belong to the latter. Shāfiʿī's point, then, is that different kinds of legal authority engender different levels of epistemic certainty, and therefore entail the need for a class of experts, at least in difficult cases. The lists of authorities which occur in the course of this discussion are, perhaps, not exactly irrelevant to this important idea, but their details are hardly determinative of it either.

C. *Lists of the Form* Qurʾān-Sunnah-ijmāʿ-ijtihād/qiyās; *Mining*

I have sought to show in the above discussion that Shāfiʿī's lists, however many members they may have, never constitute the focal point of his discussions of legal-theoretical issues. This fact strongly suggests that they do not constitute the core of his legal theory. Just to drive this point home,[51] I would like to focus, briefly and as a conclusion to this section, on the classic four-part lists among those which have been examined above. Of the eighteen lists which I identified at the outset of this article, by my count only six unproblematically contain the four elements Qurʾān, Sunnah, *ijmāʿ*, and *ijtihād* or *qiyās*. Of these six, three (¶¶959, 1012, and 1470) occur in the first group of lists which I discussed, and clearly represent, therefore, lists of secondary, corroborative authorities used in relation to other texts which provide the primary evidence of rules. One other such list (¶120) occurs in a discussion concerning *ijtihād* and the importance of limiting legal enquiry to revealed texts (this particular list has a fraternal—but not identical—twin at ¶1468, which contains five members, as I noted above). The remaining two "unproblematic" lists (¶¶1321, 1812) represent utterances of the interlocutor and cannot simply be taken as expressions of Shāfiʿī's own ideas. In light of all of the above evidence, it is not possible to maintain the four-sources interpretation of the *Risālah.*

IV. *The Other Theory in the* Risālah

If Shāfiʿī's lists of authorities do not represent the central legal-theoretical achievement of the *Risālah*—and they would be not only the best, but really the *only* evidence of the four-sources theory[52]—then

[51] And lest it be thought that I have simply muddied the waters by considering lists which are not of the form Qurʾān-Sunnah-*ijmāʿ*-*ijtihād*/*qiyās*.

[52] In order to rescue the four-sources interpretation, it might be argued that the

what is the *Risālah* about?[53] Although the primary purpose of this article is to call the "four sources" interpretation of the *Risālah* into question, it would only be fair, by way of conclusion, to suggest an alternative interpretation. To do that, one might ask: What do Shāfiʿī's lists, or for that matter the allegedly central four-sources, have to do with Shāfiʿī's various hermeneutic techniques and concepts which are so painstakingly demonstrated throughout the *Risālah*, such as the notions of *ʿāmm/khāṣṣ, jumlah/naṣṣ, naskh, ikhtilāf al-ḥadīth*, or *amr/nahy*?[54] Except in the narrow (but important) sense which I have already described, concerning secondary, corroborative authority which is analytically posterior to exercises in legal reasoning and interpretation, the answer is: nothing really. One might then ask whether some other concept or idea in the *Risālah* could explain

Risālah as a whole, in its arrangement of topics, reflects the usual four-sources scheme (Qur'ān, Sunnah, *ijmāʿ*, *qiyās/ijtihād*), even if not all of its lists of authorities do. This argument fails, however, as soon as one considers that the first four legal-theoretical concepts which are introduced, and which take up approximately the first third of the *Risālah*—*bayān, ʿāmm/khāṣṣ, naskh*, and *jumlah/naṣṣ*—all demonstrate the interaction (or the collision) of Qur'ān and Sunnah in specific instances. For the overall form of the *Risālah* to reflect the four-sources scheme, the discussion of these concepts would have to concern the Qur'ān alone, not the functioning of Qur'ān and Sunnah together. In fact, the *Risālah* seems mostly unconcerned with legal problems for which the authority, whether primary or secondary, is entirely Qur'ānic. This point is easily proved by an examination of the approximately sixty example problems discussed by Shāfiʿī in the *Risālah*. It also follows, in my view, from Burton's studies of Shāfiʿī's legal thought (e.g., his *Sources of Islamic Law*). One might also mention, in this regard, that the *Risālah*'s discussion of *ijmāʿ* (¶¶1309–1320) is exceptionally brief and probably best interpreted as belonging to the larger discussion of the Sunnah rather than as constituting an independent, coequal topic. See especially ¶¶1309–1312, where, in an admittedly difficult passage, Shāfiʿī denies that an instance of the Sunnah can be inferred from *ijmāʿ* (that is, one needs the actual Sunnaic text, not just the jurists' opinion about what one must do) and then suggests that *ijmāʿ* is only valid because of its proximity to the Sunnah. I have analyzed this passage in detail in my "Legal-Theoretical Content", 430–437.

[53] I noted above the view that Shāfiʿī's achievement consisted in making the Prophetic Sunnah the sole supplement to the Qur'ān, a view that, incidentally, seems incompatible with the four-sources theory; see, e.g., Coulson's clumsy attempt to link both ideas in his *History of Islamic Law*, 55–59. That view, however, concerns much more Shāfiʿī's place in the history of Islamic legal thought than the precise details of his doctrine as they appear in the *Risālah*.

[54] Only one of Shāfiʿī's hermeneutic techniques seems at all related to his lists of authorities, namely *qiyās*, and then only by the fact of its inclusion in the lists, since the lists do not really explain anything about *qiyās* except, possibly, its epistemological value relative to those authorities which precede it in a given list. Note, also, that *qiyās* appears in some lists only.

something about the significance of those hermeneutic techniques and concepts, and there does in fact exist an idea in the *Risālah* which sheds some light on both the content and the organization of the *Risālah*.

The very first legal-theoretical concept which Shāfiʿī discusses at length in the *Risālah* is what he calls the "*bayān*", a "statement of a legal rule". According to Shāfiʿī, legal rules are expressed, in revealed texts, in one of five ways: (1) by the Qur'ān alone, (2) by the Qur'ān and the Sunnah together whereby the Sunnah echoes the Qur'ān, (3) by the Qur'ān and Sunnah together whereby the Sunnah explains the Qur'ān, (4) by the Sunnah alone, or (5) by none of the above, in which case one resorts to *ijtihād* and *qiyās* (see generally *Risālah* ¶¶53–125). This catalog of modes of Qur'ān-Sunnah interaction aims to provide a complete statement of all possible combinations of revealed authority, and in those cases where revealed authority eludes the practitioner completely, then the practitioner is thrown back into this matrix of revealed texts by the injunction to resort to *qiyās*, a carefully defined method for linking a rule to a revealed text in particularly difficult cases.[55] The scheme of source-interaction outlined by the *bayān* evinces a kind of symmetry, inasmuch as any given rule will always be a product of the Qur'ān alone, the Qur'ān and Sunnah together, or the Sunnah alone. Thus, Shāfiʿī's concept of the *bayān* complements his claim that the divine law is all-encompassing,[56] by showing that the divine law exhausts all possible permutations of revealed authority,[57] and by showing that it does so in an orderly and aesthetically satisfying manner.

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[55] If my interpretation of this aspect of Shāfiʿī's concept of the *bayān* is correct, then the ostensibly non-revelatory elements in Shāfiʿī's lists—*ijmāʿ*, *āthār*, *aqāwīl al-ṣaḥāba*, and so on—should probably be understood as offering interpretations of underlying revealed texts, that is, Qur'ān and Sunnah, as I have already suggested above, at notes 37 and 38 for *ijmāʿ* and *āthār*. This is because non-revelatory information would be irrelevant to or excluded from the system described by Shāfiʿī's theory of the *bayān*.

[56] "No event befalls one of the people of God's religion without there being in God's Book the indication of a rightly-guided course of conduct in respect of it". "*Laysa tanzilu bi-aḥad min ahl dīn allāh nāzilah illā wa-fī kitāb allāh al-dalīl ʿalā sabīl al-hudā fīhā*". (*Risālah* ¶48)

[57] It is also worth noting that the intensely complementary nature of the relationship between Qur'ān and Sunnah, as portrayed in the *bayān* scheme, recalls the relationship between the Written and Oral Torahs in Rabbinic Judaism.

If I have understood it, Shāfiʿī's *bayān* begins to sound like the foundations of a theory of the law, since it attempts to offer an utterly complete and systematic description of the law's shape and functioning. It seems to me to represent the central point of the *Risālah*: it forms the first topic discussed at any length in the *Risālah*, Shāfiʿī refers to it repeatedly after his introduction of it,[58] and, significantly, it also reflects, or rather, I would argue, determines, the overall structure of the *Risālah* and the order of topics discussed. In the first third of the *Risālah*, Shāfiʿī discusses problems of source-interaction (¶¶53–125 [*bayān*] and 179–568 [*ʿāmm/khāṣṣ, naskh,*[59] *jumlah/naṣṣ*]), that is, problems in which the Qurʾān and Sunnah combine to express legal rules. In the second section, he discusses problems relating to contradictions between individual *ḥadīth* (¶¶569–1308, also including *isnād* criticism),[60] that is, problems in which the Sunnah alone expresses legal rules. In the third section, he discusses *ijtihād* and *qiyās* and other problems whose solutions are difficult to document (¶¶1321–1670), that is, problems for which Qurʾān and Sunnah seem to offer no directly apposite rule, such that one which is only indirectly relevant must be used as a basis for *qiyās*.[61] Thus, the overall form of the *Risālah* as well as its arrangement of discussions of individual hermeneutic techniques—*ʿāmm/khāṣṣ, ikhtilāf al-ḥadīth, qiyās*, and so on—appear to be arranged according to Shāfiʿī's categories of the *bayān*.[62]

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[58] He expressly invokes this idea at *Risālah* ¶¶293, 298–301, 308, 310–311, 418, 433, 440, 461–462, 465, 478–480, 568, 570–571, 613–615, and 629. That is, it appears frequently in that part of the *Risālah* devoted to problems of source-interaction, as one might expect.

[59] Burton has certainly suggested, and the text of the *Risālah* confirms, that for Shāfiʿī *naskh* is very much a problem of Qurʾān-Sunnah harmonization. Burton, *Sources*, e.g. 1–8. Shāfiʿī himself admits as much at *Risālah* ¶608, where he says that the Sunnah frequently provides a *dalīl* that *naskh* has occurred within the Qurʾān: *wa-akthar al-nāsikh fī kitāb allāh innamā ʿurifa bi-dilālat sunan rasūl allāh.*

[60] At the beginning of this section, Shāfiʿī also reprises some aspects of Qurʾān-Sunnah interaction.

[61] As noted above, Shāfiʿī's principal discussion of *ijmāʿ*, ¶¶1309–1320, may belong to his treatment of the Sunnah as an independent source of law. Shāfiʿī's discussion of problems in which the solution is difficult to document in a revealed text, ¶¶1671–1821, arguably belongs together with his discussion of *qiyās* and *ijtihād*.

[62] Conspicuous by its absence is a section on the Qurʾān as an independent source of legislation. I noted above that this absence represents a problem for the four-sources theory as well, but I think I have shown that there is no independent statement of a four-sources idea in the *Risālah*, and so no reason to think in the first place that the four-sources theory might constitute the *Risālah*'s main point.

Now, the point of Shāfiʿī's concept of the *bayān* would seem to be to show, first, that all legal rules come from revealed texts and, second, that what must have appeared as a bewildering array of contradictory rules and texts can always be explained in terms of more-or-less defined hermeneutic techniques (*ʿāmm/khāṣṣ, etc.*), which themselves can be arranged into rationally organized categories of possible combinations of Qurʾān and Sunnah (modes of source-interaction described by the *bayān* scheme).[63] These two points have theological corollaries: First, if the divine law is truly all-encompassing, as Shāfiʿī claims, then that fact should be reflected in its texts, and Shāfiʿī's concept of the *bayān* attempts schematically to show how the law makes every possible use of its two revealed sources, Qurʾān and Sunnah, by deploying them (as legislation) in all possible combinations. This attempt to account for all possible combinations of revealed texts complements the notion of a revelation which contemplates every eventuality. Second, when apparent contradiction in the divine law can always be resolved and shown to be illusory, the perfection of the divine itself is confirmed. These corollaries serve an even grander theological point, which is that, for Shāfiʿī, Islam is first and foremost a religion of laws, and the perfection, which is to say the ultimate truth, of the religion itself emerges only, or at least most obviously, from a consideration of the religion and its texts as fundamentally legislative in design. There is good reason to think, then, that Shāfiʿī's notion of the *bayān* might represent the cornerstone of a carefully constructed "juridical theology".[64]

On the other hand, Shāfiʿī clearly outlines his notion of the *bayān* and then refers to it repeatedly. The absence of a section of the *Risālah* devoted exclusively to the Qurʾān could be explained by the fact that the overwhelming majority of legal rules are found in the Sunnah and, moreover, the primary legal-hermeneutical problem to be solved for someone like Shāfiʿī was the problem of contradictions between Qurʾān and Sunnah. Shāfiʿī's *bayān* theory obviously attempts to naturalize such contradictions by making Qurʾān-Sunnah combinations a primary feature of the law's structure. This explanation is supported by the conclusions of Burton especially on the role of the Qurʾān in early legal thought. See also, for a good survey of the whole problem of the early legal history of the Qurʾān, P. Crone, "Two Legal Problems Bearing on the Early History of the Qurʾān", *Jerusalem Studies in Arabic and Islam* 18 (1994), 1–37.

[63] Shāfiʿī devoted his lengthiest work on legal theory and hermeneutics, *Ikhtilāf al-ḥadīth*, to instances of contradictory *ḥadīth*.

[64] This is George Makdisi's term for Shāfiʿī's achievement in the *Risālah*, and is more apt than he may have realized. "The Juridical Theology of Shāfiʿī: Origins and Significance of *uṣūl al-fiqh*", *Studia Islamica* 59 (1984), 5–47.

V. *Conclusion*

I have tried to show above that Shāfiʿī's lists of authorities appear in the service of larger legal-theoretical ideas, ideas which really cannot be reduced to the lists, and of which the lists do not represent convenient summations. Quite apart from the fact that the *Risālah*'s text does not allow such a reductive interpretation, it seems to me that the four-sources interpretation does considerable damage to Shāfiʿī as a legal theorist, making his legal thought appear simplistic and implicitly making of the *Risālah* a badly organized jumble of unconnected ideas, unconnected, that is, except by diverse, randomly appearing lists of authorities, sandwiched between discussions of matters to which they are largely irrelevant. I have also tried to suggest that the *Risālah can* be read as a book with an overarching point: Shāfiʿī's theory of the *bayān*.

Given the sweeping implications of Shāfiʿī's concept of the *bayān*, it seems significant that it has no obvious connection to anything like a theory of four sources; it certainly does not spell out a method (such as mining the sources). Instead, Shāfiʿī's concept of the *bayān* would seem to be an attempt to describe, down to the last detail, the divine architecture of the law. By contrast, the (alleged) four-sources theory has no particular implications that I can discern, and it is hard to explain why anyone should have taken the trouble to work it out as a full-blown theory (which anyway it is not). Since the four-sources theory also seems to have much less support in the text of the *Risālah* than one might have thought, given its ubiquity in the secondary literature, perhaps the time has come to abandon it and to ponder instead Shāfiʿī's concept of the *bayān*.

SUNNAH IN THE RESPONSES OF ISḤĀQ B. RĀHWAYH

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An examination of Ibn Rāhwayh's *fiqh* responses will enable us to shed light on two topics. One is what kind of a jurist he was, and the other is the use of the term *sunnah* in early jurisprudence. By investigating the way he uses the term *sunnah* in his *masā'il*, it will be possible to come to some conclusions about the way he combines his expertise as a traditionist with his expertise as a jurist. Ibn Rāhwayh had a considerable reputation both during and after his lifetime, despite the fact that he is not well represented in modern secondary literature. In pre-modern *ṭabaqāt* sources, he is described as a renowned jurist and traditionist. This is the case in the biographical notice of him in *Ṭabaqāt al-shāfi'īyah* by Tāj al-Dīn al-Subkī (d. 771/1370), and also in the one in *Ṭabaqāt al-ḥanābilah* by Ibn Abī Ya'lā (d. 527/1133).[1] Sezgin, however, lists him with the traditionists, but not with the jurists of any school; Schacht's article on him in the *Encyclopaedia of Islam* also describes him only as a traditionist, while Goldziher, in his book on the *Ẓāhirīyah*, refers to Ibn Rāhwayh only as a Shāfi'ī lawyer.[2]

Isḥāq b. Ibrāhīm b. Makhlad b. Rāhwayh al-Ḥanbalī al-Marwazī, Abū Ya'qūb (d. 238/853) was born in Merv and traveled extensively in connection with his studies, most especially in Iraq and the Ḥijāz, before settling in Nishapur, where he died. Ibn al-Nadīm lists him as the author of a Qur'ān commentary, a *Kitāb al-sunan fi'l-fiqh* and a *musnad*. The first two works have not survived; there are fragments of the *musnad* in Cairo, Damascus and Cambridge, England.[3] Although

[1] Tāj al-Dīn al-Subkī, *Ṭabaqāt al-shāfi'īyah al-kubrā*. 6 vols. (Cairo: Maṭba'at al-Ḥusaynīyah, 1906), 2:83–93; Abu'l Ḥusain Muḥammad b. Abī Ya'lā, *Ṭabaqāt al-ḥanābilah*, 2 vols. (Cairo: Maṭba'at al-Sunnah al-Muḥammadīyah, 1952), 1:109; Further, al-Shīrāzī (d. 476/1083) in his *Ṭabaqāt al-fuqahā'* includes Ibn Rāhwayh as a *faqīh* of Khurasan. Abū Isḥāq al-Shīrāzī, *Ṭabaqāt al-fuqahā'* (Beirut: Dār al-Rā'id al-'Arabī, 1970), 94.

[2] See Fuat Sezgin, *Geschichte des arabischen Schrifttums* (hereafter *GAS*), vol. 1 (Leiden: Brill, 1967), 109–10; Ignaz Goldziher *The Ẓāhirīs, Their Doctrine and Their History*, ed. and trans. Wolfgang Behn (Leiden: Brill, 1971), 4.

[3] For manuscripts of Ibn Rāhwayh's *Musnad*, see *GAS*, 1:110. The section of the

no separate work is available for the study of Ibn Rāhwayh's *fiqh*, his juristic thinking can be gleaned from his responses (*masā'il*, sing. *mas'alah*), which were linked with those of Ibn Ḥanbal in one of the surviving versions of *Masā'il Aḥmad b. Ḥanbal* compiled by a student and younger contemporary of both Ibn Ḥanbal's and Ibn Rāhwayh's, Isḥāq b. Manṣūr al-Kawsaj al-Marwazī (d. 251/865).[4]

In the context of early *fiqh*, a *mas'alah* is either a question, or a question and its answer, or the subject matter of both the question and the answer. Strictly speaking, the *masā'il* in al-Kawsaj's compilation are neither *fiqh*, nor *furū'*, nor *ḥadīth*, but a combination of all three in which we find ongoing discussion about a variety of issues that preoccupied early jurists. These issues are sometimes practical, other times theoretical or casuistic, and often a combination. It is not always clear why some issues are discussed and not others. There are five extant versions of Ibn Ḥanbal's *masā'il*, for example, and it is striking how different they are from each other. Details mentioned briefly in one will be covered fully or omitted in others.[5] For by the third century, thousands of questions had been asked by successive generations of jurists and various answers given. These questions were incorporated into all *fiqh* works, either explicitly in works devoted to *ikhtilāf*, or implicitly in the way new questions were posed. These questions are also reflected in the thousands of traditions in circulation through which the growth of legal doctrines can be traced. In their compilations, the transmitters of Ibn Ḥanbal's and Ibn Rāhwayh's responses were not attempting to set out a coherent body of doctrine, rather they recorded the end result for their time of discussions among experts in which this body of shared background was assumed. What they wished to do in compiling their responses was to elicit answers to questions they themselves were uncertain

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Cairo manuscript which contains only 'Ā'ishah's *musnad* has over one thousand *ḥadīths*. 'Ā'ishah's *musnad* is the subject of Jamila Shawkat, "A Critical Edition with Introduction of Tradition Recounted by 'Ā'ishah, Extracted from the *Musnad* of Isḥāq b. Rāhwayh" (Ph.D. diss., Cambridge University, 1984).

[4] It was not unusual for Ibn Ḥanbal's *masā'il* to be linked with those of another scholar. See Henri Laoust, "Le Hanbalisme sous Le Califat de Baghdad", *Revue des études islamique* 27 (1959), 75. Al-Kawsaj seems to have followed much the same route as Ibn Rāhwayh. He too was born in Merv and after studying in many of the same places as Ibn Rāhwayh, settled in Nishapur. See *GAS*, 1:509.

[5] For descriptions of these works, see Susan Spectorsky, *Chapters on Marriage and Divorce, Responses of Ibn Ḥanbal and Ibn Rāhwayh* (Austin, Texas, 1993), 1–2 and "Appendix" (hereafter *Chapters*).

about or answers to questions on which they knew there was *ikhtilāf*, in order to find out what choices these two eminent scholars would make among the opinions of other jurists, the often conflicting *ḥadīth*s on the same subject and the differing interpretations of relevant Qur'ān verses.[6]

Here I will investigate Ibn Rāhwayh's responses with examples from the chapters on marriage and divorce. By comparing Ibn Rāhwayh's responses to the opinions of earlier and contemporary jurists on the same subjects, it is possible to discover the background for the discussions that evolved concerning problems of marriage and divorce and so provide a context for the way Ibn Rāhwayh uses the word *sunnah* when he supports one doctrine over another. In comparing his responses to earlier material, I assume that he knew it and made use of it. Among the collections of traditions, I have limited my investigation mainly to the earlier collections by ʿAbd al-Razzāq al-Ṣanʿānī (d. 211/827) and Ibn Abī Shaybah (d. 235/849).[7] Except in one instance (example V, below), I have avoided reference to the Six Books which were compiled a bit later, although they certainly contain material he knew. Even within these limitations, it should be noted that with a text of this kind, it is virtually impossible to make such comparisons exhaustive. One more early text that mentions the same material, or one more tradition can always be found. However, I do not think that an increase in the amount of detail discussed would alter the substance of my conclusions.

Let me make a few more points in advance about comparisons I make between Ibn Rāhwayh's *fiqh* and that of other scholars. To begin with, I find Calder's revised dating of early texts unconvincing.[8]

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[6] In *The Sources of Islamic Law: Islamic Theories of Abrogation* (Edinburgh: Edinburgh University Press, 1990), John Burton argues that the background for all issues taken up in *ikhtilāf* is to be found in problems of *naskh*. He makes a strong case; however, the responses I examine here do not usually refer to relevant qur'ānic verses. This is not because Ibn Rāhwayh does not use them, but because he takes for granted the assumption that they are an integral part of the background of all questions. See Spectorsky, *Chapters*, s.v. "Index of Qur'ān Verses" for responses that directly take up problems of *tafsīr*.

[7] ʿAbd al-Razzāq b. Ḥammām al-Ṣanʿānī, *Al-Muṣannaf*, 11 vols. (Beirut: al-Majlis al-ʿIlmī, 1972); Ibn Abī Shaybah, *Al-Muṣannaf fi'l-aḥādīth wa'l-āthār*, 9 vols. (Beirut: Dār al-Tāj, 1989).

[8] See Norman Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Oxford University Press, 1993), especially chapter 2 on Mālik's *Muwaṭṭa'*, chapter 3 on early Ḥanafī texts and chapter 4 on Shāfiʿī's *Kitāb al-umm*. It is disappointing that Calder nowhere took account of Ibn Ḥanbal or any of the printed versions of his *masā'il*, long available in major libraries.

The references to Mālik and Mālikī doctrine in all the versions of Ibn Ḥanbal's *masā'il* make it difficult to believe that Ibn Ḥanbal and Ibn Rāhwayh did not know the *Muwaṭṭa'*, even if not precisely in the form in which we read it today.[9] I also assume that when reference is made to "the scholars of Iraq", these include Abū Ḥanīfa, Abū Yūsuf and Shaybānī. Further, Ibn Rāhwayh certainly knew Shāfiʿī's work, even if the story of their meeting in the Hijaz and their debate on *ḥadīth* is apocryphal,[10] and even though, as I will show, Ibn Rāhwayh did not fully incorporate Shāfiʿī's methodological concerns in his *fiqh*.[11] Therefore, parallel cases in these earlier texts reveal the layers of *ikhtilāf* Ibn Rāhwayh is aware of when he applies the term *sunnah* to one doctrine rather than another. Finally, I shall refer to *ḥadīth* and *athār* indiscriminately as traditions, because evidence from *isnād*s cannot be conclusive here, since Ibn Rāhwayh often does not cite them and when he does, does not do so systematically. We can never assume that he is ignorant of an *isnād* because we do not find it in a particular response. Among the authors of early *fiqh* texts only Shāfiʿī uses *isnād*s consistently as part of his insistence that *sunnah* mean only *sunnah* of the Prophet and that it be documented by means of *ḥadīth* with sound *isnād*s. We can also never assume that Ibn Rāhwayh did not know a *matn* just because he does not use it in a particular instance. It is conceivable that he does not know it, but far more likely that he is taking it for granted.

As a framework for examining Ibn Rāhwayh's use of *sunnah*, it will be useful to summarize Schacht's conclusions about the term. Schacht said that the early Muslim jurists of Iraq, Medina and Syria, who made up what he refers to as the "ancient schools of law", used the term *sunnah* to give prestige to their local doctrines. When

[9] See Spectorsky, *Chapters*, s.v. index "Mālik b. Anas".

[10] See Subkī, *Ṭabaqāt*, 6:89–92.

[11] In his review article of Calder's *Studies*, John Burton took up some of the points I have raised here and in meticulous detail refuted many of Calder's claims. See his "Rewriting the Timetable of Early Islam", *Journal of the American Oriental Society* 115 (1995): 3. In another review article of Calder's book, Miklos Muranyi approaches the problems in Calder's analyses somewhat differently, but also expresses serious reservations about his redating of early juristic texts. See "Die frühe Rechtsliteratur zwischen Quellenanalyse und Fiktion", *Islamic Law and Society* 4 (1997): 3. See also the thoughtful discussion of dating early texts in Jonathan E. Brockopp's article, "Early Islamic Jurisprudence in Egypt: Two Scholars and their *Mukhtaṣar*s", *International Journal of Middle East Studies* 30 (1998): 167–82.

these jurists said that a certain practice or theoretical position was a *sunnah* or the *sunnah* without further qualification, they were referring to an opinion or course of action which they attributed sometimes to the authority of the Prophet and sometimes to that of the Companions, including, of course, the early caliphs. Further, they attributed *sunnah*s to the authority of the Successors and to their own scholarly pronouncements. Often they combined the authority of several of these. In addition to using *sunnah* alone, they used the phrase "*sunnah* of the Prophet", but they did not associate it with formal traditions from him. They also used *sunnah* in combination with other words such as "well known and recognized" (*al-sunnah al-maḥfūẓah al-maʿrūfah*), or *maḍā*, as in *maḍat al-sunnah*, "the *sunnah* in the past".[12]

Shāfiʿī attacked these jurists for their inconsistent use of the term and insisted that it mean only the *sunnah* of the Prophet as ascertained through the use of traditions with sound *isnād*s. That is its meaning in later legal theory. But, as Hallaq has pointed out, Shāfiʿī's methodology was not necessarily adopted by the generation of jurists that came right after him.[13] Ibn Rāhwayh is one of these jurists. The examples that follow, which are intended to be representative, will show that he uses *sunnah* in all the ways the jurists of the ancient schools of law did.

***Sunnah* Used Alone**. When he uses *sunnah* alone, we cannot always tell whether his final authority is practice or traditions or a combination of both. This is the case in the first example below. In the second, he says *al-sunnah ʿindanā* to refer to practice, either ideal or real, but certainly there are enough traditions to back him up.

In a response about the marriage contract of a minor girl, al-Kawsaj assumes that if a minor girl is given in mariage by a guardian (instead of by her father), she has the option of dissolving the marriage. He asks about the mechanics of this dissolution (referring to Ibn Rāhwayh as Isḥāq):

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[12] Joseph Schacht, *The Origins of Muhammedan Jurisprudence* (Oxford: Clarendon Press, 1959), 58–81. A close reading of this chapter will show that Schacht describes only minute differences between the different geographical schools. Mālik and the Medinese stands out for their insistence on the authority of the practice of Medina regardless of whether it is opposed to traditions.

[13] See Wael Hallaq, "Was al-Shāfiʿī the Master Architect of Islamic Jurisprudence?" *International Journal of Middle East Studies* 25 (1993): 587–605.

> I. I asked Isḥāq about the minor orphan given in marriage by her *walī*: "Is her option to dissolve the marriage [an automatic] separation or not? Can her husband have intercourse with her before she is of age? When she is of age? Can she opt before she is of age?"
>
> Isḥāq said, "The *sunnah* concerning that (*al-sunnah fī dhālika*) is that she can opt to end the marriage when she is of age. She is of age when she has completed her ninth year, because at that age she can begin to menstruate and bear children. If her *walī* gave her in marriage and her husband wishes to have intercourse with her before she is of age, he cannot lawfully do so. [He cannot lawfully do so] until she exercises her option whether to remain married or not, and her exercise of this option before she is of age has no legal effect. If one or the other, or both of them die before coming of age, they never inherit from each other.[14]

Here, Ibn Rāhwayh refers to the *sunnah* regarding several questions about the ramifications of a guardian giving his minor female ward in marriage. His answers are based on the assumption that in an ideal marriage contract, a woman's father gives her in marriage to a suitor who is her equal in status for an appropriate dower. If her father has died, her nearest male relative takes his place as her guardian (*walī*). Ibn Rāhwayh indicates that if a minor girl is given in marriage by a *walī* instead of by her father, the marriage is neither valid nor invalid until she comes of age and can speak for herself. At this point, she can opt out of the marriage, in which case it is automatically dissolved without legal effects, as it would be if either spouse had died while she was still a minor (in which case also intercourse should not have taken place). The question is part of an ongoing discussion in early *fiqh* texts about the difference between the extent of a father's authority over the marriage of his daughter and a guardian's authority over the marriage of his ward.[15]

There was general agreement that a father had absolute authority to give his minor daughter in marriage without consulting her. All but the Mālikīs agreed that a daughter who has attained puberty, and hence come of age, must be consulted about her marriage. The Mālikīs said a father has the same authority over a mature unmar-

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[14] This example and all subsequent ones are taken from Spectorsky, *Chapters*. This is §5, 145–6.

[15] For other issues regarding the extent of a father's authority over the marriage of a daughter and a *walī*'s authority over the marriage of his ward, see *Chapters*, 9–14 and references there.

ried daughter as he has over a minor one. All, including the Mālikīs, are agreed that any woman who has previously been married, must give verbal consent to any subsequent marriage. But a *walī*'s authority does not equal a father's, and Mālik and Shāfiʿī said a *walī* must wait until his ward is of age before giving her in marriage and he must do so only with her consent. Ibn Ḥanbal admits that it is possible for a guardian to give an underage girl in marriage, but says, "I do not like him to do so (*lā yuʿjibunī*)".[16] Shaybānī said that Abū Ḥanīfa held that a guardian can give a minor girl in marriage, but that she has the option of dissolving the marriage when she comes of age.[17] Finally, Ibn Abī Shaybah's *Muṣannaf* contains several traditions from Companions attesting to her having this option, as does that of ʿAbd al-Razzāq.[18]

In a question about the length of time of a widow's *ʿiddah*,[19] al-Kawsaj asks a question about the *ʿiddah* of an *umm al-walad* after her master has died. An *umm al-walad* is a slave who has borne her master children. If, during his lifetime, he has accepted paternal responsibility for the children, he cannot sell her. He may manumit her, but if he keeps her, she free upon his death.[20] Al-Kawsaj reports:

> II. Isḥāq was asked about the *ʿiddah* of the *umm al-walad* whose master dies.
>
> He said, "Our *sunnah* (*al-sunnah ʿindanā*) is that she waits an *ʿiddah* of four months and ten days".

In this example, Ibn Rāhwayh supports one of several contending views about the status of an *umm al-walad* upon her master's death. The length of her *ʿiddah* depends upon whether, at her master's death, she is considered a free widow, or a slave rather than a widow. Ibn Rāhwayh thinks of her as a free widow, and therefore her *ʿiddah* is

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[16] See Muḥammad b. Idrīs al-Shāfiʿī, *Kitāb al-umm*, with *Mukhtaṣar al-Muzanī*, 8 vols. in 6 (Beirut: Dār al-Maʿrifa, n.d.), 5:17–19; Mālik b. Anas, *Muwaṭṭaʾ Yaḥyā b. Yaḥyā*. with commentary by Muḥammad al-Zurqānī, 4 vols., (Cairo: Maṭbaʿat al-Istiqāmah, 1379/1959), 3:143–44, and Ibn Ḥanbal in *Chapters*, §7, 93.

[17] Muḥammad b. al-Ḥasan al-Shaybānī, *Kitāb al-ḥujjah ʿalā ahl al-madīnah*, edition and commentary by Mahdī Ḥasan al-Kīlānī al-Qādirī, 4 vols., (Beirut: ʿĀlam al-Kutub, 1403/1983), 4:140–42.

[18] Ibn Abī Shaybah, 3:281; ʿAbd al-Razzāq, 6:164–66.

[19] See *EI* (second edition), s.v. "*ʿIdda*". All subsequent references to *EI* are to the second edition.

[20] See *Chapters*, §312, 237–38. See *EI*, s.v. "*umm al-walad*" for the history of the doctrine about this kind of female slave.

four months and ten days. However, if she is thought of primarily as a slave, she does not wait an *ʿiddah*, but an *istibrāʾ*.[21] Both opinions were held, as well as the opinion that her *ʿiddah* was three menstrual periods, or three months.[22] Ibn Abī Shaybah recorded a number of traditions about the *ʿiddah* of an *umm al-walad* whose master has died; some support an *ʿiddah* of one menstrual period, others, three menstrual periods, others, four months and ten days. Included in this last group is a statement from the Companion ʿAmr b. al-ʿĀṣ in which he says, "Do not make the *sunnah* of the Prophet obscure to us, her *ʿiddah* (i.e., the *umm al-walad*'s) is that of a [free] widow".[23] Ibn Rāhwayh echoes this statement at another point in these responses where al-Kawsaj records him saying of the *umm al-walad* whose master has died, "She waits an *ʿiddah* of four months and ten days, because the death of her master has made her a free woman.[24]

Abū Yūsuf reported that Abū Ḥanīfa held that the *ʿiddah* of the *umm al-walad* who has been manumitted or whose master has died was three menstrual periods. Mālik, in the *Muwaṭṭaʾ*, said, "Our practice (*al-amr ʿindanā*) is that the *ʿiddah* of the *umm al-walad* whose master has died is one menstrual period, unless she is among those women who do not menstruate, then she waits an *ʿiddah* of three months". Shāfiʿī said her *ʿiddah* was an *istibrāʾ*. Ibn Ḥanbal is reported to have supported, at different times, one month, three months or four months and ten days as the appropriate *ʿiddah* for an *umm al-walad* whose master has died.[25]

In both of the above responses, Ibn Rāhwayh indicates a vote in the *ikhtilāf* by using the word *sunnah*. He does not particularly associate it with the Prophet, unless one assumes in II that he votes for four months and ten days as the *ʿiddah* of the *umm al-walad* whose master has died because he agrees with the statement found in Ibn Abī Shaybah that it represents the *sunnah* of the Prophet, but that

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[21] Usually one month, or one menstrual period, but also three months or three menstrual periods. See *EI*, s.v. "*Istibrāʾ*". The article points out that the purpose of this waiting period was to ascertain whether the woman in question was pregnant. Some sources also mention propriety.

[22] The *ʿiddah* of a woman too old or too young to menstruate is reckoned in months.

[23] Ibn Abī Shaybah, 4:117–19.

[24] *Chapters*, §221, 209.

[25] Abū Yūsuf Yaʿqūb b. Ibrāhīm, *Kitāb al-āthār* (Hayderabad: Lajnat Iḥyāʾ al-Maʿārif al-Nuʿmānīyah, 1355 A.H.), 145, #661; Mālik, *Muwaṭṭaʾ*, 3:225; Shāfiʿī, *Kitāb al-umm*, 5:218; For Ibn Ḥanbal's differing opinions, see *Chapters*, 54–55.

is only an assumption. In I, his use of *sunnah* supports the Iraqī position rather than the Madinese, and there are many traditions to reinforce it. In II, he says "our *sunnah*" when he makes the choice of four months and ten days for the *ʿiddah* of an *umm al-walad* whose master has died. This time period is supported by one set of traditions, but he does not adduce them. He disagrees here with Abū Ḥanīfa, Mālik and Shāfiʿī, although not with one of Ibn Ḥanbal's opinions.

***Sunnah* of the Prophet.** In III and IV Ibn Rāhwayh refers to the *sunnah* of the Prophet. In III, he uses the whole expression; in IV he refers to an incident in the Prophet's life which he and his fellow scholars know something about, although they do not agree on the exact details.

In III, when Ibn Rāhwayh refers to the *sunnah* of the Prophet, he is establishing the maximum dower a bride can receive. Al-Kawsaj reports his opinion about the amount of a bride's dower when a marriage contract is concluded on her behalf for a dower in accordance with her status. Al-Kawsaj reports:

> III. Isḥāq said, "Whenever a man marries a woman for a dower in accordance with her status, she can receive what the Prophet established as his *sunnah* for his daughters and wives, and that is 480 dirhams".

With this figure, Ibn Rāhwayh establishes a maximum dower by choosing one set, among many, of traditions about the amounts of the dowers of the Prophet's daughters and wives.[26] In Ibn Saʿd's *Ṭabaqāt*, for example, a chapter on the dowers of the Prophet's wives contains eight traditions. Four report 480 dirhams as the amount both the Prophet's wives and daughters received, and four report 500.[27] ʿUmar's name is associated with those specifying 480 dirhams; he is reported to have urged that women's dowers not be excessive and that the Prophet's example of giving his wives and daughters no more than 480 dirhams be followed. In addition, in his biographical sketch of the Prophet's daughter Fāṭima, Ibn Saʿd records

[26] See *Chapters*, 151, §20 for this response. I have ammended the translation for this paper. See also *Chapters*, 16–22 and references there for a discussion of the appropriate dower for a bride.

[27] Muḥammad b. Saʿd, *Kitāb al-ṭabaqāt al-kabīr*, Edited by Eduard Sachau, 9 vols. (Leiden: Brill, 1905–40), 8:115–16.

a *ḥadīth* about her marriage to ʿAlī which says that in order to provide a dower for her, ʿAlī sold a camel for 480 dirhams.[28]

In ʿAbd al-Razzāq's *Muṣannaf* as well as in Ibn Abī Shaybah's, ʿUmar's name is associated both with 480 and 500 dirhams.[29] But other numbers are also reported in traditions about the wives of the Prophet, as well as about women given in marriage during his lifetime. In addition, all collections include traditions that say the dower is whatever the parties agree upon, and that a woman's fair dower is the dower the women in her family can expect to receive.[30]

If we turn to other early *fiqh* works, in Abū Yūsuf's *āthār* we find 1,000 dīnars mentioned as the dower for which Ibn ʿUmar used to give his daughters in marriage, as well as a statement that the dower can be whatever the parties have agreed upon.[31] In the *Muwaṭṭaʾ*, Mālik established a minimum dower and it is three dirhams. In *Kītāb al-umm*, Shāfiʿī offered 500 dirhams as the amount of a maximum dower with a *ḥadīth* on the authority of ʿUmar that 500 dirhams was the dower of the wives and daughters of the Prophet.[32] In his responses, Ibn Ḥanbal does not mention a number. Ibn Rāhwayh uses the *sunnah* of the Prophet here to support the traditions that establish 480 dirhams as the maximum appropriate dower. However, as we have just seen, the Prophet's name is associated with all the amounts given, and just as we could not tell in the matter of the *ʿiddah* of the *umm al-walad* why Ibn Rāhwayh chose one period of time for her *ʿiddah* rather than another, here too, in the absence of any direct statement, we cannot know why he supports the sum of 480 dirhāms.

In IV, Ibn Rāhwayh uses a decision of the Prophet's to show that when a female slave is married to a slave husband, her manumission carries with it the right to opt to separate from her husband. However, the Prophet's authority is associated both with granting her that right and with withholding it. Al-Kawsaj reports:

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[28] Ibn Saʿd, *Ṭabaqat*, 8:115–16. The Prophet then told ʿAlī to use two-thirds of the money on perfume and the other third on clothing. However, in other traditions, ʿAlī's dower to Fāṭimah is variously described as a suit of armor, or a few household appurtenances.

[29] ʿAbd al-Razzāq, *Muṣasnnaf*, 6:174–80; Ibn Abī Shaybah, *Muṣasnnaf*, 3:317–20.

[30] See discussion in *Chapters*, 16–22.

[31] Abū Yūsuf, *Kītāb al-āthār*, #1021. This 1,000 figure is also found in a tradition on the authority of Ibn ʿUmar in ʿAbd al-Razzāq's *Muṣannaf*, 6:180, where Ibn ʿUmar says that some of his daughters received 500 and others 1,000 dīnars.

[32] Mālik, *Muwaṭṭaʾ*, 3:133; Shāfiʿī, *Kītāb al-umm*, 5:58. See Schacht, *Origins*, 107–8 for the development of the idea of a minimum dower.

> IV. Isḥāq was asked what happened when a female slave who is married to either a free man or a slave is manumitted.
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> He replied, "The *sunnah* in this case is that she has no option at all of separating from her husband if he is a free man, because through manumission she has achieved the same status as he, so what is there to choose? Rather, she can opt to separate from her husband when she is manumitted if he is a slave. Further, the truth of the matter about Barīrah's husband is that he was a slave".[33]

Barīrah was bought and then manumitted by ʿĀ'ishah. After her manumission, the Prophet gave her the choice of remaining with her husband or separating from him. She chose to separate from him. A number of traditions say her husband was a slave, but a number of others say he was free. The underlying issue in these traditions—although it is not specifically mentioned in them—is the notion of *kafā'ah*, "equality", which requires the guardians of free Muslim women to give them in marriage to men of equal standing.[34] Ibn Rāhwayh aligns himself with those traditions that say Barīrah's husband was a slave and hence not her equal in freedom once she had been manumitted. Otherwise, she would not have been given the option of choosing to separate from him. Ibn Rāhwayh's reasoning is reflected in the wording of one of the traditions in his own *Musnad* in which ʿUrwa b. al-Zubayr (ʿĀ'ishah's nephew) says of Barīrah's husband, "If he had been free, he [the Prophet] would not have given her the choice of separating from him".[35] Mālik and Shāfiʿī both agree with Ibn Rāhwayh's reasoning that a manumitted female slave is given the option of separating from her husband only if he is a slave, and they also share his view that Barīrah's husband was a slave.[36]

Although Ibn Rāhwayh's use of the *sunnah* of the Prophet is supported here by a number of traditions that say Barīrah's husband was a slave, as well as by the agreement of two prominent jurists,

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[33] *Chapters*, 237, §308.

[34] On *kafā'ah*, see *Chapters*, 14–16 and references there (read "lowly" for "sickly" on 14, l. 15).

[35] Ibn Rāhwayh, *Musnad*, #169. The several traditions Ibn Rāhwayh records about Barīrah include different details about her family and her purchase and manumission by ʿĀ'ishah, but all say her husband was a slave. See also Ibn Abī Shaybah, *Muṣannaf*, 3:451–2 for several traditions that say her husband was a slave and several others that say he was free. For what is known of Barīrah, see the article on her in *EI*, s.v. "Barīra".

[36] The assumption here is that he is not her equal if she is free and he is a slave and hence not a suitable husband for her. Mālik, *Muwaṭṭa'*, 3:180; Shāfiʿī, *Kitāb al-umm*, 5:122. See also *EI*, s.v. "Kafā'a".

in his *Ḥujjah*, Shaybānī introduced another line of reasoning entirely. He pointed out that such a woman is always given the option of separating from her husband, regardless of whether he is a slave or free. The underlying issue is not, Shaybānī said, as others claim, that if her husband is free her manumission makes her his equal, but rather that when she was a slave, she had been given in marriage without being consulted; once free, she acquires a say in her own affairs and thus has a right to choose whether or not to remain married.[37]

***Sunnah* of the Companions Supported by the Authority of the Prophet.** In V and VI, Ibn Rāhwayh cites the Companions as proof of the *sunnah* and the Prophet only to give weight to their actions.

In a question about the religious affiliation of a child who has one Muslim and one Magian parent, Ibn Rāhwayh deals with two issues. One is the question of the child's paternity, which is easily solved. The real issue is one of custody, and the Muslim parent is awarded the child. Al-Kawsaj reports:

> V. Isḥāq said, "A Magian is married to a Magian woman for five months before she converts to Islam. Then a Muslim marries her and she gives birth exactly nine months after the Magian has had intercourse with her. Then the Magian claims the child is his, and the Muslim also claims the child is his.
>
> In this case, the child belongs to the Magian, and he is a Muslim because his mother is. The reason for this solution is the well-known fact that women do not give birth after four months. In this instance the woman spent four months with her Muslim husband, so his claim is not valid and the claim of the Magian takes precedence because of our certainty that she became pregnant when she was his possession.
>
> We make the child Muslim because his mother is. A child of mixed parentage is always attached to the Muslim [parent]. The *sunnah* has stipulated that (*naṣṣat al-sunnah fī dhālika*), on the authority of (*min*) ʿUmar b. al-Khaṭṭāb and ʿUmar b. ʿAbd al-ʿAzīz. And the same thing has been related on the authority of the Prophet (*wakadhālika dhukira ʿan al-nabī*) in the story about Rāfiʿ b. Sinān when he converted to Islam and his wife refused to do so".[38]

In a tradition found in Abū Dāwūd's *Sunan*, we learn that the Companion Rāfiʿ b. Sinān and his wife had a daughter. After Rāfiʿ

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[37] See Shaybānī, *Kitāb al-ḥujjah*, 4:19–33.

[38] *Chapters*, §201, 202–03.

had accepted Islam and his wife had not, the Prophet placed the child between them and told each to call her. They did so, and she turned at first toward her mother. However, when the Prophet asked God to guide her, she turned toward Rāfiʿ who then kept her.[39] Ibn Rāhwayh uses the word *sunnah* to refer to a specific text that contained the ruling of ʿUmar b. al-Khaṭṭāb and ʿUmar b. ʿAbd al-ʿAzīz.[40] He also refers to the authority of the Prophet, whose unusual act of granting custody of a small daughter to a father instead of a mother is explained by the mother's unwillingness to accept Islam. But the Prophet's action only confirms the *sunnah* established by the two ʿUmars.[41]

In the next example (VI) where Ibn Rāhwayh also gives the Companions precedence over the Prophet, he uses *sunnah* to mean the practice of the community (*al-sunnah al-māḍiyah*) which he establishes by reference to a single, nameless Companion whose doctrine is, in turn, strengthened by an action of the Prophet. The particular question concerns the consequences of a husband uttering the divorce statement, "Your matter is in your hands (*amrukī biyadikī*)". The discussion involves the further question of the consequences of his uttering the statement, "Choose! (*ikhtārī*)", and whether through uttering either statement he has transferred to his wife the right to divorce herself from him singly, doubly or triply?[42] "Your matter is in your hands" is usually called *tamlīk*, and "Choose!" is called *takhyīr*. Al-Kawsaj reports:

> VI. 1. Isḥāq [Ibn Rāhwayh] was asked about a man who puts a woman's matter into her hands, and he said, "[The question of what happens] whenever a man puts a woman's matter into her hands [is one] about which the Companions of the Prophet disagreed. ʿUthmān

[39] Abū Dāwūd, *Sunan*, *Kitāb al-ṭalāq*, *ḥadīth*, no. 1916. CD-Rom, *The Hadith Encyclopedia Program*, Sakhr Software Co., 1996. Abū Dāwūd's *isnād* is Ibrāhīm b. Mūsā al-Rāzī—ʿIsā—ʿAbd al-Ḥamīd b. Jaʿfar—his father—his grandfather. I have not found this story elsewhere.

[40] See Schacht, *Origins*, 71, n. 3 and 192 for references to ʿUmar b. ʿAbd al-ʿAzīz as an authority of the Medinese.

[41] For discussions of child custody in early *fiqh* texts, see *EI*, s.v. "Ḥaḍāna" and "Ṣaghīr".

[42] For more discussion of both these kinds of divorces, see *Chapters*, pp. 48–9. Underlying all discussion of *takhyīr* is exegesis of Sūrah 33:28–29 in which the Prophet offered his wives the choice of divorcing him. The details of events in the Prophet's household that are connected with this event are discussed fully in Nabia Abbott, *ʿĀ'ishah the Beloved of Muḥammad* (Chicago: University of Chicago Press, 1942; Reprint, New York, 1973), 51–56.

and Ibn ʿUmar were of the opinion that it meant what the wife decided it meant (*al-qaḍā' mā qaḍat*). But ʿUmar and Ibn Masʿūd said [that the statement] "Your matter is in your hands" is like a man's saying [to his wife], "Choose!" and they deemed that (i.e., the statement "Choose!") a single, revocable divorce. But another Companion of the Prophet disagreed with them and said that [how many divorces the statement implied] was up to the man.

2. What we use as a basis (*wal-lādhī naʿtamidu ʿalayhi*) [for deciding the question] is having the judge (*qāḍī*) make the man [who says to his wife, "Your matter is in your hands"] take an oath about what he means. Then, if he means an irrevocable divorce, or more than one divorce, his statement is [understood] in accordance with what he means.

3. It has been explained that where Ibn ʿUmar said that it (i.e., the statement "Your matter is in your hands") meant what the wife decided it meant, he [also] said, "Unless the husband intended something else. In that case, the judge (*qāḍī*) makes the husband take an oath [regarding his intention], and then he abides by it". This doctrine most resembles the past *sunnah* (*al-sunnah al-māḍiyah*).

4. Because the Prophet gave his wives the choice, ʿUmar held that whoever gave [his wife or wives] the choice was not innovating, and whenever a man can lawfully divorce his wife on the basis of a doctrine (*madhhab*) that has been established for him as *sunnah*, that divorce takes place only in accordance with the *sunnah* of that doctrine, and it (i.e., a statement of *takhyīr*) becomes a [single] revocable divorce.

5. What strengthens this doctrine (i.e., that of inquiring of a man what his statement "Your matter is in your hands" means) is the Prophet's saying to Rukānah b. ʿAbd Yazīd when he divorced his wife *al-battah*, "What do you mean by that?" And that is what ʿUmar did: he made any man who divorced [his wife using the expression] *al-battah*, or an expression similar to *al-battah*, take an oath, and thus the legal consequences of his statement are in accordance with what he stipulated.

6. Therefore, in cases where [a man says to his wife], "Your matter is in your hands", we choose to have the man take an oath as to what he meant by his statement—whether he meant three [divorces], or fewer. Whenever a man [in the process] of divorcing is made to take an oath, he gives his word about what he claims [he meant].[43]

In the first paragraph, Ibn Rāhwayh summarizes the *ikhtilāf* on this question among the Companions. There are three possibilities The first, associated with ʿUthmān and Ibn ʿUmar, is that the statement of *tamlīk* leaves the wife free to exercise her option to divorce her-

[43] For this response, see *Chapters*, §315, 238–39.

self singly, doubly, or triply. The second, associated with ʿUmar and Ibn Masʿūd, is that the statement is analogous to *takhyīr* and that that can result only in a single, revocable divorce. The third, associated with a nameless Companion, is that the statement means whatever the husband intended it to. This last opinion is the one Ibn Rāhwayh himself supports in the second paragraph, where he states that the husband's intention should be established by means of an oath administered by a *qāḍī*.

In the third paragraph, he first assimilates Ibn ʿUmar's opinion (and by extension ʿUthmān's) to his own on the grounds that Ibn ʿUmar said that it meant what the wife decided it meant only if her decision did not go against the husband's original intention and then he validates his opinion by saying, "This doctrine most resembles the past *sunnah* (*wahādha al-qawl ashbahu bi al-sunnah al-māḍiyah*)", referring to the practice of the community.

In the fourth paragraph, having established that ʿUmar did not regard a statement of *takhyīr* as an innovation, Ibn Rāhwayh goes on to say that ʿUmar held that *takhyīr* thereby fell within the framework of the *sunnah* that was in fact established for it. This in turn is based on an understanding of the Prophet's offering his wives the choice of divorcing him or remaining with him. The point most often taken up in the traditions about this event is that ʿĀ'ishah immediately chose to remain with the Prophet. In one set of these traditions, she reports that she (and the other wives of the Prophet who also chose to remain with him) did not consider the choice and their rejection of it a divorce: "We chose the messenger of Allah and we did not consider that a divorce".[44] However, in another set of traditions, ʿĀ'ishah is reported to have said, instead, "The messenger of Allah gave us the choice, and then we chose him, and that was a divorce". One of these is in Ibn Rāhwayh's own *Musnad*.[45]

In the fifth paragraph, Ibn Rāhwayh, without saying so directly, indicates that he does not think the material he has just gone over specially relevant to the question at hand. Indeed, he returns to his own opinion—that a statement of *tamlīk* means whatever the husband meant it to—by drawing a parallel with *ṭalāq al-battah*. *Ṭalāq*

[44] See *Chapters*, 48–49 for references to some of these traditions. See also Ibn Abī Shaybah, *Muṣannaf*, 4:46–7.

[45] Ibn Rāhwayh, *Musnad*, #833. No tradition about *takhyīr* mentions more than a single divorce.