Pious Critique: Abū Isḥāq al-Shīrāzī and the 11th Century Practice of Juristic Disputation (*Munāẓara*)

by

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Abstract

The 5th/11th century Shāfi'ī jurist Abū Isḥāq al-Shīrāzī (d. 476/1083) rose to scholarly fame in the context of a Baghdad culture of pious critical debate. The emergence of the practice of disputation (*munāẓara*) within the 10th century Muslim lands of Iraq and Persia had shaped a class of jurists dedicated to open and continual face-to-face debate in their search for God's law (*ijtihād*). Jurists debated each other on contentious legal issues (*al-khilāf*): one jurist would adopt a thesis and try to defend it in the face of his opponent's objections. They structured their practice around the boundaries of school affiliation and hierarchies. They debated those of equal rank and defended their doctrines from outside-school detractors. Their intended audience was fellow-jurists who could benefit and learn from exposure to critical debate. The ideal setting for the disputation was a space like the mosque because it was removed from the court of rulers and their potential influence on the debate. The pedagogical ethics of the disputation demanded that all present treat the practice with the seriousness and sincerity characteristic of acts of religious devotion. The jurists' exclusion of lay Muslims from their debates entrenched their role as religious guides of the community and re-inforced the gender-hierarchy that marginalized women's voices in the shaping of the law.

Transcripts of Shīrāzī's disputations reflect the impact of the disputation on the development of Shāfiʿī legal doctrine. The jurists' acknowledgement of the epistemic uncertainty of legal proofs led them to posit the need and sometimes even the obligation to have their ideas subjected to rigorous objections. Moreover, legal uncertainty justified that this process of debate continue even on issues that had already been examined over generations. The disputation did not typically resolve differences of opinion and did not spell the end of the debate. Records of Shīrāzī's disputations show how this process of critical engagement with opponents inside and outside of the Shāfiʿī school allowed the jurist to continue to test, develop, and refine his arguments for the law. Shīrāzī's freedom to explore his legal tradition free from the demands of the courts and the petitions of lay Muslims permitted him to turn to building his own rendering of the Shāfiʿī tradition with the greatest rigour possible. The impact of this process on the eventual formation of school doctrine was less certain. The canonization of Shāfiʿī doctrine in the 13th century in the works of Yaḥyā b. Sharaf al-Nawawī (d. 676/1278) show that the eventual authoritative position of a school was not necessarily dependent on the force of argument but rather on the fame of the person who subscribed to it.

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Introduction

Project Overview

My dissertation examines the practice of legal disputations (*munāẓara,* pl. *munāẓarāt,* sometimes referred to as *jadal* or *mujādala*) among Muslim jurists of the 5th/11th century in Iraq and Persia. It does so by focusing on four disputations of the famed Baghdad Shāfiʿī jurist Abū Isḥāq al-Fīrūzābādī al-Shīrāzī (d. 476/1083). Disputations were face-to-face debates between jurists of the same or different schools of law on a contentious legal matter (*masā'il al-khilāf*). One jurist would adopt a position and the other would challenge it through a series of objections and counter-arguments. The practice of disputation has long been recognized as a prominent and pervasive part of Islamic legal pedagogy within the juristic community of the 11th century. George Makdisi characterized it as a part of the scholastic method through which jurists trained to reason and argue over matters of dispute in Islamic law.[1] I trace the historical emergence of the disputation in the early 10th century as a pious act of critical reflection aimed at finding God's law. This pious practice created a sphere of open debate structured around the authority of jurists as privileged speakers on the law. I show how the jurists' culture of open critical debate in the 11th century created conditions in which they could test the validity of their legal reasoning. This testing impacted the development of the Islamic legal tradition by allowing jurists to change and refine the arguments supporting their school's legal doctrines.

The juristic disputation was a form of legal critique in which one jurist took the role of questioner in order to interrogate and probe the soundness of the responding jurist's position. The heart of the disputation was the objections (*iʿtirāḍāt*) leveled against the respondent's position and his attempts to overcome them. This form of critique was an act of religious devotion (*ʿibāda*) through which the jurists' could fulfill the communal obligation (*farḍ kifāya*) of discovering God's revealed law (*aḥkām al-sharīʿa*) to then provide guidance to the community of lay Muslims (*al-ʿāmm*). Hence the subjects of Shīrāzī's disputations:

[1] Makdisi, *The Rise of Humanism in Classical Islam and the Christian West*, 128.

- "Can a father coerce his virgin daughter into marriage?"[2]
- "Does a person who is certain to have prayed in the wrong direction need to repeat his or her prayer?"[3]
- "Does a wife have the right to end her marriage if her husband has difficulty paying for her financial maintenance?"[4]
- "Does a *dhimmī* who converts to Islam need to pay his past *jizya*?"[5]

Jurists saw subjecting their positions to the critique of an interlocutor as the last step toward ensuring the soundness of their positions.

The practice of disputation emerged in its classical form by the 4th/10th century. It grew out of earlier, more informal debates between jurists. We have some records of earlier debates purporting to be from the 8th century. These debates mixed argument with casual banter and sometimes turned acrimonious. It was in the 10th century that schools of law began to theorize the disputation for the first time. The juristic disputation came to acquire a formal set of conventions and take on a standard form. The Shāfi'ī school played a pioneering role in this regard. The disputation became key to the training of jurists and the defense of the school against outside detractors. Simultaneously, the debate on the infallibility of jurists (*taṣwīb*) in works of *uṣūl al-fiqh* nurtured the formal practice of the disputation, by forcing jurists to question its purpose. Despite their different opinions, jurists came to agree that the uncertainty of the law made it necessary to countenance each other's views. They recognized that there was always the possibility that one's own reasoning was deficient and that the arguments of a competing jurist could lead one to an enriched view of the law. In this regard, the legal disputation diverged sharply from the theological disputation. Jurists considered that proofs in the realm of theology were strong enough to yield certainty and they therefore saw the task of the theological

[2] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 5:214–18. Also reproduced in al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:252–56.

[3] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 5:209–14.

[4] Ibid., 4:245–52.

[5] Ibid., 4:237–45.

disputation to be to lead the misguided back to orthodox creedal beliefs. This meant that they had little reason to value the intellectual contributions of their interlocutor.

The legal disputation afforded jurists the ability to refine their legal reasoning. It gave them the freedom to explore different lines of reasoning on the law, free from the immediate demands of the court or the layman's query (*mustaftī*). The jurist was then able to examine and build upon the legal discourse he had inherited from his school of law. For instance, Shāfi'īs had inherited certain legal positions from their school master, though the latter provided no (or only minimal) explicit proofs (*adilla*). By Shīrāzī's time, later generations had developed and modified arguments in favour of these positions. Shīrāzī and his contemporaries learned these arguments by studying books of *khilāf* and tested them in the court of the disputation. They also tried out new ones or at least modified older ones. The testing of arguments permitted jurists to better assess, improve, or even change the *ratio legis* (*'illa*) or underlying cause (*ma'nā*) of a case.[6] In doing so, they knew when and how the law should be applied and extended to novel cases. Finally, the arguments permitted 11th century jurists to sometimes determine the strongest among divergent points of view within the school of law. The freedom to explore legal reasoning allowed each jurist to come up with his own version of the *madhhab,* which is the reason that Shāfi'ī legal manuals of the time differ from each other. This was a highly aesthetic differentiation: the jurist sought to produce what he felt was the soundest legal system in which all of his arguments and positions cohered with each other. Whether or not these doctrines ended up becoming authoritative within a school of law would depend upon the history of scholarly appointments, which ended up broadcasting the views of some jurists over others.

These findings permit us to better understand *ijtihād* (independent reasoning) in the age of the classical schools of law (9th-13th Centuries).[7] Historians have typically viewed *ijtihād* as the

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[6] In fact, this is the reason that the respondent in a *munāẓara* tended to posit a *qiyās al-'illa*: in analogizing the case under review to another, the jurist could better determine and convince his opponent of the true basis of the law. See Hallaq, "A Tenth-Eleventh Century Treatise on Juridical Dialectic"; El Shamsy, "The Wisdom of God's Law: Two Theories."

[7] The periodization of the of classical schools is rough at best but I use it here to refer to the period beginning with the emergence of the classical schools of law, which Melchert and Hallaq both date to the late 9th/early 10th centuries CE (despite using different criteria to identify and define the school of law) and continuing until the time that canonical works of school doctrine (e.g., Nawawī's *Rawḍat al-Ṭālibīn* or Khālīl's *Mukhtaṣar*) began being produced in the 13th century CE. For more on the emergence of the schools, see Hallaq, *The Origins and Evolution of Islamic Law* and Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries C.E*. For more on canonization, see Halim, *Legal Authority in Premodern Islam*; Fadel, "The Social Logic of Taqlid and the Rise of the Mukhtasar."

opposite of following school doctrine.[8] They have therefore understood the *ijtihād* of 11th century jurists to be limited to determining the strongest of divergent positions within the school of law (*tarjīḥ*) and to extending school doctrine to new cases (*takhrīj*). They have maintained this view despite the Shāfiʿī school's insistence that each qualified jurist must perform *ijtihād*. Ahmed El Shamsy has recently provided us with the tools to think differently about *ijtihād* by showing that the early Shāfiʿīs of the 3rd/9th century did not see adherence to their school master's doctrines as blind imitation, because they permitted themselves to revisit and reassess his positions.[9] Likewise, 5th/11th century Shāfiʿīs saw it to be their individual duty to find what each believed to be the strongest proofs for their legal positions. Their predecessors had done much of the legwork in finding strong and convincing proofs, but these 11th century Shāfiʿīs nonetheless continued to revisit, reassess, and adduce legal proofs for old problems.

Through the analysis of jurists' argumentation, I seek to engage the literature on the development of Islamic law in this period in two ways—one pertaining to substantive law, the other to legal theory. In regards to substantive law, it critiques the current assumption that the 11th century was a period of consolidation of school doctrine, which would eventually lead to the formulation of a school canon. This view is prominent in the work of Wael Hallaq, Norman Calder, and Fachrizal Halim.[10] In fact, Hallaq and Makdisi both see the disputation as a tool in the process of establishing this consensus on the law.[11] My analysis of the disputation argues against this teleological view, with its notion of linear development of school doctrine from a multiplicity of legal views to narrower canon. The disputation could just as well nurture rather than reduce diverse perspectives on the law. The jurists themselves were divided as to whether the disputation could or even should convince an opponent to change his view on the law. They acknowledged that the evidence in some cases made it difficult to commit to one position over another. Shīrāzī even accepted that an individual jurist may need to defer indefinitely between choosing one position over another. Many articulated that one of the purposes of the disputation

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[8] For overviews of the debates around ijtihād, see Emon, "Ijtihad"; Ali-Karamali and Dunne, "The Ijtihad Controversy."

[9] See also El Shamsy, *The Canonization of Islamic Law*, 185–89; Ibrahim, "Rethinking the Taqlīd–Ijtihād Dichotomy"; El Shamsy, "Rethinking 'Taqlīd' in the Early Shāfiʿī School."

[10] Halim, *Legal Authority in Premodern Islam*; Hallaq, *A History of Islamic Legal Theories*; Calder, *Islamic Jurisprudence in the Classical Era*, 84.

[11] Hallaq, "A Tenth-Eleventh Century Treatise on Juridical Dialectic," 199; Makdisi, "The Significance of the Sunni Schools of Law in Islamic Religious History," 2.

was to legitimize legal positions that other jurists widely dismissed. This 11th century acceptance of diversity and indeterminacy within the school of law forces scholarship to rethink the reasons for the emergence of a legal canon in the following centuries.[12]

The dissertation also contributes to our understanding of the way in which jurists historically used legal theory (*uṣūl al-fiqh*) in developing the law. It critiques Sherman Jackson and David Vishanoff's assertions that *uṣūl al-fiqh* had little importance beyond offering a rhetorical mask for legitimating whatever position the jurist wanted to defend.[13] Their view is premised on the fact that legal theory is not deterministic and can justify a multitude of contradictory positions. The dissertation suggests that this view misses the dialogical nature of the law, in which each argument anticipated and was met with a counter-argument probing it further. *Uṣūl al-fiqh* was not a rhetorical mask for a given opinion because the outcome of legal debate was never already determined. No position was given a free ride. All were subject to scrutiny, and some would pass muster while others would fail. *Uṣūl al-fiqh* then served as a set of analytical tools the jurists could draw from in his dialogical encounter with other jurists.

Situating the Project: What we Know about the *Munāẓara*

In this section, I situate my work within the existing scholarship on the disputation: I begin by reviewing the literature and then proceed to explain the ways in which my work builds and departs from it.

Hava Lazarus-Yahef et al.'s edited volume *The Majlis: Interreligious Encounters in Medieval Islam* and Joel Kraemer's *Humanism in the Renaissance of Islam* provide a sense of the intellectual environment of debate in the early centuries of Islam. Both texts highlight how rulers' courts patronized disputations on any topic of intellectual interest, including theology, grammar, philosophy, and poetry.[14] These discussions could take place between Muslims of the

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[12] For an explanation of the rise of school canons based on the need for legal predictability, see Fadel, "The Social Logic of Taqlid and the Rise of the Mukhtasar."

[13] Jackson, "Fiction and Formalism"; Vishanoff, *The Formation of Islamic Hermeneutics*.

[14] Kraemer, *Humanism in the Renaissance of Islam*, 58.

same or different sects and also between members of different religions. Lazarus-Yafeh notes: "Two connected characteristics of early Islamic society stand out clearly in this context: its pluralism and open-mindedness to an extent rarely found in later Islam and totally absent from the medieval European scene."[15] Kraemer, in particular, locates in the Shī'ī Buyid 9th century an era of free-thinking that would not endure through the period of Seljuq rule during which Shīrāzī lived: "The Sunnī restoration, presided over by the Seljūqs, which terminated the Buyid-Shī'ī interlude, exemplifies a recurrent pattern in Islamic history by which a homeostatic reassertion of traditional forms tends to follow periods of openness and receptivity."[16] In contrast, this dissertation shows that the legal tradition of the Seljuq period exemplified an openness to being radically questioned.

Ahmet Hadi Adanali's dissertation "Dialectical Methodology and its Critique: al-Ghazālī as a Case Study" provides the greatest insight into the contentious nature of the disputation.[17] Adanali presents Ghazālī's critique of dialectical argumentation as the product of social and religious upheavals, and notes the sectarian fractioning and consequent bloodletting among the Muslim communities of the time. Adanali's dissertation sheds important light on the discontent with the disputation among segments of the 11th century juristic community for the form's self-aggrandizement, its hairsplitting, and its logically deficient method. Key to Adanali's argument is that Ghazālī (d. 505/1111) represents a shift in Muslim intellectual history because of his appropriation of Aristotelian syllogistic logic, which favours monological thinking, over the disputation's dialogism.[18] He nonetheless thinks that Ghazālī's life and writings show his deep-rooted training in the method of dialectical reasoning. Missing from Adanali's study is a sufficient distinction between the theological disputation and the legal disputation, a distinction critical to Ghazālī's own thought. For instance, Ghazālī's *Mustaṣfā* suggests Adanali's statement that "al-Ghazālī rejected the dialectical method in theology *and law*" [emphasis mine] is too strong.[19] It would be fairer to say that Ghazālī advocated circumspection in its use.[20] Moreover, I

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[15] Lazarus-Yafeh, "Preface," 8.

[16] Kraemer, *Humanism in the Renaissance of Islam*, 30.

[17] See also Belhaj, *Argumentation et dialectique en islam*, 29-33, 110-111.

[18] Aristotle in fact held that dialectical reasoning was deficient in contrast to the syllogistic logic, see his *Topics*.

[19] Adanali, "Dialectical Methodology and Its Critique," 3.

show that even the jurists that celebrated the disputation were aware of the dangers of self-aggrandizement and insincerity.

Numerous works shed light on the disputation by focusing on manuals of *jadal* (dialectic). This is because manuals of *jadal* provide a description of the disputation's rules, conventions, ethical recommendations, and standard arguments. The most comprehensive study of these manuals remains Larry Miller's dissertation "Islamic Disputation Theory: A Study of the Development of Dialectic in Islam from the Tenth through Fourteenth Centuries." Miller grapples with *jadal* theory in the philosophical, theological, and juristic sciences. He attempts to reconstruct the first known theological treatise of *jadal* ascribed to Ibn al-Rāwandī by using the earliest extant text of *jadal*, written by the Iraqi Karaite Jew, al-Qirqisānī (d. after 937).[21] He shows that there are remarkable similarities between Aristotle's texts on dialectic, especially the *Topics*, and the texts that emerge in the 9th century among Muslim writers. He contends that the theory of dialectic first made its way into the science of theology and then into the science of law. He shows how the culmination of the development of *jadal* within theology, law, and philosophy led to the discipline of *ādāb al-baḥth* in the 13th century.[22] Miller's chronology of the development of the *jadal* is only slightly amended in other writings. As we will see below, some express the view that the dialectic and disputation could have been an indigenous growth within Arab society, while still acknowledging the influence of Aristotle's texts on the development of theory of *jadal*.[23]

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[20] Al-Ghazālī, *al-Mustaṣfā fī 'Ilm al-Uṣūl*, 4:70–71, and more generally, his section on *ijtihād*.

[21] Miller, "Islamic Disputation Theory." Vajda, "Études sur Qirqisānī"; Makdisi, "Dialectic and Disputation." Sarah Stromsa provides more information on Ibn Rāwandī's relationship to disputation: "Ibn Rāwandī's *Sū' Adab al-Mujādala.*" See also her longer treatise examining Ibn Rāwandī and other so-called free-thinkers in Islam, in Stroumsa, *Freethinkers of Medieval Islam*.

[22] Ahmet Karabela expands upon Miller's treatment of *ādāb al-baḥth* in his dissertation; see Karabela, "The Development of Dialectic and Argumentation Theory in Post-Classical Islamic Intellectual History."

[23] Geert van Gelder expresses that many of the cultures of the Near East practiced disputations and that it is therefore possible to see it as an indigenous outgrowth. He notes for instance the existence of the practice of *munāfara* or *mufākhara* among pre-Islamic Arabs who sought to agonistically engage each other in a form of self-aggrandizing debate. See Gelder, "The Conceit of Pen and Sword." Wael Hallaq for his part has remained agnostic as to whether Muslim jurists took their theory of disputation directly from Greek sources or through the intermediary of theology: Hallaq, *A History of Islamic Legal Theories*, 136. He also emphasizes that Aristotelian dialectic was completely Islamicized and "its link to the 'ancient sciences' had dissipated," as in Hallaq, "A Tenth-Eleventh Century Treatise on Juridical Dialectic," 198.

Miller correctly identifies the heart of the disputation as the process of question and answer. He notes that there were standard questions that structured the disputation. The questioner asked the respondent his position on a given legal topic. He asked him what his proof was and then began to level objections against him. One of the virtues of Miller's dissertation is the great detail with which he treats different types of arguments listed in books of *jadal*. He draws on jurists like Shīrāzī and al-Khaṭīb al-Baghdādī in order to present the possible objections and counter-objections that a jurist could employ in critiquing and defending a legal position. Miller's analysis provides a handy guide to making sense of the claims of Shīrāzī and his opponents studied in this dissertation.

Abdessamad Belhaj's *Argumentation et dialectique en Islam: Formes et séquences de la munāẓara* is another work that primarily uses texts of *jadal* to attempt to provide a full spectrum of different forms of disputation in Islam. He begins by positing a capacious definition of the *munāẓara* that encompasses any type of oppositional dialogue.[24] This allows him to locate references to disputation in the Qur'an, the *ḥadīth*, and pre-Islamic Arab debating practices. He surveys the disputation in literature, theology, and law. Belhaj believes al-Shāfi'ī made a tentative effort to theorize the disputation in his discussion of the meaning of *ikhtilāf*. He believes that dialectical argumentation emerged in the 4th century, likely through the intermediary of al-Fārābī's analysis of Aristotle's *Topics*. Belhaj departs from Miller by arguing that it was the jurists and not the theologians who digested this new science. Nonetheless, the jurists retained part of their pre-Aristotle forms of argumentation by relying on presumptive (*ẓannī*) proofs of law until the emergence of *ādāb al-baḥth.* Belhaj is unique for his attention to the Muslim debates over the relationship between seeking truth and moral conduct. This is a point upon which the dissertation will elaborate in great detail.

A final noteworthy work that focuses on texts of *jadal* is Wael Hallaq's analysis of juristic disputation through Abū al-Ḥusayn al-Baṣrī's *Kitāb al-Qiyās al-Shar'ī.* Hallaq correctly identifies analogical reasoning (*qiyās*) as the heart of the disputation. He notes that as a result, the focus of the disputation was finding the '*illa* (*ratio legis*) underlying a legal position.[25] He

[24] Belhaj, *Argumentation et dialectique en islam*, 15.

[25] Hallaq, "A Tenth-Eleventh Century Treatise on Juridical Dialectic," 200.

somewhat overstates his point, however, by neglecting that jurists could and did invoke non-*qiyās* proofs of law. Hallaq also claims that the disputation's purpose was a means to reduce the plurality of the law.[26] He contends that *uṣūl al-fiqh* provided the jurists with methods of deriving the law and that the disputation was a final process in legal thinking that was meant to establish the truth of the law and to weed out different opinions:

Normally, two compatible jurists who represent their school in a certain geographical area would meet with the intent of convincing one another of the validity of their opinion on a *ẓanni* case of law. Should one of the disputants be successful in establishing that his adversary's legal reasoning is erroneous with regard to the disputed case and should he also persuade him that his own reasoning and conclusion are sound, the adversary is morally, if not legally, bound to abandon his views on that case and adopt those of the other.[27]

George Makdisi shares the same view as Hallaq in this regard.[28] As I will elucidate below, it is certainly not the case that all jurists thought they were attempting to win over an opponent and reduce the plurality of the law.

These studies, relying mainly on texts of *jadal,* are limited in what they can say about the disputation. *Jadal* texts provide a general picture of the sequence of the disputation but give little sense of how it actually took place. More importantly, the impact of the disputation on the juristic community and on the development of the law is largely inaccessible from these texts. As Makdisi recognizes, *jadal* and *munāẓara* should be kept analytically separated: the jurists trained with books of *jadal* before engaging in the *munāẓara*. To be fair, Miller clearly recognizes this analytical distinction and specifies that his study deals with disputation *theory.* Most studies, however, are not as cautious as either Makdisi or Miller and blur the line between theory and practice. In my dissertation, I use texts of *jadal* extensively, but only in tandem with transcripts of actual disputations.

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[26] In relation to the concept of pluralism, it is well to note that Islamic law has been characterized since its earliest times, 2nd/ 8th century by the existing of many different positions on a legal topic. For a discussion of legal pluralism in Islamic law, see Coulson, *A History of Islamic Law*, 89.

[27] Hallaq, "A Tenth-Eleventh Century Treatise on Juridical Dialectic," 199.

[28] Makdisi, "The Significance of the Sunni Schools of Law in Islamic Religious History," 2.

Walter Young's "Dialectical Forge" is the only recent attempt to examine the use of dialectical arguments in legal debates. By examining al-Shāfiʿī 's *Ikhtilāf al-ʿIrāqiyyīn*, Young demonstrates that later arguments of juristic *jadal* were already present in an earlier period. Young takes the position that theories of *jadal* were the product of the practice of disputation itself. His position is extended to the law more generally, and claims that legal theory and substantive law was an outgrowth of the jurists' engagement in dialectic argumentation:

My argument throughout this thesis is that dialectical debate was the most important dynamic in the evolution not only of doctrinal bodies of substantive rulings and norms, but of Islamic legal theories and of Islamic dialectical theory itself. The exigencies of dialectical debate provided key motives, and forged key structures, elements, principles, and concepts for what would eventually become knowledge as the ʿ*ilm* of *uṣūl al-fiqh*, and the *ʿilm* of *jadal* or *munāẓara*, not to mention other juristic ʿ*ulūm* (e.g., *furūq*; *ashbāh wa naẓā'ir*; etc.) This, then, is the meaning of "the Dialectical Forge": the formative dynamic of juridical *jadal* in the evolution of *fiqh*, *uṣūl al-fiqh*, and *jadal*-theory.[29]

My research concurs with Young's assessment that dialectical argumentation was the foremost means by which the law developed. However, my concern is specifically with disputations. Because *Ikhtilāf al-ʿIrāqiyyīn* is not a transcript of a disputation but a highly edited summary of debates between al-Shāfiʿī and the early Ḥanafīs, it tells us little about the practice of disputation and its impact upon the evolution of the law. Compounding this limitation is the fact that the disputation had not yet emerged in its classical form.

This dissertation most builds off of Makdisi's analysis in *The Rise of Colleges*, a book concerned with the system of education of the classical Muslim legal schools, which remains our best guide to understanding the disputation. Makdisi claims that the disputation was part and parcel of the scholastic method of reasoning on the law.[30] Makdisi identifies the three components of the scholastic method as *khilāf*, *jadal*, and *munāẓara*.[31] The *khilāf* corresponded to the *sic-et-non* method in which legal opinions were posited in response to contrary opinions and arguments.

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[29] Young, "The Dialectical Forge," 2.

[30] Makdisi, *The Rise of Colleges*, 128.

[31] Makdisi, "The Scholastic Method in Medieval Education," 650.

Makdisi labels *jadal* "Islamic dialectic"—a designation that is not entirely correct because, as he himself notes elsewhere, many jurists explicitly stated that they used the term synonymously with *munāẓara*.[32] Makdisi distinguishes *jadal* from *munāẓara* because jurists tended to use the former when speaking of their books on dialectical argumentation (e.g., Ibn 'Aqīl's book of dialectic is titled *Kitāb al-Jadal*). These books served as a repertoire of strategic types of arguments a jurist could use in his *munāẓara*. The three terms were intertwined: studying books of *jadal* permitted the jurist to address matters of *khilāf* in the course of the *munāẓara*. Makdisi also notes that the disputation determined the head (*ra'īs*) of a school of law. An aspiring jurist would engage in and successively win debates with others until this afforded him the leadership of his school.

Makdisi describes the varied settings and tones of the disputation, noting that jurists themselves held disputations in their homes but they often also took place in more ceremonious settings—whether in a ruler's court or otherwise:

> Disputations such as these drew large crowds of spectators. They were also performed ceremonially, on occasions of state, or during the period of condolence following the funeral of a master-jurisconsult, three sessions of disputation taking place usually on three consecutive days, the disputations being engaged in by the new incumbent to the professorial chair. On all these occasions jurisconsults of great, as well as of modest, reputations attended. The sessions often ran from sunset to midnight.[33]

In sum, Makdisi identifies that disputations were both mundane and more ceremonious affairs.

Finally, Makdisi highlights that interlocutors often mocked, insulted, and sometimes even used violence against each other in their disputation. For instance, he mentions the example of one disputant calling another a fool, and he relates the story of 'Alī al-Nāshi' who, in disputing the theologian Abū al-Ḥaṣan al-Ash'arī (d. 324/926) slapped him in the face in order to make the

[32] Makdisi, *The Rise of Colleges*, 109.

[33] Ibid., 134.

point that humans have free will and are responsible for their actions. [34] Makdisi also notes the less humorous tale of al-Shāfiʿī's demise, who according to some accounts was killed by the partisans of a Mālikī opponent he humiliated in a disputation. Makdisi describes the disputation as a "pastime," a form of entertainment in which one jurist attempted to show off his skills against others, which would then become the talk of the town and would lead to his praise or disrepute.

The importance of Makdisi's research to my dissertation cannot be overstated. I follow Makdisi in attempting to embed the disputation in the jurists' legal culture. I share his efforts to: 1) depict the practice of disputation; 2) delineate the impact of the practice on a competing and hierarchically organized class of jurists; 3) place the practice within the system of education and knowledge production in the classical schools; 4) explain the purpose or function of the disputation; 5) and to relate the impact of the disputation to the development of the law. Unsurprisingly, I use the same types of texts Makdisi does to answer these concerns. Like him, I draw on on historical and biographical works that present information about disputations and fragmented transcripts of actual disputations. My sources are different only insofar as I rely on transcripts of Shīrāzī's entire disputations.

I nonetheless come to a very different set of conclusions than Makdisi does. Some of these differences are of a minor nature, like the fact that disputations did not only transpire when a master-jurist passed away, but any time a jurist was in a period of mourning and receiving condolences (*ʿazā*) in the mosque. Thus the death of the wife of Shīrāzī's teacher was the occasion for two disputations analyzed in this dissertation. But other divergences from Makdisi are more significant:

- Makdisi claims that a jurist acceded to the leadership (*riyāsa*) of his school of law through the disputation. The evidence suggests otherwise. For instance, Shīrāzī was the best among the Shāfiʿī s of his generation in disputation, yet Shāfiʿī texts do not unanimously proclaim him the head of his school.[35]

[34] Ibid., 135–136.

[35] Al-Subkī, *Ṭabaqāt al-Shāfiʿiyya al-Kubrā*, 5:122.

- Makdisi underappreciates the shift in the ethics of the juristic disputation in the 10th century—likely around the time it became formalized in its classical form—which significantly altered the extent to which abusive language was deemed permissible.

- Makdisi does not distinguish between the juristic and theological disputation. This distinction is important because respect for one's opponent was encouraged to a far greater extent in juristic disputations than it was for theological ones.

The last two lead to a mischaracterization of the religio-ethical aims jurists attached to their practice of juristic disputation.

- To Makdisi's claim that the disputation served primarily pedagogical purposes, I add that the jurists themselves identified part of their objectives for engaging in disputation—for instance, as a means to defend school doctrine against its outside detractors. Moreover, the concept of pedagogy that I posit includes not only the shaping of the jurists' argumentative skills (as in Makdisi), but also the shaping of a critical subjectivity.

- Makdisi, like Hallaq, identifies the disputation as seeking to achieve consensus on the law and therefore to weed out differences of opinion. In contrast, I show that the disputation also legitimated a plurality of different opinions.

Beyond these points of divergence, I elaborate upon the history and the social and legal impact of the disputation in ways Makdisi did not. The dissertation traces the emergence of the disputation in its classical form in the 9th century from its rudimentary beginnings to its fully developed classical form. It highlights the attempts of the juristic community to take back the disputation from its function as entertainment in the courts of rulers and to make it a practice through which they sought to worship God and guide the community of lay Muslims. It explores the historical epistemological debates that nourished and sustained the practice of disputation and created a culture of critical legal debate by forcing jurists to recognize the possible validity of their opponent's positions. Finally, it examines how concrete legal disputations made use of legal theory and affected the evolution of school doctrine.

Why Shīrāzī? His Life and the Afterlife of His Disputations

This dissertation focuses upon the disputations of Abū Isḥāq al-Shīrāzī,[36] an 11th century Shāfi'ī scholar of Persian origin. He was born in Firuzabad, in the province of Fars, in 393/1003. Biographers mention nothing of Shīrāzī's family background. This is telling because they tend to say much when the jurist in question comes from a prominent family. For instance, biographers mention that Shīrāzī's contemporary Abū al-Ma'ālī al-Juwaynī's (d. 478/1085) father was one of the most prominent jurists of his time and came from a family well-versed in Arab literature (*adab*).[37] Shīrāzī's lifetime of poverty is indicative that his family likely had modest economic resources. As a young man he travelled to neighbouring Shiraz in order to study the legal sciences. There he studied under the guidance of the Shāfi'ī scholar Abū 'Abd Allāh al-Bayḍāwī (d. 424/1033) before moving on to study in Basra under Abū Aḥmad Ibn Rāmīn.[38] Both of his teachers had received their training in Baghdad: Ibn Rāmīn was the disciple (*ṣāḥib*) of Abū al-Qāsim al-Dārakī (d. 375/985), the head of the Shāfi'īs of Baghdad in his time. Baghdad had dominated Shāfi'ī scholarship for the preceding two centuries, and thus Shīrāzī made his way there in 415/1024 to continue his education.

Shīrāzī attached himself to Abū Ṭayyib al-Ṭabarī (d. 450/1058), who sometime after Abū al-Ḥamid al-Isfarāyinī's death in 418/1027 became the head of the Shāfi'īs in Baghdad.[39] Shīrāzī is characterized as al-Ṭabarī's most diligent student. He allegedly reviewed each of his lessons a thousand times and would attract the wonder of his fellow students, who could not comprehend his intellectual stamina. He remained poor despite taking on the position of Ṭabarī's *mu'īd* (lesson repetitor—a sort of teacher's assistant). Stories recount how he would seek food from friends. Biographers emphasize that his poverty hindered him from purchasing the mount necessary to perform the pilgrimage to Mecca. He nonetheless appears to have retained his good

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[36] For biographies of Shīrāzī, see Ibn al-Ṣalāḥ al-Shahrazūrī, al-Nawawī, and al-Mizzī, *Ṭabaqāt al-Fuqahā' al-Shāfi'iyya*, 1:302–10; Ibn-Qāḍī Shuhba, *Ṭabaqāt al-Shāfi'īya*, 1:244–46; al-Isnawī, *Ṭabaqāt al-Shāfi'iyya*, 2:7–9; al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:215–56. Subkī's biolgraphy of Shīrāzī is by far the most detailed; for contemporary biographies of Shīrāzī, see Chaumont, "al-Shīrāzī"; Hītū, *al-Imām al-Shīrāzī*.

[37] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 5:175.

[38] Al-Fīrūzābādī al-Shīrāzī, *Ṭabaqāt al-Fuqahā'*, 125. Subkī indicates that Shīrāzī studied under Ibn Rāmīn in Shiraz which is unlikely since Shīrāzī himself says that Ibn Rāmīn taught in Basra.

[39] Shīrāzī also studied *uṣūl al-fiqh* under the guidance of Abū Ḥātim al-Qazwīnī, see al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:217. For more on Ṭabarī, see his entry in al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 5:12–50.

cheer and sense of humour through these difficult circumstances. He once joked with a student who arrived in Baghdad intending to study with him: "Where are you from?" The man answered: "From Mosul," which prompted Shīrāzī to say: "Welcome, my fellow countryman." This puzzled the young man, who responded by stating the obvious: "But sir, I am from Mosul and you are from Firuzabad?" To which Shīrāzī answered, "Yes, my son, but were we not all gathered on Noah's boat?"[40]

Shīrāzī's fame increased dramatically when in 459/1066 the Seljuq vizier Niẓām al-Mulk (d. 485/1092) built the famous Niẓāmiyya college of Baghdad, intending that he take up its professorial chair. Shīrāzī apparently had misgivings about the appointment, even refusing it on the day of the college's inauguration: the story goes that he was walking towards the college to take up his chair when a young man accosted Shīrāzī, informing him that the materials from which the school was built were misappropriated. Shīrāzī hurried back home and refused to take his appointment out of fear of God.[41] His rival Abū Naṣr Ibn al-Ṣabbāgh filled his position for twenty days, until Shīrāzī's students convinced him to take it up by threatening to cease studying with him. Shīrāzī would occupy the most prestigious professorial chair in the Abbasid Empire for the next seventeen years until his death. Shīrāzī's legacy in the Shāfi'ī school is considerable, not least because his text *al-Muhadhdhab fī fiqh al-Imām al-Shāfi'ī* was a reference point for later Shāfi'ī s on the doctrine of the Iraqi branch of their school. The famous Nawawī, widely seen as formulating the canonical doctrines of the school, wrote his incomplete magnum opus of school doctrine, the *Majmū',* based on the *Muhadhdhab*.

Shīrāzī was also known to have particularly distinguished himself in the disputation. Tāj al-Dīn al-Subkī (d.771/1370) called him a "lion in disputation."[42] Subkī writes that in matters of *khilāf* "no one rivalled Shīrāzī in his time."[43] Subkī explains that matters of *khilāf* were those matters upon which the Ḥanafīs and Shāfi'īs, representing the two main participants of disputations in Baghdad, disagreed. This appears to have stirred in Ibn Ṣabbāgh a measure of jealousy: he

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[40] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:224. "*Qāla: yā waladī, a-mā jama'atnā safīnat Nuḥ?*"

[41] Makdisi, "Muslim Institutions of Learning in Eleventh-Century Baghdad," 31–37; Talas, *L'enseignement chez les arabes*. Makdisi and Talas disagree on the circumstances that led Shīrāzī to refuse the appointment to the Niẓāmiyya.

[42] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:222. "*Kāna al-shaykh Abū Isḥāq ghaḍanfaran fī l-munāẓara.*"

[43] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 5:123. "*Fa-ammā al-mukhtalaf, fa-ma kanā aḥad yuḍāhī Abā Isḥāq fī 'aṣrihi.*"

reportedly disparaged Shīrāzī by stating that "If Abū Ḥanīfa and al-Shāfi'ī [i.e., their schools of law] ever come to agree, the knowledge of Abū Ishāq al-Shīrāzī would disappear."[44] Shīrāzī's skill in disputation even found itself immortalized in poetry: the poet al-'Uqaylī uses "Abū Isḥāq's tongue in the gathering of disputation (*lisān Abī Isḥāq fī majlis al-naẓr*)" as a simile for eloquence.[45] To examine Shīrāzī's disputations is therefore to examine how the most masterful of jurists performed in the disputation in the 11th century.

Focusing on Shīrāzī offers the modern historian greater insight into the classical juristic disputation than any other Muslim figure of his time. One reason is that he has four disputations still extant and available to us. Very few disputations were recorded in this period, and those that survive are largely fragmentary—summaries of the debate or short passages.[46] The likely reason for this tattered documentary record is that transcribing disputations was pedagogically inefficient. The disputation was a testing ground and jurists had little incentive to record arguments containing errors in them. Moreover, since disputations were extremely lengthy and detailed in their treatment of a single proof for a legal position, jurists-in-training were better off memorizing concisely presented arguments found in books of *madhhab* and *khilāf*. The four extant disputations of Shīrāzī's within Subkī's *Ṭabaqāt al-Shāfi'iyya al-Kubrā* are therefore exceptional. The fact that two of these disputations are with a Ḥanafī jurist and two with a Shāfi'ī jurist reveal competing dynamics in inter- and intra-*madhhab* disputations. The topics also cover a range of legal subjects: marriage and divorce, state taxation and the management of non-Muslim communities, and ritual worship. This variation highlights that jurists employed the same methodology or types of arguments across legal topics.

Another reason to focus on Shīrāzī is that many of his texts of dialectic (*jadal*) and law are extant, and several are published. He authored two texts of dialectic, *al-Ma'ūna fī al-Jadal* and *al-Mulakhkhaṣ fī al-Jadal*.[47] Moreover, he gathered under his wing students from other schools

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[44] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:222. "*Idhā iṣṭalaḥa al-Shāfi'ī wa-Abū Ḥanīfa, dhahaba 'ilm Abū Isḥāq al-Shīrāzī*."

[45] Ibid., 4:216.

[46] Subkī does record two other full disputations of Shīrāzī's master Abū Tayyib al-Ṭabarī against rival Ḥanafī jurists: al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 5:24–46.

[47] Al-Fīrūzabādī al-Shīrāzī, *Al-Mulakhkhaṣ fī al-Jadal*; al-Fīrūzābādī al-Shīrāzī, *Kitāb al-Ma'ūna fī al-Jadal*.

of law, like the Ḥanbalī jurist Abū al-Wafā' Ibn 'Aqīl (d. 513/1119) and the Mālikī jurist Abū al-Walīd al-Bājī (d. 474/1071), who themselves would compose manuals of *jadal* very close to those of their master.[48] It is no exaggeration to say that Shīrāzī played the most important role in the development of manuals of disputation in the 11th century, for which reason Miller and Young give him and his students so much attention in their analysis of *jadal*. This dissertation uses these texts of *jadal* to better understand the definition, rules, settings, and conventions of the disputations. The transcripts of Shīrāzī's disputations are analysed in light of what we find in these texts.

Of equal importance are Shīrāzī's legal texts. These manuals include the *Muhadhdhab* and *al-Tanbīh fī Fiqh al-Shāfi'ī*.[49] They provide the necessary background to the topics and arguments of his disputations. For instance, the *Muhadhdhab* adds context to Shīrāzī's position on the wife's choice (*khiyār*) to press for divorce when not receiving her entitled maintenance (*nafaqa*). The text explains his school's position that three days of financial neglect constitutes the point at which a wife can present her grievance to a court. The *Muhadhdhab* also elucidates Shīrāzī's arguments in his disputations. It is only by examining the pronouncements in the *Muhadhdhab* on the slave's rights to maintenance that one fully understands Shīrāzī's analogy in the disputation between a wife and slave. In addition to texts of substantive law, Shīrāzī's texts of *uṣūl al-fiqh* are also available in published form. These texts include *al-Tabṣira fī Uṣūl al-Fiqh, Kitāb al-Lum'a,* and its commentary *Sharḥ al-Lum'a.*[50] The *Sharḥ* in particular is Shīrāzī's most detailed treatise of legal theory. These texts define the types of proofs Shīrāzī levels against his interlocutor. For instance, it becomes possible to identify what type of *qiyās* Shīrāzī invokes in the course of his disputation. It also sheds light on why Shīrāzī sometimes rejects the legitimacy of an opponent's proof.

The aforementioned Mālikī jurist al-Bājī transmitted two of Shīrāzī's disputations. Bājī left his home in Muslim Spain and travelled to the Islamic lands of the East in order to gain religious

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[48] Ibn 'Aqīl, *Kitāb al-Jadal*; al-Bājī, *al-Minhāj fī Tartīb al-Ḥijāj*.

[49] Al-Fīrūzābādī al-Shīrāzī, *al-Tanbīh fī al-Fiqh al-Shāfi'ī*; al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 1992.

[50] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*; al-Fīrūzābādī al-Shīrāzī, *Kitāb al-Luma' fī Uṣūl al-Fiqh*; Fīrūzābādī al-Shīrāzī, *al-Tabṣirah fī Usūl al-Fiqh*. Chaumont's notes to his translation of Shīrāzī's *Luma'* are an exceptional reference to understanding not onsy Shīrāzī's *uṣūl al-fiqh* but also its divergences from and agreements with other writers of *uṣūl al-fiqh* texts.

knowledge between 426-434/1034-5-1042-3.[51] Bājī spent three years in Baghdad between 429-432/1038-1041,[52] and recorded disputations he witnessed during his time there in his book *Firāq al-Fuqahā'*. Shīrāzī's two disputations present him debating his Ḥanafī rival Abū ʻAbd Allāh al-Dāmaghānī (d. 478/1085) during a period of mourning and condolence-giving in the wake of the death of Abū Ṭayyib al-Ṭabarī's wife.[53] Shīrāzī was the star pupil of Ṭabarī at the time, and Dāmaghānī was the leading student of the head of the Ḥanafī school, Abū ʻAbd Allāh al-Ṣaymārī.[54] Unlike Shīrāzī, Dāmaghānī came from a prestigious family of jurists who were often appointed to the position of chief Qāḍī of Baghdad. Dāmaghānī would eventually come to fulfill this role as well. One disputation tackles the question: "What is the lot of a wife whose husband struggles to support her financially?" As the respondent, Shīrāzī takes the view that she has the choice (*khiyār*) to ask for the dissolution of her marriage." The second disputation concerns the question of a *dhimmī* (a non-Muslim living under Muslim rule) converting to Islam: "Does a non-Muslim converting to Islam need to pay the *jizya* for [the time] when he was a non-Muslim?" As respondent, Shīrāzī adopts the position prevalent in his Shāfiʻī school, that the convert must indeed pay his past *jizya*. Bājī likely recorded these disputations because the practice of disputation was not prevalent within the Muslim West. He therefore described the nature of disputations in order to share it with an unfamiliar audience. The *Firāq* is not extant but was sufficiently widespread in Subkī's time that several authors attest to its contents.[55]

Shīrāzī himself transcribed his two other disputations. The second set of disputations took place in 475/1083 between Shīrāzī and Juwaynī.[56] Shīrāzī was in the final year of his life and the height of his career and fame as professor of the Niẓāmiyya. The Caliph al-Muqtadī requested that Shīrāzī lead a political mission to Khurasan, to deliver letters to his sultan Malikshah and vizier Niẓām al-Mulk concerning a governor or ʻAmīd who aggrieved him named Abū al-Fatḥ b. Abū Layth. Juwaynī greeted and hosted Shīrāzī and his party when they arrived in the city of

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[51] Vidal-Castro, "al-Bājī, Abū l-Walīd."

[52] Turkī, "Tamhīd," 48.

[53] Makdisi, "al-Dāmaghānī, Abū ʿAbd Allāh Muḥammad b. ʿAlī."

[54] Ibid.

[55] Kaddouri, "Refutations by Mālikī Authors," 564.

[56] For more on Juwaynī, see the entry in al-Subkī, *Ṭabaqāt al-Shāfiʻiyya al-Kubrā*, 5:165–222.

Nishapur. Subkī tells us that they engaged in disputation, "only some of which has come down to us."[57] The two disputations found in Subkī are on the topics of coerced marriage and ritual prayer. The question on coerced marriage is: "Can a father coerce his daughter into marriage?" Shīrāzī is the respondent and answers in the affirmative. The second disputation asks: "If a person prays in the wrong direction, then comes to realize of his mistake with absolute certainty, does he need to repeat his prayer?" Juwaynī takes the position of the respondent who argues that the prayer must be repeated. These two disputations therefore provide us with a snapshot of how the intra-*madhhab* disputation unfolded.

Subkī notes the genealogy of the disputations. He writes that he took them from the *Majmūʿ* of Taqī al-Dīn Ibn al-Ṣalāḥ:

> Ibn al-Salāḥ said "I transmitted it from the handwriting of the Shaykh Abū ʿAlī ibn ʿAmmār, who said 'I transmitted it from the handwriting of a man among the disciples (*aṣḥāb*) of Shaykh Abū Isḥāq [i.e. Shīrāzī], who mentioned at the end of the text that he had copied it from the handwriting of the Shaykh al-Imām Abū Ishāq.'"[58]

Subkī takes as proof that Shīrāzī was its first scribe that the narrator of the text at one point uses the first person to refer to Shīrāzī. More specifically, the text introduces Shīrāzī's argument with the statement: "I thus said to him…"

There is little doubt that Subkī's transcripts are not verbatim narrations of the disputations. The editor of Subkī's *Ṭabaqāt al-Shāfiʿiyya Kubrā* notes differences across extant manuscripts of the text. These differences are not usually of great importance to the meaning of the two disputations, and are limited to a word here or there. Nonetheless they show that the original transcripts were subject to minor variations in the history of the textual transmission. More significant is the fact that it would have been improbable for Shīrāzī to have remembered the

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[57] Al-Subkī, *Ṭabaqāt al-Shāfiʿiyya al-Kubrā*, 4:219–22. "*Wa-tanāẓara huwa wa-iyyāhu, wa-intahā ilaynā baʿḍuhā.*"

[58] Al-Subkī, *Ṭabaqāt al-Shāfiʿiyya al-Kubrā*, 5:213–14. "*Qāla ibn al-Ṣalāḥ: naqaltuhā min khaṭṭ al-shaykh Abī ʿAlī ibn ʿAmmār, wa-qāla naqaltuhā min khaṭṭ rajul min aṣḥāb al-shaykh Abī Ishāq, wa-dhakara fī ākhir al-khaṭṭ annahu katabahā min khaṭṭ al-shaykh al-imām Abī Ishāq.*"

exact wording of his lengthy debates with Juwaynī. The transcripts at best would be relaying the arguments of both jurists rather than their exact words. Shīrāzī would also have had the incentive to embellish his actual performance.

These concerns notwithstanding, there is good reason to view these transcriptions as faithfully conveying the course and content of Shīrāzī's disputations. The chains of narration seem probable in both instances. But the main reason to believe their authenticity is their content. The arguments and positions featured in each disputation mirror those in each jurist's respective books of substantive law. This is true even in terms of minute details. For instance, Shīrāzī's claim that the meaning of the term *ṣāghirūn* in the Qur'anic verse on the *jizya* was a position that he adopted in contrast to most Shāfi'īs. Likewise, his disagreement with Juwaynī about the condition of coequality (*naẓīr*) in making an analogy is evident from their texts of *uṣūl al-fiqh*. To forge these differences, one would have to have intimate knowledge of each jurist's thought. They would need to know not only major points of disagreements, but also the subtleties of each jurist's views on the law. One might also add that there would be little incentive to forge a disputation. The only utility that Subkī finds in presenting the disputation is to show the brilliance of Shīrāzī and Juwaynī's legal minds.

The Disputation and the Search for God's Law

Ijtihād and School Authority in the 6/11th Century

The practice of disputation cannot be understood without first placing it in the context of a juristic culture of *ijtihād*. Shīrāzī defines *ijtihād* as "the expenditure of capacity and effort in finding a legal ruling."[59] This expenditure was associated with the use of reason in interpreting the law, and therefore contrasted cases whose rulings could be known through deference to the plain meaning of scripture. An example of the latter was the obligation to perform the five daily prayers: no *ijtihād* would have been expected or permitted in determining such a case. In the

[59] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 1043. "*Huwa badhl al-wus' wa-badhl al-majhūd fī ṭalb al-ḥukm al-shar'ī.*"

early 9th century, al-Shāfi'ī famously associated this process of *ijtihād* with the argument by analogy (*qiyās*).[60] As Ignaz Goldziher points out, al-Shāfi'ī was effectively making a case for limiting the use of reason in determining the law by contending that any opinion needed to have a textual basis.[61] He was making a case against those who felt that their independent opinion (*ra'y*) could have judicial validity. Unsurprisingly, some early Shāfi'īs interpreted the meaning of *ijtihād* to mean *qiyās*. By the 11th century, however, Shāfi'īs agreed that *ijtihād* exceeded the bounds of *qiyās*: Shīrāzī writes: "As for the one who says that [*qiyās*] is *ijtihād*, this is not correct because *ijtihād* is reasoning on the proofs [of the law] and expending effort in finding the ruling, and this is not limited to *qiyās*."[62] Shīrāzī then gives the example of scriptural hermeneutics in finding the law as a non-analogical form of *ijtihād*. The 11th century Shāfi'īs saw the near entirety of the law as subject to *ijtihād*. Shīrāzī saw textual certainty in very few cases of law. These cases were limited to those around which there was some sort of overwhelming agreement of among all Muslims (*ma'lūm min al-dīn bī-ḍarūra*) or juristic consensus (*ijmā'*) the about the right ruling.[63] This consensus was a means to guarantee that the jurists' interpretation of scripture was actually correct. The jurists of the other 11th century Sunnī schools joined the Shāfi'ī s in their understanding that most of their conclusions were epistemically uncertain.[64] Thus, in the consciousness of the 11th century Muslim jurists, the production of the law was almost in its entirety an interpretative project. As I will explain below, the disputation was a final and crucial stage in this process of *ijtihād*.

Historians have deeply misunderstood when and how jurists performed *ijtihād.* They have tended to see *ijtihād* as impossible in the context of school doctrine. Joseph Schacht famously concludes that *ijtihād* stopped in the beginning of the 4th/10th because the scholars of the schools of law thought that all "essential questions" of doctrine "had been thoroughly discussed and finally

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[60] Lowry, *Early Islamic Legal Theory*, 12.

[61] Goldziher, *The Ẓāhirīs*, 19–20.

[62] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 755. "*Fa-ammā man qāla: "innahu al-ijtihād," fa-laysa bi-ṣaḥiḥ li-anna al-ijtihād huwa al-naẓar fī al-adilla wa-badhl al-majhūd fī ṭalb al-ḥukm wa-dhalika lā yakhtaṣṣ bihi al-qiyās*." See also al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, 748.

[63] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 1045–46.

[64] Zysow, *The Economy of Certainty*.

settled."[65] Schacht equates deference to school authority with *taqlīd* which he defines as the "unquestioning acceptance of the established schools and authorities."[66] It was this equation of *taqlīd* with school authority that continued to plague scholarship on *ijtihād.* Hallaq disputes the idea that *ijtihād* had ended in the 10th century by showing that texts of *uṣūl al-fiqh* did not set the bar for being a *mujtahid* prohibitively high and that examples of *ijtihād* continued in Islamic history. Nonetheless, Hallaq never questions that following school authority was *taqlīd* and not *ijtihād*. Thus he makes originality the key feature of *ijtihād*: "During the third/ninth and fourth/tenth centuries mujtahids, whether independent or affiliated with legal schools, have expressed highly original views on the law."[67] Schacht and Hallaq likely derive their understanding of *taqlīd* and *ijtihād* from modern Muslim debates. For instance, the late *muftī* of Syria, Muḥammad Sa'īd Ramaḍān al-Būṭī, defines two meanings of *ijtihād* today. The first refers to expending one's efforts in addressing new issues for modern society. Būṭī considers this to be a permissible and laudable form of *ijtihād*. The second however refers to those matters that the jurists of the past have already addressed. He states that doing this is invalid (*da'wa bāṭila*).[68] Thus for Būṭī *ijtihād* is always original and new, which is why any *ijtihād* in matters already reviewed by the schools of law will necessarily violate tradition.

The problem with this view is that the jurists of the 11th century saw no contradiction between *ijtihād* and following school doctrine. This is evident if one pays special attention to their definition of *taqlīd* as "the acceptance of a statement without proof."[69] As Ahmed El Shamsy notes, this definition does not preclude a jurist from following school doctrine if he has proof for it.[70] In fact, the jurists would have been foolish to abandon a history of discursive argumentation in their schools and decided instead to reinvent the wheel. There was far more probability of arriving at the strongest position if they worked collectively to build off of the arguments and

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[65] Schacht, *An Introduction to Islamic Law*, 70–71.

[66] Ibid., 71.

[67] Hallaq, "Was the Gate of Ijtihād Closed?" 10.

[68] Al-Būṭī, *Muḥāḍarāt fī al-Fiqh al-Muqāran*, 7–8.

[69] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 1007. "*Ḥadd al-taqlīd huwa qubūl al-qawl min ghayr dalīl*."

[70] El Shamsy, *The Canonization of Islamic Law*, 185–89; El Shamsy, "Rethinking 'Taqlīd' in the Early Shāfiʿī School."

positions of their predecessors. In short, *ijtihād* had to do with the process by which a jurist arrived at a ruling, and not the ruling itself.

This view of *ijtihād* is what permitted the Shāfiʿīs to reject *taqlīd* and still labour within the bounds of a doctrinal school. The Shāfiʿīs were adamant that anyone capable of deriving the law had the responsibility to do so. It is true that they recognized the difference between themselves and al-Shāfiʿī: their master had the skill to found a school of law independently (*muṭlaq*) whereas they were working within the school (*muntaṣib*). Still, the great dividing line attested in books of *uṣūl al-fiqh* was between the jurists who had the responsibility to perform *ijtihād* and the lay Muslims who had the responsibility to consult the jurists to discover the law (*al-ʿamm*).[71] The Shāfiʿis were unique in the extent to which they renounced *taqlīd*.[72] Their view was that the individual had a responsibility before God to use his own faculties to discover the law if he knew how. Moreover, as Hallaq notes, the means to know how were part of the standard training of a jurist and were equivalent to those qualifying one to produce a *fatwā*.[73] In sum, the insistence that each jurist perform *ijtihād* was not a "contradiction" or a threat to school authority in the 11th century, as some have intimated.[74]

The Shāfiʿī position is elucidated when one examines their ruling on *ijtihād* in finding the prayer direction (*qibla*). The Shāfiʿīs took the view that two companions out in the desert who had the capacity to use nature—the stars, the moon, etc.—to determine the prayer direction had the obligation to pray in the direction in which their *ijtihād* (interpretation) had directed them. If each person concluded that the prayer direction was in opposite sides, each had the religious obligation to follow his or her respective *ijtihād*. The Shāfiʿīs were adamant that praying together in this case would be impermissible, but they in no way proscribed each individual from consulting or trying to convince the other. In fact, they supposed this would happen: they

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[71] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Lumaʿ fī Uṣūl al-Fiqh*, 1012–16; al-Juwaynī, "Kitāb al-Ijtihād," 1339–41. Although Juwaynī's exposition of the matter makes it clear that the Shāfiʿīs rejected *taqlīd*, he himself had an agnostic view of whether it was permitted or not after the jurist attempted his own *ijtihād*.

[72] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Lumaʿ fī Uṣūl al-Fiqh*, 1014–15; Ibn al-Farrā', *al-ʿUdda fī Uṣūl al-Fiqh*, 1594; al-Jaṣṣāṣ, *Uṣūl al-Jaṣṣāṣ al-Musammā al-Fuṣūl fī al-Uṣūl*, 2:372–73. Jaṣṣāṣ nonetheless notes that the Ḥanafīs were divided on the topic and that some denied the permissibility of *ijtihād*.

[73] Hallaq, "Was the Gate of Ijtihād Closed?" 6–7.

[74] Chaumont, "al-Shāfiʿiyya."

expected that each would try to explain to his companion his reasoning in determining his conclusion. Only if two companions were at an impasse would they need to pray apart. Likewise, the Shāfi'ī s understood the jurist's *ijtihād* to happen in the context of shared arguments. The jurist could arrive at his conclusion not only through exposure to his contemporaries' reasoning on the subject but also through the inherited arguments of his school's predecessors. Thus, in the minds of the Shāfi'īs, following school authority was never blind following because it was the product of each individual's learning of the proofs buttressing this authority. At the end of the day, the individual jurist was responsible before for trying to find His law, but only a foolish jurist would not rely on the arguments and debates of other jurists when discharging this obligation.

The disputation was the final act in the process of training for *ijtihād*. It came after the jurists learnt the law in books of *madhhab* and *khilāf*. The term *madhhab* referred to those intra-school opinions and arguments that the Shāfi'īs had collectively produced in attempting to flesh out the legal doctrine that al-Shāfi'ī had initiated. These doctrines could be subject to differences of opinions internal to the Shāfi'īs. The Shāfi'īs of the 11th century had no canon or authoritative guide as to what views most represented their school. This is the reason Shīrāzī speaks of Māwardī as someone who "preserved the *madhhab,*" likely in reference to his *al-Hāwī al-Kabīr*, a voluminous commentary of Muzanī's abridgement of Shāfi'ī's substantive legal manual.[75] The *khilāf* referred to those issues of disagreement between schools of law. Shīrāzī speaks of jurists who wrote books on *khilāf*.[76] As al-Khaṭīb al-Baghdādī intimates, the disputation came after a process of deep study of the arguments within these books of law[77] The process of disputation permitted the jurist to assess proofs and come up with his own opinion as to which was strongest. The disputation acted as the final testing ground for his conclusion. It did so by exposing the argument to a series of objections or counter-arguments. If the position passed, then the jurist—and now also his interlocutor and the audience—knew its merits.[78] In general, the jurists considered the disputation to be a religiously meritorious (*mustaḥabb*) act in the process of

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[75] Al-Fīrūzābādī al-Shīrāzī, *Ṭabaqāt al-Fuqahā'*, 131. "*Kāna ḥāfiẓan li'l-madhhab*."

[76] Ibid., 3:129.

[77] Al-Baghdādī, *Kitāb al-Faqīh wa'l-Mutafaqqih*, 2:56.

[78] Al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, 2:175; al-Baghdādī, *Kitāb al-Faqīh wa'l-Mutafaqqih*, 2:127.

arriving at their ruling.[79] In some cases however, they considered it an obligation. Ghazālī, for instance, deems the disputation a religious obligation in instances where the jurist was unsure of the position he deemed weightier and needed to expose the options to critique in order to arrive at a conclusion.[80]

Ijtihād in the 11th century was therefore a critical and inevitably dialogical enterprise. The jurist did not go straight to scripture to discover the law. Nor did he pay blind deference to school authority. His responsibility was to sift through the arguments of jurists within and outside of his school of law in order to arrive at the ones he deemed most founded. He began with an initial critical dialogue with the jurists of the past. Books of the *madhhab* and of *khilāf* allowed him to reflect upon the variety of points of view within the law, to come with reasons for dismissing some, and reasons for assenting to others. The disputation pushed this critical reflection even farther. Here the jurist's imagined dialogue was transformed into a real face-to-face encounter with other jurists. The jurists subjected each other's *ijtihād* to objections with the aim of defeating it.

The Emergence of a Pedagogy of Critical Debate

The classical disputation of the 11th century emerged from earlier forms of legal debate. The word for disputation, "*munāẓara,*" was used as early as the 8th/ 2nd century to refer to informal and unstructured legal discussions between jurists. Sometimes these discussions could be quite short and, in the course of their exchanges, the jurists could easily diverge into personal topics immaterial to the legal topic at hand.[81] Moreover, they did not need to be adversarial. They could feature one speaker expositing his views to another(s). In fact, al-Khaṭīb al-Baghdādī (d. 463/1071) in the 11th century continued to recognize that the term *munāẓara* could refer to the giving of answers to someone seeking knowledge.[82] For the most part, however, the jurists of the

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[79] Al-Ghazālī, *al-Mustaṣfā fī 'Ilm al-Uṣūl*, 4:70–72; Ibn Fūrak, *Mujarrad Maqālāt al-Shaykh Abī al-Ḥasan al-Ash'arī*, 293; al-Baṣrī, *al-Mu'tamad fī Uṣūl al-Fiqh*, 2: 384.

[80] Al-Ghazālī, *al-Mustaṣfā fī 'Ilm al-Uṣūl*, 4:70-71.

[81] Al-Rāzī, *Manāqib al-Imām al-Shāfi'ī*, 272ff.

[82] Al-Baghdādī, *Kitāb al-Faqīh wa'l-Mutafaqqih*, 1:558.

11th century distinguished the *munāẓara* from this type of dialogue. They reserved the term for a critical exchange between equals and designated the teacher's exposition to a seeker of knowledge as a process of *ta'līm* (learning).[83] These critical *munāẓarāt* of the 8th century were natural offshoots of the disagreements that arose in the context of developing legal doctrines in the different centres of the Muslim world. Thus al-Shāfi'ī is known to have entered into animated discussions with his Ḥanafī Iraqi contemporary Muḥammad ibn al-Ḥaṣan al-Shaybānī and against his Khurasani contemporary Isḥaq ibn Rāhawayh defending his views and critiquing those of his interlocutor. Jurists of the 11th century tended to associate the term *munāẓara* with the word *mujādala* or *jadal*. Shīrāzī and Juwaynī saw no difference between the two.[84]

The biographical texts of Shafi'ī jurists tend to locate the emergence of the disputation in its classical form with the Shāfi'ī Ibn Surayj (d. 306/918) and his circle of students. Ibn Surayj is said to have theorized the disputation for the first time and Shīrāzī identifies his student al-Qaffāl al-Shāshī (d. 365/976) as the first to have written a text outlining the theory of argumentation.[85] That Ibn Surayj's study circle systematized the disputation to a greater degree than ever before should occasion little surprise. For one, the circle would have been exposed to the recent theorizations of the disputation that had taken place within the science of *kalām* (theology). The Greek translation movement had made Aristotle's discussions on the practice of dialectic, largely in the *Topics*, available to the theologians who appropriated it for their own debates. Ibn Surayj and his circle took a great interest in theology, even as they focused on the law. Subkī transmits reports that Ibn Surayj was the best among the Shafi'īs in theology; and he singles out al-Qaffāl among the students of Ibn Surayj as being a theologian as much as a jurist.[86] For another, historians identify Ibn Surayj as having initiated pedagogical reforms that systematized knowledge production within the schools of law.[87] It was in this context that the practice of disputation was thought of more self-consciously and became the object of theorization.

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[83] Ibn 'Aqīl, *Kitāb al-Jadal*, 246.

[84] Al-Juwaynī, *al-Kāfiya fi al-Jadal*; al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 153; Al-Fīrūzābādī al-Shīrāzī, *Sharḥ al-Luma',* 153.

[85] Al-Fīrūzābādī al-Shīrāzī, *Ṭabaqāt al-Fuqahā'*, 112; al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 3:22.

[86] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 3:202. For a secondary work that incorporates the ideals on theology of Ibn Surayj's school, see Reinhart, *Before Revelation*.

[87] Hallaq, "Was al-Shafi'i the Master Architect of Islamic Jurisprudence?"; Melchert, *The Formation of the Sunni Schools of Law*.

By the time Shīrāzī entered Baghdad in 1024, the disputation had a defined structure that jurists needed to learn to be able to participate. Larry Miller correctly identifies the heart of these rules as a process of question and answer.[88] The participants of the disputation were known as the questioner and the respondent. It was possible for the jurists to tag-team and there to be more than one questioner or respondent. The questioner initiated the disputation by asking the respondent his position on a particular legal question and would follow-up by asking the respondent the proof for his position. The respondent would typically give one and only one proof.[89] The questioner would then move on to levelling as many objections (*iʿtirāḍāt*) or counter-arguments (*muʿāraḍa*) as he possibly could against the proof in order to frustrate the respondent's position. Note that the questioner's own position was never the focus of the disputation: his task was not to build an argument but to try to frustrate his opponent's. It was possible that he subscribed to the same legal opinion as his opponent while also thinking that his opponent's proof in the disputation was weak. The respondent's task was to show that the questioner's objections had no traction. Transcripts of disputations suggest that the questioner could follow-up his initial critique with another one or two. As the disputation progressed, the initial topic could easily branch into several others and the jurist needed to show great skill in dealing with seemingly disparate topics. Skilled and seasoned jurists typically finished at a standstill with each scoring points in the course of their disputation.

This classical form of *munāẓara* disputation in the 11th century was part of the pedagogical training of a critical Muslim subject. By that time, the disputation had morphed into a highly pietistic practice. Rumee Ahmed makes the point that we cannot fully understand the motives of Muslim jurists if we neglect the devotional aspect of Islamic legal reasoning.[90] This is certainly true of the classical disputation. Gone is the violence and mockery that Makdisi documents in an earlier period of Islamic legal debate. In contrast, Bājī presents us a picture of the disputation in the 11th century as a devotional practice capable of beautifying the listener and sending God's blessings upon them.[91] He juxtaposes the merits of the disputation with those of reciting the

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[88] Miller, "Islamic Disputation Theory," 15.

[89] My transcripts show one proof being presented, and Bājī corroborates that this was a convention: al-Bājī, *al-Minhāj fī Tartīb al-Ḥijāj*.

[90] Ahmed, *Narratives of Islamic Legal Theory*, 153.

[91] Al-Subkī, *Ṭabaqāt al-Shāfiʿiyya al-Kubrā*, 4:245–46.

Qur'an. Perhaps nothing highlights the gravitas and sacredness with which the jurists approached the disputation more than their custom to engage in disputations in periods of mourning and condolence-giving. To engage in arguments about God's law was a means to remember God in a time of hardship. Bājī's description is corroborated in books of *jadal* that assert that one should seek truth in the disputation for the sake of being among those who witness God's countenance in the afterlife.[92] These books even provide jurists' with a set of practices aimed at ensuring they maintain the right intentions in debating.[93] This was particularly important because the jurists were aware of the possibility of egos flaring up in the course of debate. It was thus the performative nature of the disputation that helped forge an 11th century juristic community open to and united around critical debate.

This openness contradicts Joel Kraemer's claim that the 11th century Seljuq Sunnī restoration was a period of homeostasis in which the openness of thought that had existed in the Buyid era disappeared.[94] It also goes against Makdisi's description of the disputation as a practice that bred acrimony between jurists who mocked and insulted each other for their differences of opinion. Part of what leads Kraemer and Makdisi astray is their failure to distinguish between the theological and legal disputation. The 11th century is rife with episodes of strife and violence between schools of theology—Shīrāzī and Juwaynī were both victims of it at different times in their lives; but the same cannot be said of the law.[95] The law benefitted from an epistemology of uncertainty that theology did not. Jurists were adamant that rationalizable theological matters like the existence of God or the createdness of the world were not amenable to multiple answers and they were therefore harsh in the way they spoke about their theological opponents. Shīrāzī even calls them "prevaricators and liars" (*mubāhit wa kādhib*) and Ibn Fūrak (d. 406/1015) notes that the point of the entering in theological disputations with them is to guide the misguided.[96] In contrast, they acknowledged that the proofs of the vast majority of the law were too uncertain for any jurist to feel confident that his opponent's position was mistaken. Some even adopted the

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[92] Al-Baghdādī, *Kitāb al-Faqīh wa'l-Mutafaqqih*, 2:47.

[93] Al-Bājī, *al-Minhāj fī Tartīb al-Ḥijāj*, 17–19; Ibn ʿAqīl, *Kitāb al-Jadal*, 245–46.

[94] Kraemer, *Humanism in the Renaissance of Islam*, 30.

[95] Al-Subkī, *Ṭabaqāt al-Shāfiʿiyya al-Kubrā*, 5:176; al-Subkī, *Ṭabaqāt al-Shāfiʿiyya al-Kubrā*, 4:235.

[96] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Lumaʿ fī Uṣūl al-Fiqh*, 1044; Ibn Fūrak, *Mujarrad Maqālāt al-Shaykh Abī al-Ḥasan al-Ashʿarī*, 293.

view that each jurist was correct and that the point of the disputation was to sharpen each participant's arguments.[97] However much a given jurist might be sure of his position—and Ghazālī informs us that many were[98]—a school's official line made it difficult to publically tout one's position without allowing it to be continuously subjected to critique or to reject the merits of another's position without first entertaining it.

The disputation linked critical reflection to religion in ways that might appear on the surface counter-intuitive to our modern world where religion is associated with dogma and secularism with critique.[99] Religion served as the motive for engaging in disputation insofar as doing so could help one draw nearer to God and discover His law. Religion also served as a prerequisite to finding truth. Truth was most likely to reveal itself when the interlocutors had cultivated a sense of sincerity towards God. The relationship between sincerity and truth is clear in a statement of the famed leader of the Shāfi'īs of Baghdad, Abū Hāmid al-Isfarāyinī, explicitly admonishing his student not to write down his disputations out of fear that he lacked sincerity in debating:

> Do not comment too much on what you hear from me in the gathering of disputation. For verily speech within it is subject to the debater's duplicity, his desire to find fault in his opponent, to refute and to beat him. Thus we do not always speak sincerely for God's sake. If that was truly what we sought after we would be quicker to silence than to lengthening our speech. And though we often through disputation invite God's anger, we nonetheless seek through it His mercy.[100]

Al-Isfarāyinī here acknowledges that the truth of the conclusions of the disputation were inextricable from sincere intentions. He feared his intentions were compromised and therefore

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[97] Al-Jaṣṣās, *Uṣūl al-Jaṣṣāṣ al-Musammā al-Fuṣūl fī al-Uṣūl*, 2:435-40; al-Juwaynī, *al-Talkhīs fī uṣūl al-fiqh*, 3:342-5.

[98] Al-Ghazālī, *al-Mustaṣfā fī 'Ilm al-Uṣūl*, 4:70–71.

[99] Brown et al., *Is Critique Secular? Blasphemy, Injury, and Free Speech*.

[100] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:62. "*Lā tu'alliq kathīran mimmā tasma' minnī fī majālis al-jadal fa-inna al-kalām yajrī fīhā 'alā khatl al-khaṣm, wa-mughālaṭatihi, wa-daf'ihi, wa-mughālabatihi, fa-lasnā natakallam li-wajhi allāh khāliṣan, wa-law aradnā dhālika la-kāna khuṭāanā ilā al-ṣamt asra' min taṭāwulinā fī al-kalām, wa-in kunnā fī kathīr min hadhā nubawwi'u bi-ghaḍab illāh ta'lā, fa-innā ma'a dhalika naṭma' fī raḥmat illāh*."

thought it best not to record his disputation. This relationship between truth and sincerity becomes even clearer when his student narrating the story adds that al-Isfarāyinī's desire for God's mercy "was likely fulfilled" because the great benefits of the disputation, such as "the establishment of authoritative proofs (*iqāmat al-ḥujja*) and the spread of knowledge" is "diminished by insincerity" (*yuqillu 'indahu qillat al-khulūṣ*). The recognition among jurists of the soundness of Isfarāyinī's arguments was testament to his sincerity. As Ibn 'Aqīl explains, only a sincere subject who avoided anger and pride would refrain from intimidating an opponent or use specious arguments to win.[101]

Piety did not preclude the disputation from simultaneously being a highly political act. For one, the emergence of the disputation as a pious act depended on the jurist wrenching the control of the disputation from the courts of rulers. Manuals of *jadal* specifically condemn disputations in rulers' courts: they express the view that rulers are seldom impartial in wanting to find truth and that one party would likely feel intimidated to speak freely.[102] Bājī's description of the gathering of jurists in the mosque shows that they were on their home turf.[103] He explicitly notes that all those who had some sort of affiliation with the community of knowledge were present. None of this precludes that jurists like Shīrāzī maintained good relations with the ruling class. He is characterized as having been held in high esteem by the Caliph. Moreover, his disputations with Juwaynī transpired while on a political mission. Nonetheless, the two jurists' disputation was not organized by the rulers of Nishapur where the disputation took place. Rather, they came out of the fact that Juwaynī was playing host to Shīrāzī. In sum, the juristic disputation shifted the power of critical speech on the law away from the rulers' *majlis,* where intellectual engagement was a pastime little concerned with religious devotion.[104]

The disputation also solidified the boundaries between the community of jurists and the lay community of Muslims. The jurists' saw themselves as a special class that fulfilled a communal

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[101] Ibn 'Aqīl, *Kitāb al-Jadal*, 244-246. Ibn 'Aqīl notes that it is possible to convince someone of one's position through authoritative argument, specious reasoning, or through intimidation.

[102] See for examples, Ibid.; Al-Bājī, *al-Minhāj fī Tartīb al-Ḥijāj*; al-Baghdādī, *Kitāb al-Faqīh wa'l-Mutafaqqih*.

[103] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:245.

[104] Ghazālī for instance speaks of the wine that was prominent during disputations at the rulers' court, see reference in Lazarus-Yafeh, "Preface," 10. See also Makdisi, *The Rise of Colleges*.

obligation in debating God's law. Shīrāzī notes that not everyone has the time to learn the law: civilization depends on an economic division of labour between those that focus on learning the law (*al-khāṣṣ*) and those that focus on producing the material needs of society (*al-ʻāmm*). The jurists' role was to guide lay-Muslims when they had a query on the law. Daphna Ephrat notes that the 11th century jurists of Baghdad saw themselves as responsible for shaping the identity of the Muslim community in response to political instability.[105] The upshot was that jurists arrogated to themselves the right to speak on behalf of lay Muslims. Disputations did not only deal with textual hermeneutics but also expressed empirical assumptions about lay Muslims' desires and pains. This was particularly evident in the case of women. The jurists felt little reticence to speak about women's sexuality, intelligence, or interests without ever including them in the debate. As Iris Young reminds us, a public sphere is never free of power relations between privileged speakers who are heard and those whose voices simply do not count.[106] The classical disputation was a practice of critical reflection premised upon excluding certain voices from the debate. This fact had a significant impact on the development of legal doctrine.[107]

Finally, the disputation crystallized hierarchies and divisions between jurists. The disputation's emergence in the early 10th century was an organic outgrowth of attempts to defend the school of law from outside detractors. Ibn Surayj, for instance, consistently upheld Shāfiʻī doctrine in his numerous debates with Ibn Dāwūd al-Ẓāhirī (d. 297/910).[108] This fact did not change as the disputation progressed. In particular, sources speak of the rivalry between the Shāfiʻīs and the Ḥanafīs,[109] the two schools that most frequently engaged each other in disputation in Shīrāzī's time. Bājī speaks of the defense of school doctrine as a responsibility of the heads of each respective school of law, which they could delegate to their students. The disputation's ability to draw lines between the schools of law suggest that what shaped the school of law was not only doctrine, as Hallaq has maintained, or the jurists' training, as Melchert has theorized, but also

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[105] Ephrat, *A Learned Society in a Period of Transition*.

[106] Young, "Impartiality and the Civic Public."

[107] Kecia Ali notes how men's privileged position as juristic interpreters of the law created a gendered interpretation of Islamic law: Ali, *Marriage and Slavery in Early Islam*, 21–22.

[108] Al-Subkī, *Ṭabaqāt al-Shāfiʻiyya al-Kubrā*, 3:23–24.

[109] Al-Subkī, *Ṭabaqāt al-Shāfiʻiyya al-Kubrā*, 4:222, 5:122; al-Ghazālī, *Iḥyā' ʻUlūm Al-Dīn*, 1:42.

their argumentative other.[110] Moreover, the disputation cemented the status and rank of jurists within the same school of law. Manuals of *jadal* typically assert that jurists should only debate another jurist of equal rank. This is borne out in Bājī's description of one of his transcribed disputations: he shows that it would be improper for the head of the Shāfi'īs to debate anyone other than the head of the Ḥanafīs. Manuals advocate that the jurist of lesser rank humbly attempt to learn from his senior rather than debate him.

In sum, the performative nature of the disputation helped trace and form the social boundaries of the juristic community. It trained jurists to adopt a critical disposition in which they continuously debated with each other for God's sake. Members of this debating community were expected to conform to a certain set of ethical rules that shaped their attitudes towards each other and attempted to inculcate a sincere search for truth. This community was characterized by an openness to submit its members' ideas to ruthless critique and to revisit and debate arguments that appeared settled long ago. Its members' attempts to justify school doctrine divided them along school lines and hierarchies even as they committed to bracketing the authority of school doctrine momentarily in deference to argument alone. Outside of the community of debate stood the masses whose guidance and social organization offered an ideological justification for the formation of the juristic community. The disputation gathered the members of the community of debate and divided them from other parties within the Muslim community.

The Disputation and the Evolution of Islamic Legal Tradition

The Formation of an Aesthetic Tradition

The disputation invites reconsideration of the historical development of substantive law. Examination of Shīrāzī's disputations highlights the significance of the disputation on the development of substantive legal doctrine of the Shāfi'ī school of law. The disputation created the arena for jurists to test the merits of their schools' legal positions. The testing of an argument differed greatly between inter- and intra-*madhhab* disputations. In the former, the objections

[110] Hallaq, *The Origins and Evolution of Islamic Law*; Melchert, *The Formation of the Sunni Schools of Law*.

levelled criticized the beliefs of an opposing school of law, while in the latter the argument for a position was tested from standards internal to one's own school of law. Thus Dāmaghānī critiques Shīrāzī by invoking standard beliefs and doctrines in the Ḥanafī school and Juwaynī does so by invoking those of the Shāfi'ī school.

The ability to test out arguments for school doctrines had three consequences on the individual jurist's reasoning on the law. The first was to allow him to find arguments for the case under review that he felt was most compelling. These arguments might serve to strengthen and refine the proofs buttressing school doctrine. Or, when the case was one on which the Shāfi'īs disagreed, choosing the best argument could help him determine the position he felt was strongest (the process known as *tarjīḥ*). The second was to permit him to verify, confirm, or modify what he thought was the *ratio legis* (*'illa*) of the law. The process of critique was indispensable (if also insufficient) in guaranteeing that one had found the correct '*illa,* and discovering a case's *'illa* was tantamount to uncovering a reality hidden behind a more superficial account of the law. The jurist who knew the *'illa* knew the real object of God's legislation. Moreover, at a practical level, establishing an *'illa* gave a jurist a full view of when the legal ruling is to be applied.[111] Finally, the disputation allowed the jurist to ensure consistency between his legal positions. His opponents often challenged him by showing the allegedly internal contradictions between his line of reasoning in the disputation and those arguments buttressing his other substantive legal or theoretical positions. The jurist's attempts to show that the claim of contradiction was illusory sometimes meant changing his legal position or the arguments buttressing it so as to ensure consistency with his position in the disputation.

The practice of disputation was able to impact the individual jurist's legal thinking in these ways precisely because it was sheltered from the immediate exigencies of life. The disputation did not take place in order to determine a legal case before a court of law or to answer a petitioner asking for a legal edict. From all the available evidence, the chosen topic was haphazard and up to the discretion of the questioner. This play-like freedom from necessity allowed the jurists to explore

[111] Here one is reminded of Rumee Ahmed's points that even when two jurists subscribed to the same legal ruling, the way each argues for that law will affect its application. Ahmed, *Narratives of Islamic Legal Theory*, 12.

the law. The unconstrained nature of the disputation permitted the jurists to precipitate the intellectual development of their tradition. [112]

Alasdair MacIntyre points out that each intellectual tradition needs to grow and refine itself with time, as each generation notices problems that escaped its predecessors. [113] New social circumstances, outside critics, or new questions hitherto unasked challenge a tradition's viability. This need leads MacIntyre to claim that a tradition "in good order" will always involve debate and argument among its practitioners. MacIntyre calls a tradition "an argument extended through time," in which "certain fundamental agreements are defined and redefined."[114] Indeed, at its limit, the failure to respond to intellectual challenges can lead a tradition into a state of crisis where its survival is in jeopardy. However, the disputation made it possible for jurists of a school of law to anticipate the types of intellectual problems that MacIntyre identifies before and *irrespective of whether* they became actual challenges to their tradition. The Ḥanafīs' objections were leveled in a safe space where they did not actually occasion a threat to the tradition. Thus the objections of the Ḥanafīs and those of fellow Shāfi'īs permitted a jurist like Shīrāzī to detect the weak points of his tradition. If a tradition is "an argument extended through time," then the disputation collapsed time. In so doing, the disputation facilitated the jurist's development, systematization, and elaboration of his legal tradition.

Following MacIntyre, one could say that all traditions are discursive or rational. However, the more a tradition creates institutions and practices to facilitate and encourage debate, the more this discursive tradition is produced in abstraction from ground-level concerns. Members of such a tradition will tend to rigorously refine arguments for their own sake. Thus, this rigour becomes a good worth pursuing in itself, and is the product of the type of creative imagination that Collingwood associates with aesthetics. [115] I use aesthetics here to refer both to the attitude of members of this discursive tradition and the outcome their reasoning produces. The rigour and systematicity found in their arguments contrast those of polemics, apologetics, or practical

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[112] MacIntyre, *Whose Justice? Which Rationality?* 12.

[113] See MacIntyre, *After Virtue,* 222; MacIntyre, *Whose Justice? Which Rationality?*

[114] MacIntyre, *Whose Justice? Which Rationality?* 12.

[115] R.G. Collingwood, *The Principles of Art*, 125 ;See also Khaled Abou El Fadl, *The Search for Beauty in Islam, xviii* where he speaks of an ethos of knowledge of the jurists.

guidance. Rather, it bears more likeness to the kind of argumentation oftentimes exemplified in modern universities – performed in an ivory tower, as an end in itself. Such an aesthetic dimension characterized the 11th century legal tradition as well. Indeed, Shirazi himself tacitly admits that most activities of the legal community were superfluous to the needs of lay Muslims.[116] He alongside other jurists thought that the responsibility of the juristic community was fulfilled so long as lay Muslims of a locale could consult a single jurist for their legal guidance. In fact, it was the superfluity of debate that led Ghazālī to critique the jurists' hairsplitting.[117] The disputation did not fulfill a particular need; rather Bājī depicts the disputation as an occasion for a community of debate to gather in a pious quest to find God's law. Because this law could never be determined with conclusivity, each jurist used his creative faculties in attempting to come up with the most rigorous and internally coherent account of his legal school's doctrine. One could equate this quest with beautifying God's law.

What the study of the disputation shows is the need to pay attention to the pressures under which a tradition develops: the more a tradition is organized around open debate, the easier it will be for it to countenance its objections and deficiencies before they actually pose themselves as a threat to the survival of the tradition. This insight is all the more important because of the prominence gained by the concept of tradition within Islamic studies.[118] Talal Asad's 1986 lecture "The Idea of an Anthropology of Islam" encouraged anthropologists to study Islam as a discursive tradition in line with MacIntyre's own theorization of the concept. Asad suggested that Muslims of each generation draw on the past to argue amongst themselves about what their tradition should be or become. Moreover, Asad contended that Muslims, scholarly and lay people alike, seek to bring coherence to their religious tradition through their formal and informal discussions. Anthropologists and other academics have made great use of Asad's suggestion. Among the merits of many of these studies is their attentiveness to the social conditions under which argument takes place. For instance, Gregory Starett has examined how the schooling system in Egypt is a site for the contestation and development of tradition; Saba Mahmood has highlighted

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[116] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 1035.

[117] See Adanali, "Dialectical Methodology and Its Critique: al-Ghazālī as a Case Study."

[118] Asad, *The Idea of an Anthropology of Islam*; Mahmood, *The Politics of Piety*; Starrett, *Putting Islam to Work*; Deeb, *An Enchanted Modern*; Hirschkind, *The Ethical Soundscape*.

how literacy has shaped the pedagogical exchanges between teachers and students in the mosque movement of Cairo; and Charles Hirschkind has examined how the emergence of the new media of cassette-tapes creates different conditions of subject-formation and debate in the Egyptian public sphere. My attention in this study to the historical context of the legal schools and to the format of the disputation owes much to this approach. However, my focus on the aesthetic dimension of tradition in the 11th century suggests the need for scholars to also think about the consequences of the urgency or leisure with which Muslims have had to historically grapple with their tradition. Jurists engaging in disputations momentarily bracketed or suspended the authority of their tradition because they could. In contrast, modern Muslims have typically laboured under the pressures of secularization and conditions of postcoloniality, which, as Hamid Dabashi explains, forces Muslims to ever respond to the "self-universalizing tropes of European metaphysics."[119]

The Dialogism of *Uṣūl al-fiqh*

The analysis of the jurists' arguments sheds light on the use of arguments of *uṣūl al-fiqh* in the development of the law. *Uṣūl al-fiqh*'s relationship to law has divided historians for some time now. Hallaq, for instance, sees *uṣūl al-fiqh* as a methodology for the derivation of the law.[120] Others have taken issue with this view by pointing out that most legal doctrines were already formulated by the time mature books of legal theory appeared in the 4th/10th century.[121] They have thus seen *uṣūl al-fiqh* as a post-hoc justification of the law. Sherman Jackson and David Vishanoff have even contended that *uṣūl al-fiqh* is too indeterminate to serve as anything more than a rhetorical device to justify the positions of jurists whose real reasons for advocating an opinion lie elsewhere.[122]

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[119] Asad, *Formations of the Secular*; Dabashi, *The Arab Spring*, xxi.

[120] Hallaq, *A History of Islamic Legal Theories*; Hallaq, "Was al-Shafi'i the Master Architect of Islamic Jurisprudence?"

[121] Calder, "al-Nawawi's Typology of Muftis and Its Significance for a General Theory of Islamic Law"; Ahmed, *Narratives of Islamic Legal Theory*, 2012.

[122] Vishanoff, *The Formation of Islamic Hermeneutics,* 4; Jackson, "Fiction and Formalism."

Neither view is quite correct because both overlook the dialogical nature of the law exemplified in the disputation. First, the disputation shows that *uṣūl al-fiqh* texts could not serve as the methodology for legal reasoning because reasoning on the law did not begin from the ground up. Rather it followed what George Makdisi identifies as the *sic-et-non* method, where a jurist posited a plausible argument and waited for other jurists to level arguments against it. This is the reason that books of *jadal* list the types of proofs of the law without offering justifications for them.[123] Their main focus is on the possible objections that one could level against a fellow jurist and the means of overcoming such objections. This is also the reason why Shīrāzī points out that some jurists considered books of *uṣūl al-fiqh* to be of little use to legal argumentation. He presents the argument of one jurist, stating: "we know the specific proofs in matters of *khilāf* such that we have no need to know its place within a general understanding of the proofs of law, so it is incumbent upon us to limit ourselves to this and to refrain from the knowledge of the general proofs of the law, since there is no benefit to it."[124] It is also the reason that Qāḍī Abū Ya'lā (d. 458/1064) dismisses a jurist who learns to argue about the law on the basis of *uṣūl al-fiqh* texts rather than by practical experience of reasoning on issues of substantive law.[125] For Shīrāzī, the science of *uṣūl al-fiqh* had first and foremost the purpose of ensuring that the jurist was not falling into *taqlīd*. He explains that a jurist might very well be correct that a certain type of proof or hermeneutic principle imparts an obligation. However, if he does not know why, then he cannot claim to truly know the proofs of the law. Shīrāzī also adds that a jurist at an impasse in a difficult case would be better positioned to approach it if he knows *uṣūl al-fiqh*.

However, the disputation also forces us to reject the claim that the proofs of the law listed in books of *uṣūl al-fiqh* and those of *jadal* were a mere cover-up to justify the real historical motives for jurists' rulings. The disputation helps us understand the problem with Jackson and Vishanoff's claim that *uṣūl al-fiqh* could not determine the law because it could be used to shore up a multiplicity of positions. This view insufficiently coutenances the possibility that there exists a position between deterministic reasoning and a free for all. This oversight stems from the

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[123] Fīrūzābādī al-Shīrāzī, *Kitāb al-Ma'ūna fī al-Jadal*.

[124] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 161–62. "*Fa-in qīla lanā: idhā kunnā qad 'arafnā al-adilla 'alā al-tafṣīl fī masā'il al-khilāf fa-lā ḥāja lanā ilā ma'rifatihā 'alā al-ijmāl, fa-wajaba an naktafī bi-dhalika 'an ma'rifatihā 'alā ijmāl idh lā fā'ida fīhi."*

[125] Ibn al-Farrā', *al-'Udda fī Uṣūl al-Fiqh*, 71.

assumption that legal reasoning occurred in isolation and that each jurist could use *uṣūl al-fiqh* arguments without opposition. The dialogical nature of legal reasoning, exemplified in the disputation, suggests that a jurist used *uṣūl al-fiqh* as a set of analytical tools from which he could draw in his encounter with other jurists. His ability to champion one view over another depended very much on overcoming the objections of other jurists.

The Development of the *Madhhab*

The reigning assumption in the scholarship is that the disputation was a means to weed out the pluralism of the law and, in so doing, to construct the authoritative doctrines of the school. Makdisi and Hallaq both articulate this position, and no doubt they were influenced by the view of some jurists (like Ibn ʻAqīl) that the very definition of the disputation (*jadal*) was the attempt to make an opponent adopt one's own opinion. This assumption likely also derives from the widespread view in scholarship that schools of law in the 11th century sought to address the loose ends in their doctrines by elevating one divergent opinion over another. For instance, Shāfiʻīs are seen as attempting to establish which of two contradictory statements of their school eponym is most sound, or which views of the early jurists of the school should be primary over the others.

In reality, the picture was more complicated than this. The disputation served to sustain the plurality of legal perspectives as much as it did to reduce it. The jurists themselves were divided as to whether the disputation could or even should convince an opponent to change his view on the law. They all acknowledged the proofs of the law were too subtle to determine the truth of God's law with any certainty. This uncertainty even led Shīrāzī to emphasize the validity of a jurist remaining agnostic about the merits of contradictory positions on a single case. In fact, Shāfiʻī manuals of the time are in no haste to conclude which of two or more positions within their school of law is most authoritative. Many jurists celebrated the possibility that the disputation could rehabilitate marginalized legal opinions. Jaṣṣās's early text of *uṣūl al-fiqh* notes that the disputation allowed jurists who dismissed the opinion of another to see the position's merits. Likewise, Ghazālī thought that the disputation became an obligation upon the jurist accused of maintaining his position out of obstinacy rather than legitimate proofs.

The effects of the disputation on school doctrine were filtered through fame and institutional authority. The legal positions that received the most attention within a school of law were those that were disseminated by famous teachers. Thus Subkī tells us that the Shāfiʿīs of Baghdad learned their *madhhab* through Shīrāzī's *Tanbīh* and his rival Abū Naṣr Ibn Ṣabbāgh's *Shāmil*. The disputation might have helped a jurist like Shīrāzī construct his doctrines, but it was his place within the educational system that ensured that these views would get a hearing. This is the reason that different doctrines developed in different regional branches of the Shāfiʿī school. Moreover, a jurist's fame might very well depend upon a political appointment. There is little doubt that Shīrāzī's appointment to the Niẓāmiyya helped secure his legacy in shaping and transmitting the authoritative doctrines of the Shāfiʿī school.

In sum, the disputation played an immense role in enriching the legal thought of a jurist and proliferating legal arguments and positions, but the actual opinion that ended up becoming school doctrine depended on other factors, such as local hierarchies within the system of education.

Outline of Chapters

Part I of the dissertation examines the historical emergence of the practice of disputation in the classical period. Chapter 1 presents the disputation as a pietistic form of critical reflection aimed at fulfilling the jurist's *ijtihād* on the law. The chapter highlights the rules, conventions, and standard arguments of the disputation. It shows how the jurists called for a series of ethical injunctions to ensure their intentions were sincerely aimed at pleasing God and finding His law. Moreover, it highlights that the exclusion of lay Muslims was a structural precondition of their disputation; because jurists saw the purpose of their *ijtihād* as one of guiding lay Muslims, they arrogated to themselves the right to speak on their behalf. For example, the exclusion of women's voices from the outcome of the debate is particularly noteworthy when one considers the topic of the disputation under review in the chapter: Shīrāzī and Dāmaghānī examine the wife's choice to dissolve her marriage in a situation of financial neglect. The chapter demonstrates some of the ways that debate was circumscribed and delimited.

Chapter 2 presents a historical overview of the emergence of the disputation in early 10th century Baghdad. It shows how the classical form of the disputation emerged from the early unstructured polemical debates between jurists of the 8th and 9th centuries. The prevalence of debate at rulers' courts and the translation of Aristotle's texts on dialectic facilitated the emergence of the disputation. Ibn Surayj and his Shāfi'ī circle were the first to theorize the juristic disputation systematically and to give it the form and structure that would endure in the classical period.[126] The 10th century schools of law used the disputation to train their jurists and to defend their doctrines against outsiders. The Shāfi'īs and Ḥanafīs became regular debaters. The jurists' disputation was nurtured by their epistemological debates about the uncertainty of the law. The jurists came to agree that the disputation could serve to enrich their legal thought by allowing them to see all the facets of a legal case. This acknowledgement that the disputation could help them better reason on the law distinguished legal disputation from its theological counterpart and helps explain the openness of jurists to disagreements in the law as compared to the conflict that theological disagreements could engender.

Part II turns to examining the effects of the disputation on the development of the legal tradition. Chapter 3 examines an inter-*madhhab* disputation between Shīrāzī and Dāmaghānī on the topic of the payment of the accrued, but unpaid *jizya* (poll-tax) of a *dhimmī* who converts to Islam. Shīrāzī attempts to defend his school doctrine and in so doing revisits, refines, and revises the arguments and doctrines of his school of law. The chapter shows how the disputation becomes an occasion for Shīrāzī to test his legal doctrines free from the immediate practical concerns of the judge's court. This allows Shīrāzī to work on creating rigour and consistency in his legal positions.

Chapter 4 presents an intra-*madhhab* disputation between Shīrāzī and Juwaynī on the topic of coerced marriage. The disputation shows how disputations between members of the same school of law permitted the jurists to test their school doctrines from the internal standards of their school of law. Juwaynī does his utmost to level Shāfi'ī-based objections to his own school's doctrine that a father can coerce his virgin daughter into marriage against her consent. The disputation reveals the dialogism upon which the use of *uṣūl al-fiqh* arguments depended.

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[126] I make no claims in this dissertation about the nature or continuation of the practice of disputation beyond the 13th century. The questions relating to changes and continuities in the practice of disputation need their own study.

Finally, Chapter 5 examines the disputation's impact on an unresolved issue of school doctrine by analyzing Shīrāzī and Juwaynī's second disputation on the topic of a prayer performed in a mistaken direction. The Shāfiʿīs were divided as to whether a person who attempted to locate the correct prayer direction, and then discovered with certainty that he had made a mistake, needed to repeat his prayer. The roots of the division went all the way back to al-Shāfiʿī himself, for he had two statements on the subject which he offered at different times in his life. What is more, each jurist had inherited a different set of arguments from their respective regional branches of their Shāfiʿī school of law. Despite this, neither jurist ended up committing to a position within their works of substantive law. The disputation thus becomes an occasion to think about the historical factors that came to bear on determining authoritative school doctrines. Examination of the disputation alongside Shīrāzī's statements in the *Sharḥ* suggests that jurists were in no haste to finalize school doctrine nor were they particularly troubled by the regional variations within their school of law.

PART I: THE EMERGENCE OF PIOUS CRITICAL DEBATE

Chapter 1

1 The *Munāẓara*: Critique, Piety, and Power in 11th Century Islamic Law

The jurists' 11th century practice of disputation was part of a quest for God's law. As George Makdisi points out, jurists debated the vastness of contentious issues between the legal schools (*masā'il al-khilāf*) face-to-face and oftentimes in a public setting.[1] These topics included matters of religious devotion (*'ibāda*), trade, marriage and divorce, criminal punishments, and state administration among others. Various texts of *jadal* show that this process of face-to-face debate was supposed to take place at the end of the jurist's *ijtihad*, once he had examined the proofs relevant to a case and believed he knew which of these proof(s) had merit.[2] Texts of *jadal* identify the process of this debate: one participant (known as the questioner, or, *sā'il*) asked the other his position on a legal topic of his choice. He had full freedom in deciding which topic to initiate, his only limitation being that no prior consensus (*ijmā'*) among jurists existed on the legal matter. The other debater (known as the respondent or *mujīb*) would then state his position. The *sā'il* would proceed by asking for proof and the *mujīb* would offer him one. The crux of their exchange would then revolve around the questioner's attempts to level as many objections to this proof as possible and the respondent's attempt to overcome these objections. The *sā'il* did not have to prove a thesis; rather, he only needed to show the invalidity of his opponent's proof. Books of *jadal* do not typically list the number of exchanges of each participant. However, records of disputations suggest that the *sā'il* had the right to two or three rounds of objections and the respondent to two or three rounds of rebuttals to these objections. The respondent tended to have the last word if he succeeded in carrying through the disputation in the defence of his position. A respondent who failed to defend his position, or a questioner who failed to press his interlocutor and sustain his objections was termed *munqaṭi'* (defeated).[3]

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[1] Makdisi, "The Scholastic Method in Medieval Education," 650.

[2] Al-Baghdādī, *Kitāb al-Faqīh wa'l-Mutafaqqih*, 2:56; al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, 2:175.

[3] The term *munqaṭi'an* literally means "cut off," as in, one of the two jurists were "cut off" from completing the expected defense or critique typical of the disputation. See Miller for more details on what constituted defeat, Islamic Disputation Theory, 39.

The chapter serves to highlight the effects of the performative nature of the disputation on the subjectivities, practices, and relations of power of 11th century Eastern (i.e. Iraq and Persia) Muslim lands. The chapter shows how the jurists' practice of critical debate intertwined piety with power. It does so by examining Abū al-Walīd al-Bājī's record of a disputation between Abū Isḥāq al-Shīrāzī and the Ḥanafī jurist Abū 'Abd Allāh al-Dāmaghānī which transpired sometime between 429-432/1038-1041. Bājī presents the disputation in a way that shows its spiritual value to the community of jurists. The disputation was an occasion to draw closer to God by learning His law; it was also a practice that bestowed blessings upon its audience. Critical debate was an act of worship alongside prayer and Qur'anic recitation. The ethics of debate partly aimed to fashion a juristic subject sincerely critiquing to find truth for the sake of God. The pedagogy of the disputation exceeded a focus on dispassionate or rational argumentation and gave special attention to the embodied nature of critique.

But the disputation was also an act of worship reserved exclusively for the juristic class and it cemented boundaries of authority within 11th century Muslim society. The disputation entrenched school hierarchies by delimiting debate to jurists of equal rank and it affirmed school boundaries by serving to defend school doctrine from outside detractors. More importantly, when disputations were in public spaces like mosques, they exemplified and reinscribed the special role of jurists as privileged speakers on the law and custodians charged with guiding and shaping the Muslim community. The jurists did not only or even primarily seek out God's law for themselves but for the alleged benefit and guidance of lay Muslims. The topic of the disputation at hand illustrates this: the wife's *khiyār* (her optionality, or choice) to dissolve her marriage when her husband fails to provide financial maintenance. The jurists throughout the disputation arrogate to themselves the power to speak on behalf of lay Muslims and to assert claims about their purported wants and interests. The exclusion of lay Muslims from the debate, and particularly of Muslim women's ability to assert her own motivations and desires, is never questioned.

Contemporary political theorists like Iris Young, Seila Benhabib, and James Tully have alerted that all debate is structured by relations of power.[4] In particular, feminist and critical race studies have made us attuned to the privileging of some voices over others in even the allegedly freest and most open of debates.[5] The 11th century juristic debate legitimated its exclusions by appeal to objective legal expertise: it was the criteria for being a *mujtahid* or *muftī*, i.e., familiarity with legal source-texts and the ways to derive law from them, that acted to legitimate who could participate in debate. This helps explain why the lack of women's voices in a disputation about their rights as wives could be overlooked. Yet as the following analysis shows, the jurists exceeded the bounds of their own ideology of exclusion. They arrogated to themselves the privileged position not only to examine the proofs of the law but to speak to empirical concerns about women's pains and interests—concerns that could have truly been known only by including women in the debate.

1.1 Part I: Piety and Critique

1.1.1 The Setting of Shīrāzī and Dāmaghanī's Disputation: The Devotional Dimension of the Disputation

Bājī's rich description of the setting of Shīrāzī's and Dāmaghānī's disputation clearly reveals the devotional ideal at the heart of the disputation. He begins by giving us background to understand the catalyst for the event:

> The custom in Baghdad was that whoever was afflicted by the death of a cherished one would spend days in his neighbourhood mosque, gathering with his neighbours and brethren in faith. After days had passed, and they had offered their condolences, they invited him to return to his normal life and routine. The days he spent in the mosque receiving the condolences of his brethren in

[4] Tully, *Public Philosophy in a New Key*; Fraser, "Rethinking the Public Sphere: A Contribution to Actually Existing Democracy"; Young, "Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory."

[5] Ayesha Chaudhry puts it well when she says: "There is no aspect of Islam that is gender-neutral," *Domestic Violence and the Islamic Tradition*, 1.

> faith and his neighbours would typically only be interrupted by the recitation of the Qur'an and by juristic disputations on a given topic.[6]

Bājī attempts here to explain the "custom in Baghdad", ie., the practices he had witnessed, during his travels to Muslims of the West (Spain and North Africa). The practice of disputation during such times is curious insofar as death and mourning in the Islamic tradition is occasion to remember God and one's ultimate meeting with him in the afterlife. A *ḥadīth* enjoins the rememberance of death because death is the end or "destroyer" of worldly passions and pleasures.[7] In contrast, debate is oftentimes seen in the Qur'an and *ḥadīth* in negative terms, the Prophet saying for instance: "Leave debate even if you are right."[8] One might thus expect that disagreement and debate would be put aside in a moment of condolence-giving rather than normalized as custom. Perhaps this is why Bājī emphasizes the devotional aspect of the disputation. His juxtaposition of disputations with the recitation of the Qur'an informs his reader both that the jurists of Baghdad took death seriously and that legal disputations, like reading the Qur'an, was a means for them to remember God in times of difficulty.

Bājī continues by explaining that on this particular occasion, the wife of the head of the Shāfi'īs of Baghdad, Qāḍī Abū Ṭayyib al-Ṭabarī, had died. Ṭabarī was therefore in the mosque grieving, mourning, reciting Qur'an, and receiving condolences. His status and reputation as a great scholar—Bājī calls him "the shaykh of the jurists at that time in Baghdad"[9]—meant that all jurists of Baghdad knew of his loss and felt compelled to pay their respects. Bājī notes "that practically everyone belonging to the community of knowledge was in attendance." Among

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[6] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:245. "*Qāla Abū al-Walīd al-Bājī al-Mālikī raḥimahu Allāh wa-qad shahida hādhihī al-munāẓara wa-ḥaḍarahā: al-'āda bi-Baghdād anna man uṣība bi-wafāt aḥad mimman yukarram 'alayhi qa'ada ayyāman fī masjid rabaḍihi yujālisuhu fīhā jīrānuhu wa-ikhwānuhu fa-idhā maḍat ayyām 'azzūhu wa-'azamū 'alayhi fī al-tasallī wa'l-'awda 'ilā 'adātihi min taṣarrufihi fa-tilka al-ayyām al-latī yaq'ud fīhā fī masjidihi li'l-'azā' ma'a ikhwānihi wa-jirānihi lā tuqṭa' fī al-aghlab illā bi-qira'āt al-qur'ān aw-bi-munāẓarat al-fuqaha' fi al-masā'il."*

[7] Al-Ghazzālī, *The Remeberance of Death and the Afterlife*; Haj, *Reconfiguring Islamic Tradition*, 38. See Haj's discussion of the benefits of remembering death as it relates to the modern controversy over grave visitation.

[8] Al-Juwaynī, *al-Kāfiya fī al-Jadal,* 77. "*Da' al-mirā' wa-in kunta muḥiqqan.*" Juwaynī also quotes the Qur'an [43:8] which takes the disbelievers to task for their desire to quarrel with the Prophet and his teachings, 43.

[9] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 3:245. "*wa-huwa shaykh al-fuqahā' fī dhālika al-waqt bi-Baghdād wa-kabīrihim*."

those present was the head of the rival Ḥanafī school of law, Abū ʿAbd Allāh al-Ṣaymarī (d. 436/1045).

Bājī intimates that neither of them had engaged in disputations for several years. He explains that the two heads of the school had "delegated the responsibility of engaging in disputations to their students."[10] This description goes against the impression Makdisi conveys that disputations were a type of gladiator sport in which the head (*raʾīs*) of the school emerged. In constrast, Bājī's description suggests that being the head of the school instead confered the right and responsibility to speak on behalf of the school and to defend it against outsiders. Part of the reason the two had not engaged in disputations for years was that a less-knowledgeable jurist was not to engage in disputations with someone more knowledgeable than he. Proper decorum would mandate that an exchange between jurists of different ranks be one of *taʿlīm* (instruction) rather than disputation. This is the reason that Bājī thinks relevant to add that Ṣaymarī was "the only one who equaled Abū Ṭayyib in knowledge, seniority (*shaykhūkha*), and rank (*taqaddum*)."[11] The students' hope to see the two heads of their school engage in a disputation was made possible by this unique circumstance of condolence-giving. The religious community in attendance could not resist but to beseech their masters to grace them with a disputation.

Bājī's description of the audience's request begins to elucidate why the disputation was an act of devotion on par with Qur'anic recitation. The students implore their masters by characterizing the potential disputation as an act of charity to its audience (*ṣadaqa*). Those attending would be "beautified" (*yutajammal*) by hearing, "memorizing (*hifẓihā*)," "transmitting (*naqlihā*) and "narrating (*riwāyatihā*)" the words of their masters. Bājī here highlights that it was the process of learning and searching for God's law (*ijtihād*) that made the disputation an act of devotion. In the absence of Prophetic inspiration (*waḥī*), God had provided humans with proofs or clues (*adilla* or *amāra*) for finding His law but he left it up to human reason to interpret these proofs. The harder the jurist needed to work to interpret these proofs the more he was rewarded and the closer he drew to God. Shīrāzī gestures towards this in his *Sharḥ* where he points out the wisdom behind God's choice to force his community to search for His law: "they strive with diligence to

[10] Ibid., 3:246. "*kānā qad tarakā dhālika mundhu aʿwām wa-fawwaḍā al-amr fī dhālika ilā talamīdhihimā.*"

[11] Ibid. "*wa-huwa al-ladhī kāna yuwāzī Abā al-Ṭayyib fī al-ʿilm waʾl-shaykhūkha waʾl-taqaddum.*"

discern and search for God's law so their reward is mulitiplied and their recompense is increased."[12] Shīrāzī goes on to say that ease in knowing God's law might be beneficial in this life but the challenge of searching for God's law is more beneficial for the afterlife. Al-Khaṭīb al-Baghdādī presents several Prophetic traditions extoling the intellectual work of the *faqīh* above other acts of worship. He even concludes that the gathering dedicated to learning religious law (*fiqh*) is superior to that of the remembrance (*dhikr*) of God.[13]

The jurists' form of religious knowledge was but one in the Muslim community and their texts of *uṣūl al-fiqh* reflect their efforts to justify and preserve its value. Juwaynī lists the view of different parties. He mentions those who thought that true knowledge was always divinely inspired (*ilhām*).[14] This view approximates that of the Sufī or mystical tradition's emphasis on *ma'rifa* as a form of experiential knowledge given by God rather than reason. As Barbara Metcalf points out, the Sufīs and the jurists—though oftentimes overlapping—represented the most pervasive forms of religious leadership throughout Muslim history.[15] Other groups that Juwaynī mentions include the Ḥashawiyya who thought that only the Qur'an, Muḥammad's example (*sunna*), and communal consensus represented true knowledge. Juwaynī also notes that some disparaged reason completely by saying that only sense-perception could yield knowledge. The Sunnī jurists of the 11th century tended to straddle a middle position between faith in reason and acknowledging reason's limits. Juwaynī notes that God bestowed upon humans foundational forms of knowledge ("*fa-amma al-ḍarūriyyāt fa-innahā taq'a bi-qudrat illāhi ta'alā ghayr maqdūra bi'l-'ibād*") like sense-perception and mathematical truths that allow them to accede to knowledge through the use of reason. God, however, had not given the Muslim community clear proofs for His law choosing and therefore most of religious law did not even yield knowledge proper (*'ilm*), but only led to presumptive knowing (*ẓann*). In this situation, the connection between humans and God established through Muhammad needed to be sought out.

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[12] al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 1071. This point takes place in the context of discussions about whether god's law is singular or not, of which I will have more to say in the next chapter. "*Ḥaml al-nās 'alā madhhab wāḥid anfa' lahum wa-aṣlaḥ fa-innahum yatawaffirūn 'alā tamyīzihi wa-ṭalbihi fa-yatawaffir ajruhum wa-ya'ẓam thawābuhum. Fa-in ta'allaqta bi-mā huwa ashal lahum fī dunyā ta'allaqnā bi-mā huwa anfa' lahum fī al-ākhira*."

[13] Al-Baghdādī, *Kitāb al-Faqīh wa'l-Mutafaqqih*, 1:88.

[14] Al-Juwaynī, *al-Burhān fī uṣūl al-fiqh*, 1:24-25.

[15] Metcalf, *Islamic Revival in British India*, 17. "The Sufis, who engaged in meditative disciplines and sought direct knowledge of religious truths; and the 'ulama, who knew the scholarly traditions of the faith and, above all, the injunctions of the Law."

There are several indications that the disputation was to be the final step in a jurist's attempts at *ijtihād*. Books of *jadal* encourage the jurist to dedicate himself to long periods of study before engaging in a disputation. In particular, he was to study books of *khilāf* which listed different possible arguments relevant to a legal topic. Juwaynī speaks of the disputation as a method of sifting through contradictory evidence. Many would consider the disputation a recommended act that helped the jurist assess the merits of his position, implying that the jurist had already performed a preliminary form of *ijtihād*.[16] The place of the disputation in the process of *ijtihād* is also confirmed in Ghazālī's argument that the disputation shifted from being a recommended to an obligatory act upon the jurist who cannot decide which way the evidence fell on a legal issue.[17] Moreover, Bājī's description of the setting of the disputation reveals that the audience of a disputation was in some way or other also participating in a process of learning and discovering God's law. In short, the disputation's place in seeking God's law raised its status to a form of worship through which, as Baghdādī points out, the jurist could "seek God's countenance" (a reference to the beatific vision promised to the Muslim in the afterlife).[18]

Unfortunately for the audience in attendance on that day, the students present would not hear a disputation between two of the leaders of their Sunnī schools. Bājī informs us that Ṭabarī was willing to oblige but that Ṣaymarī instead delegated the task to his student, stating: "Whoever has a student like Abū ʻAbd Allāh," referring here to his student al-Dāmaghānī, "has no need to speak as long as he [Dāmaghānī] is present. Whoever wishes to debate him, let him do so."[19] To this the Qāḍī Abū Ṭayyib answered: "This is Abū Isḥāq, here sitting among my students. He represents me." Bājī then writes: And so it was decided that Shīrāzī and Dāmaghānī would engage in a disputation."

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[16] Ibn Fūrak, *Mujarrad Maqālāt al-Shaykh Abī al-Ḥasan al-Ashʻarī*, 293–94.

[17] Al-Ghazālī, *al-Mustaṣfā fī ʻIlm al-Uṣūl*, 4:70-71.

[18] Al-Baghdādī, *Kitāb al-Faqīh wa'l-Mutafaqqih*, 2:48. "*Wa yukhliṣ al-niyya fī jidālihi, bi-an yabtaghī bihi wajh allāh taʻalā.*"

[19] Al-Subkī, *Ṭabaqāt al-Shāfiʻiyya al-Kubrā*, 3:246. *"man kāna lahu talmīdh mithl Abī ʻAbd Allāh, yurīd al-Dāmaghānī, lā yakhruj ilā al-kalām, wa-hā huwa ḥāḍir, man arada an yukallimuhu fa'l-yafʻal."*

1.1.2 Self-Cultivating Sincerity: The Muslim Ethics of Critique

Books of *jadal* highlight and emphasize the need for the jurist to purify his intentions to seek truth alone before engaging in the disputation. As Hallaq notes, this is because "all forms of worship" in Islam are governed by "the all-important attribute of intention (*niyya*)."[20] Jurists associated the need for intentional action with gaining closeness (*qurba*) to God. Hallaq expounds on this saying: "The presence of the *niyya* in the repeated performance of a ritual act is therefore insurance that the act is not constituted through a physically mechanical performance devoid of content".[21] Baghdādī explains that the jurist's "object in his inquiry must be the clarification of truth, and its affirmation, not the defeat of an opponent."[22] Likewise, Baghdādī reports al-Shāfi'ī as saying that "Whenever I have debated anyone, I always wished for him his success, his aid, and his succor, and that God protect and preserve him, and whenever I have debated anyone, it never made a difference to me whether God manifested the truth on my tongue or his."[23] Ibn 'Aqīl goes so far as to argue that the right intention was a condition precedent for achieving the true ends of the *munāẓara*: "If one of the two is remiss in his search [for the best ruling], and meets only to provide a field for his tongue and heart to roam, the precedent condition for valid inquiry is absent, and his argument is transformed into merely an attempt to overwhelm and dominate his opponent."[24] While the need for jurists need to emphasize right intention suggests that they often fell short of it, their discourse nonetheless reveals an ethical ideal at the heart of their debate.

Manuals of *munāẓara* did not simply state the proper intentions jurists should have, they also articulated the practical means to develop them. Manuals listed a series of practices that the jurist should do before and during the *munāẓara*. In his *Minhāj*, Bājī states: "It is incumbent upon the

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[20] Hallaq, *The Impossible State*, 120. See also, Powers, *Intent in Islamic Law*.

[21] Hallaq, *The Impossible State*, 121.

[22] Al-Baghdādī, *Kitāb al-Faqīh wa'l-Mutafaqqih*, 2:49. "*wa-li-yakun qaṣduhu fī naẓarihi īḍāḥ al-ḥaqq wa-tathbītihi dūn al-mughālaba li'l-khaṣm*."

[23] Ibid. *Mā kalamtu aḥadan qaṭṭ illā ahbabtu an yuwaffiq wa-yusaddad wa-yu'ān, wa-yakūn 'alayhi ri'āya min Allāh wa ḥifẓ, mā kallamtu aḥadan qaṭṭ illā wa-lam ubāli bayyana Allāh al-ḥaqq 'alā lisānī aw-lisānihi*."

[24] Ibn 'Aqīl, *Kitāb al-Jadal*, 245. "*fa-idhā kāna aḥaduhumā yataqāṣar 'an al-baḥth wa-yajtami' 'an infisāh al-liṣān wa'l-qalb, zāla sharṭ naẓarihi, wa-kharaja ilā ḥayyiz al-mughālaba wa'l-muwāthaba.*"

munāẓara participant to precede his *munāẓara* by prayers to seek God's protection, to purify his intentions in *munāẓara*, and to praise God and send many blessings upon his Prophet in order to multiply the blessings and benefits of the *munāẓara*."[25] He adds that he then "asks help and success for himself in searching for the truth and help in attaining it." Shīrāzī exemplifies this when he ends the disputation against Dāmaghānī with the statement "And it is God who grants success in finding what is correct."[26]

A whole host of recommendations were aimed at helping the jurist retain his composure in the *munāẓara* in order to avoid pride or anger. Baghdādī states that "[The jurist] is to be filled in the gathering with gravitas and remain calm and collected."[27] Part of this calmness included the injunction to avoid certain bodily comportments. Bājī affirms that participants are to avoid moving around or "playing with their hands and beard."[28] There was also the injunction to practice "silence except when there is a need to speak," so as to stay on point. Composure was also guaranteed by gaining mastery of one's subject: "It is necessary for him to persist in the solitary study of his books , and to practice alone, in the memorization of potential objections and responses to these objection… such that he avoids falling speechless in the gathering of *munāẓara* when observed by those around him."[29] In short, there were a variety of practices by which the jurists could train himself to avoid letting baser sentiments govern his conduct in the *munāẓara*, or fear or panic rendering him speechless. In line with Bājī's description of the audience as participating in the process of seeking God's law, Ibn 'Aqīl notes that they are subject to many of the same standards of decorum.[30] They should avoid disrupting the disputation or fidget, and they should listen attentively to the content of the disputation.

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[25] Al-Bājī, *al-Minhāj fī Tartīb al-Ḥijāj*, 17–18. "*Yanbaghī li'l-munāẓir an yuqaddim 'alā jadalihi taqwā Allāh 'azza wa-jalla li-yazkuwa naẓaruhu, wa-yaḥmad Allāh 'azza wa-jalla wa-yuṣallī 'alā rasūlihi kathīran li-takthur barakātuhu wa-ta'ẓam fawā'iduhu*." This view is systematically articulated in books of *jadal*, al-Baghdādī, *Kitāb al-Faqīh wa'l-Mutafaqqih*, 2:47.

[26] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:252.

[27] Al-Baghdādī, *Kitāb al-Faqīh wa'l-Mutafaqqih*, 2:51."*wa-yastash'ir fī majlisihi al-waqār, wa-yasta'mil al-hadī*."

[28] Al-Bājī, *al-Minhāj fī Tartīb al-Ḥijāj*, 18. "*wa yatawaqqar fī julūsihi wa-lā yanza'ij min makānihi fa-yunsab ilā al-rikka wa-l-kharq, wa-lā ya'bath bi-yadihi wa-liḥyatihi*."

[29] Al-Baghdādī, *Kitāb al-Faqīh wa'l-Mutafaqqih*, 2:56. "*wa yanbaghī lahu an yuwāẓib 'alā muṭāla'at kutubihi 'anda waḥdatihi…li-a-llā yanḥaṣir fī majālis al-naẓar idhā ramaqathu abṣār man ḥaḍara.*"

[30] Ibn 'Aqīl, *Kitāb al-Jadal*, 245-247.

Finally, some practices aimed at shaping the jurist's attitude towards his interlocutor. *Jadal* manuals instruct the jurist to face his opponent directly. He is to listen to him carefully, allow him to finish his argument completely, and to avoid interruption. "He is not to change his (opponent's) words in order to distort their meaning, and to play with them when it is his turn, because this blinds the seeing, and breaks the sharpness of the mind."[31] Quoting the Qur'an, Ibn *'*Aqīl notes the verse "And those who disbelieve say do not listen to this Qur'an and talk idly during its recitation such that you may gain the upper hand."[41:26] The jurist is to avoid vulgar speech and he is to forbear in cases in which his opponent fails to extend the same courtesy. However, Baghdādī also instructs him to avoid speaking in the presence of one who bears false witness and refuses to accept the truth when convincing arguments are presented to him. These actions are a sign of stubbornness and bias from which truth cannot be attained.

The Islamic tradition of disputation highlights how jurists conceived of the preconditions for a truthful dialogue. Juristic discourse shows great attention to the subjectivity of the speaker in finding truth. The juristic discourse posited that truth of God's law cannot reveal itself without the proper speaker of that truth. Base motives risk obscuring the true merits of arguments and mislead the audience as to the most founded legal position. It also means that God would not bless and help guide the debater. The link between sincerity and truth is evident in Abū Yūsuf's statement: "Oh people, seek through knowledge [to draw close] to God. I have never participated in a gathering [of disputation] whatsoever, intending to be humbled, except that I have overcome my opponents. And I have never participated in a gathering of [disputation] seeking to beat my opponent except that I have been disgraced."[32] Moreover, the Islamic tradition did not simply enjoin proper intentions, but it also provided an elaborate set of practices to create them—what Foucault calls an *askesis*.[33]

This is in many ways a radical departure from the presumed necessary conditions for a rational critical dialogue in contemporary thought. Take, for instance, Jürgen Habermas's highly

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[31] Ibn 'Aqīl, *Kitāb al-Jadal*, 246. "*Wa-la yughayyir kalāmahu bimā yuḥīl al-ma'na, wa-lā yalghū fī nubātihi*."

[32] Al-Baghdādī, *Kitāb al-Faqīh wa'l-Mutafaqqih*, 2:49. "*Yā qawm, urīdū bi-'ilmikum Allāh 'azza wa-jall, fa-innī lam ajlis majlisan qaṭṭ, anwī fīhi an atawāḍa'a illā lam aqum ḥatta a'lūhum, wa-lam ajlis majlisan qaṭṭ anwī fīhi an a'lūhum, illā lam aqum ḥattā aftaḍiḥ*."

[33] Foucault, *The Use of Pleasure: Volume Two of The History of Sexuality*, 31.

influential theory in which a rational dialogue depends on approximating an ideal speech situation.[34] The crux of Habermas's view is that a rational discourse aiming to arrive at truth depends on participants speaking honestly, freely and without coercion such that reason alone can be the basis of the evaluation of their claims. Muslim jurists were not oblivious to this need to minimize coercion. Manuals counselled against holding a *munāẓara* in the court of a ruler because one party might have that ruler's favour and the other might be fearful to speak freely. Likewise, the exhortation against anger stemmed partly from the recognition that one's opponent might then feel intimidated. Lastly, the rule against interruptions parallels Habermas's demand that all be given due consideration when speaking, as well as the requirement to construe the word's of one's interlocutor fairly and not to distort their sense. Despite this overlap, Habermas does not appear interested in theorizing how subjects can become honest or sincere in their speech. He provides no guidance on the practices that act as a precondition for one to become a speaker of truth.

Jadal manuals reveal the concern with the pedagogical formation of a distinct Muslim critical subject in the classical era—a historical Muslim version of what Foucault called the truth-teller. In a series of lectures delivered at Berkeley in 1983 and published within a book entitled *Fearless Speech*, Foucault reminded us that the question of who speaks the truth, about what, and with what consequences, was a matter of historical exploration and problematization.[35] About a quarter of a century later, Talal Asad also reminded us that our contemporary assumptions that genuine critique is always secular were the product of a contingent history. Asad's terse genealogy of the concept and grammar of critique showed that critique in the West historically intersected with religion in various ways in different times and places.[36] Asad concludes by suggesting that the assumption that critique is secular is the product of the emergence of a modern secular subject, always attempting to free himself heroically from tradition, in order to become an autonomous subject.[37] The *munāẓara* flips this modern assumption on its head: critique here is a religious duty that fulfills a divine command and leads the debater to gain

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[34] Habermas, "Towards a Theory of Communicative Competence."

[35] Foucault, *Fearless Speech*, 169–70. "What are the moral, the ethical, and the spiritual conditions which entitle someone to present himself as, and to be considered as, a truth-teller?"

[36] Asad, "Free Speech, Blasphemy, and Secular Criticism," 48–55.

[37] Ibid., 55.

closeness to God. This means that piety figured as both the correct motivation for engaging in the disputation and also as the precondition for its correct or felicitous performance.

The pietistic nature of the disputation is largely overlooked in academic discussions on the disputation. In fact, the overriding impression that one gets from Makdisi's analysis of the disputation is that jurists' primary intentions were to outdo each other.[38] This view seemingly fits well with Muslim sources that are themselves very critical of the disputation for its participants' tendency towards self-aggrandizement. Ghazālī had a large historical role to play in this: Ghazālī vociferously critiqued the jurists' hairsplitting of legal issues as a symptom of their misplaced concerns and attempts to attain fame through legal debates. But as Ahmet Adanali shows, Ghazālī continued to be influenced by the method of disputation.[39] Moreover, a careful look at Ghazālī's *Mustaṣfā* shows he never completely rejected the disputation.[40] In fact, Ghazālī's critique was enabled by a generally-agreed upon ethical ideal at the heart of the disputation—one which Bājī makes clear was likely often realized. Eleventh-century jurists had a longstanding tradition of cautioning each other against the pitfalls of insincere and self-aggrandizing argumentation precisely because they knew it was a real danger to their community's self-proclaimed ethical aspirations.

1.2 Part II: The Politics of Debate

1.2.1 The Wife's Option (*Khiyār*): Guiding the Lay Muslim

The devotional nature of the disputation in no way precluded it from also being a highly political act structured by and reinforcing relations of power. The disputation was a critical debate limited to the community of jurists. Only the jurists were qualified to interpret the law. And yet the concerns of the debate touched upon the community as a whole. The jurists' privileged position depended upon arrogating to themselves the right and responsibility to act as religious guides to

[38] Makdisi, *The Rise of Colleges*, 135-136.

[39] Adanali, "Dialectical Methodology and Its Critique: al-Ghazālī as a Case Study."

[40] Al-Ghazālī, *al-Mustaṣfā fī 'Ilm al-Uṣūl*, 4:70–71.

lay-Muslims. This becomes evident when one examines the topic and arguments of Shīrāzī's and Dāmaghānī's disputation.

The disputation begins in earnest with a young Ḥanafī jurist by the name of Abū al-Wazīr filling in for Dāmaghānī and initiating the disputation. As the *sā'il*, Abū al-Wazīr had the right to determine the topic of the disputation. He was free to choose any among the multitude of topics of substantive law that had absorbed the attention of jurists and over which they had disagreed. We have no way of knowing with certainty why he chose the topic that he did, but perhaps it was the context of the death of Ṭabarī's wife that led him that day to decide upon a question of family law:

> A young man from the people of Kāzarūn called Abū al-Wazīr was appointed to commence the disputation. Thus he asked the Shaykh Abū Ishāq al-Shīrāzī: "Does the inability to provide financial maintenance for one's wife arising out of insolvency entitle her to the option (*khiyār*) of ending her marriage?"

Shīrāzī responded that it does. This position is also that of Mālik b. Anas (d. 179/795), in contrast to Abū Ḥanīfa, who says that it does not.[41]

Shīrāzī here affirms that a wife whose husband failed to provide for her had the option (*khiyār*) to petition a judge to end her union. He also notes that Mālik had the same opinion. The topic of the disputation highlights that the jurist's search for God's law was not only a personal quest to help him discharge his ritualistic and ethical obligations to his maker, it was also oftentimes aimed at determining rules of concern to the organization and practices of the general Muslim community.

In fact, it was partly this concern with the guidance of lay Muslims that made the jurists' search for God's law a religiously meritorious act. This is because legal knowledge was meant to fulfill the practical dimension of properly applying or practicing the law. Thus Baghdādī associates the

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[41] For a short biography of Mālik, see Dutton, *The Origins of Islamic Law*, 11-21. Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:246. "*fa-lammā taqarrara al-amr 'alā dhalika intadaba shāb min ahl kāzarūn yud'ā Abā al-Wazīr, yas'al Abā Isḥāq al-Shīrāzī al-i'sar bi-l-nafaqa hal yūjib al-khiyār li'l-zawja fa-ajābahu al-Shaykh annahu yūjib al-khiyār, wa-huwa madhhab Mālik, khilāfan li-Abī Ḥanīfa fī qawlihi annahu lā yūjibuhu lahā."*

merit of the pursuit of *fiqh* with the guidance that this provides to the Muslim. He relates the *ḥadīth*: "Whoever goes out searching for knowledge in order to replace misguidance with guidance, or falsehood with truth, it is as though he worshipped in the fashion of someone continually worshiping for forty years."[42] Baghdādī explains that worship itself is conditional upon a proper understanding of God's law: "there is no worship without *fiqh*, and the gathering of *fiqh* is greater than the worship of sixty years."[43]

This study of the law (*fiqh*) could not practically be expected of all Muslims. As Shīrāzī would observe, the law could be a difficult affair and took time to master:

> The means by which one arrives at legal rulings is through the knowledge of the Qur'an, the *sunna*, *ijmā'* (communal consensus), and *qiyās*, among other [means], and acquiring this knowledge requires a lengthy period of time. If we had obligated everyone [to acquire this knowledge], then this would have led to an interruption in the pursuit of their livelihood, and a postponement of the cultivation of the land and of having children, with which human life on earth is sustained. [44]

It was for this reason that the juristic *uṣūl al-fiqh* discourse posited a stark division between the *'āmm* and the *khāṣṣ*. The former referred to the lay Muslim masses unfamiliar with how to reason on the law and the latter referred to the specialist class of jurists who could competently find their way through the evidence that would reveal the legal rulings of their religion.

Yaḥyā b. Sharaf al-Nawawī (d. 676/1278) categorizes different types of legal knowledge based upon this '*āmm*/*khāṣṣ* division. The first category of knowledge is incumbent upon every Muslim to learn. It encompasses "That without which he could not discharge religious obligations, such

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[42] Al-Baghdādī, *Kitāb al-Faqīh wa'l-Mutafaqqih*, 1:97. "*Man kharaja yaṭlub bāb min al-'ilm li-yaruddu bihi ḍāllan ilā hudā, aw-bāṭilan ilā ḥaqq, kāna ka-'ibāda muta'abbid 'arba'īn 'āmm."*

[43] *Ibid. "lā 'ibāda illā bi-fiqh, wa-majlis fiqh khayr min 'ibāda sittīn sana*."

[44] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 1008–9. "*al-ṭarīq al-latī yatawaṣṣal bihā ilā ma'rifat al-aḥkām al-shar'īyya hiya al-'ilm bi-ṭarīq min al-kitāb wa'l-sunna wa'l-ijmā' wa'l-qiyās wa-ghayr dhalika, wa-ma'rifat dhalika yastaghriq 'umran ṭawīlan. Fa-law alzamnā kull aḥad ma'rifat dhalika la-addā ilā al-inqiṭā' 'an al-ma'āsh wa-ta'ṭīl al-ḥarth wa'l-nasl al-ladhayna bihimā qiwām al-dunya.*"

as the knowledge of how to make ablutions or perform the prayer."[45] The lay Muslim must know how to perform all religious acts that are incumbent upon him or her. Of social transactions (*mu'āmalāt*), much of which a Muslim might never engage in, Nawawī explains that the Muslim only needs to learn their appropriate rules and conditions before doing them. The second type of knowledge involves the production of legal rulings of the *sharī'a*. In contrast to the first, this type of knowledge is a communal obligation (*farḍ kifāya*), not an individual one. Nawawī expresses the common view that the community is in need of knowing these rules to establish their religious lives and that therefore someone needs to take upon themselves the task of discovering them."[46] The Muslim community is free of wrongdoing so long as some people possess this knowledge. The Muslim jurists fulfilled this obligation, which permited the rest of the Muslim community to consult them. Shīrāzī thus explains that the mujtahid who knows how to arrive at God's law will in some cases have the individual obligation (*farḍ 'ayn*) to provide religious answers to lay-Muslims: "if there is no one in his region among scholars that can give a *fatwā*, then he is responsible for it."[47]

Shīrāzī explains that the lay Muslim substitutes personal knowledge of the proofs of the law with the opinions of the jurists. He presents an anecdote in his *Sharḥ*, incidentally featuring the same two Shāfi'ī and Ḥanafī leaders presented in the beginning of this disputation, that illustrates this view. To give a bit of context to the anecdote, the Shāfi'īs considered it necessary for the validity of a marriage that a woman's guardian be morally upright, a point with which the Ḥanafī s disagreed. Shīrāzī relates:

> A man came to al-Ṣaymarī the Ḥanafī with a *fatwā* given by one of the followers of al-Shāfi'ī stating that if a woman has been given away in marriage by a guardian who is *fāsiq* (morally corrupt) and her husband subsequently utters the pronouncement of divorce three times, the divorce does not take effect and the man can marry

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[45] Al-Nawawī, *al-Majmū'*, 1:41. "*wa-ta'allum al-mukallaf mā lā yata'addī al-wājib al-ladhī tu'ayyin 'alayhi fi'luhu illā bihi ka-kayfiyyat al-wuḍu' wa'l-ṣalāt*."

[46] Ibid., 1:43. "*wa-huwa taḥsīl mā lā budda li'l-nās minhu min iqāmat dīnihim min al-'ulūm al-shar'iyya*."

[47] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 1035. "*fa-in kāna fī iqlīm laysa fihi ghayruhu min al-'ulamā' tu'ayyin 'alayhi al-fatwā wa'l-ta'līm 'anda al-ṭalb*." Nawawī also listed *uṣūl al-fiqh* as a type of knowledge.

> the woman with a new marriage contract. Ṣaymarī told him: "those who have given you this response have stated that sexual relations with [the woman] were illicit [when the guardian originally gave her away] but that they are licit today [with a new marriage contract]. I tell you however, that sexual relations were licit in the period [prior to the pronouncement of divorce] and that what you have done has made her sexually impermissible to you." Ṣaymarī said this in according with the teaching of his own [Ḥanafī] madhab. So I [Shīrāzī] went to the Qāḍī Abū Ṭayyib al-Ṭabarī, recounting the story to him, to which he said: You should have told Ṣaymari "God almighty has not charged [that man] with the responsibility of following Ṣaymarī, but has charged him with following whomsoever he wills from among the *'ulamā'* such that if he follows a Shāfi'ī, he is free from sin and responsibility on the day of resurrection."[48]

The story highlights how the jurist's opinion serve as a source of evidence legitimating the lay Muslim's understanding and practice of the law.

It was partly the communal obligation of seeking God's law that invested the disputation with its devotional dimension. Baghdādī explains that lay Muslims could defer to a jurist for guidance because they were not able to test the veracity of the view of other jurists "through sound means and through engagement in disputation" in the way jurists themselves could.[49] Shīrāzī and Dāmaghānī's critical engagement on the wife's *khiyār* fulfilled the responsibility they had to the

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[48] Ibid., 1038. "*Wa-ḥakā al-imām al-Shīrāzī 'an rajul jā'a ilā al-Ṣaymarī al-Ḥanafī bi-futyā li-aṣḥāb al-Shā'fi'ī annahu idhā kāna al-walī fāsiqan fa-ṭallaqahā al-zawj thalāthan lā yunaffadh al-ṭalāq wa-lahu an yatazawwajahā bi-'aqd jadīd fa-qāla al-Ṣaymarī: 'ha'ulā' qad aftūka annaka kunta 'alā farj ḥarām fī mā taqaddama min al-mudda wa-innahā ḥalāl laka al-yawm, wa-anā aqūl laka: innahā kānat mubāḥa laka qabla hadhā, wa-hiya al-yawm 'alayka ḥarām min yawm waqa'at al-furqa baynakumā.' Wa-qaṣada bi-dhalika radd al-'āmmī ilā madhhabihi. Fa-raja'tu ilā al-Qāḍī Abī al-Ṭayyib al-Ṭabarī wa-ḥakaytu lahu al-qiṣṣa fa-qāla: kunta taqūl lahu: "huwa kamā qulta ghayr anna Allāh ta'alā lam yukallifhu taqlīd al-Ṣaymarī wa-innamā kallafahu taqlīd man shā'a min al-'ulamā', wa-idhā qallada shāfi'īyyan takhallaṣa min al-ithm wa'l-tab'iyya fī yawm al-qiyāma*."

[49] Al-Baghdādī, *Kitāb al-Faqīh wa'l-Mutafaqqih*, 2:127. The fuller passage reads: "*Inna al-'āmmī yuqallid awthaqa al-mujtahidīn fī nafsihi, wa-lā yukallaf akthar min dhalika li-annahu lā sabīl lahu ilā ma'rifat al-ḥaqq, wa kull wāḥid min al-mujtahidīn yaqīnuhu bi-mā addā ilayhi ijtihāduhu, fa-yu'addī dhalika ilā ḥayrat al-'āmmī, fa-ja'ala lahu an yuqallid awthaqahummā, wa-yukhālif al-mujtahid, , li-annahu yatamakkan min muwāfaqatihi 'alā ṭarīq al-ḥaqq wa-munāẓara fihi*."

Muslim community to guide them and order their affairs according to revealed law. But this also meant that lay Muslims were, as a matter of principle, excluded from the debate. This made the exclusion of women all the more glaring because they did not typically have representatives as part of the juristic community. In what follows, I will present the content of the disputation before highlighting the concrete ways in which the exclusion of Muslim women from the debate shaped the determination of the legal case under review.

1.2.2 Background to the Debate on the Wife's *Khiyār*

The Ḥanafī Muḥammad ibn al-Ḥaṣan al-Shaybānī and al-Shāfi'ī explored the question of the wife's *khiyār* nearly three centuries prior to Shīrāzī's and Dāmaghānī's disputation. During his travels to Iraq, al-Shāfi'ī appears to have debated quite often with Shaybānī. Fakhr al-Dīn al-Rāzī presents several purported disputations between the two.[50] Al-Shāfi'ī is reported to have had great admiration for his interlocutor. The two differed when it came to deciding the lot of the wife whose husband failed to pay for her spousal maintenance. Both agreed that a woman was entitled to have certain expenses paid. These included housing, food, and clothing. Shaybānī had learnt from his master Abū Ḥanīfa that neither the slave nor the freeman is to be separated from his wife if he cannot find the means to provide for her; rather he is to request a loan according to an amount determined by custom.[51] Shaybānī sought to defend this opinion in the face of differing opinions of the Medinan jurists. The Medinan jurist Mālik ibn Anas reportedly stated that the state authorities should separate the husband and wife if the husband could not pay for his wife's maintenance.[52] In response, Shaybānī recalled that poverty was an Islamic virtue and therefore was not a suitable cause for a wife's petition for divorce. He stated that "The people of righteousness are a people of need and poverty" and relayed narrations of the early community to support his claim:

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[50] Al-Rāzī, *Manāqib al-Imām al-Shāfi'ī*, 272."

[51] Al-Shaybānī, *Kitāb al-Ḥujja Alā al-Ahl al-Madīna*, 451. He adds The people of Medina say "If the freeman doesn't find what is needed for his wife, slave or free, they are separated, and the same goes for the slave."

[52] Saḥnūn, *al-Mudawwana al-Kubrā*, 888; al-Shaybānī, *Kitāb al-Ḥujja 'alā al-Ahl al-Madīna*, 452. "*wa-qāla lanā Mālik wa-kull man lam yaqwa 'an nafaqat imra'atihi, furriqa baynahumā.*"

> It has reached us from ‘Ā’isha, May God be pleased with her, that she has said: ‘The family of Muḥammad never ate their fill of bread three days in a row until he met God’; and it has been narrated from Fāṭima, may God be pleased with her, that she complained to ‘Alī about her children’s hunger until he went to some of the people of Medina and they gave him a number of baskets that filled his hands. Within each basket were dates which he gave to his family. [53]

Al-Shāfi‘ī would embrace Mālik’s view but appears to have modified it and elaborated upon it in far greater detail. At the heart of his view was the concept of *khiyār* (option). The concept referred to a wife’s choice to remain with her husband or to demand the dissolution of their union. Al-Shāfi‘ī affirmed that lack of spousal maintenance was cause for a wife’s *khiyār*. The reason was that her marriage was a contract granting rights to each party. In particular, marriage was a contract giving a woman “rights to maintenance over [her husband]”and a man “rights to sexual enjoyment over her.”[54] Al-Shāfi‘ī reasoned that any failure to provide maintenance meant a man was not upholding his end of the bargain, and was in breach. The woman would thereby be entitled to dissolve the contract. Al-Shāfi‘ī contended that a man who has difficulty paying for the maintenance was to be given a reprieve of three days, after which, the wife could exercise her choice in staying or leaving the marriage. Moreover, her choice to stay did not bind her to a life of poverty. Any new three-day failure to provide for her renedwed her option. In fact, this possibility of a renewed option meant she could not waive any future option to leave the marriage because she cannot waive in advance what is not yet owed to her.[55]

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[53] al-Shaybānī, *Kitāb al-Ḥujja ‘alā al-Ahl al-Madīna*, 456–58. “*wa-mā kāna al-ṣālihūn illā ahl al-ḥāja wa’l-faqr!*” and “‘*an ‘Ā’isha raḍiyā Allāh ‘anhā qālat: mā shaba‘a āl Muhammad min khubz burr thalātha ayyām mutatābi‘āt ḥatta laḥaqa Allāh. Wa-laqad balaghanā ‘an Fāṭima raḍiya Allāh ‘anhā annahā shakat ilā ‘Alī al-jū‘ fī waladihā fa-kharaja ḥatta atā ilā ba‘ḍ ahl al-Madīna fa-astaqā lahu ‘adadan min al-adlā’ kull dalw bi-tamra ḥatta mala’a kaffahu thumma atāhā bihi*.”

[54] Al-Shāfi‘ī, *al-Umm*, 6:235. “*kāna min ḥaqqihā ‘alayhi an yu‘awwiluhā wa-min ḥaqqihi ‘alayhā an yastamti‘ minhā.*”

[55] Ibid., 6:237.

1.2.3 "What is Your Proof?": The Wife and the Slave

> The questioner then asked Shīrāzī for proof for his position. So the Shaykh Abū Ishāq said: "The proof for my position is that marriage is a type of ownership which gives rise to a right of maintenance. Thus inability to provide maintenance on account of insolvency must result in the cancellation [of this ownership] by analogy to the case of the ownership of slaves."[56]

Abū al-Wazīr's inquiry as to Shīrāzī's proof corresponds to what several books of *jadal* identify as the "second question in the disputation."[57] This question often took the form of "What is your proof for your position?"[58] Extant disputations suggest that the respondent's answer was typically a single argument which then became the object of scrutiny for the remainder of the disputation.[59] Shīrāzī's argument makes an analogy (*qiyās*) between marriage and slavery. Jurists used *qiyās* "to apply the ruling of an original case to a derivative one."[60] The particular analogy Shīrāzī invokes here is a *qiyās al-'illa*. This *qiyās* identifies the legal cause of the original rule (*al-aṣl*) in order to argue that because that same legal cause is also found in the second, or derivative case, that the second case must also take the same rule as that of the primary case. Shīrāzī's response hopes to bind his opponent to two claims. First, that slaves and wives are types of property deserving of financial maintenance. And second, that the example of the slave shows that a lapse in maintenance is cause for the termination of this ownership. Acceptance of these two claims would force Dāmaghanī to concede that the husband's inability to providing for his wife's maintenance on account of insolvency must result in the termination of the marriage.

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[56] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:246. "*fa-ṭalaba al-sā'il bi'l-dalīl 'alā ṣiḥḥat mā dhahaba ilayhi fa-qāla al-Shaykh Abū Isḥāq: al-dalīl 'alā ṣiḥḥat mā dhahabtu ilayhi anna al-nikāḥ naw' milk yastaḥiqq bihi al-infāq fa-wajaba an yakūn al- i'sār bi'l-infāq yu'aththir fī izālatihi ka-milk al-yamīn*."

[57] Al-Fīrūzabādī al-Shīrāzī, *al-Mulakhkhaṣ fī al-Jadal*, 121.

[58] Ibn 'Aqīl, *Kitāb al-Jadal*, 387. *"Mā dalīluka 'alā hadhā al-madhhab*?"

[59] Al-Bājī, *al-Minhāj fī Tartīb al-Ḥijāj*, 59. Bājī notes possible alternative answers. He explains that the respondent had the choice between presenting a proof supporting his position and presenting a proof that attacked the position of his interlocutor: "So when (the respondent) knows his position, he states it; then after, he has a choice, he can either provide evidence for his position or he can frustrate the position of his opponent. (*fa-in 'arafa madhhabahu dalla 'alayhi, thumma huwa bi'l-khiyār, in shā'a dalla 'alā ṣiḥḥat qawlihi, wa-in shā'a dalla 'alā faṣād qawl khaṣmihi. Ayyuhummā fa'ala min dhalikha jāza*)."

[60] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 756. "*wa-min aṣḥābinā man yaqūl: ijrā' ḥukm al-aṣl 'alā al-far'*."

Muslim jurists of both the Ḥanafī and the Shāfiʿī schools agreed that a master who failed to provide for his or her slave could be compelled under certain circumstances to sell the slave. They adduced the slave's right to maintenance from traditions such as the Prophetic *ḥadīth*: "A slave is entitled to daily provisions and clothing, and he is not to be burdened with labor greater than that which he can bear."[61] The Ḥanafīs argued that if an owner refused to provide for his or her slave, the slave had the right to earn a living by working for himself. Burhān al-Dīn Marghīnānī (d. 593/1197) writes "they spend on themselves from their own labour, this being advantageous to both (slave and master), since the slave stays alive and the master's ownership continues."[62] In the case that a slave was unable to find alternative sources of livelihood, a judge could compel the owner to sell him/her. Marghīnānī explains that this is because slaves are rights-bearing subjects. Their sale to another master is thus a way to fulfill their right to maintenance. "This is in contrast to other living beings (i.e., animals) because they are not rights-bearers and thus the owner is not compelled to provide for them, but rather he is enjoined to do so for the sake of God because the Prophet forbade harming animals."

This association between marriage and slavery had deep roots in Islamic law. Kecia Ali's *Marriage and Slavery in Islam* has shown that there was an unmistakable relationship between the institution of slavery and the early Muslim jurists' marriage laws formulated in the 8th and early 9th centuries. Ali points towards the influence of the large influx of slaves in the wake of the early Muslim conquests and to the institution of concubinage, which made sexual relations between a male master and his female slaves legal, in shaping juristic thinking on marital relations. [63] What joined marriage and slavery together was the concept of *milk* (dominion): the husband possessed ownership over his wife's sexual capacity just as the master possessed ownership over his slave. This similarity formed the basis of numerous analogical arguments between slavery and marriage in determining marriage laws. Shīrāzī's argument for women's right to choose whether to remain within or dissolve their marriage depends upon re-inscribing

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[61] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfiʿī*, 4:636. "*li'l-mamlūk ṭaʿāmuhu, wa-kiswatuhu, wa-lā yukallafu min al-ʿamal illā mā yuṭīq*."

[62] Al-Marghīnānī, *al-Hidāya*, 2:659–60. "*fa-in imtanaʿa wa-kāna lahumā kasb iktasabā wa-anfaqā li-anna lahu fīhi naẓaran li'l-jānibayn, ḥatta yabqā al-mamlūk ḥayyan wa-yabqā fīhi milk al-mālik" And "wa bi-khilāf sā'ir al-ḥayawānāt, li-annahā laysat min ahl al-istiḥqāq falā yujbar ʿalā nafaqatihā illā annahu yu'mar bihi fīmā baynahu wa-bayna Allāh taʿalā*."

[63] Ali, *Marriage and Slavery in Early Islam*, 7.

this patriarchal conception of marriage as a type of *milk*. This case suggests that the jurists' ability to organize themselves as a community of experts able to speak and debate among themselves legitimized and enabled the system of law to posit, establish, or entrench forms of power relations within the Muslim community—between figures like the husband, the wife, the master, the slave, and the concubine.

1.2.4 Objections and Responses: Marriage, Sales, and the *Umm al-Walad*

> The questioner provided several objections but Shīrāzī did away with them. The Shaykh Abū 'Abd Allāh al-Dāmaghānī then took over from him (the people of disputation call someone taking over from another in the disputation a *mudhannib*).
>
> Dāmaghānī said: "It is not impossible that two types of ownership, each of which gives rise to a duty of maintenance, should be terminated by different causes. Do you not see how the marriage and sales contracts both give rise to a right of ownership but that only in one of the cases—that of sales—does the failure to transfer [the object of the contract], because of its destruction or death (*fawāt taslīm bi-al-halāk*), invalidate the contract?
>
> In contrast, the death of the wife before her transfer to her husband's care does not invalidate their marriage contract. This is the reason that the legal rules of marriage apply to her husband after her death. The same principle can be applied to the analogy you have posited: both cases equally give rise to a right of maintenance, but only in one of these cases does failure to provide maintenance dissolve ownership.
>
> (Second Objection)
>
> Moreover, it is relevant to the case under review in this disputation that the husband lacks the power to transfer ownership of his wife

> in the way that a master can in the case of his slave. The fact that a wife cannot be transferred to another husband prevents the husband's failure in providing for her maintenance on account of insolvency from terminating his ownership, as is the case with the *umm al-walad* [whose master becomes insolvent and is therefore unable to provide for her maintenance]."[64]

Dāmaghānī here moves the disputation to what the *Mulakhkhaṣ* identifies as the final question of the disputation, namely the objections (*i'tirāḍāt*) and counter-argument (*mu'āraḍa*) to Shīrāzī's proofs.[65] He could also have chosen to ask Shīrāzī first for clarification about the relevance of his argument to the debate at hand, but manuals of *jadal* give the impression that this question was rarely asked among seasoned debaters, stating that: "it is reprehensible to ask this question if the questioner understands the proofs presented."[66] Objections were designed to probe the soundness of the respondent's thought. The levelling of critiques initiated the phase of the disputation that took up the greater part of the disputation. It is for this reason that manuals of *jadal* overwhelmingly dedicated most of their attention to outlining the possible objections and defenses a debater might present. The questioner's critique typically occurred in two rounds of exchanges. The respondent followed-up his initial critique with an attempt to address the respondent's defense against this critique. The respondent would then get the final word.[67]

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[64] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:246–47. *fa-i'taraḍahu al-sā'il bi-i'tiraḍāt wa-waqa'a al-infiṣāl 'anhā. Thumma tanāwala al-kalām 'alā wajh al-niyāba 'anhu, wa-huwa al-ladhī yusammīhi ahl al-naẓar al-mudhannib, al-Shaykh Abū 'Abd Allāh al-Dāmaghānī, fa-qāla ghayr ṣaḥīḥ, li-annahu lā yamna' an yastawiyā fī an kull wāḥid yastaḥiqq bihi al-nafaqa thumma yakhtalifān fī al-izāla. A-lā tarā anna al-bay' wa'l-nikāḥ yastawiyān fī anna kull wāḥid minhumā yastaḥiqq bihi al-milk thumma fawāt al-taslīm bi'l-halāk fī aḥadihimā yūjib buṭlān al-'aqd wa-huwa al-bay' li-annahu idhā halaka al-mabī' qabla al-taslīm baṭala al-bay' wa fī al-nikāḥ lā yabṭul al-'aqd wa-tunaffadh aḥkām al-zawjiyya ba'd al-mawt fa-ka-dhalika fī al-far' yūjib an yatasāwayā fī anna kull wāḥid minhumā yastaḥiqq bihi al-nafaqa thumma al-'ajz 'an al-infāq fī aḥad al-mawḍu'ayn yūjib al-izāla wa-fī al-far' lā yumkin naql al-milk 'anhu ilā al-ghayr fa-wajaba a-llā tajib al-izāla bi'l-i'sār kamā yuqāl fī umm al-walad.*

[65] Al-Fīrūzabādī al-Shīrāzī, *al-Mulakhkhaṣ fī al-Jadal*, 121.

[66] Al-Bājī, *al-Minhāj fī Tartīb al-Ḥijāj*, 63. This third question addressed "the way proofs are used (*wajh al-dalīl*)."

[67] Shīrāzī's *Ma'ūna* makes clear that the questioner also had the option to use a counter-argument (*mu'āraḍa*) instead of or alongside objections. A counter-argument did not place the interlocutor's proof in doubt; its purpose was to show that a stronger piece of evidence spoke for one's own position. Bājī also adds the third option of requesting (*al-muṭālaba*) from one's interlocutor that he further justify his proof. He explains that this could take many forms: "Asking that the report (*akhbār*) invoked be proven true, that the *ijmā'* (communal consensus) be shown or that the *'illa* be confirmed," *al-Minhāj fī Tartīb al-Ḥijāj*, 63. The designation of the fourth question as *i'tirāḍāt* reflects the fact that objections were what most commonly followed the presentation of the respondent's evidence. Al-Fīrūzābādī al-Shīrāzī, *Kitāb al-Ma'ūnah fī al-Jadal*, 262.

Dāmaghānī's critique presents an objection and a counter-argument. The objection raises the possibility that Shīrāzī's conclusion does not follow from his premises. It may very well be the case that both marriage and slavery give rise to one and the same right, but this does not mean that failure to fulifll this right need to impact each case in the same way. What ends slavery might not end marriage. Lack of maintenance might only terminate the former by forcing the master to sell the slave, and not terminate the later. Dāmaghānī buttresses his claim by taking two examples from substantive law that are meant to show how the failure to fulfill a right impacts two cases differently. He gives the example of two contracts: the contract of sales and the contract of marriage. He notes that both sales and marriage are contracts that require the handing over of something (*taslīm*) to one of the parties—a trade good in the case of sales and the wife in the case of marriage. However, the law treats the two cases quite differently when it responds to a situation where this handing over becomes impossible because the object or person in question is destroyed or perishes.[68] Dāmaghānī contends that a marriage contract remains valid even if death happens before *taslīm*. His proof is that her widower is subject to the legal rulings of a married couple (*aḥkām al-zawjiyya*). He would, for instance, inherit from her in the same manner as a husband with whom she had consummated her marriage. The same cannot be said of sales. If an object is destroyed prior to *taslīm*, destruction being the analogue to the wife's death, the sale itself is nullified. Thus the destruction of the object of ownership prior to being handed over cancels the contract in one case but not in the other. Dāmaghānī's example serves to show that the Ḥanafī position that lack of maintenance terminates ownership of the slave does not bind the school to the separation of a wife from her insolvent husband.

Dāmaghānī's counter-argument claims that there is another legal case more appropriate than the labouring slave (*'abd qinn*) Shīrāzī invokes to which the wife should be analogized. Dāmaghānī contends that the case of the wife's lack of maintenance should be compared to the lack of maintenance of the *umm al-walad*. The *umm al-walad* was also a slave, but she was distinguished from the labouruing slave (*'abd qinn*), because, in her capacity as a concubine, she had borne her master a child. The law therefore treated her differently than other slaves in granting her freedom from slavery upon her master's death. Thus the *Muhadhdhab* relates a *ḥadīth* in which the Prophet says of Marya the Copt, a concubine who gave birth to his boy that

[68] al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 4:599.

died in infancy, "Her son has freed her."[69] The *umm al-walad*'s expected emancipation prevented her master from selling her, giving her as a gift, or bequesting her in a will.[70] Dāmaghānī's counter-argument seeks to force Shīrāzī to acknowledge that his comparison between the wife and the laboring slave is deficient because this slave can be sold to a solvent master but a wife cannot be transferred to solvent husband; he thus seeks to replace Shīrāzī's analogy with one where the master cannot sell the slave to another. Dāmaghānī will later explain that the insolvent master of the *umm al-walad* is not forced to manumit despite being unable to sell her.

1.2.5 Speaking for the Lay Muslim: The Purpose of Marriage and the Wife's Relative Burdens

Shīrāzī responds to Dāmaghānī's first claim by positing a difference between marriage and sales. In doing so, he seeks to bar Dāmaghānī's comparison between the two, thereby denying his argument that the law might address the same lapse in rights-claims differently. He explains that the very purpose of a sale would be vitiated if the item were destroyed prior to the buyer's taking possession of it. This is because the purpose of purchasing an item is the acquisition and use of what is purchased. The same cannot be said of marriage because the purpose of marriage is the union (*al-wuṣlā*) and the creation of ties of kinship (*al-muṣāhara*) between them until death. The reason that the law treats the widower who never consummated his marriage in the same way as one who did is that the purpose of their contract has been fulfilled and ends, rather than being cancelled, with death. Shīrāzī states:

> Death marks the completion of this union and therefore the contract has reached its end. Marriage is like rent in this respect: it makes no sense to call the completion of a contract its invalidation. We do not, for instance, say that the rulings applicable to a rental

[69] al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 4:61. "*A'taqahā waladuhā*."

[70] Ibid.

> contract are invalidated by the end and completion of a rental period.[71]

To this, Dāmaghānī responds that marriage's purpose is not to establish a kinship but sexual fulfillment. He states that a man would never seek marriage if not for sex. "The purpose of marriage is intercourse because a spouse marries for sexual pleasure, and not a union devoid of sexual pleasure."[72] The force of the argument is that the Shāfi'īs agreed sexual pleasure was an integral part of the marriage contract. It was for this reason that they ruled it invalid for a bride to stipulate in her marriage contract that the couple's relationship should not involve sexual relations.[73]

In fact, Shāfi'īs considered the husband's right to sexual access to be what established the wife's right to maintenance. A wife that did not allow sexual access to her husband was no longer entitled to maintenance.[74] Shīrāzī is thus constrained in his final rejoinder to concede that sexual pleasure is the purpose of marriage. But he defends his original argument by contending that marriage could have more than a single purpose: "As regards your saying: And your statement that a man seeks sexual pleasure through marriage is right but this does not preclude that he should seek other ends as well."[75] In short, even a marriage which has not been consummated might fulfill some of the purported goals of its contract. Neither appears to countenance the concrete or particular motives which might impel a man to conclude a marriage contract for different reasons than those they would assume. The jurists' here demonstrate the ease with which they can make assumptions about the motives for which Muslims seek marriage without consulting those Muslims themselves.

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[71] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:247. *"fa-idhā māta aḥaduhimā fa-qad tammat al-wuṣla wa-intahā al-'aqd ilā muntahāhu fa-min al-muḥāl an yakaūn ma'a tamām al-'aqd naḥkum bi-ibṭāl al-'aqd kama naqūl fī al-ijāra idhā 'uqidat ilā amad thumma inqaḍat al-mudda lam yajuz an yuqāl inna al-aḥkām qad baṭalat bi-inqiḍā' al-mudda wa-tamāmihā."*

[72] Ibid., 4:248. "*li-anna al-maqṣūd fī al-nikāḥ huwa al-waṭ' li-anna al-zawj innamā yatazawwaj li'l-istimtā' lā bi-qaṣd al-wuṣla min ghayr 'istimtā'*."

[73] al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 4:162.

[74] Ibid., 4:599.

[75] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:250. "*wa-qawluk: inna al-rajul yaqṣid bi'l-nikāḥ al-istimtā' fa-huwa ṣaḥīḥ illā an lā yamtani' an yakūn lahu maqāṣid ukhar*."

Shīrāzī also seeks to counter Dāmaghānī's second claim. He disputes that the transferability of a labouring slave distinguishes him/her from the wife. He first contends that marital separation is similar to transfer of ownership because it permits the woman to remarry another. Through remarriage, a wife can seek a husband who can provide her with financial maintenance. Shīrāzī adds support to his claim by saying that the same line of thought justifies the dissolution of marriage in the situation in which a wife has no means of sexual fulfillment: "Do you not see how we separate them in the case of impotence."[76] His reasoning is that a wife can seek, through the end of her marriage, a new spouse that can meet her sexual needs. According to the *Muhadhdhab*, a wife whose husband is impotent, whether prior to or after consummation, is allowed to choose whether she wishes to stay married to him or not because his impotence denies her sexual pleasure (*al-istimtā'*).[77] Shīrāzī adds that the man is to be given a reprieve of a year because his impotence may simply be a temporary problem: the judge "gives him a year… because his inability to have intercourse could be from impotence, or simply from exposure to warmth or cold, or humid or dry conditions," which would be worked out with the passing of the seasons.[78]

Dāmaghānī responds by casting doubt on the relative burdens of poverty compared to impotence. He states: "What you have stated concerning the husband's inability to have sex is incorrect, because the wife cannot accede to sex through any other means" than her husband, thus making separation incumbent upon the two parties. "But as for [the money that is part] of maintenance," Dāmaghānī states, a wife can seek to obtain it "through taking on a loan and through work."[79] Shīrāzī counters by claiming the reverse, namely that lack of maintenance is far more harmful to a woman than lack of sexual intercourse:

> That which befalls a woman from lack of maintenance is greater in harm than lack of sex because a woman can be patient in the face

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[76] Ibid., 4:248. "*a-lā tarā annā nufarriq baynahumā bi'l-'unna fa-kadhalika hā-huna.*"

[77] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 4:165.

[78] Ibid., 4:169. "*ajjalahu al-ḥākim sana…li-anna al-'ajz 'an al-waṭ' qad yakūn bi'l-ta'nīn, wa-qad yakūn li-'āriḍ min ḥarāra aw-burūda aw-ruṭūba aw-yabūsa*."

[79] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:249. "*wa-ammā mā 'alzamta min al-waṭ' idhā 'ajaza 'anhu al-zawj fa-laysa bi-ṣaḥīḥ fa-in fī al-waṭ' lā yumkinuhā taḥṣīluhu wa-ammā al-nafaqa fa-yumkinuhā taḥṣiluhā bi'l-istiqrāḍ wa'l-istikhdām."*

> of lack of sex. But maintenance is an absolute necessity because a person depends on it for her survival. So if a woman possesses *khiyār* for impotence… then the same must follow in the case of lack of maintenance as well.[80]

The jurists, in this case two men, feel fully capable to speak about the relative pains that a woman might suffer in a position of financial insecurity and an asexual marriage. Their exchange shows that they felt comfortable making claims about lay Muslims that exceeded their competency in dealing with the scriptural proofs of the law.

The disputation ends with no clear winner. Shīrāzī finishes having consistently defended his position; Dāmaghānī ends having consistently critiqued it. Extant disputations suggest this is by no means anomalous. Some manuals of *jadal* do list the ways in which the questioner or respondent could be said to have been frustrated or defeated in his disputation (*munqaṭi'*).[81] Most of these indicate a failure to carry out the debate to term. This includes a lengthy silence or an inability to finish one's statement. Also included is the denial of the validity of a definitive legal proof like a *ijmā'* or an perspicuous scriptural text (*naṣṣ*) or the denial of a self-evident truth (*al-ḍarūriyyāt*), e.g. sense-perception or mathematical truths.[82] That the disputation did not necessarily or usually end with a clear winner highlights that the type of critique at stake had less to do with resolution of a legal issue and more about coming to see the law from different angles.

1.3 The Power to Speak: Constructing the Juristic Class through Disputation

The idea that the Islamic tradition is focused on an ethical subject-formation can easily minimize attention to relations of power at play in the Islamic system of ethics of the classical period. Take

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[80] Ibid., 4:251. "*fa-inna al-ladhī yulhiq al-mar'a fī tark al-nafaqa aʿẓam min al-ḍarar fī tark al-jimā' fa-inna al-jimā' qad taṣbir al-mar'a li-faqdihi wa'l-nafaqa lā budda minhā wa-bihā yaqūm al-badan wa'l-nafs thumma qulnā innahu yathbut al-khiyār wa-in kāna lā yumkin naql al-milk fīhā bi-'iwaḍ fa-kadhalika hā-huna*."

[81] Ibn 'Aqīl, *Kitāb al-Jadal*, 485–88.

[82] Ibid., 488. Interestingly, Ibn 'Aqīl does not list denial of self-evident truths as a sign of defeat when speaking of the questioner though there is no reason to believe he would not consider it one. This appears to be the product of his cursory treatment of the signs of defeat of a questioner and highlights that the burden of proof in the disputation rested with the respondent.

for instance Wael Hallaq's recent attempts to mitigate the distinction between the *khāṣṣ* and the *'āmm*:

> The jurists of Islam lived with and in the norms and values of the common social world and on average hailed from the lower and middle social strata. Their mission was defined by these norms and values, which were heavily inspired by the pervasive egalitarianism of the Qur'ān, which is to say that they saw themselves and were seen as advocates of society, the weak and disadvantaged having first priority…As a product of their own social environment, the legists' fate and worldview were inextricably intertwined with the interests of their societies. They represented for the masses the ideal of piety, rectitude, and fine education. Their very "profession" as guardians of religion, experts in religious law, and exemplars of the virtuous Muslim lifestyle made them not only the most genuine representatives of the masses but also the idealized "heirs of the Prophet," as one influential and paradigmatic Prophetic report came to attest. They were the locus of legitimacy and religious and moral authority.[83]

This allows Hallaq to answer the question: Who made the *Shari'a*? by stating: "the answer is the Community, the common social world…"[84] It was, in his view, this common social world that produced the jurists who then articulated the law. The jurists under this view acted as the ethical exemplars and guides in lay-Muslims own quest to develop Islamic virtues.

The problem with this view is that it turns a blind-eye to the jurists' privileged position to articulate and determine those common social values. Take for instance, Shīrāzī and Dāmaghānī's arguments over the purpose of marriage. One contends that a man would only marry for sexual pleasure. The other dissents and points to the importance of relations of kinship. Answering this question does not need the type of far-reaching knowledge of the method of

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[83] Hallaq, *The Impossible State*, 52–53.

[84] Ibid., 52.

deriving the law which legitimated the distinction between the *ʻāmm* and the *khāṣṣ*. The question is an empirical one. And yet the *munāẓara* does not include the voices of lay-Muslims in determining an answer.

The privilege to speak about and on behalf of lay Muslims is even more evident in the two interlocutor's debate over impotence. The two jurists debate over whether impotence or lack of maintenance is harder for a woman to bear. Both agree that impotence is a harm that justifies the wife's choice to end her marriage. For Shīrāzī, lack of maintenance is far worse for a woman than lack of sex. For Dāmaghānī, lack of sex is worse, though not intrinsically, but because there is no prospect of relief from her hardship in the taking of a second husband or lover. In contrast, she can seek a loan to pay for her daily needs of food and shelter. For Shīrāzī, this relief is no relief at all but an imposition of financial difficulties upon the couple. Most striking is the absence of the voice of women who allegedly incur these difficulties. An empirical claim about what constitutes a hardship for women would presumably most readily be answered by those women themselves. Their absence from the legal process is all the more pronounced because the two male jurists seem to agree that a woman's sexuality differs from that of a man, i.e. her ability to be patient when lacking sex.

These two examples from the disputation show that jurists not so much mirrored as much as they *shaped* the values of their community. In contrast to Hallaq, Daphna Ephrat's *A Learned Society in a Period of Transition* provides a more accurate understanding of the juristic class of Baghdad in this era as attempting to organize and construct a communal identity in a time of political change and instability. Ephrat notes that in the aftermath of the fragmentation of the Abbasid empire the Baghdad *ʻulama* of the 11th and 12th centuries attempted to construct a more united and homogeneous Sunni Islam: "Pressure for conformity and uniformity among Muslims was perhaps nowhere stronger than in the caliphal city of Baghdad, where the bitter disputes over proper Islamic creed and behavior reached a peak."[85] Ephrat's study itself is concerned with answering the question of how the jurists were "able to guarantee their exclusive authority in transmitting legitimate knowledge and defining the boundaries of their group?"[86] She argues that

[85] Ephrat, *A Learned Society in a Period of Transition*, 2.

[86] Ibid., 6.

jurists during this period "began to emerge as a more defined and exclusive group." Ephrat examines the *ḥalqa* of learning and deems that the transmission of knowledge was essential in delineating the boundaries of the *'ulamā'* from the lay Muslims.

The disputation should also be seen as a practice that delineated the boundaries and hierarchies of the juristic community. This is so in two ways. First, the disputation brought the community of jurists together: recall Bājī's statement that "practically everyone belonging to the community of knowledge was in attendance" when Ṭabarī and Ṣaymarī were first implored to engage in a disputation. The aforementioned injunction not to debate in the rulers' courts meant that the jurists gathered by and for themselves in their private homes, mosques, and colleges. The disputation also linked its participants to a community that transcended time and space. Following Benedict Anderson, one could say that disputation permitted jurists to imagine that this community's members, despite never all meeting each other, were united in the search for God's law.[87] This was partly the effect of being able to bring together jurists from a variety of geographical origins, e.g., Bājī, a Moroccan traveller, Shīrāzī, originally a Persian from the province of Fars, and Dāmaghānī, a native of Baghdad. Moreover, each jurist saw themselves as continuing the disagreements and, in some cases, disputations of their predecessors. The hierarchy of authority within these schools depends who has the right to represent the school in the continuation of these debates. Here Dāmaghānī stands in for Abū Ḥanīfa and Shaybānī, Shīrāzī for al-Shāfi'ī. And although Bājī does not engage in the disputation directly, he demonstrates how, as an audience member, the points made in the disputation relate to his own Māliki school of law.

Second, the disputation drew boundaries between jurists and lay Muslims. Only the jurist had the capacity and therefore the right to engage in the disputation. The disputation was at times a very public manifestation of this prerogative. The mosque in which Shīrāzī and Dāmaghānī disputed was an open space for all. One might see the disputation as a practice of boundary-making.[88]

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[87] Anderson, *Imagined Communities*, 6. In fact, all communities larger than primordial villages of face-to-face contact (and perhaps even these) are imagined.

[88] There is here a resemblance to David Freidenreich's claim that ritual restrictions around food also created boundaries communal boundaries. Freidenreich contends that the placing of limitations on the type of foods a religious community places limits on who can sit at a common table and therefore thwarts "efforts to make connections across boundaries." Freidenreich, *Foreigners and Their Food*, xi.

Likewise, the performative nature of the disputation in plain sight of lay Muslims made clear who could and could not speak in debates on the law.

In theory, the critical debate that characterized classical Islam is one that opens up the possibility of inclusivity in determining the law. This potential for inclusivity has been the reason for so much attention to Habermas's theory of deliberative democracy. Speaking of Habermas' theory, Iris Marion Young notes:

> A dialogic conception of normative reason promises a critique and abandonment of the assumption that normative reason is impartial and universal. Precisely because there is no impartial point of view in which a subject stands detached and dispassionate to assess all perspectives, to arrive at an objective and complete understanding of an issue or experience, all perspectives and participants must contribute to its discussion. Thus dialogic reason ought to imply reason as contextualized, where answers are the outcome of a plurality of perspectives that cannot be reduced to unity.[89]

The attention to Habermas's theory has however brought out the chimera of imagining an impartial dialogue divorced from power. As Chantal Mouffe notes, Habermas presupposes that the more democratic a society, the less power will determine social relations.[90] Mouffe in contrast articulates that relations of power are ineradicable. There is no ideal speech situation in which the rules governing a dialogue, the voices and identities given consideration, and the forms of rationality taken seriously do not end up privileging some and silencing others.

The critical debate of Islamic law might have included a plurality of voices, but it was not exempt from exclusion. As Talal Asad notes, the development of a tradition always involves power. He states: "orthodoxy is not a mere body of opinion but a distinctive relationship--a relationship of power to truth. Wherever Muslims have the power to regulate, uphold, require, or adjust correct practices, and to condemn, exclude, undermine, or replace incorrect ones, there is

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[89] Young, "Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory," 68–69.

[90] Mouffe, "Deliberative Democracy or Agonistic Pluralism?," 753.

the domain of orthodoxy."[91] The distinction between scholarly and lay classes was an explicit and unashamed one. It was in many ways essential to the production of the law insofar as it restricted the participants to those who had received adequate legal training; but as the analysis above shows, it also transcended engagement with the revelatory sources of the law and permitted jurists to speak on behalf of the pains and normative behaviours of Muslim husbands and wives. That jurists were men makes more pronounced their belief that they can speak on women's behalf.

1.4 Conclusion: An Islamic Mode of Critical Reflection

This chapter has attempted to show how the practice of disputation was inextricable from it as an act of worship. Through the disputation, jurists attempted to fulfill the communal obligation of discovering God's law as it related to the affairs of the lay-Muslim community. Jurists therefore recommended that the courts of rulers be avoided. The mosque, among other spaces, was a more appropriate setting to ensure all jurists could speak their mind without fear of reprisal.[92] They insisted the disputation take place between jurists of equal skill in order to permit the best arguments to emerge. In addition, the jurists advocated the cultivation of sincerity towards finding truth by adopting a variety of ethical practices. The jurists were attuned to the possibility of passions and egos arising in a competitive debate. The cultivation of sincerity would ensure that jurists avoid making arguments out of anger or pride. This transformed the disputation from a potentially competitive encounter of showmanship to one that could bring the Muslim subject closer to God.

The disputation therefore involved a distinctly Islamic mode of critique in the classical period. Critiquing another was not in the service of freeing the subject from religion for the sake of subverting authority. Quite the contrary, it served to unite and shape the religious community of Muslims by providing them with laws rooted in the revelatory sources of the religion and depended on entrenching relations of power between Muslim jurists who debated and decided on

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[91] Asad, "The Idea of an Anthropology of Islam," April 1, 2009, 22.

[92] Other places included colleges (*madrasas*), and scholars' homes, see Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West*, 134–35.

these rules and the lay class expected to follow them.[93] Women in particular found themselves excluded from the debate even on issues where they could uncontrovertially claim expertise.

[93] Kant, *Critique of Pure Reason*, 101.

Chapter 2

2 The Emergence of the *Munāẓara*: The Formation of a Culture of Critical Legal Debate

Jürgen Habermas's famous *The Structural Transformation of the Public Sphere* traces the emergence of a debating public in Europe in the 18th century Enlightenment.[1] Habermas contends that salons, cafes, and newspapers were sites of genuine and open debate among the European bourgeois class. Critics and sympathizers of Habermas alike have pointed out the ways in which relations of power excluded the participation of most of society within this public sphere.[2] Their critique makes one wonder about the extent to which this sphere could be qualified as truly open to debate. Still, Habermas's work has the virtue of alerting us to the fact that particular modes of critical debate were pervasive during particular historical junctures. In that sense, it is possible to speak of periods of greater openness to critical debate—so long as one contextualizes and specifies in what ways this is the case. It matters, for instance, that some historical critics were pilloried and others celebrated. Socrates' *Apology* and *Crito* show the limits of critique in Athens in the 4th century BCE.[3] In contrast, Kant's contemporaries' celebration of his critical philosophy reflects a certain type of openness to philosophical critique in Europe in the 18th century. It is then a genuine question of historical interest to ask what forms of critique were accepted, embraced, and celebrated in different historical eras and cultures—and which were not. What is more, it is relevant to ask *why*. In other words, it is relevant to ask what conditions permitted particular practices of critical debate to emerge and to continue.

This chapter asks these questions of Shīrāzī's legal culture. In particular, it traces the intellectual history from which the disputation emerged and to analyze the discourses that supported and legitimated the jurists' openness to legal debate through the medium of the disputation. This openness is characterized by the jurists' willingness to continue to engage in mutual critique and

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[1] Habermas, *The Structural Transformation of the Public Sphere*.

[2] See the edited volume, Calhoun, *Habermas and the Public Sphere*.

[3] Plato., *The Last Days of Socrates*.

to entertain the validity of each other's arguments over a sustained period of time. In the disputation, the jurists could not defer to doctrinal authority. They agreed to place their doctrine in a position of temporary vulnerability and to open themselves up to seeing the law from a new angle even if this meant being subject to doubts over their legal arguments and doctrines.

Part of the story I tell focuses on the emergence of legal disputation, with its defined structure and rules, within Baghdad's 10th century law schools. I will show how disputation was an outgrowth of early informal and unstructured debates on the law. The schools formalized and theorized the practice of disputation in order to use it in the process of training jurists. They also used it as a means of defending school doctrine from its detractors.[4] The disputation therefore became a permanent facet of the landscape of the jurists' legal culture. There are indications that through their practice of debate on legal disagreements, the jurists came to respect their interlocutors and to appreciate the diverse views they had to share in their critical debate.

However, the institutionalization of the disputation within the schools of law was only part of the equation of shaping this debating culture. Crucially, this culture's openness to debate was nurtured by the emergence of an epistemological discourse that validated the need for critical engagement in the process of deriving the law. The jurists' agreed that the proofs of the law were too subtle and recondite for a jurist to have any assurances that his position was the weightiest. Some went so far as to declare all positions equally valid.

It was in the context of debating their legal epistemology within books of *uṣūl al-fiqh* that jurists turned towards thinking about the purpose of the disputation. Many asked, "Why do we gather to engage in the practice of disputation if all legal positions are correct?" The answer to this question varied from one jurist to another. However, all of their answers touched upon the ways in which dialogical debate could help the jurists in their *ijtihād*. The debate itself reflected the jurists' heightened awareness about the benefits of face-to-face critical debate to their attempts at expounding their legal tradition. This then led to exhortations that jurists respect their opponents for their contributions to their own legal reasoning. In the end, this epistemological discourse about the uncertainty of the proofs of the law ultimately provided a discursive justification for continued and open debate among the juristic class.

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[4] Makdisi, *The Rise of Colleges*, 128.

The importance of this epistemological discourse is most evident in the contrast between the legal and theological disputation (the *munāẓara* dedicated to the science of *kalām*). The theological disputation did not benefit from an epistemology of uncertainty and the accompanying pluralism that came from it.[5] Theology dealt with rational proofs, like the existence of God, and jurists agreed that disagreement in these matters was inconceivable. In fact, the 11th century is replete with acrimonious disputes between the jurists on questions of theology. Shīrāzī himself was a key figure in at least one of these more ugly episodes. In 1076-1077, Shīrāzī, as the chair of the *Niẓāmiyya* College of Baghdad, invited Abū Naṣr al-Qushayrī from Khurasan to lecture in his college. Qushayrī's lectures on Ash'arī theology angered the Ḥanbalīs, most of whom considered many of the Ash'arī school's teachings to be heretical and antagonistic to their own creedal beliefs.[6] The situation escalated into a series of riots in which "about 20 people died" according to Subkī, and the seriousness of the situation resulted in the state intervention more than once.[7] The rejection of multiple opinions in theology shaped the theological disputation. In the jurists' eyes, the theological disputation was a means to combat heresy and confusion about the absolute truths in the religion. The encouragement towards openness to the other's views and a humility about one's own that marked legal disputation was absent in the case of its theological analogue.

This analysis of the epistemology buttressing legal disputation is meant to contribute to Islamic legal history in two ways. First, it refines our understanding of the differences between types of disputations in classical Islam. The current scholarship minimizes the distinction between the legal and the theological practice of disputation. For instance, George Makdisi invokes both theological and legal disputations in his analysis of the decorum and setting of the jurists' disputations.[8] He feels no need to alert his reader to the possibility that the two might diverge in significant ways. Likewise, Larry Miller points out that legal disputation's structure of question

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[5] Margaret Davies, "Legal Pluralism" in the *Oxford Handbook of Empirical Legal Research*. Ed. Peter Cane and Herbert Kritzer. "Legal pluralism refers to the idea that in any one geographical space defined by the conventional boundaries of a nation state, there is more than one law or legal system." My use of the term pluralism should not be confused with the doctrine of pluralism that characterizes modern political theory in which recognizes a pluralistic nature of the nation and therefore resembles multiculturalism to great extent. There is a way in which Islamic law resembles the philosophical pluralism that characterizes postmodern thought in that it recognizes the limits of human reasoning in understanding the law.

[6] Subkī mentions exceptions of Ḥanbalīs who were also Ash'arīs in theology, al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 3:373.

[7] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:235.

[8] Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West*, 128–40.

and answer was analogous to its theological counterpart.[9] This minimization of differences is the product of the widespread view that jurists derived the legal disputation from its theological counterpart, whose practitioners in turn had appropriated their theory of dialectical argumentation from translations of Aristotle's works. Historians have come to this conclusion by noting that the first *jadal* manuals were composed in order to theorize the theological disputation in the 9th century and that these manuals greatly inspired later manuals of legal *jadal*.[10] Thus the jurists are said to have digested and adapted the theological dialectics to suit their purposes. Walter Young takes exception with the narrative that legal *jadal* was the by-product of a theological practice.[11] He notes that the proofs and objections listed in books of *jadal* can be located in the polemical treatises of law of the 8th century. He considers this to show that *jadal* manuals were at least partly the product of jurists own legal discussions. He states that the translation movement spurred changes in the juristic disputation: "What we see after the translation of Greek dialectic may best be understood as a *re-invigoration*—a new systematization along more strictly Aristotelian lines, in certain quarters and among certain theorists."[12] Thus this chapter continues Young's pioneering efforts to delineate the separate and distinct histories of the different disputations in the world of Islam.

Second, and more importantly, it serves to correct the view that legal disputation's function was to close disagreement—quite the opposite, it fostered it. As the chapter shows, not all jurists defined disputation as an attempt to sway their opponent to follow their own view. Moreover, even those jurists who did think disputation's aim was to convince another to adopt his opinion, generally agreed that most legal proofs were too subtle to produce agreement. The literature up until now asserts the reverse. Makdisi explicitly asserts that the disputation's objective was achieving consensus (*ijmā'*) stating: "Within each school, as well as among all schools, personal legal opinions were pitted against one another, and the best-defended opinion survived."[13] Hallaq likewise states this point, saying that the disputation sought to solve issues of

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[9] Miller, "Islamic Disputation Theory, 87.

[10] Ibid., 5–6; Hallaq, "A Tenth-Eleventh Century Treatise on Juridical Dialectic," October 1, 1987; Hallaq, *A History of Islamic Legal Theories*, 136.

[11] Young, "The Dialectical Forge," 57.

[12] Ibid., 47.

[13] Makdisi, "The Significance of the Sunni Schools of Law in Islamic Religious History," 2.

disagreement because "being that truth is one, and for each case there is only one true solution."[14] By the jurists' own admission, this alleged resolution was either irrelevant to them or practically impossible for most cases.

The chapter is divided into two parts. It begins by historicizing the emergence of the legal disputation from its origins in the informal and unstructured legal discussions of jurists in the 8th century to its systematization within the early 10th century school of law. While this historicization acknowledges the common view that the development of legal disputation owed much to its widespread practice and to the theorization of dialectic in theological debates—a practice patronized by caliphs and other rulers—it also adds complexity to the narrative by attempting to compare records of disputations across the 8th-11th century to trace their slow evolution into the classical form of that emerged sometime in the 10th century. The second section turns to a standard exposition within books of *uṣūl al-fiqh* of the epistemological differences between law (*fiqh*) and theology (*usūl al-dīn*). In the process of this exposition, the jurists debated the question of disputation's relationship to finding the truth of God's law. These debates are the earliest traces of the jurists' self-reflexively engaging with the purpose of disputation. This second section uses their disagreements to highlight how the jurists' understanding of truth about the law nurtured an awareness that they had much to gain intellectually from debating with others. This helped nurture an openness to continued debate.

2.1 The Emergence of the Classical Legal Disputation

In the consciousness of 11th century jurists, disputation was a practice that began with the Prophet.[15] Ibn Fūrak states that to engage in disputation is to "follow the example of the Prophet" who called the people to Islam. He presents the commands addressing the Prophet in the Qur'an: "Call towards the way of your lord with wisdom and a beautiful exhortation, and dispute with them in the best of manners"[16:125] and "do not dispute with the people of the

[14] Hallaq, "A Tenth-Eleventh Century Treatise on Juridical Dialectic," October 1, 1987, 198.

[15] In fact, Abū 'Alī Sukūnī's *'Uyūn*, a work which aspires to present all extant theological disputations, begins with a disputation that transpires between the angels and satan when God creates Adam, al-Sukūnī, *'Uyūn al-Munaẓarāt*, 15.

book except in the best of ways."[16] [29:46] In speaking of legal disputations, Abū Bakr al-Bāqillānī (d. 403./1014) expresses and agrees with a common view that: "the *'ulamā'* have not ceased from the time of the Prophet until our time today to present each other with arguments."[17] He speaks of this as the "consensus of the scholars to dispute the proofs of the law (*ijmā' al-'ulamā' 'alā al-tanāẓur*)." Among others, Shīrāzī mentions the example of 'Alī who thought, against the majority of companions, that the *umm al-walad* (a slave who gave birth to her master's child) could be sold.[18] Other examples include 'Umar and Abū Bakr's disagreement about how to deal with the Arab tribes refusing to pay the *zakāt* in the wake of the Prophet's death.[19] Juwaynī explains nonetheless that this type of early legal disputation departed from those of the 11th century insofar as they did not involve the leveling of "objections, critiques, or the presentation of contradictory evidence."[20] He describes their debates as mutual consultation that paralleled the later juristic process of *tarjīḥ* whereby a jurist would examine and rank different evidences' strength bearing on a case.

The early juristic community of the 8th century certainly tested and defended their positions through fairly frequent face-to-face debates. Biographical entries are littered with the terms *jadal* and *munāẓara* and they recount famous debating partners like al-Shāfi'ī and Muḥammad ibn al-Ḥasan al-Shaybānī.[21] Melchert claims that disputation was common among the juristic community and distinguished it from the *ahl al-ḥadīth* movement that tended to move away from rational debate.[22] Some have attempted to attribute the prevalence of disputation during this time to a history of debate within the Middle East. Geert van Gelder, for instance, notes the presence

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[16] Ibn Fūrak, *Mujarrad Maqālāt al-Shaykh Abī al-Ḥasan al-Ash'arī*, 293.

[17] Al-Juwaynī, *al-Talkhīs fī uṣūl al-fiqh*, 2003, 3:304. "*wa-mā zāla al-'ulamā min 'ahd al-rasūl ilā 'aṣrinā yataḥājjūn*." This is the view that Juwaynī attributes to Bāqillānī in the course of presenting a summary of Bāqillānī's *uṣūl al-fiqh* doctrine.

[18] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 1043.

[19] Ibid., 1063; al-Bājī, *al-Minhāj fī Tartīb al-Ḥijāj*, 16. Bājī notes a disputation between 'Alī and Zayd b. Thābit on whether a *mukātaab* slave (i.e., a slave who is a party to a contract of manumission with his master) could be stoned if he committed adultery. 'Alī said no because he remains a slave so long as he still owes a single dirham to his master.

[20] Al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, 2:175.

[21] Qārī al-Harawī, *Athmār al-Janiyyah fī al-Asmā' al-Ḥanafiyyah al-Shahīr bi-Ṭabaqāt al-Ḥanafiyyah*, 138. Here Shāfi'ī says that God aided him in gaining knowledge through al-shaybani.

[22]Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries C.E*, 19.

of the practice in the pre-Islamic Middle East among various linguistic communities.[23] Belhaj points to the practice of pre-Islamic practice called *mufākhara/munāfara* in which two opponents extolled and enumerated the virtues of the tribe or clan in poetic form before a judge as a precursor to the disputation.[24] As Elizabeth Wagner notes, these competitions sometimes took place before battles with the topic being "courage in battle (a favourite topic are the slain enemies, left as carrion to the birds), generosity, a well-balanced judgment in tribal council meetings, and a talent to enjoy the pleasures of life, sc. women, gambling, wine and hunting."

The dialogical nature of debates within early Islamic legal culture continued to leave its imprint on the law. For instance, Walter Young argues that al-Shāfiʿī's polemical treatise *Ikhtilāf al-ʿirāqiyyīn* is the product of his disputations with the jurists of Iraq. The treatise explicitly contains the dialectical back and forth (*sic-et-non*) between al-Shāfiʿī and his detractors each taking turns speaking on a particular legal issue. It is his opponents' claims that push al-Shāfiʿī to develop his ideas and better defend his positions. Likewise, one might point towards Saḥnūn's (d.240/855) *Mudawwana* as another early text exemplifying the dialectical structure of the law. The early Mālikī text is structured around a socratic-type of question and answer between Saḥnūn and Mālik's student ibn al-Qāsim (d.806) relaying his master's views.

Despite sharing the same name (*munāẓara*), these 8th and early 9th century departed significantly in their rules, conventions, and formalities from those disputations of the 11th century analyzed in this dissertation. This is evident in the twenty-three alleged disputations that Fakhr al-Dīn al-Rāzī (d.606/1209) would record in his *Manāqib al-Imām al-Shāfiʿī*. Take the narration of al-Shāfiʿī's encounter with Isḥaq ibn Rāhawayh, also found in Bayhaqī's book on al-Shāfiʿī.[25] The disputation sees the pair debating the question of whether or not houses in Mecca can be said to be owned, and as a consequence, can be rented or inherited. Al-Shāfiʿī believed they could be

[23] Gelder, "The Conceit of Pen and Sword: On an Arabic Literary Debate."

[24] Belhaj, *Argumentation et dialectique en islam*, 6.

[25] Bayhaqī, *Manāqib al-Shāfiʿī*, 1:179. See also Melchert's rendering of the debate, Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries C.E*, 20. While these disputations authenticity might be placed into question, it is well to note that they appear in multiple sources that predate al-Rāzī such that collectively, they do give the reader a sense of the structure of early *munāẓarāt*. Moreover, the fact that they depart so much from the later disputations is an indication of their early origins (if not necessarily authenticity).

while Isḥaq took the view that they could not because they were the collective property of the Muslims:

> Isḥaq ibn Rāhawayh narrated: We were in Mecca when al-Shāfiʿī and Aḥmad ibn Ḥanbal were present. Aḥmad used to attend the gatherings of knowledge of al-Shāfiʿī, but I stayed away from them, so Ahmad said to me: "Oh Abū Yaʿqūb, why don't you join this man's gatherings." I answered: "What do I have to gain from him, his age is very near ours and I do not want to leave Ibn ʿUyayna and the other scholars for his sake." He said: "Woe to you, others come and go, but not this man." Ibn Isḥaq said: "So I went to him and we debated (*tanāẓarnā*) on the subject of the rent of the houses of the people of Mecca. Al-Shāfiʿī was taking things easy in debating whereas I was going to great lengths to make strong arguments. When I concluded my argument, I turned to a man from the people of Marv who was with me and said: "This man isn't very skillful." Al-Shāfiʿī understood that I had said something insulting about him. He then said: "Are you debating?" and I said: "That's why I came." Al-Shāfiʿī said: God the highest said "To the poor among the *muhājirīn* (the migrants), those who have been forced to leave their homes," from this, do you think that God ascribed these homes to their owners or to others than their owners?" And the Prophet said on the day of the conquest of Mecca: "Whoever locks his door [among the Meccans] is protected" and whoever takes refuge in the house of Abī Sufyān is protected." Thus from this, do you think he ascribed their homes to their masters?" …Isḥaq ibn Rāhawayh answered: "The proof for my position is that some of the *Tabiʿīn* have said it." So al-Shāfiʿī said to those present: "Who is he?", to which it was said: "Isḥaq ibn Ibrahīm al-Hanẓalā." Al-Shāfiʿī said "You are the one that the

people of Khurasan claim as their most learned" So Isḥāq answered: "That is what they claim**.**"[26]

This disputation's departures from its successor are evident. First, there is the lack of formality that exists in later disputations. Al-Shāfi'ī here has to ask his opponent if they are actually engaged in a disputation and the disputation also easily slides from tackling a subject of debate to casual conversation. This lack of formality is attested in al-Shāfi'ī's other narrated disputations. In one disputation, al-Shāfi'ī is reclining in the mosque when the theologian Bishr al-Marīsī walks in and makes a statement to al-Shāfi'ī's student al-Muzanī, which provokes al-Shāfi'ī to sit up, answer with a one liner, and to lie back down again.[27] By contrast, the classical disputation's form was well-defined through a clear set of typical questions and answers from which the jurists only had modest flexibility to alter. Moreover, they stayed on point rather than digressing into other topics. Second, even after al-Shāfi'ī recognizes that he and Ibn Rāhawayh are indeed engaged in a disputation, there is no designated questioner or respondent. In other words, there is no one person positing a proof and the other attempting to level objections. As Larry Miller notes, the process of question and answer was the hallmark of the classical disputation. Finally, the jurists do not dwell on the validity of one particular proof. Rather, the disputation sees both jurists presenting their multiple evidences for their position. The positing of one proof was also essential to the process of disputation in its classical form. The concept of a disputation for these early jurists might thus best be understood as referring to any discussion on a matter of law in which jurists presented and attempted to justify their points of view.

This early understanding of the disputation continued to influence the 11th century jurists' definition of the term *munāẓara*. Al-Shīrāzī defines the *munāẓara* as a gathering in which two

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[26] Al-Rāzī, *Manāqib al-Imām al-Shāfi'ī*, 272–73. "*Kunnā bi-makka wa'l-Shāfi'ī bihā wa-Aḥmad ibn Ḥanbal ayḍan bihā. Wa-kāna Aḥmad yujālis al-Shāfi'ī. Wa-kuntu lā ujālisuhu. Fa-qāla lī Aḥmad: 'Yā Abā Ya'qūb, li-ma lā tujālis hadhā al-rajul?' Fa-qultu: 'Mā aṣna' bihi wa-sinnuhu qarīb min sinninā, kayfa atruk Ibn 'Uyayna, wa-sā'ir al-mashāykh li-ajlihi?' Qāla: 'Wayḥak. Inna hadhā yafūt wa-dhāka lā yafūt.' Qāla Isḥāq: fa-dhahabtu ilayhi, wa-tanāẓarnā fī kirā' buyūt ahl Makka. Wa-kāna al-Shāfi'ī yusāhil fī al-munāẓara, wa-anā bālaghtu fī taqrīr. Wa-lammā faraghtu min kalāmī—wa-kāna ma'ī rajul min ahl Marw—iltafattu ilayhi wa-qultu:* (words in a foreign language) *Fa-'alima al-Shāfi'ī annī qultu fihī sū'an. Fa-qāla lī: 'A-nunāẓir?' Qultu: 'li-munāẓara ji'tu.' Fa-qāla al-Shāfi'ī: 'qāla Allāh ta'āla: 'li'l-fuqarā' al-muhājirīn, al-ladhīna 'ukhrijū min diyārihim,' fa-nasaba al-diyār ilā mālikīhā, am-ilā ghayr mālikīhā? Wa-qalā al-nabī…yawm fatḥ Makka: "min aghlaqa bābahu fa-huwa āmin, wa-man dakhala dār abī sufyān fa-huwa āmin, fa-nasaba al-dār ilā arbābihā am ilā ghayr arbābihā?'…fa-qultu: 'al-dalīl 'alā ṣiḥḥat qawlī: ba'ḍ al-tābi'īn qāla bih.' Fa-qāla al-Shāfi'ī li-ba'ḍ al-ḥāḍirīn: 'man hadhā?' Fa-qīl Isḥāq ibn Ibrahīm al-Ḥanẓalī. Fa-qāla al-Shāfi'ī 'anta al-ladhī yaz'am ahl khurasān annaka faqīhuhum?' Fa-qāla Isḥāq: 'hakadhā yaz'amūn…'*"

[27] Ibid., 275.

people reason. He notes that the word comes from the same root as *naẓar* (reasoning or reflection), which he himself defines as the "the thought upon the state of an object of reflection."[28] As al-Juwaynī puts it: "all *munāẓarāt* involve reasoning, but not all reasoning is a *munāẓara*."[29] Linguistically, the word *munāẓara* did not necessarily refer to a dialogue among opponents defending conflicting positions. Thus Subkī uses the word *munāẓara* to describe a discussion in the 10th century between the Shāfi'ī jurist Abū Bakr al-Ṣayrafī (d. 330/942) and Abū al-Ḥasan al-Ash'arī in which al-Ash'arī points out that it is theologically problematic to retain the view that it is a legal obligation to be grateful to God, the benefactor (*shukr al-mun'im*). Al-Ash'arī explains that if Ṣayrafī retains his view, he will be obliged to follow the view of the Mu'tazila on another point of doctrine. Ṣayrafī, understanding the situation, answers without any reticence or seemingly deep thought, "Abandoning the position of the obligation to be grateful to God is easier (*tark al-qawl bi-wujūb al-shukr ahwan*)."[30] In practice, however, a *munāẓara* usually featured two jurists tenaciously defending their conflicting positions. This is the reason that 11th century jurists, as Makdisi points out, tended to equate the word *munāẓara* with *mujādala*.[31] Juwaynī states that there "there is no difference between the *munāẓara, jidāl, jadal,* and *mujādala* in the technical language of the scholars of substantive law and legal theory even if *jadal* and *munāẓara* are distinguished in plain speech (*al-lugha*)" owing to their separate linguistic roots.[32] Shīrāzī expresses the same view when he points out that the practice referred to as *munāẓara* would more fittingly be called *mujādala* because it denotes the adversarial nature of their reasoning. [33]

A series of historical events are responsible for transforming the 8th and 9th century *munāẓara* into the institutionalized and convention-governed practice described in books of *jadal*. The first of these was the emergence of a culture of debate within the Caliph's and other rulers' courts. We know, for instance, that debates frequently took place in the court of early

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[28] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 153. *"huwa al-fikr fī ḥāl al-manẓūr fīhi"*

[29] Al-Juwaynī, *al- Kāfiya fī al-Jadal*, 83.

[30] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 3:187. Subkī adds "*fa-'ataqadahu*" i.e., he believed in the Ash'arī position.

[31] Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West*, 109.

[32] Al-Juwaynī, *al-Kāfiya fī al-Jadal,* 83. "*Wa-lā farq bayn al-munāẓara wa'l-jidāl, wa'l-jadal, wa'l-mujādala fī 'urf al-'ulamā' bi'l-uṣūl wa'l-furū'*."

[33] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 153.

Abbasid Caliph Harūn al-Rashīd. These early caliphal court debates appear to have been largely for purposes of entertainment. Ghazālī notes the prevalence of wine and music during the gatherings.[34] As A. Talmon has suggested, court debates spanned the entire gamut of intellectual topics. His analysis notes that debates in the court of the ruler tackled nearly all topics of knowledge, whether "[t]he readers of Qu'ran and the learned doctors of the law and physicians and astrologers and scientists and mathematicians and philosophers."[35] Moreover, these debates often occurred across religious lines, notably including the participation of Jews and Christians of different sects.[36] The style of these debates varied. Some depended more on the rhetorical and poetic skills of its participants. For instance, Jāḥiẓ's *Kitāb al-Ḥayawān* offers a literary rendering of a purported historical debate on the whether the dog or the rooster is superior.[37] These disputations had a competitive and agonistic undertone that in some ways resembled the pre-Islamic Arabic practice of boastful and self-aggrandizing poetry competitions mentioned above. Other court disputations involved far more straightforward argumentation. This was particularly the case of the more theological debates. Sarah Stromsa, for instance writes that that theological debates would have been "more sober, more earnest, and perhaps less entertaining."[38] Still others featured a type of inquisitorial questioning in which the interlocutor attempted to defend himself in front of the ruler.[39] The law does not appear to have been particularly prominent in early Caliphal or governor court debates. Ghazālī says that rulers first took an interest in the debates of theologians and only later in those of the legal jurists.[40] Still the rulers' patronage of debates created a society in which organized debate became a prevalent mode of engagement within the

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[34] Lazarus-Yafeh, "Preface," 10. Taken from In the *Iḥyāʾ*, part 2, book 9 on *'Amr bi'l-ma'ruf and nahī 'an al-munkar.*

[35] Talmon, "Tawaddud-The Story of a Majlis," 123.

[36] See Griffith, "The Mond in the Emir's Majlis." Moreover, Ghazālī suggests that the law did not receive the attention of the rulers' *majlis* until after theology.

[37] Miller, "More Than the Sum of Its Parts," 8. Considering that the alleged interlocutors of this debate, al-Naẓẓam (d.835) and Ma'bad (d.703), died nearly a century apart, the debate could not have historically taken place. Yet Jāḥiẓ's reconstruction of the debate suggests that such topics were not anomalous in the ruler's court.

[38] Stromsa, "Ibn Rāwandī's Sūʾ Adab al-Mujādala: The Role of Bad Manners in Medieval Disputations."

[39] Thus al-Sukūnī lists the Aḥmad ibn Ḥanbal's inquisition as a disputation, al-Sukūnī, *'Uyūn al-Munaẓarāt*, 211.

[40] Al-Ghazālī, *Iḥyā' 'Ulūm Al-Dīn*, 1:42.

Eastern lands of Islam. As Hava Lazarus-Yafeh notes, there was openness in these debates to a variety of viewpoints.[41]

The second major event was the Greek translation movement (circa 815-865).[42] Many studies have noted the impact of the translation of Aristotle's works, particularly the *Topics,* on the theological and legal theorization of the disputation, i.e, works of *jadal*.[43] Belhaj contends that the crucial moment in the Muslim science of *jadal* was al-Fārābī's analysis of Aristotelian dialectic, which made intelligible the science of disputation to an Arabic speaking audience.[44] Before influencing the legal sciences, Aristotle's theorizations on dialectic first made their way into theological treatises. Miller locates in Ibn Rāwandī (d.250/864) the first theological exposition of dialectic.[45] Miller concludes that though theological texts of *jadal* are free from direct influence from Greek sources, they overlap in several respects with Aristotle's writings in the *Topics* and other texts from his *Organon*.[46] For instance, Miller notes the appropriation of the model of question and answer as being Aristotelian in origin. Historians contend that the jurists then followed suit and appropriated the nascent science of *jadal* for their own purposes.[47] Hallaq expresses agnosticism as to whether the jurists took inspiration directly from Greek sources or through the intermediary of the books written for the science of theology.[48] Regardless, the translation movement played a part in transforming the practice of *munāẓara* into an object and science of theorization.

Finally, the pedagogical reforms within the schools of law in the early 10th century played a significant role in institutionalizing and giving more definite shape to the legal disputation. The institutions of learning in Baghdad in the early 10th century established more defined stages in

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[41] Lazarus-Yafeh, "Preface," 8.

[42] Hallaq, "A Tenth-Eleventh Century Treatise on Juridical Dialectic," October 1, 1987, 197.

[43] Miller, "Islamic Disputation Theory"; Hallaq, "A Tenth-Eleventh Century Treatise on Juridical Dialectic," October 1, 1987; Belhaj, *Argumentation et dialectique en islam*.

[44] Belhaj, *Argumentation et dialectique en islam*, 15.

[45] Miller, "Islamic Disputation Theory, 1.

[46] Ibid., vii.

[47] For instance, Makdisi identifies a text of jadal ascribed to a theologian named Ibn Rummanī as being the source for Ibn 'Aqīl's own treatise on the subject. Makdisi, "Dialectic and Disputation: The Relation between the Texts of Qirqisani and Ibn 'Aqil."

[48]Hallaq, *A History of Islamic Legal Theories*, 136.

the progress of a student on his way to becoming a jurist *faqīh*.[49] This process included the systematization of disciplines within the school curriculum, one key example being *uṣūl al-fiqh*, and the introduction of pedagogical methods like practices of memorization and the production of school commentaries (*ta'līqa*). It appears that very early on, the disputation was recognized as an important tool in the educational process. This is clear from what biographical dictionaries say about the first generation of Baghdad Shāfi'īs who initiated and continued these pedagogical reforms. Melchert and other have associated Ibn Surayj and his students with the formation of these new institutions of learning. According to Abū al-Hafṣ al-Muṭṭawi'ī, Ibn Surayj should be credited with developing the discipline of the science of disputation. He said: "Ibn Surayj is the master of his generation…he is the great leader (*ṣadr al-kabīr*) and the minor al-Shāfi'ī, he is an independent *imām* (*muṭlaq*), so far ahead of his colleagues that they could not match him, he was the first to have opened the gates of the science of legal reasoning (*al-naẓar*), and the first to teach them the science of dialectical argumentation (*jadal*)."[50] It is entirely plausible that Ibn Surayj systematized the process of disputation after his own engagements with theologians; some claimed that "Ibn Surayj was the best of al-Shāfi'ī's followers in *kalām*."[51] This association with *kalām* would also explain why Shīrāzī and other biographical authors attributed the first treatise of juristic *jadal* to al-Qaffāl al-Shāshī, Ibn Surayj's most theologically-inclined student.[52]

The 10th century pedagogical reforms also solidified school boundaries, which made the disputation indispensable to the defense of school doctrine. This is a point that the next chapter explores in greater detail, though it is sufficient for now to point to the fact that Ibn Surayj's recorded disputations include the defense of school doctrine against the school's detractors. This is evident from the fact that Ibn Surayj's primary interlocutor was Ibn Dāwūd of the rival Ẓāhirī school. Subkī writes: "Abū al-'Abbās [Ibn Surayj] had disputations with the Imām Dāwūd al-Ẓāhirī. As for his son, Muḥammad Ibn Dāwūd, Abū al-ʿAbbās engaged in many famous debates

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[49] Makdisi, *The Rise of Colleges,* ch.2 (99-148). Melchert, *The Formation of the Classical Sunnī Schools of Law, 9Th-10th Centuries C.E* 102. See especially Melchert's chapter 5.

[50] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 3:22. "*Ibn Surayj sayyid ṭabaqatihi bi-iṭbāq al-fuqahā', wa-ajma'uhum bi'l-maḥāsin bi-ijmā' al-'ulamā, thumma huwa al-ṣadr al-kabīr, wa-Shāfi'ī al-ṣaghīr, wa'l-imām al-muṭlaq, wa'l-sabbāq al-ladhī lā yulḥaq, wa-awwal man fataḥa bāb al-naẓar, wa-'allama al-nās ṭarīq al-jadal*."

[51] Ibid. Subkī reports this from al-Imām Diyā' al-Khitāb: "*Abū al-'Abbās kāna abra' aṣḥāb al-Shāfi'ī fī 'ilm al-kalām*,"

[52] Al-Fīrūzābādī al-Shīrāzī, *Ṭabaqāt al-Fuqahā'*, 115. Abū 'Alī al-Ṭabarī, who succeeded Ibn Surayj as head of the Shāfi'īs of Baghdad is also said to have written two texts on dialectic.

with him, as well as other encounters in salons that are preserved, and Abū al-ʿAbbās would prevail over him [on these occasions]."[53] Some of these disputations refer to the Shāfiʿīs as a collective group and highlight Ibn Surayj's defense of the school. Subkī records a disputation in which Ibn Dāwud arrives early at a regular meeting place for disputations between him and Ibn Surayj. There he finds a group of Shāfiʿīs, one of whom initiates a debate by asking Ibn Dāwud on a legal question relating to divorce.[54] When Ibn Surayj arrives and continues the debate, Ibn Dāwud challenges his position by stating that al-Shāfiʿī himself had two opinions on the subject, one of which being that of Ibn Dāwud, and thus that Ibn Surayj was bound to accept his rival's opinion as valid. The narration illustrates the awareness of all parties of the boundaries of their school and the need to defend its doctrine.

The practice of disputation in this early period presented above helped normalize divergent points of view on the law. There is evidence to suggest that it was through engaging in debates among each other that the jurists came to see their law as more pluralistic than they would have otherwise. This is clear in a story featuring Ibn Surayj in which the knowledge of the diversity of the legal positions pushes the boundaries of tolerable legal pluralism:

> The Wazir ʿAlī ibn ʿĪsā (d. 956 CE) was ill-disposed towards Abū al-ʿAbbās [Ibn Surayj], disliking him on account of his prideful attitude and his refusal to visit him. He favoured instead al-Qāḍī Abū ʿAmr because of the latter's devoted service to him, for which reason he appointed him to the judgeship. But Abū ʿUmar used to be ostentatious with his equals in Baghdad because of his high office. For that reason a group of scholars began search through his *fatwas*, until they gained the upper hand over him when he issued a *fatwa* that enabled them to claim that he had defied *ijmāʿ* (communal consensus). This news made its way to the caliph and to the Wazir, who called a meeting because of it. During the

[53] Al-Subkī, *Ṭabaqāt al-Shāfiʾiyya al-Kubrā*, 3:23–24. "*Wa-qad nāẓara Abū al-ʿAbbās al-Imām Dāwud al-Ẓāhirī, wa-ammā ibnuhu Muḥammad ibn Dāwud fa-li-Abī al-Abbās maʿahu al-munāẓarāt al-mashhūra, waʾl-majālis al-marwiyya, wa-kāna Abū al-ʿAbbās yastaẓhir ʿalayhi.*"

[54] Ibid., 3:26.

> meeting, Abū ʻAmr had a submissive countenance. Among those that attended was Ibn Surayj. When the Wazir told him about the matter, Ibn Surayj said: "What should I say about their claim that he [Abū ʻAmr] had violated *ijmāʻ*—a claim against which he has been unable to defend himself. In response, I say that his *fatwā* is in fact based on the statement of a good number of scholars, and the strangest thing of all is that it is the opinion of his own master Mālik. This statement of his is written within such-and-such book of his. So the Wazir ordered that this book be brought, and the matter was as Ibn Surayj had said. The Wazir was extremely pleased, especially by Ibn Surayj's knowledge of positions contrary to those of his own school, even as Abū ʻAmr appeared to be ignorant of the opinion of his own master. This episode was among the surest reasons for the friendship between Ibn Surayj and the Wazir. The Wazir continued to honour Ibn Surayj until he was appointed judge.[55]

The story shows how debate stretched the limits of *ijmāʻ* in the consciousness of jurists and thus the limits of what could be a legitimate source of disagreement. It was Ibn Surayj's knowledge of the science of *khilāf* that allowed him to defend the hapless Abū ʻAmr, and it was his sharing of it in a public setting that forced the jurists present to concede the validity of Abū ʻAmr's views. Moreover, there are reports that indicate the sincere respect that interlocutors gained for each other through debating. For instance, al-Shāfiʻī is known to have praised al-Shaybānī. Ibn Surayj, likewise, is said to have mourned Ibn Dāwūd's passing, going so far as stating: "The one thing

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[55] Al-Subkī, *Ṭabaqāt al-Shāfiʾiyya al-Kubrā*, 3:30–31, "*Kāna ʻAlī ibn ʻĪsā al-wazīr munḥarifan ʻan Abī al-ʻAbbās, li-faḍl taraffuʻihi, wa-taqāʻudihi ʻan ziyāratihi, munṣiban biʾl-mayl ilā Abī ʻUmar al-Mālikī al-qāḍī, li-muwāẓibatihi ʻalā khidmatihi, wa-li-dhalika kāna mā qalladahu min al-qaḍāʾ, wa-kānat fī Abī ʻUmar nakhwa ʻalā akfāʾihi min fuqahāʾ baghdād, liʻuluwwi martabatihi, fa-ḥamala dhalika jamāʻa min al-fuqahāʾ ʻalā tatabbuʻ fatāwāhu, ḥattā ẓafirū lahu bi-fatwā khālafa fīhā al-jamāʻa, wa-kharaqa al-ijmāʻ, wa-unhiya dhalika ilā al-khalīfa waʾl-wazīr, faʻaqadū majlisan li-dhalika, wa-kāna khadd Abī ʻUmar fīhi al-aḍraʻ, wa-fī man ḥaḍara Abū al-ʻAbbās ibn Surayj, fa-lam yazid ʻalā al-sukūt, fa-qāla lahu al-wazīr fī dhalika, fa-qāla mā akād aqūl fīhim, wa-qad addaʻaw ʻalayhi kharq al-ijmāʻ, wa-aʻyāhu al-infiṣāl ʻammā iʻtaraḍū bihi ʻalayhi, thumma inna mā aftā bihi qawl ʻidda min al-ʻulamāʾ, wa-aʻjab mā fī al-bāb, qawl ṣāḥibihi mālik, wa-huwa masṭūr fī kitābihi al-fulānī. Fa-amara al-wazīr bi-iḥḍār dhalika al-kitāb, fa-kāna al-amr ʻalā mā qālahu, fa-uʻjiba bihi ghāyat al-iʻjāb , wa-taʻajjaba min hifẓihi li-khilāf madhabihi, wa-ghaflat Abī ʻUmar ʻan madhhab ṣāḥibihi, wa-ṣāra hadha min awkad asbāb al-ṣadāqa baynahu wa-bayna al-wazīr, wa-mā zālat ʻināyat al-wazīr bihi ḥattā rushshiḥa liʾl-qaḍāʾ*."

that causes me sorrow is that the earth has consumed the tongue of Muhammad Ibn Dāwūd."[56] Debate in general seems to mould and shape the debaters to temper their zeal. It is well to note that even Christian debaters in the court of the Caliph were sometimes sent home with gifts.[57]

However, it would be an overstatement to suggest that the type of tolerance and respect for one's interlocutors which greatly contributed to the jurists' openness to critical debate could have arisen simply out of continued practice. For one, there are also reports about al-Shāfiʿī and Ibn Surayj's antagonism with their interlocutors. Makdisi relays the narration whereby al-Shāfiʿī's death was the result of blows suffered at the hands of the supporters of a Mālikī jurist in the aftermath of an acrimonious disputation between the two.[58] As for Ibn Surayj, he reportedly was in the middle of a disputation with the other leading Shāfiʿī of his time, Abū Saʿīd al-Istakhrī (d. 328/940), when he turned to his opponent and said: "You have been asked about a legal matter and you are mistaken on it. You are a person who eats a lot of greens, perhaps this has caused you to lose your brain." To which al-Istakhrī answered: "And you eat a lot of vinegar and the seasoning *murrī*, perhaps this has caused you to lose your religion."[59] For another, the practice of disputation on matters of theology did not preclude violent episodes between theological factions in the 11th century. What then made the legal disputation of the later 10th and 11th centuries different?

What is missing from the above story is the impact of juristic debates on the very purpose of their disputations. During the 10th century, jurists reflexively turned their gaze to their practice of disputation and made it an object of enquiry. They asked of each other the question: "why do we debate?" Jurists answered this question differently; but what would surface from their debates was a consensus that there are only a few legal issues which could lead a jurist in the disputation to believe his opinion was definitively correct. For the remainder of legal cases, either both parties' were correct, or else no one really knew for certain who had the better position. The upshot of this epistemological understanding of the law's uncertainty was the need to recognize

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[56] Ibid., 3:24. "*Mā āsā illā ʿalā turāb akala lisān Muḥammad ibn Dāwud*."

[57] For a general account of inter-religious disputations, see Lazarus-Yafeh, "Preface"; Talmon, "Tawaddud-The Story of a Majlis"; Griffith, "The Mond in the Emir's Majlis."

[58] Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West*, 136.

[59] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 3:231.

that one's opponent in the disputation could be right, or, at the very least, had something to contribute to one's own thinking on the law. It was these epistemological debates that nurtured the open culture of debate that marked juristic disputations. And it was these debates that distinguished the tolerance for pluralism in the law with the demand for consensus in theology. The next section examines these debates.

2.2 The Epistemological Framework of Islamic Law and Theology

The jurists' debates about the purpose of their face-to-face disputations determined the attitude with which they engaged in critical dialogue with their opponents. Scholarship has thus far missed these debates of theirs, precisely because they were tucked away in books of *uṣūl al-fiqh* under a wider epistemological question of the infallibility of jurists (*taswīb*).[60] Those scholars concerned with the function of disputation have therefore guessed and spoken for the jurists instead of paying attention to their own arguments on the matter. Most notably, Wael Hallaq asserts that the disputation's purpose was to produce or defend the real and true legal ruling amid other conflicting and erroneous opinions:

> In one sense dialectic constituted the final stage in the process of legal reasoning, in which two conflicting opinions on a case are set against each other in the course of a disciplined session of argumentation with the purpose of establishing the proof of one of them. The aim of this exercise, among other things, was to reduce disagreements (*ikhtilāf*) among legists by demonstrating that one opinion was more acceptable or more valid than another. Minimizing differences of opinion on a particular legal question was of the utmost importance, the implication being that truth is one, and for each case there exists only one true solution.[61]

[60] For published works dealing with this topic, see Zysow, "Mu'tazilism and Māturīdism in Ḥanafī Legal Theory"; Abou El Fadl, *Speaking in God's Name*; Emon, "Ijtihad."

[61] Hallaq, *A History of Islamic Legal Theories*, 137.

Certainly, some of the texts of *jadal* support this view. Ibn ʻAqīl provides as a definition of the disputation (*jadal*): "The bringing of one's opponent from one opinion to another by means of argumentative proof."[62] This definition suggests the desire to prove the other wrong. Moreover, there is no doubt that the disputation did aim to arrive at some sort of truth about God's law. As the previous chapter highlights, the jurists needed to purify their intentions to find truth (*al-ḥaqq*). The problem with Hallaq's view is that it neglects jurists' own debates about the purpose of the disputation and whether or not truth was singular or relativistic in their legal system. As I will show below, this debate makes clear that Hallaq's comments about the singularity of truth and the desire to weed out differences of opinion are more appropriate to the disputation in theology rather than in law. To show this, it is important to take heed of the wider epistemological debates shaping both law and theology in the 11th century.

2.2.1 The Jurists' Epistemology

By the 11th century, the jurists' arguments on epistemology shaped how they approached the study of theology and law. This epistemology divided all knowledge into two categories—knowledge as either necessary (*ḍarūrī*) or acquired (*iktisābī* or *muktasab*).[63] Shīrāzī defines necessary knowledge as: "All knowledge that God's creation cannot escape by raising doubts or by presenting specious argument."[64] It includes knowledge acquired through the five senses, knowledge of one's psychological states like the knowledge one has of one's happiness or sadness. It also includes the knowledge one obtains from a great many people relating the same information (*khabar mutawātir*). Juwaynī supplements this list by adding the knowledge of self-evident propositions like the impossibility that two contradictory statements be true.[65] Shīrāzī notes that this type of necessary knowledge is immediate without being mediated through the

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[62] Ibn ʻAqīl, *Kitāb al-Jadal*, 1967, 243. "*wa-huwa al-fatl li'l-khaṣm ʻan madhhab ilā madhhab bi-ṭarīq al-ḥujja*."

[63] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Lumaʻ fī Uṣūl al-Fiqh*, 148–49. See also, al-Juwaynī, *Kitab al-Irshad.* See Bernard Weiss for a more detailed discussion of this epistemological division Weiss, *The Search for God's Law*, 35–41.

[64] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Lumaʻ fī Uṣūl al-Fiqh*, 148. "*fa-ammā al-ḍarūrī fa-kull ʻilm lā yaqdir al-makhlūq an yadfaʻahu ʻan nafsihi bi'l-shakk wa'l-shubha*."

[65] Al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, 1:27.

faculties of reasoning. He explains that it is called necessary because it imposes itself upon the subject beyond any will of his own.

In contrast, the second type of knowledge was known as acquired knowledge (*'ilm al-muktasab*). This knowledge was acquired because it demanded that the knower use his rational faculties to process evidence and to arrive at a conclusion: "it is called acquired because he must acquire it through reflection and he must arrive at it through inference just as money must be acquired through toil and effort."[66] Unlike necessary knowledge, humans of sound mind could fail to arrive at this knowledge because the inference needed could be stunted by counter-arguments that raised doubts about one's position. It is well to point out that despite being liable to doubts, acquired knowledge was objectively true and therefore could produce certainty.

The jurists made a distinction between two types of proofs that lead to acquired knowledge. Juwaynī defines a proof saying that it is "That which, if reflected upon using sound reasoning, leads to that which was not known by necessity."[67] The first type of proof was called rational (*'aqlī*). Rational proofs were those which independently, or as Juwaynī puts it, "by virtue of a characteristic internal to itself" lead to knowledge. Juwaynī notes that it is impossible for the mind to entertain the existence of this proof without it also leading to the knowledge for which it serves as a proof. He gives as an example the perfect nature of our created world: this perfection is a rational proof for the conclusion that the creator possesses the attribute of knowledge. The second type of proof was transmitted proofs, or proofs that are "heard." This is the type of proof that is taken from the information contained in the statements of another being. Its validity was therefore contingent upon taking the speaker as an authority on the information transmitted. The information within scripture like the Qur'an and the *ḥadīth* was an example of transmitted proof.

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[66] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 149. "*summiya muktasaban li-annahu yaktasibuhu bi'l-naẓar wa yatawaṣṣal ilayhi bi'l-istidlāl, ka-mā yaktasib al-māl bi'l-sa'ī wa'l-ṭalb.*"

[67] Al-Juwaynī, *Kitab al-Irshād.*, 8. "*al-adilla hiya al-latī yutawaṣṣal bi-ṣaḥiḥ al-naẓar fīhā ilā mā lā yu'lam fī mustaqarr al-'āda iḍṭirāran*"

2.2.2 Truth and the Theological Disputation

By the 11th century, the jurists of Iraq and Persia took the view that the science of theology (*kalām*) relied exclusively upon rational proofs. Theology did not make pretentions to explain everything about God. It acknowledged the world of the unseen (*al-ghayb*) and the limits of human reason. Rather theology's focus was upon justifying basic beliefs about the createdness of the world and the existence and nature of God. Reason here was essential because it made little sense to prove the existence of God through scripture. To do so would be circular because one had no reason to trust that scripture came from God if one could not prove that God existed, that He could send Prophets, and that Muhammad's claim to prophecy was truthful. This reliance on rational proofs cut across theological factions. Juwaynī conveys Bāqillānī's position as well as those of the Ash'arīs by stating: "Know, may God grant you success, that some kinds of knowledge can only be attained through rational proofs… The type of acquired knowledge which is only attained through rational proofs encompasses all knowledge without which monotheism and prophecies could not be (fully) proved."[68] Likewise the Ḥanbalī Abū Ya'lā ibn al-Farrā' expresses the need for reason to prove scripture's validity. He writes that among the principles of the religion there are those "which one does not correctly know without rational proof, transmitted proofs in these matters being insufficient, like the temporality of the world's existence, the existence of a creator as well as his attributes, the prophethood of his messengers, and other matters the knowledge of which knowledge of monotheism and prophethood depend."[69] At most, scripture could fill in those creedal matters which reason had proven possible but not necessary. Juwaynī gives as an example the beatific vision of God in paradise: Juwaynī explains that once reason proved seeing God with one's own eyes in paradise was rationally possible, scripture could be appealed to in order to show that God had chosen to make

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[68] Juwaynī, *al-Talkhīs fī uṣūl al-fiqh,* 1: 133–34. "*A'lamū waffaqakum Allāh anna min al-'ulūm mā lā yatawaṣṣal ilayhā illā bi-adillat al-'uqūl…fa-ammā mā lā yatawaṣṣal ilayhi min al-'ulūm al-kasbiyya illa bi-adillat al-'uqūl fa-hiya kull 'ilm lā tatimma ma'rifat al-waḥdāniyya wa-nubuwwāt illā bihi.*" See also Bāqillānī, *al-Taqrīb wa'l-Irshād fī Uṣūl al-Fiqh*, 105.

[69] Ibn al-Farrā', *Kitāb al-Mu'tamad fī Uṣūl al-Dīn*, 24–25. "*mā lā yaṣiḥḥ an yu'lam illā bi-dalīl al-'aql faqaṭ dūn al-sam' naḥwa ḥudūth al-'alam wa-ithbāt muḥdithihi wa-mā huwa 'alayhi min ṣifātihi wa-nubuwwat rusulihi wa-mā jarā majrāhu mimmā lā yatimm al-'ilm bi-tawhīd wa-nubuwwa illā bihi.*"

this rational possibility a reality.[70] It was for this reason that disputations on matters of theology were not based on invoking scripture but on providing rational arguments for one's position.[71]

Jurists had little appreciation for those who failed to see eye to eye with them when it came to the correctness of their rational proofs in theology—ofter referred to as the fundamentals of the religion (*uṣūl al-dīn*).[72] They explicitly rejected the possibility of there being any pluralism when it came to creedal matters. Shīrāzī writes: "In rational matters, like the creation of the world and the establishment of its creator, and the establishment of prophecies, and other matters among the fundamentals of religion *(uṣūl al-dīn*) truth in these matters will be in one statement on the subject and the others are false."[73] The jurists consistently invoked 'Ubayd Allāh ibn al-Ḥaṣan al-'Anbarī as the one voice who broke ranks with this opinion. 'Anbarī apparently stated that all the positions of "the people of the *qibla*"—a term to speak capaciously of Muslims as all those who face Mecca in prayer—were correct.[74] Thus, for example, on the question of whether or not the Qur'an existed eternally or was created in time, a position the Mu'tazila and the Ḥanbalīs and later Ash'arīs disagreed upon, all parties might be right. Part of what made this position intolerable was that the jurists felt the issue of controversy could be resolved. Shīrāzī writes: "These principles (of theology) are based on proofs that produce sure knowledge and thus prevent any excuse (for ignorance). Thus the truth must lie in one of the positions and the others must be false."[75] Shīrāzī adds with a certain indignation that in such a situation of certainty, the beliefs of someone with an opposing view are "ignorant and amount to a lie."[76]

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[70] Al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, 1:29.

[71] Kraemer, *Humanism in the Renaissance of Islam*, 51.

[72] See Anver Emon's discussion of the difference between these "core" essentials of religion (*uṣūl*) and the *furu'* (the peripherals) which could admit of disagreement, Emon, "To Most Likely Know the Law," 425.

[73] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 1043. *"fa-ammā al-'aqliyya fa-huwa mithl al-'ilm bi-ḥudūth al-'ālam wa-ithbāt al-ṣāni'—subḥānuhu—wa-ithbāt al-nubuwwāt, wa-ghayr dhalika min uṣūl al-diyānāt. Fa'l-ḥaqq fī hadhihi al-masā'il fī jiha wāḥida wa-ma 'adāhu bāṭil."*

[74] E.g., Ibid., 1043–44; al-Jaṣṣāṣ, *Uṣūl al-Jaṣṣāṣ al-Musammā al-Fuṣūl fī al-Uṣūl*, 2:435; al-Juwaynī, *al-Talkhīs fī uṣūl al-fiqh*, 3:342.

[75] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 144. "*wa-dalīl 'alā fasādihi an hadhihi al-uṣūl 'alayhā adilla mūjiba li'l-'ilm qāṭi'a li'l-'udhr fa-yajib an yakūn al-ḥaqq fīhā fī wāḥid wa-mā siwāhu bāṭilan wa-kadhiban.*"

[76]Ibid., 1044. "*kāna al-mukhālif fīhā mubāhitan wa-kādhiban*." Shīrāzī even notes: "Acquired knowledge could be of the same status as necessary knowledge, like our knowledge of the creation of the world and the existence of a creator because if we reason upon the evidence, looking into these masterful things that humans have created and artisans have fabricated, we know beyond doubt that they have fashioners who have fashioned them and creators who have created them, so if there is no doubt that

This intolerance for creedal deviation colored theological disputations. The theological disputation became a means to prove wrong one's ignorant opponent. Ibn Fūrak explains the Ashʿarī position on the importance of theological disputations. He writes:

> The type of reflection that we call *jadal* can either be an obligation or a recommendation. …. As for the one who is confused about a matter about the matters of religion…then asked for guidance, it is an obligation to guide him and to notify and remind him. And if he believes that the truth is false and he imagines it to be other than what it is, and he defends (his position) and he attacks the truth then it becomes an obligation, derived from the principle of commanding the good and forbidding the wrong, that he undo this and he clarifies the way in which he is mistaken such that he abandon his position and come to see the truth.[77]

Ibn Fūrak here shows that there is no wiggle room for differences of opinion in matters of theology. The theologian's disputations are either to guide the confused or to prove wrong the misguided. In fact, Ibn Fūrak makes no difference between the theological opponent and debates with those belonging to other religious communities.[78] He analogizes this theological debate to the prophet's debates with the Arab polytheists and with the people of the book.

Transcripts of theological disputations reflect this attitude that one's opponent was wrong, misguided, and ignorant. ʿIzz al-Dīn b. ʿAbd al-Salām (660/1262) commented on a famous disputation between al-Ashʿarī and al-Jubbāʾī on the topic of what would happen to a child on

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the built wall and the sewed garment have someone who made them, then how much more so these amazing things [that constitute the universe]."

[77] Ibn Fūrak, *Mujarrad Maqālāt al-Shaykh Abī al-Ḥasan al-Ashʿarī*, 293. "*Fa-ammā al-naẓar idhā kāna bi-maʿnā al-jadal fa-qad yakūn fī ḥāl wājiban wa-fī hāl nadban wa-taṭawwuʿan…fa-ammā idhā iltabasa amr min umūr al-dīn fī aṣlihi aw-farʿihi fa-istarshada man iltabasa ʿalayhi wajaba irshādahu wa-tanbīhihi wa-tadhkīrihi. Fa-idhā tawahhama mutawwahim fīmā huwa ḥaqq annahu bāṭil wa-taṣawwarahu bi-khilāf ṣūratihi fa-akhadha yadhubb ʿanhu wa-yaṭʿan ʿalā al-ḥaqq faʾl-wājib fī al-amr biʾl-maʿrūf waʾl-nahī ʿan al-munkar an yadfaʿ ʿan dhalika wa-yubayyin lahu wajh khaṭāʾihi li-yarjiʿ ʿanhu wa-yatabaṣṣar.*"

[78] Ibid.

the day of judgement.[79] Jubbā'ī takes the view that a child who died before attaining the age of maturity, and therefore before the age of legal responsibility, would be saved on the day of judgement but would be deprived of the higher rank of the believer. Al-Ash'arī goes on to ask Jubbā'ī how that is fair to the child, who would naturally ask God why he cannot have the rewards of an adult believer. Jubbā'ī claims that God would explain to the child that He knew the child would disbelieve or be sinful if he attained the age of maturity. In causing the child to die before he could sin, God was saving the child from perdition. Ash'arī notes that the punishment of the disbeliever would then seem unjust, since the disbeliever could tell God "you saw that my situation was like his, so why didn't you cause me to die?" at which point Jabbā'ī is said to have remained silent. What is most relevant is the disdainful attitude that Ibn 'Abd Salām next writes in his transcription: "How ignorant is he who claims that God almighty cannot create as he wills without having to guarantee his creation benefit and protecting it from harm. By God they have aimed wide and are far off the mark."[80] This scornful attitude served a performative end: by disparaging another school of theology Ibn 'Abd Salām emphasizes and entrenches the validity of his Ash'arī school. Ghazālī describes this attitude towards theological opponents as common in the 11th century.[81] Its pervasiveness helps explain the many historical conflicts theology stirred up in this time period.[82]

As we will see, this was in marked departure from the epistemology of the law and legal disputation. Most laws were not based on rational proofs capable of yielding certainty, but on interpretations and extrapolations of scripture, capable of yielding only probability. Deprived of certainty, the interlocutor of the legal disputation could not approach his opponent with the confidence of his correctness and his opponent's misguidance.

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[79] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 3:356–57.volume 3, 356-357.

[80] Ibid., 3:357. "*mā ajhala man yaz'um anna Allāh subḥānahu lā yajūz an yakhluq shay'an illā an yakūna fīhi jalb naf' aw-daf' ḍarar! Tallāhi laqad tayammamū shās'ian wa-laqad taḥajjarū wāsi'an.*"

[81] See Jackson, *On the Boundaries of Theological Tolerance in Islam*; al-Ghazālī., *Faysal al-Tafriqah Bayna al-Islam Wa-al-Zandaqah.*

[82] On top of Shīrāzī's dispute with the Hanbalis, see the story of Juwaynī's exile for his Ash'arī beliefs, al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 5:170.

2.2.3 Legal Certainty, Uncertainty, and the Question of Relativism

The law relied on a different set of proofs than theology. The juristic community based their system of law mainly on transmitted proofs (*sam'iyyāt*). This was because the law relied on scripture (Qur'an and *ḥadīth*) and scripture was something transmitted from one generation to the next. The reliance on scripture was only possible once theology rationally proved its validity, namely, the existence of God and the veracity of Muhammad's Prophetic mission. Only then was it logically possible to take the Qur'an as a source of authority in matters of law. As Bāqillānī writes: "the one who does not have the knowledge that confirms the possibility of a prophethood and prophecy cannot rely on the transmitted proofs (*dilālat al-sam'*)."[83] This debt to theology is the reason that Juwaynī states that "the proofs of the law are all dependent upon the word of God, and therefore they are all dependent upon theology."

For the great majority of Shāfi'īs, like Shīrāzī, who belonged to or were at least influenced by the Ash'arī school of theology, scripture was not only a source for the derivation of the law, but it was its exclusive source.[84] The Ash'arīs made it a doctrinal point to deny that reason could ever independently determine the law. They considered that religious obligations (*taklīf*), which God would reward or punish in the afterlife could only arise through his pronouncements, and particularly his commands and prohibitions.[85] To be sure, reason did play a role in determining God's commands. For instance, reason was important in determining the logical possibility that God would have made analogical reasoning a proof of the law. Shīrāzī writes in opposition to those like al-Naẓẓām who denied the rational possibility of *qiyās*, stating that nothing precludes the possibility that God asks his creation to find His law through the process of analogizing one case from another.[86] However, Shīrāzī did not establish the actual obligation to use *qiyās* in reason—as the Shāfi'ī al-Ḥasan ibn 'Alī al-Daqqāq (d. 405/1015) and the Mu'tazila believed—but rather in a *ḥadīth* in which the Prophet commanded a companion to rely on his own opinion (*ra'y*) in cases in which he found no textual precedent. Most Shāfi'ī jurists like Shīrāzī spoke of

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[83] Al-Juwaynī, *al-Talkhīs fī uṣūl al-fiqh*, 2003, 1:134. "*dilālat al-sam' lā tathbut fī ḥaqq man lam yuḥiṭ 'ilman bi-thubūt al-mursil wa'l-mursal*."

[84] Ibid.; al-Baṣrī, *al-Mu'tamad fī Uṣūl al-Fiqh*, 1: 6. The Mu'tazila like al-Baṣrī, thought that there were religious obligations that were a product of reason rather than scripture.

[85] Texts of uṣūl al-fiqh therefore had their sections on hermeneutics structured around the topic of *amr* and *nahī*.

[86] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 760.

the law as being part of the *Shar'* or *Sharī'a* in order to highlight its exclusive roots in revelatory, and therefore, transmitted proofs.

The jurists divided their legal proofs between those they considered definitive (*qaṭ'ī*) and those they considered merely presumptive (*ẓannī*). The former could yield knowledge of the acquired type similar to theology, but the latter did not reach the level of genuine knowledge. Shīrāzī defines *ẓann* as: "the consideration of two (or more) things as admissible, but seeing one as stronger or better founded than the other."[87] This designation placed *ẓann* somewhere between knowledge and doubt (*shakk*), the latter being defined as a situation where one has no clue which of the possible positions is more founded. As Aron Zysow shows, the jurists of the early period spent much time debating which of their proofs were to be considered definitive and which were merely presumptive.[88] By the 11th century, it was clear that the vast majority of what the law relied upon was *ẓannī*. In particular, one could gesture toward a general proneness to error on the part of most *ḥadīth* and analogical reasoning. One could also gesture to the multiple interpretations of the Qur'an as making its meaning presumptive rather than definitive. The Ash'arīs and Mu'tazila even refused to speak of presumptive proofs as real proofs (*dalīl*), speaking of them instead as signs merely gesturing to the rulings.[89] This awareness of the uncertainty of the law led the Ash'arī writers of *uṣūl al-fiqh* to attempt to defend the legitimacy of an indefinite system of law. Juwaynī responds to an opponent who asserts that "most of the issues of *fiqh* are presumptive" by explaining that the jurists had definitive proofs showing the obligation of Muslims to carry out a ruling based on presumptive proof.[90] In other words, the Ash'arīs claimed to have definitive knowledge of God obligating them to follow less than certain proofs in determining the law. The Shāfi'īs of Baghdad showed less of a concern in validating the presumptive nature of the law. They had little compunctions using presumptive proofs to validate the use of other presumptive proofs; and Shīrāzī adamantly refused to follow the

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[87] Ibid., 150–51.

[88] Zysow, *The Economy of Certainty*.

[89] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 155.

[90] Al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, 1:8. "*Mu'ẓam mutaḍaman masā'il al-sharī'a ẓunūn*."

Ash'arīs in not calling the presumptive proofs *dalīl*.[91] Nonetheless, they shared the same acknowledgement of the law as a less than certain set of legal rulings.

Jurists showed little tolerance to those who deviated from legal opinions founded upon epistemic certainty (*qaṭ'ī*). Shīrāzī explains that such rulings fall into two categories. There are those rulings which all Muslims throughout the centuries know and agree are from the religion. These rulings include the "obligation of the *ṣalawāt* and the *zakāt*, and the *hajj*," as well as the prohibition against wine and fornication.[92] Shīrāzī considers that the knowledge of these things are known by necessity (*ma'lum min al-dīn bi-'l-ḍarūra*). The term suggests that just as sense perception cannot be doubted, neither can this knowledge—it imposes itself upon the conscience of the believer as surely true. This level of epistemic certainty means that whoever disagrees with these laws, if done knowingly, "rejects God Almighty and his Prophet." Shīrāzī deems such a person a disbeliever. The second category of laws consists of those rulings for which there were definitive proofs. In theory, such proofs could include an unambiguous text (*naṣṣ*) in the Qur'an. In practice, however, the only way to guarantee that a text constituted a definitive proof was that the Muslim community of jurists had established a consensus around the matter. Thus for Shīrāzī, these matters were synonymous with community consensus. He writes of these laws that: "this is what the companions (*ṣaḥāba*) and the scholars of the ages have agreed upon."[93] Again, Shīrāzī had a stern verdict for those who deviated from definitive proofs, stating: "whoever rules otherwise is considered a miscreant (*fāsiq*)." He adds that the judge adopting a ruling opposed to consensus can have his ruling overturned.

In contrast, the jurists thought it permissible that differences of opinion arise in the vast majority of legal cases that did not rely on definitive proofs. The lack of definitive evidence on these issues made them the subject of each jurist's individual *ijtihād*. The jurists debated whether or not God had even stipulated a single right answer to these types of legal questions. If there was only one right answer to these legal questions, why would not God have given the jurists clear proofs? Perhaps he had intentionally made the law relativistic. Two camps in Iraq emerged in

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[91] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 155.

[92] Ibid., 1045–46. "*Ḍarb 'ulima min dīn illah—ta'alā--ḍarūratan ka-wujūb al-ṣalawāt wa'l-zakāt wa'l-ḥajj wa-taḥrīm al-zinā wa'l-liwāṭ wa'l-khamr*."

[93] Ibid., 1046. "*huwa mā ajma'a 'alayhi al-ṣaḥāba wa-fuqāhā' al-a'sār*."

response to this question of the law's relativity. The first adopted the slogan that all mujtahids are correct (*kull mujtahid muṣīb*) and the second took the slogan that "truth is in only one of the (mujtahid's) statements."[94] It is this debate that would form the background to the jurists own explorations into the purpose of the *munāẓara*.

Members of each camp were themselves on a spectrum. Most that proclaimed that truth was only in one statement (known also as the *mukhaṭṭi'a*) took the view that God had decided upon a particular ruling (*ḥukm*) and that the jurist who failed to find that correct ruling was mistaken. This was Shīrāzī's position and that of the majority of the Shāfi'īs. However, some within this camp, like Ibn Surayj, sought to make a distinction and to say that the jurist was mistaken in his ruling but not in his *ijtihād*. The reason Ibn Surayj adopted this view was that God did not charge the jurist to actually find the correct ruling. He only asked him to attempt his utmost effort in finding it. Thus no matter what position he adopted, he could be said to be correct. The Shāfi'īs were joined by the Ḥanbalīs among those who proclaimed the singularity of truth.[95]

The camp that took the view that all mujtahids are correct (the *muṣawwiba*) ranged from extreme relativists to those who were very close to the position of Ibn Surayj. What united them all was the view that God had not decreed a specific ruling for a case. As Rāzī would later put it, they saw God's ruling as appearing as a consequence or effect of the jurist's legal reasoning on the law.[96] In the absence of a *ḥukm*, this camp coined the term of art *al-ashbah* (the best argument) to speak about what the jurists sought to find through the proofs of the law. However, they disagreed strongly on how to understand *al-ashbah*. The camp of extreme relativists saw *al-ashbah* as something subjective. They believed that it was the jurist's task to find what he thought was the strongest proof for a legal ruling, even though, objectively, the evidence for all positions were equal. This was a position attributed to al-Jubbā'ī and Abū Ḥāshim among the Baṣran Mu'tazilites as well as to Al-Ash'arī and some of his early followers. [97] Others took the position that the *ashbah* was not subjective because some proofs were stronger than others. The

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[94] Ibid., 1043.

[95] E.g., Ibn al-Farrā', *Kitāb al-Mu'tamad fī Uṣūl al-Dīn*.

[96] Al-Rāzī, *al-Maḥṣūl fī 'ilm al-Uṣūl*, 6:33-34.

[97] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 1050; Fīrūzābādī al-Shīrāzī, *al-Tabṣirah fī Usūl al-Fiqh*.

proponents of this position still upheld the view that the statements of all jurists were correct in the sight of God. The Ḥanafīs of Iraq took the view that God did recognize a stronger position among the multiplicity of points of view. They spoke of *al-ashbah ʻinda Allāh* (the *ashbah* "being with God"). They believed that all mujtahids were correct in their ijtihad because God did not ask them to do more than to search for the law, but that there was a right answer that their search tried to find.[98] This position only departed from Ibn Surayj's insofar as it chose not to speak of a ruling. They avoided the term *ḥukm* because, by definition, the word meant that God commanded Muslims to abide by it. It made little sense to them to speak of God's command on a matter he chose to keep uncertain. Thus some defined the *ashbah* by saying "it is the ruling that God would have given if He had given a ruling."[99]

Emon makes the point that the two camps present two different metaphors for the law: "whether as an archaeologist who must find or discover the law, or as a constructivist who must exercise creative agency in developing the law."[100] He contends that the two approaches to the law will yield "different contours if law is understood as separate from the interpreter or, alternatively, as tied to an interpretive engagement with doctrine, institution, and history."[101] Moreover the *muṣawwiba*'s ideology fits well with flexibility and tentativeness that historically accompanied legal *fatwa*.[102] But beyond the legal consequences of adopting one position over the other, the very emergence of the question of juristic infallibility gave rise to juristic self-reflexivity about their practice of disputation. It was through the debate on *taṣwīb* that the jurists began to think through and argue over the purpose that their disputation fulfilled within their legal culture.

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[98] Al-Jaṣṣāṣ, *Uṣūl al-Jaṣṣāṣ al-Musammā al-Fuṣūl fī al-Uṣūl*, 2:377–88; al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 1051.

[99] Ibn al-Farrā', *al-'Udda fī Uṣūl al-Fiqh*, 1549.

[100] Emon, "Ijtihad," 7.

[101] Emon, "To Most Likely Know the Law," 419.

[102] For instance, David Powers and Hussain Agrama show in very different contexts how juristic reasoning in legal responsas depended upon questions of ethics and individual and social good that went beyond the textual proofs bearing on the case. Agrama, *Questioning Secularism*; Powers, *Law, Society, and Culture in the Maghrib, 1300-1500*.

2.3 Why Debate in a Pluralistic Legal System?

Amid this controversy on the determinacy of the law, the jurists began to theorize the purpose of the disputation. It was in self-consciously theorizing their practice of disputation that the jurist formulated a discourse that positively valued the openness and ongoing nature of critical debate in the 11th century. The critics of the partisans of *taswīb* claimed that their opponents' position made nonsense of the juristic practice of disputation. Abū Ya'lā writes: "If all the mujtahids were correct then the *munāẓara* would be a misguided and foolish practice. Because each person would see the other as correct, their disputation would be senseless."[103] He adds "one does not try to convince another to abandon the truth." In fact, the disputation would be "equivalent to a situation of agreement between the [debaters]." What lent strength to this argument was the pervasiveness of the practice of disputation among jurists. Shīrāzī thus writes:

> What proves our position [on the singularity of legal truth] is the consensus (*ijmā'*) of the *umma* on the obligation of *naẓār* and *ijtihād* and their agreement that some proofs are stronger than others. For if all of positions were true, then there would be no point to do *naẓar* and *ijtihād*. Another way to state this is that people have agreed upon the goodness of *naẓar* and have agreed to establish gatherings [of disputation] within which reasoning on the law takes place. And if all [postions] were true, there would be no point to *naẓar* and no point to the disputation, because there would be no reason for the interlocutors to debate each other in what they have *agreed upon* about the law already. [emphasis mine][104]

The proponents of *taswīb* had their responses. Bāqillānī claimed that Shīrāzī's line above reflected a sleight-of-hand. It was true, he conceded, that all agreed upon establishing and

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[103] Ibn al-Farrā', *al-'Udda fī Uṣūl al-Fiqh*, 1563. "*Law kāna kull mujtahid muṣīban la-kānat al-munāẓara bayna ahl al-'ilm khaṭa'an wa-hawasan. Li-anna kull wāḥid minhum 'anda ṣāḥibihi 'alā ḥaqq, fa-lam yakun li-munāẓaratihim ma'na, wa-kāna bi-manzilat munāẓarat al-muttaqfiqīn fīmā ittafaqā fīhi.*"

[104] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 1054. "*Wa-yadullu 'alayhi ijmā' al-umma 'alā wujūb al-naẓar wa'l-ijtihād wa-tartīb al-adilla wa-binā' ba'ḍihā 'alā ba'ḍ. Fa-law kāna al-jamī' ḥaqqan la-mā kāna li'l-naẓar wa'l-ijtihād ma'nā. Wa rubbamā 'ubbira 'an hadhā bi-anna al-nās qad ittafaqū 'alā ḥusn al-naẓar wa 'aqd al-majālis lahu. Wa-law kāna al-jamī' ḥaqqan lam yakun li'l-naẓar ma'nā wa-lā li-'aqd al-majālis bi-sababihi wajh idh lā yajūz an yunāẓir ba'ḍuhum ba'ḍan fī mā ajma'ū 'alayhi min al-aḥkām.*"

engaging in disputations but not everyone agreed about the purpose of the disputation. He felt the other side had too quickly assumed that the disputation's purpose was to "call an opponent to abandon his position," something which he said "we do not concede."[105] He explains that the Prophet's companions had other reasons to debate than to convince each other to abandon their respective legal views. The main one was to train in the methodology of *ijtihād* because through debating the law, they became familiar with how to reason on the law. Ghazālī would later articulate the same view by stating that disputation would permit the jurist to see how rulings are derived from legal proofs: "Through disputation there is a type of training, a sharpening of the mind, and a strengthening of one's qualifications."[106]

The partisans of *taṣwīb* also noted that the disputation was a means to validate difference of opinion. Both Abū Bakr al-Jaṣṣāṣ (d. 370/980) and Ghazālī posit the increased recognition of diversity in the law as one of the main purposes of the disputation. Jaṣṣāṣ writes that it allows the jurist "to clarify to the '*ulamā* the reason for his opinion so that he repels the thought that he merely followed his passion."[107] In doing so, the jurist proves that his position reflects "a plausible way of doing ijtihad." Ghazālī for his part writes that the disputation is recommended in a situation in which the jurist is "believed to be obstinate in his view, rather than sincerely believing it. He thus attempts to do disprove that [his position] is based on envy, obstinacy, and denial, so he engages in disputations with them to remove the sin of suspicion from them, and to show that he espouses his views from sincere belief and diligent inquiry (*ijtihād*)."[108]

However, the partisans of *taṣwīb* did think disputation should lead to an elimination of different opinions in very particular legal cases. These cases were those in which the relevant proofs were discovered to yield epistemic certainty. Bāqillānī thus contends that one of disputation's purposes was to allow the jurist to assess the relative certainty of the evidence being debated.[109] He explains that through the process of disputation, the jurist might come to see that the proof

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[105] Al-Juwaynī, *al-Talkhīs fī uṣūl al-fiqh*, 3:355.

[106] Al-Ghazālī, *al-Mustaṣfā fī 'Ilm al-Uṣūl*, 4:71.

[107] Al-Jaṣṣāṣ, *Uṣūl al-Jaṣṣāṣ al-Musammā al-Fuṣūl fī al-Uṣūl*, 2:423. "*wa-huwa anna 'alayhi an yubayyin li'l-'ulamā' wajh mā dhahaba ilayh, li-yazūl 'anhu al-ẓanna fī itbā' al-hawā*."

[108] Al-Ghazālī, *al-Mustaṣfā fī 'Ilm al-Uṣūl*, 4:71.

[109] Al-Juwaynī, *al-Talkhīs fī uṣūl al-fiqh*, 3:355.

bearing on a given case was a *naṣṣ*, an unambiguous and authentic text whose legal certainty was beyond debate. If the jurist discovered that a text was unambiguous, such a situation would move the legal issue from the realm of permissible interpretative disagreement to one where the jurist would unanimously be considered to have erred if he departed from the text. The disputation then functioned as a means to discern the realm of permissible legal disagreement from the realm where faithful application of the text was mandated. This process was also essential to the functioning of the judiciary since it would legitimate that the jurist overturn his prior ruling if it departed from his new-found certainty on the law.

Other arguments from this camp highlighted the improved quality of the positions that came out of disputation. To recall, the majority among this camp did not deny that one position was better than others, even though they were reluctant to say that God had made this position the only ruling (*ḥukm*) in the law. Ibn Fūrak (d.1015-1016), thus has al-Ashʿarī stating the view that disputation's purpose was to help the jurist find *al-ashbah*: "He used to affirm the benefit of the *munāẓara* in matters of substantive law even if the law is based on the principle that all mujtahids are correct. This benefit is discovery of the *al-ashbah* of the case, such that a jurist's *qiyās* not be off the mark. Al-Ashʿarī did not deny that there was for a ruling a better position that distinguished it from the remainder."[110] Jaṣṣāṣ articulates a similar position expressing the views of the Ḥanafīs of Baghdad.

The Muʾtazilī jurist Abū Ḥusayn al-Baṣrī presents two additional reasons that legitimate disputation even for the extreme relativist. The first is that the jurist was to use disputation to help him make up his mind about which "position he thought strongest."[111] The disputation in this situation served as a means to explore the variety of proofs bearing on a case. Moreover, even if the jurist was absolutely convinced of his position, then he would likewise also be sure that his opponent had insufficiently examined the case. By presenting his opponent with his own evidence for the case or by critiquing his opponent's evidence, the jurist could help his opponent

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[110] Ibn Fūrak, *Mujarrad Maqālāt al-Shaykh Abī al-Ḥasan al-Ashʿarī*, 293. "*wa-hakadhā qawluhu fī al-naẓar fī furūʿ al-dīn liʾl-ʿālim al-mujtahid al-mustaḥabb li-nafsihi wa-li-yuftiya ghayrahu…wa-kāna yuthbit liʾl-munāẓara fī al-furūʿ ayḍan fāʾida wa-in kāna aṣluhu anna kull mujtahid fīhā muṣīb. Wa-huwa an yaruddahu ilā al-ashbah biʾl-ḥāditha li-kay-lā yabʿud fī qiyāsihi fa-yabʿud ʿan wajh al-ṣawāb. Wa-lam yakun yunkir an yakūna fī ḥukm ḥawādith al-furūʿ ashbah wa-ghayruhu.*"

[111] Al-Baṣrī, *al-Muʿtamad fī Uṣūl al-Fiqh*, 2:384. "*immā an yakūna aḥaduhima lam yaghlib ʿalā ẓannihi al-amāra al-aqwā fa-huwa yurīd bi-munāẓaratihi an yaḥsula lahu bi-dhalika li-annahu lam yaḥkum bi-shayʾ… wa-immā an yakūna kull wāḥid minhumā yaẓunn anna amāratahu hiya aqwā min amārat ghayrihi, fa-huwa yunāẓir ghayrahu li-yuriyahu dhālika.*"

come to decide which position he thought strongest. Even the most relativistic understandings of the law did not advocate an "anything goes" attitude towards the derivation of the law. It was presumed that the jurist should be diligent in evaluating the proofs for what he thought was the strongest position.

Despite the jurists' different views, it is possible to distill agreement between them on three points. The first is the acknowledgement and acceptance that the disputation would very seldomly produce agreement. Continued disagreement and pluralism in the law were to be taken as the normal product of the epistemic uncertainty of the law. This is a point that Khaled Abou El-Fadl recognizes well: "Importantly, both the *mukhatti'ah* and *muṣawwibah* do not adopt positions that mandate the closing of the text. The mukhaṭṭi'ah endorses the theoretical possibility of closing the text upon locating the truth, but as a practical matter, that might not be possible as long as there is juristic disagreement upon the meaning of the text."[112] Certainly, the partisans of the singularity of truth tended to be more optimistic about the possibility of making progress in finding God's law. Ideally, the disputation should confirm the right answer and discredit the wrong one. Yet this hope was always tempered by the awareness that there were no guarantees about which jurist in fact had the right answer. Abū Ya'lā, for instance, relates the teaching of Bakr ibn Muḥammad that a jurist should not say to his opponent "You are mistaken." The reason, he explains, is that although "truth is singular, a man does not know if he is correct in identifying it or not."[113] Moreover, this uncertainty and pluralism was not lamentable in any way. Shīrāzī notes that there is great benefit in making the law ambiguous because it affords God's creation an opportunity to worship God through diligently and faithfully striving to find it. Thus he argues that having one right legal answer is precisely "because it forces them to try harder to find the proofs at stake and distinguish the right opinion from others and have more rewards."[114] In practice, then, both camps agree that disputation will neither eliminate legal

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[112] Abou El Fadl, *Speaking in God's Name*, 308.

[113] Ibn al-Farrā', *al-'Udda fī Uṣūl al-Fiqh*, 1542. "*lā yaqul li-mukhālifihi innahu mukhṭi'. Yurīd bihi: lā taqṭa' 'alā khaṭa'ihi, li-anna Allāh ta'alā mā naṣaba dalīlan qāṭi'an wa-innamā naṣaba dalīlan khafiyyan aw-mā huwa amāra 'alā al-ḥukm.* "

[114] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 1071. "*Ḥaml al-nās 'alā madhhab wāḥid anfa' lahum wa aṣlaḥ fa-innahum yatawaffarūn 'alā tamyīzihi wa-ṭalabihi fa-yatawaffar ajruhum wa-ya'ẓum thawābuhum. Fa-in ta'allaqta bi-mā huwa ashal lahum fī al-dunyā ta'allaqnā bi-mā huwa anfa' lahum fī al-ākhira*."

indeterminacy nor will it vindicate any and all opinions. Disputation's ability to weigh difficult proofs of the law limit and bound legal indeterminacy.

Second, the epistemic uncertainty of the law implied the need to cultivate an affect of humility and tolerance in engaging with fellow jurists. Even those denying the law's indeterministic nature emphasized that the jurist who made a mistake in finding God's ruling incurred no sin. Shīrāzī states: "There is no disagreement among these positions that the one who is mistaken is sinless. So if a judge rules with a contrary opinion, it is not to be overturned."[115] As Emon reminds us, all agreed that the jurist would only be held accountable for following what his reasoning saw as the best position among merely presumptive ones (a process known to as *ghalabat al-ẓann*).[116] But they also went beyond mere tolerance of difference. They invoked a *ḥadīth* that indicated that God himself rewarded the mistaken *mujtahid*: "If the judge (*hākim*) performs *ijtihād* then gets it right, he receives a reward and if he does *ijtihād* and gets it wrong, then he only receives one reward" to show the legitimacy of all jurists' positions.[117] Abū Ya'lā interprets this *ḥadīth* as suggesting that God gives one reward for the process of *ijtihād* and one reward for the finding of the right ruling. This is a very similar view to the one of the Ḥanafīs, Jaṣṣās noting that the jurist obtains one reward for finding *al-ashbah* and one reward for the attempt at arriving at the correct *ijtihād*.[118] Shīrāzī emphasizes that the reason the jurist is free from blame was that the proofs of the law were too recondite and subtle for him never to make a mistake. Shīrāzī explains that the companions of the Prophet did not malign each other because "the evidence in each case is subtle and this makes it excusable to make an error, since the evidence is not definitive."[119]

Finally, and most importantly, all jurists agreed that continued disputation improved their legal reasoning. The disputation exposed the jurist to different views and the proofs buttressing them. It allowed them to evaluate them through engagement with the critical eye of another jurist who

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[115] Ibid., 1051. "*an al-ithm mawḍū' 'an al-mukhṭi'. Fa-in ḥakama al-ḥākim bi-khilāfihi lam yunqaḍ*."

[116] Emon, "To Most Likely Know the Law," 434.

[117] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 1051 and 1046. This is the reason Shīrāzī writes of God : "*wa-ja'ala li'l-muṣīb ajrayn wa-li'l-mukhṭi' ajran wāḥidan 'alā qaṣdihi al-ṣawāb.*"

[118] Al-Jaṣṣāṣ, *Uṣūl al-Jaṣṣāṣ al-Musammā al-Fuṣūl fī al-Uṣūl*, 2:422.

[119] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 1063–64. "*al-adilla fīhā khafiyya ghayr qāṭi'a li'l-'udhr wa-lā maqṭū' bi-ṣiḥḥatihā*."

might see what they do not. This was true regardless of whether the jurists sought God's specific *ḥukm*, *al-ashbah*, or simply the jurist's subjective opinion. This is, in fact, the point that comes out most clearly from the jurists's debate on the purpose of their disputation.

Moreover, taken together, these three points of agreement nurtured the openness to critique that characterized the disputation. Theological disputation was deprived of all of these three points. Continued difference of opinion was a sign of failure in theological disputation. It was a sign that the heresy existed among the Muslims. One's interlocutor was not rewarded for this heresy, but rather, could be deemed misguided or even a disbeliever if he persisted in it. And there was no sense in which a critical dialogue was of mutual benefit for both parties. This is because the disputation was not a means to discover something. If truth was with one of the two interlocutors, only one party had something to learn from the other. This is why there was considerably less openness to theological debate than that on the law: in contrast to the law, a theological opponent's views were not to be entertained as plausible or legitimate, but as an obstacle to be overcome in order to vindicate the truth.

2.4 Conclusion: The Disputation and the 11th Century Culture of Critical Debate

I have sought to explain the emergence of a juristic culture of open and critical debate among Muslim jurists of the 10th and 11th centuries in the Muslim East. One of my central claims is that debate itself has been one of the major causal factors for Muslim jurists' openness to countenancing a multiplicity of legal perspectives.[120] This is evident in some of the attitudes that 8th and 9th century Muslim jurists had towards their debate partners. The legal schools' theorization and formalization of the *munāẓara* in the wake of the Greek translation movement in the late 9th/early 10th centuries further entrenched critical debate as a normative part of the jurists' legal culture. Shīrāzī highlights how these disputations undermined his and other jurists'

[120] Note that the openness to countenancing different legal opinions is not the same as the acceptance of legal pluralism. The acceptance of legal pluralism was a fact that accompanied the Islamic tradition from its inception. It was, however, not necessarily something considered inevitable or positive until later. So for instance, Yasin Dutton's interpretation of Malik's refusal to make his *Muwaṭṭa'* the law of the land makes clear that Mālik thought everyone should follow the jurisprudence of the Medina, but did not think it politically feasible. Dutton, *The Origins of Islamic Law*, 29.

certainty in their own view; he mentions the example of the lay Muslim who, he says, has more certainty in his heart about his beliefs than the scholar—so much so that the lay Muslim might not recant under the threat of the sword.[121] In contrast, the jurist is exposed to many arguments that make him doubt the certainty of his own views.

However, it was only in the course of the 10th and 11th centuries that the jurists began to expound reasons legitimating their continued critical engagement with each other. They reflexively examined their practice of disputation and collectively came up with a list of the purposes of their disputations. These reasons all related to the perfection of their *ijtihād*: they included the pedagogical aim of learning how to reason on the law and how to deal with legal proofs; but also the ability to figure out a case by weighing and assessing the proofs bearing on it; and finally, the jurists believed that disputation might allow them to appreciate and respect the arguments of fellow jurists. Their reasons were all based on the uncertainty of the proofs of the law. Indeed, the jurists disagreed as to whether there was only one right answer in their disputations or not; but all agreed that no one could legitimately claim that one's opponents were definitively wrong. Thus, their discourse on the purposes of their face-to-face disputations not only legitimated the practice itself, but also directed jurists to an openness when listening to their opponents as well as to continuing their debates, even when they were tackling legal issues previously examined.

Habermas's own study on the formation of a bourgeois public sphere shows how the existence of publics depends upon institutions, practices, and philosophies that defend and promote debate. Thus, 18th century bourgeois publics benefitted from the printing press, the settings of salons, and a philosophy that placed great confidence in human reason. Likewise, the debate culture of 11th century Muslim jurists depended on a similar set of historical conditions. These included the legal schools and colleges' incorporation of the disputation as part of their practices, as well as the inter-school rivalry that led jurists to seek to defend their school opinions. The culture of debate also benefitted from the epistemological discourse that saw the law as an uncertain project in which the jurist had to continually search to find the proofs he thought strongest. These conditions fashioned the members of the 11th century juristic debating community: they were committed to examining each other's arguments in conditions where the force and authority of

[121] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 148.

school doctrine was bracketed and the strength of argument alone mattered. The *munāẓara* was their means to do this.

PART II: *MUNĀẒARA* AND THE DEVELOPMENT OF THE LAW

Chapter 3

3 Putting the *Madhhab* in Play: The Convert's *Jizya* (Poll-Tax)

The goal of this chapter is to address the impact of disputation on the development of substantive legal doctrine in the 11th century. Crucial to understanding this impact is the relationship between school doctrine and *ijithād* in the 11th century. The jurists of the 11th century, like those of the 10th, were trained within and inevitably belonged to one of the schools of law. This is true even of jurists like Juwaynī who, due to his alleged legal brilliance, would retroactively be called an independent mujthahid. For Shīrāzī, belonging to the Shāfi'ī school of law meant being dedicated to continue the corporate project of finding God's law initiated by his school eponym and elaborated upon by his later predecessors. This meant that the past carried a certain level of authority. But as El Shamsy points out, this authority was not predicated on blind deference (*taqlīd*). To be a mujtahid in the 11th century demanded that the individual jurist himself be certain of the strength of the arguments bearing on his school of law. This meant that he had the duty to revisit the arguments of his predecessors and to amend them if he considered them weak. The Shāfi'īs in particular liked to emphasize that they followed al-Shāfi'ī not out of blind deference but because they found his way of reasoning to be the best. Abū Isḥāq al-Isfarāyinī proudly asserted that while other schools blindly followed the rulings of their school eponyms, the Shāfi'īs followed their's only in his legal methodology.[1] The result was that 11th century texts of Shāfi'ī doctrine exemplified a high degree of idiosyncrasy in each jurist's rendition of school doctrine. Jurists usually attempted to preserve the historical range of opinions within their texts but they would also permit themselves to present their favoured argument for a position and, especially in cases where opinions differed, they would feel free to champion one view over another.

This chapter seeks to illustrate how the practice of disputation shaped the jurists' process of *ijtihād* and therefore their own rendering of their school of law. It does so by examining the

[1] Al-Dīb, "Muqaddimāt Nihāyat al-Maṭlab," 151. Dīb is here relying on Nawawī's statement in his *Majmū*.'

second of the two disputations between Shīrāzī and Dāmaghānī which also likely took place in the aftermath of the death of Ṭabarī's wife. Dāmaghānī on this occasion initiated the disputation by asking Shīrāzī his opinion on a topic that had long divided Shāfi'īs and Ḥanafīs: Does a *dhimmī* who converts to Islam still owe accrued, but unpaid *jizya* (poll-tax)? At the centre of the debate stood two ambivalent legal categories within the early history of Islam. The first was the *dhimmī*, the non-Muslim living permanently in Muslim lands, whose life is protected (*maḥqūn al-damm*), but whose status is subordinate to the Muslim. The second, the convert, who at once vindicated the faith but also represented a threat both to the early empire's tax-base and to the Arabs' hegemony over the faith. It was in this context that Abū Hanīfa held that liability for accrued, but unpaid *jizya* lapsed upon the non-Muslim's conversion to Islam, while al-Shāfi'ī asserted the continuity of the convert's liability for such amounts. The view became and continued to be authoritative in each school, with no recorded history of dissent. Nearly three centuries later, after generations of Shāfi'īs and Ḥanafīs attempted to defend their eponym's position with new arguments, Shīrāzī and Dāmaghānī revisited the issue.

Historians have long recognized this juristic objective of justifying school doctrine (the *madhhab*).[2] They have mostly discussed justification in relationship to *uṣūl al-fiqh* (*legal theory*). For example, after contending that *uṣūl al-fiqh* was a method for *discovering* the law, Hallaq states "legal theories played another (rarely and vaguely articulated) role, involving the justification and re-enactment of time-honored and long-established legal rules and of the processes of reasoning that produced and continued to sustain them. Put differently, this other role consisted of a reasoned defense of the *madhhab*, the legal school and its authoritative standard doctrine."[3] As Norman Calder explains: "One read and mastered the books of the tradition in order to discover the *madhhab*; and one manipulated the diverse hermeneutical techniques that had been developed in the literary genre of *uṣūl* (and in related genres, e.g. of *ḥadīth* criticism) in order to explain and justify the *madhhab*."[4] For Calder, this legitimates the law in the present and thereby mediates between the past and the present, i.e., between "the

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[2] David Vishanoff, *The Formation of Islamic Hermeneutics,* 4; Rumee Ahmed, Narratives of Islamic Legal Theory, 6-7. I should note that Ahmed's conception of justification involves not only defending school doctrine, but also making a case for how it should be applied prospectively.

[3] Hallaq, *A History of Islamic Legal Theories*, ix.

[4] Calder, "al-Nawawi's Typology of Muftis and Its Significance for a General Theory of Islamic Law," 139.

diachronic and the synchronic community."[5] However, what interests me in this chapter is not the *fact* that jurists sought to justify the law but how disputation shaped this process of justification. Disputation was distinct from other sites of discourse like books or teaching lectures in forcing the jurist to submit his claims to immediate and rigorous critique. The Shāfiʿīs and Ḥanafīs, namely, the schools who engaged most in disputations in Baghdad in this period, pushed each other through their disputations to think about the shortcomings of their reasoning on the law.

My argument in this chapter is that disputation most impacted Islamic law by giving the jurists an arena in which they could revisit, strengthen, innovate, or amend the arguments they had inherited from past authorities. The jurists' freedom to explore the law anew depended on establishin distance from the immediate legal concerns of the Muslim community. The jurist in disputation had neither a petitioner awaiting his *fatwa* nor two litigants awaiting a judgment in court. While substantive law ultimately served these two ends, disputation sheltered the jurist from their often-pressing nature. Disputation resembled a college debating team whose distance from actually deciding the issues they debate gives them the freedom and luxury to explore them at leisure. Thus the *sā'il* could ask a jurist any among all questions that had found their way within the texts of *khilāf*. The jurist could in this context of relative freedom put the law in play by bracketing or suspending the authority of his tradition and focusing on the merits of the arguments before him.

Shīrāzī's and Dāmaghānī's disputation illustrates this freedom to revise and strengthen their legal arguments. It features Shīrāzī testing out the merits of a partially novel or at least less-known argument for his school's position on the convert's *jizya*. Doing so allows him to explore the possible *ratio legis* of the case. Shīrāzī also revises other school doctrines in the process of arguing in favour of the convert's obligation to pay the *jizya*. This is largely because the jurists in disputation tended to cross-reference laws in order to exemplify the methodological argument they were trying to put forward and to claim horizontal coherence between legal cases. Certaintly the most striking instance of doctrinal modification is when Shīrāzī jettisons Shāfiʿī's statement that the *jizya*'s purpose is to humiliate non-Muslims. He does not seem to do this out of a

[5] Ibid., 140.

concern or compassion with *dhimmīs*; but rather, he seems motivated to escape his opponent's challenge that to impose the *jizya* on a convert is to humiliate a Muslim—a position neither jurist wanted to countenance.

A jurist's freedom to explore and strengthen arguments did make its way into his books of substantive law. What he had learnt by bracketing the authority of the law then allowed him to make claims about what he believed to be the correct or strongest explanation of his school of law. This is evident in Shīrāzī's adoption of his pronouncements in the disputation in his *Muhadhdhab*—a rather late work that came long after Shīrāzī had distinguished himself as a jurist.[6] It shows how disputation sharpened his awareness of the merits and shortcomings of arguments for laws within his legal tradition. The suspension or bracketing of tradition led to a period of tradition-building where the jurist used the arguments he had tested and developed to make a stronger and more enduring case for what the law of his school should be. This rendering of tradition might be said to have an aesthetic dimension; what mattered was the rigour, detail, and nuance of the arguments put forth. This contrasts a tradition which needs to address pressing social and intellectual challenges that place its viability in question.

In the long run, it was precisely the distance from immediate practical concerns that also made the disputation's impact on later jurists of a school so unpredictable. The outcome of a disputation did not have a necessary or determinable impact on the law: the assembly did not vote for a winning position that would become law of the land in the manner of a modern parliament. Moreover, later jurists who began to canonize the school did not always determine authoritative school doctrine by carefully considering the arguments of all their predecessors. *Who* argued for what position mattered as much as what was argued. Fame and professorial appointments influenced whose arguments were championed as part of school doctrine. Thus later Shāfi'ī tradition continued to favour the view that the *jizya* was meant to humiliate non-Muslims without showing deep engagement with Shīrāzī's line of reasoning.

[6] We know the *Muhadhdhab* is a later work from the fact that Shīrāzī is said to have written it as a response to Ibn al-Ṣabbāgh's intimation that Shīrāzī's knowledge of the *madhhab* was deficient. Moreover, the fact that Ibn 'Aqīl relates that most Shāfi'īs of Baghdad read the *Tanbīh* without mentioning the *Muhadhdhab* suggests he had not yet composed the latter. See Chaumont, Al-Shīrāzī. Considering that this disputation took place before Shīrāzī master passed away, it likely predates the *Muhadhdhab.*

3.1 The *Dhimmī* and the Convert: Background to the Dispute

3.1.1 The *Dhimmī*

The *dhimmī* is the juridical subject whose rights and responsibilities form the discursive ground upon which Shirāzī's and Dāmaghānī's disputation proceeds. As a non-Muslim permanently living within Muslim-ruled lands, the *dhimmī*'s presence perturbed the universalist political-legal ethos of Islamic jurists. Unlike Muslims, his inclusion within the empire was not a given, but was predicated upon the contract of protection (*'aqd al-dhimma*).[7] As Anver Emon explains, "the contract of protection was symptomatic of the more general challenge of governing amidst diversity."[8] At the centre of this contract was the poll-tax (*jizya*). Māwardī thus defines the covenant by stating that "the people of the book [non-Muslims] be acknowledged as residents in the lands of Islam through the *jizya* (poll-tax) that is levied upon their necks [i.e. for each individual] every year."[9] The desire to include that which threatened the homogeneity of the Islamic state reflects sovereignty's tendency to internalize the marginal and aberrant: In discussing his paradox of sovereignty, Agamben explains "Sovereignty only rules over what it is capable of interiorizing…Confronted with an excess the system interiorizes what exceeds it through an interdiction."[10] Once his residency in the Muslim-governed lands was insured, the *dhimmī* was entitled to freedoms of person, property, and religion. But he was also subject to a variety of laws that excluded him from and made him inferior to the Muslim population. Emon thus perspicuously notes that the *dhimmī* was a figure of simultaneous inclusion and exclusion: "the *jizya* was a complex symbol which can be viewed as a tool of marginalization or a mechanism of inclusion, but more fruitfully understood as both."[11]

The Arabic concept *dhimma* was broadly significant to the political language of the Arabs at the inception of the first Muslim community. C.E. Bosworth notes the early use of the phrase "the

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[7] The contract of *dhimma* was shorthand for "*dhimma* of Muslims", that is to say, the general protection they owed to those with whom they contracted. The population with whom they contracted were to be defended in case of attack and liberated in cases of enslavement, in each case, to the same extent that Muslims would do for themselves. See also Khaddurī for an alternate etymology of the term, *War and Peace in the Law of Islam*, 176.

[8] Emon, *Religious Pluralism in Islamic Law*, 95.

[9] Al-Māwardī, *al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi'ī, Wa-Huwa Sharḥ Mukhtaṣar al-Muzanī*, 14:298.

[10] Agamben, *Homo Sacer*, 18.

[11] Emon, *Religious Pluralism in Islamic Law*, 99.

dhimma (protection) of God (*dhimmat Allāh*)" and the "*dhimma* of Muhammad (*dhimmat Muhammad*)" to denote the relationship of suzerainty between the Medinan state and tribes of Arabia.[12] The mention of *dhimma* is even found in the constitution of Medina in 13AH/ 622 CE, prior to the commencement of wars between Muslims and non-Muslims. Moreover, the Qur'an rebukes the non-Muslim Arabs for failing to honour or lacking in the will to extend *dhimma* to the Muslims should they gain the upper hand [9:8; 9:10]. At this early stage then, *dhimma* does not seem particular to the *jizya* and to non-Muslims. To speak of *dhimma* over a territory and its people was to demarcate relationships characterized by the rule of law as opposed to anarchy and war. *Dhimma* appears more appropriately to serve as a marker of identification of friend and enemy, along the lines theorized by Carl Schmidt in his *Concept of the Political*.[13] Those who have *dhimma* are friends or allies not to be harassed and to be succored in the advent of aggression from potential enemies. As the Medinan state extended its sovereignty, however, the contract of *dhimma* began to take concrete shape in the form of the *jizya* reserved specifically for non-Muslims.

The *jizya* found its legal warrant in the Qur'anic verse: "Fight those that do not believe in God and the last day and do not prohibit what God and his Messenger have prohibited, and do not follow the true path from those who have been given the book until they give the *jizya* from their hands and they are *ṣāghirūn"* [9:29]—a term, which as will become apparent was contested among jurists. Using Muslim historical sources, Ziauddin Ahmad provides a chronology of the *jizya'*s adoption in early Islamic history. He locates its period of revelation and initial application around the time of the battle of Tabūk (9/632), a period in which several tribes entered into treaties with the Medinan Muslim state which included within their terms the *jizya*. For instance, he relates that "Uhanna b. Ru'ba, the Chief of Ayla, agreed to pay a *Jizya* of 300 dinars from a tax of one dinar upon each adult in addition to serving as hosts to the Muslim travelers to their regions."[14] However, Ahmad notes that rather than a yearly poll-tax, most of these instances appear to have involved a fixed-sum tribute. Daniel Dennett notes that in the period of the early conquests outside of Arabia under 'Umar b. al-Khaṭṭāb (13-23/634-644), the *jizya* as a poll-tax

[12] See Bosworth, "The Concept of the Dhimma," 40-41.

[13] Schmitt 26.

[14] Ahmad, "The Concept of Jizya in Early Islam," 301.

had become a generalized phenomenon: "The traditions are precise and unanimous on the point that all non-Muslims paid a poll-tax."[15] This in no way implies that the conquerors were bringing something particularly new to the region. Bosworth notes that the Islamic provisions relating to inter-religious governance "were by no means alien to the Near Eastern world, in which hardly any state or empire ever achieved—or indeed sought—an ethnic or religious exclusiveness."[16]

Juristic discourse drew on this history in explaining the relationship between the *jizya* and the '*aqd al-dhimma.* They considered the *jizya* to be an exchange guaranteeing rights to non-Muslims under Muslim rule. Māwardī articulates two such rights. The first was that "they be left in peace (*al-kaff 'anhum*)."[17] Whereas Shāfi'ī laws of war permitted the killing of non-Muslim males, the *jizya* made their blood inviolable (*mahqūn al-damm*). It was for this reason that women and children did not pay the *jizya*. Their blood was already inviolable, making a contract of protection unnecessary, if not absurd. Their second right was military defense (*al-ḥimāya lahum*). The Muslim state was responsible for mounting a defense of its *dhimmī* population against any attacking armies, Muslim or non-Muslim. The Ḥanafīs saw matters slightly differently. Their laws of war considered all human life to be intrinsically inviolable. They therefore saw the *jizya* as an exchange for their sparing of male combatants upon the conquest of a territory. They also saw it as the fulfillment of a right of financial aid owed to the Muslims as a substitute for the *dhimmī*'s lack of physical participation in the state's military.[18] Like the Shāfi'īs they agreed the *dhimmī*s had a right to be protected from military attack.

Jurists debated from whom the *jizya* could be taken and the *dhimma* extended. Much depended upon identifying the people of the book (*ahl al-kitāb*) referenced in the Qur'anic verse 9:29. The Shāfi'ī school in particular was adamant that the *jizya* could only be taken from the people of the book. There was no disputing that the Jews and Christians were included under this designation. However to limit the designation to these two groups caused a problem insofar as much of the conquered land was populated by Zoroastrians (*majūs*) and other religious groups. The stakes

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[15] Dennett, *Conversion and the Poll Tax in Early Islam*, 26.

[16] Bosworth, "The Concept of Dhimma in Early Islam," 37.

[17] Māwardī, *Al-Aḥkām al-Sulṭāniyya*, 182. "*Wa-yaltazim lahum bi-badhlihā ḥaqqayn: aḥadihimmā al-kaff 'anhum. Wa-thānī al-ḥimāya lahum li-yakūnū bi'l-kaff āminīn wa-bi'l-ḥimāya maḥrūsīn."*

[18] Al-Marghīnānī, *al-Hidāya*, 2:863.

were high: if they could not be reasonably accommodated, their lot would be execution, slavery, or exile. The anxiety is evident in a narration attributed to ʻAlī found in both Abū Yūsuf's *Kitāb al-Kharāj* as well as in Shīrāzī's *Muhadhdhab*, in which Zoroastrianism is made to appear as an originally divinely inspired religion:

> The Majūs were a nation who possessed a religious book which they used to study. One of their kings one day got drunk and took his sister to a place outside the town. He was followed by four of his priests who witnessed his copulation with his sister. When he sobered up, he was told by his sister that the only way to save himself from being punished to death for what he had done in the presence of the four priests was to declare the act lawful and call it "Adam's law", because Eve was part of the body of Adam. He followed her advice and ordered accordingly, killing all who were against it. He then threatened to put to fire any objector and this brought them to submit to the new law. The Prophet accepted the *jizya* from them for their original religious book but did not allow inter-marriage and sharing of food with them.[19]

Thus the Shāfiʻīs included another category for the Zoroastrians called *shubhat al-kitāb* (quasi-book), designating those who had what resembled a scripture like the Jews and Christians. Shīrāzī writes: "It is not permissible to take the *jizya* from those who have no book, or do not have a quasi-book" (*shubhat kitab*)."[20] Many Shāfiʻīs also accepted other groups if they claimed to be following the scripture of other prophets like Seth, Abraham, or David.[21]

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[19] The story is relayed in this way in Abū Yūsuf, *Abū Yūsuf's Kitāb al-Kharāj*, 89. Shirāzī describes it slightly differently: "They had knowledge which they acted upon, and a book that they studied, but their king became drunk and slept with his daughter or his sister, such that some of his royal entourage surrounded him and were going to apply the prescribed penalty for such a crime, and to avoid this penalty, he decreed the nullity of their book, and thus true knowledge disappeared from their breasts." *Kāna lahum ʻilm yaʻmalūnahu, wa-kitāb yadrusūnahu, wa-anna malikahum sakara fa-waqaʻa ʻalā ibnatihi, aw-ukhtihi, fa-aṭṭlaʻa ʻalayhi baʻḍ ahl mamlakatihi, fa-jāʼū yuqīmūna ʻalayhi al-ḥadd, fa-amtanaʻa, fa-rafaʻa al-kitāb min bayni aẓhurihim, wa-dhahaba al-ʻilm min ṣudūrihim*. al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfiʻī*, 5:312. 312

[20] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfiʻī*, 5:311. *"Lā yajūz akhdh al-jizya mimman lā kitāb lahu wa-lā shubhat kitāb."*

[21] Ibid., 5:313; al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 17:9.

The jurists preceding al-Shāfi'ī and known to be more pragmatic than textual in their rulings felt compelled to include nearly all non-Muslims under the covenant of *dhimma*. Abū Ḥanīfa took the view that the *jizya* could be taken from all, whether they be a person of the book or an idol worshipper, with the exception of the Arabs.[22] Polytheist Arabs were the one group that had no choice but to convert. Emon points out that some Ḥanafīs justified this intolerance by stating that the Arabs could not but be aware of the truth of the Qur'an because of their intimate access to its language.[23] Mālik went even further in his inclusion, saying that only those of Quraysh, the tribe of the Prophet, could not be subject to the *jizya*. The Shāfi'īs then were those who, at least on the surface, were the most restrictive in their interpretation of who could be tolerated within the Muslim empire.

Intrinsic to the contract of protection was a whole host of stipulations imposed upon the *dhimmī*. These were fairly modest in the early period. As Bosworth notes, relying on Ibn 'Abd al-Ḥakam and al-Balādhurī's depiction of the treatment of *dhimmī*s during the early period of the conquests, "They have to act as guides through unknown terrains for the Muslims, and give Muslim travelers shelter from between one and three nights and days; they have to keep up roads and bridges; they have to supply the Muslims with basic foodstuffs like corn, oil and honey and raw materials…they must undertake not to provide aid or comfort to the Muslims' enemies."[24] However, as time progressed, jurists began to theorize the *dhimmī*'s subjection to a system of more burdensome and discriminatory laws. Among them was the stipulation of a dress code. Shīrāzī states that *dhimmī*s are forced to wear the *ghiyār* (a coloured patch) and the *zunnār* (a distinctive belt).[25] These stipulations were part of a general restriction against resembling Muslims—others included the prohibition of wearing hats similar to those of Muslims. But the *dhimmī* rules were also meant to establish the inferiority of non-Muslims in the Muslim-governed state: thus one reads of the obligation to cut forelocks, since it was at the time a sign of

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[22] Al-Māwardī, *al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi'ī, Wa-Huwa Sharḥ Mukhtaṣar al-Muzanī*, 14:284; al-Marghīnānī, *al-Hidāya*, 2:862.

[23] Emon, *Religious Pluralism and Islamic Law*, 102-103.

[24] Bosworth, "The Concept of Dhimma in Early Islam," 44.

[25] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 5:326–27.

high esteem, or of riding horses, bearing arms, or erecting buildings that would tower over Muslim neighbours.[26]

The basis of most of these rules was an alleged historical agreement that ‘Umar had imposed on the non-Muslim population of Syria at the time of their incorporation into the territory of the Islamic state. The tradition came to be known as the *Shurūṭ ‘Umar*, or the Pact of ‘Umar. Though historians doubt the authenticity of the *Shurūṭ ‘Umar*, some nonetheless trace it to a fairly early period (circa 2nd/8th century).[27] In drawing on the *Shurūṭ ‘Umar*, jurists were able to give a sense of coherence and uniformity to their treatment of *dhimmī*s, in marked departure to the historically divergent rules imposed upon them.[28] As Bosworth writes: “the *dhimma* system came into existence almost inevitably but in a somewhat informal way; the elaboration of a tight legal system here was to be the work of later, systematizing jurists, above all in the Abbasid period.” Indeed, even Muslim sources locate the first imposition of a dress code not in ‘Umar b. al-Khaṭṭab, but in the later Ummayad Caliph Umar b. ‘Abd al-‘Azzīz (99-101 /717-720).[29] The rule of the Abbasids Harūn al-Rashīd and al-Mutawakkil mark periods in which several of these *dhimmī* rules were enforced. Milka Levy-Rubin considers the emergence of these rules and the Shurūt ‘Umar in this period to be a response to the increased interactions and dealings with non-Muslim communities.[30] Fluctuations continued in the application of the rules, and even the collection of the *jizya* itself, long after the *Shurūṭ ‘Umar* became part of the juristic discourse. As Fattal notes, *dhimmī*s oftentimes “wore sumptuous clothes, rode elaborately bridled mounts, horses and mules both.”[31] And, as Shawkat Toorawa’s study of physicians in Shirāzī’s own Baghdad suggests, the non-Muslim physician “was not a marginalized, minority participant in a repressive majority regime but was rather integral to Muslim society.”[32]

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[26] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi‘ī*, 5:330. “Islam is higher and nothing goes above it.”

[27] Fattal, *Le Statut Légal Des Non-Musulmans En Pays d’Islam,* 68. “La convention de ‘Umar, dans sa redaction definitive, est peut-être l’oevre de quelques *muğtahids* du IIIème siècle qui n’ont pu résister à la tentation de réunir en un même document toutes les restrictions successives aux liberté des *Ḏimmīs*, sans tenir compte des circonstances de temps et de lieu.”; Tritton, *The Caliphs and Their Non-Muslim Subjects*; Levy-Rubin, *Non-Muslims in the Early Islamic Empire*.

[28] Fattal, *Le Statut Légal Des Non-Musulmans En Pays d’Islam.*

[29] Levy-Rubin, *Non-Muslims in the Early Islamic Empire*, 88–89.

[30] Ibid., 59.

[31] Translation from Toorawa, “The Dhimmi in Medieval Islamic Society,” 15.

[32] Toorawa, “The Dhimmī in Medieval Islamic Society,” 10.

3.1.2 The Early Convert

Ironically, if the *dhimmī* was a troubling figure for the integrity of the universalist ethos of Muslim jurists, the convert—at least the non-Arab convert—was no less a figure of ambivalence in the early Islamic empire. Western scholarship has long doubted the traditional Muslim view that the conquests outside of Arabia were meant to spread the message of Islam. Under this view, the conquered peoples were a source of financial profit and not a group to be incorporated as equals within the faith. Agreeing with Caetani, Dennett writes: "what was contemplated was not the overthrow of an empire but the seizure of booty, and perhaps the incidental conversion of the nominally Christian Arab tribes of the region."[33] Fred Donner's classic the *Early Muslim Conquest* has done much to rehabilitate the idea that the Muslim armies, and in particular their politico-military leadership, were motivated by religious conviction. He does not dismiss that other factors such as "the acquisition of properties in the conquered areas, the ability of the state to levy taxes on population, the booty in wealth and slaves," but finds sufficiently compelling the assertion that Islam provided the ideology that for the first time in history united the Arab peoples to be able to undertake the conquests.[34]

Regardless of the motives for the conquests, Muslim sources amply show that the conversion of non-Arab peoples and the attendant loss of the *jizya* tax represented a heavy loss to the financial base of the empire.[35] Thus when Umar II declared exempt from the *jizya* "all those praying in the direction of Mekka" the sources speak of the reticence of the governor of Khurasan to follow through with the orders, suggesting to the Caliph that the converts' sincerity should be tested by forcing circumcision upon them.[36] The same scenario repeated itself in the decade after Umar II's rule when the Soghdians of Transoxiana began converting en masse after the encouragement

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[33] Dennett, *Conversion and the Poll Tax in Early Islam*, 16.

[34] Donner, *The Early Islamic Conquests*, 271. In his more recent *Muhammad Among the Believers,* Donner shows himself even more forceful in his assertion that the early Muslim empire was motivated by religious impulse. He extends this impulse even to the Ummayads, long seen in Western scholarship as unconcerned with Islamic piety, Donner, *Muhammad and the Believers*.

[35] Madelung, *Religious Trends in Early Islamic Iran*, 13. Madelung writes: "Arab interest, firmly represented by the Umayyad caliphate, pressed for maintenance of Arab rule in the conquered lands and was wary of uncontrolled mass conversion which would naturally encourage claims to equality and a share of the power in the name of Islam and would threaten the tax base of the state resting on the non-Muslim subjects."

[36] Dennett, *Conversion and the Poll Tax in Early Islam*, 18.

of the governor of Khurasan. The governor of Khurasan Ashras then "wrote Ibn Abī al-'Amarraṭa the governor of Samarqand: 'The power of the Muslims rests in the tribute. I have learned that the Soghdians and their likes have not become Muslims out of a desire (for Islam). They have joined Islam merely in order to avoid the *jizya*. Examine therefore whoever has been circumcised, performs the ritual obligations (*farā'iḍ*), whose Islam is unimpeachable, and who is able to recite a sura of the Qur'an. Exempt him from his tribute."[37] When it was discovered that these converts did circumcise themselves, the governor nonetheless reimposed the *jizya* upon them.

Comingled with this financial imperative was what Wilferd Madelung identifies as the ethnocentricity of the Arab rulers. So much was Islam identified with the new Arab aristocracy that the convert typically entered into a relationship of patronage with an Arab tribe, becoming the tribe's client (*mawlā,* pl. *mawālī*).[38]As Madelung notes: "*mawalī* indeed became a common term for the non-Arab Muslims."[39] Madelung speaks of a model of "controlled conversion" aimed at those with whom they interacted frequently and could make use of in the higher echelons of government and military administration. Thus, unsurprisingly, the first major non-Arab group to convert to Islam was the Khurasanian army which allied itself to the expanding Islamic state. Dennett contends that while the early educated converts fared well, the uneducated peasant masses' conversion was considered problematic. He notes how the Ummayad governor of Iraq, al-Hajjāj b. Yūsuf (d.714 CE), forced peasant converts flocking to cities to return to the countryside and continued to impose upon them the *jizya*. Considering them as a potential source of instability, he is even reported to have stated to those that had immigrated to Basra "You are barbarians and strangers. You belong in your towns and villages."[40] Though Muslim sources speak of al-Hajjāj's actions as illegal, the report nonetheless highlights the presence of ethnocentrism among the ruling elite.

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[37] Madelung, *Religious Trends in Early Islamic Iran*, 16.

[38] As Dennett writes: "The Arabs of the Conquest formed a ruling aristocracy with special rights and privileges, which they emphatically did not propose to share with the mawali," Dennett, *Conversion and the Poll Tax in Early Islam*, 38.

[39] Madelung, *Religious Trends in Early Islamic Iran*, 13.

[40] Dennett, *Conversion and the Poll Tax in Early Islam*, 38.

The historical record shows divergences in 2nd/8th century jurists' enthusiasm towards converts. Madelung notes that Abū Ḥanīfa was an early champion of the rights of the converts: he sees in Abū Ḥanīfa's adherence to the view that "there were no ranks or degrees of faith among the Muslims" and that "the faith of every Muslim is identical with that of the prophets and the angels" a defense of the radical equality of all believers, regardless of lineage.[41] In contrast, some Arab jurists feared that the incorporation of non-Arabs could negatively impact the understanding of a hitherto pristine Islamic message. In fact, Sherman Jackson reads al-Shafi'ī's *Risāla*, the classic treatise of uṣūl al-fiqh, as an attempt at curbing the non-Arabs' excessively rationalistic approach to Qur'anic interpretation. As Jackson writes:

> Al- Shafi'ī s campaign now appeared to be a somewhat frantic attempt to preempt the influence of these philosophizing trends, based on his view that the primordial linguistic idosyncracies of the Arabs were the *sine qua non* of a proper understanding of scriptural intent, and that not only did these native idiosyncracies defy efforts at systemization, such systemizing efforts were likely to corrupt or undermine them, either by omitting aspects that could not be accounted for by theory or by attributing to them qualities extrapolated from theory but baseless in reality.

On this reading of al- Shafi'ī, enthusiasm for the growth of the Islamic community of faith would have to be tempered by a measure of cautiousness against the effects of including non-Arabs in the process of interpreting scripture.[42]

3.1.3 The Early Debates on the Convert's *Jizya*

This then was the context in which the eponyms of the Shafi'ī and Ḥanafī schools to which Shirāzī and Dāmaghānī belonged formulated their positions on the obligation of the convert to pay his accrued, but unpaid *jizya*. Al- Shafi'ī cursorily deals with the subject within the course of

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[41] Madelung, *Religious Trends in Early Islamic Iran,* 19.

[42] Jackson, "Fiction and Formalism," 188.

discussing the legitimacy of taking the *jizya* from a *dhimmī* who converts to a religion other than Islam. Shāfi'ī takes the position that while people of the book are entitled to freedom to practice the religion of their forefathers, they are not allowed to pay the *jizya* and establish themselves in Muslim-governed lands if they convert to a different religion after the advent of Islam.[43] Thus a Christian could not convert to Judaism and vice-versa. This being the case, al-Shāfi'ī affirms that such a convert should be told "if you go back to your religion, we will take the *jizya* from you. And if you become a Muslim, we will relieve you of it in the future, and we will take from you the amount that you owed up until the time of your conversion." The statement is uttered without any scriptural backing and it is therefore an example of what Mohammad Fadel has called the "puzzling" relationship between *uṣūl al-fiqh* and substantive law (*furū' al-fiqh*), that is to say that it defies the expectation that legal reasoning be grounded in authenticated legal proofs. In his *Mukhtaṣar*, Muzanī states, "And if he converts and part of the year has passed, it is taken from him in proportion of the amount of that passed time."[44]Abū Ḥanīfa, for his part, reportedly contended that the *dhimmī* did not need to pay the amount owing. He adduced his position on the interpretation of two Qur'anic verses. First, that the *dhimmī*s are to give the *jizya* in a position in which they are "*ṣāghirūn*"—a word that the Ḥanafīs interpreted as meaning humiliation. Since "the Muslim is not subject to humiliation," it would not be becoming for the Muslim to have to pay the *jizya*. The second verse states: "Say to those who disbelieve that if they stop they will be forgiven for what has come before" [8:38]. From this he reasoned that their debt was to be forgiven.

By the time of Shirāzī's and Dāmaghānī's disputation, the historical role of the non-Arab convert had changed drastically: from a figure that reflected tensions between the financial and religious imperatives of the state, the convert became the primary agent of the development of the Islamic sciences. As Richard Bulliet notes, in the lands of Iran where, along with Iraq, Muslim thought flourished in the 9th through 12th centuries, converts came to form the religious class, identified as "exemplars of Muslim behavior."[45] He notes that "They acquired popular followings and in

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[43]Al-Shāfi'ī, *al-Umm*, 5:437. "*In raja'ta ilā dīnika akhadhnā minka al-jizya wa-in aslamta ṭaraknāhā 'anka fīmā yastaqbil wa-na'khudh minka ḥiṣṣa al-jizya al-latī lazamtaka ilā aslamta."*

[44] Later Shafi'īs would actually disagree on whether part of the *jizya* should be taken if the *dhimmī* spent only part of the year as a non-Muslim, al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 17:32.

[45] Bulliet, *Conversion to Islam in the Medieval Period: An Essay in Quantitative History*, 134.

time came to have a significant influence in local affairs because they represented an important segment of popular feeling." Nothing illustrates this more than the Persian origins of the leaders of many of the Shāfi'īs of Baghdad, such as Abū Ishāq al-Marwazī (from Marv in Khurasan) and Shirāzī himself, whose origins were from Firūzabad in Fars. Bulliet goes so far as to call this class "the functioning heart of the historic Muslim community."[46] Despite these changed historical circumstances, there is no change in the positions of the Shāfi'ī and Ḥanafī schools with regards to the convert's duty to pay the owing portion of the *jizya*. Māwardī's *Hāwī* not only reiterates Shāfi'ī's position but also presents a long series of arguments against the Ḥanafī position, which the Shāfi'īs had developed in the period between Shāfi'ī's death and the middle of the 5th/11th century. Shīrāzī and Dāmaghānī thus continued this trend of defending Shāfi'ī and Ḥanafī doctrine against their detractors when they faced off against each, raising the question once again.

3.2 Testing New Ground: The *Jizya* and the *Kharāj*

The disputation momentarily put established school doctrine in play. Authority had no weight in the disputation, only arguments mattered. For this reason, the jurist was presumed free to argue as he pleased. Even when the questioner (*sā'il*) initiating the disputation knew quite well his opponent's school doctrine, he nonetheless followed the convention of asking the jurist his position.[47] Thus Bājī narrates:

> The Shaykh Abū Isḥāq the Shāfi'ī was asked about a *dhimmī* who converted: Does his obligation to pay accrued, but unpaid *jizya* lapse? He denied that it does, thereby affirming the opinion of al-Shafi'ī.[48]

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[46] Ibid., 138.

[47] This was partly a matter of strategy. As manuals of *jadal* note, one would lack prudence to assume an opponent's position. Ibn Furak, *Mujarrad*,295.

[48] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:237. "*su'ila al-shaykh Abū Isḥāq al-Shīrāzī al-Shāfi'ī 'an al-dhimmī idhā aslama hal tasquṭ 'anhu al-jizya li-mā maḍā fa-amna' min dhalika wa-huwa madhhab al-shāfi'ī*"

Shīrāzī as respondent (*mujīb*) is then asked about the evidence supporting his position, (*fa-su'ila 'an dalīlihi*). Shīrāzī's answer, analyzed below, was relatively novel within 11th century juristic discourse. It reveals how the disputation created a space in which the respondent could experiment with different justifications for his school doctrine, without fear of immediate consequence.

Shirāzī's justification relies upon an analogy between the *jizya* and another form of taxation called the *kharāj al-arḍ* (land tax):

> He defended his position by saying that the *jizya* is one of two forms of *kharāj* (sources of income extracted on non-Muslims): "because it is owed when one is in a state of disbelief (*kufr*), conversion does not cancel it. I base my reasoning here on an analogy with the case of the land-*kharāj*."[49]

Shīrāzī's analogical argument is an example of what jurists called a *qiyās al-'illa*, or analogy by cause. *Qiyās al-'illa* depends on identifying the occasioning cause in the ruling of the original case. Shīrāzī defines the term *'illa* as "the *ma'na* (reason) necessitating the ruling."[50] In other words, the *'illa* refers to that entity intended by scripture whose presence signals the presence of a legal ruling (*ḥukm*)**.** After identifying the occasioning cause, the jurist is able to determine whether or not it is present in the derivative case. Shīrāzī thus defines the *qiyās al-'illa* as "that the derivative case is interpreted according to the original case *by means* of the common *ratio legis* and point to which the ruling is attached."[51] He provides the example of *nabīdh* or date wine (the derivative case) which is interpreted as impermissible (the ruling) by analogy to *khamr* or grape wine (the original case), whose impermissibility is premised upon its ability to induce drunkenness (the *'illa*). In the disputation, Shīrāzī's analogy extends the rule of the original case of the land-*kharāj*, in which a person's conversion does not cancel his financial liability to pay

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[49] Ibid. *"fa-istadalla 'alā dhalika bi-annahu aḥad al-kharājayn fa-idhā wajaba fī hāl al-kufr lam yasquṭ bi'l-islām aṣlahu kharāj al-arḍ."*

[50] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 833. "*al-ma'na al-muqtaḍī li'l-ḥukm*."

[51] Ibid., 799. "*Huwa an yajma' bayna al-far' wa'l-aṣl bi'l-'illa wa-nukta al-latī 'allaqa alayha al-ḥukm*."

the tax, to the the case of convert's *jizya*. His argument depends on his identification of disbelief (*kufr*) as the common occasioning cause of the two cases.[52]

Shirazī's analogy identifies the *jizya* and the *kharāj* on land as two types of taxes called *kharāj*. This is certainly not obvious in 11th century legal manuals. Manuals typically employ the word *kharāj* in reference to a land tax and therefore do not subsume the *jizya* under it. Even Shīrāzī and Dāmaghānī use the term *kharāj* in the remainder of the disputation to mean land tax. Shīrāzī's claim is better understood when examining the complex semantic range of the term *kharāj* in the history of the early conquests. As Julius Wellhausen and later Dennett concluded, in the first century of Islam, "the terms *kharāj* and *jizya* were synonymous."[53] Both according to Dennett meant a tax. To distinguish the poll-tax from the land-tax, early Muslims added to either of the two words, the expressions, "levied on their heads, or on their necks (*ʿalā riqābihim*)," to designate the former, and "levied on their lands (*ʻalā arāḍīhim*)" to reference the latter. Majid Khadduri has suggested a slight modification to Dennett's thesis. He articulates that while the term *kharāj* was often used in reference to a poll tax, the term *jizya* was very rarely used to speak of a land tax.[54] It would thus seem mistaken to speak of synonymity between the two terms; rather, just as Shīrāzī and Dāmaghānī use it in the disputation, the *jizya* was synonymous with the expression *kharāj ʻalā raqaba* "a tax levied on their necks." Over time, the term *jizya* gained wider currency as the expression designating the poll-tax; the *kharāj*, in turn, became shorthand for the land tax. As the disputation shows, however, the jurists of the 11th century were aware of the roots of the terms and that the *jizya* was itself a type of *kharāj*. To avoid confusion, I will use the expression land-*kharāj* in the remainder of the chapter to designate the land tax.

Shīrāzī's claim that the *jizya* can be analogized to the land-*kharāj* assumes that Islamic law often regulates in like manner practices belonging to the same genus (*jins*). Shīrāzī states in the *Sharḥ*: "It is possible that an *ʻilla* be applicable to the genus of the ruling, just as it is possible that it

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[52] The concept of *kufr* is here rendered as disbelief for lack of a better expression. The meaning of the word *kufr* is complex and has occasioned much debate but for the purposes of state law, it fairly straightforwardly refers to someone whose status is non-Muslim. See, Bjorkman, "Kāfir."

[53] Dennett, *Conversion and the Poll Tax in Early Islam*, 12. Dennett is here objecting to Wellhausen who thought that both *jizya* and kharāj meant tribute.

[54] Khadduri, *War and Peace in the Law of Islam.*, 189–90. Khadduri notes that only Ibn ʻAbd al-Ḥakam uses the term *jizya ʻalā al-arḍ*, speculating that the expression was perhaps unique to Egypt.

apply to specified rulings."[55] For instance, Shāfi'īs considered the *'illa* of *lex talionis* retribution in criminal law (*qiṣāṣ*) to be "intention combined with parity [between perpetrator and victim] (*al-'amd wa-takāfu'*)." All the particular types of retributions, such as execution for murder or amputation for bodily harm, would then depend on the presence of this occasioning cause. Shīrāzī's *uṣūl al-fiqh* texts abound with examples of how the rulings of one type within a genus can be extended to another. To take one, can a *dhimmī* woman be divorced through *ẓihār* (swearing that a woman is as sexually unlawful to oneself as one's mother)? Shīrāzī affirms that she can because she can be divorced by a *ṭalāq* pronouncement, and both *ẓiḥār* and *ṭalāq* are types of divorce.[56] Shīrāzī is here doing the same with the *jizya* and the land-*kharāj*. If they belong to a single genus subject to the *'illa* of disbelief, then conversion should affect both in like manner. If the land-*kharāj* remains owing after conversion, so should the *jizya*. As will become evident in the next section, this move is a sagacious one: linking the *jizya* tightly to the land-*kharāj* forecloses standard Ḥanafī counter-examples of practices whose *'illa* was also disbelief, but did not share the *jizya*'s genus.

Like the *dhimmī* rules, the legal schools' discussions on the land-tax come out of the historical imperatives of governing an empire. Historians agree that Muslim conquerors of the Sassanian Empire largely adopted the existing Persian system of land-tax, though some jurists later attempted to substantiate it in religious texts.[57] Māwardī makes clear that unlike the *jizya*, no explicit source texts gives the land-*kharāj* sanction—rules governing its application are dependent upon the *ijtihād*, or the legal interpretation, of jurists.[58] Dennett notes that taxation in the early empire took various forms in different lands. There was nonetheless an important distinction between lands conquered by force and those that capitulated through treaty (*ṣulḥ*). Taxes on treaty-lands depended on the terms of the treaty. In Iraq, such lands which included the town of Hira, paid a fix-sum, termed *kharāj 'alā muqāṭa'a*.[59] In some sources, this sum was calculated on the size of the population, thus amounting to a poll-tax. Moreover, Yaḥyā bin

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[55] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 840. "*al-'illa qad takūn li-jins al-ḥukm wa-qad takūn li'l-'ayān*."

[56] Ibid., 811. The argument is more complex: Shīrāzī relies on the case of the Muslim to declare "whoever's divorce by *ṭalāq* is valid so is their divorce by *ẓihār* (*Man ṣaḥḥa ṭalaqahu ṣaḥḥa ẓihārahu*)."

[57] See A. Ben Shemesh's Introduction to *Abū Yūsuf's Kitāb al-Kharāj*.; and Dennett *Conversion and the Poll Tax in Early Islam*.

[58] Al-Māwardī, *Kitāb al-Aḥkām al-Sulṭāniyya wa'l-Wilāyāt al-Dīniyya*, 181.

[59] Dennett, *Conversion and the Poll Tax in Early Islam*, 25.

Ādam writes that no tax was specifically imposed upon their lands.[60] In contrast, lands obtained through force were subject to a land tax in addition to a poll-tax. This land tax was assessed based on the type of crop and the size of the area cultivated (*kharāj ʿalā masāhat al-arḍ*). Several sources relay a story in which ‘Umar sought council of eminent companions in order to determine what to do with the conquered Iraqi lands of Sawād. Some encouraged him to distribute the lands among the fighters, many of whom felt it was their battle-earned right. ‘Umar, finding sanction in a Qur’anic verse granting future Muslims rights to the wealth of conquests, decided its indigenous population would remain as they were on the land, but would pay the land-*kharāj* from its agricultural product. This would then ensure that the Muslim state and community would receive a steady income for generations to come.

The schools of law differed on how to interpret this early conquest period and particularly ‘Umar’s course of action concerning the Sawād.[61] The Ḥanafīs interpreted the story of ‘Umar to mean the Muslim ruler was free to choose how to deal with land conquered by force. He could “divide it among the Muslim troops”: such land would then be exempt from the *kharāj*, becoming ‘*ushr* land, land on which 1/10 of its product is to be given as part of the obligatory Muslim alms-tax (*zakāt*).[62] Alternatively, the ruler “could confirm its inhabitants [as its owners]” in which case they would retain its property rights and be entitled to sell the land. This land would then be subject to the *kharāj*, assessed according to crop and area. But moreover, even lands like those of the town of Hira, obtained through a peace treaty, were to be subject to the land *kharāj*—despite historical evidence to the contrary. The Ḥanafīs reasoned that the *kharāj* was the means to force the non-Muslim inhabitants to cultivate the land and therefore felt it should apply to treaty lands as well as conquered ones. Marghīnānī writes: “All land that is conquered by force and whose people are granted residency rights upon it is land of *kharāj.* The same goes if he (the ruler) obtains the land through a peace treaty, because [in both cases] there

[60]Ibid., 22.

[61]al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfiʿī*, 5:321–22. The Sawād of ‘Iraq is that which is between Abdan up until Mosul in length, and from Qadisiyya until Halwan in width.” 321-322.

[62] Qudurī, *Mukhtaṣar*, 576, “*Fa-idha fataḥa al-imām balda ‘unwatan fa-huwa bi’l-khiyār, in shā’a qasamahu bayna al-muslimīn wa-in shā’a aqarra ahlahu ‘alayhi wa-waḍa‘a ‘alayhim al-jizya wa-‘alā arāḍīhim al-kharāj*.”

is need to make them work the land."[63] Neither conversion nor sale changed the imposition of *kharāj* on this land.

The Shāfi'īs diverged from the Ḥanafīs in important respects. They denied that the ruler had any say in determining ownership of lands conquered by force. They conceded that non-Muslims remained residents of the Iraqi lands of Sawād, but they argued that this was because the fighters themselves had agreed to relinquish their entitlement to the land. Legally, however, such conquered lands was to be divided amongst the Muslim army, save for a fifth that would go to the state (*khums*), and would therefore be considered *'ushr* lands. It was land that was acquired "without the charging of horses and mounts" that were deemed subject to the *kharāj*. It is possible to further subdivide this land into two categories, the rules surrounding the *kharāj* in each case differing. The first was land made into a *waqf* (immobilized lands rendered communal property), either because its owners had fled from fear or because the terms of their surrender stipulated their loss of land ownership. Such land became the collective property of the Muslim community. According to one Shafi'ī opinion, the land of Sawād was made into a *waqf*. The Shāfi'īs relayed the tradition of one 'Uqba b. Farqad, who, after having purchased a piece of land in Sawad, came to see 'Umar. Umar asked him from whom he bought the land; when 'Uqba answered 'its owners', 'Umar coyly asked those around him, '[Its owners] are the Muslims, so did you sell him something?' They said: 'No.' He said: 'Then go and get your money back.'"[64] The land being unmarketable, the land-*kharāj* became equivalent to a rent cost. Like the Ḥanafīs, however, the amount of this *kharāj* was to be assessed by crop and area and neither conversion nor Muslim tenancy changed the status of the land as *kharāj* lands.

The second sort of *kharāj*-land remained the property of the non-Muslim population by virtue of the terms of their surrender treaty. This *kharāj* was not assessed by crop and acreage, but by an amount stipulated at the time of their surrender. As Māwardī explains, the *kharāj* in this case *was* the non-Muslim's *jizya*: it constituted the financial exchange needed to establish the *'aqd al-*

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[63] Al-Marghīnānī, *al-Hidāya*, 2:855. "*Wa kulll arḍ futiḥat 'unwatan fa-uqirra ahluhā 'alayhā fa-hiya arḍ kharāj wa-kadhā idhā ṣālaḥahum li-anna al-hāja ilā ibtidā' al-tawẓīf 'alā al-kāfir wa'l-kharāj alyaq bihi.*"

[64] Shirazi, "*Rawā Bakīr ibn 'Āmir 'an 'Āmir qāla: ishtarā 'Uqba ibn Farqad arḍan min arḍ al-kharāj. Fa-atā 'Umar, fa-akhbarahu, fa-qāla: 'mimman ishtaraytahu? Qāla: min ahlihā.' Qāla: 'fa-haʾūlāʾi ahluha al-Muslimūn, a-bāya'tumūhu shay'an?' Qalū: 'lā.' Qāla: 'fa-adhhab fa-aṭlub mālak.'*"

dhimma.[65] This is why Shīrāzī writes in the *Muhadhdhab*, "it is permissible to impose the *jizya*…upon the product of the land, from among its fruits (*thamr*) and crops (*zar*ʿ)."[66] The only condition was that this amount be equivalent to at least a *dināر* per person, which for the Shāfiʿīs is the minimum *jizya* each male must pay. This type of land-*kharāj* corresponded to the historical reality of treaty-towns like Hira, which paid but a single tax. The Shāfiʿīs thus departed from the Ḥanafīs who thought such lands should be subject to a land-tax in addition to the *jizya*. The Shāfiʿīs considered conversion or the selling of the land to Muslims to cancel this type of *kharāj*. Shīrāzī adduces his position by invoking the *ḥadīth*: "No *kharāj* is incumbent upon the Muslim," explaining that "it is the *jizya* so it cannot be taken from a Muslim."[67] Conversely, the non-Muslim seller of such land would now find himself obliged to pay the same amount in currency to fulfill his *jizya* obligation.

Shirazī's opening argument analogizes the *jizya* exclusively to this type of land-*kharāj*. He has in mind neither the alternate Shāfiʾī land-*kharāj* on land owned by the public treasury for the benefit of the Muslim community, nor the Ḥanafī land-*kharāj*, imposed on all non-Muslim lands. This is clear from his identification of disbelief as the *ratio legis* of his analogy between the *jizya* and the land-*kharāj*: "He defended his position by saying that the *jizya* is one of two forms of *kharāj* (sources of income extracted on non-Muslims): 'because it is owed when one is in a state of disbelief (*kufr*), conversion does not cancel it. I base my reasoning here on an analogy with the case of the land-*kharāj*.'" To recall, in the other forms of land-*kharāj*, disbelief could not be said to *cause* the tax's applicability, since changes in Muslim ownership/tenancy did not impact its continuation. For this reason, Shīrāzī later in the disputation rejects Dāmaghānī's appeal to 'Umar's example in the Sawād. Shīrāzī states:

> I did not simply say that we can compare the two types of *kharāj* because they have the same genus; rather, I added that they also have the same cause, namely, being a disbeliever. The *kharāj* of

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[65] Māwardī, 188.

[66] al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfiʿī*, 5:315–16. "*Wa yajūz an yaḍrib al-jizya ʿalā mawāshīhim, wa ʿalā mā yakhruj min al-arḍ min thamr aw zar*ʿ."

[67] Ibid., 5:316. "*Lā yanbaghī li-Muslim an yuʾaddī al-kharāj wa-li-annahu jizya falā yajūz akhdhuhā min al-Muslim wa-lā yajūz iqrār al-kāfir ʿalā kufr min ghayr jizya fa-intaqala ilā al-raqaba*."

> the land of Sawād is not what I have in mind in my analogy of the *jizya* to the land-*kharāj* because jurists do not consider disbelief to be its cause; rather some consider the *kharāj* on the Sawād to be a form of rent that inhabitants—Muslim or non-Muslim—pay on the land and others see it as the price of a sale that permitted its original inhabitants to stay on the land. The type of land-*kharāj* invoked in my analogy has the same cause as the *jizya*, i.e., disbelief.[68]

Shāfi'īs debated whether the *kharāj* of Sawād was a rent cost for living on land belonging to the Muslim community and administered by the public treasury, or whether it was the cost at which 'Umar sold the land back to its conquered people. In either case, disbelief was not its *ratio legis*.

In analogizing the *jizya* to a type of land-*kharāj* Ḥanafīs did not accept, was Shīrāzī speaking past his interlocutor? The Ḥanafīs did not countenance a land-*kharāj* that functioned as the *jizya* paid in agricultural products. Nor did they think that any *kharāj* would end with conversion. Despite their different understandings of the land-*kharāj*, the effectiveness of Shīrāzī's *qiyās* is in its appeal to a shared common ground. Both schools agreed that the *jizya* was a type of *kharāj*, and both agreed that conversion would not cancel any owing *kharāj*. This was sufficient for Shīrāzī's argument to have some bite to it. It at least raised the possibility that the convert ought to pay his past *jizya* in the same way he did for the *kharāj*.

Shīrāzī's qiyās was far from the only, or even the standard justification for the Shāfi'ī position. If Māwardī's *Ḥāwī*, the most detailed 11th century Shāfi'ī defense, is taken as a reflection of the school's most prominent arguments of the time, Shāfi'īs appear primarily to have contended that financial obligations like the *jizya* must be fulfilled regardless of religion. This is reflected in Māwardī's one scriptural proof for the position, the Prophetic *hadīth "al-za'īm ghārim*" (the one liable is under financial obligation), which he explains by stating "since he has become liable

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[68] Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:244. *"lam aqul innahuma jins wāḥid sawa' bal qultu innahummā jins wāḥid wa-sababuhummā al-kufr wa-innamā huwa al-bay' wa'l-ijāra 'alā ikhtilāf al-madhhab wa-hā-hunā kull min al-kharajayn wajaba li-ḥaqq al-kufr fa-lam yakhtalifā."*

[for the payment], the amount is incumbent upon him."[69] Māwardī then presents a *qiyās* that compares the owing *jizya* to a debt. Since all jurists agreed that the debt (*dayn*) of a non-Muslim was unaffected by conversion, neither should the *jizya*: "It is money whose obligation imposed itself as a *dhimmī*, thus it is not cancelled with Islam, just as in the case of debt (*dayn*)."[70] It is also reflected in the Shāfi'īs imposition of accrued, but unpaid *jizya* upon the decedent's estate. Both the convert and the deceased (when alive) enjoyed the right to live in security in Muslim lands. The right was obtained in a transactional exchange (*mu'āwaḍa*) for which the *jizya* was expected. The Muslim state had thus fulfilled its side of their transaction and the Shāfi'īs expected the convert to do the same.

Moreover, Shīrāzī's rendition of the land-*kharāj qiyās* itself was likely novel in important respects. Māwardī presents the *qiyās* in two forms, one prevalent among his Shāfi'īs of Iraq and the other among the Shāfi'īs of Khurasan: "It is a form of wealth deserving to be paid because of disbelief, so it is not cancelled by [conversion to] Islam, just like the *kharāj*. And some of the people of Khurasan state it thusly: that which was obligatory upon the non-Muslim to discharge is not cancelled in the state of Islam, like the *kharāj*."[71] The first form resembles Shīrāzī's argument insofar as it identifies disbelief as the cause of the *jizya*. Where Shīrāzī departs from Māwardī's formulation is in including the common genus of the land-*kharāj* and the *jizya* to his argument. As mentioned above, the argument from common genus was one Shīrāzī expounded upon theoretically far more than the other extant Shāfi'ī texts of legal theory of the time. Lack of records make it impossible to know if and how common Shīrāzī's particular formulation of the argument was in his day, but its absence from Māwardī's *Ḥāwī*, suggests that, at the very least, jurists had the freedom to formulate, choose, and adapt their own arguments in disputations. The novelty of arguments was product of the jurist's personal *ijtihād* whereby he became convinced of the veracity of the doctrine he had learnt in his preliminary studies within his school of law. The disputation also encouraged this novelty because new or slightly new arguments were likely to catch an opponent off-guard. The disputation created a certain play-spirit characterized by

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[69]Al-Māwardī, *al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi'ī, Wa-Huwa Sharḥ Mukhtaṣar al-Muzanī*, 14:313–14. "*Wa dalīlunā: qawl rasūl illāh: "al-za'īm ghārim.*"

[70]Ibid., 14:314. "*Wa min al-qiyās: innahu māl istaqarra thubūtuhu fi dhimmatihi, fa-wajaba an lā yasquṭ bi-islāmihi ka-duyūn*."

[71]Ibid. "*Innahu māl mustaḥaqq bi'l-kufr, fa-lam yasquṭ mā wajaba minhu bi'l-Islam, ka'l-kharāj, wa 'abbara 'anhu ba'ḍu ahl Khurasan bi-anna mā wajaba 'alā al-kāfir bi'l-iltizām lam yasquṭ bi'l-Islām ka'l-kharāj*."

what Johann Huizinga calls the willingness "To dare, to take risks, to bear uncertainty, to endure tension."[72] This play-spirit shaped the jurist's rationalistic desire to produce a coherent body of law by giving them the freedom to test out new arguments over an extended period of time. In contrast to an institution like a modern parliament, they jurists debated without culminating in any binding resolutions.

The jurist's freedom to test new argumentative ground impacted the development of legal reasoning within the tradition in important respects. Māwardī's *Ḥāwī* shows that at some level the justification of school doctrine was an additive process, the more the better. Whereas al-Shāfi'ī was silent on the proofs for his position, his future disciples produced several. By adding new arguments in favour of their position, the Shāfi'īs could hope to strengthen their side of the debate. But this testing also created the possibility of finding the strongest argument(s).[73]There is good reason to believe that Shīrāzī found the standard formulation of the *jizya*/land-*kharāj qiyās* to be deficient. As it was, the *qiyās* was merely an example among many that the Shāfi'īs produced to show that past obligations did not end with conversion. Over a century later Ibn Rushd al-Ḥafīd would sum up the problem with this position as leading to a stalemate: if the Shāfi'īs had examples of past obligations continuing after conversion, their opponents likewise had examples of past obligations that *were* cancelled after conversion.[74] Shīrāzī's *qiyās* attempted to break this stalemate. The land-*kharāj* was not merely an example, but because it shared in the *jizya*'s genus, it was the *jizya*'s legal mirror, what applied to it applied to the *jizya* and vice-versa.

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[72]Huizinga, *Homo Ludens*, 51.

[73] Māwardī thus speaks of the *taḥrīr* (the summation) of the debate, al-Māwardī, *al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi'ī, Wa-Huwa Sharḥ Mukhtaṣar al-Muzanī*, 14:314.

[74] Ibn Rushd, *Bidāyat al-Mujtahid*,1:405. *Fa-man ra'ā anna al-islām yahdim hadhā al-wājib fī al-kufr kamā yahdim kathīran min al-wajibāt qāla: tasquṭ 'anhu…wa man ra'ā annahu lā yahdim al-islām hadhā al-wājib kamā lā yahdim kathīran min al-huqūq...mithl al-duyūn wa ghayr dhalika qāla: lā tasquṭ ba'd inqiḍā' al-ḥawl.*

3.3 Cross-Referening Legal Cases: Charity, Slavery, Execution, and Agricultural Tithes

Having heard Shīrāzī's proof, Dāmaghānī in his capacity as *sā'il*, shifts from a passive questioner, to actively producing objections (*i'tirāḍāt*). He presents three objections to be examined in detail below. Dāmaghānī need not prove the Ḥanafī position, he need only show Shīrāzī the weakness of his *qiyās* to win the disputation. All of Dāmaghānī's objections attempt to show cases in substantive law that falsify Shīrāzī's methodological assumptions in analogizing the *jizya* to the land-*kharāj*. What this reveals is how the disputation allowed jurists to cross-reference legal cases and gain greater insight into the similarities and differences bearing on how these cases are or should be determined within their legal system—a process known as *jam' wa-farq*.[75]

3.3.1 The First Objection: The Two *Zakāts*

Dāmaghānī's first objection attacks an assumption buttressing Shīrāzī's analogy. He states:

> Nothing precludes the possibility that there be two forms of *kharāj* and that one form is subject to a condition that the other is not.[76]

Dāmaghānī does not here deny that two legal rulings sharing the same genus might depend on an identical set of facts; he merely denies that they *must*. In particular, he raises the possibility that the set of facts can be subject to different *conditions*. Abū Bakr al-Jaṣṣās's *Al-Fuṣūl fi al-Uṣūl* explains the Ḥanafīs' understanding of the relationship between a condition, an occasioning cause, and a ruling: "It is possible that an occasioning cause necessitate the ruling based on conditions, such that the occasioning cause would fail to effect (*ta'thīr*) a ruling except if they are present." [77] What Dāmaghānī has in mind is the Ḥanafī condition that land be subject to *kharāj* only if its original owners, after the Muslim conquest, are non-Muslims. This condition

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[75] See Abū Muḥammad al-Juwaynī, *al-Jam' wa'l-Farq*.

[76] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:237. "*lā yamtani' an yakūna naw'ān min al-kharāj thumma yushtaraṭ fi 'aḥadihima mā lā yushtaraṭ fī al-ākhar.*"

[77] Al-Jaṣṣāṣ, *Uṣūl al-Jaṣṣāṣ al-Musammā al-Fuṣūl fī al-Uṣūl*, 2:313.

remains fulfilled after conversion and therefore makes conversion irrelevant to the land-*kharāj*. In contrast, the *jizya* is not subject to such a condition. Dāmaghānī does not spell this out and it is sufficient for his purposes that Shīrāzī accept the principle that each of the two laws sharing the same genus might be subject to differing conditions.

But how might he prove this principle? Dāmaghānī invokes the example of the two forms of *zakāt* (alms-giving or the poor's due):

> Such a possibility is exemplified in the case of the two types of zakāt, e.i., the *zakāt al-fiṭr* and the *zakāt al-māl*, for whom the *niṣāb* is stipulated as a condition for one of them and not for the other.[78]

Zakāt al-māl refers to a portion of a Muslim's wealth whose transfer to specified entitled recipients is obligatory after a year of possession. It is one of the five pillars of Islam: The Shāfi'īs and Ḥanafīs not only provided verses of the Qur'an and Prophetic *ḥadīth* to justify the *zakāt*, they also relied on communal consensus (*ijmā'*), demonstrating the extent to which the practice was entrenched in the religion.[79] They agreed that it was only due on a free Muslim; but the Ḥanafīs stipulated the additional requirement that it apply only to the sane and to adults. The two schools also agreed on the condition of a year (*al-ḥawl*); Marghīnānī explains that this is to allow a period of time during which wealth can accumulate.[80] According to the Shāfi'īs, the assets upon which the *zakāt* is due are animals (*ḥayawān*), and more precisely pasture-fed livestock, currency (*jawhar*), plants (al-*nabāt*) which refers more specifically to crops (*zurū'*) and fruits (*thimār*), and trading goods.[81] The Ḥanafīs agreed with most of this list with but minor variations.[82] Shīrāzī also lists buried treasure (*rikāz*) and mined wealth (*ma'dan*) as assets upon which the *zakāt* is due, both of which were to be given immediately upon discovery (subject to

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[78] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:237. *"kama anna zakāt al-fiṭr wa-zakāt al-māl naw'ān min al-zakāt thumma yushtaraṭ fī 'aḥadihimma al-niṣāb wa-lā yushtaraṭ fī al-ākhar."*

[79] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī* , 487. Al-Marghīnānī, *al-Hidāyah: The Guidance*, 1:248.

[80] Ibid.,

[81] Juwaynī, *Nihāyat al-Maṭlab,* 3:77.

[82] For instance, they followed their school eponym in including horses in the list of animals, Marghīnānī, *al-Hidāyah*, 256-257.

the *khums* obligation (one-fifth)). Each asset was subject to a minimum amount or *niṣāb*, below which no *zakāt* was due. For instance, the *niṣāb* of cattle was thirty cows: if one owed even twenty nine cows, they would all be exempt from the *zakāt*.[83] Likewise, the *niṣāb* for silver used for currency was 200 dirhams exempting anything below it.[84] Thus the *niṣāb* was considered a condition for the obligation of the *zakāt al-māl*.

The second form of *zakāt*, *zakāt al-fiṭr* refers to charity due on the first day of *'Īd al-Fiṭr*, a festival marking the end of the Ramadan fast. The Shāfi'īs stipulated the amount due to be a *ṣā'* of grain (approximately 5 pints) for every Muslim, free or slave, male or female.[85] They disagreed as to whether the grain could be any staple (*qūt*), or whether one should give that which is most prevalent in one's region of residence, or that which one possesses most of.[86] The Ḥanafīs stipulated one half *ṣā'* of wheat or one full *ṣā'* of dates, raisins, or barley.[87] According to the Shāfi'īs an individual had the responsibility for paying the amount of one's dependents entitled to maintenance (*nafaqa/mu'na*), such as children (*walad*), a wife, a slave, or even parents in constraints. The Ḥanafīs imposed this responsibility only with regards to those upon whom one had guardianship (*wilāya*,) like one's young children, but not one's wife or adult children, even if they may be financial dependents ('*īyāla*).[88] Unlike the *zakāt al-māl*, a *niṣāb* is not a condition of the *zakāt al-fiṭr*. So long as the individual possesses that which exceeds his and his dependents needs, he was liable to pay the *zakāt al-fiṭr*.

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[83] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī* , 1:486.

[84] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī,* 1:518.

[85] A. Bel, "Ṣā'."

[86] Ibid., 543.

[87] Wheat, *sawīq*, or *daqīq*, to be more precise.

[88] The Ḥanafīs disagreed from the Shāfi'īs in excluding the wife from the husband's responsibility for her *zakāt al-fiṭr*. She is *quṣūr al-wilāya wa'l-mu'na,* Marghīnānī, *al-Hidāya*, 291. Likewise they diverged regarding adult children, even if they are dependents. The Shāfi'īs did not include the wife who is *nāshiz* (recalcitrant) as part of the husband's responsibility. The Ḥanafīs also departed from the Shāfi'īs in including the non-Muslim slave whose *zakāt* the Muslim slave-owner must pay for.

3.3.2 The Second Objection: Execution and Enslavement

Dāmaghānī then objects to the assumption that all duties depending upon disbelief either continue or are cancelled with conversion:

> Nothing precludes the possibility that both types of *kharāj* are dependent (*muta'alliqān*) upon disbelief and that conversion to Islam cancels only one of them and not the other.[89]

In other words, it is quite possible that disbelief be instrumental in producing (*ta'thīr*) both rulings, either as a *ratio legis* or as a condition, but it does not follow that the irrelevance of conversion to accrued land-*kharāj* entails its irrelevance to accrued, but unpaid *jizya*. Dāmaghānī again provides an example to buttress his position, "Do you not see that although enslavement and execution are both dependent upon disbelief, only one of them lapses with conversion to Islam, i.e., execution, and the other is not, i.e., slavery?"[90]

The examples of slavery and execution are intimately related to the laws of war with non-Muslims. As Qudūrī writes, male prisoners of war had three possible fates under Ḥanafī law: "With regards to the prisoners, [the imām] has the choice: 1. If he wants, he executes them, 2. If he wants, he enslaves them, or 3. If he wants he leaves them as free men under the contract of the *dhimma* to the Muslims."[91] Shīrāzī echoes similar sentiments, while adding the option of ransoming the prisoners in exchange for Muslim prisoners of war: "If a free adult from among the those regarded as combatants (*ahl al-qitāl*) is taken prisoner, it is up to the *imām* to decide what he sees as best, either executing them, enslaving them, releasing them, or ransoming

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[89] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā,* 4:237.*"lā yamna' an yakūna ḥaqqan muta'alliqan bi'l-kufr thumma aḥaduhumā yasquṭ bi'l-islām wa'l-ākhar la yasquṭ."*

[90] Ibid. "*A-lā tarā an al-istirqāq wa'l-qatl ḥaqqan muta'alliqan bi'l-kufr thumma aḥaduhummā yasquṭ bi'l-islām wa-huwa al-qatl wa'l-ākhar lā yasquṭ bi'l-islām wa-huwa al-istirqāq?*"

[91] Al-Qudūrī, *Mukhtaṣar al-Qudūrī,* 576. "*Wa-huwa fī al-usārā bi'l-khiyār, in shā'a qatalahum, wa-in shā'a istaraqqahum, wa-in shā'a tarakahum aḥrāran dhimmatan li'l-Muslimīn."* Translation taken from Kiani, see *The Mukhtaṣar of Imām Abū al-Ḥusayn al-Qudūrī al-Baghdādī: A Manual of Law*

According to the Ḥanafī School, 667.

them."[92] Thus slavery and execution were two alternatives to imposing the *jizya* upon non-Muslim males coming under Muslim rule.

The ruler also had the right to choose between these options in other cases than conquest. Shīrāzī explains that if a non-Muslim refuses to pay the *jizya* or refuses to recognize the binding nature of the Muslims' rules (*aḥkām al-Muslimīn*), the '*aqd al-dhimma* is considered overturned, and "the *imām* chooses, either execution, enslavement, release (with exile), or ransom, as we have said for the [case of the] prisoner." Al-Shāfi'ī even included certain crimes like sleeping with a Muslim woman or corrupting the faith of Muslims as cause for declaring the contract rescinded. Shīrāzī disagreed but notes that later Shāfi'īs were divided about a situation in which such crimes were stipulated in the contract itself, some considering it a cause for calling the contract rescinded and others thinking it nonetheless negligible. Ḥanafīs limited the rescinding of the *'aqd al-dhimma* to the waging of war against Muslims, Marghīnānī explaining that this makes "the *'aqd al-dhimma* devoid of its purpose, which is to repel the evil of war."[93] They condemned one guilty of doing so to death or enslavement.[94] Likewise, the *imām* had the same options in the case of a non-Muslim found in Muslim-governed lands without a right of safe conduct (*amān*).[95] What unites all these cases is that non-Muslims are treated as enemies of the state (*harbīs*).

The imam's options of execution, enslavement, or imposing the *jizya* depended on the prisoners' disbelief. This is made abundantly clear in that conversion prior to being taken prisoner of war obviated all three options, protecting the life, freedom, and property of the new convert: "And whoever converts from among the disbelievers before being taken prisoner has by doing so protected his life and wealth."[96] However, conversion after being taken prisoner did not affect

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[92] Shīrāzī, al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 5:339. "*Wa-in usira ḥurr bāligh min ahl al-qitāl fa-li'l-imām an yakhtāra mā yarā min al-qitāl, wa'l-istirqāq, wa'l-mann, wa'l-fidā"* Setting them free (*al-mann*) was rejected in the Ḥanafī school, based on the verse "kill them wherever you find them" [2:191]. They felt enslavement was an appropriate substitute however.

[93] *Li-annahum ṣārū harban 'alayna, fa-ya'rā 'aqdu al-dhimma 'an al-fā'ida wa-huwa daf' sharr al-harb.*

[94] Qudūrī's comparison of this non-Muslim no longer benefitting from the '*aqd al-dhimma* to the apostate (*murtadd*) shows that Ḥanafīs saw the association between this person and the prisoner of war to be less straightforward than the Shāfi'īs.

[95] Thus if he enters without *dhimma* or *amān*, it is up to the Imām to choose what he sees fit among the options of execution, enslavement, freeing them, or ransoming them, see al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 5:345; Marghīnānī says that his blood is now licit, *al-Hidāya*, 2:850.

[96] al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 5:272. "*Wa-man aslama min al-kuffār qabla al-asr 'aṣama damahu wa-mālahu"*

execution and enslavement equally. Conversion eliminated the option of execution. The Ḥanafī authority Muḥammad b. Ḥaṣan al-Shaybānī writes: "If after a Muslim defeats a polytheist in battle and is about to kill him, [the polytheist] says: I testify that there is none worthy of worship other than God…it is incumbent upon the Muslim not to harm him." This point is also evident in Shāfiʿī discussions concerning the *jizya* of the unemployed poor *dhimmī*, "unable to earn a living other than by begging."[97] Some Shāfiʿīs asserted nothing was due from this man, claiming that Umar did not impose the *jizya* upon him.[98] Others however disagreed, claiming that because the unemployed poor fell within the category of male combatants liable to execution as prisoners of war, the *jizya* was incumbent upon him, and the state should consider his financial circumstances when collecting it. Shīrāzī then adds, "But some of our companions say: there is no [need] for consideration [of financial ease], because he [the unemployed poor] can protect his blood through conversion to Islam…such that it is said to him: if you can pay, we will leave you alone, and if you cannot then our covenant is rescinded."[99]

In contrast, the prisoner convert could still be enslaved. In fact, Shīrāzī relates a saying of al-Shāfiʿī in which slavery becomes his inevitable lot. He explains that al-Shāfiʾī's reasoning depends on an analogy between women and children taken as prisoners of war: "[the prisoner convert] is enslaved because of his conversion; the other options no longer apply to him because he is now a prisoner that cannot be killed, like the woman and child whose lot is also enslavement."[100] A second narrated saying of al-Shāfiʿī permitted the remaining options, adding that if ransomed, the convert could only be sent to a land inhabited by his (ʿ*ashīratuhu*) kin who would protect his life and permit him to practice his religion. As for the Ḥanafīs, Shaybānī explains that if a Muslim fighter captures an enemy combatant "and takes him to the imam then [the prisoner] becomes a free Muslim if he uttered the testimony of faith before being defeated,

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[97] See Māwardī for more on the four different types of political agreements that "protects the blood" of non-Muslims in Muslim governed lands, *al-Hāwī al-Kabīr*, *Wa-Huwa Sharḥ Mukhtaṣar al-Muzanī,* 9:298.

[98] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfiʿī*, 5:323.

[99] Ibid., "*Fa-ʿalā hadhā yunẓar ila al-maysara, fa-idhā aysara, ṭūliba bi-jizyat mā maḍā, wa-min aṣḥābinā man qāl: la yunẓar li-annahu yaqdir ʿalā ḥaqn al-damm bi'l-islām…fa ʿalā hadhā yaqūl lahu: in tawaṣṣalta ilā adā' al-jizya, khallaynāk, wa-in lam taf'al, nabadhnā ilayka al-ʿahd*."

[100] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfiʿī*, 5:262. "*Innahu yariqq bi-nafs al-Islām, wa-yasquṭ al-khiyār fī al-bāqī, li-annahu asīr lā yuqtal, fa-raqqa ka-al-ṣabī wa'l-mar'a."* The Shafi'īs themselves were divided on whether women could initiate the ʿ*aqd al-dhimma*, some thinking that since it was already proscribed to shed their blood, the contract had no rhyme or reason, and they could only be enslaved, see al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 18:24.

but if he uttered it after defeat, he becomes part of the war booty (*fay'*)," Muhammad b. Ahmad al-Sarakhsī (d.490) in his commentary of the text adding "because Islam protects him from execution, not from enslavement after defeat."[101] Moreover, once enslaved, the institution of slavery endured beyond conversion. Conversion had no impact on the slave-owner's property rights in a person.[102]

Dāmaghānī's objection was a restatement of a Ḥanafī counterexample. The Ḥanafīs presented the example of execution to show that conversion cancels rights whose *ratio legis* was disbelief. The Shāfi'īs returned fire by presenting the example of the continuation of enslavement after conversion. The arguments were well-known, found not only in Māwardī but also in Ṭaḥāwī's 10th text of *ikhtilāf*. Dāmaghānī here reformulates it to address the specificity of the disputation. His goal is to blunt Shīrāzī's claim that the common *'illa* of disbelief between the *jizya* and the land-*kharāj* entails conversion will affect both identically. He rather ingeniously juxtaposes the tradtional Shāfi'ī proof of enslavement beside the Ḥanafī proof of execution to show that conversion can sometimes cancel an existing right/duty and sometimes uphold it. His objection shows again how disputation blended together tradition and creativity.

3.3.3 The Third Objection: The *'Ushr* and the Land-*Kharāj*

Thus far Dāmaghānī has tip-toed around the fact that Ḥanafīs identified a different *'illa* than the Shāfi'īs for the land-*kharāj*. Dāmaghānī's first and second objections gesture towards the Ḥanafīs' position that disbelief is a condition and not an occasioning cause of the land-*kharāj*. MH Kamali explains what a condition is in the law by defining a condition as a "constant attribute whose absence necessitates the absence of the *hukm* but whose presence does not automatically bring about its object (*mashrut*)."[103] This entails that Shīrāzī used a false original

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[101] Sarakhsī, *Sharḥ Kitāb al-Siyar*, 368. "*Fa-in akhadhahu wa-jā'a bihi ilā al-imām fa-huwa ḥurr Muslim in kāna takallama bi-kalimat al-tawḥīd qabla an yaqharahu al-Muslim, wa-in qāla ba'damā qaharahu fa-huwa fay', li-anna al-Islām ya'ṣimuhu min al-qatl, lā min istirqāq ba'd al-qahr*."

[102] The Muslim slave did have greater benefits over his non-Muslim counterpart. Because the Shāfi'īs made the freeing of a believing slave a means to expiate violations of oaths and the breaking of the Ramadan fasts, a Muslim slave was more likely to be manumitted than a non.

[103] He adds also "A condition normally complements the cause and gives it its full effect." See Kamali, *Principles of Islamic Jurisprudence*, 337-338.

case from which to compare the *jizya*. Jurists called such an objection *man' min waṣf fī al-aṣl* (preventing appeal to a characteristic in the original), which Shīrāzī explains as: "that one identifies as *'illa* of the original case a characteristic which one's opponent does not concede …because if it is not conceded, then one is prevented from affirming it" without further debate.[104] Dāmaghānī's third objection begins with identifying the Ḥanafī *'illa* of the land-*kharāj*:

> The land-*kharā*j is an obligation upon a non-Muslim due to his ability to benefit from the earth.[105]

It was because the land-*kharāj*'s *ratio legis* was 'benefitting from the land' that Ḥanafīs exempted land failing to produce its expected yield from taxation. Marghīnānī states:

> If the soil of *kharāj*-land is flooded, if there is a drought, or the crop is ruined, there is no *kharāj* upon it, because peasants have no ability [to cultivate it], and it is the expected product (*al-namā' al-taqdīrī*) that is considered (in determining) the *kharāj*; and also because when the crops are ruined so is the estimated growth of part of the year, and one of the conditions (*sharṭ*) of [the *kharāj*] is that [land] produce in the entirety of the year, just as in the case of the *zakāt*.[106]

In claiming that the land-*kharāj* has a different *'illa* than Shīrāzī presupposes, Dāmaghānī undercuts the validity of his opponent's argument.

However, Dāmaghānī's objection goes further than this objection, building upon it to provide an explanation for the continuation of the land-*kharāj*. In contrast to the *jizya*, the *ratio legis* of

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[104] Al-Fīrūzābādī al-Shīrāzī, *al-Ma'ūna fī al-Jadal,* 232; al-Fīrūzābādī al-Shīrāzī, *Sharḥ,* 875. "*An yu'allil bi-waṣf ghayr mussaliman fi al-aṣl aw-fi al-far' li-annahu idhā lam yusallim fa-qad muni'a thubūtuhu.*"

[105] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:237. "*al-ma'nā fī al-aṣl anna al-kharāj yajib bi-sabab al-tamakkun min al-intifā' bi'l-arḍ"*

[106] Al-Marghīnānī, *al-Hidāya*, 2:857–58. "*Wa-in ghalaba 'alā arḍ al-kharāj al-mā', aw-inqaṭa'a al-mā' 'anhā, aw-iṣṭalama al-zar'a āfa: fa-lā kharāj alayhi li-annahu fāta al-tamakkun min al-zirā'a wa huwa al-namā' al-taqdīrī al-mu'tabar fī al-kharāj wa-fī mā idhā iṣṭalama al-zar' āfa fāta al-namā' al-taqdīrī fī ba'ḍ al-ḥawl wa-kawnuhu nāmiyan fī jamī' al-ḥawl sharṭ kamā fī māl al-zakāt.*"

benefitting from the earth was not exclusive to non-Muslims, and thus could plausibly impose an obligation upon Muslims as well. In fact, it did in the form of the *ʻushr* tax. Dāmaghānī writes: "this same legal cause (*sabab*) also imposes the obligation of the *ʻushr* upon the Muslim."[107] The ʻ*ushr*, as briefly mentioned above, is the tenth of the agricultural product of Muslim-owned lands. It is part of the *zakāt*. Unlike most forms of *zakāt al-māl*, it is not subject to the condition of being held as property for a year (*al-ḥawl*). Rather, it is owed when the crops are harvested. Thus its method of collection differs from the *kharāj* which is assessed not on the actual yield, but on its expected yield. For the Ḥanafīs, what determined whether a land was *kharāj* or ʻ*ushr* was the religion of its owners upon conquest. Qudūrī identifies two types of land subject to the *ʻushr*: "All land whose people [voluntarily] converted to Islam," meaning, prior to conquest, and "all land conquered by force, which was subsequently divided upon the fighters."[108] What both types of land have in common is their Muslim ownership when first annexed to the Muslim state. Marghīnānī explains the Ḥanafī reasoning behind the distinction between the two types of land: "the *ʻushr* is more appropriate for [the Muslim] because of its association with devotion", gesturing towards its being part of the zakāt.[109] Dāmaghānī's argument implicitly contends that a legal obligation with a Muslim equivalent can continue after conversion. Thus he concludes "That the same cause imposes duties on the Muslim and non-Muslim alike means that it is permissible for the land-*kharāj* to continue after conversion [to Islam]," adding "This does not apply to the case of the *jizya* because there is no analogous obligation [of the *jizya*] upon a Muslim. Thus conversion must cancel the *jizya* that was imposed upon the person when he/she was non-Muslim."[110]

Dāmaghānī's three objections all seek to illustrate Shīrāzī's inconsistency in his substantive legal commitments: they imply that he cannot simultaneously hold his position on the continued, post-conversion obligation to pay accrued, but unpaid *jizya*, and his views on the two *zakāts*,

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[107] Al-Subkī, *Ṭabaqāt al-Shāfiʻiyya al-Kubrā*, 4:237. "*wa-yajūz an yaijba bi-mithl hadhā al-sabab ḥaqq ʻalayhi fī hāl al-islām wa-huwa al-ʻushr.*"

[108] *Kull arḍ aslama ʿalayhā ahluhā aw-futiḥat ʻanwatan, wa-qusimat bayna al-ghānimīn: fahuwa arḍu ʻushrin wa-kull arḍ futiḥat ʻanwatan fa-uqirra ahluhā ʿalayhā: fa-hiya arḍ kharāj*, al-Marghīnānī, *al-Hidāya*, 2:854.

[109] Ibid. "*al-ḥāja ilā ibtidāʼ al-tawẓīf ʻalā al-Muslim, wa al-ʻushr alyaq bihi,*"

[110] Al-Subkī, *Ṭabaqāt al-Shāfiʻiyya al-Kubrā*, 4:237. The fuller passage reads: "*Anna al-kharāj yajib bi-sabab al-tamakkun min al-intifāʻa biʼl-arḍ, wa-yajūz an yajib bi-mithl hadhā al-sabab ḥaqq alayhi fī ḥāl al-islām, wa huwa al-ʻushr, fa-li-hadhā jāza an yabqā mā wajaba ʻalayhi minhu ḥāl al-kufr wa-laysa dhālika hā-hunā li-an laysa yajib bi-mithli nisbatihi ḥaqq fī ḥāl al-islām fa-li-hadhā saqaṭa mā wajaba fī ḥā al-kufr.*"

enslavement, execution, and the *ʻushr*. Dāmaghānī's critique shows the potentially constructive dimension of the disputation. The disputation opened up the respondent's eyes to the myriad perspectives from which the law under review potentially did not fit within his school's doctrine. This then permitted him to formulate a line of reasoning which was consistent with his legal tradition. The disputation thus contained within it the potential to open a jurist's eyes to the potentially problematic aspects of his tradition. He could in effect reformulate his arguments or even change his commitments when coming to see these inconsistencies. As Eugene Rice points out, MacIntyre recognizes that the internal coherence of a tradition depends upon exposure to a context of critique: "The test for truth in the present is always to summon up as many questions of the greatest strength as possible; what can be justifiably claimed as true is what has withstood such dialectical questioning and framing of objections."[111] The next section highlights how Shīrāzī in fact refines and develops his arguments and even changes the doctrines of his legal school in the context of the disputation from exposure to this process of critique.

3.4 The Refinement of Legal Thought in Disputation

The remainder of the disputation consists of three replies, Shīrāzī speaking twice and Dāmaghānī only one. Shīrāzī attempts to overcome Dāmaghānī's objections and reassert the validity of his original *qiyās al-ʿilla*. He does so by turning his gaze to Dāmaghānī's examples. Shīrāzī must provide an alternative account of the facts (e.g., causes, conditions) and methodological concerns bearing on Dāmaghānī's examples in order to obviate any challenge they might pose to the validity of his argument for the *jizya*'s continuation. Shīrāzī does not in the process merely regurgitate his school's account. In searching for consistency between these laws and his position on the *jizya*, Shīrāzī is sometimes forced to revise or to select among variant opinions within his school. In what follows, I will briefly review Shīrāzī's engagement with Dāmaghānī's objections to show how the disputation forced him to develop his line of argumentation. In the section that follows I will turn to examining the impacts of this refinement of thought on a jurist's books of substantive law and on the eventual evolution of school doctrine.

[111] MacIntyre, Whose justice? Which Rationality?, 358.

3.4.1 The Two *Zakāts*

Shīrāzī opposes Dāmaghānī's comparison of the *zakāt* and the *kharāj*. Unlike the two kinds of *kharāj*, "The two *zakāts* diverge from each other (*iftaraqatā*)"—and this, despite being of the same genus.[112] Shīrāzī asserts "*Zakāt al-fiṭr* is different than the rest of the types of *zakāt* because it is attached to one's *dhimma* (legal personality). This is the reason that the *niṣāb* (stipulation of ownership of a minimum amount of property for one year) is not one of its conditions." At a more general level, the concept of *dhimma* expressed a person's ability to take on legal obligations: a person's *dhimma* was his or her juridical person over and above a biological self.[113] However, when jurists employed the concept in financial matters such as the *zakāt*, the term was used to express the basis of rights-claims. A right imposed on someone's *dhimma* referred to that person's obligation to provide, in MH Kamali's words, an "asset with no tangible existence."[114] In contrast, a right that was based on '*ayn* was a right to a concrete and specifiable object.

To say that *zakāt al-fiṭr* was dependent upon *dhimma* was essentially to declare it a poll-tax. In fact, Shīrāzī considers it the Muslim equivalent of the *jizya* for this reason: "the *zakāt al-fiṭr* because the *zakāt al-fiṭr* and the *jizya* are both poll taxes levied on the necks *('alā raqaba)* of individuals."[115] Juwaynī echoes this sentiment stating that it is the person's "body" and mere "existence" in Juwaynī's words that give rise to the debt-like obligation and therefore characterizes it as *dhimma.*[116] As a result what is taken into account in its calculation is the person's capacity (*imkān*), that is, his financial ability to shoulder the burden of the charity. In sum, there is no need for a *niṣāb* on *zakāt al-fiṭr* because a person's type and amount of wealth beyond his immediate needs is immaterial to its calculation. In contrast, the *zakāt al-mal*, being due on concrete and tangible forms of wealth, was a wealth tax. As such a *niṣāb* served to

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[112]Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:238. "*an al-zakātayn iftaraqatā li-an zakāt al-fiṭr faraqat sā'ir al-zakawāt fī ta'alluqihā bi'l-dhimma fa-fariqahā fī i'tibār al-niṣāb wa-laysa ka-dhalika al-kharajān fa-innahummā sawa' fī i'tibār al-kufr fī wujūbihimmā wa-munāfāt al-islām.*"

[113]Johansen, *Contingency in a Sacred Law*.

[114]Kamali, *Islamic Commercial Law*, 140.

[115]Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:239. "*wa-zakāt al-fiṭr tajib 'an al-raqaba, fa-yajib an al-jizya tajib 'an al-raqaba wa-an yabqā mā wajaba min dhalika fī ḥāl al-kufr fa-lā farq baynahummā*."

[116] Juwaynī, *Nihāyat al-Maṭlab, 3:76.*

establish a minimum amount of taxable wealth. Whereas the distinction between the two *zakāts* allowed them to be subject to different conditions, the lack of such a distinction in the case of the two *kharāj* proscribes the same. Shīrāzī's claim then is not that all rulings with the same genus are treated identically by the law, but merely that there is a presumption that they are. The burden of proof was with Dāmaghānī to show that the two *kharāj* were different.

Asserting the invalidity of one of Shāfi'ī's statements had important legal consequences. For instance, Shīrāzī explains that if the poor's right to *zakāt al-māl* is on '*ayn*, then the moment the *zakāt* is due, the specified object becomes their property, whether the object is transferred or not. As a result, this untransferred object is not calculated as part of the *zakāt*-payer's wealth the following lunar year. In contrast, the object would be part of this wealth if *zakāt al-māl* is due on *dhimma*, because ownership would not have changed.[117]

3.4.2 Enslavement and Execution

Shīrāzī contends that comparing the two kinds of *kharāj* to slavery and execution is also wrongheaded. To recall, Dāmaghānī sought through the examples to show that conversion might cancel one rule but not another. The *jizya* might then be cancelled like in the case of execution, even though the land-*kharāj* and enslavement are not. Shīrāzī's rebuttal is that execution and enslavement cannot exemplify the potentially variable effects of conversion on different laws. This is because the two cases are different insofar as the ruling attached to disbelief has already taken effect in one of them but not the other:

> because enslavement [first] happens in a state of disbelief and that what follows after conversion is but a continuation and perpetuation of this original enslavement (*istidāmat al-riqq*). This is not so for execution because it is an initiation of an act and not the continuation of a penalty. Thus it is permissible for the two to differ.[118]

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[117] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 1:473–74.

[118] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:238. *"al-istirqāq idhā haṣala fī ḥāl al-kufr kāna mā ba'd al-islām istidāma li'l-riqq wa-baqā' 'alayhi wa-laysa ka-dhalika al-qatl fa-innahu ibtidā' 'uqūba fa-jāza an yakhtalifā."*

That a *ratio legis* like disbelief could have different temporal relationships to their rulings is elaborated upon in the *Sharḥ*. Shīrāzī explains: "It is permissible that an *'illa* affirm a ruling's initiation and continuation" just as it is permissible for it to merely affirm "its continuation without its initiation" or its "initiation and not its continuation."[119] He provides examples of marriage laws to highlight his reasoning. While breastfeeding from the same woman prevents both the initiation and continuation of marriage between two people, apostasy only prevents the initiation of a marriage without affecting its continuation,[120] and a woman's initiated divorce (*khul'*) prevents the marriage's continuation but does not prevent the divorced couple from initiating it anew.In sum, Shīrāzī's point is that because conversion involves a continuation in one case but an initiation in the other, no general conclusions about conversion's effects on a ruling can be drawn by comparing the two cases.

3.4.3 The '*Ushr*, Land-*Kharāj*, and the Rights of God

Shīrāzī responds to Dāmaghānī's third objection by denying the land-*kharāj* and the *'ushr* have similar legal causes (*sabab*). He agrees that the land-*kharāj* is an "obligation caused by benefitting from the earth" adding the Shāfi'ī qualification "while being in a state of disbelief";[121] but rejects the same for the '*ushr*. Shīrāzī states that the *'ushr* is obligatory because it is one's status as a Muslim that creates a right owed to God (*ḥaqq Allāh*) on the earth.[122] The concept of a right of God is contrasted to that of a right of people (*al-adamiyyīn/al-nās/al-'ibād*). Baber Johansen succinctly explains the difference between the two types of rights by characterizing the latter as pertaining to "the claims of individual private legal persons against each other" and the former as "the claims of the state religion and religion against the private legal persons."[123] Thus religious obligations like the *zakāt*, of which the *'ushr* is a part, are rights

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[119] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 837. "*Wa-yajūz an yakūna al-'illa li-ithbāt al-ḥukm fī ibtidā' wa'l-istidāma…wa-yajūz an takūna 'illa fī al-ibtidā' dūn al-istidāma... wa-yajūz an takūna 'illa fī al-istidāma dūn al-ibtidā'*."

[120] To be more precise, apostasy does initiate a woman's waiting period ('*idda*) which begins the process of divorce. However, Shīrāzī considers the two spouses married during that time and no new marriage contract is needed if the apostate recants and returns to the fold of Islam. See the *Muhadhdhab* 4:189.

[121] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:239. *"al-kharāj innamā wajaba bi-sabab al-tamakkun min al-intifa' ma'a al-kufr."*

[122] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:239.

[123] Johansen, *Contingency in a Sacred Law*, 200.

of God. In contrast the land-*kharāj* is not a religious obligation and therefore it is a right of humans. The consequence is that it is erroneous to claim that the land-*kharāj* can continue after conversion based on the Muslims being subject to the *'ushr*.

Dāmaghānī's response seeks to reaffirm that benefit from the earth is common to the two laws. He points out that the land-*kharāj* is neither due on a flooded land or anything else that negates the possibility of its productive use. Likewise, the '*ushr* is only liable on productive land. This view is echoed in Ḥanafī texts, Marghīnānī asserting that the *'ushr* distinguished itself from the *kharāj* by its method of calculation: "the legal cause (*sabab*) of the two obligations are one, and it is the production of the earth, except that in the *'ushr* what is considered is the actual yield (*taḥqīqan*), and in the *kharāj* it is its estimated yield (*taqdīran*), and for this reason they are both ascribable to cultivated land."[124] Moreover the Ḥanafīs also saw similarity between the two laws insofar as both served the "need of putting its people to work" in the production of land.[125]They seem very much to have seen the difference between the two to be one of nomenclature, allowing the state and society to benefit from the labour of both Muslims and non-Muslims. Shīrāzī concludes the disputation by largely reiterating his point that a law caused by a right of God and one caused by disbelief could not be further opposed to each other.

The position that the *kharāj*, whether the land-*kharāj* or the *jizya*, was not a right of God was itself controversial. Juwaynī explains that some Shāfi'īs indeed affirmed that it was not a right of God because it was money that fulfilled the practical purpose of "spending on the army's troops (*murtaziqa*), and it is not one of those deeds that gain closeness to God."[126] Others, however, dissented, presumably because it served a public benefit rather than that of private individuals. The consequences however were important when it came to the division of the estate of a *dhimmī*. If the *kharāj* was a right of humans, then the state had equal entitlement to the *dhimmī*'s estate as his creditors. If however, it was a right of God, then some Shāfi'īs thought that rights of God had precedent over the rights of humans, and therefore, the state would be entitled to be

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[124]Al-Marghīnānī, *al-Hidāya*, 2:859. "*Wa-sabab al-ḥaqqayn wāḥid wa-huwa al-arḍ al-nāmiya illā annahu yu'tabar fī al-'ushr taḥqīqan wa-fī al-kharāj taqdīran, wa-li hadhā yuḍāfān ilā al-arḍ.*

[125] Ibid., 2:854,855.*"al-hāja ila ibtidā' al-tawẓīf 'alā al-Muslim"* and *"al-hāja ilā ibtidā' al-tawẓīf 'alā kāfir*."

[126]Al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 18:33. "*fa-minhum man qāla: hiya min huqūq al-ādamiyīn fa-inna maṣrifahā ilā murtaziqa, wa-laysat min al-qurab*."

paid what it was owed first, before the decedent's heirs could inherit. In short, in attempting to argue for the convert's payment of the *jizya*, Shīrāzī ends up arguing for a position that affects the division of *dhimmī*'s estates.

3.5 From Personal Coherence-Building to School Doctrine: The *Jizya* and Humiliation (*Ṣaghār*)

This section shows how jurists' development and refinement of their positions within the context of disputation later affected the formulation of their texts of substantive law. It focuses on the key question of whether or not the *dhimmī* should be humiliated through the *jizya*. This was, to recall, the key Ḥanafī proof for the cancellation of the convert's *jizya*. Dāmaghānī made no mention of the proof in his first round of objections. The argument that Muslims should not be humiliated through the *jizya* was no counter to Shīrāzī's claims about the land-*kharāj*. Dāmaghānī thus focused on Shīrāzī's proof and not the wider question of the proofs for each side of the debate.

The Ḥanafī argument was nonetheless a strong one, rooted in a Qur'anic verse, and it is little surprise that Dāmaghānī would appeal to it in the course of the disputation when given the opportunity. Thus, in the course of explaining why the two *zakāts* are equally cancelled by apostasy, an argument that seems to support Shīrāzī's claim that conversion should affect legal rulings of the same genus identically, Dāmaghānī states: "Disbelief (*kufr*) has the same impact on the two forms of *zakāt* because they are acts of worship and this makes it inconceivable for them to be carried out once someone has become a non-Muslim. As a general principle, non-Muslims are not subject to the obligations of worship. In contrast, the *jizya* is an act that is meant to humiliate. This is why God Most High says: 'Until they give the *jizya* by hand and they are *ṣāghirūn* (humiliated).'"[127] The key word here was *ṣāghirūn*, a word derived from the noun *ṣaghār,* and which Ḥanafīs interpreted as meaning humiliation. The Ḥanafīs used this verse to deny the convert's liability to pay his past *jizya*, contending that "there is no humiliation after

[127] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:239–40. *"an al-zakātayn innamā aththara al-kufr fīhimmā 'alā wajh wāḥid li-annahummaā yajibān 'alā sabīl al-'ibāda, fa-lā yajūz istīfā'uhummā ba'd al-kufr, li-an al-kāfir lā tathbit fī ḥaqqihi al-'ibādāt, wa-laysa ka-dhalika fī mas'alatinā, fa-inna al-jizya tajib 'alā sabīl al-ṣighār, li-an Allāh ta'ālā qāla: 'ḥattā yu'ṭū al-jizya 'an yad wa-hum ṣāghirūn'."*

one embraces Islam." Dāmaghānī invokes the argument to explain why the *kharāj* can continue after Islam, but not the *jizya*. Whereas the *jizya* involves humiliation, "the *kharāj* on the earth is not obligated as humiliation (*'alā sabīl al-ṣaghār*), and it is for this reason that it can be imposed on Muslims."[128] A Ḥanafī position saw the *jizya* as a form of punishment (*'uqūba*) for the non-Muslims' rejection of Islam. "This is the reason it is called *jizya,*" Marghīnānī would assert, "because the *jizya* is synonymous with *jazā'* (recompense, oftentimes referring to a penalty)."[129]

The argument's bite was that Shāfi'īs also recognized that the *jizya* could aim to humiliate the non-Muslims. Al-Shāfi'ī himself intimates this in the *Umm* by stating that the *jizya* is imposed as a type of subservience for non-Muslims' refusal to embrace Islam.[130] The position that the *jizya* was intended to humiliate was widespread among 11th century Shāfi'īs, Māwardī stating that one interpretation of *ṣāghirun* was the taking of the *jizya* "in a position of humiliation (*adhilla*) and defeat (*maqhūrīn*)."[131] This interpretation was in line with his view that "The purpose of the contract of the *jizya* is to strengthen Islam and to bolster it, and to weaken disbelief and humiliate it, such as to raise Islam and lower disbelief."[132] Moreover, Māwardī reiterates the possible etymological root of *jizya* as being a recompense meant to humiliate the non-Muslim for his disbelief.[133]

Shīrāzī rebuts Dāmaghānī first by maintaining parity between the two forms of *kharāj*. He states that if the *jizya* entails humiliation, then the same should be said of the land-*kharāj*, such that conversion should cancel the payment of both. But secondly, Shīrāzī refuses to concede that the *jizya* is a form of humiliation. Instead he maintains that it is a form of payment or exchange for the non-Muslim's right to live in Muslim lands, for this reason the payment of the convert depends on the amount of time he lived as a non-Muslim on Muslim lands. He adds that the

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[128] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:240. *"al-kharāj fī al-arḍ lā yajib 'alā sabīl al-ṣighār, wa-li-hadhā yajūz an yūjad bi-ismihi min al-Muslimīn."*

[129] Al-Marghīnānī, *al-Hidāya*, 2:865. "*Wa-li annahā wajabat 'uqūbatan 'alā al-kufr, li-hadhā tusammā jizya, wa-hiya wa'l-jazā' wāḥid*.

[130] Al-Shāfi'ī, *al-Umm*, 5:415-416. As we will see below, Al-Shāfi'ī was somewhat ambiguous about whether or not the *jizya* was meant to humiliate. This is the reason that later members of his school differed as to how to interpret the word.

[131] Al-Māwardī, *al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi'ī, Wa-Huwa Sharḥ Mukhtaṣar al-Muzanī*, 14:283.

[132] Ibid., 14:312.

[133] Al-Māwardī, *Kitāb al-Aḥkām al-Sulṭāniyya wa'l-Wilāyāt al-Dīniyya*, 181.

word *ṣāghirūn* does not mean humiliated but merely "subject to the legal rules of Muslims" (*tajrī 'alayhim aḥkām al-muslimīn*).[134] This interpretation was not new. 11th century Shāfi'īs attributed it to their eponym and affirmed its plausibility. This expression itself was also the subject of debate. As Juwaynī notes, what could it mean to say that they are subject to Muslim laws when Shāfi'īs themselves disagree as to whether it is permissible for a Muslim court to apply Muslim laws upon them—(even when they request it). For Shīrāzī, however, the meaning was rather straightforward: "the agreement to submit to Muslim rule in matters ivolving civil claims arising out of contracts, business transactions, and indemnities for destroyed property."[135]

Shīrāzī could have put forward this position simply for the sake of winning the disputation. The view however, is articulated clearly in his *Muhadhdhab*, where Shīrāzī states: "The *ṣaghār*: it is that they be subject to the rulings of Islam."[136] The consequence for *dhimmī*s was weighty. Māwardī's *Ahkām* recognizes that if the *jizya* is meant to humiliate, it is to be taken with harshness.[137] Juwaynī echoes these sentiments, writing that al-Shāfi'ī said: "What is meant by *ṣaghār* is the grabbing of the beard and the hitting of the his chin: the *dhimmī* is charged with handing over the *jizya* himself, bowing his head as he pours out that which he has on the scale, and he is to be grabbed by the beard and hit on his cheekbone (*lahzama*)."[138] In contrast, Shīrāzī writes: "and the *jizya* is taken with gentleness (*bi-rifq*) as are all debts, and they are not to be harmed in its taking, either by statement or by action, because it is an exchange stipulated in a contract, so they are not be harmed in statement or action, just like the payer of a rented house (is not harmed)."[139] What this reveals is that in the process of justifying the law on the convert's *jizya*, Shīrāzī was led to see a problem of consistency between two positions in his Shāfi'ī school. In rectifying this inconsistency, Shīrāzī struck one of the two from his version of school

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[134] Subkī, Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:242.

[135] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 5:326. "*Wa-lā yajūz 'aqd al-dhimma 'illa bi-sharṭayn: badhl al-jizya, wa-iltizām ahkām al-muslimīn fī ḥuqūq al-ādamīyīn fī al-'uqūd, wa'l-mu'āmalāt, wa gharāmāt al-mutlifāt.*"

[136] Ibid.

[137] Al-Māwardī, *Kitāb al-Aḥkām al-Sulṭāniyya wa'l-Wilāyāt al-Dīniyya*, 181.

[138] Al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 18:17. "*al-murād bi'l-ṣaghār al-akhdh bi'l-lihyā wa'l-ḍarb fī al-lahāzim fa-yukallif al-dhimmī an yūfiya al-jizya bi-nafshihi, wa-yuṭa'ṭi'a ra'sahu, wa-yaṣubba mā ma'ahu fi al-kiffa, wa-ya'khudha al-mustawfī bi-lihyatihi wa-yaḍrib fī lahzamatihi."*

[139] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 5:324. "*Wa-tu'khadh minhum al-jizya bi-rifq kamā tu'khadh sā'ir al-duyūn, wa-lā yu'dhīhim fī akhdhihā bi-qawl wa-lā fi'l li-annahu 'iwaḍ fī 'aqd, fa-lam yu'dhihim fī akhdhihi bi-qawl wa lā fi'l ka-ujrat al-dār.*"

doctrine. There is no way to say that this disputation was *the* reason for Shīrāzī's position in his book of substantive law—and certainly other Shāfi'īs interpreted the term *ṣaghār* as Shīrāzī did; but it does reflect how the rigourous process of argumentation in the disputation could help the jurist re-examine and review legal doctrine.

Alternative solutions to the problem of coherence were possible. Shīrāzī could have limited himself to the argument that one must distinguish between the imposition of an obligation and its execution or carrying out. Some Shāfi'īs took the position that is no humiliation in the carrying out of an obligation, only in its initial imposition. The argument was Māwardī's favoured response to the Ḥanafīs: "Humiliation is caused by the imposition of an obligation, but not in its performance."[140] Māwardī's position was strengthened by the fact that conversion did in fact end the imposition of any new obligations in Islam. Moreover, Shīrāzī accepted this line of thought and invokes it in the disputation. He justifies the argument by the fact that a Muslim could be a guarantor to the *dhimmī*'s payment of the *jizya*. But certainly, the argument that the *jizya* did not involve humiliation at all strengthened the plausibility of its payment after conversion. Moreover, as Juwaynī points out, the distinction between imposition and fulfillment runs into the problem that the humiliation was to be meted out at the time of the giving of the *jizya*, i.e., its performance.

Nonetheless, the Shāfi'ī school did not end up adopting Shīrāzī's solution to the problem. The reason was likely associated with the position that Ghazālī ended up taking on the subject. Ghazālī was the one who took Shīrāzī's chair in the Niẓāmiyya of Baghdad shortly after his death. In his *Wasīt*, Ghazālī states: "The third obligation [in speaking of the *jizya*] is the imposition of disgrace and humiliation when taking it, based on the almighty's saying: "Until they give the *jizya* by hand than they are humiliated."[141] Ghazālī recounts his teacher Juwaynī's narration of the description of how the *dhimmī* should be humiliated in giving the *jizya*. Unlike Juwaynī, however, he does not give any hint that the Shāfi'īs were actually divided on the issue. The major Shāfi'ī texts that followed, such as al-Rāfi'ī's *Muḥarrar* and al-Nawawī's *Minhaj*

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[140] Al-Māwardī, *al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi'ī, Wa-Huwa Sharḥ Mukhtaṣar al-Muzanī*, 14:314. "*al-ṣaghār 'illa fi al-wujūb dūn al-adā'*."

[141] Al-Ghazālī, *al-Wasīṭ*, 204. "*al-wājib al-thālith al-ihāna wa'l-taṣghīr 'inda al-akhdh, li-qawlihi ta'āla: 'ḥattā yu'ṭū al-jizya 'an yadin wa-hum ṣāghirūn*.'"

adopt Ghazālī's position, seemingly paraphrasing him.[142] With Ghazālī, the question shifted from "does the *jizya* serve to humiliate the *dhimmī*" to "is it desirable or mandatory to humiliate the *dhimmī*?" Shirbīnī in his commentary of the *Minhāj* chooses to highlight debates of Shāfi'īs about the details of the abuse to which the *dhimmī* should be subject: "It is sufficient that [the *dhimmī*] be hit on one cheekbone, and the best position is that he should be hit with an open palm. Al-Adhra'ī and others have expressed that the [the collector] should say: 'Oh enemy of God, give over God's right.'"[143] The success of Ghazālī's opinion likely had less to do with his reasoning on the subject than on his appointment to the Nizāmīya and his status among later Shāfi'īs.

Three important points come out of the discussion concerning the *jizya*'s purpose to humiliate. First, it reveals how the disputation's attempt to justify one legal position, e.g., the convert's payment of his past *jizya*, could end up changing another law, e.g., the duty of the *jizya* collector to physically abuse non-Muslim populations, if the two laws were in contradiction. Second, it reveals that this change was very much the scholar's *personal* attempts at achieving legal coherence. The jurist's formulation of coherent doctrine might have found themselves in their books of substantive law, but it was not always replicated in the books of their contemporaries. Lastly, because their version of school doctrine was personal, there was no guarantee their views would end up as the view of the school. The disputation was first and foremost play insofar as it was devoid of any immediate or predictable purpose. The way it filtered down into school doctrine depended upon other historical factors like professorial appointments and fame.

3.6 Conclusion: Play, Coherence, and an Aesthetic Tradition

MacIntyre explains that traditions involve three phases of enquiry. In the first phase, a community will tend to defer largely unquestioningly to certain authoritative texts. The justification of beliefs and practices at this point is rudimentary. In the second phase, realization

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[142] Al-Rāfi'ī, *al-Muḥarrar fī Fiqh al-Imām al-Shāfi'ī*, 5:404, 406.

[143] Al-Shirbīnī, *Mughnī al-Muḥtāj Ilā Ma'rifat Ma'ānī Alfāẓ al-Minhāj*, 71. "*yashbahu an yakfiya al-ḍarb fī aḥad al-jānibayn wa-'l-ẓāhir kamā qāla al-Bilqīnī annahu yaḍribuhu bi'l-kaff maftūḥan. Wa-qāla al-Adhra'ī wa-ghayruhu: 'wa-yaqūl: 'yā 'adduwwa allāh addī ḥaqq allāh.*'"

that some positions within the tradition lead to "incompatible courses of action" gives rise to doubts about the tradition's coherence. The third phase involves a defense and also a reformulation of the tradition, which will depend "not only upon what stock of reasons and of questioning and reasoning abilities they already possess but also upon their inventiveness."[144] Likewise, Shāfiʿī jurists had inherited from their eponym laws that had either little or no justification. The convert's (non)payment of the *jizya* is an example of such a law. Al-Shāfiʿī himself had provided nearly nothing for Shāfiʿī jurists to stand on. This placed their tradition in a precarious situation, surrounded by other schools of law who critiqued them for their position. The Shāfiʿīs thus responded to defend their tradition, a process which was still ongoing at the time of Shīrāzī's and Dāmaghānī's disputation.

It was the complexity of the legal system that made the process of justification so lengthy. Texts of *khilāf* such as al-Taḥāwī's reveal that every time the Shāfiʿīs produced an argument, the Ḥanafīs produced objections. Justification was a long process of testing out different arguments. It also entailed redescribing, refining, and revising other legal positions that seemingly contradicted these arguments. The process aimed at an elimination of potential discordance within the *madhhab*. The jurists built upon the arguments of their predecessors to create a more rigorous system of law.

I have shown how disputation's structure of play was indispensable to this process of refinement. This is in some ways counter-intuitive. Play has often been invoked by theorists in the last half-century as a means of undoing structures and authority.[145] In contrast, the undoing that can be located in disputation was always provisional. Placing school doctrine in play or jeopardy was meant to strengthen it. It allowed the jurists to examine the merits of arguments on their own terms and very often they encountered cogent critiques from their adversaries. This openness also allowed them to go back to the drawing board and revise their arguments. The disputation like all play presented "itself as an intermezzo, an interlude" in the lives of jurists: it created grounds in which the law's authoritative status could be temporarily placed in question without

[144] MacIntyre, *Whose Justice? Which Rationality*, 354–55.

[145] E.g. Derrida, "Structure, Sign, and Play."

immediate or necessary consequence on the law's practical application.[146] Shīrāzī's abandonment of the opinion that the *jizya* is meant to humiliate non-Muslims is at least partly a result of his exposure to the Ḥanafī's claim that imposing the *jizya* on the convert means humiliating a Muslim—a position no jurist wanted to entertain.

Johann Huizinga's classic analysis of the structure of play recognizes the potential for play to construct as much as it undoes. He associates this construction with aesthetics because of the beauty that comes from creating complexity and order:

> Play has a tendency to be beautiful. It may be that this aesthetic factor is identical with the impulse to create orderly form, which animates play in all its aspects. The words we use to denote the elements of play belong for the most part to aesthetics, terms with which we try to describe the effects of beauty: tension, poise, balance, contrast, variation, solution, resolution, etc. Play casts a spell over us; it is 'enchanting,' 'captivating'. It is invested with the noblest qualities we are capable of perceiving in things: rhythm and harmony.[147]

The disputation's institutionalization of critique played a large role in generating the complexity and rigour of argumentation in the Islamic tradition. Examination of books of *madhhab* and *khilāf* of the 11th century show the breadth and depth of the Islamic legal tradition. Its arguments are numerous and also complex in the objections they entertain. There is reason to see these arguments as a concise summation of a continued process of mutual critique.[148] This critique could and did take place in various forms, e.g. books and lectures, but the immediacy and rigour of the critique in the disputation made it stand out as a tool for the elaboration of school doctrine. The Ḥanafīs and Shāfi'īs mutually helped each other in this process of construction. They offered their opponents a safe space in which they could construct their own traditions free from

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[146] Huizinga, *Homo Ludens*, 27.

[147] Ibid., 29.

[148] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī,* Shīrāzī's exposition and defense of one proof of law in a single case was the product of his desire to refine the school of law—thus the title of his book *al-Muhadhdhab.*

serious threats to their tradition's intellectual viability. This allowed the jurists to turn to the elaboration of their tradition not of necessity, but as Norman Calder has put it, out of "intellectual pleasure."[149] Following Huizinga, one might say that this made the construction of their tradition an aesthetic project seeking to beautify God's law.

The chapter also shows the need to make a distinction between the impact of the disputation on the individual jurist and on the eventual authoritative doctrine of the school of law. The nature of *ijtihād* during this period meant that each jurist was responsible for investigating and determining the proofs he felt best justified school doctrine. The disputation might help a jurist like Shīrāzī formulate his own distinct account of the best arguments and positions for the Shāfiʿī school but later Shāfiʿīs might not be exposed to the same line of reasoning. The case of the humiliation of the *dhimmī* is illustrative of this: Rāfiʿī and Nawawī accepted this position from Ghazālī's rather than Shīrāzī's version of the Shāfiʿī *madhhab*, and there is no evidence that they fully grappled with Shīrāzī's line of thought on the subject. This fact points also towards the limitation of disputation: it was rarely written down, and thus, its historical effects were sometimes limited to traces in books of substantive law.

[149] Calder, "Nawawī's Typology of Muftīs," 139.

Chapter 4

4 Coerced Marriage in the Shāfiʿī School: The Dialogical Use of *Uṣūl al-Fiqh*

The Shaykh [Abū Isḥāq al-Shīrāzī] entered Khurasan, and passed through [its capital] Nishapur. The reason for his travel was that the Caliph, the commander of the faithful, al-Muqtadī bi-'l-llāh, was aggrieved by his governor Abū al-Fatḥ b. Abī al-Layth. He therefore called upon Abū Isḥāq and conveyed to him his grievance, mentioning that the people of the land were suffering because of [his governor], and then ordered him to go to the garrison's camp, and relay the message to the sultan and his wazir Niẓām al-Mulk. So he [al-Shīrāzī] left [for Khurasan] and with him was a Jamāl al-Dawla al-ʿAfīf, one of the servants of the Caliph…Then the Shaykh entered Nishapur, and met its people. And the Shaykh and his entourage were hosted by Imām al-Ḥaramayn Abū al-Maʿālī al-Juwaynī who was at his disposal like a young servant boy, of which he said, "I take pride in doing this."And the two participated in a disputation, some of which has ended up with us...[1]

The date of Shīrāzī's travel was 1083 CE. It is significant to a historian for it is the year of Shīrāzī's death and two years prior to Juwaynī's. It signals that when the two jurists engaged in their disputation on "The permissibility of coercing an adult virgin woman into marriage," (*ijbār al-bikr al-bāligh*) they were at their most intellectually developed. They were also at the height of their careers and fame. They had disputed years before in Shīrāzī's Baghdad in less favourable circumstances.[2] Juwaynī was there as a refugee. Originally from the patrician elites of Nishapur, he was expelled from his hometown in 1050, when its governor, ʿAmīd al-Dawla al-Kundūrī's,

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[1] Al-Subkī, *Ṭabaqāt al-Shāfiʿiyya al-Kubrā*, 4:219, 222. "*Wa-qad dakhala al-shaykh khurāsān wa-ʿabara Nīsābūr, wa-kāna al-sabab fī dhalika anna al-khalīfa amīr al-muʾminīn al-muqtadī bi-[amr]'l-llāh tashawwasha min al-ʿamīd Abī al-Layth, fa-daʿā al-Shaykh Abā Isḥāq, wa-shāfahahu bi-shakwā minhu, wa-anna ahl al-balad ḥaṣala lahu al-adhā bihi, wa-amarahu biʾl-khurūj ilā al-ʿaskar, wa-sharḥ al-ḥāl bayna yaday al-sulṭān wa-bayna yaday al-wazīr Niẓām al-Mulk, fa-tawajjaha al-shaykh, wa-maʿahu jamāl al-dawla al-ʿafīf, wa huwa khādim min khuddām al-khalīfa.*" "*Thumma inna al-shaykh dakhala Nishāpūr, talaqqāhu ahluhā ʿalā al-ʿāda al-maʾlūfa mimman warāʾahum min bilād khurāsān, wa-ḥamala shaykh al-balad Imām al-Ḥaramayn Abū al-Maʿālī al-Juwaynī ghāshiyatahu, wa-mashā bayna yadayhi kaʾl-khudaym, wa-qāla: aftakhir bi-hadhā. Wa-tanāẓara huwa wa-iyyāhu fī masāʾil, intahā ilaynā baʿḍuhā.*"

[2] Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West*, 154.

was persecuting members of the Shāfi'ī legal school.[3] Shīrāzī for his part was a poor student, working as teaching assistant (*mu'īd*) to his master Ṭabarī. Since then, their fortunes had changed, though both were tied to the political rise of one man. The same Niẓām al-Mulk whose letter Shīrāzī carried to Khurasan had risen to the position of wazir to the Seljuq Sultan Alp Arsalān. A Shāfi'ī himself, he ended the persecution of Shāfi'īs in Khurasan and created for both men the most illustrious colleges of their time. The first he built for Juwaynī in Nishapur in 1058, the second for Shīrāzī in Baghdad in 1067. In 1083, the two were by most accounts the most prominent living Shāfi'ī jurists, esteemed within the two regions in which Shāfi'ī thought had reached its greatest development over the course of the prior century. This made their disputation an event. For its spectators, it was an opportunity to witness the meeting of great minds.[4]

In focusing on this disputation, this chapter hopes to better understand what was distinct about the practice of intra-school disputations. As sources attest, inter-school disputations, at least high-profile public ones, were a more common occurrence. Ghazālī notes that the history of legal disputations involved mostly debates between members of the Ḥanafī and Shāfi'ī schools.[5] A report in Subkī confirms this. Subkī deduces Shīrāzī's proficiency in disputation from Shīrāzī's main Baghdad Shāfi'ī rival's claim that "if Abū Ḥanīfa and al-Shāfi'ī ever come to agree [i.e. if the Shāfi'īs and Ḥanafīs reconcile their different legal views], the knowledge of Abū Isḥāq al-Shīrāzī will be made redundant."[6] In what ways then did the process of testing and reviewing arguments in intra-school disputation differ from inter-school disputations like the one reviewed in the previous chapter? And what did the Shāfi'īs have to gain from revisiting the question of the virgin's coerced marriage when they were in agreement regarding its permissibility from the time of their school eponym?

This chapter shows that intra-school disputations were a means to test the validity of a doctrine from within the standards of the school itself. Juwaynī and Shīrāzī engage each other as Shāfi'īs.

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[3] Bulliet, *The Patricians of Nishapur*, 28–46.

[4] Unfortunately, Subkī gives us no details as to who attended and where the men debated.

[5] Al-Ghazālī, *Iḥyā' 'Ulūm Al-Dīn*, 1:42.

[6] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:222. *"Idhā iṣtalaḥa al-Shāfi'ī wa-Abū Ḥanīfa, dhahaba 'ilm Abī Isḥāq al-Shīrāzī."*

Juwaynī's arguments assume Shāfi'ī doctrine and theory as authoritative as he re-examines the Shāfi'īs' primary text proof, a Prophetic report (*khabar*), for identifying virginity as the *ratio legis* of coerced marriage. Though his arguments sometimes overlap with those of the Ḥanafī school, which denied the permissibility of coercing an adult woman into marriage, many others would be inconceivable for a Ḥanafī to make. Through a continuing dialogue in which jurists mutually critiqued each other's arguments, the jurists of all schools could better see the merits and weaknesses of their own school's doctrines. As will become evident, disputation did not do away with doctrine were it found weak—the doctrine being too entrenched in the law; however, it did create a legacy of dissenting views within the school, not dissimilar to the practice of judicial dissent in contemporary Anglo-American Supreme Court rulings. This dissent could in turn affect the development of the law on closely related cases.

The wider scholarly relevance of the chapter is in correcting a mistaken understanding of the nexus between the legal doctrine (*fiqh/furū'*) and legal theory (*uṣūl al-fiqh*). Historians generally view legal theory as the purported argumentative roots of the law. Sherman Jackson and David Vishanoff have argued that, in reality, "biases, interests, and the imaginative prowess of the individual jurist" are the true foundations of the law.[7] Both claim that legal theory is inherently indeterminate and therefore merely masks the true reasons for which a jurist adopts one position over another. Examining the use of *uṣūl al-fiqh* in the continuing dialogical exchange of the jurists reveals neither view to be correct. The disputation confirms the indeterminacy of legal theory and therefore its impossibility to account fully for the law. It also shows however, that regardless of the subjective motives of jurists, their arguments were never simply posited, but always subject to further critique. Legal theory is better conceived as a tool enabling jurists to refine their arguments in this process of mutual critique. Making sense of Islamic law depends not on theory or on subjective motives, but on tracing the history of dialogue between jurists. Disputation is but one among the many forms that this dialogue has historically taken, e.g. books, but its face-to-face nature helps to place this dialogue in relief.

The chapter proceeds through a close reading and explication of this particular disputation. It is divided into four sections. The first section provides a background treatment of Shāfi'ī law on

[7] Jackson, "Fiction and Formalism," 180–81; Vishanoff, *The Formation of Islamic Hermeneutics How Sunni Legal Theorists Imagined a Revealed Law*.

the marriage contract and guardianship. The second examines the opening arguments of the disputation, showing how the fact of debating as Shāfi'īs made possible a re-examination of the scriptural evidence for the validity of coercing a virgin girl into marriage. The third section examines the jurists' hermeneutic differences. It entertains but ultimately refutes the claim that legal theory permitted jurists to interpret text as much as they pleased. Against the notion that jurists silenced the multiple readings of a text, it argues they actually put these readings into a continuous dialogical play. The fourth section deals with the historical aftermath of this disputation to examine the impacts of disputation on the development of substantive law.

4.1 The Bride and her Guardian in the Islamic Marriage Contract

The Islamic marriage contract depends upon the verbal agreement of the union's two parties. As Kecia Ali notes: "the only element of marriage uniformly agreed to be absolutely necessary to conclude a valid marriage is offer and acceptance (*ījāb and qabūl*)."[8] Noticeably absent is the presence of a third party in the form of an officiating officer, whether a religious leader or political authority. The Shāfi'īs did consider it desirable that a sermon praising God be offered, Juwaynī explaining that this is the case in "each situation that has significance and weightiness" and marriage being an especially weighty event.[9] Shīrāzī adds that it is also "desirable that religious invocations be made for them [the couple] after the marriage contract."[10] Yet as Shīrāzī notes, this is not an obligation, for the Prophet himself in a *ḥadīth* (Prophetic report) narrated by Sahl b. Sa'd al-Sā'idī had married someone without delivering a sermon. Moreover, as Juwaynī explains, it need not be a third party that delivers the sermon: the parties to the marriage can do it themselves.

The early Shāfi'ī Abū Thawr (d. 854/240) viewed the simplicity of the marriage contract to parallel that of mundane sales (*bay'*). His Shāfi'ī colleagues diverged from him in requiring that a marriage include two ethically upright witnesses to the contract. As Shīrāzī notes, marriage

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[8] Ali, Kecia, "Marriage in Classical Islamic Jurisprudence: A Survey of Doctrines," 13.

[9] Al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 12:181. *"wa-hādhā maḥbūb fī kull amr lahu bāl wa-khaṭr, wa-l-nikāḥ makhṣūṣ minhā."*

[10] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 4:140. *"wa-yustaḥabb an yud'ā lahummā ba'd al-'aqd."*

"differs from sales, because the objective in sales concerns wealth (*māl*), but the objectives of marriage are sexual pleasure and gaining offspring, both of which require greater attention (*iḥtiyāṭ*)."[11] Juwaynī echoes the same sentiment, stating that upon marriage "are built many objectives that must be guarded, and therefore it is necessary to preserve it against claims of denial."[12] The witnesses must be upright, though Shīrāzī notes that it is sufficient that they have a good reputation among the common people.[13]

Shīrāzī sums up the Shāfi'ī schools' view on the parties to a marriage contract by invoking 'Ā'isha's narration of the *ḥadīth*: "Every marriage in which four are not present is nothing but fornication: the groom, the [woman's] guardian, and two witnesses."[14] Shīrāzī's appeal to this *ḥadīth* highlights that Shāfi'īs did not regard the woman as the agent of her marriage contract. Rather a male guardian drawn from among her agnates ('*iṣabāt*) represents her. A man may also choose to have a representative (*wakīl*), but this was optional. In contrast, the Shāfi'ī school required the woman's guardian for the validity of the contract, affirming "that there is no marriage without a guardian (*lā nikāḥ illā bi-walī*)."[15] Shāfi'ī himself relied upon three Qur'ānic verses to argue this point: the fairly general "Men are overseers of women" [4:34]; the earlier verse from the same chapter "Marry them (women) with the permission of their families" [4:25]; and the more important verse "When you divorce women and they reach the end of their waiting period, then do not prevent them from re-marrying their husbands when they agree among themselves in a lawful manner" [2:232].[16] Al-Shāfi'ī inferred from this last verse that for men to be ordered not to prevent women from remarrying their former spouses, one would have to first assume that men have a say in women's marriages, which allows them to prevent women from marrying in at least some circumstances. This interpretation was supported by the common story

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[11] Ibid., 4:137. "*wa-yukhālif al-bay' fa-inna al-qaṣd minhu al-māl, wa'l-qaṣd min al-nikāḥ al-istimtā' wa-ṭalb al-walad, wa-mabniyahummā 'alā al-iḥtiyāṭ.*"

[12] Al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 12:52. *"li-annahū 'aqd khaṭīr yatarattab 'alayhi maqāṣid yuḥtāṭ lahā fa-wajaba ṣīyānatihi 'an al-tajāḥud."*

[13] There is therefore no need for the witnesses to conform to the legally defines conditions of uprightness (*shurūṭ al-'adāla*).

[14] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 4:137. *"Kull nikāḥ lam yaḥḍuruhu arba'a fa-huwa sifāḥ: khāṭib, wa-walī, wa-shāhidān."*

[15] Ibid., 4:119.

[16] Al-Shāfi'ī, *al-Umm*, 6:31.

of a jaded brother's refusal to permit his sister to remarry her former husband, his refusal being the very cause of the revelation of the verse at issue. Shīrāzī writes:

> Some Qur'anic commentators claimed that Ma'qil b. Yasār gave his sister in marriage to his cousin. He (the cousin) then divorced her, but later both he and his former wife wanted to remarry after her waiting period had passed. Ma'qil refused, saying: 'I gave her in marriage to you previously, and I preferred you over her other suitors, but you divorced her. I will never give her in marriage to you again.[17]

The story presupposes that "the guardian has alongside the woman a right in [what happens] to her person."[18] Al-Shāfi'ī found support for his view in the *ḥadīth*: "Any woman who has married without the permission of her guardian, her marriage is void (*bāṭil*), her marriage is void, her marriage is void, and if he has intercourse with her, she is entitled to the dower because he allowed himself to enjoy her."[19]

In fact, a woman could very well be absent during the contracting of her marriage . Jurists acknowledged this in their discussions of the problem of specifying the married parties (*ta'yīn al-zawjayn*). If a woman is present, there is little difficulty in identifying the woman being wed, her guardian having but to say "I marry this one to you" (*zawwajtuka hadhihi*).[20] Even if he mistakes her name saying "I marry you this one Fāṭima," though her name is 'Ā'isha, the marriage is valid because through specifying in gestures, the name has no legal importance." However, Shīrāzī explains that if the woman is not present, the possibility of mistaking the identity of the intended bride increases. Thus if the guardian has two daughters, it is not

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[17] Ibid., 6:31–32. *"za'ama ba'ḍu ahl al-'ilm bi'l-qur'ān anna Ma'qil bin Yasār kāna zawwaja ukhtan lahu ibn 'amm lahu fa-ṭallaqahā, thumma arāda al-zawj wa-arādat* [*al-zawja*] *nikāḥaha ba'da maḍā 'iddatuhā fa-abā Ma'qil, wa-qāla: zawwajtuka wa-āthartuka 'alā ghayrika fa-ṭallaqtahā, lā uzawwijukahā abadan."*

[18] Ibid., 6:32. *"anna li'l-walī ma'a al-mar'a fī nafsihā ḥaqqan."*

[19] Ibid., 6:33. *"Ayyumā imra'a nakaḥat bi-ghayr idhn walīhā fa-nikāḥuha bāṭil, fa-nikāḥuha bāṭil, fa-nikāḥuha bāṭil, fi-in aṣābahā fa-lahā al-ṣadāq bi-mā istaḥalla min farjihā."*

[20] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 4:139. *"wa-in qāla: zawwajtuka hadhihi Fāṭima wa-ismuhā 'Ā'isha, ṣaḥḥa li-anna ma'a al-ta'yīn bi'l-ishāra lā ḥukm li'l-ism fa-lam yu'aththir al-ghalaṭ fīhi."*

sufficient for him to merely state, "I marry you my daughter," without adding a name or attribute, since the possibility of confusing between the two remains.

The Shāfi'īs identified two interconnected purposes of guardianship. The first purpose was the protection of the bride to be. A guardian was assumed to have empathy and care (*shafaqa*) for the woman under his guardianship. The need for care itself was premised on the notion that women were incapable of choosing their spouses wisely. Shīrāzī argues against Abū Ḥanīfa's position that a woman can marry herself, stating: "She is not to be trusted in sexual matters due to her deficient rationality (*nuqsān 'aqlihā*), and the ease with which she can be fooled."[21] He goes on to compare women to someone whose irresponsibility leads him to squander his property (*safīh*), and is therefore barred from disposing of his property without his guardian's approval. He finds her unlike the male slave whose need for a marriage guardian is not innate but arises from the guardian's right to decide against having his slave's value depreciate through marriage or having to pay the bride's dowry and living expenses. Māwardī similarly contends against Dāwūd al-Ẓāhirī's position that a virgin woman needs a guardian for marriage but not a non-virgin woman. Al-Ẓāhirī's position is that a virgin woman lacks sufficient experience with men to be able to choose her spouse. Māwardī flips the argument on its head, saying that a case could be made that the choice of the non-virgin woman is more deficient than that of the virgin.[22] The virgin's lack of sexual experience makes her naïve about sexual pleasure and a more sober judge of potential spouses. Women who have had sexual experience have a heightened sense of desire and therefore will unwisely choose their marriage partners on this basis. Māwardī then affirms that in fact both virgin and non-virgin woman are sufficiently unwise because of sexual desire (*al-shahwa*), and that deficiency warrants the need for a guardian.

The second and primary reason for guardianship was to guard against her agnates' shame (*al-shanār*) and dishonour (*al-'ār*). Māwardī follows up his argument against Dāwūd al-Ẓāhirī by stating: "they are prevented from marriage except with a guardian who is cautious lest… there enter through [the groom] dishonour into her family."[23] This made guardianship a family affair.

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[21] Ibid., 4:118. "*li-annahā ghayr ma'mūna 'alā al-buḍ' li-nuqṣān 'aqlihā wa-sur'āt inkhidā'ihā."*

[22] Al-Māwardī, *al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi'ī, Wa-Huwa Sharḥ Mukhtaṣar al-Muzanī*, 9:44–45.

[23] Ibid., 9:45. *"yumna'nna min al-'aqd illā bi-walī yuḥtāṭ li-a-lā taghallabahā farṭ al-shahwa 'alā waḍ' nafsihā fī ghayr kuf' fa-yadkhul bihi al-'ār 'alā ahlihā."*

Shīrāzī confirms this in listing the hierarchy of guardians: "If the bride is a freewoman, her guardian is her agnates, and foremost among them is her father, her paternal grandfather, her brother, her nephew, her paternal uncle, and her cousin because the purpose of guardianship in marriage is to repel dishonor from one's lineage, and lineage is a matter that pertains to the agnates."[24] Although the woman's closest male agnate gave her away, all agnates had a say in the union and all were deemed her guardians.

The patrilineal system of Islamic law meant that only family members from her paternal line were marriage guardians. A woman's son, for instance, could not give her away. Juwaynī writes "The reason is that the son is not ascribed (in lineage) to her, and she not to him; she belongs to her family's lineage, and he to his father's."[25] For this reason, she can bring his name no dishonour. Shīrāzī notes that if the son is also related to his mother by being her uncles' grandson (in a situation in which the mother married her first cousin), he is thus entitled to give her away under this ascription; Juwaynī states he can give her away if she has no agnates and he is the representative of the state, since "the sultan is the guardian of those without a [natural] guardian."[26] This contrasts other forms of kinship and guardianship in Islamic law. A son according to Shīrāzī comes third after a father and a grandfather in the list of agnate guardians entitled to lead a deceased person's funeral prayer. And Juwaynī notes that while guardianship in marriage mirrors the agnates entitled to inheritance, its exclusion of the son diverges from it. Thus a preoccupation with the honour of the family name structured which agnates were relevant to a woman's marriage.

A family avoided indignity by evaluating the suitability (*kafā'a*) of the groom to the bride. The concern with *kafā'a* is found across the Sunnī schools of law. Abū Ḥanīfa allowed a marriage contract without a guardian, but if a woman's guardian objected that the groom's status was

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[24] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 4:120. *"wa-in kānat al-mankūḥa ḥurra, fa-waliyyuhā 'iṣabātuhā, wa-awlāhum: al-ab, thumma al-jadd, thumma al-akh, thumma ibn al-akh, thumma al-'amm. Li-anna al-wilāya fī al-nikāḥ tathbut li-daf' al-'ār 'an al-nasab, wa'l-nasab ilā al-'iṣabāt."*

[25] Al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 12:80. *"Wa'l-ma'nā al-ladhī naḍbiṭ bihi al-madhhab ḥaddan anna al-ibn laysa muntasiban ilayhā, wa-lā hiya muntasiba ilayhi, fa-intisābuhā ilā abīhā, wa-intisāb ibnihā ilā abīhi".*

[26] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 4:120–21; al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 12:79,88. The statement "the sultan is the guardian of the one without a guardian" is taken from a *ḥadīth* upon which Shāfi'īs relied for their ruling. *"al-Sultān walī man lā walī lahu."*

beneath the bride's, the marriage could be dissolved.[27] Likewise, Mālik is reported to have made a distinction between the woman of high status (*sharīfa*) and that of low status (*daniyya*): the former needed a guardian for her marriage, while the latter could find a match in anyone, making her guardianship in marriage unnecessary.[28] The schools differed on the standards by which to judge a person's mettle. The Mālikīs standards were not very stringent, involving a minimal religious consciousness (*tadayyun*) and absence of certain physical defects.[29] The Shāfi'īs in contrast had more rigorous standards. Juwaynī divides *kafā'a* into three categories of consideration. The first are the groom's defects that would establish the bride's right to have a judge dissolve (*faskh*) the marriage.[30] The second are those defects that bring dishonor, though they are not cause for annulment. In contrast to the first two, the third pertains only to families of high status: the marrying of this classes' womenfolk to those of middle class lineage would sully their name, even if there is nothing intrinsically wrong with the groom. These rules were only waivable if both family and bride consented to the woman's union to a man whose status was below hers.

Under Juwaynī's categorization, the Shāfi'īs posited between four and six specific factors relating to *kafā'a*. The first was religion. Shīrāzī explains that the man cannot be known as a *fāsiq* (miscreant).[31] Since a person's spiritual rank with God is unknown, and a person might hide his good deeds, the Shāfi'īs did not posit a hierarchy of worth in religion, but a minimal reputation of religious uprightness (*ṣalāḥ fī dīn*).[32] The second was lineage. Here Shīrāzī, embedded in the Arab culture of Baghdad diverges from Juwaynī, rooted in the Persian patrician class of Khurasan, in his racialization of lineage. Shirāzī states that "the non-Arab is not equal to

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[27] Al-Māwardī, *al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi'ī, Wa-Huwa Sharḥ Mukhtaṣar al-Muzanī*, 9:38.

[28] Ibid., 9:44. Māwardī intimates that Mālik's position derived from the low-status woman finding a match in anyone. He might, however, not be relaying the Mālikī's school's opinion faithfully—or at least not the Mālikīs of the Western lands of the Muslim world. See Fadel, "Reinterpreting the Guardian's Role in the Islamic Contract of Marriage: The Case of the Maliki School," where it appears the Mālikīs standards for *kafā'a* might not cover the type of considerations listed in Māwardī's account of the low-status woman.

[29] Fadel, "Reinterpreting the Guardian's Role in the Islamic Contract of Marriage: The Case of the Maliki School," 14–16.

[30] Al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 12:152–53.

[31] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 4:131.

[32] Al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 12:153.

an Arab… and a Qurayshite is better than a non-Qurayshite."[33] In contrast Juwaynī asserts that because high lineage depends upon being related to the Prophet, the scholars *('ulamā*) "because they are the inheritors of the prophets," or the people of piety and righteousness (*ahl al-ṣalāḥ wa'l-taqwā*) are at the apex of social honor.[34] His typology therefore comfortably includes his patrician class of Khurasan as inheritors of prophets. Juwaynī is also emphatic that high lineage based on worldly (political) background is irrelevant and in many ways inauthentic, since people respect such figures simply out of fear or sycophancy. Third, is the groom's freedom. The groom's social status is affected by slavery for "there is shame for the woman who is subject to a slave."[35] The fourth is profession, Shīrāzī stating that the cupper and the weaver are lower than the cloth merchant and the tailor.[36] Even a father's profession could have bearing on the social status of his son. Juwaynī affirms the groom's defects are a fifth category. Included under this category are leprosy, impotence, castration (*majbūb*), and insanity. Shīrāzī disagreed that impotence or lack of genitals was cause for a guardian's refusal of a bride's choice.[37] He also notes that Shāfi'īs were divided on whether leprosy brought to a family shame. Some Shāfi'īs posited a sixth category of wealth, though both Juwaynī and Shīrāzī dismiss its relevance.[38]

Juwaynī's father, Abū Muḥammad, believed that the man's reputation could also be sullied by associating with a woman not his equal. He remarked that "a person can be dishonoured by the lowliness of his beloved (*khalīlihi*)" and that this can impact one's children as well, recalling the Prophet's statement: "Choose [a spouse] while considering your progeny (*takhayyarū li-nuṭafikum*)."[39] However, the majority of Shāfi'īs took the view that "a noble women humiliates herself and her lineage is lowered by marrying the lowly, but there is no dishonour for a noble

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[33] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 4:131. *"al-a'jamī laysa bi-kaf' li-l-'arabiyya… wa-ghayr al-Qurayshī laysa bi-kaf' li'l-Qurayshiyya."*

[34] Al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 12:154. *"fa-innahum warithat al-anbiyā'."*

[35] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 4:132. *"li-anna al-ḥurra yalḥaquhā al-ār bi-kawnihā taḥta 'abd."*

[36] Ibid.

[37] Ibid., 4:168. The reason was that there was no shame in a woman having such a husband. There was, however, harm (*iḍrār*) to the woman, which meant that Shāfi'īs did not think a guardian could force a woman into such a marriage.

[38] Ibid., 4:132–33; al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 12:153.

[39] Al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 12:158. *"al-insān qad yata'ayyar bi-khissat khalīlihi*".

man in marrying a lowly woman."[40] The patrilineal system meant that a noble man's lineage could be affected little by his spouse.

The powers of the guardian depended very much on the situation at hand. On the one hand, Shāfi'īs proscribed a guardian from preventing a woman's spousal choice to a man her equal. If he refused to give her away, she could bypass his authority and seek to have the state act as her guardian.[41] Likewise, a guardian could not give her away to one inferior to her without her and her remaining guardian-agnates' consent. On the other hand, Shāfi'īs alongside all Sunnī jurists, contemplated situations in which the guardian wielded the power of coercion (*wilāyat al-ijbār*). In such situations a guardian could do more than prevent a woman from marrying her desired spouse; he could marry her against her will. One contested case was the coerced marriage of the virgin adult woman, known as the *ijbār al-bikr al-bāligh*.

4.2 Debating as Shāfi'īs

4.2.1 Missing the Point

The debate begins with Shīrāzī adopting the permissibility of coercing the adult virgin (*al-bikr al-bāligh*) into marriage. Shīrāzī defends his position by introducing a standard analogical (*qiyās*) argument. He states "She has remained in a state of virginity; thus it is permitted for her father to arrange her marriage without her permission, as in the original case of when she was a minor."[42] In this *qiyās al-'illa*, the virgin minor is the original case (*aṣl*), her virginity the *ratio legis* (*'illa*), and the adult virgin woman is the derivative case (*far'*).The two cases share the same ruling (*ḥukm*) of forced marriage's permissibility. The Shāfi'ī school took the position that a father or a grandfather, because they possess *kamāl al-shafaqa*, complete empathy and care for the bride, could coerce their minor-aged virgin ward into a marriage, though consummation would wait until she was physically ready.[43]

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[40] Ibid. *"wa'l-karīma tataḍa'a wa-yakhuss nasabihā idhā tazawwajahā khasīs, wa-lā 'ār 'alā al-karīm bi-nikāh khasīsa."*

[41] Ibid., 12:39.

[42] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:252. *"bāqiyat 'alā bikārat al-aṣl, fa-jāza li'l-ab tazwījihā bi-ghayr idhnihā, aṣluhu idhā kānat ṣaghīra."*

[43] Al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 12:42.

The same applied to the minor-aged boy. Juwaynī writes "Just as the father marries off the virgin minor, he marries his minor son."[44] As Kecia Ali writes: "A father's right to marry off his minor sons was taken for granted, as was the cessation of this right when they attained majority."[45] Shīrāzī explains that, "It is permissible for a man to marry off his son if he sees it fit", Umar the second caliph, having married off his son as a minor.[46] Moreover, the father preserves his son's chastity by providing him with a companion for when he attains majority. This authority of the father over his children appears elsewhere in Islamic law. Like the Roman paterfamilias who wielded the right of life and death (*ius vitae ac necis*), Shāfi'īs refused to condemn to death a father guilty of killing his son.[47] Muzanī extends this to grandfathers and later Shāfi'īs extended this to mothers and grandmothers. While Juwaynī asserts that the ruling is based on a report (*khabar*) lacking rational basis (*ma'na*), Māwardī contends that the son is part of the father, and just as no legal punishment is exacted for self-harm, neither is it exacted when one harms one's offspring.[48] Juwaynī adds that a child is executed for killing his father because if a free male Muslim who is equal to the father is to be executed, than all the more so should his son, who is his inferior. Thus assumptions about parental care and parental authority animated jurists background thinking on forced marriage. Unlike the virgin girl, however, the boy who attained adulthood with the onset of puberty became competent (*ahlī*) to contract his own marriage, being the only one entitled to contract his marriage. The Shāfi'īs claimed that the adult virgin girl remained coercible. The reason was that virginity and not minority legitimated her coercion.

Shīrāzī's *qiyās* was commonly levied against Ḥanafīs in disputations. So much so that it is the argument that Marghīnānī's Hidāya, a reference for Ḥanafī law, associates with al-Shāfi'ī: "Al-Shāfi'ī argued for the coercion of the adult virgin on the basis of the minor virgin, because in both cases [the virgin]'s lack of experience [with men] makes her ignorant about the affairs of

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[44] Ibid., 12:43. *"Wa-kamā yuzawwij al-ab al-bikr al-ṣaghīra yuzawwij ibnahu al-ṣaghīr."*

[45] Ali, Kecia, "Marriage in Classical Islamic Jurisprudence: A Survey of Doctrines," 32.

[46] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 4:134.

[47] Parkin and Pomeroy, *Roman Social History*, 72–73.Tim G. Parkin and Arthur John. Pomeroy, *Roman Social History: A Sourcebook* (New York: Routledge, 2007), 72–73.

[48] Al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 16:23; al-Māwardī, *al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi'ī, Wa-Huwa Sharḥ Mukhtaṣar al-Muzanī*, 12:22. Māwardī does however note that Mālik thought it was only in certain circumstances that the killing of a son was not condemned with judicial penalty.

marriage."[49] The effectiveness of the *qiyās* against Ḥanafīs is apparent. Ḥanafīs agreed that a minor girl, virgin or not, could be coerced. They diverged from Shāfi'īs only on the coercibility of an adult woman. If Shāfi'īs could demonstrate that there was no difference between the minor and the adult virgin, they would effectively invalidate their opponent's position.

The Ḥanafīs had their own rebuttals. The Hidāya for instance distinguishes between the two women: "The guardianship upon the minor is because of her deficient reasoning (*li-quṣūr 'aqlihā*) and her rationality has (by the time of adulthood) fully developed, evidenced in her being addressed by the sacred law (*bi-dalīl tawajjuh al-khitāb*) i.e., [legally responsible], such that she is like the young boy."[50] The Shāfi'īs had responses to this criticism. For instance, they tried to show the irrelevance of adulthood in affecting guardianship rights, using the aforementioned right to demand equality in the groom's status (*kafā'a*) in childhood and adulthood as an example.[51] Shīrāzī's opening *qiyās* and the Ḥanafīs' rebuttal is a reminder that arguments in Islamic law depended very much on one's interlocutor's substantive legal commitments and the consequent effectiveness of one line of reasoning over another.

Of course, Juwaynī is not a Ḥanafī. Rather than highlight the difference between the minor and adult virgin, he levies an objection unknown to Shīrāzī: "You've made the question of our debate (*ṣūrat al-mas'ala*) into the *ratio legis* of the original case. And this is not permitted."[52] Shīrāzī fumbles in attempting to counter the objection and his response reflects his uncertainty about just what Juwaynī is charging him with. Rules of disputation permitted him to ask for clarification but he responds instead with three divergent interpretations of the objection. [53]

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[49] Al-Marghīnānī, *al-Hidāya*, 2:476–77. *"lahu al-i'tibār bi'l-ṣaghīra, wa-hadhā li-annahā jāhila bi-amr al-nikāḥ li-'adm al-tajriba, wa-li-hadhā yaqbiḍ al-ab ṣadāqahā bi-ghayr amrihā."* This argument is neither in Shāfi'ī's *Umm* nor in his *Ikhtilāf al-'Iraqiyyīn*. Later Shāfi'īs likely employed the *qiyās* to the extent that Ḥanafīs attributed it to their school's eponym. As Hallaq notes, Shāfi'īs who extracted rulings on the basis of their school's eponym's way of reasoning, a process known as *takhrīj*, often themselves attributed to Shāfi'ī their own conclusions, *Origins of Islamic Law,* 162*;* Shīrāzī explains that Shāfi'īs debated the permissibility of doing so, though Shīrāzī himself believed it to be a violation of al-Shāfi'ī's principle "No opinion is attributable to one who has not spoken (*wa-lā yunṣab ilā sākit qawl*)." His treatment of the subject shows, however, it was a common practice. al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 1084–85.

[50] Al-Marghīnānī, *al-Hidāya*, 2:477. *"wa'l-wilāya 'alā al-ṣaghīra li-quṣūr 'aqlihā, wa-qad kamula bi'l-bulūgh bi-dalīl tawajjuh al-khiṭāb, fa-ṣāra ka'l-ghulām."*

[51] Al-Māwardī, *al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi'ī, Wa-Huwa Sharḥ Mukhtaṣar al-Muzanī*, 9:53.

[52] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:252. "*Ja'alta ṣūrat al-mas'ala 'illa fī al-aṣl wa-dhalika lā yajūz."*

[53] Al-Zarkashī, *al-Baḥr al-Muḥīṭ fī Uṣūl al-Fiqh*, 4:342. Recourse to a new methodological argument was not uncommon to disputations. For instance, the 14th century Shāfi'ī al-Zarkashī's text of *usūl al-fiqh, al-Baḥr al-Muḥīṭ,* includes a transcription of a disputation to make a theoretical point.

He first interprets Juwaynī's objection as an argument of circularity in which the conclusion relies on a restatement of the question: The adult virgin can be coerced because she is an adult virgin. Shīrāzī is quick to point out that this is not his argument. If the virgin minor is coercible because of her virginity, then analogizing the minor to the adult is not a mere restatement of the question; like all *qiyās* arguments it reasons from what is known, i.e., that the minor can be coerced because of her virginity, to make a case about what is not known, that the adult can be coerced because of her viriginity. It is doubtful that this was the correct interpretation of Juwaynī's objection. He too subscribed to a definition of *qiyās* as "interpreting one case in function of another (*ḥaml al-ma'lūm 'alā al-ma'lūm*)" and would have realized that Shīrāzī's comparison of the minor virgin to solve the case of the adult virgin does just this.[54]

Secondly, Shīrāzī interprets Juwaynī's objection as denying that God could or would have made a quality or property that defines a legal debate the *ratio legis* of the case under review. In other words, he interprets him as saying that God would not make virginity the *ratio legis* for forced marriage because the debate itself concerns a woman's virginity. Shīrāzī begins by placing the onus on his opponent's shoulders: "Your saying, 'It is not permissible to make the question of the debate into the *ratio legis*' is a claim that has no substance. What exactly is to prevent one from doing so?"[55] He then argues for its permissibility, stating that "rationes legis, like legal rulings, are derived from revealed law (*shar'iyya*) and you cannot deny that the lawgiver can attach a ruling to the attribute mentioned in the question of the debate just as he attaches it to the remainder of a case's attributes, so it makes no sense to object to this."[56] Shīrāzī's argument relies on God's ability to decree the law as He will. Shīrāzī expounds upon this in the *Sharḥ* by stating that legal causes "do not engender their effects; if they did they would have necessitated their rulings prior to revelation just as rational causes do."[57] In other words, legal causes are determined solely by God's command. For this reason, Shīrāzī considers a *ratio legis* to function less like causes than a sign (*amāra*) indicating the presence of a ruling. There is nothing rational

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[54] Al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, 2:5.

[55] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:252. "*Qawluka: 'lā yajūz an taj'al ṣūrat al-mas'ala 'illa' da'wā lā dalīl 'alayhā wa-mā al-māni' min dhalika?*'"

[56] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:252–53. "*Inna al-'ilal shar'iyya, kamā an al-aḥkām shar'iyya, wa lā yunkar fī shar' an yualliq al-shāri' al-ḥukm 'alā ṣūra marratan, kamā yu'alliq 'alā sāir ṣifāt. Fa-lā ma'nā li'l-man' min dhalika.*"

[57] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 833. *"li-annahā law kānat mūjiba la-iqtaḍat al-ḥukm qabl al-shar' ka'l-'ilal al-'aqliyya"*

about legal causes and therefore nothing that should preclude God from making virginity the cause of a woman's coercibility in marriage should he so wish to make it so. Again, it is unlikely that Juwaynī intended this interpretation: as an Ash'ārī theologian he recognized that God had free reign to make the law what he willed. He states in the *Burhān*: "If something is rendered impermissible it is because of (God's) prohibition and if it is obligatory it is because of his command."[58]

The last interpretation is that Shīrāzī's analogy, though not circular, assumes too much for the purposes of the disputation. Shīrāzī states "if your issue is that there is no proof for this *ratio legis*'s validity, then ask me for proof of its validity from the perspective of revealed law."[59] Juwaynī then affirms: "Prove its validity from the perspective of revealed law." Juwaynī's assent to this last interpretation could reflect a shrewd move to cover up Shīrāzī's successful invalidation of his intended objection. For the reasons already mentioned, this is highly implausible. More likely, Juwaynī was pointing out to his opponent that as a Shāfi'ī, he could not be expected to argue against the permissibility of coercing the marriage of an adult virgin unless they both also put into question their school's assumption that virginity is the legal cause of the permissibility of coercing the minor's marriage. To do otherwise would be to engage in a short and shallow disputation, for if the virgin minor is coercible because of virginity, then so is the adult. Juwaynī's point to his interlocutor is that he is missing the meat of the debate, and that despite avoiding circularity, he has presented what should be questioned as proof for his conclusion.

The exchange reveals that interlocutors in intra-school disputations retained their identities as members of their school of law. Juwaynī could very well have played the part of a Ḥanafī jurist and objected that the minor virgin is indeed subject to coercion, but because of minority and not because of virginity. Had he done so, it would have been possible to conclude that intra-school disputations were preparatory to defending school doctrine against its real detractors. In contrast, Juwaynī's attempt to force Shīrāzī to debate as though virginity's relationship to coercion were

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[58] Al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, 1:8. "*wa'l-ma'nī bi-kawnihi muḥarraman annuhu muta'alliq al-nahī, wa-bi-kawnihi wājiban muta'alliq al-amr.*"

[59] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:253. "*fa-in kāna 'andaka annahu lā dalīl 'alā ṣiḥḥatihā fa-ṭālibnī bi-dalīl 'alā ṣiḥḥatihā min jihat al-shar'. Fa-qāla al-sā'il: dulla 'alā ṣiḥḥatihā min al-shar'.*"

in question shows that intra-school disputations became a means to test whether a doctrine actually fit within that school's legal canon and methodology. This will become even more evident in the next sections where Juwaynī continues to diverge from the Ḥanafī jurists' methods of reasoning on the topic. The exchange also highlights that the jurist affirming the proposition (*al-mujīb*) and initiating the argumentation did not always get to dictate the course of the disputation. Shīrāzī wanted to deal with a *qiyās*, Juwaynī however forced him to go back to reconsider the original proofs for making virginity the *ratio legis*.

4.2.2 Revisiting the Basis for the *Ratio Legis*

Shīrāzī presents two proofs for identifying virginity as the legal cause for coerced marriage. The first is a *khabar*, or report of a Prophetic statement. Shīrāzī quotes sections of it, explaining his reasoning as he does so:

> As for the report, it is the narration that the Prophet, God's peace and blessings be upon him, said 'The *ayyim* [a contested term to be explored below] has a greater right over herself than her guardian,' and what is meant by this is the non-virgin, because he contrasted the word *ayyim* to the virgin, saying later in the report, 'And the virgin is to be consulted.' This indicates that…the virgin, does not have a greater right over herself than her guardian does.[60]

The proof relies on two moves. The first is to interpret *ayyim* to mean a non-virgin woman. The second is to argue that the clause "the *ayyim* has greater right over herself than her guardian" implies that the guardian has a greater right to control the virgin's affairs than she does herself.

Jurists debated the literal meaning of the word *ayyim*. The word itself, Māwardī explains, had two literal (*lughawī*) definitions.[61] The first is that of an unmarried woman (literally, "a woman

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[60] Ibid. "*Ammā al-khabar, fa-mā ruwiya annahu ṣallā Allāh 'alayhi wa-sallam qāla: 'al-ayyim aḥaqq bi-nafsihā min waliyyihā,' wa'l-murād bihi al-thayyib, li-annahu qābalahā bi'l-bikr, fa-qāla 'wa'l-bikr tusta'mar,' fa-dalla 'alā anna ghayr al-thayyib wa-hiya al-bikr laysat aḥaqq bi-nafsihā.*"

[61] Al-Māwardī, *al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi'ī, Wa-Huwa Sharḥ Mukhtaṣar al-Muzanī*, 9:43.

without a husband"), whether or not a virgin (*Al-latī lā zawj lahā, bikran kānat aw-thayyiban*). This definition is the more inclusive of the two; it can apply to a virgin who has never been married, a woman who has had intercourse out of wedlock, a divorcee before or after consummation, or a widow.[62] The second definition is a woman who lost a husband through death or divorce, whether virgin or not: "the second statement is that she is not called an *ayyim* unless she has married and then became eligible for remarriage (*ḥallat*) through her husband's death or divorce."[63] This definition would restrict the *ayyim* to a divorcee or a widow, regardless of consummation. Shīrāzī's interpretation of *ayyim* as all non-virgin women in the report therefore refers to a subgroup of the women considered *ayyim* in the first definition. It does not refer to all women without a husband, but only the non-virgin ones. He arrives at his conclusion by pointing out that the next part of the report contrasts the *ayyim* to the virgin, affirming that "the virgin is to be consulted." Considering this point of contrast, the intention of the Prophet could not have been to refer to virgins among the *ayyim*.

Shīrāzī's argument for his interpretation of the word *ayyim* was common among Shāfi'īs, Māwardī listing it in his legal manual. Alongside it, Māwardī provides another reason to interpret *ayyim* in the report as non-virgin. He relies on a second Prophetic report mirroring the one Shīrāzī presents in his disputation. Among its few divergences is the substitution of the word *thayyib* for the word *ayyim*, a term that more clearly means non-virgin. It reads: "The *thayyib* has greater right over herself than her guardian, and the virgin is consulted in regards to her self (*Al-thayyib aḥaqq bi-nafsihā min waliyyihā, wa-l-bikr yasta'miruhā abūhā fī nafsihā*)."[64] This *ḥadīth* is in fact the one Shīrāzī chooses to invoke as proof in the *Muhadhdhab* that coercion is permissible in case of the virgin's marriage.[65] The second report suggests that *ayyim* in the first report has the same meaning as *thayyib* in the second. This interpretation of *ayyim* conforms to Shīrāzī's *uṣūl al-fiqh* claim that seemingly contradictory scriptural commands can be harmonized

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[62] Ibid. "Al-lat"

[63] Ibid. *"Wa'l-qawl al-thānī annahā lā yuqāl lahā ayyim illā idhā nakaḥa thumma ḥallat bi-mawt aw-ṭalāq bikran kānat aw-thayyiban."*

[64] Ibid., 9:43. See also al-Shāfi'ī, *al-Umm*, 6:47.

[65] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 4:125.

by using the more particular statement to narrow the scope of the general.[66] Thus *ayyim* is particularized by excluding the virgin *ayyim*.

From the statement "the non-virgin woman has greater right over herself than her guardian," Shīrāzī reasons that the virgin can be coerced. The argument is far from obvious. It assumes that if the non-virgin woman was singled out as having more right than her guardian to choose her spouse, then the virgin, as her opposite, has less right. The Ḥanafīs certainly deemed this a poor interpretation of the report. They pointed out that it contradicts the explicit statement (*manṭūq*) in the report's latter section that "the virgin is to be asked permission," contending that "asking permission is incompatible with (*munāfin*) coercion."[67]

The type of argument deployed by Shīrāzī here was, however, no stranger to Islamic law and legal theory. It was an example of an *a contrario* argument, referred to as *dalīl al-khitāb* or *mafhūm al-mukhālafa*. Shīrāzī categorizes the *a contrario* argument as part of his treatment of language, and in particular as a category of speech called *mafhūm al-khitāb* (implicit speech). He explains that implicit speech is a type of speech that can be inferred from an utterance despite its being absent from explicit speech: "Everything that is understood from speech from among that which is not encompassed within its explicit wording (*nuṭq*)."[68] He defines the *a contrario* argument, in turn, as: "That a ruling is attributed to one of two characteristics of a thing, such that what opposes this characteristic, i.e. the other characteristic, is subject to its contradictory ruling (*huwa an yu'allaq al-ḥukm 'alā aḥad waṣfī al-shay fayadullu 'alā anna mā 'adā dhalika bi-khilāfihi*)." He gives the example of the *ḥadīth* "On sheep grazing in open fields, *zakāt* is due. (*fī sā'imat al-ghanam zakāt*)" implying that sheep that have grazed in stables are not subject to *zakāt*.[69] He elaborates, stating that were it the case that in the matter of alms-giving, the stable-fed and open pasture animals were treated equally, it would be useless to have added the qualifier "open pastured" to the statement.

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[66] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 360–61. Though Māwardī speaks of it as simply a transgressive or *majāzī* use of *ayyim*, 9:43.

[67] Al-Zayla'ī, *Naṣb al-Rāya li-Aḥādīth al-Hidāya*, 3:193. *"al-isti'dhān munāfin li'l-ijbār."*

[68] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 424. *"Kull mā fuhima min al-khiṭāb mimmā lam yatanāwalhu al-nuṭq."*

[69] Ibid., 428.

As a consequence of the *a contrario*, the Shāfiʿīs interpreted "and the virgin is asked her permission" as a recommended but not obligatory command. In the *Umm*, the school's eponym states:

> That [the father's] command to consult the virgin is optional, not obligatory (*farḍ*), because if he could not marry her off against her will, then she would be like the non-virgin woman (*thayyib*). And [if this was the case], then the report would have likely stated that every woman has more right over herself than her guardian.[70]

Al-Shāfiʿī proceeds to praise the guardian who does consult his ward. He notes that it is a sign of prudence (*iḥtiyāṭ*) and of good manners. It permits the guardian to assess the woman's likes, allowing her to express herself on the suitor, and, in the event of that she suffers from an illness unknown to others, she can relate that information prior to marriage. He goes so far as to say that the guardian is "not to rush in giving her away except after informing her of her potential spouse, and it is reprehensible (*yukrah*) that her father marry her off if he knows that she dislikes her spouse," though he is permitted to do so. Thus al-Shāfiʿī uses the distinction in Islamic law between the impermissible and the reprehensible, the former defined as "an act whose commission God punishes," and the latter, an act "whose omission leads to divine reward, but whose commission does not lead to divine punishment" to explain the optional character of consulting the bride and following through on her wishes.[71]

Shīrāzī labels his second proof for linking virginity to coercion as one of reason (*naẓar*). He states:

> And as for the juridical argument, there is no difference of opinion that a girl's virginity is what permits her marriage to be contracted without her express approval. In contrast, a non-virgin cannot be married without her express consent, or without that which takes

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[70] al-Shāfiʿī, *al-Umm*, 6:47. *"amruhu an tusta'dhan al-bikr fī nafsihā amr ikhtiyār lā farḍ. Li-annahā law kānat idhā karihat lam yakun lahu tazwījuhā kānat ka'l-thayyib, wa-kāna yushbih an yakūn al-kalām fīhā anna kull imra' aḥaqq bi-nafsihā min waliyyihā."*

[71] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 170.

> the place of it, namely, writing. And were it the case that her guardian did not have the right to give her in marriage without her consent, then the law would have insisted that she marry only after she has given her express consent.[72]

This juristic consensus was premised on the final part of Shīrāzī's report. To the statement "the virgin is asked her permission," the report adds the clause "and her consent is her silence." It is therefore also subject to the contrast between the non-virgin and the virgin woman. Al-Shāfi'ī states plainly "the non-virgin woman's (*thayyib*) permission is her word. And the virgin's is her silence."[73]

Jurists explained the ruling, stating that virgins are too shy to express themselves on sexual matters: "she is shy to give her permission to her father by word." (*tastaḥyī an tu'dhin lī abīhā bi-nuṭq*).[74] This becomes evident in Shīrāzī's discussion of the coercion of a women whose hymen is broken without ever engaging in intercourse. Shāfi'īs agreed that linguistically, such a woman would not have been considered a *bikr*, Juwaynī stating that *bikāra* "is an expression relating to the hymen *('ibāra 'an jildat al-'udhra*)."[75] Some Shāfi'īs thought such a woman could not be coerced into marriage, stating that the report mentions the *thayyib* in general and therefore that she fell under this category. Others like Shīrāzī dissented and maintained that she could still be coerced into marriage, invoking the argument that: "she should marry as a virgin marries, because the non-virgin woman's permission is taken into account because through sex she loses her shyness."[76] This distinguishes the virgin from the non-virgin woman who has had intercourse, whether lawful, unlawful (outside of the institution of marriage or slave-ownership), or quasi-lawful (*shubha*), all of whom can no longer be coerced into marriage.

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[72] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:253. "*Wa-ammā al-naẓar fa-lā khilāf anna al-bikr yajūz an yuzawwijahā min ghayr nuṭq li-bikāratihā, wa-law kānat thayyiban lam yajuz tazwījuhā min ghayr nuṭq, aw mā yaqūm maqām al-nuṭq 'indahu, wa huwa al-kitāba, wa-law lam yakun tazwījuhā ilā al-walī lamā jāza tazwījuhā min ghayr nuṭq*."

[73] Al-Shāfi'ī, *al-Umm*, 6:47.

[74] al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 4:125.

[75] Al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 12:43.

[76] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 4:127. *"annahā tuzawwij tazwīj al-abkār, li-anna al-thayyib innamā i'tubira idhnihā li-dhahāb al-ḥayyā' bi'l-waṭ', wa'l-ḥayyā' lā yadhhab bi-ghayr al-waṭ'"*

Shīrāzī's argument that were the virgin uncoercible her marriage contract would require her verbal (or written) consent is echoed in the *Muhadhdhab*. Shīrāzī notes in the *Muhadhdhab* that all guardians other than the father must have the verbal consent of the woman because she is uncoercible, stating: "when her marriage needs consent, it also needs her verbalization [of this consent]."[77] The need for verbalization fulfilled a practical purpose. That silence could be problematic in construing consent was certainly evident in juristic texts. The 10th/11th Century Ḥanafī jurist Abū al-Ḥusayn al-Qudūrī for instance writes that a woman signals her permission "if she remains silent or laughs (*fa-sakatat aw-ḍaḥikat*)."[78] Marghīnānī, commenting on Qudūrī's work a century later is forced to explain that this laughter contrasts with crying, which is indicative of her displeasure. He then cautions that if she laughs a laugh of mockery, this should not be indicative of her approval and if she cries silently, the way people do in moments of being overwhelmed, it should not be interpreted as outright rejection.[79] Clearly silence, cries, and laughter were deemed less evident than a statement by words.

Shīrāzī's labeling of his argument as one of reason (*naẓar*) should be understood within the context of his legal theory. Shīrāzī is clear in the *Ma'ūna* that when he speaks of reason determining religious law, he never means pure reason, no matter how commonsensical, but always a form of reasoning that is dependent upon and derivative of revelation (*ma'qūl al-aṣl*).[80] This claim had deep roots; Shīrāzī attributes it to al-Shāfi'ī himself. The argument is in fact a *qiyās al-dilālā*. Most obviously, Shīrāzī uses the impermissibility of marrying off a non-virgin woman without her express consent to suggest that the religious law's requirement of express consent and its rejection of coercion in marriage go hand in hand. Al-Shāfi'ī himself states that this is true even if the woman is quite content with her new husband: "if a father marries a *thayyib* without her knowledge her marriage is void (*mafsūkh*), whether she is happy with it or not."[81] Shīrāzī later on in the disputation makes clear that his argument also relies on other cases in Islamic law where guardianship removes the need for verbal consent. The most evident case is

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[77] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 4:126. "*Lammā iftaqara ilā idhnihā, iftaqara ilā nuṭqihā.*"

[78] Al-Qudūrī, *Mukhtaṣar al-Qudūrī*, 336.

[79] Al-Marghīnānī, *al-Hidāya*, 2:477–78.

[80] al-Fīrūzābādī al-Shīrāzī, *Kitāb al-Ma'ūna fī al-Jadal*, 127. *al-aṣl* referring to Qur'an, the *sunna*, and the *ijmā'*.

[81] al-Shāfi'ī, *al-Umm*, 6:48. "*Wa-idhā zawwaja al-ab al-thayyib bi-ghayr 'ilmihā fa'l-nikāḥ mafsūkh raḍiyat ba'd aw-lam tarḍa.*"

the financial transactions involving the wealth of the minor and the insane. The guardian of the insane and the minor can dispense with their verbal consent when dealing with their wealth for their own benefit precisely because their lack independent capacity renders their consent immaterial.[82] Shīrāzī reasons that likewise the possibility of marrying a woman without her verbal consent demonstrates the irrelevance of her consent to the contract's validity.

Shīrāzī's proofs reveal the ways in which intra-school disputations permitted the revisiting of a school's doctrine. Shīrāzī's appeal to the *khabar* was a standard Shāfi'ī proof; but precisely because of this, it was likely passed over in inter-school disputations which favoured *qiyās*-based arguments. *Qiyās*-based arguments permitted jurists to test new lines of reasoning that might be more effective against other schools. Moreover, they built on the schools' shared agreement in case law. Bringing it up permits both he and Juwaynī to re-examine the strength of the a contrario argument on which they based their position. Shīrāzī's appeal to juridical reasoning was by comparison either a novel or very uncommon argument, absent from Shāfi'ī manuals of law. Its novelty permits him and Juwaynī to interrogate their doctrine from a new angle. It also likely made the disputation more exciting for both interlocutors and audience, adding to its uniqueness. The review of a school's doctrine involved both repetition and departures from traditional argumentation.

Alasdair MacIntyre explains the reason for which a tradition like the Shāfi'ī school should need to defend its canon from an internal standpoint. He notes that the agreed upon doctrine structuring a tradition is continually "defined and redefined" in the course of debates with two types of interlocutors: the first are those "external to the tradition" who reject the basic structure of the tradition; but the second are those who are internal to the tradition and attempt to explain and elaborate "the meaning and rationale" of the key doctrines of the tradition.[83] As a tradition develops, internal members might come to perceive the inadequacies of their predecessors' answers to these questions. Countenancing these objections is a means to ensure the continued health of a tradition.

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[82] al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 3:272.

[83] MacIntyre, *Whose Justice?*, 12.

4.3 *Uṣūl al-Fiqh* and Hermeneutics

4.3.1 Indeterminacy and Logocentrism in the Law?

Juwaynī responds to Shīrāzī by reinterpreting the *ḥadīth*. He contends that the *ḥadīth* speaks to the virgin's verbalization of consent and not to consent itself. His interpretation parallels that of the Ḥanafīs. Zayla'ī writes "the distinction in the *ḥadīth* between the non-virgin (*thayyib*) and the virgin occurs because the *thayyib* is proposed to directly, such that she orders the guardian to marry her, but as for the virgin, it is her guardian that receives the proposal, such that he (afterwards) asks her consent, thus the difference boils down to the *thayyib*'s consent being her speech (*kalām*) and the *bikr* being her silence."[84] The upshot is that the *khabar* is not at all concerned with or addressing the topic of coercion.

In the absence of a text permitting coercion, Juwaynī argues for a woman's marital autonomy. He explains that a woman's need for guardianship has two specific causes, namely insanity and minority. In the absence of such causes, guardianship is not justifiable. Thus "the adult virgin possesses those attributes that dispense of her need for guardianship and that make her independent in contracting her marriage."[85] His position again mirrors the Ḥanafīs. To recall, the Ḥanafīs attributed guardianship to minority because of a "immaturity" (*quṣūr 'aqlihā*) that became complete with adulthood. The Ḥanafīs buttressed their claims by comparing this woman to the man who upon attaining the age of majority may not be coerced into marriage.[86] They also referred to the adult woman's right to spend her wealth as she wishes (*taṣarruf fī al-māl*). Her financial independence highlighted her general autonomy in contrast to the financial restrictions to which the minor and the insane were subject.

Juwaynī nonetheless justifies his interpretation of the *ḥadīth* differently than the Ḥanafīs. Both shared the problem of the Shāfi'ī school's interpretation that the statement "the *ayyim* has greater right over herself" implies the virgin can be coerced. Ḥanafīs acknowledged the validity of the *a*

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[84] Al-Zayla'ī, *Naṣb al-Rāya li-Aḥādīth al-Hidāya*, 3:193. *"waqa'a al-tafrīq fī al-ḥadīth bayn al-thayyib wa-al-bikr, li-anna al-thayyib tukhṭab ilā nafsihā, fa-ta'mur al-walī bi-tazwījihā, wa'l-bikr tukhṭab ilā waliyyihā, fa-yasta'dhinuhā, wa-li-hadhā farraqa baynahumā, fī kawn al-thayyib idhnuhā al-kalām, wa'l-bikr idhnuhā al-ṣamāt."*

[85] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:253. "*annahu qad ijtama'a li'l-bikr al-bāligha al-asbāb al-latī tasquṭ ma'ahā wilāyat al-walī. Wa-tastaqill bi-nafsihā fī al-taṣarruf fī ḥaqq nafsihā*."

[86] Al-Marghīnānī, *al-Hidāya*, 2:477.

contrario argument; but they found a way out by contending that it did not necessarily cover all members of the other genus (*lā ʿumūm lahu*). In other words, it could apply to a mere subgroup of virgins.[87] On this basis, they interpreted the *ḥadīth* in line with their school doctrine as applying only to minor-aged virgins. Juwaynī who does not subscribe to this theoretical principle, takes a different route. He refers to the precise wording of the *khabar* pointing out that "the guardian was mentioned without qualification."[88] Had the Prophet wished to speak on the issue of coercion, he would not have simply mentioned the guardian, but would have specified the father and the grandfather, because according to the consensus (*ijmāʿ*) of the Shāfiʿīs, these are the only two guardians legally entitled to coerce their ward. The Shāfiʿīs considered anyone other than the father and grandfather to be lacking in empathy and concern for the bride (*nāqiṣ al-shafaqa*);[89] and Shīrāzī himself relates a *ḥadīth* in which the Prophet dissolved a marriage because the new bride's uncle married her to someone without her consent.

Juwaynī's argument was likely not new. Al-Shāfiʿī gestures towards it in the *Umm*, stating: "It seems strongest in the *sunna* (example) of the Prophet that when he distinguished between virgin and the non-virgin (*thayyib*) woman, giving the non-virgin greater right over herself than her guardian, and stipulating the consultation of the virgin, that the *walī* that he meant—and God knows best—is the father in particular."[90] Al-Shāfiʿī's comment suggests that his followers were aware of and worried that the *ḥadīth* did not explicitly specify the father and grandfather. It was however, not a concern when debating other schools, since the Mālikīs agreed that virginity was cause of coercion and the Ḥanafīs denied that other guardians would lack empathy and therefore could not possess the power of coercion. The argument could only have resonated speaking from within the Shāfiʿī school.

Juwaynī's appeal to *ijmāʿ* highlights the authority of intra-school agreement in the 11th century. Juristic consensus is one of the foundational proofs of Islamic law, placing a legal ruling beyond

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[87] Al-Zaylaʿī, *Naṣb al-Rāya li-Aḥādīth al-Hidāya*, 3:193.

[88] Al-Subkī, *Ṭabaqāt al-Shāfiʿiyya al-Kubrā*, 4:253–54. "*Innahu dhakara al-walī wa-aṭlaqa*."

[89] al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfiʿī*, 4:126.

[90] Al-Shāfiʿī, *al-Umm*, 6:47. "*Wa-yushbih fī dilālat sunnat rasūl illāh idhā farraqa bayna al-bikr wa'l-thayyib fa-jaʿala al-thayyib aḥaqq bi-nafsihā, wa-jaʿala al-bikr tusta'dhin fī nafsihā, an al-walī al-ladhī ʿanā—wa-Allāh taʿālā 'aʿlam—al-ab khāṣṣatan."*

the pale of debate. Juwaynī and Shirāzi ground this principle in the Qur'anic verse: "Whoever parts ways with the Prophet after guidance has come to him and follows other than the way of the believers we shall give him what he deserves and make him burn in the fire of hell, and what a horrible abode" [4:110].[91] Both reserve this authoritative *ijmā'* for cases in which all jurists of a generation (*'ulamā al-'aṣr*) without exception assent to the same ruling.[92] A majority is insufficient. Juwaynī's appeal in the disputation to a school consensus therefore departs from the explicit theorizations of books of *uṣūl al-fiqh*. It highlights that though in theory, the consensus of a school did not bind the jurist to a doctrine, in practice, it weighed heavily on Shāfi'is.

Juwaynī's second argument for his interpretation references the latter part of the *khabar*. Juwaynī highlights that the statement, "the virgin is consulted and her consent is her silence," clarifies the meaning of *aḥaqq bi-nafsihā* as referring to verbalizing consent. The statement places in relief the initial intentions of the speaker. It signals to the jurist that the Prophet had the contrast between the virgin's silence and the non-virgin woman's speech in mind when he used the expression. Again, Juwaynī's argument diverges from that of the Ḥanafīs. The Ḥanafīs did not disagree that the term *aḥaqq bi-nafsihā* referred to the marriage contract, they simply thought that what it had to say about marriage was in favour of the woman. As Zayla'ī notes, if the woman has more right over herself than her guardian, then how much more must she be entitled to transact her marriage contract.[93]

The *khabar*'s authoritative reading depends on which term is given fixity. Shīrāzī's reading depends on presuming the guardians are limited to the father and grandfather and on assuming that the end clause "and her silence is her permission" is disconnected from the initial statement. Juwaynī's reading hinges on the reverse: in his reading the guardians are generalized and the two clauses are connected. In privileging one reading over another, each jurist is guilty of what Derrida has termed logocentrism.[94] Logocentrism involves the attempt to arbitrarily ground meaning in order to silence the competing and conflicting interpretations of a text. As one of

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[91] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 668–69; 'Abd al-Malik ibn 'Abd Allāh al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, 1:261.

[92] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 704; al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, 1:279.

[93] Al-Zayla'ī, *Naṣb al-Rāya li-Aḥādīth al-Hidāya*, 3:182.

[94] See Jacques Derrida, *De la grammatologie.*

Derrida's commentators explains "the logos expresses the desire for an ultimate origin, telos, centre or principle of truth which grounds meaning…consequently, logocentrism views all differences as ultimately derivative and recuperable."[95] Each jurist's respective reading silences and delegitimizes the other's, attempting thereby to erect a certainty of meaning where there is none.

This indeterminacy of scriptural hermeneutics is the basis upon which many historians have refused to see legal theory (*uṣūl al-fiqh*) as accounting for substantive law. They rather see theory as capable of legitimating whatever position the individual jurist should wish to promote. Sherman Jackson, for instance, argues that Islamic law conforms to the New Legal Realists' contention that law is the product of "biases, interests, and juristic prowess."[96] He identifies *uṣūl al-fiqh*'s role as supplying a fiction of formalism, i.e. the theory that the law is nothing more than the words of scripture. In reality, Jackson affirms, *uṣūl al-fiqh* does not limit the amount of extra-textual sources a jurist can research to arrive at his ruling.[97] This is up to the discretion of the jurist, and depending on how much and where he searches, very different laws can come about. Vishanoff echoes Jackson's position, articulating that Shāfi'ī' intentionally introduced a legal theory that simultaneously gave the appearance of law's dependence on scripture, while in actuality maximizing jurists' hermeneutic freedom. He contends that by the 11th century, *uṣūl al-fiqh* texts followed al-Shāfi'ī's lead.

A logocentric law reduces the disputation's testing of school doctrine to farce. If the jurist simply uses legal theory as a trump for any, or nearly any, desired opinion, then there is little use in interrogating the foundations of a given law. Both the permissibility and impermissibility of the adult virgin's coerced marriage could be supported and the decision to favour one over the other will depend not on arguments but on an arbitrary decision. The possibility of viewing the disputation as more than an elaborate masquerade depends on developing a conception of legal argumentation in which legal theory's indeterminacy does not preclude it from having a role in

[95] Wortham, *The Derrida Dictionary*, 89.

[96] Jackson, "Fiction and Formalism," 180–81.

[97] Ibid., 192–93.

determining the law. In analyzing the remainder of the disputation, the next section countenances such a view.

4.3.2 Dialogism in the Law

The disputation continues, Shīrāzī defending his interpretation by explaining why the report mentions the guardian without qualification. He invokes the hermeneutic principle that mentioning "an attribute of the thing to which a ruling is attached" is tantamount to disclosing its *ratio legis*.[98] The principle is exemplified in the Qur'anic verse, "the adulterer and the adulteress, flog each of them with a hundred stripes" [24:2] from which it can be gleaned that adultery is the cause of flogging. Shīrāzī affirms:

> And your saying: 'He spoke of the guardian in an unqualified manner,' such that it applies generally to all guardians,' well, I interpret the report as referring to the father and the grandfather of a woman. My proof for this interpretation is that the Prophet asserted the *ratio legis* that legitimates forced marriage when he spoke of the non-virgin and said: "The non-virgin has greater right over herself than her guardian." This is because the mentioning of an attribute in a ruling is tantamount to the mentioning of its *ratio legis*.[99]

In singling out the non-virgin, the *khabar* unambiguously (*naṣṣ*) identifies the attribute determines whether a woman may or may not be coerced into marriage. This being the case, the intended guardians in the *khabar* could be no other than the guardians possessing the power of coercion (*wilāyat al-ijbār*). The attribute of non-virgin is a linguistic mechanism that specifies (*takhṣīṣ*) the class of referenced guardians as the father and grandfather.

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[98] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 853. *"an yu'alliq al-ḥukm 'alā 'ayn wa-yaṣifuhā bi-ṣifa."*

[99] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:254. "*Wa-qawluka: 'Innahu aṭlaqa al-walī' fa-innahu 'umūm, fa-aḥmiluhu 'alā al-ab wa'l-jadd, bi-dalīl al-ta'līl al-ladhī dhakarahu fī al-thayyib, fa-innahu qāla: 'wa'l-thayyib aḥaqq bi-nafsihā min waliyyihā' wa-dhikr al-ṣifa fī al-ḥukm ta'līl.*"

Juwaynī's *Burhān* shows he only partially shares Shīrāzī's method of identifying the *ratio legis*. He agrees that the mention of an attribute could be the cause of a ruling, but not necessarily so. An attribute could very well be used in the same way as a proper noun (*laqab*). Juwaynī gives the example of the statement "Zayd is satiated when eating (*Zayd yashba' idhā akala*)."[100] The proper noun Zayd is used here to identify someone, but not as a specific quality that causes satiation. "The word is without effect (*lā athar lahu*)" on the ruling. Thus in the absence of either explicit linguistic markers of causation (*lafẓ al-ta'līl/tansīs*) or a strongly suggestive one, one should not rush to consider that a derived noun (*ism mushtaqq*) like *ayyim* or *bikr* referring to a group of people is meant to identify the cause of a legal ruling. Juwaynī's method of determining whether an *ism mushtāqq* is truly a *ratio legis* is to examine whether or not it is suitable (*munāsib*) and suggestive (*mukhīl*) to the law.[101] A suitable and suggestive legal cause is one that yields a general benefit to the Muslim community. If the attribute in scripture does not do this, it is discounted as *ratio legis*.

Juwaynī therefore refutes Shīrāzī on the basis of virginity's unsuitability as *ratio legis* for coercion. He asserts "the mention of an attribute only identifies a *ratio legis* if it is suitable (*munāsib*) to the ruling to which it is attached."[102] Juwaynī gives the example of stealing as an appropriate cause for the penalty of cutting hands, such that one could interpret the verse "the male and the female thieves, cut their hands" [65:6] as speaking to the cause of amputation. In contrast "virginity is not suitable to the ruling to which it is being linked, namely, coercion, and thus it cannot be the *ratio legis*." In claiming unsuitability, Juwaynī asserts the impossibility of discerning a benefit or purpose that making virginity a cause of coercion would bring about.

Juwaynī's position was embedded in his larger theory of the relationship between God's law and human benefit. As a famed Ash'ārī, he spent much time arguing against the Mu'tazilī position that revelation corroborated reasoned analysis of the innate goodness (*ḥusn*) and badness (*qubḥ*) of deeds. Juwaynī summarizes the Mu'tazilī view as dividing actions into two types.[103] The first

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[100] Al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, 1:178.

[101] Ibid., 1:175. Opwis, *Maṣlaḥah and the Purpose of the Law*, 46.

[102] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:254. "*dhikr al-ṣifa fī al-ḥukm innamā yakūn ta'līlan idhā kāna munāsiban li'l-ḥukm al-ladhī 'ulliqa 'alayhi….wa-thuyūba ghayr munāsiba li'l-ḥukm al-ladhī 'ulliqa 'alayhi."*

[103] Al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, 1:8–9. "*fa-laysa al-ḥukm al-muḍāf ilā muta'alliqihi ṣifa fīhi thābita.*"

are those which human reason can discern as good and bad, either immediately like the worthless lie, or after reflection, like the beneficial lie. The second are those actions whose goodness or badness humans fail to see, but of which God informs them, out of his kindness (*alṭāfan*), through revelation. Under this category were ranked many acts of worship, like charity and prayer. Ash'arīs considered the Mu'tazilī view to undermine God's omnipotence. If the law merely spells out what is already knowable as good or bad, then God has no say in its actual formulation. Juwaynī thus asserts that "A ruling is not a real attribute of that to which it is ascribed"; rather the law is solely a function of God's command.[104] For this reason, George Hourani calls Juwaynī's Ash'arī ethical philosophy voluntaristic: the law is not based on rational standards but on God's choice.[105]

Ironically, Juwaynī and the Ash'arīs nonetheless gave wide scope to reason in determining law. It is well to bear in mind Anver Emon's point that there is a subtle difference between saying that the law must be for human benefit and saying that it can be. Though the Ash'arīs denied God was constrained to create a law in accordance with rationally determinable human benefit, he could do so out of his grace (*faḍl*).[106] The Ash'arīs method of identifying a *ratio legis* not identified in scripture was by identifying the benefit that comes about from it. Juwaynī writes: "What the theologians (*muḥaqqiqūn*) have relied upon, and that which satisfied the teacher Abū Ishāq [al-Isfarayinī], in affirming an *'illa* is its suitability and suggestivity to the ruling."[107] So long as the suitable *ratio legis* overcomes the several objections (*'awāriḍ*) and invalidators (*mubṭilāt*) of analogical reasoning and is in accordance (*muṭābiqatuhu*) with the proofs of the law, Juwaynī considers it the primary method of finding a ruling's cause. This principle was itself rooted in the widespread practice of the companions. Juwaynī explains, "We do not follow the method of identifying a suggestive ruling by virtue of itself, [i.e not because it is prescribed rationally], rather we have noticed it in the causes of legislation (*'ilal*) of the Prophet's companions (*ṣaḥāba*), and in their method of reasoning on the law, and this is a proof for our

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[104] Ibid., 1:8.

[105] Hourani, *Reason and Tradition in Islamic Ethics*, 98.

[106] Emon, *Islamic Natural Law Theories*, 32.

[107] Al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, 2:29. *"fa-mimmā i'tamadahu al-muḥaqqiqūn, wa- irtaḍāhu al-ustādh Abū Isḥāq: ithbāt 'illat al-aṣl bi-taqdīr ikhālatihi munāsabatahu al-ḥukm."*

basing our practice upon this method." It was this association between the law and human benefit that animated Juwaynī's reading of the unsuitability of virginity as *ratio legis* to forced marriage.

In contrast, Shīrāzī justified his hermeneutic principle on the linguistic practices of the Arabs. He explains in the *Sharḥ* that attributes mentioned in rulings are to be read as identifying a *ratio legis* "because if they were not, there would be no point in mentioning them."[108] In other words, the practice of Arab speakers is to mention attributes only to single them out. This comes out more strongly in the disputation itself:

> Your saying 'The mention of virginity is not identification of a *ratio legis* because virginity is not suitable to the ruling' is not valid because in the speech of the Arabs mentioning an attribute alongside the ruling in tantamount to asserting the *ratio legis*. Do you not see that if one were to say 'cut the hand of the thief,' it would be owing to his thievery. And if he said: 'Seat the scholars' it would be owing to their knowledge.[109]

As Eric Chaumont notes, there are many instances in which Shīrāzī's *uṣūl al-fiqh* relies on the linguistic conventions of Arabs in opposition to the rational speculations of theologians.[110] Moreover, the concept of *munāsaba* does not appear in Shīrāzī's texts of legal theory. In the end, Juwaynī and Shīrāzī both attempt in this example to discern the meaning of scripture by grappling with the intent of its speaker, but whereas Juwaynī locates that intent in the convention that God creates law for human benefit, Shīrāzī finds safer ground in looking to conventions of speech for clues.

The divergence in legal theory does not here preclude the continuation of the disputation. Shīrāzī attempts to show Juwaynī that his hermeneutic principle is better in line with God's ability to decree the law as he sees fit. He states in his final rejoinder:

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[108] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 853. *"li-annahu law kāna ghayruhā fī ma'nāhā lam yakun li-dhikr hadhihi al-ṣifāt fa'ida."*

[109] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:255. "*Wa-qawluka: 'laysa bi-ta'līl, li-annahu lā yunāsib al-ḥukm' lā yaṣiḥḥ li-anna dhikr al-ṣifa fī al-ḥukm ta'līl fī kalām al-'arab. A-lā tarā annahu idhā qāla: 'iqṭa'ū al-sāriq,' kāna ma'nāhu li-sarqatihi, wa-idhā qāla: jālis al-'ulamā', kāna ma'nāhu li-'ilmihim."*

[110] Al-Fīrūzabādī al-Shīrāzī, *Kitāb al-Luma'*, 43, footnote 21. See also El Shamsy, "The Wisdom of God's Law: Two Theories."

> *rationes legis* are determined by revealed law, and nothing precludes that God should decide that loss of virginity be the *ratio legis* that eliminates the need for guardianship, just as thievery is a *ratio legis* for amputation, and fornication for lashing.[111]

The argument's effectiveness results from Juwaynī's agreement that some laws are not based on suitability but simply on the wording of the text. Thus the disputation can continue because Shīrāzī is willing to shift from defending his position on a topic of substantive law to defending his views on legal theory.

The disputation gives us two reasons to rethink the view that theory served to legitimate the jurist's biases, interests, or subjective motives. The first is the fact of vulnerability. Whatever individual motives the two jurists might have sought to validate through their arguments, their position and arguments are subject to ongoing challenge and critique. Shīrāzī's initial *a contrario* argument is here insufficient to prove his position. So is Juwaynī's claim that the guardians are unqualified, i.e., not linguistically limited to the father and grandfather. The disputation reveals the real threat of one interlocutor outdoing the other. The second reason is the disputation's unpredictability. Even if each jurist succeeds in defending his own position, there is no way to know beforehand where each will end up. Had Juwaynī been a Ḥanafī, Shīrāzī would have encountered a different critique and in turn would have answered differently. Each jurist's attempt to justify the law depends on his interlocutor.

Against the logocentric model of Islamic law stands that of Bakhtin's dialogism. Bakhtin invokes the concept of dialogism in order to describe how any and all human action is both responding to and anticipating the responses of others.[112] He writes "Any utterance, no matter how weighty and complete in and of itself, is only a moment in the continuous process of verbal communication."[113] Dialogism means more than simply a "face-to-face, vocalized verbal communication between persons." It extends to "verbal communication of any type" such as a

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[111] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:255. "*li-anna al-ta'līl li'l-ḥukm al-ladhī 'ulliqa 'alayhi ṭarīquhu al-shar', wa lā yunkar fī al-shar' an tuj'ala al-thuyūba 'illa li-isqāṭ al-wilāya*."

[112] Voloshinov, *Marxism and the Philosophy of Language*, 95.

[113] Ibid.

book that anticipates a readership and its reactions. To say that Islamic law worked according to Bakhtin's dialogism is to draw attention to its continuing process of mutual critique and defense. It undercuts the myth of an autonomous or singular author of the law and allows us to see the jurist's reasoning as embedded in the interactions of a community. If logocentrism is the attempt to silence the text's multiple readings, dialogism is the putting of these multiple readings in continual and unending play. The pervasiveness of the disputation in the 11th century reflects the jurists' embrace of the dialogism at work in their legal system. Rather than silence the plurality of scriptural readings, jurists continued to respond to them and to anticipate new ones.

In examining legal theory in the context of the juristic dialogue, it is possible to see how it served as a tool in the ongoing re-examination of school doctrine across generations of jurists. Jurists used theory to find and establish new and better arguments for and against a doctrine. It served to create a provisional ground for a legal position. And only until an interlocutor had a chance to respond and to put that ground into question.

4.4 In the Aftermath: The Triviality of Dissent?

The disputation leads to no change in the Shāfi'ī school's authoritative doctrine. The school continued to uphold the permissibility of coercing an adult virgin woman into marriage. Shīrāzī's *Muhadhdhab* restates the same *a contrario* argument as in the disputation:

> It is permitted for the father and grandfather to give the virgin (daughter) in marriage without her approval (*riḍāha*), whether she be a minor or an adult, based on Ibn Abbās's narration that the Prophet said: 'the *thayyib* has greater right over herself than her guardian, and the *bikr* is consulted (*al-thayyib aḥaqq bi-nafsihā min waliyyihā, wa'l-bikr yasta'miruhā abūhā fī nafsihā*)' showing that the *walī* has greater right over the virgin.[114]

[114] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 4:125. *"wa yajūz li'l-ab wa'l-jadd tazwīj al-bikr min ghayr riḍāhā, ṣāghīra kānat aw-kabīra, limā rawā ibn 'Abbās…an al-nabī qāla: 'al-thayyib aḥaqq bi-nafsihā min waliyyihā, wa'l-bikr yasta'miruhā abūhā fī nafsihā' fa-dalla 'alā anna al-walī aḥaqq bi'l-bikr."*

Juwaynī's manual of law, the *Nihāya*, however, departs from his position in the disputation, siding instead with his disputational opponent in both argument and conclusion:

> "The guardian that possesses complete emphathy is the father and the grandfather; he possesses the right of coercion of the virgin in situations in which a virgin can be coerced, its condition being virginity, based on the statement of the Prophet 'the virgin has more right over herself than her guardian' and it is understood from this that the guardian has more right over the virgin than herself, regardless of whether she is a minor or an adult, and the non-virgin woman is not coerced… and is not married off until she attains majority and gives her consent.[115]

Later authoritative compendiums in the Shāfi'ī school all rearticulate the same position.[116]

It is impossible to know with certainty what Juwaynī truly believed on the matter. Several possibilities explain the discrepancy between his manual of law and his position in the disputation. First, the *Nihāya* was likely already written at the time of the disputation and perhaps he had departed from his previous views on the case. Second, Juwaynī might very well have believed the Shāfi'ī view to be correct: The practice of disputation necessitates that each participant take a side, regardless of personal belief. Finally, it is possible that school authority could have constrained his statements in the *Nihāya*. The Muslim jurist disagreeing with school authority faced what J.C. Oleson has termed the Antigone dilemma where judicial decision-makers face a conflict between "command and conscience."[117] Like Oleson's example of United States antebellum judges who disregarded their abolitionist convictions in applying the Fugitive

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[115] Al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 12:42. *"al-walī al-kāmil al-shafaqa huwa al-ab wa'l-jadd, wa-yamlikān ijbār al-bikr 'alā al-nikāḥ fī al-ḥāla al-latī tujbar fīhā al-abkār, wa-sharṭuhu al-bikāra, mu'tamaduhu qawluhu 'alayhi salām: 'al-thayyib aḥaqq bi-nafsihā min waliyyihā' wa-mafhūmuhu anna al-walī aḥaqq bi'l-bikr min nafsihā, wa-sawā' fī dhalika al-ṣaghīra wa al-bāligh, wa'l-thayyib lā tujbar…wa-law kānat al-ṣaghīra, lam tuzawwaj ḥattā tablugha wa-ta'dhina."*

[116] Al-Ghazālī, *al-Wasīṭ fī al-Madhhab*, 4:134; al-Rāfi'ī, *al-Muḥarrar fī Fiqh al-Imām al-Shāfi'ī*, 5:291; al-Nawawī, *Minhāj al-Ṭālibīn*, 2:426.

[117] Oleson, "The Antigone Dilemma," 670.

Slave Acts of 1793 and 1850, Juwaynī's pronouncements in the *Nihāya* were upholding the law.[118]

There are two reasons that suggest Juwaynī did indeed believe the position he defended in the disputation, at least partially. Both reasons depend on examining his argumentation in the *Nihāya*. The first is his justification that the insane minor can be coerced into marriage because minority and insanity offer "greater cause for the loss of autonomy (*ibṭāl ma'na al-istiqlāl*) than virginity, so there is even more reason to be able to marry her off."[119] This statement disparages virginity as reason for loss of autonomy and reiterates his claim in the disputation that minority and insanity are its true causes. It is all the more remarkable because Shāfi'īs refused to concede minority's relevance in debates with Ḥanafīs on the case of whether a mature woman may be coerced into marriage. One would therefore expect a Shāfi'ī like Juwaynī to emphasize virginity's primacy as *ratio legis* of loss of autonomy as opposed to minority.

The second and most evident reason is Juwaynī's refusal to countenance mysoginistic reasons for marriage guardianship. His reasoning emerges in the course of arguing for the right of a woman without agnates to choose her spouse. The famed jurist al-Sīdlānī contended that the ruler (*sulṭān*), acting as this woman's guardian, should refuse to give this woman away to a groom who is not her social peer (*kaf'*).[120] He contended that the state needed to consider the effects of this union on the Muslim population as a whole. Juwaynī's father dissented, arguing that the Muslim population incurs no shame from such a marriage, and therefore they are irrelevant to the state's consideration. The woman herself is the only one whose right to be married to her peer is effected and she is entitled to waive her right. Juwaynī then considers a possible objection to his father's argument. If it were the case that this woman can marry anyone she pleases, why then does she need a guardian? Could she not marry herself off? Juwaynī's rejoinder is simple: the religious text stipulates the requirement of a guardian. The requirement itself "is not due to an intelligible cause (*ma'na*)" and it is followed simply as a "means to obey God," (*ta'abudd bi'l-shar'*). Juwaynī's position is greatly at odds with Shīrāzī who argues that

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[118] See also David Dyzenhaus's discussion of law in Apartheid South Africa, *Hard Cases in Wicked Legal Systems*.

[119] Al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 12:42.

[120] Ibid., 12:98.

women's rational capacities are deficient and that they are not to be trusted in their sexual choices. In articulating that marriage guardianship is a matter without a *ratio legis* beyond concern for family honour, Juwaynī potentially discounted virginity as a cause of coercion.

Juwaynī's argument highlights the freedom jurists had in justifying school doctrine. Rumee Ahmed has recently made this point concerning books of *uṣūl al-fiqh*. Ahmed argues that while jurists could not change the main principles of legal theory, following the maxim 'Thou shalt not controvert established and binding rules of law,' they could nonetheless justify them as they saw fit.[121] He writes "Each jurist has his own particular justifications for why laws are to be applied, and those justifications speak to how the jurist conceives of Islamic law as a whole."[122] Ahmed suggests that this interpretative freedom affected the way in which jurists would apply the law. The same can be extended to substantive law, where jurists like Juwaynī were free to argue for authoritative school doctrine as they wished.

Moreover, in producing a history of dissenting views, disputations allowed Muslim jurists to better see the relative strengths for their school doctrine. This in turn had important consequences on the law. Consider Shīrāzī's reasoning on two cases relating to guardianship. The first involves a Shāfi'ī judge needing to pronounce himself on the validity of a marriage without a guardian. Shāfi'īs agreed that this marriage was invalid and the judge should declare its invalidity. But now what of the case in which a Ḥanafī judge previously declared the marriage valid? Should the ruling be overturned? The Shāfi'īs were split on the subject. Some argued that it should because the text was sufficiently unambiguous (*khabar naṣṣ*). Shīrāzī however answers no, because the text is not beyond interpretation such that the judge should not invalidate another judge's ruling.[123] Shīrāzī's explicit reasoning is a product of having come to see the relative strengths or weaknesses of the evidence imposing guardianship on a woman—whether in debating with Ḥanafīs or other Shāfi'īs like Juwaynī. The second case asks whether such a marriage should warrant criminal punishment as a form of fornication. While the 10th century Shāfi'ī Abū Bakr al-Ṣayrafī affirmed that "'if the husband is a Shāfi'ī, and he believes in the

[121] Ahmed, *Narratives of Islamic Legal Theory*, 2012, 6.

[122] Ibid., 7.

[123] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 4:118–19.

impermissibility of the action, it is necessary that the penalty be applied upon him, just as though he had intercourse with a woman, knowing that she is unlawful to him."[124] Again, Shīrāzī disagreed arguing that the "permissibility of their sexual relationship is disagreed upon, so there should be no penalty."[125] Disputations like Juwaynī and Shīrāzī's that placed in contention the need for guardianship beyond cases of insanity and minority could not but have made Shāfi'īs more self-aware of the limitations of their own doctrine.

The disputation bears some resemblance to the Canadian and US Supreme Courts' practice of judicial dissent. It is customary for judges who disagree with the majority ruling to outline the basis of their dissenting view. Though practically, their arguments are immaterial to the case at hand, they add to an awareness of the complexity of a law. As Donald Lively notes in relation to constitutional law, in including dissent, judges' rulings expound "principle, doctrine, *and sometimes contradiction*" (emphasis mine).[126] The arguments of dissenting opinions can and historically have been decisive in determining other related cases.[127] As with Shīrāzī's opinions above, drawing upon dissent permits continuity with past authority even as the law develops in new directions. Moreover, the potential of law to change completely because of dissents should not be overlooked. Many dissents in Anglo-American law have served to rethink the basis of the law at a future time, the US Supreme Court ruling against racial segregation as "separate but equal" being perhaps the most obvious example.[128] Susanna Lee eloquently explains that it is the potential for an alternative that makes dissent relevant to the development of the law:

> In the forever-unfolding story of the law… a would-be narrator or character displeased with the outcome may not only envision an alternate story but also, at a future time, a politically different time,

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[124] Ibid., 4:119. *"In kāna al-zawj shāfi'iyyan, ya'taqid taḥrīmahi, wajaba 'alayhi al-ḥadd, kamā law waṭa'a imra'a fī firāshihi, wa huwa ya'lam annahā ajnabiyya."*

[125] Ibid. *"li-annahu waṭ' mukhtalaf fī ibāḥatihi fa-lam yajib bihi al-ḥadd."*

[126] Lively notes Justice Harlan's dissent that the "Constitution is color-blind" in *Plessy v. Fergusson* in 1896 informed the arguments of *Brown v. Board of Education* in 1954, though Harlan was not mentioned by name. Lively, *Foreshadows of the Law*, x.

[127] Susanna Lee gives the example of how a dissenting view in *Bowers v. Hardwick* (1986), a US case upholding a Georgia anti-sodomy law found itself rearticulated in the decision in Romer v. Evans to declare unconstitutional an amendment to the state constitution of Colorado forbidding the government from protecting the status of persons based on homosexual identity. Lee, "American Animus: Dissent and Disapproval in Bowers v. Hardwick, Romer v. Evans, and Lawrence v. Texas," 63.

[128] Lively, *Foreshadows of the Law*, x.

> substitute that alternative story for the present dominant narrative. That potential is always there, subtextual in all dissents: wishing it had been otherwise, arguing that other interpretations should have dominated, and insinuating that in a better world they would dominate and will dominate.[129]

One of the limitations of dissent in the intra-*madhhab* disputation was its absence from a written archive. Books of *khilāf* were structured around differences of opinion between the schools of law and therefore did not typically list the objections unique to an intra-*madhhab* disputation. Moreover, the recording of this disputation appears to have been exceptional. The disputation's dissent from school doctrine therefore remained unofficial and existed mainly at the level of the community's oral knowledge. In this regard, the disputation is distinguishable from the process of dissent in Anglo-American law.

Lastly, in speaking of the dialogism and dissent of Islamic law, it is well to remember Ronald Collins and David Skover's point that judicial dissent is "a case of institutionalized opposition."[130] It is embedded within the practice of the legal community. It remains essential to the inclusion of different perspectives to a legal issue, but it also has its limits insofar as it upholds a model of reasoning already in place. However well a male Muslim jurist like Juwaynī might defend the dissenting opinion on forced marriage, it is his voice that is heard and not that of those subject to the law. Juwaynī and Shīrāzī's disputation reminds us that dialogue and exclusion are not opposites, but in Islamic law as in modern democracies, coexist side by side with each other.

4.5 Conclusion: The Intra-*Madhhab* Dialogue

This chapter has made a number of interconnected claims. The first is that intra-school disputations offered a means to interrogate and defend school doctrine from a position of internal critique. Juwaynī and Shīrāzī use the theory of their school as a standard from which to

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[129] Lee, "American Animus: Dissent and Disapproval in Bowers v. Hardwick, Romer v. Evans, and Lawrence v. Texas," 57.

[130] Collins and Skover, *On Dissent*, 1.

interrogate the validity of the permissibility of coercing an adult virgin woman. The need to engage with internal critique is likely a permanent fixture of any tradition. To recall MacIntyre, the vicissitudes of history are such that members of a tradition in each generation inherit new puzzles and new queries to which they feel the need to respond. A tradition risks losing its members when it refuses to deal with potential inconsistencies of doctrine. The Shāfiʿīs were able in the process of disputation to address these potential inconsistencies even before they became an actual problem to the school's survival.

The second is that argumentation in Islamic law and legal theory work according to Bakhtin's model of dialogism in which argumentation is forever ongoing. The most characteristic feature of this intra-school disputation is that it had already ended before it began. Shāfiʿīs assented to the adult virgin woman's coercion prior to and after the disputation. And yet, Juwaynī and Shīrāzī, (and presumably later Shāfiʿīs) still engaged in a process of critiquing and defending the arguments buttressing it. They claim no privilege or invulnerability for their position, only the right to respond and continue the dialogue. The vulnerability and unpredictability of dialogism is what sets it apart from either a model in which legal theory determines law and Jackson and Vishanoff's model in which juristic prowess determines law.

The third is that disputations created a record of dissent within the juristic community. If a jurist could not change the law in manuals, he could argue against it in disputations. Moreover, the arguments of the disputation could be inserted in manuals of law to shift the prevailing understandings justifying the law. If Juwaynī could not argue against coercion, he could at least claim its irrationality, for were it not for God's right to command whatever he please, marriage guardianship's would be limited to cases where family honour was in jeopardy. In forcing a jurist to countenance dissenting arguments, the jurists could shift the way future legal issues were resolved.

Chapter 5

5 The Disputation and the Construction of School Doctrine: The Case of the Mistaken *Qibla*

Western scholarship has historically taken an interest in the *qibla* (the prayer direction) for what it revealed about the formation of the early Muslim community's identity. Specifically, historians have closely interrogated the story of the changing of the *qibla*. According to Ibn Jarīr al-Ṭabari (d. 310/923), sixteen or seventeen months after Muḥammad's migration to Medina, the Qur'an directed Muslims to change their direction of prayer from Jerusalem to Mecca.[1] Historians interpreted this event as signaling a break between Muḥammad and the Jewish communities of Medina. They considered the previous prayer direction to Jerusalem to be an attempt to draw the Jews of Medina to Muḥammad's religion by minimizing the differences between them. Margoliouth states: "Mohammed had to decide whether or not he should identify his system with Judaism: and it seems likely that he was inclined to do this."[2] Historians based themselves on Muslim sources that narrated the Jews telling Muḥammad upon his arrival to Medina that they would follow him if he made Jerusalem his *qibla*.[3] William Muir writes of the decision to change prayer directions: "When there was no longer any hope of gaining over the Jews, or confusing Islam and Judaism into one religion, the ceremony lost its value. His system would receive a fresh accession of strength and local influence if he thus magnified the Ka'ba by making it the Kibla of his people."[4] AJ Wensinck summarizes the importance Western historiography has given to the question of the *qibla* by saying that it is "a criterion of a true Muslim," adding that its significance extended beyond indicating the direction of prayer: "the head of an animal to be

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[1] Ṭabarī, *Tafsīr*, 3:172-178; Peters, Muhammad and the Origins of Islam, 209.

[2] Margoliouth, *Mohammed and the Rise of Islam.*, 226. F.E. Peters notes that there are conflicting narrations: some saying that Mecca was first prayed to then Jerusalem, and then again Mecca. In Ibn Isḥāq there is a reconciliatory view where the Prophet was facing both at the same time. Peters, *Muhammad and the Origins of Islam*, 207–8.

[3] Juwaynī, *Nihāyat al-Maṭlab*, 2:70.

[4] Muir, *The Life of Mahomet*, 3:42–43. See also, Peters, *Muhammad and the Origins of Islam*, 206–7.206-207; Margoliouth, *Mohammed and the Rise of Islam.*, 247.

slaughtered is turned to the *qibla* and the dead are buried with the face towards Mecca," and "it is forbidden to turn towards Mecca when relieving nature."[5]

In contrast to this historical positivist frame, the *qibla* posed a different, more hermeneutical significance for the legal tradition. The *qibla* came to symbolize the permissibility of *ijtihād* precisely at a time when jurists and *ḥadīth* scholars debated the limits of reason in determining law. Extant sources suggest al-Shāfiʿī was responsible for this move. In order to demonstrate the legitimacy of using reason in interpreting the law, al-Shāfiʿī appealed to God's command to the believers to use the signs of nature, like the stars, to determine the direction of the *qibla*. Al-Shāfiʿī writes

> He indicated to them (sublime His praise) that if they were distant from the Sacred Mosque itself, a correct result would be arrived at through interpretation, an obligation which He imposed on them in conjunction with the intellects that He placed in them, which can distinguish between things and their opposites, and those signs that He set up for them apart from the Sacred Mosque itself, toward which He had commanded them to face.[6]

Al-Shāfiʿī argued that God chose to test Muslims by conferring upon them the responsibility of using reason to seek out and discover His law. This use of reason is what he called *ijtihād*. As El Shamsy has recently argued, determining the *qibla* continued to be a metaphor for *ijtihād* in the writings of later Shāfiʿī jurists.[7] Among the questions they posed to themselves was what one should do if he made a mistake in his ijtihad in finding the *qibla*.

This chapter tackles Juwaynī and Shīrāzī's second 1083 CE disputation on what a worshipper should do if he made a mistake in finding the *qibla*. The disputation asks: Does the worshipper who performs *ijtihād* in finding the *qibla,* only to discover without a shadow of a doubt that he prayed in the wrong direction, need to repeat the performance of his prayer, or is

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[5] Wensinck, "Ḳibla."

[6] Al-Shāfiʿī, *The Epistle on Legal Theory*, 17.

[7] El Shamsy, "Rethinking 'Taqlīd' in the Early Shāfiʿī School."

his prayer valid despite not fulfilling God's command to face the *qibla*? Juwaynī takes the position of the respondent. He argues in favour of repetition by invoking an analogy between direction and time: because praying at a mistaken time necessitates the repeating performance of the prayer, so too should praying in the wrong direction. Shīrāzī objects to the analogy by claiming that an inductive examination of substantive law suggests the two are too different to be compared. He explains that time is more important than direction. It is conceivable that the shari'a might overlook a mistake on direction but not one on time. Each delve into methodological arguments and invoke cases of substantive law to support their positions.

This chapter uses the case of the mistaken *qibla* to explore the practice of disputation's relationship to the construction of Shāfi'ī school doctrine. In contrast to previous chapters, the topic of the mistaken *qibla* was one that divided Shāfi'īs. Al-Shāfi'ī himself allegedly subscribed to both the positions of repetition and non-repetition at different times in his life. Later Shāfi'īs sought to examine which position was more consistent with their master's general methodology. The chapter shows that the process of constructing school doctrine depended on two general factors. The first factor was the jurists' ability to test and develop arguments that allowed them to assess the merits of different positions. The second was the hierarchies within the school that permitted the ideas of some jurists to gain a greater audience than those of others. However, the limited and local nature of school authority and the difficulty of debating across distances created a context that facilitated the emergence of regional variations among the Shāfi'īs. This is evident in Shīrāzī's and Juwaynī's arguments, which reflect the divisions between the Shāfi'īs of Baghdad and Khurasan. These divisions extended to the domain of *uṣūl al-fiqh* as well. There is no evidence to suggest Shāfi'īs lamented this divergence of opinion or consciously felt the pressing need to create consensus among their ranks. Each jurist had the freedom and responsibility to formulate what he thought was the strongest position on a legal issue and to engage with members of the Shāfi'ī school wherever they might be. The bonds of the school depended on this acknowledgement that the arguments of other Shāfi'īs could only but enrich one's own views.

The chapter proceeds in four sections. Each section begins with a presentation of a section of the disputation, followed by an analysis that highlights its relevance to understanding the process of constructing school doctrine. Section one presents the question and analyzes how the disputation was instrumental in tackling unresolved questions within the school. The second

section presents Juwaynī's argument for the repetition of the prayer. Its analysis shows the limits of disputation in preventing the emergence of regional variations within the Shāfi'ī school . The third section examines a methodological point that divides the two jurists in determining the question of the mistaken *qibla*. Their disagreement reflects how Shāfi'īs were divided by more than simply substantive legal concerns; they had also inherited different, and even conflicting traditions of *uṣūl al-fiqh*. The last section examines the two jurists' concluding arguments. With the disputation finished, the chapter tackles the question of why scholarship has been mistaken to see indeterminacy as a problem the school of law felt compelled to overcome. This highlights an earlier point in the dissertation that disputation did not always attempt to limit, but also to legitimate different legal perspectives.

5.1 The Question: Facing the Wrong *Qibla*

Shīrāzī presents the opening question of the disputation. He interrogates Juwaynī on the question of a person who prays in the wrong direction:

> The Shaykh al-Imām Abū al-Ma'ālī al-Juwaynī was asked about someone who became certain after the performance of his prayer that he had made a mistake in his attempt (*ijtihād*) to determine the proper prayer direction (*qibla*).[8]

The necessity of praying in the direction of the Ka'ba in Mecca was well-established in the legal tradition. Shīrāzī's *Muhadhdhab* adduces its necessity from the Qur'anic verse: "So turn your faces towards the direction of the sacred mosque, and wherever you are turn towards it."[9] [2:144] Shāfi'ī states in the *Umm*, facing the *qibla* "is an obligation upon every praying person—regardless of whether he is performing an obligatory prayer, an optional one, a funeral prayer, a

[8] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 5:209. "*Su'ila al-Shaykh al-Imām Abū al-Ma'ālī al-Juwaynī 'amman ijtihada fī al-qibla wa-ṣallā thumma tayaqqana al-khaṭa'*."

[9] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 1:226.

prostration of gratitude, or a prostration that follows from reciting the Qur'an."[10] He lists only two exceptions to this rule, which will be of great importance below as the disputation unfolds.

Shīrāzī's question to Juwaynī references specifically someone who performed *ijtihād* to determine the *qibla*. The notion of *ijtihād* is here used only slightly differently than in the context of the law. Both entail an "effort" or diligent search. Shīrāzī defines legal *ijtihād* in the *Sharh* by stating that "It is the reflection on proofs and the expenditure of effort in the search for a ruling."[11] *Ijtihād* in the context of the prayer direction implies making an effort to examine evidence to find the direction of Mecca. This effort is not always needed. The worshipper in Mecca could usually determine the *qibla* with certainty by seeing it with his own eyes. Likewise, Shāfi'īs of Shīrāzī's generation noted that the prayer niche in mosques, and especially the Prophet's mosque, were reliable indicators of the prayer direction. It is for the worshipper who cannot use his sight because of darkness or, more likely, because he ventures outside of Muslim cities, that *ijtihād* to locate the *qibla* becomes necessary. The Shāfi'īs pointed towards nature as offering proofs for this ijtihād. They interpreted the Qur'anic verses "He is the one who has given you the stars so that you may be guided…" [6:98] and "And with signs and with the stars they guide themselves" [16:16] to support the need for the Muslim to interpret the signs of nature to orient herself towards the direction of Mecca.[12]

Paying attention to Shīrāzī's qualification that the worshipper is "certain (*tayaqqana*) of his error" in his *ijtihād* is also relevant to understanding the question. The notion of *ijtihād* implies the recognition of an inevitable uncertainty. Just as one might misread the proofs of scripture, one could also misread the signs of nature. Shāfi'īs agreed that a person who performed *ijtihād*, prayed, then doubted himself and performed another *ijtihād* that contradicted his first one, did not need to repeat his original prayer.[13] The reason was that there was no

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[10] Al-Shāfi'ī, *al-Umm*, 211. "*fa'l-farḍ 'alā kull muṣallin farīḍa, aw-nāfila, aw-'alā janāza, aw-sujūd li-shukr, aw-sujūd qur'ān-an yataḥarrā istiqbāl al-qibla.*" See also Muzanī, *Mukhtaṣar Kitāb al-Umm fī al-Fiqh*, 93.

[11] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 755. *"al-ijtihād al-naẓar fī al-adilla wa-badhl al-majhūd fī ṭalb al-ḥukm."*

[12] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 1:228.

[13] Al-Shāfi'ī himself seemed to waffle as to whether or not *ijtihād* always implied a measure of uncertainty. His followers nonetheless used the term exclusively to refer to a situation where the possibility of error was present. Al-Shāfi'ī, *al-Umm*, 2:212. Al-Shāfi'ī states that a person who prayed in the wrong direction should not repeat his prayer unless he is sure that he is mistaken.

guarantee that the worshipper's new *ijtihād* led him to the right direction; his second *ijtihād* was also liable to being mistaken. Shāfi'īs compared these two *ijtihāds* to the rulings of a judge. The same judge might change his *ijtihād* on a legal matter but his change of opinion in no way invalidated his application of his first ijtihād to a past case. It was a general rule in the school that *ijtihād* does not invalidate a ruling determined through *ijtihād*.[14] However, in the disputation, Shīrāzī presents a case where the individual becomes certain (*tayaqqana*) of his error. This means that his new determination of the prayer direction does not suffer from the inevitable doubt that accompanies *ijtihād*. Such a situation might arise when a worshipper in the dark in Mecca can now see the Ka'ba or when a traveler happens upon a mosque indicating the prayer direction. Does such certainty then warrant a repetition of prayer?

5.1.1 Analysis: Growth and Indeterminacy in the Madhhab

The topic of the mistaken *qibla* shows the relevance of disputation in determining school doctrine. The case discussed in the disputation was an example of an unresolved legal issue *within* the Shāfi'ī school of law. Juwaynī could affirm the obligation of repetition or non-repetition without breaking the bounds of school authority because the Shāfi'īs themselves were uncertain about which position was correct. The roots of their disagreement lay in the fact that their eponym allegedly asserted *both* positions at different periods of his life. During his time in Iraq, al-Shāfi'ī had originally held that no repetition was needed. In Egypt, however, he had unequivocally stated the opposite. The *Umm*, written in Egypt, states: "If a person is not blind, but must pray in the dark and therefore does *ijtihād* in order to determine the *qibla*, and then finds out that he made a mistake in his calculation, his prayer is not valid until he repeats it because his new judgement is not based on mere probability but on certain knowledge (*iḥāṭa*) of [the right direction]."[15]

When a situation arose in which al-Shāfi'ī had more than one view on a subject, his later followers attempted to determine which was more persuasive. They did so by attempting to

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[14] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 1:229.

[15] Al-Shāfi'ī, *al-Umm*, 2:212. *"Wa-in kāna baṣīran, wa-ṣallā fī ẓulma, wa-ijtahada fī istiqbāl al-qibla, fa-ya'lam annahu akhṭa'a istiqbālahā, lam yujzihi illā an yu'īda al-ṣalāt li-annahu yarji' min ẓann ilā iḥāṭa."*

extend his arguments and method of reasoning on similar or related matters of law. As generations of Shāfi'īs succeeded one another, they also drew on the arguments of later Shāfi'ī' successors to help them determine which view was strongest. Al-Shāfi'īs' successors referred to al-Shāfi'ī's *qawlān* (two statements) to speak of his conflicting positions.[16] Sometimes al-Shāfi'ī had posited two positions without expressing which he thought was most founded. More often, like in the case of the *qibla* above, he changed his mind. Shāfi'īs often spoke of his *qawl al-qadīm* and his *qawl al-jadīd* to refer to these changed views. Some Shāfi'īs considered that unless al-Shāfi'ī explicitly retracted his *qadīm* position, he held each view to be equally valid. Others, like Shīrāzī, stated that in articulating a new position, al-Shāfi'ī was implicitly rejecting his old view.[17] Regardless of Shāfi'ī's final view on any given matter, the Shāfi'ī school sometimes thought it was worth weighing his different opinions. This reflects Ahmed El Shamsy's point that the early followers of the school accepted Shāfi'īs opinions conditionally.[18] They would favour an earlier view (or abandon it altogether for that matter) if it was shown that it was more consistent with their master's views as a whole.

This is indeed what al-Muzanī did in the case of the mistaken *qibla*. Muzanī believed that al-Shāfi'ī had continued to subscribe to his original view because he allegedly invoked it while dealing with a mistake in determining the day of 'Arafa.[19] The day of 'Arafa refers to the 9th of the month of *Dhul Hijja* when pilgrims of the Hajj stand on the mount 'Arafa near Mecca. It is also a day in which it is highly recommended for all non-pilgrim Muslims to fast. Al-Shāfi'ī argued that the person's fast was valid even if he fasted on the wrong day by comparing it to a mistake in determining the *qibla*: "Whoever seeks the *qibla* then comes to know after completing his prayer that he made a mistake, his prayer is still valid, just as in the case of a mistake concerning 'Arafa."[20] This mistake would have been the result of one's inability to identify accurately the new moon signaling the beginning of a new lunar month. In relating Muzanī's

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[16] For more on this, see al-Nawawī, *al-Majmū',* Volume 1, introductory notes before the commentary of the legal text; al-Dīb, "Muqaddimāt Nihāyat al-Maṭlab."

[17] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 177–78.

[18] El Shamsy, *The Canonization of Islamic Law*, 182.

[19] See Muzanī's discussion of the qiblā, Al-Muzanī, *Mukhtaṣar fī Furū' Al-Shāfi'ī*, 23–25.

[20] Māwardī, *al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi'ī, Wa-Huwa Sharḥ Mukhtaṣar al-Muzanī*, 81. *This passage is quoted from Māwardī's commentary, dictating Muzanī's statement about what al-Shāfi'ī said, : "Wa-law akhṭa'a al-qibla thumma 'alima ba'd kamāl al-ṣalāt annahū akhṭa'a, anna dhalika yujzi'uhi, kamā yujzi' dhalika fī khaṭa' 'arafa."*

views, Māwardī presents more arguments attributed to Muzanī supporting al-Shāfi'ī's *qadīm* position.[21] Later Shāfi'īs added still more. But they also produced arguments against Muzanī's reasoning which favoured al-Shāfi'ī's earlier *jadīd* position. Māwardī for instance noted that the comparison to 'Arafa was dubious because the person repeating his fast would have no certainty that the new day would actually be the day of 'Arafa. This contrasted with the certainty existing in the case of the mistaken *qibla* under review. In short, which of al-Shāfi'ī's two positions was the correct one was an enduring question within the school of law.

This indeterminacy in the question of the mistaken *qibla* was by no means an anomaly. Indeterminacy was a main feature of the Shāfi'ī school in the 11th century as both Shīrāzī and Juwaynī's texts of *furū'* demonstrate. Shāfi'īs not only disagreed about which of their eponym's statements was strongest. They also sometimes disagreed about whether or not Al-Shāfi'ī had more than one opinion on a subject. As Nawawī explains, they spoke of more than one *ṭarīqa* to refer to such differences: "the *ṭarīqa* is the difference of opinion in the relaying of the *madhhab*."[22] To take a concrete example, Shāfi'īs disagreed as to what their eponym had said concerning the necessity of repeating one's prayer if one followed the *ijtihād* of another in determining the *qibla*. Ibn Surayj thought that al-Shāfi'ī had only one *qawl* (statement) on the subject and that it asserted no repetition was needed.[23] His student Abū Isḥāq al-Marwazī also thought that there was only one *qawl* but that it was that repeating the prayer was necessary. Finally, Muzanī, among others, thought there were two statements on the subject, one necessitating repetition and the other not. Māwardī makes clear that the reason for the disagreement here stemmed from how to interpret their master's words. This reflects the Shāfi'īs easy tendency to attribute to al-Shāfi'ī an opinion based on what appeared implicit to them in his reasoning. The Shāfi'īs also sometimes disagreed about cases their eponym never addressed—either because he did not think of the matter or because it came about with new social circumstances.[24] To distinguish these positions from al-Shāfi'ī's own views, they spoke not of

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[21] Al-Māwardī, *al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi'ī, Wa-Huwa Sharḥ Mukhtaṣar al-Muzanī*, 2:81–84.

[22] Al-Nawawī, *al-Majmū'*, 1:107. *"Wa-amma al-ṭuruq, fa-hiya ikhtilāf al-aṣḥāb fī ḥikāyat al-madhhab."*

[23] Al-Māwardī, *al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi'ī, Wa-Huwa Sharḥ Mukhtaṣar al-Muzanī*, 2:79.

[24] Ibid., 2:71. An example of new circumstances was the spread of Muslim communities and the building of mosques. This new development led later Shāfi'īs to consider the prayer niche in mosques to be a means of determining with accuracy the prayer direction. They reasoned that it was highly improbable for a traveller's *ijtihād* to be more reliable than that of generations of Muslims who prayed in one particular direction.

qawl but of *wajh*/pl. *wujūh* (positions). For instance, they spoke about different *wujūh* concerning whether or not a worshipper should restart his prayer if he changed his *ijtihād* on the *qibla* in the middle of his prayer.[25]

The Shāfi'īs of the 5th/11th century saw their weighing of different opinions in the school as a continuation of al-Shāfi'ī's reasoning on the law. This is evident in Shīrāzī's explanation of why al-Shāfi'ī sometimes posited two opinions without stating which one was correct. He explains that al-Shāfi'ī did so to eliminate consideration of all other options on the subject:

> He did not mention two opinions thinking they were equally correct. How could this be when both positions are contradictory? Rather, he presented two opinions because he did not think the case could be interpreted except by one of these two options. Because he did not know which of the two was weightier, he mentioned both in order to investigate them further at a later time, but then death overtook him before he was able to resolve the issue.[26]

It was the shortness of human life and the complexity of the particular issue at hand that had prevented al-Shāfi'ī from determining what he believed to be the strongest among possible rulings. Thus, it was the duty of al-Shāfi'ī's disciples to continue what death had prevented him from achieving. Their task was to weigh his different views and those that his followers articulated using his methodology. The disputation as the primary mode to test out arguments was key to this process. Disputations provided more thorough and elaborate attempts at defending a single proof than found in books of law. They provided jurists with the means to try out the merits of their favoured arguments for a position. Moreover, jurists themselves expressed that the disputation was the means to weigh different proofs after one had reviewed the existing

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[25] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 1:229.

[26] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 1079. "*lam yadhkurhumā 'alā annahu ya'taqid ṣiḥḥātahuma! Wa-kayfa ya'taqid ṣiḥḥat dhalika, wa-humā qawlān mutaḍāddān, wa-innamā dhakarahumā li'-anna al-ḥāditha 'indahu lā yaḥtamil illā hadhayn al-qawlayn.*"

books of law.[27] But it would be too strong to say that argument alone determined school doctrine.

Beyond argumentation, the construction of authoritative doctrines depended greatly on school hierarchies. In particular, the emergence of the position of the *riyāsa* (leadership) of the *madhhab* in the late 9th early 10th centuries facilitated this construction. There is evidence to suggest that aspiring jurists sought to study with the leader of the school and those jurists he trained. This meant that the legal interpretations of the leader of the school (*ra'īs*) had a greater chance of becoming dominant among future generations of jurists. As Christopher Melchert has pointed out, the institution of the *riyāsa* could be traced back to the Iraqi Shāfi'ī jurist, Ibn Surayj, who was responsible for formalizing the Shaf'i school by introducing "a normal course of advanced study leading to the production of *ta'liqa* [commentary]."[28] The school that gathered around Ibn Surayj had a well-defined curriculum and method of learning which would train and regulate membership within the Shāfi'ī school in Baghdad. Shīrāzī's *Ṭabaqāt* relates a statement from Abū Ḥāmid al-Isfarāyinī about Ibn Surayj that shows the popularity of the *ra'īs*' opinions among later Shāfi'īs: al-Isfarāyinī states "We follow him in the clearer issues of *fiqh* (*ẓawāhir*) but not in those matters that need greater precision."[29] Shīrāzī expresses similar statements about the influence of later Shāfi'ī leaders. For instance, he states of Ibn Surayj's successor, Abū Isḥāq al-Marwazī (d.340) that "the imams took from him", i.e., they took his statements on the law to be authoritative.[30] The same is said of Abū al-Qāsim 'Abd al-Azīz ibn 'Abd Allāh al-Dārakī (d.375/986) "From him the bulk of scholars (*shuyūkh*) of Baghdad learnt, as well as those from other lands."[31]

It is important to note that this hierarchy was not absolute. This is because the institution of the *riyāsa* appears to have been more informal than current scholarship supposes. It does not appear to have been based on appointment, but rather on the general perception of a given generation of Shāfi'īs. The *ra'īs* was the one that Shāfi'īs saw as the most outstanding among them. This

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[27] See chapter 3.

[28] Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries C.E*, 87.

[29] Al-Fīrūzābādī al-Shīrāzī, *Ṭabaqāt al-Fuqahā'*, 109. *Naḥnu najrī ma'a Abī al-'Abbās fī ẓawāhir al-fiqh dūn al-daqā'iq."*

[30] Ibid., 3:112. "*Wa-akhadha 'anhu al-a'imma."*

[31] Ibid., 3:118. *"Wa-akhadha 'anhu 'ammat al-shuyukh Baghdād wa-ghayrihim min ahl al-afāq."*

means that the *ra'īs* had little control over the other professors of law beyond prestige. In fact, the *ṭabaqāt* literature suggests that there were periods in the 10th and 11th centuries when Shāfi'īs were uncertain as to who was the foremost authority among them. Shīrāzī's own life is a good example of this. Upon al-Ṭabarī's death, Shīrāzī and his rival Abū Naṣr b. al-Ṣabbāgh appear to have both been considered—at least for some time—the leading jurists of their school of law. This is clear from Ibn 'Aqīl's statement that jurists of the time valued both Shīrāzī's *Tanbīh* as well as Ibn Ṣabāgh's *Shāmil* as the two most authoritative books of Shāfi'ī *fiqh*.[32] Subkī is even more explicit of this, saying "Ibn Ṣabbāgh was Abū Isḥāq's al-Shīrāzī's equal in *fiqh*."[33] The point is that the loose authority within the school of law made the consolidation of school opinion a gradual process that always permitted minor variation between jurists. Even when a clear *ra'īs* existed, as during the life of Abū Ḥāmid al-Isfarāyīnī, other leading jurists like Ṭabarī were free to teach their students what they thought to be the best positions and arguments for any given legal question. Thus the disputation played a role in the process of consolidating a school's authoritative doctrines by helping the leaders of a school of law in their process of ijtihād. Moreover, as the next section shows, this process of consolidation lent itself to the development of local versions of the school.

5.1.2 The Proof: Time and Direction

Juwaynī responds to Shīrāzī by analogizing the *qibla* to the time of prayer. He states:

> It is incumbent upon the person to repeat his prayer because he is certain of an error concerning a condition among the conditions of prayer, just as in the case of a mistake about the time of prayer.[34]

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[32] A.M. Turkī's, "Tamhīd*,"* 44.

[33] In fact, Shīrāzī appears to have been given the title of *ra'īs* posthumously. Daphna Ephrat relies upon sources that do affirm him to be a school *ra'īs*, *A Learned Society in a Period of Transition*, 93. It does not appear in Subkī likely because Subkī saw Shīrāzī and Ibn Sabbāgh as equals. "*Kāna Ibn al-Ṣabbāgh yuḍāhī Abā Isḥāq al-Shīrāzī."*

[34] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 5:123. *"fa-istadalla fīhā bi-annahu ta'ayyana lahu yaqīn al-khaṭa' fī sharṭ min shurūṭ al-ṣalāt, fa-lazimahu al-i'āda, kamā law tayaqqana al-khaṭa' fī al-waqt."*

Juwaynī identifies "being a condition of prayer" as the *ratio legis* that unites the two cases of his analogy. In his substantive legal manual Juwaynī defines a condition of prayer as "the bare minimum that validates a prayer."[35] He lists as examples of conditions of prayer the performance of ritual ablutions, covering one's private parts, and also being a Muslim, i.e. possessing faith (*imān*).[36] The Shāfi'īs also widely considered the facing of the *qibla* to be a condition of the prayer.[37] The force of Juwaynī's analogy is that most of his fellow-jurists agreed that praying at the wrong time necessitated the repetition of one's prayer. If praying at the wrong time necessitates the prayer's repetition, so too should praying in the wrong direction since both are conditions of prayer.

In principle, Shīrāzī agrees with Juwaynī's assessment that conditions of prayer are essential to the prayer's validity. He asserts in the *Muhadhdhab* that: "If a condition among the conditions of prayer no longer holds, like *ṭahāra* (ritual purity)… then one's prayer is invalidated (*baṭalat*)."[38] However, the *Muhadhdhab* also explains situations where one may have an excuse for not fulfilling a condition of prayer. In regards to the condition of covering oneself in prayer, Shīrāzī writes: "If the wind causes the revealing of part of [the worshipper's] body which should be covered, and the man then covers it, his prayer is not invalidated, because this is excusable."[39] Certainly, a person cannot willfully neglect the appropriate direction of prayer. But is a sincere attempt at finding the right location sufficient for the prayer's validity, even if that location turns out to be wrong? Shīrāzī does not argue either way in the disputation. Nor is he required to affirm a position. As the questioner, his task is merely to frustrate his opponent's proof. He does so by objecting to the appropriateness of Juwaynī's analogy.

Shīrāzī answers Juwaynī by contending that facing the *qibla* is a less important condition of prayer than praying at the right time. His claim implies that the prayer direction can be dispensed with in a way that time cannot. He supports his claim by pointing out that there are two

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[35] Al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 1:285. *"Aqall mā yujzi' min 'amal al-ṣalāt."*

[36] Al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 2:285.

[37] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 1:70. Shīrāzī writes that "Al-Shāfi'ī mentioned that facing the *qibla* is one of the conditions of prayer. But he made an exception for the prayer performed in a situation of extreme fear, as when two armies meet and an enemy is to be repulsed, as well as for optional prayers during travel."

[38] Ibid., 1:288. "*Idhā qaṭa'a sharṭ min shuruṭihā ka-ṭahāra baṭalat ṣalātihi.*"

[39] Ibid., 1:289. *"Wa-in kashafat al-rīḥ al-thawb 'an al-awra thumma raddahu lam tabṭul ṣalātihi, li-annahu ma'dhūr."*

exceptions in substantive law to the requirement of facing the *qibla*. He asserts that one can abandon the *qibla* in a situation of extreme fear and in one's optional prayers during travel. But one cannot in these circumstances abandon the specified prayer times.[40] The *Muhadhdhab* explains that if facing the *qibla* in war, the paradigmatic example of a situation of fear, would jeopardize the safety of the Muslims, then the fighters were permitted to pray in whatever manner ensured their safety, "facing the *qibla* or not facing it (*mustaqbilī al-qibla wa-ghayr mustaqbilīhā*)"[41] Likewise, the optional prayers could under certain circumstances of travel be performed facing a direction other than that of the *qibla*. Juwaynī explains that the reason for this dispensation is to make it easier for people to both travel and continue offering their optional prayers. He explains that imposing facing the *qibla* would lead people to either abandon their optional prayers or to abandon their travels. The first situation would be detrimental to people's piety and the second to their livelihood.[42] Shīrāzī continues by pointing out to Juwaynī that no similar dispensations apply to the time of prayer. War does not allow one to postpone the time of the five obligatory prayers. Likewise, worshippers are bound in travel to perform their daily recommended optional prayers at their specified times. If the direction of prayer is more easily dispensed with than its time, it makes sense that a mistake in the former might be excusable in a way that a mistake in the latter is not.

Juwaynī defends his analogy with two arguments. First, he claims that the relative importance of the two conditions of prayer is immaterial to the validity of his analogy. He draws on a methodological principle to press his point. He states that analogy does not depend on similarity in all aspects of the original and derivative cases. It only necessitates that the two cases share the relevant *ratio legis* of the law. In fact, Juwaynī states that to necessitate that two cases resemble each other in all respects would make the very strategy of analogical reasoning impossible. He asserts that all jurists concur on this point: "The people of reflection (*ahl al-naẓar*) agree that it is not a condition of *qiyās* that the derivative case resemble the original case in all respects. All that matters is that the two cases resemble one another both possessing the *ratio legis* (*'illa*) of the

[40] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 5:209-210.

[41] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 1:351.

[42] Al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 2:71.

ruling."[43] Juwaynī adds force to his argument by example: "Do you not see how we make analogies between obligatory and voluntary prayers even though one is less important than the other?" Juwaynī affirms that to impose resemblance between two cases in all respects would spell the end of the juristic method of *qiyās* since "there are not two cases except that they are different from each other in some respect."[44]

Second, Juwaynī does not concede that the time of prayer is actually less important than its direction. He notes that "it is [also] permissible to abandon the time of prayer in travel by combining the prayers (*al-jam' bayna al-ṣalatayn*)."[45] The *Muhadhdhab* explains that an individual could combine his noon and afternoon prayers and his sunset and nighttime prayers together during his travels.[46] The traveler has the discretion to pray at the time of the first of the two prayers or at the time of the second. In unequivocal terms, Shīrāzī speaks of this as taking an act of worship outside of its prescribed time: "It involves taking an act of worship outside of its prescribed time, which would not be permissible for a short trip."[47] Juwaynī uses this to suggest that the direction of prayer is of equal weight in the law as the time of prayer. He then goes further and contends that there are indications that the direction of prayer is even more important than time. He draws on the example of someone who mistakenly prays prior to the time of the prescribed prayer. The Shāfi'īs agreed that this person had to repeat his prescribed prayer. However, they did not consider this prayer at the wrong time to be completely invalid. Rather they deemed that it became a valid optional prayer, thereby indicating that God would reward it. In contrast, a prescribed prayer performed in the wrong direction is deemed to be completely invalid. Again, this position on the wrong prayer time was well-attested in Shāfi'ī texts, with Shīrāzī writing: "Whoever begins performance of the *ẓuhr* prayer before the sun reaches its zenith, thinking that its time has begun, his prayer becomes an optional prayer."[48] In sum,

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[43] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 5:210. "*Lā khilāf bayna ahl al-naẓar annahu laysa min sharṭ al-qiyās an yushābiha al-far' al-aṣl min jamī' al-wujūh. Fa-idhā istawayā fī 'illat al-ḥukm lam yaḍurra iftirāquhumā fīmā siwāhā…a-lā tarā annā naqīs al-farḍ 'alā al-nafl, wa'l-nafl 'alā al-farḍ, wa-in kāna aḥaduhimā akhaff wa'l-ākhar ākad?*"

[44] Ibid.

[45] Ibid. "*kamā yajūz tark al-qibla ma'a 'ilm fī al-nāfila fī safar wa'l-ḥarb, fa'l-waqt ayḍan yajūz tarkihi fī al-jam' 'alā ṣalātayn fī safr.*"

[46] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 1:342.

[47] Ibid., 1:343. *"li-annahu ikhrāj 'ibāda 'an waqtihā, fa-lam yajuz fī al-safar al-qaṣīr, ka'l-fiṭr fī ṣawm."*

[48] Ibid., 1:237. *"man dakhala fī ẓuhr qabla al-zawāl wa huwa yaẓunn annahu ba'd al-zawāl kaānat ṣalātuhu nāfila."*

Juwaynī flips Shīrāzī's assumption on its head and asserts that time is in fact equal to, or more important than, the *qibla*.

5.1.3 Analysis: The Baghdad and Khurasanian Branches of Shāfi'īsm

Juwaynī's analogy highlights the limits of the disputation in constructing school doctrine across geographical divides. His analogy exemplifies the divide between the Shāfi'īs of Baghdad and those of Khurasan. His comparison between direction and time was a proof far more familiar and accepted among his fellow jurists in Khurasan than it would have been to Shīrāzī's Baghdad jurists. Juwaynī writes in the *Nihāya*:

> Among the things to note before we tackle the issue [of the mistaken *qibla*], is that the *fuqahāʾ* have produced argument after argument on this issue, and thus the *madhhab* on it is muddled. Among those arguments upon which those who claim the need of repeating the prayer have relied is the case of a mistake regarding the prayer's time… if it is clear to the one who has performed *ijtihād* on the time of prayer that he has performed the prayer before its time, and there is time left, then he must repeat his prayer. And if he does not realize this until after the time has passed, then that which our compatriots have concluded is the obligation of *qaḍā'* (performing an act after its prescribed time).[49]

Juwaynī's argument in the disputation builds upon and reframes the *qiyās* of his Khurasanian predecessors by placing in relief the *qibla* and time as "conditions of prayer." This was the argument he found most satisfying in his *Nihāya* as well: "The most convincing *qiyās* on the

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[49] Al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 2:98. *"Wa mimmā nujrīhi fī dhalika qabla mujāwazat al-faṣl, anna al-fuqahā' iḥtajjū bi-qawl 'alā qawl bi-masā'il, wa'l-madhhab fīhā muḍṭarib: fa-mimmā istashhada bihi man naṣara wujūb al-qaḍā': farḍ al-khaṭa' fī al-waqt! Fa-man ijtahada fī waqt al-ṣalāt, wa- akhṭa'a, fa-tafṣīl al-madhhab fīhi, anna hādhā in waqa'a fī al-ta'khīr, fa'l-wajh: al-qaṭ' bi-ijzā' al-ṣalāt…Wa-law tabayyana li'l-ladhī ijtahada fī waqt al-ṣalāt annahu awqa'a qabla al-waqt, fa-in tabayyan dhalika wa waqt al-ṣalāt bāqin ba'd, tajib i'ādat al-ṣalāt fī al-waqt. Wa-in lam yatabayyan dhalika ḥattā inqiḍā al-waqt fa'l-ladhī qaṭa'a bihi al-aṣḥāb wujūb al-qaḍā'. "*

matter is that the object of the present *ijtihād* is among the conditions of prayer."[50] In contrast, extant books of *furū'* among the Shāfi'īs of Baghdad make no mention of the *qiyās* between time and direction.[51] They either did not know of it or did not give it much attention at the time of Juwaynī and Shīrāzī's disputation.[52]

The division between the Shāfi'īs of Baghdad and Khurasan was seen by later Shāfi'īs as a seminal moment within the history of the school. Ibn Mulaqqin in his '*Iqd al-Mudhhab fī Ṭabaqāt Ḥamalat al-Madhhab* brings his reader's attention to the historical division (*inqisām*) and splintering (*tafarruq*) in the jurists of the Shāfi'ī school between two camps. He writes "Know that our compatriots diverged, and that the Iraqis are the people of Baghdad and those that are adjacent to it…" (and that the Khurasanis are those belong to the province of Khurasan).[53] As Maḥmūd al-Dīb notes, one must take note that this geographical ascription speaks not to place of birth but to the locale where a jurist was trained.[54] Nawawī would notice a qualitative difference between the two branches, praising the Iraqis for their faithful transmission of the *madhhab* and praising the Khurasanis for their legal reasoning: "Know that the transmission of our Iraqi colleagues on the textual statements of Shāfi'ī and the general rules of his *madhhab*, as well as the views of our predecessors are usually better and more accurate than the transmission of the Khurasanis. And the Khurasanis are usually better in their application, investigation, extraction, and ordering of proofs."[55]

The origins of the division can be located in those same two factors that contributed to the development of school doctrine—the school system and the *riyāsa*. Lectures and the general face-to-face nature of the disputation did not allow jurists from different lands to easily share

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[50] Ibid., 2:99. *"Wa'l-qiyās al-muqni' fī dhalik, anna mā yataṭarraq ilayhi al-ijtihād min sharā'iṭ al-ṣalāt."*

[51] Al-Baghawī, *Al-Tahdhīb Fī Fiqh Al-Imām Al-Shāfi'ī*, 2:69; Ibn al-Maḥāmilī, *Al-Lubāb Fī Al-Fiqh Al-Shāfi'ī, 96*; and especially al-Māwardī, *al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi'ī, Wa-Huwa Sharḥ Mukhtaṣar al-Muzanī*, 2:79.

[52] They likely did know about it because al-Shāfi'ī's *Umm* mentions the *ijtihād* of the condition of prayer side by side with the *ijtihād* of the *qibla*, al-Shāfi'ī, *al-Umm*, 2:213.

[53] Ibn al-Mulaqqin, *Al-'Iqd al-Mudhab fī Ṭabaqāt Ḥamalat al-Madhab,* 215. "*Fa-'lam anna aṣḥābanā tafarraqū, fa'l-'irāqiyyīn ahl baghdād wa-mā wālāhā."*

[54] Al-Dīb, "*Muqaddimāt Nihāyat al-Maṭlab*," 132.

[55] Al-Nawawī, *al-Majmū'*, 1:112. "*Wa-a'lam anna naql aṣḥābinā al-'irāqiyyīn li-nuṣūṣ al-Shāfi'ī wa-qawā'id madhhabihi wa-wujūh mutaqaddimī aṣḥābinā atqan wa-athbat min naql al-khurāsāniyyīn ghāliban, wal-khurāsāniyyīn aḥsan taṣarrufan wa-baḥthan wa-takhrījan wa-tartīban ghāliban.* "

with each other their arguments for different positions. Certainly, Baghdad was a cosmopolitan place of learning: Shīrāzī and his master Ṭabarī were Persians who migrated there for learning. But travel was not always easy. Shīrāzī was known to have lived most of his life in great poverty. Biographers emphasize that he could not perform the pilgrimage to Mecca owing to his financial inability to purchase a mount.[56] This is indicative of the difficulties he would have had to travel to lands like Khurasan to debate with its leading jurists. It is unlikely that he would have met Juwaynī in the period between the latter's appointment to the Niẓāmiyya in 1055 and the date in which the current disputation occurred nearly three decades later. As for the *riyāsa*, its local and informal nature meant that jurists of different regions owed no deference to each other. This meant that the leading jurists of different regions like Khurasan, Fars, or Tabaristan could disseminate their own understanding of the best positions and arguments of the Shāfi'ī *madhhab*. These jurists could, and sometimes, did study the books of jurists of other regions—below we will see the example of Abū 'Alī al-Sinjī—but they most easily learnt and assimilated the doctrines they had imbibed from the teachers of their respective regions. Thus Juwaynī's *Nihāya* incorporates positions from Shāfi'īs the world over—largely because he was able to come across and gather these positions in exile—but Juwaynī shows greatest deference to doctrines he learnt from his father whom he refers to simply as "my shaikh."

Still, why Khurasan and Iraq? The more immediate cause for the division is better explained by reference to the waning hegemony of Baghdad Shāfi'īsm in the 11th century. During the 10th century, the Shāfi'īs of Baghdad had unrivaled primacy in shaping the content of their school of law across Muslim lands—despite the local nature of the *riyāsa*. This hegemony can be attributed to Ibn Surayj and his circle's influence. Shīrāzī says of Ibn Surayj that it was "through him that the *madhhab* spread."[57] In fact, in introducing the generation of scholars following Ibn Surayj's, he writes: "And then *fiqh* was passed on to another generation, most of whom were the disciples of Ibn Surayj."[58] This continued for some time. For instance, Abū Sahl al-Ṣu'lūkī (d. 370/980) who is said to have taught the *fuqahāʾ* of Khurasan's capital of Nishapur was the disciple (*ṣāḥib*) of Ibn Surayj's successor in Baghdad, Abū Isḥāq al-Marwazī (d. 340/951); and

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[56] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4: 227.

[57] Al-Fīrūzābādī al-Shīrāzī, *Ṭabaqāt al-Fuqahā'*, 109. "*Wa-'anhu intashara fiqh al-Shāfi'ī."*

[58] Ibid., 3:106. The same process repeated itself with later leaders of the Baghdad Shafi' ī school.

Abū ʿAlī al-Zujājī al-Ṭabarī (d. 350/961), from whom the *fuqahā'* of Āmil took their legal knowledge, was a student of Abū al-'Abbās Ibn al-Qāṣṣ (d. 335/946), another leading student of Ibn Surayj's.[59] Thus while Shīrāzī speaks of different leaders of Shāfi'īsm for every region in which the school predominated, these local leaders were usually shaped by the doctrines and arguments developed in Baghdad.

Khurasan emerged as a rival of Baghdad towards the end of the 4th/10th century. Shāfi'īs would identify the emergence of the Khurasani branch of Shāfi'īsm with al-Qaffāl al-Marwazī (known also as al-Qaffāl al-Ṣaghīr) (d. 417/1026).[60] Qaffāl's training can be traced back to the Baghdad school. He was the student of Abū Zayd al-Marwazī (d. 372/982) who had gone to study with Abū Isḥāq al-Marwazī in Baghdad. Shāfi'īs would nonetheless consider Qaffāl's arguments and opinions sufficiently independent from Baghdad to warrant speaking of a new branch of Shāfi'īsm. Qaffāl would be the teacher of Abū 'Alī al-Sinjī (d. 427/1036), al-Qāḍī Ḥusayn al-Marwarrūdhī (d. 462/1069), and Abū Muḥammad al-Juwaynī (Juwaynī's father, d. 438/1046), three of the most illustrious Khurasani Shāfi'īs of the early 5th/11th century who would further develop Khurasanī Shāfi'īsm. The cause of Khurasan's gradual independence from Baghdad should be linked to the distance between Iraq and Khurasan and the region's affluence which sustained a rich intellectual culture. As Richard Bulliet has noted, the province's capital of Nishapur benefitted from the silk route which sustained a class of wealthy families from which the juristic class hailed.[61] This wealth helped sustain an intellectual culture which led Nishapur of the 11th century to develop not only in the area of Shāfi'ī law but also in the formulation of Ash'arī theology, philosophy, and Sufism.[62] The rich intellectual culture of Khurasan allowed it to produce its own scholars who gradually developed arguments and legal positions that with time came to reflect and be known as a distinctly Khurasanian branch of the Shāfi'ī school.

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[59] Ibid., 3:115, 117.

[60] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā,* 5:53-62.

[61] Bulliet, *The Patricians of Nishapur*.

[62] See for Sufism Laury Silvers, *A Soaring Minaret*; see also S. Frederick Starr, *Lost Enlightenment.*

5.1.4 The Methodological Divide: *Qiyās* and Coequality

The remainder of the disputation on the mistaken *qibla* tackles roughly two issues: first, does it matter to the operation of *qiyās* that direction is less important than time; and second, is direction truly less important than time? Here, I take up the first of these two issues and leave the second to the next section.

Shīrāzī elaborates upon his claim that the relative importance of time and direction invalidates Juwaynī's analogy. He asserts that it is a condition of *qiyās* that the original and derivative case be *naẓīr* (comparable). The cases are said to be *naẓīr* if they mirror each other in some legal respect. This mirroring gives the jurist reason to believe the two cases might share a common *ratio legis* on a given legal problem he encounters and subsequently to apply the ruling of one to the other. The means to establish that two cases are *naẓīr* is through an inductive examination of the substantive legal rulings pertaining to the two cases, which gives the jurist reason to believe that the two cases would be governed by the same set of rules in the regards under consideration. One example Shīrāzī gives in the *Sharḥ al-Lum'a* is the case of the *zakāt* (alms tax) and the *'ushr* (land tax). Shīrāzī suggests that the two cases are *naẓīr* when it comes to those upon whom it is an obligation. His proof for their being comparable is that both are equally incumbent upon the adult Muslim, stating "whomsoever is subject to *'ushr* is subject to the *zakāt*, just like the adult Muslim."[63] Shīrāzī concludes on this basis that the *zakāt* should be taken from the minor and the insane since they are subject to the *'ushr*.

In the present disputation, Shīrāzī uses the notion of comparability to discredit the analogy between the two cases. Shīrāzī explains in the *Ma'ūna* that lack of comparability can be an objection to an opponent's *qiyās al-'illa*.[64] He notes that an analogy between two actions that are not comparable constitutes a form of erroneous consideration (*fasād al-i'tibār*). This is because inductive examples of their respective rulings convey the impression that the two cases are not to be judged alike. The *Ma'ūna* gives the example of analogizing the woman apostate to the male apostate in determining that both are to be killed. One might object that this analogy makes little sense since the rulings concerning the killing of non-Muslim women differs from that of non-

[63] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 810. "*Man wajaba al-'ushr fī zar'ihi wajabat al-zakāt, ka'l-bāligh*."

[64] Al-Fīrūzābādī al-Shīrāzī, *Kitāb al-Ma'ūna fī al-Jadal*, 255.

Muslim men. For instance, the latter can be killed in war, whereas the former cannot. Why would this difference not extend to the apostate? Shīrāzī's argument in the disputation follows the same logic. There is empirical evidence in the dispensation of the direction of prayer in cases of fear and travel to suggest that it differs from time. It is for this reason that Shīrāzī asserts to his opponent: "I do not concede that you have identified the right *ratio legis* because those differences I mentioned suggest that they have different *rationes legis* for their respective rulings."[65] Juwaynī responds, seemingly annoyed, by stating that Shīrāzī should have asked him the reason he identified "being a condition of prayer" as the *ratio legis* of the two cases. Moreover, Shīrāzī should have shared "and not dissimulated" what he identifies as the *'illa* for the ruling on the mistaken *qibla*. This would have permitted Juwaynī to defend his position and to show its superiority over the alternative Shīrāzī espoused. Shīrāzī, in turn, laconically responds that "I have the prerogative either to ask you to defend your *'illa* or to show why it is false."[66]

Shīrāzī asserts that this principle of comparability holds in all areas of law. He denies Juwaynī's claim that all Shāfi'īs accept analogies between acts of lesser importance like analogizing optional prayers to obligatory ones or rights to rights. He maintains that when cases are not comparable, then "I do not permit their *qiyās*."[67] Shīrāzī attempts to add support to his methodological position by using one of Juwaynī's critiques against him:

> "As for your statement 'it is not a conditon of *qiyās* that a case resemble another in every ruling because this would prevent any type of *qiyās*', this is contradicted by the fact that it is not a condition of dissimilarity (*farq*) (the attempt to show two cases to be different) that two cases be different from each other in all

[65] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 5:211. "*Anā lā usallim annahumā istawayā fī 'illat al-ḥukm li-anna iftirāqahumā fīmā dhakartu yadullu 'alā annahumā lam yastawiyā fī 'illat al-ḥukm*."

[66] Ibid., 5:213. "*li-annī bi'l-khiyār bayna an uṭālibaka bi-taṣḥiḥ al-'illa wa-bayna an adhkura mā yadullu 'alā fasādihā*"

[67] Ibid., 5:211. "*Fa-anā amna' min al-qiyās."*

> respects and, if we obliged this, then it would spell the end of the juristic method of [dissimilarity] *farq*."[68]

Juwaynī remains unconvinced, explaining that invoking the method of *farq* in this case would have necessitated that Shīrāzī explicitly state the *ratio legis* of the case of the mistaken *qibla*, and show that the case of the mistaken time differs from it. He adds, "You did not do this. If you wish to abandon what you said and choose to show me how the differences in my two cases are relevant, then I will address what you have to say."[69] In the end, then, the two jurists butt heads on the notion of comparability as a prerequisite to determine the suitability of analogizing one case to another.

5.1.5 Analysis: Divisions in *Uṣūl al-Fiqh*

The two jurists' methodological differences on comparability reflect just how deep the divergences between the Khurasanis and Iraqis had become. These divergences were the product of the differences in the evolution of the science of *uṣūl al-fiqh* in both regions. Both regions could speak of their origins within al-Shāfi'ī's early theoretical pronouncement in the *Risāla* and in his substantive legal works. Even more important to both were the early theorizations of Ibn Surayj and his students within 10th century Baghdad. Hallaq even suggests that Ibn Surayj and his students introduced the discipline of *uṣūl al-fiqh* and credits them with the production of books expositing the discipline in full.[70] They were thus responsible for systematizing what would be considered Shāfi'ī *uṣūl al-fiqh* in the 10th and 11th centuries. They are referenced copiously throughout Shīrāzī's *Tabṣira* and the *Sharḥ,* demonstrating the extent to which they were considered authorities on the subject. But both regions also drew on Ash'arī *uṣūl al-fiqh.*[71] It was the different ways in which the two regions, and specificially Juwaynī and Shīrāzī, drew

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[68] Ibid., 5: 211. "*Wa-qawluka: 'innahu laysa min sharṭ al-qiyās an yastawiya al-aṣl wa'l-far' fī jamī' al-aḥkām, li-annahu law shuriṭa dhalika insadda bāb al-qiyās' yu'āriḍuhu annahu laysa min sharṭ al-farq an yufāriq al-far' al-aṣl fī jamī' al-ashyā', li-annahu law shuriṭa dhalika insadda bāb al-farq.*"

[69] Ibid., 5:212. "*wa-lam taf'al dhalika, wa-in tarakta mā dhakarta, wa-ista'nafta farqan takallamtu 'alayhi.*"

[70] Hallaq, "Was al-Shafi'i the Master Architect of Islamic Jurisprudence?"

[71] See the appendices to Juwaynī's *Burhān*, Edited by Dīb, 1443-1449, where Dīb notes the opinions where Juwaynī departs from al-Shāfi'ī's positions and those where he parted ways with al-Ash'arī.

on these two sources that accounts for their different positions in *uṣūl al-fiqh*. It is thus important to understand the early developments and interactions between these two branches of *uṣūl al-fiqh.*

Following Hallaq, we could say that Ibn Surayj and his disciples had produced detailed expositions of *uṣūl al-fiqh* in the early 10th century. In contrast, Abū al-Ḥaṣan al-Ashʿarī, who died two decades after Ibn Surayj, had very little to say on the discipline of *uṣūl al-fiqh*. In the course of repudiating the Muʿtazilī views of his master Abū ʿAlī al-Jubbāʾī, he did make pronouncements on matters of *uṣūl al-fiqh* that sometimes clashed with the Shāfiʿīs' *uṣūl al-fiqh* positions. Al-Ashʿarī's subscription to the idea that all *mujtahids* are infallible is an example.[72] Considering that many of al-Ashʿarīs' students were Shāfiʿīs in law—including al-Qaffāl al-Shāshī, one of Ibn Surayj's leading students—this could have caused them conflicting loyalties.[73] There is however no evidence to suggest this in this early time-period. If anything, there are reports of students of Ibn Surayj changing their views through their friendly discussions with al-Ashʿarī.[74] This lack of tension should be attributed to the fact that al-Ashʿarī's pronouncements on questions of *uṣūl al-fiqh* were tangential. He was dedicated to the science of *kalām* (theology), not to law.[75] Even Juwaynī, who thinks that *uṣūl al-fiqh* is dependent upon theology, describes theology as a different discipline concerned with understanding God and His attributes, the nature of his creation, and the nature of prophethood.[76]

All of this seems to have changed with Abū Bakr al-Bāqillānī. Despite being a Mālikī jurist, Bāqillānī's text *al-Taqrīb wa al-Irshād* was a fully fleshed-out Ashʿarī theory of *uṣūl al-fiqh*. It addressed all the common questions of the discipline from the perspective of Ashʿarī theology. Henceforth, when 11th century jurists would speak of the Ashʿarī position in *usūl al-fiqh*,

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[72] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Lumaʿ fī Uṣūl al-Fiqh*, 1048. It is well to note that there were conflicting narrations about al-Ashʿarī's and al-Shāfiʿī's positions on these matters.

[73] Al-Subkī, *Ṭabaqāt al-Shāfiʾiyya al-Kubrā*, 3:200–222.

[74] Ibid., 3:186–87.

[75] Several texts of *uṣūl al-fiqh* at the time highlight the distance between the two disciplines. E.g., al-Juwaynī, *al-Talkhīs fī uṣūl al-fiqh*, 2003, 1:134. See Chapter 2 of the dissertation for more on this.

[76] Al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, 1:7–8.

Bāqillānī was primarily who they had in mind.[77] Bāqillānī's *usūl al-fiqh* created a situation of divided loyalties for the Shāfiʿīs: should they follow the opinions of their theological school or their legal school in *uṣūl al-fiqh*. For instance, should they follow the view of Ibn Surayj's circle that the imperative form—*ifʿal* (do)—has the primary linguistic purpose of imparting an obligation upon the addressee.[78] Or should they follow the Ashʿarī view of *tawaqquf* (agnosticism) which contended that without knowledge of the context, it is impossible to know how the word is being used.[79] For instance the statement in the Qur'an, "Act as you wish, God is well-aware of what you do" [41:40] is not a command but a threat (*tahdīd*).[80] This linguistic issue mattered for how jurists were to interpret commands in scripture when these commands were denuded of context.

There are suggestions that these tensions led Abū Ḥāmid al-Isfarāyīnī, the head of the Shāfiʿīs of Baghdad during Shirazī's young years as a scholar, to take a stand against Ashʿarī *uṣūl al-fiqh*. Makdisi long ago pointed to Ibn Taymiyya's report that al-Isfarāyinī distinguished and separated Shāfiʿī from Ashʿarī *uṣūl al-fiqh*.[81] Ibn Taymiyya's disdain of the Ashʿarīs would make him a dubious source if not for that fact that this distinction is borne out in Shīrāzī's own works of *uṣūl al-fiqh*. As Chaumont has noted, Shīrāzī almost always opposes and attempts to refute the position he attributes to the Ashʿarīs within his texts of *usūl al-fiqh*.[82] Shīrāzī himself allegedly pointed this fact out when a group of Ḥanbalī scholars accused him of spreading Ashʿarī thought: "These are my books on *uṣūl al-fiqh* where I profess doctrines opposed to those of the Ashʿarīs."[83] Despite distinguishing themselves from Ashʿarī *uṣūl al-fiqh*, the Shāfiʿīs of Baghdad did attempt to incorporate Ashʿarī thought when it did not contradict the *uṣūl al-fiqh* positions of their masters. For instance, their treatment of epistemology was incredibly indebted to Ashʿarīsm

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[77] This is the reason that Bāqillānī is oftentimes referred to simply as the *Qāḍī* in these works, e.g. al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh* 1:8-11. For more on Bāqillānī's importance to Ashʿarī *uṣūl al-fiqh*, See also Chaumont's "Encore Au Sujet de l'Ashʿarisme d'Abû Isḥâq Ash-Shîrâzî."

[78] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Lumaʿ fī Uṣūl al-Fiqh*, 206.

[79] Ibid.; al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, 1:67.

[80] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Lumaʿ fī Uṣūl al-Fiqh*, 191.

[81] Makdisi, "The Juridical Theology of Shâfiʿî."

[82] Chaumont, "Encore Au Sujet de l'Ashʿarisme d'Abû Isḥâq Ash-Shîrâzî."

[83] Makdisi, 29.

and especially to Bāqillānī. Shīrāzī does not in any way mask that he takes his definition of knowledge from Bāqillānī.[84] In fact, Shīrāzī mentions a story of his master Ṭabarī, which suggests he was a student of Bāqillānī's.[85] Certainly, he was open about Ṭabarī's learning from Abū Isḥāq al-Isfarāyīnī, one of the leading Shāfiʿī-Ashʿarī theorists of the time.[86] This suggests that the Shāfiʿīs of Baghdad did not reject Ashʿarī *uṣūl al-fiqh* but gave primacy to the ideas whose genealogy could be traced to Ibn Surayj and his disciples.

The situation in Khurasan was not entirely dissimilar. There too, the Shāfiʿīs attempted to merge Ashʿarī and Shāfiʿī *uṣūl al-fiqh*. This is evident in some of the positions reported of the two great Shāfiʿī scholars to spread Ashʿarism in the region, Abū Isḥāq al-Isfarāyinī (d. 406/1016) and Ibn Fūrak, both of whom settled in Nishapur.[87] For instance, Abū Isḥāq al-Isfarāyinī championed Bāqillānī's position that in the absence of a clear text, the identification of a correct *ratio legis* depends on identifying the benefit (*maṣlaḥa*) that it produces to the Muslim community. Like the Iraqis, these two Ashʿarīs also sometimes had to privilege one branch of *uṣūl al-fiqh* over the other. Thus Juwaynī notes that Abū Isḥāq al-Isfarāyinī was the only one among the followers of al-Ashʿarī to "support al-Shāfiʿī" (meaning his school's opinion) in maintaining that the imperative form's original and therefore primary meaning was to impart an obligation.[88] But what differentiated the Khurasanis from their Iraqi counterparts is that they never felt the need to disavow one branch or the other. Juwaynī felt free to draw on both branches according to what he thought was the strongest position. This freedom also gave him the room to abandon the dominant positions of both branches in favour of his own. Thus Subki notes of Juwaynī's *Burhān*: "Know that the Imām wrote this book in a strange way for he did not follow anyone," "the imam did not limit his positions to either al-Ashʿarī or al-Shāfiʿī."[89] In the end, the history of the development of *uṣūl al-fiqh* in Iraq and Khurasan meant that Juwaynī's and Shīrāzī's

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[84] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Lumaʿ fī Uṣūl al-Fiqh*, 146–47.

[85] Ibid., 173.

[86] Al-Fīrūzābādī al-Shīrāzī, *Ṭabaqāt al-Fuqahāʾ*, 126.

[87] Ibid., 3:167. Of al-Isfarāyīnī, Shīrāzī says: "From him the general body of *shuyūkh* of Khurasan took their *kalām* and their *uṣūl al-fiqh*."

[88] Al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, 1:68."*wa-lam yusāʿid al-Shāfiʿī minhum ghayr al-ustadh abī Isḥāq*."

[89] Al-Subkī, *Ṭabaqāt al-Shāfiʿiyya al-Kubrā*, 5:192. *"iʿlam an hadhā al-kitāb waḍaʿahu al-imām fī uṣūl al-fiqh, ʿalā uslūb gharīb, lam yaqtadi fīhi bi-aḥad" and "waʾl-imām lā yataqayyid [lā] biʾl-ashʿarī wa-lā biʾl-Shāfiʿī."*

methodological positions differed in significant ways. One of those differences is illustrated in disagreements over coequality as a condition for a correct *'illa*.

A deep chasm separated Juwaynī and Shirazī's views on facing the *qibla.* This chasm was the product of different histories of substantive law and legal methodology within the two regions that shaped them. Each jurist relied on different arguments and different methodologies to assess the case at hand. Their disputation raises the question of whether or not the Shāfi'ī school could remain united considering the trajectory of its two main branches. Was the school destined to become two distinct schools? What precluded such a split was that the two branches shared a sufficient commitment to common past authorities and doctrines to see each other as seeking to fulfill the legal project which al-Shāfi'ī began and which his early companions continued. Shortly after the purported emergence of the two branches of Shāfi'ism, al-Sinjī, the student of al-Qaffāl al-Saghīr, reportedly attempted to merge the ideas of the Iraqis and the Khurasanis.[90] Juwaynī himself, while deferring mostly to his Khurasani branch, and particularly to his father whom he refers to simply as my *shaykh*, does at times include the positions of the Iraqis. The Iraqis appear to have been slower in taking an interest in the Khurasanis. This is likely the product of their sense of historic pre-eminence as a centre of Shāfi'ī scholarship. In due time, they too would produce books countenancing the positions of both branches.[91]

However, more needs to be said, if only because neither Shīrāzī nor Juwaynī, despite being the respective masters of their regional school of law, ever express the sense that their school is threatened by its lack of doctrinal or methodological consensus. There is no sense of a need to salvage a lost unity. In fact, as the next section will show, they were in no rush to determine what the authoritative doctrines of the school should be. I will suggest this should be understood by reference to the jurists' culture of debate, which made them see the sharing of different opinions as enriching each other's thought. But first, let's see how the disputation ends.

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[90] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 4:347–48.

[91] Al-Dīb, "*Muqaddimāt Nihāyat al-Maṭlab*," 133.

5.1.6 Closing the Disputation: The Importance of Time or Direction?

Shīrāzī and Juwaynī spend their last exchanges debating whether time or direction is a more important condition of prayer. To recall, one of Juwaynī's claims was that while a prayer at the wrong time still counts as an optional prayer, praying in the wrong direction invalidates the prayer completely. This allows him to claim the greater importance of direction over time. Shīrāzī responds by stating that this is simply because optional prayers can be prayed at any time: thus the worshipper prayed during a correct time, even if not during the correct time of the obligatory prayer he had intended to perform. In contrast, there is no correct different direction for optional prayers that would set them apart from obligatory prayers. This difference between the time and the direction of prayer therefore has little to do with their relative importance. Juwaynī does not press him on this further.

Shīrāzī also responds to Juwaynī's argument that combining prayers parallels the abandonment of direction in travel and extreme fear. He states that combining prayers is simply the traditional form of ritual (*sunan al-nusuk*) of prayer in travel.[92] Shīrāzī compares it to the relative shortness of the dawn prayer in comparison to the four other obligatory daily prayers. Its brevity is not indicative of its importance, or lack thereof. It is arbitrary and Muslims follow it simply because this was how the Qur'an and Muḥammad ordered them to pray (*'alā wajh al-'ibāda*). Juwaynī remains unconvinced of this claim. He states that: "If this was the reason that these prayers were joined, then delaying the afternoon prayer to its normal time during travel would involve the invalid performance of an act of worship."[93] The Shāfi'īs considered that a person in travel was not *obligated* to join his prayers. He could choose to pray the *'aṣr* prayer at its regular non-travel time rather than to pray it at the time of the noon prayer (*ẓuhr*). Juwaynī astutely points out that if joining the prayers was based on the ritualized form that the Prophet initiated, then Muslims would be obliged to follow it. The fact that it is at their discretion indicates that joining the prayers is a dispensation because of the hardships of travel. While Shīrāzī provides a rebuttal, his claim that combining prayers is not a dispensation appears to be a weak one. It even catches Subkī off guard, who adds at the end of the disputation: "the combining of prayers during travel

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[92] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 5:212.

[93] Ibid., 5:213. "*law kāna li-hadhā al-ma'nā la-wajaba idhā akhkhara al-'aṣr ilā waqtihā a-lā yuṣaḥḥ, li-annahu fi'l al-'ibāda 'alā ghayr wajhihā, fa-dalla 'alā annahu 'alā wajh al-takhfīf li-ḥaqq al-'udhr.* "

reflects the lesser importance of time [in this situation]; and this raises no controversy."[94] In fact, Subkī was so perplexed by the argument that he attempted to suggest that Shīrāzī and Juwaynī could not possibly have been speaking about the standard joining of prayers in travel. They must have been referencing a more particular travel prayer, even though Subkī was at loss as to which one.

Juwaynī's last objections turn the gaze to the abandonment of the *qibla* in times of fear and travel. He seeks to show that the causes of the dispensation of facing the *qibla* in these cases is absent in the case of the mistaken *qibla*. He explains that the cause of their dispensation is hardship (*mashaqqa*) and inability (*'ajz*). Juwaynī notes that if an army were forced to pray facing the *qibla* during war, they would be "exposed to defeat and death."[95] Likewise praying during travels would impede one from travelling. However, there is no hardship or inability in the case of performing one's prayer again after having been mistaken. Juwaynī notes that confusion (*ishtibāh*) is not taken as a legitimate excuse to dispense with a requirement of the law. He states: "Do you not see that a woman bleeding outside of her menstrual period (*al-mustaḥāḍa*) and someone suffering incontinence of the bladder can pray [because of hardship (*'ajz*) in holding them to the same standards of ritual purity as others], whereas someone who thinks they are in a state of purity has not [by virture of mere confusion] thereby freed themselves from the requirement of praying in a state of ritual purity."[96] Shīrāzī concludes by taking aim at Juwaynī's suggestion that keeping the time of prayer during war is not a hardship: "If hardship was the reason for abandoning the *qibla* during fighting, then time would also be abandoned such that one could postpone until they are in a state of safety (*ḥāl al-kamāl*) and they can focus on fighting."[97] This last move allows Shīrāzī to reassert that direction is indeed less important than time and therefore even confusion (*ishtibāh*) can be a valid cause for abandoning it.

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[94] Ibid., 5:214. "*ḍāk 'alā sabīl al-takhfīf bi-lā ishkāl."*

[95] Ibid., 5:213. "*law alzamnāhum istiqbāl al-qibla addā ilā hazīmatihim aw-qatlihim.*"

[96] Ibid.. "*A-lā tarā an al-mustaḥāḍa wa-man bihi salas al-būl yuṣalliyān ma'a qiyām al-ḥadath, wa-law ẓanna annahu mutaṭahhir wa-ṣallā lam yasquṭ al-farḍ.*"

[97] Ibid. "*li-annahu kāna yajib li-hadha al-'ajz an yutrak al-waqt, fa-tu'akhkhar al-ṣalāt fī shiddat al-khawf li-yu'addiyahā 'alā ḥāl al-kamāl wa-yatawwafar 'alā al-qitāl.*"

5.1.7 Analysis: Unity through Debate

If the disputation sought to build doctrinal consensus, this one appears to have been a failure. Juwaynī and Shīrāzī's encounter could only be seen as a draw. Neither provided a compelling reason to the other for the abandonment of their methodological position on the (ir)relevance of comparability to a *qiyās al-'illa*. Neither convincingly showed the relative importance of the condition of time or direction over the other. Both Shīrāzī's *Muhadhdhab* and Juwaynī's *Nihāya* expresses the authors' uncertainty about which doctrine should become that of the school. Each text provides arguments for the two sides of the position. Shīrāzī supports repetition by invoking an analogy with a judge: being certain of one's mistake in determining the *qibla* was "just as the judge who gives a ruling then finds an unambiguous text (*naṣṣ*)."[98] The judge is bound to follow the unambiguous text because he now definitively knows God's law. On the other hand, Shīrāzī supported non-repetition by highlighting the permissibility of praying in that direction after making an *ijtihād*: "the case in essence resembles that in which no certainty of mistake is made."[99] Juwaynī for his part identified the question with that of juristic infallibility. He deemed that the question hinged on whether or not the shari'a demanded of the *mujtahid* that he "be correct in finding the object of his search" or whether "he is only charged with making the effort" in coming up with his ruling.[100] He expressed that the answer to this question would determine how any and all conditions of prayer should be treated. The question of the *qibla* in Shīrāzī and Juwaynī's estimation remained indeterminate.

Much of modern scholarship has seen indeterminacy as a "problem." Fachrizal Halim speaks of the accumulation of Shāfi'ī doctrine saying: "All these four layers of doctrine extending from al-Shāfi'īs's personal teaching, his immediate students, the *aṣhāb al-wujuh* [the early followers of the school], and the jurists of the *muta'akhkhirīn* [its later followers], contributed to the problem

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[98] Al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, 1:229. "*ka'l-ḥākim idhā ḥakama thumma wajada al-naṣṣ bi-khilāfihi*."

[99] Ibid. "*fa-ashbaha idhā lam yatayaqqan al-khaṭa'*".

[100] Al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, 2:99. *"fa-inna ḥaqīqatahā ta'ūl ilā annā—fī qawl—nukallif iṣābat al-maṭlūb, wa-fī qawl nukallif badhl al-majhūd fī al-ijtihād."*

of indeterminacy in the Shāfi'ī school."[101] Halim associates the problem of indeterminacy with the practical burden of "re-deriving the law from the original sources or scrutinizing the entire corpus of a school's legal solutions."[102] Nor is Halim alone in his assessments. Others speak of the problem of indeterminacy as making the legal system inefficient or unpredictable to litigants in court. Hallaq, for his part, implies that the unity of the *madhhab* depended on its members' subscription to a common doctrine.[103] In fact, he considers that the *madhhab* emerged from a process of eliminating the diversity of opinions in the law present in the multiple personal schools of the 10th century.

To view plurality of opinions in the *madhhab* as something to be overcome ignores how 11th century Shāfi'ī jurists themselves perceived indeterminacy. For Shīrāzī, the necessity of jurists to re-examine the sources of the law was not a problem but a necessary feature of the Islamic legal system. Each *mujtahid* was duty-bound to examine the proofs of the law in order to be convinced of the position he adopted. This was because "he has in him the same ability of *ijtihād* as his companion: since he has the ability to gain knowledge of the proper ruling, it is not permissible for him to follow someone else."[104] This reflects how the individual jurist's attempts to continue the process of legal reasoning that al-Shāfi'ī and his followers initiated could only proceed when he himself became personally convinced of that the proof speaking for a position was the strongest. Just as Al-Shāfi'ī could defer settling on an issue, so too could the contemporary jurist. Shīrāzī writes: "It is permissible for the *mujtahid* to derive two statements on an issue by saying 'the issue can be interpreted according to these two statements.'"[105] Moreover, Shīrāzī does not see this deferral as a sign of intellectual deficiency: "As for the answer to those who say 'this shows deficiency of knowledge,' the truth is otherwise; rather it indicates his knowledgeable disposition, his strong understanding, and his natural ability to grasp matters because the case

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[101] Halim, *Legal Authority in Premodern Islam*, 83.

[102] Ibid., 80.

[103] Hallaq, *The Origins and Evolution of Islamic Law*, 156.

[104] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 1016. "*Anna ma'ahu min ālat al-ijtihād mithl mā ma'a ṣāḥibihi. Wa-in kāna ma'ahu āla yatawaṣṣal bihā ilā ma'rifat al-ḥukm lā yajūz lahu taqlīduhu ghayrahu*."

[105] Ibid., 1075. "*Yajūz li'l-mujtahid takhrīj al-mas'ala 'alā qawlayn wa-dhalika an yaqūla: hadhihi al-mas'ala taḥtamil hadhayn al-qawlayn li-yubayyina bihi anna mā siwāhuma bāṭil*."

can be interpreted in multiple ways and yet he has narrowed them down to two."[106] Shīrāzī notes that it would have been easy for a jurist like al-Shāfi'ī to come up with one ruling if he was only aware of a single proof and argument on the matter. Shīrāzī then sums up his view by presenting a story about Ibn Surayj: "A man came to ibn Surayj and said 'I used to rush to give an answer when I was asked about a legal question, but now I need to ponder the issue deeply', to which Abū al-'Abbās [ibn Surayj] replied 'Only now have you become a true jurist [*faqīh*]', by which he meant that now he understands the multiplicity of proofs of the law."[107] This suggests that Shīrāzī did not perceive the multiplicity of opinions in the Shāfi'ī school as a sign of the legal system's deficiency, but as a sign of its strength. There was no rush to end this indeterminacy because each set of arguments left the school in a better position to judge the issue at hand.

The disputation was one of the means to lay bare the relevant considerations of an indeterminate case. This is apparent in Juwaynī's and Shīrāzī's disputation. Juwaynī's analogy between time and direction offered Shīrāzī a new and less familiar way to treat the problem. He showed Shīrāzī that the analogy might even fit within his framework of comparability since there are instances in the law where time is abandoned to facilitate the religious life of the worshipper. He also showed him that perhaps the relative importance of the direction of the prayer is irrelevant in a case like a mistaken *ijtihād* because it incurs no hardship on the worshipper to repeat his prayer. Even if Shīrāzī felt his original treatment of the case within the *Muhadhdhab* was the most satisfactory way of dealing with the question, the disputation allowed him to see why. In laying bare the strongest proof for an indeterminate legal matter, each jurist left to future generations the means to further investigate the matter. They were like links in this chain which began with al-Shāfi'ī and continued with future jurists across the regions of the school. As Juwaynī would put it, speaking of their relationship to al-Shāfi'ī: "Though the predecessor has the right to establish and found [his craft], the one who comes later has the right to complete and

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[106] Ibid., 1076. "*Wa-ammā al-jawāb 'an qawlihim: 'inna hādhā yadullu 'alā qillat al-'ilm,' fa'l-amr bi-khilāf mā dhakartum bal yadullu 'alā ghazārat al-'ilm wa-quwwat al-fahm wa-fiqh al-nafs li-anna al-hāditha taḥtamil wujūhan 'idda min al-iḥtimāl fa-yasquṭ al-kull illā wajhayn li-yubayyina anna al-ḥaqq lā yakhruj minhumā.*"

[107] Ibid., 1079. "*qāla rajul li-ibn 'Abbās [ibn Surayj]: kuntu idhā su'iltu 'an mas'ala asra'tu fī al-jawāb wa'l-ān aḥtāj (ilā an) ufakkira, fa-qāla: al-āna faqihta ya'nī kathurat 'alayka al-uṣūl.*'"

perfect it."[108] If the Shāfi'ī school could survive as a united school despite its regional variations, it is because of this acceptance of a diversity of views.

5.2 Conclusion: Rethinking the School of Law

In the end, the disputation paradoxically both helped to construct school doctrine and to produce difference of opinion within it. Within a given region, the disputation allowed jurists of the *madhhab* to examine and test out the best arguments for different positions collectively. The head of the school and the other leading teachers would then disseminate what they thought was the strongest position among their students. The practice of disputation also mitigated the possibly divisive effects that regional variations could have on the unity of the school. It did so by producing a culture of debate that recognized the benefits of a plurality of views within the *madhhab* and tolerated indeterminacy.

The jurists' acceptance of legal pluralism (that is to say, a system in which more than one law is admissible) and indeterminacy allows us to fine-tune our understanding of what held the school of law together. No doubt, Makdisi and Melchert were right to associate the school of law with institutions of learning.[109] The hierarchies of learning structured school authority, regulated state appointments, and led to greater uniformity in law. This is evident in the way in which the Shāfi'īs of Baghdad took their doctrines mainly from the *ra'īs* and other leading teachers of their school. However, this structure of authority was highly local and therefore cannot account for why the Shāfi'īs saw their school as transcending local borders. Daphna Ephrat's contention that schools of law mostly rallied around theology is also only partly true.[110] Theology certainly divided the Shāfi'īs of Baghdad from their Ḥanbalī counterparts, but it is clear from Shīrāzī's *Ṭabaqāt* that membership to the Shāfi'ī school depended primarily upon a jurist's relationship to

[108] Al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, 1:177. "*inna al-sābiq wa-in kāna lahu ḥaqq al-waḍ', wa'l-ta'sīs, wa'l-ta'ṣīl, fa-li'l-muta'akhkhir al-nāqid, ḥaqq al-tatmīm wa'l-takmīl*."

[109] Makdisi, *The Rise of Colleges*; Melchert, *The Formation of the Sunni Schools of Law*.

[110] Ephrat, *A Learned Society in a Period of Transition*, 86–87.

substantive law, and secondarily to *uṣūl al-fiqh*.[111] Hallaq's view that the school of law amounted to a subscription to common doctrine is an equally important insight. Common doctrine, alongside methodological rules, is what separated the Shāfi'īs from other schools like the Ḥanafīs. But as we have seen, this cannot explain why jurists felt comfortable maintaining indeterminacy in their doctrines.

El Shamsy has more recently characterized the early Shāfi'ī school as an interpretive community relying on a shared discourse. Their discourse was drawn from al-Shāfi'ī's statements and from a collection of secondary literature. These Shāfi'īs saw their role as a continuation of al-Shāfi'ī's attempts at reasoning on difficult issues of law. The concept of interpretive community is useful because it suggests that disagreement was just as much a part of the community as agreement. El Shamsy employs this concept in relation mostly to al-Shāfi'ī's early (9th century) successors. The analysis in this chapter suggests that it can just as accurately be applied to the Shāfi'īs of the 11th century. Juwaynī's and Shīrāzī's disputation on the *qibla* highlights the extent to which their legal system could accept, encourage, and sustain differences of opinion in the process of fulfilling what al-Shāfi'ī had begun. That an individual *mujtahid* needed to be convinced that he had thoroughly examined the proofs bearing on a case before pronouncing himself firmly on it, all reflects the need to confront and engage with the opinions of other school members. The bonds of the school of law depended on debate as much as adherence to common institutions of learning, common doctrine, or common theology.

[111] Al-Fīrūzābādī al-Shīrāzī, *Ṭabaqāt al-Fuqahā'*. The lesser importance of *uṣūl al-fiqh* is manifest in the possibility that Shāfi'ī jurists like Juwaynī follow Ash'arī legal theorists like al-Bāqillānī, despite their belonging to another school of law.

Conclusion

In 1083, the Niẓāmiyya of Baghdad closed for a year to mourn the passing of Shaykh Abū Isḥāq al-Shīrāzī. Hailing from a small town in Fars, Shīrāzī emerged as one of the most respected and famous Shāfi'ī jurists of his century. His students had multiplied and spread throughout the lands of the Muslim world and he took great joy at the end of his life in discovering that there was not a town in Khurasan that did not have a student of his serving as a judge, *muftī*, or congregational prayer preacher (*khatīb*).[1] At the time, Shīrāzī's reputation rested largely on his debating skills; Subkī is emphatic that no one equalled him in this regard.[2] However, posterity would not remember Shīrāzī for his masterful disputations; rather, his later reputation was based upon his literary works. The *Sharḥ al-Luma'* and the *Muhadhdhab* would continue to be references for the Shāfi'ī school.

This contrast between the differing reasons for Shīrāzī's fame in varied periods of Islamic history highlights the ephemeral nature of disputations in comparison to books. Bājī's description of what he witnessed in Baghdad suggests that disputations were transmitted orally and rarely written down. It is this ephemeral nature of the disputation that makes it so difficult for the historian to study the practice and evaluate its impact on Muslim society and the development of the legal tradition. I have nonetheless sought to analyze the disputation through the few traces of it that remain in various writings. These traces include Subkī's record of Shīrāzī's disputations as well as jurists own theorizations around the purpose and conventions of the disputation in books of *jadal*.

From these sources, I have sought to present a picture of the performative nature of the disputation. I have dwelt on the 11th century jurists' description of their practice as an act of religious devotion that necessitated correct intention and was to be approached with gravitas.[3] This practice of debating for God involved a pedagogical training of bodily sensibilities and

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[1] Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā,* 4: 216.

[2] Al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 5:123

[3] E.g. Al-Baghdādī, *Kitāb al-Faqīh wa'l-Mutafaqqih*, 2:51.

aptitudes. The jurists recommended particular religious invocations, sought to regulate bodily comportment, and attempted to regulate the disputation's setting so as to safeguard and distinguish it from the frivolity of debates at the ruler's court. The product was the shaping of distinctly juristic critical subject.

Shīrāzī in many ways exemplified this pious critical subject. He craved the search for God's law. He believed that these difficult legal proofs to assess the law were given to him and his community by God in his Infinite Wisdom;[4] to be sure, challenges of this order would be rewarded by God accordingly. Shīrāzī was thus known for his long hours of study and his dedication to reviewing a thousand times over all the possible analogical arguments for a legal case. The effects of his training were palpable: transcripts of his disputation show a debating virtuoso capable of invoking fine details of seemingly disparate legal cases like enslavement and *zakāt* to make his point. Moreover, he was able to remember meticulously the details of an opponent's statement in order to point out an impressive number of potential flaws in its reasoning. The effect was that the disputation branched out like a tree; for example, Shīrāzī's single proof for the convert's ongoing liability to pay the poll-tax after conversion led to three objections which elicited, in turn, seven refutations of these objections, and so on and so forth as the disputation continued.

The pedagogical effects of the disputation were discernible in another way as well. Shīrāzī's engagement in critical debates led him to appreciate the indeterminacy of the law. The practice of disputation forced him to put in question inherited school doctrine—from both an internal and external standpoint. The practice showed him the ways in which his predecessors views—about coerced marriage or the humiliation of *dhimmīs*—were far from irrefutable. Shīrāzī would comment that the many proofs with which he had to grapple had diminished his certainty in his own legal positions.[5] His acceptance of the uncertainty of the law was reinforced by the jurists' own theorizations on the purpose of their face-to-face critical debates. The jurists agreed that the process of *ijtihād* greatly benefitted both from the testing of one's proofs and listening to the proofs of an opponent. In coming to view the nature of law as intricately subtle, the jurists

[4] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh,* 1071.

[5] Al-Fīrūzabādī al-Shīrāzī, *Sharḥ al-Luma' fī Uṣūl al-Fiqh*, 148.

considered legal debate as a process that remained continually ongoing, and fundamentally interminable. Ideas reviewed generations ago could be improved upon, and thus it was wise, and in some cases, necessary to continue to engage with one's fellow jurists and interlocutors. This community was also committed to ensuring that power should not constrain the rationality of the debate. They advocated that jurists only debate in places like mosques where there was no risk that one of the two jurists be favoured by a ruler and they condemned the interruption or intimidation of any debater.

The same legal colleges and pedagogical practices that shaped a juristic community of debate also determined the limits of that debate. Jurists justified the exclusivity of their debate by invoking their expertise in the methods of legal reasoning. They contended that lay Muslims did not have the means to reason on the law. The jurists saw themselves as helping Muslims at large to organize and order their collective lives. The consequence is that they arrogated to themselves the general role of spokesperson and guide for the members of this community. Their debates were oftentimes about these lay-Muslims, namely, figures such as the wife, the husband, the daughter, the slave, the *umm al-walad,* the convert, or even non-Muslims in the empire, namely, the *dhimmī*. However, the limits of the debate participants also thus limited the range of views expressed.

My reconstruction of the performance of the disputation also serves to examine the nature and evolution of argumentation in the classical schools of law. In particular, the disputation provides the historian with the means to attend to what Asad calls "the embodied nature of argumentation" in the 11th century Islamic legal tradition. Asad departs from MacIntyre in highlighting that the development of a tradition does not always or only depend upon argument. A tradition also depends on the subjectivites of those thinking and arguing. Asad notes that thought itself is never divorceable from emotions, sensibilities, or acquired aptitudes: "argument is itself interwoven with the body in its entirety, it always invokes historical bodies, bodies placed within particular traditions, with their potentialities of feeling, of receptivity, and of suspicion. So much of this is part of everybody's experience of what argument is about."[6]

[6] Asad, "Appendix: The Trouble of Thinking," 288.

The embodied nature of debate helps contextualize the production of legal literature in the classical period. Books of 11th century substantive law be understood as a summary form of the different proofs that jurists tested out in disputations and found to have merit. As Makdisi notes, they reflect the *sic-et-non* method that retains the arguments of one's opponents. [7] Even the most detailed of these books like Māwardī's *Hawī* or Juwaynī's *Nihāya* do not fully convey the complexity of the arguments jurists imbibed, posited, defended, and critiqued. Similarly, books of *uṣūl al-fiqh* only give a superficial sense of how a jurist might prove a legal position. In this way, knowledge was embodied in perhaps a most fundamental sense: it lived in the people who had learned it. Thus, it is unsurprising that jurists often reflected on the following Prophetic *ḥadīth*: "God does not remove knowledge by taking it directly away from the people; but rather, he removes through with the death of the scholars."[8]

[7] Makdisi, "The Scholastic Method in Medieval Education," 650.

[8] For more on the discussions surrounding this *ḥadīth*, see Atif Ahmad Atif's *The Fatigue of the Shari'a*, 81.

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Appendix A: Translation of Shīrāzī's Four Disputations

Diputation 1: Shīrāzī vs. Dāmaghānī on the Convert's Poll Tax (*Jizya*)

In Baghdad (circa 1038-1041)

Abū al-Walīd al-Bājī, the Mālikī (may God have mercy on him), who attended and witnessed this disputation said: The Custom in Baghdad was that whoever was afflicted by a death of a cherished one would spend days in his neighbourhood mosque, gathering with his neighbours and brethren in faith. After days had passed, and they had offered their condolences, they invited him to return to his normal life and routine. The days he spent in the mosque receiving the condolences of his brethren in faith and his neighbours would typically only be interrupted by the recitation of the Qur'an and by juristic disputations on a legal topic. Thus it was on this occasion that the wife of the Judge Abū Ṭayyib al-Ṭabarī had died. He was the shaykh of the jurists at that time in Baghdad and the greatest of them and therefore the people filled his gathering of condolences in throngs such that practically everyone belonging to the community of knowledge was in attendance.

Among those that attended the gathering was the Judge Abū 'Abd Allāh al-Ṣaymarī who was the leader of the Ḥanafīs and their shaykh and the only one who equaled Abū Ṭayyib in knowledge, seniority, and rank. A group among the students requested from the two judges that they speak on an issue of *fiqh* that the gathering could listen to and transmit. We told them that most of those in the assembly sought to obtain blessings from them and to learn from them. It had not been possible for those in attendance to hear a disputation between the two for several years because they had delegated the responsibility of engaging in disputations to their students. We requested them to charitably grace the assembly through their words on a legal topic, for this would beautify those attending by permitting them to transmit, memorize, and narrate what they had heard. Now as for the Judge Abū Tayyib, he obliged our wish. But the Judge Abū 'Abd Allāh declined, stating: "Whoever has a student like Abū 'Abd Allāh," referring here to his student al-Dāmaghānī, "he should not advance to speak. He [Dāmaghānī] is present here.

Whoever wishes to debate him, let him do so." To this the Qādī Abū Ṭayyib answered: "This is Abū Isḥāq among my students, he represents me."

The matter being decided, a young man from the people of Kāzarūn called Abū al-Wazīr was appointed to commence the disputation. Thus he asked the Shaykh Abū Ishāq al-Shīrāzī: "Does difficulty in providing financial maintenance for one's wife entitle her to the option (*khiyār*) of ending her marriage?"

Shīrāzī responded affirming that it does. This position is also that of the jurist Mālik, in contrast to Abū Hanīfa, who says that it does not grant her *khiyār*.

The questioner then asked Shīrāzī for proof for his position. So the Shaykh Abū Ishāq said: "The proof for my position is that marriage is a type of ownership which gives rise to a right of maintenance. Thus difficulty in payment must cause the cancellation [of this ownership] by analogy to the case of the ownership of slaves."

The questioner provided several objections but Shīrāzī did away with them. The Shaykh Abū ʻAbd Allāh al-Dāmaghānī then took over from him (the people of disputation call someone taking over from another in the disputation a *mudhannib*).

Dāmaghānī said:

(First Round of Objections)

(Objection 1)

"Nothing prevents that two cases of ownership that both give rise to a duty of maintenance should be terminated by different causes. Do you not see how the marriage and sales contracts both give rise to a right of ownership and that only in one of the cases—that of sales—does the failure to transfer [the object of ownership] because of its destruction or death (fawāt taslīm bi-al-halāk) invalidate the contract.

In contrast, the death of the wife before her transfer to her husband's care does not invalidate their marriage contract. This is the reason that the legal rules applicable to widowers apply to her husband after her death. The same principle can be applied to the analogy you have posited: both cases equally give rise to a right of spousal maintenance and only in one of these cases does failure to provide maintenance spell the end of ownership.

(Second Objection)

Moreover, it is relevant to the case under review in this disputation that it is not possible for the husband to transfer ownership of his wife in the way that the master can in the case of his slave. The fact that a wife cannot be transferred prevents that the difficulty in providing for her maintenance should enable the end of her ownership; this conclusion can be inferred by analogy to the case of the *umm al-walad*."

(First Round of Rejoinders)

(Rejoinder to First Objection)

The Shaykh Abū Isḥāq provided two answers to the first objection:

"First, I am not bound to the point you are trying to make in comparing the marriage and sales contracts. I did not say that two types of ownership similar in one respect are necessarily subject to all of the same rulings. Various types of ownership and contracts do indeed differ when it comes to their legal rulings and the obligations they impart. Rather I analogized the two cases of

the ownership of the wife and the slave specifically because they both give rise to a right maintenance. Since we see that the inability to pay this maintenance in the case of the slave necessitates the termination of his ownership, the same must apply to the other case.

Second, we can explain the difference between rules governing the termination of the marriage and sales contracts by pointing out that the purpose of marriage is the union and kinship between the spouses until the death of one of them. Death marks the completion of this union and therefore the contract has reached its end. Marriage is like rent in this respect: it makes no sense to call the completion of a contract its invalidation. We do not, for instance, say that the rulings applicable to a rental contract are invalidated by the end and completion of a rental period.[1]

The same cannot be said of sales. The purpose of a sale is not completed if the object in question is destroyed before being handed over because its purpose is the buyer's use of the object in the ways that ownership permits, i.e. acquisition and/or utilizing the object. It is for this reason that the [contract] is invalidated if the object of the sale is destroyed before being handed over.

In contrast, in our two cases, the obligation of providing maintenance for the wife and the slave serves the same purpose such that the inability of providing maintenance should have the same effect in terminating both types of ownership.

(Rejoinder to the 2nd Objection)

As for your counter-argument that the *umm al-walad* serves as a better analogy than the slave:

[1] Al-Subkī, *Tabaqāt Al-Shāfi'iyya Al-Kubra*, 4:247.

Your claim that the case of the wife is different from the slave's because the slave's ownership is terminated through his transfer to another fails to recognize that the same can also be said of the wife. She too can have her ownership transferred to another by means of her divorce. In fact, it is the possibility of transferability that legitimates the wife's *khiyār* if her husband has difficulty engaging in sexual intercourse: Don't you see how we separate them when the husband is impotent? She therefore does not differ from the slave in the way you suggest and the termination of her ownership is as necessary as his.

Moreover, I do not concede your claim that a master's ownership of the *umm al-walad* is not terminated when he cannot provide for her. This is because some of our companions have indeed said that she must be manumitted. But even if we did concede this claim to you, then the reason for which the *umm al-walad*'s ownership continues is particular to her case and does not apply to the wife. The reason is that her manumission prevents her from obtaining the same maintenance rights that her master owed her. In contrast, the wife's ability to remarry allows her to obtain the rights her previous husband owed her. The same can be said of the laboring slave in my analogy, i.e., his transfer to another master ensures he obtains his maintenance rights."

(2nd Round of Objections)

The Shaykh Abū 'Abd Allāh al-Dāmaghānī said in relation to his first objection, i.e., that two cases giving rise to the same right might be terminated by different causes:

"If you maintain that that we must treat alike the cases of the wife and the slave when determining what terminates ownership because both give rise to maintenance rights, then you must also accept that we consider alike the causes of the termination of the sales and marriage contracts because both contracts give rise to ownership rights. This would force you to conclude that failure to hand over the object of ownership invalidates both contracts—a position you do not maintain.

As for your statement: “the purpose of marriage is the union of the spouses.” This is not true. The purpose of marriage is intercourse because a spouse marries for sexual pleasure and not a union devoid of sexual pleasure.

But if, for the sake of argument, I concede to you that the union of the spouses without sexual pleasure is the purpose of marriage, then I could respond that the purpose of the marriage and sales contracts is not that different. This is because I could say that the purpose of sales is ownership without use. The proof is that a person’s purchase of his father who is a slave is considered legally valid despite the law’s prescription that he manumit his father and its prohibition that he take him and use him as a slave. Thus I could say that the purpose of both the marriage and sales contracts is realizable despite the failure to hand over an object of ownership.

Conversely, I could instead say that the differences between the wife’s maintenance and that of the slave’s also bars the comparison between your two cases. Don’t you see how any case of failure to provide the maintenance owed to the slave ends the master’s ownership but that there are some forms of maintenance owed to a wife that you yourself agree do not terminate the husband’s ownership if he withholds them from her. These forms of maintenance include a wife’s right to her past maintenance and her right to a servant. The two cases in your analogy are therefore at odds with each other and should not be compared in our attempts to derive rulings.

(Second Objection)

As for my second objection, i.e., the counter-argument that the *umm al-walad* is a better analogy to the wife: it is correct.

Your statement that divorce is similar to the selling of a slave in that both involve transferring ownership to another is not correct because there is no compensation given to the husband in divorce as there is for the master who sells his slave and receives money for it. Just as no master

is forced to manumit his slave because of his inability to provide maintenance, so too should no husband be forced to divorce or separate from his wife because of his inability to provide for her.

Your comparison between the husband's failure to provide maintenance and his inability to have sex is also incorrect because the wife cannot have sex through any other lawful means than finding another husband. This makes sex different than maintenance because she can obtain maintenance through a loan and through her own labour, among other means. From this income she can spend on herself.

As for what you said concerning the view of some that the master must free the *umm al-walad* if he does not provide for her: I do not concede this position to you because there is consensus that the master is not forced to manumit her.

Finally, your claim that an umm al-walad cannot obtain the right that was owed to her through her manumission in the way a wife can through her divorce is incorrect. This is because there is no guarantee that after a wife goes through her waiting period, her second husband won't be just as poor as the first. Thus leaving her with her first husband is better."

(3rd Round of defense)

The Shaykh Abū Isḥāq said in relation to the first objection:

(Rejoinder to First Objection)

"I have analogized the two cases of ownership based on the fact that both give rise to a right of maintenance and I have claimed that this commonality between them means that we must consider the causes of their termination to be the same. It follows that if inability to provide

maintenance in one case leads to a termination of ownership then the same must be true of the other case.

However, my analogy is different than the comparison you have posited between sales and marriage. For though you are right that marriage and sales contracts both give rise to rights of ownership, the law nonetheless deals with transfer of ownership differently in each case. A sales contract gives rise to an immediate right of the buyer to the object in question and it is for this reason that a contract selling a fugitive slave is invalid. In contrast, the marriage contract does not give the husband immediate right to the wife. The two contracts' differences in the immediacy of the obligation of transferring the object of the contract means that they will differ in their consideration of the validity of the contract if this transfer has not occurred.[2] No such distinction exists in my analogy because both give rise to the same obligation of maintenance.

And your statement that a man seeks sexual pleasure through marriage is right but this does not preclude that he should seek other ends as well. The same cannot be said of sales because all of the potential purposes of such a contract have been vitiated by failure of handing over the object. Thus it stands that the two cases of marriage and sales are indeed different.

Moreover, your claim that the sales contract's purpose is ownership without use invokes the very atypical and rare example of the purchase of one's enslaved father and it is not permissible to invalidate a general principle based on atypical and rare cases. The purchase of one's father is unique because one's purpose in buying his father is to manumit him. This is why the Prophet, peace and blessings be upon him, said: "The son cannot repay his father except if he finds him a slave, purchases him, and frees him." And it is not the case for sales in general because ownership on its own does not fulfill the purpose of the sales.

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[2] The marriage of a a minor is a situation in which *taslīm* could be delayed until minor reaches an age during which consummation could occur.

Finally, you have claimed that the slave and the wife should not be compared because there are cases of maintenance owed to the wife that do not thereby permit the termination of her ownership. This claim is incorrect: first, providing a wife with a servant is a pious deed and not an obligation. Second, the obligation to pay a wife her past maintenance does not grant her the right of *khiyār* because her husband's withholding this amount does not cause her harm in the way that his failure to provide her with her present maintenance does. Thus it is her present maintenance that should be compared to the maintenance of the slave.

(Rejoinder to 2nd Objection):

As for the counter-argument, i.e., concerning the *umm al-walad*:

You have argued that husband need not divorce his wife because she cannot be sold in the way that the slave can. In reality, the only reason the master is not forced to manumit his slave is that he can sell him. In contrast, the fact that the wife cannot be sold means that the end of her ownership must happen through divorce. This same principle applies to what I have said about the umm al-walad, namely that some of our compatriots have maintained that she must be freed when lacking maintenance precisely because she cannot be sold. This is the preferred view of al-Shaykh Abī Ya'qūb.

My claim about the wife's right of *khiyār* if her husband is unable to have sex with her is correct. Let me elaborate why: That which befalls a woman from lack of maintenance is greater in harm than lack of sex because a woman can be patient in the face of lack of sex. But maintenance is an absolute necessity because a person depends on it for her survival. So if a woman possesses *khiyār* for impotence, despite it being a case in which the husband receives no compensation for his loss of ownership, then the same must follow in the case of lack of maintenance as well.

And as for your claim that intercourse is different than lack of maintenance because the wife cannot lawfully obtain intercourse without the termination of her husband's ownership of her but she can obtain her maintenance money through a loan: this is invalid because a loan in her husband's name subjects him to harm since he will be asked for it and possibly imprisoned for failure to pay it back. Moreover, if we force the wife to contract a loan in his name then we must also force her eventually to contract one in her name as well, and doing so imposes a great and unbecoming hardship upon her…[3]

As for your attempt to posit a distinction between the slave and the wife by stating that the wife must wait for her waiting period to be over before she can remarry:

This is wrong because if the waiting period was actually a relevant factor in considering the separation of the spouses, then we would need to posit a difference between the wife that has consummated her marriage and the wife that has not. This is because the wife that has consummated her marriage is subject to a waiting period and the wife that has not consummated her marriage is not and can therefore obtain her maintenance from a new husband immediately. The fact that you do not posit this distinction shows that her waiting period does not create a distinction that would prevent us from comparing her to the slave.

It is also wrong because if the uncertainty caused by the wife's waiting period prevented her from separating from her husband, then we would have to say that lack of sex is likewise not a reason for her separation. In this case too she cannot have sex until after her waiting period is over and there are no guarantees that her second husband will not be like the first in his incapacity of having sex. Since we know that this incapacity does terminate the husband's

[3] There is here in the text a claim that appears to be referring back to one of Dāmaghānī's arguments which is not in the text itself.

ownership, we know that it is invalid to consider the waiting period an impediment to her option to separate when lacking maintenance.

And it is God who grants success in finding the right answer.

Disputation 2: Shīrazī vs. Dāmaghanī on the Wife's Optionality (*Khiyār*)

In Baghdad, during a period of mourning (circa 1038-1041)

The Shaykh Abū Isḥāq the Shāfi'ī was asked about a *dhimmī* who converted: Is his past *jizya* cancelled? He denied that it is, thereby affirming the opinion of al-Shafi'ī. He was then asked for proof. He defended his position by saying that the *jizya* is one of two forms of *kharāj* (sources of income extracted on non-Muslims): "because it is owed when one is in a state of disbelief (*kufr*), conversion does not cancel it. I base my reasoning here on an analogy with the case of the land-*kharāj*."

(First round of objections)

So the shaykh Abū 'Abd Allāh Muḥammad ibn 'Alī ibn Muḥammad al-Dāmaghānī said:

"Nothing precludes the possibility that there be two forms of *kharāj* and that one form is subject to a condition that the other is not. Such a possibility is exemplified in the case of the two types of *zakāt*, i.e., the *zakāt al-fiṭr* and the *zakāt al-māl*, for whom the *niṣāb* is stipulated as a condition for one of them and not for the other."

His second objection: Nothing precludes the possibility that both types of *kharāj* are dependent (*muta'alliqān*) upon disbelief and that conversion to Islam cancels only one of them and not the

other. Do you not see that although enslavement and execution are both dependent upon disbelief, only one of them is cancelled with conversion to Islam, i.e., execution, and the other is not, i.e., slavery?

And the third objection: "The land-*kharā*j is an obligation upon a non-Muslim due to his ability to benefit from the earth, and this same legal cause (*sabab*) also imposes the obligation of the *'ushr* upon the Muslim. That the same cause imposes duties on the Muslim and non-Muslim alike means that it is permissible for the land-*kharāj* to continue after conversion [to Islam]. This does not apply to the case of the *jizya* because there is no analogous obligation [of the jizya] upon a Muslim. Thus conversion must cancel the *jizya* that was imposed upon the person when he/she was non-Muslim."

(1st round of defense)

(Response to first objection)

The Shaykh Abū Ishaq said: "I have three things to say in regards to the first part of your objection, i.e., that there is a consideration of a *niṣāb* in the case of the *zakāt al-māl* and not in the case of the *zakāt al-fiṭr*:

First: What you have said is an argument in my favour because it shows how changes in one's religious status as a Muslim or non-Muslim impacts two cases sharing the same genus in the same way. Thus, being a Muslim imposes both the *zakāt al-fiṭr* and the *zakāt al-māl* upon a person, and rejection of the faith also impacts both in the same way. We see this in the case of the apostate for whom *zakāt al-fiṭr* and *zakāt al-māl* are no longer imposed. We can extend this same principle to our case of the two *kharāj*: disbelief causes both to come into being and therefore the impact of conversion to Islam must be the same in both cases. Because we see that the land-*kharāj* is not cancelled with conversion, the same must apply to the other *kharāj*.

A second answer is that the two *zakāts* diverge from each other: "*Zakāt al-fiṭr* is different than the rest of the types of *zakāt* because it is attached to one's *dhimma* (legal personality). This is the reason that the niṣāb is not one of its conditions." But our two cases are not different in this way because being a non-Muslim obligates both types of kharaj and being a Muslim negates both: their similarity means that if conversion cancels one, it also cancels the other.

A third answer: there is no consideration of the *niṣāb* in calculating the *zakāt al-fiṭr* because it does not increase with an increase in wealth. This contrasts the remainder of the zakāts because they change with changes in wealth, and in particular, they increase with an increase in wealth. And for this reason the niṣāb is given consideration. But the two kharajs are equal in the ways I have mentioned and, thus, it is incumbent that conversion have the same effect upon them.

(Response to the second objection):

And I have two answers to the second part of your objection which invokes execution and enslavement:

The first is that killing and enslavement have two different genera and it is permissible for cases with different genera to differ in their rulings. In contrast, our two cases of *kharājs* possess the same genus. This fact, combined with the fact that they are both caused by disbelief, means that it is not permissible that they differ in their ruling.

The second is that conversion impacts enslavement and execution differently because enslavement [first] happens in a state of disbelief and that what follows after conversion is but a continuation and perpetuation of this original enslavement (*istidāma al-riqq*). This is not so for execution because it is an initiation of an act and not the continuation of a penalty. Thus it is permissible for the two to differ. But as for our case, the temporal state of the two kharaj are the

same because both involve an implementation of a prior obligation such that if one is not cancelled, neither is the other.

I have two ways of answering the third part of your objection which invokes your counter-argument that analogizes the *kharāj* of the land to the '*ushr*:

First: I do not concede your claim that the *kharāj* and the *'ushr* have the same legal cause because the kharāj is caused by "the benefitting of the earth while being in a state of disbelief." In contrast, it is Islam or one's "being a Muslim" that causes the earth to be subject to the *'ushr*. The *'ushr* is therefore a right owed to God.

Second: If, for the sake of argument, I were to concede that the land-*kharāj* and the '*ushr* share the same legal cause and that this permits the continued obligation to pay the land-*kharāj* after conversion, well then I could certainly make the same claim for the continuation of the *jizya*. I could say that the *jizya* too has the same legal cause as the *zakāt al-fiṭr* because the *zakāt al-fiṭr* and the *jizya* are both poll taxes levied on the necks *('alā raqaba)* of individuals.[4] I could then argue that this commonality permits us to continue to impose the past *jizya* owed by the non-Muslim after his conversion. In sum, the *jizya* and the land-*kharāj* are the same: both have an analogous obligation due upon the Muslim.

(2nd round of objections)

(First Objection)

Abū 'Abd Allāh al-Dāmaghānī said, in regard to the *zakāt*:

[4] The expression *'alā raqqba* is meant to convey the *jizya*'s application upon each individual.

First, you have claimed that my objection which invokes the two types of *zakāt* is an argument in your favour because both zakāts are impacted in the same way by one's status as a Muslim or non-Muslim and by changes to this status like apostasy. To this I answer: it is not because one's status as a non-Muslim gives rise to both the obligations of the jizya and the land-kharāj that the two cases could not differ in how. More specifically, changes to this religious status might impact the possibility of carrying out one of the obligations differently than the other. This is plain in the example of the zakāt al-fiṭr and the *zakāt al-māl*: money is relevant to determining a person's obligation of paying the *zakāt* in both cases even though it differs as to how. Thus, what matters for the the zakāt al-fiṭr is that a person possess the amount in addition to what is necessary for him and his family to live on. In contrast, what matters for the zakāt al-māl is that he possess the *niṣāb* for each type of wealth. This same goes for our case of the two kharāj: One's status as a non-Muslim (*kufr*) matters to both cases but only in one of them is it necessary for a person to remain in this state for the existing obligation to be carried out.

Second: *Kufr* has the same impact on the two *zakāt* because [the *zakāts*] are acts of worship and this makes it inconceivable for them to be carried out once someone has become a non-Muslim. As a general principle, non-Muslims are not subject to the obligations of worship. In contrast, the jizya is an act that is meant to humiliate. This is why God most high says: "Until they give the jizya by hand and they are *ṣāghirūn* (humiliated)." And the law forbids a person's humiliation after he convert to Islam. This is why it is invalid to continue to impose the jizya upon him. In contrast, the land-*kharāj* is not an act of humiliation, which is why it is permissible to impose it upon Muslims in the way that 'Umar did for the land of Sawād.

Then Dāmaghānī spoke to the second answer to this objection, i.e., concerning *zakāt al-fiṭr*'s attachment to one's *dhimma*:

"The attachment of one of the two *zakāt* to the *dhimma* and the other to the specific object (*'ayn)* of wealth does not explain why one has a *niṣab* and not the other. Look how the indemnity for crimes depends on the specific crime (*'ayn*), and yet, there is no *niṣāb* in this case in the way that there is for the *zakāt al-fiṭr.* Also, might I point out that al-Shāfi'ī himself had two contradictory views about whether the *zakāt al-māl* was attached to the *'ayn* or to the *dhimma*. This shows that what you've asserted fails to explain the cause of the distinction between the two types of *zakāt*."

Then he spoke to the third answer to this objection, i.e., that the *zakāt al-fiṭr* does not increase in accordance with an increase in one's wealth:

"You have argued that there is no *niṣāb* for the *zakāt al-fiṭr* because it does not increase with an increase in one's wealth. This argument is falsified by your view about the *niṣāb* of the *zakāt* of dinars and dirhams because the amount owed increases in accordance with an increase in one's wealth even though there is no *niṣāb* to determine this increase.

Then he spoke to the second part of his objection, and addressed Shīrāzī's claim that enslavement and execution are different than the two types of *kharāj* in that they have different genuses.

First: "The fact that they have different genera is irrelevant because they are both caused by kufr, and your own analogy between the *jizya* and the land-*kharāj* presumes that conversion should impact cases caused by *kufr* in the same way.

Second: “It is not because the two types of *kharāj* have the same genus that both must be carried out after conversion. Look at the two types of *kharāj* that ‘Umar imposed: the obligation of one could be initiated after conversion but not the other. Our case is the same: the carrying out of each type of *kharāj* can differ.”

Then he answered the second response of this objection, i.e., the claim that enslavement after conversion involves the continuation of an existing state and that execution is the initiation of a new act.

“There is no difference between execution and the *jizya* after conversion: both cases came to be because of a prior ruling and both have yet to be carried out. Thus if

you claim that conversion renders execution impermissible then you would be forced to say the same of the payment of the convert’s *jizya*: both cases would entail initiating a new act based on a prior ruling.”

(Third Objection)

And he spoke to the counter-argument. He addressed the first response:

“The *kharāj* and the ‘*ushr* do have the same legal cause: The cause of the *kharāj* is the ability to benefit from the earth and this is the reason that there is no *kharāj* upon land that does not yield benefit from the earth, such as barren land and those lands that have from suffered natural disasters. The *‘ushr* is likewise obligated by one’s ability to benefit from the earth. For this reason, the permissibility of initiating the imposition of one of these obligations after conversion, i.e, the *‘ushr*, means that it is permissible to continue to demand the payment of the other, i.e., the *kharāj*.

And he spoke to the second part of this claim, i.e., concerning the *zakāt al-fiṭr* being obligated for the same reason as the *jizya*:

"The jizya is not obligated for the same reason as the *zakāt al-fiṭr.* The *zakāt al-fiṭr* is obligated as part of religious devotion and the *jizya* is obligated in order to humiliate. Thus the reason obligating the two cases are different."

The Shaykh Abū Isḥāq addressed the first objection, and specifically, he revisited his claim that the comparison of the two *zakāts* are an argument in his favour.

(Response to First Objection)

"You have stated that being a Muslim can impact two cases even as the two cases differ in the way in which it impacts them. The proof you have given for your position is that wealth impacts *zakāt al-fiṭr* and *zakāt al-māl* differently even though it impacts them both. I say to you that this line of reasoning is admissible in relation to considerations of wealth but not so for matters of religious status. Do you not see that religious status impacts *zakāt al-fiṭr* and the *zakāt al-māl* in the same way? There is no sense in which religious status impacts the carrying out of one of the two cases differently than the other in the way you suggested it could. Rather, being a Muslim is a condition for both obligations [while] disbelieving cancels both obligations and prevents them from being carried out. The same principle must be applied to our case of the two kharāj: being a non-Muslim is a condition for both types of *kharāj* and Islam cancels them both. It is thus incumbent that we treat the two cases alike in considering what initiates the existence of an obligations and what imposes or prevents them from being carried out.

As for the second statement, namely that the *zakāt al-māl* and the *zakāt al-fiṭr* are both cancelled because they are performed as acts of devotion whereas the *jizya* is different than the land-*kharāj* because it is meant to humiliate: this statement of yours is incorrect because if you maintain that the *jizya* is meant to humiliate then I could say the same of the land-*kharāj*. It too would be meant to humiliate such that if conversion cancels one of these two kharāj and prevents that it be carried out, then the same must happen for the other case as well.

But also, we Shāfiʿīs do not recognize that the *jizya* is meant to humiliate. Rather we consider it a part of a transactional exchange. It is for this reason that time spent in Muslim lands as a non-Muslim is relevant to determining the amount of the *jizya* that is owed; other transactions also depend on time to determine the amount owed.[5] If it wasn't a transactional exchange then it would resemble more enslavement and execution for which time is of no consequence. The fact that it is a form of exchange is also evident in that the jizya is obligated as compensation for the protection of their lives and for their rights to live in Muslim lands.

As for God's statement: "until they give the *jizya* by hand and they are *ṣāghirūn*"; it is said in the exegesis of this verse that it means that non-Muslims are subject to the legal rules of Muslims.

And finally, let me say that acts can [at once] be humiliating in their imposition but not in their execution. Don't you see that a Muslim can take on the liability of paying the jizya of a non-Muslim without incurring humiliation?

Moreover, sometimes the law imposes an obligation for the purposes of humiliating someone but does not seek to humiliate them through carrying out this obligation. For example, the criminal punishments are meant as chastisement for disobedience. This is why God almighty has said

[5] Shīrāzī has in mind a transaction like rent.

"Their retribution for what they have earned is a chastisement from God and God is powerful and wise." Here the chastisement is a consequence of the punishment and humiliation is a consequence of chastisement. Nonetheless the punishment itself cannot be meant as a humiliation because it has been narrated that the Prophet said: "the one who repents from sin like the one who has no sin."

As for the second answer to this objection, namely, that the consideration of a *niṣāb* for the *zakāt al-fiṭr* cannot be the result of its being attached to a specific object (*'ayn*) because there is no *niṣāb* in calculating indemnities to specific injuries. This is incorrect because I did not say that all cases in which the amount is attached to a specific object must give rise to a consideration of the *niṣāb*. I only said that the *zakāt* attached to a specific object of wealth necessitates a *niṣāb*, and that the *zakāt al-fiṭr* has no *niṣāb* because it is not attached to a specific object. Thus, it is not necessary that a *niṣāb* exist for other obligations.

Your claim that the consideration of the *niṣāb* cannot be a consequence of the *zakāt al-māl*'s attachment to the *'ayn* because al-Shāfi'ī has two statements, one which states that the zakāt al-māl is attached to the dhimma and the other to the *'ayn*, is incorrect. We can dismiss the statement that the *zakāt* is attached to the *dhimma* as wrong because there would be no consideration of a *niṣāb* if it were attached to the *dhimma*...[6]

As for your claim that the *niṣāb* for money (*athmān*) and for grain (the *'ushr*) disproves that the *niṣāb* exists because the amount owing increases in accordance with increases in wealth:

This is mistaken because the reason that an increase in wealth causes a second *niṣāb* for some forms of *zakāt* is to escape the harm that would result if we did away with this *niṣāb*, namely, it

[6] There is here an argument which appears to refer back to an argument of Dāmaghānī's which is not in the text.

is to dispense with the need to kill and cut animals into parts in order to divide the *zakāt* owed on them. This problem neither arises for grain nor for species and it is for this reason that the requirement of a second *niṣāb* is not imposed upon them.

As for the second objection regarding enslavement:

Your claim is that it is irrelevant that enslavement and execution have different genera because they have the same cause, namely, disbelief, which means that conversion must impact both in the same way. This is mistaken because legal rules governing two different cases (*ḥaqqān*) can themselves differ regardless of the two cases common cause. Don't you see how the Friday prayer and its sermon are obligations for one and the same reason, but that they are governed by different rules because of their different genera? The same is true of enslavement and execution: it is disbelief that makes both of them possible even though they have different rulings governing them because of their different genera.

As for your statement that the *kharāj* of the lands of Sawād demonstrate a difference between the *jizya* and the land-*kharāj* [attributed to the fact that] the former cannot be imposed after conversion but the latter can:

This misconstrued what I said. I did not simply say that we can compare the two types of *kharāj* because they have the same genus; rather, I added that they also have the same cause, namely, being a disbeliever. The *kharāj* of the land of Sawād is not what I have in mind in my analogy of the *jizya* to the land-*kharāj* because jurists do not consider disbelief to be its cause; rather some consider the *kharāj* on the Sawād to be a form of rent that inhabitants—Muslim or non-Muslim—pay on the land and others see it as the price of a sale that permitted its original inhabitants to stay on the land. The type of land-*kharāj* invoked in my analogy has the same cause as the *jizya*, i.e., disbelief.

As for your claim that the cancellation of execution after conversion shows the need to cancel the jizya too because both cases involve the carrying out of a prior ruling:

This statement is mistaken because it is only possible to make such a comparison between cases possessing the same genus. The two *kharāj* can [indeed] be compared to each other because they possess the same genus and both involve the carrying out of a prior ruling. Thus, because the land-*kharāj* can be carried out after conversion, so too can the *jizya*. In contrast, execution has no analogue that would permit us to extend to it the rules about when and how it can be carried out.

As for the counter-argument, i.e., comparing land-kharāj to the ‘ushr:

What I have said [regarding] prohibiting the comparison of the land-*kharāj* and the ‘*ushr* is correct because the cause of the *‘ushr* and the land-*kharā*j are different. The cause of the ‘*ushr* is Islam, and the amount owed depends on the land’s yields; in contrast, the cause of the land-*kharāj* is *kufr*, and the amount owed depends on the ability to benefit from the earth.

In fact, the two have contradictory causes insofar as Islam imposes the ‘*ushr* and prohibits the *kharāj* and disbelief imposes the *kharāj* and prohibits the *jizya*. It is for this reason that the land-*kharāj* and the *‘ushr* cannot be imposed at one and the same time upon a person. Their contradictory causes prohibits us from concluding that it is the obligation of the *‘ushr* after conversion that permits the continued imposition of the payment of the land-*kharāj* after conversion.

Second: What I have said concerning the similarity between the *jizya* and the *zakāt al-fiṭr* is correct. Just as you’ve attempted to say that the ‘ushr is like the land-kharāj because it too involves benefitting from the earth but is imposed upon the Muslim, I say that the *zakāt al-fiṭr* is like the *jizya* because both are levied upon the necks of people, [with the difference] that the *zakāt al-fiṭr* is imposed upon Muslims.

And God knows best.

Disputation 3: Shīrāzī vs. Juwaynī on the Mistaken Prayer Direction (Qibla)

In Nishapur (1083 CE)

The Shaykh al-Imām Abū al-Maʿālī al-Juwaynī was asked about someone who became certain after the performance of his prayer that he had made a mistake in his attempt (*ijtihād*) to determine the proper prayer direction (*qibla*). Al-Juwaynī concluded that it is incumbent upon the person to repeat his prayer because he is certain of an error concerning a condition among the conditions of prayer, just as in the case of a mistake about the time of prayer.[7]

The Shaykh al-Imām Abū Ishāq al-Shirāzī objected to him, saying: "It is not proper to analogize the *qibla* to time because the condition of facing the *qibla* is less important than that of time. Two proofs show this:

The first: That it is permissible to abandon the *qibla* in praying voluntary prayers in travel but it is not permissible to abandon the specified times of voluntary prayers like the prayer of Eid or the recommended dawn prayer.

The second: That it is permissible to abandon the *qibla* for obligatory prayers in the heat of battle but the condition of time cannot be abandoned in the same situation."

Then the Shaykh Abū al-Maʿāli said: "The people of reflection (*ahl al-naẓar*) agree that it is not a condition of *qiyās* that the derivative case be alike to the original case in all respects. All that matters is that the two cases be alike in both possessing the *ratio legis* (*ʿilla*) of the ruling. Thus their differences do not impede comparison between that which is the same between them; and if we had to consider their similarities in all respects in order to compare them, then *qiyās*-based

[7] The time of prayer is also a condition of prayer.

arguments would become impossible because there is not a thing that is similar to something else in one way except that it also differs from it in another way.

And your claim that one of the two conditions is less important than the other does not in fact preclude that we compare them. Do you not see how we make analogies between obligatory and voluntary prayers even though one is less important than the other? Likewise, we analogize between acts of worship that differ in their importance; and we analogize between rights (*huqūq*) even though some are more important than others. Thus in our case too, it is permissible to compare the *qibla* to time even if one is more important than the other.

Another answer: Just as it is permissible to knowingly abandon the *qibla* in war and in the voluntary prayer in travel, likewise it is permissible to abandon the time of prayer in travel by combining the prayers (*al-jam' bayna al-ṣalatayn*). Thus there is no real difference between the importance of the condition of time and that of the *qibla*.

In fact, if anything, the *qibla* is more important than time. Do you not see that a person who knowingly performs an obligatory prayer before the commencement of its proper time is rewarded for having performed a voluntary prayer? In contrast, his prayer is invalid if he knowingly performs it facing other than the *qibla*. This shows that the condition of facing the qibla is of greater importance than that of praying at the right time."

Then the Shaykh Abū Ishāq said to him: "As for your statement 'It is not a condition of *qiyās* that the derivative case be similar to the original one in all respects, rather it is sufficient that it be similar only in relation to the ruling's *ratio legis* and other differences do not matter'; this statement is opposed by the fact that it is a condition of *qiyās* that a derivative case be compared only to its coequal (*naẓīrihi*). The original case in your analogy is not coequal to the derivative case and so the *qiyās* is invalid. The contrast between the permissibility of abandoning the *qibla* in travel and in the heat of battle and the impermissibility of abandoning time in the same situations shows the lack of coequality. This demonstrates the two cases do not have the same *ratio legis* and that, therefore, their *qiyās* is invalid.

And your saying: 'Why is it not permissible to analogize one case to the other regardless of their differences in importance?' My answer is that if one is more important than the other, then the

two cases are not coequal and it is not permissible to analogize one case to another which is not its coequal.

And as for your saying: 'We analogize between voluntary and obligatory acts, and one of the two is more important than the other, and we analogize between acts of worship, and between rights, despite their differences in importance,' this is not true. I do not permit analogies between such cases. It is true that I allow us to make analogies between entire cases (*fī al-jumla*)[8]; but if the legal matter concerns details of a case, then it is not permitted to compare cases that are not coequal. And this is in accord with our principle that the *qiyās* between entire cases is permissible except when doing so is contradicted by scripture (*naṣṣ*). [9]

And your saying: 'It is sufficient for them to have the same *ratio legis*, after which their differences do not matter' is correct but I do not concede that our two cases of time and the qibla have the same *ratio legis* because the differences I have noted indicate that they do not.

And as for your saying: As for your statement 'it is not a conditon of *qiyās* that a case resemble another in every ruling because this would prevent any type of *qiyās*', this is contradicted by the fact that it is not a condition of *farq* (the attempt to show two cases to be different) that two cases be different from each other in all respects and, if we obliged this, then it would spell the end of the juristic method of *farq*.

And as for your saying: 'Just as it is possible to leave the *qibla* in the voluntary prayer in travel, and in the heat of battle, likewise it is permissible to abandon the time of prayer in the combining of the two prayers,' it is not correct, because the leaving of time in combining the prayers has not been sanctioned based on its lack of importance. Rather the combining of prayers is simply the traditional ritualistic form of this act of worship (*sunnan al-nusuk*). In this way it is similar to the relative shortness of the morning prayer whose two cycles (*rak'a*) is not indicative that it is less important than the longer noon or afternoon prayers. In contrast, abandoning the *qibla* in the voluntary prayer in travel and the obligatory one in war is possible because of its relatively trivial importance. It is this trivial importance that sanctions a dispensation (*'udhr*) from this particular

[8] Thus Shīrāzī did permit a person to analogize the general features of one prayer to another.

[9] For instance, one could not make a *qiyās* to say that there is a sixth obligatory prayer based on the five other obligatory prayers because the text contradicts this. See *Sharḥ al- Luma'*, 793-795.

condition of prayer. This dispensation resembles more the case of the shortening of the noon and afternoon prayer in travel than it does the combining of the prayers.

And as for your saying: 'A person's prayer before the appropriate time is nonetheless rewarded as a voluntary prayer, but his prayer facing other than the *qibla* is invalid.' This distinction is not caused by the greater importance of the *qibla*; rather it can be explained by the fact that what comes before the time of a prescribed prayer is the time designated for voluntary prayers. In contrast, there is no specially designated direction for voluntary prayers. All voluntary prayers are to be prayed towards the *qibla* unless one has a dispensation. This is the reason his prayer is invalid."

So the Shaykh Abū al-Ma'ālī said: "As for your saying 'I do not concede that this is the *ratio legis* of the original case', I agree that proving the *ratio legis* is of paramount importance, but you had the opportunity to explicitly ask me for my proof, and tell me what you think is the *ratio legis* rather than dissimulate your views, so I will not entertain this critique after this point.

As for your saying: 'Your claim that *qiyās* does not require that the two cases resemble each other in all respects makes the method of *farq* impossible because there are not two cases that differ from each other except that they also have something in common.' It is true that establishing a *farq* does not require that one show that the two cases are different in all respects; but one does need to clarify and prove the relevant difference that would prohibit analogizing two cases. You did not do that in examining our current issue. If you wish to abandon what you said and choose to show me how the differences in my two cases are relevant, then I will address what you have to say.

And as for you saying 'The cases are not coequals because, unlike time, the *qibla* can be abandoned in the voluntary travel prayer and in the obligatory prayer in war', this is not correct. The reason that the *qibla* can be abandoned in these cases is not the same as the reason that it could be abandoned in the case of making a mistake in one's *ijtihād*. The reason the prayer could be abandoned in the case of war and travel is because of inability (*al-'ajz*) and this inability legitimates the abandonment of an obligation (*farḍ*). In contrast, in the case of the mistaken *ijtihād* a person would be abandoning the *qibla* because of confusion (*ishtibāh*). And the leaving of something because of inability is not like the leaving of it because of doubt. "Do you not see that a woman bleeding outside of her menstrual period (*al-mustaḥāḍa*) and someone suffering

incontinence of the bladder can pray [because of hardship (*'ajz*) in holding them to the same standards of ritual purity as others], whereas someone who thinks they are in a state of purity has not [by virture of mere confusion] thereby freed themselves from the requirement of praying in a state of ritual purity."[10] Shīrāzī concludes by taking aim at Juwaynī's suggestion that keeping the time of prayer during war is not a hardship: "If hardship was the reason for abandoning the *qibla* during fighting, then time would also be abandoned such that one could postpone until they are in a state of safety (*ḥāl al-kamāl*) and they can focus on fighting."[11]

And as for your saying: 'The leaving of time in the joining of prayers is the traditional ritualistic form of worship,' this is not correct. If this was the reason that these prayers were joined, then delaying the afternoon prayer to its normal time during travel would involve the invalid performance of an act of worship. This shows that it is because the time is deemed relatively less important that such a dispensation is possible.

And a last answer, which appeals to *fiqh*: It is necessity that forces us to distinguish between time and the *qibla* in the cases that you have mentioned. For were we to say: 'it is not permissible to abandon the *qibla* in travel' this would lead to the bearing of hardship in determining whether or not a person prayed in the right direction. In contrast, there is no hardship in keeping the time of the voluntary prayer because the recommended prayers (*sunan ratiba*) follow the obligatory such that they are [easily] prayed during their times. Likewise, the situation of war calls for the abandonment of the *qibla* because if we were to impose upon the fighters the condition of the *qibla,* this would lead to their defeat or death, but they have no need to leave the stipulated times of prayer because they can pray and keep fighting at the same time."

So I [al-Shirāzī] said to him: "As for your saying, 'it was necessary that you explicitly ask me to prove the correct *ratio legis* instead of dissimulating this question' this is not correct, because I have the choice between asking you to justify the *ratio legis* and between attacking its validity just as the one positing an analogy has the choice of either stating his *ratio legis* or to present what proves this *ratio legis*. And all of this is permissible in the disputation.

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[10] Ibid.. "*A-lā tarā an al-mustaḥāḍa wa-man bihi salas al-būl yuṣalliyān ma'a qiyām al-ḥadath, wa-law ẓanna annahu mutaṭahhir wa-ṣallā lam yasquṭ al-farḍ.*"

[11] Ibid. "*li-annahu kāna yajib li-hadha al-'ajz an yutrak al-waqt, fa-tu'akhkhar al-ṣalāt fī shiddat al-khawf li-yu'addiyahā 'alā ḥāl al-kamāl wa-yatawwafar 'alā al-qitāl.*"

And as for your saying 'If the joining was because of its being an act of worship, it would not be permissible to delay it,' this is not correct, because delaying is in fact not permissible and this [allegedly delayed] prayer is [in reality] performed during its [proper] time. It is rather that performing the prayer early is best, because it is a more excellent time and allows for closeness [to God].

And as for your saying 'The leaving of the *qibla* in travel and in war is because of weakness or hardship' this is not correct. If hardship was the reason for abandoning the qibla during fighting, then time would also be abandoned such that one could postpone prayer until they are in a state of safety and they can focus on fighting. So when it is seen that it is not permissible to leave the time [of prayer], but that it is permissible to leave the *qibla*, then it is indicative that the obligation of the *qibla* is less important than that of time. And it is this lesser importance of the *qibla* relative to time that allows confusion to function as a valid dispensation from facing the right direction but not from praying at the right time."

And this is the last of it.

Disputation 4: Shīrāzī vs. Juwaynī on the Virgin's Forced Marriage

In Nishapur (1083 CE)

The Shaykh and Imām Abū Isḥāq, may God have mercy on him, inferred in the city of Nishapur that an adult virgin woman could be coerced into marriage, stating: "She has remained in a state of virginity, thus it is permitted for her father to arrange her marriage without her permission, as in the original case of when she was a minor."[12]

The questioner said: "You've made the question of our debate (*surat al-mas'ala*) into the *ratio legis* of the original case. And this is not permitted."

Shīrāzī responded: "Your statement is wrong for three reasons:

[12] The original case here refers to the case from which the analogy is made.

First: I did not make the question of our debate into the *ratio legis* of the original case. Our question is about contracting the marriage of an adult virgin woman without her permission. In contrast, my *ratio legis* is that she has remained a virgin. This *ratio legis* is not the same as the question of our debate because it is not limited to the adult virgin woman, rather it is generally applicable to all virgins, and so for this reason I analogized from the minor.

Second: Your saying, 'It is not permissible to make the question of the debate into the *ratio legis'* is a claim that has no substance. What exactly is to prevent one from doing so?

And third: That *rationes legis*, like legal rulings, are derived from revealed law (*shar'īya*) and you cannot deny that the lawgiver can attach a ruling to the attribute mentioned in the question of the debate just as he attaches it to the remainder of a case's attributes, so it makes no sense to prevent this. But if your issue is that there is no proof for this *ratio legis*'s validity, then ask me for proof of its validity from the perspective of the law.

So the questioner asked: "Prove its validity from the perspective of revealed law."

He said: "The proofs of the correctness of the *ratio legis* are a report and reason. As for the report, it is the narration that the Prophet, God's peace and blessings be upon him, said 'The *ayyim* has greater right over herself than her guardian' and what is meant by this is the non-virgin because he contrasted the word *ayyim* to the virgin, saying later in the report, 'And the virgin is to be consulted.' This indicates that the non-virgin's opposite, meaning the virgin, does not greater right over herself than her guardian does. And the strongest way to establish a *ratio legis* is an explicit pronouncement of the lawgiver like this one here.

And as for reason, there is no difference of opinion that a girl's virginity is what permits her marriage to be contracted without verbalizing her approval. In contrast, a non-virgin cannot be married without this verbalization, or without that which takes the place of it, namely, writing. And if the virgin's marriage was not up to her guardian, then the law would have insisted that it is not possible to marry her without her verbalization.

The Shaykh and Imām Abū al-Ma'ālī ibn al-Juwaynī objected to this, saying: "Your position rests on these two proofs you have mentioned. As for your report, it is subject to more than one interpretation. It is possible that what it means is that the non-virgin has greater right over herself

because she may not be married without affirming her agreement to the contract in explicit verbalized speech, in contrast to the virgin, whose agreement could be tacit, based on a lack of explicit objection to her marriage contract. My interpretation is supported by the following: the adult virgin possesses those attributes that dispense her of the need for guardianship and that make her independent in contracting her marriage. A woman only needs a guardian because of a lack of independence owing either to her status as a minor or to insanity. Thus, if she possesses the causes that make her self-sufficient from guardianship, it is not permissible to impose guardianship upon her in marriage without her consent. There are two proofs which support this interpretation:

The first: That the guardian was mentioned without qualification, and if the report was really referring to the type of guardianship that has the right to coerce, the guardian would not have been mentioned in an unqualified manner. We know this because the father and the grandfather of a woman are the only guardians who possess the right of coercion by consensus of our school of law. Thus it is clear that the reports is referring to the need for verbalization of permission in the marriage contract of the non-virgin and the lack of such a need in the case of the virgin."

Second: The end of the report when the Prophet states 'And the virgin is consulted and her consent is her silence,' shows that he meant to highlight the need for the verbalization of the non-virgin."

The Shaykh and Imām Abū Ishāq answered, saying: "It is not permissible for you to interpret the report as referring to verbalization, because the Prophet, upon him be peace, said: 'The non-virgin has greater right over herself' and this means that she has greater right over herself in the marriage contract and in the disposing of herself, not verbalization.

And your saying: 'He spoke of the guardian in an unqualified manner,' such that it applies generally to all guardians,' well, I interpret the report as referring to the father and the grandfather of a woman. My proof for this interpretation is that the Prophet asserted the *ratio legis* that legitimates forced marriage when he spoke of the non-virgin and said: "The non-virgin has greater right over herself than her guardian." This is because the mentioning of an attribute in a ruling is tantamount to the mentioning of its *ratio legis*. This statement affirming the *ratio legis* is a unambiguous (*naṣṣ*), and thus it forces us to particularize the general statement wording of

his statement about the guardian, just as it would force us to particularize the mentioned attribute within the use of a *qiyās*-based argument.

And your saying: 'He mentioned the silence in the case of the virgin and therefore intended to refer to the need for the verbalization of the non-virgin;' this is not correct, and in fact it is an argument against you, because when he mentioned the virgin, he explicitly mentioned that her permission occurs through her silence. If it were really the case that he intended verbalization in speaking about the non-virgin, it would have been repetitive to mention the virgin's tacit permission-giving at the end of the report: 'and the virgin is consulted.'

And as for your saying: 'My interpretation is rests on certainty (*qat'*)'; this is not true. Rather your interpretation rests on an analogy with other types of guardianships. And analogy should only be invoked when there is no unambiguous scriptural reference (*naṣṣ*)."

The Shaykh Abū al-Ma'ālī: You have two choices: either you claim that the text is unambiguous, and this is a patently false claim, because the unambiguous is that which does not bear interpretation, or you accept that the report can be interpreted differently.

And as for your saying: 'I interpret the guardian as being the father and the grandfather' because of your claim that the report mentions the *ratio legis*; this then is not correct, the mention of an attribute only identifies a *ratio legis* if it is suitable (*munāsib*) to the ruling to which it is attached, e.g., theft in necessitating the cutting of the hand of the thief. In contrast, virginity is not a suitable cause for the ruling of coercion. Thus virginity cannot be the *ratio legis*.

Moreover, your claim that my process of inference is a *qiyās* is mistaken; my reasoning rests on other foundations and thus it is permissible to abandon your purported *ratio legis*."

The Shaykh and Imām Abū Isḥāq said: 'As for your claim that the report can be interpreted differently'; this is not valid, because interpretation involves turning away from the most apparent meaning of speech. It is like the saying of a man: 'I saw a donkey' whereby he meant a 'stupid man.' Because this word donkey is commonly used in this way, it is permissible to interpret it as such. But it is not valid to interpret a word in a way other than it is used. For instance, it is inconceivable for someone who says, "I saw a mule (baghalan)" to then say, 'I meant by this a stupid man.' This is because the mule is not used to describe the state of a man.

Likewise, your interpretation of the Prophet's saying 'the non-virgin has greater right over herself than her guardian' is inconceivable.

Your saying 'The mention of virginity is not identification of a *ratio legis* because virginity is not suitable to the ruling' is not valid because in the speech of the Arabs mentioning an attribute alongside the ruling in tantamount to asserting the *ratio legis*. Do you not see that if one were to say 'cut the hand of the thief,' it would be owing to his thievery. And if he said: 'Seat the scholars' it would be owing to their knowledge.

And your saying: 'The mention of an attribute alongside a ruling is only the identification of a ratio legis if the attribute is suitable, like thievery in the case of amputation'; this is not correct because *rationes legis* are determined by revealed law, and nothing precludes that God should decide that loss of virginity be the *ratio legis* that eliminates the need for guardianship, just as thievery is a *ratio legis* for amputation, and fornication for lashing.'

And your saying 'That which I mentioned is not based on *qiyās*'; this is not true. You have based a woman's marital independence on specific attributes. These attributes are traceable to those that give her independence from guardianship in other areas of the law. Your conclusions are therefore based upon *qiyās* because reason alone would not be able to prove insanity and minority are causes of guardianship. And *qiyās* should not be invoked when there is a *naṣṣ*. Thus, since I have established that the report under consideration is a *naṣṣ*, interpreting it differently is not admissible.

Moreover, your reliance on other forms of guardianship to make your point is self-defeating. For if our examination of legal cases reveals that guardianship is required in situations of need and that sanity and adulthood remove this need, then these same cases also show that the verbalization of permission is always required when a person is free of guardianship. The fact that it is not needed in the case of the virgin is proof that she is subject to guardianship.

The Shaykh and Imām Abū al-Maʿālī said: "She does not need to verbalize her consent because a naṣṣ says that she does not."

So the Shaykh and Imām Abū Isḥāq said: "That is for sure, and this is a proof in favour of what I have said."

And this is the last of what occurred between the two. And God knows best.