CHAPTER 9

Authority in Ibn Abī Zayd al-Qayrawānī’s Kitāb al-nawādir wa-l-ziyādāt ‘alā mā fī l-Mudawwana min ghayrihā min al-ummahā: The Case of “The Chapter of Judgments” (Kitāb al-aqūliya)

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1 Introduction: Ḥadīth versus Raʾy or Ḥadīth and Raʾy?

The study of early Islamic legal history, in important respects, continues to be dominated by a quest for origins. In its most simplistic form, this quest for origins breaks down into two competing positions. The first, which can be described as the position of Islamic orthodoxy, believes that the rules of Islamic law derive primarily from the time of the Prophet Muḥammad as set forth in both the Qurʾān and his practice (sunna), and the practice of his immediate followers and their successors. The work of the mujtahid-imams Abū Ḥanīfa (d. 150/767), Mālik b. Anas (d. 179/796), Muḥammad b. Idrīs al-Shāfiʿī (d. 204/820), and Aḥmad b. Ḥanbal (d. 241/855) of the latter half of the first and first quarter of the second hijrī centuries, on this view, was largely one of interpretation, systematization, and organization of a legal system the broad outlines of which (including its jurisprudential doctrines regarding sources of law) had already come into existence some one hundred years earlier.1 The second, which can be described as the position of modern revisionist scholarship, expresses differing degrees of skepticism toward the orthodox Islamic position. Some revisionist scholars go so far as to cast doubt on the historical existence of the Prophet Muḥammad or that the Qurʾānic text was fixed by the time of the Prophet Muḥammad’s death;2 other revisionist scholars, while accepting the historicity of the Qurʾānic text, reject the historicity of the Prophetic sunna.

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1 See, for example, Muhammad Mustafa Azami, On Schacht’s Origins of Musliman Jurisprudence (Riyadh: King Saud University, 1984).
in favor of an anonymous communal *sunna* that was transformed into the concept of Prophetic *sunna* by the work of later jurists.3

Scholars of the revisionist camp, however, agree that Muslim jurists did not have a theory of the material sources of law that privileged the Prophet’s *sunna* until al-Shāfiʿī set forth his theory of the sources of Islamic jurisprudence in his celebrated *al-Risāla*. In addition to laying out the rudiments of what would later become the highly-developed science of *uşul al-fiqh*, al-Shāfiʿī is commonly credited by modern revisionist scholars as having established for the first time in Islamic law the predominance of Prophetic hadīth over other sources of law. As such the formally valid Prophetic hadīth (*al-ḥadīthal-ṣaḥīhal-muttaṣil*), in the view of revisionist scholars, gains its place as the preeminent legal proof among jurists primarily as a result of al-Shāfiʿī’s labors.

Professor Norman Calder, in his work *Studies in Early Muslim Jurisprudence*, further develops the implications of the revisionist position by arguing that one can divide texts of Islamic jurisprudence into two generic categories, discursive and hermeneutical. The former are texts that are structured in the form of a dialogue, typically through the “use of the *qultu/qāla* device.”4 The latter are texts that “purport [...] to derive the law exegetically from Prophetic sources.”5 Based on this typology of legal texts, Calder concludes that the *Mudawwana* should be viewed as belonging “to the oldest discernible phase of Muslim juristic thought,” given that “[i]t has a discursive approach ... adequately symbolized in the phrase *a-raʾayta*; “[t]he dominant figures of authority are Medina jurists of earlier generations, above all ... Mālik himself”; and, although legal judgments attributed to companions were “incorporated in significant numbers ... Prophetic were relatively few and are for the most part clearly secondary.”6 Given the discursive structure of the *Mudawwana*, Calder concludes that “[i]t is ... difficult to accept that there was widespread recognition of the authority of Prophetic hadīth—for legal purposes—much before [the] date [of the fixing of the *Mudawwana*].”7

In contrast to the *Mudawwana*, Calder argues that the *Muwatta’* of Mālik is a hermeneutical text that relies on an “apostolic’ theory of authority.” Structurally, the text of the *Muwatta’* formally subordinates Mālik’s authority “to that of the Prophet, Companions, and Successors.”8 Moreover, because Mālik’s

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5 Ibid.
6 Ibid., 19.
7 Ibid.
8 Ibid., 23.
views in the *Muwatta’* are inevitably prefaced by the statement "qāla Mālik," and because such statements invariably appear after the text lists a variety of authority statements, e.g., Prophetic, Companion or Successor hadiths the *Muwatta’*’s structure “takes on the appearance of commentary and thereby initiates the problem of a hermeneutic approach to the law.”\(^9\) Based on the structural differences in the *Mudawwana* and the *Muwatta’,* Calder famously concludes that the *Muwatta’* “represents a later stage in the development of Islamic juristic theory than the *Mudawwana.*”\(^10\) According to Calder, the discursive approach to law continued to prevail in Mālikism until the latter half of the third hijrī century when Baqi b. Makhlad (d. 276/889) returned to Andalusia from a scholarly journey to the east and “filled the land of Andalus with ḥadīth and riwāya.”\(^11\) While Andalusian Mālikis resisted this development, Baqi, according to Calder, enjoyed the backing of the Andalusi Umayyad rulers, and thus was successful in removing independent juristic judgment (*ra’y*) from its pride of place in Mālikī jurisprudence and replacing it with ḥadīth, a development Calder argues is reflected in “the transition from the *Mudawwana* to the *Muwatta’.*”\(^12\)

The recently published study of Miklos Muranyi, in which he conducted a detailed analysis and collation of thousands of manuscript fragments (*ajzā’*) of the *Mudawwana* taken from collections in the libraries of the Qayrawān mosque and the Qarawiyyīn mosque in Fez, casts considerable doubt on Calder’s dating of the *Mudawwana* and the *Muwatta’*.\(^13\) Likewise, recent work of historians of Islamic Spain have cast doubt on the importance of the *Muwatta’* to subsequent developments in Andalusian Mālikism, stressing instead the continued centrality of Mālik’s *ra’y*—and hence that of the *Mudawwana*—to the development of Andalusi Mālikism centuries after Calder proposed the demise of *ra’y* and the triumph of ḥadīth.\(^14\)

\(^9\) Ibid., 24.
\(^10\) Ibid.
\(^11\) Ibid., 36.
\(^12\) Ibid., 37.
This article also offers a critique of Calder, but one that focuses more on his jurisprudential assumptions regarding the historical trajectory of the development of Islamic jurisprudence rather than the dating of early Islamic legal texts. Calder’s work is based on the important observation that genre is relevant to understanding a legal text, and that by paying careful attention to the structure of authority in a legal text, one can glean important insights regarding the implicit jurisprudence animating that text. Calder’s conclusion that the *Mudawwana* preceded the *Muwaṭṭaʿ* was largely a result of his assumption that the jurisprudences of the *Muwaṭṭaʿ* and the *Mudawwana* were incompatible and therefore, that one had to succeed the other. Because he believed that reliance on *ḥadīth* postdated *raʾy* as a matter of the historical development of Islamic jurisprudential theory, he concluded that the *Muwaṭṭaʿ* could not have been authored prior to the *Mudawwana*, contrary to the claims of traditional Muslim legal historians. Calder never seriously entertained the possibility that both texts shared an implicit jurisprudence that could have simultaneously accounted for the authority structure of each work. To the extent that the *Muwaṭṭaʿ* and the *Mudawwana* share a common jurisprudence, it would not be surprising to learn that far from one text dominating the other, each continued to play vital, although distinct, roles within the Mālikī tradition. Even if Calder was mistaken in his dating of the *Mudawwana* and the *Muwaṭṭaʿ*, his question remains both relevant and unanswered: how is it possible to reconcile the different authority structures of the *Muwaṭṭaʿ* and the *Mudawwana*? My proposed answer is quite simple, if not necessarily simplistic: different authority structures can coexist in any legal system, including the Islamic one. Specifically, the Mālikī legal tradition could have, to use Calder’s terminology, simultaneous commitments to an exegetical tradition and to a discursive one because it adopted an exegetical approach that narrowly construed authoritative texts.\(^\text{15}\)

\(^{15}\) An example of such an approach may be found in Ibn al-Labbād (d. 333/944), a fourth-century AH Mālikī jurist of Qayrawān who penned a spirited defense of Mālik against al-Shāfiʿī. In defense of Mālik’s rule that a dog’s saliva is not impure, and in opposition to al-Shāfiʿī’s, Ibn al-Labbād argued that a Prophetic *ḥadīth* in which the Prophet ordered special steps to be taken to purify any vessel (*ināʾ*) licked by a dog did not provide any textual basis to conclude that a dog’s saliva was impure (*najis*) or that food licked by a dog became impure as a result. Mālik’s rule was proof that Mālik hewed more closely to the words of the Prophet Muḥammad than al-Shāfiʿī, who took the *ḥadīth* as general proof that a dog’s saliva was impure. In other words, Ibn al-Labbād accused al-Shāfiʿī of engaging in a kind of rationalist process of generalization under the guise of simply following the Prophet’s words. Abū Bakr Muḥammad b. al-Labbād, *Kitāb al-radd ʿalā l-Shāfiʿī*, ed. Ṭābiʿ Abī Ḥamīd b. Ḥamda (Tunis: Dār al-ʿArab, 1986), 53.
Logically, the narrower the interpretive approach that is taken to authoritative texts, the broader the scope for a discursive practice of law would be. Calder’s approach to early Islamic jurisprudence, by contrast, is binary: a text is either authoritative (and hence stands in need of proper exegesis) or it is part of a discursive structure unconnected to apostolic authority. But there is no logical reason to assume that apostolic/exegetical authority can only exist at the expense or even the exclusion of discursive authority.

Hadith and Ra’y in the Fourth-Hijrī Century: The Case of Ibn Abī Zayd al-Qayrawānī’s Kitāb al-nawādir wa-l-ziyādāt

This article will establish that both exegetical and discursive structures of legal authority coexisted in the Mālikī tradition subsequent to the alleged triumph of ḥadīth over ra’y through an analysis of the authority structure of two issues in the Kitāb al-aqḍiya (The Chapter of Judgments) from the fourth-century work Kitāb al-nawādir wa-l-ziyādāt by the celebrated North African Mālikī jurist of Qayrawān, Abū Muḥammad ʿAbdallāh b. ʿAbd al-Raḥmān Ibn Abī Zayd al-Qayrawānī (d. 386/996).16 The first is the rules governing entering judgment against an absent defendant (al-qaḍāʾʿalāl-ghāʾib) and the second is whether a judge’s ruling changes the moral obligations of the litigants (mā lā yaḥill bi-ḥukmal-ḥākimwa-māyaḥillbi-ḥukmih).

The Nawādir is encyclopedic. Its stated goal is the collection of Mālik’s legal teachings, as well as those of his students (and sometimes his students’ students) that were not included in the Mudawwana. Given the breadth and size of the text, fifteen volumes in its printed version, it would be hazardous to venture any generalizations about the overall authority structure of the work. The Kitāb al-aqḍiya, however, is more manageable. It appears in volume 8 of the printed edition, between al-Juzʾ al-thānī min kitāb adab al-qadāʾ and Kitāb al-shahādāt al-awwal, and is a rather modest 103 printed pages in length.17 Studying the Nawādir should also be helpful for understanding the practical development of Islamic jurisprudence in the century following the traditional

16 Abū Muḥammad ʿAbdallāh b. ʿAbd al-Raḥmān Ibn Abī Zayd al-Qayrawānī, al-Nawādir wa-l-ziyādātʿalāmāfīl-Mudawwana min ghayrīhā min al-ummahāt, ed. ʿAbd al-Fattāḥ Muhammad al-Ḥulw, 15 vols. (Beirut: Dār al-Gharb al-Islāmī, 1999). While Professor al-Ḥulw oversaw the editing of the entire series, other scholars may have edited individual volumes, including vol. 8 of the Nawādir which contains Kitāb al-aqḍiya, and was edited by Muhammad al-Amin Bū Khabza.

17 Nawādir, 8:143–246.
dating of the Mudawwana. Ibn Abī Zayd is a late enough figure for us to assume he was reasonably aware of the jurisprudential debates that had been raging in Islamic legal circles for the previous 200 years, and that this awareness would be reflected in the nature of the arguments he made in his book as well as the authorities he cited. In particular, we can assume that if in fact hadith had triumphed over ra’ī as suggested by Calder, Ibn Abī Zayd would be predisposed to citing hadith in favor of legal rules—at least in controversial contexts—over the opinion of Mālikī jurists.

While the issue of al-qaḍāʾʿalāl-ghāʾib appears to be a very technical one, it generated an enduring controversy between the Mālikīs, who generally permitted it, and the Ḥanafīs, who rejected it.18 The controversial nature of the issue makes it especially fertile ground to test the teleological hypothesis of Calder which asserts that the progress of Islamic law is marked by a transition from discursive argumentation to exegetical commentary marked by an increased deference to authority statements, typically Prophetic hadith. I will contrast Ibn Abī Zayd’s treatment of this question with his treatment of another controversial issue: whether the judge’s ruling changes the moral status of the act in controversy between the parties to a dispute. While the Ḥanafīs and the Mālikīs take different positions on this question as well, Ibn Abī Zayd in that context deployed arguments that relied on Prophetic authority, while he did not with respect to the first question, even though there were hadiths that would appear to have been relevant to this question.19

To better describe the authority structure of the Nawādir with respect to these two issues, I will begin by giving an account of the sources used and whether they are unique to the Mālikī school, and thus part of the Mālikī discursive tradition, or whether they are authority statements, e.g., Prophetic or Companion hadith, that transcend madhhab-affiliation and instead call for exegesis rather than dialogue. I will then proceed to discuss some of the dif-

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18 For an excellent discussion of Ḥanafi doctrine on this question, see Farhat J. Ziadeh, “Compelling Defendant’s Appearance at Court in Islamic Law,” Islamic Law and Society 3 (1996): 305–335. Indeed, Ḥanafi judges in the Ottoman Empire refused to enforce decisions of non-Ḥanafi judges entered against absentee defendants. Rudolph Peters, “What Does it Mean to be an Official Madhab? Hanafism and the Ottoman Empire,” in The Islamic School of Law, ed. Bearman et al., 156.

19 Indeed, al-Bukhārī had apparently argued for the permissibility of entering a judgment against an absent defendant using a hadith reported by Hind bt. Abī Sufyān. Muḥammad b. Ismā‘īl al-Bukhārī, al-Ṣaḥīḥ (Cairo: Wizārat al-Awqāl, 1990), 1:52 (no. 649). Ibn Rushd would later dismiss this argument as weak without attributing the view to al-Bukhārī. See text at n. 32, infra.
ferent hadīths that could have been relevant to the discussion, whether or not included in the Nawādir. Finally, I conclude with a discussion of what these two issues—the legitimacy of ruling against an absentee defendant and whether the judge's ruling changes the moral status of the act in controversy—tells us about Ibn Abī Zayd's understanding of the relationship of discursive reasoning to exegetical reasoning. While answering the question of the jurisprudential relationship of authoritative texts to discursive authority in the first two hundred and fifty years of Islamic history is beyond the scope of this article, the fact that they could coexist one hundred years after Calder declared the demise of raʾy at least raises the possibility that they coexisted in early centuries.

3 Discursive Authority in the Nawādir: The Case of Entering Judgment against an Absentee Defendant

The Mudawwana—but not the Muwatta’—has several texts attributing to Mālik the view that a judge may enter judgment against a defendant who is absent from the court's proceedings. In some of the cases discussed in the Mudawwana, the Mudawwana takes the view that, where the plaintiff seeks to sue an absentee defendant, the court should hear the plaintiff's evidence and even proceed to judgment against that defendant, subject only to the defendant's right to challenge the evidence entered against him in the event of his return. Only if the defendant was located at a distance of a few days' journey from the court, or if the object of the lawsuit involved real property (al-dūr), was the judge obligated to stay the plaintiff's case and order the defendant to appear. Other opinions in the Mudawwana, however, suggest that the judge ought to wait for the defendant to make an appearance in court before ruling. All, or substantially all, of the opinions attributed to Mālik on this question in the Mudawwana are reported either directly or indirectly by Mālik's most famous student, ʿAbd al-Raḥmān b. al-Qāsim (d. 191/806). Sometimes, Ibn al-Qāsim also reports his own opinion in the Mudawwana in

20 I could not find a reference to this issue either in the recension of Yahyā b. Yahyā or that of Muḥammad b. al-Ḥasan al-Shaybānī.
22 Ibid., 4:188.
23 Ibid., 4:243.
24 Ibid., 4:243.
25 Ibid., 4:255.
response to Saḥnūn in circumstances where he did not know whether Mālik had a view. The primary function of the Nawādir, as suggested by its name, is to supplement the Mudawwana’s teachings by collecting the teachings of Mālik, his students, and his students’ students, as set forth in sources other than the Mudawwana.

Ibn Abī Zayd references at least five books in the course of his discussion of this issue: al-Majmūʿa, al-ʿUtbiyya, Kitāb Ibn Saḥnūn, Kitāb Ibn Ḥabīb, and Kitāb Ibn al-Mawwāz. Along with the Mudawwana, these works, with the exception of Kitāb Ibn Saḥnūn, comprise the primary sources of Mālikī substantive law, and all are attributed to authors who lived in the first half of the third hijrī century.26 In the course of nine printed pages discussing the issue of judgments against absentee defendants,27 Ibn Abī Zayd indirectly cites the views of ten early Mālikī authorities through these sources: ʿAbd al-Malik b. Ḥabīb (d. 238/852–853); Saḥnūn (d. 240/854–855); Ibn al-Qāsim; Ashhab (d. 203/818); Ibn al-Majīshān (d. 212 or 214/827 or 829); Aṣbagh b. al-Faraj (d. 224–225/839–840); Muḥammad b. ʿAbd al-Ḥakam (d. 282/896); Shajara b. ʿīsā al-Maʿāfirī (d. 232/846); Ḥābib b. Naṣr (d. 287/900); and Muḥammad b. Saḥnūn (d. 256/870).

While it would be dangerous to generalize about the kinds of texts included in these five sources, it is clear that Ibn Abī Zayd did not rely on them for Prophetic or Companion hadīth to support the position of the Mālikīs against the Ḥanafīs, at least with respect to the issue of al-qaḍāʾʿalāl-ghāʾib. Throughout his discussion of this issue, Ibn Abī Zayd did not include any proof-text from the Prophet, although some of his authorities refer to actions of ʿUmar b. al-Khaṭṭāb that were indirectly relevant.28 Instead, he established the legitimacy of the Mālikī position as against the Ḥanafīs by citing Ibn Ḥabīb’s discursive argument in the Majmūʿa that if one accepts the rule that judgments entered

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26 The author of al-Majmūʿa was Muḥammad b. ʿAbdīs (d. 260–261/873–874). The author of al-ʿUtbiyya, also known as al-Mustakhrajā, was Muḥammad b. ʿAbd al-ʿAzīz al-ʿUtbī al-Qurṭubī (d. ca. 254–255/868–869). The author of Kitāb Ibn Ḥabīb, also known as al-Wāḍiḥa, was ʿAbd al-Malik b. Ḥabīb b. Sulaymān al-Sulamī al-Andalusī (d. 238/852–853). The author of Kitāb Ibn al-Mawwāz, also known as al-Mawwāziyya, was Muḥammad b. ʿAbraham Ibn al-Mawwāz (d. 269/883). Along with the Mudawwana, these works are called al-ummahāt. Ibn ʿAbdīs and Ibn Saḥnūn were Qayrawān scholars; al-ʿUtbī and Ibn Ḥabīb were Andalusians; and Ibn al-Mawwāz was an Egyptian from Alexandria.

27 Nawādir, 8:197–205.

28 Nawādir, 8:198, stating that ʿUmar entered legal judgments against missing persons who were presumed dead (mafqūd).
against an agent bind the agent’s principal, as the Ḥanafīs do, then one cannot object to a judge hearing a case and entering a judgment against an absentee defendant, because in each case, the defendant is bound despite his absence from the proceedings.29

Indeed, Ibn Ḥabīb adduced other examples of Ḥanafī rules that effectively permit a judge to enter a judgment against a party who is absent from the proceedings. One such rule is the judgment of a court adjudicating the life or death of a missing person (al-mafqūd). In this case, the Ḥanafīs allowed a judge to declare the missing party deceased based on the testimony of two witnesses, with the result that the missing person’s wife becomes free to re-marry, his umm walad becomes free, and any of his slaves whom he had designated for emancipation upon his death (mudabbar) also attain their freedom, all of this despite the absence of a corpse conclusively proving the death of the missing person. Another such rule is the decision of a court to impose monetary liability on the kin group (al-ʿāqila) of a defendant found guilty of negligent homicide (qatl al-khaṭa’), even though the kin group is not a party to the trial. A third example is that the Ḥanafīs permit the wife of an absentee husband to obtain a court order permitting her to attach her absent husband’s assets in order to provide for her living expenses as well as those of her children.30

With the exception of a summary reference to the fact that ʿUmar b. al-Khaṭṭāb had entered judgment against missing persons presumed to be dead,31 Mālik’s early followers, at least to the extent that Ibn Abī Zayd reproduced their arguments accurately, did not resort to exegetical argument to refute the Ḥanafī position. Instead, their arguments were purely discursive in the sense advanced by Calder since they take as propositions positions accepted as true from the perspective of the relevant discursive tradition, in this case the emerging body of Ḥanafī legal doctrine, and try to show why the rational integrity of that tradition should compel it to accept the legitimacy of judgments against defendants who are absent from the proceeding.

But what about Ibn Abī Zayd himself? Did he adduce any exegetical material in favor of the Mālikī position? His approach may be profitably contrasted with that taken approximately two centuries later by Ibn Rushd the Grandson (Averroës) (d. 595/1198), the Mālikī Qurtubi jurist and philosopher. Ibn Rushd, in contrast to Ibn Abī Zayd, cited two hadīths, one, a well-known report that contradicted the Mālikī rule and the other, a report that the Mālikīs cited

29 Nawādir, 8:197–198.
30 Nawādir, 8:198.
31 See note 28, supra.
as evidence in support of their position. Ibn Rushd, however, dismissed the Mālikī's use of that report as a poor argument. Ibn Abī Zayd, however, appears indifferent to justifying the Mālikī rule on the basis of an apostolic proof-text in the sense Calder used that term. What may be particularly significant is that Ibn Abī Zayd did not even make a passing reference to a hadīth attributed to 'Āli b. Abī Ṭalīb in which, after the Prophet appointed him to serve as a judge in Yemen, the Prophet reportedly asked God to bless 'Āli in his judicial task and told him, "When the two disputants appear before you, do not rule for the first until you hear from the second." There were also credible reports that prominent figures from the generation of the Successors did not permit a judge to rule against an absentee defendant. 'Abd al-Razzāq al-Ṣaḥrāwī, under the chapter heading "No Judgments May Be Entered Against an Absentee [Defendant]," included in his Musannaf two Successor proof-texts, one from Shurayḥ and one from 'Umar b. 'Abd al-‘Azīz. Ibn Abī Shayba also included in his Musannaf a report from the generation of the Successors rejecting the practice.

32 According to the hadīth relied upon by the Mālikīs, Hind bt. ʿUtba complained to the Prophet that her husband, Abū Sufyān b. Ḥarb was niggardly and failed to provide adequately for her and her children's needs. In response, the Prophet was reported to have instructed her to take from her husband's property an amount sufficient for her and her children. Abū I-Walīd Muḥammad b. Ḥabīb, Bidāyatal-mujtahidwa-nihāyat al-muqtaṣid, 6 vols. (Beirut: Dār al-Kutub al-‘Ilmiyya, 1996), 6:232.

While from an exegetical perspective, a skilled interpreter could easily explain why this hadīth does not rule out the possibility of entering judgment against an absent defendant, its plain meaning certainly could be taken to prohibit such a procedure. Ibn Abī Zayd, who probably would have been aware of this hadīth, appears to have been indifferent to resolving the tension between this hadīth’s plain meaning and the well-established Mālikī rule set forth in the Mudawwana permitting judges to enter rulings against absentee defendants. Because it would be rash to conclude, based on Ibn Abī Zayd’s indifference to the citation of hadīth and other proof-texts, that al-Nawādir was in fact a second-century text rather than a late fourth-century text, the structure of the Nawādir demands a jurisprudential theory that goes beyond an assumed teleological development of Islamic legal reasoning from ra’y to hadīth.35 To put the question differently, if Ibn Abī Zayd was not interested in justifying the rules of Mālikī law from an exegetical perspective, what was he doing in al-Nawādir, at least with respect to the question at hand, and what would have led him to believe that his task was consistent with the jurisprudential primacy of Prophetic sunna?

The simple answer is that he may have been gathering the relevant views of leading Mālikī scholars in order to provide a convenient reference for the solution of practical problems facing the administration of justice. In other words, from the perspective of the legal system, answering the threshold question of whether proceedings against an absent defendant are legitimate does not then provide the legal system with any rules as to how such proceedings should be conducted. Accordingly, the “exegetical” question of permissibility, by its very nature, does little to establish a set of rules designed to be applied by courts. Having taken the position that this controversial procedure is permissible, the task of Mālikī jurists was to develop a set of rules governing how this procedure could be implemented. The contribution of Ibn Abī Zayd was to assist in developing a coherent set of rules governing how this procedure would operate, a task that required going beyond the rudimentary teachings of the Mudawwana.

Having taken the view, at least implicitly, that the rule derived from various proof-texts requiring judges to hear both sides of a dispute before reaching a decision, is not categorical, the Mālikis then faced the problem of working out the circumstances in which such proceedings are legitimate. That task

35 Indeed, elsewhere, Ibn Abī Zayd shows himself perfectly capable of citing hadīth when it suits him. See, for example, Nawādir, 8:6 (quoting hadīths from the Prophet Muhammad found in the Sunan of Abū Dāwūd and the Ṣaḥīḥ of Bukhārī on judging).
necessarily had to be discursive because there were no authoritative texts supporting the practice. Discursive reasoning, as a matter of jurisprudence, therefore, could have operated interstitially to fill in the gaps of texts having, to use Calder’s term, “apostolic authority.” There is no reason to believe that a text based on apostolic authority such as the Muwaṭṭaʾ is inconsistent with a discursive text such as the Mudawwana if one’s jurisprudence allows for the possibility that “apostolic authority” may be incomplete and is therefore in need of other forms of authority to further its ends.36

This appears to be the implicit jurisprudential approach of Ibn Abī Zayd to this question. From an exegetical perspective, Ibn Abī Zayd might be imagined to say on behalf of the Mālikis something to the effect that

While it is true that a judge is ordinarily prohibited from entering a judgment against an absentee defendant, Muslims are also under an obligation to satisfy just claims, and accordingly, a just claim should not be defeated by virtue of the fact that the defendant, for whatever reason, cannot be brought before the court. Judges are required to hear both sides of a dispute only to protect the rights of both parties. Accordingly, where it is possible to protect the rights of the absentee defendant, there is no reason to prevent the plaintiff from presenting his claim just because the defendant cannot be found.

The goal of Mālik jurists then is to determine, as precisely as possible, those circumstances in which it is “possible” to permit a judge to hear a legal claim despite the defendant’s absence. For this reason, Ibn Abī Zayd’s discussion proceeds as a string of opinions of early Mālikī authorities who were essentially giving their views on the circumstances in which a judicial proceeding against an absentee defendant would be just.

4 Early Mālikī Doctrine on al-qaḍāʾ ʿalā l-ghāʾib

Early Mālikis, despite their broad agreement that judgment against an absentee defendant was a permissible procedure in certain circumstances, disagreed as to what those circumstances were. Early Mālikī authorities adopted two

36 As an aside, the absence of any authoritative texts supporting the Mālikī position is at odds with the often casual presumption that Muslim jurists could manufacture hadiths virtually at will to support their controversial positions.
basic approaches to this problem, both of which appear to have a basis in the *Mudawwana*. The first approach is based on the nature of the claim. Ibn Abī Zayd cites the *Majmūʿa* as quoting Ibn al-Qāsim for the proposition that Mālik's view of the legitimacy of a proceeding against an absentee defendant depended on the nature of the claim. If the claim was personal to the defendant (*dayn*), there was no objection to trying the plaintiff's claim provided that the defendant was located at a distance exceeding a journey of more than a few days from the court. On the other hand, if the claim involved property that was ordinarily evidenced by a deed (*ḥujja/ḥijāj*), such as real property, then the judge could not proceed without the defendant unless the defendant had repaired from the jurisdiction to a distant land, such as Andalusia relative to Egypt. Ibn al-Qāsim reportedly affirmed this doctrine, both in the *Mudawwana* and according to Ibn Abī Zayd, in the *Majmūʿa*, but permitted an exception where the defendant had abandoned the jurisdiction and taken up residence in a distant land, such as Andalusia or Tangiers with respect to Fustāṭ. According to Ibn Abī Zayd the distinction between claims involving personal obligations and claims involving ownership of real property was also reported by other Mālikī authorities such as Aṣbagh and Muḥammad b. al-Mawwāz.

The second approach was a notice-based theory: a judge could proceed against an absent defendant provided that he has exhausted all reasonable means of providing an opportunity for the defendant to answer the claim brought against him, regardless of whether the claim relates to a debt or ownership of real property. This trend among early Mālikī jurists is broadly consistent with Mālik's statement in the *Mudawwana* that a judge should not enter judgment against an absentee defendant's real property, but should instead "wait for him to appear." This line of reasoning, at least as presented by Ibn Abī Zayd, was most closely associated with Ibn al-Mājīshūn, who opined that regardless of the nature of the claim, the judge could not enter a judgment against an absentee defendant without first exhausting reasonable methods to secure the defendant's appearance. Accordingly, the judge would give the absentee defendant a deadline by which he must appear, based on the judge's determination of the distance between the court and the defendant. If the defendant still failed

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38 Nawādir, 8:198.
39 Ibn Abī Zayd quotes *Kitāb Ibn Ḥabīb* as reporting Ibn al-Qāsim's view on this issue as well as that Aṣbagh also accepted the distinction between personal claims and real property. Ibid., 201–202. See note 26, supra, and the text related thereto.
40 Ibid., 204. See note 26, supra, and the text related thereto.
41 *Mudawwana*, 4:255 ("yustaʾnā bih").
to show up, the judge should establish a second deadline on the assumption that the defendant was located at the furthest point possible (but presumably within the territory of the Islamic state) from the court. The court should also seek out the defendant’s agent if he had one, or anyone else who took an interest in his affairs, whether a friend or a relative, to assist in resolving the case. Only after taking these measures could the judge enter a judgment against the absent defendant.\footnote{Nawādir, 8:200, 202. According to Ibn Abī Zayd, Ibn al-Mājishūn’s views were preserved in the Majmū’a as well as Kitāb Ibn Habīb. Ibn Habīb, as reported by Ibn Abī Zayd, also attributed to Muḥammad b. ’Abd al-Ḥakam the position that a judge could enter a judgment against an absentee defendant regardless of the nature of the claim.}

While the different approaches to the threshold question of when a judge may enter judgment against an absentee defendant had roots in the Ḥudawwana, other important aspects of Mālikī doctrine on this issue did not, but instead were derivative of the approach taken to the threshold conditions of permissibility. For example, for those jurists who believed that claims against real property were different from claims involving personal obligations, it was necessary to determine the precise boundaries of the quasi-immunity from the suit that real estate enjoyed so long as its possessor/owner was absent. Suppose a plaintiff had won a judgment against an absent defendant based on an unpaid debt, could the prevailing plaintiff then ask the authorities to sell the defendant’s real property in order to satisfy the debt owed to him by the absentee defendant? What about a plaintiff who did not claim that he owned the entirety of the property, but rather that he was a co-owner, along with the current possessor, by means of an inheritance? Could a person possessing a right of first refusal to a parcel of land exercise that right in the absence of the putative purchaser of the realty? Could a non-owner retrieve personal property located on the premises of the absentee defendant-owner? Could a landlord sue a tenant for eviction if the tenant had disappeared, but left his family on the premises? These were some of the particular questions according to Ibn Abī Zayd that were discussed by the generation of Mālik’s students and their students arising out of the rule permitting a judge to rule against an absentee defendant while providing a kind of exemption to suits involving real estate.\footnote{With respect to the first question, Ibn al-Mawwāz, despite his refusal to permit suits against an absentee defendant that challenged his ownership of real property, permitted courts to seize and sell the real property of an absentee defendant to satisfy a personal judgment against that defendant (ibid., 204). With respect to the second question, Ibn Habīb took the view that, after the plaintiff produces evidence of his co-ownership of the property by way of inheritance, the judge should give the defendant an opportunity}
All Mālikī jurists, regardless of their view on what kinds of claims could be adjudicated with the absence of the defendant, had to consider the legal consequences of the defendant’s reappearance after the judgment, whether he had, a right to challenge the initial judgment, and if so, on what grounds. Here, the initial approach to the claim against the absent defendant was determinative of that absentee defendant’s rights upon his return. For those jurists who accepted the notion that a judge could rule against an absent defendant in all claims involving personal obligations, unless the defendant was located sufficiently close to the court to permit him to be summoned without causing more than a few days’ delay, the defendant retained most of his procedural and substantive rights. Accordingly, the returning defendant would be allowed to produce evidence to the court exonerating himself from the obligation to the plaintiff, or impeaching the plaintiff’s proof. If, upon consideration of the returning defendant’s evidence, the court concluded that it had wrongfully ordered the sale of assets belonging to the defendant, the defendant could not reclaim his sold property; instead, he could sue the original plaintiff to recover the proceeds from the judicial sale prompted by that plaintiff’s suit. For the jurists who adopted Ibn al-Mājishūn’s position, viz. that the judge must exhaust all reasonable means possible to contact the defendant and give the defendant repeated stays to allow him the opportunity to defend the claim, the absentee defendant, upon his return, could only challenge the judgment on the narrow grounds of the capacity of the plaintiff’s witnesses, e.g. that the plaintiff’s witnesses were non-Muslims or slaves; however, he could not substantively impeach the plaintiff’s witnesses on grounds such as a conflict of interest or introduce his own evidence negating the plaintiff’s claim, such as evidence that he had satisfied the obligation.

This contrast seems largely a function of the different approaches later Mālikī jurists take to the initial question of when a judge can proceed against an absentee defendant. Because the first group of jurists was relatively lenient in permitting the judge to proceed against absentee defendants, these scholars

44 Ibid., 199 (quoting Ibn Ḥabīb), 200 (quoting Kitāb Ibn Saḥnūn), 201 (quoting Aṣbagh), and 204 (quoting Kitāb Ibn al-Mawwāz). See note 26, supra, and the text related thereto.
relaxed the normally binding nature of the judgment by allowing the defendant to challenge the substantive ruling if and when he returned to the jurisdiction. The second group of jurists, by contrast, required that rigorous procedural requirements be satisfied before a judge could rule against an absentee defendant, so as a result denied the returning defendant an opportunity to challenge the substance of the ruling if and when he returned.

Exegetical Discourse in the *Nawādir*: The Moral and Legal Consequences of a Judge’s Verdict

The *Nawādir*, in Calder’s terminology, is not exclusively discursive. Ibn Abī Zayd’s discussion of the moral effect of a judicial ruling, which appears shortly after Ibn Abī Zayd’s discussion of the permissibility of proceedings against an absent defendant, takes an exegetical tack. Titled “Regarding that which does not become licit as a result of a judicial ruling and that which does become licit,” it begins with the citation of a *ḥadīth* on the authority of Saḥnūn as quoted in the Kitāb Ibn Saḥnūn in which the Prophet Muḥammad is quoted as saying that

> I am only a man. You bring your disputes to me, but one of you may be more persuasive in his argument than the other, leading me to rule for him in accordance with what I have heard from him. So, whosoever I rule in favor of, taking thereby a right of his brother, let him not take it, for I am only awarding him a piece of Hell.46

Ibn Abī Zayd’s subsequent discussion of this issue involves both exegetical statements, analysis of particular cases, and inter-madhhāb polemics. Ibn Abī Zayd began by quoting Saḥnūn as saying that the Prophet’s statement means that a judge’s ruling does not make an act morally licit for the victorious party in circumstances where “if the judge knew what [the victorious] party knew, he would not have ruled in that fashion.”47 The Ḥanafīs, while in general agreement with this principle, make an exception for fraudulently procured divorces, in which case the wife, despite her knowledge that the witnesses committed perjury, could remarry, even if she married one of the witnesses who provided the perjured testimony. In support of the Mālikī interpretation of the

47 *Nawādir*, 8:233.
hadīth, and contrary to the Ḥanafī interpretation, Saḥnūn reported that both the Mālikīs and the Ḥanafīs agreed that if a wife had direct knowledge that her husband had divorced her three times, but he falsely denied it before the judge and she lacked two witnesses to prove her claim, with the result that the judge ruled, contrary to the actual facts, that she continued to be married to her husband, she was nevertheless morally obligated to refuse him sex because, as a moral matter, she was no longer married to him. Indeed, she was permitted to use force to defend herself against him, with some authorities even permitting her the right to employ deadly force. 48 Accordingly, the opposite must also be true, i.e. when the wife knows that she has not been lawfully divorced, she cannot remarry. In a similar vein, Saḥnūn was quoted as saying that if a slave girl knows that her emancipation was the result of perjured testimony, she cannot allow herself to another man, whether by marriage or otherwise. 49

A judgment procured by perjured testimony, however, is not the only circumstance in which this principle is relevant. Ibn Abī Zayd also reports Saḥnūn's view that the parties' understanding of the applicable law is also relevant. For example, if the parties' subjective view of the law is different from that of the judge, the judge's ruling in favor of one of the parties based on a different theory of the law is of no moral effect with respect to the prevailing party. Thus, if a man divorces his wife irrevocably (al-battata), and the wife brings a suit before a judge who views such a divorce as the equivalent of only one divorce, but both the husband and the wife believe that such a divorce is the equivalent of three divorces, a judicial declaration that it is the equivalent of only one divorce does not transform the triple divorce into a single divorce. From a moral perspective, she could not return to her husband unless she first marries and consummates her marriage with another man, and then subsequently is divorced or widowed from the second husband. 50

Where the parties have a different understanding of the applicable rule, however, and the ruling is consistent with the subjective understanding of the prevailing party, then that prevailing party is morally free to act on that judgment. Ibn Abī Zayd gives the example of a master who says to his slave, “Give me some water,” intending thereby to emancipate him. The master, however, does not believe that such a formula of emancipation is binding, and subsequently repudiates the emancipation. The slave, however, believes that even

48 Ibid., 234.
49 Ibid.
50 The result in this case can be explained on the grounds that the lawsuit was fictitious insofar as there was no dispute between the parties as to the law or the facts, and accordingly, there was no case or controversy for the court to resolve.
Oblique formulas (kināyāt) of emancipation are binding. In this case, if the slave receives a legal judgment declaring that he is free, the slave is morally justified in acting on the ruling.\footnote{Ibid., 235 (fa-lil-ʿabdfīmithlāhā an yadhhab bayth šāʾ bi-mā ḥukin lah).}

A judge’s ruling does not, however, resolve all cases in which the parties have a different conception of the law. Here, Ibn Abī Zayd quoted Saḥnūn’s analysis of a divorce case in which the husband gives his wife an option to divorce (takhyīr), which she then exercises to divorce herself (ikhtārat nafsahā). If the wife believes that the effect of exercising her divorce option is a triple divorce, but her husband believes that it is only a single divorce and they take their dispute to a judge who believes that this divorce is only a single divorce which preserves the husband’s right to resume the marital relationship (talāq rajī’), a ruling in accordance with the husband’s view “does not make licit for him what she believes is forbidden, and it does not make it permissible for her to have intercourse with him willingly.”\footnote{Ibid. This result is problematic to the extent that it deprives the judgment of any moral effect, even though the parties are acting in complete good faith. Indeed, if this were the correct rule, there would be no point in bringing such a case before a judge. Subsequent developments in Mālikī doctrine, however, would reject Ibn Abī Zayd’s analysis of this issue in favor of granting moral legitimacy to all judicial decisions in which the parties acted in good faith. See Mohammad Fadel, “Adjudication in the Mālikī Madhhab: a Study of Legal Process in Medieval Islamic Law,” (PhD dissertation, University of Chicago, 1995), 104–117.}

6 Conclusion

In this paper I have argued that Calder’s distinction between exegetical authority and discursive authority is meaningful from a jurisprudential perspective, but it is not a useful tool for dating legal texts. Its irrelevance to dating legal texts was demonstrated by a close analysis of sections of Ibn Abī Zayd al-Qayrawānī’s encyclopedic work Kitāb al-nawādir wa-l-ziyādāt in which I illustrated that Ibn Abī Zayd used both modes of authority in his book. I also argued that discursive authority dominates in cases where there are no revelatory texts that can be credibly deployed to solve the legal issues at hand.

Even where a relevant revelatory text exists, such as the hadiths whose plain meaning prohibits a judge from ruling against an absentee defendant, it does not necessarily lead even a post-Shāfiʿī jurist to adopt an exegetical approach to generating rules. One reason is that hadith texts are rarely so explicit so as
to exclude rules that are inconsistent with the plain meaning of the \textit{ḥadīth}. Indeed, in the case of the permissibility of a judge proceeding against an absent defendant, Ibn Abī Zayd did not even bother to provide an alternative interpretation for the relevant \textit{ḥadīth}s in defense of the Mālikī position. What accounts, however, for Ibn Abī Zayd’s concern with a proper interpretation of the \textit{ḥadīth} regarding the moral effect of a judicial ruling? I believe the answer is theological: whereas \textit{ḥadīth}s pertaining to judicial procedure could be understood as a rule intended to further human welfare, and thus amenable to rational legal analysis, the \textit{ḥadīth} announcing that a false judgment does not change the prevailing party’s moral obligations raises a theological question for which discursive legal reasoning may have no role to play.

From a jurisprudential perspective, then, the choice to adopt a discursive strategy or an exegetical one is not binary; they could, and did, coexist in the post-Shāfiʿī period, and there is no reason to believe that they could not have coexisted in the pre-Shāfiʿī period as well. Accordingly, a text that uses an exegetical strategy cannot be taken as prima facie evidence that it is post-Shāfiʿī nor can the fact that a text adopts a discursive structure be taken as evidence that it is a pre-Shāfiʿī text.

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