

Islamic Law in Theory

Studies in Islamic Law and Society

Founding Editor

Bernard Weiss

Edited by

Ruud Peters and A. Kevin Reinhart

VOLUME 37

The titles published in this series are listed at brill.com/sils

Islamic Law in Theory

Studies on Jurisprudence in Honor of Bernard Weiss

Edited by

A. Kevin Reinhart and Robert Gleave

With an Appreciation by

Peter Sluglett



BRILL

LEIDEN • BOSTON
2014

Library of Congress Cataloging-in-Publication Data

Islamic law in theory : studies on jurisprudence in honor of Bernard Weiss / edited by A. Kevin Reinhart and Robert Gleave ; with an appreciation by Peter Sluglett.

pages cm. — (Studies in islamic law and society ; volume 37)

Includes bibliographical references and index.

ISBN 978-90-04-26480-9 (hardback : alk. paper) — ISBN 978-90-04-26519-6 (e-book) 1. Islamic law. I. Reinhart, A. Kevin, 1952-, editor of compilation. II. Gleave, R. (Robert), editor of compilation. III. Sluglett, Peter, writer of preface. IV. Weiss, Bernard G., honoureee.

KBP144.I85 2014

340.5'9—dc23

2013045972

This publication has been typeset in the multilingual “Brill” typeface. With over 5,100 characters covering Latin, IPA, Greek, and Cyrillic, this typeface is especially suitable for use in the humanities. For more information, please see www.brill.com/brill-typeface.

ISSN 1384-1130

ISBN 978-90-04-26480-9 (hardback)

ISBN 978-90-04-26519-6 (e-book)

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This book is printed on acid-free paper.

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HAPPY MEMORIES OF BERNARD WEISS

Peter Sluglett

I am delighted to have the opportunity to write about Bernard Weiss, a good friend and fellow toiler at the academic coalface at the University of Utah.

Bernard was born in Pine River in northern Minnesota on August 10, 1934, to parents who had both immigrated to the U.S., his father from Germany and his mother from Sweden. In 1935, his parents, devout Presbyterians, were asked to serve abroad, and crossed the Atlantic in the Queen Mary to be missionaries in Morocco. In the fall of 1938, his father was recalled to the United States to take charge of the mission headquarters in Kansas City, where Bernard graduated from high school in 1952. He recalls that while there was nothing in his high school curriculum that pertained directly to the Middle East, his exposure to Latin proved to be of invaluable help to a budding Arabist who would soon be bent over Wright's *Arabic Grammar* with its heavy load of Latin grammatical terminology.

During his childhood and adolescence, he continued to hear a great deal about Morocco and its culture; his father liked to wear Moroccan dress, sang hymns in Maghrebi Arabic, and lectured regularly on Islam. This, together with many relics from Morocco in their home, made for a thorough education in things Islamic and Moroccan. Bernard also read widely, with a special fondness for ancient and medieval subjects; he was particularly fascinated by Scott's depiction of the world of the Crusades in *Ivanhoe* and *The Talisman*. In a sense, his years in Morocco, as recreated continually in memory, became a romantic tale of a distant and exotic place; the potential for a life-long interest in Islam was certainly there, although he had no plans to become a scholar of Islam until he entered Princeton Theological Seminary after his BA.

Bernard graduated from Wheaton College, "a top-ranked, academically rigorous Christian liberal arts college located west of Chicago" (as it describes itself on Google), in 1956, majoring in History. He stayed at Wheaton for another year at the Graduate School of Biblical Studies, and then went to Princeton Theological Seminary (a Presbyterian seminary reflecting the origins of the nearby Princeton University), where he concentrated on theology and the Bible for three years. He was especially

interested in theology, homiletics, and church history, and did very well, being awarded the seminary's annual prize in systematic theology and homiletics at commencement. It was at the seminary that he first learned about Islam in a formal way from Edward Jurji, a native of Aleppo and a specialist on comparative religion. Bernard took every course that Jurji taught and also became a supply preacher in a church of which Jurji was pastor for many years for the Syrian Christian community in Brooklyn, the Fourth Avenue Presbyterian. In this way, Jurji was able to leave Brooklyn to spend a year in India. During that year Bernard became familiar with some of the life-ways of a Middle East community, including, as he told me, learning to love *mulukhia*. During Jurji's absence Bernard had to take charge of the funeral for a 95-year-old woman, which plunged him into the intricacies of the religious dynamics of Middle Eastern Christian communities: some in the Brooklyn community were Protestant (Presbyterian mainly), some were Eastern Catholic, some were Eastern Orthodox, and all three had clerical representatives at the funeral. He lined them up, in what he hoped was an appropriate order, and read some lines from the Book of Common Order, while the other clerics recited parts of their own liturgies.

In the summer of 1959, just before his last year at the seminary, he took an elementary Arabic course at Columbia. (He also met and started dating his wife Felicia that summer; they married on June 11, 1960.) During the following year, while finishing seminary, Bernard applied to Princeton for admission into the doctoral program of the Department of Oriental Studies (now Near Eastern Studies). In order to get a head start and assure everyone that he was serious, he attended second-year Arabic at Princeton. As part of the admissions process, applicants were interviewed by a member of the faculty, in his case Professor T. Cuyler Young, the chair of the department, whose background in Presbyterian missions in Iran evidently resonated profoundly with Bernard's own childhood memories.

His studies at Princeton brought the various strands in Bernard's intellectual life together: Islamic theology, philosophy, jurisprudence, mysticism, logic, and Arabic grammar. He was especially interested in the logical structure of Islamic thought and in how much Islamic and Judaeo-Christian thought had shared during the Middle Ages and how they drew upon common sources, notably the ancient and Hellenistic philosophers. Advised by Professor Rudolf Mach, he began to look at the *'ilm al-waḍ'* literature; Mach was curator of the Middle East manuscript library, where there was an impressive collection of manuscripts concerned with *waḍ'*. After some months Bernard decided that he would like to work in the

manuscript collections in Cairo, and applied for and received a grant to work at the American Research Center in Cairo for a year. Alas, his progress was impeded by the fact that the Azhar library announced that it was holding an inventory, and would only be open to visiting scholars for half a day each week. Eventually, Rashshad Abdel Muttalib, an official connected with the Arab League Department of Manuscripts, came to his rescue, arranging to have all the manuscripts he needed filmed, so that, armed with a case filled with microfilms, Bernard returned to the U.S. to work on his doctorate. He was very short of money, so he borrowed and rented a small apartment on Bank Street in Princeton, and in his own words, "as I had managed to get myself in a do-or-die situation, I decided to do." He showed up at the Firestone Library at 8:00 AM and left at 11:00 PM for about three months, and managed to get through his defense with some degree of respectability.

After Bernard's defense, Marsden Jones, Professor of Arabic Studies at the American University in Cairo, and a Visiting Scholar at Princeton, asked him if he would like a job in Cairo. He said yes, and Bernard and Felicia, together with their first child Kathy, who had been born in Princeton in March 1961, soon found themselves aboard the *U.S. Constitution* heading toward Genoa, the point of departure for Alexandria on Adriatic Lines. This was their second trip to Egypt, where they would spend thirteen often quite tumultuous years. Their son, Ted, born in Cairo in December 1966, would go to school there with his older sister, and the two children had much of their education in Cairo. All their lives were disrupted by the war of June 1967, since all AUC foreign personnel with families were required to leave Egypt, and Bernard ended up in Geneseo, NY, teaching at the SUNY-Geneseo campus. During his first year there, he was invited to McGill, but this was a temporary position, and by the next academic year he was back in Cairo. He also considers his publications during his early years of teaching somewhat sparse, but they showed the direction his career would take. His first scholarly article, "Medieval Muslim Discussions of the Origins of Language," appeared in *Zeitschrift der Deutschen Morgenlandischen Gesellschaft* in 1974. In 1975 he was invited to present a paper at a conference in Salt Lake City; little did he know at the time the part that Salt Lake would play in his future. The conference papers were published in the *International Journal of Comparative Law*; Bernard's contribution was entitled "Interpretation in Islamic Law: The Theory of *Ijtihad*," which he regards as one of his most seminal articles.

Bernard began to work on Amidi during his Cairo years, although his interest in Amidi's writings had begun at Princeton. At some point he

decided to read Amidi's *al-Iḥkām fi uṣūl al-aḥkām* on a regular basis; all his advanced classes entailed readings in Arabic legal and theological texts—mainly Amidi. Among his students were Everett Rowson, Juan Cole, and Khalid Blankinship. After Cairo, he taught at Toronto (1980–82), and then at McGill (1982–84): in April 1984 he was invited to join the faculty of the Middle East Center at the University of Utah, where he stayed for the rest of his academic career, retiring to Colorado in 2009. At this point, with what he describes as “a new-fangled gadget called a computer and a new-fangled program called Word Perfect” Bernard spent every free moment writing, ending up with a book of nearly 800 pages. He had heard that publishers tend not to be enthusiastic about very long books, but he was not prepared to give up a single iota. Fortunately, the University of Utah Press was very cooperative, and published *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Din al-Amidi* in 1992: a second revised edition, with the important addition of an index, appeared in 2010. A shorter book, *The Spirit of Islamic Law*, published by the University of Georgia Press in 2006, was an attempt to sum up in a general way his thoughts about Islamic Law, particularly its social vision and values, its methodology, and its logical structure.

* * *

I first met Bernard when I arrived in Salt Lake for my interview for the directorship of the Middle East Center early in 1994. I was keen to return to American academia after stints as a visitor to Harvard and Berkeley, which I had enjoyed very much. It was snowing heavily in Salt Lake when I arrived, but I was warmly welcomed by all my future colleagues, and I returned to London a few days later, very much hoping that this would not be my last visit, as indeed turned out to be the case.

My first years in Utah were scarred by a profound personal tragedy, and Bernard, along with many other colleagues, was a rock of quiet support, both to me and to my stepsons, who were frequent visitors. Bernard was one of the most senior Middle East Center faculty members, and I learned to rely on his moderate reasonableness at faculty meetings. I also served with him on a number of M.A. and Ph.D. committees, and profited greatly from his great erudition, as have all those who have had the good fortune to have been taught or supervised by him.

For a number of reasons (and I will return to this topic later), one of the happiest episodes in my directorship of the Middle East Center between 1994 and 2000 was participating in the organization of the conference known to people in the field (and of course especially to the authors in

this collection) as “Alta One,” held at Alta Lodge, a ski resort in the mountains above Salt Lake, in late September/early October 1999. The conference itself was a great success, both socially and intellectually; the weather was mild enough to enable those who wanted to do so to go on long walks, and the evenings were especially convivial. It was most people’s ideal kind of conference, one where those involved have either known each other personally for many years, or have been thoroughly acquainted with each other’s work from a distance. On the “performance indicator” side (and how we all envy Bernard and his generation for not having to bother about such matters), Alta One resulted in the publication, in 2002, of a collection edited by Bernard entitled *Studies in Islamic Legal Theory* as a part of Brill’s “Studies in Islamic Law and Society” series, which Bernard himself had founded in 1993.

Bernard was a regular participant in the meetings of a small circle in Salt Lake known to its familiars as The Priesthood. I am not sure when the circle’s meetings began, but in the late 1990s, when I became aware of it, members would meet most Thursday evenings for drinks and a meal. The “founder,” Christof Westenfelder, was an avid observer and wry critic of some of the more bizarre practices of the adherents of the majority religious sect in Salt Lake City, and I am happy to say that, like Bernard in retirement in Colorado, I receive, even in temporary exile in Singapore, weekly bulletins of exhortation and reminders of the next Priesthood meeting. Some of these meetings ended with, or were punctuated by, Bernard and me singing Anglican hymns: this was a division of labour, to the extent that he is musical and knows the tunes, but did not always know the words, while a misspent youth in an Anglican school means that I know the words, but cannot sing in tune. But it worked somehow.

Bernard was particularly close to his departmental colleague and regular attender Harris Lenowitz, but other Priesthood stalwarts included Christof’s colleagues Carl Cablitz and Matthew Movsesian, and Michael Rudick. Christof is a distinguished nephrologist at the University of Utah, and I know that Bernard and many others would want to express our great gratitude to him for his willingness to give frequent and detailed informal advice, and constant moral support, to his friends as they confront various perturbing aspects of what may optimistically be described as “the aging process.”

A few years after Alta One, I bumped into Kevin Reinhart at a MESA meeting. We started reminiscing about the conference, and said almost simultaneously, why don’t we see if we can’t do it again, this time in the form of a *festschrift* for Bernard? The idea gestated for a while, and a few

months later Kevin e-mailed me, asking if I could test the waters about the possibility of holding a second conference. Eventually, a combination of the University of Utah's Law School and the Middle East Center funded the conference at the Utah end, together with a generous grant from the Harvard Islamic Law Programme; the result is this volume, and the conference, "Alta Two," which preceded it. We are all profoundly grateful to Kevin and Rob Gleave for their work both on organising the programme and, of course, over a much longer period, for their editorial work on this volume. I would also like to thank Shari Lindsey for taking care of the administration of the conference with an admirable degree of unflappability.

During Alta Two, I was delighted to hear the following exchange between Ahmed Shamsi and Muhammad Fadel which, as I recall it, went something like this: (Muhammad had been talking about how an "ordinary Muslim" can know whether an individual is a *mujtahid*, and how he might judge between the differing opinions of two or more *mujtahids*)

Ahmed: A lot of this early stuff seems to centre on a single Muslim, left in the desert or some other isolated place, armed only with a copy of the Qur'an and the main collections of hadith. I wonder if you have any idea about how the jurists thought this might work out in practice?

Muhammad: No, I haven't. I'm not concerned about the facts.

A good reminder that what is under discussion is Islamic legal *theory*...

* * *

Let me end on a happy note. I am sure that there is a technical term in *uṣūl al-fiqh* for "unintended consequences." As I have already mentioned, during the last weekend in September 1999, we were all up in Alta for Alta One. Devin Stewart was part of the group, and a friend of his, one of our graduate students in the Middle East Center at the time, came up to Alta to take Devin out. By the happiest of chances, she brought a friend of hers to Alta with her. I was immediately captivated by the friend, and was determined to see her again. My determination paid off: Shohreh and I were married four years later, and as seemed right and proper, I asked Bernard to officiate at our wedding. He wondered what kind of ceremony we would like, and as befitted a marriage between a non-believing Jewish Anglican and a not-particularly-believing Shi'i Muslim, the old-fashioned Anglican ceremony seemed most appropriate. I remember my pleasure at hearing Bernard say at the end: "Those whom God hath joined together, let no man put asunder."

Sometimes, when people ask Shohreh and I how we met, we say that we met as a result of a common interest in Islamic law. So you will see that I am indebted to Bernard not only for his friendship, and his wisdom, but also, indirectly, for much of my present happiness.

I wish him and Felicia a long, happy, and fruitful retirement.

London and Singapore, June 2012

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¹ To 2008.

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THE SPIRIT OF ISLAMIC LAW: INTRODUCTION

Robert Gleave and A. Kevin Reinhart

Both a brief biography of Bernard Weiss (BW), and a bibliography of his scholarship are found elsewhere in this volume. It remains our task to describe Bernie's contribution to the study of Islamic law and his place in the field, as well as to sketch out the contents of this volume honoring Bernard Weiss, and to link our work to his.

The trajectory of Bernard Weiss's scholarship follows a line less possible today; the depth of his work *inter alia* suggests the value of that venerable model. BW spent the first part of his career mastering the issues of language—of *Lughā* as he came to call it—in Islamic theology and speculative jurisprudence. Having grasped from this tightly-focused study how medieval Islamic scholastics pursued their craft, he then spent more than a decade carefully reading through al-Āmidī's *summa* in the field of Islamic jurisprudential theory (*uṣūl al-fiqh*)¹ and the author's other major works—the précis of the *Iḥkām*, the *Muntahá*, and the *Abkār al-Afkār* in speculative theology (*kalām*). Rather than attempt a premature overview of *uṣūl*, BW spent much of his scholarly life in intense conversation with the *uṣūlī* whom he found most congenial. By awling his way into al-Āmidī's work over a long period of time, BW could engage in scholarly conversation and even dispute with al-Āmidī—confident that his interlocutor was real and not simply a projection of BW's present scholarly concerns; in this way he could be confident too that he was doing full justice to al-Āmidī and thereby to the discipline to which both al-Āmidī and Bernard Weiss himself dedicated their academic careers.

BW's masterwork, consequently, was a magisterial study of the *Iḥkām*, which provided an anchor for all students of the field (especially after the 2nd edition with its index!). Unmatched in its scope, depth, and above all reflective precision, *The Search for God's Law* provided English technical terminology—much of which has become standard—but more significantly, it provided a lodestone to orient readers in the subject of *uṣūl*

¹ For a ruminative and extremely helpful discussion of this term, see *Search* 2nd edition pp. 23–6. All references in this introduction are to the 2nd revised edition (2010). The references in individual essays will vary according to the edition at hand to the authors.

al-fiqh without the, often speculative, interpretation that had characterized the more recent works in *uṣūl* preceding BW's search. Other Weiss scholarship-articles such as "Knowledge of the Past..." (on *tawātur*) (1985), "Language and the Law" (1986), and "Interpretation in Islamic Law" (1996)—were also timely interventions in the development of *uṣūl* studies. His deceptively modest *The Spirit of Islamic Law* is in fact a masterful distillation of all he had learned in Islamic law and of his profound *Mitdenken* with many of Islamic jurisprudence's great minds.

Indeed, BW himself describes his enterprise as to come "in contact with the world of ideas inhabited by my author Sayf al-Dīn al-Āmidī (d. 631/1233) and to [become] capable of expounding those ideas accurately and faithfully in relatively clear English";² and further, "to know well [his] mind and the complex dialectic in which he was involved."³ BW's work is less exposition than conversation, and consequently the reader engages with not just the doctrines, but the world-view, of *uṣūlī* discourse to a degree unusual in Islamic textual studies.

Two features of BW's work stand out. (1) His concern with language and (2) his apprehension of the truth that *uṣūl* and *fiqh* are religious enterprises—notwithstanding BW's decision to focus on the 'positive law' rather than the 'morality' aspect of *sharī'ah*-studies.⁴

BW's scholarly career began with a dissertation on language, and his first articles came from that dissertation. They concern the arcane yet central problem of whether language is mere human convention or instead rests on a substratum of divine prediction. Perhaps he was convinced by the latter position given his own fastidious attention to language—both that of the *uṣūlīs* and his own. Throughout his work BW spends pages patiently picking apart the knots of language—phrases, technical terms, underlying linguistic assumptions. All who have read *The Search* have remarked on how felicitous they find his English representations of the *uṣūlī* technical terms. This is no accident. All of us have spent many happy hours with BW discussing terminology, and in the process discovered how much reflection, effort, and research ought to go into every English attempt to convey the Arabic.

The title of BW's *magnum opus* reflects his unwavering recognition of the religious standpoint from which Islamic jurists operated. Notwithstanding

² *Search* xxiii.

³ *Ibid.*

⁴ *Search* 4–5; 8.

BW's avowed interest in the "legal" rather than the "moral" aspect of the *uṣūlī* enterprise, he repeatedly reminds the reader that Al-Āmidī views the human lawgiver as no more than a "mediator of the divine law to humankind."⁵ His framework is always that "the fundamental preoccupation of Muslim thinking about the Shari'a is with duties that human beings have towards God and with sanctions that belong to the world to come, not to this world. . . . The Shari'a rules exist for the primary purpose of fostering obedience to God . . . Therefore we cannot automatically equate the rules of the Shari'a with law."⁶

On one level this is unexceptional. Every discussion of Islamic law concedes this at the beginning. What marks BW's scholarship is that, like the jurists he studies, he never loses sight of this axiom. In *Spirit* every chapter is framed as a discussion of some aspect of the religious discourse of Islamic law. Chapter two is titled "Divine Sovereignty and His Subordinates;" chapter three, on the "Textualist/Intentionalist Bent" begins, "The universal insistence of Muslim jurists upon the divine authorship of the law and their refusal to accord to human reason any role in the creation of the law . . ." Chapter four concerns "The Venture Beyond the Text" and reminds us that, whatever the cause for an extension of a *ḥukm* analogically to another case, "it is always the will of God that is the true necessitating factor [that is, the *'illah* that allows the connection between the known case and the novel case]."⁷ In the chapter "Probabilism and the Limits of Certainty," we read, "The law was not something to be passively received and applied; it was rather something to be actively constructed by human toilers [his term for *mujtahids*] eager to gain the approval of their Lord for their effort."⁸ Further examples would be tedious, but there is little doubt that there is a shared religious sensibility between BW and the *uṣūlīs* that was no doubt an aid in his sensitive reading and interpretation of their "toil," and was perhaps also a factor that attracted him to these very texts.

THIS VOLUME

In most academic study in the humanities and social sciences, a decision is made at the outset: should one study in micro or in macro? Or to give the

⁵ *Spirit* 1.

⁶ *Spirit* 20.

⁷ *Spirit* 67.

⁸ *Spirit* 89.

same question more extended expression: can the study of a single author or an individual text illustrate the more general truths of a phenomenon, or will such studies always be restricted by and to their specifics? One can anticipate BW's response to such questions, since he produced a monograph of around 750 pages, and not a few additional articles, exploring (in the main) a single work of a single author. The general is only understood through the specifics. Al-Āmidī's own keen sense of the interlinking of the general and the specific and his desire to relate legal or theoretical minutiae to broader theological themes facilitated BW's work.

Sayfaddīn al-Āmidī and Bernard Weiss have had a fruitful, long-term working relationship from which, one could say, both have accrued much benefit. From BW, al-Āmidī has gained canonicity in the academic study of *uṣūl al-fiqh*, replicating (and reviving) the position he held in the medieval Islamic legal curriculum. In al-Āmidī, BW chose wisely: a legal theorist whose identification of the fundamental questions of legal theory was direct and authoritative. BW positions himself as a kindly interrogator, grilling al-Āmidī through his *Iḥkām* in an effort to understand rather than criticize. The aim is to recreate al-Āmidī's web of connected questions (*masā'il*) in which each discrete answer creates tension diagonally through the system as arguments elsewhere are stretched. BW's task of representing al-Āmidī's *uṣūl* is, in one sense, limited to one thinker and his text. Because al-Āmidī's exposition is so well-informed and carefully constructed, it acts as a worthy proxy for *uṣūlī* writings more generally. The construal of al-Āmidī's ideas found in BW's oeuvre, particularly *The Search for God's Law*, is of such mastery that it has formed an organon of sorts for scholars across North America and Europe, not unlike the *Iḥkām* for students in the medieval Muslim academy. The Āmidī-Weiss partnership has created a matrix through which the interconnectedness of all the central themes of *uṣūl al-fiqh* can be identified, and then subjected to rigorous analysis. In this volume particularly, and in contemporary research into Islamic legal theory more generally, scholarly understanding has been both formed and informed by our readings of BW's reading of other *uṣūlīs* and especially of al-Āmidī.

Consequently, this is not simply a volume "in honor" of BW, a "*Weissschrift*" as we have styled it in our shorthand. It is not merely a collection of studies arising from a conference convened to celebrate BW and his contribution to scholarship. In fact, the four sections in which the papers are arranged here reflect four dominant themes that emerge from BW's exploration of the *uṣūl al-fiqh* enterprise through his work on

al-Āmidī. Each theme arises from an interrelationship between at least two constituents of *uṣūlī* discourse, and each poses a particular question:

1. Law and Reason: Does reason uncover and create law, or are the two fundamentally at odds?
2. Law and Religion: Can the exercise of law ever be a purely religious activity?
3. Law and Language: How do words, language systems and discourse create rules, commands and legal systems?
4. Diversity and Authority: If the legal solutions to a problem are various, how can the law be obeyed?

Since *uṣūlī*-type questions are usually interconnected, it is not a great surprise to find the papers presented here crosscutting themes, answering more than their supposed brief and straying into another's territory. In truth, most papers could have been placed in various headings; some could be placed under all four rubrics.

Law and Reason

[M]edieval Muslim theology is a type of natural theology; it holds basic verities (the existence and attributes of God, the prophethood of Muhammad in particular) to be accessible to human reason apart from revelation. Acceptance of these verities is in fact the precondition of acceptance of the revelation mediated by the Prophet, including the law, which is a central part of that revelation.⁹

BW sees al-Āmidī as conforming to a mainstream, medieval Muslim theological trend (be it Ash'arī or Mu'tazilī) of "natural theology." Al-Āmidī, in abbreviated form in *al-Iḥkām* and in more detail in the *Abkār al-Afkār*, argues for there being a series of truths (or "verities") which can be known through reason alone. The key debating point for legal theory was the elasticity of this category. How much knowledge, and of what sorts, can reason provide us? How much law can be known rationally? Indeed, how "rational" is the law? Al-Āmidī's discussion reflects the preceding centuries of debate within Islam, the beginnings of which are tackled by Ahmed El Shamsy. In his "The Wisdom of God's Law: Two Theories" (chapter 1), El Shamsy examines the emergence of a Mu'tazilī-Shāfi'ī trend in the early

⁹ Search 687.

years of the tenth century (late third–early fourth *hijrī* century). Later Shāfi‘ism, as is well known, was closely linked to the anti-Mu‘tazilī movement bearing the name of Abū al-Ḥasan al-Ash‘arī. Indeed, this linkage has, for some commentators, created the intellectual predominance of both the Shāfi‘ī and Ash‘arī schools from the eleventh century onward. Earlier Shāfi‘ī legal theoretical leanings (or rather, the theories of some early Shāfi‘ī legal theorists), according to El Shamsy, seem to have incorporated select Mu‘tazilī principles. The works of al-Khaffāf and al-Qaffāl al-Shāshī have recently come to light in which there are clear references to Mu‘tazilī ethical thinking being employed in a legal theoretical context. The extent to which reason can identify legal evaluations (obligatory, permitted, forbidden) or the benefits of the law for humankind are only two of the examples where early Shāfi‘īs have adopted Mu‘tazilī notions and given them a specific Shāfi‘ī twist.

The presence of Mu‘tazilī influence in Shāfi‘ī *uṣūl* was not restricted to this early period. Chaumont’s “La notion de *wajh al-ḥikmah* dans les *uṣūl al-fiqh* d’Abū Ishāq al-Shīrāzī (m. 476/1083)” (chapter 2) examines the influence of Mu‘tazilism at the beginnings of the “mature” period of Shāfi‘ī legal theory. The dispute over the rationality of the law revolved around whether the *shar‘* was dictated by God’s will (*irādah*) or was decided by reference to “benefit” or “well-being” (*maṣlahah*). Al-Shīrāzī would appear an orthodox Ash‘arī in his *kalām* and ‘*aqidah* works, stating clearly that it is the former (*irādah*) that is operative. In his *uṣūl* works, such as *al-Luma‘ fi uṣūl al-fiqh*, one has hints that Mu‘tazilī concepts within legal theory have had more traction than in his theological works. In particular, the influence is to be found among the individuals he cites as opponents, and in al-Shīrāzī’s views on the meaning of *imān* (faith, belief) and in his use of the term *wajh al-ḥikmah* (“*sagesse*,” wisdom). *Wajh al-ḥikmah* appears to refer to a reason for the legal ruling being as it is, a cause deeper than the immediate legal cause (*illah*), and which can be identified as a reasonable, rational and moral framework; the deeper cause could, on occasion, allow the jurist to void individual rulings by reference to this deeper rationale. Shīrāzī’s occasional employment of this concept, along with other evidence presented by Chaumont, indicates that even during the demise of the Mu‘tazilah, their influence on *uṣūl* thinking continued. The “natural theology” identified by BW as a background (a “theological postulate”) to *uṣūl al-fiqh* shows Mu‘tazilī influence even when proposed by Ash‘arīs.

Nonetheless, even the Mu‘tazilīs admitted that at times the rationality of the law was difficult to identify. Nowhere is this more in evidence than in the discussion of ritual (*‘ibādāt*), which was seen as outside of rational

investigation by many, be they Ash‘arī or Mu‘tazilī. Kevin Reinhart, in “Ritual Action and Practical Action” (chapter 3), embarks on a detailed and thorough account of the place of ritual in Islamic legal thinking, beginning with Qur’anic and early Islamic lexicography, moving on to the organization of works of *fiqh* (and what the principles of organization reveal about the underlying thought world of medieval Muslim intellectuals). Famous amongst those who rejected any rationality within the ritual sphere was the Mu‘tazilī al-Nazzām, who parceled off the area of ritual obedience (*‘ibādāt*) from the “this-worldly” concerns of the *mu‘āmalāt*. The problem of ritual, or “religious” versus rational elements of the law, is traced further in the discussions over intention. Intention (*niyyah*) appears in the *fiqh* crucial to the validity of ritual performance; it does not seem so central to non-ritual acts. The essential element of intention perhaps is linked to the non-rationality of ritual, in contrast to the this-worldly concerns of the *mu‘āmalāt*. How this affects the overall shape of the law is one of the larger concerns addressed by Reinhart.

As BW noted, the underlying framework, running through these discussions of the relationship between law and reason, reflects a particular epistemology. Reason naturally brings knowledge of some truths to any rational human being. Debates in *uṣūl* and in *kalām* revolved around which truths fell into this category, and how one might gain knowledge of other truths, not immediately accessible to reason. Fadel (chapter 4) examines the way this epistemological concern is reflected in the graded theory of knowledge found in *uṣūl al-fiqh*. For a skilled and expert jurist (or *mujtahid*), one position may be more likely than another, but that does not necessarily mean the one is categorically true and the other false. For the non-expert (*muqallid*), there is an ethical dilemma as to which expert to follow, and how one might know that one expert is more worthy of one’s allegiance than another. Fadel examines the various solutions of both Ash‘arī and Mu‘tazilī writers of *uṣūl al-fiqh*, revealing how the debate polarizes between the two options of *takhyīr* (the *muqallid* simply chooses, almost at random) and *tarjīh* (the *muqallid* chooses but must do so on the basis of a piece of evidence—a *dalīl*). The *uṣūlīs* do not indicate how the *muqallid* works out whom to trust (and for *tarjīh*, whom to follow), and this, for Fadel, constitutes a sort of “under-determination” in *uṣūl* theories. For a “fully determined” theory, some level of basic moral knowledge (and hence moral reasoning) on the part of the non-expert would have to be presupposed. This theoretical underdevelopment must, Fadel supposes, in some way be linked to the “natural theology” stance described by BW when outlining the moral world of al-Āmidī.

Law and Religion

We thus, according to the Muslim view, do not receive the law considered as a body of fully articulated and implementable rules directly from God; we receive it rather from great jurists. But the law expounded by the jurists, the jurists' law, has validity only by virtue of its claim to being the closest approximation of the ideal law of God that the jurists are capable of producing. In order to make this claim, the jurists must be able to declare with a clear conscience that they have expended the utmost effort on this task.¹⁰

The law of God—which BW uses as a gloss for the Arabic term *sharī'ah*—is mediated through a class of scholars who claim exclusive right to be its interpreters. The scholars may not simply assume this position from an ambition for social status. The obsessive attention to the minutiae of legal debate has led some to view them as merely playing intellectual games when the real business of the law is moving on apace in practice. BW, throughout his work, recognized that this characterization was unjust, and to understand the “spirit” of Islamic law is to discern the religious motives for scholars' involvement in the activity of law drafting. Brockopp develops this further, in his contribution to this volume, and argues that one should see the jurists and their works as motivated by piety. In this vein, he studies “Saḥnūn's *Mudawwanah* and the piety of the *Sharī'ah*-minded” (chapter 5) and sees in the *Mudawwanah*'s detail, not a practice-orientated text, but a meditation on the nature of law. Legal texts, and the scholarly discussions they represent, are a “place to encounter the divine,” and this devotional aspect of juristic composition might be seen to act as a bridge between the two classical categories of *furū'* and *uṣūl*.

Whilst Brockopp explores the pious dividend for jurists engaging in legal writing, Lange (chapter 6) explores the way the major theological questions of entry into heaven and hell affected the writing and composition of *furū'*. In a thorough survey of the notion of (*kaffārah*)—how deviations from the law (sinful or otherwise) are expiated—Lange sees echoes from the theological debates about grave sinners and their entry into paradise. For the Shāfi'īs, one can apply analogical reasoning to the fixed forms of punishment (*ḥudūd*) and expiation (*kaffārah*), such that a punishment or expiatory act decreed in the revelatory sources might be substituted for some other, “equivalent” act. For the Ḥanafīs, these expiatory penalties were fixed and unchangeable. The two positions reflect different understandings of what can and what cannot be subject to legal

¹⁰ *Search* 15.

reasoning. But for Lange, the significant point is that these debates might reflect a broader theological debate—namely the Ash‘arī-Māturīdī debate over the punishment that awaits the grave sinner. The Shāfi‘īs, with their encouragement of analogical reasoning and the notion of compensatory equivalence, may have been influenced (or may have themselves influenced) the Ash‘arī position, which is much more optimistic about the fate of the grave sinner: for some Ash‘arīs, he may enter heaven without any expiatory period. The Ḥanafī commitment to stick rigidly to the rules about what can and cannot act as expiation and punishment may be linked with the position in more mature Maturidism that the punishment of the grave sinner is necessary and fixed—a theological certainty. Lange argues that the theology-law relationship is such that at times purely theological dogmas may have specific consequences for legal doctrine (and, potentially, vice versa).

The Shāfi‘ī willingness to allow a substitution or an equivalent *kaffārah* might promote a practical attitude to ritual practice. If so, this might be linked to Raquel Ukeles’s observation that many Shāfi‘īs from the mature, medieval period promoted the notion that practices which clearly had no grounding in prophetic example might not be reprehensible innovation (as the term *bid‘ah* is normally understood), but could be viewed as “good” (*ḥasan*) innovations (chapter 7). Ibn ‘Abdassalām al-Sulamī is the first to apply the full scale of *fiqh* assessments to *bid‘ah*, and after him it became commonplace: Innovations could come in all different types and with different legal assessments, from the obligatory to the forbidden, including the recommended and the discouraged. Ukeles explores the practice of *ṣalāt al-rahā’ib* as an example of this: the discussions may reveal a certain practicality in Shāfi‘ī attitudes to ritual which makes the stance of their legal conception more accommodating than we might otherwise have thought. What is clear is that the notion of the law, as presented in works of *fiqh*, is the workspace of the jurists. When the jurists claim their *fiqh* to be “the closest approximation of the ideal law of God that . . . [they] are capable of producing,”¹¹ as BW puts it, this legitimacy claim inevitably reflects the jurists’ self-understanding as pious scholars, religious intellectuals and social actors. A full account of how religious concerns affected the legal thinking of the jurists requires a recognition of all these roles.

¹¹ *Search* 15–6.

Law and Language

The *Lughā* is not merely an instrument of communication: it is a *perfect* instrument . . . The perfection of the *Lughā* as an instrument of communication makes possible the objectification of intended meaning. Private subjective meanings are, through it, projected into the public arena . . . Only if full objectification of God's intended meanings through the *Lughā* is possible is revelation, in both the broad and narrow senses of the term (*tanzil, izhar*) possible.¹²

For the *fuqahā'*, God communicates to his servants in his revelatory texts, and these texts are composed in language. Studying how medieval Muslim thinkers conceived of the origins and operation of the linguistic system (the *lughah*) represents, perhaps, BW's most sustained intellectual preoccupation. From his earliest research on the origins of language to his most recent publications on hermeneutics and *uṣūl al-fiqh*, BW has written with care for clarity and precision which, coincidentally, shows his own mastery of the linguistic code. Powers, in "Finding God and Humanity in Language" (chapter 8), compares the linguistic system common to many *uṣūlīs* (al-Āmidī included) in which sound or "vocable" (*lafẓ*—following BW) is linked to idea or meaning (*ma'ná*), with the implicit connection between actions and intentions found in *fiqh* texts. In *fiqh*, one finds a tendency to believe actions to reveal internal states in an uncomplicated manner. So, for example, intentional homicide is assessed not through any examination of the culprit's mental state, but an assessment of the external attributes of the deadly act. These are reproduced in a crescendo of details by *fiqh* writers, making the application of the rule (*ḥukm*) to the individual case increasingly mechanistic. By the end of the discussion, the initially complicated task of assigning an assessment to a real case by incorporating it into a "named action type" becomes almost simplistic and obvious. Actions reveal inner mental states for *fiqh* writers, as utterances do for *uṣūlīs*. In a sense, utterances are merely a particularly articulate form of action. Powers, though, identifies also a tendency in *fiqh* to envisage a legally effective utterance which may actually be at variance with the inner mental state of the agent. For example, the divorce formula when uttered without intent, remains legally effective. This, Powers identifies as a "formalist" tendency amongst the jurists in which language, on its own, can create legal facts: such cases must modify our understanding of the oft-repeated saying of the Prophet, "Actions are judged by their intentions."

¹² *Search* 145–6.

As Powers notes, the association of vocable (*lafz*) with meaning (*ma'na*) is, for *uṣūlīs*, the result of a placing (*wad'*) of the latter upon the former. The connection between the two, though arbitrary, is a strong bond, such that the assigned meaning might be termed the "literal" or "true" (*ḥaqīqah*) meaning of the word. Gleave examines "Literal Meaning and Interpretation in Early Imāmī Law" (chapter 9), exploring how this connection is established within the Imāmī Shī'ī tradition. He identifies a theory of language formation in Imāmī circles which was popular in the early period: namely, that the meaning of words is established by God and diverges from (and overrides) the meanings employed by the language community. This makes the Qur'ān incomprehensible without an interpreter, as God speaks in the Qur'ān using this special language. The interpreter, of course, is the infallible Imām who is fluent in both languages, the divine and the ordinary, and can communicate God's message to the community. The theory completely negates the standard *uṣūlī* account, which is based on the presumption that divine speech and everyday speech can be subjected to the same interpretive mechanisms. The peculiar Shī'ī theory did not survive. When Shī'ī writers began to read and imitate the science of *uṣūl*, the standard theory became the orthodoxy, and the sectarian notion of language was to make only sporadic reappearances in the history of Shī'ī legal thought.

The particular terminology of the law also, in a sense, created a peculiar language and discourse which was available only to the initiated. The iteration and reiteration of ever more precise definitions through a series of semantic categories is a standard feature of *fiqh* writing. Powers already identified this method of literary presentation, arguing that it closes the gap between theoretical category and actual case. Heinrichs examines what he terms "genres" in the *Kitab al-Luṭṭah* of Ibn Rushd's *Bidāyat al-mujtahid wa-nihāyat al-muqtaṣid* (chapter 10). The "genres" are "semantic categories of the smallest discussion units." His translation/summary/commentary enables the reader to decode the discussion of Ibn Rushd, as he navigates the differing definitions of terms by the various schools, the accompanying varying school assessments within the *sharī'ah* and the reasoning behind the opinions. Ibn Rushd's clear elucidation of the argumentation which supports the school opinions is reproduced in Heinrichs's detailed account of the chapter.

Law: Diversity and Authority

[A]n opinion concerning the divine law that an individual *mujtahid* arrives at by dint of his deliberations over the relevant indicators is authoritative for any commoner who attaches himself to the *mujtahid* as a follower . . . but

the opinion is not authoritative for other *mujtahids* . . . An Ijmā'ic consensus, on the other hand, carries an authority that is directed primarily to *mujtahids* . . . Once formed, an Ijmā'ic consensus puts an end to all such deliberation in the future . . . An opinion of an individual *mujtahid*, however authoritative for commoners, can never bring a halt to further deliberation.¹³

Al-Āmidī, as BW regularly reminds us, is interested in preserving the diversity of opinion amongst the qualified scholars, whilst at the same time preserving the authority of the individual *mujtahid*'s opinion outside of the scholarly class. In Fadel's paper, already mentioned, the problem of how the authority of a *mujtahid* is grounded in the *muqallid*'s ethical system was carefully dissected. The authority of the scholars as a class is, perhaps, nowhere more explicitly signaled in works of *uṣūl* than in the discussions of *ijmā'*—the consensus of the scholars on a particular legal assessment which is binding on future explications of the law. Lowry asks, "Is there something postmodern about *ijmā'*?" (chapter 11), exploring the discussions of various *uṣūlīs* through the interpretive theory of Stanley Fish. Fish famously posited that the meaning of texts is fixed by the interpretive communities that read them, rather than by the individual identified as the "author." Interpretive communities often claim that their interpreted meaning is not their own, but the author's original meaning: this, as is widely recognized, is a ploy whereby the community may distance itself from the subjectivity of the interpretive process and attempt to inject an authoritative objectivity into their conclusions. At times, the mechanism of *ijmā'*, as described in works of *uṣūl al-fiqh*, acts to "fix" the meaning of a historic text; it might also establish the valid application of a rule in a text to a case which may previously have seemed irrelevant. BW has already tested the application of Hans-Georg Gadamer's hermeneutic theory on the system of *uṣūl al-fiqh* in his article "Text and Application."¹⁴ With regard to *ijmā'*, he wonders whether *ijmā'* might be a counterpart to "Gadamer's agreement-through-conversation." His conclusion is that an alluring similarity should not persuade us—the two notions do not map perfectly upon one another. Lowry's conclusions are similarly cautious: at root is a rhetorical (and, one might say, structural) foundationalism in *uṣūl* writings generally which prevented *carte blanche* interpretive freedom.

¹³ Search, 203.

¹⁴ "Text and Application: Hermeneutical Reflections on Islamic Legal Interpretation." In *The Law Applied: Contextualizing the Islamic Shari'a. A Volume in Honor of Frank E. Vogel*. Edited by Peri Bearman, Wolfhart Heinrichs, and Bernard G. Weiss.

Diversity of juristic opinion is, sometimes, seen as a weakness in a legal system, and one which might lead to fragmentation of judicial authority. Indeed, it might be argued that the incorporation of diversity into the *uṣūl*, whilst attempting to preserve the authority of those proclaiming and implementing the law (through *ijmāʿ* and other theoretical conceptions) is a concession to the reality of disagreement. In “Body and Spirit of Islamic Law” (chapter 12), Peters explores the workings of legal diversity in the Dakhla Oasis through an examination of a cache of documents discovered there between 2003 and 2007. The people of al-Dakhla were Shāfiʿīs, but they lived under the imperial Ottoman-Ḥanafī legal supremacy. That both the local judges and the central judicial bureaucracy accepted that at times the local law may depart from that prescribed by the central *madhhab* is, perhaps, a reflection of this acceptance of diversity. Indeed, that the Ḥanafī court officials “rubberstamped” the local Shāfiʿī judges’ decisions shows not mere acceptance, but complicity in the promotion of legal pluralism when this was necessary. Perhaps the Ḥanafīs were able to accept this state of affairs because their legal school had developed the most detailed theoretical structure into which diversity could be slotted. The results are, Peters states, “not earth-shattering,” but they do contribute to our understanding of diversity in legal assessment, both at the intellectual and practical levels.

The authority of the state to decree and rule is, in part, based on a conception of law which operates within a constitutional framework. So, the relative autonomy of the Dakhla judges from central *diktat* is preserved in a conception of law’s operation which may not be extensively explored in the underdeveloped science of Islamic political theory. Instead, accepted conceptions of how government and law interact were based on conceptions grounded in the Muslim intellectual tradition from the pre-Ottoman period. It is in this tradition of thought that one can place the influential, but rarely imitated, constitutional theorizing of al-Māwardī. In his “Tracing the Nuance in Māwardī’s *al-Aḥkam al-sultāniyyah*” (chapter 13), Frank Vogel returns to al-Māwardī’s text with a fresh perspective: that of the ultimate authority of the *sharīʿah* (or more precisely, the scholars’ conception of the *sharīʿah* as found in their works of *fiqh*) over any other rival claim to political authority. In Vogel’s reading, al-Māwardī is not desperately trying to justify the existing, chaotic state system by means of legal casuistry. Rather he is trying to impose upon the Muslim notion of the state a set of constitutional principles which are legitimate only because they emerge from reasoned *fiqh* argumentation. By drawing attention to the way al-Māwardī protects and promotes the role of

legal scholars and practitioners within the constitutional framework, subjecting caliphal authority to the *fuqahā*'s ultimate sanction, Vogel sees al-Māwardī as accomplishing something theoretically novel: the beginnings of a specifically Islamic constitutional theory. The aim, as with *ijmā'* and the evidence from Dakhla, was to maintain the authority of the law by establishing the exclusive right of the religiously trained legal personnel (from the *mujtahid* to the *qāḍī*) to interpret it. BW, as Vogel notes, has expressed this phenomenon succinctly: "The caliphate had to give up all claims to legislative powers and to resign itself to being—or at least to giving the appearance of being—the instrument of implementation of the law of scholars, the law of books."¹⁵

LEGACY

Bernard Weiss's contribution to the field of Islamic, Islamic legal, and specifically *uṣūlī* studies is not to be measured only by his own scholarship. Were someone to write a history of the study of Islamic Law in North America, Bernard Weiss would be a featured figure because he was also a nodal point in the development of Islamic legal studies in the United States. Although scholars like Hallaq, Zysow and Reinhart had, autodidactically, begun studying the "principles of jurisprudence" (*uṣūl al-fiqh*) in the middle and late 1970s, Weiss's *Search for God's Law* validated and grounded *uṣūl* as a field of study. At meetings of the Middle East Studies Association in particular, but also the American Academy of Religion and the American Oriental Society, Weiss faithfully attended, commented on, and delivered papers concerned with Islamic law and religion. As importantly, Weiss, along with the late and much-lamented Jeanette Wakin (to whom the first volume of *Alta Papers* is dedicated), nurtured tyros in Islamic legal studies. He was an engaged conversation partner and (after the development of the web) email correspondent. The series he founded with Ruud Peters at Brill—*Studies in Islamic Law and Society*—published a number of these young scholars' first works—Sherman Jackson, Christoph Melchert, Frank Vogel, Robert Gleave, Jonathan Brockopp, Paul Powers, Kevin Jacques, to name just a few. The first *Alta* Conference, which he convened in 1999, and formed the basis for his edited collection *Studies in Islamic Legal Theory*, marked a maturing point in the study of

¹⁵ *Spirit* 16.

Islamic jurisprudential theory. This was not only because of the papers included—which he masterfully edited—and the record of the discussion which he laboriously transcribed and edited, but also because of the collegial community he fostered. He taught by example the value of careful work, serious engagement with others' work, and generosity in reading and assessing. In this way Bernard Weiss shaped the history of Islamic law's study in the United States for decades to come.

The papers in this volume were presented in embryonic form at a conference in Alta 2008. This second gathering, Alta Two, was convened in honor of BW, and forms the basis for this present collection. It was a particular privilege to have Bernard present for the presentations and discussions. All the papers presented here reflect, in various ways, his scholarly contribution to the study of Islamic law, and are framed by questions he saw as fundamental to the understanding of Islamic legal theory. BW's contribution though is more than simply his important scholarly output: it is also the expression of an etiquette of scholarly exchange that reflects BW's own approach to his subject. In his dialogue with al-Āmidī, BW's approach has been characterized (by Heinrichs) as *Mitdenken*—a “thinking along with” the author. In this sense BW's reading of al-Āmidī might be termed sympathetic—not in the sense of supporting or promoting his subject's perspective, but rather as an attempt to understand and represent, almost from the inside, an unknown scholarly discipline. This etiquette of engagement with the sources applies equally to the exchange between scholars. At one point during Alta Two, two participants embarked on a rather heated exchange about some detail of *uṣūl* methodology. BW intervened, saying, “That is not how we do things at Alta—at Alta we listen, try and understand, criticize if necessary, and then we agree to differ.” That there might be an “Alta way of doing things” is entirely due to the atmosphere at both conferences engineered by BW himself and reflecting his own approach. It could also be a lesson learned from Al-Āmidī's own method. BW's legacy will not simply be in his definitive account of the *uṣūlī* thought-world, but also in his encouragement of scholarship and scholarly collaboration in the study of that world. Thanks to his efforts, the once neglected field of Islamic legal theory is now established as one of the critical elements in the academic study of Islam.

Last, and at the risk of repetition, all of us owe profound thanks to the University of Utah—its deans and administrators and its Middle East Center and Law School, who so enthusiastically supported the idea of a *festschrift* conference for Bernard Weiss from the germination of the idea to the publication of this volume. Thanks are particularly due to Peter

Sluglett who enthusiastically handled arrangements at the Utah end of things, and to Shari Lindsey, whose logistical mastery made the conference such an effortless and pleasant event. We have also the pleasant duty of expressing our gratitude to the Islamic Legal Studies Program at the Harvard Law School and its then director, Baber Johansen, who generously subvented the conference and this volume. We thank our colleagues who are also, in part due to Bernard's efforts, friends, for their contributions to the conference, and to this volume. Their scholarship constructs our field, but also enriches our understanding of so many domains of human history and human life. And last, but foremost, we express here, once more, our gratitude to Bernard Weiss, fellow-scholar, teacher, mentor, friend, and deeply admired pioneer in the fascinating field of *uṣūl al-fiqh* studies.

* * *

The editors and contributors to *Islamic Law in Theory* were saddened to learn that Wolfhart Heinrichs died in January of 2014. Not only was he a good friend to all of us, including Bernard Weiss, but he had introduced many of us to the study of Islamic legal theory, and continued his contributions throughout the rest of his life. His untimely death is a profound loss to Islamic and Arabic studies.

PART ONE

LAW AND REASON

THE WISDOM OF GOD'S LAW: TWO THEORIES

Ahmed El Shamsy

I. INTRODUCTION

Montesquieu begins his *De l'esprit des lois* with the assertion that “laws, in their most general signification, are the necessary relations arising from the nature of things. In this sense all beings have their laws: the Deity His laws, the material world its laws, the intelligences superior to man their laws, the beasts their laws, man his laws.”¹ In Montesquieu’s view, God is constrained by rules that necessarily spring from His wisdom and power, while human beings construct their laws against a background of natural justice. This dictates certain “primitive laws,” such as the obligation to thank one’s benefactor and to provide retaliation for an injured party. Such rules exist objectively and are independent of the man-made positive laws that may give expression to them. Montesquieu thus vehemently opposes ethical subjectivism, claiming that “to say that there is nothing just or unjust but what is commanded or forbidden by positive laws, is the same as saying that before the describing of a circle all the radii were not equal.”²

Roughly eight centuries before Montesquieu, the Mu‘tazilī conception of the spirit of the law was based on very similar premises of natural justice.³ The Mu‘tazilīs, too, believed in the existence of objective and rationally graspable ethical principles that applied to both human and divine actions; they, too, considered the imperative of gratitude to the benefactor (*shukr al-mun‘im*) to represent one such principle. The question that this paper explores is whether and how these Mu‘tazilī ethics influenced the theorization of Islamic law and the development of conceptual tools for legal reasoning. I focus on a group of Shāfi‘ī scholars who

¹ I would like to thank Gregor Schwarb for his helpful comments on a draft of this paper. Montesquieu, *The Spirit of Laws (De l'esprit des lois)*, 1:1.

² Montesquieu, *The Spirit of Laws*, 1:2.

³ For a succinct overview of the pre-Islamic history of the natural law concept, see Frank Griffel, “The Harmony of Natural Law and Shari‘a,” 39–42.

lived in the early tenth century C.E. (late third and early fourth Hijrī century). Kevin Reinhart has shown that a subsection of the Shāfiī school in this period had evidently adopted a Mu‘tazili theological outlook, giving rise to what he calls “speculative Shāfi‘ism.”⁴ Secondary sources indicate that these Mu‘tazilī-inclined scholars produced some of the earliest works on legal theory (*uṣūl al-fiqh*) to be written after al-Shāfi‘ī’s (d. 204/820) *Risālah*. Of these, no major works seem to have survived. However, by piecing together evidence from two newly available sources, most importantly a short but complete legal-theoretical text from the first half of the tenth century, we are able to reconstruct in some detail a coherent legal theory that reveals the role played by rationalist theology in tenth-century Shāfiī law.

An analysis of these sources reveals that at least one prominent strand of Shāfiī legal theory in this period was not merely influenced by, but indeed fundamentally embedded in, rationalist theology. George Makdisi has claimed that for al-Shāfiī legal theory represented an alternative to theology,⁵ but it seems clear that by the fourth/tenth century, many of al-Shāfiī’s successors considered it part and parcel of a broad theological system. Within this system, the proposition that the sacred law promotes human benefit (*maṣlaḥah*) occupied a central position: it served to justify both the overall rationality of the law and the practice of analogical reasoning (*qiyās*). However, for tenth-century Shāfiīs the concept of *maṣlaḥah* remained a theoretical construct and was not employed as a practical tool of legal reasoning. Counterintuitively, the systematic utilization of *maṣlaḥah* as a device in analogical rule derivation seems to have begun among Shāfiīs after the decline of Mu‘tazilī ethics and with the rise of Ash‘arī ethical subjectivism.

II. LEGAL THEORY AND THEOLOGY AMONG EARLY SHĀFI‘IS

Al-Shāfiī was intensely critical of the *kalām* theology of his day, both form and content.⁶ His condemnation did not, however, deter his students from taking up positions on the heated debates of the third/ninth century. Abū Ya‘qūb al-Buwayṭī (d. 231/846), Abū ‘Alī al-Karābīsī (d. 248/862), Ismā‘īl b. Yaḥyā al-Muzanī (d. 264/877), and Abū ‘Abd al-Raḥmān al-Shāfiī

⁴ Reinhart, *Before Revelation*, 15–16.

⁵ Makdisi, “The Juridical Theology of Shāfi‘ī.”

⁶ al-Bayhaqī, *Manāqib al-Shāfi‘ī*, 1:452–470.

(d. after 230/845) all appear to have voiced opinions regarding the controversial Mu'tazilī thesis of the createdness of the Quran. Al-Buwayṭī unequivocally rejected the thesis,⁷ while al-Karābīsī and al-Muzanī endorsed an intermediate position according to which only the utterance (*lafẓ*) of the Quran was created.⁸ Abū 'Abd al-Raḥmān, in contrast, not only affirmed the createdness doctrine wholeheartedly, but became an open Mu'tazilī and acted as the right-hand man of the imperial grand judge Ibn Abī Duwād (in office probably 218–237/833–851 or 852) in enforcing the Quranic inquisition (*miḥnah*),⁹ an occupation that caused much embarrassment among the Shāfi'īs both at the time and afterwards.¹⁰ But the opprobrium heaped upon Abū 'Abd al-Raḥmān should not be interpreted as evidence that Mu'tazilī ideas in general were considered anathema by the Shāfi'īs in the period that followed the inquisition. Particularly in the realm of legal theory, the opposite appears to be the case.

A preliminary indication of this is provided by the remarkable dearth of extant works on Shāfi'ī legal theory from this period. We know of a number of works on legal-theoretical topics that were composed before the mid-tenth century,¹¹ but already al-Zarkashī (d. 794/1392) had difficulty in finding anything beyond single copies of a handful of these texts for his encyclopedic work on Shāfi'ī *uṣūl al-fiqh*.¹² The most likely reason for the disappearance of these works lies in the theological attitudes that they displayed—attitudes rooted in Mu'tazilī ethics, which came to be considered unacceptable by later generations of Shāfi'ī jurists. This theory is supported by the fact that the only hitherto found fragments of legal-theoretical writings from the early period have survived as part of works on positive law. Ibn Surayj's (d. 306/918) *al-Wadā'i' li-manṣūṣ al-sharā'i'*, a work primarily concerned with the recitation of uncontroversial points of law, contains a small addendum on legal theory; however, this is silent on the contentious theological issues that are the subject of this study.¹³

⁷ al-Dhababī, *Siyar a'lām al-nubalā'*, 12:61.

⁸ For al-Karābīsī, see van Ess, "Ibn Kullāb und die Miḥna," 102. For al-Muzanī, see al-Qazwīnī, *Kitāb al-irshād*, 1:431. On the other hand, Ibn 'Abd al-Barr, in *al-Intiqā'*, 170, claimed that al-Muzanī believed in the createdness of the Quran itself.

⁹ van Ess, *Theologie und Gesellschaft*, 3:292–295.

¹⁰ Ibn 'Asākir, *Tārīkh madīnat Dimashq*, 51:358, quoting Abū Dāwūd al-Sijistānī (d. 275/889).

¹¹ See, for example, Bedir, "An Early Response to al-Shāfi'ī"; Stewart, "Muḥammad b. Jarīr al-Ṭabarī"; and Stewart, "Muḥammad b. Dāwūd al-Zāhirī."

¹² al-Zarkashī, *al-Baḥr al-muḥīṭ*, 5:42, 1:6–9.

¹³ Ibn Surayj, *al-Wadā'i' li-manṣūṣ al-sharā'i'*.

My analysis here draws on two primary sources that have thus far received little or no attention, but which offer an unparalleled insight into early Shāfiʿī legal theory. These sources are *al-Aqsām wa-l-khiṣāl* by Abū Bakr Aḥmad b. ʿUmar b. Yūsuf al-Khaffāf, and the recently edited *Mahāsīn al-sharīʿah* by al-Qaffāl al-Shāshī.¹⁴ While al-Qaffāl is a well-known mid-tenth-century Shāfiʿī jurist (he died in 365/976), very little is known about al-Khaffāf. He is said to have belonged to the generation of Ibn Surayj’s students and to have been a contemporary of Ibn al-Ḥaddād (d. 345/956 or 957), so he probably lived a few decades earlier than al-Qaffāl.¹⁵ He is also widely recognized as the author of a work titled *al-Aqsām wa-l-khiṣāl*.¹⁶ This short work exists in the Chester Beatty Library in Dublin as a single water-damaged manuscript that the catalog mistakenly attributes to Ibn Surayj.¹⁷ *Al-Aqsām wa-l-khiṣāl* is a book of *fiqh*, but it is prefaced by a remarkable 3,000-word introduction, *Muqaddimah*, which contains a concise but complete exposition on legal theory. The *Muqaddimah* represents, to my knowledge, the oldest extant work of this kind after al-Shāfiʿī’s *Risālah* and al-Buwayṭī’s abridgement of the *Risālah*. It discusses explicitly, under the rubric of *uṣūl al-fiqh*, many of the core topics of mature legal theory that are missing from the *Risālah*, such as the *āḥād-tawātur* distinction, types of *ijmāʿ* and *qiyās*, the nature of the imperative (*amr*), ambiguous expressions (*mujmal*), previous divine laws (*sharāʿiʿ man kāna qablanā*), legality in the absence of revelation (*al-ashyāʿ qabla majīʿ al-sharʿ*), and legal conformism or *taqlīd*.

What is most striking about the *Muqaddimah* is the fact that it places legal theory squarely within a theological framework. Al-Khaffāf begins the text with the thesis that “the permissible and the impermissible are recognized from two angles, one of them reason, the other revelation

¹⁴ For another discussion of the value of the *Mahāsīn*, see Kevin Reinhart’s paper in this volume.

¹⁵ This information is contained in a single-sentence entry in al-Shīrāzī’s *Ṭabaqāt al-fuqahāʾ*, 114. Subsequent biographers all drew on this source; see, for example, al-Isnawī, *Ṭabaqāt al-shāfiʿiyyah*, 1:464–465. Ferdinand Wüstenfeld seems to have had access to a further manuscript of al-Isnawī that describes al-Khaffāf as a contemporary of Ibn al-Ḥaddād; see Wüstenfeld, *Der Imām el-Schāfiʿī*, 19. Ḥājjī Khalīfah mistakes the Ḥanafī jurist al-Khaṣṣāf for al-Khaffāf, and attributes to the latter al-Khaṣṣāf’s death year of 261/874; see Ḥājjī Khalīfah, *Kashf al-zunūn*, 2:1416.

¹⁶ See, for example, al-Zarkashī, *al-Baḥr al-muḥīṭ*, 5:42, and the works mentioned in the previous note.

¹⁷ Al-Khaffāf’s name is recognizable on the first page of the manuscript. Also, classical Muslim authors cite the work and attribute it to al-Khaffāf; see previous note. I am in the process of editing the *Muqaddimah* for publication.

(*al-ḥalāl wa-l-ḥarām yudraku min jihatayn aḥaduhā al-ʿaql wa-l-ākhar al-samʿ*).¹⁸ Reason establishes three categories: obligatory, forbidden, and permissible (*wājib*, *mumtaniʿ*, and *mujawwaz*). The first two categories are rationally intelligible and binding on any human being; in these areas, revelation only confirms rational insights. Law proper takes place in the neutral category of things deemed permissible by reason. It is revelation that sorts what is allowed by reason into the various categories of legal classification through the application of the hermeneutic tools of *uṣūl al-fiqh*.¹⁹ Though the available evidence is scanty, it seems that this position was shared by at least some of al-Khaffāf's Shāfiʿī peers, including Ibn al-Qāṣṣ (d. 335/946 or 947) and Abū Bakr al-Ṣayrafi (d. 330/941 or 942).²⁰

From the very beginning, the *Muqaddimah* thus sets out to establish a position for law within a wider theological system that assigns roles to reason and revelation respectively. A constant reminder of this basis appears in the non-contradiction clause that recurs numerous times in the text: an interpretation is valid only if it does not violate reason (*khārijan ʿammā fi al-ʿuqūl*) and if it is, as al-Khaffāf puts it, “good in itself and not deemed evil (*ḥasanan fī nafsihi ghayra mustaqbah*).”²¹ This insistence on non-contradiction with reason stresses that revelation in its different manifestations is constrained and delimited by a firm and epistemologically superior ethical framework of reason.

Within this framework, legal theory serves an important theological function. While the rational categories of obligatory and forbidden embody imperatives that are logically necessary, the legal rules established by revelation within the rational category of allowable are not necessary. The role of legal theory is to prove that the law is nonetheless not arbitrary. Al-Khaffāf stresses that everything, including the rules provided by revelation, has a cause (*ʿillah*), but that there are two different kinds of causes, namely rational and legal causes. Rational causes (*ʿilal ʿaqliyyah*) are necessarily connected to their effects: movement causes the body to be moved, and this connection cannot be severed or abrogated. A legal cause (*ʿillah sharʿiyyah*), on the other hand, such as intoxication that

¹⁸ al-Khaffāf, *al-Aqsām wa-l-khiṣāl*, fol. 1b.

¹⁹ al-Khaffāf, *al-Aqsām wa-l-khiṣāl*, fol. 1b.

²⁰ In *Adab al-jadal*, Ibn al-Qāṣṣ argued that “God’s proof for these two [the categories of rationally obligatory and rationally impermissible] is established for anyone with an intellect whether before or after the coming of revelation, and revelation has only come to confirm it”; al-Zarkashī, *al-Baḥr al-muḥīt*, 1:149. For al-Ṣayrafi and al-Qaffāl al-Shāshī, see al-Zarkashī, *al-Baḥr al-muḥīt*, 1:139–140; translated in Reinhart, *Before Revelation*, 19.

²¹ al-Khaffāf, *al-Aqsām wa-l-khiṣāl*, fols 7b, 3a.

causes wine to be forbidden, is dependent on revelation: its causality was not in existence before revelation and it could be retracted again through abrogation. It should be noted that in al-Shāfiʿī's terminology, legal causes were known as *maʿānī*.²² Though al-Khaffāf probably was not the first to do so, using the same word for both rational and legal causes draws an analogy between the two by suggesting that they are in some basic way similar, a point to which I return later. Legal theory is thus integrated into a theological system and revelation is granted a space to develop an alternative form of causality that is parallel to, though different from, necessary rational causality.

III. MAṢLAḤAH AS THE STRUCTURING PRINCIPLE OF THE LAW

The structuring principle of the causality that is established by revelation is human benefit, *maṣlaḥah*. On this subject, al-Khaffāf's position is echoed by his fellow Shāfiʿī al-Qaffāl al-Shāshī, whose recently edited work *Maḥāsin al-sharīʿah* provides a more detailed exposition of the function of benefit within the theological system that both al-Khaffāf and al-Qaffāl evidently shared. Al-Qaffāl's fundamental premise is that the specific cause (*ʿillah*) of a legal ruling is itself caused by the ultimate cause (*maʿlūl bi-l-ʿillah al-ʿāmmah*) that is human benefit.²³ The primary justification for the assumption that the sacred law was intended for the benefit of humankind appears to have been the divine attribute of wisdom (*ḥikmah*). Al-Qaffāl argues that "if you affirm that things have a creator who is wise and powerful, then He must intend good for His servants, rendering satisfaction for them according to virtuous governance that is based on seeking their benefit."²⁴ This connection between human benefit and God's attribute of wisdom can be encountered among later Ashʿarīs, such as Fakhr al-Dīn al-Rāzī (d. 606/1210),²⁵ but it appears to have originated among the Muʿtazilīs of Baghdad,²⁶ where it was closely linked to

²² Josef van Ess has found some evidence that usage of the term *ʿillah* to denote causality in law predates al-Shāfiʿī; see van Ess, "The Logical Structure of Islamic Theology." On al-Shāfiʿī's use of *maʿnā*, see Lowry, *Early Islamic Legal Theory*, 150–152.

²³ al-Qaffāl al-Shāshī, *Maḥāsin al-sharīʿah*, 27.

²⁴ al-Qaffāl, *Maḥāsin al-sharīʿah*, 25. The term "virtuous governance" (*al-siyāṣah al-fāḍilah*) is unusual in legal discussions and indicates that al-Qaffāl's argument transcends the purely legal realm, an issue that is investigated below.

²⁵ al-Rāzī, *al-Maḥṣūl*, 5:175–177. See also al-Ḥakīm al-Tirmidhī, *Ithbāt al-ʿilal*, 69.

²⁶ See, for example, al-Ashʿarī, *Maqālāt al-islāmīyyīn*, 575.

a broader debate regarding God's obligation to bring about the optimum, *al-aṣlah*, in creation as a whole.²⁷

Al-Khaffāf and al-Qaffāl thus lay out a double rationality of the law. The first kind of rationality relates to necessary truths that are intelligible independently of divine revelation; these are few in number. Within the vast realm of the rationally possible, a second type of rationality exists, namely a means-ends rationality: God's wisdom gives rise to laws that serve the benefit of His creatures. In some instances the connection between a rule and the benefit that it serves is transparent; in others, both al-Khaffāf and al-Qaffāl admit that the benefit must be assumed, but cannot be understood.²⁸

The affirmation that the realm of law is structured by causes, which in turn aim at the generation of human benefit, addressed three important concerns that had emerged in the course of the third/ninth century.

First, the assertion that the law serves human benefit played a role in theological discussions as part of the justification for the obligation to obey the divine law. Given the Baghdadi Mu'tazilī position that the tendency to maximize benefit for creation is an inherent characteristic of God, the divine law must necessarily reflect the same goal. This divine beneficence towards humankind, as evident in the law as well as more broadly in creation, gives rise to the rational obligation to thank one's benefactor and thus to obey the precepts laid down by him.²⁹

Second, arguing for the beneficial nature of the sacred law served a crucial theological and polemical purpose within an intellectual context of anti-religious and antinomian critiques of Islam. According to al-Qaffāl, criticisms of the benefits of the sacred law and its rationality are voiced principally by two parties. The first group, he claims, denies prophecy and the creation of the world and uses the alleged irrationality of the law as part of an attack not only on Islam, but on all revealed religion; these *dahrīyyūn* avow only a belief in the eternity of the cosmos. The second group admits both a creator and prophethood, but rejects the outward meanings of revelation in favor of esoteric interpretations that nullify the rules of the law. Al-Qaffāl mentions particularly Ismā'īlīs as falling

²⁷ See Brunshvig, "Mu'tazilisme et optimum (*al-aṣlah*)"; Zysow, "Two Theories of Obligation," 400.

²⁸ "Ista'thara Allāh bi-'ilmih": al-Qaffāl, *Maḥāsīn al-sharī'ah*, 26; al-Khaffāf, *al-Aqsām wa-l-khiṣāl*, fol. 4a.

²⁹ Zysow, "Two Theories of Obligation," 399–400.

into this category.³⁰ The explicit aim of *Maḥāsīn al-sharīʿah* is to defend the rationality of the sacred law against such critiques by demonstrating that the law is fully compatible with the principle of virtuous governance (*al-siyāsah al-fāḍilah*).³¹ This term is not frequently encountered in legal discussions, and al-Qaffāl's use of it reflects a discourse outside the sphere of law. It appears that ethical norms employed in Islamic political philosophy by al-Qaffāl's contemporaries such as al-Fārābī (d. 339/950)³² were used as standards of comparison against which the *sharīʿah* was measured and found wanting. Likening God's governance to that of a hypothetical virtuous ruler on Earth, al-Qaffāl sought to prove that the sacred law was rational in the sense that its general prescriptions served rational ends, even though the individual details could not be evaluated by the limited human mind. The theme of justifying the sacred law in philosophical and rationalist terms by highlighting its promotion of human benefit also appears in the writings of the "philosopher of Nishapur," Abū al-Ḥasan al-ʿĀmirī (d. 381/992).³³

Finally, the hypothesis of benefit as the ultimate cause of the law affirmed the existence of at least partly intelligible patterns within the non-necessary aspects of the law. Al-Nazzām (d. between 220 and 230/835 and 845) famously denied that any such regularity could be found. He claimed that while rationally necessary obligations exist and are equally binding on God and man, the rules that constitute the *sharīʿah* were utterly arbitrary and had only become good and wise as a result of the divine speech act that made them obligatory.³⁴ In the absence of an underlying systematic principle, al-Nazzām argued that the analogical extension of known rules was impossible. By establishing a direct and necessary connection between the beneficial nature of the sacred law and divine attributes such as *ḥikmah*, tenth-century Shāfiʿīs could counter this critique and develop a justification for the practice of analogical reasoning: The extension of a ruling from one case to other similar situations requires the assumption of continuity and consistency within the law, and this is provided by the unifying principle of benefit.

³⁰ al-Qaffāl, *Maḥāsīn al-sharīʿah*, 17–20.

³¹ al-Qaffāl, *Maḥāsīn al-sharīʿah*, 19.

³² Al-Fārābī uses the expression in *Kitāb al-millāh*, 55. I am grateful to Gregor Schwarb for this reference.

³³ Compare the formulation of the five overall policies of the law in al-ʿĀmirī, *Kitāb al-iʿlām*, 123, and, in more developed form, in al-Ghazālī, *Shifāʾ al-ghalīl*, 160–161.

³⁴ van Ess, *Theologie und Gesellschaft*, 6:168–169.

IV. CONSIDERATIONS OF BENEFIT IN PRACTICE

The principle of *maṣlaḥah* was thus harnessed by tenth-century Shāfiʿī jurists to justify the validity of analogy. However, it appears that in practice, considerations of benefit played no role in the actual process of legal reasoning; I have found no evidence that Shāfiʿī scholars in this period possessed or used conceptual tools that could have accommodated the assumption of the beneficial nature of law.³⁵ Indeed, the concept of benefit as developed by al-Qaffāl especially was by its very nature unsuited to practical application. Al-Qaffāl's primary objective in the *Maḥāsīn*, as seen above, was to defuse criticisms of Islam and of its laws, not to generate new rules. His statements in this context nonetheless demonstrate that he conceived of benefit in very abstract terms, and that he perceived a discontinuity between the general principle of benefit and the actual rationale of specific legal rulings. He admits, for example, that the many benefits of the law that he enumerates in his work are in the end only "meanings that could be attached to the rules so that the minds of the believers may approach them (*innamā hiya maʿānin yajūzu an tuʿallaqa tilka al-aḥkām bi-hā ḥattā taqruba min ʿuqūl al-mutaʿabbidīn*)."³⁶ Furthermore, al-Qaffāl notes that human beings can easily perceive overall features, but cannot distinguish subtleties; he points out that one look suffices to distinguish between a man with much hair and one with little hair, but a beard containing a thousand hairs looks much the same as a beard containing a thousand and one hundred hairs.³⁷ Likewise, the overall rules of the law can be recognized as clearly beneficial, but the details are often inaccessible to human understanding. As an example, al-Qaffāl quotes the differing punishments meted to an unmarried fornicator (100 lashes) and to someone who makes an unsubstantiated accusation of fornication (80 lashes).³⁸ Given that the legal reasoning of the jurist deals precisely with such minutiae, it seems unlikely that al-Qaffāl's concept of

³⁵ Muḥammad Zāhid al-Kawtharī (d. 1952) already argued that the concept of *maṣlaḥah* among the Muʿtazilis served a theological rather than a practical legal purpose in "Athar al-ʿurf wa-l-*maṣlaḥah*," 239–243.

³⁶ al-Qaffāl, *Maḥāsīn al-sharīʿah*, 261. The edited text reads "taqruba/tuqarriba ʿalā," but I have changed the preposition based on a manuscript of the *Maḥāsīn* that was not used by the editor (Yale University, Beinecke Rare Book and Manuscript Library, MS Landberg 614, fol. 72b). I am grateful to Kevin Reinhart for allowing me to consult his copy of this manuscript.

³⁷ al-Qaffāl, *Maḥāsīn al-sharīʿah*, 27.

³⁸ al-Qaffāl, *Maḥāsīn al-sharīʿah*, 540.

benefit could be used in the actual determination of legal causes for the purpose of analogy.

Al-Qaffāl's theory of benefit bears a strong resemblance to that developed by his contemporary Ḥanafī legal theorist Abū Bakr al-Jaṣṣāṣ (d. 370/980). Al-Jaṣṣāṣ distinguished between causes of benefit (*'ilal al-maṣāliḥ*) and causes of the rule (*'ilal al-ḥukm*).³⁹ Like al-Qaffāl, al-Jaṣṣāṣ deduced the beneficiality of the law in general from God's attribute of wisdom. The benefits of the details of the law, however, could not be deciphered through reasoning. It was enough to know that they necessarily had to exist, flowing from the premise of a wise God. Al-Jaṣṣāṣ's teacher, Abū al-Ḥasan al-Karkhī (d. 340/952), put forth a similar distinction between what he called the causes of a rule (*'ilal al-ḥukm*) and the wisdom of a rule (*ḥikmat al-ḥukm*), emphasizing that the wisdom of a rule could not be used to establish its cause.⁴⁰

The distinction between, on the one hand, the specific cause of a legal ruling and, on the other, the overall purpose served by the ruling reveals a particular understanding of the nature of legal causes. This "sign model" of the cause treats legal causes as arbitrary signs, set by God, that are not ontologically connected to the underlying reasons of the divine law, like names lacking an inherent connection to their referents. The function of such causes is to act as markers that enable the jurist to generalize the known ruling in one case to other, similar cases that share the same salient feature, i.e. the same cause. Knowing that the law in general serves human welfare, the jurist can also speculate about the nature of the broader benefit provided to humankind by the ruling. However, this—unlike the determination of the legal cause—is mere conjecture. Within the sign model, considerations of benefit can thus have no practical role in the identification of legal causes and the practice of analogy.⁴¹

The sign model of the cause was by no means universally held by early Shāfi'īs: Abū 'Alī b. Abī Hurayrah (d. 345/956), for example, is reported to have adhered to the alternative "motive model,"⁴² according to which legal causes correspond in a direct and often intelligible way to the overall policies served by legal rulings. Nonetheless, we know that the sign model was adopted by at least some prominent Shāfi'ī scholars in this period. In particular, Abū Bakr al-Ṣayrafī, one of the most influential speculative Shāfi'īs of the early tenth century, is reported to have adhered explicitly to

³⁹ al-Jaṣṣāṣ, *al-Fuṣūl fī al-uṣūl*, 2:291–293.

⁴⁰ al-Karkhī, *al-Uṣūl*, 172.

⁴¹ Zysow, "Economy of Certainty," 374–390.

⁴² Zysow, "Economy of Certainty," 374–390.

the sign model,⁴³ which indicates that for him, too, the practice of analogy could not utilize considerations of benefit. Although al-Qaffāl was more willing to speculate on the underlying benefits of the law than al-Jaṣṣāṣ and al-Karkhī, he stressed the speculative nature of these interpretations and the polemical project that they served as a justification of the law against antinomian threats.⁴⁴ Whether or not al-Qaffāl also endorsed the sign model (the fact that he adhered to al-Ṣayrafī's legal theory suggests that he did),⁴⁵ this certainly indicates that he did not view the principle of benefit as representing a useable element in the methodology of analogy.

V. DIALECTICS AS AN ALTERNATIVE JURISTIC TOOL

Al-Khaffāf's work, like al-Qaffāl's, offers insufficient information to determine conclusively whether he adhered to the sign model of the cause. However, it is clear that his discussion on the ascertainment of legal causes makes no mention of benefit. In contrast, he deals extensively with a very different technique, namely dialectics (*jadāl*).⁴⁶ Aristotelian dialectics made its first appearance in Islamic thought in the field of theology with Ibn al-Rāwandī's (d. mid-third/ninth century) *Adab al-jadāl*, and it was subsequently adopted into law. The topic of *jadāl* takes up about a fifth of the whole *Muqaddimah*. The importance of *jadāl* in al-Khaffāf's work correlates with the information that we have about other early Shāfi'īs' engagement with the subject: al-Qaffāl, Ibn al-Qāṣṣ, and Ibn Abī Hurayrah all composed independent treatises on *jadāl* in law,⁴⁷ and may thus have been the first jurists to adopt this originally theological methodology. Al-Ṣayrafī also wrote on and endorsed the practice.⁴⁸ It is noteworthy that the Shāfi'īs' apparent enthusiasm for *jadāl* in law was not shared by many scholars outside the school, who viewed the technique with reservation.⁴⁹

⁴³ al-Zarkashī, *al-Baḥr al-muḥīt*, 5:112.

⁴⁴ al-Qaffāl, *Mahāsīn al-sharī'ah*, 17–20, 261.

⁴⁵ See Ibn Qāḍī Shuhbah, *Ṭabaqāt al-shāfi'īyyah*, 1:116.

⁴⁶ On *jadāl*, see Miller, "Islamic Disputation Theory."

⁴⁷ See al-Zarkashī, *al-Baḥr al-muḥīt*, 1:149 (on Ibn al-Qāṣṣ), 5:136 (on Ibn Abī Hurayrah); and al-Shīrāzī, *Ṭabaqāt al-fuqahā'*, 112 (on al-Qaffāl).

⁴⁸ al-Zarkashī, *al-Baḥr al-muḥīt*, 5:364.

⁴⁹ The Ḥanafī al-Karkhī concluded that though the tests of consistency and convertibility sufficed to ground an argument within *jadāl*, they could not be used as the basis of legal responsa (*fatāwā*) or actual practice; al-Zarkashī, *al-Baḥr al-muḥīt*, 5:249. Both al-Ḥakīm al-Tirmidhī (d. ca. 300/917) and the Ash'arī Abū Bakr al-Bāqillānī (d. 402/1013) argued that *jadāl* could not produce proof of legal causes; see al-Ḥakīm al-Tirmidhī, *Ithbāt al-'ilal*, 73; and al-Ghazālī, *Shifā' al-ghalīl*, 267.

While juristic *jadal* provides the framework for disputes on any source of the law, in actual practice the most discussed topic was the process of analogy and especially the verification of the legal cause. By the very nature of the method of *jadal*, the verification process was formalistic. The primary way of arguing for a legal cause was to demonstrate its consistency (*tard*, i.e. whenever the cause is present, the legal qualification is present) and convertibility (*'aks*, i.e. whenever the cause is absent, the legal qualification is absent).⁵⁰ The legal cause used for the tests of consistency and convertibility thus had nothing to do with the presumptive benefit provided by the rule in question.

It is plausible that the Shāfi'īs' adoption of the formalistic method of *jadal* is connected to the terminological shift, mentioned above, from underlying reason (*ma'ná*) in al-Shāfi'ī's *Risālah* to legal cause (*'illah*) a century later. As Aron Zysow has already pointed out, the fascination of early Shāfi'īs with consistency and convertibility in the ascertainment of legal causes springs from the application of the standards of rational causes to legal ones.⁵¹ It seems that the introduction of the term *'illah* into Shāfi'ī legal theory went hand in hand with a new view of the basic unit of analogical reasoning: if it was a cause, rather than a more nebulous "meaning" (*ma'ná*), then it could be verified the way that natural causes were verified, namely through formalistic means. The method *par excellence* for such a procedure was *jadal*.

In contrast to the apparent non-use of the principle of benefit in verifying legal causes, there is therefore extensive evidence that early Shāfi'īs used the formalistic method of *jadal* as the basis of analogical reasoning. This adoption of a theological method into law lends further support to the thesis that tenth-century Shāfi'īs integrated law both substantially and methodologically into a theological system.

VI. AL-GHAZĀLĪ'S THEORY OF BENEFIT

The advent of Ash'arism transformed the theory and use of *maṣlaḥah* among the Shāfi'īs. The change is evident when comparing the theories of al-Khaffāf and al-Qaffāl with that of Abū Ḥāmid al-Ghazālī (d. 505/1111) about a century and a half later. While for the early Shāfi'īs the assumption of the beneficial nature of the law flowed necessarily from premises

⁵⁰ Zysow, "Economy of Certainty," 367–369.

⁵¹ Zysow, "Economy of Certainty," 370.

about divine nature, as an Ash'arī, al-Ghazālī denied any such connection. Al-Ghazālī did acknowledge that reason could distinguish between harm and benefit in this world, and that it directs mankind towards pursuing benefit and avoiding harm. However, in contrast to the Mu'tazilīs, al-Ghazālī denied that the prescriptions of reason impose constraints on God's actions or commands. He nonetheless affirmed that the promotion of human benefit does indeed underpin the sacred law; and he arrived at this conclusion through induction on the basis of the known rules of the *sharī'ah*.⁵² Al-Ghazālī's legal methodology thus consisted of a bottom-up inferential process that used textually established rules to grasp the spirit of the law and then employed these insights as guiding principles for its further elaboration. He termed this technique of evaluating presumptive legal causes against such overall policies of the law the test of appropriateness (*munāsabah*).⁵³

Al-Ghazālī was not opposed to the formalism of consistency and convertibility tests (*tard wa-'aks*), as his Ash'arī predecessor Abū Bakr al-Bāqillānī (d. 402/1013) had been. Rather, he considered consistency and convertibility to be simply the outward indicators for the jurist of where to look for the relationship between an individual ruling and human benefit; for example, consistency shows that wherever intoxication is present, impermissibility is present.⁵⁴ Going beyond this formalism, al-Ghazālī identified the policy, or purpose, behind this ruling as the protection of the intellect. Once the policies of the law (what later became known as *maqāsid al-sharī'ah*) have been identified, this knowledge can serve to test presumptive causes: to be assumed valid, a cause has to serve the overall policies of the law.

In practice, this principle thus allows the jurist to analyze legal rules in order to isolate their legal causes. The jurist might, for example, query the benefit underlying the imposition of the death penalty for murder and—guided by the Quranic verse 2:179—conclude that the policy of the law that is served by this punishment is deterrence. This conclusion would have practical implications for specific cases of murder: to achieve the

⁵² Hourani, "Ghazālī on the Ethics of Action," 86.

⁵³ Although the exact origins of the appropriateness test are unclear, already Badr al-Dīn al-Zarkashī (d. 794/1392), who had access to considerably more sources than are extant today, quoted al-Ghazālī as the earliest proponent of a worked-out theory of appropriateness; see al-Zarkashī, *al-Baḥr al-muḥīṭ*, 5:206–208.

⁵⁴ al-Ghazālī, *Shifā' al-ghalīl*, 267–276.

maximum deterrent effect, murder carried out with any type of weapon would be subject to the death penalty, with deference to the Ḥanafī position according to which only murder committed with a lethal weapon merits this punishment.⁵⁵

The Muʿtazilī understanding of benefit in law was rationalist in the sense that it was derived from higher principles postulated to be directly dictated by reason. Al-Ghazālī's theory, on the other hand, was quasi-empiricist: its basis in Ashʿarī voluntarism necessarily precluded the assumption of a *a priori* structure or aims within the law, but it left open the possibility of discovering such a structure through observation of the law itself.

It is tempting to link this empiricist turn in al-Ghazālī's thought to his engagement with the work of Galen of Pergamum (d. around 216 C.E.), particularly the latter's *De usu partium* ("On the usefulness of the parts of the body," in Arabic *Manāfiʿ al-aʿdāʾ*), which enumerates the benefits of each part of the human body and the harmony in which they interact.⁵⁶ This work was translated into Arabic already by the late ninth century,⁵⁷ and it enjoyed enormous popularity in al-Ghazālī's time. ʿAbd al-Raḥmān b. Abī Ṣādiq al-Naysābūrī (alive in 459/1067) wrote a commentary on Galen's book,⁵⁸ and Abū Ḥayyān al-Tawḥīdī (d. 414/1023) praised its genius which he attributed to divine inspiration.⁵⁹ Al-Ghazālī, in *al-Munqidh min al-ḍalāl*, refers directly to Galen's work: in a discussion on the ancient natural philosophers, he explains that the benefit of the study of anatomy lies precisely in the discovery of this "usefulness of the body parts" (*manāfiʿ al-aʿdāʾ*), which in turn illuminates to the scholar God's wisdom (*ḥikmah*) and the purposes (*maqāṣid*) of His actions.⁶⁰

The overlap between al-Ghazālī's terminology and that of legal theory is evident and becomes clearer still in al-Ghazālī's *al-Ḥikmah fī makhlūqāt Allāh*,⁶¹ which is dedicated to elucidating the divine wisdom behind the creation of the planets, the elements, animals and plants, as well as the human body. Already the introduction indicates an empiricist approach, as al-Ghazālī justifies his work in terms of the Quranic injunction to

⁵⁵ al-Ghazālī, *al-Mankhūl*, 545–547.

⁵⁶ Galen, *On the Usefulness of the Parts*.

⁵⁷ The translation was done by Ḥubaysh b. al-Ḥasan, who died in the early fourth/late ninth century; see Ibn al-Nadīm, *al-Fihrist*, 349.

⁵⁸ Kaḥḥālah, *Muʿjam al-muʿallifīn*, 5:154.

⁵⁹ al-Tawḥīdī, *al-Muqābasāt Abū Ḥayyān al-Tawḥīdī*, 351.

⁶⁰ al-Ghazālī, *al-Munqidh min al-ḍalāl*, 76–77.

⁶¹ al-Ghazālī, *al-Ḥikmah fī makhlūqāt Allāh*, 5–49; see, e.g., 24.

observe creation.⁶² The overarching theme of the work is the principle of averting harm (*maḥṣadah*) and facilitating benefit (*maṣlahah*) in creation. With regard to the human body, it is revelation and more specifically divine law that provides the guidance necessary to use the body so as to achieve these dual aims.⁶³ The divine law is thus part and parcel of a wider, observable landscape of creation that is structured by the promotion of benefit and the aversion of harm.

In order to avoid terminological confusion, it is important to note that within the empiricist-rationalist divide among the doctors of his day, Galen leaned towards rationalism.⁶⁴ However, when juxtaposed with Mu'tazilī theological rationalism, Galen's arguments in *De usu partium* contain the basis for the empiricism that permitted al-Ghazālī to arrive at the beneficiality of the law through the inductive movement from individual rulings to overall patterns.

VII. CONCLUSION: TWO THEORIES OF BENEFIT

What this study has shown is that the integration of rationalist ethics and legal theory in the work of early tenth-century Shāfi'ī jurists did not lead to a de-scripturalization in favor of legal reasoning based on notions of natural law, as it had in the work of Montesquieu. Rather, reason was employed as an apologetic tool for justifying the overall thrust of the law as necessary and the details as possible ways of virtuous divine lawmaking. Meanwhile, the actual process of legal reasoning for individual rules took place according to the formalistic method of juridical dialectics. The idea of a rational sacred law was upheld but radically altered in the work of Ash'arīs such as al-Ghazālī. While Ash'arī ethical subjectivism rejected the notion that God is bound by rational obligation, al-Ghazālī argued for a bottom-up rationality of the law that was justified empirically: through induction, an intelligible structure could be discerned in the law, and this structure could then be utilized for the analogical extension of rules through the test of appropriateness.

We thus arrive at the counterintuitive conclusion that the Ash'arī decoupling of ethics from law coincided with the transformation of benefit

⁶² al-Ghazālī, *al-Ḥikmah fī makhlūqāt Allāh*, 3–4; cf. Quran 10:101.

⁶³ al-Ghazālī, *al-Ḥikmah fī makhlūqāt Allāh*, 28–29.

⁶⁴ For Galen's attempt to reconcile rationalism and empiricism, see Frede, *Essays in Ancient Philosophy*, 279–300.

considerations from mere theological postulate to a tool of legal reasoning. This conclusion confirms and to an extent explains Felicitas Opwis's finding that the use of *maṣlaḥah* in legal reasoning was a relatively late development.⁶⁵ A possible explanation for this phenomenon relates to the required levels of certainty in different fields of inquiry. From the standpoint of objectivist ethics, which embedded law within theology, knowledge had to reflect a high degree of certitude. The benefits of the law were clear and certain with regard to the law in general, but became less and less so the further the law branched out into details that were subject to disagreement among jurists. The neat methodology of testing formal consistency that was provided by *jadal* must have appeared a much more reliable tool for dealing with the specific questions that are the subject of legal reasoning.

Once Ash'arī subjectivism had pulled law out of the sphere of theology, a model of benefit that relied on probabilistic inductions became acceptable. It seems no coincidence that al-Ghazālī describes and defends in his *Mi'yār al-'ilm* how incomplete induction (*istiqrā' nāqiṣ*) can yield useful rules for the jurist, arguing that while it cannot lead to certainty, it does establish the kind of probability suitable for legal matters.⁶⁶ After all, the policies of the law that lie at the heart of his appropriateness test are the products of precisely such incomplete inductions.

The Ash'arī rejection of rationalism thus moved the concept of benefit from the realm of theology to the realm of law, and al-Ghazālī enthroned it as the primary mechanism of legal analogy, downgrading formalistic methods of ascertaining consistency to the role of mere indicators of benefit. At least for the Shāfi'īs, then, it was the de-theologization of *maṣlaḥah* by Ash'arism that appears to have opened the door to the integration of this concept into legal reasoning.

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⁶⁵ Opwis, *Maṣlaḥa and the Purpose of the Law*, 4.

⁶⁶ al-Ghazālī, *Mi'yār al-'ilm*, 160–163.

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LA NOTION DE *WAJH AL-ḤIKMAH* DANS LES *UṢŪL AL-FIQH* D'ABŪ
ISHĀQ AL-SHĪRĀZĪ (M. 476/1083)

Éric Chaumont

Il y a plus de quinze ans, j'ai écrit un bref article intitulé "Encore au sujet de l'ash'arisme d'Abū Ishāq al-Shīrāzī"¹ dans lequel j'ai cherché à démontrer que sur le plan théologique, Shīrāzī était bien, comme il le prétendait, un ash'arite et non un *salafī*. À l'époque, la question qui apparaissait pertinente était en effet la suivante: "Shīrāzī était-il un ash'arite ou un *salafī*?" Dans son livre sur Ibn 'Aqīl et la résurgence de l'islam traditionaliste au XI^{ème} siècle,² le regretté George A. Makdisi a imposé l'idée que la question pertinente à se poser concernant un légiste vivant à Bagdad au XI^{ème} siècle était la suivante: "Ce légiste était-il un ash'arite ou un 'traditionaliste' (*salafī*)?" Et George Makdisi, tout comme Henri Laoust avant lui,³ considérait, sans vraiment argumenter son opinion, qu'Abū Ishāq al-Shīrāzī devait être rangé parmi les "traditionalistes," qu'il était un *salafī*. 'Abd al-Majīd Turkī, l'un des deux éditeurs des *'aqīda*-s—deux lui sont attribuées, peut-être faussement⁴—partage la même opinion. En revanche, la regrettée Marie Bernand a bien montré que cette hypothèse était indéfendable.

L'influence du maître de George Makdisi, Henri Laoust, et la sienne restent importantes dans l'étude des pensées théologique et légale musulmanes médiévales et elle amène aujourd'hui, me semble-t-il, de nombreux chercheurs à grandement surévaluer l'importance du "traditionalisme" en islam sunnite médiéval. L'influence proprement spirituelle et intellectuelle des "traditionalistes," et plus particulièrement celle des ḥanbalites bagdadiens du XI^{ème} siècle, n'a peut-être pas été telle, même si leur rôle fut de

¹ E. Chaumont, "Encore au sujet".

² Makdisi, *Ibn 'Aqīl*.

³ Laoust, *La politique de Ghazālī*, 30 et Laoust, *Les schismes*, 190.

⁴ Le *Kitāb al-ishārah ilā madhhab Ahl al-Ḥaqq* et la *'Aqīdat al-Salaf* ont été édités à deux reprises: 1. *La profession de foi d'Abū Ishāq al-Shīrāzī*, édition et présentation par Marie Bernand; 2. En annexe de al-Shīrāzī, *Sharḥ*, I, 91–125 (pour le *K. al-ishārah*) et, en annexe de al-Shīrāzī, *Al-Ma'ūna fi l-jadal*, 91–102 (pour la *'Aqīdah al-Salaf*). Les références (*Ishārah* et *Salaf*) renvoient à l'éd. M. Bernand. Pour le caractère douteux de l'attribution de ces deux petits textes d'*uṣūl al-dīn* à al-Shīrāzī, voir ma présentation de son oeuvre dans *Luma'*, 25–27.

premier plan dans les troubles, les *fitan*, qui agitèrent les rues de Bagdad de cette époque. En d'autres termes, si l'importance socio-politique des traditionalistes dans la société bagdadienne du XI^{ème} siècle est indéniable et leur influence sur le petit peuple incontestable, moins certaine est celle de leur influence sur le plan des sciences religieuses et, plus particulièrement, de la théologie et de la théorie légale. Avec Shīrāzī comme allié, j'essayerai ici de montrer que les "traditionalistes"—en général des Hanbalites mais pas seulement—n'existaient pas sur le plan doctrinal à Bagdad au XI^{ème} siècle; une sorte de coquille vide sur le plan des idées mais très résistante, un peu comme aujourd'hui le salafisme se définit avant tout comme un activisme d'une rare pauvreté spirituelle et intellectuelle.

Mon propos ici sera de montrer que si Shīrāzī était partagé entre deux doctrines divergentes *en matière de théorie légale* (*uṣūl al-fiqh*), ces deux doctrines ne sont pas l'ash'arisme et le salafisme mais l'ash'arisme et le mu'tazilisme. Je montrerai aussi que Shīrāzī est probablement toujours resté indécis et que c'est ainsi que peut s'expliquer l'"opportunisme" doctrinale apparent dont témoigne parfois son oeuvre. En revanche, *sur le plan théologique* (*uṣūl al-dīn*), les choses sont beaucoup plus claires et l'ash'arisme de Shīrāzī n'est pas douteux. L'exemple de Shīrāzī pose en somme la question de la survie du mu'tazilisme au sein de l'islam sunnite, non pas en tant que doctrine théologique—sous cette forme, il n'a que difficilement survécu à la *miḥnah* du Coran—, mais en tant que cette doctrine a des incidences critiques en matière de théorie légale. Et sur ce terrain-là, le champ des *uṣūl al-fiqh*, le mu'tazilisme a peut-être connu des victoires insoupçonnées jusqu'en islam sunnite. Je procéderai en trois moments: 1. Je montrerai que Shīrāzī ignore les *salafi*-s dans ses travaux d'*uṣūl al-fiqh* et d'*uṣūl al-dīn* et qu'il ne les considère tout simplement pas comme des interlocuteurs; pour lui, les *salafi*-s n'ont pas de doctrine théologico-légale; 2. La suspension du jugement de Shīrāzī relative à la question du principe qui est au principe de l'institution de la *sharī'ah*—*al-irādah* ou *al-maṣlaḥah*?, l'hypothèse ash'arite ou l'hypothèse mu'tazilite?—montrera que cette dernière était pour le moins encore d'actualité dans le contexte intellectuel de l'époque; 3. La présence étonnante d'une notion appartenant à l'appareil conceptuel du mu'tazilisme—la notion de *wajh al-ḥikmah* qui donne son nom au titre de cet article—dans les *uṣūl al-fiqh* de Shīrāzī indiquera l'influence de cette doctrine "hétérodoxe" sur sa pensée légale. En conclusion, j'évoquerai l'hypothèse, à vérifier et à travailler dans d'autres travaux, que c'est probablement le mu'tazilisme qui, dans l'histoire, s'est imposé en théorie légale musulmane sunnite alors que l'ash'arisme ne triomphait que sur le plan théologique.

L'ASH'ARISME DE SHĪRĀZĪ SUR LE PLAN THÉOLOGIQUE ET SON
INDIFFÉRENCE GÉNÉRALE FACE AUX "TRADITIONALISTES"

En focalisant mon attention sur la question des "noms légaux (*al-asmā' al-shar'īyyah*)" dans l'ensemble de l'œuvre de Shīrāzī—une question importante à la fois en théologie et en théorie légale—j'ai montré au moins, je crois, qu'il se revendiquait de l'ash'arisme.⁵ Mais, dans le débat en question, ses contradicteurs ne sont pas d'hypothétiques "traditionalistes," des *salafī*-s, ce sont les mu'tazilites et il cherche clairement à se démarquer d'eux. Ce que Shīrāzī cherche manifestement à éviter est d'être vu comme un mu'tazilite en affirmant sans ambiguïtés son ash'arisme, non pas son "salafisme," lorsqu'il adopte un principe herméneutique appliqué au discours légal révélé rejeté par les ash'arites et admis par les mu'tazilites. Les "noms légaux," pour ceux qui croient en leur existence, sont des "noms" qui, dans le discours légal révélé, soit le Coran, ont été investis d'une signification nouvelle par rapport au sens qui était les leurs avant la révélation dans la langue courante (*fi l-lughah*). Ces noms ne sont pas anodins: *ṣalāt* ("prière") et *ḥajj* ("pèlerinage") par exemple en sont. Ce sont des vocables qui concernent au premier plan les légistes surtout lorsqu'ils ont à faire avec les "actes cultuels (*al-'ibādāt*)." Si les théologiens ash'arites niaient en bloc l'existence des "noms légaux, c'est parce que les théologiens mu'tazilites appliquaient ce principe au mot *īmān* ("foi")—et *al-īmān* est ce qui fait d'une personne un musulman: qui ne l'a pas n'est pas un musulman—pour en proposer une définition qui leur répugnait (à savoir une définition de la "foi" qui incluait les actes—*isman li-man lam yartakib shay'an min al-ma'āṣī*—et dont les implications théologico-politiques sont importantes). Shīrāzī est partisan de l'existence de ces "noms légaux" dans ces traités de théorie légale alors qu'il la conteste dans son *Credo des Anciens* précisément alors qu'il est question de la définition de la foi et qu'il en donne une de facture clairement ash'arite (*al-īmān huwa al-taṣdīq bi-l-qalb*).⁶ Dans ces traités de théorie légale en revanche, la musique est différente: Il se rallie à la thèse inverse. Dans le plus détaillé de ces textes, le *Sharḥ al-Luma'*, il s'explique longuement et sent le besoin de se justifier. L'existence des "noms légaux" est chose évidente mais reconnaître

⁵ Je ne fais ici que résumer "Encore au sujet de l'ash'arisme d'Abū Ishāq al-Shīrāzī," voir n. 2.

⁶ *Salaf*, 72, l. 4–6. C'est dans le même contexte que le théologien ash'arite de tout premier plan al-Bāqillānī (m. 403/1013) affirmait la même chose, voir *Kitāb tamhīd al-awā'il*, 389–390.

leur existence ne signifie pas que le mot *īmān* en soit un, de sorte qu'on peut fort bien admettre ce principe sans pour autant verser dans le mu'tazilisme, tout en restant un ash'arite sur le plan théologique. Ce qu'il convient de remarquer ici, c'est que les deux doctrines en compétition dans ce débat sont l'ash'arisme et le mu'tazilisme. Shīrāzī, armé de son simple bon sens de *faqīh*, arrive à dédramatiser le débat. Mais aucune trace de "salafisme" dans l'histoire.

L'absence de cette "non-doctrine" sur le plan théologique dans les écrits de Shīrāzī s'explique de la manière la plus simple. Lui-même en donne la clé dans *al-Ishārah ilā madhhab Ahl al-Ḥaqq* juste après avoir affirmé que la doctrine, la voie des *Ahl al-Ḥaqq* est l'ash'aro-shāfi'isme et aucune autre: "Quant au dire des ignorants (*qawl al-jahalah*) 'Nous sommes shāfi'ites pour ce qui des *furū'* et ḥanbalites en *uṣūl'*,⁷ on ne le prendra pas en considération car l'Imām Aḥmad b. Ḥanbal n'a rédigé aucun ouvrage en *uṣūl* et rien n'est rapporté de lui en la matière sinon son endurance, le fait qu'il a été battu et emprisonné lorsque les mu'tazilites appelaient à ce qu'on marque son accord avec la thèse de la création du Coran et il n'était pas d'accord; il a été invité à débattre et il n'a pas débattu. Suivre le chemin de celui [*i.e.* al-Ash'arī] qui a rédigé [en *uṣūl*], qui en a discuté et qui a réduit les innovateurs au silence avec des preuves péremptoires et des arguments splendides, [suivre son chemin] prime et est plus indiqué."⁸ Pour Shīrāzī, le "salafisme"—"doctrine théologique" se réclamant d'Ibn Ḥanbal—n'existe pas et on voit dès lors mal comment il aurait pu soit y adhérer soit s'y être converti.⁹ Dans *al-Ishārah*, les seuls contradicteurs de Shīrāzī sont les *qadariyyah*, soit les mu'tazilites, et les *mushabbihah*, "les anthropomorphistes," et, en tant qu'ash'arito-shāfi'ite, il les voue aux gémonies, allant jusqu'au *takfīr*.¹⁰ Quant aux ḥanbalites, il fait plus que les combattre, il les ignore.

Qu'en est-il des ḥanbalites dans les traités de théorie légale (*uṣūl al-fiqh*) de Shīrāzī? C'est bien simple: Ils ne sont *jamais* évoqués. Ni dans *al-Tabṣīrah*, ni dans *al-Luma' fī uṣūl al-fiqh*, ni dans le *Sharḥ al-Luma'*, ils n'existent. Ibn Ḥanbal lui-même est cité, très rarement (trois fois dans les *Luma'* sous le nom de "Aḥmad"),¹¹ comme les autres "grands Imāms," qui

⁷ Dans ce contexte, *al-furū'* désigne l'ensemble de la sphère légale (*uṣūl* et *furū' al-fiqh*) et *al-uṣūl* le champ des réalités théologiques (*uṣūl al-dīn*); voir Shīrāzī, *Livre des rais*, 3, n. 1.

⁸ *Ishārah*, 47.

⁹ C'est l'hypothèse de G. Makdisi.

¹⁰ al-Shīrāzī, *Ishārah*, 45.

¹¹ al-Shīrāzī, *Livre des rais*, §§ 108, 208 et 315.

le sont beaucoup plus souvent. En revanche, les opinions des shāfi'ites, des ḥanafites, des mālikites et des zāhirites, parfois aussi des ash'arites et des mu'tazilites, sont souvent discutées et disputées. Tout comme en *uṣūl al-dīn*, Shīrāzī fait comme s'il n'existait pas d'*uṣūl al-fiqh* spécifiquement "ḥanbalites".¹² Les ḥanbalites, en d'autres mots, n'ont pas d'*uṣūl*; les sciences théorétiques leur sont totalement étrangères, et, comme le suggère Shīrāzī avec un brin de mépris dans le passage cité plus haut, la figure de l'Imām Aḥmad doit son exemplarité à l'action, au zèle religieux et au militantisme plus qu'à la pensée. À vrai dire, l'historien contemporain de la pensée légale musulmane classique ne peut qu'être d'accord avec ce jugement¹³ et il n'est pas nécessaire, pensons-nous, de lui chercher des raisons d'être extra-scientifiques, d'ordre socio-politique par exemple.¹⁴

Là seulement où Shīrāzī reconnaît l'existence d'une doctrine, d'un *madhhab*, aux "disciples d'Aḥmad," aux *ḥanābilah*, ou, plus simplement, qu'il reconnaît leur existence, c'est sur le terrain des *furū' al-fiqh*, du droit positif. Lorsqu'il retrace l'histoire de la "science shari'ique" depuis ses origines jusqu'à sa propre époque dans ses *ṭabaqāt al-fuqahā'*, Shīrāzī signale bien la naissance d'une "École", d'un *madhhab*, ḥanbalite parallèlement à celles des *madhāhib* shāfi'ite, ḥanafite, mālikite et zāhirite.¹⁵ Il faut ici se rappeler que la fonction première de la littérature des *ṭabaqāt* est de conserver

¹² Pas plus de traces des ḥanbalites dans le *Mustaṣfā min 'ilm al-uṣūl* de Ghazālī (m. 505/1111), un savant ash'aro-shāfi'ite comme Shīrāzī. L'index des noms propres de l'édition Ḥāfiẓ (I–IV, Médine sd.) est trompeur car il renvoie aussi aux notes de l'éditeur et il n'est question des "ḥanābilah" que dans celles-ci, jamais dans le texte de Ghazālī.

¹³ Voir ma recension des ouvrages d'*uṣūl al-fiqh* de Ibn Ḥāmid al-Ḥanbalī, du Qāḍī Abū Ya'lā et d'Abū l-Khaṭṭāb al-Kalwadhānī.

¹⁴ On sait que Shīrāzī, alors directeur de la Nizāmiyyah, a rencontré de sérieux problèmes avec les ḥanbalites de Bagdad lors, notamment, de l'affaire Ibn al-Qushayrī et il est certain qu'il ne leur portait guère de sympathie (Sur ce point, à nouveau, le point de vue de G. Makdisi ne repose sur rien). Je ne pense pas que cela ait eu la moindre incidence sur les écrits de Shīrāzī. D'après Subkī pourtant, Shīrāzī, après la *fitnah* engendrée par la présence d'Ibn al-Qushayrī et fomentée par les ḥanbalites, aurait demandé au calife d'abolir (*ibtāl*) le *madhhab* ḥanbalite. Cette requête, si Shīrāzī l'a faite, ne peut à mon sens traduire que son exaspération, justifiée, devant les agissements des ḥanbalites de Bagdad, voir Makdisi, *Ibn 'Aqīl*, 350–366. Il faut aussi signaler qu'à la même époque, à Nisapur, un condisciple de Shīrāzī, Juwaynī (m. 478/1085), a rédigé un ouvrage, le *Mughīth al-khalq*, qui a pour objet de montrer la supériorité du shāfi'isme sur toutes autres écoles de pensée shari'ique dans lequel le ḥanbalisme est également superbement ignoré; mais, dans ce cas, l'adversaire de Juwaynī est clairement le ḥanafisme, voir É. Chaumont, "En quoi le *madhhab* shāfi'ite", 17–26. Cela indique, me semble-t-il, qu'un climat de forte compétition entre les *madhāhib* régnait au V/XI^{ème} siècle et que dans cette lutte, les ash'aro-shāfi'ites cherchaient à tirer avantage des sympathies, réelles ou tactiques, que leur portait le puissant ministre seljoukide Nizām al-Mulk et qu'il mettait principalement shāfi'isme et ḥanafisme aux prises.

¹⁵ Voir Shīrāzī, *Luma'*, 22–23.

la mémoire de la biographie de *tous* les légistes-*mujtahid*-s dont l'avis, le *qawl*, doit être pris en considération dans la constitution de l'*ijmā'*, de l'«accord unanime de la communauté (représentée par ses savants qualifiés),» qui, dans le système légal musulman sunnite, est source infaillible de droit. Sur le seul plan du *fiqh*, Shīrāzī reconnaît les ḥanbalites comme des interlocuteurs légitimes.

À la lecture des textes de Shīrāzī et en distinguant chacune des disciplines (*uṣūl al-dīn*, *uṣūl al-fiqh* et *fiqh*) auxquels ils appartiennent, il apparaît pour le moins infondé, absurde en réalité, de le considérer comme un *salafī*. Ses textes d'*uṣūl al-dīn* le font apparaître comme un ash'arite en débat et en désaccord avec les mu'tazilites le plus souvent et parfois avec les *mushabbihah*. Mais que deviennent ces évidences au regard de la pensée légale (*uṣūl al-fiqh*) de Shīrāzī? Elles se compliquent car ici l'ash'arisme de Shīrāzī n'est plus aussi clair.

LA PRÉSENCE DES ASH'ARITES, DES MU'TAZILITES ET DES "THÉOLOGIENS"
DANS LA THÉORIE LÉGALE DE SHĪRĀZĪ

L'opinion des ash'arites, des mu'tazilites et parfois plus généralement des "théologiens (*al-mutakallimūna*)" alors opposés aux "légistes (*al-fuqahā'*)" sans autre précision¹⁶—on suppose alors que *tous* les théologiens, toutes obédiences confondues, ont un avis singulier par rapport à celui de *tous* les légistes, toutes affiliations confondues—est assez souvent évoquée dans les traités d'*uṣūl al-fiqh* rédigés au V^{ème}/XI^{ème} siècle, et, notamment, dans ceux de Shīrāzī.¹⁷ De prime abord, cela a de quoi étonner. Le *ʿilm uṣūl al-fiqh* n'est-il pas une science sharāʿique, la science propédeutique à la compréhension de la Loi révélée, au "droit?" Elle est en principe étrangère à la théologie, qui a *al-dīn* pour objet et non *al-shar'*. Alors que viennent donc faire des théologiens dans une discipline qui, en principe, ne concerne que les légistes? La réponse à cette question est plurielle. J'ai essayé de montrer ailleurs¹⁸ qu'au sein de cette science, des enjeux théologico-politiques, des enjeux relatifs à l'autorité sur la communauté étaient

¹⁶ Dans le *Sharḥ al-Luma'* par exemple: 13 occurrences pour les ash'arites, 40 pour les mu'tazilites et 24 pour les "théologiens".

¹⁷ Rappelons que l'on distingue traditionnellement—Ibn Khaldūn est, je pense, à l'origine de cette distinction aujourd'hui adoptée par la plupart des spécialistes sans qu'elle soit jamais analysée—deux "manières" de pratiquer les *uṣūl al-fiqh*, celle dite "des juristes" et celle dite "des théologiens".

¹⁸ É. Chaumont, "Bāqillānī, théologien".

présents: À qui, des légistes ou des théologiens, l'autorité sur le plan religieux doit-elle revenir? Il y a aussi, de manière beaucoup plus générale, qu'au fil de son évolution, le *'ilm uṣūl al-fiqh* est devenu la science propédeutique non plus seulement à la compréhension du "discours sharaïque révélé" mais du "discours révélé" tout court. Ainsi est-elle *de facto* devenue la science propédeutique à toutes les sciences religieuses qui ont le discours révélé—le Coran—comme fondement, le *fiqh* bien sûr, mais aussi la théologie (*uṣūl al-dīn* et *'ilm al-kalām*), l'exégèse coranique (*al-tafsīr*), et, dans une moindre mesure, le soufisme (*al-taṣawwuf*). Le *'ilm uṣūl al-fiqh* est en somme devenu la reine des sciences théorétiques en islam.

Un troisième facteur—celui qui nous importe ici—explique de manière plus essentielle la présence de la théologie dans la sphère des *uṣūl al-fiqh*. Ce facteur est structurel. Tous les savants musulmans de l'âge classique reconnaissent que l'ensemble de la sphère légale, tout ce qui concerne le *shar'*, repose en dernière analyse sur les *uṣūl al-dīn*¹⁹ de sorte que les fondements, les *uṣūl*, de la citadelle de la Loi sont des réalités de nature théologique. Le "devoir-faire" repose sur le "devoir-croire" ou le "devoir-penser." Les *uṣūl al-dīn* déterminent non seulement la vision globale que l'on se fera du *shar'* mais aussi, par voie de conséquence, la manière dont on fera de la théorie légale (*uṣūl al-fiqh*) et, ultimement, du droit (*al-fiqh*). Un exemple simple: Avant de pouvoir établir et adopter la *sunna* du prophète comme deuxième source du droit, il faut tenir la preuve que le prophète était bien un prophète et non un charlatan, il faut avoir établi la prophétie de Muḥammad (*ithbāt al-nubuwwah*). Mais l'établissement de la prophétie de Muḥammad n'est pas objet des sciences sharaïques; c'est une problématique relevant de la théologie. La nature et les qualités du Coran, du discours révélé, sont elles aussi définies dans les cadres de la théologie et elles influent sur la manière dont les légistes entendront le discours révélé dans sa dimension proprement sharaïque.²⁰ La question de la création ou de l'incrédation du Coran par exemple est cruciale en ce qui regarde la flexibilité et l'adaptabilité des statuts légaux réputés issus du Livre.

¹⁹ Voir Shīrāzī, *Livre des rais*, 31–35 et F. Rahman, "Functional Interdependence," 89–97.

²⁰ Telle est la raison, soit dit en passant, pour laquelle on ne peut imaginer une réforme du droit musulman qui fasse l'économie d'un réexamen d'un grand nombre de questions de nature théologique. C'est ce qu'a compris, sans vraiment creuser cette voie, un auteur comme Jamāl al-Bannā dans son *Hal yumkin taṭbīq al-sharī'ah?* où il s'attaque à l'examen des fondements théologiques de cette problématique apparemment strictement sharaïque.

L'un des "articles fondamentaux" de la doctrine sacrée a une efficace toute particulière sur la compréhension de la Loi révélée et ses modalités; il la concerne d'ailleurs directement et exclusivement. La question est la suivante: "Quel est le principe qui est au fondement de l'institution de la shariah?" Quelle idée Dieu avait-Il "derrière la tête" si je puis me permettre de parler comme les *mushabbihah*—mais c'est bien la question que tout se posent—en instituant et en révélant une Loi, une Loi, qui plus est, qui est réputée régir l'agir des croyants en tous ses détails, une Loi "intégrale"? À en croire la littérature de théorie légale classique, et, plus particulièrement, celle de Shīrāzī, deux doctrines sont restées en compétition. Al-Mutawwalī (m. 478/1085), un contemporain de Shīrāzī—il a notamment repris les fonctions de directeur de la Nizāmiyya à la mort de ce dernier et il était comme lui ash'aro-shāfi'ite—, les expose de manière très synthétique. La première thèse est celle "de l'intérêt (*al-maṣlahah*)" et elle est attribuée aux mu'tazilites, la seconde est celle "de la volonté (*al-irādah*)" et on la rattache à l'ash'arisme.²¹ Dans le premier cas, pour les mu'tazilites, la Loi révélée a pour raison d'être de satisfaire aux "intérêts" de la création et cette doctrine se double de l'idée, fondatrice du mu'tazilisme sur le plan éthico-légal, que "le bien (*al-ḥasan*)" et le "mal (*al-qabih*)" sont des catégories *per se*, indépendantes de la volonté de Dieu et identifiables par la raison (*al-'aql*)²² et que Dieu n'ordonne jamais que ce qui est "bien" et n'interdit jamais que ce qui est "mal." Dans cette perspective, qui reconnaît l'existence d'une Loi naturelle, la nécessité d'une Loi révélée est compromise puisqu'elle est redondante par rapport à la loi que la raison pourrait édicter. C'est parce que "bien" et "mal" sont parfois très difficiles à distinguer, parce que la raison se fourvoie souvent, que la Loi révélée trouve, selon la *mu'tazilah*, sa raison d'être. Mais si la raison était parfaitement exercée, elle la perdrait. Pour les ash'arites, il en va tout différemment. La seule réalité que l'on puisse identifier derrière la Loi révélée, c'est la volonté divine—*al-irādah*—, souveraine et absolue et surtout normative. "Bien" et "mal" ne préexistent pas à la volonté divine, c'est elle qui fait le bien et le mal et la raison laissée seule à elle-même est bien incapable de les distinguer. La volonté divine n'est pas "par-dessus le bien et le mal," elle crée le bien et le mal. Difficile de concevoir deux visions plus opposées de la Loi révélée. Et être ash'arite en matière sha-

²¹ al-Mutawwalī, *Mughnī*, 45–46. Voir aussi, Gimaret, *Ash'arī*, 535.

²² al-Mutawwalī, *Mughnī*, 43. "Le statut [légal] suit l'intérêt (*al-ḥukm yattabi'u al-maṣlahah*)" écrit le mu'tazilo-shāfi'ite 'Abd al-Jabbār (m. 415/1024), *Al-Mughnī*, XVII, 282.

raïque, c'est adopter la thèse de l'*irādah* alors qu'être mu'tazilite, c'est se rallier à celle de la *maṣlaḥah*. Pourtant, au sein des *uṣūl al-fiqh* d'un légiste comme Shīrāzī, elles coexistent, l'une n'a pas effacé l'autre. Il les évoque comme si elles étaient pareillement légitimes. Il faut signaler pourtant que Shīrāzī ne signale pas, alors qu'on peut difficilement imaginer qu'il l'ignorait malgré ses "lacunes" en théologie, que l'une des deux thèses est issue du mu'tazilisme et l'autre de l'ash'arisme.

Dans ses *Luma'*, Shīrāzī évoque à deux reprises l'existence de ces deux thèses. La première fois, c'est pour disqualifier "la coutume et la pratique courante (*al-'urf wa-l-'ādah*)" comme facteur susceptible de "particulariser le général (*takhṣiṣ al-'umūm*)" parce qu'elle n'a de place ni selon la première conception de la Loi ni selon la seconde mais il ne précise pas à laquelle il adhère.²³ La seconde fois, c'est pour établir l'admissibilité de l'abrogation (*al-naskh*) au sein de la Loi révélée parce que, écrit-il en substance, rien ne s'y oppose, que l'on adhère à la première conception de la Loi où à la seconde, mais, à nouveau, il ne dit pas quelle est la sienne.²⁴ Il semble suspendre son jugement. Dans un passage du *Sharḥ al-Luma'* où il est question de la fameuse question de "la justesse de l'*ijtihād* (*iṣābat al-ijtihād*)"—une question "théologico-légale" par excellence et donc particulièrement révélatrice dans le cadre de cet article—Shīrāzī se montre moins neutre et dit sa préférence pour la thèse mu'tazilite de la *maṣlaḥah*, mais sous une forme un peu particulière, que l'on qualifierait presque de "dé-mu'tazilité".²⁵ Il écrit en substance que les statuts sharaiques n'ont pas été institués (*ghayr mawḍū'ah*) en fonction de ce que nous pensons être notre "intérêt" à la lumière de nos inclinations naturelles mais qu'ils l'ont été au regard de ce que Dieu sait mieux être véritablement l'intérêt de la création (*bal al-aḥkām mawḍū'ah 'alā mā fīhi al-ṣawāb wa-l-maṣlaḥah 'inda allāh fī ma'lūmihi*).²⁶ En somme, Shīrāzī ne croit pas en la raison qu'en parfait shāfi'ite il identifie avec une forme de passion, mais il pense néanmoins que le principe qui est au principe de la sharī'ah est l'intérêt de la création et non pas la volonté arbitraire de Dieu. Cela fait apparemment de lui un penseur "hybride," un mu'tazilite manquant de confiance dans les ressources de la raison mais dont la pensée répugne à l'idée

²³ al-Shīrāzī, *Livre des rais*, § 97. Le *Sharḥ* ne dit rien de plus que les *Luma'* sur cette question.

²⁴ al-Shīrāzī, *Livre des rais*, § 139.

²⁵ Voir aussi al-Shīrāzī, *Sharḥ*, II, § 893 où Shīrāzī, en réponse à un contradicteur mu'tazilite qui nie la validité du *qiyās shar'ī*, ne conteste pas la thèse de l'*irādah* elle-même mais seulement les implications qu'en voit son contradicteur.

²⁶ al-Shīrāzī, *Sharḥ*, II, § 1216.

que la Loi révélée puisse être arbitraire, même si cet arbitraire est divin, ce qui l'éloigne grandement de l'ash'arisme "pur." Il n'est ni purement ash'arite, ni purement mu'tazilite. En réalité, les légistes de son temps qui se réclamaient ouvertement du mu'tazilisme, Abū al-Ḥusayn al-Baṣrī (m. 436/1044) par exemple, n'étaient pas loin de partager la même doctrine. Leur mu'tazilisme était teinté d'ash'arisme tout comme l'ash'arisme de Shīrāzī était mâtiné de mu'tazilisme. Cela signifie, je pense, que les doctrines, à l'époque, n'était pas aussi imperméables, aussi figées, qu'elles ne le sont aujourd'hui (ou que l'islamologie d'obédience catholique a voulu le faire croire en imposant à la compréhension de la pensée musulmane une grille de lecture qui ne lui convient pas). Je rappelle aussi que le point de vue des "traditionalistes"—quel était-il s'il a jamais existé?—est ici totalement absent des débats. Au risque de me répéter: Shīrāzī, comme théoricien de la loi, est partagé entre l'ash'arisme et le mu'tazilisme et le "traditionalisme" lui est parfaitement indifférent.

LA NOTION DE *WAJH AL-ḤIKMAH* DANS LES *UṢŪL* DE SHĪRĀZĪ

Dans le cadre du chapitre qu'il consacre au *qiyās* de ses *Luma'*, plus particulièrement lorsqu'il analyse la *'illah*, la "cause légale," qui en est l'élément à la fois le plus important et le plus problématique, Shīrāzī utilise à deux reprises le concept de *wajh al-ḥikmah*.²⁷ Dans un raisonnement analogique "par la cause (*qiyās 'illah*)"—le plus probant des *qiyās*—, la *'illah* explique Shīrāzī est susceptible soit d'être une entité dont "la sagesse," le *wajh al-ḥikmah*, apparaît au *mujtahid* parce qu'il l'appréhende rationnellement, soit une entité dont "la sagesse" lui échappe, Dieu en ayant conservé le monopole de la connaissance. Illustration du premier cas: L'interdiction de consommer du vin se comprend rationnellement, on en voit "la sagesse": c'est "une cause de perte" et "il éloigne de la remembrance de Dieu et de la prière." On voit, soit dit en passant, que la meilleure traduction que l'on puisse donner de *wajh al-ḥikmah* est "*ratio legis*" au sens plein du terme alors que cette traduction est inadéquate pour le mot *'illah*. Illustration du second cas: la *'illah* de l'interdiction du *ribā*, de l'échange à parts inégales, est, selon les uns, la "comestibilité," et, selon les autres, "le fait d'être mesurable à l'aune du *kayl*" mais personne ne peut dire pourquoi, personne ne peut en donner une explication

²⁷ al-Shīrāzī, *Livre des rais*, § 258 et § 279.

rationnelle. Seul Dieu connaît le sens de cet interdit. Il y a une *ratio* derrière ce statut mais la raison humaine ne peut la saisir.

Cette notion de *wajh al-ḥikmah* est en réalité peu compatible avec la représentation que les ash'arites se font de la Loi révélée que j'ai évoquée plus haut. Selon la thèse de *l'irādah*, c'est l'arbitraire divin, ou la volonté arbitraire divine, qui est derrière la *sharī'ah* et, dans ce cadre, s'interroger sur la *ratio legis*—les “causes légales (*al-'ilal al-shar'īyyah*)” ne sont appelées “causes” que *'alā sabīl al-majāz* répète assez souvent Shīrāzī même si leur valeur causale n'est pas moindre que celle des “causes rationnelles”—est une entreprise vaine puisque cette thèse pose dès le départ qu'il n'y a pas de *ḥikmah*, de “sagesse” au sens rationnel du mot, de *ratio*, dans la *sharī'ah*. Toujours dans le cadre du chapitre du *qiyās*, Shīrāzī met en évidence l'a-rationalité foncière de la *sharī'ah* quand il écrit contre des mu'tazilites et des zāhīrites: “Si la Loi révélée avait interdit ce qui est permis et si elle avait permis ce qui est interdit; comme de dire: 'Je vous ai interdit le miel et je vous ai permis le vin/Le miel vous est interdit et le vin vous est permis', cela ne répugnerait pas à la raison. *Cela démontre que [la raison] n'a pas de place dans les choses de la sharī'ah (dalla 'alā annahu lā majāl lahu fī al-shar'īyyāt)*”.²⁸ Cela, c'est un argument purement ash'arite: *Lā sharī'ah li-l-'aql*. Dans un autre contexte, celui du statut des actes avant la révélation—encore une problématique aussi théologique que légale, en réalité plus théologique que légale²⁹—Shīrāzī revendique sans détours son ash'arisme face aux mu'tazilites. Il écrit: “La réponse est que cela repose sur votre principe faux (*aṣḥab al-bāṭil*), à savoir que les actes de Dieu répondent/obéissent à des causes (*af'āl allāh mu'allalah*) alors que nous ne disons pas cela, nous disons: 'Dieu fait ce qu'Il veut et Il statue comme Il le désire (*wa naḥnu lā naqūlu dhālika bal naqūlu yaf'alu allāh mā yashā' wa yaḥkumu mā yurīdu*)'”.³⁰ Ralliement clair de Shīrāzī à la thèse ash'arite de *l'irādah*, ou de la *mashī'ah*—ce sont des synonymes—, contre celle des mu'tazilites mais dans un contexte où la théologie importe plus que les sciences sharaïques même si la problématique appartient formellement aux *uṣūl al-fiqh* et non aux *uṣūl al-dīn*. Ces arguments cohabitent, comme on l'a vu, dans les écrits de Shīrāzī avec une notion, importante en théorie légale, dont la seule présence les contredit.

²⁸ al-Shīrāzī, *Sharḥ*, II, § 891.

²⁹ À propos de cette problématique particulièrement intéressante, voir K. Reinhart, *Before Revelation*.

³⁰ al-Shīrāzī, *Sharḥ*, II, § 1126.

La notion de *wajh al-ḥikmah* semble, dans un premier temps, n'avoir été utilisée que par des mu'tazilites³¹ et elle n'a de sens que dans le cadre de l'intelligence anthropomorphique que ceux-ci se faisaient de la sagesse divine: Tout acte de Dieu doit obligatoirement être fondé en sagesse objective, indépendante de Sa volonté, de sorte que derrière chacun de Ses actes, et derrière tout statut sharaïque, il y a un *wajh al-ḥikmah*.³² On a vu que c'est également ce que pense Shīrāzī même s'il est aussi d'avis que parfois cette "sagesse" n'est pas repérable. Un ḥanbalite bien connu plus tardif disciple d'Ibn Taymiyyah, Ibn Qayyim al-Jawziyyah (m. 751/1350), fait un très grand usage de cette notion dans son ouvrage éthico-légale *I'lām al-muwaqqi'īn*. Personnellement, cela ne m'étonne guère car j'ai toujours pensé que sur le plan éthico-légal, non pas sur le plan théologique, le ḥanbalisme est plus proche du mu'tazilisme, et lui a beaucoup emprunté, que de l'ash'arisme;³³ ils ont en effet en commun d'être des moralismes, ils conçoivent la sphère sharaïque comme étant de nature "éthico-légale," ce que n'est pas l'ash'arisme qui est un légalisme/normalisme beaucoup plus pur au sens kelsenien.

POUR CONCLURE

En m'attachant à la pensée d'un légiste comme Shīrāzī qui est une figure importante et très représentative de la tradition de la pensée sharaïque musulmane, je me suis posé la question de ses orientations idéologiques, plus précisément théologiques. Une conclusion me paraît incontournable et elle va à l'encontre de bien des idées reçues en islamologie. Le "salafisme," le "traditionalisme," est une chose qui, pour Shīrāzī, n'existe pas comme doctrine et qui, probablement, n'existait pas comme telle à Bagdad au V^{ème}/XI^{ème} siècle. Il s'agissait d'un activisme moraliste ou moralisant "immédiat," viscéral, vis-à-vis duquel il n'est pas impossible que Shīrāzī ait eu parfois quelque sympathie, quand, par exemple, il s'agissait de lutter aux côtés des ḥanbalites contre la prostitution qui s'affichait dans les rues.

³¹ Abū 'Alī al-Jubbā'ī en est peut-être l'artisan, voir Ibn al-Murtaḍā, *Kitāb Ṭabaqāt al-mu'tazilah*, 80–85.

³² Sur ce point, voir Gimaret, *Ash'arī*, 433–434.

³³ Voir n. 13. Que la figure d'Ibn Ḥanbal soit restée exemplaire, pour certains, en islam sunnite parce qu'il s'est opposé au dogme de la création du Coran que voulaient imposer les ḥanbalites alors qu'ils avaient le vent en poupe n'a finalement pas beaucoup d'importance et n'entre pas en contradiction avec l'idée que mu'tazilisme et ḥanbalisme puissent s'accorder sur le plan éthico-légal.

Shīrāzī a peut-être été un “conservateur” sur le plan moral—si l’on veut bien croire en la véridicité des sources historiographiques ḥanbalites: le seule source des partisans contemporains du salafisme de Shīrāzī (Laoust et Makdisi)—mais il n’a certainement jamais été un militant du “traditionalisme” sur le plan intellectuel.

Mais était-il aussi ash‘arite qu’il prétend l’être? Sur le plan théologique, c’est très clair. Même si les deux professions de foi qui lui sont attribuées ne sont pas de lui, ses revendications d’ash‘arisme dans ses traités d’*uṣūl al-fiqh* suffissent à le prouver. Pourtant, dans ces traités-là, Shīrāzī n’affiche sans ambiguïté son ash‘arisme que dans le cadre de débats théologico-légaux et dont, souvent, les enjeux sont plus théologiques que shari‘iques. En revanche, sur le plan strictement légal, Shīrāzī paraît considérer comme légitimes les grandes orientations mu‘tazilites sans pour autant y adhérer; il les évoque sans les disqualifier et je pense que cela traduit son indécision sinon pourquoi n’aurait-il pas indiquer sa préférence? Parfois, il adopte, contre les ash‘arites, des principes herméneutiques admis par les mu‘tazilites (la question des “noms légaux”) mais alors il les “neutralise” théologiquement; enfin, on a vu qu’une catégorie—celle de *wajh al-ḥikmah*—est présente et a une efficace dans sa théorie légale et que cette catégorie n’a de sens que dans la représentation mu‘tazilite de la Loi révélée. Signalons enfin que chaque fois, douze, que les Ash‘arites sont cités dans sa *Tabṣīrah fī uṣūl al-fiqh*, Shīrāzī s’oppose à eux sauf une fois.³⁴ C’est d’ailleurs l’opposition que Shīrāzī manifeste aux ash‘arites et parfois même à Ash‘arī lui-même dans ses traités d’*uṣūl al-fiqh* qui a permis à certains de nier son ash‘arisme en bloc et qui a obligé Ibn ‘Asākir (m. 571/1175) à remettre les pendules à l’heure dans son *Tabyīn*.³⁵ Sur le plan de la théorie légale, on ne peut dire de Shīrāzī ni qu’il était ash‘arite, ni qu’il était mu‘tazilite. En d’autres termes, son adoption de l’ash‘arisme sur le plan théologique ne semble pas le lier, au contraire, sur le plan shari‘ique, et, inversement, son rejet massif du mu‘tazilisme sur le premier plan ne se traduit pas sur le second. Faut-il y voir une contradiction interne à la pensée de Shīrāzī? Dans la mesure où l’ordre du *dīn* est

³⁴ al-Shīrāzī, *Al-Tabṣīrah*, 22, 27, 67, 99, 105, 173, 195, 240, 289, 335, 498, 532. En leur grande majorité, les questions qui opposent Shīrāzī aux ash‘arites sont des questions linguistiques (“L’ordre a-t-il une ‘forme’ dans la langue?”, etc.) Il en va de même dans les *Luma’* et dans le *Sharḥ al-Luma’*.

³⁵ Ibn ‘Asākir, *Tabyīn*, 276–278. Le fait que Ibn ‘Asākir n’avait pas connaissance des deux professions de foi attribuées à Shīrāzī est la principale raison de douter de leur authenticité; c’eut été un jeu d’enfant sinon pour lui de démontrer l’ash‘arisme de Shīrāzī.

en islam sunnite classique strictement distingué de celui du *sharʿ*, chacun ayant ses propres objets et répondant à sa propre logique, je ne le pense pas.

La question posée ici était celle de la survie du muʿtazilisme en théorie légale musulmane et non comme théologie. On savait déjà que des *uṣūl al-fiqh* assez purement muʿtazilites n’avaient jamais cessé d’exister en islam, plus particulièrement chez les Zayidites, et les bibliothèques du Yémen ne cessent de révéler leurs trésors (dont l’un des plus précieux, *Al-Mujzī fi uṣūl al-fiqh* d’al-Nāṭiq bi-l-Ḥaqq Abū Ṭālib Yaḥyā al-Ḥusayn b. Hārūn (m. 424/1033), n’a toujours pas été édité). Mais dans le cadre du sunnisme, on n’a guère exploré la question. L’exemple de Shīrāzī montre sa complexité. Pourtant, il me semble—c’est une hypothèse—que l’évolution des *uṣūl al-fiqh* sunnites a été dans le sens d’une réaffirmation des thèses muʿtazilites surtout lorsque l’on considère l’importance de plus en plus marquée acquise par la notion de *maṣlaḥah* dans les *uṣūl al-fiqh* sunnites. Mais, l’origine muʿtazilite de cette notion est souvent ignorée (bien des analyses en attribuent aujourd’hui la paternité à Ghazālī). Que l’on pense, par exemple aux *uṣūl al-fiqh* de Ghazālī ou de ‘Izz al-Dīn b. ‘Abd al-Salām (m. 660/1262), deux shāfiʿites réputés ashʿarites. Si l’on considère par ailleurs que le concept de *maqāṣid al-sharīʿa* est fille de celui de *maṣlaḥah*, on mesure mieux encore le chemin plutôt heureux du muʿtazilisme au sein des *uṣūl al-fiqh* sunnites. Et, en théorie légale musulmane contemporaine, où il n’est plus question que des *maqāṣid al-sharīʿa*, c’est franchement d’une victoire “déguisée” du muʿtazilisme sur l’ashʿarisme que l’on peut parler.

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RITUAL ACTION AND PRACTICAL ACTION:
THE INCOMPREHENSIBILITY OF MUSLIM DEVOTIONAL ACTION

A. Kevin Reinhart

INTRODUCTION

Bernard Weiss has always been aware of the religious dimension of *fiqh* and *sharī'ah*. In his *Search for God's Law*, Professor Weiss rightly demands that we think of Islamic law as “law and morality.” Yet when we turn to the great works of Islamic law, we are confronted with a puzzle: every pre-modern *fiqh* work of which I am aware begins with a lengthy section on ritual prescriptions: how to ritually purify, how to worship, how to fast, and so on. On the face of it, to wash the bottoms, but not the tops, of one's feet seems neither a legal nor a moral issue.¹

From the earliest legal works to those of the present, both ritual and “practical” issues are included in the same law book, and the ritual always precedes the “practical.” In addition, discussions of complex issues found in *uṣūl* works seem to draw examples from “ritual” practices more often than from practices like marriage or criminal law. Clearly the jurists considered ritual prescriptions at least as much “law” as sales, criminal cases, contracts and divorce. Ritual is indubitably part of Islamic law, and no account of Islamic law that neglects it can be considered seriously.

If it is puzzling that “law” books include ritual on an equal footing with ‘practical law’, it is equally puzzling that Islamic legal theorists at the same time consistently distinguished the “ritual” from the practical—just as seems natural to Western academics. The term for the rituals prescribed by law is “*‘ibādāt*,” and these are never confused with the more practical “*mu‘āmalāt*.” It cannot therefore be that Muslims included ritual with “law” because of some primitive confusion between ritual and social norms. In

¹ The term “ritual” in English is too narrow to encompass practices like “*zakāh*” which Muslims have always included as among the *‘ibādāt*. I am persuaded by William Graham who long ago argued that “it is more appropriate to translate the term as ‘devotional practices,’ since what distinguishes these practices is their principle (or sole) aim of demonstrating devotion to God.” W. Graham, “Islam in the Mirror of Ritual,” Introduction fn. 41. Yet for the most part, for reasons of euphony, I will use “ritual” as an English calque of *‘ibādāt*.

fact, as we will see, the well-known distinction between *ʿibādāt* (“acts of bondsmanship”) and *muʿāmalāt* (“mutual acts” that is, “social acts” or “practical matters”) dates at least to the Islamic second century. Indeed, as we shall show, by the time of the first books on *fiqh* practices, the distinction between the ritual and the “social” had long been accepted.

While this distinction is a stable feature of Islamic legal thought, nonetheless the standard academic surveys of Islamic law have almost nothing to say about the *ʿibādāt/muʿāmalāt* distinction, and tend to ignore *ʿibādāt* altogether.

Schacht’s still classic *Introduction to Islamic Law* is typical:

The sacred Law of Islam is an all-embracing body of religious duties, the totality of Allah’s commands that regulate the life of every Muslim in all its aspects; it comprises on an equal footing ordinances regarding worship and ritual, as well as political and (in the narrow sense) legal rules. *It is [only] with these last that this book is concerned [emphasis mine]*. This restriction is historically and systematically justified; it must, however, be kept in mind that the (properly speaking) legal subject-matter forms part of a system of religious and ethical rules.²

Schacht stipulates that we must recognize that the practical rules of the *sharīʿah* are qualified by being religious. He does not observe the obvious corollary: that the religious rules must have been affected by their inclusion within a “practical” legal system. Yet both facts seem to be equally noteworthy and are equally exotic features of the corpus that we call “Islamic law.” Both features of Islamic law deserve consideration.

This paper has four parts.

- The first part will trace the development of words and concepts associated with “ritual” and their presence in Islamic law more generally, drawing from the Qurʾān, *ḥadīth*, and another early text.
- The second section consists of translations of two rare presentations of how Islamic law looks when considered as a whole, along with some commentary.
- The third part will discuss what I believe to be the distinguishing feature of ritual from the point of view of Islamic legal theory, namely its irrationality, or better, as Christian Lange calls it elsewhere in this volume, its “non-rationality”; this section will also briefly discuss the place of intentionality in ritual.

² Joseph Schacht, *An Introduction to Islamic Law*. 1.

- The fourth section will briefly consider the implications for the Islamic legal system of including ritual within it, and of Islamic ritual as part of a “legal system.”

I. THE TERMINOLOGY OF RITUAL IN FORMATIVE ISLAM

A. Lexical Definitions of Ritual

We will first consider the terminology of “ritual” per se. Then we will suggest, from a study of the history of various words that came to have precise meanings in later legal discourse that ritual was an unnamed but still differentiated concept in early Islamic self-understanding. Ritual, in fact, was what for early Muslims distinguished one as *muslim*, and as Muslim.³ Indeed there is evidence that the term *sharī‘ah*, which later comes to refer to all of Islamic law, is originally a synecdoche that originally referred explicitly to ritual acts. Finally, we will discuss the location of “ritual” in Islamic legal works. We will establish that there is an astonishing stability in the taxonomy of normative action from the very beginnings of Islamic legal thought. We will discuss the origin of this taxonomy.

It might seem sufficient to begin (and end) with definitions of rituals as found in dictionaries and other sources of lexical information. Unfortunately, these sources are relatively unhelpful for our purpose. They look for synonyms rather than offering descriptions. *Lisān al-‘Arab*, for example, simply says “*al-‘ibādāt* is ‘obedience’ (*tā‘ah*).” It then discusses the grammar of another form of the root as used in the Qur’an.⁴ The *Tāj al-‘Arūs* alludes to a definition that says that *al-‘ibādāt* are acts whereby God is pleased (though al-Zabīdī does not endorse this definition).⁵ The *Kashshāf* defines *al-‘ibādāt* as “the utmost exaltation,” which can be directed only to God. It is used also, he tells us, “for the stipulations (*aḥkām*) of the *sharī‘ah* connected with an ‘eternal matter (*amr ākhirīyyah*)’; it is one of the constituents of *fiqh* (*arkān al-fiqh*).”⁶ Abū Ya‘lā (458/1065) says an *‘ibādah* is “everything that is obedience to God and that draws one near him (*qurbat^{an} ilayhi*),” or that “is in conformity to His command.”⁷ An act is equally

³ Here and elsewhere it is useful to distinguish between “muslim”—one who, in accord with Qur’anic dictates, has surrendered to God, and “Muslim,” a member of the Muslim religious community.

⁴ Muḥammad ibn Mukarram Ibn Manẓūr, *Lisān*. 10:9b–10a; s.v. ‘*b-d*.

⁵ Murtaḍā Muḥammad ibn Muḥammad al-Zabīdī, *Tāj*. 2:410.

⁶ Muḥammad ‘Alī b. ‘Alī al-Tahānawī (1158/1745), *Kashshāf*, 2:948.

⁷ Muḥammad b. al-Ḥusayn al-Farrā’ al-Ḥanbalī Abū Ya‘lā, *al-Uddah*. 1:63.

an *‘ibādah* if it is “a doing” or “a not doing.” Examples of doing are *ṣalāh*, but also paying a debt. Examples of not-doing are not fornicating and not eating or drinking things prohibited. The *‘ibādāt* are God’s claims (*ḥaqq allāh*) which can’t be shared with anyone else.⁸ They are obedience and abasement before God.⁹ An *‘ibādah* is an occupation (*wazīfah*) stipulated by God so as, by it, to draw near to Him.¹⁰ Al-Zarkashī (794/1392) says that *al-‘ibādah* is obedience, adding that the Ḥanafīs qualify this by adding that it is those acts of obedience that require intentionality (*niyyah*). The Shāfi‘īs disagree (as we shall see below). The opposite of the *‘ibādāt* is rebelliousness (*al-ma‘ṣiyah*). As for the *qurbah*, so often used as a synonym for *‘ibādah*, it seems to mean “ingratiation,” that is, “an exaltation whose goal is the hope of reward from God Most High.”¹¹

It is easy to see that these are not so much descriptions as theologizations—they do not tell us what is distinctive about rituals as opposed to other aspects of law—indeed, from this theologized perspective, *all* conformity to Islamic law is an *‘ibādah*—a position held by al-Qaffāl al-Shāshī among others.¹² In this definition-section of the paper, we will attempt to induce from Islamic texts a *description* of ritual to determine what distinguishes the ritual from the non-ritual as well as to trace the history of that distinction.

DEFINITIONS OF “RITUAL” IN ISLAMIC LEGAL SOURCES

II. “RITUAL” IN THE EARLIEST SOURCES

A. *Qur’ān*— $\sqrt{‘-b-d}$ and $\sqrt{‘-m-l}$ (3rd-form)

The root *‘b-d*, meaning to be in bondage of some sort or to do things associated with bondage, is prolific in the *Qur’ān*, appearing 277 times. In the domain that interests us, *‘abad^a*, means ‘worship’ and Q109 establishes that the root can mean to worship something correctly or incorrectly, something deserving worship or undeserving of worship.¹³

⁸ Al-Shāṭibī, *al-I’tiṣām* quoted in al-‘Ajām, *Mawsū‘at muṣṭalahāt uṣūl al-fiqh*. 1:920.

⁹ Al-Shāṭibī, *al-Muwāffaqāt* quoted in *ibid.* 1:921.

¹⁰ Muḥammad Riḍā al-Muẓaffar *Uṣūl al-fiqh* quoted in *ibid.* 1:021.

¹¹ Muḥammad ibn Bahādur al-Zarkashī *al-Baḥr*, 1:293–4.

¹² Abū Bakr Muḥammad b. ‘Alī b. Ismā‘īl b. al-Shāshī al-Qaffāl al-Shāshī *Maḥāsīn al-sharī‘ah*, 29, where he speaks of “*‘ibādāt al-amwāl*” and “*‘ibādāt al-abdān*.”

¹³ E.g., Q19:82. See EQ 1:375b–376a. See also s.v. “servant” and “ritual.” See also EI2 1:245a–b, s.v. *‘ibādāt*.

In the Qurʾān, the noun, *ʿibādah*, is infrequent, appearing nine times and always prefixed with the particle *bi*—in/with/by-means-of—or with a possessive ending (e.g., “his” *ʿibādah*, “my” *ʿibādah*, etc.), or with both. In these instances it means being in service, or being appropriately humble, a human attitude; here it does not mean “ritual,” an abstraction denominating a set of human acts. It never appears in the plural (“rituals,” *ʿibādāt*) and there is no Qurʾānic case where it unequivocally refers to rituals per se rather than to the more general service of a bondsman or bondswoman to their Lord. The closest to a specifically ritual reference would be Q7:206: {Those were not arrogant (*yastakbirūn*) towards (ʿan) His *ʿibādah* and praise Him and prostrate}. (In the Qurʾān, “prostration” and “praise” seems to constitute ritual practice.) On the whole, however, there appears to be no Qurʾānic word for Islamic rituals collectively, and *ʿibādah* is best understood to mean “acting humbly” (its opposite is to be arrogant, *yatakābir*, or *yastankaf*, to disdain).¹⁴

As for the category of acts conceptually alternative to *ʿibādāt*, the *muʿāmalāt* (sing. *muʿāmalah*), the third form of the root *ʿ-m-l* does not appear in the Qurʾān at all. The process by which *these* particular terms came to define their subjects—*ʿibādāt* for ritual as opposed to *marāsim*, or *sharāʿiʿ* or *ṭaqūs*—and *muʿāmalāt*—as opposed to *iʿmāl* or *afʿāl*, *ḥudūd* or something else—may eventually be traceable by working with the earliest manuscript texts, but it is more likely that process by which one, from among the many, many, possible terms as the *rubrics* for legal discourse was selected, may never be accessible.

B. Qurʾān— $\sqrt{\text{sh} - \text{r} - \text{ʿ}}$

One back-door method to understand how the notion of ritual occurs in the Qurʾān is to consider the word *sharīʿah* that in classical times comes to stand for Islamic law *in toto*. The way in which the term *sharīʿah* emerged to signify Islamic morality and norms of practice is only slightly less obscure than the way in which *ʿibādāt* came to stand for all rituals. There are many terms in the Qurʾān that could have, perhaps even more naturally, served to mean Islamic law—*minhāj* for instance. Yet if we consider just the root *sh-r-ʿ*, we find suggestions of a recognition, during Islam’s earliest days, of a distinction between ritual and non-ritual.

¹⁴ See Q4:172; 7:206; 21:19; 40:60.

It is difficult to read the scriptural passages in which the root *sh-r-ʿ* appears without imposing on them understandings from a time in which *sh-r-ʿ* was unquestionably connected to law or morality or its imposition. The root appears as a verb twice in *sūrah* 42, and nowhere else. It appears three times as a noun or adverb, but never in the definite case—the *sharīʿah*. This suggests that in the Qurʾānic period no single word meant “law and morality.” To what, then, did words derived from *sh-r-ʿ*, refer?

First the use of the root as a verb: Q42:13¹⁵—

{He has made accessible for you (*sharaʿa*) that *dīn* that he commended to Noah and that We reveal to you [Muhammad], and that we commended to Abraham, Moses, and Jesus, saying: Establish the *dīn*, and do not be divided about it. . . .}

Translators have chosen “ordained,”¹⁶ “made accessible,”¹⁷ “laid down for you,”¹⁸ to represent “*sharaʿa*.” “Ordained” and “laid down for you” seem to be translations informed by later developments in Islamic thought that link the root *sh-r-ʿ* to law. “Made accessible” seems best to fit the meaning attested in early Arabic sources,¹⁹ which can also suggest a “clear way,” “something that is manifest, plain, clear,” etc.²⁰

What is “made accessible” is *dīn*—itself a word fraught with complexities²¹—and the things that together constitute *dīn* or, perhaps, *the dīn*.²² As Q42:14–16 tells us, the content of *dīn* can be disputed. In Q42:21 it is clear that some of those disputed things that alleged to be part of *dīn* are permitted and others are not. The Qurʾān text establishes a parallel between “permit” (*yaʿdhan*) and “make accessible” (*sharaʿ*). The contents of “*dīn*,” consequently, would seem to be things done, rather than, for example, things believed. One adjudicates among these disagreed-

¹⁵ This Qurʾān passage is probably heavily revised. See the discussion in Bell commentary 2:225–6.

¹⁶ Pickthall and Asad translations of the Qurʾān.

¹⁷ Bell tr. 2:485.

¹⁸ Arberry tr. 2:193.

¹⁹ See Lane dictionary s.v. “sh-r-ʿ” 4:1534b.

²⁰ For one discussion of the root meaning of *sharīʿah*, see A.K. Reinhart, “Islamic Law as Islamic Ethics”; see also W.C. Smith, “The Concept of Sharīʿah among some Mutakallimūn.”

²¹ See further discussions in, W.C. Smith, *The Meaning and End of Religion.*, index “*dīn*.” See also EQ s.v. “religion” and index of Arabic terms, “*dīn*,” EI2, s.v. “*dīn*.”

²² “The *dīn*” has become, especially in contemporary Muslim parlance, a synonym for “Islam.” In the time of the Qurʾānic usage, however, it must have been something more abstract—religiosity, good conduct, piety, obedience to God, and so forth (see sources cited in preceding footnote).

about things (as in a legal dispute—the verb is *quḍīy^a*) and the ones who do permit what God had not permitted are wrongdoers, due for painful chastisement.

In the same *sūrah* we find the other use of the root as a verb, where again, in a somewhat syntactically awkward passage, *sh-r-ʿ* is linked to *dīn*: {Or have they partners who have made accessible to them in religion that which God never permitted? (Q42:21)} It is not the belief in false gods that is at issue in this sentence, but allowing conduct that is not in fact allowed. Here too the root in verbal form seems to refer to acts allowed or perhaps required.

The root's other three occurrences in the Qurʾān are all non-verbal forms. *Shurrāʿ^{an}*, *shirʿat^{an}*, and *sharīʿat^{an}*—all are indefinite nouns, the first used adverbially. Only *sharīʿah* is a common form in later Islamic discourse. Despite the fact that these usages are largely unproductive in Muslims' later conceptual vocabulary, these usages too are suggestive if we are to understand the early significance of the root's meaning, and how it might be linked to "ritual." *Shurrāʿ* appears as an insignificant adverb amidst a series of threat-stories where they are found in the context of Banū Isrāʾīl salvation history. The Qurʾān tells us there was a township (of the Banū Isrāʾīl, presumably)

{by the sea, [where] when people transgressed the Sabbath (*al-sabt*), fish (*ḥūtān*) manifestly (or 'availably,' *shurrāʿ^{an}*) came to them on the day of their Sabbath, and on a day when they did not keep Sabbath [the fish] did not come to them [The appearance of the fish was a temptation to transgress the Sabbath, to which they yielded]. (Q7:163)}.²³

The root here has nothing to do with law, but instead refers to something visible, manifest, perhaps unmistakable, and accessible.

With the next two occurrences we approach classical uses of the root. Once more, in these passages, the Qurʾān provides a kind of salvation-history in which the religiosity of Muḥammad is located among Judaism and Christianity, the latter two imperfectly practiced by their adherents. Jesus follows in the footsteps of the Jews, thereby confirming the Torah, but God also bestows on him the Gospel, which further confirms the Torah's message.

²³ This passage is quite obscure. I have translated it guided by, but not in complete agreement with Richard Bell, *The Qurʾān*, Richard Bell, Clifford Edmund Bosworth, and M.E.J. Richardson, *A Commentary on the Qurʾān*.

{We revealed to you [in Arabic] a Scripture (*kitāb*) with the truth, confirming whatever Scripture was before it and a guardian over it. So judge between them by that which God has revealed, and do not follow their caprices away from the truth which has come to you. For each we have made a *shirʿan* and a *minhājʿan*. Had God willed He could have made you one community (*ummah*). . . . Unto God you will all return, and He will then inform you of that wherein you differ. (Q5:48)}

Once more *sh-r-ʿ* appears in a context of religious plurality and dispute, but here we see that a *shirʿ* is particular to each community and distinctive to it. This “*shirʿ*” is distinctive, and would have the effect of distinguishing the members of each community from members of other religious groups.

Finally, again in the midst of an analysis of the other religions, Muslims are told {Now we have put you on a *sharīʿatʿan* with regard to ‘the Command.’ Follow it, and do not follow caprices of those who do not know. (Q45:18)}. Here the word *sharīʿah* must mean a path, but one that is manifest, opened before one, that gets one where one wants to go (gives access to something).²⁴

In Qurʾānic usage, then, the root *sh-r-ʿ* indicates something literally outstanding, that is, manifest and clear. It seems also to involve permission to do something or stipulation that one must *do* something that constitutes *dīn*. That the nominal forms occur in the context of religious divisiveness suggests that the *sharʿ* visibly distinguishes one, makes one, or identifies one, as *muslim*, or Muslim, as opposed to a Christian or a Jew or a *kāfir*. The *sharīʿah* is comprised of the manifestations of Islam, or of being *muslim*, over against being a member of the Christian or Israelite versions of religion. The key conceptual feature of the root, *sh-r-ʿ* is, then, “distinction,” “manifestation,” not ordination or requirement. In the Qurʾānic period, *sharīʿah* shows something, it does not ordain something.

C. Ḥadīth: $\sqrt{c-m-l}$ (3rd form); $\sqrt{c-b-d}$ and $\sqrt{sh-r-ʿ}$

When we turn to the *ḥadīth* corpus, the word latterly used to mean non-ritual law, *muʿāmalah*, appears only in an odd section of Nasāʾī’s *ḥadīth*

²⁴ It is tempting to see an evolution in the meaning of *sharīʿah* in the order of the *ḥadīths* related by al-Ṭabarī in his commentary, to gloss *sharīʿah*. For Ibn ʿAbbās (d. 68/686–8), the term *sharīʿah* means “guidance and clarification.” For al-Qatādah (d. 117/735) it means “duties (or “rituals” *farāʾid*) and limits (*hudūd*), the command and prohibition.” For Ibn Zayd [perhaps Nahshal b. Zayd c. 153/770? ‘Umar Riḍā Kaḥḥālāh, *Muʿjam al-Muʿallifīn*. 13:118; according to the *Ḥilyah*, Ibn Zayd narrated to Ibn Wahb. Abū Nuʿaym Aḥmad b. ʿAbdallāh al-Iṣfahānī (430/1038), *Ḥilyah*, 3:147] [*sharīʿah* means] the *dīn* (or just ‘*dīn*’).” Abū Jaʿfar Muḥammad b. Jarīr al-Ṭabarī (310/923), *Tafsīr*, 25:148.

collection regarding agricultural practices.²⁵ There it seems to mean “sales,” or, in some cases, a specific kind of agricultural transaction.²⁶ A lengthy study of *‘ibādah* in the *ḥadīth* proved unhelpful for our purposes. When the word appears in the corpus, it has already come to mean either “devotion,” in the general sense—a service to God, or it means “worship,” as in English—e.g., worshipping idols (*‘ibādat al-awthān*), or the ritual duties of Muslims: *ṣalāh*, *zakāh*, etc. *‘ibādāt* does not appear. Of somewhat more interest is the root *sh-r-‘*, particularly in the plural form, *sharā’i’*.

Where one finds the word, it seems obvious, even without doing the *isnād* analysis, that these *ḥadīth* are part of the later process of religion-formation. They are unlikely to date from the Prophet’s time. They almost all belong to a genre we might call creedal-*ḥadīth* where someone, usually a Bedouin, but sometimes a mysterious stranger, comes to the Prophet and asks for instruction on *islām* or *īmān*—precisely the issues contested in the first three centuries of Islam.

In one *ḥadīth*, a Bedouin complains that the “*sharā’i’* (plural of *sharī‘ah*) of *al-islām* seem [too] plentiful (and hence, burdensome) to him.”²⁷ What does this putative Bedouin mean by “*sharā’i’*?” In another *ḥadīth*, we find more detail: the proverbial Bedouin asks Muḥammad what God has imposed for him for *ṣalāh*. Five, says the Prophet. For fasting? The month of Ramaḍān, says the Prophet. *Zakāt*? These details are clearly too numerous to relate pithily in a *ḥadīth*, and the narrator refers elliptically to the other details of Islamic ritual, saying that “the Prophet [went on to inform] him of the *sharā’i’* of Islam.”²⁸ Thus the *sharā’i’ al-islām* are the devotional duties that Muslims are obliged to perform. The limited witness of the *ḥadīth* suggests that, by the time that the *ḥadīth* reached their

²⁵ This is suggestive in light of M. Bernand’s suggestion in the Elz article, *mu‘āmalah*, that the term originally has to do with agricultural credits—debt and payment—these being the quintessential interactive human activities. Nasā’ī died in 303/915.

²⁶ Nasā’ī, *Kitāb al-aymān wa-sharā’i’ih* (7:56–8; and 46 & 47) where it means only “transactions.” [This is an odd work. It is a book of agricultural *shurūṭ* dropped into Nasā’ī’s book of oaths and vows.]

²⁷ *Inna sharā’i’ al-islām qad katharat ‘alayya*. #3702 *al-Du‘āt* bab 4 juz’ 2 p. 868 in *al-Tirmidhī*.

²⁸ Muḥammad b. Ismā‘īl al-Bukhārī (256/870), *Ṣaḥīḥ al-Bukhārī*, *Kitāb al-Ṣawm* 1; v2:225. For other uses of the root in the *ḥadīth* corpus, see A.J. Wensinck et al., *Concordance et indices de la tradition musulmane*. This is not the place to trace the evolution of the term, but it is clear that there is a progression from *sharā’i’* meaning “ritual duties” (*farā’id*) to more general “rules” (e.g., *al-islām wa-sharā’i’ih* in *Ṣaḥīḥ al-Bukhārī Kitāb Manāqib al-Anṣār* 29; v6:239. For *al-sharī‘ah* as right conduct, see Aḥmad ibn Ḥanbal, *Musnad Aḥmad* 3:439 (not 429 as in Wensinck).

final wording, the term *sharāʿi* already meant ritual duties particular to membership in the Muslim community.

D. *ʿUmar b. ʿAbdalʿazīz*

Our final bit of data comes from the *Sīrat ʿUmar b. ʿAbdalʿazīz*, an early biography of the Umayyad caliph (d. 101/719) by Ibn ʿAbdalḥakam (d. 214/829).²⁹ It purports to contain documents written by the caliph, sermons given by him, and apothegms uttered by the so-called “fifth of the *rāshidīn*.” There are many usages that would seem to confirm the antiquity of the text, and as Gibb says, it “carries every indication of genuineness in its content and linguistic style . . .”³⁰

In one of the discourses, it is recorded that ʿUmar said, “Islam is limits (*ḥudūd*) and *sharāʿi*, and norms (*sunan*). One who acts according to them has perfected his faith (*īmān*). . . .”³¹ With just this text, it is hard to sort out the substance of these terms. Simply on an etymological basis, it is reasonable to suggest that *ḥudūd* are those things that Muslims may not do that others, perhaps, may do—drink wine, for instance, marry outside Islamic norms (*zinā*), or gamble. *Sunan* is harder to parse out. It must mean something like “practices” that have been deemed normative. Its domain may be expressly ethnic: “This is how we Muslims/Arabs have decided to do things.”³² Since, however, ʿUmar is associated with the nascent de-ethnicization of Islam, his letter may mark the time when Arab customs are increasingly identified as Muslim customs. In any case, the *sharāʿi*, in line with the Qurʾānic usage and the later *ḥadīth*, would seem to refer to the *rituals* that identify Muslims as Muslims, the acts that are not merely distinctively Muslim ways of doing things, but things done *only* because one is a Muslim.

²⁹ The texts were collected by Abū Muḥammad ibn ʿAbdalḥakam (d. 214/829), though perhaps they were worked over by his son, Abu ʿAbdallāh Muḥammad (d. 268/882) (conversations with Jon Brockopp at the second Alta *uṣūl* conference were helpful here). The texts seem to me to be archaic and use phraseology that seem to precede Ibn ʿAbdalḥakam’s time, which suggests they may be authentically from the generation before his. I suspect that there are editorial insertions—“*wa-sunnat nabīh*,” for example, is inserted in formulaic ways after *kitāb allāh*, and the text uses the word *sunnah* in a way different from what “Umar” seems to mean by the plural *sunan*, when he uses it throughout his sermons, admonitions and letters.

³⁰ H.A.R. Gibb, “The Fiscal Rescript of Umar II,” 2.

³¹ ʿAbdallāh Ibn ʿAbalḥakam (214/829), *Sīrah ʿUmar b. ʿAbdalʿazīz (khāmis al-khulafāʾ al-rāshidīn)*, 72.

³² M.M. Bravmann, *The Spiritual Background of Early Islam; studies in ancient arab concepts*, section III.

There is some confirmation for this in the letters ‘Umar repeatedly wrote to his governors and generals insisting on punctilious observance of Islamic rituals. In one of these, he says, “One who defaults on *ṣalāh* has, with respect to *sharā’i’ al-islam*, most seriously defaulted. Therefore, increase your undertaking of the *sharā’i’* of *al-Islam*...”³³ And in the famous “Fiscal Rescript” ‘Umar says,

The religion (*dīn*) of God, with which he sent the Muḥammad, is His book, which He sent down upon him that God might be obeyed by means of it, and His command followed, and what He forbade be avoided, and His limits (*hudūdah*) established, and His duties (*farā’id*) performed, and what He permitted be permitted, and what He forbade be forbidden, and its truth be acknowledged and that [matters] be judged by what He sent down in it...³⁴

Here, “*hudūd*” is followed not by *sharā’i’* as above but by *farā’id*, a term that, as I argued in an earlier Alta conference paper, must refer to Islamic rituals.³⁵ There I suggested that the later Ḥanafī term *sharā’i’ al-īmān* was a reflex of an earlier concept of the limited number of practices essential to defining one as Muslim or to marking one as having faith (*īmān*). These were the shibboleths of being a Muslim—not just fasting and worship, but also, perhaps, avoiding *khamr*-wine for instance.

Our evidence from this early period, before the coalescence of early Islam, is only suggestive, but it is plausible to see it indicating a cultus, referred to as “*farā’id*” and “*sharā’i’*,” distinctive to, and definitive of, membership in the Muslim community, practices that made one Muslim, as well as acts governing social and ethical conduct (*minhāj*, *hudūd*, *sunan*, etc.).

It would seem, then, that while the concept-pair that expressed this combination, *ibādāt* and *mu‘amalāt*—ritual manifestation and ethical normativity—developed rather later, these late terms reflect a conceptual map present in Muslim thought and practice from a very early date—perhaps from the very beginnings of the Muslim community. It follows that rituals are not extraneous to Islamic law but indeed the very word that later comes to stand for Islamic law, *sharī‘ah*, had earlier referred to the rites that were distinctive to Muslims—the rituals of *al-Islam*.

³³ Ibn ‘Abalḥakam *Sīrah ‘Umar b. ‘Abdal‘azīz (khāmīs al-khulafā’ al-rāshidīn)*, 87.

³⁴ *Ibid.* 97.

³⁵ A. Kevin Reinhart, “Difference Between Heaven and Earth.”

III. ORGANIZING OBLIGATIONS: THE STABILITY OF ISLAMIC FIQH WORKS

Another avenue for tracing the distinction between ritual and practical law is to consider too the arrangement of ritual and non-ritual matters in books of law (*kutub al-fiqh*). The earliest sources in the contents of law books, especially the *Fihrist* of al-Nadīm, seem to suggest that discussions of the law were composed in opuscles (*kutub*) on various topics; these were only later organized into compendia.³⁶ The titles of these small books use the rubrics of the different ritual activities (*i'tikāf, ḥajj, ṣalāh, zakāh*), as well as “retaliation,” “lost items,” etc. This is hardly surprising since many of these categories are practices described in the Qurʾān (the “prayer of fear,” for example). What we do not find in lists of *fiqh* topics is a term that unites all devotional activities into one master category, or all practical activities into another category. Nevertheless we do find a kind of privileging of ritual in the topics listed in context—lists of the earliest *fiqh* works began with *ṣalāh*, then *zakāt*, then fasting and so on.³⁷ Al-Nadīm reports that al-Shaybānī's book of “*uṣūl*” begin with *ṣalāh*, then *zakāt*, then pilgrimage rites (*manāsik*), and the oddities of prayer law. (Menstruation, a topic that usually comes before or during the discussion of prayer, is not mentioned until much later in the topic list.)³⁸ Al-Shāfiʿī's *Mabsūṭ* (transmitted by al-Rabīʿ) as well as his *Umm*, puts the ritual acts, for the most part, at the beginning.³⁹ Abū Thawr's book seems to be all ritual,⁴⁰ and al-Muzanī's *Mukhtaṣar* has ritual at the front.

When Willi Heffening wrote, to my knowledge, the only study of the organization of Islamic law books, he found that ritual preceded non-ritual in all cases. In a survey of the construction (*Aufbau*) of Islamic legal works,⁴¹ he laid out in tabular form the contents of the early *fiqh* works

³⁶ For which, see the articles of el-Shamsy and Brockopp in this volume.

³⁷ Abū l-Faraj Muḥammad b. Abī Ya'qūb Ishāq ibn al-Nadīm (380/990), *al-Fihrist*, 256.

³⁸ *Ibid.* 257. The versions we have of al-Shaybānī's *Jāmi' al-kabīr*, and *Kitāb al-Aṣl (al-Mabsūṭ)* follow this order, though the issue of purity has been (editorially?) incorporated into *Kitāb al-ṣalāh*. It is worth noting that al-Shaybānī has a section on oaths (*aymān*) in the ritual section. This is because, as we shall see, the Ḥanafis treat oaths, or more precisely, the expiation for the breaking of an oath, as at least a quasi-ritual matter.

³⁹ *Ibid.* 264.

⁴⁰ *Ibid.* 265.

⁴¹ W[illi] Heffening, “Studien zur Geschichte und Kultur des Nahen und Fernen Ostens.” Muranyi's pioneering work (Miklos Muranyi, *Die Rechtsbücher*; idem, *Ein altes Fragment medinensischer Jurisprudenz aus Qairawan*; idem *Beiträge zur Geschichte der Hadīṭ und Rechtsgelehrsamkeit der Mālikīyya*), suggests also the stability of these categories and their arrangement.

known to him. While his sample is actually quite random—it is based only on editions printed at the time he wrote the article (1935) supplemented with various manuscripts available to him—I have confirmed his findings with other works not then available to Heffening. Nothing that has appeared since—Arabic text or academic secondary text—suggests that these findings are substantially to be altered.⁴²

What Heffening found was that, with remarkable consistency, the *‘ibādāt* (to use later terminology) always showed up first in the *fiqh* works, followed by *mu‘amalāt*. Within the practical law there is a certain looseness of structure, and there are organizational differences that are predictable by school. Heffening observes some instability within individual *madhhabs* themselves. For example, he demonstrates that Rabī’s recension of al-Shāfi‘ī’s *fiqh* compendium differs from the organization recorded in Muzanī’s *Mukhtaṣar*, which becomes more influential than the *Umm/Mabsūṭ* in shaping subsequent Shāfi‘ī *furū‘* organization.⁴³ There are various other oddities in the *Umm* that are not relevant here.⁴⁴

A. *The Origin of Islamic Law’s Categories*

In looking for the origin of this law-book ordering, in which *‘ibādāt* are seen as distinct from *mu‘amalāt*, and ordered first in the book, it now seems to be a mistake to restrict our research to the genre of law as found in pre-classical and classical Islam. Rather, it is probable that this order of topics is first ordained by scholars of *ḥadīth*, who, very early on, constructed “*muṣannaḥ*” collections of *ḥadīth*, that is, *ḥadīth* organized by their topic, not their transmitters.

There is good reason to suppose that Abū ‘Abdalraḥmān ‘Abdalmalik ibn Jurayj (d. 150/768) was the first to organize a book in this manner.

⁴² The small differences between what I found and what he found are not worth documenting. Thanks to Philip Aubart who helped compile the research data that confirmed the contents of Heffening’s article.

⁴³ See the biography of al-Muzanī in the *Fihrist of Ibn al-Nadim*. See also therein the biography of Ibn Surayj.

⁴⁴ The arrangement was distinct so that even someone who disagreed with al-Shāfi‘ī ordered his book in the same fashion as al-Shāfi‘ī’s book (Abū Thawr). Heffening, it should be noted, says Shāfi‘ī wrote only individual works, but I don’t think this is what Ibn al-Nadīm tells us. He says Shāfi‘ī wrote a *mabsūṭ* but Ibn Abī Yūsuf (or al-Ṣayrafi depending on the ms.) says *mā hādha nuskhatuh*, then follows *Kitāb al-Ṭahārah*, etc. The implication is that there was a *nuskhah* of the *mabsūṭ* that looks like this. Shamsy seems to suggest that the *Umm* in the form we have it is the work of al-Ḥaṣā‘irī (d. 338/950). See Ahmed El Shamsy, “From Tradition to Law” (Harvard University, 2009), p. 232. El Shamsy’s is now the definitive account of the composition and transmission of the *Umm*.

This at least is a claim recorded in Ibn Abī Ḥātim's *al-Jarḥ wa-l-Ta'dīl*.⁴⁵ Ibn al-Nadīm, who seems to have known the book, records that, "among [ibn Jurayj's] books is a book of the *Sunan* and it contains what is usually contained in books of *sunan* such as *al-Ṭahārah*, *al-Ṣiyām*, *al-Ṣalāh*, *al-Zakāh*, and other things."⁴⁶ It is suggestive that Ibn al-Nadīm's entry for another scholar, Abū 'Abd al-Rahmān, says, "among his books is a book of *Sunan*; it contains the books of *fiqh*, such as *ṣalāh*, *ṭahārah*, *ṣiyām*, *zakāh*, *manāsik*, and other things."⁴⁷ In other words, these topics were part of the standard arrangement of books of *fiqh*, a topic list interchangeable between "books of *fiqh*" and "books of *sunan*."⁴⁸ Since, to our knowledge, there were no "books of *fiqh*" in the classical sense of the word "*fiqh*" when Ibn Jurayj himself wrote, Ibn al-Nadīm suggests that the received order of *fiqh* topics, with the ritual rules first, dates to a time substantially before 150/768, plausibly during the Umayyad period, a generation before Mālik's (179/796) *Muwatṭā'*, and contemporaneously with Abū Ḥanīfah (d. 150/767) (though Ibn al-Jurayj was probably older than Abū Ḥanīfah when he died). This is, moreover, approximately the order we find in the *muṣannaḥ ḥadīth* works of al-Ṣan'ānī and Ibn Abī Shaybah.

The compilers of *muṣannaḥ ḥadīth* works—it is clear—therefore were the ones who established the standard categories and structures of *fiqh* books. The testimony of Ibn al-Nadīm, and of our earliest *muṣannaḥ* works—those of al-Ṣan'ānī and Ibn Abī Shaybah—compel us to see Ibn Jurayj as the one who first grouped what would later be called *'ibādāt* together and placed them before what the later jurists called the *mu'āmalāt*. Ibn Jurayj's logic must have reflected a deep cultural consensus, however, since his structure has continued to determine, with only the smallest deviations, the order of *fiqh* works from his time to the present. Why this should be the case is not clear. We may speculate that ritual is first because it is more "sacred," and because it is ritual that marks one as *muslim*. Perhaps the order of the rituals' listing within the "*'ibādāt*" section is based on frequency, augmented by the practical order of the rituals themselves:

⁴⁵ The attribution of *taṣnīf* to Ibn Jurayj is in Harald Motzki, *The Origins of Islamic Jurisprudence: Meccan fiqh Before the Classical Schools*. 274 and see notes 928–931. Motzki's biographical notes for Ibn Jurayj begin at p. 268.

⁴⁶ Ibn al-Nadīm *al-Fihrist*, 282; Abū l-Faraj Muḥammad b. Abī Ya'qūb Ishāq al-Nadīm, *The Fihrist of al-Nadīm; a tenth-century survey of Muslim culture*, 1:1:547.

⁴⁷ Ibn al-Nadīm *al-Fihrist*, 281; al-Nadīm, *The Fihrist of al-Nadīm; a tenth-century survey of Muslim culture*, 1:1:546.

⁴⁸ I do not believe we can make much of the fact that Ibn al-Nadīm's list of books in his entry for 'Abd al-Rahmān has *ṭahārah* after *ṣiyām*.

purification is a precondition of worship; worship happens five times daily, while fasting and *zakāh* take place once per year; *ḥajj* is still less frequent. Whatever the logic, there is a gravitational attraction that pulls the *'ibādāt* toward the beginning of all works on Islamic practice, whether 'scriptural' (as the *ḥadīth* works became) or practical, as *fiqh* became.

What we have seen so far, then, is that the notion of ritual, and the ritual/social distinction, in the formative arrangement of Islamic norms, dates from the very beginnings of Islam. The later term for ritual, "*'ibādah*," is present in the Qur'ān where it indicates an attitude, not a specific practice. It is plausible that in this period the word for "ritual" was *sharī'ah*, pl. *sharā'i'*, with a synonym *farīdah*, pl. *farā'id*.⁴⁹ Other *muslim* practices were denominated by the terms *ḥudūd*, "limits," which were perhaps shibboleths of *muslim* conduct, and *sunan*, acts that were also *Muslim*/Arab norms. This account rests on the *Sīrat 'Umar* but also on usages in *ḥadīth* where *sharā'i'* are explicitly what Muslims would later call the "Five Pillars." Hence the ritual/non-ritual distinction among Islamic norms dates from as early as we can see back into Islamic history.

How, then, did Muslims from the classical age of Islamic jurisprudence—al-Ghazālī and his generation, then later the *ṭahqīqī* intellectuals, see Islamic law *in toto*?

IV. THE NON-RATIONALITY OF THE *SHAR'*

A. *How the Shar' Fits Together*

The notion of "ritual," and the terminology that expresses it, developed as Islamic self-reflectiveness itself grew and matured. Often, however, the "great scheme of things" is inaccessible to those living within the schema, simply because this scheme itself is the medium of their reflection. In particular, it is only rarely that jurists attempted to provide an overview of Islamic law as a whole, to theorize the entire system—before the 19th century. (Then the intellectual assault upon Islam from modernity, from European polemics, as well as intra-Muslim critique, forced Muslims defensively to articulate the way that Muslim practices, values, and meanings

⁴⁹ *Farḍ*, *farīdah* and so forth also have as root meanings "cutting," "notching," "distinguishing by setting apart," as *sharī'ah* means a cut in a riverbank that gives access to water. See Edward William Lane, *Lexicon*. s.v. *sh-r-*' and *f-r-d*. See also Reinhart, "Islamic Law as Islamic Ethics," pp. 188–89, corrected by the discussion in the present article, above.

facilitated and fashioned meaningful Muslim lives).⁵⁰ As part of our attempt to understand the place of ritual in Islamic law, it is worth translating and discussing two of these rare pre-modern overviews here.⁵¹

B. *Translation of a Portion of al-Taftazānī's Talwīḥ*
(with an addition from Mollah Khūsrev's *Mir'āt*)

In the first, and briefer of the two accounts, al-Taftazānī (93/1390) extends the meaning of the technical term *sabab* (“occasion”) to mean something very much like occasioning factor (*‘illah*), or even rationale (*ḥikmah*)⁵² to explain why it is that there are *mu‘āmalāt* rules and why God stipulated them.

God willed the sustaining (*al-baqā’*) of the world to a Moment He knows and a Time He has determined; this is the occasion for his stipulation of [the rules for] sales, marriage, and the like. What makes this clear is that God determined for this order the entrusting of the human species to survive (*baqā’*) until the Hour, and this [survival] is built upon preservation (*ḥifẓ*) of individuals for by it the species survives. However, due to a certain imbalance of the humors, humans need, in order to survive, certain manufactured items—food, clothing, dwellings and the like. These in turn require cooperation and mutual participation among the individuals of the species. In turn, for procreation, and to have a posterity, marriage between male and females is required; this also [requires] the establishment of communal welfare. Now [this cooperation and mutual participation] requires general principles (*uṣūl kullīyyah*) determined by the Legislator. By these, equity (*‘adl*) is preserved among [individuals] in the system (*niẓām*) that binds them together in the domain of marriage—which is linked to the preservation of the species—and [in the domain of] communal relations, which is linked in turn to the survival of individuals.

[The need for principles to preserve equity] is because every one [harbors the] desire to transgress and to take from those around him. This would lead to injustice and the order would be deranged. Thus are occasioned the rules of mutual interaction (*mu‘āmalāt*).⁵³

⁵⁰ It is to be regretted that the most influential modern account of Islamic practice and ethics, Sayyid Quṭb’s, described it as a “system,” a mechanical and rigid image, rather than something more biological that would have expressed the flexibility, growth, and adaptation of the pre-classical, classical, and medieval Islamic thought and practice.

⁵¹ Another overview of the law is found in Abū Ishāq Ibrāhīm b. Mūsā al-Mālikī al-Shāṭibī, *al-Muwāfaqāt*. 2:7ff. His is a rather vague formulation, however: *‘ibādāt* are occasioned by the need to preserve *dīn*; *mu‘āmalāt* by the need to preserve life (*al-naḥs*).

⁵² The translations of these technical terms are drawn from Bernard G. Weiss, *Search for God’s Law*, pp. 639, 671, 110.

⁵³ Sa’daddīn Mas’ūd b. ‘Umar al-Taftāzānī (792/1388), *al-Talwīḥ*, 2:401.

Mollah Hüsrev, after a paraphrase of this passage, adds,

The point of all this is that *fiqh* is the knowledge of the stipulated practical rules according to what we have already said: that they are either (A) connected with an eternal matter—and those are the acts of bondsmanship (*‘ibādāt*), or (B) [they are bound up with] matters of this world, which are

- 1) connected with the preservation of individual—and these are the statutes of mutual interaction (*mu‘āmalāt*)—or
- 2) with the preservation of the species facilitated by domesticity, such as marriage or
- 3) facilitated by political life (*tamaddun*), and these are the rules of criminal sanction (*al-‘uqūbāt*).⁵⁴

In this vision, surely shaped by Greek political theory and its Muslim realizations, acts are directed toward other-worldly concerns (and those are rituals) or this-worldly concerns, and those are commercial, domestic, or political. The other-worldly matters are not here given a rationale. Their general telos is expressed by their name: *‘ibādāt* are acts that reflect and perform humans’ status as bondsmen and bondswomen. Ritual here is defined, quite literally, by its impracticality, its escape from a reasoned apprehension of its utility. This theme will be discussed more extensively below.

C. Translation of a Portion of Ibn Barhān’s Wūṣūl

A second, and much longer, reflection on how God has structured human practice is found in Ibn Barhān’s (d. 520/1126) earlier *uṣūl* work, the *Wuṣūl*. Its larger scope gives us still another standpoint from which to view the entire edifice of *fiqh*—ritual and practical—as the Muslim jurist saw it. He is responding to al-Nazzām who, as we shall see, denied the validity of *qiyās* in legal readings, believing that the entire *shar‘* was non-rational. To this Ibn Barhān responds with a rare summary of how the entire *sharī‘ah* fits together, together with passionate reflections on the differences between the *shar‘* in the abstract as it were—its general principles (*kullīyyāt*)—and the ocean of *shar‘ī* particulars. He asserts that a goal (*maqṣūd*) is discernible even in rituals, and all the more so in the *mu‘āmalāt*.

The *sharī‘ah* is divided into *‘ibādāt*, *mu‘āmalāt*, *munākaḥāt* [things related to marriage], and *siyāsāt* [i.e., “political” laws of the state including criminal law].

⁵⁴ Mollā Mehmed b. Farāmarz b. ‘Ali Hüsrev (885/1480), *Mir‘āt*, 2:417.

[First section: *‘ibādāt*] One section of [acts] is corporeal *‘ibādāt*, like fasting and worship. Their goal (*maqṣūd—telos*) is to break the power of the appetitive soul (*nafs*) as a sign of its evil (*sū’*) and to forestall trivialities and pleasures. The goal of worship (*ṣalāh*) is humility, abasement, mortification, and abnegation before God the most high. Among [the category of bondsmanship acts also] are those whose goal is defense of the realm [of Islamdom] and protection of the community (*millah*) as well as killing the enemies of God—namely the *jihād*. And among [acts of bondsmanship also] are those whose goal is abiding (*al-‘amārah*) in the house of God the most high, and thereby serving [God]; this is the *ḥajj*.

[Second division of the shar‘: *mu‘āmalāt*] Among [the acts stipulated in the *shar‘*] are those whose goal is the establishment of equitable practice (*al-sunnah al-‘ādilah*) and so to [have someone] undertake the burden on behalf of the people. This thereby [provides] a recourse for the ones seeing recourse when there is dispute or disagreement. This [undertaking of the collective burden] is due to [the ordinary person’s] incapacity fully to understand (*iḥāṭah*) the consequences (*‘awāqib*) of diverse factors (*al-umūr*). For, sometimes humans delight in the experience of something, though the consequence is blameworthy and the outcome is distressing.

This [limited awareness of consequences] necessitates [rules on] sales; this necessitates [the rules we call] “*mu‘āmalāt*” (“commercial interactions”) due to the inability of humans to undertake [all] the aspects connected to the various matters, and [all the aspects related] to that welfare [derived from] persistent cooperation with others. The [limited] capacity of humans acting in isolation leads, then, to sharing and procures cooperation; it leads sometimes to [rules] on sales and sometimes it leads to [rules on] rents, or to [rules about] witnessing and documentation for deposits, or other things. This necessitates the various kinds of *mu‘āmalāt*, for necessity conduces to it and the needs of life are [its] motivations. If a human being were charged to undertake all of his goals without seeking the aid of anyone else, he would perish. Thus it can be said that a human being is in need [of others’ assistance and cooperation] by his nature.

[Third section: Marriage] [In addition to *‘ibādāt* and *mu‘āmalāt*] the third division [of the *shar‘*] is things having to do with marriage. The need that motivates it is preservation of the genus of human beings, and human companionship, as well as the establishment of lines of descent. Thus God has forbidden fornication (*al-zinā*), and God’s creative order [*al-‘ādah*] has led to creation by means of the male and the female. One has to permit marriage; [its absence] would lead to the cessation of offspring. The harm of that is obvious, as is the harm to worldly welfare. By this, religion would be corrupted, for religious welfare is joined to worldly welfare.

[Fourth section: Political law] As for “political matters” and the sections on crimes, the benefit of them is obvious and the wisdom behind [the rules] is intellectually comprehensible. If we did not require retaliation, this would lead to the loss of the inviolability of blood and malefactors (*dhū*

al-gharāmah) would hasten to shed blood of ordinary virtuous folk. Thus it is said “Killing nullifies assistance.”⁵⁵ And the Most High said {In retaliation you have life... (Q2:179)}. Such is also the case with cutting the hands of thieves, which is a means to preserve property; were it not for these punishments as a deterrent, property would be obliterated. Similarly with the statutory punishments imposed for fornication, which preserve the bed from corruption and lineages from confusion; were it not for them, people would be confused like livestock, and immorality would appear openly. These punishments are applied to corrupt people [to compel] order and welfare. These [underlying goals] are manifestly apprehensible by the intellect from the *sharʿ*; there is no method by which they can be refuted nor is there any mode to attack them and rebut them. [Thus, the general cases (*al-kulliyāt*).]

[The particulars] As for the particulars (*al-tafāṣīl*), we shall not include the aspects of welfare in [our discussion of the particular cases] or point to the descriptions [of good outcomes] that are well known to any reflective person, in proportion as the welfare is manifested in the general cases (*al-kulliyāt*). The particular rules are grounded upon the underlying principle (*al-tafāṣīl yaraddu ilā al-aṣl*). We know that [this underlying principle] was imposed by One Whose wisdom is well-established. The inability [to perceive] the good outcome [underlying some detailed rule] does not make the act in itself un-wise.

This is just the same to us as concepts that *do* appear rational to us (*al-maʿānī al-maʿqūlah lanā*).⁵⁶ In their obscurities are secrets that baffle (“cut the kidneys”) of the skillful who are unable to comprehend them. Ignorance of [a rule’s rationale] does not negate the realities of the bases [that underlie the realities].

[Consider] seeking knowledge, as in the science of medicine: physicians cannot know the duration of illness; if they knew these durations, they would know the time of one’s duration [on earth]. [Nonetheless,] they know that certain amounts of a remedy cure these illnesses. Their inability to [know the deeper causes of illnesses] does not compel the invalidation of [medicine’s] bases.

Just so, the general concepts of the *sharʿ*: there is no way to invalidate them just because of the inability to arrive [by reason to their] particularities. This is equivalent to [what we might] believe about someone lifting one of his legs, and standing on the other, while nodding his head. If we saw him in this state perhaps we would attribute [his actions] to *jinn* [i.e., that he was mad]—[that is], if we thought about only the outward manifestation of

⁵⁵ Although see footnote two in the text edition for other possible readings. My translation of *ḥatm* is derived from *Lisān* $\sqrt{h-t-m}$ where Ibn Manẓūr says it is really from $\sqrt{h-t-n}$ but adds, *wa-allāhu aʿlam!*

⁵⁶ Paul R. Powers, *Intent in Islamic Law*, discusses the semantic field of *maʿqūl al-maʿnā* at 33. An article that came to my attention only as I was finishing also discusses this and other relevant materials. See Marion H. Katz, “Meaning of Wuḍūʿ.”

his state. Yet [considering only the outward behavior of someone] is utterly contrary to the custom among reasonable people. Rather, if we reflected upon his inner state [of mind] and [supposed that] he intended to remove water from his ear, we would recognize the rationale (*ḥikmah*) for his act.

The particulars of the *sharʿ* are like that: its details and its restrictions and its conditions [are determined by] the One Who has true knowledge of them. Were we informed of the divine secret in [these particular rules], our knowledge about them would have the same certainty] as knowledge of the general bases [of the *sharʿ*]. We cannot [infer these particularities] through [our knowledge of] the universals. Since we cannot [infer the link between particularities and general principles], we allege that they are not within the experiential domain of intelligible things. [This is a mistake.]

[Thus], when al-Nazzām alleges that the *sharīʿah* is not an intelligible, and he points to some aspect of its application in the practice of practical justice, and to some aspect of its application to just practice (*al-siyāsāt al-ʿādilah*) and noble eternalities, and [asserts] that its particulars are at odds with the universals, the falsity of what he says is evident.⁵⁷

Let us set the last paragraph on al-Nazzām aside for the moment, and consider this description of the *sharīʿah* as a whole. For our purposes note that the stipulations of the *sharʿ*, even rules for ritual, have a *telos* (*ḥikmah*, sometimes, *aṣl*, or *maʿnā*, here Weiss’s “rationale”) that can be discerned. These rules have a human benefit (*maṣlahah*) that can often, if not always, be understood upon reflection. Nonetheless, especially in ritual, the relation of the underlying principle to the particular practice (*tafāṣīl*) is often inaccessible to reflection. Ritual and non-ritual are equally grounded in general principles of human welfare. The particular duties of ritual practice, however, are, according to Ibn Barhān, less accessible to rational analysis than in commercial law, for example. We can understand why a contract is conducive to human welfare in commercial law. Yet even if it is supposed that worship exists to discipline the appetitive self, why one performs two prayer cycles at dawn and three in the afternoon is impermeable to human understanding.

D. *The Utilities (maḥāsīn) of the Sharīʿah*

This leads us to consider briefly an important work that aspires to explain the divine wisdom (*ḥikmah*)—Weiss’s “rationale—or “excellent qualities” (*maḥāsīn*) for all facets of the law, al-Qaffāl al-Shāshī’s (prob. d. 370/972)

⁵⁷ Abū l-Faḥḥ Aḥmad b. ʿAlī al-Baghdādī Ibn Barhān (518/1124), *al-Wuṣūl*, 2:234–237.

Maḥāsīn al-sharīʿah.⁵⁸ This work was written primarily against the esotericism of the Ismāʿīlīs,⁵⁹ and perhaps also the categorical skepticism of al-Nazzām (about which see below). It purports to give a “meaning” and to expose the divine wisdom for all requirements of the sharʿ. It is *muṣannaf*, and, chapter-by-chapter, topic-by-topic, al-Qaffāl finds the wisdom underlying the acts required by the sharʿ. He expresses a certain humility about understanding all the details of the sharʿ.⁶⁰ Yet he assigns a *telos* to each of the ritual acts just as he does for the non-ritual acts that take up the bulk of the book. *Ṣalāh*, he says, exalts the Creator by a variety of self-abasing actions to thank the Creator for His benefactions. *Zakāh* is the charitable sharing with those who are in want, and who are unable to uplift themselves. It is feared they will be ruined if they are bereft of the charity of those who can do without. Fasting is the restraint of the appetitive self (*naḥs*) from passion, concentrating on the Creator, so as thereby to draw near to Him. In this way the one fasting realizes he needs nothing apart from obtaining God’s favor. *Ḥajj* is the manifestation of repentance (*tawbah*) to the Creator for falling short of his performance of the obligation to be thankful. He performs this so that the Creator accepts his repentance. *Jihād* is the exchange of one’s life-blood and wealth on behalf of the Creator to uphold His claim and leads to obedience of Him. Slaughter and immolation are a sacrifice to the Creator in place of the immolation of the self that is appropriate to require what is deserved for rebellion against God.⁶¹ Every item in the *sharīʿah* is analyzed in this way. He even essays to provide a rationale for the details that others assert to be non-rational, such as the number of *rakaʿāt* in a given prayer.⁶² In short, al-Qaffāl argues that all of the sharʿ (and he uses the words *ʿibādāt* and *muʿāmalāt*) is rational if not perspicuous. However, these accounts are hedged with “it is likely that” (*iḥtimāl^{an}*) and “it may be” (*qad yakūn*). When it comes to the number of cycles in the prayers, for instance, he asserts modestly that “an underlying principle (*maʿnā*) may be extracted (*qad yukhrij al-maʿnā*) from their difference.”⁶³

⁵⁸ See El Shamsy’s article in this volume. The book deserves a full study. The printed edition, al-Qaffāl al-Shāshī *Maḥāsīn al-sharīʿah fī furūʿ al-shāfiʿīyyah*, however, drew only on the Ahmed III ms., and made no use of the (better) Yale ms., which is not mentioned in Sezgin, *GAS*. Consequently there are many errors and implausible readings.

⁵⁹ *Ibid.* 18–25.

⁶⁰ *Ibid.* 27 and 29: *yakhfi al-wajh fih*.

⁶¹ *Ibid.* 29. See also 47–7 for *ʿumrah* rituals and 48 for purification.

⁶² *Ibid.* 82.

⁶³ *Ibid.*

In the end, however, al-Qaffāl's speculation was too flimsily grounded to satisfy the savants of *'ilm*, and the genre lived on only in ethical and mystical works, al-Ghazālī's *Ihyā'*, being the best-known example, where it was no doubt religiously influential but had no epistemological cachet with scholars in the science of the law. If it follows that the rationale of a statute is only speculatively comprehensible, its rational impermeability is one of the features, perhaps *the* feature, that distinguishes it from other aspects of the law. Unless, of course, all of the law is equally inscrutable.

E. *Al-Nazzām and the Non-Rationality of
the Shar' and of Ritual in Particular*

The notion of the law's essential non-rationality—which Ibn Barhān was at such pains to refute—is ascribed in Sunnī circles to al-Nazzām (d.221/836). He was the *agent provocateur* who took the position that *qiyās*—the rationalist identification of a causative feature (*'illah*) that accounted for the juridical status (*ḥukm*) of the act—could not be used in the domain of the *shar'*, since *qiyās* was a form of speculation (*rā'y*), and the assessment of human acts required rational assessment. *Tbādāt* particularly, he asserted, were by their nature irrational⁶⁴—from the human point of view, inscrutable and arbitrary—and so their rationale could not be determined by the act of the human mind.⁶⁵

Al-Nazzām's assertion that the *shar'* was non-rational and so, inappropriate for extension through analogy, becomes a stock debate in the *uṣūlī* accounts of *qiyās*. This set-piece discussion is usually phrased as a debate over whether “one can be under obligation/caused to worship (*ta'abbud*) by *qiyās*-reasoning.” The pivot on which the discussion turns, Bernard Weiss has suggested, is the term *ta'abbud*, a derivation of the root $\sqrt{b-d}$ that is somewhat unusual.⁶⁶ In the *Lisān* it means to make someone a slave, or take someone as a slave, or compel someone to be obedient.⁶⁷

⁶⁴ I want to distinguish between al-Nazzām, who held that ritual was irrational in the pejorative sense, and Sunnis and Mu'tazilis who more neutrally argued that ritual was non-rational, to use Lange's term. The position that the “*uṣūl al-'ibādat*” could not be determined by the intellect is attributed to al-Jubbā'ī (Abū Hāshim? Abū 'Alī?) and al-Karkhī by al-Rāzī. Fakhraddin al-Rāzī, *al-Maḥṣūl*. 2/2:469.

⁶⁵ The best summary of al-Nazzām's life is van Ess's article in the *Encyclopedia Iranica* (Josef van Ess, “ABŪ ESHĀQ NAZZĀM,” but the most thorough account is in his *Theologie und Gesellschaft*. 3:296–419, and see index.

⁶⁶ Bernard Weiss, *Search*, 634–5.

⁶⁷ s.v. $\sqrt{b-d}$, 10:9a. This form is not as rare as Professor Weiss supposes; the verb is found quite early, e.g., in b. Muḥammad al-Qādī al-Nu'mān (351/962), *Ikhtilāf uṣūl al-madhāhib*, 137.

The term is also, however, permeated by the aura of ritual itself, to suggest something “arbitrary,” “incomprehensible,” and “resistant to human analysis.” Hence the title of these debates is about being-subject-to the law, but the aura of the title includes notions of the inscrutability of God’s design.

[Al-Nazzām alleges that] a complete bathing (*ghusl*) is required as a result of producing of a “precluding impurity” (*al-janābah*). This is what is stipulated for purification from it. Yet [a washing is not required] for the entire body [as a result] of a “minor impurity” (*ḥadath*). This indicates that the assessments of the *sharʿ* are built upon distinctions [that are unknowable, rationally].⁶⁸

Al-Nazzām asserts that it is not a logical, but a ritual, distinction that separates the *ḥadath* (so-called ‘minor’ impurity, e.g., urination, defecation) from the ‘major’ impurity (e.g., sexual relations, menstruation). While al-Nazzām is making an argument about the law in general, the preponderance of his examples are drawn from ritual, which is conceived to be quintessentially incomprehensible in its categories and practices.

Sharīf al-Murtaḍā’s (d. 436/1044) *Dharīʿah*⁶⁹ confirms that al-Nazzām’s goal was to refute the use of *qiyās* entirely (a position attributed also to Dawūd al-Iṣbahānī the Zāhirī and his son). According to Sharīf al-Murtaḍā, al-Nazzām’s argument was that the *sharʿ* itself is a domain of irrationality, in his words that “things similar are treated differently and things that are different are treated similarly.”⁷⁰ A menstruant woman must make up the days she misses when fasting, but she needn’t make up prayers skipped for the same reason; similarly a traveler must make up days missed when fasting, but not the prayers he has shortened (*qaṣṣara*) because he was traveling; and one must bathe the entire body (*ghusl*) at the exit of a child or of semen, both of which seem “cleaner” than urination or defecation, which require only the lesser purification. Finally, and memorably, it is permitted by the law to look at the attractive parts of a beautiful slave

⁶⁸ Ibn Barhān *al-Wuṣūl ilā l-uṣūl*, 2:234. On al-Nizzām as provocateur, see Abū l-Ḥusayn al-Baṣrī *al-Muʿtamad*, 2:746; see also, *ibid.* 1:281–3; Abū Ishāq al-Shirāzī (476/1083), *Sharḥ al-Lumaʿ*, 2:86off. A complete account of this discussion is impossible here, but see, for instance, Imām al-Ḥaramayn al-Juwaynī (478/1085), *al-Burhān*, 2:75off; esp. 752–3. The most extensive discussion of this position (al-Nazzām is mentioned at p. 150) is found in 2/2149ff. The Āl Taymiyyah give a characteristically thorough account of who’s who in this dispute. See Āl Taymiyyah, *al-Musawwadah*, 367–8.

⁶⁹ ‘Alam al-Hudā Sayyid [Sharīf] al-Murtaḍā (436/1044), *al-Dharīʿah*, 690.

⁷⁰ *Li-ānnau warada bi-ikhtilafi l-muttafiqayn, wa-ittifāq al-mukhtalifayn*. *Ibid.* 690.

girl (by others than her master), but this is forbidden for a free women, even if she is ugly.

Al-Nazzām's argument is also presented in the section of the Mu'tazilī Abū l-Ḥusayn al-Baṣrī's d. 436/1044) *Mu'tamad*.⁷¹ There we can see that al-Nazzām cites ritual and particularly marriage (according to al-Juwaynī, the most ritualist of the *mu'āmalāt*—see below) to refute the idea that *qiyās*-reasoning is consonant with either a rational or a revelational perspective, given what we know about the law.

Al-Nazzām said, "God indicated that we are forbidden to do *qiyās* when He differentiated between likes and conflated unlikes, when He allowed one to see the hair of a handsome slave girl, but forbade one to look at the hair of a free woman even if she be ugly. [And similarly] when He required lustration for seminal emission but not urination, and required one purified from menses to make up fasts but not her prayers. . . . My purpose in what I mentioned is to permit the idea that the *sharī'ah* has borne witness to the invalidity of the evidence you [cite]. Because—regarding the *sharī'ah*—had it forbidden glancing at the hair of a free woman, and, had it not mentioned the slave girl, you would have said [based on *qiyās*-reasoning] that [glancing at the hair of a slave woman too] is forbidden, from fear of the *fitnah* that arises from [looking at the hair of] a beautiful slave also: so looking at [the slave girl's hair too] would have been forbidden. . . ."⁷²

God's logic when He prescribes through revelation is therefore utterly inscrutable; if we seek to second-guess Him through rationalist extension of the law, we risk impertinent transgression. This would seem to be an argument for restricted understanding of the *shar'*'s scope—in the manner of Abū Dawūd al-Ẓāhirī.

It appears, however, that the true origin of the argument lies elsewhere than al-Nazzām's skepticism. Our earliest written source—as far as I know—for this argument is in al-Qāḍī al-Nu'mān's (d. 363/974) *Ikhtilāf uṣūl al-madhāhib*,⁷³ where al-Qāḍī al-Nu'mān argues against the use of *qiyās*. There he offers examples of differentiation among similar acts such as the range of different expiations (*kaffārah*) for what he says amount to a single type of act—breaking a vow.⁷⁴ At the same time one does only the dust-ablution (*tayyammum*) whether one has broken wind, or urinated, had sexual relations, a nocturnal emission or various other acts. If different acts are categorized together, and similar acts are parsed

⁷¹ al-Baṣrī *al-Mu'tamad fi uṣūl al-fiqh*, 2:705–761.

⁷² *Ibid.* 2:746–7.

⁷³ *Ibid.* 140.

⁷⁴ Again, see Lange's article in this volume.

differently, this establishes that the *sharʿ* does not belong to the domain of rationality. (Note again, that the acts cited belong for the most part to the domain of the *ʿibādāt* and not to the *muʿāmalāt*.)

Al-Qāḍī Nuʿmān does not mention al-Nazzām here, so it is possible that the argument first originated in Ismāʿīlī circles. However, al-Qāḍī al-Nuʿmān places the origins of the argument a century before, in the first period of Islamic jurisprudence. Allegedly Jaʿfar al-Šādiq (d. 148/765) had already challenged Abū Ḥanīfah (d. 150/767), his student, with this problem.

“Which,” he says, “is nearer to ritual purity—urine or *janābah*?” Abū Ḥanīfah says, “the *janābah*, nor do I believe they are equivalent.” “Why then,” said Jaʿfar, “is the stipulation of God concerning urine, the minor ablution (*wuḍūʿ*), and for the major impurity (*janābah*) the complete bathing (*al-ghusl*)? Would it not seem better than to have *ghusl* for urination, according to what you say, or to have their stipulation be the same?”

Abū Ḥanīfah fell silent, says al-Qāḍī al-Nuʿmān. Similarly, Jaʿfar asked,

“Which is the more severe crime, the more severe sin, killing or fornication?” Abū Ḥanīfah said, “Killing.” Jaʿfar then said, “Why then did God require four witnesses for fornication so that there is no *ḥadd*-punishment without them? And He required only two witnesses for murder and allowed execution with only those two?”

Abū Ḥanīfah was once more silent.⁷⁵

Here it is not a limitation of the *sharʿ*'s scope that is the point Jaʿfar (and al-Qāḍī al-Nuʿmān) defend. They both want to assert that it requires authoritarian, charismatic knowledge to understand and hence extend the *sharʿ*. In short, only Imāms of the Shīʿī sort grasp the law's logic sufficiently to apply it outside the domains stipulated in the text.⁷⁶ Mere ordinary human rationality cannot infer the telos of a rule, or especially not the particularities of its application sufficiently to appropriate it for a novel case or circumstance.

Yet whether Jaʿfar's authoritarianism or al-Nazzām's epistemological skepticism, the effect is the same—to challenge the notion that the mores ordained by God are comprehensible to human reasoning. This posed a challenge to the advocates of *qiyās*-reasoning—Ḥanafī, Shāfiʿī, Muʿtazilī or Ashʿarī—that, while ostensibly refuted, turned out to have had an effect, particularly in envisioning the domain of ritual. We will return below to the

⁷⁵ al-Qāḍī al-Nuʿmān *Ikhtilāf uṣūl al-madhāhib*, 141.

⁷⁶ See Gleave's article in this volume.

problem of “*al-ta‘abbūd bi-l-qiyās*,” which is fundamental to understanding ritual. First, however, the larger challenge posed by al-Nazzām—that the law as a whole is non-rational—needs to be examined against those to whom it was the most severe challenge—the Mu‘tazilah of Basra.

F. *The Mu‘tazilah and the Non-Rationality of Ritual*

To deny the rationality of the law was first and foremost a challenge to the Basran Mu‘tazilah for whom the law was above all a confirmation of the ethical judgments of the intellect. For the Basrans, there was no need, *prima facie*, for Revelation to tell humankind that stealing was forbidden—it was an obvious wrong and as such reprehensible (*qabīḥ*) to the intellect. Yet when the rationalist Mu‘tazilah reflected upon the nature of religious obligations, they found the distinction between *‘ibādāt* and *mu‘āmalāt* to be profoundly meaningful.

The starting place for the Mu‘tazilī study of ritual is that, on the face of it, each act of Islamic ritual is a transgression, because it is (seemingly) pointless. For the Mu‘tazilah, good acts had utility, and acts without utility were, *prima facie*, detestable. The *mu‘āmalāt* regulations governed acts in a way that could easily be understood as useful—the regulation of sales and contracts, of inheritance, of lost items—all these rules were useful because they made these transactions predictable and equitable. However, for the Mu‘tazilah, ritual acts were in no obvious sense useful: bending and straightening up while reciting texts produces no obvious benefit. For them, *ṣalāh* had to be, *prima facie*, bad.

If we are commanded to perform *ṣalāh*, for instance, [God] has commanded us to do something that, as far as the intellect is concerned (were it not for this command [from God]), would be proscribed, and ceasing to do it would be obligatory, because it is the introduction of a hardship and a burden to the self without benefit.⁷⁷

Indeed, if one perfectly performed the Islamic acts of worship before the appearance of revelation with its command to perform them, these acts of worship would be wrong and detestable.⁷⁸ The set of actions that comprise *ṣalāh* or any other ritual seem to be simply pointless. It is only in the context of revelational (*samī‘*) information—in this case a command—that *ṣalāh* is seen to be not only beneficial, but supremely so.

⁷⁷ Sayyid [Sharīf] al-Murtaḍā *al-Dharī‘ah ilá uṣūl al-sharī‘ah*, 72.

⁷⁸ al-Qāḍī ‘Abdaljabbār, *Mughnī*, 6/1, 5:109.

Note that ‘Abdaljabbār and Sharīf al-Murtaḍá do not assert that worship, in the abstract, is pointless: the intellect informs us that we should thank our Benefactor and perform *‘ibādāt*. How to perform the act of worship, nonetheless, cannot be determined by the intellect, and in the absence of Revelation, any mode of worship is pointless calisthenics.⁷⁹ Rational thought is for the most part unable to grasp the composition of the ritual acts or how it is that they satisfy the Benefactor’s claim upon us.

How could the intellect indicate that *ṣalāh* without ritual-purification (*ṭahārah*) is not an *‘ibādah* [since *ṣalāh* without purification is invalid], but with *ṭahārah* it is an *‘ibādah*, even though the condition of abasement [*al-khushū‘*—the rationale for worship] is still present [in both cases] and though [the two acts of *ṣalāh*] are no different?⁸⁰

Abdaljabbār provides in the same place a list of the rationally arbitrary features of all the acts of worship, including fasting, *ḥajj* and other acts as well. It is not just that the acts themselves are irrational, but they are also hedged about with conditions and circumstantial rules that are equally inscrutable.

For the Mu‘tazilah, in fact, it was precisely the rituals of Islam that clarified the need for revelation (*al-sam‘*) and established the limitations of intuitive and rational (*badīhī* and *‘aqlī*) knowledge. They believed that revelation disclosed the rationality and therefore the value of Islamic rituals. For the Mu‘tazilah, rituals’ benefits are made clear only by the information that in return for performing these rituals God rewards the performer. This reward is earned by the satisfaction (*riḍā*) of the claim upon the bondsman. For the Mu‘tazilah, then, the *‘ibādāt* are rational like all prescriptions of the law, but their benefits are utterly opaque until Revelation. They are therefore characterized precisely by (a) their manifest dis-utility and (b) their Revelational prescription.

The method (*ṭarīqah*) of the *sharī‘ah* is built upon differences of conditions among those who are morally responsible (*al-mukallaḥīn*), as well as differences of time, place, and necessary-conditions (*shurūṭ*) for acts. It may be that what is obligatory for Zayd is detestable for ‘Amr, and what is permitted for one of them is proscribed for the other, and what is obligatory is made obligatory in a certain condition and detestable in another condition. How [in such circumstances] can a *purely rational* indicant indicate that worship outside a state of ritual purity (*al-ṭahārah*) does not lead to (*dā‘iyah*) fulfillment of an obligation but rather leads to a detestable [act]? But if [worship]

⁷⁹ See *idem*, *al-Mughnī* 15, 15:27.

⁸⁰ *Ibid.* 15:28.

occurs with *al-ṭahārah*, it leads to fulfillment of the obligation, and the prevention of immoral acts (*al-fuḥashāʾ*) and [also prevents other acts] which one is forbidden to do. This applies to the situation at a certain time rather than another, and to a certain person rather than another, as, for example, between a menstruant and one who is in a state of ritual purity.⁸¹

For al-Qāḍī ʿAbdaljabbār, acts of worship are a kind of speech act in the ecosystem of “thanking the benefactor.” ʿAbdaljabbār sees the *ʿibādāt* as a request for reward; it is performed with the intention of being or drawing near (*taqarrub* and *danū*) to God, “and this proximity is the place of reward, since there is no place more sublime than that.” Consequently, though it is action, it functions as a statement requesting reward.⁸² Compliance with the form of petition required by the Lord is not a matter of reason; sovereigns have the right not to explain themselves. For the Basran Muʿtazilah then, ritual is rational in reality but it is *de facto* non-rational because it is speech in an idiom foreign to human reflection—meaningful only because it is prescribed by the One to Whom the worship is addressed. In some way ritual’s incomprehensibility is the justification for revelation itself.

G. *Sunnī Non-Rationalism*

Here, rather than tracing the eventually unpersuasive (to Sunnī Muslims) Muʿtazilī position on *qiyās*, and Muʿtazilah polemic against al-Nazzām, it is of more interest to turn to a polemic between the Ḥanafī and the Shāfiʿī *maddhabs*—both regarded as Sunnī schools in good standing.

For both of these schools there were also domains of non-rationality that looked rather like al-Nazzām’s view of Islamic law in general. This much the Shāfiʿīs and Ḥanafīs agreed upon. What they did not agree upon was where to find this non-rationality that prohibited inquiry into the telos of the act, and the instrumentality of the means assigned by God to achieve that end.

As we have seen, the root ʿ**-b-d** is a powerful one in Islamic understanding of relations between the divine and the human. The root refers to bondsmanship:⁸³ the power of the “owner” to determine the actions of the one owned, without dispute or recourse; it is “being owned” that defines

⁸¹ Ibid. 27.

⁸² Idem, 20/2 *al-Mughnī fi Abwāb al-Tawḥīd wa-l-ʿAdl; fi l-imāmah*, 20/2:252.

⁸³ I’ve found that “slavery” in ordinary usage is too determinate to use in this context. It inevitably suggests the New World quasi-industrial slavery of plantations, mines and so on. Both the theory and practice of involuntary servitude were quite different in Islamic

a slave.⁸⁴ It is, as we have seen the basis for the term we usually translate as rituals (*‘ibādāt*) which are, more precisely, acts of obedience.⁸⁵ The fifth form, *ta‘abbada*, in jurists’ usage is manifestly ambiguous. It means, first, to take someone as a slave, or consider/treat him as a slave (*ista‘bada*). It is used, as we noted above, in one of the stock *uṣūlī* controversies “*hal yajūz^u ‘l-ta‘abbud^u bi-l-qiyas?*” “Can [God] impose as a duty upon [human-kind, rules derived] by *qiyās*? Weiss notes that

[i]t is a matter of some interest that the phrase appears in discussions in which the use of analogy is in dispute, and not elsewhere . . . We may guess that it emerges in discussions of analogy simply because some jurists . . . found it incredible that God should place man in subjugation to what, to them at least, was nothing other than human judgment.⁸⁶

On the one hand this definition would explain al-Nazzām’s categorically skeptical view of *qiyās*-reasoning in the domain of legal reflection, and *ta‘abbud* would refer to all aspects of Islamic law—inasmuch as human obedience to all of it is dictated by humans’ status as bondsmen and bondswomen. Yet the term “*ta‘abbud*” was also colored by the notion of *‘ibādāt*. The argument for Sunnīs, particularly, played itself out in a dispute about whether *qiyās* could be invoked to extend or apply what all agreed were non-rational rules to new circumstances.

In his paper in this volume, Christian Lange has thoroughly and insightfully described the Ḥanafī aversion to any extension of assessments connected with the *ḥadd*-statutes, *kaffārah*, and quantitative ordinances (*maqādīr*), (and according to some), exemptions (*rukhaṣ*), to novel cases. To recapitulate briefly, the Ḥanafīs denied that one could use the analogy process to derive judgments in the domains of “numerical stipulations by God” (*maqādīr*), the *ḥadd*-punishments, and expiatory acts (*kaffārāt*). While Lange uses this problem as a lens through which to examine “non-rationality” itself, we want to call attention here to the notion that, for the Ḥanafīs, within the *shar‘* as a whole, there are domains of rationality and non-rationality.

law, and in Islamdom, for the most part. Hence a less determinative term like “bondsmen” and “bondsmanship” seems most useful here.

⁸⁴ Ibn Manẓūr, *Lisān al-‘Arab*, s.v. ‘-b-d (10:8b). It seems also definitionally to be linked to lack of autonomy; at its base the root suggests “capture” rather than sale.

⁸⁵ *Ibid.* 10:9b–10a.

⁸⁶ Weiss, *The Search for God’s Law: Islamic Jurisprudence in the Writings of Sayf al-Din al-Āmidī*, 635.

These domains are characterized by what appears from the outside to be an irreducible quality of arbitrariness that incomprehensibly determined the penalty for hunting a deer within the Sacred Precincts of the Ka'bah, for instance, or for having sexual relations during the Ramadan fast. Consequently no analogy from the rules we know to unknown situations is possible, since we cannot know the occasioning factor (*'illah*) that brings about the expiatory act, the exemption, or the *ḥadd*-punishment. As Lange has shown, the Shāfi'īs did not see this particular domain as off-limits to *qiyās*-reasoning, and they not only used *qiyās* themselves but they argued that willy-nilly, the Ḥanafīs did too.⁸⁷

Our own window into the Shāfi'ī-Ḥanafī dispute is a polemical pamphlet, the *Mughūth al-khalq fī tarjīḥ al-qawl al-ḥaqq* of Imām al-Ḥaramayn al-Juwaynī (d. 478/1085).⁸⁸ It is a work of Ash'arī-*uṣūlī* polemic, vindicating al-Shāfi'ī over Abū Ḥanīfah.⁸⁹ In this work, al-Juwaynī's purpose is clear:

We assert that it is required for the whole of the intellectuals, and the masses of the Muslims, East and West, far and near, to come over to the *madhhab* of al-Shāfi'ī...⁹⁰

Ultimately his is a supercessionist argument. He asserts that Abū Ḥanīfah had not really “worked out the details” of Islamic law, that his legal reasoning was premature. He was in this respect more a Companion than an Imām—to be respected for that, but his *madhhab* is simply not fully developed, and Abu Ḥanīfah's younger disciples, Abū Yūsūf, al-Shaybānī and others, found themselves compelled to disagree with him on very many matters, which shows the *madhhab*'s underdevelopment.⁹¹ The point of friction between the schools is what al-Juwaynī alleges to be Abu

⁸⁷ See first the Lange article in this volume. An inclusive site for these critiques of the Ḥanafīs is al-Rāzī, *al-Maḥṣūl fī uṣūl al-fiqh*, 2/2:469f. Al-Rāzī breaks from al-Ghazālī and other Shāfi'īs of his type and denies that *al-ta'abbud bi-l-qiyās* is possible, since it entails circular reasoning. More extensively 483ff.

⁸⁸ Abū al-Ma'ālī 'Abd al-Malik ibn 'Abdallāh Imām al-Ḥaramayn al-Juwaynī (478/1085), *Mughūth al-khalq*. This is the sort of thing we need more of in published form, and many lie in manuscripts of “*Rasā'il*” in *majmū'āt* in libraries across the world. The work has been cited elsewhere to my knowledge only by Éric Chaumont. See Éric Chaumont, “En quoi le madhab šāfi'ite est-il šāfi'ite.”

⁸⁹ I say “Ash'arī” because of his reference to al-Bāqillānī, a distinguished Ash'arī but in law a Mālikī. He calls him “our *qādi*” (pp. 7–8), even if he disagrees with him about the degree of certainty in the *tarjīḥ* process, and whether “every *mujtahid* hits the mark” (p. 9).

⁹⁰ al-Juwaynī *Mughūth al-khalq fī tarjīḥ al-qawl al-ḥaqq*, 16.

⁹¹ Ibid. 22–3. Indeed, al-Juwaynī alleges that they abandoned “two-thirds of it.” p. 44.

Ḥanīfah's hasty analysis that has led his *madhhab* astray in the domain of ritual—specifically ritual purification (*tahārah*). Al-Shāfi'ī, he says,

divided the foundations (*qawā'id*) [of the *shar'*] into that for which one can find an occasioning factor, and that for which one can not find an occasioning factor. [When Abu Ḥanīfah's] followers [applied *qiyās*-reasoning] to that for which one may find no occasioning factor, they departed from the manifest *qiyās* (which sticks to the initial understanding (*awā'il al-afhām*) and argued from the general principles (*uṣūl*) of the *shar'ah*: This led to rash assertion and tumultuous chatter that truncated the understanding by [God's] bondsmen of [what the law really requires].

Example: For the Shāfi'īs, the removal of impurities is excluded from *qiyās*-reasoning because it is an inscrutable ritual and so its “purpose” can not be discerned. Yet Abu Ḥanīfah said ‘the intelligible fact is the intent to remove [that impure thing]. Everything by which removal is accomplished is [an acceptable] cleansing agent.’⁹²

Al-Shāfi'ī said: ‘This is what one would think in general, but the matter is not like this. . . . [There are] restrictions to which one must pay attention when complying with [the *shar'*]. An impurity [for example urine on a garment] can [sometimes] be [effectively] removed by drying in the sun; nonetheless it is unequivocally required to [ritually] remove [the impurity] with water [also]. Consequently our ruling is that [the medium by which the impurity is removed], be ritually pure. . . . The analogy [that prevents analogizing!] is based on the fact that something liquid [that is uncontaminated can be] contaminated by just a little of something that is also impure and that is liquid.’⁹³ What a difference between when something impure falls into a vessel of water [which becomes impure] and pouring out the water from the vessel onto the impurity [which purifies it]! The requirement that the medium be ritually pure is necessary; flowing water has the power to replace the impurifying effect by its purity. And this is a particular characteristic [of water] that is absent from vinegar.’⁹⁴

This subtle argument asserts the principle that even when the “purpose” of a ritual act seems obvious, there remains a fundamental unintelligibility that puts its logic beyond one's grasp. An impure thing falls into a basin and renders the water impure; pour that water over something

⁹² His argument is that one can use any liquid, including, for example, vinegar to remove impurity from a garment, since it is a liquid that floats the impurity away, just as water does. A good overview of this dispute is found in Abū Manāqib Shihābaddīn Maḥmūd ibn Aḥmad al-Zinjānī, *Takhrīj al-furū' 'alā l-uṣūl*. 38ff. And see the editor's deeply informed notes.

⁹³ Corrected from printed text.

⁹⁴ 38–39.

impure and it renders the impure object pure. Vinegar is liquid and can float the impurity away. But only water is designated as *taṭhīr*, “capable of purifying something” and so, whatever might seem reasonable, in the end, only water can effect purity.

This is because the assessments of the *sharʿ*

are divided into three sorts: (1) those whose governing idea (*maʿnā*) fundamentally cannot be grasped by reason; (2) those whose governing idea⁹⁵ can be grasped [by reason] simply by regarding it (*zāhīr^{an}*); (3) those whose governing idea can be grasped rationally, but some aspect of its particular practice (*tafāṣīlīh*) cannot be grasped rationally.

(1) An example of the [rule whose occasioning factor is manifestly incomprehensible] is holding a kinship group (*ʿāqilah*) liable for bloodwit (*diyāh*), and the requirement for a total lustration when semen emerges, but not when urine emerges. (2) An example of the [type whose occasioning factor is obvious] is retaliation (*qiṣāṣ*), whose rationality and rationale are obvious. (3) An example of the third category [whose occasioning factor is only seemingly obvious] is ablution (*wuḍūʿ*), whose governing idea is apprehensible, namely cleanliness for prayer: prayer is a kind of cultivation, and the removal of what does not belong is part of cultivation. However, the various precise ritual practices (*taʿabbudāt*) involve details such as the precise mode of the ‘cycle’ (*rakʿah*) and things like the types of impurities. Un-reasoned compliance (*al-taʿabbud*) is dominant (*ghālib^{an}*). The domain of *qiyās* is closed to it. The insight of al-Shāfiʿī suits the basic principle in this case, and is better than Abu Ḥanīfah’s.⁹⁶

Here *taʿabbud* seems not merely “being subject to” but “obeying an incomprehensible rule because one is obligated to do so.”⁹⁷ The term, because of its lexemic relation to “ritual,” and the notion of ritual as non-rational, means that “being subject to” is elided with “obeying because one supposes there is a good reason, even if the reason is not apprehensible.” It seems that for the Shāfiʿīs the degree of “ritualization” governs the extent to which a rule requires *literal* compliance as opposed to *effective* compliance.

For example, a sale according to invalid forms (*al-bayʿ al-fāsid*) may not convey ownership, even if it is accompanied by a change of possession,

⁹⁵ The text reads “cannot be grasped on the face of it” but the example below (retaliation) shows that this must be affirmative: you *can* grasp it. So the three divisions are: utterly obscure, not at all obscure, and seemingly clear but in some respect not—which is a typically Shāfiʿī order of argument.

⁹⁶ 39–41.

⁹⁷ Al-Ghazālī expressly contrasts *taʿabbud*—which must mean “a ritual prescription one must perform just because it is commanded” with an “occasioning factor.” Abū Ḥamid Muḥammad al-Ghazālī, *Mustasfā*. 2:160

inasmuch as God required *sharʿī* details, binding compliances, and effective limitations in contracts.⁹⁸ These should be complied with. However, Al-Shāfiʿī said that a sale could be concluded with any verbal utterance that conveyed the idea of a sale. By contrast, marriage cannot take place other than with certain specified formulas because *al-taʿabbudāt* go further into marriage than they go into sales. Hence marriage contracts differ from other contracts,

with respect to witnessing, and the agent (*walī*) and contract; the contract of marriage is characterized from other contracts by hidden aspects, and special characteristics and matters somewhat hidden and innumerable. [These] manifest its nobility and clarify [marriage's] weightiness, distinguishing between marriage and other things; surely it is distinguished by special formulations ritualizing it (*taʿabbud^{am}*) from the point of view of the Legislator.⁹⁹

Consequently, marriage too cannot be analogized from.¹⁰⁰

Marriage is more “ritualish” than sales, though less so than the *ʿibādāt* proper. Al-Juwaynī reports that Abū Ḥanīfah allowed someone unable to say the Arabic to contract a marriage in Persian: “the meaning” Abu Ḥanīfah said, “is the same though the expressions differ.”¹⁰¹ Yet al-Shāfiʿī was more discerning, according to al-Juwaynī, and he said,

the degree of ritualization (*al-taʿabbud*) for the *muʿāmalāt* is less (*abʿad*) than is the case in marriage. Marriage [in turn] is [less ritualized] than the declaration of God's greatness [saying ‘*Allāhu akbar!*’—*al-takbīr*] in *ṣalāh*.¹⁰² Therefore there is no doubt that the domain of *qiyās* is excluded [and one may not] use the *takbīr* as an *aṣl* [to analogize to] something other than

⁹⁸ al-Juwaynī *Mughīth*, 41.

⁹⁹ *Ibid.* 41.

¹⁰⁰ *Ibid.* 42.

¹⁰¹ *Ibid.* 43.

¹⁰² It is important to understand that for the Ḥanafīs the initial *takbīr* is not properly a constituent (*rukn*) of *ṣalāh*; it is a precondition (*shart*), the act of consecration (*tahrīm*). See Abd al-Rahmān Jazīrī, *Islamic Jurisprudence According to the Four Sunni Schools*. 1:287ff and 293. For the Shāfiʿīs, however, it is a constituent element. It is impossible to know when these competing analyses were constructed, but it is surely significant in understanding Abu Ḥanīfah's willingness to let this *preparatio* be performed in Persian and al-Shāfiʿī's denial of the possibility. It has to be said, however, that this is a theoretical issue, since there is no solid evidence Abu Ḥanīfah ever said one could perform *ṣalāh* proper in Persian, and among the canonical formulae of *ṣalāh* are several *takbīrs*. On the use of the “Persian Qurʾān” and *naẓm*, see A. Kevin Reinhart, “[The Quran in Islamic] Jurisprudence,” 437–8. On this issue, see now Travis E. Zadeh, *The Vernacular Qurʾan*.

the *tabkīr*, whether one is capable [of the Arabic] or not—in the soundest view.¹⁰³

One has to conform to the requirement to perform the *tabkīr* in Arabic, whether capable or not, as a matter of ritual requirement (*ta‘abbud^{an}*). It may be that one can use Persian, if incapable of the Arabic, to effect a marriage; this is unlike the case of Qur’ānic recitation—particularly in prayer—since the Qur’ān is inimitable for various reasons, all of which are grounded in its ‘Arabicness.’

But Abu Ḥanīfah makes the *mu‘āmalāt*, marriage issues, the *tabkīr*, rituals, and the inimitable Qur’ān sent down from the Lord of the heavens and the earth, equivalent. [Abu Ḥanīfah] said, ‘the sale is effected without particular locutions (*bi-ghayr lafẓih*) and marriage without particular locutions and the *tabkīr* without particular locutions and the Qur’ān without its distinctive linguistic and rhetorical features (*bi-ghayr naẓmih*), so that if one recites a Persian Qur’ān in *ṣalāh*, his *ṣalāh* is accomplished,¹⁰⁴

says Imām al-Ḥaramayn. “This is mixing one domain (*fann*) with another, and mingling one species with another, and it is imprecise (*dhuhūl ‘an al-daqa’iq*)!”¹⁰⁵ The domains are the ritual and the non-ritual, though as we shall see further, there are degrees of “ritualization” within the law as a whole.

For example, no analogies are possible with *zakāh* because that is “*ḥaqq allāh*—God’s claim.”

Looking for an occasioning cause is invalid (*bātil*) because the claim of God, being restricted in ‘locus’ (*maḥall*), one cannot go beyond it to what is equivalent to it by looking for an occasioning factor or an underlying concept. Just as with prostration, one cannot look for an occasioning factor with relation to something else, nor can *sujūd* take the place of prayer.¹⁰⁶ Even the “human claim,” if it is restricted to a specified locale, cannot be used as an occasioning factor for something else.¹⁰⁷

Stepping back to provide an overview, al-Juwaynī says the law is composed of seven divisions, one might say: *mu‘āmalāt* (commercial law),

¹⁰³ al-Juwaynī *Mughūth*, 43.

¹⁰⁴ “The Qur’ān without its *naẓm* is merely stories and accounts.” p 51.

¹⁰⁵ al-Juwaynī *Mughūth al-khalq fī tarjūh al-qawl al-ḥaqq*, 44.

¹⁰⁶ Al-Ghazālī points out that [in the domain of ritual], any particular requirement cannot be the basis of *qiyās* because “perhaps [God] imposed it (*ta‘abbad*) and it has no “occasioning factor, or it is occasioned by some other appropriate factor (*ma‘nā*) that isn’t apparent to us.” 2:154.

¹⁰⁷ al-Juwaynī *Mughūth al-khalq fī tarjūh al-qawl al-ḥaqq*, 51–2.

‘ibādāt (devotional acts), *munākihāt* (marriage), *ḥudūd* (criminal law ordained by God), *aḥkām* (other statutes), *ḥukūmāt* (matters related to governance), and *ādāb* (matters related to courtesy). Yet although the law is not two categories but seven, still the law has, let us say, two poles. The one extreme is assessments from which one can draw no analogies; the other is acts from which it is perfectly permissible to draw unlimited analogies.

The view of al-Shāfi‘ī is that the *‘ibādāt* are enabled (*muqaddarah*) by *ṭahārah* [practices of ritual purification] because [*ṭahārah* satisfies] the necessary conditions of the noblest of devotional acts (*sharṭ ashraf al-‘ibādāt*). This is because *ṣalāh* is the noblest of the *‘ibādāt* after faith in God—it is the strongest pillar and the most permanent of them and the foremost of the *‘ibādāt* as far as obligation is concerned. Yet there is no *ṣalāh* without *ṭahārah*. Then [al-Shāfi‘ī] said, “all that can be supposed about *ṭahārah* can be collected into two main ideas: (1) ‘Purity’ (*ṭahārah*), cleanliness, removal [of filth], purification from uncleanness, repelling disgust, and initiating the ceremonies of the ritual.” Thus he holds that *ṭahārah* has as its aim cleanliness—which cannot be accomplished except with reference to the second idea (2) that is, worship (*al-ta‘abbud*).¹⁰⁸

The precise stipulations (*dawābiṭ*) of the *shar‘* are to express [this] lest the cleanliness that is the aim of the *shar‘* be deficient. He held that the coming together of these two concepts could take place only with a particular medium (*ālah*), namely, water—as we explain in the *furū‘* [sections]. Someone who did *wuḍū’* with date brandy (*nabīdh*) would deface himself in both [this world and the next] and would be an exemplary figure to all creation, especially in the heat of hell.¹⁰⁹

These were not merely ivory-tower abstractions to those involved in the polemic; they evoked real zeal.

Al-Bāqillānī said that if someone who was a brazen, degenerate alcoholic fell into a pool of *nabīdh* and performed his *ṣalāh* with [remnants of *nabīdh* on him]—Abu Ḥanīfah would allow his *ṣalāh*! There can be no doubt that this [presence of *nabīdh*] would [in fact] undo all of the aims [of *ṭahārah*]—purification, cleanliness, and worship (*ta‘abbud*). Likewise Abū Ḥanīfah allowed *wuḍū’* without *niyyah*, though *wuḍū’* is an act of worship according to what appears in Prophetic accounts (*al-akḥbār*).¹¹⁰ An act of worship is a “drawing near” (*qurbah*) to God Most High and one who would draw near

¹⁰⁸ Ibid. 52.

¹⁰⁹ Ibid. 53.

¹¹⁰ This is a shibboleth in the disputes between the two schools. The Ḥanafis assert that the practices of *ṭahārah* are not *‘ibādāt* by definition since an *‘ibādah* requires *niyyah* and they believe no source stipulates *niyyah*-intention as a condition for *ṭahārah*.

to God would not do so except in a pure state (*ikhlaṣ*) and there is no pure state save by *niyyah*.¹¹¹

For Abu Ḥanīfah the ritual logic is inscrutable only for the ritual proper, and since *tahārah* is not an *'ibādah*, the requirement for intention does not apply, and one can satisfy the requirement for ritual purity in any pragmatic way. For the Shāfi'īs, the rules of purity are inscrutable practices because they do require *niyyah*, and hence they must be performed exactly as stipulated.

Whereas,

Abū Ḥanīfah said, “repetition in the rubbing of the head (in *wuḍū'*) is not desirable (*masnūn*) because the aim of repetition is only to fully cover [the head with water]. If the covering (*istī'āb*) has taken place, there is no need to repeat.”¹¹²

Shāfi'ī's response was that the

repetition was an increase in the “*wuḍū'*-ness” (*al-waḍā'ah*) and cleanliness in the place where one originally put the water a single time . . . One obtains thereby a perfection of the initial act . . .¹¹³

Al-Shāfi'ī explains the significance of a prescribed and unalterable practice. Abu Ḥanīfah sees only a task that can be fulfilled in various ways, and once it is fulfilled, the worshipper is done and ready for prayer.

And finally, Abū Ḥanīfah also allowed prayer wearing the skin of a dog, because a dog is not essentially impure, as a pig is. One is required to cover one's nakedness when praying and a dog-skin fulfills that purpose. Imām al-Ḥaramayn is aghast:

How is it permissible to approach God the most high with a garment made from the hide of an animal that the *shar'* has forbidden one to purchase?¹¹⁴

Imām al-Ḥaramayn views ritual not as instrumental but as shaped by all sorts of religious sentiments that govern ritual law, even if these feelings are not, strictly speaking, part of “the law.” Ritual, in the Shāfi'ī view, is comprised of “an activity that is unreflectively obeyed by way of training

¹¹¹ al-Juwaynī *Mughīth*, 53–54.

¹¹² This is because Abu Ḥanīfah analogizes from the rubbing in *tayammum* which needn't be repeated. See al-Ghazālī, *al-Muṣṭafá* 2:160.

¹¹³ al-Juwaynī *Mughīth*, 54.

¹¹⁴ *Ibid.* 54–5.

(*wazīfah ta‘abbudīyyah tamrīniyyah*), that does not accessibly reveal the principle behind them.”¹¹⁵

In sum, both the Shāfi‘īs and the Ḥanafīs believe there to be a domain from which ritual is excluded. The Ḥanafīs draw the boundary narrowly, and restrict it to matters overtly prescriptive—numbers of time something is to be repeated, for example, or the exchange-equivalent necessary to expiate a wrongful hunting in the area of the Ka‘bah. The Shāfi‘īs believe expiation, to the contrary, to be a straightforward process and so it can be analogized from. But because of their constituent irrationalities, rituals themselves can never be a source of analogy.

H. *Later Developments in the Shāfi‘ī Understanding of Ta‘abbud*

The next logical step in the development of the concept of subjugation to the law (*ta‘abbud*) is to use *ta‘abbud* in the wider sense. Although there is no space for an extensive study of the term, it is significant that by the sixteenth century, “*ta‘abbudī*” is firmly established as a term of art meaning “humanly incomprehensible,” and it is used in domains not strictly ritual.

Al-Suyūṭī, in his *Ashbāh wa-l-nazā‘ir*, uses the term simply to mean that humans have no access to the logic behind some practice. “Its underlying significance (*ma‘nā*) is incomprehensible.”¹¹⁶ The use of water (as we’ve seen, a Shāfi‘ī shibboleth) for ablutions is *ta‘abbudī*. The occasions that trigger lustration and full-body washing are *ta‘abbudī*, as are most of the rules of post-marital quarantine (*‘iddah*), the particular forms of the marriage contract, the prohibition of fasting by a menstruating woman and many other stipulations of the *shar‘*. These, by al-Suyūṭī’s time, are fully and categorically off-limits to rational dissection. More significantly, al-Suyūṭī records that “some” say, categorically, “if a legal scholar (*faqīh*) is unable to discern the occasioning factor for a rule (*‘illah*), that rule is to be considered *ta‘abbudī*,” just as, if a grammarian can’t figure out the ‘why’ of a usage, it is to be considered idiomatic (*masmū‘*).¹¹⁷

The trajectory of ritual from Abu Ḥanīfah to al-Suyūṭī is from a belief that some devotional acts fulfill functions that can be rationally discerned,

¹¹⁵ al-Ghazālī, *al-Mustaṣfā min ‘ilm al-uṣūl*, 2:160.

¹¹⁶ Jalāladdīn al-Suyūṭī, *Ashbāh*, 407–8; in fact al-Shāṭibī uses the term *al-ta‘abbudāt* as a synonym for *‘ibādāt* which he contrasts with *‘ādāt*, which for him means *mu‘āmalāt*. Abū Ishāq al-Shāṭibī, *al-Iṭīṣām*, 333.

¹¹⁷ Al-Suyūṭī, *Ashbāh*, 408.

to a belief that not only is all ritual non-rational, but everything not comprehensible to a given jurist is to be understood as a religious idiom whose usage and practice are also non-rational and whose relation to humankind *is* nothing more than a demand for conformity. In this sense, all of the law comes to be, for someone like al-Suyūṭī, a form of ritual.

V. HEIGHTENED INTENTIONALITY (*NIYYAH*) AS
AN INDEX OF NON-TRANSPARENCY

The last “way into” scholars’ understanding of devotional acts’ distinctive character is to consider the question of intentionality. Everyone, Muslim scholar or Western academic, quotes the *ḥadīth*, “acts are [assessed] by their intentions.” This is often understood as a gesture toward romantic sincerity: it’s what you *intend* that counts. In the discourse of the legal sciences, however, *niyyah* is a technical term that is much narrower and more precise than simply “intention” (and the term often translated as “sincerity”—*ikhhlāṣ*—means something more akin to “unmixed motives” which is original, etymological sense of sincerity, but not its current English use).

Paul Powers has, fortunately, waded through the sources in his comprehensive *Intent in Islamic Law*.¹¹⁸ Reading Powers’ work and the sources cited there, it is clear that the *‘ibādāt* differ from the *mu‘āmalāt* not just in their relative rationality, but in another way as well. To understand this, we need briefly to consider the Islamic legal notion of “intent.”

Ritual intent, Powers says, fulfills a taxonomic function, making something into a ritual that might otherwise have another significance or function.¹¹⁹ The term “intent” is used to translate *niyyah*, but while the term may be used generically to distinguish between accidental and deliberate acts, or to refer to the aim of the actor in performing the act, *niyyah* is also a term of art to refer specifically to the intentions that precede and inform ritual action. Because rituals are “new acts,” for the most part, that exist only because of their stipulation through the *shar‘*;¹²⁰ the point of “intending” cannot (for the most part) be to distinguish between two otherwise similar acts. (Though for example *niyyah* in bathing [for the *madhhabs*

¹¹⁸ Especially chapters 2 & 3.

¹¹⁹ Powers, *Intent in Islamic Law: Motive and Meaning in Medieval Sunnī Fiqh*, 25.

¹²⁰ *Ibid.* 31.

that require it] distinguishes between mere washing and the purificatory ritual that allows one to worship after, for example, sexual intercourse.)¹²¹

We can see another feature of ritual, however, in the discussion of the way in which ritual and intention coincide meaningfully. Consider a person who stands in a mosque with others who are performing the noon worship service. Is he performing (*adāʿ*) the noon service or is he making up (*qaḍāʿ*) the morning service and he just happens to be with others who are performing a different prayer? Or perhaps he is performing a supererogatory prayer?¹²² The only way these different acts are distinguished, at least at first, is by the actor's intent, which, though it may be proclaimed, is efficacious only interiorly, independently of any public statement. Similarly, a washing may be to cool off, or to prepare for worship. It is intention that makes the act into preparation for worship, even if (according to Shāfiʿīs, at least) it is legitimate also to want to cool off when cleansing. *Ḥajj* performed by person A may serve to remove the obligation of B, if person A so intends (but then, it does not satisfy A's individual obligation).¹²³

As Powers pointed out, apologists for Islam, whether Muslims or not, have accepted the Protestant critique that ritual, or as it is often written, "mere" ritual, cannot be religiously significant without a spiritual interiority, and it is that spiritualism that is *really* significant in ritual. The ritual, in effect, must stand for something, they suggest, it must do something else other than what it is itself to be *truly* religiously significant. Hence intention is an expression of sincerity that recuses ritual from mere formalism. Powers sees that for the jurists, however, "intention" was, rather, a component of the ritual and nothing more—it is what you do with your mind when performing ritual.¹²⁴ It protects against the robotic performance of ritual, and guarantees that the will is enlisted in ritual as much as the body.¹²⁵

Powers makes the point, which I think lies behind the *fuqahāʿ*'s discussion of *niyyah*, that "ritual is in an odd situation where the acts can look exactly correct, yet the actor is not 'authoring' them, not imbuing them with intention, not making them what they appear to be. In ritualized

¹²¹ Ibid. 45.

¹²² Ibid. 45–6.

¹²³ Ibid. 51–8.

¹²⁴ Ibid. 73.

¹²⁵ Ibid. 86.

action, intention is a particularly precarious part of action.”¹²⁶ He argues that in ritual, “intention” is a part of ritual performed for an audience, in this case God, Who is concerned that the “authorial intention” is His and not the bondsman’s.

I have elsewhere argued for a more “etic” understanding of how intention functions in Islamic ritual.¹²⁷ Here, what we need to notice is that, for the *fuqahā*’, ritual is distinguished from other acts by the uncertainty of the actor’s intention, and while at the same time there is a heightened importance for intention in validating the act as a devotional activity and not something else.

Powers is, I believe, the first to note that in the technical language of jurisprudence, the intention that defines non-ritual acts is referred to with different words (*qaṣd*, *sabab*, *irādah*, *‘amd*), and *niyyah* is used rarely. This is because, Powers believes, in non-ritual acts intention pervades the act, and hence can be discerned from the qualities of the act itself.¹²⁸ With ritual, on the other hand, intention cannot be inferred from the mere fact that the act (however taxonomically unique) is performed. Hence, there must be an explicit *act* of intention. Consequently, ritual acts differ from other acts in this: their motivations are unreadable from the outside, and yet, paradoxically, are crucial, in fact, definitive, of the act itself. They are constitutive rather than pervasive and this makes them, as Powers says, precarious.

VI. SUMMARY

This article has demonstrated some aspects of the rich reflections on “ritual” within the Islamic ritual tradition. We have argued that the distinction between ritual and “non-ritual” rules for Muslims is very early and may go back to the earliest days of Islam. We suggested that there is a general process, that we can observe terminologically, of extending the scope of ritual to include all of the law. This may be observed in changes in the meanings of the root *sh-r-ʿ* (which gives us *‘sharī‘ah*). In the Qur’ān and early Muslim religious history, the root referred to practices that distinguished Muslims from non-Muslims, acts of ritual observance and demonstration. The

¹²⁶ Ibid. 92.

¹²⁷ A. Kevin Reinhart, “What to Do with Ritual Texts: Islamic *fiqh* Texts and the Study of Islamic Ritual.”

¹²⁸ Powers, *Intent in Islamic Law: Motive and Meaning in Medieval Sunnī Fiqh*, 204.

scope of this term was then enlarged to mean all of prescribed Muslim practice, and the classical terminological pair of *‘ibādah* and *mu‘āmalah* (perhaps originally a word referring to credit practices) was then coined.

We argued also that the structural emphasis on ritual, by placing it first in books prescribing Muslim practice, is also very early, and is certainly found in the earliest works on Islamic law, including the *muṣannaḥ* collection of Ibn Jurayj. His arrangement of Islamic legal topics, particularly the priority of ritual over non-ritual, and the order of purification, worship (*ṣalāh*), fasting, and pilgrimage must have reflected a deep conceptual schema, since it has been ratified by every jurist since Ibn Jurayj’s time—without, so far as I can tell, exception.

Two translated texts provided an overview of the way that Islamic law fit together—of God’s logic and the innate distinctions between ritual and non-ritual obligations.¹²⁹ In both these texts, the *mu‘āmalāt* are distinguished by their manifest utility to promote the survival and flourishing of humanity in this world. Ritual, by contrast, is a feature of the other world, and as such cannot be discussed in such a straightforward way as “useful.” Ritual expresses human status before God, and humanity’s desire to draw near to Him in hopes of acquiring His favor. The details of the law are often obscured from human comprehension. It is only the command to perform these acts that is perspicuous.

The incomprehensibility of ritual law was used as a fulcrum by al-Nazzām to try to pry Muslims away from the extension of revelation to new cases through *qiyās*-reasoning. God treated similar things differently and different things similarly, and this proves that all the *shar‘*, but particularly ritual, is irrational and not susceptible to the kind of analysis that is required for legitimate *qiyās*-reasoning. It may have been that this argument was originally a Shī‘ī one, as al-Qāḍī Nu‘mān suggests, as a justification for authoritarian rather than rationalized derivation of the law in new cases. This would explain why al-Qaffāl al-Shāshī was compelled to write his defense of the utility, and hence rationality, of the *shar‘*, *Maḥāsīn al-sharī‘ah*. The Mu‘tazilah, the Ḥanafīs and the Shāfi‘īs alike argued that ritual is non-rational insofar as its statutes cannot be derived independently of revelation, but they continued to view it as expressive, rather than opaque, and so, to different degrees, capable of extension through

¹²⁹ I should add that a more *ad hoc* essay on *fiqh*-ordering, which deserves more discussion in another context, argued for the deep meaningfulness of every detail of Islamic legal table-of-contents. See ‘Umar b. Raslān al-Bulqīni, Sirājaddīn, “al-Munāsibah.” Thanks to Ahmad El Shamsy, who provided me with a copy of this fascinating work.

reason. Nonetheless, the impulse that viewed all Islamic order as “ritual” (*sharā’i’*) led to a view that seemed to make the non-rationality of ritual proper the default category for Muslim acts; any act whose rationale was not understood by a given jurist was understood by at least some later jurists to be “*ta’abbudī*,” that is, an un-analyzable feature of Islamic practice.

We ended with a recapitulation of Paul Powers’ observations on ritual—namely that they are distinguished by a particular kind of intentionality that distinguishes them from ordinary acts. This legal theory betrays a certain anxiety about the opacity of the ritual’s performer to outside observation, and it consequently insisted on a heightened attention to the mental dispositions of ritual actors. In this way too, then, ritual was distinguished from non-ritual acts.

VII. CONSEQUENCES

What effects do we see from systems in which “practical law” and “ritual law” are included together? To answer the question is to speculate—it is implicitly a hypothetical question comparing the real Islam to an imagined one with perhaps two genres or two different discourses rather than a single one. Reflection on this question, however, may clarify what distinguishes the study of Islamic law and Islamic ritual from other forms of both law and ritual. What follows is both speculative and preliminary.

A. *Ritual as Law*

When ritual is embedded into a single entity along with sales, marriage, credit, found property, war-conduct, and nearly every other aspect of human experience, it becomes not an exceptional but an unexceptional domain of human life. This is the opposite of the modern cliché that “Islam is not a religion, it is a way of life,” by which apologists assert that, for Muslims, ordinary life is consecrated. Instead, I would argue, the *religious* domain becomes to some extent ordinary, quotidian, domestic. The laws of sales, the laws of marriage, for example, need to be practical, and perhaps one way to read Raquel Ukeles’s article in this volume is that the expediency of the *mu’āmalāt* creates an attitude that helps discipline efflorescences of ritual—the tendency to add duties and observances, to sacralize more places, times and practices. Just as Shāfi’ī Cairo merchants, under Ḥanafī jurisdiction, came to prefer Ḥanbalī forms of rent for its

efficacy,¹³⁰ Ḥanbalī and Ḥanbalī-like arguments disciplined “extraneous” ritual practices among Shāfi‘īs and Mālikīs too.

The ordinariness of ritual moves it away from the magical and the dramatic toward the social and the communal. Daily, sober, puritan *ṣalāh* is the dominant idiom of Islamic ritual, not the extravagant drama of, for instance, the *istisqā’* prayer, with clothes turned inside-out, repeated entreaties for God’s mercy, and “prayers of distress,” while the prayer leader, according to some, dramatically and exceptionally holds a bow, a sword, or a stick, and demands repentance.¹³¹ Ordinary *ṣalāh*’s ritual sobriety accords well with rules of ordinary social order and for reasonably resolving disputes.

However, as we have seen, the juxtaposition of *‘ibādāt* with *mu‘āmalāt* also casts ritual’s otherness into relief. It is opaque. When measured against the obvious rationality of contract or criminal law, ritual law is inscrutable but profoundly consequential, non-rational but orderly and precise. While the efficacy of *ṣalāh* in both teaching and performing humankind’s humility before the Creator is recognized by all, why that humility is expressed with four prayer-cycles in the afternoon and three at sunset remains mysterious. Why should one pray in a clean garment when the purification that precedes the prayer may be done with dust? If ritual by its nature invites speculation and explanation, it may be that the contrast between the apparent arbitrariness of ritual and the pragmatism of the *mu‘āmalāt* excites the speculative discourse that enhances and enriches ritual itself.¹³²

Finally, the clear *dunyawī* (this-worldly) nature of *mu‘āmalāt* and *akhrawī* (other-worldly, or eternal) nature of the rituals, when joined together, suggests the interpenetration of this world and the next—a clear theme in Islamic religiosity where the next world is so explicitly a reformed and enhanced version of this world, and this world is an imperfect anticipation of the next.

¹³⁰ Amira Sonbol, “Adults and Minors in Ottoman Sharia Courts and Modern Law,” 237 n. 3.

¹³¹ In the Ḥanafī *madhhab*. See Jazīrī, *Islamic Jurisprudence According to the Four Sunni Schools*, 471.

¹³² Reinhart, “What to Do with Ritual Texts: Islamic *fiqh* Texts and the Study of Islamic Ritual”; Caroline Humphrey and James Laidlaw, *The Archetypal Actions of Ritual; A Theory of Ritual Illustrated by the Jaine Rite of Worship*.

B. *Effects on Law of Its Juxtaposition with Ritual*

If ritual is in part shaped by its syzygy with the more practical regulations of *fiqh*, how are the *mu'āmalāt* affected by being yoked to ritual?¹³³

The most important effect of this harnessing together of what, as we have shown, Islamic jurists always recognized as separate domains, may be that the student of Islamic law, trained equally to reflect upon ritual and what he understood to be more pragmatic law, is reminded that all domains of *sharī'ah* are, at some level, *religious* law. Even questions clearly shaped by any of the *qawā'id*, by concerns of welfare (*maṣlahah*) or 'preferring the optimal' (*istiḥsān*), will confront the fact that some of the *sharī'ah* is *ta'abbudī*—non-rational, ritualized, and hence unsusceptible to the deepest level of analysis. This may tend to diminish the force of purely practical considerations in law, particularly in the domains Juwaynī argued were *mu'āmalāt* but *penetrated* by ritual, such as marriage (and gender). Such ritualization of the law would tend to inhibit *at least* the most radical forms of *ijtihād* and to consecrate received understandings of religio-moral imperatives as "part of Islam," a process that has demonstrably grown over time.¹³⁴ This may be one of the factors contributing to the abandonment of *sharī'ah* as a source of practical law in almost all Muslim-majority states in the period following World War I and especially in the independence following World War II. The model of non-rational stipulation must serve as a brake to the fundamental re-examination of practical law; it may be easier simply to abandon Islamic claims in the field of contracts, say, or rentals, than to contest claims that Islamic law is immutable. It is notable that the parts of Islamic law still in force in the new nation states of Islamdom are those Juwaynī argued were the most *ta'abbudī*—marriage in particular, but also family law. (This set of *ta'abbudī*-tinctured domains includes inheritance law which, by its divisions of property, effectively constructs the Islamic family).

When the kinds of readings characteristic of modernity are imposed on Islamic legal texts the result is often to discard the accumulated wisdom of centuries of Islamic scholarship, in favor of a *ta'abbudī* reading of the entire Islamic legal corpus.¹³⁵ Attempts to "Islamicize" law, that is, to confront social and legal practice with the norms of Islamic texts,

¹³³ Another effort to understand this problem is found in Reinhart, "What to Do with Ritual Texts: Islamic *fiqh* Texts and the Study of Islamic Ritual."

¹³⁴ Jane Smith, *Study of the Term Islam*.

¹³⁵ Haym Soloveitchik, "Rupture and Reconstruction."

have resulted in, among other things, a break from the legislative wisdom acquired over time by the scholars in favor of a harsher social view reflecting early texts believed to be normative by modern religious reformers. This is particularly clear in the discussions of adoption in Morocco and rape in various Islamicate locales.¹³⁶

The entire body of Islamic norms referred to by terms like *fiqh* and *sharīʿah* is shaped by this amalgam of what Muslims have always recognized as two different, though often interpenetrating spheres of action—the rules of ritual (*ibādāt*) and the rules of practical human relations (*muʿāmalāt*). Practical law is to some extent ritualized and “de-rationalized” when linked to ritual, but ritual is also domesticated and integrated into the ‘*dunyawī*’ (worldly) realm to an extent unlikely if it were seen simply as a practice related to the ‘*akhrawī*’ (other-worldly or eternal) sphere. Consequently, even those scholars whose interest is ‘practical law’ must, as jurists did throughout the history of Islamic law, take the measure of Islamic ritual. And students of Islamic ritual must recognize the potency, the immediacy of Islamic ritual derived in part from its combination with the ordinary rules of social practice.

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¹³⁶ Jamila Bargach, *Orphans Of Islam*; Rubya Mehdi, “The offence of rape in the Islamic law of Pakistan”; Delfina Serrano, “Rape in Maliki legal doctrine and practice (8th–15th centuries C.E.)”; Amira Sonbol, “Rape and Law in Modern Ottoman Egypt”; Afiya Shehrbano Zia, “Rape in Pakistan: Zina Laws—Legalities and Loopholes.”

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“*ISTAFTI QALBAKA WA IN AFTĀKA AL-NASU WA AFTŪKA:*”^{*}
THE ETHICAL OBLIGATIONS OF THE *MUQALLID* BETWEEN
AUTONOMY AND TRUST^{**}

Mohammad Fadel

In the theological tradition of *kalām*, epistemology and dogma are fused. The fusion between epistemology and dogma is evidenced by the claim of Muslim theologians that theological dogma must be based on knowledge (*ilm*), which by definition is accessible to all rational persons.¹ This emphasis on epistemology is also evidenced in the many works of Sunni jurisprudence (*uṣūl al-fiqh*), whether Ash‘arī or Mu‘tazilī, which adopt the distinction between knowledge and considered opinion (*ẓann*). In contrast to *kalām*, for example, which demands certainty for its conclusions,² *uṣūl al-fiqh* was generally satisfied if the conclusions its methods supported were merely probable (*rājiḥ*).³

One can also distinguish *kalām* from *uṣūl al-fiqh* in another important respect: all individuals, in their individual capacities, are required to have knowledge of the truth of *kalām*’s theological propositions,⁴ while in the domain of jurisprudence individuals are generally not obliged to reach a substantive conclusion regarding the judgments produced in jurisprudence.

^{*} Part of a hadith in which the Prophet Muḥammad, when asked about the meaning of righteousness (*al-birr*), replied by saying: “Seek the opinion of your heart, even if the people give you opinions to the contrary.”

^{**} I would like to thank the participants in the ALTA II conference held between September 26–29, 2008 for the valuable comments I received on a draft version of this paper.

¹ See, e.g., 9 *Nafā‘is al-Uṣūl fī Sharḥ al-Maḥṣūl*, Shihāb al-Dīn Aḥmad b. Idrīs al-Qarāfi, ed. by ‘Ādil Aḥmad ‘Abd al-Mawjūd and ‘Alī Muḥammad Mu‘awwaḍ 4026 (Maktabat Nizār Muṣṭafā al-Bāz: Riyāḍ, 1997) (quoting Fakhr al-Dīn al-Rāzī as saying, with regard to the fundamentals of religion (*al-uṣūl*), that “God, may He be glorified, has laid out for these [foundational] requirements certain proofs (*adillah qāṭi‘ah*), and He enabled rational persons to know them”); see also, Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī, *al-Mustasfā* 347–348 (Dar al-Kutub al-‘Ilmiyyah, Beirut: 1993) (linking the possibility of sin to the possibility of knowledge); and Aron Zysow, *The Economy of Certainty* 1 (unpub. Ph.D. Diss., Harvard University, 1984).

² Mohammad Fadel, “The True, the Good and the Reasonable: the Theological and Ethical Roots of Public Reason in Islamic Law,” 21 *Can. J. L. & Juris.* 1, 21–23 (2008).

³ Zysow, *supra* n. 1 at 4.

⁴ See, e.g., al-Faḍālī, *Kifāyat al-‘Awāmm min ‘Ilm al-Kalām*, trans. Duncan B. MacDonald in *Development of Muslim Theology, Jurisprudence, and Constitutional History* (Unit Printing House, Lahore: 1964) 323–324.

Instead, most individual Muslims were non-specialists (*muqallid*) who were obliged to identify an appropriate scholar-specialist—one who has mastered the tools of jurisprudence (*mujtahid* or *muftī*)—and to follow the jurisprudential opinions of that scholar-specialist without affirming or rejecting that scholar-specialist’s reasoning (*ijtihād*) in support of that opinion (*taqlīd*). As Professor Weiss has suggested, this task is itself a type of *ijtihād*, but unlike the *mujtahid-muftī* who sought a probative opinion regarding a rule of conduct, the *mujtahid-muqallid* “was trying to arrive at a sound opinion as to who might be truly qualified to interpret the law for him.”⁵ This task, however, was complicated by the range of views expressed by *mujtahid-muftīs*, thus giving rise to the problem of how a *muqallid* could determine his ethical obligations in the face of divergent, even contradictory opinions of *muftīs*.⁶

In this chapter, I will survey the views and arguments of various pre-modern scholars of *uṣūl al-fiqh* on the ethical dilemma facing *muqallids* as a result of the ethical pluralism generated by *uṣūl al-fiqh*’s individualist ethical paradigm. I will begin with a general discussion of the epistemological context (or the domain) in which *taqlīd* is operative and its relationship to moral obligation. I will then take up the different views expressed on the question of how the ethical obligation of an individual is to be determined in a context of moral controversy. I will then argue that the pre-modern solutions to this problem, because of their focus on epistemology, are highly unsatisfactory. I instead suggest that a better way to understand *taqlīd* is as a relationship of trust in which an otherwise autonomous individual gives up aspects of his own autonomy for rational self-regarding reasons, but only because that other is morally worthy of receiving that trust. On the account of *taqlīd* I propose, the *muqallid* plays a central role in maintaining the integrity of Islamic law by monitoring would-be *mujtahids* to ensure that they conform to Islamic ethical ideals.

I. INDIVIDUAL OBLIGATIONS AND THE DOMAIN OF *TAQLĪD*

Islamic theology and ethics adopted an epistemological approach rooted in theoretical reason’s ability to discover the truth of God’s commands (the basis of moral obligations according to the Ash‘arīs), or the ethical

⁵ Bernard Weiss, *The Spirit of Islamic Law* 128 (University of Georgia Press, Athens: 1998).

⁶ *Id.* at 129.

content of good and evil (the basis of moral obligations according to the Mu'tazilis) in contrast, for example, to a Kantian approach to ethics which is grounded in the practical reason of autonomous persons.⁷ Indeed, al-Ghāzālī goes so far as to say that a *mujtahid* can commit sin only in those areas where it is possible to attain epistemological certainty.⁸ The theological propositions to which one must subscribe are claimed to be rational and therefore individuals may know them to be true, in the same manner they can know other rational propositions, e.g. that an object cannot be in two places at once, or that parallel lines never meet, are also true. Accordingly, despite the fact that theologians oblige non-*mujtahids* to follow the legal opinions of *mujtahids* in matters of substantive law (*furū'*), they prohibit *taqlīd* with respect to theological dogma, *uṣūl al-dīn*.⁹ This seems to suggest that all Muslims must be *mutakallimūn*, and indeed, the theologian al-Faḍālī states that theology must be the first object of study, for without an understanding of this subject, one could not even make a judgment as to whether one's prayers were valid.¹⁰

But is it really the case that all Muslims must become *mutakallimūn* in order for their faith to be valid? It turns out that for many, if not most theologians, the answer is clearly not: it is sufficient if a person has a general proof (*ijmālī*) as to the truth of Islamic dogma, rather than the detailed (*tafṣīlī*) proofs of *kalām*. This distinction was popular for at least two reasons: first, it answered the palpable skepticism that was expressed by opponents of *kalām* when theologians claimed that rational understanding of the Islamic creed was a condition for the validity of faith; and second, it also provided a counter to dissidents within the theological tradition, e.g. the Baghdadi Mu'tazilites, who rejected *taqlīd* in its entirety, whether in theology or in law.¹¹

For opponents of *kalām*, the claim that rational proof was required for faith to be valid was not only contrary to the experience of the Muslim community, it was also absurd on its face, insofar as it inevitably led to

⁷ For an introduction to Kantian ethics, see J.B. Schneewind, "Autonomy, obligation, and virtue: An overview of Kant's moral philosophy," in *The Cambridge Companion to Kant*, ed. by Paul Geyer (Cambridge University Press: New York, 1992), 309–341.

⁸ Al-Ghazālī, *supra* n. 1 at 347–348.

⁹ For a summary of various theologians' views on the necessity of individuals' holding a rational belief in God, see Fadel, *supra* n. 2 at 31–33 (2008).

¹⁰ Al-Faḍālī, *supra* n. 4 at 327.

¹¹ See, e.g., Abū al-Ḥusayn Muḥammad b. 'Alī al-Baṣrī, *2 al-Mu'tamad fi Uṣūl al-Fiqh* 360 (Dar al-Kutub al-'Ilmiyyah, Beirut: 1983) and Sayf al-Dīn 'Alī b. Abī 'Alī al-Āmidī, *4 al-Ihkām fi Uṣūl al-Ahkām* 306 (Beirut, Dar al-kutub al-'ilmiyyah: 1983).

the conclusion that the vast majority of professing Muslims—given the undeniable fact that most Muslims did not understand theological argument and probably never could—were in fact unbelievers.¹² The notion of a general proof responded to both of these objections: while it was no doubt true that the early community did not develop sophisticated theological proofs of God's unity, for example, there was ample evidence that they had general proofs for the existence of God, and that even the rude Bedouin were capable of apprehending such proofs.¹³

The notion of a general proof also answered the Baghdadi Mu'tazilites who criticized the doctrine of *taqlid* in substantive law as being inconsistent with the notion that knowledge was required in theological matters: a prohibition of *taqlid* in matters of substantive law is tantamount to one of two things, either *muqallids* are not subject to moral obligation, or *muqallids* are obliged to undertake *ijtihād* when faced with a situation not covered by an express rule. While all agree that *muqallids* are subject to moral obligation even when there is no express text of revelation, nonetheless forcing *muqallids* to become *mujtahids* would be absurd because it would lead to the end of civilization—all productive activities would grind to a halt because people would become preoccupied with learning the tools of *ijtihād* rather than, for example, cultivating the soil. Theological matters, however, are relatively easy to grasp, because they are rational propositions, especially if all that is needed is a general proof. Accordingly, for the Basran Mu'tazilites and the Ash'arites generally, it appears that *taqlid* in matters of substantive law is akin to a special dispensation—a kind of *rukḥṣah*—that is necessitated by the deleterious consequences to collective human life should everyone attempt to be a *mujtahid* in matters of substantive law.

The distinction between a general proof—which is assumed to be within the reasonable grasp of all rational individuals—and the detailed proofs of theology does not solve the problem, however, so much as dissolve it. Fakhr al-Dīn al-Rāzī criticized this distinction as meaningless because it misconstrues the nature of a proof: a proof must include only those propositions that are necessary to demonstrate the truth of the

¹² Indeed, during the Saljuk era, this led to the scandalous issue known as *taḳfīr al-ʿawāmm*, which was used to discredit Ash'arī theologians before the Saljuk sultans. See Wilferd Madelung, *The Spread of Maturidism and the Turks*, Actas IV congresso de estudos árabes e islâmicos 109, 129 n. 52 (describing persecution of Ash'arites by Tughrulbeg as a consequence, in part, of the Ash'arī doctrine of *taḳfīr al-ʿawāmm*) (1968).

¹³ Fadel, *supra* n. 2 at 33. (quoting al-Jurjānī's *Sharḥ al-Mawāqif* for the proposition that the early Muslim community, including the Bedouin, had general proofs of divine unity).

proposition being asserted. If, in the course of the proof, a proposition is added, or is deleted, or is accepted without proof, the proof is not a simplified version of the “real” proof: it is simply no longer a proof and can only be accepted on the basis of *taqlid*.¹⁴ And in fact, this is the case of general proofs in al-Rāzī’s opinion: they are insufficient to save the generality of Muslims from the charge that their religious faith is simply the result of opinion and not based on knowledge.¹⁵

Al-Rāzī also pointed out that the conventional anti-*ijtihād* argument used by both the Basran Mu‘tazilites and the Ash‘arites to refute the Baghdadi Mu‘tazilites—that it is a social impossibility for everyone to be a *mujtahid*—is only true if one accepts other controversial epistemological premises, specifically, the obligation to act in accordance with the requirements of solitary reports (*khavar al-wāhid*) and analogy (*qiyās*). Otherwise, if one rejects the authority of solitary traditions and analogy, ethical reasoning would not require years of specialized training because in areas of life where revelation is either silent or ambiguous, individuals would be left to the judgment of reason, which is accessible to all without great effort, and in cases where an individual is unable to discern what reason requires, it would be a relatively simple matter for the *mujtahid* to point out to the *muqallid* what the rational principles governing the issue are.¹⁶

Given Islamic theology’s epistemological preference for knowledge, and its general condemnation of *taqlid*, it is unsurprising that the obligation to perform *taqlid* was somewhat of an embarrassment. All things being equal, a *mujtahid* could not, for example, rely on the conclusions of another *mujtahid*, but instead had to engage in his own *ijtihād* when faced with an issue that he had heretofore not considered. Indeed, it was a controversial matter as to whether a *mujtahid*, having once pondered a question of law, was then required to reconsider his earlier reasoning if the issue came up later or whether he could simply rely on his previous

¹⁴ Fakhr al-Dīn al-Rāzī, 2 *al-Maḥṣūl fī ‘Ilm Uṣūl al-Fiqh* (Dar al-Kutub al-‘Ilmiyyah, Beirut: 1988) 529–530.

¹⁵ In an apparent criticism of al-Ghazālī, al-Rāzī rejected the argument put forth by al-Ghazālī that knowledge of the truth of the Prophet—by virtue of his miracles—is sufficient to absolve a Muslim of the charge of *taqlid*. According to al-Rāzī, knowledge of the Prophet’s miracles does not necessitate by itself that Muḥammad was a prophet who was truthful in his claims unless a host of other propositions are also demonstrated to be true. *Id.* at 530–531.

¹⁶ *Id.* at 528–529.

reasoning.¹⁷ There was no general agreement on this point, however. Al-Qarāfi, for example, argued that the passage of time is relevant to the reasoning of a *mujtahid*—presumably because of new learning and new experience—and accordingly, in most cases, it would be erroneous to assume that the *mujtahid* would give the same opinion at the end of his life that he gave in its beginning, as evidenced by the multiple opinions attributed to the historical *mujtahids*. Accordingly, a *mujtahid* is obliged to reconsider issues even when he recalls his original analysis of the question.¹⁸

The disrepute of *taqlīd* also led to a line of argument that denied that the obligation of a *muqallid* to defer to the judgment of a *mujtahid* counted as *taqlīd* at all. According to this argument, *taqlīd* is accepting the opinion of another without proof, but the kind of *taqlīd* that Sunnī theologians countenanced did not suffer from this defect: the legitimacy of the Sunnī institution of *taqlīd* was grounded in objective proof (or so it was claimed). This argument goes back at least as far as al-Ghazālī who stated that, unlike the *taqlīd* of the *ḥashwiyyah* and the *Ta'limiyyah*, his call for *muqallids* to adhere to the opinions of *mujtahids* is grounded in certain proof. Because it is not self-evident that the authority whom a person takes as a source of moral instruction is truthful, a rational person demands proof from such an authority that he is truthful before he would agree to defer to his teachings. In the case of the Prophet Muḥammad, that proof lies in the various miracles he wrought. Because we know that the Prophet Muḥammad is truthful, al-Ghazālī argued, we know that what he reports about God is also truthful. We also know that the consensus of the Muslim community is truthful because the Prophet informed us that the consensus of the Muslim community is immune from error. Accordingly, following the command of the consensus of the Muslim community does not constitute *taqlīd* because it is justified by our knowledge that consensus is an infallible source of moral truth.

¹⁷ See, for example, al-Qarāfi, *supra* n. 1 at pp. 4098–4099 (quoting Fakhr al-Dīn al-Rāzī as permitting a *mujtahid* to rely on his previous analysis of a legal issue only to the extent that he recalls his previous reasoning, but if he has forgotten his previous reasoning, he is obliged to reconsider the issue). See also, Bernard Weiss, *The Search for God's Law* (University of Utah Press: Salt Lake City, 1992) 723 (noting that al-Amīdī described this issue as controversial among *usūlīs*).

¹⁸ Al-Qarāfi, *supra* n. 1 at p. 4101 (arguing in favor of an absolute obligation to engage in *ijtihād* each time the issue comes up, even when the *mujtahid* recalls his previous reasoning).

The institution of *taqlīd*, according to al-Ghazālī, can be analogized to judicial procedure which requires a judge to accept the testimony of upright witnesses, despite the possibility that they may be lying. In this case, the judge cannot be accused of having engaged in *taqlīd* because he is giving effect to a rule derived from consensus, and is thus acting on proof. The same principle applies to the *muqallid*: when he follows the opinion of the *mujtahid*, he is acting in accordance with the command of an infallible source, in this case, consensus. This infallible source obliges him to follow the opinion of the *mujtahid*, whether or not the *mujtahid* is truthful, just as consensus obliges the judge to rule in accordance with the testimony of upright witnesses despite the possibility that they may be lying. *Taqlīd*, on al-Ghazālī's account, is a therefore a *procedure* for satisfying the ethical obligations of a *muqallid*; the legitimacy of this procedure is established with certainty, even if its results may be erroneous in particular circumstances. The Sunnī practice of *taqlīd* cannot, therefore, be compared to the *Ta'limīyyah*'s version of *taqlīd* because the latter cannot provide a rational justification for why individuals should submit to the teachings of their Imam.¹⁹

Taqlīd, therefore, for the Ash'arites and Basran Mu'tazilites, was limited to rules of conduct (*fiqhiyyāt*) (provided of course that the issue was not covered by an express text, e.g. the prohibition of *khamr* (grape wine), or fornication). It did not apply to dogma or even the rational matters of *uṣūl al-fiqh* (*al-'aqliyyāt*), such as whether a solitary tradition or analogy constitutes proofs of a divine rule, or whether every *mujtahid* is correct or only one. *Taqlīd* in matters of conduct was tolerable in part not only because of the epistemological uncertainty that characterized *ijtihād*, but also because, from a theological perspective, not much was at stake: while theological error involved blasphemy insofar as it entailed affirming statements about God that were false, controversies regarding matters of conduct all revolved around affirming or denying the positive commands or prohibitions of God, any of which, from a rational perspective, God might conceivably have decreed.²⁰ Because errors in rules of conduct do not carry the risk of blasphemy, there is no harm in deferring to the views of others.

¹⁹ Al-Ghazālī, *supra* n. 1 at 371.

²⁰ Al-Qarāfī, *supra* n. 118 at 4136.

II. TAQLĪD AND MORAL CONTROVERSY: THE MUQALLĪD'S VIEW

According to the *uṣūlīs*, the *muqallid* is as much a moral agent (*mukallaf*) as the *mujtahid*. Both are subject to the same obligation of having true knowledge of God. Both are required to affirm the truth of the prophets when confronted by evidence that they are truthful in their claims. Both are required to conform their conduct according to prophetic teachings to the extent such teachings are indisputable (the so-called *ma 'ulima min al-dīn bi-l-ḍarūra*).²¹ Their obligations only differ when it comes to determining the scope of moral obligation for acts that are not subject to an express rule of revelation. When faced with such a circumstance, the *mujtahid* reasons to a rule using the texts of revelation as a basis for forming his rule. The *muqallid*, however, is subject to another duty: to find a *mujtahid* and ask him what to do.²²

It is important to keep in mind that the obligation to perform *taqlid* is contingent upon the inability of the *muqallid* to investigate the texts of revelation himself to arrive at an answer. More importantly, the *muqallid*, given his theological knowledge, knows that he is not in a position to resolve any ethical dilemmas that might arise as a result of events not subject to an express revelatory rule. He also knows that he could escape the obligation of *taqlid* were he to devote himself to becoming a *mujtahid*. On the other hand, while he has no ethical obligation to become a *mujtahid*, he does have the choice to devote himself to learning and become a *mujtahid* or continue living a life unconnected with learning and scholarship. For a person uninterested in religious scholarship, then, *taqlid* offers a practical solution to the general problem that ethical knowledge—other than the basic ethical obligations that are a necessary part of revelation—is specialized knowledge. *Taqlid* seems to offer the *muqallid* the opportunity to have his cake and eat it too: the chance to live an ethical life without having to master the various obscure sciences required of a *mujtahid*.

But, if something is too good to be true, we may have reason to be skeptical. *Taqlid* is no exception. Less dramatically, *taqlid* is really only

²¹ This follows simply from the fact that such are rules are established with certainty so there is no room for disagreement with respect to such an obligation.

²² See, e.g., al-Āmidī, *supra* n. 11 at 275–276 (a *mujtahid* always engages in independent *ijtihad* when faced with a novel question) and at 299 (a *muqallid* is obliged to follow the opinion of a *mujtahid* with respect to matters of *ijtihad*); see also, al-Ghazālī, *supra* n. 1 at 368–369 (same with respect to the *mujtahid*) and at 362–363 (same with respect to the *muqallid*).

helpful to a *muqallid* when he is lucky enough to know the views of only one *mujtahid*. In this case, his ethical life is greatly simplified: whenever he has a question, he simply asks the *mujtahid* and acts in conformity with what the *mujtahid* tells him.²³ But how does a *muqallid* know that someone is a *mujtahid*, i.e. possesses that combination of learning and moral integrity that permits him to serve as a source of ethical knowledge for the *muqallid*? For most *uṣūlīs*, a *muqallid* can ascertain whether someone is a *mujtahid* by consideration of certain objective social facts. For example, if the person in question gives fatwas publicly, the public accepts him as an authority (as evidenced by the fact that they seek out his fatwas), the public generally accepts that person's fatwas, and no one challenges his credentials, then a *muqallid* in that case has a sufficient basis to believe that such person is in fact a *mujtahid*.²⁴

If he comes to know about more than one *mujtahid*, his ethical life becomes more complicated, but only slightly: so long as he is ignorant of any disagreements between or among the *mujtahids* that he knows, he is free to question any of the *mujtahids* he knows for advice.²⁵ When the *muqallid* comes to know that *mujtahids* disagree, however, matters become complex. The solution to this problem, moreover, does not turn on one's stand with respect to the fallibility of *mujtahids*: in the absence of an institutional mechanism whereby one of the many proposed solutions to an ethical problem could be declared to be correct and the others mistaken, the fact that one *mujtahid* is correct and the others are mistaken is irrelevant from the perspective of a *muqallid*. Because Islamic ethical theory does not provide an objective perspective from which anyone (whether a *mujtahid* or *muqallid*) could conclude which of the competing opinions is the one that ought to be implemented, all opinions of *mujtahids* from the perspective of the *muqallid* seem to have a *prima facie* claim to validity. In short, when faced with ethical controversy, it is not at all clear what the *muqallid* should do, or even whether it makes sense to speak of the *muqallid* in this context as having an ethical obligation at all.²⁶

²³ See, for example, Abū al-Walid Sulaymān b. Khalaf al-Bājī, *Iḥkām al-Fuṣūl fi Ahkām al-Uṣūl*, ed. 'Abdallāh Muḥammad al-Jabūrī (Mu'assasat al-Risālah: Beirut, 1989) 644; al-Ghazālī, *supra* n. 1 at 373.

²⁴ See, e.g., al-Baṣrī, *supra* n. 11 at 363; Abū Ishāq Ibrāhīm b. Musā al-Shāṭibī, 4 *al-Muwāfaqāt fi Uṣūl al-Sharī'ah* 262 (Dār al-Ma'rifah, Beirut: n.d.); al-Āmidī, *supra* n. 11 at 311.

²⁵ See, e.g., al-Ghazālī, *supra* n. 1 at 373; 4 al-Shāṭibī, *supra* n. 24 at 132–133.

²⁶ See *infra* n. 41.

Disagreement among *mujtahids* creates numerous potential ethical problems for the *uṣūlī* tradition.²⁷ To be clear, this uncertainty also had the potential to undermine the efficacy and integrity of the entire legal system derived from Islamic jurisprudence.²⁸ As I have argued elsewhere, the institutionalization of *taqlīd* in courts and public-fatwa giving served to mitigate substantially the political problems arising out of indeterminacy.²⁹ Here, however, I wish to focus on another problem: the ethical obligations of the *muqallid* when faced with conflicting opinions of *mujtahids*, and whether the *uṣūlīs* proposed a workable solution for a *muqallid* who is assumed to be acting with moral integrity (*‘adl*).

Looming large in the discussions of the *uṣūlīs* was whether an irresolvable dispute among *mujtahids* meant that the *muqallid* was free to choose among any of the positions advanced by a qualified *mujtahid*, a position known as *takhyīr*. It would be tempting to suppose that those who advocated *takhyīr* also endorsed the doctrine of the infallibility of *mujtahids* with regards to their moral reasoning. While this was the case for the infallibilist Abū Bakr al-Bāqillānī,³⁰ not all *uṣūlīs*' views on *takhyīr* were derivative of their position on infallibilism. Some *uṣūlīs* who endorsed infallibilism, al-Ghazālī, for example, nevertheless rejected *takhyīr* in favor of imposing an obligation on the *muqallid* to engage in a process of *tarjīḥ*, weighing the competing opinions, although as we shall see below, no jurist who advocated *tarjīḥ* suggested that *muqallids* could weigh the *substantive* merits of the different views expressed.³¹ Likewise, some *uṣūlīs* who rejected infallibilism, al-Āmidī, for example, nevertheless endorsed *takhyīr*,³² albeit on the grounds of consensus rather than rational ones.³³

²⁷ For a summary of these problems, see Zysow, *supra* n. 1 at 479–483.

²⁸ See, e.g., al-Shāṭibī, *supra* n. 24 at 135–136 (discussing the deleterious impact of *takhyīr* upon the integrity of the legal system).

²⁹ See Mohammad Fadel, “The Social Logic of Taqlid and the Rise of the Mukhtaṣar,” *3,2 Islamic Law & Society* 193 (1996).

³⁰ Zysow, *supra* n. 1 at 464.

³¹ Al-Ghazālī, *supra* n. 1 at 352 (endorsing infallibilism) and at 374 (rejecting the doctrine of *takhyīr*).

³² Al-Āmidī, *supra* n. 11 at 247 (rejecting infallibilism) and at 318 (endorsing *takhyīr*); Weiss, *Search*, *supra* n. 17 at 728.

³³ *Id.* at 318 (stating that but for the consensus of the companions on this point, the position rejecting *takhyīr* would be the better argument). The Mālikī jurist al-Bājī shared al-Āmidī's views, endorsing *takhyīr* on historical grounds even as he rejected infallibilism. Al-Bājī, *supra* n. 23 at 623 (rejecting infallibilism) and at 644–645 (endorsing *takhyīr*).

Despite the association of infallibilism with subjectivism, and fallibilism with objectivism,³⁴ jurists such as al-Ghazālī and al-Shāṭibī, despite their differences on fallibilism,³⁵ each endorsed an obligation of *tarjih* for *muqallids* in controversial matters rather than *takhyir* because of what was, essentially, a subjectivist view of moral obligation. The advocates of *takhyir*, for example al-Qarāfi and al-'Izz b. 'Abdassalām, by contrast, took an ethical position that was indifferent to the subjective views of the *muqallid*; accordingly, they judged the conduct of that person solely from the objective perspective of whether it conformed to a valid opinion of any *mujtahid*.³⁶ For al-Ghazālī and al-Shāṭibī, *takhyir* was immoral *precisely* because it was indifferent to the subjective motivation of the individual *muqallid*. This indifference subverted what to them was one of the highest purposes of revelation: to subject human beings to law. *Takhyir* was inconsistent with this goal because it functioned as a *de facto* means of broadening the category of the permissible to all things that were in dispute among the jurists. Al-Shāṭibī, for example, complained that jurists of his time had gone so far as to take the existence of a controversy among jurists as evidence that the conduct at issue was morally indifferent (*ibāḥah*).³⁷

In making his case, al-Shāṭibī argued that there was a categorical difference, on the one hand, between the right of a *muqallid* to follow the view of one among the many *mujtahids* he happened upon without ascertaining which was the most qualified, and on the other hand, arbitrarily following one among the many opinions expressed by various *mujtahids* after the *muqallid* became aware of their disagreement.³⁸ The failure to distinguish these two scenarios led many to make the erroneous analogy between the practice of the early Muslim community—which allowed *muqallids* to ask the opinion of any of the companions who were *mujtahids* without requiring them to identify which of them was the most reliable in his reasoning—and the practice of *takhyir* which gives the *muqallid* the right to *choose* arbitrarily among the various *mujtahids'* opinions.

³⁴ See Zysow, *supra* n. 1 at 466–467 (“Fallibilism in its various versions holds that the result of *ijtihād* can be tested against an objective measure.”) and at 469 (“Essentially, infallibilism is a doctrine of solipsism.”).

³⁵ Al-Shāṭibī, *supra* n. 24 at 118–131.

³⁶ Al-Qarāfi, *supra* n. 1 at 4134 (quoting with approval Ibn 'Abdassalām's position that it was permissible to follow any opinion so long as it was a valid rule, meaning, were a judge to rule on the basis of that rule, his ruling would not be overturned).

³⁷ Al-Shāṭibī, *supra* n. 24 at 141.

³⁸ *Id.* at 132–133.

The reason these two scenarios is different is that in the first case—where the *muqallid* is ignorant of the controversy—he is giving effect to the reasoning of the *mujtahid*, and by hypothesis, the *mujtahid* has engaged in a good faith effort to understand what God wants in this particular situation. Accordingly, the *muqallid* is acting in concert with some good faith understanding of God's will. In the second case—where the *muqallid* is given the freedom to choose which opinion he will follow—the *muqallid* is not giving effect to the relevant revelatory text which the *mujtahid* had relied upon, but is rather giving effect simply to his own ends. As a consequence, he is acting out of desire (*hawá*) rather than in compliance with the teachings of revelation. *Takhyir* in al-Shāṭibī's view severs the nexus between subjective apprehension of probability born out of good faith interpretation of revelation and moral obligation, and therefore subverts one of the primary goals of revelation: to replace desire as the motive for human behavior with obedience to God.³⁹

While al-Ghazālī suggests a weak epistemological argument in favor of *tarjih* (that there is a chance that a *mujtahid* made an error by failing to identify an express text that applies to the case), his primary objection to *takhyir* is ethical, not epistemological. Like al-Shāṭibī, he complained that *takhyir* has the effect of relieving *muqallids* of the burdens of moral obligation. Indeed, he identified the asymmetry between the ethical obligations of the *mujtahid*—who is subject to a categorical obligation to exercise his judgment in matters for which there is no express revelatory text and to follow his probable judgment that results from the exercise of that duty in virtually all cases—and the obligations of the *muqallid* under a rule of *takhyir*—in which the requirement of having a probable judgment is abandoned—as being fatal to *takhyir*. The principle of *takhyir*, moreover, contains within it the threat that it would subvert the need for *ijtihad*: in all cases where there is no explicit revelatory text, a *mujtahid* could conclude that he can do whatever he wants because whatever he chooses will conform with the view of one *mujtahid*, and therefore will be permissible. In short, *takhyir* not only freed the vast majority of Muslims from firm ethical obligations, it also had the potential to subvert the incentives of *mujtahids* and thereby threaten the continuing viability of the activity of *ijtihad* itself.⁴⁰

³⁹ *Id.* at 132–135.

⁴⁰ Al-Ghazālī, *supra* n. 1 at 373–374.

That the advocates of *tarjih* were more concerned with the moral integrity of the individual Muslim, whether a *mujtahid* or a *muqallid*, than the objective coherence of the ethical system, is evidenced by their discussion of what happens when it is impossible for a *muqallid* to determine which of the competing *mujtahids'* views is weightier. In theory, the *muqallid* was to treat the different opinions of the *mujtahids* in the same manner a *mujtahid* would treat conflicting texts of revelation. While a *mujtahid* would apply substantive criteria to determine which text ought to be given greater weight in such a circumstance, the task of the *muqallid* was limited to determine which *mujtahid* was more virtuous, virtue being measured along an index of two variables: piety and learning. Accordingly, the *muqallid* should adopt the opinion of that *mujtahid* whom he believes to be the most learned and most pious. The numerous possible combinations of piety and learning, and whether piety is weightier than learning, are not important in this context except to the extent that they reveal the difficulty of discharging such a task. Nevertheless, the point for those *uṣūlīs* who demanded *tarjih* was that the *muqallid* make this attempt, and if he reaches a conclusion, then he is bound to accept the opinions of that *mujtahid* without engaging in “fatwa-shopping.” If, however, after having engaged in this process, he is unable to reach a probable judgment regarding which *mujtahid* is more virtuous, he is relieved of moral obligation with respect to that particular issue, at least with respect to God, *in toto*.⁴¹

Al-Qarāfi, and his teacher al-‘Izz b. ‘Abdassalām, by contrast, are indifferent to the nexus between the conduct of the actor and the actor’s subjective understanding of his action in light of revelation. Because of al-Qarāfi’s commitment to the notion that legal obligation is tied to some benefit to the actor (*maṣlaḥah*), he rejected the argument that imposition of *taklīf*—simply for the sake of imposing obligation—was a goal of revelation. Indeed, he dismissed this argument on the grounds that it imposed hardship (*mashaqqah*) upon individuals simply for the purpose of hardship

⁴¹ Al-Shāṭibī, *supra* n. 24 at 291 (stating that where a *muqallid* is unable to know what his obligation is, the *muqallid* is in a position akin to that which exists prior to the advent of revelation and were the *muqallid* to be subject to some obligation in such circumstances, it would be impossible for him to discharge it); Abū al-Ma‘ālī ‘Abdalmalik b. ‘Abdallāh al-Juwaynī, *2 al-Burhān fi Uṣūl al-Fiqh* 884 (stating that when a *muqallid* cannot determine which *mujtahid* is more virtuous, he is like someone on a deserted island who only knows the foundations of Islam, and accordingly, has no obligations toward God with respect to that issue). Al-Ghazālī, however, in this circumstance permitted *takhyir*. Al-Ghazālī, *supra* n. 1 at 16.

rather than furthering their own good, a principle that he believed the Shari'a denied. Accordingly, al-Qarāfi understood ethical controversy as creating a kind of "freedom for the actor (*tawsi'ah 'alā al-mukallaf*).” Al-Qarāfi limited this qualified ethical freedom in two respects: first, the *muqallid* must not choose among the various *mujtahids'* positions in such a manner as would produce a violation of consensus; and second, he must not follow an opinion which, if it were the basis of a judicial ruling, could be overturned by a subsequent judge (a "pseudo-rule").⁴² Both of these limitations, moreover, are objective, meaning they do not depend upon the *muqallid's* subjective appreciation that he violated consensus or acted on the basis of a pseudo-rule.

Al-Qarāfi gave the following example (apparently from his own experience) of how the first limitation could become relevant. A follower of al-Shāfi'i asked him whether it would be permissible for him to follow Mālik's view regarding the purity of clothes stitched with pig hair. Al-Qarāfi replied in the affirmative, but cautioned that if the questioner intended to follow Mālik's view on the purity of his garment as opposed to the rule of al-Shāfi'i, then he had to take care to follow Mālik's views on the requirements of valid ablutions, paying particular attention to those rules in which Mālik differed from al-Shāfi'i. Accordingly, if the Shāfi'i followed Mālik regarding the purity of his garment, but followed al-Shāfi'i with respect to the permissibility of rubbing only a portion of the head during ablutions, both Imām Mālik and Imām al-Shāfi'i would declare that man's prayer to be invalid. Thus, *takhyir* poses a risk to the *muqallid* that following the doctrine of one school does not: inadvertently nullifying the validity of one's acts of devotion, and for that reason, al-Qarāfi suggested to his Shāfi'i questioner that he might be better off sticking to the teachings of his own school.⁴³

As for the second limitation on *takhyir*, a pseudo-rule is one that is contrary to consensus (*ijmā'*), a legal principle (*al-qawā'id*), an explicit text (*al-naṣṣ alladhī lā yaḥtamīl al-ta'wīl*) or an *a fortiori* analogy (*al-qiyās al-jalī*). An example of such a pseudo-rule is the Ḥanafī rule giving neighbors a right of first refusal (*shuḥ'at al-jiwār*) in connection with the sale of adjoining real property. Because a judge who ruled in accordance with that rule would have his ruling overturned (at least according to the Mālikīs), *a fortiori* it is impermissible for a *muqallid* to act upon that rule

⁴² Al-Qarāfi, *supra* n. 18 at 4148.

⁴³ *Id.* at 4149.

in his private life.⁴⁴ Other than these two objective limitations, however, al-Qarāfi is unconcerned about the consequences of *takhyīr* on the moral life of *muqallids*. In fact, he denied that it is impermissible for *muqallids* to seek out, consciously, the dispensations (*rukhaṣ*) of the various *mujtahids*, on the condition that in so doing the *muqallid* takes care not to violate consensus or follow a pseudo-rule.⁴⁵ Unlike al-Ghazālī and al-Shāṭibī, who viewed imposing moral obligation on human beings as one of the most important functions of revelation, al-Qarāfi denied that revelation came simply to impose obligations on people willy-nilly; rather, he understood the purpose of revelation as being to assist individuals achieve various beneficial ends.⁴⁶ Unlike al-Ghazālī and al-Shāṭibī, then, al-Qarāfi's strand of soft infallibilism, combined with *takhyīr*, operated to produce an objective method by which a *muqallid*, presumably in consultation with a scholar, could know whether his conduct was consistent with the demands of Islamic normativity. This objective account of the *muqallid's* ethical obligations, however, resulted in a fundamentally different standard of behavior for a *muqallid* relative to a *mujtahid*: while the latter was obligated to conduct his life in accordance with his understanding of revelatory evidence (*al-adillah al-shar'iyyah*), the *muqallid* was free to pursue the ends of his life without considering the implications of revelatory evidence, directly or indirectly, except insofar as they produced incontrovertible rules.

III. TRUST AND AUTONOMY

The *mujtahid*, at least with respect to those areas of life which are unregulated by an express revelatory norm, appears to be a law unto himself: answerable only to God, his ethical life is governed only by universal norms that are either true in themselves, i.e. such rules that constitute the *ma'lūm min al-dīn bi-l-ḍarūrah*, or particular rules that he has formulated for himself based on his considered opinion using the interpretive techniques of *uṣūl al-fiqh*. The *muqallid's* ethical life, as we saw from the previous section, is more (e.g. under al-Ghazālī's or al-Shāṭibī's reasoning) or less (e.g. under al-Qarāfi's or Ibn 'Abdassalām's reasoning) derivative of

⁴⁴ *Id.* at 4148.

⁴⁵ *Id.* at 4149.

⁴⁶ *Id.* (*al-sharī'ah lam tarid li-maqṣid ilzām al-'ibād al-mashāqq bal bi-taḥṣīl al-maṣāliḥ al-khāṣṣah* [sic: read *al-khāliṣah*] aw *al-rājiḥah*).

the *mujtahid*'s ethical reasoning. The *muqallid* does not, as discussed previously, defer to the *mujtahid* because he lacks the capacity for independent moral reasoning. Presumably, he chooses to be a *muqallid* because, given the various options available to him in his life, he would rather spend his time doing something, e.g. farming or trading, other than becoming a theological/ethical/legal specialist, a task that could very well be quite burdensome.⁴⁷

To choose the option of *taqlid*, however, a *muqallid* must have some basis on which he can distinguish a genuine *mujtahid* from a mere pretender. In other words, a *muqallid* must have a basis to *trust* the judgment of the would-be *mujtahid*. In this context the term *trust* is probably a more accurate translation of the term *ẓann* than probable belief, despite the fact that the *uṣūlīs* claim that the *muqallid* is responsible to confirm that he has a reasonable belief that the person whom he is asking for a fatwa is in fact a qualified *mujtahid*. *Ẓann*, of course, is literally different from *trust* insofar as it denotes a particular subjective state of mind that entails the belief that A, for example, is more likely to be true than B.

Trust, as some contemporary moral philosophers have argued, cannot be reduced simply to a determination that some particular fact has a more likely existence than not. It involves a relationship between one party, A, and another party, B, in which A reaches some subjective assessment as to the likelihood that B will act in a certain way, but in circumstances where A cannot directly observe B's conduct. In addition, in a relationship of trust the manner by which B conducts himself will have an important effect on A.⁴⁸ There is also an important asymmetry in trust: "it cannot be given except by those who have only limited knowledge, and usually even less control, over those to whom it is given,"⁴⁹ and while there may be an accounting of sorts, the accounting is usually deferred sometime into the future.⁵⁰ Trust also connotes something different than merely obeying commands; instead, it is "to take instruction or counsel, to take advice, to be patient and defer satisfying one's reasonable desire to understand what is going on, to learn some valuable discipline, or to conform to authoritative laws which others have made."⁵¹ As a consequence, a trust relation-

⁴⁷ For a discussion of the topics someone must master in order to qualify as a *mujtahid*, see, e.g., al-Ghazālī, *supra* n. 1 at 242–244 (noting in particular the difficulties of mastering knowledge of the *sunnah*).

⁴⁸ Annette Baier, "Trusting People," 6 *Philosophical Perspectives, Ethics* 137–153, 138.

⁴⁹ *Id.* at 139.

⁵⁰ *Id.* at 140.

⁵¹ *Id.* at 144.

ship can be viewed as an investment by A whose returns, if successful, will increase with time, thus benefitting A, but if B turns out to be untrustworthy, the relationship will prove detrimental to A. Trust accordingly always involves risk to A that B will abuse the relationship to A's loss.⁵²

In my view, the relationship of the *muqallid* to the *mujtahid* is better understood as a relationship of trust rather than one of epistemological dependence. Weiss has suggested that the enterprise of *ijtihād* is, in an important sense, a cooperative relationship, at least in the sense that the *mujtahid* depends upon a steady stream of questions from *muqallids* to provide him with the opportunity to develop legal rules.⁵³ I would suggest, however, that the cooperative nature of the enterprise of *ijtihād*, and hence the development of Islamic ethics and law through the interpretation of revelation, requires a much thicker notion of cooperation and trust than that which would be required if the only function of the *muqallid* were to provide the questions necessary for the development of the *mujtahid*'s thought. Indeed, such a conception of the role of the *muqallid* reduces him to a mere instrument of the *mujtahid*: the *muqallid* would be at once the occasion for the development of the law and its object, but would have no role whatsoever in its development.

If the *muqallid-mujtahid* relationship were understood to be a relationship of trust, on the other hand, it may be the case that the *muqallid* necessarily would play a more active role in the development of Islamic law than that accorded to them by *uṣūlīs*. This is especially so for *uṣūlīs* such as al-Ghazālī, al-Shāṭibī and al-Juwaynī who reject *takhyīr* in favor of *tarjih*. *Tarjih* is only possible on the assumption that *muqallids* are responsible to choose their moral advisors carefully, by monitoring their objective characteristics—such as learning and (outward) piety—to confirm that they are persons of moral integrity. Indeed, even for those *uṣūlīs* who accept *takhyīr*—whether with diffidence in the example of al-Āmidī,

⁵² *Id.* at 147. Note that one might raise the objection that the relationship between the *mujtahid* and the *muqallid* does not need trust because the *muqallid* does not suffer any moral injury if he mistakenly, but in good faith, relies on someone who is not a genuine *mujtahid*, or if the *mujtahid* fails to carry out his duty in investigating the *muqallid*'s question. Even though the *muqallid* does not bear the risk of sin arising out of misplaced trust, he does face the risk that he will suffer worldly injury in terms of regret with respect to choices made vis-à-vis others. In certain cases, he might also suffer a tangible economic loss if he relies on the advice of an incompetent *mujtahid*. The profitable side of the ledger is easier to grasp: the *muqallid* is able to obtain valid opinions on God's law if he successfully identifies a *mujtahid*.

⁵³ Weiss, *supra* n. 5 at 128.

or embrace it in the example of al-Qarāfi—the concept of the moral integrity (*‘adālah*) of the *mujtahid* is central to the functioning of the system.⁵⁴

The judgment that a particular person possesses moral integrity, of course, is an ongoing one: unlike a judicial determination ruling that the property in dispute belongs to A and not B, a judgment of moral integrity is always provisional and thus is always subject to revision based on future experience. The responsibility to monitor prospective *mujtahids*’ moral integrity is a burden that falls on everyone, not simply *mujtahids*. Tellingly, virtually all of the *uṣūlīs* surveyed for this essay agree that a *muqallid* can rely on the collective judgment of his contemporaries regarding the moral credibility of a prospective *mujtahid* as evidenced by the fact that this person is in fact engaged in public fatwa-giving without censure. While these authors did not explain why this is sufficient evidence, one could justify this assumption if one believes that individual members of society have had sufficiently lengthy and ethically significant interactions with that figure to have allowed them to conclude, independently of one another, that he is a person of moral integrity. Here, the logic of *tawātur* seems to be implicit in the justification of this kind of evidence for moral integrity. In the absence of an assumption of active independent monitoring by large numbers of persons of those who publicly give fatwas, the right to rely on such a fact could not justify a *muqallid* placing his trust in that person.

Indeed, the one dissenter on this point—al-Juwaynī—confirms the argument developed here that the *mujtahid-muqallid* relationship is one of trust rather than knowledge. For al-Juwaynī, collective judgments regarding the qualifications of a person who engages in public fatwa-giving cannot justify a *muqallid*’s conclusion that such a person is in fact a *mujtahid*. Al-Juwaynī denied the probative force of this collective report on the grounds that the determination of whether a person is, or is not, a *mujtahid*—and hence qualified to give fatwas—cannot be resolved by reputation evidence, no matter the number of witnesses.

But, al-Juwaynī’s solution to this problem is even more radical in exposing the trust that is at the core of this relationship: he proposed that the only way for a *muqallid* to reach a probative judgment as to whether someone is a *mujtahid* is simply to ask the would-be *mujtahid*.

⁵⁴ Moral integrity, while not strictly speaking a condition of *ijtihād*, is a condition for the validity of a fatwa. See, e.g., al-Ghazālī, *supra* n. 1 at 342.

Al-Juwaynī's argument cuts to the heart of the matter: we have no way of knowing that a person is in fact a *mujtahid* because the most critical element of the vocation—moral integrity—is not amenable to outside verification, but is only something that can be discovered over time. At the beginning of the relationship, all a *muqallid* can do is ask, and hope that the person answering is trustworthy. At its beginning, however, the *muqallid* would lack any basis upon which he could objectively justify his relationship with the *mujtahid* at issue. It is only over time, as a result of repeated interactions between him and the *mujtahid* (and perhaps other encounters between other *muqallids* known to him and that *mujtahid* as well) that the *muqallid* can determine whether the trust he had reposed in the *mujtahid* was justifiable. Given this, asking seems like an obvious way to begin.

But, does the *uṣūlī* discourse on the *muqallid* justify the belief that a *muqallid* is in a position to engage in the monitoring activity that is arguably necessary in order to generate the trust required for the relationship between *mujtahids* and *muqallids* to succeed? Indeed, one of the principal objections to the *tarjih* position was that *muqallids* are incapable of determining which *mujtahid* is “the more learned and the more pious” with any competence. Indeed, one could take as further evidence of *muqallids*' incompetence the fact that advocates of *tarjih* refused to permit *muqallids* to engage in *tarjih* based on the substance of the different opinions. Al-Ghazālī and al-Rāzī, for example, dismiss the possibility that *muqallids* could engage in substantive *tarjih* on the grounds that it would constitute moral negligence: just as a parent would be held negligent and liable if he medicated his sick child using his own judgment, even after consulting with doctors, so too a *muqallid* would be negligent and morally culpable if he took it upon himself to judge which of the two contradictory positions is substantively stronger.⁵⁵ In both cases, he simply lacks the *competency* to engage in the judgment. Al-Juwaynī was even more blunt in rejecting this possibility, which he described as “giving reign to intuition and idiocy (*ittibāʿ al-hawājis wa al-ḥamāqāt*).⁵⁶

Al-Shāṭibī, unlike al-Juwaynī, al-Ghazālī and al-Rāzī, did not even raise the possibility of the *muqallid* engaging in his own substantive *tarjih*. While he accepted the notion of *tarjih* based on piety and learning—which al-Shāṭibī called referred to as “general weighing (*tarjih ʿāmm*)”—he

⁵⁵ Al-Ghazālī, *supra* n. 1 at 374; al-Rāzī, *supra* n. 14 at 534.

⁵⁶ Al-Juwaynī, *supra* n. 41 at 883.

introduced another technique for giving precedence to one *mujtahid* over another which he called “particular weighing (*tarjih khāṣṣ*).” This method of selection explicitly incorporates the notion of the *mujtahid* as a moral exemplar, someone whose life—and not just his learning or outward piety—represents an outstanding model of moral excellence (*quḍwa*). The most important feature of such a *mujtahid* is his moral integrity as evidenced by the consistency between his private actions and his public pronouncements.⁵⁷

That *muqallids* are incompetent to judge the substantive reasoning of a *mujtahid* is somewhat of a puzzle, however, at least to the extent that *muqallids* are endowed with the attributes given to them in *uṣūl al-fiqh*. After all, the *uṣūlis*’ conception of *taqlid* assumes that the *muqallid* has full rational capacity, something that allows him to recognize the theological and ethical truths of Islam. One might have expected that, given this reservoir of true theological and moral knowledge, *muqallids* might have a legitimate basis upon which they could evaluate the substance of different fatwas. Indeed, one of the hadiths included in al-Nawawī’s popular 40 Hadiths suggests that even the most ordinary individuals carry within them the capacity for moral discrimination between virtue and vice. According to that hadith, Wābiṣah, a companion of the Prophet Muḥammad asked him about righteousness (*al-birr*), to which the Prophet was said to have replied, saying: “Ask the opinion of your soul! Ask the opinion of your heart,” repeating that three times. Then, the Prophet continued, saying: “Righteousness is that in which the soul and heart find tranquility and sin is that which pricks the soul and bounces back and forth in the breast, even though the people may give opinions [to the contrary].”⁵⁸

For al-Shāṭibī, and perhaps al-Ghazālī, the implicit answer seems to be that even if the *muqallid* has substantial theological and moral knowledge, when it comes to matters of moral controversy, he is too self-interested to behave morally: he will consistently choose that which pleases him and serves his interest (*hawā*) rather than engaging in an objective moral analysis of what God requires of him. It could therefore be argued that it is precisely because a *muqallid* has theological and ethical knowledge that he comes to be conscious of how his ethical decision making can be tainted by his self-interest, and therefore that he ought to defer to the

⁵⁷ Al-Shāṭibī, *supra* n. 24 at 270–271.

⁵⁸ See ‘Abdarrahmān b. Aḥmad Ibn Rajab, *Jāmi’ al-‘Ulūm wa-l-Ḥikam* 272 (Dar al-Jil, Beirut: 1987).

views of a trustworthy third-party, the *mujtahid*, who can judge the ethical consequences of the situation objectively. Accordingly, the fact that the moral knowledge of a *muqallid* is inoperative when it comes to his own conduct does not negate the fact that he is in fact a bearer of moral knowledge; it could be that it is the problematic element of self-interest that precludes him from relying on that self-knowledge in morally controversial matters. Conversely, he would be capable of serving as a monitor of *mujtahids* because in that case there would not be a conflict between judgment and desire. It is the *muqallid's* capacity for disinterested moral judgment that allows for the relationship of trust that is at the heart of the *mujtahid-muqallid* relationship to form and be sustained over time.

IV. CONCLUSION

The relationship of epistemology to obligation in Islamic theology and ethics ultimately led to the recognition of a limited kind of moral pluralism. This fact in turn generated political as well as ethical problems. With respect to the problem of how to maintain a sense of ethical obligation in morally controversial areas of life, Sunnī Muslim theologians split into two camps, those advocating *takhyīr* and those advocating *tarjīh*. While both sides of this debate understood that *muqallids'* moral obligations in controversial areas were derived from *mujtahids'* reasoning, each camp had a fundamentally different view of what moral obligation entailed in the case of a *muqallid*. For at least some of those who advocated *takhyīr* like al-Qarāfī and his teacher al-ʿIzz b. ʿAbdassālām, moral obligation was objective: as long as a *mukallaf* did not violate the objective boundaries of Islamic ethical norms, his conduct was both legal and moral. For at least some of those who advocated *tarjīh*, moral obligation was much thicker: it required the *muqallid* to justify his conduct by reference to some revelatory source (*dalīl*). It was the role of the *mujtahid* to provide the nexus between a *mukallaf's* conduct and revelation. For them, it ultimately did not matter what the conduct was, so much that it was grounded in a good faith interpretation of revelation. For either system to work, however, *muqallids* need to have sufficient moral judgment to identify trustworthy authorities. The theological tradition of *uṣūl al-fiqh* surveyed in this article, however, under-theorizes this problem by failing to explain how a *muqallid* may be able to identify trustworthy authorities. I suggest that the answer (if there is one) must lie in the notion that *muqallids* do in fact possess a robust—even if incomplete—set of moral data provided by

the moral truths of Islam which is sufficient to permit them to distinguish between genuine *mujtahids* and mere pretenders. A fully determined theory of *taqlid* would require an explanation of how the moral truths in the possession of the *muqallid* enable him to process, critically, the performance of would be *mujtahids* as a condition for the trust implicit in the relationship to arise. Such a theory, however, at least as far as I know, has yet to be developed.

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PART TWO

LAW AND RELIGION

SAḤNŪN'S *MUDAWWANAH* AND THE PIETY
OF THE "SHARĪ'AH-MINDED"

Jonathan E. Brockopp

The *Mudawwanah*, one of the key texts for Mālikī law, poses several problems; its internal structure, its relationship to other early legal texts, and the history of its compilation have all confounded historians of Islamic law for centuries. Previously, I have used this text to help demonstrate that Islamic law did not develop a single perception of legal authority, but that competing ideas of legal authority were already present in the earliest legal texts.¹ Here, I want to suggest something a bit bolder, that through analysis of the *Mudawwanah* and other early legal texts, we may perceive of an alternate origin for Islamic law itself, not merely in the crucible of the courts, where pragmatic need drove speculation and expansion of law, but also in the *ḥalaqah*, the shaykh's circle, where the "sharī'ah-minded" reflected on God's law as a means of interacting with the divine.²

In some ways, this hypothesis is not at all surprising. Many observers have acknowledged that scholars are deeply concerned with reflections on the nature of Islamic law as divine law. Reasonably, these observations generally center on works of legal theory, not the earliest *fiqh* texts, since these later authors are much more explicit about the interaction of human and divine in Islamic law. But as Bernard Weiss points out in his preface to *The Spirit of Islamic Law*, early *furū'* writers were very much interested in *uṣūl* and the clear boundaries between these disciplines were produced and maintained only by later generations of scholars.³

¹ "Competing Theories of Authority in early Mālikī Texts" in *Studies in Islamic Legal Theory*, ed. Bernard Weiss. Leiden: E.J. Brill, 2001, 3–22.

² I borrow the term from Marshall Hodgson, *Venture of Islam*, 2:446–47 where he discusses the piety of the "sharī'ah-minded" as compared to that of Sufis, "hadith folk" and others. There is not a lot of content to Hodgson's sense of this piety, other than a "conservative spirit" and an adherence to "doctrines" of Islamic law, and so I take inspiration from Christopher Melchert's elegant article "The Piety of the Hadith Folk" in *International Journal of Middle East Studies* 34 (2002), 425–39. There, Melchert suggests ways of expanding this category through analysis of, for example, ideal public comportment. My aims here are a bit different as I am more interested in the question of how a particular understanding of piety can be reflected in the contents of a legal text.

³ Bernard Weiss, *The Spirit of Islamic Law*. Athens, University of Georgia Press, 1998, xi–xii.

Nonetheless, historians of Islamic law continue to be governed by this divide when looking at the earliest *fiqh* texts. This impression is concretized by what Joseph Lowry has called a “functionalist” view of Islamic legal development, one shared by Wael Hallaq, Joseph Schacht and others.⁴ In this view, the “branches” of Islamic law developed from Umayyad practice and the early *qāḍīs*’ courts; pragmatic decisions and rulings were established that, de facto, formed the basis of legal precedent, and only later were these legal rules connected with their “roots,” that is, justified by reference to religiously accepted explanations of legal authority. Like Lowry, I do not deny the importance of the courts in pushing the development of Islamic law, but Lowry not only argues that al-Shāfiʿī’s *Risāla* can be approached as “a work of pure theory,” but also suggests that other early legal texts cannot be entirely explained by the pragmatic needs of either the courts or the teaching of Islamic law.⁵ His observations dovetail nicely with Weiss’s observation that “scholars” (not court bureaucrats) had much more on their minds than simply the recording and organization of positive rules of law.⁶

To be sure, some of these scholars, such as Abū Yūsuf and Ibn al-Muqaffaʿ, were also bureaucrats employed by the government,⁷ but most of the others were not. What, then, motivated these scholars to study the law if not the worldly gain of court and patronage? Like the “hadith folk,” they demonstrated a notion of piety that seemed to exclude the selling of their knowledge or its practical application. The famous story of Hārūn al-Rashīd seeking out the *Muwaṭṭaʿ*’ of Mālik b. Anas is a case in point—Mālik staunchly refused this princely offer, arguing rather for the plurality of scholarship.⁸ In this essay, I will argue that the concern (obses-

⁴ Joseph Lowry, *Early Islamic Legal Theory: The Risāla of Muḥammad ibn Idrīs al-Shāfiʿī*. Leiden: Brill, 2007, 367.

⁵ *Ibid.*, 366–68. On p. 368, Lowry suggests that these theoretical concerns can be connected to theological concerns that “are in some ways more general than the issues debated within the *kalām* tradition”.

⁶ Weiss, *Spirit*, 7.

⁷ Mathieu Tillier’s *Les cadis d’Iraq et l’État Abbasside*. Damascus (Institut français du Proche-Orient), 2009.

⁸ Ignaz Goldziher (*The Zahiris*. Tr. and ed. Wolfgang Behn. Leiden: E.J. Brill, 1971, 89) depending on al-Damirī, quotes the Caliph as saying: “I am firmly committed to lead people to your *al-Muwaṭṭaʿ*’ just as ‘Uthmān led them to the Koran.” He also cites Mālik’s reply to the Caliph: “This is hardly possible, for the Companions of the Prophet dispersed into all directions after his death and spread the traditions so that, now, the inhabitants of each region have their [own method in the] science.” See also Nabia Abbott, *Studies in Arabic Literary Papyri*. Vol. 2. Chicago: University of Chicago Press, 1967, 123–4. This story is often repeated, but rarely has anyone questioned Hārūn’s choice in the first place. To

sion) in these texts for teasing out the minutiae of legal thought was an end in itself, one that meshed poorly with the needs of the court, and that in this rather impractical reflection we can see an important aspect of *uṣūlī* thought. In other words, I hope to discover the textual evidence for Weiss's claim that these early scholars were more interested in "a wide-ranging and politically unfettered formulation and systematization of an ideal law of God . . . Law as it ought to be."⁹

Any argument about the development of early legal texts must begin with a careful examination of the sources. This is particularly important in the case of the *Mudawwanah*, not only because modern scholars have disputed its compilation date, but also because we possess a wealth of early manuscript witnesses that can help us understand the complicated means by which early legal texts were produced. Briefly, Norman Calder noticed that the *Muwaṭṭa'* demonstrates an interest in promoting the primacy of Prophetic hadith, whereas the *Mudawwanah* forwards the opinions of Mālik b. Anas over hadith. Therefore, Calder argued, the *Mudawwanah* must represent an *earlier* example of legal drafting and he gave a rough date of AH 250 for the closing of the text.¹⁰ Calder's arguments are based largely on "internal evidence," that is examination of the specific arguments found in the *Mudawwanah* and a comparison of these arguments with those in other early legal texts.¹¹ Some may find these arguments persuasive, but they do not correspond well to the history of the text as borne out by the extant manuscripts.¹² Such external critique demonstrates that AH 250 is both too early and too late, and does not do justice to the complex

me, Mālik's book seems a strange source for a legal code. Unlike, say, the *Mukhtaṣarāt* of Ibn 'Abdalḥakam, Mālik's text is a collection of opinions, open-ended discussions and quotations from authorities—it would be very difficult indeed to apply it in the sense that a legal code is most often used.

⁹ Weiss, *Spirit*, 7.

¹⁰ Calder, *Studies*, 19.

¹¹ Calder's closing date for the *Mudawwanah* is constricted by the date he assigns to the *Muwaṭṭa'*, which is determined by external evidence, since fine copies of Yaḥyā b. Yaḥyā al-Laythī's recension of the *Muwaṭṭa'* are attested in the 270's (*Studies*, 38). In my mind, such fine copies would only be produced long after a text has achieved fame and therefore serve as a poor indication of a text's age. More to the point, it seems strange to assert a connection between this particular recension of the *Muwaṭṭa'* and the *Mudawwanah*. While Yaḥyā b. Yaḥyā's recension is the best-known version today, this was not so for earlier generations and certainly not for Saḥnūn's Kairouan, where Ibn Ziyād's recension was apparently the best known (our only manuscript of that recension, a fragment, dates to the fourth/tenth century).

¹² See Miklos Muranyi, "Die frühe Rechtsliteratur zwischen Quellenanalyse und Fiktion," *Islamic Law and Society* 4 (1997): 224–41.

process of compilation. As for the relationship of the *Mudawwanah* to the *Muwatta'*, it is true, as Calder pointed out, that Saḥnūn sometimes does not include hadiths found in the *Muwatta'*.¹³ Christopher Melchert, building on Calder's arguments, suggests that if we do not accept Calder's re-dating, we are forced to imagine a world where books existed but were not read, meaning that legal scholars in North Africa were "idiots" (in the etymological sense, as he nicely puts it), quite isolated from developments in other cities.¹⁴ I believe that there are other alternatives, since manuscript evidence demonstrates that Saḥnūn transmitted many hadiths that he nonetheless failed to include in the *Mudawwanah*, a fascinating example of how scholars could be well aware of much material that they nonetheless chose not to include in their texts.¹⁵ Given the range of writing styles used by single authors (and indeed, the range found within single texts, such as the *Mudawwanah*), it does not seem possible to date texts on the basis of internal evidence alone. Moreover, it does not seem that Saḥnūn's intention was for the *Mudawwanah* to be an exhaustive or encyclopedic text; rather, there is a process of selection in operation that needs explanation.

The extant manuscript tradition for Saḥnūn's writings, and for the *Mudawwanah* in particular, is massive. Miklos Muranyi's study of this material demonstrates, in fact, that the *Mudawwanah* was the subject of one sort of school activity, with our earliest witness to a complete copy coming 200 years after Saḥnūn's death. The printed edition is itself based on just one of these late manuscripts, a parchment codex from Fez dated AH 476; it is not a critical edition and pays no attention to thousands of other manuscript fragments, many of which can be dated to a much earlier period.¹⁶ Muranyi mentions the existence of several of these early

¹³ Calder's argument here is problematic for another reason as well. He argues that concern with Prophetic hadith is a hallmark of a later text, and so presumes that the hadiths that are found in the *Mudawwanah* were added by later generations of students (18). But given that Saḥnūn died in AH 240, ten years hardly seems enough time for such a process. I would suggest that those who wish to follow him down this path must abandon the notion of linear development and accept the phenomenon of regional differences in legal drafting.

¹⁴ Christopher Melchert, "The Early History of Islamic Law," in Herbert Berg, ed., *Method and Theory in the Study of Islamic Origins*. Leiden: E.J. Brill, 2003, 293–324, at 310.

¹⁵ See, generally, Miklos Muranyi, *Die Rechtsbücher des qairawāners Saḥnūn b. Sa'īd: Entstehungsgeschichte und Werküberlieferung*. Stuttgart: Franz Steiner, 1999. For a summary of these additional texts, see my "Saḥnūn b. Sa'īd" forthcoming in Oussama Arabi, Susan A. Spector, and David S. Powers, eds., *Islamic Legal Thought. A Compendium of Muslim Jurists*. Leiden: Brill, 2013.

¹⁶ Muranyi, *Rechtsbücher*, ix.

fragments, some of which contain marginal notes from the second half of the third century—evidence that causes Muranyi to argue for a "fixed, textual transmission" of the *Mudawwanah* during the lifetime of Saḥnūn and his students,¹⁷ while also admitting that "during the lifetime of Saḥnūn no fixed version of the entire text (*redaktionell abgeschlossenes Gesamtexemplar*) existed."¹⁸ In other words, he argues that Saḥnūn's work existed, during his lifetime, as a series of discrete chapters which were organized only much later into the *Mudawwanah* that we know today.¹⁹

After the publication of that book, Muranyi told me of the existence of an even earlier fragment in Kairouan, one that I have now seen and photographed. Despite the fact that it is only a single page from the *Mudawwanah*, this fragment has much to teach us.

Here we have the conclusion to the first chapter on pilgrimage, the contents of which follow the printed edition closely as can be seen from this transcript.²⁰

قلت له (ف) هل يصوم الوالد في جزاء الصيد والفدية عن الصبي؟ قال لا. قلت فيطعم؟ قال نعم له (أن يطعم) أو يهدي أي ذلك شاء. قلت أرأيت المجنون إذا أجه والده، أكون بمنزلة الصبي في جميع أموره؟²¹

¹⁷ Muranyi, *Rechtsbücher*, x.

¹⁸ Muranyi, *Rechtsbücher*, 12. On page 17 he states it is therefore not possible to reconstruct Saḥnūn's own "archetype" of the entire text.

¹⁹ One unresolved issue that may pose problems for Muranyi's thesis is the relationship of the *Mudawwanah* with Saḥnūn's *Mukhtaliḥah*. Until recently, the existence of the *Mukhtaliḥah* was known primarily through commentaries and references in historical texts. Numerous manuscripts in North Africa, however, make reference to the *Mukhtaliḥah*, which Muranyi describes as "lediglich eine Titelvariante der *masā'il*-Sammlung Saḥnūns mit einer inhaltlich teilweise anderen Struktur als die *Mudawwana* darstellt" (*Rechtsbücher*, 11). Analysis of these fragmentary remains is enigmatic; in some cases the two texts diverge significantly, while in others it seems that they contain the same material. Some manuscripts include chapters that treat the two as a single text. Sezgin incorrectly ascribes the *Mukhtaliḥah* to Asad (*GAS* 1:467 where he identifies it with the *Asadīyya*); Muranyi has found no mention of Asad in the extant fragments (*Rechtsbücher*, 11). Much more work on the relationship between these two texts remains to be done, but the possibility exists that we will find in the *Mukhtaliḥah* evidence of the composition process that resulted in the *Mudawwanah*.

²⁰ Compare the printed edition, 1:425, lines 4–22. Miklos Muranyi first told me of the existence of this fragment (located with dozens of other loose parchment pages in folder [*milaff*] number 69); my thanks to him and to the late Shaykh al-Ṣādiq Mālik al-Gharyānī for directing me to this page. I also express my deep appreciation to Dr. Mourad Rammah, director of manuscripts at the Raqqada Center for Islamic Arts, for facilitating my scholarship in Tunisia and for giving me permission to photograph this fragment.

²¹ في جميع أموره: في قول مالك

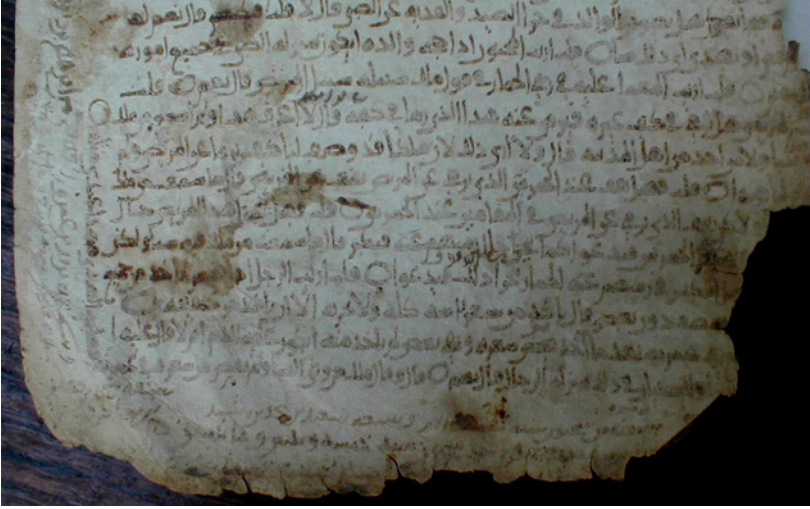


Fig. 1: Fragment of an early version of the *Mudawwanah*, Kairouan.

قال نعم. قلت رأيت المغمي عليه في رمي الجمار في قول مالك سبيله
 سبيل المريض؟²² قال نعم. قلت
 (أرأيت المريض هل يرمى في كف غيره فيرمي عنه هذا الذي رمى في كفه
 في قول مالك؟²³ قال لا أعرف هذا ولم أسمع من مالك
 في هذا²⁴ شيئاً ولا من أحد من أهل المدينة. قال ولا أرى ذلك لأن
 5 مالكا قد وصف لنا كيف يرمى عن المريض ولم
 يذكر لنا هذا. قلت فهل يقف عند الجمرتين الذي يرمى عن المريض يقف
 عن المريض؟ قال ما سمعت من مالك
 (فيه شيئاً) ولكن يقف²⁵ الذي يرمى عن المريض في المقامين عند
 الجمرتين. قلت²⁶ فهل يتجرى هذا المريض حال

²² الجمار في قول مالك سبيله سبيل المريض: الجمار أسبيله سبيل المريض في قول مالك

²³ في قول مالك: تصحيح بين السطرين

²⁴ في هذا: تصحيح بين السطرين

²⁵ ولكن يقف: ولكن أرى أن يقف

²⁶ قلت: قلت لابن القاسم

(وقوفهم عنه عند) الجمرتين فيدعو كما يتحرى حال رميهم عنه فيكبر؟²⁷
 قال ما سمعت من مالك فيه شيئاً ولكن
 (أرى ذلك حسناً) مثل التكبير في رميهم عنه الجمار يتحوى ذلك
 فيدعو.²⁸

²⁹(رسم في أخذ الرجل من شعره)
 قلت أرايت الرجل إذا قصر يأخذ من جميع
 (شعره أو يجزئه) بعضه دون بعض؟ قال يأخذ من شعر رأسه كله ولا
 10 يجزئه إلا أن يأخذ من جميعه. (قلت فإن جا) مع في عمرته بعد ما أخذ بعض
 شعره وبقي بعض لم يأخذ منه يكون عليه الدم أم لا؟ قال عليه
 (الهدى). قلت (والنساء والصبيان في ذلك بمنزلة الرجال؟ قال نعم. قال
 وقال³⁰ مالك من وطئ النساء ولم يقص من شعره في عمرته فعليه الهدى
 فهذا عندي مثله.

سمعت من سخون سنة (. . . .) الأم وسمعه سعيد بن محمد بن رشيد
 سمعته وقر(يته من؟) سخون سنة خمسة وثلاثين ومائتين

Two variations from the printed text are worth noting: first, the subject of the verb *qāla* is twice left unclear in the Kairouan fragment, while the printed edition identifies the speaker as Ibn al-Qāsim. Without these insertions, Mālik is the only identified authority in this text. Equally important, a subtitle appears in the printed version, but is not included in this fragment. Not only do subtitles demonstrate an attempt to give the text an organizational structure, they can also subtly change the meaning of some sections.³¹ Muranyi observed similar variants in other early manuscripts, demonstrating that while the contents of chapters were fixed early on, the organization of these chapters was not established until the fifth/eleventh century, with some variants noted even later.³² Muranyi's

²⁷ فيكبر: ويكبر

²⁸ عنه الجمار يتحوى ذلك فيدعو: عنه عند الجمار يتحى ذلك في الوقت فيدعو

²⁹ ساقطة من المخطوطة

³⁰ قال وقال: قال ابن القاسم قال

³¹ For an example of this, see my "Saḥnūn b. Sa'īd".

³² Muranyi, *Rechtsbücher*, 15.

claim that Saḥnūn's work existed during his lifetime as a series of discrete chapters is nicely demonstrated by this fragment, on which two student notations are still legible. First: "I heard this from Saḥnūn [...] the original and Sa'īd b. Muḥammad b. Rashīd heard it,"³³ and then on the next line: "I heard this from Saḥnūn, reciting it back to him, in the year 235." This second remark was written just one year after Saḥnūn was *qādī*, and it marks this fragment as the oldest dated legal text known to survive.³⁴

This fragment effectively demonstrates, however, that at least in this chapter, Saḥnūn was not concerned to make the connection to Ibn al-Qāsim explicit, and that it was later generations of students who added interpolative remarks to make this attribution clear. To this extent, Calder was right to suspect that later generations worked on Saḥnūn's text. But it is just as interesting to note what those students did not do. Had they been the ones who added a hadith layer to the *Mudawwanah*, then one would expect this fragment—utterly devoid of hadith to be a witness to this layering process. But it is a curious fact that later manuscripts of the pilgrimage chapter also contain no hadiths, even though most every other chapter in the *Mudawwanah* contains both the dialogue with Ibn al-Qāsim and also hadith. The significance of this inconsistency is hard to explain, but it effectively undermines Calder's conjecture that the *Mudawwanah* was subject to ongoing editorial activity by students. Given the age and variety of manuscripts in our possession, we can see precisely what Saḥnūn's students did, and did not, do. We do not, for example, find substantial differences among transmissions by separate groups of students. In an open, school environment, we would expect to find uneven levels of, for example, incorporation of texts by Ibn Wahb or additional material from Saḥnūn's dicta. What we do find are changes of voice in the text³⁵ and small editorial changes that are typical of manuscript transmission. Moreover, we find scholars taking great care to distinguish marginal comments from the text itself.³⁶ From this evidence, one seems forced

³³ Sa'īd b. Muḥammad b. Rashīd cannot be identified.

³⁴ I will review the latest manuscript findings in a forthcoming book.

³⁵ Interesting notes begin sections on 2:152 and 4:30, but these do not necessarily suggest that students were exercising authorial control over the manuscript. Rather, they are part of the transmission of this manuscript, including by the editor.

³⁶ Muranyi has documented many instances where marginalia *are* copied into later manuscripts, but copied as marginalia. In some cases, these are then deserving of secondary commentary (*Rechtsbücher*, 56–7). See also p. 69 for discussion of Saḥnūn's entertaining personal remarks recorded by students as marginalia, but not entered into the text itself. For a rare exception in one manuscript (but not in the printed version) see Muranyi, *Rechtsbücher*, 29–30.

to conclude that the *Mudawwanah* was subject to a very conservative editing, one that did not seek to polish its formulations or to impose a different sense of order, though chapter headings and minimal interpolative remarks were added.

But while it was almost certainly Saḥnūn himself who added the layers of hadith, the *Mudawwanah* does not seem to be overly concerned with the *uṣūlī* question of sources. Certainly Saḥnūn makes no effort here to defend or adhere to a four-source theory of Islamic law. What is radically new about the *Mudawwanah* is not its literary forms or its clarity of argument, but rather the fact that it is an utterly impractical text. If you knew nothing about Islamic law, you could not learn it by reading the *Mudawwanah*. Saḥnūn provides no introduction to the novice, little of use to a court functionary or a judge. The concerns in this fragment are typical of the *Mudawwanah* in that they reflect more of a fascination with interstitial categories than they do practical matters of law. Questions here focus not merely on a child who goes on pilgrimage, but a mentally impaired child; women, slaves and the ill often come to the fore in this text, and many questions are so arcane that Ibn al-Qāsim is forced to give his own opinion, having heard nothing from Mālik on these issues. As Calder correctly observed, the *Mudawwanah*'s jurisprudence "is not a logical presentation of known rules but a reflection of developing thought about rules."³⁷

It can be useful to think of this distinction, between known rules and reflection about rules, as first-order and second-order questions. First-order questions inquire into the basic rules of ritual or practice; these texts describe what to do, but not why. Anyone without the least training in law could come to first-order texts and learn how to perform the ritual prayer or conduct business transactions. Texts based on first-order questions seem closely tied to court practice and daily life; they lend themselves to exposition of settled law and would have been useful as legal primers. In contrast, second-order questions are concerned with small details, interstitial categories and controversies that arise in discussions about law. These texts are themselves discursive and even contradictory. The point of second-order questions is not so much to explain what to do in a situation as to explore the boundaries of law, and, indirectly, the very nature of law itself. Theological and philosophical arguments are embedded in these texts, though they are not often drawn out specifically. In second-order texts, I believe we can see a central element of the piety of

³⁷ Calder, *Studies*, 7.

the shari‘ah-minded. It is not so much, *pace* Hodgson, that they hold to specific doctrines, but that they are totally consumed with contemplation of the law. The utter impracticality of the *Mudawwanah* is the marker of this piety, as one must be a true devotee of the law in order to understand, much less comment on, its discussion.

To these two categories I would like to add the notion of third-order questions, those that are primarily interested in the theoretical categories that surround actions, connecting them with fundamental and wide-reaching principles of jurisprudence. Third-order questions ask both how law came to be as well as how law should be extended in future situations. Texts based on third-order questions may be apologetic and defensive (rationalizing a law as Islamic) or polemic and offensive (rejecting a law as un-Islamic). But they can also be, in Lowry’s terms, “pure theory,” devoted to the understanding of law’s connection to Prophet and Qur’ān for its own sake.

To some extent, I see a historical progression from first- to second- and then third-order questions. No matter the motivation, the interstitial categories of law can hardly be argued before the basics of law had been established, for example. Yet in terms of legal writing, our oldest examples, such as the *Muwaṭṭa’* and al-Mājishūn’s legal texts, appear to mix together second-order and first-order questions. This suggests, I believe, that the “functionalist” and “theological” trends in Islamic law grew up together, and were only later separated out. The *Mudawwanah*, to my mind, is our first example of a pure “second-order” text in the Medinan tradition, just as Ibn ‘Abdallhākam’s *Mukhtaṣar al-saghīr* is our earliest example of a pure first-order text.

Saḥnūn’s obsession with second-order questions is not, I would argue, an attempt to extend the reach of Islamic law into the actual lives of the Muslim community. Indeed, the examples from this fragment are unlikely to have been much use for either a *qāḍī* or a *muftī*. In this sense, second-order questions might extend our understanding of the word *fiqh* (insight) into the nature and meaning of law. Studying the *Mudawwanah* would not necessarily make one a better judge—Saḥnūn himself does not appear to have been particularly successful in carrying out his legal duties, for example—but it does an excellent job of presenting a means by which one may meditate on law.

These observations about second-order texts suggest a rather different meaning for Islamic law than the functionalist definitions that have been in vogue. They suggest that Islamic law has less in common with

the digests and functionality of some aspects of Roman law and more in common with Near Eastern models. Recent work on Mesopotamian law codes, even the famous "code" of Hammurabi, suggest that they were not guides for judges and not applied in courts as we would expect.³⁸ Rather, they were the site of pious reflection on the meaning of law in religion. The Talmuds seem to address similar interests. In exile from Israel, the scholars who wrote reflections on legal pronouncements in the Bible and the Mishnah were increasingly separated from the real world of king and court, yet they continued to focus intensely on law as the site of interaction with God. In this way they continue an understanding of law as expressed centuries earlier by the psalmist:

Oh, how I love your law!
 I meditate on it all day long.
 Your commands make me wiser than my enemies,
 for they are ever with me.
 I have more insight than all my teachers,
 for I meditate on your statutes.
 I have more understanding than the elders,
 for I obey your precepts.³⁹

In this sense, one might consider the *Mudawwanah* to be a bridge between the genres of *fiqh* and *uṣūl al-fiqh*, since it exemplifies an utter devotion to law that is a necessary component of *uṣūl* texts.

But it seems to me that this key element to the piety of the sharī'ah-minded might be found in first-order texts as well, of which the early *mukhtaṣarāt* are prime examples. While Mohammad Fadel has adduced much evidence to demonstrate that later *mukhtaṣarāt* were used as authorities for legal decisions,⁴⁰ Hallaq points out that the authority of these texts was dependent on the community of jurists, who could choose to cite different authorities or to dilute the power of the *mukhtaṣar* in other ways.⁴¹ An example is found in the way that students read Ibn 'Abdalḥakam's *Mukhtaṣar al-ṣaghīr*, making it into a type of *ikhtilāf* text

³⁸ Gonzalo Rubio, "From Sumer To Babylonia: Topics In The History Of Southern Mesopotamia" in *Current Issues in the History of the Ancient Near East*, ed. Mark W. Chavalas. Claremont: Regina Books, 2007, 1–51, at 33–34.

³⁹ Psalm 119: 97–100, New International Version.

⁴⁰ Mohammad Fadel, "Social Logic of *Taqīd* and the rise of the *Mukhtaṣar*" *Islamic Law and Society* 3 (1996): 193–233.

⁴¹ Wael Hallaq, "Introduction: Issues and Problems" *Islamic Law and Society* 3 (1996): 127–136, at 134.

by inserting the opinions of early jurists alongside his own. The effect of this process is manifold, but it certainly reduces the all-encompassing nature of the original and renders the whole text far less practical as an authoritative guide to the law. Evidently, first-order texts were never used as codes, but perhaps the early *mukhtaṣarāt* were also never meant to serve as authoritative guides to law. If the same piety exemplified by Saḥnūn's *Mudawwanah* was operative a generation earlier in Egypt, it may be that first-order texts were also meant to serve primarily as a foundation for reflection on God's law, rather than a compendium for practical application in a court. Certainly they were teaching texts, but perhaps not merely for the training of lawyers and judges and other legal professionals, but also for those who would study law as a road to piety and grace.

In his broad survey of the Near Eastern legal context, Weiss does not say much about the development of Jewish law in late antiquity. This choice is reasonable, given the fact that Weiss argues for an Islamic law that was not heavily influenced by either Byzantine or Sasanid models. I am also making no arguments here for borrowing of legal precepts or institutions from any particular tradition. Rather, I am suggesting that early Muslim jurists understood Islamic law to be more than a series of divine commands to be carried out, but also a subject worthy of philosophical and theological reflection in its own right. I argue that the sorts of questions that occupied Saḥnūn were similar to those that occupied the authors of the Talmuds.⁴² Intense concern with second-order questions goes far beyond a "functionalist" concern with law to a deeper sense of law as a place to encounter the divine. For some, such as al-Shāfi'ī, this motivation may result in a desire to find the divine footprint at the heart of the law, how God designed things. For others, such as Saḥnūn, it results in intense study and concentration on the law itself, teasing out all its permutations in actual as well as fantastical cases.

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⁴² To my mind, this method of organizing genres by the type of question asked by the author(s) has the same advantages of comparability as organization by literary style (championed by Calder). In contrast, organization by indigenous genre (the *mukhtaṣar* for example) has little comparability and presumes a unity to such texts that cannot be supported by the evidence.

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SINS, EXPIATION AND NON-RATIONALITY IN ḤANAFĪ AND SHĀFIĪ *FIQH*

Christian Lange

He said, “Muḥammad, do you know what the heavenly host debate?” I said, “No.” So He put His hand between my shoulder blades until I felt its coldness between my collarbones. Then I knew what was in the heavens and what was in the earth. He said, “Muḥammad, do you know what the heavenly host debate?” I said, “Yes, [they debate] about the expiatory acts [*al-kaffārāt*] [...]”¹

1. ISLAMIC LAW AS DIVINE LAW AND AS A JURISTS’ LAW

In Western scholarship, Islamic law has been variously described as a divine law and as a jurists’ law. Admittedly, these two characterizations are not mutually exclusive. However, the question as to which factors, divine or human, were more important in the formation and continued development of *sharī‘ah* law has significant repercussions for our understanding of the degree of this legal tradition’s rationality.² The relationship between theology (*kalām*) and legal reasoning (*fiqh*) in Islam therefore remains a fruitful field of investigation.

Some scholars have emphasized that Islamic legal thinking is anchored in the idea of a metaphysical stimulus extrinsic to itself; for these scholars, Islamic law has an indelibly divine, and therefore non-rational, aspect. As Noel Coulson wrote in his *Conflicts and Tensions in Islamic Jurisprudence*, “in the fully fashioned fabric of the law the threads of divine revelation and

¹ Tirmidhī, *Sunan, Tafṣīr sūrat 38*, 2. Cf. Qur’ān 38:69, where Muḥammad is instructed to admit that he has no knowledge of what the angels in the “High Council” (*al-mala’ al-a’lā*) debate about. Here and in what follows, *ḥadīths* from the nine books (*al-kutub al-tis‘ah*) are cited according to Wensinck’s *Concordance*.

² In the following, unless indicated otherwise, I use the term “rationality” in the sense of “consistency of reasoning *within* a belief system,” what Jon Elster (1983) calls “thin rationality” (as opposed to “broad rationality,” which is grounded in the concept of the autonomy of human judgment). Cf. Tambiah, *Magic, Science, Religion*, 117–8. For this reason, in this article I avoid the term “irrationality,” which belongs in the conceptual framework of “broad rationality.”

human reason are so closely interwoven as to be almost inseparable".³ In Coulson's judgment, "juristic speculation [...] was entirely subordinate to the divine will in the sense that its function was to seek the comprehension and the implementation of the purposes of Allāh for Muslim society".⁴ Also emphasizing the divine dimension of Islamic law, Wael Hallaq has stated that Islamic law "presupposed [...] theological conclusions and went on to build on them".⁵ As has been suggested, even if *kalām* in the later stages of its development lost its grip on the law, theological presuppositions and implications remained implicit in *fiqh*,⁶ albeit to a greater extent in *uṣūl al-fiqh* than in positive law (*furū' al-fiqh*).⁷

Others, on the other hand, have preferred to stress that Islamic law developed following an intrinsic logic that was independent from its perceived origin in revelation, in other words, that *sharī'ah* is a system of norms resulting first and foremost from the mundane procedures of human legal reasoning—namely, *fiqh*. In this view the Muslim jurists, once the age of revelation had come to an end and the law's fundamental theological postulates (*mabādi' kalāmiyyah*), such as God's existence and creatorship, had been established, were quite content to do without reference to metaphysics and simply to rely, instead, on "reason's ability to know the law".⁸ As has been pointed out, this was not only the case with regard to some "heterodox" schools of thought, such as the Mu'tazilites and Shī'īs, but also within mainstream Sunnism, for example, among the Ḥanafīs.⁹ The impact of theological concepts on *fiqh* is thus claimed to have been marginal at best. As Baber Johansen has argued, *fiqh* specialists increasingly tended to exclude theologians from the consensus of their discipline, so that "*fiqh* and theology came to differ in essential points."¹⁰ Similarly, Aron Zysow, focusing on the same Transoxanian Ḥanafī jurists of the late-classical period (4th/10th to 6th/12th c.) that are at the center of Johansen's analysis, has stated that in this period, "theology generally

³ Coulson, *Conflicts and Tensions*, 19.

⁴ Ibid. Coulson acknowledges that Islamic law is both a "divine law" and a "jurists' law," but in the passage quoted, the emphasis is clearly on the former characterization.

⁵ Hallaq, *Origins and Evolution*, 129. According to Marie Bernard, the influence of (Mu'tazilī) *kalām* on al-Jaṣṣā's (d. 370/980) *al-Fuṣūl fī l-uṣūl*, which she calls "a turning point in *uṣūl al-fiqh* literature," was pervasive and direct. See Bernard, "Ḥanafī *Uṣūl al-Fiqh*."

⁶ Powers, "Offending Heaven and Earth," 43.

⁷ Abd-Allah, "Theological Dimensions," 238.

⁸ Weiss, *Spirit*, 36.

⁹ Reinhart, *Before Revelation*, 43–56.

¹⁰ Johansen, "The Muslim *Fiqh* as a Sacred Law," 3, 6.

underdetermines legal theory".¹¹ According to Zysow, once *uṣūl al-fiqh* doctrines had acquired a certain stability, theology could exert only a "very limited influence".¹²

Bernard Weiss has elegantly summarized this debate in *The Spirit of Islamic Law*. He underscores that the "extreme voluntarism" of Muslim thinking lead to the refusal of many "to acknowledge any rational element in the law that the human mind is capable of comprehending on its own without the help of revelation".¹³ At the same time, however, Weiss points out that "a sizable segment" among the jurists kept insisting that "since God is a rational being, his law will never conflict with sound rational judgments".¹⁴ Thus, "the law does indeed, for these jurists, accord to a very large extent with the judgments of human reason," but this may be no more than "pure coincidence".¹⁵

This article seeks to shed some additional light on the vexed question of the historical relationships between reason and revelation in Islamic law. In doing so, it follows Zysow's useful lead, who has proposed to study, not the causal relationships that exist between *fiqh* and *kalām*, but the theological "associations" of *uṣūl al-fiqh*.¹⁶ However, while Zysow's focus of attention has been the respective impact (or lack thereof) of Mu'tazilī and Māturīdite theology on *uṣūl al-fiqh*, this paper seeks to trace how an Ash'arite-Māturīdite debate relates to Islamic legal theory. This is the question as to whether grave sinners (*ahl al-kabā'ir*) can legitimately trust that they will be forgiven on Judgment Day and let into paradise, or whether they are likely to be purged of their sins by a temporary punishment in hell. As this article suggests, in *fiqh* this issue resonates with the question as to how widely one defines the scope of the expiatory acts (*kaffārāt*), which were one important means by which sinners might achieve salvation despite disobedience toward God's laws.

The choice of putting a spotlight on the *kaffārāt* is motivated by various considerations. Theological and legal issues intersect when the law touches questions of faith, sins and salvation. Islamic theology offers a variety of ways to ensure salvation, faith (*īmān*) being of course the *conditio sine qua non*. However, the theologians also, and importantly, discussed other

¹¹ Zysow, "Mu'tazilism and Māturīdism," 235. Cf. Brunschvig, *Études d'islamologie*, II, 323: The *uṣūl al-fiqh* demonstrate "face au *kalām* théologique... une suffisante autonomie."

¹² Zysow, "Mu'tazilism and Māturīdism," 264.

¹³ Weiss, *Spirit*, 35.

¹⁴ *Ibid.*, 36.

¹⁵ *Ibid.*, 37.

¹⁶ Zysow, "Mu'tazilism and Māturīdism," 235.

means by which God's forgiveness (*maghfirah*) for sins can be achieved and the Muslim be assured a place in paradise. These additional mechanisms for salvation include repentance (*tawbah*), intercession (*shafā'ah*) and compensation (*ihbāt*) for sins by good actions (*ḥasanāt*). The atonement of sins through specific expiatory acts (*kaffārāt*) appears to belong to the latter category. While *imān*, *shafā'ah* and *tawbah* largely (if not entirely)¹⁷ remained the province of theology,¹⁸ the *kaffārāt*, as observable (*ẓāhir*) actions, entered into the sphere of legal discussion. Accordingly, it is with the *kaffārāt* that the present investigation will be concerned. In addition to enhancing our understanding of the extent to which Islamic law, as it found its classical formulation toward the end of the 'Abbāsīd period,¹⁹ was in conversation with theology, or how much impact *kalām* had on the formation of *fiqh* and *uṣūl al-fiqh*, this article is also conceived as a contribution to the study of *kaffārāt*, a topic which invites further investigation.

2. THE KAFFĀRĀT IN THE QUR'ĀN AND ḤADĪTH

Before discussing the place of the *kaffārāt* in *fiqh* literature, an overview of the Qur'ānic and *ḥadīth* background to the topic seems in order. Neither in the Islamic corpus of religious literature nor in Western scholarship has the question of the *kaffārāt* received much attention.²⁰

The Qur'ān lays out a core group of expiatory acts for a number of offences. It details expiatory acts for breaking the fast in the month of

¹⁷ See, for example, the important place of public repentance and recantation in the Muslim law of apostasy. Opinions on whether "inner belief" and "inner repentance" was enough to avoid legal punishment or whether there had to be external proof of the sincerity of repentance, however, differed greatly among and within the legal schools. See Griffel, "Toleration and Exclusion," 339–54.

¹⁸ Cf. van Ess, *Theologie und Gesellschaft*, IV, 580.

¹⁹ For the concept of a "classical age" in the development of *fiqh*, see Chehata, *Études*, I, 21–24; Meron, "Development," 73–118, esp. 92–95; Johansen, "Eigentum, Familie und Obrigkeit," 4.

²⁰ Other than the entries "Expiation and Atonement—Muslim," in *Encyclopaedia of Religion and Ethics* (by D.S. Margoliouth), "Kaffāra" in the second edition of the *Encyclopaedia of Islam* (by J. Chelhod), and "Atonement" in the recent *Encyclopaedia of the Qur'ān* (by G. Hawting), the main contribution in this field appears to remain that by Mensia, "L'acte expiatoire," 125–39. Other studies focus on specific legal aspects of *kaffārah*. Cf. Fierro, "Caliph Legitimacy," 55–62 (historical examples of rulers' *kaffārah* for sexual intercourse during the fast in Ramaḍān and for breaking an oath); Powers, "Offending Heaven and Earth" (legal doctrines about *kaffārah* for homicide). See now also Lange, "Expiation," *EI3*.

Ramaḍān without reason (2:184), for violations of some of the ritual requirements of *ḥajj* (2:196, 5:95), for uttering vain oaths or breaking oaths (*aymān*, 5:89), for using the pagan pre-Islamic *ẓihār* formula in divorcing one's wife (5:82–4), and for unintentional homicide (*qatl al-khaṭa'*, 4:92).²¹ Typical acts of atonement specified by the Qur'ān include feeding and clothing a number of the poor, emancipating a slave, and fasting for a specified number of days.²² A number of further distinctions are made. For example, Qur'ān 4:92 distinguishes between the unintentional killing of a Muslim and of a Muslim "from an enemy people" (*min qawm 'aduww*); the latter act only requires the freeing of a slave, while the former calls for the additional payment of blood-money (*diyyah*).

In addition to the Qur'ān, a significant number of *kaffārāt* are compiled in the *ḥadīth*. The list includes *kaffārāt* that atone for further transgressions against the fast in Ramaḍān,²³ misbehavior in the mosque,²⁴ misuse of solemn pledges (*nadhhr*),²⁵ including the swearing by non-Islamic deities (such as Allāt or al-'Uzzah),²⁶ sexual intercourse with menstruating women,²⁷ and some others. All in all, one is dealing here with a rather substantial but heterogeneous group of norms. The question therefore arises as to how one is to account for this diversity. Can any classificatory principles in this body of traditions be ascertained?

How, for example, do the *kaffārāt* relate to the concept of sin? The Qur'ān states that "as long as you abstain from grave sins (*kabā'ir*) we will cover up (*nukaffir*) your [other] sins (*sayyi'āt*)" (4:31). From this one could infer that the *kaffārāt* can only atone for minor sins (*ṣaghā'ir*) but not major ones (*kabā'ir*), and this is indeed how some theologians saw

²¹ Later Shāfi'ī jurists discussed the permissibility and indeed the obligation to perform *kaffārah* not only for accidental, but also for intentional homicide. See Powers, "Offending Heaven and Earth," 44. For difference of opinion among the Ḥanafis and Shāfi'īs in this question, see also Quwayzānī, *Kaffārāt*, 15.

²² These three types of expiatory acts are sometimes referred to simply as *kaffārat al-yamīn* (cf. Qur'ān 5:89). Cf. Ullmann, *WKAS*, I, 266a.

²³ Mālik b. Anas, *Muwatta'*, *Ṣiyām* 9 (eating); Bukhārī, *Ṣaḥīḥ*, *Ṣawm* 30 (sexual intercourse).

²⁴ According to Bukhārī, *Ṣaḥīḥ*, *Ṣawm* 37, the *kaffārah* for spitting in the mosque is to dig a hole and bury the spit in it (*dafnuhu*).

²⁵ Muslim, *Ṣaḥīḥ*, *Nadhhr* 5; Ibn Ḥanbal, *Musnad*, IV, 144, 146, 147; Ṣan'ānī, *Muṣannaḥ*, VIII, 433, also mentions pledging to disobey God (*ma'ṣiyat Allāh*). The *kaffārah* in all instances is the same as *kaffārat al-yamīn*.

²⁶ Nasā'ī, *Sunan*, *Aymān* 12.

²⁷ Dārimī, *Sunan*, *Wuḍū'* 109.

the issue.²⁸ However, let it be noted immediately that in post-Qur'anic literature, sins whose status as major sins was seldom disputed were also matched with specific *kaffārāt*. Notably, *ḥadd* crimes such as theft and fornication, both indisputably major sins, can be atoned through their earthly punishment.²⁹ The same goes for killing one's children and for spreading slander (*buhtān*); even the punishment for *shirk*, or "associating other gods with God," that is, execution in the case of the apostate, is a *kaffārah* for the *mushrik*.³⁰ There are *kaffārāt* for a number of other major sins enumerated by al-Dhahabī (d. 748/1348) in his standard work on the topic, such as abstention from giving *zakāt*,³¹ belief in evil omens (*ṭiyarah*),³² desecration of the *ḥaram* in Mecca,³³ forms of negligence in praying,³⁴ and violently beating or torturing one's slave.³⁵ One also has to allow for the possibility that more *kaffārāt* could be extrapolated from the law by way of analogical extension (*qiyās*)—a jurisprudential point of disagreement which will be discussed in greater detail below. At any rate, it is not the case that the *kaffārāt* were conceived to serve to compensate for minor sins only.³⁶ In fact, the relationship of *kaffārah* to sin is far from straightforward.³⁷

The somewhat fluid boundaries of the concept of *kaffārah* in Islamic tradition may have accorded with the pious feeling that, as is suggested in the tradition in al-Tirmidhī's (d. 279/892) *Sunan* quoted at the beginning of this article, only the angels in heaven's High Council and the Prophet himself can comprehend the topic. Further exacerbating this confusion was that a large number of *ḥadīths*, possibly reflecting pre-Islamic sacrificial practice,³⁸ express the idea of propitiation, rather than expiation

²⁸ According to Abū l-Yusr al-Pazdawī, *Uṣūl al-dīn*, 145–7, the *ḥasanāt*, which can only be acts of worship (*ʿibādāt*), such as prayer, do not obliterate the *kabāʿir*, but they do obliterate the *ṣaghāʿir*.

²⁹ Ṣanʿanī, *Muṣannaḥ*, VII, 326 (stoning of an adulteress), VII, 328; Bukhārī, *Ṣaḥīḥ*, *Īmān* 11.

³⁰ *Ibid.*

³¹ Suyūṭī, *Laʿālī*, II, 347; Ibn Ḥajar, *Lisān al-mīzān*, VII, 65. Cf. Dhahabī, *Kabāʿir*, #5.

³² Ibn Ḥanbal, *Musnad*, II, 220. Cf. Dhahabī, *Kabāʿir*, #63.

³³ Ṣanʿanī, *Muṣannaḥ*, IV, 435–7, stipulates a *kaffārah* for killing game inside the *ḥaram* or in an *iḥrām* state. Cf. Dhahabī, *Kabāʿir*, #73.

³⁴ Dārimī, *Sunan*, *Ṣalāt* 205, stipulates the giving of one *dīnār* as *kaffārah* for omitting the congregational prayer on Friday without excuse.

³⁵ Muslim, *Ṣaḥīḥ*, *Aymān* 8; Muttaqī, *Kanz*, IX, 36. Cf. Dhahabī, *Kabāʿir*, #66.

³⁶ This is suggested by Mensia, "L'acte expiatoire," 126, 133, 139.

³⁷ Sometimes, as in the case of accidental homicide, *kaffārāt* are even due for non-sins. See Power, "Offending Heaven and Earth," 44.

³⁸ Margoliouth, "Expiation and atonement."

for specific sins. The aim of propitiation is to appease God and to seek conciliation with Him. Acts of *kaffārah* thus conceived do not atone for specific transgressions, but for *any* sin. This notion is already found in the Qurʾān, which states that “good works [*ḥasanāt*] remove evil works [*sayyiʿāt*]” (11:114). Qurʾān 5:45 declares the act of forfeiting one’s claim to retaliation (whether in cases of homicide or injury) to be a *kaffārah*, without mentioning the offence that this specific *kaffārah* might help to expiate. The performing of *kaffārah* here is simply a way to accumulate merit in the eyes of God; it gives Muslims another argument that can be adduced in their favour on the Day of Reckoning (*ḥisāb*), when the good deeds are weighed against the bad ones.

From the Qurʾān, the idea of propitiatory *kaffārāt* appears to have spread into the *ḥadīth*, where one finds listed a great number of propitiatory acts, such as showing remorse (*nadāmah*),³⁹ seeking (religious) knowledge (*ṭalab al-ʿilm*),⁴⁰ martyrdom in *jihād*,⁴¹ fasting,⁴² frequent and extended visits to mosque⁴³ and, especially, proper ablutions⁴⁴ and prayer.⁴⁵ Here one might also mention traditions which state that calamities (*muṣībāt*) that befall human beings, such as grave illness (*saqam*),⁴⁶ fever,⁴⁷ black death,⁴⁸ and even menstruation,⁴⁹ function as *kaffārah*. Needless to say, not all of these traditions were considered authentic, and other traditions militated against the kind of *carte blanche* mentality expressed in them. Thus, a group of traditions have it that a certain good action can serve as atonement *except* for sins that were thought to be especially grave. For example, one finds the notion that proper ablution and praying are expiation for all sins *except* the major sins.⁵⁰ Ibn Ḥanbal’s (d. 241/855) *Musnad* records the opinion that there is *kaffārah* for every sin “except *shirk*, illegal killing, plundering Muslims, flight from the battlefield, and false oaths”.⁵¹

³⁹ Ibn Ḥanbal, *Musnad*, I, 289; Muttaqī, *Kanz*, IV, 88, 91.

⁴⁰ Tirmidhī, *Sunan*, *ʿilm* 2; Dārimī, *Sunan*, *Muqaddimah* 46; Muttaqī, *Kanz*, III, 111.

⁴¹ Mālik b. Anas, *Muwattaʿaʿ*, *Jihād* 31; Muslim, *Ṣaḥīḥ*, *Imārah* 117.

⁴² Ibn Ḥanbal, *Musnad*, III, 55.

⁴³ Ibn Mājah, *Sunan*, *Ṭahārah* 50; Muttaqī, *Kanz*, XV, 391.

⁴⁴ Ibn Mājah, *Sunan*, *Ṭahārah* 50; Muttaqī, *Kanz*, XV, 391. All declare that ablution in the *makāriḥ*, uncomfortable circumstances such as cold winter mornings, is a *kaffārah*.

⁴⁵ Muslim, *Ṣaḥīḥ*, *Ṭahārah* 4; Muttaqī, *Kanz*, I, 57, VII, 129, 305. Special prayers such as *qiyām al-layl* are likewise mentioned. See Ibn Ḥanbal, *Musnad*, V, 237.

⁴⁶ Ṣanʿānī, *Muṣannaḥ*, XI, 197; Abū Dāwūd, *Sunan*, *Janāʿiz* 1.

⁴⁷ Tirmidhī, *Sunan*, *Daʿawāt* 101.

⁴⁸ Ibn Ḥajar, *Lisān al-mizān*, I, 211.

⁴⁹ Muttaqī, *Kanz*, IX, 270.

⁵⁰ Muslim, *Ṣaḥīḥ*, *Ṭahārah* 4; Muttaqī, *Kanz*, I, 57.

⁵¹ Ibn Ḥanbal, *Musnad*, II, 361.

Other traditions seek to circumscribe the wide scope of propitiatory acts by defining a specific temporal frame within which sins are forgiven. For example, a *ḥadīth* states that performance of the minor pilgrimage (*ʿumrah*) atones for all sins committed between two *ʿumrahs*.⁵² Fasting on the Day of ʿĀshūrā amends for all sins of the preceding year.⁵³

Expiatory acts, on the other hand, offer ways to atone for specific sins. Put differently, the object of expiation is sin itself, while the object of propitiation is God. All the *kaffārāt* mentioned in the Qurʾān, with the exception of 5:45, are of the expiatory type and, as indicated above, a significant number of other expiatory *kaffārāt* can be found in the *ḥadīth*, both in the canonical and the non-canonical collections. Unlike in the case of the *kabāʿir*,⁵⁴ however, there seem to exist no comprehensive lists of expiatory *kaffārāt*. Sunnī works specifically dedicated to the *kaffārāt*, to the best of my knowledge,⁵⁵ are a late, post-6th/12th-century phenomenon and deal exclusively with the propitiatory type of *kaffārāt*, promising forgiveness for “former and future sins (*mā taqaddama wa-mā taʾakhhara min al-dhunūb*)”.⁵⁶ The absence of systematic interest by Muslim authors with regard to the classification of expiatory acts is noteworthy, and some hypotheses to explain this phenomenon will be advanced below. For the moment, however, suffice it to note a number of points.

⁵² Bukhārī, *Ṣaḥīh*, *ʿUmrah* 1.

⁵³ Ṣanʿānī, *Muṣannaḥ*, IV, 285–6; Ibn Ḥanbal, *Musnad*, VI, 128.

⁵⁴ In addition to Dhahabī’s *K. al-Kabāʿir*, see the works of al-Ḥākim al-Tirmidhī (fl. late 3rd/9th c.), *Manḥiyāt*, and Ibn Ḥajar al-Haythamī (d. 974/1567), *Zawājir*. For the development of the notion of *kabāʿir*, see further Lange, *Justice*, 101–11.

⁵⁵ One possible exception is Ibn Abī l-Dunyā’s (d. 281/894) *Al-Maraḍ wa-l-kaffārāt*, which I have not been able to consult. See the editor’s list of works of Ibn Abī l-Dunyā in idem, *Man ʿasha*, 148.

⁵⁶ I know of six works devoted to this topic from the 7th/13th to the 10th/16th century. These are [1] ʿAbd al-ʿAzīm b. ʿAbd al-Qawī al-Mundhirī (Shāfiʿī/Egypt, d. 656/1258), [*Juzʿ*] *fi-man ghufira lahu mā taqaddama min dhanbihi wa-mā taʾakhhara* (unedited), mentioned in Ḥājī Khalifa, *Kashf*, I, 589. Cf. Kaḥḥālah, *Muʿjam*, II, 171. [2] Muḥammad b. ʿAbd al-Dāʾim Ibn Bint al-Maylaq (Shāfiʿī/Egypt, d. 797/1395), *al-Wujūh al-musfirah ʿan taysīr asbāb al-maghfirah* (unedited). See Kaḥḥālah, *Muʿjam*, III, 388 (no. 13919). [3] Ibn Ḥajar al-ʿAsqalānī (Shāfiʿī, d. 852/1449), *al-Khiṣāl al-mukaffirah li-l-dhunūb al-muqaddamah wa-l-muʾakhharah*. [4] ʿAbd al-Raḥmān b. Khalīl al-Qābūnī (Shāfiʿī/Damascus, d. 869/1465), *Bishārat al-maḥbūb bi-takfīr al-dhunūb*. [5] Jalāl al-Dīn al-Suyūṭī (Shāfiʿī, d. 911/1505) wrote a didactic poem (*manzūmah*) about expiatory acts. [6] Muḥammad b. M. b. ʿAbd al-Raḥmān ʿal-Ḥaṭṭāb ʿal-Ruʿāynī (d. 954/1547, Tripoli/Libya), *Tafriḥ al-qulūb bi-l-khiṣāl al-mukaffirah li-mā taqaddama wa-mā taʾakhhara min al-dhunūb* (unedited). See Kaḥḥālah, *Muʿjam*, III, 650. For a list of works from this genre, see the introduction by the editor to Ibn Ḥajar’s *Khiṣāl*, 8.

To begin, the number of expiatory *kaffārāt* grew over the first centuries of Islam and, in fact, throughout the later Middle Period.⁵⁷ All in all, the Qurʾān and *sunnah* speak of about fifty, perhaps more, expiatory *kaffārāt*. This is an estimate, however, and does not account for the issue of the authenticity of certain *ḥadīths*, or in fact for the ways in which the *fuqahāʾ* elaborated on the issue of expiation, the topic to which we will turn in the next section.

Secondly, this growth may be said to have been facilitated by the lack of distinction between propitiatory acts and expiatory acts in the Muslim doctrine of atonement. The Qurʾān introduces the idea that certain good deeds can atone for *all* sins. This idea is clothed into traditions such as “every [sinful] act has a *kaffārah* (*li-kulli ʿamal kaffārah*),”⁵⁸ which implies that every sin, whether minor or major, has a *kaffārah* that corresponds to and compensates for it. But in the absence of scriptural indicators, how was one to know what the required *kaffārah* was? There was a certain pressure, then, that such scriptural indicators, in the form of *ḥadīth*, would be “found”.

Thirdly, the *kaffārāt* increasingly penetrate the realm of the *kabāʾir*. In the early 3rd/9th century, al-Shāfiʿī (d. 204/820) still was not sure whether *ḥadd* crimes could indeed be expiated by their earthly punishment,⁵⁹ but the proliferation of *ḥadīth* did away with such doubts.⁶⁰ This tendency culminates in traditions such as the *ḥadīth* preserved by al-Suyūṭī (d. 911/1505) that to carry the bier in a funeral procession is expiation for fifty of the *kabāʾir*.⁶¹ This development must have been worrisome for the theologians and in particular to the proponents of *al-waʿd*, the divine

⁵⁷ Muttaqī, *Kanz*, mentions a plethora of traditions not found in the ‘classical’ collections. For example, he cites traditions prescribing *kaffārāt* for breaking the fast in Ramaḍān by cupping (one additional day of fasting), breaking the promise to donate money to the Kaʿba (same as *kaffārat al-yamin*), saying “Yathrib” instead of “Medina” (saying “Medina” ten times), and others. See *ibid.*, VIII, 275, XII, 116, XVI, 302.

⁵⁸ Bukhārī, *Ṣaḥīḥ*, *Tawḥīd* 50; Ibn Ḥanbal, *Musnad*, II, 457, 467, 504.

⁵⁹ Shāfiʿī, *Umm*, VI, 138: *laʿalla l-ḥudūd nazalat kaffāratan li-l-dhunūb*. In other places, however, al-Shāfiʿī seems to lean toward the position that *ḥadd* punishment does indeed serve as atonement, for example when stating that the testimony of the slanderer (*qādhif*) is not accepted before he is punished with *ḥadd*, for as long as he is not punished he remains unfit for testimony (*sharru ḥālan*). See *idem*, *Umm*, VII, 46. Already the traditionist Ibn Abī Dhiʿb (d. 159/776) reported from the Prophet that he did not know “whether or not the *ḥudūd* are *kaffārāt* for those who are punished with them”. Cf. Muttaqī, *Kanz*, XII, 37.

⁶⁰ See the chapters entitled *B. anna l-ḥadd kaffārah* in Ibn Mājah, al-Tirmidhī and al-Dārimī’s *ḥadīth* collections.

⁶¹ Suyūṭī, *Laʿālī*, II, 337.

threat of punishment for the unrepentant Muslim grave sinner (*ṣāhib* or *murtakib al-kabīrah*). This was because the greater the number of expiatory acts that undid grave sins, the less real the prospect of retribution for sins in the hereafter must have appeared. Before we turn to this problem, however, let us first look at legal discussions of the *kaffārāt*.

3. THE KAFFĀRĀT IN SUNNĪ LAW

Fiqh is only concerned with the expiatory kind of *kaffārāt* since Muslim jurists tended to regard the *kaffārāt* as a type of punishment (*‘iqāb*) incurred on account of a specific transgression (*ma‘ṣiyah*).⁶² The propitiatory *kaffārāt*, on the other hand, do not fall under the purview of legal reasoning. As supererogatory rather than normative acts, they lack the legal aspect of punishment, since no offence for which this kind of *kaffārah* is due is specified. In the following discussion of *fiqh*, *kaffārah* shall be understood accordingly, in the exclusive sense of “expiatory act”.

However, none of the standard textbooks of *fiqh* devotes a separate chapter to the concept of *kaffārah*. Instead, the *kaffārāt* are discussed whenever the context invites it, that is, in the chapters on prayer, *ḥajj*, fasting in Ramaḍān, oaths, *ḏihār*, and homicide.⁶³ The jurists’ treatment of the various *kaffārāt* can go to considerable length and detail.⁶⁴ Thus, the *kaffārāt* appear in all three major areas of Islamic jurisprudence, that is, the ritual duties (*‘ibādāt*), transactions between humans (*mu‘āmalāt*), and in penal law (*‘uqūbāt*), but they do so in a rather sporadic and casuistic fashion. As is suggested by the term’s etymology, the *kaffārāt* act to “cover up,”⁶⁵ rather than to “wipe out” or “efface” sins, and in fact there is a ten-

⁶² Mensia, “L’acte expiatoire,” 132.

⁶³ See Santillana, *Istituzioni*, I, 268–71, II, 14f., 100, 630; Juynboll, *Handbuch*, 122, 225, 267–9, 298.

⁶⁴ See, for example, the extended discussion of the *kaffārah* for *ḏihār* in Māwardī, *Hāwī*, XXIII, 353–450. Māwardī discusses, inter alia, the kind of slave that one may or may not manumit, the appropriate times of the year for expiatory fasting, and the kind of food that one may or may not distribute when choosing to feed sixty of the poor. He devotes similarly extended discussions to the *kaffārah* for homicide (ibid., XVI, 308–17) and the *kaffārah* for false oaths (ibid., XIX, 353–401). For an early Ḥanafī treatment of the *kaffārāt al-ḏihār*, see Qudūrī, *Mukhtaṣar* (tr. Bousquet/Bercher), 135–40.

⁶⁵ For example, the night is said to cover (*kafara*) the earth with darkness. See Ibn Manẓūr, *Lisān al-‘Arab*, s.v. *k-f-r*. Cf. Chelhod, “Kaffārah,” 206; Tahānawī, *Kashshāf*, II, 1252. For further references, see Ullmann, *WKAS*, I, 261. See ibid., I, 262, for the second (intensive) form of the verb: *Al-asīru l-mukaffaru*, in Labīd, *Dīwān*, 79 v. 5, means “the prisoner who is covered [with chains]”. An *iwazza mukafarra*, as in Zamakhsharī, *Asās*, 395, is a

dency in *fiqh* to “cover up the cover-up”. An ethos of keeping sins hidden prevails in much of Islamic legal discourse, which may help explain the reluctance in *furūʿ* literature to treat the *kaffārāt* as *sui generis*. The Ḥanafī al-Sarakhsī (d. ca. 483/1090), to give an example, opines that an animal sacrifice, if meant as *kaffārah*, is better performed in secret because otherwise the sin for which this *kaffārah* is meant to compensate would be made public (*tashhūr*); on the other hand, if the sacrifice is an act of supererogatory devotion, its public performance is recommended.⁶⁶

Next to the casuistic discussions of *kaffārah* in *furūʿ* textbooks, debates about the *kaffārāt* arise in certain chapters in legal hermeneutics (*uṣūl al-fiqh*), and it is on *uṣūl al-fiqh* that the emphasis will be laid in the following paragraphs. As it turns out, the Ḥanafī and the Shāfiʿī *uṣūlīs* were sharply divided on the question as to whether the *kaffārāt* can be subjected to the process of analogical reasoning (*qiyās*). A post-classical Egyptian authority, the Ḥanafī chief judge of Cairo Ibn al-Turkumānī (d. ca. 745/1344) relates that the Ḥanafīs do not accept *kaffārāt* “except where God has ordained (*qaddara*) them,” and he explicates that “nothing can be assimilated to them (*lā yajūzu l-tamthīl ʿalayhā*), and nobody may impose a duty [of this kind] on a Muslim except on the basis of the Qurʾān, *sunnah* and consensus [of scholars]”—but not, as he appears to imply, on the basis of *qiyās*.⁶⁷

Ibn al-Turkumānī’s point is one that the Ḥanafīs had made at least since the time of Abū Bakr Aḥmad b. ʿAlī al-Jaṣṣāṣ (d. 370/980).⁶⁸ Al-Jaṣṣāṣ, commonly considered the founding father of Ḥanafī *uṣūl al-fiqh*, is known for his Muʿtazilī leanings, which is seen in the place of importance he grants reason (*ʿaql*) in determining the law.⁶⁹ In his *uṣūl* work *al-Fuṣūl fī l-uṣūl*, al-Jaṣṣāṣ points out that it is not permissible to use *qiyās* in the *ḥudūd* and *kaffārāt*.⁷⁰ He marshals two arguments for this. First, most of the *kaffārāt* are punishments (*ʿuqūbāt*), and punishments cannot be applied in the presence of doubts (*tusqīṭuhā l-shubhā*).⁷¹ Since *qiyās* is a method of

goose thickly covered in feathers. In the Levitical system, Hebr. *kappārā* is usually a blood sacrifice, which is why Chelhod, against Margoliouth, Jeffrey and Paret, stresses that Arab. *k-f-r* is an autochthonous concept, not derived from Biblical precedent. See Chelhod, “Kaffāra.”

⁶⁶ Sarakhsī, *Mabsūṭ*, IV, 102.

⁶⁷ Ibn al-Turkumānī, *Jawhar*, VIII, 132. On Ibn al-Turkumānī, see Ibn al-Qunfudh, *Waḥyāt*, II, 117.

⁶⁸ Jaṣṣāṣ, *Fuṣūl*, IV, 106.

⁶⁹ See Bernand, “Ḥanafī *Uṣūl al-Fiqh*,” 623–35.

⁷⁰ Jaṣṣāṣ, *Fuṣūl*, IV, 105.

⁷¹ On this legal maxim, see Fierro, “*Idraʿū l-ḥudūd*,” 208–38.

reasoning in which a certain amount of doubt always remains, it is inapplicable to the *kaffārāt*.⁷² Secondly, the *kaffārāt* are “divinely ordained” (*muqaddar*), which is underscored by the fact that they are from the genus (*min qabīla*) of the *maqādīr* (“numerically defined norms”), which have no place in *qiyās* at all. As al-Jaṣṣāṣ elaborates, the numerical aspects of the punishment for crimes (*maqādīr ‘iqāb al-ijrām*) are known only through *tawqīf*, that is, reliance on Qur’ān and *sunnah*. Nobody but God can “calculate” them (*lā yuḥṣihā aḥadu ghayrihi*).⁷³

Another prominent Mu‘tazilite Ḥanafī jurist, Abū l-Ḥusayn al-Baṣrī (d. 436/1044), explains the different epistemological status of the “things ordained by God” by the impossibility to establish the occasioning factor (*‘illah*) of the norms whose object they are. He raises the question (without, however, providing a definitive answer) whether there is a group (*jumlah*) of issues in the law “for which it is known that nothing can show the factor that occasions the norm that governs them (*yu‘lamu annahu lā yajūzu an tadulla dalālatun ‘alā ‘illati aḥkāmihā*).” If such a *jumlah* can indeed be identified, al-Baṣrī suggests, the use of analogy must be rejected for the norms in this group *in toto*.⁷⁴ One senses here a certain skepticism on the side of the Ḥanafīs to inquire into the logical structure of some norms of the law, especially in terms of defining the *‘illah* of the “divinely ordained” norms of the divine law.

A generation later, during the time of the great Ḥanafī-Shāfi‘ī controversies under the Saljūqs of Iran and Iraq in the 5th/11th century, the Ḥanafī position first enunciated by al-Jaṣṣāṣ and elaborated upon by al-Baṣrī came under virulent attack from the Shāfi‘īs. An example of this is Abū l-Muzaffar al-Sam‘ānī (d. 489/1096), a *faqīh* who was brought up and trained as a Ḥanafī and then converted to Shāfi‘ism, a move which caused public riots in his home town of Marv.⁷⁵ In his *Qawāṭi‘ al-adillah*, al-Sam‘ānī states that the Shāfi‘īs oppose the Ḥanafīs in this “well-known

⁷² Jaṣṣāṣ, *Fuṣūl*, IV, 106. For the Ḥanafī position that *qiyās* is inapplicable in the *hudūd* (*lā qiyāsa fi l-hudūd*), see further Lange, *Justice*, 179–99.

⁷³ Jaṣṣāṣ, *Fuṣūl*, IV, 106.

⁷⁴ Baṣrī, *Mu‘tamad*, II, 265. A shorter version of this argument can be found in Rāzī, *Maḥṣūl*, V, 349.

⁷⁵ Abū l-Muzaffar al-Sam‘ānī’s career benefited from the vizier Nizām al-Mulk’s policy of rehabilitating the Shāfi‘ī *madhhab*, which had suffered persecution under sultān Tughril I (r. 429–55/1038–63). Sam‘ānī, who was from a prominent Ḥanafī family and himself a distinguished Ḥanafī *faqīh*, publicly announced his conversion to Shāfi‘ism in 468/1075. Nizām al-Mulk then offered him protection and gave him a place to teach in the Nizāmiyyah in Nishāpūr. See Halm, *Ausbreitung*, 86; Madelung, “The Spread of Māturīdism,” 138 n. 72. From then on, Sam‘ānī appears to have entertained a close connection to Nizām al-Mulk:

issue (*hādhihi l-mas'alah al-ma'rūfah*),” that is, “the applicability of analogical reasoning to the *ḥudūd*, expiatory acts (*kaffārāt*) and all numerically defined norms (*maqādīr*).” He goes on to say that “according to the school of al-Shāfi‘ī, it is permissible to establish expiatory acts and the *ḥudūd* on the basis of analogy,” whereas “according to the followers of Abū Ḥanīfah, it is not”.⁷⁶

From these quotations it has become clear that the *kaffārāt* were not the only realm of the law in which the Ḥanafis rejected analogical reasoning. The *maqādīr* and *muqaddarāt* figure prominently in the discussion,⁷⁷ and in fact the *kaffārāt*⁷⁸ and *ḥudūd*⁷⁹ seem to be subsumed under them. Al-Jaṣṣāṣ and al-Sarakhsī also mention specific numerically defined norms in the *‘ibādāt*.⁸⁰ However, few, if any, exhaustive lists of the *muqaddarāt* or the *maqādīr* appear to exist in Sunnī legal literature. As the Ḥanafis argued, the *muqaddarāt* in the law are, as reported by al-Āmidī (d. 631/1233), “things whose purpose cannot be apprehended in order to infer judgements (*al-umūru l-muqaddarāti l-latī lā yumkinu ta‘aqqulu l-ma’nā li-l-taqdīr*).”⁸¹ Others described the *muqaddarāt* as things that “escape the human mind (*al-‘uqūl lā tahtadī ilayhā*).”⁸² The point seems to be that the *muqaddarāt* are characterized by the sovereign imposition of a norm, without specification of either the concrete reason or the larger purpose (*ḥikmah*) that lies behind the norm. Instead, the *muqaddarāt* are, as it were, givens; they are non-rational in the sense that their logical structure cannot be penetrated. Analogical reasoning in the law, on the other hand, requires the jurist to explain, by a process of independent legal reasoning, why a certain factor

his son Abū Muḥammad al-Ḥasan b. Maṣṣūr transmitted *ḥadīth* from the vizier. See Subkī, *Ṭabaqāt*, IV, 318.

⁷⁶ Sam‘ānī, *Qawāfi‘*, IV, 88.

⁷⁷ Rāzī, *Maḥṣūl*, V, 349, also uses the term *taqdīrāt*.

⁷⁸ See also Zayla‘ī, *Tabyīn*, VI, 100.

⁷⁹ The *ḥudūd* are often referred to as *‘uqūbāt muqaddarah*. See Peters, *Crime and Punishment*, 53. For Ḥanbalī definitions, see Ba‘lī (d. 709/1309–10), *Muṭlī‘*, I, 370; Ibn al-Mufliḥ (d. 884/1479–80), *Mubdī‘*, IX, 43.

⁸⁰ Jaṣṣāṣ, *Fuṣūl*, I, 312, speaks of the *ḥudūd* and the prescribed waiting period of a divorced woman as instances of *maqādīr*. See *ibid.*, II, 318, for the *miqdār* of the duty to fast and to perform the *rak‘ahs* of mid-day (*zuhr*). Sarakhsī, *Uṣūl*, II, 111–2, states that “the *maqādīr* in the *ḥudūd* and *‘ibādāt*, for example the numbers of *rak‘ahs* in prayer, are without doubt things in which there is no room for reasoning (*ra‘y*) so that one may know what they are.”

⁸¹ Āmidī, *Iḥkām*, IV, 65.

⁸² Rāzī, *Maḥṣūl*, V, 353. For Ḥanafī references, see Abū l-‘Uṣr al-Pazdawī, *Uṣūl*, IV, 1643; Ibn al-Humām, *Fath*, II, 35, III, 319, 443; Ibn ‘Abidīn, *Radd*, III, 210, VI, 407. The Ḥanafī-Māturīdī polygraph Qārī, *Mirqāt*, III, 384, reports this principle from Marghinānī as well.

(*‘illah*) occasions the original rule (*ḥukm al-aṣl*), and with what purpose, and then to investigate whether this occasioning factor also occurs in the novel case. Consequently, the argument goes, the *muqaddarāt* fall outside the scope of legal reasoning altogether.

This has repercussions for the degree to which the law is perceived to be transparent and “rational”: if one understands the *muqaddarāt* to be non-rational, the greater one conceives the overlap of the *muqaddarāt* with the totality of norms of *sharī‘ah* to be, the more “non-rational” the law will appear. In this regard, it is noteworthy that Ḥanafī definitions of the *muqaddarāt* seem less comprehensive than those of the other schools. The Ḥanbalīs, for example, also include the portions of inheritance among the *muqaddarāt*,⁸³ and the Shāfi‘ī ‘Abd al-Ra‘ūf al-Munāwī (d. 1031/1621) was of the opinion that the *muqaddarāt* were “too numerous to count”.⁸⁴ In other words, while the Ḥanafīs are unabashed about the fact that the law includes non-rational elements (i.e., the *muqaddarāt* norms), their tendency to define the term rather restrictively allows a sense of the overall (or “broad”)⁸⁵ rationality of the law. By making the theological presuppositions of a well-defined group of norms of the law explicit, the Ḥanafī position safeguards “reason’s ability to know the law”.

As is suggested by al-Jaṣṣāṣ’s reference to the prohibition of punishment in the presence of doubt, there was an added problem for the Ḥanafīs with regard to the kind of knowledge that *qiyās* produces. It was widely accepted by both Ḥanafīs and Shafi‘īs that analogical reasoning could only produce knowledge that had a great probability (*ghalabat al-ẓann*) of being correct.⁸⁶ Probability in the law, with few exceptions, was accepted as a given reality of the human interpretive endeavor to understand God’s intent in revealing His law to mankind.⁸⁷ The Ḥanafīs were no exception to this. They agreed that certainty is not a precondition for declaring acts obligatory or permissible.⁸⁸ Analogical reasoning, they argued, is one of the accepted proofs among the sources of the law (*ḥujjah*

⁸³ See Muqri, *Miṣbāḥ*, II, 469; Kaffawī, *Kulliyāt*, I, 690.

⁸⁴ Munāwī, *Fayḍ*, V, 23.

⁸⁵ Cf. footnote 2.

⁸⁶ Sarakhsī, *Uṣūl*, II, 139, 140. Cf. Rāzī, *Maḥṣūl*, V, 352. Norms derived from analogy (unlike those derived through syllogism) can never be said to be logically waterproof. The *ratio legis* (*‘illah*) is a construct which always carries the probability of being false (*shubhat al-aṣl*). See Bernand, “*Qiyās*,” 238a.

⁸⁷ Weiss, *Spirit*, 92; Hallaq, “On Inductive Corroboration,” 6; idem, *Origins and Evolution*, 130.

⁸⁸ Sarakhsī, *Uṣūl*, II, 139: *‘ilm al-yaqīn laysa bi-sharṭin li-wujūb al-‘amal wa-lā li-jawāzihī*.

aşlıyyah), even if it cannot be considered a method used to arrive at certain knowledge (*‘ilm yaqīnī*).⁸⁹ After all, the Ḥanafīs, from early on, were known as avid defenders of the idea that the law must proceed even in the absence of absolute certainty.⁹⁰ However, with regard to the *muqaddarāt* (including the *kaffārāt*), the Ḥanafīs decided that a critical juncture had been reached where the principle of great probability was no longer good enough. Given that they were generally favorably disposed toward probabilistic reasoning and thought the logic of the law comprehensible, the non-rational domain of the *muqaddarāt* was for them a thorn in the flesh of *sharī‘ah*, to be isolated logically and excised by exclusion from judicial reasoning.

The Shāfi‘īs thought this arbitrary and contradictory. For them, the *muqaddarāt* were unexceptional and no different from the rest of the revealed ordinances, and therefore very well amenable to analogy. In fact, as mentioned above, they refused to grant that the *muqaddarāt* were only a small group (*jumlah*) of the norms of *sharī‘ah*.⁹¹ The Shāfi‘īs imputed “non-rational” arbitrariness to the Ḥanafīs in choosing to set apart what they considered to constitute the *muqaddarāt*, but not other groups of norms in the law.⁹² As al-Sam‘ānī polemically states,

they do not build the law on sound methodological principles. Rather, they have conveniently defined the issues (*waḍa‘ū l-masā‘il*) according to what has seemed correct to them (*tarā‘at lahum*). Then, however, with reference to the aforementioned issues [the *ḥudūd* and *kaffārāt*], something else seemed correct to them, and so they have judged these things to have different norms (*fa-ḥakamūhā bi-ghayri tilka l-aḥkām*).⁹³

According to al-Sam‘ānī, if one accepts that analogy is one of the sound proofs in jurisprudential reasoning that God has given to mankind (*al-qiyās dalīlu llāh*),⁹⁴ there is no *a priori* reason why analogy should be operative in

⁸⁹ Ibid., II, 140. Among the four “sources” (*uṣūl*) of the law, only the Qur’ān, sufficiently attested (*mutawātir*) Prophetic tradition and consensus can lead to absolute certainty (*‘ilm yaqīnī*). See Johansen, “Verité et torture,” 148.

⁹⁰ Cf. Hallaq, *Origins and Evolution*, 114.

⁹¹ Nawawī, *Majmū‘*, I, 183–4, distinguishes three kinds of *muqaddarāt*: [1] things ordained by God in order to establish a precise definition and about which there is no difference of opinion among the jurists (*taqdīruhu li-l-taḥdīd bi-lā khilāf*); [2] things ordained by God in order to establish a limit within which acts are to be judged and about which there is no difference of opinion (*taqdīruhu li-l-taqrīb bi-lā khilāf*); [3] things about which there is difference of opinion.

⁹² Ghazālī, *Mustasfā*, II, 91.

⁹³ Sam‘ānī, *Qawā‘ī*, IV, 92.

⁹⁴ Ibid., IV, 94; Shīrāzī, *Luma‘* (tr. Chaumont), 46.

some cases, but not in others. In this context, the Shāfi'īs quoted the well-known Prophetic tradition telling the story of how the Prophet praised Mu'adh b. Jabal, his governor in Yemen, for using his own reasoning (*ajtahidu ra'yī*) in cases where no Qur'ānic text, Prophetic model or consensus was available to him. The Prophet's approval of Mu'adh's use of independent reasoning, according to the Shāfi'īs, was unconditional (*muṭlaq*). For them, this proved the general permissibility of analogical reasoning in *all* areas of the law.⁹⁵ In sum, the Shāfi'īs felt no qualms about subjecting the "things ordained by God" to *qiyās*. Al-Sam'ānī goes on to affirm that analogical reasoning always applies *in general* (*fi l-jumlah*).⁹⁶

Another jurist of the 5th/11th century, Abū Ishāq al-Shīrāzī (d. 476/1083) also discusses the issue of whether the *kaffārāt* deserve to be treated *sui generis* at some length. His opponents the Ḥanafīs, he begins, argue thus:

Hadd was revealed to repel and as a deterrence from transgressions, and *kaffārah* was legislated for the atonement of sin. Only God knows what repels from sins and what atones for sins. Likewise, only God knows how to specify a norm that is characterized by a numerical value (*ḥukm bi-miqdār*)... It is not permitted to establish anything of this by way of analogical reasoning.

Al-Shīrāzī draws attention to God's purpose (*ḥikmah*) in decreeing the *ḥudūd* and *kaffārāt*, which according to the Ḥanafīs, remains unfathomable under all circumstances. Although al-Shīrāzī sidesteps the awkward question of the arbitrariness of the *muqaddarāt*'s numerical dimension, he refuses to capitulate in front of the Ḥanafī attitude. In response, he offers the following reasoning:

If this were a way to destroy *qiyās* in this context it would be a way to destroy *qiyās* with regard to all other norms as well. The deniers of *qiyās* who declare *qiyās* void argue along these lines. They say: "The norms [of the Law] are revealed for the benefit (*maṣlaḥah*) of all legally responsible Muslims (*al-mukallaḥīn*), and only God knows of what this benefit consists. Therefore *qiyās* is void altogether!" However, if it is false to say this about the declaring void of *qiyās* in the first place, then it is also false to say it here.⁹⁷

Al-Shīrāzī polemically links the Ḥanafīs to the "deniers of *qiyās*," that is primarily, the Shī'īs and Zāhirīs. He is in line here with al-Ghazālī (d. 505/1111)⁹⁸ and al-Sam'ānī,⁹⁹ both of whom state that the exact reason that

⁹⁵ Āmidī, *Iḥkām*, IV, 64.

⁹⁶ Sam'ānī, *Qawāṭi'*, IV, 94.

⁹⁷ Shīrāzī, *Wuṣūl*, II, 240.

⁹⁸ Cf. Laoust, *La politique*, 177.

⁹⁹ Sam'ānī, *Qawāṭi'*, IV, 95.

produces the benefit (*maṣlahah*) residing in the expiatory act may not be known, but that this does not preclude that the same benefit may be produced by way of analogical transfer to novel cases. If a type of behavior necessitating *kaffārah* is found in a similar situation, this is enough to justify the analogical extension of the *kaffārah* from the original to the novel case. Thus, for example, the *kaffārah* for breaking the fast in Ramaḍān (*kaffārat Ramaḍān*) is applicable, by analogy, to breaking the fast during the time that a Muslim has set aside to make up for a missed fast in Ramaḍān (*fi qaḍā' Ramaḍān*).¹⁰⁰

Continuing this line of argument, the Shāfi'ī al-Āmidī (d. 631/1233) states that “the rule which is extended from the principal case to the novel case necessitates either a divinely ordained punishment and an expiatory act *in as much as this [necessity] is obligatory (min haythu huwa wujūb)*”. As al-Āmidī affirms, “this [necessity] is something that can be known.”¹⁰¹ What al-Āmidī is saying here is that, for example, the number of poor people one has to feed as *kaffārah* for the breaking of an oath is indeed something whose purpose eludes human reason. Indeed, why should one feed ten and not, for example, twelve? Therefore, if a *kaffārah* is extended to a novel case, this numerical value (i.e., feeding ten of the poor) must not be changed. However, what *can* be known, regardless even of any consideration of *maṣlahah* or *ḥikmah*, is that that law stipulates this expiatory act for the novel case.

In sum, as the Shāfi'īs argued, not only are the *muqaddarāt* hardly different from other realms of the law, but also the hidden wisdom of the *muqaddarāt* remains untouched in the process of analogical reasoning. The Ḥanafīs, on the other hand, in the absence of certainty, preferred to exempt certain realms of the law from probabilistic reasoning, namely those whose causal structure seemed to them to lie uniquely with God, that is, the *muqaddarāt*. But this triggered the problem of how one was to define the *muqaddarāt*. As indicated above, the Ḥanafīs tended to circumscribe the concept rather narrowly, emphasizing the *ḥudūd* and *kaffārāt*. The Shāfi'īs' definition, on the other hand, included a number of other areas, “too numerous to count”.

¹⁰⁰ See Jaṣṣāṣ, *Fuṣūl*, IV, 107, who, as a Ḥanafī, rejects this position.

¹⁰¹ Āmidī, *Iḥkām*, IV, 66.

4. THEOLOGICAL DIMENSIONS: GRAVE SINS AND SALVATION IN AŞH'ARITE AND MĀTURĪDĪ KALĀM

The Shāfi'īs, or so it would seem, had a point in accusing the Ḥanafīs of a certain arbitrariness. Why single out the *kaffārāt* and the *ḥudūd*? Other groups of norms—such as the portions of inheritance (*farā'id*)—are also characterized by the imposition of a numerical value (*miqdār*), but they appear to escape the Ḥanafī rejection of *qiyās* reasoning. For the sake of argument, let us assume that al-Sam'ānī and the Shāfi'īs were right in claiming that the Ḥanafīs were, as al-Sam'ānī implies, acting capriciously in singling out these groups of norms of the Law, that they intuitively followed what “seemed to them correct (*mā tarā'at lahum*),” and that their discussions of the *muqaddarāt* was a *post facto* attempt to explain this intuition. Might there perhaps be a theological argument associated with this controversy that could help to explain the position of the Ḥanafīs? Could theological commitments in any way account for the Ḥanafīs' decision to limit the scope of the *kaffārāt* by disallowing *qiyās* in them? And conversely, was there anything in the credal tenets the Shāfi'īs embraced that facilitated their acceptance of *qiyās* in the *kaffārāt*?

Let us begin with the assumption that the theological significance of expiatory acts lies in the promise of salvation that they imply. The *kaffārāt* constitute an opportunity to make up for sins. As suggested above, the proliferation of *ḥadīths* specifying *kaffārāt* even for the *kabā'ir* was of concern to those who insisted on the reality of the threat of punishment (*al-wa'īd*) for the Muslim grave sinner. Similarly, the growth of the *kaffārāt* by way of *qiyās* must have been bothersome to the proponents of *al-wa'īd*, such as the Khārijites and, in the time of al-Jaṣṣāṣ, the Mu'tazilah.¹⁰² It could be said, therefore, that al-Jaṣṣāṣ's rejection of analogical reasoning in the *kaffārāt* and *ḥudūd* is in line with his Mu'tazilite leanings.

However, as is well known, most later Ḥanafī jurists, especially those stemming from Transoxania, were not Mu'tazilites in theology but tended to follow the school of the “people of Samarqand,” that is, Māturīdism. Sirāj al-Dīn 'Alī b. 'Uthmān al-Ūshī al-Farghānī (fl. 569/1173), for example, was a Ḥanafī jurist who, next to an influential *furū'* work,¹⁰³ also wrote

¹⁰² van Ess, *Theologie und Gesellschaft*, III, 265 (Abū l-Hudhayl, d. ca. 227/841), IV, 509, IV, 648. On the Mu'tazilite insistence that *al-wa'īd* is directed to *all* sinners, see further Weiss, *Search*, 389–91; Zysow, “Economy of Certainty,” 126ff., esp. 133–42.

¹⁰³ Ūshī, *Fatāwah*.

a Māturīdite theological treatise.¹⁰⁴ Likewise, Abū l-Barakāt ‘Abd Allāh al-Nasafī (d. 710/1310), who penned an influential Ḥanafī *furū‘* work, the *Kanz al-daqa’iq*, also wrote a famous Māturīdite creed, the *‘Umdat ‘aqīdat ahl al-sunnah wa-l-jamā’ah*.¹⁰⁵ What, then, was the Māturīdite position on *al-wa’id*, to what extent did it echo Mu‘tazilite notions, and how did it differ on this issue from Ash‘arism, the dogmatic school of thought to which most Shāfi‘ī jurists subscribed?

In most scholarly accounts of the history of *kalām*, Māturīdism is contrasted with the Khārījite and Mu‘tazilite confessions and is considered, alongside Ash‘arism, as one of the two main schools of Sunnī “orthodoxy”. The doctrinal differences between Māturīdism and Ash‘arism have received relatively little attention in Western Islamic studies. Wilhelm Spitta, in his book on al-Ash‘arī (1876),¹⁰⁶ and Jean Spiro, in his short study devoted to al-Māturīdī (1904),¹⁰⁷ both followed some of the late-medieval Muslim scholars in their assessment that these differences were inconsequential. Ignaz Goldziher, in his *Vorlesungen über den Islam* (1910), cemented this perception by judging that “it is not worth going into the petty differences of these two closely related doctrines”.¹⁰⁸ Arguably, this judgment is simplistic; it reflects the tendency of writers such as the Egyptian Tāj al-Dīn al-Subkī (d. 771/1370) and the Ottoman Abū ‘Udhbah (*fl.* 1125/1713) to seek ways to harmonize Ash‘arite and Māturīdite positions.¹⁰⁹ Not only did al-Māturīdī’s theology differ considerably from that of al-Ash‘arī, as Ulrich Rudolph’s groundbreaking study (1996) has demonstrated, but also, especially after the demise of Mu‘tazilite theology toward the end of the ‘Abbāsīd period, Māturīdism continued to develop away from Ash‘arism, since the Transoxanian theologians who acknowledged al-Māturīdī (d. 333/944) as their master did not merely echo his ideas.¹¹⁰ In the 6th/12th century in particular, Māturīdism took a new

¹⁰⁴ Ūshī, *Lāmiyyah*. See Gilliot, “La théologie musulmane,” 164.

¹⁰⁵ The *‘Umdah* of Abū l-Barakāt al-Nasafī has long since been known to Western scholarship through the 1843 edition of William Cureton. On his *Kanz al-daqa’iq*, the famous Ḥanafī jurist Ibn Nujaym (d. 970/1563) wrote his commentary *al-Bahr al-rā’iq*. See Schacht, “Ibn Nuḍjāyṁ,” 901.

¹⁰⁶ Spitta, *Geschichte*, 112ff.

¹⁰⁷ Spiro, “La théologie,” 294.

¹⁰⁸ Goldziher, *Vorlesungen*, 117.

¹⁰⁹ Rudolph, *Māturīdī*, 8–10.

¹¹⁰ Tritton, *Muslim Theology*, 176. Rudolph notes that the *khilāf* literature of the later Middle Ages, such as al-Bayāḍī Zādeh’s *Ishārāt al-marām*, describes controversial issues that arose *after* the time of al-Māturīdī and al-Ash‘arī. See Rudolph, *Māturīdī*, 356.

direction, acquiring a “distinctly rationalist flavor”¹¹¹ which was aimed, *inter alia*, against the Ash‘arite doctrine of extreme voluntarism in matters eschatological.¹¹² Thus, with regard to the question of the punishment of the grave sinner, Louis Gardet has observed, in passing, a “notable divergence” between the two schools.¹¹³

In what exactly did this “notable divergence” consist? As has been shown, al-Māturīdī’s position regarding the grave sinner (*murtakib*, or *ṣāhib al-kabīrah*) remains largely faithful to Abū Ḥanīfah’s Murji‘ite views,¹¹⁴ even if the remainder of his *K. al-Tawḥīd* goes beyond Abū Ḥanīfah’s views in significant respects.¹¹⁵ Indeed, in the passage al-Māturīdī devotes to the question of the grave sinner, he is more occupied with refuting Khārijite and Mu‘tazilite lines of thought rather than any Ash‘arite doctrine.¹¹⁶

In his *al-Tamhīd li-qawā‘id al-tawḥīd*, the important reviver of al-Māturīdī’s legacy in Transoxania, Abū l-Mu‘īn al-Nasafī (d. 508/1114), appears to follow al-Māturīdī’s Murji‘ite position. According to Abū l-Mu‘īn, there are two possible judgments (*ḥukmān*) awaiting the Muslim sinner. It is possible that God will forgive him (*jawāz al-maghfirah*) and that he will enter Paradise without further ado. However, it is also possible that he will be punished for some time in hell; but in no case will he remain in hell eternally, as the Mu‘tazilah had claimed.¹¹⁷ Abū l-Mu‘īn’s *Tabṣirat al-adillah*, though marking the beginnings of Māturīdite-Ash‘arite

¹¹¹ Madelung, “Spread of Māturīdism,” 134.

¹¹² *Ibid.*, 135. Cf. n. 67, where Madelung draws attention to “the Ash‘arite doctrine that it would not be a violation of divine justice for God to punish the obedient (cf. Subkī, II, 267).” On the growing opposition between Ḥanafis and Shāfi‘is in the 6th/12th century, see further *ibid.*, 138. See the summary of the Ash‘arite position in Wensinck, *Muslim Creed*, 184: “[I]t seemed theoretically (*‘aqlan*) possible to some dogmatists that the Faithful should dwell in Hell for ever on account of their sins, and that the infidels should dwell in Paradise for ever on account of divine forgiveness”.

¹¹³ See Gardet, *Dieu*, 304.

¹¹⁴ Gilliot, “La théologie,” 158; Madelung, “Spread of Māturīdism,” 123; Rudolph, *Māturīdī*, 350. Māturīdī concurred with the view expressed by Abū Ḥanīfah in the first *Risālah* addressed to ‘Uthmān al-Baṭṭī. Cf. *ibid.* 343.

¹¹⁵ *Ibid.*, 354.

¹¹⁶ Cf. Māturīdī, *Tawḥīd*, 334–8. (Unfortunately, I have not been able to access the new edition of al-Māturīdī’s *K. al-Tawḥīd* by Bekir Topaloğlu and Muhammad Aruçi [Ankara: İSAM, 2005].) This was a line of reasoning followed by all later Māturīdites. See, in addition to the works discussed in the text, Lāmishī, *Tamhīd*, 122–3; Qārī, *Ḍaw’*, fols. 51–56; al-Bayāḏī Zādeh, *Ishārāt*, 189ff.

¹¹⁷ Abū l-Mu‘īn al-Nasafī, *Tamhīd*, 77–8. The early Mu‘tazilah and Abū l-Hudhayl (d. ca. 227/841) insisted on eternal punishment for the Muslim grave sinner. Abū l-Hudhayl distanced himself in this respect from the Baṣran Murji‘ah. See van Ess, *Theologie und Gesellschaft*, III, 265, IV, 509.

polemics,¹¹⁸ at first sight also appears to put a focus on the Māturīdites' opposition to the Mu'tazilah, in particular with regard to the question of whether the Qur'anic threat of punishment in hell is directed to *all* sinners (the *qawl bi-l-'umūm* of the Mu'tazilah).¹¹⁹ Abū l-Mu'īn argues against the Mu'tazilah and, it seems, in favor of the *qawl bi-l-waqf* (i.e., avoiding the *'umūm* understanding of *al-wa'īd*), a position with which the Ash'arites concurred.¹²⁰

However, in another of Abū l-Mu'īn's theological tractates, the *Baḥr al-kalām*, one comes across a surprisingly severe view concerning the impact of grave sins on one's prospect of salvation. Abū l-Mu'īn states categorically that there is no repentance for grave sins if these sins are committed knowingly. For example, deliberate fornication with a married woman, abandoning of prayer, *zakāt* and fasting cannot be annulled (*turfā'u*) by repentance. Abū l-Mu'īn then underscores the possibility that God may punish the grave sinner, quoting the Qur'anic promise of punishment: "He shall take you [i.e., punish you] in accordance with what your hearts have done (*yu'ākhidhukum bi-mā kasabat qulūbukum*)".¹²¹

In the light of this passage, Abū l-Mu'īn's espousal of *al-qawl bi-l-waqf* turns out to be less unequivocal than would appear at first sight. Another look at the *Tabṣīrat al-adīllah* is revealing in this regard. True, Abū l-Mu'īn states that Abū Ḥanīfah's Murji'ite position regarding the grave sinner is the correct one, but then he launches an open attack on one group among the Murji'ah whom he calls "the corrupt Murji'ah" (*al-murji'ah al-khabūthah*). These are people "who claim that no Muslim is ever punished for a grave sin, and that, in the same way in which a good deed is to no avail if there is no faith, an evil deed does not do any harm when there is faith."¹²² He goes on to criticize the idea that only the *āyāt al-wa'd* but not the *āyāt al-wa'īd* must be understood to apply in the general (*'umūm*) sense, a position which his opponents defend on grounds of the notion that the *āyāt al-wa'd* "are more true to what is known about God's attributes of mercy and forgiveness (*al-raḥmah wa-l-'afw wa-l-ghufrān*)".¹²³ With this

¹¹⁸ Madelung, "Abū l-Mu'īn al-Nasafi," 319. Cf. Gilliot, "La théologie," 161; Rudolph, *Māturīdī*, 6, 359–60.

¹¹⁹ Abū l-Mu'īn al-Nasafi, *Tabṣīrat*, II, 766–67. Cf. Zysow, "Economy of Certainty," 135–42; Tillschneider, *Entstehung*, 146–49, 166–86.

¹²⁰ *Ibid.*, 148.

¹²¹ Abū l-Mu'īn al-Nasafi, *Baḥr*, 45.

¹²² *Idem*, *Tabṣīrat*, II, 766. Abū l-Mu'īn goes on to say that "this is what is reported from Muqātil b. Sulaymān, the author of the *tafsīr*."

¹²³ *Ibid.*, 774.

one-sided characterization, Abū l-Muʿīn does not agree. Instead, he insists on the broad applicability of both the *āyāt al-waʿd* and the *āyāt al-waʿd*. He merely exempts from the latter the verses that speak of *eternal* punishment which, as he reassures his readers, is reserved exclusively to the unbelievers. Thus, he concludes that “the punishment of the believer in accordance with his sin is not impossible according to reason, and there is no indicator in revelation that this is not possible; there are many traditions about this.”¹²⁴ While this is not a case of *qawl bi-l-ʿumūm*, it is also more than a simple *qawl bi-l-waqf*. It is a middle position between the rigorism of the Muʿtazilah and the voluntarism of the Ashʿarites, a position which gives considerable room to reason’s ability to predict punishment for Muslim sinners, temporary though it may be.

One of Abū l-Muʿīn’s commentators, Najm al-Dīn Abū Ḥafṣ al-Nasafī (d. 537/1142), in his famous creed, points out that “the punishment for unbelievers and for some sinful believers is in accordance with God’s knowledge and will”.¹²⁵ This is tantamount to saying that it would be *against* God’s will *not* to punish “some” Muslim sinners. The introduction of the concept of God’s will marks a shift of emphasis from Abū l-Muʿīn’s exposition of the problem. It implies that God can in theory forgive “some” sinners but never all: the majority are likely to be punished. A couple of decades later, another Transoxanian *mutakallim*, Nūr al-Dīn Aḥmad al-Ṣābūnī (d. 580/1184), also leans in this direction. He reports the opinion of “some” (presumably the Muʿtazilah) that the Qurʾānic threat of punishment is a general statement directed against *all* grave sinners, and that if some were to be exempted from this threat, this would produce a *khulf fi l-khabar*, that is, a logical inconsistency in revelation, which, it is understood, is an impossibility.¹²⁶ Al-Ṣābūnī then states that the Māturīdites are actually not so far from this position, acknowledging that “some of our people have embraced the principle of the general nature of *al-waʿd* and that it is directed against *all* transgressors (*ʿuṣāt*)”.¹²⁷ At the same time, he hastens to add that “to renege on the threat of punishment is an act of magnanimity (*karam*), and this is something that is possible for God,” concluding that if some (but again, not all) of the transgressors

¹²⁴ Ibid., 775.

¹²⁵ Abu Ḥafṣ al-Nasafī, *ʿAqīdah* (tr. Watt), 82.

¹²⁶ Ṣābūnī, *Bidāyah*, 142.

¹²⁷ Ibid.

(*ʿuṣāṭ*) are exempted from the general nature of *al-waʿīd*, this would not be a *khulfi l-khabar*.¹²⁸

Overall, in the course of the 6th/12th century, Māturīdite authors distanced themselves from the Ashʿarites (as well as the “corrupt Murjiʿah”) whose shoulder-shrugging acceptance of divine voluntarism, combined with their naïve trust that God’s mercy would eventually outweigh His wrath,¹²⁹ they found unconvincing and too optimistic. Later Māturīdite authors picked up on the argument mentioned by al-Ṣābūnī by stressing the logical impossibility of *khulf al-waʿīd*. For example, Abū l-Barakāt ʿAbd Allāh al-Nasafī (d. 710/1310), in his *ʿUmdat ʿaqīdat ahl al-sunnah wa-l-jamāʿah*, points out that “it is impossible that the [divine] promise (*waʿd*) be retracted,” but that this is equally true with regard to *al-waʿīd*.¹³⁰ From the 6th/12th century onwards, the Māturīdites, in other words, moved from affirming the logical possibility that God will punish Muslim sinners towards stating the logical impossibility that He will not. This is also how the Egyptian Tāj al-Dīn al-Subkī (Shāfiʿī-Ashʿarite, d. 771/1370), keen as he may have been to harmonize Ashʿarite with Māturīdite teachings, saw the problem. In his *Qaṣīdah nūniyyah*, al-Subkī first presents the Ashʿarite position of extreme voluntarism, stating that,

according to us, God can punish the obedient and reward those who transgress (*al-ʿāsūn*). Every gift (*niʿmah*) of Him is [a sign of His] grace, and every punishment (*niqmah*) of Him is [a sign of His] justice. There is no limitation imposed on His power (*mulkuhu*), and there is nothing that motivates Him toward any of His actions.¹³¹

The Māturīdites (whom al-Subkī calls *aṣhāb Abī Ḥanīfah*¹³²), on the other hand, “say that punishment of the disobedient (*ʿāṣī*) is a necessity, as is

¹²⁸ Ibid., 143. Cf. al-Bayāḍī Zādeh, *Ishārāt*, 195: “The thought that it is likely that both [reward and punishment] will occur (*ghalabat ḡann al-waḡfāʾ*) is enough to arouse desire [of paradise] and fear [of hell]. To allow for [the possibility of God’s] abandoning [either of the two] does not detract from this.”

¹²⁹ Cf. the *ḥadīth qudsī* that “My mercy outweighs my wrath (*inna raḥmatī taḡlibu ḡhaḍabī*)” (Bukhārī, *Ṣaḥīḥ*, *Tawḥīd* 15 und passim) which Ashʿarī writers liked to quote, for example al-Ghazālī in his *Iḥyā ʿulūm al-dīn* (tr. Winter, 253). The fortieth book of al-Ghazālī’s *Iḥyāʾ*, the *K. al-Mawt wa-umūr al-ākhirah*, is devoted to the afterlife; it is significant that al-Ghazālī, while also describing the punishment of sinners in hell, ends with a section on God’s mercy and on paradise.

¹³⁰ Abū l-Barakāt al-Nasafī, *ʿUmdat*, 34–5.

¹³¹ Subkī, *Qaṣīdah nūniyyah*, 70–1.

¹³² He does so although he is really referring to the teachings of al-Māturīdī and his school. See Rudolph, *Māturīdī*, 7, 9. Subkī reacts to the presence of Ḥanafī-Māturīdites in Syria and Egypt. See Madelung, “The Spread of Māturīdism,” 166.

the reward for the obedient, and that the opposite is logically impossible.”¹³³ The Ottoman ‘Abd al-Raḥīm b. ‘Alī Shaykhzādeh (d. 944/1537) reiterates this point, this time from the Māturīdite perspective, citing as his witness the *‘Umdah* of Abū l-Barakāt al-Nasafī.¹³⁴ He then goes on to explicate the Ḥanafī (i.e., Māturīdite) rejection of *khulf al-wa’id*:

The Ḥanafīs have argued that to break the promise of punishment would be a change (*tabdīl*) of [God’s] word. God said: “What I [once] said, will not be changed. Verily, I do not do injustice to people (50:29)”. They argue that [if one says the opposite] one [also] must declare it possible that God tells a lie when He pronounces a threat; however, the *ijmā’* is to declare His message free from this.¹³⁵

The process described here culminates in the words of al-Laqānī (d. 1041/1631), who states that the Māturīdites hold it to be “mandatory that some of those who have committed a grave sin are punished”.¹³⁶ God, one infers, can theoretically grant absolute pardon to a grave sinner in an act of specification (*takhṣīṣ*), but He cannot absolve *all* sinners from punishment. In fact, one can be sure that some (or indeed most) believing grave sinners will be in hell, if not forever, then at least for an extended period of time. According to the Māturīdites, then, the default case is punishment for *all* Muslim sinners.

In sum, despite the tendency to downplay differences,¹³⁷ the Māturīdites by and large affirmed, against the Ash‘arites, that absolute pardon for the Muslim grave sinner is merely a theoretical possibility, but that temporal punishment is the more likely case. This is not to deny that the Māturīdites held, with the Ash‘arites, that all grave sinners were believers and that, in the long run, they would be taken into paradise. But the degree of *certitudo salutis* reflected in the writings of the Māturīdite theologians quoted above is significantly below that which one encounters in

¹³³ Subkī, *Qaṣīdah nūniyyah*, 71. He adds that “according to al-Ash‘arī, however, reason is no judge (*al-‘aqlu laysa bi-ḥākīmīn*).”

¹³⁴ Shaykhzādeh, *Naẓm*, 211–3, on the question of whether God can break his promise of punishment (*khulf al-wa’id*). Gardet, *Dieu*, 304, n. 3, refers to the *K. Naẓm al-farā’id* as a good summary of the Māturīdite position. The text edited by Bassām al-Jābī under Shaykhzādeh’s name also cites, in the same paragraph, al-Laqānī’s (d. 1041/1631) *al-Sharḥ al-kabīr* and ‘Alī al-Qārī al-Harawī’s (d. 1014/1606) *Sharḥ al-fiqh al-akbar*. Obviously, both these authors died after Shaykhzādeh, and therefore must have been interpolated by the later transmitters of *Naẓm al-farā’id*. See the introduction of the editor Bassām al-Jābī, 31–2.

¹³⁵ Shaykhzādeh, *Naẓm*, 212.

¹³⁶ Laqānī, *Jawharat*, verse 117.

¹³⁷ Cf. Abū ‘Udhbah, *Rawḍah*, 115. Rudolph, *Māturīdī*, 12, also counts al-Bayāḍī Zādeh among the “harmonizers”.

Ash‘arite formulations. According to al-Ash‘arī, Muslims ought to believe that “if God wills, He punishes them [the grave sinners], and if He wills, He forgives them”.¹³⁸ However, beyond this basic espousal of voluntarism, shared by the Māturīdites, the Ash‘arites displayed a more pronounced tendency to emphasize that God shows kindness to humankind and will pardon the sinner.¹³⁹

Psychologically, here would indeed seem to be a “notable divergence” between the two schools. The Ḥanafī-Māturīdites were closer to feeling that salvation was uncertain, even for the believers. The Māturīdites’ view of man’s uncertain capacity to achieve salvation was never as extreme as that of the Mu‘tazilites, but at least some of the latter’s “pessimistic view of the hereafter” (“pessimistische Jenseitsanschauung”)¹⁴⁰ survived in their theology, in the same way in which Ḥanafī *uṣūl al-fiqh* remained close, in certain respects, to Mu‘tazilī principles: most Central Asian Ḥanafī *uṣūlīs* embraced the *qawl bi-l-‘umūm* in legal hermeneutics.¹⁴¹

5. CONCLUSIONS

In conclusion, we are brought back to the question of the relationship between 5th/11th-century *uṣūlī* views of the *kaffārāt* and 6th/12th-century theological discussions about the status of the grave sinner, the *murtakib al-kabīra*. How then, if at all, are these two doctrines related?

To recapitulate: the Ḥanafī *uṣūlīs*’ rejection of *qiyās* in the *kaffārāt*, at first sight, appears to undermine the law’s “rationality,” while the Shāfi‘īs’ defense of it seems to give “reason’s ability to know the law” greater sway. However, the Ḥanafīs were in fact motivated by their desire to preserve the internal coherence of the legal system by making the few non-rational “givens” of the law (i.e., the *muqaddarāt*) explicit, in order to then excise them from the scope of judicial reasoning. Once they had accomplished this, a legal framework within which the jurists were free to speculate about new norms and meanings remained intact. The Shāfi‘īs, on the other end, by refusing to define the *muqaddarāt* narrowly and to exempt them from *qiyās* procedure, blurred the line between what was simply “ordained” by God and what was available to human reasoning. In the end, the Ḥanafīs and the Shāfi‘īs mutually accused each other of non-rationality

¹³⁸ Ash‘arī, *Ibānah*, 9–13 (tr. Watt, 44). Cf. the similar creed in idem, *Maqālāt*, 290–97.

¹³⁹ Abū ‘Udhbah, *Rawḍah*, 115: *jāda fi haqq al-‘ibād bi-l-iḥsān . . . bi-tark al-‘iqāb*.

¹⁴⁰ See Goldziher, *Richtungen*, 155–69.

¹⁴¹ Zysow, “Mu‘tazilism and Māturidism,” 264.

because the rationality each of them pursued was of a different kind: the Ḥanafīs aimed for rationality *ab initio*, while the Shāfi'īs were satisfied with rationality *post hoc*. Both, however, strove to safeguard the consistency of reasoning within the legal system of *sharī'ah*.

This article has argued that Māturīdism, at least in its 6th/12th-century incarnation, developed away from the Ash'ari doctrine of sins and salvation in significant respects. Māturīdite theologians came to emphasize that punishment of the grave sinner in hell was rather likely and, in the greater scheme of things, even necessary. This punishment may have been conceived of as temporary and purgative, preparing the sinners for their eventual redemption in paradise, but a formidable prospect it must have been nevertheless, and psychologically far from anodyne. In consequence, Goldziher's statement about the "pure optimism" of "orthodox" Sunnī eschatology,¹⁴² needs to be adjusted in this light, unless one wants to exclude Māturīdism from Islamic "orthodoxy".

The development of the Māturīdī position *vis-à-vis* the status of the grave sinner away from the Ash'arite *certitudo salutis* and toward a mitigated form of pessimism can be traced to the 6th/12th century. Was this shift in theological doctrine anticipated by the Ḥanafī-Shāfi'ī debate a century earlier about the permissibility of *qiyās* in the *kaffārāt*? The Ḥanafīs' reluctance to widen the scope of the *kaffārāt* through the use of *qiyās*, an *uṣūlī* position which had Mu'tazilite precursors (in both *fiqh* and *kalām*) but came into full swing during the early Saljūq period, indeed appears to foreshadow the development in Māturīdite theology toward a more rigoristic outlook on the chances of salvation for the Muslim sinner. Their view that the threat of *al-wa'īd* had to be taken seriously is in line with their reluctance to widen the scope of the *kaffārāt*, since expiation corrodes the logical link between sin, whether minor or grave, and punishment. On the other hand, the Shāfi'īs, most of whom were followers of Ash'arism,¹⁴³ tended to have a more optimistic vision of the hereafter, and therefore thought *qiyās* in the *kaffārāt* permissible. Thereby they broadened the scope of opportunities for expiation of sins. It is perhaps no

¹⁴² Goldziher, *Richtungen*, 160. For similar views, see Wensinck, *Muslim Creed*, 49; van Ess, *Flowering*, 42; idem, *Theologie und Gesellschaft*, IV, 677–8; Smith/Haddad, *Islamic Understanding*, 81.

¹⁴³ It must be noted, however, that not all Shāfi'īs were Ash'arites. See Madelung, "Spread of Māturīdism," 109–10.

coincidence that works dedicated to the *kaffārāt* were written predominantly by Shāfiʿī-Ashʿarite authors.¹⁴⁴

In conclusion, this article suggests that the rejection of *qiyās* in the *kaffārāt* among the Ḥanafī *uṣūlīs* of the late-classical period shows an elective affinity with a certain theological preference, that is, a position of *Heilungewisheit* peculiar to the Māturīdite doctrine of salvation, with echoes of earlier, Muʿtazilite views. Whether this reflects a working out in theology of the implications of a legal doctrine, or whether both reflect a background concern with the need for sinners' punishment—both on logical and psychological grounds—we cannot and should not attempt to determine. What seems unlikely, however, is that the two traditions existed in a vacuum or that they were completely uninfluenced by one another. Suffice it to say that the adjustments that were made to the Māturīdite doctrine of salvation from the 6th/12th century onwards resonate in suggestive ways with a bitter dispute between Ḥanafī and Shāfiʿī *uṣūlīs* a century or so earlier, that of how to deal with the *kaffārāt*, a problem which, presumably, the angels in heaven's High Council discuss to this day.

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¹⁴⁴ See footnote 56. The fact that the Ḥanafīs were in general more suspicious of *ḥadīth* may also have contributed to this. Cf. Makdisi, *Ibn ʿAqīl*.

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JURISTS' RESPONSES TO POPULAR DEVOTIONAL PRACTICES IN MEDIEVAL ISLAM

Raquel M. Ukeles

I. INTRODUCTION

In his treatise on religious innovations (*bida'*), the Mālikī jurist, Abū Bakr al-Ṭurṭūshī (d. 520/1126), establishes the recent origin of *ṣalāt al-raghā'ib*, the immensely popular yet highly controversial congregational prayer performed on the first Thursday night of Rajab, by citing the eyewitness testimony of his colleague, one Abū Muḥammad al-Maqdisī. Abū Muḥammad relates that the prayer occurred for the first time in 448[AH], [when] a man from Nablus, who recited Qur'an beautifully, came to Jerusalem and performed the prayer at al-Aqṣá with a few other participants. He came again the next year, and a large group of people prayed with him. The prayer then spread within the [Aqṣá] mosque and became well known both in the mosque and in peoples' homes, such that "it became established as if it was a religious norm (*sunnah*) until today."¹ While we might expect Abū Muḥammad's testimony to conclude with his censure of this clearly post-Prophetic practice, he surprises us with his own behavior. Al-Ṭurṭūshī continues—"And I said to him: 'But I saw you praying it in the congregation!' and Abū Muḥammad said, 'Yes! And may God forgive me for it.'"²

The cognitive dissonance that Abū Muḥammad seems to display (and the intriguing impulse of al-Ṭurṭūshī to include this vignette) might lead one to the cynical suggestion of scholarly hypocrisy. After all, Abū Muḥammad all but acknowledges the sinfulness of participating in a prayer that he went out of his way to perform. Instead, as I will argue, the responses of jurists to the devotional practices that formed the living traditions of their times must be understood both from an analysis of canonical texts related to devotional norms and from an understanding of the multiple roles played by scholars in dynamic and polymorphous Muslim societies.

¹ al-Ṭurṭūshī, *al-Ḥawādith wa-al-bida'*, 267.

² Ibid.

II. BACKGROUND AND ARGUMENT

This paper takes as its starting point Bernard Weiss's central idea that jurists consistently upheld the textualist approach to determine the law. Weiss defines textualism specifically as "an approach to the formulation of the law that seeks to ground all law in a closed canon of foundational texts and refuses to accord validity to law that is formulated independently of these texts."³ This central idea of Weiss's *Spirit of Islamic Law* undoubtedly is correct both when it comes to canonical acts of worship (the *'ibadāt*, which I would mark with a capital *'ayn*), and when it comes to devotional practices more generally (what I would call *'ibadāt* with a lower-case *'ayn*). Jurists shared a core commitment to anchoring all such practices in the Qur'an, Hadith and the traditions of the early Muslim community.

However, when one looks at the responses of jurists to the controversial yet popular devotional practices of their times, one finds the textualist model to be insufficient. Why do Shāfi'ī jurists permit certain devotional innovations and not others? Why would a Hanbali jurist such as Aḥmad ibn Taymiyyah (d. 728/1328) reject the lawfulness of all devotional innovations yet suggest that practitioners of innovations might deserve a reward? In general, how did jurists deal with the fact that many of the devotional practices that pervaded medieval Muslim societies, including the overwhelming majority of Sufi practices, lacked explicit attestations in the Qur'an and Hadith? Although jurists shared a commitment to determining norms based on canonical texts, they differed in the strategies they used to preserve the normative tradition and its relevance in shaping Muslim religious life.

This study of jurists' responses to popular devotional practices builds upon a growing body of literature that situates jurists as a set of actors, powerful but not exclusively so, within medieval Islamic societies. This idea begins with Boaz Shoshan's pioneering study from 1993 on popular culture in medieval Cairo, which illustrated the pervasiveness of rituals that lacked textual bases within medieval Islamic Cairo and pointed to scholarly participation in many of those so-called popular practices.⁴ Since Shoshan's study, other scholars have deconstructed further the dichotomy

³ Weiss, *The Spirit of Islamic Law*, 38.

⁴ See "Popular culture and high culture in medieval Cairo," in Shoshan, *Popular Culture*, 67–78.

of elite and popular religion to illuminate highly interconnected religious societies in which jurists negotiated for influence both with laypeople and political rulers in competition with others who claimed religious authority. For example, Jonathan Berkey's study of popular preachers in the medieval Near East demonstrates that jurists worked actively to preserve their authority as supreme interpreters of the text in the face of intense competition from a variety of preachers and storytellers.⁵ Additionally, Daniella Talmon-Heller, in her book on Islamic forms of piety in Ayyubid Syria, describes an interconnected religious society in which leading *'ulamā* "missed no opportunity to reach out to wide and varied audiences."⁶ As Talmon-Heller suggests, we can understand jurists' preoccupation with excesses in devotional practices—rather than with those who merely were negligent in their *'ibadāt*—as part of jurists' attempts to promote their conception of piety and devotion. These studies help to change the way we understand jurists' writings on devotional practices. Rather than seeing jurists' writings as defining mainstream Islamic religion, we can read their work as attempts to influence an inherently dynamic mainstream religious culture in which they were participants.

Beyond situating jurists as actors within complex religious societies, these studies also suggest that jurists were not monolithic in their responses to devotional practices that lacked explicit attestation in the early legal sources. Most so-called 'popular' practices had scholarly adherents as well. Even *ṣalāt al-raghā'ib*—considered detestable by most legal writers—had its share of scholarly adherents, such as al-Ṭurṭūshī's interlocutor Abū Muḥammad, as we will discuss below.⁷ Christopher Taylor's book on *ziyārah*, i.e., travel to petition at the gravesites of prophets and saints, set in medieval Cairo, is helpful particularly in correcting the modern tendency to overemphasize the influence of reformist heroes such as ibn Taymiyyah. His book demonstrates that the majority of scholars in the medieval Near East permitted the veneration of saints and petitioning

⁵ See Berkey, *Popular Preaching and Religious Authority*, in which he provides numerous anecdotes that attest to the great popular esteem of preachers as authenticators and interpreters of religious texts relative to the status of jurists. Berkey situates treatises on preaching by jurists such as Abū al-Faraj Ibn al-Jawzī, Aḥmad ibn Taymiyyah, and Jalāl al-Dīn Suyūṭī in the context of jurists attempting to assert control over who defines the norms of preaching and storytelling.

⁶ Talmon-Heller, *Islamic Piety in Medieval Syria*, 250.

⁷ As Jonathan Berkey notes in an article on tradition and innovation, the criticism by reformist jurists of other scholars for participating in non-canonical devotional practices should trigger a reexamination of how we define the religion of medieval Islam. Berkey, "Tradition, Innovation and the Social Construction of Knowledge," 64.

at their tombs, even while they expressed deep concern over devotional excesses and frivolous behavior. After analyzing these treatises, Taylor writes:

As the works of al-Subkī, Ibn Abī Ḥajalah, al-Ghazālī, and ‘Alā’ al-Dīn make clear, Ibn Taymiyya was hardly the ardent spokesperson for the cultural and religious elite; rather, he was the persecuted champion of a minority position among his colleagues and the eloquent spokesman of a lost cause.⁸

In fact, one sees the trope of the reformist jurist as marginal figure echoed within the writings of medieval reformists themselves. For example, Ibrahīm al-Shāṭibī, the 14th c. Mālikī jurist, begins his treatise on *bid’ah*, *al-I’tiṣām*, with the hadith, “Islam began as a stranger (*gharīb*) and will return to [being] a stranger; blessed are the strangers who correct what the people after me have corrupted of my *sunnah*.”⁹ Al-Shāṭibī wrote *al-I’tiṣām* to defend himself against the charge of *bid’ah*, which suggests that mainstream Andalusian society, and even the majority position within his own Mālikī school, regarded al-Shāṭibī as the deviator from the *sunnah* instead of as the *sunnah*’s defender.¹⁰

Rather than defining this issue simply as elite jurists’ perspectives on popular religion, it is thus more accurate to examine legal debates about questionable devotional practices as part of a broader scholarly (and societal) debate over what constitutes proper modes of Islamic worship. The resulting picture—much messier but much more interesting—challenges us to re-evaluate jurists’ positions on devotional matters and the variety of ways that they attempted to keep the textual tradition relevant within the religious cultures of their day.

In what follows, I first examine briefly the medieval legal debates regarding the permissibility of devotional practices that lacked a precedent in the Qur’an and Hadith, which centered on the opposing ways that jurists defined and applied the terms *sunnah* and *bid’ah*. I then examine how the lens of the jurist as actor within a particular religious culture helps us understand when and why a jurist deviates from his stated legal

⁸ Taylor, *In the Vicinity of the Righteous*, 222.

⁹ *Sunan al-Tirmidhī*, Book of Belief (*īmān*), Chapter 13; Hadith No. 2838, 2:670. Al-Shāṭibī quotes the hadith in the opening page of his introduction to *al-I’tiṣām*, 11, as does the Mālikī jurist, Tāj al-Dīn al-Fākihānī (d. 734/1334), in his fatwa against *mawlid al-nabī* [cited in al-Suyūṭī, “*Husn al-maqṣid fi ‘amal al-mawlid*,” in *al-Hāwī li al-fatāwā*, 1:191–2].

¹⁰ I want to thank Muhammad Khalid Masud for sharing this insight with me (November, 2002).

position on devotional innovations (*bida'*). Finally, I return to the case of *ṣalāt al-raghā'ib*, which highlights the complex religious dynamics in which jurists functioned and contains the most explicit medieval legal discussion of the role of popular practice in determining legal rules.

III. JURISTS' STRATEGIES IN RESPONSE TO CONTROVERSIAL DEVOTIONAL PRACTICES

Jurists primarily wrote about the legal status of devotional practices by using the categories of *sunnah* and *bid'ah*. To be more precise, opponents of a given practice would denigrate or prohibit it by calling the practice a *bid'ah*—such as al-Shāṭibī's fatwa against public *dhikr* (recitation of God's names) sessions or 14th century jurist Ibn al-Ḥājj al-Abdarī's writing against *mawlid al-nabī* (Prophet's birthday festival) celebrations.¹¹ In contrast, proponents of a given devotional practice generally rejected the label of *bid'ah* and supplied instead textual precedents from the Qur'an, Hadith and writings of early jurists. Tāj al-Dīn al-Subkī uses this strategy in his multi-chapter defense of *ziyārah*, as do other legal writers in their defense of Sufi practices, such as *samā'* (musical/auditory sessions) or *dhikr*.¹² Occasionally, though, supporters of a practice acknowledge the ritual to be a post-Prophetic innovation, but argue that the practice is a good innovation. This is true with regard to Shāfi'i and North African Māliki writings in support of *mawlid al-nabī* celebrations and in the 13th century debate over *ṣalāt al-raghā'ib*.¹³ That is, jurists used one of three legal strategies when writing about a devotional practice of ambiguous status: they rejected the practice by calling it a *bid'ah*; they defended it by insisting that it had the status of *sunnah*; and, occasionally, they defended it as a *bid'ah ḥasanah*.

¹¹ Al-Shāṭibī, in al-Wansharīsī, *al-Mi'yār*, 11: 39–40; Ibn al-Ḥājj, *al-Madhkhal*, 2:229–261.

¹² For al-Subkī's defense of *ziyārah*, see Taylor, *In the Vicinity of the Righteous*, 195–218. On *samā'*, see Arthur Gribetz's discussion of the legal debate over its permissibility. Gribetz, "The *samā'* controversy," especially 44–50 and 56–61. On collective recitation of *dhikr*, see, for example, David Powers' analysis of a lengthy fatwa in its defense by fifteenth century Māliki jurist, Abū al-Faḍl al-Uqbānī. Powers, "Law and Sufism," citing a fatwa found in al-Wansharīsī, *al-Mi'yār al-mu'rib*, 11:48–73.

¹³ For a Shāfi'i example, see Jalāl al-Dīn al-Suyūṭī's fatwā on *mawlid al-nabī*, in *al-Ḥāwī li al-fatāwā*, 1:189–197, also discussed in Ukeles, "Innovation or Deviation," 206–227. For North African Māliki examples, see Nico Kaptein, *Muhammad's Birthday Festival*, chapters 4–8, 76–166.

At the theoretical level, the legal debate over the possibility of commendable innovations in general, and commendable devotional innovations in particular, is based on a difference of textual interpretation: How did jurists understand the Prophetic traditions that warned against *bid'ah* (e.g., “every innovation is a deviating error [*kull bid'ah ḡalālah*]”),¹⁴ while taking into account the fact that the Prophet’s companion, ‘Umar b. al-Khaṭṭāb, introduced a new form of worship in the congregational Ramadan night prayer of *tarāwīḥ* and called it an excellent innovation (“*ni'mat al-bid'ah hādhihi*”).¹⁵ In general, Ḥanbalīs and most Mālikīs understood the many hadith traditions censuring *bid'ah* as a restriction specifically on novel acts of worship and rejected the possibility of a good devotional innovation. Shāfi'ī jurists as well as some Mālikī jurists used ‘Umar’s statement as evidence that not all novel acts are prohibited, and following Imam Shāfi'ī’s definition of a good novelty as being in agreement with the law, developed a set of legal principles for assessing *bida'* based on legal principles.¹⁶

In the 13th century, Shāfi'ī jurist, Ibn ‘Abd al-Salām al-Sulamī, changed the parameters of this debate by defining *bid'ah* strictly as a value-neutral term and by ignoring any negative meanings found in the Hadith literature. He addresses the subject not in a treatise against innovations, but in his book of legal principles, *al-Qawā'id al-kubrā*, and there defines *bid'ah* strictly in terms of chronology, “*Bid'ah* is an act that was not known during the time of God’s Messenger (*al-bid'ah fi'l mā lam yu'had fi 'aṣr rasūl allāh*).”¹⁷ Al-Sulamī expanded al-Shāfi'ī’s binary typology of positive and negative *bid'ah* and applied the five values of *fiqh* to *bid'ah*. He furthermore subsumed the subject of *bid'ah* under the rubric of the legal system, by asserting that the legal status of an innovation should be determined by the applicable legal rule. After al-Sulamī, all treatises on *bid'ah* addressed his classification system and whether innovations should be evaluated based on their content and their agreement with the law or whether the

¹⁴ *Ṣaḥīḥ Muslim*, Book of Friday Congregational Prayer (*jum'ah*), Chapter 14: Hadith No. 2042, 1:339. For references to other variants of this hadith, see Ukeles, “Innovation or Deviation,” 62–64.

¹⁵ *Ṣaḥīḥ Bukhārī*, Book of the *tarāwīḥ* Prayer, Chapter 1: Hadith No. 2049, 1:374. For references to other variants of this hadith, see Ukeles, “Innovation or Deviation,” 78–79.

¹⁶ For a more detailed discussion on the medieval legal debate over *bid'ah* with relevant citations, please see Ukeles, “The Medieval Legal Debate about *bid'ah*,” in “Innovation or Deviation,” 87–199.

¹⁷ Al-Sulamī, *al-Qawā'id al-kubrā*, 337.

Hadith warnings on *bid'ah* should lead jurists to reject all innovations without examining their content.

These two interpretations of *bid'ah* led to two fundamentally different approaches regarding the possibility—even at the theoretical level—of a virtuous devotional act that is not attested to in the early sources. If there is no explicit indication regarding a devotional practice—that is, it has no explicit source supporting it but does not violate any legal principles—can one approve of a new devotional practice? Ḥanbalīs and most Mālikīs say no. For example, Ibn Taymiyyah in *Iqtidā' al-ṣirāṭ al-mustaqīm limukhālafat aṣḥāb al-jaḥīm* (*The Necessity of the Straight Path in Order to Oppose the Disciples of Hell*) writes:

The principle regarding *'ibādāt* is that there is no legislating from it except that which God legislated and the principle regarding *'ādāt* is that there is no prohibiting it except that which God prohibited.¹⁸

The category of forbidden *'ibādāt* includes all novel devotional practices (which Ibn Taymiyyah defines elsewhere as practices marked by a specific time, place and/or set of actions),¹⁹ even if these practices correspond with generally approved devotional activities, such as prayer or fasting.²⁰ He declares, “*shirk* enters into every devotional act (*'ibādah*) that God does not permit.”²¹ Ibn Taymiyyah would thus label any devotional act that lacks an explicit source in the Qur'ān, Hadith or Consensus of the early community as a *bid'ah* and as a theological sin.

In contrast, some (though not all) Shāfi'īs and a few Mālikīs argue that 'Umar b. al-Khaṭṭāb's devotional innovation is a precedent for commendable devotional innovations more generally. The clearest defense of this position can be found in the anti-*bid'ah* treatise of the Shāfi'ī jurist, Jalāl al-Dīn al-Suyūṭī (d. 911/1505), *al-Amr bil-ittibā' wa al-nahy 'an al-ibtidā'* (*The Command to Obey and the Prohibition against Innovating*). In order to understand al-Suyūṭī's opinion here, we first must understand that he borrows heavily—without mention—from *Talbīs Iblīs* (*The Devil's Deception*), written by the Ḥanbalī jurist, Abū al-Faraj ibn al-Jawzī (d. 597/1200). One can identify al-Suyūṭī's own opinion through his additions and subtractions. In Ibn al-Jawzī's discussion of the status of a virtuous devotional

¹⁸ Ibn Taymiyyah, *Iqtidā' al-ṣirāṭ al-mustaqīm*, 2:86.

¹⁹ *Ibid.*, 2:5.

²⁰ *Ibid.*, 2:117.

²¹ *Ibid.*, 2:86.

innovation, he describes the following approach by the early Muslim community (*salaf*) following Muḥammad's time:

It has been clarified for you that the people were wary of innovation, even if there was no harm lest they create something that was [harmful]. And yet, novelties (*muḥdathāt*) occurred that do not clash with the law (*sharī'ah*) and do not negatively affect it, and they did not see harm in doing them, as it was related that the people used to pray during Ramadan individually...²²

Even though Ibn al-Jawzī acknowledges the theoretical possibility of a virtuous devotional innovation during the time of the *salaf*, he sees 'Umar's institution of congregational *tarāwīḥ* as an exception to the general rule against innovating.

Although Al-Suyūṭī cites the above passage by Ibn al-Jawzī almost verbatim, he adds an extra clause that changes the overall intent of the passage to support certain devotional innovations:

It has been clarified for you that the people were wary of innovation, even if there was no harm lest they create something that was [harmful]. And yet, novelties occurred that do not clash with the law and do not negatively affect it, and they did not see harm in doing them, *but rather some of them said, 'they are acts of drawing near to God (innahā qurbah)' and this is correct*, as it was related that the people used to pray during Ramadan individually...²³

Al-Suyūṭī, by adding an extra clause, presents the opinion that non-reprehensible innovations can be considered as "*qurbah*" (supererogatory acts that draw a person near to God), and then affirms that this is correct. With these additional words, 'Umar's statement becomes the judicial precedent for establishing a category of commendable devotional acts that were not instituted by the Prophet himself rather than an exception that subsequent generations should not follow. Al-Suyūṭī then goes on to use the category of *bid'ah ḥasanah* to permit certain devotional innovations.

However, as flexible as Suyūṭī's approach sounds about adding new devotional innovations, we must pay attention to the fact that he discusses this issue in a treatise *against* innovations, which he wrote to counter the spread of popular innovations in his time. In general, one finds a dissonance between the neutral legal principle of *bid'ah* developed by al-Sulamī and expanded by subsequent Shāfi'īs on the one hand, and their

²² Ibn al-Jawzī, *Talbīs Iblīs*, 30.

²³ Al-Suyūṭī, *al-Amr bil-ittibā'*, 36–37, bolded text for emphasis.

public actions and writings against *bid'ah* on the other hand. It is here that the dual lenses of textual analysis and an awareness of the role of the jurist in his religious society helps us understand the seemingly contradictory positions taken by jurists.

For many medieval Shāfi'ī jurists, their theoretical support of a positive type of *bid'ah* was tempered by their deep ambivalence about approving popular devotional innovations in practice, for a number of reasons. First, most popular devotional practices that lacked a clear textual precedent combined virtuous elements and problematic ones. Jurists often complain about numerous problematic aspects of a given popular devotional practice, including the excessiveness of its requirements; the intermingling of men and women; the extravagant spending; and/or the popularization of false or weak hadiths that supported the given practice. Jurists who wrote in approval of popular devotional practices either downplayed the problematic elements (as al-Suyūṭī does in his fatwa supporting the *mawlid al-nabī* festival or as we will see in Ibn al-Ṣalāḥ's defense of *ṣalāt al-raghā'ib*) or offered conditional approval so long as the content of the practice does not violate Islamic legal principles (as Ibn Ḥajar al-'Asqalānī [d. 852/1448] does in the case of the *mawlid*).²⁴ Second, and more generally, jurists feared that their tolerance of devotional innovations contributed to widening the gap between the normative tradition shaped by the Prophet's *sunnah* and the living traditions of their times, as well as undermining the jurists' own influence as those who define devotional norms. In this way, we can understand why al-Sulamī, the jurist who removed the stigma of *bid'ah* and gave examples of obligatory and commendable innovations in his treatise on legal principles, would use his position as preacher at the Umayyad mosque in Damascus to campaign against innovations. As we will see, these concerns also explain his vehement rejection of *ṣalāt al-raghā'ib*.

The tension between the theoretical position of the jurist and his writing and behavior at the practical level can be seen in the writings of Ḥanbalī and Mālikī jurists as well. In particular, Ibn Taymiyyah, who referred to devotional innovations as a kind of *shirk*, writes that people who engage in innovated acts of devotion for pious reasons are worthy of reward.²⁵ As he writes in *Iqtidā' al-ṣirāṭ al-mustaqīm*,

²⁴ Ibn Ḥajar, as cited by al-Suyūṭī in "*Husn al-maqṣid fi 'amal al-mawlid*," in *al-Ḥāwī li al-fatāwā*, 1:196.

²⁵ And, in the case of the *mawlid al-nabī* festival, "a great reward (*ajr aẓīm*)."
Ibn Taymiyyah, *Iqtidā' al-ṣirāṭ al-mustaqīm*, 126.

There is no doubt that one who performs [these innovated festivals], either because of his own interpretation and independent reasoning or his being a blind imitator (*muqallid*) of another, receives a reward for his good purpose (*ḥusn qaṣḍihi*) and for the aspects of his act that conform with the lawful, and he is forgiven for those aspects that fall under the scope of the innovated if his independent reasoning or blind obedience was pardonable.²⁶

Not only does Ibn Taymiyyah recognize the pious elements within devotional innovations, but he asserts that sincere practitioners of these innovations merit a reward.²⁷ As I argue elsewhere, Ibn Taymiyyah's paradoxical position stems from a pragmatic awareness of the way that Muslims of his day engaged in devotional practices.²⁸ As he explains, unlike the early Muslim community that practiced only licit acts, the later community of Ibn Taymiyyah's time combines licit practices and pious intentions with innovated acts and deviant intentions.

Given this reality, Ibn Taymiyyah sets up two levels of religious expectations: a higher standard for those whom Ibn Taymiyyah calls the rightly-guided believer (*al-mu'min al-musaddad*) and a lower standard for those who are distracted by the "spiritual candy" of pious innovations. Thus, he writes,

If you see someone observing [the *mawlid*] and you know that he would only abandon it for worse (*sharr minhu*), do not summon him to abandon a detestable deed (*munkar*) for an even more detestable one.²⁹

Although he is clear about the *mawlid's* legal status, Ibn Taymiyyah, as a pragmatist, was keenly aware of the emotional and psychological elements at play in religious practice. He urges that one should not admonish an observer of the *mawlid* to abandon his innovated practice without providing a substitute normative practice through which he could channel his piety. Ironically, Ibn al-Ṣalāh uses the same logic to defend the continuation of *ṣalāt al-raqhā'ib*.

Once we situate the writings and actions of jurists within their respective societies, we are better able to understand their complex responses to popular devotional practices. The dual lens of a jurist's legal framework and broader conception of his role in society allows us to evaluate why,

²⁶ Ibid., 2:117.

²⁷ This seeming disconnect perplexes and even offends modern Salafi editors of Ibn Taymiyyah's work. See Muḥammad al-Fiqī's comment in a footnote on this passage in the 1977 reprint of *Iqtidā' al-ṣirāṭ al-mustaqīm*, 294–296.

²⁸ Ukeles, "The Sensitive Puritan."

²⁹ Ibn Taymiyyah, *Iqtidā' al-ṣirāṭ al-mustaqīm*, 2:125.

for example, a Shāfiʿī jurist would support one devotional innovation but not another, or why Ibn Taymiyyah would posit a reward for participants in innovated religious acts. That is, jurists' interpretations of the canonical texts regarding *bid'ah* were shaped as well by a number of other elements, such as the weighting of positive and negative aspects of a given practice; the support of the people and/or ruler; and, I would throw in—in tribute to al-Ṭurṭūshī's interlocutor, Abū Muḥammad al-Maḥdī— a scholar's own religious inclinations.

With this greater understanding, we are now in a position to return to the case with which we began and to evaluate briefly the reasoning behind the positions taken in the 13th century debate among leading Shāfiʿī scholars of Damascus.

IV. THE CASE OF ṢALĀT AL-RAGHĀ'IB

In 632/1235, a number of scholars succeeded in convincing al-Malik al-Kāmil, Ayyubid ruler of Damascus, to issue a ban on *ṣalāt al-raghā'ib*.³⁰ The Rajab prayer aggravated scholars because it was widely esteemed as a Prophetic *sunnah*, based on the proliferation of a fabricated hadith in support of the prayer.³¹ The prayer also seemed to stir up broad excitement that people never displayed for canonical prayers. In Ibn al-Jawzī's drippingly sarcastic words:

³⁰ For more on the historical background of this debate, see Daniella Talmon-Heller's discussion of this event in *Islamic Piety in Medieval Syria*, 64–66.

³¹ Al-Ghazālī cites the alleged Prophetic hadith that describes *ṣalāt al-raghā'ib* (referred to here as the “Rajab prayer”), which includes a description of the format and contents: “As for the Rajab prayer, it was transmitted by chain upon the authority of the Messenger of God, peace and blessings be upon him, that he said: ‘Whoever fasts the first Thursday of Rajab then prays between the evening and night prayers twelve prayer cycles (*raḳ'āt*), each divided by a *taslīmah*, with each cycle including one recitation of the *fātiḥah*, three repetitions of [Sūrah 97 that begins], “We have indeed revealed this [message] in the night of power (*Innā anzalnāhu fī laylat al-qadar*)” and twelve repetitions of [Sūrah 112 that begins], “Say: He is Allāh, the One and Only (*Qul: huwa Allāh aḥad*)”, and then after completing his prayer (i.e., after the twelve cycles), he prays for me (i.e., the Prophet) 70 times saying, “O God! Pray for Muḥammad the untutored Prophet and for his family (*Allāhum ṣalli 'alā Muḥammad al-nabī' al-ummī' wa-'al ālihi*),” then does a full prostration and says 70 times in the prostrated position, “Most majestic and holy, Lord of angels and spirits (*sabūḥ qudūs rabb al-malā'ikah wal-rūḥ*),” and then he raises his head and says 70 times, “My Lord! Forgive me and overlook that which You know, for you are the most powerful and generous (*Rabbī uḡfir wa-urḥum wa-tajāwuz 'ammā ta'lamu, innaka anta al-a'azz al-akram*),” and then prostrates a second time and repeats what he said in the first prostration, and finally, remaining in the prostrated position, he asks after his personal needs—they will be fulfilled.’ al-Ghazālī, *Ihyā' 'ulūm al-dīn*, 1:283.

But I am jealous for Ramadan and its night prayer (*tarāwīḥ*), how can it compete with this! For this [prayer] is greater and more beautiful according to the people, and those who do not attend the [normative] congregational prayers attend it.³²

In light of *ṣalāt al-raghā'ib*'s immense popularity, it is not surprising to learn that the ruler's ban seems to have failed. Five years later, on the Friday before the beginning of Rajab 637/1240, the Shāfi'ī jurist al-Sulamī launched his new position as preacher (*khaṭīb*) of the Umayyad mosque in Damascus by attacking the prayer as part of his campaign against unlawful innovations. Al-Sulamī called on Muslims to abstain from *ṣalāt al-raghā'ib* and announced his refusal to lead the prayer.³³ The people were disturbed by his sermon, but not deterred from performing the prayer that many regarded as an act of obedience (*tā'ah*) and of drawing near to God (*qurbah*).³⁴ Instead, they demanded of al-Malik al-Ṣāliḥ Ismā'īl (al-Kāmil's successor beginning in 1238) that the prayers be held with a different leader. Ibn al-Ṣalāḥ, another prominent Shāfi'ī jurist in Damascus, writes that he sympathized with the people and rejected al-Sulamī's position.³⁵ Ibn al-Ṣalāḥ declared the prayer to be permissible, based on the Prophetic traditions extolling the benefits of prayer in general, and asserted the value of letting the people worship according to their custom. His position here is all the more surprising since Ibn al-Ṣalāḥ, in two earlier *fatwās*, had permitted only the private recitation of *salat al-raghā'ib* but prohibited its collective recitation in the mosque.³⁶

Ibn al-Ṣalāḥ's change in position shocked and upset his Shāfi'ī colleagues, and their responses were harsh and even insulting. The hadith scholar and historian, 'Abd al-Raḥmān Abū Shāmah (d. 665/1268), who recorded the debate in detail criticizes Ibn al-Ṣalāḥ's change of opinion, accusing the esteemed scholar of changing his position "to suit the whim of the Sultan and the masses of the time."³⁷ Abū Shāmah's contemporary, Abū Zakaryā al-Nawawī (d. 676/1278), instructs his readers, in a fatwa on

³² Ibn al-Jawzī, *al-Mawḍū'āt*, 2:438.

³³ Abū Shāmah, *al-Bā'ith*, 64. Sections of the treatises also can be found in Tāj al-Dīn al-Subkī, *Ṭabaqāt al-Shāfi'īyyah al-kubrā*, 4:383–385, under heading, "*sharḥ ḥāl ṣalāt al-raghā'ib . . .*"

³⁴ Abū Shāmah, *al-Bā'ith*, 64.

³⁵ Ibn al-Ṣalāḥ, "*Risālah fī jawāz ṣalāt al-raghā'ib*," in Tabbā', ed., *Risālah fī dhamm ṣalāt al-raghā'ib wa-risālah fī radd jawāz ṣalāt al-raghā'ib*, 48. In the 1960 edition, the treatises have different titles, which likely are based on earlier manuscript attestations. See footnote 39 below.

³⁶ Ibn al-Ṣalāḥ, in Tabbā', ed., *Risālah*, 65–68.

³⁷ Abū Shāmah, *al-Bā'ith*, 64.

the prayer, to ignore the practice's immense popularity and to discount its scholarly supporters: "One should not be deceived by the multitude of its practitioners in many countries nor by their mention in [Abū Ṭālib al-Makkī's] *Qūt al-qulūb* or [al-Ghazālī's] *Iḥyā' ulūm al-dīn*, and the like, for [the prayer] it is [nevertheless] a futile innovation."³⁸ These Shāfi'ī scholars reassert the predominant scholarly position that the practices of the masses should not influence legal rulings issued by jurists.

While it is easy to dismiss Ibn al-Ṣalāḥ's position as an example of pandering to the ruler and/or to the masses, the heated and extensive responses by al-Sulamī and others suggest instead that Ibn al-Ṣalāḥ's insistence on the legal value of permitting the people to engage in worship, however problematic, touched upon a sensitive issue in medieval Islamic society. It is worthwhile thus to examine the debate in more detail.

In al-Sulamī's first treatise, a published version of his Rajab sermon of 637, he rules that *ṣalāt al-raghā'ib* is a reprehensible innovation for two sets of reasons.³⁹ First, its false status as a Prophetic *sunnah* leads scholars and laypeople who participate in the prayer to lie implicitly about the Prophet. Second, the prayer itself transgresses several points of law, including violating the hadith against the designation of prayers on Thursday night and the legal rule against establishing a congregational form for supererogatory prayers (which should only be held in private). Al-Sulamī

³⁸ Al-Nawawī, *Fatāwā al-Imām al-Nawawī*, 1:31. See footnote 31 above for al-Ghazālī's support of the prayer. As for Abū Ṭālib al-Makkī, I was unable to locate his explicit support of *ṣalāt al-raghā'ib*. In *Qūt al-qulūb*, Abū Ṭālib omits the first Thursday evening of Rajab in his list of fifteen commendable nights [of prayer] of the year, while including three other days from Rajab (i.e., the first day, the 15th and the 27th). He does, however, include the 15th of Sha'bān, in which the controversial *Alfiyyah* prayer—of 100 prayer cycles of ten repetitions of the 112th chapter of the Qur'ān—should be recited. The other eleven opportunities that he mentions are the last six nights of Ramadan, the first and tenth days of Muḥarram, the night of 'Arafah on the ninth of Dhū al-Ḥijjah, and the evenings of the two canonical festivals. Abū Ṭālib al-Makkī, *Qūt al-qulūb*, 135–137.

³⁹ I rely on the titles cited in the 1960 collection edited by Muḥammad Zuhayr al-Shawīsh and Nāṣir al-Dīn al-Albānī even though I refer to the pages of the clearer 2001 edition by Iyād Khāled al-Ṭabbā', since the Shawīsh titles appear as well in early manuscripts. Al-Sulamī's first treatise, in the 1960 Shāwīsh edition, is called, "*al-Targhib 'an ṣalāt al-raghā'ib al-mawḍū'ah wa-bayān mā fihā min mukhālafat al-sunan al-mashrū'ah* (Awakening an aversion to [or—Discouraging] the fabricated prayer of great rewards and clarifying that which conflicts with legally prescribed norms)." Ibn al-Ṣalāḥ's response is entitled, "*al-Radd 'alā al-tarhib 'an ṣalāt al-raghā'ib wa-bayān mā fihā min mukhālafat al-sunan al-mashrū'ah* (A Rebuttal of Discouraging the raghā'ib prayer and clarifying that which conflicts with legal norms)." Finally, Ibn 'Abd al-Salām's counter-response is called, "*Tafnīd radd Ibn al-Ṣalāḥ* (The refutation of Ibn al-Ṣalāḥ's rebuttal)." The first term of Ibn 'Abd al-Salām's treatise, "*targhib*" might be a copyist's error and should read "*tarhib*," corresponding with the beginning of Ibn al-Ṣalāḥ's title.

also delineates numerous minor problems, such as the prayer's arduous format of twelve prayer cycles (*rak'āt*), followed by two prostrations (*sujūd*) with multiple repetitions of praise passages, violates the norms of humility (*khushū'*) and quietude (*sukūn*) during prayer.⁴⁰ In other words, unlike those who reject all innovations in worship, Ibn 'Abd al-Salām does not reject the prayer because it lacks an explicit source in the Qur'an and Hadith, but because aspects of the prayer violate Islamic law. In his view, the attachment of the people has no value in the face of the prayer's transgressing Islamic legal norms and rules.

In Ibn al-Ṣalāḥ's rebuttal, he affirms that the congregational recitation of *al-raghā'ib* is an innovation, but rules here that it has the legal status of a commendable one (*bid'ah ḥasanah*). Ibn al-Ṣalāḥ acknowledges the recent origins of the prayer and rejects the supporting hadith as fabricated. However, unlike al-Sulamī, Ibn al-Ṣalāḥ is unconcerned with the prayer's false reputation as a Prophetic *sunnah* and instead focuses on providing a different legal basis for the *raghā'ib* prayer. Ibn al-Ṣalāḥ grounds the *raghā'ib* prayer in the numerous textual supports for the general merit of prayer and establishes a 'commendable unless proven otherwise' rule for prayers.⁴¹ Among these supports are general statements by the Prophet about prayer, such as his aphorisms, "Prayer is light (*al-ṣalāh nūr*)"⁴² and "Know that the best of your deeds is prayer (*wa-i'lamū anna khayr a'mālikum al-ṣalāh*)."⁴³ He bolsters these legal bases with the observation that many new prayers that have entered Muslim devotional life rely upon the universal virtue of prayer.⁴⁴

In response to al-Sulamī's claim that key problems in the *raghā'ib* prayer make it a reprehensible innovation, Ibn al-Ṣalāḥ marshals legal argumentation where he can, and where he cannot, he returns to one of two meta-legal ideas. First, Ibn al-Ṣalāḥ distinguishes between what he regards as the most important components of the *raghā'ib* and other, more problematic, components; as mentioned earlier, his approach here resembles

⁴⁰ Al-Sulamī, in Tabbā', ed., *Risālah*, 29–30.

⁴¹ Ibn al-Ṣalāḥ, in Tabbā', ed., *Risālah*, 45.

⁴² *Ṣaḥīḥ Muslim*, Book of Purity (*ṭahārah*), Chapter 1: Hadith No. 556, 1:114.

⁴³ *Sunan Ibn Mājah*, Book of Purity and Its Norms (*al-ṭahārah wa-sunanihā*), Chapter 4: Hadith No. 290, 45–6. Ibn al-Ṣalāḥ finds more direct support for the basic structure of the prayer in the Prophet's comment, "whoever prays after the *maghrib* prayer 20 prayer cycles, God will build him a house in Paradise," since the *raghā'ib* prayer's twelve cycles after the *maghrib* prayer fall within the 20 cycles recommended by the *ḥadīth*. *Sunan al-Tirmidhī*, Book of Prayer, Chapter 209: Hadith No. 437, 1:128. Cited in Ibn al-Ṣalāḥ, in Tabbā', ed., *Risālah*, 46.

⁴⁴ Ibn al-Ṣalāḥ, *ibid.*

that of al-Suyūṭī's defense of the *mawlid*, in which the latter distinguishes between the core practices of the *mawlid* that are commendable and contingent practices associated with the *mawlid* that are legally problematic. Second, Ibn al-Ṣalāḥ stresses the value of maintaining this controversial practice because it benefits the people spiritually; it provides them with a devotional act to which they had grown accustomed.⁴⁵ He concludes with a petition to scholars to omit the problematic parts of the prayer as they see fit, but to allow the people to continue their devotional practice during this evening.

In al-Sulamī's counter-response, he defends his rejection of the prayer as a sign of his juristic integrity and leadership:

And he [i.e., Ibn al-Ṣalāḥ] began to slander me [saying] that I prevented the people from [performing] a devotional act (*'ibādah*), but I did not prevent it for being a devotional act; rather I rejected it because of its [problematic] qualities, forbidding just as the Prophet, peace be upon him, forbade . . . prayers during the reprehensible times.⁴⁶

Al-Sulamī, in his second treatise, insists that scholars cannot ignore the problematic components of the *raghā'ib* prayer, such as its convening on Thursday evening, since they are defining features of the prayer. Even though he admits that canonical texts on prayer do allow for the possibility of new commendable prayers, al-Sulamī here sharply limits the applicability of commendable innovations as the exception to the general rule against *bid'ah*. In al-Sulamī's view, Ibn al-Ṣalāḥ's attempts to support the prayer because of the people's attachment and despite its problematic elements reflect poorly upon the latter's juristic credentials: "And he [i.e., Ibn al-Ṣalāḥ] posited the custom (*i'tiyād*) of those who have no knowledge

⁴⁵ Deeply disturbed by Ibn al-Ṣalāḥ's change of legal position, the editors of the 1960 collection, al-Shāwīsh and al-Albānī, see this idea as "the secret of Ibn al-Ṣalāḥ's confusion here." In their view, "he did not take a scholarly position on this case but a position of accommodation (*'lam yaqif min hadhihi qaḍīyyah mawqifan 'ilmīyyan bal mawqifan tafwīqīyyan*") (*Musājalah 'ilmīyyah*, 9). Given Ibn al-Ṣalāḥ's recognized piety, he can hardly be accused of following his whim in supporting this innovation. Al-Shāwīsh and al-Albānī thus surmise that Ibn al-Ṣalāḥ was afraid that, if stripped of this devotional act, the people would abandon the normative religion for worse. They see this interpretation as a way to restore Ibn al-Ṣalāḥ's credibility even while they shun his position (al-Shāwīsh and al-Albānī, "Introduction," in *Musājalah 'ilmīyyah*, no page number). The editors' comment raises important questions regarding the role of the jurist as community leader. When a jurist takes community interests into account, or marshals legal evidence to support community actions, is he still determining the law? See my discussion of this issue in the following pages.

⁴⁶ Al-Sulamī, in al-Tabbā', ed., *Risālah*, 55.

as a proof for the practice of a forbidden innovation, but only the masses practice it and those who do not have a foot planted in the science of the law."⁴⁷ Al-Sulamī believes that the law is the sole determinant of an innovation's status, and that only those with an expert knowledge of the law could be its proper interpreters.

To summarize their main arguments in this case, al-Sulamī is concerned primarily with preserving the law and the normative framework of prayer. Ibn al-Ṣalāḥ, by contrast, argues that there is sufficient legal ground to uphold this prayer, which has value as a popular way that people worship. Their opposite rulings thus reflect a debate about which values to privilege—constancy with the traditional norms of law or responsiveness to the people.

This case highlights two opposing juristic positions on the relevance of popular attachment to a practice in legal determination. The predominant position represented here by al-Sulamī was to reject its relevance when the practice contradicted established legal rules of prayer. However, the vitriolic tone found in al-Sulamī's treatises suggests he regarded the popular esteem for the practice, and most probably their attempts to circumvent him when he criticized the practice, as a threat to his authority as arbiter of normative practice. Thus, at the beginning of his second treatise, al-Sulamī formulates this issue as between one who follows the people and one who follows the Prophet. Al-Sulamī sees the jurists as the keepers of the normative tradition originating with the Prophet and as the sole teachers authorized to impart this tradition to the people; the law flows only in one direction, namely from the scholars to the people.

Ibn al-Ṣalāḥ, however, did not view the popular attachment to the prayer as a threat to his authority but rather as a sign of their spiritual yearning. In what seems to be a break with juristic consensus, Ibn al-Ṣalāḥ asserts that the people should be able to worship God in the ways that they have become accustomed. Ibn al-Ṣalāḥ's rationale is less populist than it might initially sound. His assertion does not stem from a belief that the masses hold an independent source of religious wisdom (as one find in Jewish legal writings on the authority of custom in medieval Europe).⁴⁸

⁴⁷ Ibid., 56.

⁴⁸ If this was Ibn al-Ṣalāḥ's intention, one would expect him to cite relevant sources such as the famous hadith, "my people do not agree upon error." For analyses of the function of custom in medieval Ashkenazi Jewish law, see Israel Ta-Shma, *Ritual, custom and reality* (Heb.), and in Jewish law more generally, see Elon, *Jewish Law*, 880–944.

Rather, Ibn al-Ṣalāḥ espouses here a strategy of legal flexibility in meeting people where they are devotionally (perhaps with the idea of exerting subtle pressure on their practices in due course). Ibn al-Ṣalāḥ expresses this idea most clearly when he admits that the two prostrations at the end of the prayer might be regarded as reprehensible. He underscores the importance of omitting such parts rather than rejecting the whole, “for the purpose is for the people to remain engaged in worship (*ibādah*) during this time as they are accustomed to.”⁴⁹ If, in his view, the role of the jurist is to encourage the worship of God, it is more important to preserve popular devotional acts than to follow scrupulously the most rigid application of the law. Although jurists like Abū Shāmah dismiss Ibn al-Ṣalāḥ’s treatise as departing from law to accommodate the people, Ibn al-Ṣalāḥ’s method of legal argumentation suggests that, for him, the consideration of the people’s practice has legal relevance. Ibn al-Ṣalāḥ’s legal flexibility here stems from his belief that the jurist is responsible for the community’s religious welfare.

The debate over *ṣalāt al-raghā’ib* challenges us to revisit our assumptions about the way that jurists responded to popular devotional practices. Although Ibn al-Ṣalāḥ’s position did not gain traction in his school, one does find variations on this idea in other periods. For example, medieval Māliki scholars in North Africa used this logic to institute *mawlid al-nabī* celebrations as a way to counter the influence of Christmas celebrations of in the Maghreb.⁵⁰

V. CONCLUSION

In conclusion, the case of *ṣalāt al-raghā’ib* provides a clear example of the need to examine medieval legal debates over devotional issues both from an understanding of the legal texts marshaled but also from an awareness of the dynamics at play among scholars, laypeople, and political rulers. What I hopefully have demonstrated both in this case and in the legal debates about *bid’ah* is that the jurists’ decisions of when and how to apply legal rules about *sunnah* and *bid’ah* were related integrally to their conceptions of the purpose of the law and the role of the jurist. Instead of thinking about Ibn al-Ṣalāḥ’s early fatwas as “law” and his treatise in

⁴⁹ Ibn al-Ṣalāḥ, in Tabbā’, ed., *Risālah*, 48.

⁵⁰ See Kaptein, *Muḥammad’s Birthday Festival*, 76ff.

support of the prayer as “accommodation,” it is more meaningful to suggest that jurists incorporated meta-legal values and concerns into the process of their legal determination. I would argue this to be true as well for understanding Ibn Taymiyyah’s position that *mawlid* practitioners receive a great reward or for al-Sulamī’s restrictions on the application of *bid’ah ḥasanah* only to practices that do not undermine the normative tradition and the authority of the jurist.

The goal of this paper has been to bring texture to Weiss’s notion of textualism and, ultimately, to show that jurists’ attempt to preserve the supremacy of the text as the exclusive way to determine legal norms motivated some jurists to be creative and responsive interpreters as well as active religious leaders.

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PART THREE

LAW AND LANGUAGE

FINDING GOD AND HUMANITY IN LANGUAGE: ISLAMIC LEGAL ASSESSMENTS AS THE MEETING POINT OF THE DIVINE AND HUMAN

Paul R. Powers

INTRODUCTION

For as long as Western scholars have studied Islamic law, they have struggled to understand the relations between its “religious” and “legal” aspects. As Baber Johansen shows, western scholars have often either reduced *fiqh* to a mere deontology, a jumbled *Pflichtenlehre* lacking proper legal characteristics (*à la* Snouck Hurgronje), or they have carved off what they consider the “properly legal” from the ethical and religious dimensions (*à la* Joseph Schacht).¹ The former approach hinders rational and comparative analysis and implies (incorrectly, as subsequent scholarship has shown) that *fiqh* had little to do with actual legal practice. The latter approach risks vivisectioning *fiqh* discourses and leaves crucial questions about relations among the various dimensions unanswered. Recent scholarship has added much to our understanding of how Islamic theology, ethics, ritual, and “law proper” have interacted, or just how *fiqh* is “religious” or “sacred” law. One stream of relevant scholarship is historical and empirical and shows that Islamic law actually was more widely practiced and more adaptable to changing circumstances than previously supposed. A second approach is more theoretical and conceptual, showing how Muslim jurists successfully blended concerns that previous Western scholars had assumed could only be badly stitched together. In short, we have come a long way in understanding how Islamic law is both “religious” and “properly legal.”

The present article joins these efforts, especially their more theoretical and conceptual manifestations, in exploring the details of the juristic integration of religious and legal concerns. The overarching argument is that pre-modern Muslim jurists’ understandings of the nature of language, including divine speech, displays important continuities with

¹ Baber Johansen, “The Muslim *Fiqh* as a Sacred Law. Religion, Law and Ethics in a Normative System,” in *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: Brill, 1999), 42–7.

jurists' understanding of the nature of human action as encompassed by language. The assessments or rules (*aḥkām*, sg. *ḥukm*) of Islamic law are a meeting point—for jurists, *the* meeting point—between the divine and the human, a meeting that takes place in the realm of language. To make this argument, we will begin by reviewing the understanding of language developed in medieval Islamic contexts, a topic illuminated with verve and clarity by the work of Bernard Weiss. Language was seen as a code in which words reliably convey the meanings intended by speakers/authors, and these meanings are theoretically transmittable intact over indefinite time and space. Divine intentions can be read in the language of revealed texts that can be parsed for the rules they convey governing human actions. The divine, in short, can confidently be known in—and only in—language. I will seek to show that we find a counterpart to this view of language in the jurists' understanding of the nature of human action, which was understood to be fully describable in language.

Jurists display two tendencies in their treatment of actions, what we will call a *foundationalist* bent that finds a strong link between actions and the intentions of actors, and a *formalist* bent that largely disregards human subjectivity. While the former displays strong continuity with the understanding of divine speech as a direct manifestation of intention and the latter does not, both tendencies align in seeing action as encompassed by language—that is, as namable. The jurists, in assigning names to actions, generate what we will call “named act types,” which intrinsically carry religio-legal assessments (e.g., prohibited, obligatory, etc.). Human actions and divine intentions can thus meet in the medium of language. Jurists had a two-part task both of discerning, in the words of the revealed texts, God's intentions and rules governing human actions, and of identifying human actions by assigning to them names, and thus lining up the words of God's rules with the words naming human actions.

I. MEETING THE DIVINE IN LANGUAGE

For most post-formative, pre-modern (roughly the tenth through eighteenth centuries) Sunnī jurists, divine will could be known through one channel alone, namely the event of revelation during the life of the Prophet Muḥammad, resulting in two sources, the Qur'ān and the *sunnah/ḥadīth* (some saw these sources as confirmed and even supplemented by the earliest generations of pious Muslims). That is, revelation could be known by anyone other than Muḥammad himself only through observation and

through language; for those never directly in the presence of Muḥammad, language was the only medium. (Some, though by no means all, Ṣūfis, and many Shīʿīs allow for other means of access to the divine, as have many Muslims engaged in what is often called “popular” religion.) While this oversimplifies the situation (understating, for example, the extent of Muʿtazilī “rationalist,” natural-law influence), it helps efficiently explain why the nature of language took on such a pressing importance for Muslim theology and jurisprudence.

What became the dominant pre-modern Islamic view of language rests on the idea that language (*luḡha*) was originally generated in a moment of primordial invention, in which discrete elements of speech, or “vocables” (*lafẓ*, *alfāẓ*) were assigned meanings (*maʿnā*, *maʿānin*), or vice versa. According to Weiss, the details of the process, including the identity of the actor(s), were seen as having been lost to us, “shrouded in obscurity.”² But this view holds that language emerged not through gradual evolution or a “natural” relationship between words and the things they signify; rather, an essentially arbitrary relationship was established as “normative for all time”³ through a deliberate positing, or “laying down” (*waḍʿ*), of “vocal sounds as the names of ideas.”⁴ (I think that we could say that this assigning of meaning made mere “vocables” into “words.”) The language produced by this primordial event (or series of episodes)⁵ had, and retained, the characteristics of a code, a system of stable signifiers and their assigned signifieds, marked by a high degree of constancy and permanence.

Though ultimately dominant, such a view of the origins and nature of language was not without a history, or without rivals. The several positions on the origins and nature of language largely amount to two, most likely inspired by Greek debates, employing the Arabic term *ṭabʿ* for the Greek *physis* (signifying a natural connection of sound and meaning) and *waḍʿ* for *thesis* (signifying the arbitrary assignment of sounds to meanings).⁶ The theory described above, a version of the *waḍʿ* approach, came to predominate after roughly the end of the tenth century, when those

² Bernard Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Dīn al-Amīdī* (Salt Lake City: University of Utah Press, 1992), 125 and cf. 122; and see his “Medieval Muslim Discussions of the Origin of Language,” *Zeitschrift der Deutschen Morgenländischen Gesellschaft* 124 (1974): 33–41 *passim*.

³ Weiss, *The Search for God's Law*, 126, italics in original.

⁴ *Ibid.*, 123.

⁵ *Ibid.*, 124.

⁶ Bernard Weiss, *The Spirit of Islamic Law* (Athens and London: University of Georgia Press, 1998), 63.

interested in the topic, led by the influential Ash‘arī theologian al-Bāqillānī (d. 403/1013), accepted a basic framework for primordial establishment of language but also accepted uncertainty about the precise details, especially whether the establishing had been done by God or humans.⁷

Prior to settling on this “non-committal” (*waqf*) view,⁸ grammarians, theologians, and jurists forwarded numerous positions. Among these was an early “naturalist” theory, “the theory that language has its origin in a natural affinity (*munāsaba ṭabī‘īya*) between expressions and the things they signify.”⁹ This onomatopoeic view reportedly had its champion in no less an authority than Khalīl b. Aḥmad (d. ca. 174/791), the putative father of Arabic philology.¹⁰ It was later propounded by ‘Abbād b. Sulaymān (d. ca. 250/864) and taken up among many *mutakallimīn* of the era. The following generation saw a shift toward the “revelationist” position (a return, really, to a view previously held by the earliest Qur‘ān exegetes). On this view God had originally named all things and revealed all (or at least some) language to humans.¹¹

The first extensive debates about the origins of language soon followed, with a “conventionalist” view—that is, the ascribing of the essentially arbitrary assigning of names to meanings by cooperative human social convention (*iṣṭilāḥ*)—challenging the revelationist view.¹² The naturalist theory faded into the background as first the conventionalist and then the revelationist theories (the former embraced by many Mu‘tazilīs such as Abū Hāshim (d. 321/933) as supportive of the doctrine of a “created” Qur‘ān, the latter appealing to anti-Mu‘tazilīs and propounded by Abū al-Ḥasan al-Ash‘arī (d. 324/935) himself) found enthusiastic suitors, only to both be left at the altar by the non-committal Ash‘arīs.¹³ As an element of their view, early Ash‘arīs maintained a distinction between phonic speech (*al-kalām al-lisānī*) and internal or mental speech (*al-kalām al-naḥsī*); language was the union of these two types, the vocalizations of *al-kalām al-lisānī* giving voice to the meanings of *al-kalām al-naḥsī*.¹⁴

Added to this basic distinction was the idea that the internal speech of God was *sui generis*, of a kind all to itself, uncreated as “an abstract

⁷ Weiss, “Medieval Muslim Discussions of the Origin of Language,” 40.

⁸ *Ibid.*, 35.

⁹ *Ibid.*, 34.

¹⁰ *Ibid.*, 37.

¹¹ See *ibid.*, 34–5 and 38.

¹² *Ibid.*, 34 and 38.

¹³ See *ibid.*, 38–41; *The Search for God’s Law*, 121–2.

¹⁴ Weiss, *The Search for God’s Law*, 66.

quality (*ṣifah*) inhering in the divine nature.”¹⁵ Taking this position undid much of the motivation to uncover the ultimate origin of language.¹⁶ This divine internal speech was first passed into the comprehension (*fahm*) of Gabriel, and from there it entered creation, “embodied in a phonic speech (*al-kalām al-lisānī*) of God’s own making.”¹⁷

This wrangling eventually produced the dominant Muslim view of language, in which the act of speaking (the paradigmatic form of language use) does not involve assigning meanings to words and phrases, but rather “employ[ing] vocables that have already *been given* meanings.”¹⁸ A given vocable may have more than one meaning (such as metaphorical meanings), and new meanings may be grafted on to the code (or lost) over time, but on this view the range of both multiple and novel meanings is limited—this is manifestly a conservative view of language. Speech is an act of appropriating previously-established potential meanings, which, in the act of speech, are turned into “intended meanings.”¹⁹ The vocables of a given instance of speech thus directly convey authorial intent, the one intended meaning picked out by the author from among the pre-established possible meanings. As the Ḥanafī jurist Sarakhsī (d. ca. 483/1090) puts it, “Expressions are adequate for intentions, and this adequacy is realized only when for each intention there exists a special expression.”²⁰ While a given word may have “extended” or metaphorical meanings in addition to its proper meaning, intention still picks out a single meaning to be communicated. That is, this view of language assigns a one-to-one correspondence between authorial intent and linguistic meaning.

For communication to occur, any person receiving (hearing) speech must already know the code and pick out the meaning for the given word. Again, words, in this theory, generally have a proper or literal meaning (*ḥaqīqah*) and may also have one or more extended or metaphorical

¹⁵ Weiss, “Medieval Muslim Discussions of the Origin of Language,” 41; and see Weiss, *The Search for God’s Law*, 66.

¹⁶ Weiss, “Medieval Muslim Discussions of the Origin of Language,” 41.

¹⁷ Weiss, *The Search for God’s Law*, 68–9.

¹⁸ Weiss, *The Spirit of Islamic Law*, 59, italics in original.

¹⁹ *Ibid.*, 59.

²⁰ *al-‘ibārāt lā taqṣuru ‘an al-maqāṣid wa lā yataḥaqqaqu intifā’ al-quṣūr illā ba‘da an yakūna li-kulli maqṣūd ‘ibārah huwa makḥṣūṣ bi-hā* (Abū Bakr Muḥammad b. Aḥmad al-Sarakhsī, *Uṣūl al-Sarakhsī*, ed. Abū al-Wafā’ al-Afghānī [Hyderabad: Lajnat ihyā’ al-ma‘ārif al-nu‘māniyya; reprint, Cairo: Dār al-Kitāb al-‘Arabī, 1953–54], 1:12, quoted/translated in Aron Zysow, “The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory” [Ph.D. diss., Harvard University, 1984], 99, referring to the Hyderabad edition with the same pagination).

meanings (*majāz*), and normally one expects the proper meaning.²¹ As Weiss puts it, “vocables have, in medieval Muslim thinking, a triggering function: they trigger particular meanings in the mind, their literal meanings . . . [a vocable’s] literal meaning rushes immediately (*mubādaratan*) into the mind of the hearer.”²² If intending an extended meaning, the speaker must signal this intent to the hearer by placing the word in a linguistic context that will disrupt the literal-meaning trigger mechanism.²³ (Of course, ambiguity may itself be intentional, but the view under consideration considers the proper and predominant purpose of language to be clear, unambiguous communication).²⁴

We have been calling this orthodox view of language “non-committal,” for while it posited a primordial act of establishing or “laying down” (again, *waqʿ* as opposed to *ṭabʿ*), it resisted speculation about exactly when, how, and by whom this had been done.²⁵ This uncertainty, however, did not dampen the general confidence in the fact of a primordial assigning of meaning to vocables, or in the long-term stability and utility of the resulting *lughah*-code. Indeed, the need for confidence in the utility of the code—the need for a solid foundation upon which to build an understanding of God’s words and intentions in the aftermath of the decline of the Muʿtazilis—seems to have helped cement the other elements of the theory and to serve as a precondition for the post-Shāfiʿī general consensus in *uṣūl al-fiqh*. For without this confidence, there could be little hope of accessing the divine in texts and learning of God’s intentions for humanity.

As it was, from the late tenth century onward, the *lughah* was nearly universally seen as a rock-solid foundation upon which to build religio-legal knowledge. The *lughah*, or lexical code, did not substantially evolve but remained constant as “a discrete and integral entity that existed through time more or less intact.”²⁶ This view mapped closely onto the original Arab notions of *sunnah*; as Weiss puts it, “A sunnah—the body of customs of a human community—was very much a constant: it undergirded the very continuity of communal life. Likewise, the lexical code also undergirded the continuity of the communal life, adding a linguistic dimension

²¹ On the highly elaborate discussions of *majāz* and literal language see Weiss, *The Search for God’s Law*, 134–50; Weiss, *The Spirit of Islamic Law*, 99–110.

²² Weiss, *The Search for God’s Law*, 137.

²³ *Ibid.*, 137.

²⁴ See Weiss, *The Spirit of Islamic Law*, 61; Zysow, “The Economy of Certainty,” 99.

²⁵ See Weiss, *The Spirit of Islamic Law*, 63; Weiss, *The Search for God’s Law*, 123.

²⁶ Weiss, *The Search for God’s Law*, 124.

to the very identity of human communities.”²⁷ The *lughah* seems to have been viewed as coming into existence simultaneously with the “original primordial society,” as an integral part of that society’s stock of identity-giving customs.²⁸ While some degree of “post-primordial” modification of the *lughah* was recognized, such change left untouched the foundation.²⁹

The stability attributed to the *lughah* is of central importance for the present argument. As I see it, this stability has two dimensions. First, we see stability over time, as the primordial establishing of the *lughah* gave words a definite meaning (or definite and limited range of meanings) assumed to be largely constant since then. Second, this word-meaning stability allowed for a direct and solid connection between the intentions of a speaker/author, via the words giving expression to those intentions, and the recipient/hearer’s faculties of understanding. Aron Zysow, drawing especially on Ḥanafī sources, talks about both dimensions of this stability in terms of the “adequacy” of language to accomplish communication:

Precisely because it is adequate, language is not indefinitely flexible. Words can indeed be used in extended senses, but such departures from the proper sense must be signaled. The intention of the speaker must be made tangible or it is beyond our grasp. Language is based on external appearances. It is a public medium, and private intentions must adjust themselves to this medium if they are to be communicated. In this respect, language is like the law, which is also based on externals.³⁰

The function and indeed the very *raison d’être* of language is to communicate information, and thus its operations must be stable and publicly available.³¹ Language “is characterized by an inner order” and “inner harmony” which are “evidence of the rationality of its inventor.”³² Seeking to communicate with humans, God chose to address humanity in human language, putting the divine *al-kalām al-naḥsī* into the shared divine and human medium of *al-kalām al-lisānī*. Ḥanafīs, and in this they were close to most Sunnī *uṣūlīs*, focused on the apparent, exoteric meaning (*zāhir*) of the revealed sources, rather than seeking esoteric secrets (*bāṭin*), if

²⁷ Ibid.

²⁸ Ibid., 125.

²⁹ Ibid., 126, 129.

³⁰ Zysow, “The Economy of Certainty,” 99.

³¹ Ibid.; and see Weiss, *The Spirit of Islamic Law*, 61.

³² Ḥanafīs, however, adhere to the non-committal *waqf* view; see Zysow, “The Economy of Certainty,” 99 n. 47 (note appears on p. 179).

such exist.³³ On this view, “the principal features of language correspond to significant human intentions and . . . the linguistic forms which signal these intentions are not to be taken in another sense without adequate justification.”³⁴ It seems that here we are justified in adding “significant divine intentions”—that is, if God is using phonic speech (at least indirectly, as Sayf al-Dīn al-Āmidī (d. 631/1233) and other Ash‘arīs would emphasize),³⁵ it is to communicate God’s intentions through the doubly-stable medium of language. Thus “it is the ordinary canons of interpretation which must be applied to understanding the sacred texts.”³⁶ A direct line exists, then, from divine intentions and the mind of God, as it were, to the humanly-comprehensible language of the revealed sources.

Sophisticated communication requires the orderly arrangement of multiple words into a “text.”³⁷ A text here is first and foremost understood as oral/aural in nature, “a body of precisely fixed and, in principle, unalterable words that were *orally* transmitted from one generation to another.”³⁸ Since speaking is by definition intentional and meant to communicate, jurists often used the term *khitāb*, or “address,” for the speaking that constitutes significant texts.³⁹ In theory, writing was essentially irrelevant, at best a mnemonic device, at worst an invitation for scribal error, distortion, and loss. The process of transmission of important texts, such as the Qur‘ān and *ḥadīth*, of course came under a great deal of scrutiny. But in principle, such texts were understood to be perfectly transmittable over time and space, and could be known to have actually been transmitted perfectly if certain conditions prevailed (such as the existence of consistent texts from multiple transmitters, the *tawātur* principle).⁴⁰ A great deal more could be said about the process of transmission of texts and knowledge. But for our purposes it suffices to say that, minor fluctuations aside, the *lughah*-code was considered highly stable, allowing for efficient and effective preservation and conveyance of meaning in texts.

³³ *Ibid.*, 100; to be more precise, Arabic grammarians and jurists contrasted the *zāhir*, or univocal expression, not with the *bāṭin* but with the *mujmal*, the ambiguous expression (see Weiss, *The Spirit of Islamic Law*, 99–100). As noted above, the literal (*ḥaqīqah*) meaning of words was contrasted with the extended or metaphorical (*majāz*) meaning.

³⁴ Zysow, “The Economy of Certainty,” 100.

³⁵ See Weiss, *The Search for God’s Law*, 65–9.

³⁶ Zysow, “The Economy of Certainty,” 99–100, paraphrasing Sarakhsī, *Uṣūl al-Sarakhsī*, 1:141.

³⁷ *Nazm* (Weiss, *The Spirit of Islamic Law*, 61) or *matn* (Weiss, *The Search for God’s Law*, 259).

³⁸ Weiss, *The Search for God’s Law*, 259.

³⁹ Weiss, *The Spirit of Islamic Law*, 61.

⁴⁰ See *ibid.*, 49–52.

Of course the most important texts for jurists (and for Muslims *qua* Muslims) were the divinely-authored Qurʾān and *sunnah/ḥadīth*. General knowledge of the *lughah* was, for jurists, to be sought in the service of understanding the meanings—and putting into practice the directions—encoded in the divine sources. Given the strong and stable link assumed to hold between authorial intent and words/texts—an assumption apparently nowhere stronger than in the view of divinely revealed texts⁴¹—command of the *lughah*-code and the specific contents of the divinely revealed texts together allowed for potential knowledge of the words and intentions of God. Obviously, problems such as the completeness and certainty of this knowledge were of paramount concern to jurists—indeed, these were among the definitive problems shaping Islamic legal theory—but “the jurists adhered steadfastly to the view that the divine intent was always discoverable in principle, even when it was not discovered in fact.”⁴² It is perhaps not too much to say that *fiqh* consists largely of the systematic effort to discern, to de-code as it were, the meanings of divine speech and to minimize (and otherwise come to terms with) the problems of completeness and certainty. As Weiss observes, “it was the toilsome task of the jurist to read the mind of God to the best of his ability.”⁴³

The theoretical end-product of this toilsome task was the *ḥukm*, the legal assessment or rule. This complex term has at least two general meanings in juristic discourse, the assessment by God of the moral/legal standing of a human action, and the specific ruling by a (human) judge on a legal case.⁴⁴ That these two meanings are not so easily separated will be important to us later, but for the moment our concern is with the former, with what Weiss calls “the particular type of divine speech that constitutes a categorization (*ḥukm*) of a human act.”⁴⁵ A legal rule, or *ḥukm sharʿī*, was widely understood to be “addressed speech” (*khitāb*), speech directed at an audience for the purpose of communication.⁴⁶ To be precise, for Āmidī and most Ashʿarīs, the actual divine assessments exist prior to speech, but are the intentional meaning of the speech; “the words [of

⁴¹ See Weiss, *The Spirit of Islamic Law*, ch. 3, esp. 52–65.

⁴² Weiss, *The Spirit of Islamic Law*, 64, italics in original.

⁴³ *Ibid.*, 171.

⁴⁴ Along these lines Ibrahim Moosa remarks that “the *ḥukm* proper is a transcendental norm, of which the empirical *ḥukm* is but a temporal manifestation” (“Allegory of the Rule [*Ḥukm*]: Law as Simulacrum in Islam?” *History of Religions* 38, 1 [August 1998], 7); see also A. Kevin Reinhart, *Before Revelation: The Boundaries of Muslim Moral Thought* (Albany: State University of New York Press, 1995), 4.

⁴⁵ Weiss, *The Search for God’s Law*, 151.

⁴⁶ See Weiss, *The Search for God’s Law*, 93ff.

the *aḥkām*] . . . signify, point to, those categorizations in the manner of all meaning-laden words."⁴⁷ The *aḥkām sharʿiyya* locate human acts on the well-known scale from obligatory to forbidden, with at least three stops in between.⁴⁸ Āmidī, like many jurists, does not discuss the moral/theological matters of divine reward or punishment, but rather focuses solely on liability for temporal, human-applied sanctions.⁴⁹ How to discern these *aḥkām* in the revealed sources is basically what *uṣūl al-fiqh* is all about.

Here we will look past the myriad complexities of the jurists' efforts to derive rules from the revealed sources, in order to emphasize two defining features of the *aḥkām sharʿiyya*: they take the form of language, specifically divine *kalām nafsī* in the shared divine-human medium of *kalām lisanī*, and they refer to human actions. As such they are the fulcrum of the divine-human relationship, where the divine, effectively comprised of language, meets the human, effectively comprised of action—action which is itself, as we will argue below, fully describable in language. Above, we established the relationship between the mind of God, as it were, and language, showing that sufficient knowledge of language (both of the nature and rules of language and the content of the revealed speech of God) allows for knowledge of God's intentions. God is manifest in the temporal realm *as speech*, and the instances of that speech that mattered most to jurists were the *aḥkām*, the assessments of human action. Our next task is to explore the jurists' understanding of the nature of action and to show that like divine intentions, human actions were seen as fully describable in language. Thus, like the divine, the human can effectively be known through language, and language (specifically the *aḥkām sharʿiyya*) is where, in the juristic cosmos, the divine and human meet.

II. THE HUMAN AS ACTION, ACTION AS LANGUAGE

Positive Islamic law is, in short, a discourse about human actions and their assessment in terms of the *aḥkām sharʿiyya*. Manuals of *fiqh* present a thoroughly prescriptive discourse, displaying little concern for the meaning of actions, focusing instead on defining the significant actions of a legally responsible person (*mukallaḥ*) and the status of these actions in the

⁴⁷ Ibid., 95.

⁴⁸ See *ibid.*, 96ff.

⁴⁹ Ibid., 105, attributing this to Mu'tazili influence.

range of religio-legal evaluation. These texts do not provide a systematic account of the nature of action, nothing that would parallel the explicit discussions of the nature of language described above. Still, they do reveal a discernible set of ideas in this regard. The theory of actions includes the assumption that actions have names, and thus may be fully encompassed by the *lughah*-code. We will examine how this assumption leads to the defining of “named act types” with their accompanying *aḥkām*. Then we will turn to a different aspect of this approach to action, its dual treatment of the role of human subjectivity and agency. Here I seek to show that there are two general tendencies in the jurists’ understanding of the relationship of human action to human subjectivity, namely a foundationalist bent and a formalist bent. Both, however, agree that actions are namable with words. These words carry with them the divine intentional meanings of moral-legal assessment and thus bring the divine into contact with the most significant aspect of the human.

A. *Turning Actions into Words: Fiqh Manuals and Fatāwá as Guides to “Named Act Types”*

I will argue here that the rule-books of Muslim jurists, in presenting the *aḥkām*, categorize human actions in language, which in turn is understood to have direct continuity with divine speech. *Fiqh* handbooks exhibit a structure and function much like those of dictionaries. Alongside their various other functions, *fiqh* manuals assign words (signifiers) to particular meanings (signifieds). More precisely, they provide an explicit account of the meaning already assigned to certain words by the specific speech of God—that is, they tell us what are, in the *lughah*-code, the “intended meanings” of God’s revealed speech. The meanings of concern in these texts refer primarily to human actions and their legal/moral value. (God’s speech certainly addresses other topics, such as history, theology, etc., but *fiqh* manuals focus on the subset of divine speech concerned with human action.) Put differently, *fiqh* manuals list and define a set of words drawn from divine speech, words whose meaning refers to human actions. I will use the term “named act types,” or NATs, for these words and phrases. These NATs are words or short phrases signifying human actions (often complex or compound actions). They are conventional and widely used among Muslim jurists as core elements in their shared specialized vocabulary.

To better understand the category “named act types” we might draw on the western philosophy of action, where we find a distinction between

“act types” and “act tokens”: “An act type is a kind of action, like whistling or mailing a letter. An act token is a particular action, performed by a particular person, at a particular time.”⁵⁰ A major concern among action theorists is the “individuation of actions,” or how to divide up the potential component parts of a given act token (e.g., pulling the trigger, discharging the gun, killing the rabbit, scaring the neighbors, displaying one’s hunting prowess).⁵¹ Philosophers have also explored other aspects of actions, such as notions of agency and freedom, the role of intentions in actions (debating, for example, whether intentions “cause” actions), and degrees of “basic-ness” (degrees of direct control by an agent, and the prospect of performing actions by doing other actions).⁵² Many such details of the western philosophy of action are beyond the scope of the present inquiry, but the categories “act type” and “act token” are highly useful (and we will also touch on the issues of intention and the individuation of actions below). I am adding the designation “named” to “act type” to emphasize the linkage of actions to words in Islamic legal discourses (for clarity, I will avoid using any acronym for “act token”).

Defining and assessing NATs is a central function of *fiqh* handbooks. For all their complexity, one can discern within these books a fairly straightforward structure. However sensitive to disagreement or steeped in nuance, and whatever else they accomplish along the way, the handbooks seek to provide a list of defined terms referring to human actions, our NATs. The genre of the *fiqh* handbook is defined in part by its typical structure, parsing out each topic into its own “book” (*kitāb*) and then further treating the subsections of “chapters” (*abwāb*, sg. *bāb*) and “issues” (*masā’il*, sg. *mas’alah*) or “parts” (*fuṣūl*, sg. *faṣl*). The number and designation of subdivisions vary among texts, but the commitment to subdividing and designating is effectively universal and generic here. At each level the presentation revolves around established legal categories, conventional terms referring to types of human action: purification (*ṭahārah*), prayer (*ṣalāt*),

⁵⁰ Alvin Goldman and Holly Smith, “Action,” *Encyclopedia of Ethics*, 2nd ed., ed. L.C. Becker and C.B. Becker (New York: Routledge, 2001), 113. The same distinction is made by many others, sometimes using different terms.

⁵¹ See Goldman and Smith, 113–4; and Jennifer Hornsby, “Action,” *Routledge Encyclopedia of Philosophy*, ed. Edward Craig, (New York: Routledge, 1998), 137–8; and Alfred R. Mele, “Action,” *Macmillan Encyclopedia of Philosophy*, 2nd ed., ed. Donald M. Borchert (Detroit: Macmillan, 2006), 114–15.

⁵² Goldman and Smith, “Action,” 114–15; Hornsby, “Action,” 138–39; major works on these topics include G.E.M. Anscomb, *Intention* (Oxford: Blackwell, 1963); and John R. Searle, *Intentionality: An Essay in the Philosophy of Mind* (Cambridge: Cambridge University Press, 1983).

alms (*zakāt*), oaths (*aymān*), vows (*nudhūr*), marriage (*nikāḥ*), divorce (*ṭalāq* and other forms), sales (*buyūʿ*), partnership (*sharikah*), bankruptcy (*taflīs*), inheritance (*farāʿid*), manumission (*ʿitq*), injurious actions (*jināyāt* or *jirāḥ*), and so forth. Human life consists of a potentially infinite number of act tokens. But Muslim jurists, theoretically reflecting their reading of revelation, are concerned with a finite and determinate set of relevant or significant act types—those addressed by God’s speech—and it is for these that they generate NATs. Not only is it assumed that a portion of a given person’s action’s will be NATs (e.g., getting married, buying or selling property), which must be assessed in terms of the *aḥkām sharʿiyyah*, but also that a proper Muslim *must* do some certain NATs (especially required acts of worship, the *ʿibādāt*).

By way of demonstration, we may begin with the Ḥanbalī jurist Ibn Qudāma’s (d. 620/1223) *fiqh* manual *al-Mughnī*, which opens one chapter as follows:

The book of injurious actions (*kitāb al-jirāḥ*). Otherwise known as the book of criminal damages (*kitāb al-jināyāt*), though the term injurious actions (*al-jirāḥ*) is more commonly used. Criminal damage (*al-jināyah*) [means] any aggressive action toward person or property. But in customary usage [the term *al-jirāḥ*] is limited to illegal infringement of the body, while offences against property are called *al-jināyāt*, [and these latter include] unjustified seizure of property (*ghaṣb*), robbery (*nahb*), theft (*sariqah*), fraud (*khiyānah*), and damage (*itlāf*). Chapter (*faṣl*) [one]: Muslims agree that unjustified homicide (*qatl bi-ghayr ḥaqq*) is forbidden.⁵³

Here our attention is funneled from a general named act type, “injurious action,” past a related, differentiated type, “criminal [property] damage” (variously subdivided), to a more specific named act type, “illegal infringement of the body.” At the next level, “unjustified homicide” is singled out as the premier subset and exemplum of the type “illegal infringement of the body.” Ibn Qudāmah next provides proof texts, partially quoting Q17:33 (“Do not take the life that God has forbidden except with just cause; Whoever is unjustly slain, We have given authority to his heir”), Q4:92 (“Never should a believer kill a believer unless by accident”), and Q4:93 (“Whoever kills a believer intentionally, his recompense is to dwell forever in hell”). He also cites several *ḥadīth*, including: “The blood of a Muslim is not licit...except in three cases: one who commits capital fornication,

⁵³ Muwaffaq al-Dīn ʿAbd Allāh b. Aḥmad Ibn Qudāmah, *al-Mughnī*, ed. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī and ʿAbd al-Fatāḥ Muḥammad al-Ḥilū (Cairo: Hajir, 1992), 11:443.

in retaliation for killing, and for the apostate.”⁵⁴ With such citations of revealed sources, Ibn Qudāmah explicitly links the *aḥkām* for human conduct to the speech of God. This is, of course, not surprising, as this is what, in theory, *uṣūl al-fiqh* serves to make possible. However, such a link is often not made so explicit, particularly in the many shorter compendia of rules. But here we have a clear example of how jurists represented the perceived relationship between the intentions conveyed in divine speech, on the one hand, and human action, on the other.

Ibn Qudāmah then moves to his next level of textual subdivision, the “issue” or “problem” (*mas’alah*), the first of which begins: “Issue (*Mas’alah*): ... Killing (*al-qatl*) is of three types: intentional, quasi-intentional, and accidental.”⁵⁵ Subsequent “issue” sections define each of these three types, beginning with intentional homicide:

Issue: ... Intentional [killing] occurs when one strikes another with an iron bar, or a large wooden pole larger than a tent pole, or a large stone, such that it usually could kill, or repeatedly striking with a small wooden pole, or acting in a way that usually causes serious damage.⁵⁶

Ibn Qudāmah then considers various possibilities in the category of deliberate intent, such as using an ambiguously dangerous instrument:

If the wound is a small one such as from a cupping glass, or [the victim] is stabbed with a needle or thorn (*shawkah*), you [i.e., the one assessing the case] look [to examine the situation]. If [the wound] is in a [potentially] fatal place (*fi maqatalⁱⁿ*), like the eye, heart, torso [near the kidneys], temple, or inner ear, so that he dies, this is also intentional [homicide] because the blow by that instrument is in a fatal place, like a wound with a knife in a non-fatal place [i.e., a fatal stab with a knife in any part of the body]. If [the small wound] is in a non-fatal place, then you look; if it has reached the interior of the body, then it is like a large wound because of the increase in the severity of pain, and it can thereby lead to death, like a large [wound].⁵⁷

Here the text piles on the specific details, providing instructions for how to discern among increasingly subtle distinctions and probing the boundaries of the type. As we move further into the elaborations, we move closer to real life, to the actual act tokens of living persons. The text thus serves as mediator between concrete reality and legal assessment, the latter with its link to the mind of God.

⁵⁴ Ibid.

⁵⁵ Ibid., 11:444.

⁵⁶ Ibid., 11:445.

⁵⁷ Ibid., 11:446.

Looking past the many intriguing details to discern a core structure, we see that a NAT is first presented under a word or short phrase referring to an abstract category of action, presented as the title of the book (*kitāb*) at hand (i.e., *jirāh*, “injurious action”). This word or phrase is given a basic definition which involves differentiating it from similar named act types (i.e., *jināyāt*, “criminal [property] damage”). Then the focus narrows to one of several possible subsets of the general category, a more specific named act type (i.e., *qatl bi-ghayr ḥaqq*, “unjustified homicide”). This NAT is then specified as “forbidden,” and this assessment is established through revealed proof texts—thus a *ḥukm* is formulated.

Then the term is elaborated upon, clarifying which specific elements constitute the specific NAT; that is, the NAT is defined with increasing precision. The NAT and *ḥukm* are effectively intertwined into a single unit. Various examples of the wide array of relevant potential act tokens are presented (e.g., “stabbing with a needle in the temple”), broadening the category outward; though the text does not say so explicitly, the way seems clear for analogous actions to be subsumed into the category (e.g. “stabbing in the neck with a pair of scissors,” perhaps).

We might imagine this structure taking the shape of an inverted funnel, with the most general and abstract term (“injurious actions”) at the narrow top of the funnel neck, and successive stages of increasingly numerous and specific named act types filling out the funnel cone. Depending on one’s interest, one could begin at the top of the funnel and trace a line downward, level by level, into the array of ever more specific NATs. Conversely, if one has a specific act token in mind, one could begin at the open end of the funnel, find the NAT most closely analogous, and trace upward to determine the most general NAT fitting the case. The act of reading the text on the page may encourage the former approach, and a newcomer to the text or genre might need to follow such a linear approach. Yet the expert jurist for whom the text is perhaps more mnemonic device than step-by-step guide could readily work upward, against the flow of the written presentation, or move around as needed. At any rate, one can search the pool of specific named act types for the one most closely corresponding an actual act token, which then links that act token to the proper general NAT (with accompanying *ḥukm*) at the top of the funnel, or somewhere along the way back toward the top. For example, one could use the text to help determine if “a fatal stab in the neck with scissors” counts as the NAT/*ḥukm* “[prohibited] intentional homicide.”

What we see here, in short, is the process of turning an action into a concept, identified by a name. Jurists carve up the constant, undifferentiated

flow of human activity into discrete actions and give the legally significant actions names. These names allow actions to be treated in the medium of language and, more specifically, to be integrated into the linguistic units of the *aḥkām*. These *aḥkām* are, as established above, expressions of divine intent (as processed through juristic effort). A grammar of action thus becomes possible that is simultaneously a grammar of the speech of God. In the terms that Weiss adopts from Gadamer, the process described here involves the perpetual bringing of the revealed source-texts into the ongoing present of human life.⁵⁸ However, as Weiss emphasizes and as we will consider below, this effort to link the speech of God to real human actions cannot be accomplished in the still-too-abstract context of the normative legal manual; a gap remains that can only be bridged by the more concrete and pragmatic work of the *qāḍī* or *muftī*.

A positive (prescribed rather than proscribed) example of the same structure and process is easy to come by. *Ṣalāt*, the required daily act of worship usually called “prayer” in English, is treated at length in handbooks of Islamic law. Here, in a difference from the passages above regarding homicide, the purpose is to instruct the reader how to perform the act, rather than how to assess a completed act. Yet the basic structure is retained, linking an actual act token with a named act type.

This structure and process are readily apparent in a concise *fiqh* manual such as the *Ikhtiyār li-taʿlīl al-mukhtār* of the Ḥanafī jurist Ibn Mawdūd al-Mawṣilī (d. 683/1284).⁵⁹ Mawṣilī begins his “*Kitāb al-Ṣalāt*” with a section on the proper times for prayer, times that prayer should be avoided, and the call to prayer. He then addresses “Preliminaries to *Ṣalāt*” (*bāb mā yafʿalu qabla al-ṣalāt*) and “The Actions of *Ṣalāt* Proper” (*bāb al-afʿāl fī al-ṣalāt*), which together serve to define the NAT *ṣalāt*. He begins:

[Preliminaries to *ṣalāt*] consist of six requirements: purity of the body from impurities, purity of the clothing, purity of the immediate surroundings, covering of the requisite parts of the body, determination of the direction of the *Kaʿbah*, and intent to pray.⁶⁰

⁵⁸ Bernard Weiss, “Text and Application: Hermeneutical Reflections on Islamic Legal Interpretation,” in *The Law Applied: Contextualizing the Islamic Shariʿa*, ed. P. Bearman, W. Heinrichs, B.G. Weiss (London: I.B. Taurus, 2008), 381–2, and see 388–9.

⁵⁹ ʿAbd Allāh b. Maḥmūd b. Mawdūd al-Mawṣilī, *al-Ikhtiyār li-taʿlīl al-mukhtār*, ed. Maḥmūd Abū Daqīqah (Beirut: Dār al-Kutub al-ʿIlmiyyah, n.d.).

⁶⁰ *Ibid.*, 1:45.

These are each then addressed in further detail, clarifying, for example, what portions of the male and female body must be covered. Then, addressing “The Actions of *Ṣalāt* Proper,” he asserts that

the person praying should concentrate on his prayer and look toward the area of his prostrations. One who wishes to begin prayer proper then says “*Allāhu akbar*” and raises his hands, with [the fingers extended] parallel to the thumbs, to his earlobes, but he should not raise them during the pronouncement of “*Allāhu akbar*.” Then he holds his right hand over his left, at the wrist, over the navel. Then he recites [the *Fātiḥah*, the opening chapter of the Qurʾān] in a low voice.⁶¹

The text continues specifying in detail the movements and utterances of a proper prayer, addressing along the way various sub-sets of the general category, such as group prayer, Friday congregational prayer, and so forth. What we see, then, is an extended definition of the general NAT *ṣalāt* and the specific elements—themselves NATs—that make up the type. (Mawṣili does not regularly cite revealed proof-texts, but rather, like many jurists, instead treats it as implicit that the definitions and assessments he lays out are ultimately authored by God.) The text makes clear why and how one should do this named act type—this is a guide to making one’s own act token into this particular NAT.

Other examples are pervasive. All the major categories of *ʿibādāt* exhibit the same basic structure as that just described for *ṣalāt*. Sections of *fiqh* manuals dealing with purity (*ṭahārah*), for instance, provide extended definitions of such NATs as *wuḍūʿ*, *tayammum*, *ghusl*, and the canceling of purity (*mā yanquḍu al-ṭahārah*),⁶² and these can be broken down into parts, such as the rinsing of the hands, face, nose, etc., each of which is itself a NAT. Again, Ibn Qudāmah often explicitly demonstrates that revealed sources establish the requirement to purify before certain actions, such as *ṣalāt*, (Q8:11 for general purity,⁶³ and Q5:6 on *wuḍūʿ* and *tayammum*,⁶⁴ and numerous *ḥadīth*). As with the *ʿibādāt*, jurists provide extended definitions of the various other NATs that make up positive law, such as marriage (*nikāḥ*), divorce (*ṭalāq*, *khulʿ*, *liʿān*, etc.), and inheritance (*ʿilm al-farāʿid*), contract-formation (*ʿaqd*), usury (*riba*), homicide (*al-qatl*), the *ḥudūd*, and so on. I do not wish to overstate my case: there is plenty

⁶¹ Ibid., 1:48–50.

⁶² See, e.g., Ibn Qudāmah, *al-Mughnī*, 1:230.

⁶³ See *ibid.*, 1:11.

⁶⁴ See *ibid.*, 1:12.

going on in most *fiqh* manuals that does not fit neatly into the category of NAT.⁶⁵ But the rules that are the backbone of *fiqh* manuals are given their form and expression through the process of defining NATs.

Fiqh handbooks, of course, are only one important expression of the *aḥkām al-sharʿiyyah*, another being *fatāwá*. I would assert that *fatāwá* display the same basic orientation around NATs, the same view of human action as containable in language—and thus linked to divine language and intention—as do *fiqh* manuals. Without going to great lengths of demonstration, we can see this readily in the basic structure of the prototypical *fatwá*. Collections of *fatāwá* have provided scholars with a wealth of information about social history and legal reasoning and procedures.

But for all their richness, many could be accurately reduced to the following generic form: “Question: Is the case at hand a case of named act type *x*? Response: Yes (or no), this is (not) a case of named act type *x*, for reasons *y* and *z*.” Or, less leadingly, “Question: Which named act type applies to this case? Response: named act type *x*.” These NATs, again, either implicitly or explicitly determine the *ḥukm*, whether the NAT in question is obligatory, forbidden, or has some determinate set of legal effects, themselves perhaps NATs with accompanying *aḥkām* (e.g., this is a valid marriage, and thus the sexual activity which followed was licit). Of course, a *fatwá* may well ask other types of questions as well, such as those regarding technicalities of legal procedure. But even many of these display a similar basic structure, asking whether a person of a certain type has legal standing (that is, is it a person of type *a*?) or whether a document is appropriate for the legal purpose at hand (that is, is it a document of type *b*?). Being defined and named as a particular type of person or document entails a set of legal effects, such as licensing certain actions that in turn take their definition and assessment from the prior determination of the status of the relevant person or document (e.g., a proper “legal heir” may undertake the NAT of inheriting her proper legal share). Thus many *fatāwá*, like *fiqh* handbooks, implicitly link a set of specific real actions, or act tokens, to a set of established legal terms, or named act types.

⁶⁵ For example, Ibn Qudāmah, like most jurists, includes a section on the proper types of containers for water to be used for purification (*al-Mughnī, bāb al-āniyyah*, 1:89ff). This appears not to be about human action so much as about physical objects. But, of course, these objects (water containers) are relevant here only insofar as they are elements in the action, the NAT, of purification.

B. *The Human as Action-in-Language*

The argument so far has basically been that, for post-formative, pre-modern Muslim jurists, divine speech produced the NATs and simultaneous *aḥkām* of positive law. These NATs were taken to express, in language and within the limits of human capacity for certainty, divine intent regarding human action. But if we have seen how we get from the “divine mind” to NATs, how do we get from NATs to the human mind? Or can we? This brings us to the nature of human action, especially the significant human actions signified by NATs. Again, neither *uṣūl* nor *furūʿ* works provide a systematic accounting of the nature of action, certainly nothing as extensive and explicit as the attention paid to the nature of language. So we are left to discern a theory of action in the context of the jurists’ discussions of actions and their assessments. For this, we will again look primarily at *fiqh* handbooks. I argue that these works display two general understandings of the nature of human action, a “foundationalist” bent and a “formalist” bent, but that while these diverge in their treatment of human subjectivity, they converge in treating actions as both the most important aspects of humans—indeed, as metonyms for persons—and as fully describable in language. (Neither the foundationalist nor the formalist bent maps neatly onto a single *madhhab*, era, or region, and in fact most texts, jurists, and *madhhabs* exhibit both, treating many actions foundationalistically, yet isolating a few for formalistic treatment.)

First, we see what we will call a “foundationalist” bent that finds a strong link between actions and intentions. We are borrowing this term from Brinkley Messick, who uses it for a tendency in Islamic legal thought to locate “the site of authoritative meaning-generation internally, within the self, and thus beyond direct observation.”⁶⁶ As he puts it, the consideration of intentions in a contract, for example, indicates a particular view of the self and of authoritative speech:

In and of itself, then, the specific wording employed in sale and related contracts is not to be considered constitutive or binding, but, at the same time, this same wording serves as a principal type of contextual indicator concerning that which is constitutive and binding, namely, consent. In such analyses, a kind of culturally specific foundationalism assumes that a bedrock of human authority and truth exists, located at a remove from ordinary

⁶⁶ Brinkley Messick, “Indexing the Self: Intent and Expression in Islamic Legal Acts,” *Islamic Law and Society* 8, 2 (2001), 153.

discourse, inwardly (in the “heart” or in the “self”) in the elemental ‘language,’ if that is the appropriate term, of human intention (*qaṣd, niyyah*).⁶⁷

On this view, consideration of intentions in contractual exchange is more than an insistence on consent, it is also an indication that verbal forms and other outward signs are indices of a deeper level of expression, an internal formulation of intention that authorizes the words. In short, bodily movements and verbal utterances are *indirect* evidence of “what is really going on,” which takes place in the subjective states of the contracting parties.

The foundationalist approach treats actions in a way that is structurally parallel to, or a mirror-image reflection of, the dominant understanding of language described above. If words are given their “intended meanings” or identities in the process of speech, actions in this view are given their intended meanings or identities in the process of action. In both cases, that aspect of agency that we call intent picks out from the range of possible meanings the one meaning the agent chooses for that word or act token. Like “authorial intent” in speaking, which picks out from the potential meanings of a word the actual meaning of that instance of the use of the word, what we might call “actorial intent” in acting picks out the actual meaning or identity of the action. And, further, the meaning/identity of an action is understood to be fully expressible in language. Each significant action considered in *fiqh* manuals has a name and thus is a NAT with its intrinsic *ḥukm*. Thus, for foundationalist treatments of action, we see a circuit completed between the divine mind and human minds through the linguistic conduit of the NAT/*ḥukm*.

Foundationalism is spread widely, if unevenly, throughout *fiqh* manuals. It is the dominant approach to injurious actions,⁶⁸ for example, and a significant (though not exclusive) component of contract law.⁶⁹

⁶⁷ Ibid., 161–2; see also Brinkley Messick, “Written Identities: Legal Subjects in an Islamic State,” *History of Religions* 38, 1 (August 1998), 45.

⁶⁸ See J.N.D. Anderson, “Homicide in Islamic Law,” *Bulletin of the School of Oriental and African Studies*, University of London 13, 4 (1951), 819–20; Paul R. Powers, *Intent in Islamic Law: Motive and Meaning in Medieval Sunni Fiqh* (Leiden: Brill, 2006), 169–89. For discussion of a particularly complex aspect of the juristic treatment of intentions, see Colin Imber, “Why You Should Poison Your Husband: A Note on Liability in Ḥanafī Law in the Ottoman Period,” *Islamic Law and Society* 1, 2 (1994): 206–216.

⁶⁹ Contract law displays a mix of formalism and foundationalism. Jurists specify the formal/objective elements of a valid contract, such as the explicit specification of goods and price, and these objective elements are crucial to the definition of a given act as the NAT “forming a valid contract.” Intent matters primarily in two ways, namely the basic sincerity of the speech acts involved in contracting, and the potential wider effects of

Foundationalism is perhaps most prominent in the treatment of required religious duties, the *'ibādāt*. All jurists include among the required elements of the *'ibādāt* a subjective state or action called *niyyah* (pl. *niyyāt*). Often translated as “intention,” *niyyah* here has a distinguishing function, determining the identity of an act by picking out the meaning of the action. This meaning is expressible in language; it amounts to the verbal “name” of the action drawn from the list of names of legally significant actions. The question of whether one has done one’s *'ibādah* can be restated as the question of whether one’s action can properly be named as one of the previously defined *'ibādāt*, and this depends in large part on whether one “intended” (that is, subjectively picked out the name/meaning of) one’s action to be a particular, named *'ibādah*. The objective form of the action also matters, but without *niyyah* to establish the action’s identity at the subjective level, the action cannot be named as the particular *'ibādah*. Aḥmad b. Idrīs al-Qarāfi’s (d. 684/1285) treatise on *niyyah* is quite explicit in this regard:

The rationale for the requirement [of *niyyah*] is distinguishing (*tamyīz*) acts of worship from ordinary actions (*al-'ādāt*) and distinguishing among levels of acts of worship [such as required from supererogatory prayer].⁷⁰

the contract. Coercion is universally considered an invalidating condition for contracts. But jurists disagree about sincerity in the absence of coercion, with some holding explicit statements of contract to be valid and binding even if not so intended, while others disagree. Jurists allow a limited degree of ambiguity in the speech of a contract, and consider intentions as definitive when some, but not too much, objective ambiguity exists. Jurists also considered the possible wider effect of contracts. Intentions become an issue in this regard in the case of a transaction that might be seen as indirectly leading to illegal effects (the classic example is the selling of grapes to a winemaker: selling grapes is perfectly legal, whereas making wine is prohibited). Here jurists disagree not about whether intentions help define actions but rather about what components of a complex action are to be considered relevant. See Powers, *Intent in Islamic Law*, 97–121.

⁷⁰ Aḥmad b. Idrīs al-Qarāfi, *al-Umnīyyah fī idrāk al-nīyyah* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1984), 20, see also 9–10. Abū Ishāq al-Shīrāzī (d. 476/1083) says that when performing a required prayer, “One must have specific *nīyyah*, intending the noon prayer or the evening prayer to distinguish it (*li-tatamayyaz*) from other [prayers]” (*al-Muhadhdhab fī fiqh al-imām al-Shāfiʿī*, ed. Muḥammad al-Zuhaylī [Damascus: Dār al-Qalam, 1996] 1:236). Similarly, *nīyyah* distinguishes a required prayer from supererogatory prayer (see Shīrāzī, *al-Muhadhdhab*, 1:236; al-Qarāfi, *Al-Umnīyyah*, 20), and in a group context *nīyyah* distinguishes the prayer of the “leader” (*imām*) from the “follower” (*al-maʿmūm*) (see Shīrāzī, *al-Muhadhdhab*, 1:310), and abbreviated prayer (of a traveler, e.g.) from full prayer (see Shīrāzī, *al-Muhadhdhab*, 1:338–40). Ibn Qudāmah says of fasting: “one must specify the *nīyyah* for each required fast, such as whether the next day’s fast is for Ramaḍān or for making up a previous broken fast, or as an expiation, or [in fulfillment of] an oath” (*al-Mughnī*, 4:338). Spending time in a mosque can be a generic act or the NAT *iʿtikāf* (supererogatory retreat during Ramaḍān) if so identified by the actor’s *nīyyah* (see Mawṣilī, *al-Ikhtiyār*, 1:136–8).

Niyyah is what distinguishes *wuḍūʿ* from simply washing up or cooling off with water, and what distinguishes one prayer from another.⁷¹ Jurists further make clear that *niyyah* is a silent, internal phenomenon, a product of the *qalb*, a term here best translated as “mind.”⁷² The *ibādāt* are actions defined in part by what we might call “actorial intent,” the mental action of picking out the meaning or identity of the action, and that identity is expressed in language, specifically the NATs of *fiqh* manuals. Thus human actions can be measured against divine intentions in the shared medium of language. In cases of strong foundationalism, language links the human mind, through the actions that are its manifest expressions, directly to the mind, as it were, of God.

While foundationalism is prominent in *fiqh* works, jurists at times take a decidedly different view, one that disregards human intentions and subjectivity, instead treating the objective components of an action as fully definitive. In taking such a “formalist” approach, jurists do not deny that human intentions exist, nor do they say that the intentions are so completely manifest in the objective action that the subjective can safely be collapsed into the objective. Rather, they pointedly disregard intentions, intentions that they recognize might, if taken into consideration, change the identity and assessment of the action. The parallelism between language and action described above breaks down in cases of formalism. Here the expectation that actions express intentions is abandoned. Instead, jurists treat intentions as altogether irrelevant to the legal identity and status of the action. The objective elements of action, in such cases, even if known to be at odds with the subjective intentions of the actor, are treated as definitive. Still, in such cases the action is treated as namable, and this name establishes the action as a linguistic entity.

Niyyah distinguishes the NAT *zakāt* from voluntary charity, gift-giving, or other transfers of wealth (al-Mawṣilī, *al-Ikhtiyār*, 1:101; see Shīrāzī, *al-Muhadhdhab*, 1:560), and distinguishes the NAT *ḥajj* from its close counterpart the *ʿumrah* (see Abū Zakariyyā Muḥyī al-Dīn b. Sharaf al-Nawawī, *Kitāb al-maǧmūʿ: sharḥ al-muhadhdhab lil-Shīrāzī* [Cairo: Dār Iḥyāʾ al-Turāth al-ʿArabī, 1995], 7:237).

⁷¹ See Powers, *Intent in Islamic Law*, 45.

⁷² Jurists universally agree that *niyyah* is a product of the *qalb* (often this is discussed in terms of the “location,” *maḥāll* of the *niyyah*, or *niyyah* is called “an action of the *qalb*” [*ʿamal al-qalb*]). The term *qalb* is often misleadingly translated as heart, but in this context a better choice is “mind,” as the *qalb* (an organ located in the chest) was understood as the seat of the intellect or rational faculty (*ʿaql*)—emotions and spirit were located elsewhere. So *niyyah* was formed or expressed by the mind (*ʿaql/qalb*), and while it might be accompanied by a verbal pronouncement, jurists did not consider this essential (see *ibid.*, 36–40).

Such formalism appears most prominently in some treatments of contract law and in the law of marriage and divorce. In brief, these legal procedures all rest on verbal pronouncements of one kind or another, and for some jurists, under some circumstances, these verbal pronouncements have valid and binding legal effects regardless of the intentions of the speaker. Contracts of marriage generally disregard intent; they must be explicit and formally proper, but the contracting parties' intentions are not significantly discussed (with the partial exception of some concern for gaining proper consent from the woman).⁷³

Divorce, especially in its paradigmatic legal form of *ṭalāq*, is more complex.⁷⁴ *Ṭalāq* consists in major part of a unilateral pronouncement by a husband to the effect that he is initiating *ṭalāq*; a waiting period (*ʿiddah*) follows, and if the *ṭalāq* is not retracted through word or deed, the marriage is then dissolved. Jurists widely agree that if the husband's pronouncement is explicit and unequivocal (*ṣarīḥ* [for example, "I hereby initiate *ṭalāq*"]), the husband's intentions are irrelevant—he may be speaking in jest and have no desire to divorce, but the *ṭalāq* still stands. Intention matters only when the pronouncement is ambiguous (*kināyah* [for example, "You are free" or "You are on your own"]).⁷⁵ In such a case, the divorce becomes effective only if the husband intended his words as divorce. But the jurists emphatically treat explicit statements of *ṭalāq* in purely formalistic terms—certain verbal utterances simply are the NAT *ṭalāq* and thus have certain legal effects.

What we see, then, is that sometimes action is defined as a composite of subjective and objective dimensions, and sometimes is defined solely by the objective dimension. Put differently, for jurists, the subjective and objective can work together, or the objective can stand alone, but the subjective can never stand alone. Whether in a foundationalistic or formalistic mode, Islamic law pays a great deal of attention to the objective elements of actions, establishing in considerable detail the proper bodily movements and verbal expressions that constitute a given NAT. Ibn Qudāmah's treatment of homicide, seen above, displays this concern for the objective, with its discussion of weapons employed and bodily parts struck. Likewise, our example of prayer deals extensively with objectively

⁷³ See *ibid.*, 125–30.

⁷⁴ See *ibid.*, 130–53.

⁷⁵ See, e.g., Shīrāzī, *al-Muḥadhdhab fī fiqh al-imām al-Shāfiʿī*, 4:294–95. Some pronouncements, treated casuistically, are considered too vague to come into effect regardless of intention, such as inaudible pronouncements (see Powers, *Intent in Islamic Law*, 142–43).

manifest bodily movements and verbal utterances, and examples could easily be multiplied, drawing from the rules of contract, divorce, and evidence, for example. Such is highly typical of the genre. In defining NATs, jurists go to great lengths to specify the objective, bodily, physical dimensions of those acts, to an extent that moderns often find off-putting or baffling. *Fiqh* texts are largely unconcerned with what moderns would call the “meaning” of these acts, at most perhaps touching on their utilitarian effects, but rather are thoroughly and unapologetically prescriptive. In short, jurists treat actions as objectively manifest, concrete things in the world. And they assign to these specific, clearly defined names, names that carry with them assessments.

To sum up, then: Actions are usually, but not always, defined by intentions. But in either case, they are defined in words. When actions are treated as defined in part by the subjective intentions of the actor, in what we are calling foundationalism, then the actions are in effect manifestations of the whole person, the person being a coherent unit of thought and action. When the subjective is disregarded, the action is still what matters, but in this case it does not represent part of a coherent whole. Rather, it stands alone as the relevant manifestation of the (at least temporarily) non-coherent person. But the action in either case is named, turned into words, and these words are metonyms for the legally relevant person. The whole person bears the subsequent legal liability (and potential responsibility for punishment or reward in the afterlife), but the NAT is the part or aspect of the person that matters to the law.

CONCLUSION

In assessing the history of western scholarship on Islamic law, Johansen has asserted that “the liturgical acts, the ethical content of those norms which cannot be applied by courts but which address the conscience of the individual believers, their *forum internum*, in short, the religious dimension of the *fiqh*, has hardly been considered as an object of legal reconstruction.”⁷⁶

While far from providing a full remedy to this problem, the present chapter has sought to explicate some of the specific ways that the religious dimensions of *fiqh* were understood by jurists and were related to

⁷⁶ Johansen, “The Muslim *Fiqh* as a Sacred Law,” 59.

dimensions of *fiqh* not readily seen by western scholars as having religious characteristics. Taking seriously the linguistic premises (what Weiss calls the “*lughah*-related postulates”) that the jurists were working with, we see that divine speech was understood as a direct and stable expression of divine intentions. The *aḥkām sharʿiyyah*, in theory, were the intentional meanings of divine speech regarding significant human action. Human actions, in turn, were themselves seen as fully enmeshed in the *lughah*-code, as jurists turned deeds into words by defining and naming them. Actions were often seen as taking their specific name and identity through a combination of objective and subjective factors, or, in some cases, only through objective manifestations. But in either case, jurists turned deeds into the NATs of positive Islamic law. And it was in these NATs, with their accompanying *aḥkām*, that the divine was able to meet the human. Islamic law managed, as it were, divine-human relations by placing (or finding) each in the realm of language.

Above, we focused primarily on the work of jurists in producing *uṣūl al-fiqh* and positive law. However, it was perhaps in their roles as *qāḍīs* or *muftīs* that the work of jurists most directly brought together in language divine speech and human actions. We noted above that the word *ḥukm* refers both to the divine assessment of a human action, on the one hand, and the worldly and binding assessment of a *qāḍī* or the assessment-opinion of a *muftī* on the other hand. The hope, of course, is that these are one and the same, but the jurists recognized the likelihood that this will not always be the case. Jurists had to rule in the context of limited knowledge both of God’s will and of worldly fact, and they bore responsibility for potential errors in each. A. Kevin Reinhart has already richly analyzed the “sacerdotal role” of *qāḍīs* and *muftīs*; here we might add modestly to his findings by emphasizing the linguistic nature of the work done in this role. Reinhart observes that the handbooks of *fiqh* are no true *corpus juris*: “even a compendium of relevant *Fiqh* can be no more than guidance” for the “religiously legitimate process of measuring the situation at hand against the corpus of Revelation.”⁷⁷ In our terms, this is the process of naming a given act token (“the situation at hand”) in terms of the NATs of *fiqh* handbooks, and thus assigning a *ḥukm*. However, Reinhart’s study reminds us of the imprecise fit between world and text and the need for the *qāḍī* or *muftī* to fill that gap. Weiss, drawing on Gadamer and Frank

⁷⁷ A. Kevin Reinhart, “Transcendence and Social Practice: *Muftīs* and *Qāḍīs* as Religious Interpreters,” *Annales Islamologiques* 27 (1993), 8.

Vogel, reflects on this same matter when he observes that jurists were always in the process of linking the “macrocosmic law . . . of the insufficient text” to the “microcosmic” level of assessing actual human actions.⁷⁸

Our findings above highlight some details of the specialized work of the jurist and the epistemological framework within which it happened. If God’s will can only be known in divine speech, with a single correct meaning and stable over time and space, and if that speech is found not to be easily understood, not easily read for guidance and assessment of the infinite array of human act tokens, then only through the long-term systematic effort of the specialist can one acquire the requisite skill for discerning NATs and generating *aḥkām* for real-life situation. Not only must a jurist know the intended meanings of divine speech, which while stable and timeless are not always easily known, but he must also undertake the perilous task of tying to this solid mooring the perpetually moving reality of human actions. Indeed, as Reinhart notes, “the *ḥukm* is rightly understood not as something known . . . but as something theoretically indeterminate until performed.”⁷⁹ The *ḥukm*, then, does not fully exist in the abstract, but rather comes into being in the jurists’ act—linguistic act—of simultaneously naming and assessing actions. For all this to even be possible, each element, divine speech, human action, and the *ḥukm*, must exist on the same plane, be of the same stuff. That stuff is language.

Much has been said, and certainly much more could be said, about just how *qāḍīs* and *muftīs* formulated their assessments, how they attached the NATs of their texts to the act tokens of their living interlocutors. Recognizing that this is one direction in which my inquiry naturally leads, however, I will conclude instead with some brief speculations about another set of questions raised by my arguments, namely, whether the general pre-modern Muslim legal understandings of language and action still hold today. Reinhart asserts that pre-modern jurists “envisaged a world in which by far the minority of Muslims were competent to know how to act rightly. The consequence was a hierarchy of knowledge and knowers that goes back to the dawn of Islamic legal thought.”⁸⁰ Starting from what I take to be a similar premise, namely that pre-modern Islamic law was understood as a difficult, highly disciplined, and context-sensitive process undertaken

⁷⁸ Weiss, “Text and Application,” 392, drawing on Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Leiden: Brill, 2000), 21–28; in the same vein, Weiss also discusses what he calls the “inseparability of interpretation from application” (387).

⁷⁹ Reinhart, “Transcendence and Social Practice,” 8.

⁸⁰ *Ibid.*, 9.

by specialists, Wael Hallaq has asserted that Islamic law has not survived into modernity: “the *shari‘ah* is no longer a tenable reality . . . it has met its demise nearly a century ago.”⁸¹ His point is that the actors, institutions, and relationships that constituted pre-modern Islamic law have largely given way to new ones that no longer amount to anything very much the same. Most notably, the *shari‘ah* has been transmuted into a code and incorporated into central governments, thus obviating the traditional *‘ulamā’*. Hallaq emphasizes the massive psychological, ethical, and epistemological transformations that differentiate modernity from the pre-modern framework of Islamic law.⁸² Our exploration above might add to our understanding of the epistemology of pre-modern Muslim jurists, and thus sharpen our understanding of what has changed in modernity. Above we described an Islamic law based on knowledge of God available only through the linguistic medium of divine speech. God’s intentions were known through the workings of language, a stable but complex code to be deciphered by experts working, theoretically at least, on behalf of the whole *umma*. Divine speech was connected to human actions through careful consideration of the myriad details of each. For the pre-modern Muslim world, to know God was to know texts, texts understood to be available to all, but deeply understood only by a few, and to be put into action, so to speak, with great care and even some reluctance.

One of the religio-legal epistemologies coming to dominance in the past one to two centuries, which we might refer to under the shorthand term “Salafism,” however, reflects a considerably different set of views. Salafism is often taken by western observers to be a hyper-conservative stance, but it is at least potentially nearly the opposite, a radical unmooring of religious authority and its underlying epistemology. Whether for modernist or for conservative or “fundamentalist” Muslims, Salafism is based on the premise that each individual believer can and must go directly to the source texts rather than employing intermediaries. Those intermediaries, formerly respected experts, now become suspect as each individual is to be an expert him- or herself. For present purposes, what is relevant is that this Salafism seems to rest on a new and different understanding of the

⁸¹ Wael B. Hallaq, “Can the Shari‘a be Restored?” In *Islamic Law and the Challenges of Modernity*, ed. Yvonne Y. Haddad and Barbara F. Stowasser (Walnut Creek, Ca.: AltaMira, 2004), 22.

⁸² See especially *ibid.*, 45–48. Khaled Abou El Fadl largely agrees; see his *Speaking in God’s Name: Islamic Law, Authority and Women* (Oxford: Oneworld, 2001), especially 170–73.

nature of language, including divine language. The dominant pre-modern view held language to be a rock-solid code in which meaning was established in a once-and-for-all moment of authorial intent, an objective fact. Modern Muslims seem to be moving in the direction of seeing language as considerably less solid, far more subjective—a set of meanings to be encountered in the fluid, contextualized subjectivity of the individual believer.⁸³ While this is more readily apparent for “liberal” Muslims, even so fundamentalist a figure as Sayyid Qutb, with his mystically-tinged epistemology and hermeneutics, could be included under the umbrella of the new subjectivism.⁸⁴

Olivier Roy’s provocative book, *Globalized Islam*, is one of numerous works to examine the ways that contemporary Muslims have largely lost or abandoned traditional structures of authority. Roy describes this as the end of a discursive epistemology, of knowledge conveyed primarily in language. Discursive epistemology is being displaced by an experiential epistemology, one that sees the subjective dimension of the individual person as the primary medium of the divine-human relationship:

[contemporary Muslims] are in search of a faith, not theological knowledge. It is a general feature of contemporary religiosity that truth is not linked with the acquisition of knowledge, or more precisely that such knowledge as there is can be immediately understood, especially when a charismatic leader is in charge. . . . Faith in a sense is direct access to truth, so the new believer is no longer interested in gradual access to knowledge. The knowledge he is seeking should fit with the sudden *feeling* of being in touch with the truth.⁸⁵

A widespread non-consequentialist view of the *‘ibādāt*, a view of the reasons for and effects of religious duties as largely beyond human ken (Ibn Rushd (d. 595/1198), for example, labeled the *‘ibādāt* as *ghayr ma‘qūlat al-ma‘nā*, “without rational foundation”)⁸⁶ seems to be fading.

⁸³ Hallaq remarks on the “incurable subjectivity” of many modern efforts to reform Islamic law, as such traditional *uṣūl al-fiqh* concepts as necessity (*darurah*) and public interest (*maṣlahah*), once very limited in scope and treated as hedges around the central, more objective-textual categories of legal theory, now “are taken so far as to obliterate the very system from which they themselves derive” (“Can the Shari‘a be Restored?” 46).

⁸⁴ See Robert D. Lee, *Overcoming Tradition and Modernity* (Boulder: Westview Press, 1997), ch. 4, especially pp. 97–99 and 103.

⁸⁵ Olivier Roy, *Globalized Islam: The Search for a New Ummah* (New York: Columbia University Press, 2004), 165–67, emphasis added.

⁸⁶ Abū al-Walid Muḥammad b. Aḥmad Ibn Rushd al-Qurṭubī, *Bidāyat al-mujtahid wa-nihāyat al-muqtaṣid* (Beirut: Dār al-Kutub al-‘Ilmiyya, 1988), 1:8–9.

In its place we see a growing consequentialism and rationalism, efforts to describe the physical, social, and psychological benefits of Islamic practices and the manifest rationality of Islamic beliefs. Religion becomes individualistic and therapeutic; *ṣalāt*, for example, increasingly becomes noetic communication with the divine rather than primarily worshipful and duty-fulfilling. One could argue, as Roy does, that these changes are happening to most religious traditions and are part and parcel of some global and globalizing developments, including secularization. But to the extent that these changes are happening among Muslims, we can see them as specific as well as general; that is, we can see how they are changes from some specific pre-modern attitudes and theories regarding language, action, and the like.

Certainly, the dominant pre-modern view of language, and the legal theory that rested on it, may have been more theory than fact, masking the extent to which jurists' positions were products of history, not pristine discourse floating above it all. But we may be witnessing today the emergence of a dramatically new view of language, epistemology, and authority, a view that itself often explicitly denies its historicity and subjectivity (only the most liberal Muslims, such as Irshad Manji, Salman Rushdie, and perhaps Omid Safi and his "Progressive Muslim" movement, champion an explicit embrace of the hyper-contextualized and subjective), but nonetheless abandons the idea of language and divine speech as objective fact. The modern triumph of the subjective seems to be working its peculiar magic deep into the fabric of Islamic law. Whether this is to be celebrated or lamented is, of course, itself a subjective matter.

In his recent work on the potential relevance of Gadamer for revitalizing Islamic law today, Weiss promotes a model of law as process and dialogue, to serve as a way out of "radically subjectivist and relativist post-modern ways of thinking" and without reverting to dogmatism.⁸⁷ It seems he has in mind retaining the stability of language and of the textual sources of knowledge for God's intentions (avoiding relativism), along the lines discussed above, coupled with a view of the application of those sources as open-ended and context sensitive (avoiding dogmatism). Taking seriously Reinhart's arguments, we have reason to think that pre-modern jurists, *qāḍīs*, and *muftīs* did just that—they allowed real life to shape their determination of assessments while still measuring them against the stable language of revealed sources. It may be, then, in the

⁸⁷ Weiss, "Text and Application," 375.

very features of pre-modern law described above that way might be found of salvaging Islamic law and making it suitable for modernity—keeping the law alive in modernity by making it less modern.⁸⁸

Pre-modern jurists made the *shari'ah* viable by preserving the stability of the language and texts that conveyed it to humans, and by performing the highly difficult and specialized work of determining assessments and linking them to actions. If today each Muslim can or must perform these tasks herself, the complexity and stability of those texts, and of language itself, must perhaps be lost in the bargain. Without a view of language as something stable and enduring coupled with a view of divine intentions as knowable only through disciplined and specialized study, perhaps Islamic law, now seemingly everywhere, is, in effect, nowhere. It is, at any rate, a very different thing.

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⁸⁸ For Hallaq, reviving Islamic law in modernity requires new political structures ("a genuinely Islamic polity") that incorporates, while leaving substantively independent, a "Muslim intelligentsia" assigned the task of generating an Islamic law that can evolve with changing conditions without sliding into either shapeless subjectivism or irrelevant academic idealism ("Can the Shari'a be Restored?" 46–47).

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LITERAL MEANING AND INTERPRETATION IN EARLY IMĀMĪ LAW

Robert Gleave

INTRODUCTION

The term “literal meaning” is used extensively, but generally uncritically, in the secondary literature on medieval Islamic hermeneutics. Two technical terms in classical *uṣūl al-fiqh* are frequently translated as “literal meaning” (or a variant such as “literal understanding,” “literal definition,” “literal interpretation”): *ẓāhir* and *ḥaqīqah*. Scholars have suggested a plethora of alternative translations for both these terms (from “obvious” and “uncritical” for *ẓāhir* to “veridical” and “proper” for *ḥaqīqah*), though “literal,” in my estimation, is the most popular for both terms.¹ Bernard Weiss, as far as I can ascertain, is the only scholar to date to embark on a self-reflective examination of whether the term “literal” is an appropriate translation for either *ẓāhir* or *ḥaqīqah*, as they are used in *uṣūl al-fiqh*. In his magisterial study of Sayf al-Dīn al-Āmidī’s (d. 631/1233) *al-Iḥkām fī uṣūl al-aḥkām*, Weiss assesses the position of *ẓāhir* and *ḥaqīqah* in al-Āmidī’s legal hermeneutics. The first thing to be said is that Weiss sees the terms *ẓāhir* and *ḥaqīqah* as relating to the classification of expressions. A *ḥaqīqah* expression is one in which “a vocable [Weiss’s translation of *lafẓ*] is used to convey the meaning to which it was originally assigned [*wadʿ*] as an item within the lexical code [that is to say within the *Lughā*].”² The implication here is that the term *ḥaqīqah* describes the usage of a word, rather than its meaning (if the two things can, indeed, be distinguished).

¹ For a selection, consider the following: *ẓāhir*: “literal” (Y. Dutton, *The Origins of Islamic Law*, 79; M. Bernard, “Hanafī *uṣūl al-fiqh*,” 625), “obvious” (E. Winkel, *Islam and the Living Law*, 40); “apparent” (Sands, *Sufi Commentaries on the Qur’an*, 60); “immediate implication” (Bedir, “An Early Response to Shāfiʿī,” 298); “overt manifestation” (Gully, “Implication of Meaning,” 462). *ḥaqīqah*: “literal” (W. Heinrichs, “On the Genesis,” 115; Gully, *Grammar and Semantics in Medieval Arabic*, 39); “veridical” (W. Heinrichs, “On the Genesis,” 115 and Wansbrough, *Quranic Studies*, 236; J. Lowry, “The Legal Hermeneutics of al-Shāfiʿī and Ibn Qutayba,” 36); “strict sense” (Frank, *Beings and their Attributes*, 157); “real” (J. Peters, *God’s Created Speech*, 79; S. Wild, “We have Sent down to thee the Book with the Truth’,” 151. This does not exhaust the translations in English of either term, without even mentioning the terms’ translation into other languages.

² Weiss, *The Search For God’s Law*, 134.

For al-Āmidī, *ḥaqīqah* only becomes an appropriate category of analysis to describe an uttered statement, an expression, not a meaning *per se*.

Here, it might be said that al-Āmidī's (or more accurately Weiss's interpretation of al-Āmidī's) use of *ḥaqīqah* to refer only to expressions, differs from the summary of the classical position given by Heinrichs. Heinrichs glosses the term *ḥaqīqah* as "the literal, proper, veridical meaning or use of a given word"³ giving the impression that in the classical theory, *ḥaqīqah* is used to describe meanings as well as uses (i.e. expressions). It is quite possible that al-Āmidī's use of *ḥaqīqah* as referring exclusively to expression (i.e. language use) and not meaning (which is linked to his notion of *wadʿ*) is unusual. The matter requires further investigation, but it is not my main concern here. It should be noted that the term *zāhir*, unlike *ḥaqīqah*, is used to describe the meanings of words, and not only expressions, but, as Weiss argues, this is a separate (but linked) use of the term, and deserves a different translation.⁴

Remaining with *ḥaqīqah* for the minute, whilst it might be convenient to talk of the "*ḥaqīqah* meaning" of a word or expression, what is really meant by such a phrase is, in al-Āmidī's theory, "the assigned" meaning of the word (*mawḍūʿ lahu*). This is the meaning which has been assigned to a sound in what Weiss calls the "primordial Lughā." It is the assigned meaning which, in Weiss's terminology, is the "literal" meaning of a word. An expression is *ḥaqīqah* when this word is used by a speaker to mean the same thing as the assigned/literal meaning; *ḥaqīqah* describes the use of the word, rather than the word itself. Of course, al-Āmidī's theory is based on the notion (made explicit in the text of the *Iḥkām*) that a word's use is quite different from a word's meaning, in that the former relates to the intended meaning of the speaker, whilst the latter is bound up with the position of the word within a grand lexical code known as the Lughā.

Weiss next tackles the term *zāhir* and its relationships with *ḥaqīqah* as a means of describing an expression. A *zāhir* expression is a particular type of *ḥaqīqah* expression—namely one which has a single literal meaning. The reason for this subcategory being necessary is the phenomenon of homonymity—that is, particular vocables having more than one meaning assigned to them: Weiss uses the word "bank" as an illustration of this (it has two assigned definitions: financial institution/side of a river).⁵

³ Heinrichs, "On the Genesis," 115.

⁴ Weiss, *Search for God's Law*, 140.

⁵ Weiss, *Search for God's Law*, 139.

Homonymity exists quite extensively in Arabic, and when it does, an expression using a word (or words) with two (or more) assigned meanings can now be simultaneously ambiguous and *ḥaqīqah*. The frequency of this occurrence is not a matter of concern for al-Āmidī—its existence establishes the need to have a theory which incorporates such an eventuality. A *zāhir* expression is one which is not troubled by homonymity. Each word/phrase within the *zāhir* expression has a single literal meaning, which when combined give us a single literal meaning of the expression. When this occurs, we can say that the expression is *zāhir*—it is “univocal.” Its univocality engenders the probability that the intended meaning of the expression is its literal meaning (i.e. the meaning assigned to its component parts in the *Lughā*). When used to describe a meaning rather than an expression, Weiss wishes to translate *zāhir* as “apparent.” The meaning of an expression (as opposed to the expression itself) can be described as *zāhir* when it is “the apparent intended meaning by virtue of its being the sole literal meaning of the expression and by virtue of the preponderance of literal meaning over non-literal meaning.”⁶ All this means that the rather lax use of the term “literal” in the secondary literature on hermeneutics is ripe for re-examination. Weiss remarks:

[In presenting al-Āmidī’s thought in this way,] I am obviously taking exception to the common practice of translating *zāhir* as “literal.” A *zāhir* meaning is, of course, a literal meaning, but it is more than that: it is a literal meaning that has no competitors and thus has an *ab initio* claim to be the meaning intended by the author.⁷

Now, I have taken some time to re-express Weiss’s expression of the *zāhir-ḥaqīqah* relationship not merely because his remains the only detailed analysis of which elements within *uṣūl al-fiqh* hermeneutics coincide with the common understanding of the term literal. It also serves as a useful parameter for my investigation of the extent to which the notion of “literal meaning” became an operative category in early Imāmī legal hermeneutics. Literal meaning, for the purposes of my study here at least, is the intuitively attractive idea that a word (and when strung together, words make sentences) has a meaning which it “owns” and which might potentially differ from the speaker’s intended meaning when using that word. In medieval Islamic theories of language, as we know, this was associated

⁶ Weiss, *Search for God’s Law*, 140.

⁷ Weiss, *Search for God’s Law*, 140.

with the invention of the Lughā, the great linguistic code in which sounds were associated with meanings.

However, a full buy-in to that theory is not necessary for my purposes in this chapter. I aim for a more modest goal of tracing the emergence of the idea of a literal meaning in early Imāmī legal literature. For the sake of terminological precision, I mean by literal meaning in the following analysis not necessarily a meaning conceived of as assigned to a word in some primordial past. Rather, I use the term simply as a convenient marker for the idea that a word, or set of words (a text) has a meaning which is not influenced by the context in which the words are used, and is distinct from the intended meaning of the author. The literal meaning is, in some sense, the “inherent” meaning of the text. The purpose of this paper is not to analyse whether or not such a notion is philosophically coherent, nor do I aim to address whether or not the notion is a convenient hermeneutic myth. Rather, my aim is to identify elements of the legal reasoning found in early Imāmī legal texts which, implicitly or explicitly, rely on a concept of literal meaning, as I have just defined it.

NOTIONS OF LITERAL MEANING IN IMĀMĪ ḤADĪTH LITERATURE

Potential evidence for an early reflexive Shīʿī understanding of literal meaning can be found in a report attributed to Imam ‘Alī in an early Shīʿī source, the *Kitāb Sulaym b. Qays al-Hilālī* (d. 76/695).⁸ The report presents the Imam as well aware of at least some of the standard hermeneutic categories of later *uṣūl al-fiqh*. Imam ‘Alī says:

In the hands of the people there is valid and invalid (*ḥaqqan wa-bāṭilan*), truth and falsehood (*ṣidqan wa-kadhban*), abrogating and abrogated (*nāsikhan wa-mansūkhan*), general and particular (*‘āmma wa-khāṣṣan*), clear and ambiguous (*muḥkaman wa-mutashābihan*), preserved and whimsical (*hiḏḏan wa-wahman*) . . . The orders of the Prophet and his prohibitions are like the Qur’ān—with abrogating and abrogated, general and particular, decisive and ambiguous. The speech which comes from the Prophet is of two types. There is particular speech and general speech, just as in the Qur’ān. Someone who does not know what God means by [this speech] or what God’s messenger means by it, may hear it. Not every Companion of the Messenger would ask him questions, and understand. There were amongst

⁸ An assessment of the authenticity of the *Kitāb Sulaym* can be found in Modarressi *Tradition and Survival*, 82–86, and Dakake, “Loyalty, Love, and Faith,” Appendix I; I discuss this particular report in a forthcoming article Gleave, “Early Shīʿī Hermeneutics.”

them [i.e. the Companions] some who did not ask or enquire. Hence they loved it when a stranger or a bedouin used to come and ask the Prophet [a question] so that they might listen to him.⁹

Within this passage, some of the constituent elements of the later theory of literal meaning are to be found. In particular, we see the idea that one may hear what God or the Prophet says, but misunderstand it fundamentally. The reason for the misunderstanding is that one takes it as *‘amm* when it is *khāṣṣ*, or *muḥkam* when it is *mutashābih*, and *nāsikh* when it is *mansūkh*. Dealing with these pairings in turn, the last (*nāsikh/mansūkh*) operated entirely within the realm of the literal: the literal meaning of one revelatory segment cancels out the literal meaning of another. *Naskh* can be seen as a rather rudimentary effort at solving revelatory contradiction between the literal meanings of texts. It is, to an extent, an abandonment of exegesis, since the two segments cannot be reconciled by reinterpreting one or the other (as, for example, *‘amm* and *khāṣṣ*). Activating *naskh* could signal a failure to produce a convincing combination through the application of the common literal/non-literal operations (*‘amm/khāṣṣ*, *mutlaq/muqayyad*, *ḥaqīqah/majāz* etc.). In either case, an awareness of the process of abrogation does not necessarily imply a commitment to an advanced theory of literal meaning and its operation in revelatory texts.

The presence of the pairings *‘amm/khāṣṣ* and *muḥkam/mutashābih*, on the other hand, might indicate a theoretical awareness of literal meaning (presuming, of course, the pairings are used in a manner congruent with their employment in later exegetical writings). However, it is not at all clear from the report in the *Kitāb Sulaym* that the terms are used in the same way as in a classical work of (say) *uṣūl al-fiqh* or *tafsīr*. The report was transmogrified into one of ‘Alī’s speeches in the *Nahj al-Balāgha*, and here the commentators naturally assumed that the meaning of these terms is quite stable and unproblematic. By doing this they imply that ‘Alī, in the early years of the Rāshidūn, had mastery over the later science of *uṣūl al-fiqh*. Ibn Abī al-Ḥadīd (d. 655 or 656/1257 or 1258) writes:

The statement concerning the interpretation of *uṣūlī* terms; such as *‘amm* and *khāṣṣ*, *nāsikh* and *mansūkh*, *ṣidq* and *kadhb*, *muḥkam* and *mutashābih*, is all related to the discipline of *uṣūl al-fiqh*, and I have already discussed this [discipline] when I covered the *uṣūlī* books. To lengthen my commentary [on this speech] at this point [by repeating this] would be improper.¹⁰

⁹ Sulaym b. Qays, *Kitāb Sulaym* II, 623.

¹⁰ Ibn Abī al-Ḥadīd, *Sharḥ Nahj al-Balāgha* XI, 40.

Another early commentator, this time from within the Shīʿī tradition, Ibn Maytham al-Baḥrānī (d. 679/1280), also assumes the terms are used with their common (technical) meanings. According to him, they refer to “types of speech” (*anwāʿ al-kalam*), and the understanding of these notions (*mafḥūmāt*) has already been established.¹¹ In the treatment of this passage by both exegetes, the only pairing which needs particular mention is *ḥifẓ/wahm*, since this is not current in subsequent hermeneutic thought (though the meaning of the two terms need not concern us here).¹² But this, on both the commentators’ parts, is probably wishful thinking.

When read on its own terms, what can be deduced about the meaning of *ʿamm/khāṣṣ* and *muḥkam/mutashābih* from the report? It is clear that a proper recognition of *ʿamm* and *khāṣṣ* relates to an accurate understanding of “what God or the Prophet means.” That is, within the report, revelatory texts (specifically Qurʾān and Prophetic reports) are devices through which God and the Prophet make their intended meaning known. But the report also recognises that an individual exegete may, due to inadequate understanding, identify an incorrect intended meaning of a statement by assuming that the text is general when it is particular (or vice versa). The procedure is familiar to those acquainted with *uṣūl al-fiqh*, and I need not go into it here,¹³ but the relevant point is that even the “rough and ready” understanding of *ʿamm* and *khāṣṣ* which can be gleaned from the report assumes the notion that the text has one meaning which could, potentially, differ from the speaker’s intended meaning. One who does not understand what God and the Prophet mean, may “hear” the revelatory segment, but they are not going to understand its legal significance until they can correctly distinguish the *ʿamm* from the *khāṣṣ*. What is missing is evidence within the report that *ʿamm* as a category is used to cover general statements (e.g. “the thief male and female, cut off their hands” Q5:38) and *khāṣṣ* is for particular statements (e.g. “the hand should

¹¹ Ibn Maytham, *Sharḥ Nahj al-Balāgha*, II, 109.

¹² *Ḥifẓ* refers to “that which is preserved from the Prophet exactly as it is”; *wahm* is when it is misunderstood—for example, it is thought to be *ʿamm* when it is *khāṣṣ*, or secure (*thābit*) when in fact it is *mansūkh*. Ibn Maytham, *Sharḥ Nahj al-Balāgha*, II, 109. What is notable about the pairing is that they seem ill-matched: the first refers to a technical ability of transmission; the latter to a skill in interpretation—one could, surely, preserve something the Prophet accurately, but misunderstand its legal significance entirely. The other pairings would seem to be mutually exclusive (either *ʿamm* or *khāṣṣ*, either *nāsikh* or *mansūkh* etc.).

¹³ The operations of the pairings *ʿamm* and *khāṣṣ* in classical *uṣūl al-fiqh* are described well by Zysow (see his “The Economy of Certainty,” 128–151); and also in Hallaq *A History of Islamic Legal Theories*, 45–58 and Weiss, *The Search for God’s Law*, 389–446.

only be cut for a quarter of a dinar or more”),¹⁴ though this is not ruled out. There does seem to be an implicit assumption within the report that the *‘amm* meaning of a statement is somehow its primary meaning, and the exegete’s error is caused by assuming that this primary meaning is the intended meaning (though this could, arguably, be over-interpretation).

The report, in typical Shī‘ī fashion, takes a side swipe at the Companions (*aṣḥāb*) of the Prophet, who failed to enquire about, or understand, the Prophet’s words. The implication here is that the *aṣḥāb* merely transmit the Prophet’s words like a rote learner. In order to understand God and the Prophet they needed a bedouin to come and converse with the Prophet. Through listening to the bedouin’s account of what the Prophet said, they gain access to the intended meaning. This appears to be a reference to the familiar motif of the bedouin’s pure Arabic being the code conveying the perfect language of revelation. The implication is that this “high” Arabic is characterised by tropes which need explanation for the less sophisticated. The report, if genuine, would of course, be an indication of the Imams’ hermeneutic understanding (including a notion of literal meaning) being advanced compared to their contemporaries. I have argued elsewhere, though, that the report (on the basis of both its *matn* and its *isnad*) is probably best dated to the early or mid ninth century.¹⁵ However, even with this speculative dating, the report is still an indication of the development of notions of literal meaning amongst the Shī‘ah which ran alongside, and perhaps predated, those present within early Sunni literature.¹⁶

The report does, at least, demonstrate that Shī‘ī self-reflection on the interpretive process led, before the *ghaybah*, to the employment of a more sophisticated technical apparatus to aid the exegete. Some of this apparatus was taken from the wider intellectual environment (*‘amm/khāṣṣ?*); and some was perhaps more exclusively Shī‘ī (the *ta’wīl/tanzīl* distinction found in early Imāmī *ḥadīth* mentioned below). Our understanding of this emerging Shī‘ī awareness of the linguistic aspect of the communicative process might be enhanced by a broader perspective on early Shī‘ī views on language, and how these relate to the later classical understanding of *wad’*. There is within the Imāmī *ḥadīth* corpus a dominant view that language is quite definitely created:

¹⁴ Found in various places, including: Bukhārī, *al-Ṣaḥīḥ* VIII, 16–17.

¹⁵ Gleave “Early Shī‘ī Hermeneutics.”

¹⁶ See Gleave, *Islam and Literalism*, ch. 4.

Imam Ja'far al-Şādiq said: "God's name is separate from him. On all things there is the name of a thing, and that is a created thing, except God. Whatever the tongue utters, or the hand makes, that is created."¹⁷

This would appear to conform to the Imāmī-Mu'tazilī convergence on the created nature of speech (and hence the created nature of the Qur'ān). The way the doctrine is expressed here seems appropriate to the mid-Abbasid period at the earliest. Similarly, there is an absolute distinction between God and any of his "names." This is expressed in Imam Ja'far's (d. 149/766) reminder to the Imāmī theologian Hishām b. al-Ḥakam (d.ca. 182/800):¹⁸ "God is a thing (*ma'ná*) which is indicated by these names, and all of them are separate from him."¹⁹ On the timing of the creation of language, the Imams do, in places, explore the *locus classicus* of later writings: Q2.31 "He [God] taught him [Adam] all the names . . ." The Imams' attributed glosses variously describe how God taught Adam the names of mountains and their passes, seas, valleys, plants, animals etc.²⁰ But the Quranic verse is not used a springboard to a full account of the creation of language. Rather it appears to refer to the invention of names. In some reports, 'Alī is seen as knowing the "name" of everything, just as Adam did. When the Prophet showed 'Alī a collection of unknown seeds, for example, 'Alī was able to name them all. The Prophet, in response, said:

Gabriel had told me that God had taught you all the names, just as he had taught Adam.²¹

The special linguistic knowledge accorded to 'Alī is reproduced in reference to the Imams, who are described as knowing all languages of the world.²² Once again, there is no systematic account of how these languages came about, merely that the Imams knew them. There is, however, a hint here of a linguistic knowledge reserved for the Imams, a theme which is present but imperfectly developed elsewhere in the corpus. This is also linked to the notion that the Imams know the special name of God, and have access to a secret knowledge. These doctrines, which some commentators have termed "esoteric,"²³ are not strictly relevant to the topic

¹⁷ Kulaynī, *Kāfi* I, 113.

¹⁸ On Hishām and his divergence from other trends within early Imāmīs, see Bayhom-Daou, "Hishām b. al-Ḥakam."

¹⁹ Kulaynī, *Kāfi* I, 115.

²⁰ See the reports in 'Ayyāshī, *Tafsīr al-'Ayyāshī* I, pp. 32–33.

²¹ Şaffār, *Başā'ir*, 438.

²² See Şaffār, *Başā'ir*, 357–360; Amir-Moezzi, *Divine Guide*, 112.

²³ Amir Moezzi, *Divine Guide*, 112.

of the legal hermeneutics of literal meaning. However, they may be an appropriate background from which to explain occasional manoeuvres of legal exegesis found within the Imāmī *akhbār*.

Take, for example, the debate around Q5:6: “if you have touched women” (*lāmastum al-nisāʾ*), found amongst the list of actions which cause ritual impurity and create the need for ritual ablutions (*wuḍūʿ*) before prayer. The classical legal debate concerns whether God, by this phrase, means sexual intercourse or mere skin-to-skin contact, and if the former, then is he using *mulāmasah* (usually translated as “touching”) in a *ḥaqīqah* or *majāz* (“literal” and “diverted”) manner.²⁴ A report from Imam Muḥammad al-Bāqir (d. 114/732 or 117/735) deals directly with this linguistic issue:

From Abū Maryam: I said to Imam Muḥammad al-Bāqir: What do you say about a man who does his *wuḍūʿ* and then calls to his slave girl; she takes him by the hand until he reaches the mosque? There are those amongst us who say this is *mulāmasah*.

He said: No! By God! If he does this, what is the problem here? Nothing is meant by this “*lāmastum al-nisāʾ*” other than the introduction [of the penis] into the vagina.²⁵

The example of holding the slave girl’s hand is probably hypothetical (a test case perhaps), and exaggerated for effect. As to the interpretation of *mulāmasah*, it is possible that the phrase “nothing is meant...” (*mā yaʿnī bi-hādihā... ilā*) is an attempt to give a linguistic definition of *mulāmasah* generally and *lāmastum al-nisāʾ* in particular. There are at least three possibilities here. First, the Imam might be saying that *mulāmasah* (i.e. Form III of *lams*) means to have sexual intercourse in a literal manner (i.e. what might anachronistically be called a *ḥaqīqah* fashion). Second, the Imam might be proposing *mulāmasah* to be a homonym with two, equally literal, meaning: “to touch” and “to have sexual intercourse,” and announcing that (due to his particular legal knowledge) he can decree the latter to be the intended meaning on this occasion. Finally, he could be arguing that he is able to speak authoritatively about the intended meaning of *mulāmasah* as a *majāz* because he has peculiar knowledge of the relevant *qarāʾin* (i.e. he has special access to God’s intended *majāz* meaning). The most theoretically interesting of these possibilities is the first, and that

²⁴ Summaries of the debate can be found in a number of secondary sources: Katz, *Body of Text* 86–92; Maghen, *Virtues of the Flesh* 133–282.

²⁵ Ṭūsī, *Tahdhīb al-Aḥkām* I, 22 and Ṭūsī, *Istibṣār* I, 88.

this is at least a possible understanding is strengthened by another report, this time attributed to Imam Ja‘far al-Šādiq:

From al-Ḥalabī: I asked Imam Ja‘far about God’s statement “or if you have touched women” (*lāmastum al-nisā*). He said, “it is intercourse, but God is the concealer (*satīr*) who loves to conceal things”. He does not give names in the same way that you give names (*fa-lam yusamm kammā tusammūna*).²⁶

Taking these reports together, there seems to be a hint that God (at least at times) has given a name (*tasmiya*) which is generally unavailable, and therefore functions like the tropic language found in the Qur’an. The meaning of the verses, which include verses with legal relevance such as this one, can only be made publicly available through the Imam. The Imam, with his knowledge of God’s law in general, and the true meaning of the Qur’an as a legal source in particular, is essential to us gaining access not only to theological truth, but also the legally relevant meaning of the Qur’an. Such a doctrine would probably be classed by later Shī‘ī theologians as belonging to the *ghulāt* and not the Imams themselves. Now, it is possible, of course, to understand these reports, and others like them, in a more mundane fashion.²⁷ However, whilst the Imam in such cases appears to have exclusive access to God’s intended meaning, there is a hint here that this intended meaning represents God’s designated linguistic meaning of the words. If so, here is an indication of a “real” designation of words (*ḥaqā’iq*), are designated by God and revealed to us through the Imams. The theory is never worked out, and was rapidly amongst the Imāmīyya overtaken by the more usual (and orthodox) theory developing in the nascent science of *uṣūl al-fiqh*.²⁸ Nonetheless, the above citations are evidence of this theory’s percolation into legal discussions amongst the Imāmīyya in the pre-occultation period (i.e. before 329/941). The notion that the Imam is the only true interpreter of the God’s speech, and that the meaning of revelation was, in some way, impenetrable without the Imam’s interpretation (both linguistic and

²⁶ Kulaynī, *Kāfi* V, 555.

²⁷ The phrase *Allāh satīr yuḥabbu al-satr* could, agreeably, be merely a reference to God’s desire to be euphemistic; though recognising when God is being euphemistic is, in itself, a particular knowledge not necessarily available to all. Such a reading would, perhaps, raise the issue of where the notion of such a euphemistic God might have come from, given the lack of bashfulness elsewhere in revelation; but other uses of the term *satīr* within the *ḥadīth* do link it to the linked idea of a respect for privacy. The Prophet is supposed to have said: “God is a living concealer—he loves life and he loves to conceal. So when any of you want to wash, cover yourself.”

²⁸ See Gleave, *Islam and Literalism*, ch. 6.

theological) was naturally attractive to some Shī'ī groups. This is particularly the case for those which have an extensive ("exaggerated") doctrine of the Imam's powers.²⁹ In the history of Twelver legal theory, one sees the idea re-emerge in the Akhbārī movement and also in modern debates around *al-ḥaqā'iq al-shar'īyya* (legal literal meanings).³⁰

Indications of a more conventional view of literal meaning (at least by later standards) are also present within early Imāmī *ḥadīth* literature. As with the more esoteric reports, the material here is extremely tricky to date, but much of it clearly predates the greater occultation as it is found in works securely dated to that period (*Baṣā'ir al-Darajāt*, *Maḥāsin*). A more recognisable notion of literal meaning³¹ forms a presumptive background for much of the exegetical material. Exegetical reasoning in this material is rarely explicitly expressed, with the interpretation simply being presented alongside the revelatory segment. Examples of this method of presenting an interpretation abound, in relation to both legal and non-legal topics. Once again, the approach within the *akhbār* to non-legal topics forms the background for our understanding of legal exegetical processes.

For the sake of illustration, one can consider Imam al-Bāqir's exegetical statement concerning Q39:9 found in the *Baṣā'ir al-Darajāt* of al-Ṣaffār:

Say: Are those who know equal to those who do not know? Only those who possess [faculties of] understanding (ulū al-albāb) shall be warned (Q39:9)

From al-Bāqir: We are the ones who know; our enemies are those who do not know; and our Shī'ah are the *ulū al-albāb*.³²

The simple identification of Quranic referents hardly constitutes sophisticated exegetical reasoning, but the employment of this technique indicates that such reports did not emerge in an environment where these interpretations needed to be defended. That is, the report is most likely composed for affirmation of already established doctrine, rather than persuasion of an intellectual opponent. Nonetheless, the presentation form, repeated in many reports and perhaps the most prevalent exegetical style in the Imāmī *ḥadīth* corpus, is based on the notion that the Quranic text has a meaning independent of its exegesis. This meaning is, perhaps, unspecific

²⁹ See Bayhom-Daou, "Hisham b. al-Hakam," 87.

³⁰ See Gleave, *Scripturalist Islam*, 275–280; Idem, "Approaches to modern Shī'ī legal theory (*uṣūl al-fiqh*)."

³¹ "Recognisable" that is from a later *uṣūl* perspective, see Heinrichs, "On the Genesis," 138–140.

³² Ṣaffār, *Baṣā'ir*, 17.

rather than ambiguous: the phrase “those who know” (for example) has a perfectly recoverable meaning through which it is understandable. Leaving it as it is, though, and understanding it solely in textual terms, will inevitably lead to a failure to comprehend the intended meaning of the text. That is, what the phrase means in itself does not contradict the speaker’s (i.e. God’s) intended meaning, but it is, in some way, deficient. The message appears to be that one cannot fully (or adequately) understand the Qur’anic passage simply by reading the text in isolation (i.e. by acquiring its “literal” meaning). One has need of an Imam to provide the referents of the unspecified phrases, which in this verse are “those who know,” “those who do not know” and “those who possess understanding.” But, and this is central to our concerns here, the shift between the literal meaning and the intended meaning is not due to any feature of the text (i.e. usual exegetical methods are useless here). Instead one needs to discover an (almost arbitrary) link between a Quranic phrase and an intended referent, and for that one needs the Imam. This distinguishes this literal/non-literal meaning relationship from those of a more literary quality and characterised as *ḥaqīqah* and *majāz*.³³

Such a process of arbitrary linkage is, of course, particularly useful in the development of a sectarian reading of the text, and as has been noted by others, can be combined with a belief in the alteration of the Quranic text itself (*taḥrīf*).³⁴ The role of literal meaning in reports referring to supplementation and emendation of the Quranic text is a little more complex. A central hermeneutic pairing is *tanzīl/ta’wīl*:

[1] Muḥammad b. Fuḍayl, from Abū al-Ḥasan [the tenth Imam ‘Alī al-Hādī]. [Ibn Fuḍayl] said: I asked him about the statement God makes, ‘They intend to extinguish the light of God with their mouths’ (Q61:8).

He said: They intend to extinguish devotion to the Commander of the Believers (*walāyat amīr al-mu’minīn*) with their mouths.

[2] I asked [about the statement]: ‘But God is the one to complete his light’ (Q61:8).

He said: ‘God is the one to complete the Imamate’ in accordance with his words, ‘Those who believe in God, his Prophet and the light which he has sent down.’ (Q64:8) The ‘light’ here is the Imam.

[3] I said: [What about] ‘He is the one who has sent his messenger with the guidance and the religion of truth.’ (Q61:9)?

³³ See Weiss, *Search for God’s Law*, p. 144; a *majāz* is a usage which is “in some way related to its literal meaning.”

³⁴ Bar-Asher, “Variant readings and additions”; Amir-Moezzi and Kohlberg, *Revelation and Falsification*, 24–30.

He answered: He is the one whose messenger has ordered [us] to show devotion (*walāyah*) to his successor, and the *walāyah* is the religion of truth.

[4] I said: [What about] ‘So that he may make it apparent to all religion[s]’ (Q61:9)?

He replied, “He will make it apparent to all religions (*jāmi‘ al-adyān*) when the one who rises up appears (*qiyām al-qā‘im*).

[5] Then he said: ‘God will complete his light’ with the *walāyha* of the *qā‘im* even if those who do not believe in [or “detest”] the *walāyah* of ‘Alī’. (Q61:8)

[6] I said to him, “Is this *tanzīl*?” He said, “Yes, this statement (*hādihā al-ḥarf*) is *tanzīl*, and the rest of it is *ta‘wīl*.”³⁵

The precise meaning of *ta‘wīl* and *tanzīl* is not entirely clear, and deserves further (separate) investigation. However, in reference to the notion of literal meaning and exegetical technique, the first four elements are identified as *ta‘wīl*, in which the identification of the intended referent of a Quranic phrase takes place, but the text remains unchanged. In [1], “light” does not mean (linguistically) “devotion to the Commander of the Believers,” but it is what God means by it. If the use of this *ta‘wīl/tanzīl* terminology was rolled out across the corpus (admittedly a rather artificial process), then al-Bāqir’s identification of “those who know/don’t know/possess understanding” (in Q39:9) would also be classed as *ta‘wīl*. The last segment [5], however, is described as *tanzīl*, implying that this is how it was revealed, but that the text has been subject to corruption, and (perhaps) requires correction. So now the Quranic phrase, instead of reading “and God will complete his light, even though the unbelievers may detest [it],” should read “and God will complete his light *with the walāya of the qā‘im* even if those who do not believe detest *the walāya of ‘Alī*.” Here the Imam is not content to leave the text having a literal meaning which is, in itself, inadequate to discern the intended message (how might one know from the earlier text, for example, that *ulū al-albāb* refers to the Shi‘a?). Instead the Imam changes (or restores) the text so that a text with the inadequate literal meaning is replaced with a text with a new literal meaning, more obviously in line with the intended meaning of the speaker. The process of textual adjustment is, in a sense, a piece of exegesis, but one which changes the literal meaning by altering the text.

In both these processes (referent identification and textual improvement), the literal meaning is either deliberately ignored or altered, hence establishing it as an essential element of the exegetical equation.

³⁵ Kulaynī, *Kāfi* I, 435. The paragraph numbering is mine.

Referent identification and textual improvement are explicitly marked in legal reports, and these can be usefully contrasted with the theological-exegetical reports mentioned above. Literal meaning forms a fundamental, if perhaps unspoken, element of the message in reports such as the following, from Imam Muḥammad al-Bāqir:

[1] It is reported from Zurāra and Muḥammad b. Muslim that they said, 'We said to Abū Ja'far [Muḥammad al-Bāqir], 'What do you say about the prayer when you are travelling? How is it and how many is it?'³⁶

[2] He said, 'God says, *If you go on a journey, there is no blame on you (laysa 'alaykum junāḥ) for shortening your prayer* (Q4:101). So it is obligatory when travelling, just as a complete [prayer] is obligatory when stationary.'

[3] (They continue) So we said, 'God only says *there is no blame on you*. He did not say, "Do it!" So how can this become obligatory, just as a complete [prayer] is obligatory when stationary?'

[4] He said, 'Has not God said concerning al-Ṣafā and al-Marwah, *He who is doing pilgrimage to the House or 'Umra, then there is no blame on him (lā junāḥ 'alayhi) if he go around them both*. (Q2:158)? Do you not see that going around both of them both is obligatory-commanded, (*wājib mafrūḍ*) because God mentions it in his Book, and his Prophet did it? And in the same way, shortening [prayer] is something that the Prophet did, and God mentions in his book.'³⁷

The hermeneutical tenor of the argument here is more resonant of later *uṣūl*. In this exchange a number of legal theoretical issues are intermingled. The Imam's Companions play the role of the picky students, perhaps testing the Imam. Their demand for a justification from the Imam for his interpretation jars somewhat with the later Imāmī doctrinal requirement of unconditional obedience to the Imam. That aside, literal meaning is more apparent here than in the brief exegetical comments in the examples above. The believer may, when travelling, perform a shortened prayer on the basis of Q4.101. There was debate around whether this is an option available to the believer, or whether one is obligated to perform a shortened prayer. Al-Shāfi'ī is associated with the view that it is an option; Mālik with the view that it is recommended to shorten, but not obligatory; Abu Ḥanīfah with the view that it is obligatory. The Imāmīs, on this

³⁶ The wording here is interpreted in the following way: 'How is it?'—i.e. 'is it a *rukḥṣah* or an *'aẓimah*?', and 'How many is it?'—i.e. 'how many *rak'āt* are there in it?' or alternatively, 'How far does one travel before it becomes obligatory?' See Ibn Bābawayh, *Man lā* I, 434, n. 2.

³⁷ Ibn Bābawayh, *Man lā*, I, 434–435.

occasion, adopt the view of Abu Ḥanīfah, as reflected here in the statement of Imam al-Bāqir ([2] above), and they based this on Q4 al-Nisā':101. The Imam's disciples object, saying that the phrase "there is no blame on you" does not mean "it is obligatory." Their argument relies on the assertion that natural (literal?) understanding of *laysa 'alaykum janāḥ* ("there is no blame on you") is permission only (making the action minimally optional). For obligation, something more direct would be required (such as an imperative (*if'al*)). Zurāra and Muḥammad b. Muslim are clearly operating with the understanding that the imperative has the literal (i.e. the primary, decontextualised) meaning of a command creating an obligation (a position associated with the Hanafis in classical *uṣūl*) and the phrase *laysa 'alaykum janāḥ* has a literal meaning which falls short of that.³⁸

The Imam's reply is most interesting in that he does not deny that these are the natural (literal) understanding of the phrases in question, but, he adds, the phrase *laysa alaykum janāḥ* (or *lā janāḥ 'alaykum*) when used in the Qur'an and then supported by the actions of the Prophet become obligatory, indeed they have their own subcategory of the obligatory spectrum in the form of "obligatory-commanded (*wājib mafrūḍ*).³⁹ The Quranic phrase has a natural meaning of permitting the action in question, but when the action is confirmed by Prophetic practice, the intended meaning of the original phrase is now understood as being obligation. In the terminology of later *uṣūl*, Prophetic practice acts as a *qarīnah*, with which we can recognise that the intended meaning of the phrase differs from its literal meaning. The underlying hermeneutic structure in the report is much closer to the developed *uṣūl* theory, and tempts one to date the statement sometime later than the early eighth century.

On occasions the Imams are attributed with the ability to employ their knowledge of Arabic grammar in their exegesis. On a non-legal matter, grammatical knowledge lies behind the asserted meaning of Q53:3:

³⁸ See Zysow, "Economy of Certainty," p. 101ff—though as Zysow notes, the position is not as simple as a simple equation of linguistic form with ethical-legal assessment, and is linked with particular elements of Marturīdī doctrine prevalent amongst the Samarqandī Hanafis.

³⁹ The meaning is not spelled out, but this would appear to be a reference to actions which attain obligatory status through the confirmation by the Prophet of a possible interpretation of a Quranic injunction.

It was at a distance of two bow-lengths or (aw) nearer.

From Imam al-Ṣādiq: "That is (*ay*), rather (*bal*), it was nearer".⁴⁰

Here the Imam is employing a particular function of the particular *aw* (*aw bi-ma'ná bal*). Normally understood to mean "or" (in particular, that there is a choice, *takhyir*, between the antecedent and subsequent items), the particle *aw* can also mean (i.e. it is permitted for it to be used to mean), "rather"—that is, the antecedent is rejected in favour of the subsequent. This meaning of *aw* as an exegetical alternative is already known from *Tafsir Muqatil b. Sulayman*.⁴¹ It is, of course, not possible to deduce from the report alone that the *aw al-takhyir* use is conceived of as the actual (literal) meaning by the Imam, whilst other usages (of which *aw bi-ma'ná bal* is just one) are non-literal. Alternatively, there might be some conception of homonymity at work here. However, *aw bi-ma'ná bal*, here and elsewhere, is certainly marked (i.e. unnatural but comprehensible), otherwise Imam al-Sadiq (or, probably before him, Muqatil b. Sulayman) would not be required to provide the gloss. The process here is much closer to the *haqiqah/majaz* contrast of later *usul*, though the technical terms are not employed. Instead the intended meaning is signalled by the particle *ay*.

The interpretive techniques used for theological-historical Qur'anic passages, such as this one, were not sealed off from the practice of legal exegesis. Concerning the exegesis of Q5:6 (on the practice of *wudu'*):

Zurarah said: I said to Abu Ja'far, "Can you tell me how I can know and declare that one should wipe part of one's head and part of one's feet?"

He laughed and said, "The Prophet said so, and the Book was sent down from God saying so, for God says, *wash your faces* and we know that all of one's face needs to be washed. And then he says, *and your arms up to the elbows*. Then he makes a break in the statement and says and says *wipe [bi] your heads* and we know when he says, [*bi*] *your heads* that one wipes part of one's head by the position of the [preposition] *bi*. Then he connects the two feet to the head in the same manner as he had connected the two hands to the face. Then he says, *and your feet up to the ankles* and we know when he connects this to the head that the wiping is over part of them..."⁴²

⁴⁰ Qummī, *Tafsir al-Qummī* I, 246–247.

⁴¹ Muqatil, *Tafsir Muqatil* III, 108, where it is cited analogously with Muqatil's interpretation of Q37:147, "and we sent him to a hundred thousand or more (*aw yazidun*)." Here the *aw* is *bi-ma'ná bal* since Yunis was sent to more than a hundred thousand.

⁴² Kulayni, *Kāfi*, III, 30—also found in Ibn Bābawayh, *Man lā, I*, 103 and Ṭūsī, *Tahdhib* I, 61.

Not unlike the Q53:3 example above (“two bows length or less than that”), the Imam here is attempting to employ a particular use of the preposition “*bi*” (the *bā*’ of division; *bā*’ *al-tabʿīd* or *al-bā*’ *lil-tabʿīd*, though he does not use the technical term). When “wipe” takes a direct object, so the argument goes, the order is to wash all of the object; when *bi-* is used, only part of the head is signalled. The Imam is arguing that the grammatical meaning of the verse (i.e. the combination of *amsahū*/wipe and the preposition *bi-*) means that only part of the head is being used. The phenomenon of *bā*’ *al-tabʿīd* (but not the technical term) is known to the Imam. The argument does not appear in either Mujāhid or Muqātil b. Sulaymān, though it had clearly entered circulation by the time of al-Shāfiʿī (d. 206/820),⁴³ so it is possible that the report emerged just prior to that; pushing it back to the mid second/mid-eighth century would, in my view, require supplementary justification.

The use of grammatical arguments is tied into the emergence of a particular (linguistic) notion of the literal meaning.⁴⁴ This is in evidence in other reports related to the understanding of Q5:6, including the debate over whether the verse requires one to wash or wipe one’s feet during the purification ritual (*wuḍūʿ*). As is well-known, part of the argument here revolves around whether the word for “feet” is in the genitive (and therefore an indirect object of wipe) or accusative (and therefore a direct object of wash). Imam Muḥammad al-Bāqir is portrayed as being well aware of the debate:

Ghālib b. al-Hudhayl says, “I asked Abu Jaʿfar [the fifth Imam Muḥammad al-Bāqir] about God’s statement, *wipe your heads and your feet up to the ankles* (Q5:6) and whether [feet] is in the genitive (*al-khafḍ*) or the accusative (*al-naṣb*). He said, ‘It is in the genitive’.”⁴⁵

Once again, the use of grammar to establish a verse as evidence for a particular legal position contributes towards the linguist notion of literal meaning. It is this that the Imam supposedly employs in this report. There are even some lexicographical opinions ascribed to the Imams, on occasions. In a controversial report in the *Fiqh al-Riḍā* (attributed to Imam ‘Alī al-Riḍā) the Imam is reported as saying:

If you wash your two feet, and you forget to wipe them, then that will suffice you because you have done more than what is required of you. God has

⁴³ Shāfiʿī, *Kitāb al-Umm* I, 41.

⁴⁴ Gleave, *Islam and Literalism*, ch. 3.

⁴⁵ Ṭūsī, *Tahdhīb* I, 60.

already mentioned all this in the Qurʾān, both the wiping and the washing, when he says “and your feet (*arjalakum*) up to the ankles,” meaning by it washing with an “a” vowel on the *l* (*bi-nasb al-lām*); and when he says “*arjalikum*” with an “i” vowel on the *lam* (*bi-kasr al-lām*), and he means by it washing. Both are permitted—the washing and the wiping.⁴⁶

The presence of this report in the *Fiqh al-Riḍā* is one of the reasons why subsequent Shīʿī scholars considered that work a dubious source of legal doctrine: the legal position justified through this lexicographical/grammatical exegesis is contrary to the standard Shīʿī doctrine. Both of these reports (from Imams al-Bāqir and al-Riḍā), however, present the Imams as capable of employing grammatical arguments in support of legal doctrine, which in turn requires a notion of literal meaning as linguistically generated.

The exegetical procedures described in the above citations indicate that there was no single notion of literal meaning amongst the pre-*ghaybah* Imāmiyyah. Instead one finds a variety of meanings which the texts are seen to “own” distinct from their interpretation. In some instances these are the “true” meanings assigned to words within a revelatory text (such as the Qurʾān) which only the Imams are able to understand/interpret and communicate to the wider community. The lines of reasoning are not clear here: when the Imam says that *lāmastum al-nisāʾ* means “nothing other” than sexual intercourse, is he saying God has designated that a particular word/phrase has a particular meaning (i.e. an act of *waḍʿ* preceding a *ḥaqīqah* usage), or is he saying that the word/phrase has the meaning, but God is using it figuratively (a *maqāz* usage)? Evidence for the former reading includes the doctrine (also found throughout the Imāmī *ḥadīth* corpus) that Imam ʿAlī (who, for Shīʿīs, passes on all knowledge to his successor Imams) has access to the names of all things, taught to him by Gabriel. The Imams also know God’s special name, constituting one element in a secret language in which the true names of things are used.

One of the central elements of sectarian exegesis is that revelatory texts appear to mean one thing, but in fact mean another. Such an exegetical stance assumes that the text has a meaning which is obvious to an uninitiated reader, but diverges from the hidden/true meaning of the text. This results in the interesting phenomenon in which the true (*ḥaqīqah*) meaning of the texts is actually not obviously available, but hidden (*bāṭin*).⁴⁷

⁴⁶ al-Riḍā (attrib.), *Fiqh al-riḍā*, 79.

⁴⁷ Whilst not pertinent to my interest here, it might be possible to trace a linkage in Imāmī sectarian exegesis between the true meaning (*ḥaqīqah*) being the allegorical rather

It is possible to identify the influence of this idea in the normally drier discourse of the law, even when developed in a sectarian environment such as Shi'ism. This idea of the literal meaning as the (ontologically) "real" meaning possessed only by the Imams appears to have quickly lost ground as Imāmī Shi'ism began to develop its own juristic stratum, and notions of literal meaning became more scholastic.⁴⁸

In any case, this notion of a secret language known to God and the Imams and through which the Qur'ān was expressed was not left unchallenged in the Imāmī *ḥadīth* corpus. There is the notion of the literal meaning being the obvious meaning: *lā junāh 'alaykum* (on its own) does not mean the action is obligatory, as Muḥammad b. Muslim and Zurārah point out: it appears to mean the action is, at best, permitted. However, states the Imam, one can recognise obligation as God's intended meaning when the phrase is combined with evidence from the actions of the Prophet. Then there is the notion of a linguistically permitted meaning as one of the competing literal meanings (e.g. the *aw bi-ma'ná al-bal* and *al-bā' lil-tab'īd*—where these prepositions could be interpreted in another manner). Finally, there is the linguistically determined literal meaning (e.g. "feet" is genitive not accusative, and therefore they must be wiped). The lack of coherence in the notion of literal meaning in Imam *ḥadīth* is not surprising. The reports emerged in different contexts (and, most likely, at different times) absorbing different intellectual presumptions as they did so. In fact, given that the formulation of a widely accepted (and coherent) doctrine of the "literal meaning" was some way off in the ninth century, it would be more surprising if the Imāmī *ḥadīth* literature did present a universally agreed notion of what might be termed in English as the "literal meaning."

EARLY IMĀMĪ FIQH AND LITERAL MEANING

The distinction between *ḥadīth* and *fiqh* was blurred in the Imāmī literature of the tenth and early eleventh centuries.⁴⁹ Many of the most

than either the linguistically determined or obvious meaning (which are also normally understood to be the *ḥaqīqah*). It would seem reminiscent of the phenomenon noticed by Heinrichs when examining Abū 'Ubaydah's *Majāz al-Qur'ān*: *majāz* in this text appears to mean both the figurative expression and its translated "natural" equivalent. Heinrichs, "On the Genesis," p. 125ff.

⁴⁸ See Gleave, *Islam and Literalism*, ch. 7.

⁴⁹ Gleave, "Between *ḥadīth* and *Fiqh*."

influential *ḥadīth* “collections” were in the form of either works of *fiqh* or commentaries on works of *fiqh*. Furthermore, the Imams (in particular Imams Muḥammad al-Bāqir, Ja‘far al-Ṣādiq, Mūsá al-Kāẓim and ‘Alī al-Riḍā to whom most reports were attributed) were also understood to be jurists, and hence their statements reflected not only simple statements of the law (such as “this is *ḥalāl*,” “that is *ḥarām*”), but also elements of legal reasoning in which reasons in support of particular legal doctrines were given. Early works of Imāmī *fiqh*, such as Ibn Bābawayh’s (d. 381/991) *al-Muqni‘* display little in the way of legal reasoning—legal doctrine is pronounced but rarely explained in any meaningful sense. Discerning any notion of literal meaning is not really possible from such a text. In the *Man lā yaḥḍuruḥu al-faqīh*, though, there is more evidence of legal reasoning, and hence there are intimations of an implicit notion of literal meaning. For example:

The Prophet said, “There is no *riḍā‘* after weaning (*fitam*).” And he means by this that if a child is wet-nursed (*riḍā‘*) for two complete years, and then drinks any amount from the milk of another woman, then this [second] wet-nursing (*riḍā‘*) does not cause a marriage prohibition because it is *riḍā‘* after *fitam*.⁵⁰

In *fiqh*, the feeding of a baby by a wet-nurse establishes a pseudo-parental bond, or “milk kinship” between the baby and the wet-nurse. Theoretically, the wet-nurse’s children are prohibited (later in life) in marriage to the wet-nursed baby.⁵¹ The presentation in this report is complicated by the fact that the word *riḍā‘* appears to be used to refer both to wet-nursing generally and specifically to “wet-nursing which causes subsequent marital prohibitions.” We could call the first of these the literal meaning and the second the legal meaning. The weaning period (*fitam*) is, of course, set by the Qur‘ān to two years, so, when the Prophet says, “there is no *riḍā‘* after *fitam*,” he could be saying one of two things: either wet-nursing is prohibited after weaning (literal meaning of *riḍā‘*)⁵² or wetnursing after the first two years creates no milk-kinship relationship (legal meaning). Ibn Bābawayh obviously considers the Prophet to mean the second of these, but if we examine his statement closely, we see that in his explanation of the Prophet’s statement Ibn Bābawayh himself consistently uses

⁵⁰ Ibn Bābawayh, *Man lā III*, 476. The prophetic statement is also found in Mālik, *al-Muwatta‘a’ II*, 408.

⁵¹ See Giladi, *Infants, parents and wet nurses*.

⁵² This seems to be Muza‘ffar’s understanding of it in a modern work of *uṣūl al-fiqh* (Muza‘ffar, *Uṣūl al-fiqh I*, 253).

riḍā' to refer to wet-nursing (in its literal sense). Hence, Ibn Bābawayh does not take the Prophet's statement *lā riḍā' ba'd fitam* as meaning it is prohibited to breastfeed after weaning; rather he understands the Prophet as declaring that milk-kinship can only be established when breastfeeding takes place before weaning. His gloss only makes sense if the Prophet uses the term *riḍā'* to mean something different from what Ibn Bābawayh normally takes it to mean. The legal doctrine is yet further complicated by the disputed correlation of *fitam* with a period of two years.

When God, in the Qur'ān, declares weaning to be achieved in a two-year period, He is not (as is commonly agreed) giving advice to the parents of young children. Rather, He is setting down a legal fact (as opposed to an actual fact) which should be used when a calculation of the weaning period is needed for other areas of the law. Once again, we are faced with *fitam* having two possible meanings within the Prophetic report: first, it could mean the point at which the child no longer consumes breast milk (a literal meaning?); second, it could mean the two-year period during which the child is normally weaned (a legal meaning). Again, Ibn Bābawayh interprets the Prophet as intending the legal meaning, because he mentions the fact that the child is breastfed by someone else after the two year marker has passed. In subsequent Imāmī *fiqh*, the term *fitam*, as it appears in the *ḥadīth* corpus, is understood to mean precisely two years, and not the simple fact of the completion of weaning.⁵³

There does not appear to be much methodological reflection here (or indeed elsewhere in Ibn Bābawayh's *fiqh* writings), but he clearly recognises the potential ambiguity within the Prophet's statement. This recognition is signalled by the need for a gloss (providing glosses is not, it should be said, Ibn Bābawayh's usual practice). The terminology of *ḥaqīqah* and *majāz*, though obviously appropriate (and available), are not employed, and whilst *al-ḥaqīqah al-shar'īyyah* was some way from being finalised within the hermeneutic lexicon, Ibn Bābawayh does appear to employ the idea that the Prophet is using *riḍā'* and *fitam* in a way which differs from their ordinary meanings. Nonetheless, without a minimal competence in this rudimentary hermeneutic framework, his gloss on the question of *riḍā'* makes little sense. We are, perhaps, edging closer to the classical *uṣūl* conceptions of *ḥaqīqah/majāz* here—beyond the general

⁵³ The great 19th century jurist, al-Najafī says that the use of *fitam* by the Prophet to refer to 2 years is in fact *majāz* here, as *fitam* means weaning, whenever it may occur. See Najafī, *Jawāhir al-Kalam*, XXIX, 296–301.

trend found within the *akhbār* collections. Ibn Bābawayh's analysis here (which could be supplemented and made more nuanced with additional examples) does represent a rise in interpretive sophistication from early statements. There is, however, little interest (or at least little expressed interest) in theorising about the exegetical process, and giving the constituent parts terms; for that, the Imāmīs had to wait until the writing of al-Shaykh al-Mufid (d. 413/1022).

Consider the following passage, found amongst a list of arguments Shaykh Mufid produces for the validity of temporary (*mut'ah*) marriage based on particular interpretations of Quranic passages.

Q4:24: *fa-ma 'stamta'tum bihi minhunna, fa-atūhunna ujūrahunna farīḍatan*
 "And for what you have enjoyed from them, then given them their due as a duty"

Shaykh Mufid: *al-Mut'ah* here is a *ḥaqīqah shar'īyyah*, which appears directly in the understanding and in use (*mubādur fī'l-fahm wa'l-isti'māl*)...

They say that *istimtā'* means simply enjoyment, and the original meaning (*al-aṣl*) is not transferred.

We say: The Lawgiver uses it, and the original meaning is *ḥaqīqah*; and if it is accepted that it is a *majāz*, then it has the aforementioned pieces of evidence (*qarā'in*) attached to it.⁵⁴

The leap in hermeneutic sophistication between Ibn Bābawayh and al-Shaykh al-Mufid is striking, and represents the already well-documented trend in Imāmī jurisprudence (and theology also) between the Iranian Imāmī community (*ḥadīth* transmitters with little hermeneutic awareness) and the developing Imāmī intelligentsia in Baghdad, who were being rapidly modernised through their integration into the formerly Sunni dominated intellectual scene.⁵⁵ It was through this Baghdadi group that we finally begin to see the experimental notions of literal meaning found in the *ḥadīth* corpus being eclipsed by the adoption of more commonplace structures of *uṣūl al-fiqh*.

⁵⁴ al-Mufid, "Risālat al-Mut'a," 22–24.

⁵⁵ Tamima Bayhom-Daou, *al-Shaykh al-Mufid*, 17–31.

CONCLUSIONS

Bernard Weiss was, of course, correct to counsel caution in our use of the term literal in the context of Islamic hermeneutics generally, and *uṣūl al-fiqh* in particular. Weiss's own employment of the term is coherent, but also specific to al-Āmidī's elaboration of technical concepts such as *ḥaqīqah*, *zāhir* and *al-mawḍū' lahu* within his *al-Iḥkām fī uṣūl al-aḥkām*. However, literal meaning can be understood within a broader framework, as the meaning which supposedly inheres within a word (or more expansively a text). That is, literal meaning can be conceived of as a meaning of the text independent of its specific employment by the speaker. The literal meaning remains even when the intended meaning of the word or text is something quite different. Under these broad parameters, one can recognise that early Shī'ī reports, particularly those preserved within the Imāmī intellectual tradition, contain no single notion of literal meaning. Most radically, the literal meaning of Qur'anic text is the meaning designated by God to sounds, revealed to the Imams, and only available to humanity generally through the Imams' explicit announcement. A softening of this position is found in the idea that the Qur'an's linguistic (possibly exoteric) meaning may be available to all, but the referent of the text is revealed only through the Imams (as master exegetes). In other places, the Imams themselves are presented as linguistic experts, or at least blessed with the knowledge of which of scripture's possible (literal?) meanings is intended. Literal meaning is identified in various ways, including selective revelation to the Imams, linguistic deduction, everyday usage and Bedouin (originally pre-Muḥammadan) Arabic. The first of these is distinctively Shī'ī; the others can be seen more generally in early Muslim literature, as a hermeneutical awareness became common place. In this sense, the trends within early Shi'ism, including the establishment of modes of legal exegesis, share common intellectual ground with those involved in the development of the Islamic sciences in early Islam.

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“GENRES” IN THE *KITĀB AL-LUQṬAH* OF IBN RUSHD’S *BIDĀYAT
AL-MUJTAHID WA-NIHĀYAT AL-MUQTAṢID*¹

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The term “genres” in the title of this paper has been put in quotation marks advisedly. It is, of course, borrowed from literary studies, but here is meant to refer to the semantic categories of the smallest discussion units in Ibn Rushd’s chapter. It is hoped that a study on this level of the text will shed some light on the ways in which legal discourse proceeds. Ibn Rushd’s book lends itself particularly well to this approach, because it is a *khilāf* work and the author thus feels inclined at times to explain why a *khilāf* came about.

The work of the great scholar, in whose honor this Festschrift has been compiled, is characterized by sustained close reading and *Mitdenken* of the sources (thinking along with them), so I cherish the hope that the approach I have used, simple though it is, might be of some interest to him.²

1. TRANSLATION (AT TIMES PARAPHRASE) OF THE CHAPTER
ON LOST PROPERTY WITH SOME EXPLANATORY NOTES

The chapter on lost property (*luqṭah*)³ may be divided into forty-one semantic units. I shall list their contents and, in the indent following each one of them, add some comments.

¹ Ed. Abū ’l-Zahrā’ Ḥāzīm al-Qāḍī (Riyadh & Mecca: Maktabat Nizār Muṣṭafā al-Bāz 1415/1995), vol. ii, pp. 545–552. The translation by Imran Ahsan Khan Nyazee, reviewed by Muhammad Abdul Rauf: Ibn Rushd, *The Distinguished Jurist’s Primer. A Translation of Bidāyat Al-Mujtahid* [n.p.: The Center for Muslim Contribution to Civilization, Reading: Garnet Publishing 1996], vol. ii, 368–37, has been consulted as well.

² There is little secondary literature on this topic; one might point to David F. Forte: “Lost, Strayed, or Stolen: Chattel Recovery in Islamic Law,” in: Nicholas Heer (ed.): *Islamic Law and Jurisprudence. Studies in Honor of Farhat J. Ziadeh* (Seattle and London: University of Washington Press, 1990), 97–115. As already the title of the paper indicates, it goes beyond “lost and found.” The author relies on translations of the main Arabic texts; on the other hand, he compares Islamic law with Common Law, which allows him to define the Islamic view of the status of lost property more sharply.

³ Most modern works and editions vocalize this word as *luqaṭah*. The *luqṭah/luqaṭah* uncertainty is old. Abū Zayd al-Anṣārī (d. 215/830), *Kitāb al-Nawādir fī ’l-lughah*, ed. Sa’id

1. Division of the Chapter on Lost Property into two parts (*jumlatān*): *arkān* = “constituent elements” and *aḥkām* = “legal determinations.”

The terms *rukn* and *ḥukm* pertain to two dimensions of a human act: the physical and the legally determinative; a third dimension would be *shart* “condition” pertaining to the legally prerequisite, but this does not occur in the present chapter. I have not been able to find extensive discussions of these dimensions in the scholarly literature. All indices I have checked for *rukn* came up negative, except for Joseph Schacht: *Introduction to Islamic Law* (Oxford: Clarendon Press 1964), p. 118.

2. The *arkān* are three: (a) the picking up (*al-iltiqāt*), (b) the one who picks up (*al-multaqit*), and (c) the thing picked up (*al-luqṭah*).⁴

The constituent elements are thus: the action, the actor, and the thing acted upon.

3. Concerning 2a (*iltiqāt*), the scholars are not unanimous about whether it is better to pick up the thing lost or leave it. Abū Ḥanīfah: It’s better to pick it up (*al-afḍalu ’l-iltiqāt*). Reason: It is incumbent on every Muslim to preserve the property of his fellow Muslim. Al-Shāfi‘ī is of the same opinion.

This unit shows that it is difficult to keep *arkān* and *aḥkām* apart. The constituent element “action” is evaluated according to its advisability. Two of the eponymous school-heads of the Sunni legal schools opt for the advisability of picking up the lost object by subsuming this particular problem under a general rule which says that Muslims ought to preserve

al-Khūrī al-Shartūnī (Beirut: al-Maṭba‘ah al-Kāthūlikiyyah 1894), pp. 229–230, has the following to say (the words are those of the redactor al-Akhfash al-Aṣghar [d. 315/927], which means that the opinion of the “others” may easily have been added by him): “Abū Zayd was of the opinion that *luqṭah* is that which is picked up, and *luqṭah* is the one who picks up; others are of the opinion that *luqṭah* is the one who picks up (*lāqit*), and *luqṭah* is the picked-up thing (*malqūt*).” The semantics of the *awzān* supports the second opinion: *fu‘alah* is an intensive participle (cf. Wright, *A Grammar of the Arabic Language* (Beirut: Libraire du Liban, [1996 edition]), 139 B), as in *lumazah* “slanderer,” while *fu‘lah* denotes small quantities that are the result of the action of the underlying verb, as in *mudghah* “morsel,” from *madagha* “to chew” (cf. Wright, *A grammar*, 175 C). For *luqṭah* to mean the object found, one would have to assume a metonymy “finder” > “object found,” which is not very convincing. In the case of *luqṭah* the small-quantity component of the semantics of the *wazn* may cause some hesitation (note that the “picking-up” even of camels is discussed); on the other hand, the central and primary concern of the texts dealing with *luqṭah* is clearly the lost purse containing coins.

⁴ I have stuck to the literal meaning of the root *l-q-ṭ*; the legal meaning will develop from what follows.

each other’s property. Abū Ḥanīfah’s formula *al-afḍalu ’l-iltiqāt* amounts to declaring this action *mustaḥabb/mandūb* “recommended.”

4. The opposite, i.e. *karāhiyat al-iltiqāt*, is maintained by Mālik and some others. This is also reported from Ibn ‘Umar and Ibn al-‘Abbās. Aḥmad was of this opinion.

The opposite position is held by the other two eponymous school-heads, Mālik and Aḥmad b. Ḥanbal, (and some other unnamed scholars); the action is declared reprehensible (*makrūh*). The sentence interjected between the two sentences dealing with Mālik and Aḥmad is actually a separate semantic unit, a different “genre,” as it were, because it deals with the personal opinions of two Companions of the Prophet. Companions were credited with legal opinions of their own; but it is difficult to distinguish these from transmissions from the Prophet. It is interesting to note that the two Companions are “framed” by the two more *ḥadīth*-oriented eponymous school founders.

5. This (the *karāhiyah*) is based on two reasons: (a) one is the *ḥadīth* of the Prophet: “The stray animal of the believer (may lead to) burning in Hell” (*ḍāllatu ’l-mu’mini ḥarqu ’l-nār*) and (b) the fear one may have regarding the finder’s less than perfect carrying out of the public notification (*ta’rīf*) of the thing found, and his transgressing against the thing found.

Two reasons are given for the reprehensibility of picking up the lost object: One is a Prophetic proof-text, which is couched in rather terse and elliptical language. The “stray animal” is one subcategory of *luqṭah*; the finder may transgress against the rights of the owner (see below) and thus end up in Hell. The other reason is a general fear that the finder may not be up to the task of public notification of his find and of keeping it away from harm. This is a mere possibility and should not weigh much as a legal argument, except that one might subsume it under the notion of *sadd al-dharā’i*; i.e., barring a situation that might lead to an infraction of rights.

6. Those who consider the picking up the correct thing to do have interpreted (*ta’awwala*) the first part of the *ḥadīth*, i.e. *ḍāllatu ’l-mu’mini*, by saying that he (the Prophet) meant by that making use of it (*al-intifā’ bihā*), not taking it in order to make public notification of it.

The enigmatic language of the *ḥadīth* obviously allows for a wide variety of interpretations.

7. Some say: Picking it up (here *laqṭuhā*) rather is obligatory (*wājib*).

Leaving the proponents of the obligatoriness of picking up the lost object anonymous is rather unusual. Maybe no one really came to Ibn Rushd's mind, and the proposition is just an introduction to the next semantic unit, which goes through four constellations of facts that would influence the decision of the finder.

8. It is said that this difference of opinion arises, when the lost property [is found] among trustworthy people (*qawm ma'mūnīn*), the ruler (*imām*) being just. They continue: If it is found among untrustworthy people, the ruler being just, then picking it up is obligatory. If it is among trustworthy people, but the ruler is unjust (*jā'ir*), it is preferable to pick it up. If it is among untrustworthy people and the ruler is unjust, then [the finder] has the option [to take it or leave it] according to which option has the greater probability of safeguarding the *luqṭah*.

This is the crucial passage on the social determinants of what the finder should do.

Shams al-Dīn⁵ Abū Bakr Muḥammad b. Aḥmad al-Sarakhsī (Ḥanafī, d. 483/1090 or later): *al-Mabsūṭ* (Cairo: Maṭba'at al-Sa'āda n.d.), xi, 5, l. -10 ff. voices a similar concern:

As for people who say that leaving the lost object is better than picking it up, we say that refers to that [early Islamic] time, because the *ahl al-khayr wa-l-ṣalāh* were predominant; so if one person left it, another person would also leave it or he would take it to carry out the trusteeship. But in our times the *ahl al-sharr* are preponderant; if a decent person left it, some perfidious person might take it and hide it from its owner. Thus the legal determination changes according to the change of the (social/moral) circumstances of the people (*wa-l-ḥukmu yakhtalīfu bi-'khtilāfi aḥwāli 'l-nās*); don't you see that at the time of the Prophet *ṣ'l'm* and of al-Ṣiddīq (Abū Bakr) the women used to go out to assemblies (*jamā'āt*); then they were prevented from that at the time of 'Umar, and it was right (*wa-kāna ṣawāban*).

Similarly, al-Sarakhsī says a little later (p. 11) about the Prophet's prohibition to "pick up" a camel (see unit no. 11): According to our opinion, its interpretation is that this was at the beginning [of Islam], because at that time the preponderance was on the side of the people of righteousness and probity (*ahl al-ṣalāh wa-l-khayr*), so no traitorous hand would reach out for it [i.e., the camel], if the finder left it behind; however, in our times

⁵ Sic ed., read: *Shams al-a'imma*.

the finder is not safe from a traitorous hand reaching out to it, after he has left.

A related idea, i.e., of *luqṭah* being a test-case for the *dār al-islām*’s true Islamicness can be found in ‘Abd al-Qāhir al-Baghdādī’s *Kitāb Uṣūl al-dīn*.⁶

9. Special geographically determined cases:

- a. Excepted from the above is the lost object found within the pilgrims’ caravan (*al-ḥājj*). The scholars agree that it is not permissible to pick it up, because the Prophet prohibited it.
- b. Things found in Mecca are also not allowed to be picked up, unless it is for one of the town-criers (*munshid*, more specifically someone who announces the finding of a stray animal), because a decisive text exists on that. Two variants of this *ḥadīth* exist: (1) *lā turfa’u luqṭatuhā illā li-munshidin* “The thing lost there [Mecca] is not to be lifted up, except for the town-crier” and (2) *lā yarfa’u luqṭatahā illā munshidun* “Only a town-crier can lift up the thing lost there.” The author then paraphrases the two variants as follows: *lā turfa’u illā li-man yunshiduhā* and *lā yalṭaqiṭuhā illā man yunshiduhā li-yu’arrifa ’l-nās*. Mālik says: These two types of lost objects (*ḥājj* and Makka) are subject to public notification in any case.

10. As for 2b (*al-mulṭaqiṭ*), he can be any free Muslim who is of age (*kullu ḥurrin muslimin bālighin*), because it is a trusteeship (*wilāya*). There are two different opinions transmitted from al-Shāfi’ī with regard to the permissibility of an unbeliever picking up the thing lost. Abū Ḥāmid says: The correct opinion is that this is permitted in the Islamic Realm (*dār al-Islām*). He says (Abū Ḥāmid): Concerning the eligibility of the slave and the grave sinner (*fāsiq*), there are two opinions of his. The reason for disallowing it is the absence of the eligibility for trusteeship; the reason for allowing it is the general sense (*’umūm*) of the *ḥadīths* concerning the thing picked up.

The second constituent element of the *luqṭah* event is the one who picks up the lost object. His qualifications (women are not discussed in this context) are “free,” “Muslim,” and “of age.” This is because looking after

⁶ Istanbul: Maṭba‘at al-Dawlah 1346/1928, p. 270. This is found in a paragraph with the title *fi bayāni mā yufraqu bihī bayna Dāri ’l-Islāmi wa-Dāri ’l-Kufr* at the end of the chapter *fi bayāni uṣūli ’l-īmān*. The wording is: *wa-l-luqṭatu fihā* (i.e. *fi Dāri ’l-Islām*) *tu’arrafu sanatan ’alā shurūṭihā*.

the object found is to be subsumed under the general notion of “trusteeship” (*wilāyah*), and these are the *shurūt* for *wilāyah*. The qualifications raise the question if the “slave,” the “unbeliever” (and the “grave sinner”), and the “minor” are qualified to pick up lost property; however, the last one of these is not discussed. Strangely, the other questionable people (unbeliever, slave, grave sinner) are only discussed within the tradition of al-Shāfi‘ī; the Abū Ḥāmid mentioned is al-Ghazālī (d. 505/1111).⁷ Note that the latter has a more logical and complete system of qualifications for the one who can rightfully pick up the lost object: *fa-yathbutu jawāzu ’l-iltiqāti li-kulli muslimin ḥurrin mukallaḥin ’adlin*, which also means that the four opposite qualifications need to be discussed with regard to the existence of the *wilāyah*, namely the *kāfir*, *raqīq*, *ṣabīy*, and *fāsiq*.⁸ So instead of *bāligh* “of age” we have *mukallaḥ* “legally responsible,” which makes perfect sense, because *bulūgh* is a necessary ingredient of *taklīf*, but it is not sufficient; the *bāligh* may be an idiot (*ma’tūh*) or a spendthrift (*safth*), which would disqualify him as a *mukallaḥ*. Al-Ghazzālī also includes the counterpart of the *fāsiq*, “sinner,” which is the *’adl*, “man of good reputation.”

As for the slave and the grave sinner, both opinions have been transmitted from al-Shāfi‘ī. The conflict, according to Ibn Rushd, is based on two ways of argumentation: either the notion of trusteeship, for which neither a slave nor a grave sinner qualifies, or the “lack of specificity” (*’umūm*) of the *ḥadīths* regulating *luqṭah*, i.e. the fact that they do not specify who is eligible for the job of picking up a lost object.⁹

11. As for 2c (*al-luqṭah*), it is any property of a Muslim that is exposed to loss, whether that be in a cultivated or uncultivated stretch of land (*fi ’āmiri ’l-arḍi wa-ghāmīrihā*), lifeless (*jamād*) and living (*ḥayawān*) objects being equal in this respect by general consent (*bi-’ttifāq*), except camels. The legal basis (*al-aṣl*) for *luqṭah* is the *ḥadīth* of Zayd¹⁰ b. Khālīd al-Juhānī, considered to be *ṣaḥīḥ*:

⁷ See his *al-Wasīṭ fi ’l-madhhab*, ed. Abū ‘Amr al-Ḥusaynī ibn ‘Umar ibn ‘Abd al-Raḥīm (Beirut: Dār al-Kutub al-‘Ilmiyyah 1422/2001), ii, 415–424 (*Kitāb al-Luqṭah*).

⁸ *al-Wasīṭ*, p. 416, ll. 13–14.

⁹ al-Ghazzālī’s treatment is more detailed and sophisticated, but need not be discussed here.

¹⁰ The text has “Yazīd,” but see G.H.A. Juynboll: *Encyclopedia of Canonical Ḥadīth* (Leiden & Boston: Brill 2007), p. 454, and cf. al-Māwardī: *al-Ḥawī al-kabīr*, ed. Maḥmūd Saṭīrjī *et alii*, vol. 9 (Beirut: Dār al-Fikr 1414/1994), p. 425, l. 3.

A man came to the Prophet asking about (what to do with) a found object (lost property). He said: “Take note of its purse (*ʿifās*) and purse-string (*wikāʿ*), then make public notification of it for a year. And if its owner shows up, fine, if not, do with it whatever you want.” “And what about a stray sheep or goat (*ḍāllat al-ghanam*), O Prophet?” He said: “It is for you or for your brother or for the wolf.” “And what about a stray camel?” He said: “What have you got to do with it? It has its ‘waterskin’ and its ‘shoes.’ It will go down to the waterhole and browse the tree (leaves), until its owner finds it.” This *ḥadīth* contains the knowledge of what should be picked up and what should not. Also the knowledge of the legal determination of what is picked up, what it is during the year [of its being made public notification of] and after it, and how the one who claims it can establish his right to it (*bi-mādhā yastahiqquhā muddaṭhā*). With regard to the camel, they agree that it cannot be “picked up,” and with regard to sheep and goats, they agree that they can be “picked up.” They hesitate about bovines. The explicit text (*naṣṣ*) from al-Shāfiʿī is that they are like camels, and from Mālik that they are like sheep and goats; there is also the opposite opinion ascribed to him.

The Prophet’s initial answer shows that *luqṭah* refers first and foremost to lost money in a purse. The stray animals seem to have been an afterthought. It appears that a stray sheep or goat is no longer the property of its owner, unless he takes possession of it. A stray camel is not lost, as it does not need a human being to look after it. Bovines are either lumped together with camels or with sheep and goats (the reason for the *qiyās* is not mentioned in either case). The *ḥadīth* also gives procedural hints with regard to public notification including its duration, also how the owner can lay claim to the *luqṭah*, and how the finder can lay claim to it.

12. The *aḥkām* (see no. 1).

Note that a number of *aḥkām* have already been mentioned in the *arkān* section.

13. The legal determination of the *taʿrīf* “public notification.”

The scholars agree that whatever one would care for (*mā kāna minhā laḥū bālun*) should be subject to public notification for one year, as long as it is not a sheep or goat. The value is not specified.

14. They disagree for the time after the initial year. The legal scholars of the various regional centers (*amṣār*), i.e., Mālik, al-Thawrī, al-Awzāʿī, Abū Ḥanīfa, al-Shāfiʿī, Aḥmad, Abū ʿUbayd, and Abū Thawr, agree that, when (the year) is over, [the finder] is allowed to consume it, if he is poor, or to give it as alms, if he is rich. If then the owner turns up, he

has the option of either allowing the alms-giving and thus gaining its reward [*fa-yanzila 'alá thawābihā*] or to hold (the finder) liable for it.

It is noteworthy that Ibn Rushd here goes beyond the eponymous founders of the four major schools of law and includes independent legal scholars in the various regional centers. In doing so, he establishes broad support for categorizing the finders into poor and rich. The disagreement mentioned at the beginning of this semantic unit gains traction only in no. 15. After the period of notification is over, the poor are entitled to use up the lost object, while the rich may give it as alms. Should the original owner turn up at this point, he has the choice of either agreeing to the alms-giving and thus participating in the heavenly reward, or he can hold the finder liable. Here the legal reasoning is not quite clear. One would think that the end of the notification period also means that ownership of the lost object is transferred from the original owner to the finder. But if liability still exists on the part of the finder, no transfer of ownership seems to have occurred. Another unclear point is: what happens to the poor man, after consuming what apparently he did not own?

15. They disagree about the rich person, whether he is allowed to consume or spend (the found property) after the initial year. Mālik and al-Shāfi'ī are for it, Abū Ḥanīfah, however, says that he can only use it as alms.

Mālik and al-Shāfi'ī, somewhat at variance with the rules laid down in the previous semantic unit, allow the rich person as well to consume the *luṭṭah*, thus creating one rule for all, whether rich or poor, while Abū Ḥanīfah sticks to the rule laid down above.

16. Something similar to Abū Ḥanīfah's opinion has been reported from [the *ṣaḥābīs*] 'Alī and Ibn 'Abbās and a number of *tābi'īs*. [cf. no. 4]

Again legal history is given more depth by ascribing the position that distinguishes between rich and poor to the first two generations of Muslims.

17. Al-Awzā'ī says that, if it is a lot of money, he [the rich man] will put it in the state treasury (*bayt al-māl*).

A third solution for the rich man.

18. An opinion similar to Mālik and al-Shāfi'ī has been reported from [the *ṣaḥābīs*] 'Umar, Ibn Mas'ūd, Ibn 'Umar, and 'Ā'isha. [cf. no. 4]

The same method as used in no. 16, now for the opposite view.

19. All of them, except the Zāhirites, agree that, if he consumes it, he is liable for it to the owner.

In other words, if the rich man gives the *luqṭah* to the state treasury (see no. 17), the ownership of the original owner apparently lapses; if he gives it as alms to the poor, the ownership of the original owner does not lapse (see no. 14); if he consumes it, the ownership of the original owner is also upheld.

20. Mālik and al-Shāfiʿī take as evidence [*istadalla*] the Prophet's words: "Do with it what you like!" He does not distinguish between rich and poor.

Here we have another case of "lack of specificity" (*ʿumūm*) in an authoritative text, here a *ḥadīth*: The Prophet does not distinguish between rich and poor finders.

21. (Another) proof (*ḥujjah*) for them is what is reported by al-Bukhārī and al-Tirmidhī on the authority of Suwayd b. Ghafalah who said:

I met Aws b. Kaʿb, who said: I found a purse with 100 dinar in it. I went to the Prophet, and he said: Make a public notification of it for one year. I did, but I did not find (the owner). I went back to him three times, then he said: Remember its purse and its purse-string. If the owner turns up, fine, if not, enjoy it. Al-Tirmidhī and Abū Dāwūd have the variant *fa-ʿstanfiqhā* "then spend it for yourself" (instead of *fa-ʿstamtiʿ bihā* "then enjoy it").

The text of this *ḥadīth* seems to mean that the finder went through four public notification periods of one year each, after which he was told by the Prophet to remember the purse and the purse-string. If after that the original owner would turn up, well and good; if not, the *luqṭah* would be his. The text has certain oddities such as the overlong notification period and the unclear purpose of remembering the purse and the purse-string. Juynboll has a slightly different version for the last part:

Then the Prophet said: "Remember how many dīnār there were, what the purse and its string looked like (and then you may spend it). If the owner comes forward (who is able to describe sum and purse to you, you pay it back and) if not, then you may keep it for your own enjoyment." In the end I kept it.¹¹

¹¹ G.H.A. Juynboll: *Encyclopedia of Canonical Hadīth* (see n. 10), p. 471b. Instead of "Aws b. Kaʿb" Juynboll has the correct "Ubayy ibn Kaʿb."

22. Explanation of the *khilāf*: The reason for the disagreement is the contradiction between the evident meaning (*ẓāhir*) of the *ḥadīth al-luqṭah* and the basic tenet (*aṣl*) of the Law, which is that the property of a Muslim man is not licit (to anyone else) except if (the owner) agrees voluntarily.

Again there is a conflict here between two *aṣls*, one textual, namely the evident meaning (*ẓāhir*) of the *ḥadīth al-luqṭah* transmitted by Zayd ibn Khālīd al-Juhanī (see no. 11) as well as the one transmitted by Suwayd b. Ghafalah (see no. 21), the other a basic tenet of the Law (*aṣl al-sharʿ*) that someone else's property can only be appropriated with the voluntary approval of the owner. Since the owner of the *luqṭah* is not present and not known, ownership is in limbo.

23. Whoever lets this basic tenet prevail over the evident meaning of the *ḥadīth*, i.e. the phrase *fā-sha'naka bihā*, says "No disposal (*taṣarruf*) regarding it is permitted, except by way of alms-giving, on condition that he is liable for it, if the owner of the lost property does not approve of the alms-giving."

It is remarkable that one of the *maqāṣid al-sharī'ah* (the term does not occur here), which are, after all, the outcome of legal thought, conducted by later legal scholars, can here supersede a clear pronouncement by the Prophet.

24. Whoever lets the evident meaning of the *ḥadīth* prevail over this basic tenet and opines that it is an exception from it says: It becomes licit to him after the initial year and part of his property, with no liability on his part, should the owner return.

If you let the evident meaning of the *ḥadīth* win out, you have to assume that it is an exception to the rule.

25. Those who steer a middle course say: After the year, it is at his disposal, though incurring liability, if it is cash (*wa-in kānat 'aynan 'alā jihatī 'l-damān*).

The middle ground means that cash is excepted from the general rule, in that liability kicks in, if the owner reappears.

26. The legal determination of handing over the *luqṭah* to the one who claims it. They agree that one should not turn it over to him, if he does not know the purse and the purse-string. They disagree, if he knows that, on whether in addition a proof (evidence) (*bayyinah*) is needed.

Circumstantial evidence is always considered somewhat unreliable; the evidence (*bayyinah*) required to make up for this deficiency is testimony (*shahādah*) to the claim (*daʿwā*) by witnesses (who, presumably, can testify to the claimant’s ownership of the lost property).

27. Mālik said: He proved his right by the circumstantial evidence [knowledge of purse and purse-string], no proof (evidence) is therefore needed. One position is that the circumstantial evidence is sufficient proof.

28. Abū Ḥanīfah and al-Shāfiʿī: He does not establish his right except through the proof (evidence). The other position is that additional personal evidence is required.

29. Explanation of the *khilāf*: The reason for the disagreement is the contradiction (*muʿāraḍah*) between the basic tenet (*aṣl*) that underlies the stipulation of testimony for the correctness of a claim and the evident meaning of this *ḥadīth*. Those who make the basic tenet prevail say there is no way around the proof (evidence). Those who make the evident meaning of the *ḥadīth* prevail say there is no need for the proof. Al-Shāfiʿī and Abū Ḥanīfah stipulated the testimony (*shahādah*), only because (the Prophet’s) word (*iʿrif ʿifāṣahā wa-wikāʿahā fa-in jāʿa ṣāḥibuhā wa-illā fa-shaʿnaka bihā*) allows the interpretation that he ordered the finder to take cognizance of the purse and the purse-string only in order for the latter not to get mixed up with other [purses] in his house, but it allows as well the interpretation that he ordered him to do so, so that he would return it to its owner by means of the purse and the purse-string. Since a possible interpretation (*iḥtimāl*) occurs, one has to go back to the basic tenet (*aṣl*), because the basic tenets cannot be opposed by possible interpretations that differ from them, unless an addition (*ziyādah*) is established (*taṣiḥḥu*), which we will mention later.

Here there is again a contradiction between a basic tenet (*aṣl*), which is the stipulation of testimony for the correctness of a claim on the one hand, and the evident meaning of a proof-text, namely the *ḥadīth al-luqṭah*, on the other. Al-Shāfiʿī and Abū Ḥanīfah required personal testimony, because the pertinent words in the *ḥadīth al-luqṭah*, in addition to their intended use, could also be interpreted as a safeguard against a mix-up of purses the finder may have in his home. Since the wording allows for (*iḥtimāl*) two different interpretations, one has to revert to the basic tenet. But see below.

30. According to Mālik and his disciples, the owner of the lost property has to describe, in addition to the purse and the purse-string, the condition of the dinars and their number. They say that this exists in some of the transmissions of the *ḥadīth al-luqṭah*, as follows: “if its owner turns up and describes the purse, the purse-string, and the number, then turn it over to him.” They say: “However, ignorance of the number does not harm him, if he knows the purse and the purse-string.” Likewise, if he gives too high a number. They are of two opinions in case he gives too low a number. Likewise, they differ in their opinion, if he is ignorant of their condition,¹² but describes the purse and the purse-string. If he errs in their [description], there is nothing for him. If he knows one of the two signs, which the basic text (*ḥadīth al-luqṭah*) specifies, and does not know the other, some say that there is nothing for him except through his knowledge of both signs. Some say: It is turned over to him after a “declaration of non-suspicion” (*istibrāʾ*). Some say: if he claims ignorance, a declaration of non-suspicion on his behalf is made (*ustubrīʾa*); if, however, he makes a mistake, it is not turned over to him. There is disagreement in the (Mālikī) school concerning the case that he adduces the sign(s) that establish his right. Should it be turned over to him with an oath (on his part) or without one? Ibn al-Qāsim says “without an oath,” while Ashhab says “with an oath.”

These are internal Mālikī positions and disagreements of diverse kinds:

- (a) Knowledge of purse and purse-string does not suffice for identification; the number and condition of the coins need to be considered as well. (Strangely, it is always the gold coins (*dīnār*) that are mentioned, presumably because they are a more spectacular find and thus greater stringency has to be applied in dealing with their restitution to their rightful owner.)
 (b) It is remarkable that protesting one’s ignorance is not harmful to the owner’s case, while committing a mistake is. (c) There is disagreement as to the necessity of the owner’s swearing an oath.

31. As for the stray sheep (or goat), the scholars agree that someone who finds a stray sheep in a desolate place far from cultivation has the right to consume it, because the Prophet has said: “It is for you or your brother or the wolf.” They disagree on the question of his liability to the owner for its value. The majority of scholars says yes. Mālik,

¹² This very likely includes things like mint and design.

however, in the best-known teaching related from him, says that he is not liable.

This is again a question of liability, with Mālik, at least according to one opinion transmitted from him, as the odd man out. See next semantic unit.

32. Explanation of the *khilāf*:

The explanation is the contradiction between the evident meaning (of the *ḥadīth*) and the well-known basic tenet of the *sharī‘ah*, as we said above, except that Mālik here let the evident meaning win out and thus proceeded in accordance with the legal determination of the evident meaning. Again there is a conflict between the basic tenet of the law that says that one’s property is not licit (to anyone else) except if the owner agrees voluntarily (see semantic unit no. 22) and the evident meaning of the *ḥadīth*: “It is for you or your brother or the wolf.” Here Mālik gives preponderance to the textual *aṣl* over a basic tenet of the law.

33. He did not, in the same way, permit free disposal of things (because the language is very strong here) that had been subject to public notification, after the initial year. In the same vein, there is another transmission from him that (the finder) is liable.

This is a parallel case, in which Mālik opted for the other solution. With regard to the *luqṭah*, after the one-year period of public notification had gone by without the owner claiming it, the Prophet had clearly said *fa-sha’naka bihā*, “do with it as you like.” But here Mālik did not apply this ruling of the Prophet, but preferred the basic tenet of property not being alienated without the will of the owner. Consistent with this, his teaching mentioned in no. 31 is contradicted (superseded?) here by disregarding the *ḥadīth* and making the finder, who consumed the *luqṭah*, liable.

34. The same is true for any kind of food that does not last, if he is afraid that it might perish, if he leaves it untouched.

In other words, foodstuffs that are likely to spoil can nonetheless not be touched by the finder, without his becoming liable to restitution to the owner.

35. The quintessence (*taḥṣīl*) of the teaching of Mālik among his students, with regard to this, is that it [the *luqṭah*] is of three kinds:

1. one that will stay in the hand of the finder and for which he fears loss, if he leaves it in place, such as minted gold [or simply “cash,” *‘ayn*,] and goods [*‘urūd*];

2. one that will not stay in the hand of the finder and for which he fears loss, if he leaves it in place, such as a sheep in a desolate place, or food that will spoil quickly; and
 3. one for which he will not fear any loss.
36. As for (1), it is divided into three categories:
- (1a) It happens to be insignificant and without importance, and its value cannot be determined. One knows that its owner will not seek it because of its paltriness. This, according to his opinion, is not subject to public notification, and it belongs to him who finds it. The *aṣl* in this is what is transmitted, namely that the Prophet passed by a date lying on the roadway and he said: “Were it not for the possibility that it is part of an intended alms-giving [*lawlā an takūna minā ’l-ṣadaqah*], I would have eaten it.” He did not mention public notification with regard to it. Other objects in this category would be staves [*‘aṣā*] and whips [*sawṭ*], although Ashhab preferred notification in these cases.
 - (1b) It happens to be insignificant, but does have a value and a benefit. [No example!] There is no disagreement in the school that it is subject to public notification. There is disagreement concerning the time-span; some say “a year,” others “a few days.”
 - (1c) It happens to be numerous [*kathīr*] or has a (considerable) value. There is no disagreement on its being subject to public notification for a year.
37. As for (2) [e.g., the sheep in a desolate area]: (The finder) may consume it, whether he be rich or poor. Is he liable for it? There are two transmissions on that, as already mentioned. The better known one is that there is no liability. There is disagreement in case he finds something in a settled area that might spoil quickly. Some say: he is not liable; others say: he is. Some make a distinction between him giving it to charity (he is not liable) or consuming it (he is liable).
38. As for (3), that’s a case like the camels, meaning that his choice concerning them is to leave them alone, because of the explicit text with regard to them. If he takes it, public notification becomes necessary. But the correct choice is to leave it. Some in the (Mālikī) school say: This is generally true at all times (*huwa ‘āmmun fī jamī‘i ’l- azminah*); others say: This is only right at a time of justice (*innamā huwa fī*

zamāni ‘l-‘*adl*), at a time of non-justice the better choice is “picking it up” (*anna* ‘l-*afḍala* fī *zamāni* *ghayri* ‘l-‘*adli* ‘*ltiqātuhā*).

39. As for liability for it [the found property] during the time of public notification, the scholars agree that he who picks up a thing and has witnesses testify to it with subsequent loss of the picked-up thing in his custody will not be liable. They disagree in case he does not have it witnessed. Mālik, al-Shāfi‘ī, Abū Yūsuf, Muḥammad b. al-Ḥasan say he is not liable, if he did not cause the loss (*in lam yuḍayyi*), even if he did not have it (i.e., the *iltiqāt*) witnessed. Abū Ḥanīfah and Zufar said: He is liable for it, if it perishes and he did not have (the picking up) witnessed. Mālik and al-Shāfi‘ī justify their opinion (*istadalla*) by saying that the *luqṭah* is a deposit (*wadī‘ah*), and the omission of having the *iltiqāt* witnessed does not change it from trust (*amānah*) to liability (*ḍamān*). They say: It is a *wadī‘ah* on the basis of the *ḥadīth* of Sulaymān b. Bilāl and others, namely that he (the Prophet) said: “If its owner turns up, fine, if not, let it be a deposit with you.” Abū Ḥanīfah and Zufar justify their opinion (*istadalla*) with the *ḥadīth* of Muṭarrif b. al-Shikhkhīr on the authority of ‘Iyād b. Ḥimār¹³ who said: The Prophet said: Whoever picks up lost property, let him make two blameless people (*dhaway* ‘*adlin*) witness it; he should not hide (it) nor cause difficulty (*lā yu‘nīt*). And if its owner turns up, he has the greater claim to it. If not, then it is God’s property, He can give it to whomever he wants.
40. The quintessence (*tahṣīl*) of the (Mālikī) school regarding this is that the finder of lost property, according to Mālik, if he picks it up, may have three motivations:
- (1) in order to snatch it away for himself (*ighṭiyāl*),
 - (2) in order to “pick it up” [in the legal sense],
 - (3) neither nor.

If he takes it in the way of *iltiqāt* (no. 2), it is with him and its preservation and notification is incumbent upon him. If he returns it (to the place where he found it), after having picked it up, Ibn al-Qāsim says: He incurs liability, while Ashhab says: He does not incur liability, if he returns it to its (exact) spot; if he returns it to another spot, he becomes liable

¹³ See Juynboll: *Encyclopedia of Canonical Ḥadīth* (see n. 10), 267b.

just as in the case of the *wadī'ah*. If he grabs it to keep it (*idhā qabaḍahā mughtālan*) (no. 1), he is liable for it. However, this modus is known only from him (*min qibalihi*).

As for modus no. 3, that is like finding a garment and taking it, thinking that it belongs to people nearby, in order to ask them about it. If they don't know it and don't claim it, then he may return it to where he found it, and he will not incur any liability by agreement among the adherents of Mālik's school. (41) Connected with this chapter is one problem that the scholars disagree about, namely the slave who uses up (*yastahliku*) the object picked up (details omitted).

2. GENRES

In what follows I would like to identify the "genres" that are employed in the *Kitāb al-luqṭah* of Ibn Rushd's *Bidāyat al-mujtahid*.

A. Structuring the Discussion by Means of Disjunctions

1. *arkān*

Some passages serve to impose structure on the text (or parts of the text). Passage no. 1 divides the whole text into a section on the constituent elements of the *luqṭah* case and a section on the legal determinations surrounding the *luqṭah*. This bipartite structure is not a given. The number of categories may be raised, as in the case of *hibah* "gift,"¹⁴ where *shurūṭ* "conditions" and *anwā'* "kinds" appear alongside *arkān* and *aḥkām*, or an entirely different system may be used, as in the case of *sariqah* "theft."¹⁵ Here the author starts with the following issues: (1) the Qur'ānic punishment (*ḥadd*) for theft; (2) the conditions of the stolen object that make said punishment necessary; (3) the characteristics of the thief who is subject to said punishment; (4) the punishment itself; and (5) how this crime is established (to have taken place). In the case of *luqṭah*, one could easily add to the *arkān* and *aḥkām*, e.g., by considering *anwā'* as another pertinent category. In the *hibah* chapter, that category comprises "tangible gifts" (*hibat 'ayn*) and "gifts of work and time" (*hibat manfa'ah*).¹⁶ *Anwā'* could clearly be applied to *luqṭah* by considering the two large groups

¹⁴ See *Bidāyat al-mujtahid* ii, p. 591.

¹⁵ See *Bidāyat al-mujtahid* ii, p. 793 ff.

¹⁶ See *Bidāyat al-mujtahid*, ii, p. 596.

of lost property, *jamād* and *ḥayawān*.¹⁷ This is actually what the Ḥanafī scholar al-Kāsānī (d. 587/1191) does.¹⁸ Why did Ibn Rushd refrain from doing this? Possibly, the *ḥadīth al-luqṭah* of Zayd b. Khālid al-Juhanī (see unit no. 11), which is considered sound, had been around long enough to lend uniformity to the various types of *luqṭah*. However, the distinction *jamād-ḥayawān* is clearly introduced when the *luqṭah* is discussed as a constituent element of the *iltiqāt* process (see unit no. 11).

When, in no. 2, Ibn Rushd enumerates the constituent elements (*iltiqāt, multaḥqīt, luqṭah*), one might try to find out if he left anything out. The only possible *rukn* that comes to mind is the owner of the lost property. But he is not really part of the actual “picking up”; his legal role is restricted to retrieving his property, by identifying it (and possibly swearing an oath), and to being awarded liability payments, in case his property perished (with exceptions).

2. The quintessence (*taḥṣīl*) of Mālik’s teaching with regard to the kinds of *luqṭah* (see nos. 35–38):

- (1) it will stay in the finder’s hand and he fears loss for it, if he does not pick it up (such as cash or goods);
 - (a) of insignificant value, not subject to notification, belonging to the finder (based on the *ḥadīth* of the date);
 - (b) Low value, but does have a benefit. No example given. Subject to notification, either for the regular one-year period, or “for a few days” (!).
 - (c) It is numerous or valuable. Notification is necessary.
- (2) it will not stay in the finder’s hand and he fears loss for it, if he does not pick it up (such as a sheep in a desolate place or food that will spoil quickly);
- (3) he fears no loss for it. This refers to the camel. They should be left alone; if they are not, notification becomes necessary.

¹⁷ It is interesting to note that Ibn Ḥazm (d. 456/1064): (*al-Muḥallā*, ed. Aḥmad Muḥammad Shākir, rev. ed., Beirut: Dār Iḥyā’ al-turāth al-‘arabī 1418/1997), usually keeps *luqṭah* “found object” and *ḍāllah* “stray animal” apart; he even adds *ābiq* “fugitive slave” as a further category to the chapter titled *Kitāb al-luqṭah wa-l-ḍāllah wa-l-ābiq* (vol. ix, 69–81).

¹⁸ al-Kāsānī, ‘Alā’ al-Dīn Abū Bakr b. Mas‘ūd (d. 587/1191): *Badā’i’ al-ṣanā’i’ fī tartīb al-sharā’i’*, ed. ‘Alī Muḥammad Mu‘awwaḍ & ‘Ādil Aḥmad ‘Abd al-Mawjūd (Beirut: Dār al-Kutub al-‘Ilmiyya 1997), viii, 326–337, here p. 326.

2. *The Quintessence (taḥṣīl) of the Mālikī School with Regard to the Intentions of the Finder is as Follows (See no. 40)*

He picks it up

- (1) in order to snatch it away for himself (*ightiyāl*);
- (2) in order to “pick it up” in the legal sense; or
- (3) none of the above.

In the first case, he is liable for it, though this *modus* is known only to himself.

In the second case, preservation of the object found and its public notification are incumbent upon him. If he returns it to the spot where he found it, he is liable for it according to Ibn al-Qāsim; according to Ashhab he is not liable, if he returns it to the exact spot. If he returns it to another spot, he becomes liable.

In the third case, it is like finding a garment and checking the neighborhood to see if anyone claims it. If not, he may return it to the place he found it, and he will not incur any liability, according to the Mālikī school.

B. *The Legal Determination of a Specific Action is Debated*

1. The *iltiqāt* is

- (a) “recommended”¹⁹ by two of the eponymous school-heads, Abū Ḥanīfah and al-Shāfi‘ī (reason: a general principle of the law: it is incumbent on every Muslim to preserve the property of his fellow Muslim). See no. 3. It is
- (b) “reprehensible.” This is the opinion of the two remaining eponymous school-heads, Mālik and Aḥmad b. Ḥanbal. See no. 4. There are two reasons: a *ḥadīth* of the Prophet, thus a textual proof (*naṣṣ*): *ḍāllatu ’l-mu’mini ḥarqu ’l-nār*, and a general consideration with regard to the *multaqīt*, that he may not be up to the task expected from him. See no. 5.
- (c) “obligatory.” No representative of this opinion nor any reason is mentioned. See no. 7.

2. The eligibility of a slave or a sinner to act as a *multaqīt* (and thus as a *walīy*) has been answered both ways by al-Shāfi‘ī: the negative stance

¹⁹ *al-afḍal*, not the regular technical term.

is based on the conditions for *wilāyah*, the positive one on the “lack of specificity” (*‘umūm*) of the *luqṭah ḥadīths*, i.e., they do not list who can and who cannot perform the legal act of picking up a lost object. See no. 10.

3. Disagreement about the rich person: Mālik and al-Shāfi‘ī say he can spend/consume the found property, after the notification period has ended without result, thus contradicting themselves (see no. 14), but creating one rule for all; Abū Ḥanīfah says he can only use it as alms. Mālik and al-Shāfi‘ī point out the “lack of specificity” (*‘umūm*) in the *ḥadīth al-luqṭah*; the Prophet did not distinguish between rich and poor. The two of them also point to another *ḥadīth* (in al-Bukhārī and al-Tirmidhī, on the authority of Suwayd b. Ghafalah), which, after an abnormal multi-annual notification period without the owner claiming his property, ends with the Prophet’s saying: *fa-‘stamti‘ bihā* “then enjoy it!” (or, in a variant of this *ḥadīth*: *fa-‘stanfiqhā* “then spend it for yourself!”). See nos. 15, 20, and 21.
4. A lone voice, al-Awzā‘ī, says that, if the find amounts to a lot of money, the rich man will put it in the state treasury. See no. 17.
5. Explanation of the *khilāf*: the evident meaning of the *ḥadīth al-luqṭah* (the one transmitted by Zayd b. Khālīd al-Juhānī as well as the one transmitted by Suwayd b. Ghafalah) is that, with the failure of the owner to claim his lost property, said property turns from possession into property for the finder; this is contradicted by the basic tenet of the Law that the property of a Muslim cannot become someone else’s property, unless the original owner agrees voluntarily, which naturally is not possible, since the owner is unknown and not available. Those who let the basic tenet prevail over the evident meaning of the *ḥadīth* allow only that the finder give the found property away as alms, with the additional proviso that he be liable for it to the owner, should the latter reappear and not approve of the alms-giving. Those who let the evident meaning of the *ḥadīth* prevail would have to assume that it is an exception to the rule. In this case a middle ground (*man tawassaṭa*) is mentioned, which seems to imply that, after the notification period has lapsed without a claim on the part of the owner, the finder can freely dispose of the object found as he sees fit; however, in case it is cash, he is liable for restitution to the owner. See nos. 22–25.
6. Identification of the owner of the lost property. All agree that the claimant must know the description of the purse and the purse-string. They disagree about the necessity of *bayyinah* (“evidence” = witnessing).

Mālik: He proves his claim by circumstantial evidence (*‘alāmah*); no “evidence” is needed. Abū Ḥanīfah and al-Shāfi‘ī: He does not prove his claim except by evidence.

7. Explanation of the *khilāf*: There is a contradiction between the basic tenet (*aṣl* [*al-shar‘*]), namely the stipulation of testimony for the correctness of a claim, and the evident meaning of the *ḥadīth*. Those who make the basic tenet prevail cannot dispense with the testimony, while those who make the evident meaning of the *ḥadīth* prevail see no need for it. The awkwardness of having the *ẓāhir* of the *ḥadīth* supersede a generally acknowledged principle of the Law is removed by giving it a different interpretation: Rather than saying that *i‘rif ‘ifāṣahā wa-wikā‘ahā* serves the identification of the rightful owner, one understands it as insuring that the finder identifies it among a plethora of purses he may have in his home. Since both interpretations are possible (*iḥtimāl*), one has to resort to the basic tenet, since basic tenets of the Law cannot be annulled by merely possible interpretations. See nos. 26–29.

C. Legal Opinions Attributed to Companions of the Prophet

Tracing a legal opinion back to Companions should be constituted as a separate genre. In no. 4, they are two famous ones, Ibn ‘Umar and Ibn al-‘Abbās, who are, as it were, precursors of Mālik and Aḥmad b. Ḥanbal in espousing the notion that the *iltiqāṭ* is “reprehensible.” In no. 16, the Companions ‘Alī and Ibn al-‘Abbās as well as some unnamed *tābī‘īs* are precursors of Abū Ḥanīfah with regard to his opinion that the rich person can use the found object, after the period of public notification has ended, only for the purpose of alms-giving. In no. 18, the opinion of Mālik and al-Shāfi‘ī that the rich man is allowed to consume/spend the *luqṭah*, after the notification period has ended without result, is also ascribed to the Companions ‘Umar, Ibn Mas‘ūd, Ibn ‘Umar, and ‘Ā‘isha.

D. Various Interpretations of a naṣṣ

1. The enigmatic *dāllatu ‘l-mu‘mini ḥarqu ‘l-nār* “The stray animal of the believer (may lead to) burning in Hell” is understood by those who advocate the reprehensibility of the *iltiqāṭ* as referring to any act of “picking up” the sheep (goat), while those who opt for the *iltiqāṭ* as “recommended,” understand it as taking the object found (here the stray animal) for personal consumption rather than for safeguarding it and notifying the public of the find. See no. 6.

E. *The Sociopolitical Situation that Would Influence the Decision of the Finder, Whether or Not to Pick Up the Lost Object*

1. In order to safeguard the lost property, the finder has to consider, (a) whether or not the government (*imām*) is just (*‘ādil* vs. *jā’ir*), and (b) whether or not the population around the place where the lost property is found is trustworthy (*ma’mūnūn* vs. *ghayr ma’mūnīn*). This results in six possible situations and solutions. See no. 8.
2. A similar consideration is proffered with regard to the stray camel. Some Mālikīs say that the rule of letting it fend for itself is true at all times; others say: This is only right at a time of justice (*innamā huwa fī zamāni ‘l-‘adl*); at a time of non-justice, the better choice is “picking it up” (*anna ‘l-afḍala fī zamāni ghayri ‘l-‘adli ‘ltiqāṭuhā*). See no. 38. Outside the *Bidāyat al-mujtahid*, similar notions may be found.²⁰

These include al-Sarakhsī’s comments:

If a man finds a stray camel, he should take it, in order to make it known, and he should not leave it to go to ruin, according to our opinion. Mālik says that leaving it is more appropriate, because of the well-known *ḥadīth* that the Prophet was asked about the stray sheep (or goat), and he said: It is for you or your brother or the wolf. Then, when he was asked about the stray camel, he became irate, until his cheeks became red, and he said: What do you have to do with it? It has its own shoes and waterskin, it will go down to the waterhole and will browse [the leaves of] the trees, until its owner finds it. According to our opinion, its interpretation is that this was at the beginning [of Islam], because at that time the preponderance was with the people of righteousness and probity (*ahl al-ṣalāḥ wa-l-khayr*), so no traitorous hand would reach out for it [i.e., the camel], if the finder left it behind; however, in our times the finder is not safe from a traitorous hand reaching out to it, after he has left.²¹

²⁰ al-Sarakhsī: *al-Mabsūṭ* (Cairo: Maṭba‘at al-Sa‘ādah n.d.), p. 11, l. 1 f.

²¹ *Ibid* p. 11, l. 1 ff.

F. “Geographical” Factors Influencing the Picking-Up, i.e.,
the Legal Status of the Place Where the Lost Object is Found

1. “Sacred” geography.
 - (a) The area occupied by the pilgrims’ caravan (*ḥājj*). Here the lost object must not be picked up. Reason: The Prophet prohibited it (but the *ḥadīth* is not adduced). See no. 9.
 - (b) The *ḥaram* of Mecca. The lost object is to be picked up by, or for, a *munshid* (town-crier), who will make public notification of the find. Reason: A *ḥadīth* of the Prophet, transmitted in two versions (“by” and “for”). See no. 9.
2. *En passant* Ibn Rushd mentions another distinction, that between cultivated and uncultivated land (*‘āmiru ’l-arḍi wa-ghāmīruhā*), but no legal argument is based on the distinction. See no. 11.
Outside the *Bidāyat al-mujtahid*, there are further “geographical” distinctions:
 - (a) *maḥall mamlūk* vs. *maḥall ghayr mamlūk*, i.e., private vs. public lands. Al-Ramlī (Shāfi‘ī) says that *luqṭah* can only occur on public land; on private land, the lost object would belong to the *dhū ’l-yad* “proprietor.”
 - (b) Another distinction made by al-Ramlī is the following: What someone finds in a *dār ḥarb*, where there are no Muslims, is *ghanīmah* “booty,” if he is there without *amān* “safe-conduct,” and *luqṭah* if he has *amān*.²²

G. Subsumption of a Legal Action under a Larger Category of Actions

1. *Iltiqāt* is a *wilāyah* “trusteeship,” the *multaqiṭ* thus a *walīy*. As such he must be a free man (*ḥurr*), a Muslim, and of age (*bāligh*). See no. 10. As mentioned there, al-Ghazzālī has a clearer system of qualifications (and their counterparts) for the *walīy*: *muslim/kāfir*, *ḥurr/raqīq*, *mukallaṭ/ṣabīy*, and *‘adl/fāsiq*.
2. The *luqṭah* is also subsumed under the category of *wadī‘ah* “deposit.” This is based on a *ḥadīth* on the authority of Sulaymān b. Bilāl and others that the Prophet said: *in jā’a ṣāḥibuhā wa-illā fa-l-takun wadī‘atan*

²² al-Ramlī, Shams al-Dīn Muḥammad b. Aḥmad al-Manūfī al-Miṣrī al-Anṣārī *al-shahūr bi-’l-Shāfi‘ī* al-Ṣaghīr: *Nihāyat al-muḥtāj fi sharḥ al-Minhāj* [with] *Ḥāshiyat al-Shubrāmallisī* [and] *Ḥāshiyat al-Maghribī al-Rashīdī* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī wa-Muḥammad Maḥmūd al-Ḥalabī 1386/1967), v, 426.

‘indaka “If its owner comes, fine, if not, let it be a deposit with you.” The deposit is a “trust” (*amānah*), and the *amīn* is not liable for accidental loss of the deposit.²³

The question of liability for the object found, should it perish during the notification period, is connected with the witnessing of the finder’s picking up the lost property. This latter problem strangely makes its appearance at a late stage in Ibn Rushd’s discussion of *luqṭah*. All agree that, if duly witnessed, subsequent loss does not engender liability. If not witnessed, Mālik, al-Shāfi‘ī, Abū Yūsuf, and Muḥammad b. al-Ḥasan say he is not liable, if he did not cause the loss (*in lam yuḍayyi*). Abū Ḥanīfah and Zufar say he is liable.

Mālik and al-Shāfi‘ī argue that the *luqṭah* falls into the category of *wadī‘ah* “deposit.” Abū Ḥanīfah and Zufar argue with the *ḥadīth* on the authority of ‘Iyād b. Ḥimār, which states that the Prophet wanted the finder of lost property to have two blameless people (*dhaway ‘adlin*) witness (*ishhād*) the picking up; he should not hide (it) nor cause difficulty, and if its owner comes, he has the stronger claim to it; if not, it is God’s property to give to whomever He wishes (*man-i ‘ltaqaṭa luqṭatan fa-l-yushhid dhaway ‘adlin ‘alayhā wa-lā yaktum wa-lā yu‘nit fa-in jā’a ṣāḥibuhā fa-huwa aḥaqqu bihā wa-illā fa-huwa mālu ‘llāhi yu’tīhi man yashā’u*). See no. 39.

H. A Scriptural²⁴ Text (naṣṣ) that Serves as an aṣl for the Whole Legal Complex at Hand

1. The *ḥadīth* of Zayd b. Khālīd al-Juhanī, considered *ṣaḥīḥ*, is the basic text, as it contains (a) a definition of *luqṭah*: either lost object or stray animal, camels excluded, with bovines categorized with camels according to al-Shāfi‘ī, with sheep and goats according to Mālik (who is, however, vacillating between the two classifications; no explicit *qiyās* [between bovine and camel, or between bovine or sheep/goat] is mentioned), and (b) indications as to procedure. See no. 11.

I. General Agreement of Scholars

1. There is general agreement that anything someone would care for should be subject to the one-year notification, unless it is a sheep or a goat. No objective value is mentioned. See no. 13.

²³ See Joseph Schacht: *An Introduction to Islamic Law* (Oxford: OUP 1964), 147, 157.

²⁴ Here used to cover both *qur’ān* and *ḥadīth*.

2. An impressive array of legal scholars, consisting of the eponymous founders of the four important schools of law and in addition a number of independent lawyers (or founders of smaller schools that did not survive) is in agreement that, after the one-year period of notification, the finder can spend or consume his find, if he is poor, or give it as alms, if he is rich. See no. 14.
3. There exists a general agreement of the scholars, except for the Zāhirites, that, if the rich man consumes/spends the object found, after the notification period, he is liable for it to the owner, should the latter return. See no. 19.

J. *Specific Mālikī Positions and Disagreements*

1. In addition to the purse and purse-string, the claimant should know the condition (*ṣifah*) and the number (*ʿadad*) of the coins (based on a longer variant of the *ḥadīth al-luqṭah*). See no. 30.
2. Differences of opinion are delineated as to the legal consequences of the owner's claiming ignorance and of giving a higher or lower number for the coins in the purse. See no. 30.
3. In addition to the circumstantial evidence, is an oath required from the owner? Ibn al-Qāsim: no; Ashhab: yes. See no. 30.
4. All agree that a stray sheep (goat) in a desolate place may be consumed by the finder, in accordance with the *ḥadīth hiya laka aw li-akhika aw li-'l-dhi'b*. See no. 31.
5. They do not agree with regard to the finder's liability to the owner. Most say yes; Mālik, in his better-known teaching, says no. Explanation of the *khilāf*: Clash between the basic tenet that someone's property becomes somebody else's property only if the original owner agrees voluntarily, and the evident meaning of the *ḥadīth*. By going with the evident meaning of the *ḥadīth*, Mālik is not consistent, though. In the case of the unsuccessful period of public notification, the Prophet had clearly said *fa-sha'naka bihā*, "do with it as you like." But here Mālik did not apply this ruling of the Prophet, but preferred the basic tenet of property not being alienated without the will of the owner. Consistent with this, his teaching mentioned in no. 31 is contradicted (superseded?) here by disregarding the *ḥadīth* and making the finder, who consumed the *luqṭah*, liable. A parallel case is perishable foodstuffs: if the finder consumes them, he becomes liable to the owner. See nos. 31–34.

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PART FOUR

LAW: DIVERSITY AND AUTHORITY

IS THERE SOMETHING POSTMODERN ABOUT *UṢŪL AL-FIQH*?
IJMĀʿ, CONSTRAINT, AND INTERPRETIVE COMMUNITIES

Joseph Lowry

I. INTRODUCTION

A. *The Vaguely Postmodern Premodern*

In this article I attempt to map Stanley Fish's concept of interpretive communities on to discussions of consensus (*ijmāʿ*) and legal disagreement (*khilāf*, *ikhtilāf*) in premodern works of Islamic legal theory (*uṣūl al-fiqh*). The goal of this attempt is to see to what extent the descriptions offered by Fish and by authors of works of *uṣūl al-fiqh* of the conditions of interpretive disagreement within a given community of interpreters exhibit similarities. I am not asking whether Fish's theory adequately accounts for aspects of Islamic legal interpretation or Islamic legal theory, but rather comparing Fish's theoretical account of legal interpretation with the theoretical accounts of legal interpretation and legal disagreement offered by authors of premodern works of *uṣūl al-fiqh*.

On its surface, premodern Islamic legal theory can appear surprisingly postmodern: its recognition of interpretation as central to the legal enterprise (interpretivism); its unembarrassed invocation of and reliance on Arabic literary theory and even poetics (law and literature); its careful assessment of the linguistic limits of communication (perhaps an implicit critique of linguistic formalism); its insistence on the provisional nature of legal interpretation (indeterminacy); and especially its theorizing of doctrinal diversity (pluralism).¹

Still, the comparison I undertake here, between postmodern and premodern theories of legal interpretation, is hardly problem-free and I dwell on some of the various difficulties and distinctions that must be drawn

¹ Sherman Jackson has explored the possibilities of a postmodern critique of premodern *uṣūl al-fiqh* in "Fiction and Formalism: Toward a Functional Analysis of *Uṣūl al-Fiqh*," in Bernard Weiss, ed., *Studies in Islamic Legal Theory* (Leiden: Brill, 2002), 177–201 and Ashk Dahlén has searched for aspects of modernity and postmodernity in religious thought in post-revolutionary Iran in *Islamic Law, Epistemology and Modernity: Legal Philosophy in Contemporary Iran* (New York: Routledge, 2003) (focusing on 'Abd al-Karīm Surūsh).

below. It seems worthwhile, however, at the very least to explore what seem to me to be obvious surface congruences between Fish's assertion that the practice of an interpretive community necessarily constrains interpretation and the *uṣūlīs'* theoretical legitimation of the existence of legal disagreement among Muslim jurists qualified to engage in legal interpretation (*mujtahids*), and to ask whether there are deeper congruences to be discerned or whether such differences as there may be are instructive.

Several matters require consideration before answers to these questions can be offered. First, I explain in more detail why this undertaking seems justified. Second, some basic characteristics of postmodern thought and postmodern legal theory must be identified and acknowledged as fundamentally different from key aspects of premodern Islamic legal thought and legal theory. Third, Fish's ideas will require a more detailed and critical evaluation before they can be weighed against premodern discussions of *ijmā'*. After these preliminaries, the analysis will focus on two specific questions that are dealt with in discussions of *ijmā'* in works of *uṣūl al-fiqh*: whether a settled constellation of legal disagreement may (or must) be reduced to unanimity, and whether a settled constellation of legal disagreement may (or may not) expand. These two issues will serve as test cases for understanding approaches to legal disagreement adopted by different *uṣūl al-fiqh* authors since these issues directly implicate the ontological status of *khilāf* as positive law.

Readers will probably not be surprised to learn that there are substantial differences between Fish and *uṣūl al-fiqh*. Although Islamic legal theorists assert the existence of an interpretive community of authoritative jurists who may legitimately disagree among themselves, *uṣūl al-fiqh* discourse remains suffused with foundationalist rhetoric, even among those authors who exhibit a markedly liberal attitude toward legal disagreement in their discussions of the above two test cases. On the other hand, perhaps the diversity and non-definitive epistemic status of their theorizing about legal interpretation and legal disagreement in general suggests a higher-order pragmatism, between legal doctrine and theology, in light of which all their claims for certainty should be viewed.

B. *Ijmā' and Community Constraints on Interpretation*

The idea that multiple exercises of legal interpretation focused on the same legal question may reach different results and yet be valid and even legally binding is especially prominent in discussions of *ijtihād* (legal

interpretation).² I will examine this idea as it appears in discussions of *ijmā'*, however, where the issue of legal unanimity and the mechanics of legal disagreement are discussed in terms of the community of qualified jurists rather than, as in the case of *ijtihād*, in terms of individual exercises of legal interpretation.³ The doctrine of *ijmā'* might seem an unpromising subject for these purposes since it appears to assert the pure univocality of the Muslim *umma*, the dream of a primeval community without difference. But it is not really a new idea to view *ijmā'* as a concept that legitimates legal disagreement, its claim to describe (and maybe promote) actual consensus on doctrine notwithstanding.⁴ Some premodern Muslim legal theorists expressly state that consensus embraces instances of legal disagreement,⁵ and this aspect of *ijmā'* has been emphasized in modern scholarship. Certain of George Makdisi's formulations in regard to the function of *ijmā'* suggest that *ijmā'* is really *constituted* by its opposite, *khilāf*, legal disagreement. Although Makdisi acknowledges a strong urge in the direction of forming consensus,⁶ he also recognizes that Islamic legal

² Al-Zarkashī, for example, says that *ijtihād* is used only for those legal problems whose answers are disputed (*ammā* [*al-masā'il*] *allati yasūgh fihā* [*al-ijtihād*] *fa-hiya al-mukhtalaf fihā*). Badr al-Dīn al-Zarkashī, *al-Bahr al-muḥīṭ fī uṣūl al-fiqh*, 4 vols., ed. M.M. Tāmir (Beirut: Dār al-Kutub al-'Ilmiya, 2000), iv, 527. That is, *ijtihād* is, by definition, only used for matters already characterized by legal disagreement.

³ It has been recognized that the problem of legal disagreement forms a link between the discussions of *ijmā'* and *ijtihād* in works of *uṣūl al-fiqh*. *Khilāf* is, after all, nothing more than the conflicting results of *ijtihād* that bar consensus. The fundamental discussion, as for much of *uṣūl al-fiqh*, is still Aron Zysow's "The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory" (Ph.D. dissertation, Harvard, 1984), chs. 3 and 5. See also Éric Chaumont, "Tout Chercheur Qualifié Dit-Il Juste?" La Question Controversée du Fondement de la Légitimité de la Controverse en Islam," in Alain Le Boulluec, ed., *La Controverse Religieuse et ses Formes* (Paris: Cerf, 1995), 11–27, at 12; and Norman Calder, focusing on al-Shāfi'i, "Ikhtilāf and Ijmā' in Shāfi'i's *Risālah*," *Studia Islamica* 58 (1984), 55–81. Both trace the issue back to al-Shāfi'i's *Risālah*. I discuss al-Shāfi'i's views in my *Early Islamic Legal Theory: The Risāla of Muḥammad ibn Idrīs al-Shāfi'* (Leiden: Brill, 2007) in chs. 5 and 7 (in the latter esp. at 350–356). For the theoretical treatment of legal disagreement among Imami Shiites, see Robert Gleave, "Intra-Madhhab *Ikhtilāf* and the Late Classical Imami Shiite Conception of the Madhhab," in P. Bearman, et al., eds., *The Islamic School of Law: Evolution, Devolution, and Progress* (Cambridge: Harvard University Press, 2005), 126–146.

⁴ Al-Zarkashī defines it as "the agreement of the *mujtahids* of Muḥammad's community, after his death, on a case, in regard to some matter or another, in a given epoch" (*ittifāq ummat Muḥammad ba'd wafātihi fī ḥāditha 'alā amr min al-umūr fī 'aṣr min al-a'ṣār*). *Al-Bahr al-muḥīṭ*, iii, 487.

⁵ See below, at, e.g., n. 63 (Ibn 'Aqīl).

⁶ It was, he says, "the goal to be achieved." *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh: Edinburgh University Press, 1981), 112. This urge is also emphasized, in different contexts, by Wael Hallaq, *A History of Islamic Legal Theories:*

literature consisted overwhelmingly of records of legal disagreements—not of instances of actual consensus.⁷ Moreover, it was the *duty* of scholars to *prevent* the formation of consensus if they believed that alternative views (their own, for instance) had merit.⁸ Thus, the high value placed on unanimity was counterbalanced by a strong incentive to dissent, reflecting the paradox that the insistence on getting God’s law right led to the sanctioning and even encouragement of legal disagreement. So, although Muslim legal theorists’ discussions of *ijmā’* focus heavily on the mechanics and meaning of agreement, the delineation of conditions of actual consensus seem largely if not entirely aspirational, even when they discuss the Companions, the Successors, the inhabitants of early Islamic Medina (or other important metropolises), the four orthodox *khulafā’*, or the Prophet’s family, all plausible sites of actual consensus.⁹ This fact suggests that the idea of unanimous agreement serves a mostly symbolic or theological (or ideological) function.¹⁰ Moreover, because actual consensus was rare and, as the *uṣūl* authors point out, not even thought binding when achieved among the aforementioned subgroups of major legal authorities, the mechanics and meaning of disagreement had to be confronted and theorized. Indeed, because the Islamic legal enterprise was in important respects scholarly, individualistic, and (perhaps) not necessarily connected with mechanisms of actual adjudication and coercion, the discussions of legal disagreement and interpretive diversity under the rubric of *ijmā’* offer an important window into the Islamic legal imagination.¹¹

An Introduction to Sunnī uṣūl al-fiqh (Cambridge: Cambridge University Press, 1997), 136–137 and 202–205.

⁷ *Rise*, 112.

⁸ *Rise*, 106.

⁹ These are the main subgroups of the *ummah* considered by al-Zarkashī, *al-Baḥr al-muḥīṭ*, iii, 525–536.

¹⁰ My argument in this essay, which is tentative and exploratory, should not be confused with the claim that *ijmā’* is some kind of dark matter that mysteriously holds the universe of the *fiqh* together, a view proposed, for example, by Snouck Hurgronje and others, and that has been convincingly refuted by Zysow, “Economy,” ch. 3, esp. 198–199.

¹¹ It should be noted that Islamic law is not the only legal system from Late Antiquity characterized by legal diversity. Both Roman and Rabbinic law exhibit considerable doctrinal diversity, and at least Rabbinic law is often highly self-conscious of its own pluralism. See, e.g., C. Hezser, “Roman Law and Rabbinic Legal Composition,” in *The Cambridge Companion to the Talmud and Rabbinic Literature* (Cambridge: Cambridge University Press, 2007), 144–163.

II. POSTMODERNISM AND UŞŪL AL-FIQH: DISTINCTIONS AND DOUBTS

A. *Postmodernism and Uşūl Distinguished*

Although *uşūl al-fiqh* offers rich and sophisticated theoretical accounts of many aspects of legal interpretation, there remain fundamental differences between the assumptions and goals found in premodern Islamic legal theory and postmodern thought about interpretation in general and law and legal interpretation in particular. I now outline, in an exemplary rather than an exhaustive way, some key points in which Islamic legal theory differs fundamentally from postmodern thought.

- *Premodern Islamic legal thought is undeniably foundationalist*: the law has a unitary, metaphysical origin; this origin is good; it is often asserted that there is only one correct answer to legal questions and even legitimations of interpretive pluralism could be understood to confirm the existence of a single correct answer; unlike postmodern thought, there is no complex and playful critique of traditional metaphysics.¹²
- *Premodern Islamic legal thought is at least partly formalist*: in the sense that objectively correct answers to legal questions are presumed to be related somehow to, and sometimes compelled by, linguistic features of Arabic; conversely, there is no interest in emphasizing that texts exhibit “an indeterminate state of endlessly deferred meanings and unresolved conflicts,” or in showing how the assertion of the naturalness of a particular meaning involves a certain interested arbitrariness which is often related to a sinister, unspoken set of exclusions.¹³
- *Premodern Islamic legal thought is happily elitist*: not only is *uşūl al-fiqh* a “prestige science,” but by the time of our earliest preserved works of

¹² Many jurists did hold that merely probable answers were the goal of legal interpretation, a view labeled “infallibilism” by Zysow. But this view does not necessarily undermine their ultimately foundationalist view of the law since it remained possible to distinguish between the subjective situation of the interpreter and the existence of an objectively correct answer. For an overview of varieties of infallibilisms see Zysow, “Economy,” ch. 5, esp. 463–476; see also Birgit Krawietz, *Hierarchie der Rechtsquellen im tradierten sunnitischen Islam* (Berlin: Duncker & Humblot, 2002), 336–353.

¹³ The quotation is from Dahlén, *Islamic Law, Epistemology and Modernity*, 99. Jackson argues that mature *uşūl al-fiqh* exhibits what he calls “classical linguistic formalism.” “Fiction and Formalism,” 185–194. I have proposed that the failure of the promise of the *uşūlis’* formalism may be part of what makes them interesting as legal theorists. “Some Preliminary Observations on al-Şāfi and Later Uşūl al-Fiqh: The Case of the Term *bayān*,” *Arabica* 55 (2008), 505–527.

uṣūl al-fiqh (say, the latter half of the 10th c. and certainly thereafter), religious thought is not seeking (in general) to undermine hierarchies (though it might have done so in earlier periods); nor is it interested in pointing out hidden strategies of textual repression, or in unmasking oppositions that conceal brooding, metaphysical omnipresences that reinforce authoritarian political structures or ideologies of domination, and so on.¹⁴

- *Works of Islamic legal theory generally portray legal interpretation as a purely intellectual undertaking:* even though the close interdependence of Islamic legal interpretation (*ijtihād*) and adjudication (*qaḍāʾ*) have recently been asserted,¹⁵ Islamic legal interpretation is described as an exercise in textual interpretation and reasoning mostly unconstrained by real-world problems of courtroom adjudication.
- *The general 'social' concerns of postmodern thought are wholly absent from premodern Islamic legal thought:* issues of class, race, sex, sexual orientation, and so on, as formulated in (post)modern times, are of little or no concern to premodern Muslim jurists and certainly do not drive premodern Muslim jurists to develop strategies for, for example, 'unreading patriarchy.'¹⁶
- *The specific postmodern criticisms of the legal system are wholly absent from uṣūl al-fiqh:* postmodern criticism of (especially) the American legal system aims to show that widespread indeterminacy, philosophical incoherence, and ideological masking of relations of power inhibit the realization of substantive justice; Muslim jurists, overwhelmingly, are not interested in a wholesale overturning of the institutions that constitute premodern Islamic legal systems, and their own notions of substantive justice likely diverge in all kinds of ways from those of postmodern legal thought.¹⁷

¹⁴ The quoted phrase is from Bernard Haykel in the "Alta Discussion," in Weiss, ed., *Studies in Islamic Legal Theory*, at 402. Postmodernism is of course also a kind of intellectual elitism.

¹⁵ Notably, Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005) and David Powers, *Law, Society, and Culture in the Maghrib, 1300–1500* (Cambridge: Cambridge University Press, 2002).

¹⁶ For Derrida, deconstruction, for example, was "an ultimately *political* practice, an attempt to dismantle the logic by which a particular system of thought, and behind that a whole system of political structures and social institutions maintains its force." Thus Terry Eagleton, *Literary Theory: An Introduction* (Minneapolis: University of Minnesota Press, 1983), 148 (emphasis in original).

¹⁷ The postmodern attraction of indeterminacy, for example, as a tool for analyzing judicial decisions and revising judicial practice is partly political: "The notion that it is

By offering these quick and simple summaries of some important differences between premodern Islamic legal thought and postmodern ideas about law and interpretation, I am not trying to brand the Islamic legal tradition as fossilized, hopelessly antiquarian, or reactionary, but only attempting to avoid anachronism. Indeed, one goal of this essay is to highlight the sophisticated strategies of and possibilities within Islamic legal thought for coping with ambiguity, diversity, and uncertainty. Still, what might be called the 'critical' concerns of postmodernism cannot easily be subtracted from postmodernism any more than they can easily be read into *uṣūl al-fiqh*.

My invocation above of Stanley Fish, postmodernism, and postmodern legal thought calls for some further distinctions. By postmodern legal thought I am referring primarily to the so-called Critical Legal Studies movement (CLS). CLS uses tools of postmodern thought to reinterpret and critique aspects of the Anglo-American legal system, and is inspired by the early 20th-century legal realist movement and, as its name suggests, by critical theory as elaborated by members of the Frankfurt school.¹⁸ Stanley Fish, to the extent that his ideas about interpretation are anti-foundationalist, certainly belongs to postmodernism, and his critique of foundationalism in contemporary American legal thought makes him a postmodern legal thinker, but he is not part of CLS. Whatever Fish's politics, his ideas about legal interpretation are not (overtly) aimed at remedying social inequities perpetuated by the American legal system. In addition, his critique of foundationalism does not equate, as it does for many postmodern thinkers and for CLS, with a strong belief in, or strategic commitment to, indeterminacy (as we will see). Although Fish shares some general assumptions with the adherents of Critical Legal Studies, his principal goal in the writings examined for this essay, stated in very general terms (and as I read him), is to describe the relationship between interpretation and constraint. CLS, by contrast, seeks, through a partly-philosophically inspired immanent critique of judicial decisions, to lay bare the contingent nature of legal reasoning in order to unmask

possible to achieve radical results working with the existing body of legal doctrine—because the seeming constraints are illusory—has powerful attraction for those committed to social change . . ." Lawrence Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma," *University of Chicago Law Review* 54 (1987), 462–503, at 497.

¹⁸ Solum, "Indeterminacy Crisis," at 468, 495–496; see also Jackson, "Fiction and Formalism," 181–185.

power relationships and so initiate a radical transformation of the American legal (and political-economic) system.¹⁹

B. Uṣūl of Fish

For present purposes, it is most useful to think of Fish as attempting to get beyond what he views as a false dichotomy between objectivism and relativism.²⁰ There are, he says, in regard to legal interpretation, two groups, “those who believe that interpretation is grounded in objectivity and those who believe that interpreters²¹ are, for all intents and purposes, free.” Both positions are, however, according to Fish, “fallacies,” one “of pure objectivity and [one] of pure subjectivity.”²² In regard to the first of these two fallacies, Fish holds that disputes about the interpretation of a text cannot be resolved by appealing to the text. This is because the text does not stand outside, or above, readers’ assumptions about it: No pre-interpretive apprehension of the text is possible since the text itself is constituted in the first place by assumptions about its nature, goals, intentions, genre, and so on. Every interpretive decision will therefore

rest on [an] assessment of the situation as it has developed; but that assessment will itself be an act of interpretation which will in turn rest on an interpreted understanding of the enterprise in general.²³

¹⁹ As Roberto Unger puts it, “The critical legal studies movement has undermined the central ideas of modern legal thought and put another conception of law in their place. This conception implies a view of society and informs a practice of politics,” and “The constructive outcome of our critique of objectivism is to turn us toward the search for alternative institutional forms of the available institutional ideals, most especially the market and the democracy. The chief medium in which we pursue this quest is deviationist [legal] doctrine itself, including the historical and analytic criticism of received legal conceptions.” “The Critical Legal Studies Movement,” *Harvard Law Review* 96 (1982–1983), 561–675, at 563 and 583

²⁰ The following summary of Fish’s views comes from his book *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1989). Fish is not alone in his attempt to steer a course between objectivism and relativism, a goal that he may be seen to share with the likes of Richard Rorty, Hans-Georg Gadamer, and others. See Richard Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis* (Philadelphia: University of Pennsylvania Press, 1985), 8–16.

²¹ “Working on the Chain Gang: Interpretation in Law and Literature,” in *What Comes Naturally*, 87–102, at 87.

²² “Working on the Chain Gang,” 88.

²³ “Working on the Chain Gang,” 91. In this essay, Fish critiques a metaphor for legal (or rather judicial) interpretation developed by the noted legal philosopher Ronald Dworkin in which several authors compose a chain novel. Dworkin seems to assume that the earlier writers will have more latitude in deciding the direction of the plot than later authors.

One important consequence of this view is that Fish is self-consciously (even militantly) anti-formalist:

The meaning of a sentence is *not* a function of the meaning of its constituent parts; . . . meaning cannot be formally calculated, derived from the shape of marks on a page; . . . there is no such thing as literal meaning, . . . a meaning that because it is prior to interpretation can serve as a constraint on interpretation.²⁴

Thus, meaning is not “a *formal fact*” for which “one could devise a method for ‘reading it off.’”²⁵ The primary focus of interpreters, argues Fish, is anyway not the text but the author’s intentions. It is not the case, however, that such intentions or evidence of such intentions “can themselves be regarded as a new (and higher) set of formal facts, a new text whose meaning can now be read off.”²⁶ Just like a text, an intention is “characterized by . . . the necessity of interpretive work.”²⁷

Fish sees formalism as symptom of a pernicious foundationalism, “a notion of truth as something independent of local, partial perspectives . . . whose availability makes plain language at once possible and essential [in order to] assure order that is *principled*, based not on the accidents of history and culture, but on the essence of enduring values.”²⁸ Fish’s critique of formalism and foundationalism is not confined to the realm of textual interpretation, but extends to the political, since assertions of both positions involve exercises “of *power* in relation to the putting in place of *constraints*.”²⁹

Although Fish denies the existence of textual (or linguistic) constraints on interpretation, he does not argue that interpreters are unconstrained; rather, he locates the constraints on interpretation elsewhere,

Fish objects that all the authors are equally constrained by their interpretive assumptions about novels and novel-writing and that none of them is more or less free, or for that matter more or less constrained, in the way Dworkin suggests. See Ronald Dworkin, *Law’s Empire* (Cambridge: Belknap Press, 1986), at, e.g., 232, where he suggests that some interpretations will be eliminated simply by the fact that one is farther along in the chain novel and therefore more constrained by what has gone before. Fish is responding to the first version of this idea offered by Dworkin in “Law as Interpretation,” *University of Texas Law Review* 60 (1981–1982), 527–550, esp. at 541–546.

²⁴ “Introduction: Going Down the Anti-Formalist Road,” in *What Comes Naturally*, 1–33, at 4 (emphasis in original).

²⁵ “Anti-Formalist Road,” 7.

²⁶ “Anti-Formalist Road,” 7.

²⁷ “With the Compliments of the Author: Reflections on Austin and Derrida,” in *What Comes Naturally*, 37–67, at 43–44.

²⁸ “Anti-Formalist Road,” 5 (emphasis in original).

²⁹ “Anti-Formalist Road,” 5 (emphasis in original).

in communities of interpretation. Fish offers the interpretive community as the source of interpretive authority (rather than the text or the unconstrained interpreter of the text), as a way of accounting both for the existence of interpretive agreement (as though formalism were valid) and interpretive disagreement (as though individual interpreters were free to go their own way). Such an interpretive community embodies or comprises

a point of view or way of organizing experience that shared individuals in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance were the content of the consciousness of community members who were therefore no longer individuals, but, insofar as they were embedded in the community's enterprise, community property.³⁰

By "the community's enterprise" is meant the particular context of a given interpretive community's practice: "Interpretive communities are no more than sets of institutional practices."³¹ Interpreters, precisely because they are embedded in such communities, are always constrained:

perception is always conventional—prestructured by categories . . . that are public and communal rather than individual and unique—[in such a way that] perception can never be arbitrary.³²

That is,

as a fully situated member of an interpretive community, be it literary or legal, you "naturally" look at the objects of the community's concerns with eyes already informed by the community imperatives, urgencies, and goals . . . your *first* glance at [the] text will be informed by that interpretive disposition (indistinguishable from what you think, in advance, the text is *for* and also from what you take to be your relation to it).³³

This understanding of the inescapable embeddedness of all interpretive activity leads Fish to reject the idea that texts could be truly indeterminate:

the question "is everything then indeterminate?" loses its force . . . there is no subjectivist element of reading because the observer is never individual in the sense of unique or private, but is always the product of the categories

³⁰ "Change," in *What Comes Naturally*, 141–160, at 141.

³¹ "Change," 153.

³² "Why No One's Afraid of Wolfgang Iser," in *What Comes Naturally*, 68–86, at 83.

³³ "Don't Know Much About the Middle Ages: Posner on Law and Literature," in *What Comes Naturally*, 294–311, at 303 (emphasis in original).

of understanding that are his by virtue of his membership in a community of interpretation.³⁴

This is how Fish disposes of the second fallacy noted above, of pure subjectivism. More generally, the notion of interpretive communities allows Fish, as noted, to account for the simultaneous existence of inconsistent interpretations within the same interpretive enterprise, and this aspect of his account of interpretation is what makes it potentially relevant to understanding *ijmā'* and its counterpart, *khilāf*.

It will be useful to give a simple but illustrative example of Fish's ideas in action. One important and immediate aspect of the constraints arising out of being enmeshed in communal interpretive practice—and for Fish there is no other way of being—is the interpretation of intentions. Imagine, for example, a judge who, after reviewing pleadings and the law in a given case, could say either “I hereby grant the writ of mandamus” or “I hereby deny the writ of mandamus” and either of these mutually exclusive interpretations of the relevant law and facts would be understood (all other things being equal) as valid judicial interpretations. However, if in the same context he were to shout out “I would like to ride the roller coaster!” or if while riding a roller coaster he solemnly proclaimed “I hereby deny the writ of mandamus,” it is not clear that either of his statements in those two latter contexts would be interpreted as right or wrong judicial interpretations, but rather as utterances that did not intend to participate in the enterprise of judicial interpretation. Thus, although squarely opposite interpretations are possible within a given interpretive community, it is not possible for the judge to ‘go wild’ because if he did, his remarks would cease to be interpreted as ‘judicial’ remarks.

Now, if we imagine, as *uṣūl* authors often do, that *ijtihād* on a particular problem permissibly leads some jurists to a conclusion of *tahrīm* (unlawfulness) and others to a conclusion of *tahllil* (lawfulness) in regard to a particular act—in other words, to squarely contradictory interpretations, *khilāf*—then we would have a situation that in its broad outlines seems congruent with what Fish describes.³⁵ Such legal disagreement

³⁴ “Why No One’s Afraid of Wolfgang Iser,” 83.

³⁵ Abū al-Ḥusayn al-Baṣrī, for example, assumes that the community of jurists could come to squarely contradictory opinions on a given legal problem (*qawlayn mutanāfiyayn fi al-mas’alah*). *Kitāb al-Mu’tamad fi uṣūl al-fiqh*, 2 vols., ed. M. Ḥamidallāh (Damascus: Institut Français, 1964), ii, 505. That situation is also expressly contemplated by al-Āmidī in his discussions of whether new legal opinions may be developed once the community’s legal disagreement has become settled in regard to a given legal problem. See the discussion of al-Āmidī below.

is theorized in two ways: expressly, as the natural consequence of legal interpretation (*ijtihād*), which is individualistic (even heroic), and valid only within the sphere of issues characterized by legal disagreement; and implicitly, as an aspect (or as the counterpart) of consensus (*ijmāʿ*). It is thus a phenomenon that is accounted for, and legitimized, by Islamic legal theory. To see, however, whether the *uṣūl* of Fish and *uṣūl al-fiqh* exhibit any relevant similarities in their accounts of legitimate legal disagreement some further reflections on Fish are required.

C. More Reservations

From the above account, we can identify three principal *ʿuṣūl* of Fish: his denial of formalism, his denial of unconstrained subjectivity as an alternative to formalism (or foundationalism), and his affirmation of constraint in interpretive communities. Muslim legal theorists do not reject formalism, but it could perhaps be argued that they exhibit concern about its limits.³⁶ Muslim legal theorists do recognize something like a binary opposition between textual constraint and unconstrained subjectivity, a distinction that is at least latent in a phrase such as *ṭalab al-dalīl* (the search for the [textual or rational] indicator) as a description of *ijtihād*. The terms used by Shāfiʿī jurists in their polemicizing against the Ḥanafī concept of *istiḥsān* is another good example of this distinction.³⁷

Still, inasmuch as Muslim legal theorists circumscribe legitimate legal disagreement within the community of *mujtahids*, a case can be made for their consideration of that community as a kind of constraint on interpretation. But even this resemblance calls for caution. Fish's identification of "interpretive communities" as loci of interpretive authority, constraints, and so on, is achieved from a particular vantage point in regard to the practices he describes. Fish achieves his insight that interpretation is constrained by the limits of interpretive communities from a vantage point outside of those communities and constraints. His vantage point is to that extent a foundationalist one from which he is able to offer a

³⁶ See note 13 above. Zysow refers to "the growth of skepticism as to the working of language." "Economy," 257.

³⁷ Al-Shāfiʿī already uses the phrase *ṭalab al-dalālah*. See *al-Risālah*, ed. A.M. Shākir (Cairo: al-Ḥalabī, 1940), ¶397; for al-Shāfiʿī's denunciation of *istiḥsān*, see *al-Risālah*, ¶¶1456–1458. See also, e.g., the beginning of al-Zarkashī's discussion of *istiḥsān*, *al-Baḥḥ al-muḥīt*, iv, 386–389.

meta-description of interpretation whose validity depends on relativizing all perspectives but his own.³⁸

This raises two questions. One is: How do the *uṣūl* authors think of their own discourse? The principles of interpretation that *uṣūl al-fiqh* urges on practitioners are implicitly conceived of as constituting part of the law. They constitute macro-level rules for deriving micro-level rules of positive law (*qawā'id kullīyah/ijmālīyah* vs. *qawā'id juz'īyah/tafṣīlīyah*, in Hart's terms, secondary rules of recognition and primary rules of obligation, respectively).³⁹ Although *uṣūl al-fiqh* purports to describe rules for determining the rules of positive law, it is also probably imagined, perhaps implicitly, as organically connected with the micro-level rules, not as a meta-discourse that provides a completely external description of how primary rules are in fact derived. In this regard, *uṣūl al-fiqh* aims lower than Fish's account of interpretation since it seeks to govern interpretation in a particular context. But in another way it also aims higher because it styles itself as organically connected to expressions of God's will, since in Islamic law, the micro-level rules are thought to represent God's plan for human behavior. However, the fact that *uṣūl al-fiqh* holds itself out as an evaluative rather than a descriptive science does not in any way preclude it from raising issues, whether legal or philosophical, that transcend the legal system of which it is a part. This fact makes it possible to compare it with a descriptive account of interpretation such as that of

³⁸ Fish would likely deny the validity of the foregoing description of the foundational or 'meta-discursive' status of his account of interpretation and claim (a) that he is simply participating in the community of writers on literary theory, and, more importantly, (b) that his theory only has rhetorical consequences, if it has any at all, in that context. In fact, he expressly denies that theories have consequences at all apart from their power to persuade (as 'mere' rhetoric) and thus modify the discourse within a given community of practice. In other words, his (or any) account of interpretation does not affect how interpretation is practiced but only how it is talked about. "[T]heory cannot have the consequences of its claim—the claim to provide a perspective to the side of practice from the vantage of which practice might be guided or reformed—but... it can have any and all of the contingent consequences of a vocabulary that already commands attention and can therefore be invoked in the confidence that it will be an ornament to one's position." "Anti-Formalist Road," 23.

³⁹ Hallaq emphasizes this 'rule-engine' character of *uṣūl al-fiqh* (while also acknowledging a retrospective rule-justification function). *Legal Theories*, ix. Others emphasize the retrospective, post-hoc, justificatory function, and still others see a science of interpretation with theological and even philosophical aspirations. See, e.g., Bernard Weiss, *The Spirit of Islamic Law* (Athens: University of Georgia Press, 1998), ch. 5 (on probabalism and certainty). For representative Arabic formulations, see al-Zarkashī, *al-Baḥr al-muḥīṭ*, i, 17–18. On primary and secondary rules, see H.L.A. Hart, *The Concept of Law*, 2d. ed. (Oxford: Oxford University Press, 1994), ch. 5.

Fish, and to look for common elements, despite the different goals of the two approaches.

Another question is whether—within Fish's logic—it is possible to have a 'boot-strapped' community of interpreters: could a group decide to constitute themselves as an interpretive community and thereby constrain themselves? *Uṣūl al-fiqh* authors self-consciously define the bounds of a game in which they themselves are players by identifying their own community—of qualified *mujtahids*—as the limit of acceptable doctrinal diversity.⁴⁰ Would Fish recognize this as possible? Undoubtedly not: Any self-conscious attempt to create constraints (of whatever kind) would be irrelevant to what actually constrains interpreters. However, if the assertion of the existence and importance of such constraints constituted a part of the discursive practice of a given community, then such assertions would, like every other part of their practice, function as a kind of constraint, but the assertions alone would not *create* a community of interpreters or actually constrain interpretation.

After these distinctions and differentiations one may well wonder whether any meaningful possibility of comparison between Fish and *uṣūl al-fiqh* remains. Perhaps we must think smaller: It seems to me that one requirement for positing any congruence at all between Fish's idea and the *uṣūl al-fiqh* tradition is that the *uṣūl* authors would have to display, in their theorizing, some level of express comfort with legal disagreement as a structural feature of the divine law and not view it merely as a temporary by-product of local, contingent acts of fallible interpretation.⁴¹ And then, if any *uṣūl al-fiqh* authors hold such a view, do they expressly or implicitly identify the community as some kind of constraint or limit? The answer to the second question is clearly yes: It seems obvious that limiting the group whose fallible interpretations are authoritative to *mujtahids* implicitly constitutes the *mujtahids* as a bounded, authoritative interpretive community that generates valid but differing interpretations.⁴² To answer the first question, however, we must turn to discussions of *ijmā'*.

⁴⁰ Al-Zarkashi expressly identifies those whose agreement constitutes an instance of *ijmā'* as "*mujtahids*". See note 4 above.

⁴¹ Zysow arrestingly summarizes the attitude of the infallibilists, in regard to the epistemic status of individual exercises in legal interpretation, as follows: "probability is not a stage on the journey to truth but the very goal of the journey." "Economy," 460–461. I am interested here in the other side of the coin: conceptions of legal disagreement.

⁴² Further support for this contention is offered by Robert Gleave, who has likened the accommodation of diversity within a single *madhhab* (Imami Shiism) to a literary tradition, in a way that is reminiscent of Dworkin's metaphor of legal interpretation as writing

III. IJMĀ' AND UṢŪL AL-FIQH

Discussions of *ijmā'* in works of *uṣūl al-fiqh* exhibit concern with a variety of issues. These include the possibility of unanimous consensus, the authority (*hujjiyah*) of *ijmā'*, the textual support for the authority of *ijmā'* in Qur'ān and Hadith, the precise group whose consensus is legally relevant, how *ijmā'* can be known, and others. For present purposes, the discussions of the limits of permissible legal disagreement are of most interest.⁴³

In general, works of *uṣūl al-fiqh* take a theoretically rigorous view of *ijmā'* in that they require (mostly) strict unanimity. The early history of *ijmā'* may give a picture of a more tentative, looser, limited form of agreement. For al-Shāfi'ī (d. 820) *ijmā'* seems to be a non-unanimous agreement of past authorities on the interpretations of revealed texts. His assertions of *ijmā'* suggest, ironically, that it is for him a defensive maneuver for particularly contested issues. Also al-Shāfi'ī does not elevate *ijmā'* to the position of being one among a very few structurally integral components in the religious law.⁴⁴ We also learn from al-Shāfi'ī about some other early conceptions of *ijmā'*, particularly in his short work *Jimā' al-ilm*. For example, it was apparently held by some that *ijmā'* could give rise to an inference in favor of the existence of an underlying Prophetic *sunnah*, even if no specific *ḥadīth* text could be identified from the terms of the instance of *ijmā'* in question. In other words, some identified *ijmā'* with communal practice rooted in non-specified but nonetheless actual revelatory authority. Al-Shāfi'ī, a positivist in this regard, rejected such a view and insisted on the identification of and citation to the underlying

a chain novel. Gleave's is probably the closest account to that of Fish, even though Fish, as noted above (note 23), has substantial disagreements with Dworkin. Gleave, "Intra-Madhab *Ikhtilāf*."

⁴³ For summaries of these discussions, see Hallaq, *Legal Theories*, 75–81; Weiss, *Spirit*, 122–127; and, for more detail, Zysow, "Economy," ch. 3; and Bernard Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Dīn al-Āmidī* (Salt Lake City: University of Utah Press, 1992), ch. 5.

⁴⁴ Later legal theorists do reify *ijmā'* as a source. The Ḥanafī writer Muḥammad al-Bazdawī (d. 1100), for example, bluntly states that *fiqh* is "knowledge of that upon which rulings of the religious law depend, which are found in the Book of God, the Sunnah of His Messenger, and the *ijmā'* of the *ummah*. *Uṣūl al-fiqh* are these three things" (*al-fiqh . . . fa-huwa al-ilm bi-mā 'allaqat bihi al-aḥkām al-shar'iyah al-mūda'ah fi kitāb Allāh wa-sunnat rasūlīhi wa-ijmā' al-ummah fa-inna uṣūl al-fiqh hādhihi al-ashyā' al-thalāthah*). *Kitāb fihī ma'rifaṭ al-ḥujaj al-shar'iyah*, ed. M. Bernand and É. Chaumont (Cairo: Institut Français d'Archéologie Orientale, 2003), 3.

ḥadīth text.⁴⁵ One of al-Shāfiʿī's contemporaries, the Muʿtazilī theologian al-Nazzām (d. 835), even denied the probity of *ijmāʿ* altogether, a position that lived on in infamy through repeated references to it in later works of *uṣūl al-fiqh*.⁴⁶

Another example of the earlier, looser conception of *ijmāʿ* is found in the *Kitāb al-Ijmāʿ* of Ibn al-Mundhir (d. 930). This short work, arranged by legal topic, lists actual instances of *ijmāʿ*, though many of Ibn al-Mundhir's asserted instances of agreement are followed by references to the dissent of important early legal authorities such as Mālik, al-Ḥasan al-Baṣrī, Ibn Sīrīn, ʿUthmān, Ṭawūs, and others. Although Ibn al-Mundhir consistently signals these instances of dissent by the term *infarada* ("he held a lone view on the matter"), the fact that he considered them noteworthy suggests that his view of *ijmāʿ* was less strict than that of later works of *uṣūl al-fiqh*.⁴⁷ Certainly by the late 10th century it had become customary to define *ijmāʿ* in terms of unanimity.⁴⁸

Provisionally, one might propose that assertions of *ijmāʿ* were originally closely connected with the justification of discrete rules, but gradually, with the rise of an organized *uṣūl al-fiqh* literature and the attendant pressures to achieve *kalām*-esque rigor in formulations, gravitated toward the theologically symbolic and hardened into a theoretically unyielding requirement of unanimity as a principle unto itself. The requirement of strict unanimity aimed in part to emphasize the saved quality of the Muslim community, which, according to a key *ḥadīth* used to support the authoritativeness of *ijmāʿ*, was declared infallible in instances of unanimous legal agreement.⁴⁹ The express connection between unity and infallibility elevates communal solidarity to a theologically idealized self-description and arguably makes *ijmāʿ* less relevant to the determination

⁴⁵ On al-Shāfiʿī's ideas about *ijmāʿ*, see my *Early Islamic Legal Theory*, ch. 7.

⁴⁶ Al-Nazzām viewed the early Muslim community as worryingly fractious in legal matters. See Josef van Ess, *Das Kitāb an-Nakṭ des Naẓẓām und seine Rezeption im Kitāb al-Fuṭyā des Ġāhiz* (Göttingen: Vandenhoeck & Ruprecht, 1972), 131–139. Al-Shāfiʿī, despite his looser conception of consensus, did not aim to highlight legal disagreement among the earliest generations of Muslims.

⁴⁷ Ibn al-Mundhir, *al-Ijmāʿ*, ed. Fuʿād ʿAbd al-Munʿim Aḥmad (Doha: Dār al-Thaqāfa, 1987).

⁴⁸ See, e.g., al-Khawārazmī (fl. ca. 976–997), *Mafatīḥ al-ʿulūm*, ed. van Vloten (Leiden: E.J. Brill, repr. 1968), 8: *huwa ittifaq al-ṣaḥābā min al-muhājirīn wa-l-anṣār wa-kadhālika ittifaq al-ʿulamāʾ fi al-amṣār fi kulli ʿaṣr dūna ghayrihim min al-ʿāmmah*.

⁴⁹ The hadith in question, along with other arguments in support of *ijmāʿ*, is discussed by George Hourani, "The Basis of Authority of Consensus in Sunnite Islam," *Studia Islamica* 21 (1964), 11–60; and Wael Hallaq, "On the Authoritativeness of Sunni Consensus," *International Journal of Middle East Studies* 18 (1986), 427–454.

of individual legal doctrines. Thus, one might further propose that once *ijmā'*-as-unanimous-agreement became uncoupled from discrete rules and conceived of as an idealized picture of the *ummah*, a space would have been opened for discussions of the nature and limits of doctrinal diversity, that is, of *ijmā'*-as-legal-disagreement.

A. *Ijmā'*, *Khilāf*, and the *Urge to Converge*

In discussions of legal interpretation (*ijtihād*), legal disagreement is theorized as a problem of pure epistemology. Muslim legal theorists are broadly divided into those who view all exercises of *ijtihād* as pertaining to matters of probability and therefore deem the results of such exercises as functionally correct (*taṣwīb*), and those who emphasize the fallibility of legal interpretation in such matters and do not hesitate to label wrong interpretations as mistaken (*takhtī'ah*). These two camps, infallibilists and fallibilists, respectively, disagree over whether the merely probable is the goal of legal interpretation or whether, instead, the one correct answer to a legal question should be pursued. In practice, both camps recognize that legal interpretation is indispensable, but they disagree strongly over how to characterize its uncertainties. Still, both camps' discussions of these issues focus on the individual interpreter and possible ways of characterizing legal knowledge and the object of legal interpretation in relation to that interpreter's activities.⁵⁰

Discussions of legal disagreement in the context of *ijmā'* deal, by contrast, at least in part, with the relationship between legal interpretation and pre-existing legal disagreement, or we might say with how the sum total of the community's interpretive practice has the potential to constrain individual interpreters. In the remainder of this essay, I examine the tension between *ijmā'* as an ideal of communal unity and the theorizing of legal disagreement. Most discussions of *ijmā'* deal with the question of whether legal disagreement must contract, and whether it is permissible for it to expand. These two issues provide the test cases for the theoretical commitment of *uṣūl al-fiqh* to the existence of legal disagreement as a settled feature of the law and they may be framed thus:

- When the jurists settle on two different answers to a legal problem, may these be reduced to a single answer through consensus (reached, for

⁵⁰ On the issues discussed in this paragraph, see above, note 12.

example, by a subsequent generation) such that one of the two opinions may no longer be adopted? In other words, can, or must, *khilāf*, legal disagreement, reduce to *ijmāʿ*, legal unanimity?

- When the jurists settle on a set of answers to a legal problem, may a subsequent generation offer a new answer to that legal problem? In other words, may *khilāf*, legal disagreement, expand?

Both these issues implicate, in different ways, the value accorded to *khilāf* and also what may be termed the ‘convergence value,’ that is, the idea that the *ummah* ought always to be heading towards *ijmāʿ*.⁵¹ In the first case, jurists who privilege doctrinal convergence—who implicitly equate correct doctrine with unanimity—encourage or envision the eventual reduction of *khilāf*.⁵² Jurists who view *khilāf* as a sufficient expression of the providential character of the community’s legal reasoning may feel less pressure to call for the eventual reduction of *khilāf*. In the second case, the convergence value should militate against expansions of *khilāf*. The strong attraction of unanimity notwithstanding, some jurists expressly contemplate that *khilāf* could expand in certain circumstances. Both issues bear on the question of whether *khilāf* is considered a transitory, provisional stage on a progression that will ultimately terminate in consensus and the elimination of doctrinal diversity.

B. *Matrix of Views and Authors Discussed*

Although a relatively small sample of authors were examined for this essay, ranging in time from al-Abū Bakr al-Rāzī al-Jaṣṣāṣ (d. 980–1) to Sayf al-Dīn al-Āmidī (d. 1233), I have tried to include authors from a range of schools and viewpoints. The cut-off date is, apart from being al-Āmidī’s death-date, somewhat arbitrary. It is not really a defense to say that a periodization of this literature has yet to be offered; I certainly do not mean to imply that post 13th-century views are uninteresting, irrelevant, or static. In regard to the two questions under consideration, views are diverse. I concentrate here on those authors who are the most accommodating of *khilāf* and this has resulted in the authors discussed being

⁵¹ Zysow has a characteristically lucid discussion of these two issues. “Economy,” 240–246.

⁵² This tendency seems to be particularly pronounced in Imāmī Shīʿite legal thought, especially in its Akhbārī variety. See Gleave, “Intra-Madhhab *Ikhtilāf*,” e.g., 139, 144. It is also characteristic of Central Asian Ḥanafism. Zysow, “Economy,” 466.

overwhelmingly Shāfi‘ī. Many of these authors disallow the reduction of *khilāf*; only two authors of those examined allow the expansion of *khilāf* through the development of new opinions.

1. *Privileging Khilāf over Univocal Consensus*

The authors who object to the reduction of *khilāf* are almost all Shāfi‘īs: al-Juwaynī (d. 1085), al-Shīrāzī (d. 1083), al-Ghazālī (d. 1111), Ibn ‘Aqīl (a Ḥanbalī, d. 1119), and al-Āmidī. I summarize their views and provide some concluding observations. Most of these authors disallow the expansion of *khilāf* and I note their views on this point in this section; those few who allow the expansion of *khilāf* are discussed in the next section.

Abū Ishāq al-Shīrāzī

According to al-Shīrāzī, although the Successors may collectively decide to adopt one of two opinions upon which the Companions’ disagreement has settled, the Successors’ decision does not constitute *ijmā‘*. Rather, the Successors become only part of the community (*ba‘ḍ al-ummah*) with respect to the settled instance of legal disagreement, that is, they constructively belong to the subgroup of Companions who accept the opinion in question. So this is a *de facto* but not a *de jure* instance of consensus—the opinion of the Companions that is abandoned by the Successors remains good law and may be adopted by subsequent generations. A settled disagreement over two opinions constitutes *ijmā‘* on the permissibility of adopting one or the other of the two (*ikhtilāfuhum ‘alā qawlayn ijmā‘ ‘alā jawāz al-akhdh bi-kulli wāḥid min al-qawlayn*). Since the Companions formed *ijmā‘* on the permissibility of adopting either of two opinions, the Successors cannot form their own consensus on the impermissibility of adopting one of those two (*lā yajūz taḥrīmuḥu bi-ijmā‘ al-tābi‘īn*). For al-Shīrāzī, then, legal disagreement can have the same precedential value as actual univocal consensus. Al-Shīrāzī does not clarify whether this is a merely pragmatic view or whether it means that both answers are in some sense objectively correct; however, his position at least implies that divergent doctrines can move in the direction of epistemic certainty.⁵³ He describes

⁵³ Abū Ishāq al-Shīrāzī, *al-Luma‘ fī uşūl al-fiqh*, ed. Muḥyī al-Dīn Mīstū, Yūsuf ‘Alī Badawī (Beirut: Dār Ibn Kathīr, 2002), 190. On al-Shīrāzī’s views on these questions, see also Chaumont, who emphasizes that al-Shīrāzī assimilates *khilāf* to *ijmā‘*. “Tout Chercheur,” 26–27.

ijmā' as binding legal authority (*hujjah*) that furnishes a universally applicable, irrebuttable decisory rule (*maqṭū' alā mughayyabihi*).⁵⁴

An interesting question posed by al-Shīrāzī (and others) is whether the Companions can reduce their own *khilāf*. The answer is yes, provided that the disagreement has not yet become “fixed and settled” (*qabla an yabrud wa-yastaqirr*). In such instances, one may consider the requirement of the “passing of the generation” (*inqirāḍ al-ʿaṣr*) of the Companions, though in general al-Shīrāzī does not make the passing of the generation a requirement of *ijmā'* because the revelatory authorities on which the authority of *ijmā'* rests speak only of agreement, not of agreement plus a waiting period.⁵⁵

Al-Shīrāzī disallows the introduction of a third opinion by the Successors as long as the generation has passed. Thus, the diversity of views, once fixed, cannot be reduced, but neither may it expand. The Companions' disagreement over two opinions makes it invalid to hold all other opinions (*ibṭāl kulli qawl siwāhu*). However, some limited rearrangement of elements of the disagreement is possible unless the Companions expressly forbid such liberties in regard to the problem in question.⁵⁶

All these issues are discussed in terms of the Companions' views and the Successors' options. It remains unclear whether the principles apply to other generations, though al-Shīrāzī does not expressly exclude that possibility, and his references to issues such as the passing of the generation suggest that his discussion could, in principle, apply at any time.

al-Juwaynī

Al-Juwaynī first discusses whether the reduction of *khilāf* is permissible in one generation. The answer is the same as al-Shīrāzī's: it depends. If the *khilāf* persists without resolution for a substantial period of time (*in tamādā al-khilāf fi zaman mutaṭāwil*) such that it becomes part of the legal landscape and the discovery of a basis for a resolution seems remote, then it may not be reduced.⁵⁷ However, before that time, it may be reduced, and he analogizes this situation to that of a lone interpreter who is at first undecided and then makes up his mind on one of two possibilities.

⁵⁴ Al-Shīrāzī, *al-Luma'*, 179.

⁵⁵ Al-Shīrāzī, *al-Luma'*, 190–191.

⁵⁶ Al-Shīrāzī, *al-Luma'*, 192–193.

⁵⁷ Imām al-Ḥaramayn al-Juwaynī, *al-Burhān fi uṣūl al-fiqh*, ed. 'Abd al-ʿAzīm Maḥmūd al-Dīb, 2 vols. (al-Manṣūra: Dār al-Wafā' li'l-Ṭibā'a wa'l-Nashr wa'l-Tawzī'm 1992), i, 455.

However, once the generation has passed, the following generation may not undo a settled *khilāf*.⁵⁸

Even if it were permissible to reduce *khilāf*, al-Juwaynī says that custom (a major reference point in his whole discussion of *ijmāʿ*) shows that people almost never abandon their own view for that of their opponents.⁵⁹ In other words, as a practical matter, irrespective of theory, *khilāf* will usually last forever because of human nature. In addition, settled *khilāf* on two positions may not expand since the introduction of a third opinion would constitute a violation of *ijmāʿ*.⁶⁰

Al-Juwaynī begins his discussion of these issues in terms of the Companions, but conducts it thereafter as though it concerned legal scholars (*ulamāʿ*) generally, suggesting that it is meant to be generalized.

al-Ghazālī

Al-Ghazālī disallows the reduction of *khilāf*, whether by those who initiate it or the following generation. His analysis follows that of al-Shīrāzī: the Successors are simply part of the community when they settle on one of two opinions allowed by the Companions.⁶¹

Al-Ghazālī disallows the third opinion, but (like some other authors) allows the use of a new *dalīl* or *illa* to reach a result that is settled by previous *ijmāʿ*. His reasoning here is that the previous jurists who formed *ijmāʿ* were “not required by their religion to uncover all the *dalīls* but rather it is sufficient to know the correct answer on the basis of one *dalīl*. The introduction of a different *illa* . . . does not entail attributing [to the Companions] the misapprehension of the correct answer.”⁶²

Ibn ʿAqīl

The Companions’ disagreement over two opinions may not be reduced by a subsequent generation to a univocal *ijmāʿ*. This is because *ijmāʿ* and *ikhtilāf* are equivalent in authority: just as when *ijmāʿ* occurs and becomes settled (*idhā ḥaṣala wa-ʿstaqarra*) it cannot be changed through subsequently arising legal disagreement (*lam yajuz an yataghayyar biʾl-ikhtilāf*), so too with a settled instance of legal disagreement (*ikhtilāf*):

⁵⁸ Al-Juwaynī, *al-Burhān*, i, 456.

⁵⁹ Al-Juwaynī, *al-Burhān*, i, 455.

⁶⁰ Al-Juwaynī, *al-Burhān*, i, 451–453.

⁶¹ Abū Ḥāmid al-Ghazālī, *al-Mustasfá fī [sic] ʿilm al-uṣūl* (Beirut: Dār al-Kutub al-ʿIlmiya, 1993), 155.

⁶² *Laysa min farḍ dīnihim al-iṭtilāʿ ʿalá jamīʿ al-adillah bal yakfihim maʿrifat al-ḥaqq bi-dalīl wāḥid fa-laysa fī iḥdāth ʿillah ukhrā . . . nisba ilá taḍyīʿ al-ḥaqq*. Al-Ghazālī, *al-Mustasfá*, 154.

it may not be reduced to *ijmā'*. Ibn 'Aqīl makes strikingly explicit what al-Shīrāzī only implied: the express equating of *ijmā'* and *ikhtilāf* suggests that legal disagreement has the same precedential value as an actual univocal consensus. However, Ibn 'Aqīl also tells us in the same passage that the Successors' reduction of an instance legal disagreement to *ijmā'* in this situation is no different than their introduction of a third, additional opinion. Both are disallowed.

Both problems are discussed in terms of the prior *ikhtilāf* of the Companions and the options that this leaves for the Successors. It is not expressly stated whether the resulting principles are meant to be generalized.⁶³

al-Āmidī

Al-Āmidī disallows the reduction of *khilāf*. Such *khilāf* he characterizes as *ijmā'* on the permissibility of adopting either opinion (*ijmā'uhum 'alā taswīgh al-akhdh bi-kulli wāḥid min al-qawlayn*). Those who form it are therefore infallible in their *khilāf*, which is apparently considered *ijmā'* for these purposes: *hum ma'ṣūmūm min al-khaṭa' fīmā ajma'ū 'alayhi*. This is a striking formulation—he is the only author among those consulted to refer to infallibility (*'iṣmah*) in the context of *khilāf*. He further argues that a later group's adoption of only one of the two positions would lead simultaneously to allowing and prohibiting one and the same opinion—in effect, *ijmā'* would have formed on the permissibility and the impermissibility of holding a particular view, thus violating the law of contradictions: *yastahīl an yakūn al-ḥaqq fī jawāz al-akhdh bi-dhālika al-qawl wa'l-man' min al-akhdh bihi ma'an*. However, al-Āmidī's reliance on the law of contradictions is not in this instance dictated by rational considerations but rather by revelation (*laysa... 'aqlīyan bal sam'an*).⁶⁴ Presumably, he means that the objective correctness of the conflicting opinions is known from the authoritativeness of *ijmā'*, and not from rational investigation of the arguments in support of the opinions or of their logical relationship to each other. The infallibility of the community even in its legal disagreement suggest that its various conflicting interpretations are objectively correct; this view seems to amount to more than mere pragmatism. Most authors are not willing to formulate this broadly.

⁶³ Abū al-Wafā' Ibn 'Aqīl, *al-Wāḍiḥ fī uṣūl al-fiqh*, 5 vols., ed. George Makdisi (Berlin: Klaus Schwartz, 2002), iv.2 (Kitāb al-Khilāf), 278–9. Chaumont suggests that this notion of the strongly precedential character of *khilāf* was passed to Ibn 'Aqīl by his teacher al-Shīrāzī. “Tout Chercheur,” 27.

⁶⁴ Sayf al-Dīn al-Āmidī, *al-Iḥkām fī uṣūl al-aḥkām*, 4 vols. (Beirut: Dār al-Kutub al-ʿIlmiya, 1980), i, 395.

Somewhat unusually in comparison with other writers, al-Āmidī begins his discussion without mention of the Companions and Successors; instead he speaks of “the people of a given age on a given problem” (*ahl ‘aṣr min al-a-ṣār fi mas’alah min al-masā’il*). However, he ends his initial exposition of his own views by referring to the Companions and the Successors.⁶⁵

Observations

Notwithstanding the diversity of these discussions, they all generally proceed by assuming two things: (1) the pre-existing *khilāf* is formed initially by the Companions and encountered by the Successors; and (2) the Companions have agreed to disagree, as it were, and settled on two and only two different opinions in regard to a given legal question. What are we to make of these two assumptions?

On the one hand, there were famous disagreements among the Companions over matters of legal doctrine and these could furnish convenient, well-known examples of actual legal disagreements among acknowledged authorities.⁶⁶ But in general, since most issues dealt with in discussions of *ijmā’* are not limited in time to the situation of the Companions and Successors, or to any other generation, it seems likely that invoking those two groups in the context of the issues under consideration is meant to be by way of example only. Moreover, the revelatory texts that support the authoritativeness of *ijmā’* do not specify subsets of the community, even though a very few legal theorists—the Zāhirīs and some Ḥanbalīs—limited valid *ijmā’* to that of the Companions or the first three “praiseworthy” generations of Muslims.⁶⁷ Moreover, nothing in these discussions suggests that permissible forms of legal disagreement could not take the form of five, twenty-five, or one hundred competing views. Thus, the reference in all discussions to Companion-level disagreement over two views could be understood as a heuristic simplification of potentially more complex constellations of legal disagreement.

Although it is tempting to view these Companion-level test cases as penultimate stops on the road to convergence—one designed to illustrate the test case of ‘almost *ijmā’*—the prohibition against the reduction of *khilāf*

⁶⁵ Al-Āmidī, *al-Ihkām*, i, 394–5.

⁶⁶ Weiss, *Search*, 182–183.

⁶⁷ The Zāhirī view is reported in, e.g., the Ḥanbalī *uṣūl* text *al-Musawwadah*, M.M. ‘Abd al-Ḥamīd, ed. (Beirut: Dār al-Kitāb al-‘Arabī, n.d.), at 317 (in the “Kitāb al-Ijmā’”): The *ijmā’* of the Successors and those who come after them is not *hujjah*. It is noted in that same passage that Aḥmad b. Ḥanbal was reported to hold a similar view, but contrary reports about Aḥmad’s views are also adduced.

suggests that convergence is not an overriding value in these authors' discussions. In all the above-summarized discussions the precedential value of *khilāf* is taken very seriously; it is assimilated to *ijmā'* and enshrined as a permanent feature of the legal landscape. It should be noted that the contrary view, upheld by certain Ḥanafis, that *khilāf* should reduce, was connected with their view that there was only one correct answer to legal problems.⁶⁸

2. *Expanding Khilāf Through 'New' Opinions*

This issue is sometimes referred to as "initiating" or "introducing a third opinion" (*iḥdāth qawl thālith*), that is, a third opinion in a situation where the interpretive community has settled on two permissible opinions in regard to a given legal question. Of the authors examined here, only two expressly allow the introduction of a new opinion, Fakhr al-Dīn al-Rāzī (d. 1209) and al-Āmidī, and both with important qualifications. As already noted, many of the authors discussed above expressly disallow the introduction of the third opinion: al-Shīrāzī, al-Juwaynī, al-Ghazālī, and Ibn 'Aqīl. Al-Shīrāzī and Abū al-Ḥusayn al-Baṣrī (d. 1044) do, however, permit some mixing and matching—limited rearrangement—of previously approved opinions as long as those opinions have severable components.⁶⁹ Some authors, such as Abū al-Ḥusayn and al-Ghazālī, allow the development of new underlying *dalīls* and *'illas*.⁷⁰ But both are more restrictive in regard to the development of new opinions than either al-Rāzī or al-Āmidī.

Fakhr al-Dīn al-Rāzī

Al-Rāzī allows the introduction of a new opinion as long as it does not necessitate a deviation from the consensus formed by the two pre-existing opinions that constitute the *khilāf* ([*lā*] *yalzam minhu al-khurūj 'ammā ajma'ū 'alayhi*). He relies on logic to explain how one determines whether such a deviation occurs. When the community is divided over two legal rulings, there are only three logical forms that those rulings can take: (1) universal affirmation (all), (2) universal negation (none); and (3) partial affirmation and partial negation (some). A pre-existing *khilāf* over a given legal problem must therefore (one infers) consist of any of the following

⁶⁸ See Zysow, "Economy," 242–243.

⁶⁹ See above for al-Shīrāzī, and for Abū al-Ḥusayn, *al-Mu'tamad*, ii, 505–506.

⁷⁰ See the previous note for Abū al-Ḥusayn; for al-Ghazālī, see above, note 61.

four possible configurations: (1) and (2), (1) and (3), (2) and (3), or (3) and (3) where the proportions of affirmation and negation differ.⁷¹ Understanding the relationships among these various possible rulings that make up the *khilāf* allows one to pinpoint precisely when a new opinion would disagree with what the opinions that constitute the pre-existing *khilāf* have in common. Al-Rāzī gives the example of two heirs (A and B): if the *khilāf* is that either A takes all (1) or splits with B (3), then the view that B takes all (i.e., none for A, 2) would be inconsistent with what those two views had in common and so disallowed.⁷² Thus, where the *khilāf* consists of rulings of type (1) and (3), the new opinion could not be type (2). We are left to work out the remaining permutations for ourselves: It seems clear that a *khilāf* consisting of rulings of type (2) and (3) would preclude a third opinion of type (1) (this is the mirror image of al-Rāzī's inheritance example). However, a *khilāf* consisting of types (1) and (2) (all and none) would seem to leave a lot of scope for different middle positions of type (3) and one consisting of two different rulings of type (3) would seem to allow for many additional such rulings as long as they did not reach the extremes of types (1) or (2).

In response to an objection, al-Rāzī points out that if every *mujtahid* is correct (*kullu mujtahid muṣīb*), then it can never be the case that a third opinion, that otherwise does not conflict with *ijmā'*, would entail deeming the pre-existing opinions constituting the *khilāf* as mistaken. Even for those who believe that there is only one correct answer (*al-muṣīb wāḥid*) the permissibility of the new opinion should not be a problem since they contemplate that *mujtahids* can be mistaken in their legal interpretation.⁷³

Al-Rāzī conducts this discussion in regard to two pre-existing opinions, but once he suggests a logical matrix, one could imagine that it might cover a larger number of conflicting opinions, as long as they did not consist solely of his types (1) and (2). But even in that case, as already noted, many subsequent opinions in the 'middle' would seem to be possible for subsequent generations.

It should be noted that although al-Rāzī presents strong arguments in favor of expanding *khilāf*, subject to the requirement that subsequently

⁷¹ (1) and (2) are each presumably self-identical such that there could never be a *khilāf* consisting of (1) and (1) or (2) and (2).

⁷² Fakhr al-Dīn al-Rāzī, *al-Maḥṣūl fi 'ilm al-uṣūl*, 2 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1988), ii, 62–3.

⁷³ *Al-Maḥṣūl*, ii, 63.

developed opinions not conflict with consensus, he is also resolutely in favor of reducing *khilāf*. He believes that *khilāf* can be reduced to *ijmā'* by a succeeding generation; that one of two pre-existing opinions may be abandoned so that *ijmā'* forms; that the death of all the holders of one of two opinions causes *ijmā'* to form on the remaining opinion; and that if all the holders of one of two pre-existing opinions abandon their opinion in favor of the alternative then *ijmā'* forms.⁷⁴ His views are thus complex. He labels the overlapping content of the opinions that constitute a *khilāf* as *ijmā'*,⁷⁵ but does not accord *khilāf* the same precedential value as univocal *ijmā'*. He does not say that he thinks *khilāf* is bad and must be reduced, but rather suggests in his formulations that one should follow whatever the community decides, so that if they decide to reduce a *khilāf*, then they are entitled to do so. He thus holds to a moderate form of the convergence value.

al-Āmidī

Al-Āmidī allows the introduction of a new opinion in the face of settled *khilāf* subject to certain conditions. He holds that for the new opinion to be permissible it must not contradict what the views constituting the prior *khilāf* have in common ([*lā*] *yarfa' mā ittafaqa 'alayhi al-qawlān*). However, al-Āmidī also allows that the new opinion could be inconsistent in certain limited respects with the prior *khilāf* without constituting a violation of consensus (*wa-ammā in . . . khālafahu min wajh fa-huwa jā'iz idh laysa fihi kharq al-ijmā'*). The example that he gives concerns the requirement of forming specific intent (*niyyah*) for the performance of acts of ritual cleansing (*al-ṭahārāt*): If the community split over two views, one requiring such intent in all such acts, and one requiring it in none, then the view that it was required in some and not others would be permissible.⁷⁶ Al-Āmidī's interlocutor is quick to point out that the holders of the pre-existing 'none' and 'all' opinions that constituted the prior *khilāf* at least agree that making distinctions to develop a 'sometimes' opinion is wrong, and that to offer such a middle opinion would therefore violate *ijmā'* on the impermissibility of holding a compromise view. Al-Āmidī replies, however, that as long as the holders of the prior conflicting views

⁷⁴ *Al-Maḥṣūl*, ii, 66–71, *mas'alahs* 3–6.

⁷⁵ See *al-Maḥṣūl*, ii, 62, where he says the third opinion is permissible so long as it does not constitute "*mukhālafat al-ijmā'*."

⁷⁶ Al-Āmidī, *al-Ihkām*, i, 386–387. In al-Rāzī's terms, this would be a *khilāf* constituted by rulings of type (1) and (2), which would then allow a subsequent ruling or rulings of type (3).

do not expressly state (*min šariḥ maqālihi*) that the middle position is impermissible (i.e., as long as they do not form *ijmā'* on its impermissibility), then there is no bar to holding a middle opinion. One cannot simply assume, based merely on the implication of the prior *khilāf*, that both sides agree on the impermissibility of the middle opinion.⁷⁷

But then al-Āmidī goes even further, in response to another objection from his interlocutor, and states that as long as the *ummah* disagrees, even if that disagreement is a settled *khilāf*, then to disagree with each of the two sides is not to disagree with the *ummah* as a whole, because disagreement is not agreement and does not have its preclusive effect: to disagree with people who already disagree among themselves is not to violate their consensus. Once legal disagreement sets in, then, al-Āmidī seems to allow considerable scope for the subsequent development of views that differ from those that constitute the pre-existing legal disagreement.

Observations

Both authors suggest that the configuration of the prior *khilāf* can be decisive. Presumably, if the doctrinal positions were sufficiently inconsistent, or distant, or inconsistent in particular ways, the scope for new opinions could be quite broad.⁷⁸ Al-Āmidī, the most *khilāf*-friendly author of those discussed, is an outlier here in his view that *khilāf* both resists reduction but welcomes considerable possible expansion. Al-Āmidī would seem to allow certain configurations of *khilāf* to grow infinitely. Bernard Weiss has noted how remarkable al-Āmidī's views are in this regard and attributes them partly to his deep knowledge of and commitment to dialectics. Weiss emphasizes that participants in the dialectic would not have recognized any overlap between their own positions and those of their opponents.⁷⁹ As seen above for both al-Āmidī and al-Rāzī, wide doctrinal divergence can potentially leave ample space for the development of new opinions. In al-Āmidī's case, perhaps his deep interest in dialectics led to a more dialogical view of legal doctrine. Many works of *uṣūl al-fiqh* are structured partly with formal disputations in mind, most conspicuously perhaps the

⁷⁷ Al-Āmidī, *al-Iḥkām*, i, 388.

⁷⁸ The existence of squarely contradictory answers leads some authors to a more restrictive view: For Abū al-Ḥusayn, for example, if the community settles on two contradictory answers (*qawlayn mutanāfiyayn*), then the community will have implicitly agreed to deem mistaken answers that are other than those two (*takḥī'at mā siwāhumā*), though Abū Ḥusayn acknowledges the possibility of an opinion that agrees in part with each of the pre-existing opinions, presumably in regard to opinions that are severable in their component parts. *Al-Mu'tamad*, ii, 505.

⁷⁹ Weiss, *Search*, 242.

Kitāb al-Wāḍiḥ of Ibn ‘Aqīl, an author who, as seen above, argued against the reduction of *khilāf* to a univocal consensus.

IV. CONCLUSIONS

Neither the fact of interpretive and doctrinal diversity in Islamic law nor the theorizing done in regard thereto in Islamic legal thought have escaped modern scholarly attention. Baber Johansen emphasizes how, from the point of view of social and institutional history, the view of individual exercises in legal interpretation as necessarily contingent and fallible, and the consequent toleration of doctrinal diversity, had key functional advantages for pre-modern Islamic legal systems. Accommodating such diversity made it possible to legitimize “normative pluralism . . . and . . . the co-existence of various doctrines and normative systems;” to allow “peaceful . . . co-existence of the groups of scholars;” and “to shield off the judiciary against ethical and cognitive criticism.”⁸⁰ Ashk Dahlén suggests that interpretive diversity functioned to buttress the authority of the revealed textual bases of the law. Islamic legal hermeneutics “predicated the possibility of multiple interpretations” as a way of suggesting “a unified or univocal hierarchy of meanings rather than a polysemous range of interpretations,” and as a way of emphasizing “textual stability rather than the opposite.”⁸¹ That is, by accommodating diversity, *uṣūl al-fiqh* really only confirms its own foundationalism. Aron Zysow has shown how different attitudes toward consensus and legal disagreement signal larger commitments to competing legal epistemologies. Mainstream Sunni legal hermeneutics (Zysow’s “formalists”) relies on consensus to compensate for relatively widespread textual and interpretive uncertainty. Minority positions in legal hermeneutics (Zysow’s “materialists,” principally *Zāhirīs* and Imami Shiites) insist on textual certainty and thus do not require that consensus play much of a role: When “sources of uncertainty are eliminated, there is no need for consensus.”⁸²

For mainstream Sunni legal hermeneutics, the gulf between the required certainty of theological postulates and the much less certain practice of legal interpretation led to a kind of pragmatism. Some *Shāfi‘ī* authors

⁸⁰ Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: Brill, 1999), 38–39.

⁸¹ Dahlén, *Islamic Law, Epistemology and Modernity*, 99.

⁸² “Economy,” 494.

were willing, within this framework, and seemingly contrary to theological imperatives, to accord a high precedential value to legal disagreement, and in some cases to argue for the permissibility of its potential future expansion. The fact that these *uṣūl al-fiqh* authors considered *khilāf*—legal disagreement within the interpretive community of *mujtahids*—to be valid law presents a striking congruence with Fish’s account of interpretive disagreement, important differences notwithstanding.

But even so, the convergence value continued to exercise a strong pull, as did foundationalism, and all the legal theorists examined in this essay, even al-Āmidī, were careful to place limits of some kind on the scope of legal disagreement. Even for the most pragmatically-minded Islamic legal theorist, it remains important to proclaim the existence of limits to legal disagreement.

However, an important aspect of all the discussions of *ijmāʿ* by the authors of works of *uṣūl al-fiqh* is that *ijmāʿ* itself—an *aṣl* that Ibn ‘Aqīl says has a status higher than many revealed texts⁸³—remains *mukhtalaf fihi*, or, we might say, a site of contestation, on two levels. Not only is there considerable variation in theoretical accounts of *ijmāʿ* and its ramifications,⁸⁴ but the determination of *ijmāʿ* itself is subject to considerable uncertainty. As Bernard Weiss reminds us, ascertaining whether *ijmāʿ* had in fact occurred remained, for several reasons, a matter of fallible opinion.⁸⁵ Muslim legal theorists were thus free to challenge whether *ijmāʿ* existed at all, quite apart from their appealing failure to achieve unity on what it meant to agree, and still less on what it meant to disagree.

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⁸³ *Al-ijmāʿ bi-rutbat al-naṣṣ. Al-Wāḍiḥ*, i, 20. By this he means that it cannot be refuted by an equivalent but contrary authority, unlike, for example, a non-*mutawātīr* Prophetic tradition.

⁸⁴ Even though the *uṣūl al-fiqh* authors themselves regarded legal theory as a site of certainty, on a par with theology (and distinct in that regard from law). Zysow, “Economy,” 482.

⁸⁵ Weiss, *Spirit*, 125: “The results [of attempting to determine whether *ijmāʿ* existed on a given point] could vary from *mujtahid* to *mujtahid*.” In other words, it was an ‘ijtihādīc’ inquiry. See also his *Search*, at 686.

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BODY AND SPIRIT OF ISLAMIC LAW: *MADHHAB* DIVERSITY IN OTTOMAN DOCUMENTS FROM THE DAKHLA OASIS, EGYPT

Rudolph Peters

In chapter 6 of *The Spirit of Islamic Law*, Bernard Weiss discusses juristic authority and the diversity of schools. One of the topics of this chapter is that *mujtahids* often derive different opinions from the same source texts. The jurists accepted this diversity as they were fully aware of the fact that *fiqh* was human understanding of the divine Shariah and that scholars could differ in their interpretations of Qur'an and hadith. This resulted, already early in Islamic history, in the emergence of the *madhhabs*, which, as it were, institutionalized difference of opinion. Doctrinal diversity, I would argue, is part of the spirit of Islamic law. Now Weiss's focus in chapter 6 of his book is the role of the *mujtahids* in finding the law and the criteria which would help laymen in finding which *mujtahids* are the most learned and trustworthy and, thus, in selecting the correct opinions from the enormous diversity of legal views. This diversity of Islamic law is the central theme of this chapter. However, I will consider it from a different angle: I intend to examine legal diversity not with a top-down approach, as Weiss did, but from a bottom-up perspective. My concern will be how legal practice dealt with this diversity on the ground. If Weiss applied the term "spirit of Islamic law" to the theory of the law and especially the process of finding the law, I would like to use the term body as a metaphor for legal practices and the documents recording them: contracts, judgements and fatwas. The corpus I will use is a family archive from the Ottoman period found in the Egyptian town of al-Qasr in the Dakhla Oasis. I will begin with a brief description of the collection.

In 2003 workers restoring an eighteenth-century mud-brick house in al-Qasr discovered pieces of paper in the rubble of an adjacent house that had collapsed. Apart from scraps and small fragments of documents, the find included many complete or nearly complete, legible documents. The restoration of the mud-brick house was carried out by the Qasr Dakhleh Project (QDP) under the aegis of the Dakhleh Oasis Project (DOP), an international project aiming to study the history of the Dakhla Oasis from prehistoric times to the present.¹ During the subsequent campaigns

¹ For information on and the annual reports of the DOP and QDP, see <http://arts.monash.edu.au/archaeology/excavations/dakhleh/index.php>.

of 2004, 2005 and 2007 more written pieces of paper were found in the remains of the ruined house, which, according to local informants, was known as *Bayt al-Qurashī* and had been abandoned before 1940, probably due to its sudden collapse. The finds include religious texts, personal letters, magical texts, amulets and 216 undamaged or nearly undamaged legal and financial documents written in the period between 1579 and 1937. A preliminary examination showed that they are the remains of a family archive of a branch of the local Qurashī family. All pieces of paper have been rehydrated, put between glass plates for conservation, numbered and photographed, and are now stored in the storerooms of the Dakhla Inspectorate of the Supreme Council of Antiquities. I have edited all complete or nearly complete legal and financial documents found so far and published them in 2011 in *Wathā'iq Madīnat al-Qaṣr fī al-Wāḥāt al-Dākhila Maṣḍar^{an} li-Tārīkh Miṣr fī al-'Aṣr al-'Uthmānī* (see Bibliography).

Two-thirds of these documents are legal: contracts, often notarized in court, receipts of payment of taxes, IOUs and appointment of attorneys. The remainder are mainly accounts or lists regarding debts or expenses. In addition I have found a few *waqfiyyas* (4), judgements (2) and fatwas (3). A substantial proportion of the documents are related to agricultural activities: lease or sale of land or of water rights, sharecropping or the payment of taxes on palm trees or springs and wells. In addition there is a document regarding a contract for the maintenance of a spring and some lists made by individual farmers recording those from whom they leased water rights. Table 1 gives an impression of the types of documents. Table 2 shows the distribution of the documents over the Hijri centuries. The oldest document of the collection is a *waqfiyya* with a length of more than one meter and dated 987/1579. Unfortunately the opening lines, with the name of the founder of the *waqf*, are missing. The most recent document is a tax receipt from 1937.

Many documents were issued and sealed by a court: forty-seven by the al-Qaṣr court and seven more by Cairo courts. The oldest one dates from 997/1589 and the most recent one from 1264/1848. Only two of these are judgements, ending litigation; all others are notarized contracts. Except for the two documents issued by the al-Qaṣr court in the 19th century,² the *qāḍīs* mention their *madhhab* affiliation. Nearly all (41) of the deeds registered in the court of al-Qaṣr bear the name and the seal of Shāfi'ī *qāḍīs*,

² This probably a result of the 1802 decree that *qāḍīs* had to follow Ḥanafī law. See Peters, "What Does It Mean?," 157 (based on Jabarti).

belonging to local families. The population of al-Qasr and, indeed, all of the Dakhla and Kharga Oases followed the Shāfi'ī *madhhab*. In this paper I will first examine to what extent the *qāḍīs* of al-Qasr were incorporated in the Ottoman Ḥanafī judiciary and, secondly, why *qāḍīs* of other *madhhabs* than the Shāfi'ī *madhhab*, issued documents in the al-Qasr court.

The Ottoman judiciary was hierarchically organized. The *qāḍīs* in the principal cities were appointed by the chief *qāḍīs* in Istanbul. Those regional *qāḍīs* could appoint deputies (*nā'ibs*), both to their own court and to the smaller courts within their districts. *Qāḍīs* did receive salaries but mainly lived off the fees the people had to pay for getting judgements and for having contracts notarized. The deputies had to hand over part of their fees to the *qāḍī* who had appointed them. The Ḥanafī *madhhab* was the official one in the Empire and until the beginning of the sixteenth century, Ottoman judges belonged exclusively to that *madhhab*. However, after the conquest of the Arab regions of the Middle East, the situation became complicated since here the population belonged to other *madhhabs* and, moreover, a judicial system had developed in the Mamluk period whereby courts in the main cities would be staffed by *qāḍīs* from different *madhhabs*. After the Ottoman conquest, this system was continued, except that the supremacy of Ḥanafī law was institutionalized by appointing a Ḥanafī chief *qāḍī* in each court, whereas the *qāḍīs* belonging to the other *madhhabs* held office as his deputies. In Egypt the *qāḍīs* of the regions (*quḍāt al-aqālīm*) resided in main cities and were usually Ḥanafī Turks, appointed by the *qāḍī 'askar* of Anatolia in Istanbul.³ Later, however, only a few of the most important regional *qāḍīs* were appointed in Istanbul and the rest by the chief judge (*qāḍī 'askar*) of Egypt.⁴ The regional *qāḍī* would appoint local ulema from different *madhhabs* as deputies in his courts and in the other towns of his district.⁵ These deputies would adjudicate disputes and notarize documents according to their own school but under the supervision of the Ḥanafī *qāḍī*.⁶ The *qāḍī* of the Oases (*qāḍī al-Wāḥāt* or *al-nāẓir fī al-aḥkām al-shar'iyyah fī kāmīl aqālīm al-Wāḥāt*), who probably resided in Girga or Asyut in the Nile valley, was one of these regional Ḥanafī Turkish *qāḍīs*.⁷ However, from the early

³ 'Īsá, *Tārikh*, 96.

⁴ Farahāt, *Al-Qaḍā' al-Shar'ī fī Miṣr fī al-'Aṣr al-'Uthmānī*, p. 381.

⁵ 'Īsá, *Tārikh*, 97.

⁶ Peters, "What Does It Mean?", 147–58.; 'Īsá, *Tārikh*, 97.

⁷ The *qāḍī* of the Oases (Alwāḥ) belonged to the first (lowest) rank of the six ranks of the Egyptian Ottoman judicial hierarchy. El-Nahal. *Judicial Administration*, Appendix B.

eighteenth century we find that there were local Shāfiʿī *qāḍīs* of the Oases (e.g. in 1702 and 1704)⁸ and Ḥanafī deputies (e.g. in 1722).⁹ It would seem that from about 1700 the office of the *qāḍī* of the Oases was held by Egyptian, local scholars.

The *qāḍī* of the Oases would appoint the deputy *qāḍīs* of al-Qasr. In a collection of documents from the Kharga Oasis also dating from the Ottoman period, there are several letters of appointment in which the *qāḍī* of the Oases appoints deputies in towns comparable to al-Qasr. The oldest ones, dated 1050/1640¹⁰ and 1058/1648,¹¹ show that these deputies had extensive jurisdiction defined as: hearing claims and testimonies, adjudicating disputes, writing official documents, court records and marriage contracts, making inventories of estates, [recording] payments of I.O.U.s, and dealing with all legal cases arising in the Kharga Oasis, an accordance with the doctrine of the Shāfiʿī *madhhab*. Excepted were matters coming from or going to the Diwan¹² and the investigation of homicide. The deputy was entitled, in case of necessity, to appoint deputies from the four *madhhabs*.¹³ We may safely assume that the deputies in al-Qasr had a similar jurisdiction. In a letter of appointment, dated 1167/1754, we find that the deputy had full jurisdiction, without any exceptions, but that the term of his appointment was restricted to one year. These remained the normal clauses until the nineteenth century.

From the formulas used in these documents by the *qāḍīs* of al-Qasr to refer to their office it is clear that they regarded themselves as part of the Ottoman-Egyptian judiciary, being deputies of the *qāḍī* of the Oases. Throughout the seventeenth century, they call themselves “the pride of the deputies and the head of the court clerks” (*fakhr al-nuwwāb wa-raʿs al-kuttāb*), whereas the full *qāḍīs* used the title “the most proficient of the *qāḍīs* of Islam and the most excellent of the governors of men” (*aqḍā quḍāt al-Islām wa-awlā wulāt al-anām*). And when these deputies describe their

⁸ “Ubayd Allāh b. Mūsā al-Dīnārī, *al-nāzir fī al-aḥkām al-sharʿiyyah fī kāmil aqālīl al-wāḥāt*.” D.04.189, dated 1114, AH. D.05.04recto, dated 1116.

⁹ “Ḥusayn ʿAlī al-Ḥanafī, *al-muwallā bi-Abwāḥ khilāfat*.” D.04.167 dated 1133 AH.

¹⁰ Dār al-Wathāʿiq al-Qawmiyyah (Egyptian National Archive), Wathāʿiq al-Wāḥāt, Microfilm 9, No. 20. The documents of this collection have been catalogued and partially edited by Salwā ʿAlī Milād.

¹¹ Milād, *Wathāʿiq al-Wāḥāt*, 135.

¹² The phrase probably refers to serious matters that had to be dealt with by the Council of the Governor in Cairo.

¹³ Milād, *Wathāʿiq Al-Wāḥāt*, 135 (Doc. 23). The 1050 AH appointment is found in Dār al-Wathāʿiq al-Qawmiyyah, Wathāʿiq al-Wāḥāt, Microfilm No. 9, doc. 20.

official position, they call themselves, up to the early eighteenth century, "Shariah judge by virtue of substitution" (*al-ḥākīm al-sharʿī khilāfat^{an}*).

Although, as we have seen, the lower echelons of the Egyptian judiciary in the eighteenth century became increasingly Egyptianized and the Ḥanafī school had to concede ground to the local schools as far as the appointment of judges was concerned, the overall legal system, headed by chief *qāḍī* in Cairo, appointed by Istanbul, remained Ḥanafī and Ottoman with a limited recognition of the other legal schools. The question of which *qāḍī* would hear a case if there were several *qāḍīs* with jurisdiction was moot in Ḥanafī law. Abū Yūsuf's opinion was that in such a situation, the choice was the plaintiff's, because the lawsuit was his. Muḥammad al-Shaybānī, however, asserted that the choice is the defendant's, on the ground that he is defending himself against the plaintiff's claim. The latter opinion was regarded as the authoritative one. Later Ḥanafī scholars, however, pointed out that this rule only applied if the *qāḍīs'* jurisdictions did not overlap, e.g. in situations that each of them had exclusive jurisdiction over one region or neighbourhood, or one over soldiers and the other over civilians. In such a situation, these jurists asserted, the choice of the court is the defendant's and he cannot be summoned to a court in another neighbourhood or to a military court if he is a civilian. However, if there are several *qāḍīs* in a city, each of them with general jurisdiction, the jurists disagree on which party may select the court. Al-Ṭīmūrtaşhī (d.1004/1595) held that the plaintiff is entitled to choose the *qāḍī*, provided there is no obvious advantage for either party as a result of this selection, whereas Ibn Nujaym (d.970/1569) claimed that the choice was the defendant's. The issue was resolved in the Ottoman Empire by a sultanī edict, issued on the basis of a fatwa given by the *Shaykh al-Islām* Abū al-Su'ūd, instructing *qāḍīs* not to adjudicate contrary to the defendant's *madhhab*:

Question: If Zayd, who is a Ḥanafī, dies while being away [from his hometown], and his Shāfi'ī creditors produce evidence of their claims [against the estate] in the absence of the heirs, and if the Shāfi'ī *qāḍī* finds for them, and the Ḥanafī *qāḍī* thereafter issues execution on the judgement, is this legally acceptable?

Answer: No. The *qāḍīs* in the Well-Protected Dominions [i.e. the Ottoman Empire] have been forbidden to give judgement contrary to the defendant's *madhhab* and the Ḥanafī *qāḍī's* order of execution is therefore null and void. Abū al-Su'ūd. Muḥammad [al-Shaybānī] held that the defendant's choice of *qāḍī* is decisive. This is the ruling according to which fatwas must be issued. Qāḍikhān and *Majma' al-Fatāwā*.¹⁴

¹⁴ P. Horster, *Zur Anwendung des islamischen Rechts*, 48.

The second question that was discussed among Ottoman Ḥanafī jurists was the status of the sentences and documents issued by the non-Ḥanafī *qāḍīs*. After the Ottoman conquest, the Ḥanafī *qāḍī* in the Arab regions was given precedence over the other *qāḍīs* who were henceforth regarded as deputy *qāḍīs*.¹⁵ However, as appears from the fatwa quoted above, they could still adjudicate, at least if the defendant wanted it. For the enforcement of such a judgement, a warrant of execution issued by the Ḥanafī supreme *qāḍī* was required. In principle, all decisions and documents of other *qāḍīs* would be endorsed. The basic rule here is that sentences based on *ijtihād* cannot be reversed by other *qāḍīs*. Its rationale is to prevent endless litigation. Yet there were certain limits. Ḥanafī doctrine in this respect was very much like the modern law of conflict of many states with Western legal systems, according to which national courts under certain conditions may apply foreign law, but only if this does not violate the *ordre public* (public policy), i.e. essential values of the legal system. For the Ḥanafī jurists, these essential values consisted in unequivocal texts of the Qurʾān and hadith or the *ijmāʿ*. The Ḥanafī *qāḍī* would issue warrants of execution for the judgements of the other *qāḍīs*, unless they violated such texts, as interpreted by Ḥanafī doctrine.¹⁶ Ḥanafī textbooks list a number of issues that are legal according to other *madhhabs*, but cannot be endorsed by Ḥanafī *qāḍīs*. Among these issues we find the following:

- Capital sentences based on the *qasāmah* procedure, i.e. fifty oaths sworn by the victim's next of kin, a possibility recognized in Mālikī law;
- Sentences based on the testimony of one witness and an oath sworn by the plaintiff, recognized by all *madhhabs* except the Ḥanafīs;
- Sentences upholding the validity of a temporary marriage (*mutʿah*), recognized in Imāmī Shīʿī doctrine;
- Capital sentences pronounced in spite of the fact that one of the victim's female heirs has waived her right to demand retribution, valid under Mālikī law;
- Sentences regarding a triple repudiation pronounced in one session as a single one, as is held by some Ḥanbalīs.¹⁷

Through the application of this law of conflict, the Ottomans could both uphold Ḥanafī supremacy and meet the practical demands of the local

¹⁵ El-Nahal, *The Judicial Administration of Ottoman Egypt*, 14–17.

¹⁶ Ibn Nujaym and al-Ḥamawī, *Ghamz ʿUyūn al-Baṣāʾir*, I, 340–2.

¹⁷ Ibn Nujaym, *Al-Baḥr al-Rāʾiq*, VII, 11–12; Ibn ʿĀbidin, *Radd al-Muḥtār*, IV, 451.

population. However, we must not exaggerate the practical importance of this system. It functioned only in a few large cities.

Having sketched the institutional framework, I will now examine the documents issued in the al-Qasr court by non-Shāfi'ī *qāḍīs* in order to try and find out why the case or the notarization was not handled by a Shāfi'ī judge. I found the following documents:

Documents issued by a non-Shāfi'ī deputy of al-Qasr:

- A judgement ending litigation about water rights, pronounced by a Ḥanafī deputy *qāḍī*, dated 1055/1645;¹⁸
- Notarization of a contract recorded overleaf, by a Mālikī deputy *qāḍī*, dated 1056/1646;¹⁹
- Annulment of a marriage on account of the husband's lasting absence, by a Mālikī deputy *qāḍī*, dated 1116/1705.²⁰

Documents issued by a (deputy) *qāḍī* of the Oases:

- Appointment of a legal guardian for a deaf-mute person, by the Ḥanafī *qāḍī* of the Oases, dated 1090/1679;²¹
- Sale of land and water rights, issued by the Shāfi'ī *qāḍī* of the Oases, dated 1114/1702;²²
- Sale of land and palm trees, issued by the Shāfi'ī *qāḍī* of the Oases, dated 1116/1704;²³
- Settlement (*ṣulḥ*) about the payment of a bride price (*ṣadāq*), issued by the deputy Ḥanafī *qāḍī* of the Oases, dated ca. 1133/1722;²⁴
- Sharecropping contract (*ja'ālah*) issued by the deputy Ḥanafī *qāḍī* of the Oases, dated 1133/1722;²⁵
- Lease of land issued by the Mālikī deputy *qāḍī* of the Oases, dated 1234/1817.²⁶

¹⁸ D.05.002.

¹⁹ D.05.079v.

²⁰ D.05.050.

²¹ D.05.024.

²² D.04.189.

²³ D.05.041recto.

²⁴ D.04.225. The last part of the document with its date is missing. Since it was issued by the same Ḥanafī deputy *qāḍī* of the Oases as D.04.167 from 1133 AH, I am assuming that it must have been issued around the same year.

²⁵ D.04.167.

²⁶ D.05.065recto.

Let us first give a closer look at the documents issued by local deputies in al-Qasr. The first one is a judgement pronounced in the court of al-Qasr by a certain Abū Ḥaṣṣ Sirāj al-Dīn ‘Umar al-Ḥanafī, the Ḥanafī deputy *qāḍī* (*Khalīfat al-ḥukm al-‘azīz bihā* [i.e. in the court of al-Qasr] *niyābat^{an}*) of a certain Jamāl al-Dīn Yūsuf Efendi al-Ḥanafī, the *qāḍī* of the Oases. The case was simple: a person sued a second cousin claiming that the latter had unlawfully taken possession of certain water rights. The defendant denied the claim and the plaintiff could not substantiate it. The *qāḍī* offered the oath of denial to the defendant. After the latter had sworn it, the *qāḍī* found for the defendant and debarred the plaintiff from suing the defendant for the same issue. In our collection, judgements are rare: there are only two of them. The other one was pronounced by a Shāfi‘ī deputy²⁷ and here the issue was also a dispute about water rights. It is difficult to explain why in our document the claim was heard by a Ḥanafī, instead of the Shāfi‘ī *qāḍī*. Under Ottoman Ḥanafī law, the choice of the *madhhab* in litigation was the defendant’s. In this case the defendant might have opted for adjudication under Ḥanafī law because he knew that the plaintiff had one witness, but not two. According to the doctrine of all *madhhabs* but the Ḥanafī, the *qāḍī* will find for a plaintiff whose claim is corroborated by one witness and his own oath. However, even if the plaintiff’s claim would have been awarded by the Shāfi‘ī deputy, the defendant had nothing to fear because an Ottoman *qāḍī* would never grant the required *exequatur* since judgements based on the testimony of one witness corroborated by the plaintiff’s oath were regarded as being against Ḥanafī *ordre public*. Therefore, “*madhhab* shopping” cannot explain the choice for a Ḥanafī deputy.

I think we must look in a different, more practical direction. It is remarkable that the next document, dating from about a year later (1056) is also issued by a non-Shāfi‘ī deputy *qāḍī*, this time a Mālikī. It is an ordinary notarization of a contract concluded a year previously and written on the reverse of the document. Our collection includes several notarizations by Shāfi‘ī deputies and their wording is almost identical with the one issued by the Mālikī deputy. Therefore, we may assume that the handling of this particular document by a Mālikī deputy was not prompted by differences between *madhhab* doctrines. A plausible explanation might be that, in 1055 and 1056, the Shāfi‘ī deputyship was vacant and that his duties were performed by Ḥanafī and Mālikī deputies. We do not know exactly how

²⁷ D.05.003, dated 1125 H./1713.

long the position was vacant, but by 1061, there was a Shāfi'ī deputy in office.

Only in the third document did the *madhhab* doctrine play a role in the choice for a deputy. It contains a decision by a Mālikī deputy *qāḍī* authorizing a woman to rescind her marriage on the ground that her husband had left her more than seven years ago without providing maintenance. It is expressly mentioned that the Mālikī deputy in this case acts with the permission of the Shāfi'ī deputy *qāḍī*. The reason for the woman to approach the Mālikī deputy is obvious: the differences between Shāfi'ī and Mālikī doctrines. Shāfi'ī doctrine does not offer relief for a woman who has been abandoned by her husband. She may demand dissolution (*faskh*) of her marriage for non-payment of maintenance, but only if she can prove that the husband is indigent, and not if he refuses to support her, although he has the wherewithal for it. If he disappears and leaves his wife without maintenance, she is not entitled to an annulment if the husband had sufficient means at the time of his disappearance.²⁸ Mālikī doctrine is more favourable to women in this respect. A woman may obtain a divorce for absence of her husband—opinions on the minimum duration vary between one and three years—if she fears that she will commit immoral acts due to her husband's absence. Her statement to this effect suffices and need not be corroborated by witnesses. If the husband's whereabouts are known, a letter must be sent to him to summon him to rejoin his wife either by returning to her or by sending for her. If he refuses to do so or fails to answer, the *qāḍī* may pronounce the divorce. If it is impossible to get in touch with him, the *qāḍī* may do so immediately. It is irrelevant whether or not the husband has made arrangements for her maintenance.²⁹ Another course open under Mālikī law to a woman in such a situation is that she petitions for divorce on the ground that her husband does not provide maintenance. In this case, the woman appears to use both options: She produces witnesses testifying to her husband's absence for over seven years, to the fact that he has left her without maintenance and to her fear that she may commit immoral acts. The *qāḍī*, after making her swear an oath to corroborate these facts, gives her permission to rescind her marriage.

²⁸ Ramli, *Nihāyat al-Muḥtāj*, VII, 212–3. It seems, however, that the practice of Shāfi'ī judges in Ottoman Palestine was to grant wives in these circumstances an annulment. See Tucker, *In the House of the Law*, 83–85.

²⁹ Dasūqī, *Hāshiyah 'alā al-Sharḥ al-Kabīr*, II, 431; Jazīrī, *Kitāb al-Fiqh*, II, 581–584.

Six documents were issued in the al-Qasr court but by *qāḍīs* of the Oases or their deputies. To leave no doubt, these were not *exequatur*s of Ḥanafī *qāḍīs*, sanctioning the execution of judgements or documents issued by judges of other *madhhabs*, but rather documents originally issued by a (deputy) *qāḍī* of the Oases. The first one is issued by the Ḥanafī *qāḍī* of the Oasis and records the appointment of a person as a legal representative (*mutaḥaddith sharʿī*) for his deaf-mute nephew whose father had died. The uncle is authorized to take possession of his nephew's share in the inheritance and will support him from it. The subject-matter of the documents gives no clue as to the reason why a Ḥanafī *qāḍī* should issue it and not a Shāfiʿī deputy. According to the letters of appointment, these deputies were competent in such matters and the collection contains several documents in which Shāfiʿī deputies appoint legal representatives for orphans. The following two documents (1114/1702 and 1116/1704) bear the seal of a Shāfiʿī *qāḍī* of the Oases, ʿUbayd Allāh b. Mūsā al-Dīnārī, a scion of a family of ulema from al-Qasr, who between 1099/1688 and 1129/1718 was one of the Shāfiʿī deputies in the al-Qasr court. Two further documents, recording a *ṣulḥ* agreement and a contract of sharecropping and dating from around 1133/1722 were issued by a Ḥanafī deputy. This probably means that, at that time, the *qāḍī* of the Oases was not a Ḥanafī and supports the notion that at the lower levels of the judicial hierarchy in Egypt the Ḥanafī *madhhab* had lost terrain by the eighteenth century. Neither document gives an indication why the Ḥanafī doctrine should have been chosen for handling the transaction. In fact, the sharecropping contract (*jaʿālah*) would have been null and void under Ḥanafī law.³⁰

The last document is a run-of-the-mill contract of lease of land, identical to many others issued by Shāfiʿī judges, bearing the seal of the Mālikī deputy of the Oases. None of these documents contains a clue as to why a *qāḍī* from a certain *madhhab* should have dealt with them. There are no doctrinal issues that could explain the choice of a specific *madhhab* and, at least in one case, a transaction was notarized that was not recognized in the *qāḍī*'s own *madhhab*. The impression one gets is that the (deputy) *qāḍīs* of the Oases from time to time visited the smaller courts falling under their jurisdiction for practical reasons, such as the collection of their due of the court fees or the appointment or annual reappointment

³⁰ Ibn Rushd, *Bidāyat al-Mujtahid*, II, 235; For the legal discussion about the use of the *jaʿālah* contract for sharecropping, see Peters, "Sharecropping in the Dakhla Oasis," 79–89.

of local deputies³¹ and at the occasion would sign and seal legal documents and adjudicate. However, these documents and judgements had been prepared by the local court clerks in accordance with the local practices and the visiting *qāḍīs* just put their signs and seals on them.

What may we conclude from this admittedly small sample of documents? The conclusions are not earth-shattering, but they confirm and complement our knowledge of the Ottoman Egyptian legal system and specifically the hierarchically lower end of the judiciary. In the first place, the collection as a whole testifies to the fact that the inhabitants of al-Qasr, being Shāfi'īs, were allowed to regulate their legal affairs to a large extent according to the Shāfi'ī school. This tallies with what we know of legal practice elsewhere in Ottoman Egypt. The second point is that in those cases handled by non-Shāfi'ī *qāḍīs* (7 out of 47) *madhhab* doctrine hardly played a role in the choice of the *qāḍī*. Only in one document does the choice of the judge appear to have been occasioned by *madhhab* doctrine. The other documents contain contracts whose wordings were identical or nearly identical with those issued by Shāfi'ī *qāḍīs*. That they were issued by judges from other *madhhabs* can only be explained by practical considerations. I have suggested that the fact that in 1055 and 1056 non-Shāfi'ī *qāḍīs* issued documents in the al-Qasr court may have been contingent on the Shāfi'ī deputyship being vacant. But lacking sources to corroborate this, this explanation remains speculative. As to the *qāḍīs* of the Oases and their deputies, they would visit the al-Qasr courts—as well as other courts in the Kharga and Dakhla Oases—not for administering justice, but for practical reasons, such as the collection of court fees or appointing deputies. However, while being there, they would rubberstamp documents that had been drafted by the local court clerks.

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³¹ Documents 23 and 39 in the Kharga collection show that the local deputies were appointed by the (deputy) *qāḍī* of the Oases in the local courts. Milād, *Wathā'iq al-Wāḥāt*, pp. 135 and 149.

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TABLES

Table 1: Distribution of the documents according to subject

Sale and lease of land, water and palm trees	70	32%
Sale and lease of urban property (houses)	9	4%
Other legal transactions (debts, attorney, family business)	39	18%
Receipts (taxes and other debts)	41	19%
Accounts and lists	37	18%
Miscellaneous (fatwas, waqfiyyas, sulḥ, judgements)	20	9%
TOTAL	216	100%

Table 2: Chronological distribution of the legal and financial documents

10th C. (1494–1591)	2	1%
11th C. (1591–1688)	29	13%
12th C. (1688–1785)	49	23%
13th C. (1785–1882)	80	37%
14th C. (1882–1979)	25	12%
Undated or not dateable	31	14%
TOTAL	216	100%

Table 3: Documents issued by Shariah courts according to *qāḍī*'s rank and *madhhab*

Issued in a Cairo court		7
Issued in the al-Qasr court		47
By a (deputy) <i>qāḍī</i> of the Oases	6	
Ḥanafī	3	
Shafī'ī	2	
Maliki	1	
By a deputy <i>qāḍī</i> of a-Qasr	41	
Shafī'ī	38	
Maliki	2	
Ḥanafī	1	

TRACING NUANCE IN MĀWARDĪ'S *AL-AḤKĀM AL-SULṬĀNIYYAH*:
IMPLICIT FRAMING OF CONSTITUTIONAL AUTHORITY

Frank E. Vogel

INTRODUCTION

The normal or canonical list of Western scholars to whom we turn for understanding Sunni *fiqh* constitutional thought has been Gibb, Lambton, and now Crone. All of them follow Gibb in examining a series of thinkers, from Māwardī's immediate theologian precursors Bāqillānī (d. 403/1013) and Baghdādī (d. 429/1037), to Māwardī (d. 450/1058), then to Juwaynī (d. 478/1085), Ghazzālī (d. 505/1111), and Ibn Jamā'a (d. 733/1333), down to Ibn Taymiyyah (d. 728/1328) (with varying additions), and in focusing on each thinker's treatment of the imamate itself—prerequisites for office, election, duties, disqualification, deposition, and the like. This is a gripping tale because during the same period the caliphate goes through various life and death throes, is finally terminated, and then begins a half-life in other bodies.

All these accounts share in degrees a single approach to the succession of Muslim theories about the caliphate. They construe it as a series of capitulations, a progressive bending or abandonment of legal principles to justify existing circumstances, which in the end weakened *sharī'ah*'s claim on rulers and acquiesced in, or even aided and abetted, a sorry history of arbitrary and semi-secular absolutism. According to this approach, Māwardī's predecessors, obsessed with shoring up the legitimacy of the Sunni caliphate at a time when it faced rival Shī'ī claims backed by the powerful Fāṭimid caliphate, bent ideals in order to justify the history of the caliphate up to their time. Or, in Gibb's words, speaking of Māwardī's predecessors, whom he calls the framers of the "classical" theory of the caliphate:

By disregarding the stipulation that the *imām*'s authority is bound up with his maintenance of the *sharī'ah* on the one hand, and insisting upon the unchanged obligation of submission to him on the other, they emptied the "contract" of all moral content and left only the factor of power operative in the political organization of the Community.¹

¹ Gibb, "Constitutional Organization," 16.

As the next step in the succession, it fell to Māwardī to devise doctrines to legitimize caliphs who had fallen entirely under the thumb of Shīʿī Būyid rulers. Again, in Gibb's words, Māwardī did still more to "undermine the foundations of all law.... Already the whole structure of the juristic theory of the caliphate was beginning to crumble...." Finally, Māwardī's successors, laboring to maintain an Islamic political theory as the caliphate continued a mostly downward course and eventually was extinguished, continued making concessions until, as Gibb puts it, by further "apply[ing] [Māwardī's] principles... brought [the juristic theory] crashing to the ground."² Gibb also, somewhat inconsistently, describes the entire sequence of Sunni political and constitutional writings as not influencing events but as rather dictated by them: they are "only the rationalization of the history of the community.... All the imposing fabric of interpretation of the sources is merely the *post eventum* justification of the precedents which have been ratified by *ijmā'*."³

But it is important to recognize that Gibb's analysis operates from within a conception of Islamic legal and political history now being rapidly eroded. What was Gibb's understanding of the Islamic theory of

² Gibb, "Al-Mawardi's Theory," 164. See also Gibb, "Sunni Theory," 142–143; Lambton, *State*, 102. Writing some 15 years later, in 1955, Gibb does acknowledge that late medieval constitutional writers partly redeem the essential principle of the state's subservience to *sharī'ah*. He states that, from Ibn Taymiyyah onward, Islamic political teachings converged on "the principle... that the true caliphate is that form of government which safeguards the ordinances of the *sharī'ah* and aims to apply them in practice." "Constitutional Organization," 26. In other words, in the end the theorists had shifted their crucial criterion for the legitimacy of the Islamic state from the person of the holder of power—particularly his qualifications and manner of selection—to whether he in fact upholds *sharī'ah*. See Lambton, *State*, 309. Later authors have criticized Gibb for overstating the loss to the "rule of law" entailed by theories like Māwardī's or Ibn Jamā'a's. Mikhail, *Politics*, 28, 42–43; Crone, *God's Rule*, 233. But even these later authors employ, in their accounts of the sequence of Islamic political thinkers, the same theme: Islamic political thought preserved Sunni legitimacy only through progressive deviations from a pre-existing *sharī'ah* ideal that became as a result ever more unattainable. Mikhail, *Politics*, xxxi ("‘*ulamā'* had to accept serious limitations as far as government was concerned"), 26, 29; Crone, *God's Rule*, 219–255, esp. 254–255 (e.g., "constant stretching of basic principles"). To say this often accords with the tone with which medieval scholars presented their doctrines. My account hypothesizes that these scholars took their positions (and framed them as they did) not regretfully but intentionally, to strengthen the *sharī'ah* rule of law as they viewed it. Their purpose was to advance a new theory of state legitimacy dominated by *fiqh* and scholars while subtly undermining older legitimacies, Islamic and non-Islamic, focused on the ruler.

³ Gibb, "Al-Mawardi's Theory," 162. Here Gibb invokes a notion of *ijmā'* that is now in retreat—the idea that, as one of the four *fiqh* roots or sources of law, consensus or *ijmā'* transforms any late-arising practice tolerated by the community into an eternal tenet of *sharī'ah*, as indisputable as if it had been literally revealed in the Qur'an itself. Gibb, *Mohammedanism*, 65; compare Hallaq, *History*, 76.

the state—the theory from which he viewed Māwardī's theory as a fatal compromise?

The head of the *umma* is Allah. . . . His rule is immediate, and His commands, as revealed to Muḥammad, embody the Law and Constitution of the *umma*. Since God is Himself the sole Legislator, there can be no room in Islamic political theory for legislation or legislative powers, whether enjoyed by a temporal ruler or by any kind of assembly. There can be no "sovereign state," in the sense that the state has the right of enacting its own law. . . . The Law precedes the State, both logically and in terms of time; and the State exists for the sole purpose of maintaining and enforcing the Law.⁴

Gibb seems to have believed that the vision of *sharī'ah* he describes had prevailed from the start:

The function and general form of the State have been laid down once and for all. . . . The minor details of application remain open to discussion, but the main principles of Islamic government are conceived as divinely ordained institutions, valid in all circumstances and for all time. . . .⁵

In these quotations we see Gibb assuming that the ideal of the Law was and had always been in no way dependent on the state; that the state can make no contribution to the Law; and that the Law can be known solely from God's "commands, as revealed to Muḥammad." Such a description of *sharī'ah* and the state assumes as original and permanent a notion of *sharī'ah* as knowable predominantly through textualist interpretations—naturally, by scholars—of a revelation taken as wholly verbal. We now understand that, contra to Gibb, such a vision of *sharī'ah* did *not* in fact "precede the State both logically and in terms of time." Only after several centuries did this vision develop to the point that it could compete with, and eventually dominate, theories by which the state itself epitomized Islamic legitimacy and played a large legislative role.

Bernard Weiss in his *Spirit of Islamic Law* very aptly captures how scholars now understand the emergence of a *sharī'ah* controlled by scholars of *fiqh* (*fuqahā'*) and articulated as *fiqh*. Referring to the period after Ibn Ḥanbal (d. 241/855), Weiss writes:

⁴ Gibb, "Constitutional Organization," 1.

⁵ *Ibid.*, 1–2. By way of contrast, Aziz Al-Azmeh, writing in 1997 and highly critical of Gibb, asks how Māwardī's book could represent a further accommodation to reality when, in creating a "novel topic of legal discourse," his was a "legislative" effort? Al-Azmeh, *Kingship*, 169.

The scholars of the law were able successfully to vindicate their independence vis-à-vis the caliphal regime and to establish once and for all their monopoly over the exposition of the law. The caliphate had to give up all claims to legislative powers and to resign itself to being—or at least to giving the appearance of being—the instrument of implementation of the law of scholars, the law of books . . . The scholars of the law, far from being beholden to the regime, were in a position to make the regime answerable to them.⁶

If we understand how contingent and late it was that the scholars' vision of *sharī'ah* gained ideological dominance, and of how it needed, in early times and late, to cooperate as well as to contend with powerful competitors for authenticity and legitimacy, then we may make a different assessment of both the creativity and the sophistication of the work of Islamic constitutional thinkers like Māwardī. We need to understand anew how "scholars of the law" achieved the advances Professor Weiss described, and to understand this we will need to make yet another re-reading of the landmark texts of Islamic legal history.⁷

Approaching Māwardī's *al-Aḥkām al-sultāniyyah* in this manner, we can readily see it not as Gibb did—as a merely clever, rather unprincipled, set of justifications for a woeful state of affairs—but as a consummate work of constitutional strategy and of ideological gamesmanship. And we can realize how, given its immediate prominence and enduring influence, it represents a permanent milestone in the progress of the scholarly enterprise. In Māwardī's book, we see a *fiqh* scholar—writing a book of *fiqh*, not *kalām* or *adab*—for the first time successfully declaring that *fiqh* dictates the legitimacy of the state and defines its functions, not the reverse. In other words, it represents a daring assault on a summit—and, on attaining it, the delineating of a new perspective by which *fiqh*, looking down,

⁶ Weiss, *Spirit*, 16. Patricia Crone offers a great deal of context and detail to support such a new reading of early Islamic constitutional history. See Crone, *God's Rule*, 17–141; Crone & Hinds, *God's Caliph*. For detailed research on the early Abbasid period, see Zaman, *Religion and Politics*.

⁷ Perhaps in general we overdo the metaphor of clash and competition, of winners and losers, in describing the constitutional struggle between '*ulamā'*' and rulers, just as we once overdid an account by which the rule of law falls victim to sheer tyranny. From Abbasid times at least, it seems clear that neither scholar nor ruler could contemplate a Sunni political and constitutional order without cooperation from the other party, making controversies over legitimacy between them (except in extreme cases) more like squabbles between spouses, or, as we describe it below, the constitutional strife between co-equal branches of government. Perhaps both parties are (again except at extremes) much more interested in protecting order and legitimacy than in winning a war—or even a battle.

defines and legitimates, by criteria stated by it, not only the caliph but the entire structure of the state.⁸

Since I am not a historian, or even a legal historian, I should not be the one to attempt a comprehensive re-reading of *al-Aḥkām al-sultāniyyah* as an episode in the history of Islamic political thought, in the manner of Gibb, Lambton, and Crone. Perhaps I can, however, offer a reading of the book as a legal and constitutional document, as a proposal (which proved highly successful) of a new model for real-world Islamic constitutional thought and practice.

This is only the beginning of a larger project. As noted above, the advances historians have recently made in unearthing the actual practice of the *sharī'ah* in various eras enable us now better to understand how Islamic law has functioned as constitution and basic law for myriad legal and constitutional systems for over a millennium. We must bring this new understanding to a re-reading of major works of Islamic legal history, one that penetrates to their implicit significance for the *legal* and especially *constitutional* practice wherever and whenever they were invoked as normative, but particularly for their own day. In other words, I propose a re-reading that, to the maximum extent possible, explores such works as addressing real-world Muslim constitutional and legal problems—now understood as arising within an *Islamic* legal framework—and not just as signposts in *fiqh* intellectual history, Muslim political history, or the evolution of religious doctrine or practice.⁹

The Originality of al-Aḥkām al-sultāniyyah

My thesis about the significance of *al-Aḥkām al-sultāniyyah* is strongly supported by the fact, accepted on all sides, that it was entirely original in its aims, scope and many of its rulings.¹⁰ Not only does his work lack

⁸ Calder, "Friday Prayer," 37, 44, and n. 15, acknowledges this originality and purpose explicitly, but says that Māwardī's work, by delving into matters that drew the *'ulamā'* and ruler closer, "if adopted wholeheartedly, seems likely to have weakened the influence of the clerical class by bringing them into a dangerously close alliance with political power." 47.

⁹ Contemporary scholars of Islamic law have already made major contributions to such a re-reading, in works juxtaposing close analysis of Māwardī, Qarāfi (d. 684/1285), and other pivotal constitutional texts with equally close study of medieval Muslim constitutional and legal practice. See Jackson, *Islamic*; Reza, "Islam's Fourth"; and Kristen Stilt, *Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt* (Oxford: Oxford University Press, 2011).

¹⁰ "Māwardī is to my knowledge the first Muslim to undertake a comprehensive deduction of the elements of Law that pertain to government." Mikhail, *Politics*, xxx; see also

predecessors, it also, and to a surprising degree yet to be fully studied and explained, lacks successors, in that no one chose to attempt precisely his task again. When addressing those areas of *fiqh* constitutional thought where Māwardī was at his most creative, his successors often contented themselves with simply quoting him *in extenso*.¹¹

Many have noted Māwardī's opening remark about the provenance of his book, where he explains that, since "*al-Aḥkām al-sultāniyyah*," meaning the legal rules as to government, are widely dispersed among all other rules so as to make it difficult for those preoccupied with ruling to consult them, he, therefore, at the request of "one whom I am obliged to obey," has gathered them into a single book. This passage seems humbly to claim that Māwardī's project was one of collation, not creation. But in a passage at the end of his book—at the end of his final chapter on *ḥisba*—he can no longer suppress pride of originality. Commenting that the *ḥisba* function has been neglected not only by rulers but also by *fuqahā'* who have failed sufficiently to expound its rulings, he states:

Most of this book of ours is devoted to matter which the *fuqahā'* ignored or failed to treat sufficiently, so we have stated what they overlooked and completed that in which they fell short.¹²

The true originality of Māwardī's treatise can easily be missed. This is for at least three reasons. First, Māwardī's very objective is to advance a vision

19, 22. Nielsen, *Secular*, 17; Calder, "Friday Prayer," 37; Crone, *God's Rule*, 223, Hurvitz, "Competing Texts." Many others assume Māwardī's originality without remarking on it. Calder has shown how, even on the subject of leadership of prayer which *fiqh* manuals had treated extensively, Māwardī's formulation shows originality particularly in choosing to face, and to provide rules for, political and legal issues aroused by an institution that other scholars preferred to ignore. Calder, "Friday Prayer."

Another question is *al-Aḥkām al-sultāniyyah's* originality vis-à-vis another work that would have equal stature were it not extremely similar to Māwardī's—a work of the same name by al-Qāḍī Abū Ya'lā Ibn al-Farrā' (d. 458/1066). Māwardī's work has gotten by far the most attention from scholars ever since the two works appeared—and this is true to my observation even among modern Ḥanbalis. Most assume it to be the original work. Modern historians profess an open mind as to which work came first (Little, "A New Look"; Halle, "Abbasid"). But to me the most obvious explanation of the clear plagiarism (or imitation as the highest form of flattery) is one often noted—that since Māwardī systematically omitted the views of Ibn Ḥanbal and his followers, Abū Ya'lā felt obliged to write a complementary work. Little, "A New Look," 7–8; Crone, *God's Rule*, 223, n. 16; Hurvitz, "Competing Texts."

¹¹ In this article I do not treat the successors to Māwardī. While some of them audaciously went much further in one direction or another than Māwardī did, in my view they did so largely by extrapolating along lines he already drew. (Juwaynī comes closest to independence.) And none attempts his comprehensive constitutional law coverage.

¹² Māwardī, *al-Aḥkām* 1978, 259.

of *sharī'ah* portraying it as having, from the start, dictated the constitutional structure that Māwardī proposes. His very success at this makes it more difficult to discern—and appreciate—the ingenuity with which he accomplishes it. Second, the originality of the text is obscured by the *fiqh* method of presentation, which, like law everywhere, seeks to portray propositions, even novel ones, as dictated by past precedent. Third, the true ingenuity and novelty of Māwardī's work is not in its content, where Māwardī draws (selectively) on older material from either *fiqh*, *kalām* or the history of the caliphate. It is rather in Māwardī's implicit assumptions, the topics, definitions, conceptions, rules, and distinctions he chooses to introduce, and the subtle suggestions he makes. Toward a proper re-reading of this text, we should adopt what Gibb himself calls for: a reading that discovers "the real significance . . . not so much in the external and obvious statements as in the apparently casual remarks and concealed implications."¹³ In Māwardī's subtle suggestions, we can find in germ most of the lines of thought later developed by his main successors in Sunni *fiqh* constitutional writing—most importantly, Juwaynī, Ghazālī, Ibn Jamā'a, and Ibn Taymiyyah.

What was the pre-existing material from which Māwardī drew? Works of *kalām* had already laid out the principles—with recognized differences of opinion—for justifying the institution of the Sunni imamate. As for *fiqh* itself, scholars had long before produced sets of rules for those few areas, chiefly taxation and criminal law, where *sharī'ah* sources contain specific commands addressed to the state. (*Kitāb al-kharāj* by Abū Yūsuf (d. 182/798) is an earlier *fiqh* scholar's catalog of the latter type of rules, which he confidently calls on the caliph to obey.) Lastly, Māwardī, like his predecessors in the fields of *kalām* and *adab*, drew extensive precedents (often implicitly) from the record of past caliphal and administrative constitutional and legal practices and events, even from times of the Umayyads. Yet, all this voluminous material taken together falls far short of anything like the ordered, comprehensive *fiqh* constitutional system that Māwardī set out to create. Therefore, even when Māwardī appears only to be reciting old material, we need to be alert to how he selects among, structures, defines, differentiates, prioritizes, and legitimates past rules and precedents to construct something new, to serve his new and distinct purposes.¹⁴

¹³ Gibb, "Mawardi's Theory," 155.

¹⁴ A full analysis of Māwardī's *fiqh* sources and method, implicit and explicit, would be difficult, and is hardly attempted here. When citing past state practices, he often adds

SOME OF MĀWARDĪ'S STRATEGIES

In this paper I propose, as a start toward a complete re-reading of *al-Aḥkām al-sulṭāniyyah*, to sketch out several of the methods or strategies that Māwardī deploys in his effort to launch a *fiqh* constitutional system. I discuss four strategies, which can be briefly stated as follows:

1. Māwardī's exaggerated *idealizations* of the prerequisites for *de jure* ruling authority
2. these always coupled with his provision, by various techniques or avenues, for a carefully managed and multiply conditioned legal efficacy in actually prevailing conditions. Māwardī presents these techniques or avenues as distasteful, regrettable *concessionary retreats* from the ideal, justifiable only because of the compulsion of contingent facts.

These two aspects of Māwardī's treatment have often been referred to by commentators, but I think not from the point of view I take on them. The remaining two strategies I have not seen discussed:

3. In his definitions and regulation of government functions Māwardī insinuates various *distinctions* that subtly narrow and constrain those functions
4. and he takes existing legal conceptions, such as *ijtihād*, and fortifies them to serve as *bulwarks* protecting scholars and the civil sphere generally from the powers of government.

It deserves emphasis at the outset that these strategies are deployed for *both* of the crucial purposes of a constitution—to *legitimize* government but also to *constrain* it. (As we recall, in Gibb's view Māwardī sought the first purpose at the expense of wholly failing at the second.) To achieve constraint Māwardī seeks, first and foremost, to defend and extend, as against the ruler and his government, the authority of scholars and their *ijtihād*; and second, to carve out zones of autonomy in the private sphere,

that these were supported by scholars of their time. For example, he cites the Umayyad caliph Sulaymān bin 'Abd al-Malik who "if [he] is not a proof, then the acknowledgement of the *'ulamā'* among the Successors who did not fear any censure in matters of truth is a proof" (*Al-Aḥkām* 1978, 13); and "the most competent holders of *mazālim* jurisdiction and scholars" (*ibid.*, 86, 87). Hurvitz, "Competing Texts," compares the *fiqh* methodologies of Māwardī and Abū Ya'lá.

zones free from government intrusion, not only in the ruler's name, but also by scholars officially enforcing *fiqh*.

As we progress through this list of strategies, we will often observe a revealing trait of Māwardī's writing. Typically, his style is frank and clear. But in places—typically when dealing with sensitive issues in the scholars' struggle against the state—he employs innuendo, ambiguity, and indirection. For me, this phenomenon helps establish that Māwardī was pursuing certain specific goals, that he did so with full awareness and intent, and that the points he makes in this manner were sensitive, and in contest, in the legal and constitutional setting of his time.

FIRST AND SECOND STRATEGIES: (I) IDEALIZING RULE, WHILE
(II) PROVIDING EFFICACIOUS CONCESSIONS SUPPLANTING THAT IDEAL

Some writers have faulted *al-Aḥkām al-sultāniyyah* for its unrealism, its total divorce from reality, while, in total contrast, Gibb and most scholars after him decry its excessive pragmatism, its craven concessions to unlawful conditions.¹⁵ In my view, both these characterizations are true—and in their juxtaposition lies the key to discerning how Māwardī and other scholars shaped the theory of the caliphate to give advantage to the scholars in their vital competition with the ruler over legitimacy.

I trace out the logic of the scholarly position as follows.¹⁶ To start with, at their stage of Islamic history, scholars perhaps could think of no form of rule other than a monarchical one. Yet, even if an alternative were available, it would not serve their interests as well as monarchy. Given the scholars' vision of *sharī'ah* as textual knowledge addressed to conscience, *sharī'ah* could best control ultimate worldly power not by sanctioning impersonal political institutions, since these would compete with scholars and their textual expertise, but rather by emphasizing its claims on the consciences of individuals. As for the form of monarchy termed the caliphate, not only had it long ago become canonical for the mainstream, to-be-Sunni groups, but also by Māwardī's time it needed urgent defense against Shi'ī competitors. So, while the scholars were certainly compelled to legitimate the caliphate, if they could do so in such a way as to render its legitimacy ever more dependent on them, such a course of action would serve their various objectives perfectly.

¹⁵ See Little, "New Look," 1–6 (contrasting views of von Grunebaum, Kerr, Gardet, and Sourdel with those of Gibb, Rosenthal, Laoust, and Cahen).

¹⁶ I have argued this previously, in Vogel, *Islamic Law*, 191–96.

If we assume this was the goal of scholars around the time of Māwardī, note how well this goal would be served by a plan having the following four elements: (1) proving that the caliphate, in its every historical up and down through to Māwardī's time, was legitimate, but this time using *fiqh* doctrine, criteria, and method; (2) subtly raising beyond practical reach the prerequisites for appointment and performance that caliphs are required to meet to be legitimate; (3) compensating for the resulting disqualification of all actual caliphs by making the choosing of caliphs both easy and unassailable while obscuring, even obstructing, any practical means actually to remove them from office when unqualified;¹⁷ and (4) suggesting ways that in practice caliphs' actual deficiencies (and those of their subordinates) could be remedied by one or another specific concession from or alternative to the ideal requirements, these concessions and alternatives to be governed by *fiqh* and controlled by the scholars. But, again, in order to preserve the ideal of the caliphate while at the same time preventing it from ever again competing for legitimacy with the *sharī'ah* and scholars, it is essential that these concessions from the ideal be presented not as proper doctrine or as permanent states of affairs, but only as woeful, regrettable, crude, yet unavoidable concessions forced by contingent circumstance.

This logic seems to me to match exactly what Māwardī performs in his book. As for idealization, one can mention two prominent instances.

As to the first, Māwardī emphatically makes knowledge sufficient to perform scholarly *ijtihād* one of the prerequisites for appointment as caliph: he demands that a caliph possess "knowledge leading to *ijtihād* both in novel cases (*nawāzil*) and legal rules (or judgments, *aḥkām*)."¹⁸ This qualification is needed, he explains, because one of the caliphs' ten functions is "execution of judgments between disputants and terminating the controversy between litigants."¹⁹ The chief delegates of the caliph in executive power—the vizier and governor—must also, if they are to enjoy full delegated powers, be qualified to perform *ijtihād*: they must possess "the traits of *mujtahids*" (*ṣifāt al-mujtahidīn*).²⁰ At the time when Māwardī was writing, scholars had begun to see *ijtihād* capacity as a high attainment even for scholars, though they continued to insist on it as a prereq-

¹⁷ Persuasive here is the extraordinarily uniform silence of the scholars, remarked on by all moderns who analyze their works, as to the question, inevitably arising, of how practically, by what means, the subjects of an imām may disqualify and then remove from office an imām who fails of the conditions for rule.

¹⁸ Māwardī, *al-Aḥkām* 1978, 6.

¹⁹ *Ibid.*, 15. See discussion at n. 55 below further examining this statement.

²⁰ Māwardī, *al-Aḥkām* 1978, 22, 33.

quisite for serving as judge or mufti.²¹ In any event, the knowledge and skill which by Māwardī's time was requisite for scholarly *ijtihād* would rarely be found in any individual who was at the same time interested in, and capable of, attaining, exercising, and holding the highest political office.²²

As a second form of idealization, Māwardī insists (against the competing view of Baghdādī) that there can be only a single caliph for the entire *ummah*. Perhaps to underline its idealism, Māwardī devotes much space to various improbable means for choosing between competing claimants, these including the casting of lots.²³ Similarly, he discusses at length the fanciful case of whether a person uniquely qualified to be caliph needs actual appointment or simply succeeds to the office.²⁴ Interestingly, Māwardī indulges in little idealizing when it comes to the usual processes

²¹ See Wael Hallaq, in *History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1992), 143–46. Hallaq states that until just about the time of Māwardī's death all scholars agreed that a mufti must be a *mujtahid*, seemingly considering this achievable in practice. But, soon after, the practice spread of muftis serving who restricted themselves to a single legal school (*madhhab*), and thus fell short of ideal *ijtihād*. *Ibid.*, 144–6. Much depends in this matter on nuances in how the term "*mujtahid*" was and is being used, as evidenced when Ibn al-Ṣalāh, claiming to analyze past practice, articulated the powerful idea of a hierarchy of levels of *ijtihād* (and of *taqlīd*, the abandonment of personal *ijtihād* to follow others). Ibn al-Ṣalāh, *Adab*. See Calder, "Al-Nawawī." As I mention in the Conclusion, the issue of *ijtihād* claims, particularly as a prerequisite, realized and not, for office as *qāḍī* and mufti, needs fresh analysis as a constitutional and legal systemic issue. See discussion at n. 74 below for Māwardī's subtle treatment of it.

²² Māwardī seems here to demand that the caliph be qualified to practice *ijtihād* in the manner of a *faqīh*. He makes, neither here nor elsewhere, any gesture toward any of the various other forms of authoritative law-making that, many documents indicate, were practiced by earlier caliphs, Abbasid, Umayyad, and Rashidun. See, e.g., Crone & Hinds, *God's Caliph*; Zaman, *Religion and Politics*, Chapter 3, esp. pp. 101–106. Zaman argues that in early Abbasid times the ruler was understood, both by himself and the *'ulamā'*, to possess some special role in purely legal decisions, seemingly whether or not he possessed exactly the qualifications of a scholar. But I wonder whether such mutual recognition is but a necessary intermediate stage on the transition to Māwardī—the stage where the ruler concedes that a textualist, scholarly *ijtihād* generating *sharī'ah* laws now subordinates his former independent authority, though he still expects scholars to solicit, participate in, and yield to his decisions, and where, in an effort to articulate this new situation, his authority is verbally associated with scholarly *ijtihād*. As Zaman says, this association of the ruler with *ijtihād* "signified the assertion of a public commitment to those fundamental sources of authority on which the *'ulamā'*'s expertise, and a slowly evolving Sunnism, were based." *Ibid.*, 105. In contrast, by defining the ruler's *'ilm* in the same terms as used for a scholar, and by pointedly linking it now to judicial (at best), not semi-legislative, functions, Māwardī seems to be quietly, implicitly, declaring any uniquely caliphal role in deciding *fiqh* issues to be now unattainable and obsolete. Related are his suggestions that "*ijtihād*" may sometimes mean merely exerting non-scholarly good judgment (see discussion at nn. 67–71 below) and that the ruler merely executes the *ijtihād* of others (see discussion at nn. 55–60 below).

²³ Māwardī, *al-Aḥkām* 1978, 8.

²⁴ *Ibid.* This discussion is also inspired by a competing Shī'ī tenet.

for selecting a caliph, which indeed he makes easy in various ways, such as by allowing for election by a single elector or designation by the existing caliph.²⁵ As to the consequences to follow when a caliph once elected subsequently falls short of the qualifications of office, Māwardī contents himself with remarking that a caliph deserves obedience or support “as long as his condition does not change”; and, if his condition does change, he “departs” or “is disqualified” from the caliphate.²⁶

As for setting in place legally efficacious, but much to be regretted, concessions from ideals, these are necessitated by circumstances and managed by the scholars; the clearest example is that of Māwardī’s governate by seizure (*imārat al-istilā*).²⁷ This addresses the situation, common in Māwardī’s time, in which power in a province is seized by force.²⁸ Māwardī dares not only to acknowledge and regularize such a situation but also to endow such a usurping governor with powers—*de jure* not only *de facto*—even greater than those of a regularly appointed governor. The magic by which he can do this is the permission (*idhn*) of the caliph, by which the essential principles of religion and law are preserved (*ḥifẓ al-qawānīn al-sharʿiyyah wa-ḥirāsāt al-aḥkām al-dīniyyah*), particularly the legality of the institutions of government and *sharīʿah* judgments (*an takun al-wilāyāt al-dīniyyah jāʿizah wa-l-aḥkām wa-l-aqḍiyah fihā nāfidhah*). This outcome attains *de jure* legitimacy (*ṣiḥḥah*) only thanks to “the distinction between conditions that apply when the proper course is possible and those that apply when it is impossible.”²⁹ Māwardī states that if the usurping governor does not meet the qualifications of office the caliph can simply accept him in hopes of his obedience, or—here he offers a significant and no doubt preferable alternative—the caliph could make the governor’s “power of action in *aḥkām* (judgments or rulings) and *ḥuqūq* (legal rights) . . . conditional on the appointment of a deputy to him” who fulfills all the qualifications for appointment the governor lacks. Since the governor with virtual certainty would lack at least the

²⁵ Ibid., 7, 10.

²⁶ Ibid., 17 (*kharaj* or *khurrij*?). For other scholars’ views on disqualification of a caliph and as to their silence on how he can be removed, see, e.g., Crone, *God’s Law*, 228–232.

²⁷ Māwardī, *al-Aḥkām* 1978, 33–34.

²⁸ Here Māwardī addresses the basic question—the problem of force overruling the claims of the legitimate caliph—relatively low in the hierarchy of government. He also discusses at length the issue of confinement or capture of the caliph. These are the two levels where the issue was pressingly raised in his time. Later scholars would address similar irregularities at the levels of the ultimate sultan (Ghazzālī) and the office of caliph itself (Ibn Jamāʿah).

²⁹ *Li-wuqūʿ al-farq bayn shurūṭ al-mukna wa-l-ʿajz*. Māwardī, *al-Aḥkām* 1978, 33.

qualification of *ijtihād*, the only subordinate who could meet his deficiencies would be a *faqīh*.

As a second example combining idealization with a concessionary but otherwise advantageous alternative, Māwardī addresses situations applying when an appointee for either vizier, governor, or *wālī al-mazālim* (chief of a tribunal to hear grievances) lacks the qualification for *ijtihād*. For such situations Māwardī lays out in detail the powers that might still be exercised by such a deficient official (giving two of these offices special titles: “vizier of execution” and “limited governor”). To take the “limited” governor as our example, it is a function that specifically does not require the qualification of *ijtihād*. Whether or not an actual governor is in fact a *mujtahid*,³⁰ if he is appointed as a “limited governor” he is forbidden from involving himself either in adjudication “and *aḥkām*”;³¹ or in criminal trials if these involve the taking of evidence or a choice among *fiqh* views; or in *mazālim* cases unless they are ones where a judge has already ruled. If he faces cases that do require the attention of a judge, he must refer them to either a local judge, a judge nearby, or in default of these, the caliph himself, seeking his command.³² Note how, by his creation of this governmental function, as fertile in its implications as the governate by seizure, Māwardī indirectly and subtly makes a number of far-reaching points even about the imam himself. One is that if the imam or his delegate lacks—as would nearly always be the case—the qualification of *ijtihād*, he should never involve himself with matters of adjudication, even in criminal matters. Nor should he hear contested *mazālim* cases. He must instead rely on judges, who by definition possess *ijtihād*, if he is to legitimately exercise his powers. (So, if his governor were to approach him for a ruling according to Māwardī’s instructions to governors just mentioned, the caliph would himself be obliged to consult judges.) Here we have the germ of the idea, much exploited later by Ibn Taymiyyah, that the prerequisites for various functions of government may be met by the cooperation of those with complementary abilities.

THIRD STRATEGY: DISTINCTIONS

I suspect that one of the richest legacies of Māwardī’s book is its introduction of certain distinctions when defining various government

³⁰ If he does it would only be “an addition to [his] excellence.” *Ibid.*, 33.

³¹ *Ibid.*, 32–33.

³² *Ibid.*

functions—distinctions that insinuate certain restraints or limitations on those functions. Māwardī may have hoped that these distinctions would predetermine or at least influence these functions' later construction and use—and they have in fact. Here follows a list of the most striking of these.

The most potent distinction—generating a series of subordinate distinctions—is that between *siyāsah* or governance, an authority that Māwardī announces is “delegated” to the caliph,³³ on the one hand, and, on the other hand, the concepts of *‘ilm*, *ijtihād*, and “*aḥkām al-dīn*,” which I shall refer to collectively as *fiqh*. Modern scholars have portrayed Māwardī as deploying the largely Persian ideals of rulership, celebrated in mirrors for princes and other *adab* works, as a normative though “non-Islamic” or “extra-*sharī‘ah*” complement or addition to *sharī‘ah*. He does this, they say, because he well knew that *sharī‘ah* alone could not suffice as foundation for a constitutional system.³⁴ These Persian ideals describe the “king” as belonging to an order of creation above ordinary human beings, as the apotheosis of justice, as endowed with a degree of divine radiance and light, and the like.³⁵ In such a system of thought, “justice” (*‘adl* or *‘adāla*) serves as the ultimate justification and measure for rule. I myself cannot see in *al-Aḥkām al-sultāniyyah* that Māwardī follows anything like this method or approach. Rather, I hypothesize—but do not here properly prove—that in *al-Aḥkām al-sultāniyyah*, the first strictly *fiqh* work on governance, and even in his works prior to it,³⁶ Māwardī turns

³³ Ibid., 1. A similar note is struck in Māwardī's *Tashīl al-naẓar*, 97, 205, describing the ruler's authority as a “delegation” (*tafwīd*) of power to one who exercises *siyāsah* to the benefit of all.

³⁴ Mikhail, *Politics*, 18, 25–26, 29–33, 46. Mikhail's declaring *siyāsah*, reason, and justice “extralegal” or “extra religious” actually runs contrary to much else that he observes and reports about Māwardī, since he represents Māwardī (like Ibn Taymiyyah later) as holding that *fiqh* and reason overlap (xxxii) and *sharī‘ah* and *siyāsah* are harmonious (22, 47). Gibb and Lambton declare that the unresolved contradiction between these two separate criteria weakened the Islamic constitutional system in opposing despotism. Gibb, “Constitutional Organization,” 15–16, 26–27; Lambton, *State*, 126, 309, 315. Crone describes the powers of rulers under the evolved Islamic constitutional system as a circle no longer within *sharī‘ah* but supporting it. *God's Rule*, 396–397.

³⁵ See Crone, *God's Rule*, 148–164; Lambton, “Islamic Mirrors.”

³⁶ Indeed, I don't see him doing it in his other works that employ the *adab* style and address the prince. According to Riḍwān al-Sayyid, these works include, in order of composition, *Adab al-dunyā wa'l-dīn*, *Naṣīhat al-mulūk*, *Qawānīn al-wizārah*, *Tashīl al-naẓar* and lastly *al-Aḥkām al-sultāniyyah*, Māwardī, *Tashīl*, 82. Despite al-Sayyid's viewing *Naṣīhat al-mulūk* as authentic in his edition of *Tashīl*, Fuḥād ‘Abd al-Mun‘im Aḥmad, on editing *Naṣīhat al-mulūk* a year later, argued convincingly that it is not of Māwardī's authorship. Pseudo-Māwardī, *Naṣīha*, 5–33. Crone, *God's Rule*, 439 agrees.

decisively away from notions such as *ʿadl*—given that these are capable of aggrandizing rulers and justifying their rule independently of *fiqh* and even of *sharīʿah*—and chooses instead to build his system on the much more prosaic and merely descriptive notion of *siyāsah*, meaning the art of governing. Moreover, I find nothing in Māwardī or in the main authors on *aḥkām sultāniyyah* and *siyāsah sharʿiyyah* after him that relegates *siyāsah* to extra-*sharīʿah* status.

For example, observe the subtle suggestions about the caliphate in some of the first few lines of *al-Aḥkām al-sultāniyya*:

[God] has appointed for the Community a leader as representative of the prophethood and as protector of the faith. He has delegated to him governance (*siyāsah*) so that administration issues from true religion and so that among views a single opinion becomes followed. The imāmate is the principle by which the precepts of the faith become stable and utilities (*maṣāliḥ*) become well-ordered, so that, by them, public affairs become sound.³⁷

In my view, Māwardī's shift to using simple *siyāsah* rather than the more substantive *ʿadl* (or, for example, divine radiance) to discuss the ruler's functions is merely another instance (albeit a fundamental one) of his asserting a principle by which *fiqh* can describe, authorize, and regulate the actual functions of rulers while at the same time undermining or diminishing their claims to a religious-political legitimacy independent of the influence of scholars.

Here we need to digress to discuss another presupposition long pervading modern accounts of *fiqh* constitutional law, one that now is becoming obsolete. This is the assumption that, in matters of law and governance, *sharīʿah* is functionally equivalent to *fiqh*,³⁸ and that, as a result, all legal activities of the state that do not easily reduce to *fiqh* or its literal

If one looks closely at *Tashīl al-naẓar* and *Qawānīn al-wizārah* one finds little glorifying the sultan, *amīr* or *wazīr*. What there is is carefully tied back to *sharīʿah* and revelation. See, e.g., *Tashīl*, 97 (adhering to truth—not *ʿadl*—brings men glory, etc.). The art of these leaders is labeled *siyāsah*, and *ʿadl* (and *inṣāf*) is made subordinate to it, referred to as essential for successful *siyāsah* and enduring rule.

³⁷ Māwardī, *al-Aḥkām* 1978, 1. See also Māwardī, *Tashīl*, 97.

³⁸ In this discussion of whether *sharīʿah* is equivalent to *fiqh*, I am neither referring to nor overlooking the essential distinction between these terms preserved within scholarly *fiqh*, according to which *sharīʿah* is the perfect divine law to be found exclusively in the Qurʾān Sunnah rather than the question of whether *sharīʿah* in spheres of law and governance is conceived of as knowable and realizable *solely* through *fiqh*, i.e., through knowledge and interpretation of verbal revelations resulting in rules expressed in books, or *also* in its myriad enactments in the real world, where non-scholars make independent and essential contributions.

application are “outside” *sharī‘ah*. To take a particularly clear example, the ordinarily perceptive Hanna Mikhail declares resort to an “extra-*sharī‘ah*” criterion to be unavoidable in Islamic states because “government in accordance with the spirit of Islam could not be attained by mere application of the *sharī‘ah* within the limited jurisdiction of the *qāḍī*.”³⁹ But, if we stop to think about it, *fiqh* as applied in the courts of a *qāḍī* can only fall short in this way, and not because of a failing in either *fiqh* or *sharī‘ah*. To give a contemporary analogy, who would think that, however much it is revered, the French *Code Civil* as applied by French civil courts could alone generate and guarantee just and effective government in France?

That we can miss such a basic point only reveals the scholars’ success in achieving ideological dominance for *fiqh*: we see *sharī‘ah* itself through the lens of their success. For example, whenever modern scholars discuss the various bodies by which the state exercised law and order other than the *qāḍī* court, they unanimously (in my observation so far) declare them “extra-*sharī‘ah*.” What is odd is that they can insist on this appellation even in the face of the contrary explicit testimony of the foundational medieval texts through which we understand these bodies.⁴⁰ We have managed to ignore the point, axiomatic in every work of *siyāsah shar‘īyyah* or *aḥkām sultāniyyah*,⁴¹ that if *sharī‘ah* is to be applied by government, then, under the mantle of *sharī‘ah*, at least two principles for the application of laws must persist, intrinsically complementary though often in tension: scholarly *fiqh* and governance by the ruler. In what I have been able to observe, medieval scholars, whatever their rhetorical excesses here and there, did not labor under such a misapprehension.

This quite basic misunderstanding of the role of the state under *sharī‘ah* has unfortunately dovetailed with another, with far-reaching consequences. To return to Gibb as an example, note how, as in a passage quoted toward the beginning of this article,⁴² Gibb assumed not only that “the Law” was essentially *fiqh*, but that it would be the state that would enforce “the Law,” if at all. There are two fundamental problems with this perspective:

³⁹ Mikhail, *Politics*, 30. Similarly, he says that a tension between ideal and reality is inherent in Islamic political thought because “government fell largely outside the province of the *sharī‘ah* as administered by Muslim judges.” *Ibid.*, 46.

⁴⁰ See, as to Māwardī, Tyan at n. 61 below. As to Ibn Khaldūn, everyone seems to ignore how he describes the *shurṭah* or police function as “another religious function that was among the *sharī‘ah* functions” of earlier dynasties. Ibn Khaldūn, *al-Muqaddimah*, 222.

⁴¹ *Al-Aḥkām al-sultāniyyah* offers many instances where Māwardī holds that results conform to *sharī‘ah* though they offend *fiqh* and *fuqahā’*. For a particularly clear example, see n. 54 below.

⁴² At n. 4 above.

first, it ignores how *fiqh*'s application concerned predominantly private and civil legal matters mostly evading state interference, and, second, it ignores how the form of law most relevant in spheres of state power was not *fiqh* but *siyāsah*—which, once again, scholars have declared “extra-*sharī'ah*.” Moderns assessing past Muslim states' actual records in “applying *sharī'ah*” were inevitably, therefore, doubly disappointed (i.e., they looked for *fiqh* application where it was not, and failed to look for it where it was). Next, in looking for whom to blame for this apparent near-total “failure” to apply *sharī'ah*, they came up with equally harmful explanations: either the state had become godless or tyrannical, the *sharī'ah* had become excessively idealistic or impractical, or the scholars had too readily made concessions to powerful rulers—or all three. Seeing the state of affairs this way, these moderns also tended to over-read, and derive too much confirmation, from any complaints by ‘*ulamā*’ they came across that aligned with these explanations. One still hears the echoes of this triple condemnation in every treatment of *fiqh* constitutional law. But thankfully, today, as historians produce more contextualized accounts of *sharī'ah*'s past real-world applications, we gain better understanding of how the state pursued its *siyāsah sharī'yyah* functions, how *fiqh* and its scholars achieved broad *sharī'ah* implementation for civil and private law within and without the state, and, most importantly, how these spheres interacted, overlapped, and blended, in intricate symbiosis.⁴³

Returning to Māwardī and his fertile distinction between *fiqh* and *siyāsah*, both under the umbrella of *sharī'ah*, let us explore three sub-distinctions that he unfolds from it. The first of these is the distinction between the expertise of those who exercise *siyāsah* and that of those who exercise ‘*ilm*. To exercise *siyāsah*, Māwardī everywhere assumes, no ‘*ilm* is required. Thus, when a governor seizes his office, he no doubt asserts independence in “*al-siyāsah wa'l-tadbīr* (administration or management),” but the execution (*tanfīdh*) of “the legal rulings of religion” (*aḥkām al-dīn*) remains outside his power.⁴⁴ This latter function enters the picture only with the caliph's “*idhn*,” permission or license, extending concessionary

⁴³ An utterly vital third constituent of this picture, which I neglect here for obvious considerations of scope, is custom (‘*ādah*, ‘*urf*). Without further understanding of custom's interactions with *sharī'ah* (*fiqh* and *siyāsah*) at various levels of its implementation, a realistic picture of life and law under *sharī'ah* will always escape us. Again we lack insightful treatments of the doctrinal and institutional strategies that ‘*ulamā*’ and *fiqh* developed in struggling, in cooperation and competition, with this third ideological and normative force, as potent as the state.

⁴⁴ Māwardī, *al-Aḥkām* 1978, 33.

legitimacy to the governor.⁴⁵ Similarly, a governor who is only “limited,” even though he lacks *‘ilm* and therefore cannot concern himself with “*al-qaḍā’*” (adjudication) and “*al-aḥkām*”, still may undertake “*siyāsah al-ra‘īyah*.”⁴⁶ A governor exercising criminal jurisdiction has certain powers (such as of intimidation and hearing unusual types of evidence) that a judge does not have. This differentiation arises “because of the specialization of the governor in *siyāsah*, and of the judge in *aḥkām*.”⁴⁷

As the second sub-distinction, *maṣāliḥ*, meaning utility or public welfare, is declared a specialization of *siyāsah*, not *fiqh*. Concern for *maṣāliḥ* is a duty of officers insofar as they perform roles associated with *siyāsah*, not roles associated with *ijtihād* or *‘ilm*. Thus, because both the *wālī al-maḥālīm*⁴⁸ and *muḥtasib*⁴⁹ properly “concern themselves with the means of achieving *maṣāliḥ*,” they have powers—denied to ordinary judges who practice only *‘ilm*—to use various methods in dealing with infractions of *sharī‘ah*. Similarly, the limited governor enjoys privileges denied to the *qāḍī* because the governor enters into

the principles (*qawānīn*) of *siyāsah* and the requirements of preserving and defending the religious community, and because the pursuit of *maṣāliḥ* is confided to governors, who are delegated the responsibility to seek it, in distinction to judges, who are charged with the determination of disputes between litigants.⁵⁰

This last passage is a relatively complete description of the innate complementarity—in all of legal product, purpose and method—between *siyāsah* and *fiqh*, toward the end of upholding *sharī‘ah*.

The third sub-distinction in this *siyāsah* series arises between what is obligated by the law and what the law chooses simply to permit. Māwardī puts this distinction to use in allowing the *wālī al-maḥālīm*, associated as he is with *siyāsah*, to impose on parties outcomes that are not obligatory (*al-wājib*) but are merely allowed or condoned by the law (*al-jā‘iz*).⁵¹ Of course, “*maḥālīm* jurisdiction cannot make lawful what the *aḥkām* of the *sharī‘ah* prohibit,” as Māwardī duly notes in the midst of a discussion of

⁴⁵ Ibid.

⁴⁶ I.e., governance of the people. Ibid., 32.

⁴⁷ Ibid., 221.

⁴⁸ Ibid., 91, 242.

⁴⁹ Ibid., 242. See discussion of the *muḥtasib* below at nn. 75–77.

⁵⁰ Ibid., 32.

⁵¹ Ibid., 83, 85, 91 (procedure), 93 (judgment).

handwriting evidence.⁵² Thus introduced in germ is the distinction, central to the *siyāsah sharʿiyyah* theories propounded several centuries later, between legislation through *fiqh*—which can enact only what *sharīʿah* entails—and legislation through *siyāsah*—which may enact anything that *sharīʿah* does not fundamentally *prohibit*. Māwardī uses this distinction fruitfully in procedural law, distinguishing between the strict procedures and forms of proof (*bayyinah*) characteristic of *qāḍīs* and judges, on the one hand, and, on the other hand, use of circumstantial evidence (*shawāhid al-ḥāl*) and intimidation (*irhāb*) by adjudicators enjoying expanded *siyāsah* powers.⁵³ The use of “beating” to encourage confessions affords a particularly powerful example:

It is permitted to the governor [but not to the *qāḍī*] in cases where the suspicion is strong, that he beat the accused in the [less painful] manner of *taʿzīr* (punishment as determined by discretion of the ruler), not the manner of *ḥadd* (one of the punishments fixed by texts of the Qurʾān and Sunnah), to compel him to be truthful about his state concerning that which he is arraigned for and accused of. If he confesses while being beaten, the reason for his being beaten is considered. If he is beaten to confess, then his confession under beating has no legal significance. If he is beaten to confirm his state, and he confesses under beating, his beating is ended and the repetition of his confession is sought. If he repeats it, he is held to the second confession, not the first. If he limits himself to the first confession and does not repeat it, [the governor] is not prevented from acting in accordance with the first confession—even if we disapprove of it.⁵⁴

Note this striking divergence between what Māwardī allows when writing constitutional *fiqh*, the *fiqh* of “*aḥkām sultāniyyah*,” and what “we,” presumably the *fuqahāʾ*, approve or disapprove of. Here we see a medieval scholar acknowledging the lack of congruence between the law “of the books” in Bernard Weiss’s phrase and the demands of *sharīʿah* governance—while at the same time not suggesting that the latter falls outside *sharīʿah*. Māwardī concedes to the ruling institution the exercise of powers of discretion falling outside routine *fiqh* methods and criteria, while at the same time he insists that that discretion must still comply with higher level, broader *sharīʿah* bounds which he as a scholar attempts to state; in other words, his ruling traces out the test of constitutionality

⁵² *Ibid.*, 86.

⁵³ For a complete analysis of Māwardī’s views in relation to a single legal and constitutional issue (the issue of search and seizure of evidence and its exclusion from trial), see Reza, “Islam’s Fourth,” 744–750.

⁵⁴ Māwardī, *al-Aḥkām* 1978, 219–21.

later made explicit in the theory of *siyāsah shar‘īyyah*. For parallels in a modern legal system, we can look to the conflicts between the branches of the United States federal government, where contradiction and contest often happens at the margin, as different branches incongruently pursue the same constitutional values; only rarely will the Supreme Court be forced, or dare, to attempt a resolution through judgments resting on mere verbal rules of law.

Indeed, one can elicit from these three sub-distinctions—between *‘ilm*, *aḥkām*, and *al-wājib* on one side and *siyāsah*, *maṣāliḥ* and *al-jā‘iz* on the other side—all the elements of the later *siyāsah shar‘īyyah* theory. Implicit in all this is a specialization of the rulers with power, administration, and communal welfare and of the scholars with knowledge, law, and religious legitimacy. This clearly adumbrates a stark dualism that later, with Juwaynī, Ghazzālī, Ibn Jamā‘a, and Ibn Taymiyyah, becomes entirely explicit.

Another of Māwardī’s most fertile distinctions is that between *ijtihād*, associated with scholarship and *fiqh*, and *tanfīdh* (or *istifā’*), meaning “implementation” or “execution,” associated with rulership. At times Māwardī may be exploiting the ambiguity of “*tanfīdh*.” For example, as quoted above, one of the ten functions of the caliph himself is “the *tanfīdh* of *aḥkām* between disputants and the termination of lawsuits (*qaṭ‘ al-khiṣām*) between litigants.”⁵⁵ Does the first part of this phrase—exploiting the further ambiguity of “*aḥkām*” as either judgments or legal rules—mean “the carrying out, enforcement, of legal rules” in disputes, or does it mean merely “the execution of judgments” possibly issued by others? But in other instances *tanfīdh*, or the term *istifā’* also meaning “fulfillment,” “performance,” or “execution,” clearly refers strictly to enforcement, as of judgments already issued. The “vizier of execution” (*wazīr al-tanfīdh*) has power only to carry out the caliph’s orders or judgments; in particular, he cannot conduct judging or hear *maṣālim*, since “*al-‘ilm bi-al-aḥkām al-shar‘īyyah*” is “disregarded,” “not requisite,” for his position (not *yu‘tabar fīhi*, suggesting that it is disregarded whether or not it exists).⁵⁶ Similarly, as discussed above, the limited governor can neither judge nor hear *maṣālim* because the qualification of “*al-‘ilm wa-l-fiqh*” is similarly “disregarded” in his position;⁵⁷ yet he may look into the execution (*istifā’*) of

⁵⁵ Ibid., 15.

⁵⁶ Ibid., 25–7. That the qualification may exist but still be disregarded is made explicit for the limited governor. Ibid., 33.

⁵⁷ Ibid.

“matters in which judgments have been issued (*naḥadhat*) or which *qāḍīs* and judges have finalized.”⁵⁸ Clearly in this distinction between *ijtihād* and its enforcement is the germ of the idea of separating the adjudicative and legislative functions of government, both entrusted to the scholars, from the executive functions, entrusted to the ruler—to invoke the modern three-part separation of powers. Māwardī’s cultivation of the distinction in several unobjectionable areas (the restricted governor and the vizier of execution) allows him to insinuate ambiguity and nuance into much more telling contexts. For example, it seems logical and unavoidable that, since the caliph (and certain key delegates) are the point from which all further delegations of public functions (*wilāyāt*) including adjudication flow, they must naturally possess authority over adjudication and *aḥkām* and also possess the qualifications of a *mujtahid*. Māwardī duly acknowledges this logic, but when he does so his language insinuates nuance: thus, when he describes the vizier as “one who puts opinions into force and executes *ijtihād*” (*mumḍī al-ārā’ wa-munaffidh al-ijtihād*),⁵⁹ he is subtly suggesting that the vizier merely implements the *ijtihād* of someone else. Notably, I found only one, not very explicit, reference to adjudication in person by either a caliph, vizier or governor.⁶⁰

A third key distinction in Māwardī is between substance and procedure. In discussing two tribunals that adjudicate in the name of the sovereign using broadened powers arising from *siyāsah*, namely, the *mazālim* tribunal and any criminal jurisdiction operated by a governor or his officers, Māwardī acknowledges that such entities possess powers exceeding those of the *qāḍī* constrained by *fiqh*. But Māwardī attempts to confine any such widened powers solely to matters of procedure and not substance.

Crimes (*jarāḥim*) are things forbidden in the *sharī’ah* that God represses by a *ḥadd* or *ta’zīr*. These [crimes] possess upon suspicion the condition of presumed innocence, as required by religious governance (*al-siyāsah al-dīniyyah*).⁶¹ They possess upon their being proved and shown valid the state of requiring fulfillment (*al-istifā’*), as dictated by the laws of the *sharī’ah*.

⁵⁸ Ibid., 32.

⁵⁹ Ibid., 22.

⁶⁰ Ibid., 27: concerning a vizier, that he has the right of *mubāsharat al-ḥukm wa-l-naẓar fi l-mazālim*.

⁶¹ “[*Lī-al-jarāḥimi*] ‘*inda al-tuhmati ḥālu al-istibrāḥi taqṭaḍihi al-siyāsatu al-dīniyyah*.” Tyan, misled by his steady interpretation of *sharī’ah* and *siyāsah* as poles apart—“*le droit strict*” vs. “*l’arbitraire*”—and of the *qadi* and the *shurṭah* processes as equally foreign to each other, cannot understand this phrase, and translates it as “*l’instruction du procès devant la [shurṭah] est régie par les principes de la siyasa*.” Tyan, *Histoire*, 605.

As for their condition after suspicion and before their proof and validity, then the question of the jurisdiction of them is to be considered. . . . If the person possessed of jurisdiction before whom the accused is brought is a governor (*amīr*) or [an officer of the police or *shurṭah*],⁶² he has rights to use means of investigation and exoneration with regard to this accused which the *qāḍīs* and [other] judges do not have. There are nine areas in which the rules of the two jurisdictions differ. . . . These are the areas in which there occurs a difference in crimes between the jurisdiction of the governors and the *qāḍīs*, in the matter of exoneration, and before proof of the *ḥadd*. This is because of the specialization of the governor in policy (*siyāsah*) and of the judge in the legal rules (*aḥkām*). After the proof of the crimes, the state of the governors and the *qāḍīs* are equal with regard to carrying out (*iqāmah*) the *ḥadd* punishments.⁶³

Māwardī gives a similar list of the powers possessed by the *wālī al-maẓālim* that the *qāḍī* does not share. The first two of these are vague and broad, touching on matters discussed above:

First, the *nāẓir al-maẓālim* possesses veneration (*haybah*, dread) and forcefulness that *qāḍīs* do not have, to deter litigants from controverting and repudiating each other and to restrain wrongdoers from contesting and vying with each other.

Second, *maẓālim* jurisdiction leaves the constraint of obligation (*al-wujūb*) for the latitude of permissibility (*al-jawāz*), such that the *nāẓir* has broader range and wider say.⁶⁴

But the remaining eight are arguably entirely within the realm of investigation and procedure. Then at the end Māwardī announces:

These are the ten aspects in which occurs a difference between the exercise of the jurisdictions of *maẓālim* and of *qāḍīs* in disputes. Otherwise the two are equivalent.⁶⁵

By attempting to confine the expanded *siyāsah* powers in adjudication of the *wālī al-maẓālim* and the governor solely to issues of procedure, Māwardī is asserting that *fiqh* decides every issue of substantive criminal law. This is surely a reach on Māwardī's part, considering the wide lati-

⁶² Al-Māwardī does not use the term "*shurṭah*" but "*awl* [read as *wulāt*] *al-aḥdāth wa'l-ma'āwin*." Tyan explains these terms as very old alternative designations of officers of *shurṭah*. *Histoire*, 575.

⁶³ Māwardī, *al-Aḥkām* 1978, 219–21.

⁶⁴ *Ibid.*, 83.

⁶⁵ *Ibid.*, 85.

tude such courts enjoyed historically and in Māwardī's own time. Māwardī himself gives some examples that do not observe this distinction.⁶⁶

A last distinction seems perhaps to be an experiment, a trial balloon, that did not go far. This is a distinction between *ijtihād* in *fiqh*, which depends on *ilm* and issues in *fiqh* rulings (*aḥkām*), and *ijtihād* as to other matters. Māwardī mentions that, while the *muḥtasib* ordinarily does not exercise *ijtihād* in determining the rules he enforces, yet he routinely practices "ijtihād as to custom" (the example is as to determining whether various building installations in fact harm neighbors). This kind of *ijtihād* is carefully distinguished from the scholars' *ijtihād*:

The distinction between the two *ijtihāds* is that, as to *sharī'ah ijtihād* (*ijtihād sharī*) any normative instance (*aṣl*) it takes into account will have a ruling (*ḥukm*, legal-moral value) established by *sharī'ah*, while, as to *ijtihād* of custom, any normative instance it deals with will have its ruling established by custom.⁶⁷

Another instance of an *ijtihād* not strictly legal is that by which a caliph determines who would make the best candidate to succeed him.⁶⁸ Still another is *ijtihād* in *siyāsah* itself. Māwardī discusses how a vizier may temporarily increase the pay of the army for adventitious reasons—to do so being "among the rights of *siyāsah* entrusted to his *ijtihād*."⁶⁹ Māwardī never mixes up such uses of *ijtihād*, meaning painstaking and responsible exercise of judgment within a particular field, with scholarly *ijtihād* which he associates with making *sharī'ah* rulings and issuing court judgments. But again, after he has used the term "*ijtihād*" in these other clearly distinct contexts, Māwardī is able to insinuate nuance and ambiguity when he uses the term without further definition. This enables him to water down the force of ascriptions to the caliph, common enough in the past, of *ijtihād* for making laws.⁷⁰ For example, the caliph is enjoined to oversee the doings of his vizier, "in order to uphold what he does that is right

⁶⁶ Ibid., 93.

⁶⁷ Ibid., 258.

⁶⁸ Ibid., 10.

⁶⁹ Ibid., 31. Another example, relatively non-controversial in *fiqh* works, is ascribing to rulers' *ijtihād* the determination of the quantum of penalty in *ta'zīr* crimes and in criminal jurisdiction generally. (Interestingly, Māwardī avoids this choice of words in discussing the discretion in *ta'zīr* of "the one in charge," *walī al-amr*. Ibid., 236–239.) He mentions the "opinion (*ra'y*) of the *imām* and his *ijtihād*" as to fixing a period for imprisoning an accused for reasons of investigation and exoneration. Ibid., 220.

⁷⁰ See n. 22 above.

(*al-sawāb*) and correct what conflicts with it because the management (*tadbīr*) of the *umma* is entrusted to him and dependent on his *ijtihād*.⁷¹

FOURTH STRATEGY: BULWARKS

Under this heading I address how Māwardī takes existing legal conceptions or institutions and tries to fortify them into bulwarks against undue assertions of governmental powers. Many of his various approaches or strategies already mentioned could be said to fall under this heading. Here I shall discuss only two further examples.

The overwhelmingly most important institution that Māwardī seeks to fortify is *ijtihād* itself. As we have seen, Māwardī makes pervasive use of this notion in his attempts, first, to define and control governmental functions using *fiqh* conceptions and values; and second, to augment the role of scholars in legal determinations and legitimation. I will cite only a few more instances to demonstrate further how much Māwardī makes *ijtihād* the linchpin of his project.

To start with, one may note briefly three traits of Māwardī's discussion, all working to widen the sway of scholarly *ijtihād*. First, he makes *ijtihād* of a high degree a prerequisite for appointment to a very wide assortment of governmental offices, among them not only the caliph, vizier, governor, *qāḍī*, and *wālī al-maẓālim* but also the collectors of the taxes of *ṣadaqah* (i.e., *zakāt*), *kharāj*, and *fay*'. (Again, in most of these cases he also provides for lesser-justified, concessionary alternatives applying whenever the requirement of knowledge is not fully met).⁷² Second, he wholly omits to mention any powers in the ruler to make regulations or laws, even on such matters as taxation or administration, disregarding the historical fact that caliphs had always promulgated such laws. For Māwardī, seemingly, all laws must stem from, or be sanctioned solely by, *ijtihād* of the scholarly sort, certainly an overreaching given the historical record. Third, Māwardī similarly omits to mention the idea, which gained much currency later, that one holding public authority but who is not a *mujtahid* enjoys the power to select, from among various views endorsed by scholars, a single view suitable for implementation. Rather Māwardī

⁷¹ Māwardī, *al-Aḥkām* 1978, 24. Other distinctions that could be added are between the manifest and the hidden (*ẓāhir* and *bāṭin*) and the three-way distinction between the rights (*ḥuqūq*) of government (*salṭana*), of God, and of man.

⁷² Besides those discussed above, a collector of *ṣadaqāt* can also be restricted to executive status if lacking *ijtihād* capacity. *Ibid.*, 113.

consistently makes choice in matters of *ikhtilāf* or scholarly disagreement a matter requiring *fiqh ijtihād*. He does, however, often associate *siyāsah* officers with the role of making opinions binding, putting them into force (*mumḍī al-ārā'*).⁷³

Māwardī also works to surround scholarly *ijtihād* with constitutional protections. For example, as do all authors of *adab al-qāḍī* works outside the Ḥanafī school, Māwardī categorically makes *ijtihād* a prerequisite for appointment as a *qāḍī*. The closest he comes to compromising this stance is in the following fascinating passage, a particularly rich example of Māwardī's use of nuance and ambiguity:

Some legal scholars have prohibited one who belongs to a certain school to judge by any other, so that a Shāfi'ī is prohibited from judging by the view of Abū Ḥanīfah, and the Ḥanafī is prohibited from judging by the school of al-Shāfi'ī, if his *ijtihād* leads to [the latter holding]. This is because of the suspicion and partiality in cases and judgments attributable to such a practice. If he judges by a school from which he [is not allowed to] depart, this better prevents suspicion and is more agreeable to the litigants. Even though good policy (*siyāsah*) requires (*taqṭaḍī*) [this result], the rulings of the *sharī'ah* do not obligate it (*lā tujibuhu*), because *taqlīd* (to adopt the *ijtihād* of another) as to [these rulings] is prohibited, and *ijtihād* as to them is requisite (*mustaḥaqq*)... If the one appointing [i.e., the ruler] is a Ḥanafī or a Shāfi'ī, and imposes a condition upon the one he appoints as *qāḍī*, that [the latter] not judge except by the Shāfi'ī or Ḥanafī school, [the condition is void. The act of appointment is also void, depending on the manner in which the condition is worded].⁷⁴

One notes how Māwardī's language is far from forceful, delicately nuanced and ambiguous, when discussing a discipline imposed on judges by *fuqahā'* among themselves: "some legal scholars have prohibited..."; "good policy requires" this result, though *sharī'ah* "does not obligate" it. But his language shifts dramatically when enforcement by the ruler is considered ("If the one appointing..."), reverting to categorical rejection, and declaring that any such attempt by a ruler to control his *qāḍīs' ijtihād* is entirely void.

As one last bulwark against state power,⁷⁵ Māwardī again puts to work the notion of scholarly difference of opinion, *ikhtilāf*. Here he uses it to prevent the government from imposing a single view in a situation where

⁷³ See n. 59 above.

⁷⁴ Māwardī, *al-Aḥkām* 1978, 67–8.

⁷⁵ Another I do not discuss here is the rule against spying (*tajassus*) which is widely used in the *ḥisba* chapter to define a zone of public privacy. See Reza, "Islam's Fourth."

scholars have differed and thereby to create a zone of scholarly and private autonomy within the realm of *ikhtilāf*. The clearest instance of this is as to the function of ordering the good and forbidding the evil or *hisba*, assigned to the officer called the “*muhtasib*.” In various ways Māwardī strives to define the *muhtasib* function in such a way as to protect social freedoms and individual autonomy and privacy.⁷⁶ He writes:

Fuqahā' of the Shāfi'ī school have differed as to whether, as to matters which [the *muhtasib*] denounces (*yunkir*) but as to which fuqahā' have reached different conclusions, he is permitted to impose his own view and *ijtihād* on people. There are two views. One [permits him to do so, and also requires him to be a *mujtahid*]. The second view is that he has no [such right] nor may he lead them toward his own legal school. This is in order to make *ijtihād* permissible to all and in matters as to which difference exists. According to this view, it is permitted that the *muhtasib* not be from those capable of *ijtihād* if he is knowledgeable about things prohibited unanimously by scholars.⁷⁷

While Māwardī here expresses no preference among these views, he aligns himself with the latter position several times during his exposition on the *muhtasib*.⁷⁸

CONCLUSION

This has been an initial effort at a legal, not political or intellectual-historical, reading of Māwardī's landmark *al-Aḥkām al-sultāniyyah*. I believe even these preliminary findings prove my claims at the beginning: that yet another reading of Islamic constitutional works is needed; that by its use of nuance and ambiguity, *al-Aḥkām al-sultāniyyah* betrays Māwardī's conscious pursuit of a novel constitutional strategy; and that, in the subtle yet far-reaching distinctions and conceptions the book deploys, we can detect the outline of a bold new constitutional structure for an Islamic state. Many tasks remain for a full picture of *al-Aḥkām al-sultāniyyah* as a constitutional document, such as discovering any indications in Māwardī's earlier works (or in his professional life as jurist) of evolution

⁷⁶ See Vogel, “The Public.”

⁷⁷ Māwardī, *al-Aḥkām* 1978, 241.

⁷⁸ The collector of *ṣadaqāt* or *zakāt* is another instance where Māwardī forbids the ruler from enacting his own judgment overruling the *ijtihād* of his functionary in cases where there exists scholarly *ikhtilāf*. If the collector is capable of making his own choices and does so, neither the ruler nor the public can contradict his decision. *Ibid.*, 116.

in his constitutional thought; confirming the degree of originality in each of the various constitutional conceptions or tenets he deploys; observing how contemporaneous legal works use the various legal terms he puts to pivotal use; carefully tracing before and after Māwardī the legal uses of key terms like *siyāsah*, *ijtihād*, *‘adl*, and *sultān/salṭanah*; analyzing how each of his successors in constitutional writing borrowed from, rejected, amended, or evolved his model; and studying to what extent later practical works regulating working legal institutions (*qaḍā’*, *ḥisbah*, *shurṭah*, *mazālim*, etc.) made use of his conceptions. Then, to go beyond Māwardī’s work, the obvious larger task is to carry this sort of re-reading much further, to increase our knowledge of how *fuqahā’* in many other contexts may have pursued constitutional strategy between and behind the literal black and white of their texts as well as by initiatives in their own lives as powerful legal actors. A promising initial area for such a re-reading, of doctrine and practice, would be scholars’ complex management and manipulation of the issue of jurists’ qualifications for *ijtihād* and *taqlīd* in various degrees.

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