Rethinking *Taqlīd* in the Early Shāfiʿī School

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INTRODUCTION

The concept of *taqlīd* in Islamic law has long received a bad press. Juxtaposed with the creative vigor of *ijtihād*—direct and independent engagement with the sacred sources—*taqlīd*, or legal conformism, has been dismissed as "servile imitation of other jurisconsults"[1] or "slavish obedience to one or other of the four recognized legal schools."[2] By approaching the concept from the perspective of legal studies, Norman Calder, Mohammad Fadel, Wael Hallaq, and Sherman Jackson have provided important correctives to this disparaging view.[3] Drawing primarily on analyses of post-formative legal texts, they have demonstrated that, instead of representing the mere empty shell of *ijtihād*, *taqlīd* in fact embodies a more developed form of law, since it can accommodate precedent and communal legal reasoning in contrast to the unrealistically solipsistic process of *ijtihād*. The consequent development of a body of binding precedent was the crucial ingredient that enabled the establishment and survival of the schools of Islamic law (*madhāhib*).

Methodologically, what these studies of *taqlīd* have in common is that they employ the term as an objective description of practice among Muslim jurists, unaffected by the self-understanding of the jurists themselves. The rationale for such externalism lies in the perceived existence of a gulf between the reality of juridical practice and the indigenous discourse on legal hermeneutics (*uṣūl al-fiqh*), which long maintained a strident rejection of *taqlīd*. Only in the post-formative period are Muslim jurists seen to begin the reconciliation between theory and practice by explicitly acknowledging the practice of *taqlīd* by the majority of their predecessors.[4] Given that the theorization of *taqlīd* in early legal theory appears to have little relevance to the actual modus operandi of early jurists, modern scholars have been left to define *taqlīd* for themselves and then to apply their definitions to the works of the jurists whom they study. This has given rise to competing classifications: while someone like Muḥammad b. Idrīs al-Shāfiʿī (d. 204/820) clearly did not see himself as a follower,

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1. George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh: Edinburgh Univ. Press, 1981), 199.

2. Albert H. Hourani, *Arab Thought in the Liberal Age, 1798–1939* (Cambridge: Cambridge Univ. Press, 1983), 235.

3. Norman Calder, "Al-Nawawī's Typology of *Muftī*s and Its Significance for a General Theory of Islamic Law," *Islamic Law and Society* 3 (1996): 137–64; Mohammad Fadel, "The Social Logic of *Taqlīd* and the Rise of the *Mukhtaṣar*," *Islamic Law and Society* 3 (1996): 193–233; Wael B. Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge Univ. Press, 2001), ch. 4; Sherman A. Jackson, "*Taqlīd*, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory: *Muṭlaq* and *ʿĀmm* in the Jurisprudence of Shihāb al-Dīn al-Qarāfī," *Islamic Law and Society* 3 (1996): 165–92.

4. This acknowledgment is found in the hierarchies of jurists developed by such scholars as Ibn al-Ṣalāḥ (d. 643/1245) and al-Suyūṭī (d. 911/1505) for the Shāfiʿīs and Ibn Kamāl (d. 940/1533) for the Ḥanafīs. See Calder, "Al-Nawawī's Typology," 160–61, and Hallaq, *Authority, Continuity and Change*, ch. 1.

or *muqallid*, the modern scholar—based on his own definition—"unmasks" him as actually practicing *taqlīd*.[5]

In this essay, I will pursue an alternative strategy towards reconstructing the history of *taqlīd* within the early Shāfiʿī school. First, by tracing the meaning and function of the concept in the intellectual context within which it emerged—namely, the scholarship of al-Shāfiʿī and of those scholars who inspired and were inspired by him—I demonstrate that the Shāfiʿī principled rejection of *taqlīd* in works of legal hermeneutics was intimately connected to the very raison d'être of the discipline of *uṣūl* as conceived by al-Shāfiʿī. Second, I argue that beyond the ideal theory of *uṣūl*, a conscious debate regarding the actual practice of *taqlīd* can be discovered at the unlikely site of positive law (*fiqh*). This debate reveals that classical Muslim scholars were keenly aware of the tension between the *taqlīd* taboo instituted by al-Shāfiʿī and the practical advantages of acknowledging and following prior legal positions. They sought to resolve this tension by developing an implicit theory of precedent, which paralleled but remained separate from the discourse on *ijtihād* and *taqlīd* within legal hermeneutics. These dual discourses created a structure of authority within the Shāfiʿī school that simultaneously guaranteed the integrity of a closed canon of sacred sources and made possible the communal cohesion and predictability generated by precedent.

THE ORIGINS OF *TAQLĪD* AS A LEGAL-THEORETICAL CONCEPT

In order to uncover the original meaning and purpose of the term *taqlīd*, we must begin our search with al-Shāfiʿī's teacher Mālik b. Anas (d. 179/796). This is not because of any real theory of the practice in Mālik's own work: Mālik does employ the term *taqlīd* in the *Muwaṭṭaʾ*, and it is also found several times in the *Mudawwana*,[6] but in none of these instances has it anything to do with legal conformism; rather, it refers to the girding of the sacrificial animal (*taqlīd al-hadī*) during Hajj.[7] The reason why Mālik's thought nonetheless offers an illuminative starting-point for an investigation of *taqlīd* lies in the role played by his conception of the nature of Islamic law, and the problems inherent in this conception, in shaping the very different legal theory developed by his student al-Shāfiʿī—a theory based on the identification and rejection of *taqlīd*.

A revealing point of entry into Mālik's teaching is a statement attributed to the Umayyad Caliph ʿUmar b. ʿAbd al-ʿAzīz (d. 101/720), which Mālik is said to have quoted repeatedly:[8]

> The Prophet and the holders of authority (*wulāt al-amr*) after him established traditions (*sunan*). To adhere to them means conforming to the book of God, perfecting one's obedience to Him, and strengthening His religion. . . . Whoever seeks guidance from them will be guided, and whoever seeks success through them will be successful. And whoever contravenes them "follows a

5. See, e.g., Hallaq, *Authority, Continuity and Change*, 36–39.

6. For examples, see Mālik's *Muwaṭṭaʾ* (al-Shaybānī's recension), ed. ʿAbd al-Wahhāb ʿAbd al-Laṭīf (Cairo: Wizārat al-Awqāf, 1993), 132 (Bāb mā lā yūjib al-iḥrām min taqlīd al-hadī); and ʿAbd al-Salām b. Saʿīd [Saḥnūn], *al-Mudawwana*, 16 vols. in 6, no named editor (Cairo: Dār Ṣādir, 199?; photomechanical rpt. of Bulaq: Maṭbaʿat al-Saʿāda, 1323/1905 or 1906), 1: 401.

7. Ibn ʿAbd al-Barr reproduces a long and interesting quotation attributed to Mālik regarding *taqlīd* in *Jāmiʿ bayān al-ʿilm*, 2 vols., ed. Abū al-Ashbāl al-Zuhayrī (Dammam: Dār Ibn al-Jawzī, 1994), 2: 995. While the terminology used in the quotation is old, the passage is not found in either the *Muwaṭṭaʾ* or the *Mudawwana*. Furthermore, the concepts and ideas discussed in it (including the use of *qibla* as a metaphor for *taqlīd*, and of *aṣl* and *maʿnā* in discussions of analogy) are foreign to Mālik's known usage but largely identical to al-Shāfiʿī's, suggesting that the text probably originates in the third/ninth century.

8. Ibn Taymiyya, *Maʿārij al-wuṣūl* (Cairo: Quṣayy Muḥibb al-Dīn al-Khaṭīb, 1387/1967 or 1968), 17.

path other than that of the believers" (*yattabiʿ ghayra sabīl al-muʾminīn*),[9] and God will turn him over to what he has turned to.[10]

As Umar Faruq Abd-Allah has shown,[11] Mālik equated the "holders of authority" in this quotation with a constellation of Medinan scholars and government officials such as judges and governors. The aggregate of their actions and decisions represented for him the normative path defined by religious tradition that commanded the obedience (*ittibāʿ*) of every Muslim—in the Qurʾanic phrase used by the Caliph, the "way of the believers" (*sabīl al-muʾminīn*). In Mālik's view, this normative path crystallized in the practice of the people of Medina (*ʿamal ahl al-Madīna*). *ʿAmal* embodied the authentic memory of the sacred age, encapsulated in the communal practice of the hallowed city of the Prophet, and it thus ought to be emulated by all Muslims regardless of their location (*al-nās tabaʿun li-ahl al-Madīna*).[12]

Mālik's concept of *ʿamal* was not simply a device for preserving the Sunna of the Prophet.[13] Rather, as the Caliph's statement indicates, it contains the notion of a continuous process of normativity production: each generation builds on the knowledge passed down by its predecessors, modifying and refining collective practice through consultation and personal reasoning.[14] The result is what Schacht described as an organic "living tradition . . . represented by the constant doctrine of its authoritative representatives."[15] Although reports attributed to the Prophet were clearly an important element within the body of material upon which this living tradition drew, *ʿamal* was neither limited to nor determined by them. Thus, on the one hand there were reports from later scholars, judges, and other officials that established *ʿamal*, while on the other there were prophetic *ḥadīth* that, although considered authentic, did not determine *ʿamal*, since the fact that they were not acted upon by the community indicated that they were not normative.

This multilayered and composite nature of the content of Medinan *ʿamal* lay at the heart of al-Shāfiʿī's disillusionment with and rejection of Mālik's theory of law. A passage from al-Shāfiʿī's *Ikhtilāf Mālik* will clarify the nature of al-Shāfiʿī's critique. On the question of whether the hand of a runaway slave who had committed theft should be amputated, al-Shāfiʿī pointed out the multiple inconsistencies of the Mālikī position. Ibn ʿUmar, a Companion and jurist, had demanded that the hand of his escaped slave be amputated; Saʿīd b. al-ʿĀṣ, the governor, had refused to follow the judgment of Ibn ʿUmar and order the punishment; Ibn ʿUmar had subsequently carried it out of his own accord. The example shows not only that jurists and governors—both carriers of the normative *ʿamal* in the Mālikī framework—disagreed on individual issues, but also that these sources in fact contradict the Mālikī position that claims to be based on them: Although Mālik believed, along with Ibn ʿUmar, that an escaped slave should forfeit his hand for theft, he also held that a slave owner was

9. Qurʾan 4: 115.

10. Quoted, via Mālik, by, e.g., Abū Bakr al-Ājurrī, *Kitāb al-sharīʿa*, 3 vols., ed. al-Walīd b. Muḥammad b. Nabīḥ Sayf al-Naṣr (Cairo: Muʾassasat Qurṭuba, 1996), 1: 174 (Bāb al-ḥathth ʿalā al-tamassuk bi-kitāb Allāh taʿālā wa-sunnat rasūl Allāh).

11. Umar Faruq Abd-Allah, "Mālik's Concept of *ʿAmal* in the Light of Mālikī Legal Theory" (Ph.D. diss., University of Chicago, 1978), 448–53 (on the *ʿulamāʾ*), 428–30 (on government).

12. See Mālik's letter to al-Layth b. Saʿd in ʿAbd al-Fattāḥ Abū Ghudda, *Namādhij min rasāʾil al-aʾimma al-salaf wa-adabihim al-ʿilmī* (Aleppo: Maktab al-Maṭbūʿāt al-Islāmī, 1996), 31.

13. In this I disagree with Yasin Dutton's argument in *Original Islam: Malik and the Madhhab of Madina* (Abingdon: Routledge, 2006), 14–16.

14. Mālik lays out this process explicitly in his letter to al-Layth b. Saʿd; Abū Ghudda, *Namādhij*, 31.

15. Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 29.

not permitted to carry out a punishment not sanctioned by the authorities.[16] Addressing his Mālikī interlocutor in *Ikhtilāf Mālik*, al-Shāfiʿī queries:

> Where is *ʿamal* here? If it is the practice of the governor, then Saʿīd was not of the opinion that the hand of the runaway slave who stole should be amputated, while you believe that it should be amputated. Or if *ʿamal* is established by Ibn ʿUmar's opinion, then [know that] Ibn ʿUmar amputated his hand, while you are of the opinion that one is not allowed to do so [if the authorities disagree]. So we cannot comprehend what you mean when you say "*ʿamal*," nor do you seem to know it yourself according to what you have told us, nor could we find clarification with any one of you about what *ʿamal* or consensus (*ijmāʿ*) are. We are forced to conclude, then, that you simply call your own opinions "*ʿamal*" and "consensus."[17]

What al-Shāfiʿī points out in this passage is that the anonymous "*ʿamal* of Medina" cannot in fact produce a single coherent verdict: it contains multiple contradictory voices, but does not offer any systematic method for adjudicating between them. Mālik did recognize complex gradations within the body of material upon which *ʿamal* was based, distinguishing older practices from later ones and widely accepted traditions from those subject to greater degrees of disagreement.[18] However, these gradations did not translate into a reproducible methodology of rule derivation. The reasons why certain sources—prophetic reports, scholars' opinions, and so on—were accepted as normative while others were not could not be deduced from an examination of the sources themselves, but only by reference to their reception, i.e., whether or not they were followed by the community. This opacity made Mālik's *ʿamal* into a "black box." One could not trace the reasoning that led to a particular ruling; one could only follow it blindly.

For al-Shāfiʿī, such blind following was an instance of what he called *taqlīd*. A definition of the term *taqlīd* common among later Shāfiʿīs is "the acceptance of a position without evidence" (*qubūl qawl bi-lā ḥujja*),[19] and al-Shāfiʿī's usage of the term demonstrates that this is also how he understood it. In the *Umm* al-Shāfiʿī asks rhetorically,

> If you follow (*wa-in kunta tuqallid*) ʿUmar b. al-Khaṭṭāb alone on issues regarding which you have no evidence beyond following him (*lā ḥujja laka fī shayʾ illā taqlīduh*), then how could you disagree with him when he is supported by the Qurʾan, analogy (*qiyās*), common sense (*maʿqūl*), and other Companions of the Prophet?[20]

The most likely source for the term *taqlīd* in al-Shāfiʿī's thought is represented by the legal and theological circles of Iraq, where it was already used in the latter half of the second/eighth century in discussions relating to the derivation of religious knowledge. It is encountered, for example, in Muḥammad b. al-Ḥasan al-Shaybānī's (d. 189/804 or 805) *Kitāb al-Aṣl*, the most significant founding text of the Ḥanafī school. In a section on religious endowments

16. Saḥnūn, *al-Mudawwana*, 6: 182 (Fī iqāmat al-ḥadd ʿalā al-ābiq), 6: 257 (Fī al-sayyid yuqīmu ʿalā ʿabīdihi al-ḥudūd).

17. Muḥammad b. Idrīs al-Shāfiʿī, *Kitāb al-Umm*, 11 vols., ed. Rifʿat Fawzī ʿAbd al-Muṭṭalib (Mansura: Dār al-Wafāʾ, 2001), 8: 738–39.

18. Abd-Allah, "Mālik's Concept of *ʿAmal*," 409–34.

19. Possibly the earliest example of this definition is found in Abū Bakr al-Khaffāf 's (d. ca. 330/941) *al-Aqsām wa-l-khiṣāl* (Dublin: Chester Beatty, MS Arabic 5115 [43 fols., 660/1262]; mistakenly attributed to Ibn Surayj in the catalog), fol. 4b. On later debates regarding the definition of *taqlīd* in the Shāfiʿī school, see Badr al-Dīn al-Zarkashī, *al-Baḥr al-muḥīṭ*, 6 vols., ed. ʿAbd al-Qādir ʿAbd Allāh al-ʿĀnī, ʿUmar Sulaymān al-Ashqar, et al. (Kuwait: Wizārat al-Awqāf wa-l-Shuʾūn al-Islāmiyya, 1992), 6: 270–74.

20. See *al-Umm*, 8: 346.

(*awqāf*), al-Shaybānī criticizes Abū Ḥanīfa's position on the issue, arguing that the latter's restriction of the potential scope of endowments to encompass solely the founding of mosques constitutes an arbitrary imposition on people (*taḥakkum ʿalā al-nās*). He warns that

> people accept the positions of Abū Ḥanīfa and his followers[21] only because they refrain from arbitrary impositions on people. But if they impose arbitrary rules on people without [reference to] reports or analogy, [people] will not follow these things (*lam yuqallidū hādhihi al-ashyāʾ*). If we were to follow (*wa-law annā qalladnā*) anyone in such matters, we would follow those who came before Abū Ḥanīfa, such as Ḥasan al-Baṣrī, Ibrāhīm al-Nakhaʿī,[22] and their like, who are worthier of being followed.[23]

As this quotation demonstrates, al-Shaybānī used the verb *qallada* to denote following a position that lacked direct support from reports or analogies on reports. His usage of the concept is complex and does not contain an outright and principled rejection of *taqlīd*. In contrast, al-Shaybānī's contemporary and fellow Iraqi Bishr al-Marīsī (d. 218/833), who is also known to have employed the term, took a stricter view of the practice. Probably due to his dual preoccupation with law and theology, Bishr denied the validity of following anything but direct evidence, even rejecting *taqlīd* of *ḥadīth* transmitters.[24]

Al-Shāfiʿī was familiar with the work of both al-Shaybānī and Bishr al-Marīsī. He studied al-Shaybānī's *Aṣl*,[25] and indeed refers to the above-quoted passage explicitly in his own discussion on endowments in *Kitāb al-Umm*.[26] He was also personally acquainted with Bishr, and even resided in the latter's house during his stay in Baghdad.[27] It seems plausible to conclude that al-Shāfiʿī adopted the term *taqlīd* and the associated methodological rigor, which linked the strength of a legal argument to its basis in the sources, from his Iraqi companions. However, in the usage of al-Shāfiʿī, unlike in that of al-Shaybānī or Bishr, the concept took on a central role within an explicit and comprehensive overall theory of the law.[28] As a consequence, al-Shāfiʿī's conception of *taqlīd* came to exert a uniquely powerful influence both within and beyond the school that he founded.

21. The reference to Abū Ḥanīfa "and his followers (*wa-aṣḥābuh*)" appears odd, given that al-Shaybānī himself was one of Abū Ḥanīfa's two most prominent students. However, since Abū Yūsuf (d. 182/798) had initially held the same opinion as Abū Ḥanīfa on endowments, this may be al-Shaybānī's subtle way of referring to his senior and teacher Abū Yūsuf. See Shams al-Dīn al-Sarakhsī, *al-Mabsūṭ*, 30 vols., no named editor (Beirut: Dār al-Maʿrifa, 1989; rpt. of Cairo: n.p., 1324–1331 [1906–1912 or 1913], with an added index volume prepared by Khalīl al-Mays), 12: 28.

22. Ḥasan al-Baṣrī died in 110/728, Ibrāhīm al-Nakhaʿī ca. 96/717.

23. This passage appears in an as-yet unedited section of *al-Aṣl* entitled "Kitāb al-ṣadaqa al-mawqūfa" (Istanbul: Süleymaniye, Murad Molla, 4 vols., MSS 1038–1041 [639/1241 or 1242]), 1041 (vol. 4), fol. 523b. I am indebted to Murteza Bedir for this reference.

24. ʿUthmān b. Saʿīd al-Dārimī, *Radd al-Imām al-Dārimī ʿUthmān b. Saʿīd ʿalā Bishr al-Marīsī al-ʿanīd*, ed. Muḥammad Ḥāmid al-Faqī (Cairo: Maṭbaʿat Anṣār al-Sunna al-Muḥammadiyya, 1358/1939 or 1940), 144; see also Josef van Ess, *Theologie und Gesellschaft: Eine Geschichte des religiösen Denkens im frühen Islam*, 6 vols. (Berlin: Walter de Gruyter, 1991–1997), 5: 362–63.

25. There is ample evidence of al-Shāfiʿī's engagement with al-Shaybānī's thought. In addition to numerous reports to this effect in the biographical literature, several verbatim quotations of al-Shaybānī's works can be found in al-Shāfiʿī's *Radd ʿalā Muḥammad b. al-Ḥasan* (*al-Umm*, 9: 85–177); compare, for example, *al-Umm*, 9: 167–69, with al-Shaybānī's *al-Ḥujja ʿalā ahl al-Madīna*, 4 vols., ed. Mahdī Ḥasan al-Kīlānī al-Qādirī (Beirut: ʿĀlam al-Kutub, 1983; rpt. of Hyderabad: Lajnat Iḥyāʾ al-Maʿārif al-Nuʿmāniyya, 1965–1971), 4: 412–17.

26. al-Shāfiʿī, *al-Umm*, 5: 123–24.

27. van Ess, *Theologie und Gesellschaft*, 3: 178.

28. This is not to deny the possibility that al-Shaybānī or Bishr may have developed such a theory, but no comprehensive legal theory attributed to either of them appears to have survived.

The crucial characteristic of al-Shāfiʿī's definition of *taqlīd* was the absence of a transparent connection between a legal ruling and the normative evidence on which it is based. This is the feature that al-Shāfiʿī highlighted in the "black box" of Mālik's *ʿamal*. While Mālikī legal reasoning in the earlier slave example does include pieces of historical information—namely, the opinions of Ibn ʿUmar and Saʿīd b. al-ʿĀṣ—the synthetic Medinan practice cannot be justified with reference to either of these pieces of information in any systematic way; in other words, they are not used as evidence. This is because, for Mālik, Medinan practice is the manifestation of the normative content of historical reports that by themselves are not fully determinate. Medinan *ʿamal* constitutes evidence, while historical reports do not.

Al-Shāfiʿī, however, did not share Mālik's confidence in the unerring wisdom of the "invisible hand" of tradition. He saw Medinan practice as an aggregate position devoid of any intelligible logic, artificially created by jurists who picked and chose among existing positions and practices and selectively declared some of them normative. Such a methodology, al-Shāfiʿī believed, would eventually sever the Muslim community's connection to divine revelation by superimposing the collective judgments of fallible scholars upon the guidance provided by God and His infallible Prophet. In this sense, al-Shāfiʿī considered Mālik's theory to differ only in degree from the doctrine of Abū Bakr al-Aṣamm (d. ca. 200/816) and his student Abū Isḥāq Ibrāhīm b. ʿUlayya (d. 218/832), infamous jurist-theologians whose jurisprudence was based on the primacy of consensus, even if only partial, at the expense of prophetic reports. In *Ikhtilāf Mālik*, al-Shāfiʿī rebuked his Mālikī opponent by likening the latter's approach to that of Ibn ʿUlayya: "This is the method of those who abolish prophetic reports in their entirety, saying 'We adhere to consensus.'"[29] In al-Shāfiʿī's view, then, the "living tradition" model based on communal practice not only provided an inconsistent and unreliable channel to the age of revelation, but ultimately smothered it in the name of local or partial agreements between scholars in the present. Although al-Shāfiʿī focused his critique on Mālik and Ibn ʿUlayya, whose doctrines were most prominent in Egypt at the time, he noted that similar dangerous trends could be observed in all the major centers of the Muslim world.[30]

Al-Shāfiʿī's solution for safeguarding the integrity of the revealed message was to isolate the sacred past as a clearly defined and uniquely normative category. This past was enshrined in and accessible through verifiable reports—primarily, the Qurʾan and the Sunna, of which other sources such as consensus (*ijmāʿ*) and the opinions of the Companions were derivations.[31] The circumscribed sacred past thus provided an unchanging and authoritative measuring stick—a *canon*—by means of which the jurist could evaluate and categorize new cases.[32]

In contrast to Ibn ʿUlayya's conception of the dominant role of consensus, al-Shāfiʿī severely curtailed its applicability and force. Only an explicit and complete consensus, he

29. al-Shāfiʿī, *al-Umm*, 8: 750. For what must be an account of al-Shāfiʿī's debates with Ibn ʿUlayya, see al-Shāfiʿī's *Jimāʿ al-ʿilm*, in *al-Umm*, 9: 5–67.

30. al-Shāfiʿī, *al-Umm*, 9: 25–28.

31. Al-Shāfiʿī's position regarding what, precisely, fell within the boundaries of this normative past appears to have undergone some change; see Éric Chaumont, "Le 'dire d'un Compagnon unique' (*qawl al-wāḥid min l-ṣaḥāba*) entre la *sunna* et l'*iǧmāʿ* dans les *uṣūl al-fiqh* šāfiʿites classiques," *Studia Islamica* 93 (2001): 59–76. See also Ahmed El Shamsy, "The First Shāfiʿī: The Traditionalist Legal Thought of Abū Yaʿqūb al-Buwayṭī (d. 231/846)," *Islamic Law and Society* 14 (2007): 317–18.

32. Jan Assmann, *Das kulturelle Gedächtnis: Schrift, Erinnerung und politischer Identität in frühen Hochkulturen* (Munich: C. H. Beck, 1992), 103–29.

declared, could exert binding authority upon later scholars, and even then, consensus did not establish a new independent norm but merely represented an unchallenged interpretation of the canon.[33] In the absence of total unanimity, al-Shāfiʿī argued, an individual jurist's interpretation of the canon was formally equal to any alternative interpretation, even if the latter were accepted by all other Muslim jurists.[34] Al-Shāfiʿī's argument, although made in the context of a judge disagreeing with his contemporaries, also appears to apply diachronically: even if a particular opinion is endorsed by the overwhelming majority of scholars of earlier generations, it is not binding upon the individual jurist. In other words, al-Shāfiʿī's model does not admit the accumulation of precedent; rather, each jurist faces the canonical sources in an interpretative situation that is not determined by the work of his predecessors.[35]

Al-Shāfiʿī's teaching on *taqlīd* can, therefore, be summed up as follows. By clearly defining a certain set of sources as exclusively normative, al-Shāfiʿī defined *taqlīd* as following a position that was not connected in an intelligible and reproducible way to the canonized sources and through them to the age of revelation. Although al-Shaybānī's use of the term had already contained the distinction between normative reports and later opinions, it was al-Shāfiʿī who embedded the concept of *taqlīd* in a conceptual landscape that clearly separated the normative past from the observer in the present. The promotion of *ijtihād* and critique of *taqlīd* that permeate al-Shāfiʿī's writings, in particular his works on legal hermeneutics, were not aimed at supporting innovation and abolishing stagnation, as the modern polemical usage of this binary pair would suggest. Rather, they reflect a conservative effort to salvage the authentic memory of the prophetic age by de-legitimizing the later accretions to the law that had been sanctioned by appeal to *ʿamal* or consensus.

That the insistence on canonical evidence represented a particularly Shāfiʿī preoccupation was also recognized by members of other legal schools. The Mālikī scholar Ibn al-Faraḍī (d. 403/1013) characterized Shāfiʿism in terms of "abandoning *taqlīd* and embracing *ḥujja*," and frequently explained these characteristics in Andalusian scholars as the result of their association with Shāfiʿīs in the East.[36] The Ḥanafī ʿAlāʾ al-Dīn al-Tarjumānī (d. 654/1257) resorted to citing al-Shāfiʿī's exhortation to follow evidence from *ḥadīth* in order to justify his own work.[37]

There were, however, two areas in which al-Shāfiʿī's own practice could be seen as falling under his definition of *taqlīd* (although he did not call it thus himself).[38] The first of these

33. al-Shāfiʿī, *al-Risāla*, published as the first volume of *al-Umm*, 1: 221; see also Joseph E. Lowry, *Early Islamic Legal Theory: The Risāla of Muḥammad ibn Idrīs al-Shāfiʿī* (Leiden: Brill, 2007), 327.

34. al-Shāfiʿī, *al-Umm*, 7: 505.

35. Note that my argument is concerned specifically with the practice of *ijtihād* and *taqlīd* by scholars who fulfill the qualifications of a *mujtahid*. Shāfiʿī scholars generally accepted and even required *taqlīd* on the part of lay Muslims.

36. ʿAbd Allāh b. Muḥammad b. al-Faraḍī, *Tārīkh ʿulamāʾ al-Andalus*, 2 vols., no named editor (Cairo: al-Dār al-Miṣriyya li-l-Taʾlīf wa-l-Tarjama, 1966); see, e.g., 1: 86–87 (no. 270), 1: 110 (no. 341), 1: 355–56 (no. 1049), 2: 39–40 (no. 1204), and 2: 144–45 (no. 1454).

37. ʿAlāʾ al-Dīn al-Tarjumānī, *Yatīmat al-dahr fī fatāwā ahl al-ʿaṣr* (Cairo: al-Maktaba al-Azhariyya, MS 2119 Khāṣṣ, 26958 ʿĀmm [260 fols., n.d.]), fol. 2a. In addition, Murteza Bedir's study of Ḥanafī fatwa collections from the fourth/tenth to the seventh/thirteenth centuries reveals that canonical evidence played very little role in Ḥanafī debates in this period, in contrast to the prominence of evidence-based reasoning in contemporary Shāfiʿī works. Murteza Bedir, "Fatwa as a Tool of Legal Interpretation: Waqiʿat Literature of the 10th–13th Centuries in the Hanafi School of Law" (lecture at the Islamic Legal Studies Program, Harvard Law School, Cambridge, Mass., February 14, 2008).

38. Hallaq identifies several examples of what he calls *taqlīd* in al-Shāfiʿī's work, but this identification is based on his own definition of the term rather than al-Shāfiʿī's; the former appears to incorporate such additional criteria as non-originality. See Hallaq, *Authority, Continuity and Change*, 36–39.

was in the field of *ḥadīth*. Al-Shāfiʿī had been trained in the Hejazi *ḥadīth* tradition, but when he met Aḥmad b. Ḥanbal (d. 241/855), he became convinced that Aḥmad's *ḥadīth* expertise could isolate authentic *ḥadīth* also from other areas of the Muslim world, especially Iraq. Acknowledging Aḥmad's superiority, al-Shāfiʿī told him: "You are more knowledgeable with regards to *ḥadīth* and [the science of] transmitters, so if a *ḥadīth* is authentic, whether it be from Kufa or from Syria, let me know so that I can follow it."[39] If one considers the authentication of *ḥadīth* (*taṣḥīḥ*) to constitute part of *ijtihād*, then al-Shāfiʿī was endorsing what would later be called the divisibility of *ijtihād* (*tajazzuʾ* or *tajziʾat al-ijtihād*);[40] or, to put it differently, al-Shāfiʿī practiced partial *taqlīd* of Aḥmad by accepting the latter's judgment regarding the authenticity of *ḥadīth* reports without examining the evidence.[41]

The significant difference between *taqlīd* of Mālik's opinions and *taqlīd* of Aḥmad's authentication of *ḥadīth* is twofold. First, the aim of *ḥadīth* criticism is to preserve prophetic reports as historical artifacts, and to guarantee their authenticity through the social-epistemological theory of uprightness (*ʿadāla*). It is not based on a complex reception theory of normativity like Mālik's concept of Medinan practice, which involves successive stages of interpretation by often anonymous actors. Second, given al-Shāfiʿī's view, expressed explicitly in the *Risāla*, of the "science of transmitters" as a methodologically rigorous discipline,[42] it seems likely that he saw Aḥmad as an expert who could—if one were to ask him—produce reliable and reproducible evidence for his judgment. The process of authentication, in contrast to Medinan *ʿamal*, is therefore not a "black box," but rather a transparent "science."[43]

The second area in which al-Shāfiʿī was considered by later jurists to have permitted *taqlīd* was the ascertainment of paternity.[44] The physiognomist (*qāʾif*) was an expert who had been consulted since pre-Islamic times to determine a child's paternity. The Prophet is reported not to have objected to this occupation, and early caliphs actively called upon physiognomists to settle paternity disputes. Al-Shāfiʿī came to the conclusion that the opinion of a *qāʾif* constituted knowledge (*ʿilm*), and therefore represented acceptable evidence in court. He argued, however, that each individual physiognomist first had to prove his reliability by correctly identifying the mother of a particular child from among a group of women.[45] As with *ḥadīth* authentication, al-Shāfiʿī's willingness to accept the testimony of the *qāʾif* without explicit proof is not inconsistent with his overall position. It is true that the process of determining paternity does not appear to be based on reproducible considerations of evidence as required for *ijtihād*, and it is thereby analogous to the workings of Medinan *ʿamal*. However, the

39. Abū Yaʿliā al-Farrāʾ, *Ṭabaqāt al-ḥanābila*, 3 vols., ed. ʿAbd al-Raḥmān al-ʿUthaymīn (Riyadh: al-Amāna al-ʿĀmma li-l-Iḥtifāl bi-Murūr Miʾat ʿĀm ʿalā Taʾsīs al-Mamlaka, 1999), 1: 13.

40. See Abū Ḥāmid al-Ghazālī, *al-Mustaṣfā fī ʿilm al-uṣūl*, 4 vols., ed. Ḥamza b. Zuhayr Ḥāfiẓ (Medina: published by the editor, 1413/1993 or 1994), 4: 16.

41. The acceptance of someone else's reports was classified as a permissible form of *taqlīd* by, among others, Ibn al-Qāṣṣ (d. 335/946 or 947) in *al-Talkhīṣ*, ed. ʿĀdil Aḥmad ʿAbd al-Mawjūd and ʿAlī Muḥammad Muʿawwaḍ (Mecca: Maktabat Nizār Muṣṭafā al-Bāz, 1999), 73. Others, such as Ibn Abī Hurayra (d. 345/956), did not consider this to constitute *taqlīd* at all; see Abū al-Ḥasan al-Māwardī, *al-Ḥāwī al-kabīr*, 18 vols., ed. ʿĀdil Aḥmad ʿAbd al-Mawjūd and ʿAlī Muḥammad Muʿawwaḍ (Beirut: Dār al-Kutub al-ʿIlmiyya, 1994), 1: 19–20.

42. Lowry, *Early Islamic Legal Theory*, 193–200.

43. As D. W. Hamlyn points out, "the word 'science' is . . . simply the traditional translation of the term 'episteme' as Aristotle uses it, and that, as he so often says, is *knowing the reason why*"; "Aristotle on Dialectic," *Philosophy* 65 (1990): 475 (emphasis mine).

44. See, for example, Ibn al-Qāṣṣ, *al-Talkhīṣ*, 74.

45. al-Shāfiʿī, *al-Umm*, 7: 605–6.

explicit approval of both the Prophet and the rightly guided caliphs lends the practice the sanction of revelation; and furthermore, the physiognomist's ability could be tested against objectively known facts. *Taqlīd al-qāʾif* can therefore be integrated into al-Shāfiʿī's "scientific" conception of the law.

AL-SHĀFIʿĪ'S STUDENTS AND *TAQLĪD*

After al-Shāfiʿī's death in 204/820, his Egyptian students laid the foundations of the Shāfiʿī school of law by propagating the ideas and writings of their master and by authoring works of secondary Shāfiʿī literature, in which they elucidated and extended al-Shāfiʿī's legal opinions. In the process, they transformed his teaching into an abstract doctrine that would become the basis of an ongoing interpretive project within the school. A central preoccupation of al-Shāfiʿī's immediate successors was to reconcile the privileged status that they assigned to the master with his explicit prohibition of *taqlīd*. An examination of the work of two of al-Shāfiʿī's students, Abū Yaʿqūb al-Buwayṭī (d. 231/846) and Ismāʿīl b. Yaḥyā al-Muzanī (d. 264/877), reveals the strategies that these scholars developed in order to remain faithful both to the sacred canon and to their teacher. Their pioneering efforts established templates for following al-Shāfiʿī that were adapted and imitated by later Shāfiʿīs.

Al-Buwayṭī was al-Shāfiʿī's first successor and, until his own death, the most influential Shāfiʿī jurist. Al-Buwayṭī composed a *mukhtaṣar*, or compendium, of al-Shāfiʿī's writings, plainly with the aim of sharing al-Shāfiʿī's teaching with a wider audience.[46] The *Mukhtaṣar* is an exercise in following: it consists largely of paraphrased quotations from al-Shāfiʿī's works, reproducing the master's legal rulings in a succinct, digested form. That it is nonetheless not an exercise in *taqlīd* as proscribed by al-Shāfiʿī can be seen in the way in which al-Buwayṭī approaches his teacher's work. In stark contrast to the *mukhtaṣar* produced by al-Buwayṭī's Mālikī contemporary ʿAbd Allāh b. ʿAbd al-Ḥakam (d. 214/829), who treats Mālik's opinions as authoritative in themselves,[47] al-Buwayṭī is careful to quote the specific textual evidence for each of al-Shāfiʿī's legal positions that he discusses in his work. This indicates that al-Buwayṭī was aware of the crucial role of evidence in al-Shāfiʿī's thought. However, al-Buwayṭī did not stop at the passive reproduction of al-Shāfiʿī's evidence. He actively evaluated the proofs presented by his teacher, and on several occasions provided further reinforcement for his arguments, for example in the form of an additional *ḥadīth* report[48] or an alternative transmission of a particular *ḥadīth* that offered stronger support for al-Shāfiʿī's opinion.[49] We also find evidence of al-Buwayṭī openly contradicting or correcting his master. In at least one instance in the *Mukhtaṣar*, he mentions al-Shāfiʿī's argument but then disagrees with it: while al-Shāfiʿī had considered it possible for a man to acknowledge another as his consanguineous brother, al-Buwayṭī points out that this would involve the man making an admission of paternity on behalf of his father, which is not admissible.[50] More dramatically, Aḥmad b. Ḥanbal's student Abū Bakr al-Athram (d. ca. 260/873), who studied with al-Buwayṭī, reported that al-Buwayṭī overtly altered one of al-Shāfiʿī's opinions in the

46. See El Shamsy, "The First Shāfiʿī."

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

48. Abū Yaʿqūb al-Buwayṭī, *Mukhtaṣar al-Buwayṭī* (Istanbul: Süleymaniye, Murad Molla, MS 1189 [196 fols., 625/1228]), fol. 30b (Bāb fī al-ṣalāt): *qāla Abū Yaʿqūb: wa-l-ḥujja ayḍan fī ḥadīth al-nabī*. . . .

49. al-Buwayṭī, *al-Mukhtaṣar*, fol. 13b (Bāb al-jahr bi-bism Allāh al-raḥmān al-raḥīm); here al-Buwayṭī adds another version of a particular *ḥadīth* that includes Abū Hurayra's clarification of its legal significance.

50. al-Buwayṭī, *al-Mukhtaṣar*, fol. 121b (Masʾala fī al-waṣīya): *qāla Abū Yaʿqūb: lā yajūzu dhālika ʿindī*. . . .

text of the *Mukhtaṣar* after being informed of a contradictory *ḥadīth* on the matter.[51] Al-Buwayṭī then justified the amendment to his students by citing al-Shāfiʿī's oft-repeated exhortation to consider his opinions as conditional upon their concordance with sound *ḥadīth*.[52] This demonstrates that although al-Buwayṭī followed al-Shāfiʿī, in the sense that he generally accepted the latter's legal reasoning and the resulting opinions, his acceptance was not opaque, in the manner of the Mālikīs' adherence to *ʿamal*. Rather, it was contingent, subject to disagreement or even to revision if contrary evidence from the authentic Sunna of the Prophet came to light. This combination of substantive opinions and hermeneutic principles rendered al-Buwayṭī's version of Shāfiʿism transparent: each opinion could be justified as an interpretation of authoritative sources arrived at through the application of explicit rules. This made the process repeatable and, in Karl Popper's phrase, falsifiable.[53] Al-Buwayṭī's understanding of following al-Shāfiʿī does not, therefore, constitute *taqlīd* in the sense of "adhering to a position without evidence."

This distinction between legitimate, evidence-based following and the reprehensible *taqlīd* is even clearer in the work of al-Muzanī, al-Buwayṭī's successor as the leader of the Egyptian Shāfiʿīs. Like al-Buwayṭī, al-Muzanī wrote a *mukhtaṣar* of al-Shāfiʿī's teaching, which became an immensely influential model for later scholars. He began it with the following introduction, as translated by Joseph Lowry:

> I made this book into an abridgement on the basis of the legal learning of Muḥammad b. Idrīs al-Shāfiʿī (may God have mercy on him) and [on the basis] of the import of his own doctrine, in order to make it accessible to those who desire it—although I hereby inform such persons that he forbade that one follow him, or any one else, unquestioningly—and in order that such persons peruse it for the sake of their religion and gain assurance for themselves therefrom.[54]

In this passage, al-Muzanī invites the reader to engage with and learn from al-Shāfiʿī's teaching, but he also warns that al-Shāfiʿī prohibited blind following, i.e., *taqlīd*. The difference between the two closely mirrors the distinction between two terms, *taqlīd* and *mushāwara* (consultation). This distinction appears both in al-Shāfiʿī's work and in its reception in al-Muzanī's *Mukhtaṣar*. In a discussion of the office of the judge in the *Umm*, al-Shāfiʿī had emphasized that a judge must reach his judgments through *ijtihād* and thus may not engage in *taqlīd*.[55] Consultation, on the other hand, was encouraged:

> The consultant (*al-mushīr*) alerts [the judge] to what has escaped his attention and points him to sources (*akhbār*) of which he may be ignorant. As for *taqlīd* of the consultant, God did not grant this [privilege of being followed] to anyone after the messenger of God; whether the scholars of his age agree upon [a matter] or not is irrelevant. He does not accept [the consultants' opinions] except as *taqlīd* of something else, [namely,] the Qurʾan, the Sunna, consensus, or analogy, to which they direct him until he understands it in the way that they understand it.[56]

51. Ibn al-Ṣalāḥ, *Ṭabaqāt al-fuqahāʾ al-shāfiʿiyya*, 2 vols., ed. Muḥyī al-Dīn ʿAlī Najīb (Beirut: Dār al-Bashāʾir al-Islāmiyya, 1992), 2: 681–82.

52. See, e.g., Shams al-Dīn Abū ʿAbd Allāh al-Dhahabī, *Siyar aʿlām al-nubalāʾ*, 25 vols., ed. Shuʿayb al-Arnāʾūṭ and Muḥammad Nuʿaym al-ʿArqasūsī (Beirut: Muʾassasat al-Risāla, 1401–1409/1981–88), 10: 33–35.

53. Karl R. Popper, *The Logic of Scientific Discovery* (London: Routledge, 2002), 18.

54. Ismāʿīl b. Yaḥyā al-Muzanī, *Mukhtaṣar al-Muzanī*, no named editor (Beirut: Dār al-Kutub al-ʿIlmiyya, 1998), 1; translated by Joseph Lowry in "The Reception of al-Shāfiʿī's Concept of *Amr* and *Nahy* in the Thought of His Student al-Muzanī," in *Law and Education in Medieval Islam*, ed. Joseph E. Lowry, Devin J. Stewart, and Shawkat M. Toorawa (Cambridge: E. J. W. Gibb Memorial Trust, 2004), 131.

55. al-Shāfiʿī, *al-Umm*, 7: 504; al-Muzanī, *al-Mukhtaṣar*, 393 (Kitāb adab al-qāḍī).

56. al-Shāfiʿī, *al-Umm*, 7: 505.

The commendable consultation differs from the forbidden *taqlīd* in that it entails being convinced by means of the acceptable sources of the law, i.e., by being able to reproduce the reasoning that led the consultant to come to his or her opinion. Although al-Muzanī does not use the term in connection with his own work, it seems likely that he conceived of it in terms analogous to consultation. He himself had become convinced of the correctness of the arguments, or the "consultation," provided by his teacher al-Shāfiʿī. In turn, he sought to convince readers of his *Mukhtaṣar* by presenting al-Shāfiʿī's rulings accompanied in each case by the relevant textual evidence. This enabled the readers, should they be convinced, to replicate al-Shāfiʿī's chain of reasoning.

Like his peer al-Buwayṭī, al-Muzanī did not merely reproduce al-Shāfiʿī's opinions passively. He juxtaposed his teacher's positions with each other and with the evidence, evaluated and analyzed his reasoning, and, on numerous occasions, even disagreed with him outright. In the method of al-Muzanī's treatment of al-Shāfiʿī's corpus we can observe the beginning of what later Shāfiʿīs came to call *ijtihād fī al-madhhab* (school-internal reasoning):[57] critical engagement with the school founder's corpus by means of a set of distinguishable techniques of interpretation and extension.[58]

The first technique that al-Muzanī employed in his work involved selecting among differing opinions attributed to al-Shāfiʿī regarding a particular issue. Such conflicting views were either recorded on separate occasions in al-Shāfiʿī's writings, developed at different points during his career (in Iraq vs. in Egypt), or mentioned by him without a firm judgment in favor of any of the possible positions. The most significant form of this technique used by al-Muzanī came to be called *tarjīḥ*—the establishment of preponderance.[59] Specifically, the term *tarjīḥ* applies to the promotion of minority viewpoints within al-Shāfiʿī's corpus in order to achieve greater consistency. So, for example, an older opinion can be preferred over a later opinion if the former is considered to be closer to the available evidence or more consonant with al-Shāfiʿī's approach as a whole. Even more interestingly, al-Muzanī isolated general rules from al-Shāfiʿī's writings and used them to overrule his individual opinions. For instance, he extracted from al-Shāfiʿī's corpus the legal maxim "everyone prays for himself" (*kullu muṣallin li-nafsih*) to represent al-Shāfiʿī's belief that even in collective prayers the validity of each individual prayer is separate from the validity of the prayers of the other worshippers and the imam. Thus two people can pray together with one performing the afternoon prayer and the other making up for a missed noon prayer; both prayers are valid as, respectively, the afternoon and the noon prayer. This maxim conflicts with al-Shāfiʿī's position regarding a person who joins a collective prayer late and only catches the last two cycles of the three-cycle evening prayer. According to al-Shāfiʿī's explicit statement, the latecomer prays cycles two and three together with the other worshippers, and then, once the others have finished, continues with cycle one. Al-Muzanī disagreed with this opinion, arguing instead that the latecomer prays cycles one and two when the other worshippers are praying cycles two and three, and then completes cycle three after the others have finished.

57. On *ijtihād fī al-madhhab*, see, for example, Bernard G. Weiss, *The Spirit of Islamic Law* (Athens: University of Georgia Press, 1998), 130–32.

58. For a detailed discussion of these techniques and examples of each, see Muḥammad Nabīl Ghanāyim, *al-Muzanī wa-atharuhu fī al-fiqh al-shāfiʿī* (Cairo: Dār al-Hidāya, 1998), 157–205.

59. On the origins of this term, see Ulrich Rebstock, "Vom Abwägen (*tarǧīḥ*): Stationen einer Begriffskarriere" (paper presented at the 30th Deutscher Orientalistentag, Freiburg, Germany, September 25, 2007); published online at http://orient.ruf.uni-freiburg.de/dotpub/rebstock.pdf. Al-Muzanī himself did not use the term *tarjīḥ*, nor did he employ the other terms discussed below.

In defense of his position, al-Muzanī remarked that this "is more befitting [al-Shāfiʿī's] principle, since he considers everyone to pray for himself (*aqyas ʿalā aṣlihi li-annahu yajʿalu kulla muṣallin li-nafsih*)."[60]

This procedure of overruling an explicit rule by means of an analogy on the basis of another rule is also a known method for dealing with the sacred texts; but in that context it is called *istiḥsān* and is vigorously opposed by the Shāfiʿīs, who regard it as an imposition of subjectivity on the sacred sources.[61] Al-Shāfiʿī wrote an epistle solely dedicated to refuting *istiḥsān*.[62] With regards to the corpus of al-Shāfiʿī's texts, however, al-Muzanī had no scruples in applying this method. The reason for this is most probably the difference between the divine lawgiver and al-Shāfiʿī, a fallible mortal. While it was generally accepted that at least in some areas of the divine law its reasons were not intelligible, al-Shāfiʿī's very project as seen earlier was aimed at making the process of legal reasoning fully transparent and thereby criticizable. Therefore, while even the seemingly inconsistent passages in the sacred sources had to remain sacrosanct, the inconsistencies of the school founder could be remedied and ironed out.

The second type of technique came to be known as *takhrīj*: the extension of one of al-Shāfiʿī's known opinions to a case not explicitly addressed by him.[63] For example, on the topic of *ḥawāla* (the payment of a debt through the transfer of a claim), al-Muzanī introduces a passage of his own writing in the *Mukhtaṣar* with the following explanation: "Regarding these questions, I reasoned on the basis of the underlying meanings of al-Shāfiʿī's positions on *ḥawāla* (*hādhihī masāʾil taḥarraytu fīhā maʿānī jawābāt al-Shāfiʿī fī al-ḥawāla*)."[64] It is worth noting that al-Muzanī explains his method with reference to "underlying meanings," or *maʿānī*, which is the term used by al-Shāfiʿī for what later came to be called *ʿilal*, i.e., the legal causes underlying rulings that are the focus of analogical reasoning.[65] So, in effect, *takhrīj* on the basis of the corpus of al-Shāfiʿī's work involves the same method of reasoning as does *qiyās* with regard to the sacred sources of the Qurʾan and the Sunna.

Finally, in a number of instances, al-Muzanī completely departed from his master's precedent, a strategy later referred to as *tafarrud* (dissent). In some cases these departures were of the kind that we saw al-Buwayṭī engaging in, i.e., overruling al-Shāfiʿī's opinion by means of the latter's own hermeneutic principles.[66] In other instances, the disagreement applied to al-Shāfiʿī's reasoning. For example, al-Shāfiʿī believed that someone who forgets the prohibition against the use of perfume during Hajj is exempt from the requirement of expiation (*fidya*), based on an analogy on a *ḥadīth* according to which the Prophet did not order expiation in the case of a Bedouin who violated other formalities of the pilgrimage. Al-Muzanī, however, justified his disagreement with al-Shāfiʿī by pointing out that a similar *ḥadīth* regarding the unintentional breaking of the fast during the month of Ramaḍān also makes no

60. al-Muzanī, *al-Mukhtaṣar*, 26 (Bāb ṣifat al-ṣalāt).

61. Ibn Taymiyya argued convincingly that the early jurists used the term *istiḥsān* in two distinct ways, and that only one of these—overruling one source text by means of an analogy on another source text—was rejected by al-Shāfiʿī and Aḥmad b. Ḥanbal. See Ibn Taymiyya, *Qāʿida fī al-istiḥsān*, ed. Muḥammad ʿUzayr Shams (Mecca: Dār ʿĀlam al-Fawāʾid, 1419/1998).

62. *Ibṭāl al-istiḥsān*, included in the *Umm*, 9: 64–84.

63. The term *takhrīj* was used already a few decades after al-Muzanī's death by his fellow Shāfiʿīs; see, for example, Ibn al-Qāṣṣ, *Adab al-qāḍī*, 2 vols., ed. Ḥusayn Jabbūrī (Taʾif: Maktabat al-Ṣiddīq, 1909/1989), 1: 68.

64. al-Muzanī, *al-Mukhtaṣar*, 148 (Bāb al-ḥawāla).

65. On al-Shāfiʿī's usage of *maʿānī*, see Lowry, *Early Islamic Legal Theory*, 149–55.

66. For example, al-Muzanī employs the *ḥadīth* principle to contradict al-Shāfiʿī's position on the question of whether sleep automatically causes ritual impurity; *al-Mukhtaṣar*, 11 (Bāb al-istiṭāba).

explicit mention of expiation being required, even though scholars agree that it—in the form of an additional day of fasting—is nonetheless obligatory in such a case.[67] As a scholar and a *mujtahid*, al-Muzanī clearly felt that he had the right not only to prioritize some of al-Shāfiʿī's opinions above others, i.e., to establish preponderance (*tarjīḥ*), but also, when necessary, to develop self-standing and independent opinions through *tafarrud*.

Al-Muzanī's endorsement of al-Shāfiʿī's prohibition of *taqlīd* can be seen clearly in his emphasis upon it in the introduction to the *Mukhtaṣar* quoted earlier. In addition, al-Muzanī composed what appears to be the first rational refutation of the practice of *taqlīd*, using the dialectic format of a *kalām* argument.[68] Al-Muzanī's sophisticated argument became widely cited both within and without the Shāfiʿī school. Among the Mālikīs and the Ḥanafīs, al-Muzanī's case against *taqlīd* became incorporated into school-internal debates regarding the permissibility of the practice.[69] These, however, remained inconclusive due to the existence of conflicting opinions on the matter attributed to Mālik, Abū Ḥanīfa, and the latter's students al-Shaybānī and Abū Yūsuf.[70] The Shāfiʿīs, in contrast, enjoyed no such leeway. Al-Shāfiʿī's unequivocal condemnation of *taqlīd* was not softened by any subsequent reinterpretation by his immediate students; to the contrary, al-Muzanī's refutation provided a persuasive reassertion of the unacceptability of the practice. The absolute prohibition of *taqlīd* on the part of a qualified *mujtahid* was consequently enshrined as an inviolable and enduring premise of Shāfiʿī hermeneutics.

THE INTRODUCTION OF PRECEDENT BY LATER SHĀFIʿĪS

However, in the field of positive law (*fiqh*), it was not the simple dichotomy of *ijtihād* vs. *taqlīd* that guided the activity of Shāfiʿī jurists. As Norman Calder notes, "The direct and independent confrontation with the texts of revelation and the manipulation of the hermeneutical principles set out in works of *uṣūl* were not characteristic of the real practical activities of *muftī*s or author-jurists from about the middle of the fourth century onwards."[71] Instead, the development of positive law within the Shāfiʿī school was increasingly shaped by precedent and collective authority as embodied in the works of the school founder and his

67. al-Muzanī, *al-Mukhtaṣar*, 96 (Bāb fī mā yamtaniʿ ʿalā al-muḥrim min al-libās). The text in the published editions of the *Mukhtaṣar* is corrupt: rather than *fī hādhā dalīl*, it should read *laysa fī hādhā dalīl*. Of the four manuscripts of the work that I have examined, one includes the word *laysa* in the text, one omits it, and in the remaining two al-Muzanī's objection has been excised in its entirety, suggesting an attempt by later Shāfiʿīs to purge it from the work. In one of the latter, however, the passage—with *laysa*—has been added into the margin. The fact of al-Muzanī's disagreement with al-Shāfiʿī on this issue was also firmly established in the commentary tradition; see, for example, al-Māwardī, *al-Ḥāwī al-kabīr*, 4: 105–6.

68. See Ibn ʿAbd al-Barr, *Jāmiʿ bayān al-ʿilm*, 2: 992–93; al-Khaṭīb al-Baghdādī, *al-Faqīh wa-l-mutafaqqih*, 2 vols., ed. ʿĀdil b. Yūsuf al-Ghazāzī (Dammam/Jedda/Riyadh: Dār Ibn al-Jawzī, 1996), 2: 136–37; and al-Zarkashī, *al-Baḥr al-muḥīṭ*, 6: 281–82. Al-Zarkashī attributes this passage to al-Muzanī's *Kitāb fasād al-taʾwīl* (or, more probably, *Kitāb fasād al-taqlīd*; ibid., 6: 232). I assume that it formed part of the corpus of *masāʾil* transmitted from al-Muzanī that includes *Kitāb al-amr wa-l-nahy*, for which see Robert Brunschvig, ed. and trans., "'Le livre de l'ordre et de la défense' d'al-Muzani," *Bulletin d'études orientales* 11 (1945–46): 145–93.

69. For example, the Mālikī Ibn ʿAbd al-Barr and the Ḥanafī al-Jaṣṣāṣ adopted elements of al-Muzanī's argument for their own refutations of *taqlīd*; see Ibn ʿAbd al-Barr, *Jāmiʿ bayān al-ʿilm*, 2: 994; and Abū Bakr al-Jaṣṣāṣ, *Uṣūl al-Jaṣṣāṣ al-musammā al-Fuṣūl fī al-uṣūl*, 2 vols., ed. Muḥammad Muḥammad Tāmir (Beirut: Dār al-Kutub al-ʿIlmiyya), 2: 181–83.

70. For the Mālikīs, see Abū al-Ḥasan b. al-Qaṣṣār, *al-Muqaddima fī al-uṣūl*, ed. Muḥammad b. al-Ḥusayn al-Sulaymānī (Beirut: Dār al-Gharb al-Islāmī, 1996), 10–11, and Abū al-ʿAbbās al-Qurṭubī's statement as quoted in al-Zarkashī, *al-Baḥr al-muḥīṭ*, 2: 286; for the Ḥanafīs, see al-Jaṣṣāṣ, *al-Fuṣūl*, 2: 373.

71. Calder, "Al-Nawawī's Typology," 160.

successors, rather than by the independent exercise of *ijtihād* on the basis of the canonized sources.

Modern scholars have searched in vain in the field of legal hermeneutics for any substantial discussion or even acknowledgment of this shift. Within works of *uṣūl*, *ijtihād* and *taqlīd* continued to be conceptualized as binary opposites; reflecting overwhelming consensus among Shāfiʿī jurists, Badr al-Dīn al-Zarkashī (d. 794/1392) asserted emphatically that "there can be no middle position between the two" (*lā yumkinu an yakūna wāsiṭa baynahumā*).[72] Within this ideal theory, the autonomy of the *mujtahid* remained untrammeled, even as, in reality, prior legal interpretations influenced his actual rulings in ever more constrictive ways. However, in spite of the silence of *uṣūl* texts on the subject, the narrowing of the scope of independent *ijtihād* did not take place unrecognized or untheorized by Muslim jurists: a self-conscious debate on the meaning and limits of *ijtihād* and *taqlīd* can, in fact, be found in books of *fiqh*. This debate focused on a subject that at first appears limited to a relatively minor detail of the law, namely, the determination of the correct direction of prayer (*qibla*). An examination of this hitherto overlooked site of discourse permits a glimpse into the evolution of a theory of precedent underlying the law as it was actually practiced by Shāfiʿī scholars from the third/ninth until at least the seventh/thirteenth century.

The question of the *qibla* derived its salience and urgency for Shāfiʿī scholars from the fact that it represents the metaphor par excellence for *ijtihād* in al-Shāfiʿī's thought. In the *Risāla*, al-Shāfiʿī explicitly equated the area around the sacred precinct in Mecca, where one can determine the direction of prayer simply by sight, with the areas of the law covered by the *nuṣūṣ*, the unambiguous and certain sources that can be understood by everyone. The rest of the world, where one must determine the *qibla* through reasoning, represents those issues that require a specialist—a *mujtahid*—who can collate various types of indicators into a probable opinion.[73] The fact that al-Shāfiʿī employed the same terms, including *ijtihād*, *taqlīd*, and *dalīl*, both in his theoretical analysis of the process of legal reasoning and in his discussion of the practical issue of determining the *qibla* established an enduring model for later Shāfiʿī scholars. They maintained the terminological overlap: subsequent legal-theoretical discourses in *ijtihād* and *taqlīd* were typically couched in terms of the *qibla* metaphor.[74] More importantly, Shāfiʿī jurists deliberately cultivated the metaphor of the *qibla* within *fiqh* as the site of collective reflection on the justification and acceptable range of conformism within the school, creating a parallel discourse on the subject outside the sphere of legal theory. As a consequence, *fiqh* debates about locating the *qibla* were always loaded with the broader implications of the positions taken for the theoretical topics of *ijtihād* and *taqlīd*. Discussions on the *qibla* often mutated into theoretical arguments devoid of any apparent connection to the practical issue at hand.[75] On occasion jurists even made the connection explicit, for example by criticizing their peers' positions on the *qibla* issue by drawing attention to their implications for the "primary discourse" on *taqlīd* within *uṣūl* proper.[76] Although the determination of the *qibla* represents an empirical matter while legal theory involves inter-

72. al-Zarkashī, *al-Baḥr al-muḥīṭ*, 6: 285.

73. al-Shāfiʿī, *al-Risāla*, in *al-Umm*, 1: 8–9.

74. See, for example, al-Māwardī, *al-Ḥāwī al-kabīr*, 1: 21, and al-Ghazālī, *al-Mustaṣfā*, 4: 123.

75. See, for example, ʿAbd al-Malik b. ʿAbd Allāh al-Juwaynī, *Nihāyat al-maṭlab fī dirāyat al-madhhab*, 21 vols., ed. ʿAbd al-ʿAẓīm Maḥmūd al-Dīb (Jedda: Dār al-Minhāj, 2007), 2: 93.

76. See, for example, Ibn al-Ṣalāḥ's comment on al-Māwardī's position regarding the authoritativeness of the communal *qibla* (discussed in more detail at the end of this section): Ibn al-Ṣalāḥ, *Sharḥ mushkil al-Wasīṭ*, printed on the margins of Abū Ḥāmid al-Ghazālī, al-*Wasīṭ*, 7 vols., ed. Aḥmad Maḥmūd Ibrāhīm (Cairo: Dār al-Salām, 1997), 2: 74.

pretive judgments, at least in the early centuries Shāfiʿī jurists do not seem to have drawn any distinction between the two. This can be explained as the result of al-Shāfiʿī's metaphysical realism, i.e., his conviction that every dilemma—whether factual or legal—has a correct answer, even if that answer is and remains unknown.[77] The essentially realist character of the *qibla* metaphor, in fact, pulled Shāfiʿī discourse consistently in the direction of fallibilism.[78]

According to Imām al-Ḥaramayn al-Juwaynī (d. 478/1085), the *qibla/taqlīd* debate among the Shāfiʿīs was triggered by al-Muzanī.[79] In his *Mukhtaṣar*, al-Muzanī quoted al-Shāfiʿī as saying that if the *qibla* "is not immediately obvious," i.e., if one is not close to the holy precinct in Mecca, then

> one must perform *ijtihād* on the basis of indicators in order to determine the correct direction of prayer. If the reasoning of two persons differs, neither of the two may follow the other's reasoning. If, however, visibility is poor and the indicators cease to be apparent to a person (*khafiyat ʿalayhi al-dalāʾil*), then he is like the blind. On a different occasion, [al-Shāfiʿī] said that a blind person may follow a Muslim who points him in the direction [of prayer], but a sighted person to whom the indicators are inaccessible may not.

Al-Muzanī applies *tarjīḥ* to reconcile these opinions, and argued emphatically that

> there is no difference between being ignorant of the direction of prayer on account of one's lack of knowledge and being ignorant of it due to one's lack of eyesight. Al-Shāfiʿī declared the person who cannot access the indicators to be like a blind person, so they are equal [in all respects].[80]

The way in which al-Muzanī's argument was subsequently harnessed by some of his successors to expand the potential scope of *taqlīd* on the level of legal hermeneutics demonstrates both the closeness of the legal and legal-theoretical discourses around this subject, and, ultimately, the limitations of the latter in accommodating restrictions on *ijtihād*. By creating an exception to the *taqlīd* ban in the case of the *qibla* for the scholar to whom "the indicators cease to be apparent," al-Muzanī opened up the possibility of a middle position between the (for the Shāfiʿīs) necessary *taqlīd* of the blind and the layman and the absolute independence of the full-fledged *mujtahid*. Only a few decades later, Ibn Surayj (d. 306/918) exploited this opening to extend al-Muzanī's argument to other, analogous cases, thus subtly stretching the boundaries of acceptable *taqlīd*. Ibn Surayj argued that the dispensation from *ijtihād* granted by al-Shāfiʿī to the blind and to the incapacitated traveler was also applicable to the situation of someone who lacks the time to determine the *qibla* accurately before the time for the prayer is over, and thus this person may practice *taqlīd*.[81] He then carried this opinion over to the realm of legal theory, asserting that a *mujtahid* who lacks sufficient time to carry out *ijtihād* before action is required may likewise avail himself of the option of *taqlīd*.[82]

77. See Lowry, *Early Islamic Legal Theory*, 246–47.

78. Al-Juwaynī argues for a moderate fallibilist position by drawing a parallel with the *qibla* in *al-Burhān fī uṣūl al-fiqh*, 2 vols., ed. ʿAbd al-ʿAẓīm Maḥmūd al-Dīb (Mansura: Dār al-Wafāʾ, 1418/1997), 2: 865. For an overview of the fallibilism/infallibilism debate, see Aron Zysow, "The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory" (Ph.D. diss., Harvard University, 1984), 463–83.

79. al-Juwaynī, *Nihāyat al-maṭlab*, 2: 93.

80. al-Muzanī, *al-Mukhtaṣar*, 24 (Bāb istiqbāl al-qibla . . .).

81. Ibn Surayj's position is quoted by Abū Isḥāq al-Fīrūzābādī al-Shīrāzī, in *al-Muhadhdhab fī fiqh al-Imām al-Shāfiʿī* (with Muḥammad b. Baṭṭāl's *al-Naẓm al-mutaʿadhdhab fī sharḥ gharīb al-Muhadhdhab*), 3 vols., ed. Zakariyyā ʿUmayrāt (Beirut: Dār al-Kutub al-ʿIlmiyya, 1995), 1: 132.

82. Ibn al-Qāṣṣ, *al-Talkhīṣ*, 74. For another version of this report, which limits the dispensation to judges only, see al-Zarkashī, *al-Baḥr al-muḥīṭ*, 6: 287. It is worth noting that al-Muzanī himself is reported to have rejected the possibility of extending the argument to legal theory; see Ibn ʿAbd al-Barr, *Jāmiʿ bayān al-ʿilm*, 2: 922.

Ibn Surayj's argument shows how al-Shāfiʿī's *qibla* metaphor facilitated crossover between discussions on the actual rules concerning the *qibla* and the legal-theoretical issue of *taqlīd*. By drawing on al-Muzanī's *qibla* argument, Ibn Surayj made a case in favor of permitting *taqlīd* in exceptional circumstances, defining such circumstances primarily in terms of time constraints. As a practical outcome, this strategy led Ibn Surayj to hold that a judge may practice *taqlīd* if he lacks sufficient time to develop his position from scratch.[83] This opinion has great historical significance, as it introduced the possibility of predictability in court decisions. That Ibn Surayj was willing to permit a judge to implement rules that he had not personally derived from the sources may be due to the fact that he was the first Shāfiʿī judge in the ʿAbbāsid empire and thus had to confront the practical necessities of a judicial role within a highly centralized legal system.

However, the potential scope of Ibn Surayj's extension of al-Shāfiʿī's position was limited. It could permit a *mujtahid* to practice *taqlīd*, but not force him to do so; and the range of situations to which the argument could be applied was limited to exceptional circumstances involving external or temporary hardships. In addition, although Ibn Surayj's theory of exception remained within the corpus of Shāfiʿī positions, it was not widely accepted by the scholars who followed him and thus came to constitute little more than a textbook example.[84] Instead, a more fundamental shift unfolded in the Shāfiʿī understanding of collective authority, with much more profound repercussions for actual practice. This was the gradual emergence and justification of precedent as a distinct locus of normativity outside the *taqlīd/ijtihād* dichotomy.

Pure *ijtihād*, as al-Shāfiʿī had defined it, required direct and unmediated engagement with the canonized sources of the law, while *taqlīd* represented the act of following—and thus granting authority to—an opinion that lacked a transparent connection with these sources. The precedent that developed in the Shāfiʿī school fit into neither of these categories. Rather, it consisted of the adoption of the opinions of the founder and subsequent generations of school members as binding interpretations of the sources, but not as sources in themselves. A consistent distinction between school opinions and the sources was maintained, and the voluminous works of positive law always argued and defended the former explicitly in terms of the latter.[85]

The introduction of precedent gave rise to a new kind of legal reasoning. In contrast to full-fledged *ijtihād* as envisioned by al-Shāfiʿī, this precedent-based *ijtihād—ijtihād fī al-madhhab*—applied legal reasoning not directly to the sacred sources but rather first and foremost to the works and opinions of the school founder and subsequent school members. These texts came to constitute a second tier of sources, only contingently attached to the historical personalities of their originators, which later Shāfiʿī scholars subjected to the application of hermeneutic techniques in ways that were analogous to the interpretation of the first tier of sacred texts. *Ijtihād fī al-madhhab* drew on the repertoire of conceptual tools that had been developed by al-Shāfiʿī's students—in particular, prioritizing some opinions over others (*tarjīḥ*) and extending opinions to cover new cases (*takhrīj*). However, there is a significant difference in scope between the work of al-Shāfiʿī's immediate students and the *ijtihād fī al-*

83. al-Zarkashī, *al-Baḥr al-muḥīṭ*, 6: 287.

84. See, e.g., al-Shīrāzī, *Sharḥ al-Lumaʿ*, 2 vols., ed. ʿAbd al-Mājid Turkī (Beirut: Dār al-Gharb al-Islāmī, 1988), 2: 1012–13.

85. A typical format involves stating the school position and then linking it to its textual basis through phrases such as *wa-l-aṣl fīh*, *li-mā rawā* (for *ḥadīth*), or *li-mā qāla* (for Qurʾan).

madhhab practiced by their successors in the fifth/eleventh century and later. For al-Muzanī, as seen earlier, *ijtihād* still included the option of complete disagreement with al-Shāfiʿī; on some occasions he blankly dismissed his teacher's opinion as wrong (*ghalaṭ*).[86] But in the later Shāfiʿī school *tafarrud* (dissent) was no longer considered acceptable, and even analogy-based *tarjīḥ* was frowned upon.[87] While jurists still enjoyed considerable freedom of interpretation in adjudicating and debating novel cases, on previously addressed topics the extent of juridical autonomy open to Shāfiʿī scholars was circumscribed by a spectrum of existing alternative positions. These were drawn both from al-Shāfiʿī's own corpus and from the body of rulings generated by later scholars on issues not treated by al-Shāfiʿī. The spectrum was further stratified by the establishment of hierarchies among the alternative positions ("majority" vs. "minority" opinions, for example) by particularly influential school members, resulting in gradations that were widely deemed binding on most Shāfiʿī jurists.[88] Thus, while Shāfiʿī doctrine never constituted a univocal legal code, at least from the fifth/eleventh century onwards,[89] the individual jurist's interpretation of the sources was in practice heavily constrained by authoritative prior interpretations within the school—i.e., by precedent. Though a specific term for precedent never seems to have taken hold, a position supported by it was generally referred to in works of *fiqh* simply as *al-madhhab*.[90]

The chapters on the *qibla* in works of positive law provide us with a view of how Muslim jurists theorized and justified the authoritative force of precedent. The debate focused on a question on which al-Shāfiʿī himself had remained silent:[91] If a *mujtahid* were to find himself in a Muslim settlement that already had an established *qibla*, would he still have to make a personal effort to discover the correct orientation, or could he simply adopt the direction set by local practice? The Muslim jurists who discussed this scenario were unanimous in their agreement that the traveler was not only allowed to follow the local *qibla*, but was, in fact, obliged to do so; in view of the existence of authoritative precedent in the form of the locally accepted *qibla*, undertaking *ijtihād* to determine the *qibla* anew was no longer a valid option. Thus, al-Ḥusayn b. Masʿūd al-Baghawī (d. 516/1122) argued that when a traveler enters

> a large village that has a prayer niche (*miḥrāb*) pointing in a particular direction, or he encounters prayer niches or signs for the *qibla* on a road used by Muslims, he must follow them and is not allowed to calculate the *qibla* for himself. . . . The same applies when an upright adult Muslim informs him [of the *qibla*] on the basis of evidence, for example by saying, "I saw my Muslim forefathers or a group of Muslims agree on this direction." He must follow this person, whether a man, a woman, or a slave.[92]

86. See, for example, al-Muzanī, *al-Mukhtaṣar*, 41 (Bāb ṣalāt al-musāfir . . .) and 79 (Bāb man talzamuhu zakāt al-fiṭr).

87. See Tāj al-Dīn al-Subkī, *Ṭabaqāt al-shāfiʿiya al-kubrā*, 10 vols., ed. Maḥmūd Muḥammad al-Ṭanāḥī and ʿAbd al-Fattāḥ Muḥammad al-Ḥulw (Cairo: Dār Iḥyāʾ al-Kutub al-ʿArabiyya, 1413/1992 or 1993; rpt. of Cairo: ʿĪsā al-Bābī al-Ḥalabī, 1964–1976), 2: 102–3; and Abū Zakariyyā Muḥyī al-Dīn al-Nawawī, *al-Majmūʿ*, 23 vols., ed. Muḥammad Najīb al-Muṭīʿī (Jedda: Maktabat al-Irshād, 1992), 1: 107–8.

88. For an extensive discussion of this phenomenon, see Hallaq, *Authority, Continuity and Change*, ch. 5.

89. The dearth of extensive legal works from the fourth/tenth century available to us renders it difficult to draw conclusions about this period.

90. Regarding use of the term *madhhab*, see Hallaq, *Authority, Continuity and Change*, 156–60.

91. Al-Shāfiʿī's teacher al-Shaybānī had discussed the question explicitly in *al-Aṣl*, 5 vols., ed. Abū al-Wafāʾ al-Afghānī [and Chefik Chehata] (Beirut: ʿĀlam al-Kutub, 1990), 3: 17. The fact that al-Shāfiʿī did not address it in spite of his overall emphasis on the *qibla* issue could be due to an awareness on his part of the radical implications, outlined in the following section, of applying his theory to this case.

92. al-Baghawī, *al-Tahdhīb*, 2: 66.

Once a Muslim community had established its *qibla*, this was considered normative and remained so even if the settlement became abandoned, as long as the prayer niche (*miḥrāb*) remained visible as a manifestation of the community's reasoning.[93] The only places where the possibility of full *ijtihād* in the determination of the *qibla* remained open were those areas that were unmapped or only unreliably mapped by Islamic normativity, i.e., those marginal lands where no, or few, Muslims had settled.

The binding nature of precedent was justified in terms of its epistemological superiority vis-à-vis *ijtihād*. The Shāfiʿīs agreed that while *ijtihād* could by its very nature produce only a probable result, the precedent of an established *qibla* approximated to certain knowledge (*ʿilm al-yaqīn*) and could not be overruled by the weaker method of *ijtihād*. ʿAbd al-Karīm al-Rāfiʿī (d. 623/1226) explained this as follows:

> Whoever is able to attain certainty may not perform *ijtihād*, nor may he have recourse to what someone else says. If he is unable to attain certainty, there are two options: either he finds someone who can inform him of the *qibla* on the basis of knowledge—an informant (*mukhbir*) whose statement can be relied upon—or he does not find such a person. If he does find him, he accepts [the informant's] statement and does not perform *ijtihād*. . . . All of this constitutes the acceptance of a report from a qualified transmitter (*qubūl khabar min ahl al-riwāya*), and has nothing whatsoever to do with *taqlīd*.[94]

Al-Rāfiʿī outlines an epistemological hierarchy that has as its pinnacle absolute certainty. Below this, the precedent provided by a reliable report (*khabar*) that reflects certain knowledge ranks higher than *ijtihād*, which is precluded should such a report be available. Given that the precedent of a *qibla* report was conceptualized as epistemologically superior to the results of *ijtihād* (*al-khabar muqaddam ʿalā al-ijtihād*),[95] adherence to it was not seen to constitute *taqlīd* in the way that adherence to someone else's *ijtihād* would have been.

Shāfiʿī scholars offered a number of different explanations for the privileged status of the *qibla* precedent. At least three distinct arguments can be identified. The first, relatively limited approach justified the normativity of the local *qibla* in certain locations by pointing out that the Prophet or his Companions had performed prayers in these places and thus implicitly sanctioned the established direction. This argument was made by Ibn Yūsuf al-Qazwīnī (d. 488/1095) regarding the *qibla* in Kufa, which he claimed was supported by the consensus of the Companions;[96] and it was extended by Yaḥyā b. Abī al-Khayr al-ʿImrānī (d. 558/1162 or 1163), who drew on the minority Shāfiʿī position of *taqlīd al-ṣaḥābī* (the ascription of normativity to the actions of individual Companions)[97] to argue that any Companion's endorsement was sufficient to set the *qibla* definitively for a particular location.[98] A second, more general strategy was pursued by Abū Saʿīd al-Mutawallī (d. 478/1085 or 1086). Al-Mutawallī linked the authority of the communal *qibla* to the technical expertise of the specialists who originally calculated it—an expertise that, he believed, rendered a mistake inconceivable.[99]

93. Abū Saʿīd al-Mutawallī, *Tatimmat al-Ibāna fī ʿulūm al-diyāna*, 10 vols. (Cairo: Dār al-Kutub al-Miṣriyya, MS Fiqh Shāfiʿī 50, vol. 1 (251 fols., 680/1281 or 1282), fol. 181a.

94. Abū al-Qāsim ʿAbd al-Karīm al-Rāfiʿī, *al-ʿAzīz sharḥ al-Wajīz*, 14 vols., ed. ʿAlī Muḥammad Muʿawwaḍ and ʿĀdil Aḥmad ʿAbd al-Mawjūd (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), 1: 446.

95. Yaḥyā b. Abī al-Khayr al-ʿImrānī, *al-Bayān fī madhhab al-Imām al-Shāfiʿī*, 14 vols., ed. Qāsim Muḥammad al-Nūrī (Jedda: Dār al-Minhāj, 2000), 2: 139.

96. Quoted in al-Rāfiʿī, *al-ʿAzīz*, 1: 445.

97. See Chaumont, "Le 'dire d'un Compagnon unique'."

98. al-ʿImrānī, *al-Bayān*, 2: 148.

99. *Al-maḥārib fī hādhihi al-mawāḍiʿ lā yanṣibuhā illā ahl al-khibra wa-l-maʿrifa bi-l-dalāʾil fa-lā yutaṣawwaru an yaqaʿa fīhi al-ghalaṭ*; al-Mutawalli, *Tatimmat al-Ibāna*, 1: 179b.

Possibly the most popular theory was that put forward by Abū al-Ḥasan al-Māwardī (d. 450/1066).[100] Al-Māwardī argued that a traveler entering a metropolis such as Basra or Baghdad must

> accept [the inhabitants'] *qibla*, deferring to their agreement (*tafwīḍan li-ittifāqihim*), because it is extremely unlikely, given the long-standing agreement of many generations and of large numbers, that they could have made a mistake that could be rectified by the reasoning of a single person.[101]

Al-Māwardī's argument was echoed by, among others, al-Juwaynī and al-ʿImrānī. The latter declared the local *qibla* binding in places where the number of inhabitants guaranteed the concurrency of their reports (*al-tawātur fī khabarihim*); in such places, the possibility of *ijtihād* was definitively ruled out (*yuṣīru ijmāʿihim qāṭiʿan li-wujūh al-ijtihād*).[102] This strategy of appealing to the probability conferred by large numbers in order to justify a claim to certain knowledge mimics the universally accepted standard of *tawātur* (concurrency of a critical mass of individual reports) in transmission. However, here it is not merely individual transmissions of received information but the results of individual acts of reasoning that are believed to accumulate into authoritative truths. Such an argument has no basis in Shāfiʿī legal hermeneutics. To the contrary, it appears to be rooted in a notion of local consensus, a concept that was the target of much criticism in Shāfiʿī works on *uṣūl*.[103]

Although Shāfiʿī jurists agreed that, for practical purposes, the precedent of a locally established *qibla* constituted certain knowledge and therefore precluded further *ijtihād*, most discussions on the subject, including al-Rāfiʿī's as quoted above, include a tacit acknowledgment that this certainty was not absolute. Although a minority viewpoint within the Shāfiʿī school considered a local *qibla*, once set, to be unalterable,[104] most Shāfiʿīs permitted the application of *ijtihād* even when the *qibla* was already known for the limited purpose of making "subtle adjustments to the right or to the left (*al-tayāmun wa-l-tayāsur*) based on the established indicators [e.g., the prayer niche]."[105] Perhaps tellingly, al-Juwaynī said that the precedent of a local *qibla amounts* to, not *is*, certain knowledge (*fa-innahu fī ḥukm al-yaqīn*).[106] It seems likely that al-Juwaynī's choice of words reflects a recognition that such precedent did not offer the complete certainty exemplified by *nuṣūṣ* or *ijmāʿ*, but rather was more akin to a proposition whose veracity was beyond reasonable doubt. Likewise, al-Nawawī argued that if a person

> is unable to reach certainty [regarding the *qibla*] but is informed by a reliable transmitter based on certain knowledge (*akhbarahu thiqa ʿan ʿilm*), he must act upon this, even though the report of a reliable transmitter yields only probable knowledge (*ẓann*). In such a situation *ijtihād* is not permitted, and there is no disagreement about this.[107]

100. I infer its popularity from the frequency with which it is cited. It is quoted by Ibn al-Ṣalāḥ in *Sharḥ mushkil al-Wasīṭ*, 2: 74; and it is reproduced, without attribution, in ʿAbd al-Wāḥid b. Ismāʿīl al-Rūyānī, *Baḥr al-madhhab*, 14 vols., ed. Aḥmad ʿIzzū ʿInāya al-Dimashqī (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, 2002), 2: 82, as well as on the margins of al-Muzanī, *al-Mukhtaṣar* (Istanbul: Süleymaniye, Turhan Valide Sultan, MS 154 [210 fols., 850/1446]), fol. 10a.

101. al-Māwardī, *al-Ḥāwī al-kabīr*, 2: 71.

102. al-ʿImrānī, *al-Bayān*, 2: 148.

103. See, e.g., al-Ghazālī, *al-Mustaṣfā*, 2: 344–50.

104. This opinion is reported but not endorsed by al-Juwaynī in *Nihāyat al-maṭlab*, 2: 92, and by al-Ghazālī in *al-Wasīṭ fī al-madhhab*, 7 vols., ed. Aḥmad Maḥmūd Ibrāhīm (Cairo: Dār al-Salām, 1997), 2: 74.

105. al-Baghawī, *al-Tahdhīb*, 2: 66. See also al-Juwaynī, *Nihāyat al-maṭlab*, 2: 92, and al-Mutawallī, *Tatimmat al-Ibāna*, 1: 179a.

106. al-Juwaynī, *Nihāyat al-maṭlab*, 2: 92.

107. al-Nawawī, *al-Tanqīḥ fī sharḥ al-Wasīṭ*, printed on the margins of al-Ghazālī's *Wasīṭ*, 2: 75 n. 1.

So, while Shāfiʿī scholars sought to elevate precedent above the probability of *ijtihād*, in practice its status fell short of complete certitude. The existence of an implicit hierarchy of certainty is also evident in discussions regarding the case of a traveler who encounters a prayer niche but is uncertain whether it points towards Mecca or towards the shrine of a different religion. The Shāfiʿīs' unanimous verdict was that in such a situation the traveler may not follow the dubious *qibla* but rather must undertake personal *ijtihād*.[108] In other words, when even the basis of the precedent—i.e., the knowledge that the *khabar* channels—is not certain but only probable, it no longer possesses any epistemological advantage over *ijtihād*.

The admission of "slight adjustments" through *ijtihād* to the otherwise fixed *qibla* parallels the flexible boundaries that Shāfiʿī scholars saw themselves as bound by in their engagement with the opinions of their school and its founder. The possibility of *ijtihād* remained open, but within limits: on topics that had already received treatment by previous scholars (analogous to existing prayer niches), *ijtihād* could not be undertaken from scratch, but rather had to take place within the space created by established school precedent. *Al-tayāmun wa-l-tayāsur* is thus a metaphor for *ijtihād fī al-madhhab* as practiced by the jurists of the established Shāfiʿī school at least until the seventh/thirteenth century.

Was the Shāfiʿī *ijtihād fī al-madhhab* genuinely distinguishable from *taqlīd*? The Shāfiʿīs were certainly accused by others of violating al-Shāfiʿī's ban on *taqlīd*. For the Andalusian Ibn Ḥazm (d. 456/1064), the absence of deviation from the school founder's opinions constituted conclusive proof of *taqlīd*. "Whoever has wasted himself in *taqlīd* by not disagreeing with his master on a single issue," wrote Ibn Ḥazm scathingly, "is not worthy of being counted among the jurists."[109] However, Shāfiʿī scholars continued to reject charges of *taqlīd* in spite of their open submission to precedent in *fiqh*, insisting that their practice did not violate the "scientific" methodology expounded by al-Shāfiʿī. Thus al-Qāḍī al-Ḥusayn al-Marwarrūdhī (d. 462/1069) defended his school as follows: "If you were to say, 'you practice *taqlīd* of al-Shāfiʿī,' we would reply [that] we do not practice *taqlīd* of him; rather, we have accepted this [i.e., al-Shāfiʿī's opinions] through indicators, whereas *taqlīd* means to accept a position without evidence."[110] By preserving and reproducing the textual evidence for Shāfiʿī positions, the Shāfiʿīs continued to uphold the ideal of *ijtihād*, even as they accepted that established school precedent granted them only a radically restricted spectrum of possible options in their interpretive endeavors. Al-Shāfiʿī's central conceptual innovations—the canonization of a clearly defined past as normative and the establishment of a subject/object relationship between the legal scholar as the interpreter and the normative sources to be interpreted—thus provided the means for his successors to deal with his legacy. Since his opinions were built on the claim of being reproducibly derived from sources, his followers could claim that in adopting al-Shāfiʿī's legal opinions, they were simply replicating the process of evidence-based reasoning that had led al-Shāfiʿī to form the opinions in the first place.

Taking a position that appears to be unprecedented among the Shāfiʿīs, Ibn al-Ṣalāḥ, in the early seventh/thirteenth century, rejected this claim to unadulterated *ijtihād*.[111] He argued that although his predecessors had engaged in independent legal reasoning, this had not been entirely free of *taqlīd*. Rather, the varying degrees to which different scholars had conformed

108. al-ʿImrānī, *al-Bayān*, 2: 148; al-Rāfiʿī, *al-ʿAzīz*, 1: 445.

109. ʿAlī b. Aḥmad b. Ḥazm, *al-Iḥkām fī uṣūl al-aḥkām*, 8 vols. in 2, no named editor (Cairo: Dār al-Ḥadīth, 1984), 5: 94.

110. al-Qāḍī al-Ḥusayn b. Muḥammad al-Marwarrūdhī, *al-Taʿlīqa*, 2 vols., ed. ʿAlī Muḥammad Muʿawwaḍ and ʿĀdil Aḥmad ʿAbd al-Mawjūd (Mecca: Maktabat Nizār Muṣṭafā al-Bāz, 1999), 1: 124.

111. Ibn al-Ṣalāḥ, *Adab al-fatwā*, ed. Rifʿat Fawzī ʿAbd al-Muṭṭalib (Cairo: Maktabat al-Khānjī, 1992), 40–41.

to al-Shāfiʿī's precedent in their legal methodology and judgments reflected, in Ibn al-Ṣalāḥ's view, differing levels of qualification. These differences gave rise to a hierarchy of *ijtihād*, of which the lowest rung was occupied by jurists who had only modest training and thus no choice but to resort to *taqlīd*, while the pinnacle was represented by the full *mujtahid* exemplified by al-Shāfiʿī himself.[112]

Modern scholars in both the East and the West have embraced Ibn al-Ṣalāḥ's theory of the *madhhab*, as it is seen to explain legal reasoning within the Shāfiʿī school much better than the ideal theory of *uṣūl al-fiqh*.[113] However, I believe that the underlying reason for Ibn al-Ṣalāḥ's pioneering stance lies not in a willingness to acknowledge realities to which his peers had apparently turned a blind eye, but rather in his reluctance to acknowledge precedent as an independent normative category. By admitting to the practice of (partial) *taqlīd* by his fellow Shāfiʿīs, Ibn al-Ṣalāḥ was able to account for the remarkable degree of conformity within the school via an explanation that was consistent with the typology of *uṣūl*. He thus bypassed the need to recognize any normative weight in the precedent accumulated in the four centuries of Shāfiʿī discourse that preceded him. This avoidance of precedent in favor of arguments commensurate with legal theory is also evident in his discussion on the *qibla*. Commenting on the claim that the precedent set by a prayer niche precluded the application of *ijtihād* to determine the *qibla*, Ibn al-Ṣalāḥ complained that "one cannot properly comprehend this ruling." He cited al-Māwardī's theory as the best attempt to explain the force of precedent, but nonetheless concluded that it was inadequate, since the inhabitants of a city "represent only a subset of the Muslim community (*baʿḍ al-umma*), and it is possible for a subset of the community[114] to err; likewise, the agreement of a similar number of scholars upon a ruling pertaining to the sacred law does not constitute decisive evidence (*ḥujja*)."[115] Ibn al-Ṣalāḥ thus drew an explicit connection between an argument regarding the *qibla* and the epistemological rules of *uṣūl al-fiqh*, and required that the former be consistent with the latter. This, however, left him with no way of justifying local *qibla*s as precedent, forcing him to propose a different, *uṣūl*-compatible explanation for their normativity: Muslims, he argued, have always adhered to locally established *qibla*s, and the practice thus enjoys the sanction of universal consensus.[116]

By forswearing precedent, Ibn al-Ṣalāḥ thus diverged from the hitherto dominant tradition of thought within the Shāfiʿī school. Whereas Shāfiʿī scholars before him had accepted the existence of two parallel but incommensurate discourses—the prohibition of *taqlīd* in *uṣūl* and the authority of precedent in *fiqh*—Ibn al-Ṣalāḥ committed himself to the binary and exclusive opposition of *ijtihād* and *taqlīd*. Consequently, in his hierarchy of muftis, he had no choice but to declare that his predecessors had indeed practiced de facto *taqlīd*.

THE DELICATE BALANCE BETWEEN CANON AND COMMUNITY

Given that the parallel discourses on following within legal hermeneutics and positive law were so clearly and intimately connected, the question arises why they remained separate

112. This justification for *taqlīd*—appealing to the greater qualifications of earlier scholars—was not new; al-Muzanī had already refuted it in his *Kitāb fasād al-taqlīd/al-taʾwīl*. See al-Zarkashī, *al-Baḥr al-muḥīṭ*, 6: 281–82.

113. Muḥammad Ḥasan Hītū, *al-Ijtihād wa-ṭabaqāt mujtahidī al-shāfiʿiyya* (Beirut: Muʾassasat al-Risāla, 1988), 16–51; Calder, "Al-Nawawī's Typology," 160–61; Hallaq, *Authority, Continuity and Change*, ch. 1.

114. Instead of *aʾimma*, the text should probably read *umma*.

115. Ibn al-Ṣalāḥ, *Sharḥ mushkil al-Wasīṭ*, 2: 74 n. 1.

116. Al-Nawawī reports in *al-Majmūʿ*, 3: 200, that Ibn al-Ṣabbāgh (d. 477/1084 or 1085) also proposed this explanation; however, Ibn al-Ṣalāḥ appears not to have been aware of this, rather presenting the theory as his own sui generis solution.

and were never synthesized into a grand legal theory of the Shāfiʿī school. I believe the reason for this lies in the radical individualism of al-Shāfiʿī's original *qibla* metaphor. Even though al-Shāfiʿī had permitted forms of *taqlīd* in auxiliary aspects of the law (the authentication of *ḥadīth*, physiognomy) and explicitly sanctioned consultation, he nonetheless conceptualized the situation of the jurist approaching a legal dilemma as fundamentally unaffected by precedent. In his model there exists only the interpreter of signs, i.e., the *mujtahid*, and the signs that he is interpreting. The landscape of the law is divided into the immediate vicinity of the Kaʿba on the one side and an endless, uninhabited desert on the other. Al-Shāfiʿī made no mention of the vast territory in between these extremes, where the presence of established Muslim communities had created a framework of accepted norms and practices. In al-Shāfiʿī's model, this realm of precedent simply did not exist.

Such a model has profound implications for the foundations of the Muslim community, the *umma*. The unitary, shared *qibla* is a perennial symbol of the communal aspect of Islam, so much so that theologians often refer to the *umma* as a whole—beyond sectarian differences—as the "people of the *qibla*."[117] To deny the validity of the communal *qibla* and impose on each individual the personal obligation to find his or her own *qibla* amounts to turning the performance and experience of the crucial ritual of prayer into a purely individualistic enterprise. In the realm of legal theory, this position translates into an anarchic view of law as a fragmented mosaic of isolated individual opinions, each binding only to its originator. The function of Islamic law as the law of the Muslim *community* is thereby negated. Furthermore, the formation of an orthopractic mainstream becomes impossible, given that in a purely ijtihādic system all interpretations are formally equal (except in the unlikely case of total consensus). On a more practical level, such individualism also undermines the predictability of court decisions—a prerequisite of social order—given that it posits the judge as a sovereign interpreter of scripture, unfettered by any form of precedent.[118]

Such concerns were not addressed by the ideal theory of Shāfiʿī *uṣūl al-fiqh*. This discipline, as argued above, arose specifically as a rejection of the power of precedent embodied in local or communal traditions. Al-Shāfiʿī's chief aim was to protect the authentic memory of the sacred past from the corruption wrought by the passage of time by developing universal rules for the interpretation of an unchanging textual canon. The perspective of legal hermeneutics is thus in its essence timeless, indifferent to the exigencies arising from practical reality and historical change.

Al-Shāfiʿī's successors, however, could not ignore the threat posed by the individualism inherent in their master's theory to the cultural memory and identity of the Muslim community, which formed the basis of Muslim communal life. While Mālik's "living tradition" approach had endangered the integrity of the past for the sake of communal unity, al-Shāfiʿī's stark individualism threatened to sacrifice the community for the sake of the normative past. The solution developed by the Shāfiʿīs consisted of an alternative discourse that balanced the individualism of *uṣul al-fiqh* with a recognition of historically grown realities, foremost among them the social "facts" that give rise to precedent.

These concomitant discourses thus served to reconcile the establishment of a direct connection back in time to the normative age with the establishment of a shared normative practice in the here and now—in other words, to reconcile the twin demands of canon and

117. Josef van Ess, *The Flowering of Muslim Theology*, tr. Jane Marie Todd (Cambridge, Mass.: Harvard Univ. Press, 2006), 40–42.

118. As Fadel points out in the context of the legal schools, "jurists could not produce uniform legal doctrine using the legal methodology governing *ijtihād*"; "Social Logic," 232.

community.[119] The *taqlīd* taboo promulgated by al-Shāfiʿī and internalized by his successors stipulated that normativity be justified exclusively in terms of a closed canon, which thus provided a fixed point of communal orientation. As a counterpoint, the theory of precedent that took shape in the *qibla* discussions accepted that individual interpretations of the canon accumulate into authoritative edifices analogous to ancient prayer niches. While slight recalibrations of these edifices could be admitted, a radical challenge to them would entail questioning the religious performance of the community both in the present and in the past. The framework formed by the dual discourses of canon and community established a stable structure of authority within the Shāfiʿī school that could be justified without recourse to outright *taqlīd*.

The Shāfiʿī theory of precedent that grew around the issue of the *qibla* drew its conceptual elements (*ijtihād*, *taqlīd*, *khabar*, *yaqīn*, etc.) from legal hermeneutics. However, the end to which these elements were deployed amounted to a justification of the system of the legal schools that could not be derived from *uṣūl al-fiqh*. The innovation of precedent enabled the theorization of two crucial conditions that underpinned the institutional authority of the schools. First, precedent accounted for the existence of an intermediate level of certainty. Shāfiʿīs agreed that the results of individual acts of *ijtihād* represented probable knowledge and were formally equal to one another, while universal consensus yielded unconditional certainty. Precedent fell somewhere between these extremes: though not sharing the absolute authority of *ijmāʿ*, it was considered epistemologically superior to individual reasoning. Second, precedent provided an explanation for the value of non-canonical time. The normative age of revelation had clearly ended and had become enshrined in the canon. The time that followed the sacred era was thus, in a sense, necessarily barren, characterized by the interpretation and re-interpretation of already received material. The discourse of precedent imbued this time with a significance that nonetheless did not violate the unique status of the canonical period. Rather than being simply empty of meaning, it was seen as generating its own normative weight through the ongoing accumulation and refinement of authoritative interpretations. These gave rise to school doctrines, which accrued in layers—a process that Shāfiʿī scholars expressed in the biographical school dictionaries (*ṭabaqāt*, lit. layers or generations) that were characteristically arranged according to generations. The Shāfiʿī school of law thus became a framework that allowed for the organic growth of a shared normative teaching while safeguarding its connection to the moment of revelation.

119. Calder argues analogously that acceptance of the notion that only the school founder could exercise absolute *ijtihād* "meant that the experience of the community, symbolized in the achievement of the founding imam, was built into the tradition, which achieved thereby an ongoing aspect"; "Al-Nawawī's Typology," 162.