notary, Ibn Ṭawq (834-915/1430-1509). This text, referred to by the author as his *Ta'līq*, which may be translated as "a summary report," contains near daily entries about the day-to-day life of the author and a slew of historical material of interest to the historian: from important events in Damascus and continuous meteorological reports to descriptions of domestic quarrels, meals the author ate, and even his own dreams.[879] For the purposes of this study, the *Ta'līq* is promising because its author worked as a professional witness (*shāhid*), and he kept a log of many of the different transactions, contracts or other legal actions to which he was a party. Unlike most annalistic histories produced during the Mamlūk Period, this author was possessed by a writerly impulse to record the details of these mundane events, and it is not improbable that part of his motivation in logging these events was to use it as an *aide-memoire*.[880] An analysis of several different notices in this text reveals a world in which the judiciary often used the trusted members of their network to provide loans and keep deposits on behalf of third parties, at times involving property belonging to orphans.

Part of the importance of these notices are not just their content but the positionality of the author within the judicial hierarchy in Damascus. Ibn Ṭawq was a student of one of the Supervisors of the Orphans, the *nāẓir al-aytām* and deputy judge Burhān al-Dīn Ibrāhīm b. 'Abd al-Raḥmān (d. 872/1467).[881] His closest friends were two members of the prestigious family of Shāfi'ī judges and scholars, the Ibn Qāḍī 'Ajlūn family. Both served in the judiciary themselves and, at one time, Ibn Ṭawq writes that he was sent by his companion the *Shaykh al-Islām* Taqī al-

[879] The translation of *Ta'līq* as "a summary report" is suggested by Boaz Shoshan. See Shoshan, 1.

[880] The author's purpose in writing the *Ta 'līq* remains uncertain. See Shoshan, 2-6; Torsten Wollina, "Ibn Ṭawq's *Ta'līq*. An Ego-Document for Mamlūk Studies," in *Ubi sumus? Quo vademus? Mamluk Studies – State of the Art*, ed. Stephan Conermann (Göttingen: Bonn University Press, 2013), 337-362.

[881] Shoshan, 1.

Dīn Ibn Qāḍī ʻAjlūn as an *amīn*, or trustee, to inventory an estate.[882] Although never identified as an *amīn al-ḥukm* (and, given the evidence presented in this chapter, it appears unlikely that this exact title was in common in Damascus at the time), he was clearly seen as a trustworthy person who regularly accepted deposits (*wadā'iʻ*) and facilitated transactions between third parties.[883]

For example, in Dhū al-Qaʻda 898/1493, a man who was leaving for the Ḥajj deposited a certain amount of money with Ibn Ṭawq and instructed him to give it to a specific merchant who was going to travel to Anatolia in order to buy livestock; the profit from the transaction was to be split between the two men.[884] Similarly, in Shawwāl 886/1481, a man deposited (*awdaʻ*) 600 dirhems with Ibn Ṭawq and instructed him to give it to another person in case the latter came to ask for it.[885] These two transactions were fairly simple, involving only three parties, but others were much more complex. For instance, in Ramaḍān 887/1482, Ibn Ṭawq received from one party 190 dirhems, which was partial repayment of a loan that a second party had taken. This loan was facilitated by Ibn Ṭawq on behalf of a third party—his niece. Yet this loan itself was not disbursed directly by the author but by some (unnamed) money changers (*ṣayārifa*).[886] In these transactions, Ibn Ṭawq appears as one node in a much larger network based on trust and mutual interest (some loans recorded by the author had interest rates of 25 or even 37 percent).[887]

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[882] *Ibid*. 22; Shihāb al-Dīn Aḥmad Ibn Ṭawq, *al-Taʻlīq: Yawmiyyāt Shihāb al-Dīn Aḥmad b. Ṭawq*, ed. Jaʻfar al-Muhājir (Damascus: Institut Français d'Études Arabes de Damas, 2000), 269.

[883] Shoshan, 23.

[884] Ibn Ṭawq, 1217.

[885] Ibn Ṭawq, 99.

[886] *Ibid*. 189.

[887] Shoshan, 117.

While it would be foolish to try to point to any one of the many nodes in these networks as a kind of bank, collectively these networks did provide financial services associated with modern banking institutions, including safekeeping cash and providing loans. The accumulation of wealth also made them targets for criminals. One notice for example, reads like a scene from a modern bank robbery: Ibn Ṭawq writes that the vaults of the moneychangers (*makhāzin al-ṣayārifa*) at a particular caravansary were robbed during the night and two trustees (*amīnān*) of the caravansary had been murdered.[888] Yet what is more striking than the superficial resemblances between any of these nodes and modern banks is the differentiated and diffuse nature in which members of the network circulated wealth. Whereas the caravansary—like the *makhzan al-aytām* or the *mūda‘ al-ḥukm*—was an obvious target for thieves or bankrupt emirs, a notary like Ibn Ṭawq was a much less obvious and tempting target for either. As a result of this trust, Ibn Ṭawq preserved items and property at times in an ad-hoc, private manner that would have eluded the investigations of the authorities into the location of this wealth. For example, his *shaykh*, Taqī al-Dīn, instructed him to keep a manumission document on behalf of an enslaved woman out of fear that the son of the manumitter might attempt to steal the document from her.[889] It seems unlikely that anyone knew—or needed to know—the location of this document except for the immediate parties involved.

At times, the financial transactions that Ibn Ṭawq logged involved orphans' property, and it is in these transactions that an alternative, decentralized system of preserving orphans' property comes to light. For example, in Dhū al-Ḥijja 887/1483, Ibn Ṭawq was present as a witness at the court of the Shāfi‘ī chief *qāḍī* while a mother of an orphan testified that she

[888] Ibn Ṭawq, 111.

[889] *Ibid*. 363.

received part of the repayment of a loan that the judge had taken from her son's property.[890] Later in the same year, Ibn Ṭawq mentions that he owed money to an orphan for payment for books.[891] He also testified that a woman received her and her children's portion of an inheritance.[892] In another instance, he was present as his *shaykh* (likely Taqī al-Dīn Ibn Qāḍī ʻAjlūn) bought books from a person selling them on behalf of adult and minor (orphaned) inheritors. The person, the author notes, had been authorized by the Shāfiʻī judge to sell the books on behalf of the inheritors.[893] In Ṣafar 904/1498, Ibn Ṭawq again witnessed the payment of money owed to orphans. Importantly, the author makes no mention of the *nāẓir al-aytām*, the *makhzan al-aytām* or any other formal title or place related to orphan's property. Orphans' property was lent, borrowed, invested and distributed, it would seem, continuously by individuals who did not necessarily have a formal title, let alone serve in the Orphans' Bureau (*Dīwān al-Aytām*). The absence of a central location for even depositing orphans' property appears clearly in a log from Rabīʻ II 905/1499. According to this entry, Ibn Ṭawq testified that a woman received 56 Ashrafī coins from the merchant Zayn al-Dīn ʻAbd al-Qādir, with whom she had previously deposited them. The coins belonged to her underage orphaned son.[894]

This system of depositing wealth with individuals rather than in a centralized institution was not without its own drawbacks. Ibn Ṭawq mentions that at one point he experienced

[890] *Ibid*. 220. See also a similar case on pp. 634, in which the Shāfiʻī judge purchases jewelry from orphans with a deferred payment of one year.

[891] *Ibid*. 220-221.

[892] *Ibid*. 249.

[893] *Ibid*. 264.

[894] *Ibid*. 905.

"distress (*nakad*)" because he had borrowed 3,000 dirhems from an estate. The inheritors, a woman and her adolescent son (*ibn murāhiq*) had been absent in Cairo but recently returned to Damascus, and Ibn Ṭawq was ordered to repay the amount he borrowed to the widow and orphan. After his request for an extension was refused, he was only able to repay the loan after borrowing the amount from an acquaintance.[895] In a nearly identical incident, the author reports that he experienced "a great ordeal (*ḥurqa shadīda*)" when a judge asked him to remit a deposit in his safekeeping. For some reason, he no longer had the cash in his possession and was forced to borrow money from his (adult) son and his wife (she gave it, he tells us, begrudgingly). He also had to request a further loan from an acquaintance. The whole experience may have made Ibn Ṭawq reconsider taking another deposit, as he writes, "O God, do not hold my sins against me nor my bad deeds. I have repented from (taking) the deposit (*wa-tubt 'an al-wadī'*)."[896]

In all, the evidence from Ibn Ṭawq's *Ta'līq* indicates that orphans' property was often loaned to or deposited with individuals. There is no mention of the *makhzan al-aytām*, which does not necessarily mean that one did not exist during his time. However, if it did exist, it is clear that it was not the only place where the property of orphans or absent persons was deposited. The preference during this period would seem to have been to entrust the property with individuals. Although this had the drawback of exposing the property to the risk that the individual may misplace the property or, as happened with Ibn Ṭawq, not be able to immediately remit the deposited wealth, it does seem to have the advantage of making it more difficult for a large amount of orphans' property to be expropriated by a corrupt administrator, a rebellious

[895] *Ibid*. 1152-1153.

[896] *Ibid*. 1723. It is ambiguous whether he means that he has repented from taking deposits in general or from taking this particular deposit which he apparently spent.

emir, or a cash-strapped sulṭān.

Conclusion

This chapter has surveyed and analyzed the evidence for practices of preserving and investing orphans' property in two provincial urban centers of the Mamlūk Empire: Qūṣ and Damascus. In Qūṣ and its environs, it was seen that the judiciary was at times able to resist attempts of the central authorities in Cairo to appropriate orphans' property. I argued that this was in part due to the distance from the capital and the decentralized nature in which orphans' property was preserved. No *mūda'* or *makhzan* appears to have existed in Upper Egypt, and therefore any demand on the orphans' property had to be made from individuals in the judiciary. In Damascus, however, a centralized location for storing and investing orphans' property did exist: the *makhzan al-aytām*. Although forced loans were demanded from this *makhzan* up to the mid-8th/14th century, the *makhzan* appears to have decreased in importance after this date. Part of this may have been due to a decrease in trade, but I have argued that the judiciary likely began relying on decentralized practices of preserving and investing orphans' property. Ibn Ṭawq's *Ta'līq* provides evidence for a diffuse network of trust in which several individuals were entrusted to keep orphans' property safe. Unlike in Egypt, moreover, the title *amīn al-ḥukm* does not seem to have been used regularly; instead the position of *nāẓir al-aytām* was responsible for orphans' property. It is significant that this title continued to carry some prestige into the early Ottoman Period in Damascus even alongside the existence of decentralized practices of preserving orphans' property. Unfortunately, it is not possible to determine on the basis of the sources available how much property continued to be supervised by the *nāẓir* in the 9th/15th and early 10th/16th centuries. Nevertheless, the continued existence of both a diffuse network of

individuals who (sometimes) were entrusted with orphans' property alongside the official position of *nāẓir al-aytām* carries an important lesson for the historian of the Islamic Middle Period: official titles could exist alongside other, parallel institutions and social practices that performed similar functions to those the office-holders nominally performed. Similar to the concept of "archival practices" studied by Hirschler and el-Leithy, the decentralized legal practices studied in this chapter should be seen as just as important, if not at times more, for preserving legal rights and upholding the rule of law. Of course, upholding the law could not be achieved by a diffuse network of individuals without a shared commitment to a written and universalized tradition of law. In the context of medieval Islamic societies, this tradition was, of course, *fiqh*. The development of this tradition as it relates to the rights of orphans and other individuals was discussed in Chapters 1 and 2. In the next chapter, it will be seen how Shāfiʿī jurists continued to express their commitment to this tradition while simultaneously allowing for gradual change within the tradition.

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Table 1

Name and Death	**Title**	**Madhhab Affiliation**
Abū al-‘Abbās Aḥmad b. al-Mufarraj b. ‘Alī al-Umawī (d. 650/1253)[897]	Supervised “*makhzan al-aytām*” for several judges; “*nāẓir al-aytām*”	Probably Shāfi‘ī
Abū al-Faḍl Yaḥyā b. Muḥammad Ibn al-Ḥubūbī (d. 671/1272)[898]	Responsible for “*naẓar al-aytām*”; Responsible for “*naẓar makhzan al-aytām*”	Shāfi‘ī
Abū ‘Abd Allāh Muḥammad b. ‘Umar b. Hilāl al-Azdī (d. 676/1277)[899]	Responsible for “*naẓar makhzan al-aytām*” for several years; *“nāẓir al-aytām*”; responsible for “*naẓar al-aytām*”;	
Ḍiyā’ al-Dīn Yūsuf b. al-Ẓuhayr Ibn Tammām (d. 678/1279)[900]	Responsible for “*makhzan al-aytām*”	

[897] ‘Alam al-Dīn al-Birzālī, *Mashyakhat ibn jamā‘a,* ed. Muwaffaq b. ‘Abd al-Qādir (Beirut: Dār al-Gharb al-Islāmī, 1988), 30; al-Dhahabī, *Siyar a‘lām al-nubalā’*, 23/281-282; al-Dhahabī, *Tārīkh al-islām*, 47/439*;* al-Ṣafadī, *al-Wāfī bi’l-wafayāt*, 8/120; ‘Abd al-Ḥayy Ibn al-‘Imād, *Shadharāt al-dhahab fī akhbār man dhahab,* 11 vol., ed. Maḥmūd al-Arnā’ūṭ (Beirut and Damascus: Dār Ibn Kathīr, 1986), 7/430.

[898] Ibn Kathīr, *Al-Bidāya wa’l-nihāya*, 17/507; al-Yūnīnī, *Dhayl mir’āt al-zamān,* 3/27; al-Dhahabī, *Tārīkh al-islām,* 50/79; al-Birzālī, *al-Muqtafī li-tārikh ibn shāma,* 1/268.

[899] Ibn Kathīr, *Al-Bidāya wa’l-nihāya*; *Dhayl mir’āt al-zamān*, 17/683, 18/315; al-Dhahabī, *Tārīkh al-islām,* 50/243; al-Birzālī, *al-Muqtafī li-tārikh ibn shāma*, 1/407-408.

[900] Al-Dhahabī, *Tārīkh al-islām,* 50/318.

Zakī al-Dīn Ibrāhīm b. ‘Uthmān Ibn al-Mu‘allim (d. 685/1286)[901]	Administrator at the Orphans’ Bureau (“*‘āmil dīwān al-aytām*”)	Ḥanafī
Nafīs al-Dīn Ismā‘īl b. Muḥammad b. ‘Abd al-Wāḥid al-Ja‘barī (d. 696/1297)[902]	“*nāẓir al-aytām*”; responsible for “*naẓar al-aytām*”	
Mu’ayyad al-Dīn ‘Alī b. Ibrāhīm Ibn al-Khaṭīb (d. 699/1300)[903]	Responsible for “*makhzan al-aytām*”; responsible for “*dīwān al-aytām*”	
Shams al-Dīn ‘Abd al-Qādir b. Yūsuf Ibn al-Khaṭīrī (d. 716/1316)[904]	Responsible for “*naẓar makhzan al-aytām*”	
Badr al-Dīn Muḥammad b. Aḥmad Ibn al-Hindī (d. 716/1316)[905]	Served in the administration of the Orphans’ Bureaue (“*khadam fī ‘imālat dīwān al-aytām*”)	Shāfi‘ī
Najm al-Dīn Aḥmad b. ‘Abd al-Muḥsin al-Dimashqī (727/1327)[906]	Responsible for “*naẓar al-aytām*”; responsible for “*naẓar*	

[901] Al-Birzālī, *al-Muqtafī li-tārikh ibn shāma*, 2/88.

[902] Al-Birzālī, *al-Muqtafī li-tārikh ibn shāma*, 1/53; al-Dhahabī, *Tārīkh al-islām*, 52/295; Ibn Kathīr, *Al-Bidāya wa’l-nihāya*, 17/701; Ibn al-‘Imād, *Shadharāt al-dhahab fī akhbār man dhahab*, 7/759; al-Ṣafadī records his death in 698 A.H., which must be a mistake. See *A‘yān al-‘aṣr wa-a‘wān al-naṣr*, 1/515.

[903] Al-Birzālī, *al-Muqtafī li-tārikh ibn shāma*, 3/71; al-Dhahabī, *Tārīkh al-islām*, 52/424; al-Ṣafadī, *A‘yān al-‘aṣr wa-a‘wān al-naṣr*, 3/245; *al-Wāfī bi’l-wafayāt*, 20/10.

[904] Al-Birzālī, *al-Muqtafī li-tārikh ibn shāma*, 2/519; al-Ṣafadī, *A‘yān al-‘aṣr wa-a‘wān al-naṣr*, 3/121-122.

[905] Al-Birzālī, *al-Muqtafī li-tārikh ibn shāma*, 4/218.

[906] Al-Birzālī, *al-Muqtafī li-tārikh ibn shāma*, 3/394; Ibn Ḥajar, *al-Durar al-Kāmina*, 1/223; Ibn Kathīr, *al-Bidāya wa’l-Nihāya*, 18/78.

	dīwān al-aytām"	
ʻImād al-Dīn Muḥammad b. Aḥmad Ibn al-Shayrajī (d. *circa* 728/1327-28)[907]	Responsible for "*naẓar al-aytām*" during the days of al-Qazwīnī	
Najm al-Dīn ʻAlī b. Muḥammad b. ʻUmar Ibn Hilāl al-Azdī (d. 729/1329)[908]	Responsible for "*naẓar al-aytām"*; responsible for "*naẓar dīwān al-aytām*"	
Jamāl al-Dīn Abū al-Rabīʻ Sulaymān b. ʻUmar al-Zuraʻī (d. 734/1333)[909]	Responsible for "*naẓar al-aytām*"	Shāfiʻī (became Shāfiʻī Chief Qāḍī in Cairo)
Muḥiyy al-Dīn Ismāʻīl b. Yaḥyā Ibn Jahbal (740/1339)[910]	Responsible for "*naẓar al-aytām*"	Shāfiʻī
Al-Sayyid al-Sharīf Jalāl al-Dīn Muḥammad b. Muḥammad al-Jaʻfarī (d. 740/1340)[911]	"*nāzir al-aytām*"	

[907] Al-Birzālī, *al-Muqtafī li-tārikh ibn shāma*, 2/381; Ibn Ḥajar, *al-Durar al-Kāmina* 5/46; al-Ṣafadī, *Aʻyān al-ʻaṣr wa-aʻwān al-naṣr*, 3/505-506.

[908] Al-Birzālī, *al-Muqtafī li-tārikh ibn shāma*, 2/417, 4/159; Ibn Ḥajar, *al-Durar al-Kāmina* 4/136; Ibn al-ʻImād, *Shadharāt al-dhahab fī akhbār man dhahab*, 8/159; Ibn Kathīr, *al-Bidāya wa'l-Nihāya*, 14/166.

[909] Al-Birzālī, 2/529; Ibn Ḥajar, *Muʻjam al-shaykha Maryam*, ed. Muḥammad ʻUthmān (Cairo: Maktabat al-Thiqāfa al-Dīniyya, 2010), 111-112; Ibn Ḥajar, *Rafʻ al-iṣr*, 164-165; al-Subkī, *Ṭabaqāt al-shāfiʻiyya al-kubrā*, 10/39-40.

[910] Ibn Kathīr, *al-Bidāya wa'l-Nihāya*, 18/226; al-Ṣafadī, *Aʻyān al-ʻaṣr wa-aʻwān al-naṣr*, 1/530-531.

‘Afīf al-Dīn Ibrāhīm b. Isḥāq al-Āmidī (d. 778/1376)[912]	Responsible for “*naẓar al-aytām*”	Ḥanafī
‘Izz al-Dīn Muḥammad b. Muḥammad al-Amāsī (d. 798/1396)[913]	*nāẓir al-aytām*; responsible for “*naẓar al-aytām*”	Ḥanafī
Najm al-Dīn ‘Abd al-Karīm b. Maḥmūd Ibn al-Sinjārī (d. 799/1397)[914]	*nāẓir al-awṣiyā’* and responsible for *naẓar al-aytām*	Shāfi‘ī
Salāḥ al-Dīn Ibn al-‘Afīf (d. after 802/1399)[915]	Responsible for “*naẓar al-aytām*"	Shāfi‘ī or Ḥanafī
Shihāb al-Dīn Aḥmad b. Muḥammad Ibn al-Jawāshinī (d. 809/1406)[916]	Nāẓir of “*makhzan al-aytām*”	Ḥanafī (became the Ḥanafī chief *qāḍī* in

[911] Muḥammad Ibn Rāfi‘, *al-Wafayāt*, 2 vol., Ṣāliḥ Mahdī ‘Abbās and Bashshār ‘Awwād Ma‘rūf (Beirut: Mu’assasat al-Risāla, 1982), 1/323. Ibn Kathīr also notes that one “Jalāl al-Dīn al-A‘yālī performed the Ḥajj pilgrimage in 731 A.H. However, given that there is no other mention of this individual in the sources that I can find, I assume that this is a copyist error and the name should read “Jalāl al-Dīn al-A‘nākī, which is the *nisba* of Jalāl al-Dīn al-Ja‘farī. See Ibn Kathīr, *al-Bidāya wa’l-Nihāya*, 18/336.

[912] Ibn Qāḍī Shuhba, *Tārīkh ibn qāḍī shuhba*, 3/517-518; Taqī al-Dīn b. ‘Abd al-Qādir al-Ghazzī, *al-Ṭabaqāt al-saniyya fī tarājim al-ḥanafiyya*, 4 vol., ed. ‘Abd al-Fattāh Muḥammad al-Ḥilw (Riyadh: Dār al-Rifā‘ī, 1983), 1/183-184.

[913] Abū al-Ṭayyib al-Makkī, *Dhayl al-taqyīd fī ruwāt al-sunan wa’l-asānīd*, ed. Kamāl Yūsuf Ḥūt (Beirut: Dār al-kutub al-‘ilmiyya, 1990), 1/255; Ibn al-‘Imād, *Shadharāt al-dhahab fī akhbār man dhahab*, 8/605; Ibn Ḥajar, *Inbā’ al-ghumr bi-abnā’ al-umr*, 1/520; Ibn Ḥijjī, 1/159.

[914] Ibn Ḥijjī, 1/218; Ibn Qāḍī Shuhba, *Tārīkh ibn qāḍī shuhba*, 3/383.

[915] I have been unable to determine the date of death of this fairly obscure individual. Ibn Ḥijjī notes that his grandfather was a Ḥanafī, and “it appears that he follows his grandfather’s *maddhab*,” but he spent most of his life dressing as a solider and had no legal training (“he only knows the craft of writing”). After being responsible for “*naẓar al-aytām*” at some point, he eventually convinced the governor of Tripoli (of Lebanon) to appoint him as the Shāfi‘ī judge of the city. Given that he was not a jurist nor had any training in *fiqh* whatsoever, Ibn Ḥijji ends his short entry on this event with the exasperation: “I wish I knew on the basis of what he makes judgements and on the basis of what authority. To God we belong and to Him we return.” Ibn Ḥijjī, 1/393. See also *Inbā’ al-ghumr bi-abnā’ al-‘umr*, 2/94.

[916] Al-Maqrīzī, *al-Sulūk*, 6/187-188; Ibn Ḥijjī, 1/129-130, 135.

		Damascus)
‘Alā’ al-Dīn ‘Alī b. Ibrāhīm al-Jazarī (d. 813/1411)[917]	Responsible for “*naẓar al-aytām*”	Shāfi‘ī
Burhān al-Dīn Ibrāhīm b. ‘Abd al-Raḥmān al-Zar‘ī (d. 872/1467)[918]	Responsible for “*naẓar al-aytām*”	Shāfi‘ī
Muḥibb al-Dīn ‘Abd al-Raḥmān b. Ibrāhīm al-Dasūqī (d. 927/1521)[919]	“*nāẓir al-aytām*”	Shāfi‘ī

[917] Ibn al-‘Imād, *Shadharāt al-dhahab fī akhbār man dhahab*, 9/151; Ibn Ḥajar, *Inbā’ al-ghumr bi-abnā’ al-‘umr*, 2/471; Ibn Ḥijjī, 2/957-958; al-Sakhāwī, *al-Ḍaw’ al-lāmi‘ li-ahl al-qarn al-tāsi‘*, 5/157.

[918] al-Sakhāwī, *al-Ḍaw’ al-lāmi‘ li-ahl al-qarn al-tāsi‘*, 1/64.

[919] *Shadharāt al-dhahab fī akhbār man dhahab*, 10/210; Najm al-Dīn Muḥammad al-Ghazzī, *al-Kawākib al-sā’ira bi-a‘yān al-mi’a al-‘āshira*, ed. Khalīl al-Manṣūr (Beirut: Dār al-Kutub al-‘Ilmiyya, 1997), 1/226; Ibn Ṭūlūn, 296, 400-401.

Chapter Six: Legal Stability and Innovation in the *Kitāb al-Ḥajr* in the Mamlūk Period

Introduction

This chapter establishes the centrality and authority of a particular body of Shāfi'ī texts of substantive law (*furū'*) for legal practice in the Mamlūk period. It is argued here that (1) the importance of these texts was reinforced by the Mamlūk leadership's commitment to Islamic legal (*shar'ī*) norms in theory and, often, in practice. Furthermore, this chapter shows that (2) common assertions of the authority of al-Nawawī and al-Rāfi'ī, the "two *shaykh*s" within the Shāfi'ī madhhab do not account for the importance of divergent opinions (*ikhtilāf*) during this period, and the existence of a large body of texts on substantive law that either bypassed or directly challenged the opinions of al-Nawawī and al-Rāfi'ī. This leads to a working hypothesis that authoritative opinions in the Shāfi'ī madhhab can be studied through careful attention to change, restructuring, and disagreement within the texts identified in §A. §B of this chapter then applies this hypothesis to the chapters on *hajr* found within the aforementioned texts of substantive law. I then argue on the basis of this analysis that the rules elaborated by jurists in chapters on *ḥajr* at times reflect legal practice. Moreover, they continue to allow for such a diversity of opinions—with prominent jurists disagreeing entirely with each other regarding the authoritative position of the *madhhab*—that the legal practice of supervising and investing orphans' property in the Mamlūk Period was formed due to a combination of the jurists' authorizing discourse on what is legal (*shar'ī*) in addition to the historical application of *siyāsa* by sulṭāns and judges. Legal practice, therefore, in the Mamlūk Period was determined by a combination of the weight of perduring institutions, *fiqh*, and the discretionary authority of both judges and sulṭāns.

§ A: The shared commitment to the *shar'* and a hybrid *madhhab*

Until quite recently, historians at times published serious scholarship on the condition of law and justice in the Mamlūk period with only the slightest reference, if at all, to those works of Islamic legal scholarship that actually attempt to describe authoritative positive laws – the *furū'* texts. This is in part, of course, due to the abundance of other genres of Muslim scholarship produced between the 13th and 16th centuries of unmistakable relevance to the study of the law from topographical histories, chronicles, biographical works of various natures to *fürstenspiegel* and homiletics. Meaningful, soundly-documented studies could be produced with little to no reference to what jurists working and writing in Egypt and Syria in this period actually had to say about what the law should be.[920]

But the issue was not just a surfeit of source material. Conceptually, the *Sharī'a*'s relevance to daily life was considered to be limited to a small number of cases; the *ulamā'* themselves are said to have "had accepted the recognition merely of the theoretical validity of the Sharī'a."[921] Effective research on legal practice, therefore, often focused on the *maẓālim* courts run by the sulṭān and his emirs. These latter courts existed before the Mamlūk period, but they played a particularly important public role in legitimizing the sulṭān by placing him in direct contact with petitioners who could bring complaints to him (or his representatives) against government abuse. Eventually, these courts expanded their jurisdiction to hear legal cases that previously were considered exclusive to the *Sharī'a* courts, such as cases of marriage disputes

[920] An example of this kind of quality scholarship that relies primarily on non-legal texts (e.g., historical narratives) is Joseph H. Escovitz, *The office of qâḍî al-quḍât in Cairo under the Baḥrî Mamlûks* (Berlin: Klaus Schwarz Verlag, 1984).

[921] Jørgen S. Nielsen, *Secular Justice in an Islamic State: Maẓālim under the Baḥrī Mamlūks, 662/1264–789/1387* (Leiden, 1985), 95.

and bankruptcy. Such courts did not necessarily follow the formal reasoning of the Islamic legal schools, rather applying *siyāsa*— a word often translated as "administrative justice."[922] A previous generation of scholars once insisted that the "royal" and "secular" justice served at these courts stood in frank opposition to the justice delivered at a *sharī'a* court.[923]

In part, the imagined wedge between the *sharī'a* norms advocated by the jurists and the actual application of law resulted from a pernicious passage in al-Maqrīzī's *Khiṭaṭ* that produced a lively debate on the meaning of the word *siyāsa*. Al-Maqrīzī, lamenting the increasing presence of *hujjāb* and other military officers who gave judgment according to *siyāsa* in front of their doorsteps, often without any authorization from the sulṭān, made a fascinating, if completely wrong-headed, claim that the *siyāsa* applied in these *maẓālim* courts was actually a form of Chinggis Khan's law—the *yāsa*—and that the word *siyāsa* itself derived from a combination of the word *yāsa* with the Persian word for three. Although the etymological argument is absurd on all counts, scholars continued to treat al-Maqrīzī as an authority on the *yāsa* until David Ayalon published a series of articles in *Studia Islamica* showing that al-Maqrīzī did not have direct knowledge of the *yāsa*, and that he manipulated his source(s) in order to condemn the legal

[922] Bosworth, et. al., "Siyāsa", *EI*[2]

[923] *C.f.* Nielsen, *ibid.* (a work whose title indicates the extent to which the *mazālim* is perceived by that author as distinct from the *sharī'a*). That author also stated that *siyāsa* "is the prerogative of the head of state—whether caliph or sultan—to set aside the Shari'a, to supplement it, and to influence its interpretation and application." Nielsen, "Mazālim and Dār al-'Adl Under the Early Mamluks," *Muslim World* 66 (1976) 114-132, 123. See also the analysis of the *mazālim* courts in Robert Irwin, "The Privatization of 'Justice' under the Circassian Mamluks," *MSR* 6 (2002), 63-70, where he speculates that the justice offered by these courts during the last century of Mamlūk rule "will not have differed very much from that offered by Don Corleone in Mario Puzio's novel *The Godfather*." *Ibid*. 70.

practice of the *mazālim* in the 15th century.[924] While Ayalon proved that the Mamlūks were not applying the *yāsa* in their interpretation of *siyāsa*, al-Maqrīzī's contention that the *siyāsa* is something distinct, beyond and essentially foreign to *sharī'a* continued to be accepted by several scholars.

Since Yossef Rapoport's well-known article on the relationship of *siyāsa* and *sharī'a* in the Mamlūk era appeared in 2012, the situation has changed dramatically.[925] No longer can it be assumed that the *siyāsa* stood outside the legal norms advocated by the *'ulamā'*. Already, in a 2009 article, Albrecht Fuess had argued that the *maẓālim* were fundamental to the image of a virtuous Muslim ruler who upheld justice and defended the weak in Mamlūk society. Even if individuals' use of *siyāsa* in the *maẓālim* was criticized, "the institution as such was never questioned" by any member of the society.[926] Rapoport took this argument one step further by showing that *siyāsa* and *sharī'a* were not two distinct concepts during the period, standing in an antagonistic or even apathetic relationship to one another, but, rather, that "[f]or many Mamluk jurists, the ruler's *siyāsah shar'īyah*—governance according to Islamic law—is a requirement of the *shari'ah*, not an external intrusion."[927] In fact, one can point out that *siyāsa*, long before the Mamlūk period, was portrayed as something the ruler should employ to facilitate respect for the

[924] David Ayalon, "The Great Yāsa of Chingiz Khān. A Reexamination (Part A)," *Studia Islamica* 33 (1971), 97-140; "The Great Yāsa of Chingiz Khān (Part B)," *Studia Islamica* 34 (1971), 151-180; "The Great Yāsa of Chingiz Khān. A Reexamination (Part C1)," *Studia Islamica* 36 (1972), 113-158; "The Great Yāsa of Chingiz Khān: A Reexamination (Part C2). Al-Maqrīzī's Passage on the Yāsa under the Mamluks," *Studia Islamica* 38 (1973), 107-156."

[925] Rapoport, "Royal Justice and Religious Law: *Siyāsah* and Shari'ah under the Mamluks," *Mamluk Studies Review* 16 (2012), 71-102.

[926] Albrecht Fuess, "*Ẓulm* by *Maẓālim?* The Political Implications of the Use of *Mazālim* Jurisdiction by the Mamluk Sultans," *MSR* 13.1 (2009), 121-147, 142.

[927] Rapoport, "Royal Justice and Religious Law," 75.

law by removing obstacles in the path of fulfilling the moral and legal norms of the *sharī'a.*[928] By the Mamlūk Period, the public affirmation of this commitment to justice and the *sharī'a* became a fundamental part of the sulṭān's duties, something they inherited from their Ayyūbid and Zangid predecessors.[929] Even in cases where *maẓālim* courts produced judgments at obvious variance with the rulings of the *sharī'a*, this was sometimes done in the interest of equity.[930] In this sense, we can speak of a shared commitment to upholding justice, despite procedural differences in the two courts.

The use of *siyāsa* to bolster confidence in the justice of the Mamlūk state was not limited to the *maẓālim* courts, but extended to a variety of duties, including collecting taxes, directing diplomacy and warfare, appointing people to positions of responsibility, and more. One particularly significant sphere of action that fell within the sphere of *siyāsa* was the structuring of the judiciary itself. As Rapoport points out, the Mamlūk sulṭāns and military officers not only oversaw courts, but also were heavily involved in creating and structuring the judicial system. He identifies three distinct periods of Mamlūk involvement in the judicial system: (1) starting in 1265 A.D. with Baybars I's appointment of four chief judges, one from each *madhhab*, and the

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[928] This is clear in the *Siyāsat-nāma* of the renowned vizier Niẓām al-Mulk, where he writes in the introduction, "Whenever there occurs any disobedience or contempt for the *sharī'a* by the people (lit: *the servants*) or any shortcoming in their obedience to the commands of God (lit: the Truth), and he wishes to punish them and make them taste the retribution for their deeds….the wrath of God overtakes those people and He forsakes them for the vileness of their disobedience….Then by divine decree one human being acquires some prosperity and power, and according to his desserts God bestows good fortune upon him and gives him wit and wisdom, wherewith he may employ his subordinates—each according to his merits—and confer upon each a dignity and a station proportionate to his power." Niẓām al-Mulk, *The Book of Government or Rules for Kings,* 2nd ed., trans. H. Darke (London: Routledge & Kegan Paul, 1978), 9; *Siyāsatnamah* ed. M. Qazwīnī (Tehran: Kitābfarūshī Tūrī, 1955). I have slightly modified Darke's translation to better capture the meaning of the original.

[929] Rabbat, "The Ideological Significance of the *Dār al-'Adl*," *International Journal of Middle East* Studies 27 (1995), 3-28, esp. pp. 5, 19-22.

[930] Rapoport, "Royal Justice and Religious Law," 89-91.

building of the Dār al-'Adl. During this period, the *maẓālim* courts were mostly limited to cases involving criminal law; (2) starting around 1350 A.D., these latter courts started to hear cases of family law and debt, which were previously reserved for *Sharī'a* courts. The Dār al-'Adl was also moved closer to the civilian population, indicating greater involvement in mundane legal cases; and (3) during the final decades of the Cairo Sultanate, Sulṭāns Qāytbāy and Qānsawḥ al-Ghawrī "present themselves as champions of the *shari'ah* and openly dispute the formalistic doctrines of the judiciary."[931] This chronology is the first attempt to account for changes within the Mamlūk legal system across the roughly 250 years of its existence. However, it focuses primarily on the *maẓālim* courts, and not on the Mamlūk sulṭāns' role in structuring the *shar'ī* courts except for Baybars' initial reforms. Other chapters in this dissertation help tell this story, but, here it will help to cite a view examples of Mamlūk intervention into the structure of the *Shar'ī* courts in order to show the extent to which Mamlūk sulṭāns and their senior officers were involved in shaping and maintaining the Sharī'a courts.

In addition to Baybars' judicial reforms—discussed in Chapter Four—there were a number of interventions undertaken by Mamlūk sulṭāns below the level of the chief judges (where the eyes of modern historians rarely probe). For example, in 755/1354 a number of witnesses (*shuhūd*) who were involved in forgery were publicly punished.[932] Then, in 764/1363, a sultanic decree (*marsūm sulṭānī*) was issued "banning the legal agents *(wukalā')* who were present at the courts of the judges in Egypt and Syria because of their great deception, conniving and dexterity in various evils (*li-katharat khidā'ihim wa-makrihim wa-tahadhlaqihim fī*

[931] *Ibid*. 76.

[932] Al-Maqrīzī, *al-Sulūk* 4/197.

tanawwu‘ al-shurūr).”[933] A similar incident occurred in 774/1372 when the powerful emir, Uljāy al-Yūsufī, ordered “that only four (notaries) sit at each of the notary offices (*ḥawānīt al-shuhūd*), and instructed each of the chief judges to only allow those notaries who belong to his own *madhhab* to sit.” In response, the *shuhūd* rallied and convinced the sulṭān to issue a decree (*marsūm sultānī*) reversing the emir’s decision.[934] Then in 799/1397, the judges were ordered (presumably by the sulṭān) to review all the notaries and remove those who either had no or poor standing in the community. After they were removed, they, again, successfully petitioned to be returned to their positions.[935] Restrictions on the number of individuals filling certain judicial positions was not limited to the notaries. In 782/1380, for example, a sultanic decree (*marsūm sulṭānī*) was issued declaring that each chief judge could only appoint four deputies. In this case, al-Maqrīzī makes his admiration of this decision explicit:

> People were relieved to be free of the deputies of the courts. They are a group of people who earn a living by adjudicating between people. To do this, they form assemblies in mosques, *madāris*, or notary offices, and they split the profit from what they make from giving testimony for people with the notaries. This came to an end through the mediation of Chief Judge Burhān al-Dīn Ibrāhīm Ibn Jamā‘a, thank God.[936]

While the details regarding the disagreeable behavior of these deputies are sketchy in al-Maqrīzī’s account, it is clear that the sulṭān’s intervention in this case was not seen as an intervention into a pure sphere of *sharī‘a* authority, but was, rather, instigated by the intervention of the Shāfi‘ī chief judge. This incident can be compared to another case in 786/1384 when the sulṭān permitted the deputies of the recently deceased Ḥanafī chief judge to remain in their

[933] *Ibid*. 4/275.

[934] *Ibid*. 4/351.

[935] *Ibid*. 5/439.

[936] *Ibid*. 5/94.

positions, thereby allowing the courts to continue to function before a replacement was found.[937] Al-Maqrīzī also notes an identical incident in the year 793/1391 with the difference that the deceased chief judge was a Mālikī and the person who gave permission to the deputies was not the sulṭān but an emir.[938]

Even at the highest levels, the composition of the judiciary was open to change at the sulṭān's discretion. For example, in 768/1366, a Ḥanafī *qāḍī* was appointed to hold court in Alexandria for the first time; previously, there had only been one Mālikī judge in Alexandria.[939] This brings up another important point about changes within the judicial system: much of what has been written on the subject reflects the urban centers in Cairo, Damascus, and Jerusalem (thanks to the collection of legal documents discovered in the latter city). Although a number of cities besides Damascus and Cairo had four judges, *only* the Shāfi'ī chief *qādi* had deputies (*nuwwāb*) in the provinces of Egypt.[940] In other words, the plurality of *madhhabs* familiar to historians of Islamic law during this period is primarily an urban, not rural, phenomenon.

Finally, sulṭāns interfered to remove judges or their deputies who either did not please them or did not follow their *madhhabs*. Formally, deputies were representatives of the chief judge, yet, as evidenced above, sulṭāns and powerful emirs could and did intervene between the chief judge and his deputies. Such an intervention occurred in 781/1379 when two Ḥanafī deputies were removed for not following their *madhhab* on the issue of determining paternity

[937] *Ibid*. 5/164.

[938] *Ibid.* 5/312.

[939] *Ibid.* 4/297.

[940] Rapoport notes that four chief judges were also appointed in Aleppo, Tripoli, Hama, Safed, Jerusalem and Gaza by the end of the 14th century, with Hanbali and Maliki judges being installed in Safed as late as 786/1384. Rapoport, "Legal Diversity in the Age of Taqlīd," 210, 213.

after the divorce of a married couple.[941] Similarly, the Mālikī Chief Judge Jamāl al-Dīn ʻAbd al-Raḥmān Ibn Khayr al-Mālikī was removed from office in 786/1384 "because he ruled in a case in which the Mālikī *fuqahā'* determined he was wrong."[942]

It is clear from these examples that the Mamlūk sulṭāns and senior officers played an important and (in the eyes of the many of the legal scholars) legitimate role in structuring and maintaining the integrity of the judicial system throughout the Mamlūk period. They were especially active in ensuring that each *madhhab*'s courts applied its own doctrines. This supports Rapoport's argument that "within the context of the Mamlūk judiciary, the *madhhab* was primarily a fairly codified set of law."[943] Studies by Sherman Jackson and Mohammed Fadel on Maliki legal theory and *mukhtaṣar*s (succinct synopses of longer, authoritative texts), respectively, indicate that the *madhhabs* were consolidating around a fairly uniform set of rules in response to the legal and social conditions of the 13th century.[944] The continued use of *siyāsa* authority to organize the judiciary and discipline those judicial officials who strayed from the opinions of their *madhhab* indicates that this process of consolidation was actively encouraged by Mamlūk state policies. In order to discover the rules applicable to a sphere of legal action—here, those cases related to legal interdiction—it follows that one can read the most authoritative *mukhtaṣar*s and legal commentaries for the school of law under investigation. Nevertheless,

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[941] Al-Maqrīzī, *al-Sulūk*, 5/68.

[942] *Ibid.* 5/165.

[943] Rapoport, "Legal Diversity in the Age of Taqlīd," 226. Some of the evidence I cited above was also cited by Rapoport. However, he did not indicate there the extent of the sulṭāns' and officers' intervention into the lower levels of the judiciary.

[944] Fadel, "Social Logic of *Taqlīd* and the Rise of the Mukhtaṣar," *Islamic Law and Society* 3, no. 2 (1996), 193-233; Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī*, Studies in Islamic Law and Society (Leiden: Brill, 1996), 142-184.

identifying which Shāfi‘ī texts held the most authority during the Mamlūk Period is a harder task than one might assume.

Although it is often thought that the opinions expressed by the jurist-authors al-Rāfi‘ī (d. 623/1226) and al-Nawawī (d. 676/1277) in their texts of positive law (*furū‘*) were considered to be the most authoritative for most of the Mamlūk period, the evidence for this is thin.[945] It is undoubtable that in the centuries following the fall of the Mamlūk sultanate, the Shāfi‘ī *madhhab* consolidated around the opinions of al-Rāfi‘ī and al-Nawawī. For example, Muḥammad b. Sulaymān al-Kurdī (d. 1194/1780) wrote that there are two kinds of *muftīs*: those who can perform *tarjīḥ* (authorizing a single opinion) within the *madhhab*, and those who cannot. The latter kind of *muftī* can only follow the opinions of the reputable 16th century scholars, Ibn Hajar al-Haythamī (d. 974/1566) and Shams al-Dīn al-Ramlī (d. 1004/1595).[946] No one in his age, al-Kurdī argues, has reached the level of *tarjīḥ* in the *madhhab*, but, if they had, they would be limited to selecting between the opinions expressed in the works of al-Rāfi‘ī and al-Nawawī.[947] These works, in his opinion, express the entire range of the valid opinions in the *madhhab*. A similar position was taken by Ibn Ḥajar al-Haythamī, who argued that *fatwās* could only be given

[945] For a recent expression of this opinion, see Mahmood Kooria, “Cosmopolis of Law: Islamic Ideas and Texts across the Indian Ocean and the Eastern Mediterranean,” Ph.D. diss., Leiden University, (2006), 11 and Rapoport, “Legal Diversity in the Age of Taqlīd,” 215.

[946] Muhammad b. Sulayman al-Kurdī, *al-Fawā’id al-madaniyya fī-man yuftā bi-qawlih min a’immat al-shāfi‘iyya*, ed. Bassām ‘Abd al-Wahhāb al-Jābī (Beirut: Nursabah & Jaffan Wa Jabi, 2011), 38; 59.

[947] *Ibid*.

on the basis of the two *shaykh*s' writings, and his student, Zayn al-Dīn al-Malībārī, argues that this was the position of the *madhhab*.[948]

But throughout the Mamlūk era, the position of the two was never so secure. A number of texts were written opposing or modifying al-Nawawī's views. One of the most important of these texts was the *Muhimmāt ʻalā al-Rawḍa*, composed by Jamāl al-Dīn al-Isnawī (d. 782 A.H.), which spawned at least 22 commentaries and abridgments.[949] Other Shāfiʻī authors writing during the period circumvented al-Rāfiʻī and al-Nawawī by commenting directly on texts written before the latter two. For example, Amīn al-Dīn al-Tabrīzī's commentary on al-Ghazālī's *Wajīz* was further commented on at least 14 times during the Mamlūk period (and only *twice* in the centuries after!).[950] An even earlier text, al-Mahāmilī's (d. 415 A.H.) *Lubāb al-Fiqh*, apparently was revived in the 9th/15th century when Abū Zurʻa al-ʻIrāqī (d. 836 A.H.) composed a *mukhtaṣar* on it, which then was commented, versified, or abridged 10 times before the fall of the Sultanate.[951] More examples could be cited. The point is that the thesis that Shāfiʻī law was "codified" in the early Mamlūk period in the works of al-Rāfiʻī and al-Nawawī is unfounded. Rather, these texts were undergoing a process of canonization in which their authority was continuously negotiated, and even directly challenged. Although the increasing reliance on these texts did produce a relatively stable set of laws, the jurisprudential tradition also allowed for

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[948] Zayn al-Dīn Aḥmad Al-Malībārī, *Fatḥ al-muʻīn bi-sharḥ qurrat al-ʻayn bi-muhimmāt al-dīn*, ed. Bassām ʻAbd al-Wahhāb al-Jābī (Beirut: Dār Ibn Ḥazm, 2004), 623.

[949] ʻAbd Allāh Muhammad al-Habashī, *Jāmiʻ al-shurūh wa'l-ḥawāshī: muʻjam shāmil li-asmā' al-kutub al-mashrūḥa fī al-turāth al-islāmī wa-bayān shurūḥihā* (Abu Dhabi: al-Mujamma' al-Thiqāfī, 2004), 1957-1960.

[950] *Ibid.* 1573.

[951] *Ibid.* 1521.

flexibility and even innovation. As will be seen in §B of this chapter, these texts were useful for skilled jurists as a starting point in a debate about the authoritative opinion of the *madhhab* that was in no way limited to the opinions and arguments advanced by al-Rāfiʿī and al-Nawawī.

A similar conclusion can be reached through examining the contents of biographical dictionaries composed during the period. For example, Tāj al-Dīn al-Subkī (d. 756/1355) claimed in his history of the Shāfiʿī school that his father, Taqī al-Dīn, was more knowledgeable than al-Nawawī.[952] Another jurist, Ibn al-Rifʿa (d. 710/1310) was considered by Ibn Qādī Shuhba (d. 851/1448) to be a *mujtahid muṭlaq* on par with al-Rāfiʿī; Ibn Qāḍī Shuhba stated that Ibn al-Rifʿa's massive commentary on al-Ghazālī's *Wajīz* was the most important, even though al-Rāfiʿī's most important work of *furūʿ* was also a commentary on this same text.[953] Biographical texts also indicate that al-Nawawī's teacher, ʿAbd al-Raḥmān b. Ibrāhīm al-Fazārī (d. 690/1272), who had the nickname "al-Farkāḥ (the bow-legged)," and outlived al-Nawawī, was considered to be more authoritative for a time than al-Nawawī. Ibn Kathīr refers to him as "the unopposed *shaykh* of the *madhhab* during his time…one of the *mujtahids*, the *faqīh* of Syria."[954] Al-Ṣafadī draws an even starker contrast between the two: "he was a more knowledge in *fiqh*, more intelligent, and a better debater than Shaykh Muḥyī al-Dīn by far. It is told that he used to say, 'What did al-Nawawī say in his trash (*mazbala*)—meaning *al-Rawḍa*."[955] Nevertheless, in the

[952] Tāj al-Dīn al-Subkī, *Ṭabaqāt al-shāfiʿiyya al-kubrā*, 10/169.

[953] R. Kevin Jacques, *Authority, Conflict, and the Transmission of Diversity in Medieval Islamic Law*, Studies in Islamic Law and Society (Leiden and Boston: Brill, 2006), 237, 245.

[954] Ibn Kathīr, *Ṭabaqāt al-shāfiʿiyya*, ed. ʿAbd al-Ḥafīẓ Manṣūr (Beirut: Dār al-Madār al-Islāmī, 2002), 831.

[955] Al-Safadī, *al-Wāfī bi'l-Wafayāt*, 18/58-59.

decades after al-Nawawī's death, his standing within the *madhhab* solidified. According to Ibn Ḥajar, for example, a *faqīh* and *muftī* by the name of Taqī al-Dīn Ismā'īl b. 'Alī al-Qalqashandī (d. 778/1376) "was considered an authority in transmitting the *madhhab* because he could cite *al-Rawḍa* from memory."[956]

If a consensus was slowly emerging, therefore, that the *fiqh* texts composed by al-Nawawī and al-Rāfi'ī were highly authoritative in the Shāfi'ī *madhhab*, this in no way implies that their opinions were not still open to revision or even complete opposition by qualified jurists within the Shāfi'ī *madhhab*. In the next section, it will be seen how two of these authors' most commonly used texts in the Mamlūk Period spawned a textual tradition on law that was open to additions, reversals of their position, and divergent opinions. The analysis in the next chapter will argue that these interventions into the textual tradition by their commentators are valuable evidence of the continued interaction of *fiqh* and legal practice during the thirteenth to fifteenth centuries in Egypt and Syria.

§B: Innovation and Stability in Shāfi'ī Jurisprudence on *Ḥajr* in the Mamlūk Period

How did the normative discourse on orphans in Mamlūk-era Syria and Egypt develop within works of positive law, *furū'*, composed during this period? What kinds of limitations on possible rules did the gradual acceptance of the legal works of al-Nawawī and al-Rāfi'ī entail? Were texts on positive law in the Shāfi'ī *madhhab* limited to the positions of these two jurists? These texts, invariably organized according to topical chapters, are replete with scattered discussions of the legal status, rights and duties of orphans and their analogs, but one chapter—the *Kitāb al-Ḥajr*—contains the most sustained, complete discussion of these individuals and

[956] Ibn Ḥajar, *al-Durar al-Kāmina*, 1/370.

their rights. The basic methodology of this chapter is philological: the chapters on *ḥajr* in a set of five related texts spanning a period of 250 years are analyzed and compared in order to draw conclusions about change and stability in the legal discourse during the period. The requirement of referring to a relatively fixed-set of texts of law, as Mohammad Fadel has argued, is an important mechanism in a legal-system that expresses "the desire for regular and predictable legal outcomes, akin to what modern jurisprudence terms the 'rule of law': the ideal that legal officials are bound to pre-existing rules."[957] If the texts studied here exhibit a wide variety and diversity of rules, the fixed nature of the *madhhab* should be questioned and its role in establishing the rule of law may be negligible. On the other hand, if they do exhibit agreement on a large number of rules, then it can be concluded that the rules of interdiction (*ḥajr*) were relatively stable during the period. As will be seen shortly, the five texts studied here reveal a high-level of uniformity while also including, and at times introducing, variant rulings that allowed for a moderate level of discretion in the selection of the correct rulings.

The method employed here—studying and comparing a set of related *fiqh* texts—is surprisingly unusual, even for a study of Islamic law during the Middle Periods, and so requires some justification. For scholars of the 20th century, the tradition of Islamic law in the Late Middle Period was hardly worthy of study. Sometime around the fall of Baghdad in 1258, Arabic and Islamic scholarship was supposed to have entered a period of stagnation or decline. The proliferation of works of commentary was seen as a mark of intellectual failure. Islamic law was seen as particularly rigid, in large part due to the supposed intellectual laziness and lack of creativity introduced by exchanging the independence of *ijtihād* for the inflexibility of *taqlīd* (deference to past authorities). For example, N.J. Coulson wrote:

[957] Fadel, "The Social Logic of *Taqlīd*," 197.

> From the tenth century onwards the effect of the doctrine of *taqlīd* was mirrored in the literature of the law. This consisted mainly of a succession of increasingly exhausting commentaries upon the works of the first systematic exponents of the doctrine such as Mālik, ash-Shaybanī and ash-Shāfiʿī. Further glosses were appended to these commentaries; different views and lines of development were collated and amalgamated, and concise abbreviated compendia were produced. Authors, almost without exception, betrayed a slavish adherence, not only to the substance but also to the form and arrangement of the doctrine as recorded in the earliest writings.[958]

If the previous century was marked by a condescending suspicion of the merits of Muslim legal scholarship in the Later Middle Period, scholars of the 21st have rejected their predecessors' uninspiring depictions of "slavish adherence."[959] For Islamic legal history, the studies by Behnam Sadeghi and Matthew Ingalls have argued that, far from a mindlessly copying the doctrine of previous generations, the writings of Muslim jurists after the 13th century consistently depart from the "canonical" positions of previous authorities, even when they appear to be merely explaining the positions of their forebearers.[960] According to Ingalls, a number of "paradoxes" subtends the relationship between the foundational text (the *matn*) and the commentary (the *sharḥ*): (1) "a commentary utterly depends on a foundational text" but it is also true that the commentary controls and shapes "both form and substance" of the foundational text as presented in the commentary; (2) although commentary attempts to make present the

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[958] N.J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 84; also quoted in Matthew B. Ingalls, "Zakariyyā al-Ansārī and the Study of Muslim Commentaries from the Later Islamic Middle Period," *Religious Compass* 10/5 (2016), 118-130, 119. See Ingalls *ibid*. 118-119 for a critical discussion of similar comments by previous generations of scholars.

[959] For the field of Arabic literature, which above all has most clearly problematized the judgments inherent in periodization into "classical" and "post-classical," see for example Thomas Bauer, "In Search of 'Post-Classical Literature': A Review Article," *MSR* 11/2 (2007), 137-167 and Michael Cooperson, "The Abbasid 'Golden Age': An Excavation," *Al-ʿUṣūr al-Wusṭā* 25 (2017), 41-65.

[960] Behnam Sadeghi, *The Logic of Law Making in Islam: Women and Prayer in the Legal Tradition*; Matthew Ingalls, "Recasting Qushayrī's *Risāla* in Fifteenth-Century Egypt," *Journal of Sufi Studies* 2 (2013), 93-120; *idem*. "Šarḥ, Iḫtiṣār, and Late-Medieval Legal Change: A Working Paper," *Annemarie Schimmel Kolleg Working Paper* 17 (2014).

significance and worldview of a canonical text, it can only do this by making the foundational text speak to the worldview of the present; and (3) commentaries through a "professional fiction" attempt to obscure the commentarial voice by hiding being the authority of the text. Often, this is done by focusing on anomalies that are meaningful or surprising to the present audience, thereby excluding parts of the text that carry less relevance. At times, this can result in an entirely new reading of the foundational text.[961]

The methodology adopted here is inspired by these studies. The paradoxes outlined by Ingalls are opportunities for researchers to expand our knowledge of change and stability in the legal discourse. In a regime of *taqlīd,* in which the model of authority generally required legal scholars to advance legal arguments in the form of *taṣḥiḥ*, or "rule-review," and *tarjīḥ*, or "rule-formulation," a legal historian cannot simply pick a single text, even a *fatwā,* and claim that the norms described in the text are representative of the entire legal discourse of the age, even of the author's *madhhab*.[962] A single text could be an anomaly, it could be reproducing material from a centuries-old text that no longer has social relevance except as a teaching aide or sign of intellectual achievement, or it could be obscuring real changes in legal practice. On the other hand, a study of a set of related texts allows the historian to witness changes, attention to parts of the texts the commentators found anomalous, and attempts to reconcile divergent social practices with authoritative legal prescriptions. Interrelated *matn* and *sharḥ* texts were always, moreover, relative in their positions within the textual tradition. The text of a *matn,* for example, could be expanded through the commentarial process of producing a *sharḥ* (literally, an "opening up" of

[961] Ingalls, "Recasting Qushayrī's Risāla," 118-120.

[962] The translations "rule-selection" and "rule-formulation" are adopted from Talal Al-Azem, *Rule-formulation and Binding Precedent in the Madhhab-Law Tradition: Ibn Qutlūbughā's Commentary on the Compendium of Qudūrī* (Leiden: Brill, 2016).

something, also referring to surgery), which then, in its turn, could be shortened again in the form of a *mukhtaṣar* (abridgment).[963] Later authors, or even the same author, might then decide to "re-open" the text by writing a *sharḥ* of the *mukhtaṣar*. The process was potentially limitless.

Two major differences between the methodology employed here and that of previous studies of the Late Middle Period Islamic legal tradition is the kind of material studied and the place of the current chapter within the broader study. First, the studies by Sadeghi and Ingalls focus primarily on what can be termed ritual law – particularly laws of prayer and ablutions. While these parts of the law can be presumed to be extremely important to the authors of legal texts (since, for example, the validity of prayer can depend on a proper understanding of the law), they were not areas of the law which Ayyūbid and Mamlūk state or courts of law had very much to do with enforcing at all. The present study, however, is focused on an area of law—guardianship and supervision of the property of individuals deemed unable to do so themselves—which the state and the courts were committed to regulating on a day-to-day basis, as seen in the previous two chapters. This means that a great deal of interference from problems encountered by jurists, judges and administrators of the law might be expected to appear in the sources. The second difference between the methodology used here and previous studies is that the study of the *furū'* texts in this chapter is but one aspect of a larger study of thematically-related legal norms and practices. Thus, the conclusions of this chapter stand to be revised, bolstered or even attenuated by the conclusions of the preceding chapters which undertake the study of different sources and, therefore, employ different methodologies. Indeed, the final discussion in this chapter will argue that the diversity one witnesses in the set of texts studied

[963] For a lucid description of the *matn/sharḥ* relationship, see Brinkely Messick, *The Calligraphic State: Textual Domination and History in a Muslim Society* (Berkely and Los Angeles: University of California Press, 1993), 30-34.

here is at least in part a reaction to the legal practice of supervising orphans' property. At times, the rules selected by scholars as representing the opinion of the *madhhab,* I argue, should be read as protests against actual legal practices rather than fair representations of the *madhhab* position.

For such a methodology to garner the most relevant set of results for understanding legal practice, it is important that the texts selected are not random, but are both (1) discursively related and (2) authoritative. In order to ensure these two points are met, I have chosen to study two sets of *furū'* texts that purport to represent the most authoritative Shāfi'ī positions on positive law during the Ayyūbid and Mamlūk periods. Before examining the relevant chapters of each set of texts, I have also written a short description of authors and their texts in order to justify the inclusion of each text in the study.

The Texts

The texts selected are:

1) Al-Rāfi'ī's *al-'Azīz*
2) Al-Nawawī's *Al-Rawḍa*
3) Al-Isnawī's *al-Muhimmāt*
4) Al-Bulqīnī's *al-I'tinā' wa'l-ihtimām bi-fawā'id shaykhay al-islām*
5) Al-Anṣārī's *Asnā al-Maṭālib*

The following is a short description of each of these five texts' and authors' place and authority within the milieu of legal scholarship between the 13th and early 16th centuries in Egypt and Syria.

1) ***Al-'Azīz,*** written by Abū al-Qāsim 'Abd al-Karīm b. Muḥammad al-Qazwīnī al-Rāfi'ī (d. Dhū al-Qa'da 623/1226), a *muḥaddith* and renowned jurisconsult who was recognized by later generations as an *imām* (leader) of the Shāfi'ī *madhhab*. He is the esteemed author of a number of legal texts. The two works that acquired nearly canonical status within the Shāfi'ī *madhhab*

were (1) *Al-ʿAzīz*, also called *Fatḥ al-ʿazīz* or the *Sharḥ al-kabīr*, which is a commentary on al-Ghazālī's condensed work of *furūʿ*, *al-Wajīz* and (2) *al-Muḥarrar*, a *mukhtaṣar*.[964] The former text is the first link in the chain of texts studied in this chapter. It quickly became a standard teaching text and one of the most highly-regarded texts of the school. According to al-Subkī in his biography of al-Rāfiʿī, the latter's "*Fatḥ al-ʿazīz* is enough of an honor for any person, for with it he ascended some distance above the reigns of Heaven and yet was still not satisfied, and so nothing of its likes has been composed in any *madhhab* of the *madhāhib*, and nothing has shone with such a light on the *umma* out of the depths of darkness."[965] Nevertheless, reflecting the continued negotiation of al-Rāfiʿī's authority within the *madhhab* (as noted in the chapter introduction), al-Subkī was quick to point out the limits of the author: "It has become a well-known saying among the students (*al-ṭalaba*) that al-Rāfiʿī was only authorizing (*yuṣaḥḥiḥ*) those laws that most of the Shāfiʿī authorities (*al-aṣḥāb*) had approved….However, the *Imām*, our father, forcefully reprimanded whoever thought this to be true." Al-Subkī then explains that both he and his father had written treatises pointing out all of the places al-Rāfiʿī diverged from the majority opinion of the school, and he includes a few examples in the biography for good measure. As we will see, taking issue with opinions of al-Rāfiʿī was common during this period. Nevertheless, al-Subkī's biography is also evidence of the ambiguous nature of al-Rāfiʿī's legal works. On the one hand, they are unsurpassed in their brilliance and completeness; on the other, they are full of aberrant opinions that justifies the work of later commentators.

[964] See, for example, al-Subkī's comments on these works in Al-Subkī, *al-Ṭabaqāt al-kubrā* 8/281.

[965] *Ibid*. 8/281.

2) *al-Rawḍa,* or, *Rawḍat al-ṭālibīn wa-ʻumdat al-muftīn,* written by Abū Zakariyyā Muḥyī al-Dīn Yaḥyā b. Sharaf al-Nawawī (d. 676/1277), a highly-respected *muḥaddith* and *faqīh*. Like al-Rāfiʻī, al-Nawawī's works of *furūʻ* would eventually become canonical, with preference in the *madhhab* after the 16th century being given generally to al-Nawawī's opinions in any case of disagreement between the two icons of the school.[966] Authorities like Ibn Ḥajar al-Haytamī (d. 974/1566) would argue that it is not sufficient for a *muftī* to look at only one of al-Nawawī's works of *furūʻ* in order to determine the position of the *madhhab*; rather, the following books should be consulted, ordered in terms of relevant weight: *Al-Taḥqīq, al-Majmūʻ*, *al-Tanqīḥ, al-Rawḍa,* and *al-Minhāj*. All of these works, moreover, should be given preference over his *fatwās*.[967] As argued in §A of this chapter, such overt preference for al-Nawawī's works, and probably also the particular order described by Ibn Ḥajar, is a post-Mamlūk phenomenon. However, even during the Mamlūk period, al-Nawawī's work had become standard reference works. Al-Suyuṭī notes that *al-Rawḍa* had become, by his time, "the mainstay of Shāfiʻī jurists (*ʻumdat al-madhhab*) for its detailed elaboration of legal doctrine and points of difference with other schools of law."[968] In part, the range of opinion contained in *al-Rawḍa* is a result of its foundational text, the '*Azīz* of al-Rāfiʻī. The latter author had included divergent opinions (*ikhtilāf*) not only of the Shāfiʻīs, but also of the other major *madhhabs*, even devising a system of abbreviation to refer to the founders of each *madhhab*. Al-Nawawī's text was apparently

[966] Fachrizal A. Halim, *Legal Authority in Premodern Islam: Yaḥyā b. Sharaf al-Nawawī in the Shāfiʻī School of Law* (New York: Routledge, 2015), 43. For al-Nawawī's biography, see *ibid.* 14-34; W. Heffening, "al-Nawawī," *Encyclopaedia of Islam, Second Edition*.

[967] ʻAbd al-Ḥamīd al-Sharawānī and Aḥmad b. Qāsim al-ʻIbādī, *Ḥawāshī tuḥfa al-muḥtāj bi-sharḥ al-minhāj,* 10 vol. (Cairo: Maṭbaʻat Muṣṭafā Muḥammad, 1938) 1/39; see also al-Kurdī, 55.

[968] Halim, 39.

popular, therefore, because it greatly shortened the length of *al-ʻAzīz* while nevertheless retaining numerous references to the doctrines of other schools. One reliable measure of this work's importance during the period is the massive production of commentaries and abridgments during the Mamlūk period alone; not including tertiary works (e.g., a commentary on an abridgement of *al-Rawḍa*), the number of these secondary works is at least 27.[969] Some of these latter works form the remaining three works in the series studied here.

3) *Al-Muhimmāt*, or *al-Muhimmāt ʻalā al-rawḍa wa'l-rāfiʻī*, written by Jamāl al-Dīn ʻAbd al-Raḥīm b. al-Ḥasan al-Isnawī (d. Jumāda al-Thānī 772/1370-1), a prolific author of works of jurisprudence and positive law and, for a time, the head of the State Treasury (*wakīl bayt al-māl*) and the market inspector (*muḥtasib*) of Cairo.[970] Along with his *Muhimmāt*, he gained fame as the author of an influential commentary on the *Minhāj* of al-Bayḍāwī, a standard work of *uṣūl al-fiqh*. But it was his *al-Muhimmāt ʻalā al-rawḍa wa'l-rāfiʻī*, which might be (loosely) rendered in English as *Essential Material for Reading the Rawḍa and al-Rāfiʻī*, that had the greatest impact within the Shāfiʻī *madhhab*, spawning at least 23 commentaries, abridgments, and tertiary texts.[971] Unlike al-Rāfiʻī and al-Nawawī who were professors and transmitters of Ḥadīth and traditionalists in methodology, al-Isnawī was drawn to the speculative and rationalist disciplines, studying the *ʻulūm al-ʻaqliyya* (logic and speculative theology), and associating with well-known opponents of the Traditionists, like the famous *mufassir*, Abū Ḥayyān al-Gharnāṭī. He was also a

[969] Al-Ḥabashī, 993-995.

[970] For al-Isnawī's biography, see Ibn Ḥajar al-ʻAsqalāni, *Al-Durar al-kāmina* 2/354-356 and Abū Bakr Ibn Qāḍī Shuhba, *Ṭabaqāt al-shāfiʻiyya*, 5 vol., ed. al-Ḥāfiẓ ʻAbd al-ʻAlīm Khān (Hyderabad: Dā'irat al-Maʻārif al-ʻUthmāniyya, 1978), 3/132-135.

[971] Al-Ḥabashī, 1957-1960.

student of Taqī al-Dīn al-Subkī, the father of the biographer, who, as we saw above, wrote a work refuting certain positions held by al-Nawawī in *al-Rawḍa*.[972] His *Muhimmāt* reflects a combination of deference to al-Nawawī and al-Rāfi'ī with a willingness to correct their mistakes and systematize their works through a comparative methodology that sought to develop a principled approach to positive law and move away from the case-by-case reasoning that typified his predecessors' writings. This latter point will become clear in our substantive analysis of *al-Muhimmāt*; for now, we can invoke al-Isnawī's own testimony about his methodology, described in a lengthy preface he authored for the book. Written late in his career (it was finished in 760 A.H.), the description of his approach and goals for the book manifests both a penchant for systematicity and an unabashed confidence in his intellect built on years of study and teaching.[973] But first, lest anyone accuse him of disrespect for the two superstars whose works he is about to criticize and attempt to correct, he commences with no small amount of praise for both: al-Rāfi'ī "excelled in the science of the *madhhab* to a degree that no one since, and not many before him, were able to reach." Al-Isnawī likens his book, *al-'Azīz,* to wrought gold. Later, he states, al-Nawawī came to follow in al-Rāfi'ī's path, and al-Isnawī identifies the *Rawḍa* as his most precious work.[974] As a result of the tremendous efforts and abilities of their authors, *al-'Azīz* and *al-Rawḍa* "have become the standard reference for *tarjīh* and their statements are relied on for *taṣḥīḥ*; the virtuous have tossed them the reigns of *fatwā*."[975] Indeed, al-Isnawī claims that the

[972] Ibn Qāḍī Shuhba, 3/132-133; for Taqī al-Dīn al-Subkī's biography, see *ibid.* 3/47-53.

[973] For the date of *al-Muhimmāt*'s completion, see Ibn Ḥajar, *Al-Durar al-kāmina*, 2/356 and Ibn Qāḍī Shuhba, *Ṭabaqāt al-shāfi'iyya*, 3/135.

[974] Al-Isnawī, *al-Muhimmāt fī sharḥ al-rawḍa wa'l-rāfi'ī*, 10 vol., ed. Abū al-Faḍl al-Dumyāṭī (Beirut: Dār Ibn Ḥazm, 2009), 1/93.

[975] *Ibid*. 1/94.

highest aspiration of most contemporary judges and *muftī*s is to read and refer to just *one* of the two books, "on the basis of which they then give *fatwā*s, make judgments, notarize, and overturn rulings."[976] Nevertheless, al-Isnawī argues, they are problematic insofar as they are full of misleading statements and hidden problems that are only visible to someone who has "poured over the scattered texts of al-Shāfi'ī and pursued the books of the *Aṣḥāb*, generation after generation, enriching his entire life reading them, and filled his days returning back to them."[977] Part of the issue, al-Isnawī explains, is an accident of history. Although Cairo is today (i.e., in the mid-14th century A.D.), he claims, "the greatest city of all Islam," the center of Shāfi'ism, and he has been able to find in his city texts of the *madhhab* that few have heard of, the Fāṭimid period in his estimation caused a great amount of knowledge to (temporarily) disappear. Al-Isnawī offers this historical argument as an explanation for why he is able to correct and update al-Rāfi'ī and al-Nawawī: they simply did not have sufficient access to the texts of the *madhhab*.

Al-Isnawī then proceeds to describe his methodology, organized into 20 different kinds of observations that he makes on *al-'Azīz* and *al-Rawḍa*. While there is not sufficient space here to review all of these different types of observations, we can note a few:

- Showing where the authors contradict their own positions either in a different part of the text or in a different text. Part of the reason that al-Nawawī, in particular, is guilty of this, al-Isnawī argues, is that he produced such a large amount of texts in such a short period due to his desire to allow others to benefit from insights that came to him in a moment of reflection.[978]

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[976] *Ibid*. 1/95.

[977] *Ibid*. 1/94.

[978] *Ibid*. 1/95-100.

- One of the "most important issues," according to al-Isnawī, is "explaining what is given as a *fatwā* in one place, which is dependent on manifesting the *transmitted selected rule* (*murajjaḥ naqlī*) and the *reinforcement of the madhhab* (*i'tiḍād madhhabī*), not merely on the basis of a claim to its preponderance by reason of evidence, for the *madhhab* is transmission (*al-madhhab naql*); but the aforementioned rule-formulation (*al-tarjīḥ*) is sometimes made on the basis of a statement of al-Shāfi'ī on the issue—which is one of the weightiest and most lucid forms of rule-formation—and sometimes it is made on the basis of the agreement of the majority, in which case it must be followed, as (al-Nawawī) stated in *al-Rawḍa* in the beginning of (the chapter on) *al-Qaḍā'*. Sometimes, it is for another reason which your heart is drawn to and pleases your eye."[979] As al-Isnawī explains, *fatwās* should be given on the basis of what the majority of the *madhhab* has agreed upon, not just what can be traced back to al-Shāfi'ī's text or what one finds pleasing for whatever reason. He then follows this passage with a long explanation of how to decide between al-Rāfi'ī and al-Nawawī when they disagree. When al-Nawawī disagrees with al-Rāfi'ī on the basis of a *ḥadīth*, then the default position is al-Rāfi'ī's because al-Nawawī has made an argument on the basis of his own *ijtihād*, not on the authority of the *madhhab*. In any other case, however, al-Nawawī's opinion is the default because al-Rāfi'ī tended to follow his own judgment rather than sticking to the opinion of the majority.[980]
- Al-Isnawī also claims to point out "odd mistakes and strange illusions" in the two books. Al-Nawawī, he claims, was more prone to such blunders, but al-Rāfi'ī was more likely to make these mistakes when transmitting the opinion of al-Shāfi'ī. Trying to think of why this might be the case, he claims he heard in Qazvīn, where al-Rāfi'ī lived and worked, that the only copy of al-Juwaynī's *al-Nihāya* was held by "some women who inherited it, and they did not let anyone borrow it, so al-Rāfi'ī would go to a mosque near their house to read and copy from it."[981] Whatever the merits of this story, al-Rāfi'ī did not have access to al-Shāfi'ī's texts, something which gave al-Isnawī, who did, an advantage.[982]
- "Explaining points where they transmitted from one authority only, but the majority (of the *madhhab*) disagrees with them."[983]
- "Mentioning the points where they claim there is no disagreement, but it (a disagreement) is recorded in one of the books of the *madhhab* that they did not read….In many cases, one of them will claim that there is no disagreement, but they actually relate one in another place, either in that book, or in a different one."[984]

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[979] *Ibid*. 1/100-101.

[980] *Ibid*. 1/101.

[981] *Ibid*. 1/101-102.

[982] *Ibid*. 1/102-103.

[983] *Ibid*. 1/104

[984] *Ibid*. 1/105.

- Pointing out all of the various ways that *al-Rawḍa* inappropriately abridged *al-ʻAzīz*.[985] Many of these types of observations that al-Isnawī describes in his introduction will, indeed, show up in the following analysis of the chapter on *ḥajr*.

4) *Al-Iʻtinā' wa'l-ihtimām bi-fawā'id shaykhay al-islām ʻalā rawḍat al-ṭālibīn*, compiled by ʻAlam al-Dīn Abū al-Biqā' Ṣāliḥ b. ʻUmar b. Raslān al-Bulqīnī (d. 868/1464), the son of the renowned "*Shaykh al-Islām*" Sirāj al-Dīn al-Bulqīnī.[986] He worked closely with his father and his uncle during their lifetimes, even assuming some of his father's positions before his death and composing, under his guidance, *fatwās*. He occupied a number of teaching and religious posts, but remained deferential to his older brother, who held the post of chief judge for a time, serving as the latter's deputy in the judiciary. Eventually, after the latter's death and the death of his teacher al-Walī al-ʻIrāqī, he became the chief judge of Egypt in 826 A.H., following which he was dismissed and returned to the position a number of times, but he continued to teach throughout his life (Ibn Ḥajar, one of his students, apparently had a close relationship with him, referring to him "our *shaykh*" and stating that he received permission from ʻAlam al-Dīn to teach and give *fatwās*).[987] He wrote a number of works, including a work of *tafsīr* and a commentary on al-Bukhārī's *Saḥīḥ*, but he also compiled some of the unpublished works of his father and brother (his father, despite his fame as a teacher, *muftī* and judge, was known for almost never finishing a composition).[988] The text that forms part of the series studied here was one of these compilations; as the title hints, it is a collation of Sirāj al-Dīn's and Jalāl al-Dīn's marginal commentaries, or *ḥawāshī*, on al-Nawawī's *Rawḍa*. His method throughout the text is the

[985] *Ibid*. 1/109.

[986] For a detailed biography of ʻAlam al-Dīn, see al-Sakhāwī, *al-Ḍawʼ al-lāmiʻ* 3/312-314.

[987] *Ibid*. 3/314

[988] See the biography of his father, Sirāj al-Dīn, in Ibn Qāḍī Shuhba *Ṭabaqāt al-shāfiʻiyya*, 4/42-52.

following: after quoting a portion of the *Rawḍa*, he then mentions any "useful points" (*fawā'id*) that his father or brother had written on the section. If the two agreed, he only refers to the opinion of his father. If they disagree, he records both opinions, referring to his father's opinion with the letter "*wāw*" and his brother's with the letter "*khā'*."[989]

As the text has not been published, and is only available in manuscript, it is worth saying a few words about the text itself. The manuscript, MS Azhar 568 Fiqh Shāfi'ī, is held in the Azhar Library in Cairo, Egypt, and it is an autograph, written in a fine *naskhī* script, and with colored ink introducing each "useful point (*fā'ida*)." As one would expect with this kind of text, it is quite large, with three volumes, each of about 300 folios, for a total of 905 folios. It was composed in 858 A.H.

5) ***Asnā al-maṭālib sharḥ rawḍ al-ṭālib*****,** written by Zakariyā b. Muḥammad al-Anṣārī (d. 926/1520), one of the most authoritative voices of the late Shāfi'ī *madhhab*, who enjoyed a long life (dying in his late 90s), witnessed nearly the entire last century of Mamlūk rule, and occupied the position of Shāfi'ī Chief Judge in Egypt for almost 20 years—longer than any other individual in the history of the Sultanate.[990] Post-Mamlūk Shāfi'īs would count him as "one of the four most influential" Shāfi'īs in the generations following al-Nawawī and al-Rāfi'ī.[991] He is known for both his works on Sufism and *fiqh*. The text under analysis here, *Asnā al-maṭālib*, while not as popular as his shorter commentary on Ibn al-Wardī's (d. 749/1349) *al-Bahja al-wardiyya*, nevertheless is significant for its length and its purpose as a teaching aide. Unlike al-

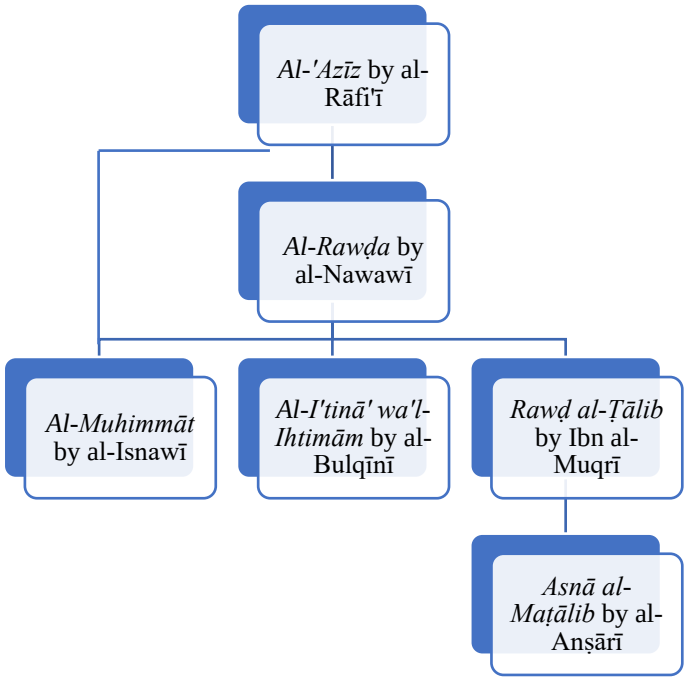
[989] Cairo, Maktabat al-Azhar, MS Azhar 568 Fiqh Shafi'i, fol. 1.

[990] His life has been careful studied by Ingalls, see Ingalls, "Recasting Qushayrī's *Risāla*," 95-107.

[991] Ingalls, "Šarḥ, Iḫtiṣār, and Late-Medieval Legal Change," 2.

Isnawī's *Muhimmāt*, which was written for practicing judges and *muftīs*, the *Asnā* was written explicitly for students.[992] Including it in this study also allows us to witness a more complex layer of legal discourse because it is a commentary on an abridgment of *al-Rawḍa* written by Ibn al-Muqrī. As a teaching aide, and possibly due to its later date of composition, it displays less willingness than *al-Muhimmāt* and *al-I'tinā* to directly challenge al-Nawawī.

The texts in this series can be visualized in the following way:



§ C: Analysis of *Kitāb al-Ḥajar*

The following is a close analysis of the chapter on interdiction, or *ḥajr*, that traces four different topical variables within the chapter in each of the texts in the series. *Ḥajr* is a rich

[992] *Ibid*. 9.

concept with legal effects relevant to every human being at some point in their lives and, for some, even their entire lives. Because of its conceptual depth and importance for potentially every human life, the chapters on *ḥajr* often include a substantial, and diverse, array of subtopics, and it is only practical to focus on a select portion of these topics—hence the focus on four major variables. Since this analysis does not attempt to analyze the entire chapter, it will be useful to first provide a short overview of the general contents of the chapters on *ḥajr* before moving to a discussion of the individual variables. This way, it will be clear not only what is included in this study, but also what is excluded as a practical matter.

First, as a general matter, *ḥajr* means *man'*, or prohibition or prevention.[993] All four Sunni *madhhabs* recognized some form of *ḥajr*, although, for the Ḥanafīs, one opinion did not recognize any form of *ḥajr* on adults, as discussed in depth in Chapter Two of this study. *Ḥajar*'s primary function, as it appears in *fiqh* texts, is to prevent an individual from disposing freely of his or her property; it is for this reason that the Shāfi'īs defined it as "the prevention of financial acts" (*al-man' min al-taṣarrufāt al-māliyya*).[994] It corresponds to the concept of "interdiction" in Western legal thought, although there are also some similarities to the concept of legal incapacity because it sometimes precludes the ability to give testimony in addition to precluding the free disposal of one's wealth and entering into contracts.[995] Ḥajr extends to two major classes of individuals: those who are subject to a partial form of *ḥajr*, including the bankrupt and the slaves, and those who are subject to a more general form of *ḥajr*. The latter consists of three categories:

[993] al-Rāfi'ī, *al-'Azīz sharḥ al-wajīz*, 13 vol., ed. 'Ādil Aḥmad 'Abd al-Mawjūd and 'Alī Muḥammad Mu'awwad (Beirut: Dār al-Kutub al-'Ilmiyya, 1997), 5/66.

[994] *Ibid*., n. 1.

[995] For a translation of *ḥajr* as "legal interdiction," see, for example, J. Schacht, "Hadjr," *EI*^{2}.

the insane (*al-majnūn*), the minor (*al-ṣabī*) who has not reached mental *and* physical maturity, and the irresponsible or spendthrift (*al-safīh*).[996] While *ḥajr* in this sense does not appear in the Qur'ān, Shāfi'ī jurists grounded their discussions of it in two Qur'ānic verses: 4:6 and 2:282.[997] According to al-Shāfi'ī, these verses establish the following principles: 4:6 shows that the property of orphans should be delivered over to them only when they reach physical maturity and soundness of mind (*rushd*). Analogical reasoning (*qiyās*) applied to the verse leads to the principle that physical maturity (*al-bulūgh*) and soundness of mind (*rushd*) are conditions for an individual's right to dispose of property. Verse 2:282 was interpreted as commanding that an individual who is either weak, who cannot dictate themselves, or who is irresponsible should have a guardian who enters into contracts in place of that person. The irresponsible person, or *safīh*, was generally glossed as a *mubadhdhir* (spendthrift). The person who cannot dictate for themselves was thought to refer to the insane.[998] The majority of the discussion of the rights and duties of the *maḥjūr 'alayh* (the person under legal interdiction) in the chapter on *ḥajr* invariably focuses on these three people, to the almost complete exclusion of the first category.

Chapters on *ḥajr* generally consist of the following discussions: 1) the legal causes of *ḥajr*; 2) the conditions and signs of physical maturity (*bulūgh*) and soundness of mind (*rushd*), with reference to the differences between males, females and intersex individuals; 3) the

[996] Al-Rāfi'ī, 5/66-67.

[997] Quran 4:6: "Make trial of the orphans until they reach the age of marriage. Then, if you find sound judgment in them, deliver to them their property, but do not consume it wastefully nor in haste fearing they should grow up. If a person is rich, let him abstain, but let the one who is poor consume what is just and reasonable. When you deliver their property to them, take witness in their presence. Allah suffices as a Reckoner."; Quran 2:282: "But if the liable party is irresponsible, or weak, or unable to dictate himself, then let his guardian dictate faithfully;" see, for example: al-Shāfi'ī, *al-Umm* 4/451, 457.

[998] Al-Rāfi'ī, 5/67.

different way that physical maturity and soundness of mind is determined for non-believers (*kuffār*); 4) how *ḥajr* can be reinstated in case of indicators that the individual is no longer sound of mind; 5) what authority can impose *ḥajr* on an adult; 6) the legal guardian for different individuals subject to *ḥajr*; 7) what constitutes being *safīh*; 8) what kinds of legal acts are prohibited for the *maḥjūr ʻalayh*; 8) what acts the guardian can take on behalf of his or her ward 9) who can be a legal guardian of a minor, and in what order; 10) the responsibilities of the guardian; 11) the ability of the *maḥjūr ʻalayh* to sue their guardian once they are no longer under *ḥajr*; 12) the ability of the guardian to take or consume some of their wards wealth in return for his or her services.[999] This summary, based on al-Ghazālī's *al-Wajīz,* the *Urtext* of the textual series studied here, is schematic in every sense of the word. Jurists could expand each topic at will, adding minutiae of their own concern, or even add entirely new topics.

Variables:

This analysis studies only the following four topical variables, which were selected due to their relevance for understanding the practice of the courts (the discussion of the signs of physical maturity, for example, while substantial in most chapters, is of only marginal relevance to this dissertation):

I. What, and how many, are the types of *ḥajr*?
II. Is only *rushd fī al-māl* (soundness of mind in finances) legally relevant for determining *safah* (irresponsibility) or is *rushd fī al-dīn* (soundness of mind in religion) also legally relevant?
III. Who can be the *walī* of a minor (specifically, can a mother serve as her child's guardian?)

[999] Al-Ghazālī, *al-Wajīz fī fiqh al-imām al-shāfiʻī*, 2 vol., ed. ʻAlī Muʻawwiḍ and ʻĀdil ʻAbd al-Mawjūd (Beirut: Dār al-Arqam b. Abī al-Arqam, 1997), 1/344-345.

IV. Who can sell real estate and loan the wealth of an orphan?

I. What are the types of *ḥajr*?

***Al-ʻAzīz*:** The foundational text in this series analyzed here, al-Rāfiʻī's *Sharḥ al-kabīr*, is a lengthy text that included, as mentioned earlier, the divergent opinions (*ikhtilāf*) of the Shāfiʻī *madhhab* in addition to frequent discussion of the positions of the other three Sunnī *madhhab*s. For this variable—the types of *ḥajr*—al-Rāfiʻī points out that it was the Iraqi *ṭarīqa* (as opposed to the Khurasanian) that first introduced a useful conceptual division between the two major groups of people subject to legal interdiction: (a) those who are *maḥjūr ʻalayhim* for the sake of others and (b) those who are *maḥjūr ʻalayhim* for their own sake. Group (a) includes five kinds of *ḥajr*: (i) the *ḥajr* of the bankrupt for the sake of their creditors, (ii) the *ḥajr* of a person who pledged something as a security (*al-rāhin*) for the sake of the pledgee, (iii) the *ḥajr* of a sick person on their deathbed for the sake of their inheritors, (iv) the *ḥajr* of a slave for the sake of their master and the *mukātib* for the sake of their master *and* God, and (v) the *ḥajr* of an apostate (*murtadd*) for the sake of Muslims. Each of these are *partial* forms of *ḥajr*. For example, a person who pledged something as security is only prevented from selling or otherwise disposing of the thing sold; they could still dispose of property not affected by the pledge. All of these five categories, moreover, are still able to perform a number of other actions, such as make a legal confession (*iqrār*) of crimes committed.

The second type of *ḥajr* is imposed on people for their own sake. This type consists of the

three categories traced by the Shāfi'īs to the Qur'anic verses noted above: the insane, the minor, and the spendthrift.[1000]

***Al-Rawḍa*:** Al-Nawawī's text, an abridgment of al-Rāfi'ī's *al-'Azīz,* eliminates the reference to the Iraqi *ṭarīqa*, instead noting only that *ḥajr* is of "two kinds: a *ḥajr* legislated for others and a *ḥajr* for the benefit of oneself."[1001] Al-Nawawī also removes all textual indicants that al-Rāfi'ī included. The only addition is his inclusion of a statement attributed to al-Mutawallī's *Tatimma al-ibāna fī al-fiqh al-shāfi'ī* that "the person who has only a minimal level of discretion (*adnā al-tamīz*) but whose mind is not fully developed is like the minor who has discretion (*ka'l-ṣabī al-mumayyaz*)."[1002] In other words, such an individual cannot contract sales independently, and remains subject to *ḥajr* despite physical maturity.

***Al-Muhimmāt*:** al-Isnawī argues that both al-Rāfi'ī and al-Nawawī missed a number of kinds of *ḥajr* imposed for the sake of others. In total, al-Isnawī adds thirty new types to this category. All of these types are based on Shāfi'ī *fiqh*; they are not products of al-Isnawī's whim. Rather, al-Isnawī's additions are presented as an attempt to systematize previous rulings in order to subsume a large number of similar cases under one legal concept: *ḥajr*.[1003]

[1000] Al-Rāfi'ī, 5/66-67.

[1001] Al-Nawawī, *Rawḍat al-ṭālibīn wa-'umadat al-muftīn*, 12 vol., ed. Zuhayr al-Shāwīsh (Beirut: al-Maktab al-Islāmī, 1991), 4/177. On the two "ways," or *ṭarīqa*s, and their role in transmitted authority within the Shāfi'ī school, see Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 123.

[1002] *Idem.*

[1003] Al-Isnawī, 426-432.

***Al-I'tinā'*:** al-Bulqīnī includes no reference whatsoever to this variable, probably because his father and brother had nothing to object to al-Nawawī's numbering.

***Asnā al-Maṭālib*:** Unlike the previous authors, and reflecting his pedagogic aim, al-Anṣārī begins his discussion by first defining the lexical and legal meaning of *ḥajr* before referring to the two Qur'ānic verses mentioned before. He then refers to the two categories of *ḥajr*, but, unlike the first three authors, he only lists the five cited by al-Rāfi'ī and al-Nawawī as *examples* of *ḥajr* imposed for the sake of others. This may be due to the influence of al-Asnawī' arguments that there are at least 35 kinds of *ḥajr*. He then considers the possibility that the case of the sleeping person and the mute who cannot be understand could be added to the second type (those who are *maḥjūr 'alayhim* for their own sake). He then quotes al-Adhra'ī (d. 783/1381) that this is doubtful because it is unreasonable to presume that someone could step in and manage a sleeping person's wealth and, in the case of a mute who cannot be understood, the only person who could manage their affairs is the judge (*al-ḥākim*).[1004]

II. Is only *rushd fī al-māl* (soundness of mind in finances) legally relevant for determining *safah* (irresponsibility) or is *rushd fī al-dīn* (soundness of mind in religion) also legally relevant?

***Al-'Azīz*:** al-Rāfi'ī notes that the condition in Qur'an 4:6, *"if you find sound judgment (al-rushd) in them,*" is ambiguous.[1005] What constitutes sound judgment, *al-rushd*? He refers to al-Shāfi'ī's interpretation that it refers to both soundness of mind in religion along with sound handling of

[1004] Zakariyā b. Muḥammad Al-Anṣārī, *Asnā al-maṭālib fī sharḥ rawḍ al-ṭālib wa-bi-hāmishih ḥāshiyat al-ramlī tajrīd al-*shawbarī, ed. Muḥammad al-Zuhrī al-Ghamrāwī (Cairo: al-Maṭba'a al-Maymaniyya, 1313 A.H./1895-1896 A.D.), 2/204-205.

[1005] Al-Rāfi'ī, *al-'Azīz*, 5/72.

finances ("*al-ṣalāḥ fī al-dīn ma' iṣlāḥ al-māl*"), then invokes a Ḥadīth with a similar meaning. He glosses "*al-ṣalāḥ fī al-dīn*" as "not committing sins that invalidate *'adāla* (i.e., the ability of a person to give testimony and assume public offices).

***Al-Rawḍa*:** Al-Nawawī repeats, in briefer form, the points made by al-Rāfi'ī noted above. His only addition is the following, "The unbelieving minor is also like the Muslim in this section, for he is considered in regards to his righteousness in religion and finances (*fī ṣalāḥ dīnih wa-mālih*) according to what is right according to them. This has been stated by al-Qāḍī Abū al-Ṭayyib among others."[1006]

***Al-Muhimmāt*:** al-Isnawī has nothing to say regarding this point, and instead focuses on pointing out contradictions in the previous two authors' treatment of the meaning of *ṣalāḥ fī al-māl*.[1007]

Al-I'tinā': al-Bulqīnī includes at this point the following *fā'ida*: al-Nawawī actually misunderstood al-Rāfi'ī's text; the latter was *actually* claiming that only *ṣalāḥ fī al-māl* is relevant for determining soundness of mind. Al-Bulqīnī adds that this is also the position taken by al-Mutawallī in the *Tatimma*, and urges that this positions be taken into consideration.[1008] Here we have a complete reversal of al-Shāfi'ī, al-Nawawī and Al-Rāfi'ī's (apparent) positions.

***Asnā al-Maṭālib*:** al-Anṣārī remains faithful to al-Nawawī's position, even pointing out that *al-ṣalāḥ fī al-dīn* is applied to the unbeliever according to their own religion, and includes the same

[1006] Al-Nawawī, *al-Rawḍa*, 4/181.

[1007] Al-Isnawī 5/435.

[1008] MS Azhar 568 Fiqh Shāfi'ī, fol. 221r (labeled pp. 425 in the margin).

gloss as found in both al-Rāfi‘ī’s and al-Nawawī’s texts that *al-ṣalāḥ fī al-dīn* refers to “not committing a sin that invalidates *al-‘adāla*.”[1009]

III. Who can be the *walī* (guardian) of a minor (specifically, can a mother serve as her child’s guardian?)

***Al-‘Azīz*:** according to the *Urtext* (al-Ghazālī’s *al-Wajīz*), the following people have guardianship (*wilāya*) of a minor, listed in order of precedence: the father, the paternal grandfather, the testamentary guardian, then the *qāḍī*. The mother is explicitly stated as having no guardianship. According to al-Rāfi‘ī, this latter opinion is the *ẓāhir al-madhhab*—the apparent position of the *madhhab*. However, he also includes in his *sharḥ* the divergent opinion of Abū Sa‘īd al-Iṣṭakhrī[1010] that she can have guardianship in financial matters (*al-wilāya fī al-māl*), and that the mother takes precedence over the testamentary guardian (*al-waṣī*) due to the fact that she has more sympathy (*shafaqa*) for the child.[1011]

***Al-Rawḍa*:** Al-Nawawī also includes the opinion attributed to al-Iṣṭakhrī that the mother of an orphan takes precedence in the order of guardianship over the *waṣiyy*. Like al-Rāfi‘ī, he does not make an argument about which opinion of the *madhhab* is preferrable.

***Al-Muhimmāt*:** Al-Isnawī does not raise this issue, probably because there is no disagreement between *al-Rawḍa* and *al-‘Azīz* on this point.

[1009] Al-Anṣārī, 2/206.

[1010] This is Abū Sa‘īd al-Ḥasan b. Aḥmad al-Iṣṭakhrī (d. 328/940), a Shāfi‘ī *faqīh* and *qāḍī* in Baghdād and Sijistān. He was considered one of the *aṣḥāb al-wujūh*. See al-Subkī, *Ṭabaqāt al-shāfi‘iyya al-kubrā*, 3/230-253.

[1011] Al-Rāfi‘ī, *al-‘Azīz*, 5/80.

***Al-I'tinā'*:** This point is not mentioned.

***Asnā al-Maṭālib*:** Al-Anṣārī includes the same order of precedence of guardians, and he does not mention al-Isṭakhrī's position about the mother acquiring *wilāya* after the father and paternal grandfather. He does, however, state that the mother, the brother and the paternal uncle can all spend from the orphans' property "for the sake of his upbringing and education (*li-ta'dībih wa-ta'līmih*) even though they do not have guardianship (*wilāya*) because it is a small amount. Therefore, it is tolerated (*fa-sūmiḥ bih*)." He attributes this opinion to al-Nawawī's *Majmū'*.[1012]

IV. Who can sell real estate and loan the wealth of an orphan?

***Al-'Azīz*:** The controlling principle for all transactions with orphans' property is that they should all be made with an eye to the *ghibṭa* (well-being or advantage) of the orphan. According to al-Rāfi'ī, any guardian of an orphan can buy real estate (*al-'aqār*) on behalf of the orphan. In fact, this is considered to be more preferrable than engaging in trade with the orphan's property because of the dangers associated with trade. Real estate owned by the orphan, however, can only be sold in cases of need (*al-ḥāja*), such as if the orphan does not have other property that can be used to clothe and feed them, and no one is found who can provide a loan to the orphan. Another case in which it is permissible for the guardian to sell real estate owned by the orphan is if the taxes or expenses associated with it are greater than the benefit it accrues.[1013]

Only the *qāḍī* has the right to loan the orphan's property, unless there is a necessity (*ḍarūra*), such as the threat of the property being stolen or ruined in a fire, or in the case that the

[1012] Al-Anṣārī, 2/210.

[1013] Al-Rāfi'ī, 5/80-81.

guardian desires to travel. As for the *qāḍī*, he should loan the property rather than deposit it as a trust (*wadī'a*). The person who takes the loan should be both worthy of trust (*al-amāna*) and financially well-off. If the *qāḍī* loans the wealth, then he can choose whether to take a pledge *(rahn*) or not. Al-Rāfi'ī also mentions, without further comment, the divergent opinion of Abū 'Abd Allāh al-Ḥannāṭī[1014] that the *qāḍī* should be held to the same conditions as others. What this means, however, is left unclear: should the *qāḍī* be restricted from providing loans on a minor's property, or is it that every other guardian of a minor can *also* provide loans? This is a point, as will be seen shortly, that al-Isnawī clarifies.

***Al-Rawḍa*:** Al-Nawawī includes the same conditions on buying or selling real estate as al-Rāfi'ī. However, he adds further examples of *ghibṭa* which could justify the sale of real estate: if someone owning a share or a neighbor offers to buy it above the normal price, and he can find something similar to purchase at only a fraction of the price.[1015] He also adds that in sales undertaken by the father or grandfather of the a minor, the father or grandfather does not need to provide evidence that there is either a need (*ḥāja*) or that it is to the advantage (*ghibṭa*) of the minor. Both the *amīn* and the testamentary guardian (*waṣī*), however, do need to provide such evidence.[1016] In the case of the father or grandfather, al-Nawawī mentions that there are two opinions about whether their *'adāla* (veraciousness, a quality considered before accepting

[1014] This is al-Ḥusayn b. Muḥammad b. 'Abd Allāh al-Ḥannāṭī al-Ṭabarī (d. after 400/1009-1010). According to Tāj al-Dīn al-Subkī, his texts contain "considered opinions (*al-wujūh al-manẓūra*), so he can also be counted as one of the *aṣḥāb al-wujūh*. See Tāj al-Dīn al-Subkī, *Ṭabaqāt al-shāfi 'iyya al-kubrā*, 4/367-371.

[1015] Al-Nawawī, 187.

[1016] Al-Nawawī, 188.

testimony) needs to be proved prior to the judge accepting their word about the advantage of the sale. He does not, however, state which opinion he believes to be more preponderant.

As for loans of property belonging to a minor or orphan, al-Nawawī includes the same conditions as al-Rāfi‘ī with no additions. He mentions al-Ḥannāṭī's divergent opinion that the *qāḍī* should be restricted to the conditions of other guardians without attributing it to anyone.[1017]

Al-Muhimmāt: al-Isnawī addresses the point that al-Nawawī left unsettled: whether the *‘adāla* of the father and grandfather needs to be proved before a judge registers a sale of real estate belonging to a minor. According to al-Isnawī, al-Nawawī indicated his support in another text for the opinion that the father or grandfather only need to have "apparent veraciousness (*al-‘adāla al-ẓāhira*)," and no investigation into their *‘adāla* is necessary.[1018] Al-Isnawī also adds that this analysis of the position of the father implies that the mother of a minor or orphan is excepted from the rules applying to the *awṣiyā’* "because she has knowledge about that."[1019] In other words, should the mother be acting as a testamentary guardian, then she should not be subject to an investigation into her *‘adāla* given that she has knowledge of the *ghibṭa* of her child.[1020]

As for loans of property belonging to a minor or orphan, al-Isnawī adds that al-Rāfi‘ī mentions in another place that it is permissible for a father as well as a judge to lend this

[1017] *Ibid*. 191.

[1019] Al-Isnawī, 5/441.

[1020] All four of the Sunnī *madhhab*s allowed a person to appoint a woman as testamentary guardian. See Muḥammad b. ‘Abd Allāh al-Raymī, *al-Ma‘ānī al-badī‘a fī ma‘rifat ikhtilāf ahl al-sharī‘a*, 2 vol., ed. Sayyid Muḥammad Muhannā (Beirut: Dār al-Kutub al-‘Ilmiyya, 1999), 2/142.

property. Al-Isnawī then points out that it is unclear what al-Ḥannāṭī's position is about the equivalence of the judge with all others in regards to loans: does this mean they are all able to initiate loans from the minor or orphan's property, or is it that everyone is restricted from doing so? It is al-Isnawī's opinion that al-Rāfi'ī meant to attributed to al-Ḥannāṭī the opinion that *everyone* is restricted from loaning out minor or orphan's property. He then makes an argument that al-Rāfi'ī's position that it is permissible for the judge to loan out the property of a minor or orphan neglected an opinion of al-Shāfi'ī that no guardian (*walī*) can lend the property of a minor.[1021] He then makes the claim that this is the position of no less than fourteen Shāfi'ī jurists.[1022] In effect, al-Isnawī makes the argument that the permission granted to the *qāḍī* to lend minor or orphan's property—the position, it will be remembered, of both *al-Rawḍa* and *al-'Azīz*, is not representative of the *madhhab*. This, again, is a complete reversal of the textual tradition al-Isnawī is commenting on.

***Al-I'tinā'*:** The text repeats, nearly verbatim, the permission to sell real estate in times of need. An addition attributed to Jamāl al-Dīn al-Bulqīnī also states that if a father or grandfather spends their own property on a minor for maintenance, they can later recuperate their expenses from property belonging to the minor that was previously not present or ready-to-hand. Other guardians, however, need permission from the *qāḍī* to do this.[1023] The point is probably added here because it parallels the stricter scrutiny of guardians who are not the father or grandfather when registering a sale of real estate.

[1021] Al-Isnawī, 5/444.

[1022] *Ibid*. 5/445.

[1023] MS Azhar 568 Fiqh Shāfi'ī, fol. 223v (labeled pp. 239 in the margin).

On the issue of lending orphan or minor's property, 'Alam al-Dīn includes an argument that he attributes to his father, Sirāj al-Dīn al-Bulqīnī. This argument proceeds as follows: Since it is permissible for a testamentary guardian (*waṣī*) to give permission to another person to spend a minor or orphan's property for the upkeep of an orphan or minor, there is already an implicit permission given to testamentary guardian to provide loans because it is possible for the person who was given permission to spend from the orphan's property to return the money. Since this is a prerogative of both the judge and the testamentary guardian, it follows that lending orphans' property is not limited to just the *qāḍī*.[1024]

***Asnā al-maṭālib*:** Al-Anṣārī supplements the conditions under which it is permissible for a guardian to sell real estate belonging to an orphan or minor. In addition to cases of need or in cases where the sale will generate a large profit, sale of a minor's real estate is also permitted if there is only "a slight need (*li-ḥāja yasīra*)" or "a little and suitable profit (*ribḥ qalīl lā'iq*)" to be made.[1025]

As for loans of the property of a minor or orphan, al-Anṣārī does not dispute the claim that only a *qāḍī* can do so. His only addition here is to clarify that the justification for the *qāḍī* lending the property of an orphan or minor is in the case that the *qāḍī* has too many other duties (*li-kathrat ashghālih*), making it difficult for him to preserve or trade with the property.[1026]

Discussion of Variables

[1024] MS Azhar 568 Fiqh Shāfi'i, fol. 225r (labeled pp. 442 in the margin).

[1025] Al-Anṣārī, 2/209.

[1026] *Ibid*. 2/213.

The study of the selected variables in the chapters on *ḥajr* in the five texts show that several critical rules were open to debate throughout the Mamlūk Period. This is clearest in the discussion of who can lend a minor or orphan's property. The first two texts in the series analyzed here—al-Rāfi'ī's *al-'Azīz* and al-Nawawī's *al-Rawḍa*—state the opinion that the judge is the only person authorized to lend this property. Nevertheless, they preserved the divergent opinion that the judge should be equal in this matter to other guardians. Al-Isnawī then intervened in order to clarify that this opinion means that no one—not even the judge—should initiate a loan of property belonging to a minor or orphan. He also makes an argument that this opinion should be considered the *madhhab*'s position because it was supported by a number of Shāfi'ī jurists, including the eponym of the *madhhab*. In *al-I'tinā'*, however, Sirāj al-Dīn argues the polar opposite: every guardian, not just the judge, is authorized to loan the property of an orphan or minor.

The legal institutions and practice of loaning and investing orphans' wealth likely helped kindled this debate. In Chapter Four, it was seen that Tāj al-Dīn al-Subkī in his description of the responsibilities of the *amīn al-ḥukm* stated that it is the position of the Shāfi'ī *madhhab* that the *qāḍī* cannot lend the property of an orphan. After reviewing these textual tradition in this chapter, one recognizes that al-Subkī's claim was more aspirational and prescriptive rather than an accurate description of the position of the *madhhab*. This matter does not appear to have ever been settled during the Mamlūk Period. Even if the texts composed by al-Nawawī and al-Rāfi'ī were beginning to attain a canonical status, this does not imply the crystallization of *fiqh*, at least not in chapters on legal interdiction.

Another variable which reveals some plasticity during this period is the rule on the ability of the mother to acquire *wilāya fī al-māl*, or guardianship in financial matters, over her child. It is

true that both *al-Rawḍa* and *al-ʻAzīz* give primacy to the position that a mother *cannot* acquire *wilāya*, yet it is notable that this position was not included by al-Ghazālī in *al-Wajīz*, the text both al-Nawawī and al-Rāfiʻī were commenting on. In other words, they made a decision to revive the position that a mother could have *wilāya* in financial matters over her orphaned children. It is also notable that neither author argued in favor of either rule. Although al-Anṣārī suppressed the divergent tradition, he nevertheless introduced the argument to this textual tradition (attributed to al-Nawawī) that would authorize a mother to spend from her orphaned child's wealth according to her own discretion in order to provide for the child's education and upbringing. Significantly, this permission would nevertheless still exclude her from buying or selling real estate. It would seem that al-Anṣārī's position here reflects economic realities of the period. As Yossef Rapoport has shown, women were systematically excluded from land ownership during the Mamlūk Period; instead elite families transferred wealth to their daughters via dowries that often included (valuable) personal items like garments and jewelry.[1027] Moreover, although I have not found specific evidence of a mother acquiring *wilāya* over the finances of her orphaned children, Ibn Ṭawq does mention women who had a role in the distribution of orphans' property. One mother received cash from the Shāfiʻī judge which the latter had borrowed from her orphaned son.[1028] In another case, Ibn Ṭawq witnessed the transfer of an estate into the hands of a mother on behalf of her and her daughter and son.[1029] Another mother received money on behalf of her orphaned son that she had previously deposited with a

[1027] Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society*, Cambridge Studies in Islamic Civilization (New York: Cambridge University Press, 2005), 22-24.

[1028] Ibn Ṭawq, 1/220.

[1029] *Ibid*. 1/249.

merchant.[1030] One mother received a lump sum of 30 Ashrafī dinars on behalf of her son.[1031] No mention is made in any of these cases of a *walī*. However, as noted above, it was legally permitted for a father to nominate a woman as a testamentary guardian. If these mothers were appointed as testamentary guardians, then they would acquire *wilāya* in financial matters after the death of the father and the paternal grandfather (see Variable III above). One wonders if this was the case with these two mothers. Fortunately, we are able to confirm from another notice in Ibn Ṭawq's text that women were, in fact, appointed as testamentary guardians. According to Ibn Ṭawq, a Shāfi'ī deputy judge divorced his wife, who was known as Bint Sha'bān. She was accused of being *fāsiqa* (morally dissolute), among other thing. She also had orphan's property in her possession, and, because of these accusations, it was said "that she is not qualified to have *waṣāya* (testamentary guardianship) over them."[1032] There is much that is left unsaid in this notice—where these orphans her children? Did she also invest this property and lend it out? Was her appointment as a guardian for orphans' property facilitated by her marriage to the deputy judge? One thing that is notable is that Bint Sha'bān had been supervising orphans' property apparently without any issue until her divorce brought to light accusations, possibly made by the disgruntled ex-husband, that she was morally unfit to perform that duty. It would seem, therefore, that the *fiqh* texts analyzed here continued to preserve divergent opinions about the mother's role in managing her orphaned children's property in part because legal practice did allow women to supervise orphans' property in certain cases.

[1030] *Ibid*. 4/1766.

[1031] *Ibid*. 3/1272.

[1032] *Ibid*. 1/414.

Conclusion

The analysis in this chapter supports the conclusion that law during this time was not just determined by the jurists' *fiqh* but was also a matter of legal practice and institutions. A person could *lawfully* acquire a loan from the *mūdaʿ al-ḥukm* or the *dīwān al-aytām*, even though legal scholars like al-Isnawī or Tāj al-Dīn al-Subkī held the conviction that this practice was not authorized by the *sharīʿa*. Nevertheless, because of the existence of the *ikhtilāf* outlined above within the Shāfiʿī *madhhab*, the (actual) practice of Shāfiʿīs providing loans was within the realm of the *sharʿ*. Since sulṭāns, at the very least in Egypt, helped establish the institutional spaces in which some of these loans were generated, moreover, this was a practice that can be considered to have been made possible by a combination of *siyāsa* and *sharīʿa*.

Although the texts studied in this chapter do exhibit a large measure of stability, they also continued to revive divergent opinions. These do not, appear, however, as threats to the role of the *madhhab* in the establishment of the rule of law due to the fact that these divergent opinions were subordinated under the principle that actions by the guardians on behalf of their orphans must be for the sake of the orphans' well-being or advantage (*ghibṭa*). The disagreements were limited to a small number of issues: whether orphans' property can be lent and whether a mother acquires guardianship in financial matters after the death of both the father and paternal grandfather. The disagreement regarding loans of orphans' property, moreover, was a moot point in some ways due to the existence of those institutions studied in Chapters Four and Five that were managed by Shāfiʿīs and regularly lent orphans' property. In light of these institutions' practice and the divergent opinions documented above, the insistence on the part of some jurists—like Tāj al-Dīn al-Subkī—that loans of orphans' property were not authorized by the *madhhab* turns out to be an aspirational characterization of the *madhhab* rather than an accurate

description of either the *madhhab* or the legal system. On a similar note, the continuation of the minority opinion that mothers could serve as financial guardians after the death of the father and paternal grandfather is directly linked to the existence of this in the legal practice of the era. For this reason, understanding legal practice is not only relevant to the study of law in action, but it is also fundamental to understanding both stability and change within *fiqh* during the Mamlūk Period.

Conclusion

This dissertation has charted the development of specific legal institutions and practices for supervising, accumulating, distributing and investing orphans' property, and, to a lesser extent, the property of absent individuals. It has identified a diachronic trend of increasing centralization of this control under the judiciary, starting in the 2nd/8th century until the early 15th century. This is not, however, a linear history—as mentioned in Chapter Three, judicial reforms instituted by a particular judge do not always seem have outlasted the individual judge. Greater continuity in the institution of the *mūdaʿ al-ḥukm* was achieved through the cooperation of both the state and the judiciary in the Fāṭimid and Mamlūk periods. In the latter period, in particular, which has been studied in greatest detail here, the Mamlūk sulṭāns of the late thirteenth and early fourteenth centuries A.D. appear to have encouraged the accumulation of orphans' property in the judicial treasuries. The accumulation of large sums of property and, especially, cash in the *mūdaʿ al-ḥukm* in Cairo and the *makhzan al-aytām* in Damascus eventually made these two institutions targets for sulṭāns and emirs in the late 14th centuries. Although I have argued that their appropriations of this wealth led to the decline of these institutions, I have resisted framing these appropriations as symptoms of an overall lack of regard for the rule of law. After all, at least one of these rulers (Barqūq) actually made good on his promise to return one of the loans he took from these caches. Moreover, it is tempting to speculate that rulers in medieval Egypt and Syria encouraged the accumulation of wealth in these institutions not only to facilitate trade but also to create a kind of bank that could be used—as it was in fact—in times of economic and political crisis. Alas, this must remain a speculation, yet it is just as much of an assumption to consider the appropriation of these funds as a sign of the corruption of the times. If anything, the availability of such large sums in these institutions is a remarkable institutional achievement that

speaks both to the political and social importance of upholding orphans' rights during this period and the economic and legal functions that the judicial treasury served.

As a study of Muslim laws and legal institutions, this dissertation has attempted to show the ways in which political, economic and social conditions contributed to the existence of particular legal practices and institutions that were framed as instruments for upholding the rights and duties outlined in Muslim juristic discourse. The focus here has been unapologetically on the particular histories of these institutions and the officials responsible for them. This resulted in an unfortunate neglect of a fascinating related topic: the social history of orphans and orphanhood during the Islamic Middle Periods. During the course of my research, I came across numerous biographical entries about the lives of individual orphans, their families, and their careers. Another phenomenon in the Mamlūk Period that I intentionally, if begrudgingly, neglected was the lives of the *mamālīk* themselves, many of whom were probably orphans themselves or experienced childhoods similar to orphans due to being taken at a young age from their natural families to be raised as soldiers. This social history of orphans and orphanhood, however, is another project for another time.

This dissertation has also suggested that the welfare of orphans and their property rights was politically significant during the Mamlūk Period. I argued as well in Chapter One that the political significance of guardianship over orphans has deep roots extending into pre-Islamic Arabic and Near Eastern culture. I also showed how the Shāfi'īs during the Mamlūk Period framed the Ḥanafīs' attempt to acquire their own *mūda'* as a threat to Islam itself—certainly an exaggeration, but indicative nevertheless of the importance that Shāfi'īs attached to their prerogative to supervise orphans' wealth and extract *zakāt*. This is an important indication of the relevance of economic factors for understanding the way in which Muslims developed *sharī'a*-

inspired legal institutions during in the Islamic Middle Periods. At the same time, as the discussion of al-Ṭarasūsīs' *fatwā* on how to block the extraction of *zakāt* indicates, formal laws and procedures as outlined in Muslim juristic discourse mattered. The struggle between Shāfi'īs and Ḥanafīs during this period, therefore, must be understood as *both* embedded in a web of economic interests and social ties *and* intimately grounded in the disagreements over legal doctrine.

It is my hope that this study will be useful for scholars interested in the history of Islamic law as it was practiced in premodern Muslim societies. Although I am confident of the overall conclusions I have reached about the history of the *mūda' al-ḥukm*, the *dīwān al-aytām* and the *umanā' al-ḥukm*, I believe that scholars working with other texts, other languages and different methodologies will be able to expand on the history of the supervision of orphans' property in Muslim societies. The supervision of orphans' property by the judiciary and the investment of that property on a regular basis was not limited in the Islamic Middle Period to Egypt and Syria, as I showed on the basis Nakhjawānī's text. More studies on other regions and urban centers may disclose similar institutions for preserving and investing orphans' property and expand the conclusions of this study.

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