of *ijtihād* responded . . ." (p. 215). Now it is not entirely certain that Ibn Dā'ūd is the scholar arguing against *ijtihād* here, but we would expect him to hold this opinion, and few other scholars whose work was available to al-Qāḍī al-Nu'mān would have, except Dā'ūd himself. The chapter on the invalidity of *taqlīd* (pp. 29–43) also includes what are possibly additional references to the work of Ibn Dā'ūd. In this chapter, al-Qāḍī al-Nu'mān argues against two types of *taqlīd*: first, the acceptance of the opinions of the Companions as true and correct in general, and second, the adoption of the opinions of the great jurists of the past, such as Abū Ḥanīfah, al-Shāfi'ī, and Mālik. Concerning the first type of *taqlīd*, he mentions that while many Sunnis adopt this doctrine, some have opposed it and met with vehement criticism from the majority.

> We have mentioned above (the Sunnis') doctrine concerning following the opinions of the Companions and avoiding deviation therefrom to other opinions, and some Sunnis' refutation of them in their blind adoption (of these opinions). This is something which Sunni commoners consider a very grave transgression and, in their ignorance, see as equivalent to apostasy. This has led a certain Sunni (scholar) who rejects *taqlīd* not to give an explicit refutation in his rejection of their *taqlīd* of the Companions, and only to indicate this with hints and allusions. If they were only aware, (they would see) that in their *taqlīd* of those whom Mighty and Glorious God did not command us to follow is the greatest denouncement against them, but they are senseless boors. That which came before them and has attained great status in their hearts has taken the place of the Truth for them. (pp. 32–33)

It is quite likely that al-Qāḍī al-Nu'mān is referring here also to Ibn Dā'ūd. We know that Dā'ūd and Ibn Dā'ūd opposed the *taqlīd* of the Companions, the position evident here. It is also clear from the text that the thinker in question is a specific Sunni jurist who was opposed by the great majority of Sunnis. In another passage, al-Qāḍī al-Nu'mān is probably referring yet again to the same author:

> Everyone among the Sunnis who holds the invalidity of *taqlīd* adopts this [the opinion that al-Qāḍī al-Nu'mān has just explained], even though he did not voice it as explicitly, because of his fear of vituperation, directed at himself, of the ignorant masses, the common people, and the rabble. [Such authors avoid doing this] out of fear for themselves from the regimes we have mentioned above,[68] who, having sought out and attained the trappings of this world, relinquished the faith to

[68] This is a reference to the Umayyads and Abbasids.

> those who had relinquished mundane matters to them. They rejected faith and sought thereby to appease the common people. The faith became weak, legal rulings were changed, the ignorant mass multiplied, and the rabble became overbearing. (pp. 39–40)

Both these passages refer to a specific Sunni jurist or jurists who reject the acceptance of the uncorroborated opinions of the Companions as reliable indicators of God's law. The Sunni jurists in question adopt something akin to a Shiite position, critical of the Companions of the Prophet, but they refrain from voicing it in plain, explicit terms for fear of denunciation by the masses and despotic rulers. Rather, they resort to a type of *taqīyah*, using allusive terms to express their doctrine on this point. It seems quite likely that these passages refer to material included in Ibn Dā'ūd's work as well, material which would have appeared in a chapter devoted to the invalidity of *taqlīd*.

Citations in other works on jurisprudence may help provide a more complete picture of *al-Wuṣūl ilā ma'rifat al-uṣūl*, if we assume that most of the recorded opinions of Ibn Dā'ūd on the topics of jurisprudence derive, ultimately, from that work. In *al-Irshād al-ṣaghīr*, al-Bāqillānī reports as Ibn Dā'ūd's opinion the statement that it is impossible for the explanation of a general statement to be delayed if the general statement is intended to mean something particular.[69] Al-Bājī (d. 474/1071) writes, "Concerning a case where a Companion says, 'The Messenger of God commanded us to do such-and-such or prohibited us from doing such-and-such,' Abū Bakr b. Dā'ūd said: 'Whoever says that this should not be taken to indicate obligation until he transmits to us (the Prophet's) exact words (has voiced) a correct statement.'"[70] In another passage, he reports, "Dā'ūd and his son said, 'It is possible that worship may occur by it (legal analogy) according to reason, but the religious law did not permit it absolutely, and actually prohibits it.'"[71] These citations suggest that Ibn Dā'ūd's work included a discussion of Prophetic sunnah as opposed to the statements of Companions and a discussion of *'āmm* and *khāṣṣ*, that is, general and particular scriptural texts, or specifically *takhṣīṣ al-*

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[69] al-Bāqillānī, *al-Irshād*, 3:387.

[70] Abū al-Walīd al-Bājī, *Iḥkām al-fuṣūl fī aḥkām al-uṣūl*, ed. Abdel-Magid Turki (Beirut: Dār al-kutub al-'ilmīyah, 1980), 1:172.

[71] Al-Bājī, *Iḥkām al-fuṣūl*, 531.

ʿāmm, the particularization of an ostensibly general text, in addition to the topics cited by al-Qāḍī al-Nuʿmān. It is not surprising that such topics fail to appear in *Ikhtilāf uṣūl al-madhāhib*, for al-Qāḍī al-Nuʿmān is focusing on the individual "principles" adopted by Sunni jurists, and does not address the topics related to scriptural language normally discussed in *uṣūl al-fiqh* works, such as commands and prohibitions, general and particular texts, ambiguous and clarified texts, and abrogation. It seems safe to say that these topics failed to appear in al-Qāḍī al-Nuʿmān's work simply because they were not subject to controversy between him and his Sunni opponents in Qayrawan. Further investigation will undoubtedly add to our knowledge of *al-Wuṣūl*; the evidence thus far provides the following sketch of the work's contents:

1. Introduction.
2. Consensus.
3. The Invalidity of *Taqlīd*.
4. The Invalidity of Legal Analogy.
5. The Invalidity of *Istiḥsān*.
6. *Istidlāl*.
7. The Invalidity of *Ijtihād*.
8. General and Particular Scriptural Texts.
9. Prophetic Sunnah.

This sketch, despite its limitations, suggests that *al-Wuṣūl* was a comprehensive manual of jurisprudence.

The material attributed to Ibn Dā'ūd gives some indication that he was responding to or drawing on earlier works of jurisprudence and provides a picture, albeit limited, of the state of the genre when he wrote. In two of the passages, al-Qāḍī al-Nuʿmān reports that Ibn Dā'ūd is presenting the doctrine of his father Dā'ūd al-Ẓāhirī himself (pp. 101, 202). In addition, al-Qāḍī al-Nuʿmān writes "others said" at the beginning of passage I and "they said" four times in passages VIII and five times in passage IX, all of which are clearly attributed to Ibn Dā'ūd. The use of the plural pronoun probably indicates that Ibn Dā'ūd was relating here the opinion of his father and of the Ẓāhirīs in general rather than merely his own. This is particularly the case with passage IX, which al-Qāḍī al-Nuʿmān ends with the statement, "This is the speech of Muḥammad b. Dā'ūd al-Baghdādī, following the doctrine of his father and his (father's) disciples [i.e., the Ẓāhirīs] and their arguments against those who uphold *ijtihād*" (p. 202). At the end of passage VIII, al-Qāḍī al-Nuʿmān

sums up, "This and the like of it are inference. This is the fundamental principle on which they built their doctrine" (p. 187). Here, and throughout the chapter on *istidlāl*, "they" presumably refers to the Ẓāhirīs in general. As mentioned above, Dā'ūd, the founder of the Ẓāhirī school of law, may himself have written a work on *uṣūl al-fiqh*, now lost, and his son may have been citing or referring to it.

In another passage, Ibn Dā'ūd refutes an argument of al-Shāfi'ī concerning the use of *ijtihād* in determining the *qiblah*. This is certainly a reference to al-Shāfi'ī's *Risālah*, for in the *Risālah*, al-Shāfi'ī uses this example as one of his main arguments for the permissibility of *ijtihād*. With Q. 2:150, "From wherever you head out, turn your face toward the sacred mosque" as a basis, al-Shāfi'ī argues that when one cannot see the Ka'bah, one must estimate its direction. For al-Shāfi'ī, this process of estimation is not only a legitimate means of determining the *qiblah* in that situation but also a legitimate model for the practice of *ijtihād* in all other circumstances where estimation is required.[72] Ibn Dā'ūd argues against this position that al-Shāfi'ī expounded in the *Risālah*. In addition, his remarks on consensus in passage I, referring to obvious matters of general consensus, may be seen as well as a response to a passage in the *Risālah*. Al-Shāfi'ī distinguishes between two types of knowledge, one of which is plain and apparent to all, both laymen and scholars, and the other of which is only understood by scholars.[73] This seems to be the text behind later distinctions between two types of consensus, the consensus of scholars and laymen alike, and the consensus of scholars alone.[74] In these instances, Ibn Dā'ūd's text responds to specific passages in *al-Risālah*.

A passage cited by the famous Shāfi'ī jurist al-Juwaynī shows that Ibn Dā'ūd dealt quite directly with a key feature of al-Shāfi'ī's *Risālah*, probably also in *al-Wuṣūl ilā ma'rifat al-uṣūl*. Al-Juwaynī's work *al-Burhān fī uṣūl al-fiqh* is, to the best of my knowledge, the only extant manual of jurisprudence that attempts to reconcile the organization of al-Shāfi'ī's *Risālah* with that of the standard *uṣūl al-fiqh* genre. That he does this is not surprising, since he also wrote a commentary on

[72] Hallaq, *Islamic Legal Theories*, 22–23; Lowry, *The Legal-Theoretical Content of the Risāla*, 206–7; Muḥammad b. Idrīs al-Shāfi'ī, *al-Risālah*, ed. Aḥmad Muḥammad Shākir (Cairo: Dār al-turāth, 1979), 487–90.

[73] al-Shāfi'ī, *al-Risālah*, 357–60.

[74] al-Khaṭīb al-Baghdādī, *Kitāb al-faqīh wa'l-mutafaqqih*, 2 vols., ed. Ismā'īl al-Anṣārī (Beirut: Dār al-kutub al-'ilmīyah, 1980), 1:172.

the *Risālah* itself. The contents of the *Burhān* are divided into five large chapters or sections:

1. Discussion of *al-bayān*.
2. Section on Consensus.
3. Section on Legal Analogy.
4. Section on the Marshalling of Evidence (*kitāb al-istidlāl*).
5. Section on the Weighing of Conflicting Evidence (*kitāb al-tarjīḥ*).

The striking element in this scheme is the first chapter, which adopts a key term from al-Shāfiʿī's *Risālah*, *al-bayān*. At the beginning of this section, al-Juwaynī presents al-Shāfiʿī's main statement on *al-bayān*, which provided the basis for the organization of the *Risālah*. Here he describes five levels (*martabah*) of *bayān*, which we may understand to mean, roughly, "how the text indicates legal rulings". This term is used to set out a five-part hermeneutic scheme showing how the law derives from the Koran and hadith and how conflicting injunctions in those texts may be reconciled. This use of the term *bayān* seems odd from the perspective of later jurisprudence, where *bayān* and *mubayyan* refer to a priori ambiguous texts which have been explained or clarified. Al-Juwaynī, however, uses *bayān* as a rubric for his first chapter, which deals with the interpretation of scriptural language. He thus subsumes under one chapter the framework of al-Shāfiʿī's *Risālah*, equating the material it covers with the discussions of scriptural language, such as abrogation, general and particular texts, commands and prohibitions, clarified and ambiguous texts, that had become standard divisions within the *uṣūl al-fiqh* genre.

After presenting al-Shāfiʿī's scheme, al-Juwaynī then quotes a comment by Ibn Dā'ūd:

> Abū Bakr b. Dā'ūd al-Iṣfahānī said, "Al-Shāfiʿī—may God have mercy on him!—ignored, among these levels, consensus, which is one of the principle indicators of the Law. If someone were to justify this, stretching the argument, by claiming that consensus indicates (the Law) when it is based on a report, so that (al-Shāfiʿī) made do with mentioning hadith reports, then (one would counter): Should he not have mentioned consensus first, and thereby obviated the need to mention legal analogy, because legal analogy depends on consensus? Wouldn't it have been more fitting to mention consensus, since it is higher than [i.e., logically prior to] legal analogy? Then legal analogy would fall under the contents of consensus. This objection could not be refuted."[75]

[75] Imām al-Ḥaramayn al-Juwaynī, *al-Burhān fī uṣūl al-fiqh*, 2 vols., ed. Ṣalāḥ b. Muḥammad b. ʿUwayḍah (Beirut: Dār al-kutub al-ʿilmīyah, 1997), 1:40–41.

Ibn Dā'ūd criticizes al-Shāfi'ī here for not following what had become by his own time the standard method of presenting *uṣūl al-fiqh*. He expects al-Shāfi'ī's statement to present a list of the *uṣūl* or *adillah*, the indicators of the law. When consensus does not appear in what Ibn Dā'ūd assumes to be a list of the indicators of the law, he interprets this as an error or failing. Ibn Dā'ūd's comment shows that al-Shāfi'ī's work became part of the *uṣūl al-fiqh* tradition before the tenth century, earlier than Hallaq supposes. Of the ninth century, Hallaq writes "It is curious, to say the least, that what is assumed to be the *uṣūl* equivalent of Aristotle's *Organon* should be thoroughly ignored in a century that is considered one of the most dynamic phases in Islam's intellectual history".[76] There are a number of indications that this may not have been the case. It is worth remarking that al-Ṣayrafī not only wrote his own commentary on the *Risālah* but also countered an earlier refutation of the *Risālah* by a certain secretary, 'Ubayd Allāh b. Ṭālib.[77] In addition, the Imāmī Shiite and Mu'tazilī theologian Abū Sahl al-Nawbakhtī (d. 311/924) wrote a refutation of the *Risālah*.[78] In light of Ibn Dā'ūd's discussion, the claims that al-Shāfi'ī's *Risālah* was totally ignored and met with "oblivion" during this period seem unwarranted. In addition, by Ibn Dā'ūd's time, the conception of *uṣūl al-fiqh* as an ordered list of indicators of the law was already so ingrained that any departure from this organizing principle met with great resistance. Furthermore, Ibn Dā'ūd and, no doubt, his contemporaries conceived already of al-Shāfi'ī's *Risālah* as a work of *uṣūl al-fiqh*, though they at the same time fundamentally misunderstood, or at least rejected, its organizing principles.

Al-Qāḍī al-Nu'mān is, on the whole, impressed with Ibn Dā'ūd's reasoning, and seems gratified to find a Sunni text that refutes a number of the Sunnis' fundamental arguments about principles of jurisprudence. He writes, approvingly, "This speaker spoke the truth

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[76] Hallaq, "Shāfi'ī", 590.

[77] Ibn al-Nadīm, *Kitāb al-fihrist*, 267. The fact that no secretary by this name appears in the sources raises at least the possiblity that a copyist's error has occurred in the text. One is tempted to identify the author mentioned with a famous namesake from the period in question, 'Ubayd Allāh b. 'Abd Allāh b. Ṭāhir (d. 300/913), scion of the influential Ṭāhirid family who served as the governor of Baghdad and was known for his wide learning. See C. E. Bosworth, "The Ṭāhirids and Arabic Culture", *Journal of Semitic Studies* 14 (1969): 45–79, esp. pp. 71–77.

[78] Ibn al-Nadīm, *Kitāb al-fihrist*, 225; Wilferd Madelung, "Abū Sahl Nawbakhtī", *Encyclopaedia Iranica*.

and hit the mark in his statement and in presenting convincing proof against his opponent". (p. 152). Another laudatory comment reads, "We say to this speaker, 'You have debated your opponent excellently in what you have pointed out and indicated to him, regarding (the necessity of) abandoning legal analogy in God's Faith . . .'" (p. 154). At the end of a section arguing against legal analogy, he remarks, "This is some of the argument presented by a certain Sunni jurist who rejected legal analogy against those Sunnis who consider it valid. It contains excellent adduction of proof (*iḥtijāj ḥasan*)" (p. 175). Ibn Dāʾūd's dialectic skill in refuting his opponents' arguments, outstanding in this work, thus earns praise from al-Qāḍī al-Nuʿmān on several occasions. This corroborates what we are told in the biographical sources of Ibn Dāʾūd's impressive skill in disputation. The style of Ibn Dāʾūd's work differs radically from that found in al-Shāfiʿī's work and reflects the extensive incorporation of formal dialectic into the genre.

We are indebted to al-Qāḍī al-Nuʿmān for preserving so much of Ibn Dāʾūd's work primarily because their works shared so much in intent and conception. Both aimed to disprove or invalidate many of the methodological principles that the Sunni jurists had adopted as fundamental elements of their theories of legal interpretation. Because so much material related in *Ikhtilāf uṣūl al-madhāhib* derives from Ibn Dāʾūd's work, we may hazard a guess that the overall organization of the former owes a great deal to that of the latter. For this reason especially, it seems abundantly clear that Ibn Dāʾūd's work, like *Ikhtilāf uṣūl al-madhāhib*, presupposes an existing genre of *uṣūl al-fiqh*. That this is so has to do with the conservative nature of generic conventions in legal literature as in many other fields. We have already mentioned how the work of al-Qāḍī al-Nuʿmān, though critical of and written against the Sunni science of *uṣūl al-fiqh*, nevertheless reflects the structure of that science as formulated by Sunni jurists. It is only natural that refutations end up reflecting the structures of the works they criticize. Ibn Dāʾūd was arguing against works which upheld *qiyās, istiḥsān*, and *ijtihād* and contained separate chapters on *ijmāʿ, qiyās, istiḥsān*, and *ijtihād*, at the very least. If he were merely presenting his own legal methodology, there would be no need for chapters on legal analogy and *ijtihād*, but only consensus and *istidlāl*, in addition, one presumes, to chapters on various aspects of the language of the Koran and Sunnah. The same may be said for his father Dāʾūd's work on jurisprudence. Already when Dāʾūd,

al-Ṭabarī, and Ibn Dā'ūd wrote, *uṣūl al-fiqh* was a sophisticated science presented in comprehensive manuals. Who wrote these manuals and how far back the tradition goes is still unclear, though one may state with confidence that they originated before the late ninth century, probably even before 233/848, by which time al-Jāḥiẓ had completed *Kitāb uṣūl al-futyā wa'l-aḥkām.*

Extrapolation from the contents of these works will provide an idea of the structure of the genre to which our ninth-century authors were responding.

Contents of Dā'ūd's Putative Manual of Jurisprudence:

1. Consensus.
2. Invalidity of *Taqlīd.*
3. Invalidity of Legal Analogy.
4. Traditions Transmitted by Single Authorities.
5. Traditions which Provide Certainty.
6. Incontrovertible Proof.
7. Particular and General Scriptural Texts.
8. Clarified and Ambiguous Scriptural Texts.

Chapters of al-Ṭabarī's *al-Bayān ʿan uṣūl al-aḥkām*:

1. Consensus.
2. Traditions Transmitted by Single Authorities.
3. Traditions whose Chains of Authority do not Reach the Prophet.
4. Abrogating and Abrogated Texts on Legal Rulings.
5. Ambiguous and Clarified Traditions.
6. Commands and Prohibitions.
7. The Acts of the Messenger.
8. Particular and General Scriptural Texts.
9. *Ijtihād.*
10. The Invalidity of Juristic Preference (*istiḥsān*).[79]

Chapters of Ibn Dā'ūd's *al-Wuṣūl ilā maʿrifat al-uṣūl*:

1. Introduction.
2. Consensus.
3. Invalidity of *Taqlīd.*
4. Invalidity of Legal Analogy.
5. Invalidity of Juristic Preference.
6. Inference (*Istidlāl*).
7. Invalidity of *Ijtihād.*
8. Prophetic Sunnah.
9. General and Particular Scriptural Texts.

[79] Yāqūt, *Muʿjam al-udabā'*, 18:74.

Using these three reconstructed tables of contents as a guide and eliminating the chapters on *istidlāl* on the grounds that they are a well-known Ẓāhirī innovation, the approximate contents of the pre-existing *uṣūl al-fiqh* genre are as follows:

1. Consensus.
2. Legal Analogy.
3. Juristic Preference.
4. *Ijtihād.*
5. Prophetic Sunnah.
6. *Taqlīd* or Opinions of the Companions.
7. Abrogating and Abrogated Scriptural Texts.
8. General and Particular Scriptural Texts.
9. Ambiguous and Clarified Scriptural Texts.

The excerpts of *al-Wuṣūl ilā maʿrifat al-uṣūl* leave no doubt as to the original author's polemic concern with *qiyās, ijtihād,* and *istiḥsān* and the energy he expended in refuting the methods of his opponents. It was above all this aspect of his work that attracted al-Qāḍī al-Nuʿmān, who appreciated being able to cite clever Sunni arguments against the methods of the Sunnis themselves. While Ibn Dā'ūd was arguing against a developed science of jurisprudence, al-Qāḍī al-Nuʿmān's excerpts unfortunately do not preserve references to his opponents by name except, perhaps, in the case of al-Shāfiʿī. Yāqūt's citation shows that Ibn Dā'ūd criticized Muḥammad b. Jarīr al-Ṭabarī in particular. Another possible opponent behind the diatribe against legal analogy is the famous Ibn Surayj. We know that Ibn Dā'ūd debated Ibn Surayj on numerous occasions. Ibn Surayj wrote a treatise arguing against Ibn Dā'ūd on legal analogy, *Kitāb fī al-radd ʿalā Ibn Dā'ūd fī al-qiyās,* and another refutation dealing with points where Ibn Dā'ūd disagreed with al-Shāfiʿī. Al-Subkī apparently had access to both of these works in the fourteenth century and describes the latter as copious and valuable (*ḥāfil nafīs*).[80]

In Hallaq's view, *uṣūl al-fiqh* came into existence after a "genuine synthesis . . . between rationalism and traditionalism" owed primarily to the influence of Ibn Surayj and his students. *Uṣūl al-fiqh,* one gathers from his presentation, did not and could not exist without the acceptance of the validity of *qiyās.*[81] Therefore, the works of the

[80] Tāj al-Dīn al-Subkī, *Ṭabaqāt al-shāfiʿīyah al-kubrā,* 10 vols., ed. ʿAbd al-Fattāḥ al-Ḥilw and Maḥmūd Muḥammad al-Ṭanāḥī (Cairo: Hajr, 1992), 3:23.

[81] Hallaq, *Islamic Legal Theories,* 32–35.

Ẓāhirīs Dā'ūd and Ibn Dā'ūd, who rejected *qiyās*, could not have been comprehensive presentations of *uṣūl al-fiqh*. On the contrary, however, the general acceptance of legal analogy as one of the key sources of Islamic jurisprudence was the result of an historical debate which took place within the genre of *uṣūl al-fiqh*. The tradition of manuals on the subject most likely predated the compromise or synthesis of which Hallaq speaks. Al-Jaṣṣāṣ, for example, omits the opinions of Ibn Dā'ūd on purpose on the grounds that he was incapable of performing *qiyās*,[82] but this had not always been the case. Even in the eleventh century, the opponents of legal analogy were not entirely marginalized. Shiite jurists such as al-Qāḍī al-Nu'mān and the Twelvers al-Shaykh al-Mufīd (d. 413/1022), al-Sharīf al-Murtaḍā (d. 436/1044), and al-Shaykh al-Ṭūsī (d. 460/1067) wrote against legal analogy in their manuals of *uṣūl al-fiqh*, but Sunni jurists as well, such as Ibn Ḥazm (d. 456/1064) and al-Khaṭīb al-Baghdādī (d. 463/1071), also wrote *uṣūl al-fiqh* works which severely restricted legal analogy as a valid method of discovering the law. As Bernard Weiss sums up, "It was not a foregone conclusion among medieval Muslim jurisprudents that analogy was to be counted among the indicators of the divine law, the instruments whereby the law became manifest".[83]

It is unlikely that Ibn Surayj was the only or even the principal innovator in the field of *uṣūl al-fiqh* against whom Dā'ūd, al-Ṭabarī, and Ibn Dā'ūd were arguing. This is particularly clear from the refutations of *istiḥsān* included in the works of al-Ṭabarī and Ibn Dā'ūd. *Istiḥsān* was generally rejected by the Shāfi'īs. Al-Shāfi'ī himself wrote a work entitled *Ibṭāl al-istiḥsān*, and to him is attributed the statement *man istaḥsana fa-qad sharra'a* ("He who adopts *istiḥsān* has legislated"), equating *istiḥsān* with a heretical usurpation of God's role as the sole determiner of the law.[84] From early on, *istiḥsān* was most strongly associated with jurists of the Ḥanafī tradition. Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/804), Abū Ḥanīfah's disciple, wrote a work entitled *Kitāb al-istiḥsān*.[85] Later Ḥanafī jurists such as Abū

[82] Al-Jaṣṣāṣ, *al-Fuṣūl fī al-uṣūl*, 3:296.

[83] Bernard G. Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Dīn al-Āmidī* (Salt Lake City: Utah University Press, 1992), 633.

[84] al-Shāfi'ī, *al-Umm*, 8 vols. (Cairo: Dār al-fikr, 1990), 7:309–20; idem, *al-Risālah*, 503–8. Weiss, *The Search for God's Law*, 672.

[85] Ibn al-Nadīm, *al-Fihrist*, 257.

al-Ḥasan al-Karkhī upheld *istiḥsān*, and it became widely accepted in the Ḥanafī *madhhab*.[86] The fact that both al-Ṭabarī and Ibn Dā'ūd included a refutation of *istiḥsān* in their manuals of *uṣūl al-fiqh* suggests that they were not writing primarily or exclusively against Shāfi'ī opponents like Ibn Surayj. Rather, they must have been writing, at least in part, against earlier or contemporary jurists in the Ḥanafī tradition who upheld *istiḥsān*. This, coupled with the evidence presented above that al-Jāḥiẓ wrote a work on *uṣūl al-fiqh*, suggests that Ibn Surayj could not have founded the genre of *uṣūl al-fiqh*. Jurists associated with the Ḥanafī tradition must have played an important role in shaping the genre during the ninth century, though later biographical and legal sources, skewed quite heavily toward the Shāfi'īs, have obscured this.

The Fatimid jurist al-Qāḍī al-Nu'mān preserves in *Ikhtilāf uṣūl al-madhāhib* substantial portions of a manual on *uṣūl al-fiqh* by the renowned Ẓāhirī jurist Abū Bakr Muḥammad b. Dā'ūd. In all likelihood, these passages derive from the work *al-Wuṣūl ilā ma'rifat al-uṣūl*, which presented a comprehensive and sophisticated legal methodology, covering the topics of consensus, *taqlīd*, *istiḥsān*, *istidlāl*, and *ijtihād* in distinct chapters within a unified framework. The work probably dates to the late ninth century, some years after the death of Ibn Dā'ūd's father in 270/884. The evidence concerning this work, as well as works by al-Jāḥiẓ, Dā'ūd al-Ẓāhirī, and al-Ṭabarī, allows a revision of the view that Ibn Surayj's students were the first authors of *uṣūl al-fiqh* manuals. The two Ẓāhirīs and Muḥammad b. Jarīr al-Ṭabarī were not the creators of the genre either. All three were writing against others who had upheld *istiḥsān*, *ijtihād*, and legal analogy, and the most likely authors to have done so consistently were jurists in the Ḥanafī tradition.

Hallaq has argued that the science of jurisprudence, as formulated in a genre of works termed *uṣūl al-fiqh*, did not arise until the tenth

[86] On *istiḥsān* in general, see George Makdisi, "Ibn Taimīya's Autograph Manuscript on *Istiḥsān*: Materials for the Study of Islamic Legal Thought", in George Makdisi, ed., *Arabic and Islamic Studies in Honor of Hamilton A. R. Gibb* (Leiden: E. J. Brill, 1965), 446–79; John Makdisi, "Legal Logic and Equity in Islamic Law", *American Journal of Comparative Law* 33 (1985):63–92; Weiss, *The Search for God's Law*, 672–76; Hallaq, *Islamic Legal Theories*, 107–13; al-Jaṣṣāṣ, *al-Fuṣūl*, 4:223–52; Abū al-Ḥusayn al-Baṣrī, *al-Mu'tamad*, 2 vols. (Beirut: Dār al-kutub al-'ilmīyah, 1983), 2:295–97; Ibn Ḥazm, *al-Iḥkām fī uṣūl al-aḥkām*, 2 vols. (Cairo: Dār al-ḥadīth, 1984), 2:192–226; al-Āmidī, *al-Iḥkām fī uṣūl al-aḥkām*, 4 vols. (Cairo, n.d.), 4:136–39.

century. He goes so far as to claim that the lack of literature on jurisprudence in the ninth century is "causally connected with the very development of legal theory, which was to emerge only as late as a century after al-Shāfiʿī's death".[87] On the contrary, it is more likely that the lack of literature on jurisprudence from this century is due particularly to the ravages of history. In jurisprudence, as in many other fields such as law, theology, and philosophy, very few works have survived intact from this period. It is reported that when al-Ṭabarī decided to write a comprehensive work on legal analogy, his bookseller, Abū al-Qāsim al-Ḥusayn b. Ḥubaysh, gathered over thirty titles devoted to the topic.[88] This anecdote gives some idea of the sheer number of legal works, the vast majority of which are now lost, that were produced before 310/923, al-Ṭabarī's death date. Similarly, of the over four hundred works attributed to Ibn Surayj, only a tiny fraction survives. Assiduously combing extant sources demonstrates the existence of a number of early works on *uṣūl al-fiqh*; we must assume that these represent only a handful among many lost works which have escaped mention.

Works on jurisprudence from later times preserve indications that the ninth century was a period of dynamic intellectual production in the field of legal theory, and it seems reasonable to see these indications as traces of sophisticated debates on legal theory originally presented in works now lost. One cannot take the fact the manuals themselves have not been preserved and have not been mentioned specifically in biographical dictionaries as proof that they did not exist. The opinions of such major ninth-century figures as ʿĪsā b. Abān (d. 221/835–36), al-Naẓẓām (d. 220–30/835–45), al-Karābīsī (d. 248/862–63), al-Jāḥiẓ (d. 255/869), Dāʾūd b. Khalaf al-Iṣfahānī (d. 270/883), and Abū ʿAlī al-Jubbāʾī (d. 303/915–16) are cited prominently in later works on *uṣūl al-fiqh*, a fact which suggests that they at one time made major contributions to the development of legal theory. Dialectic is one of *uṣūl al-fiqh*'s central features, and extant works in the genre, like an archive, preserve, sometimes in vestigial form, the historical debates which played a role in its com-

[87] Hallaq, *Islamic Legal Theories*, 36.

[88] As it turns out, al-Ṭabarī never actually completed the work, and the books were returned. Yāqūt, *Muʿjam al-buldān*, 18:81.

position. The opinions of earlier authorities such as al-Jāḥiẓ, Dā'ūd, al-Karābīsī, and others are not included simply as straw men representing heretical theories or positions which should be rejected,[89] but rather as a record of the debates which shaped the science and gave it its present form. After having passed through the wringer of the tradition for two or more centuries, their contributions have dwindled radically to a few odd statements. Nevertheless, the fact that they continue to be cited in the tradition suggests the possibility that they derive from works in the *uṣūl al-fiqh* genre and have been preserved in part for that reason.

The structure of *al-Wuṣūl ilā maʿrifat al-uṣūl* shows a close affinity with the later genre of *uṣūl al-fiqh* and is at the same time quite distant from that of al-Shāfiʿī's *Risālah*. Despite the place of honor assigned to it by the later tradition, al-Shāfiʿī's work could not have begun the *uṣūl al-fiqh* genre as evident in *al-Wuṣūl* and later extant works, and indeed seems outside the main lines of development of the genre. This is particularly so if one looks at its organization, which does not present a list of *uṣūl*. The genre of *uṣūl al-fiqh* did not arise, though, only after the turn of the tenth century, its first authors were not students of Ibn Surayj, and the genre as a whole did not result from a compromise between rationalism and traditionalism engineered primarily by Ibn Surayj himself. *Al-Wuṣūl ilā maʿrifat al-uṣūl* was one of many *uṣūl al-fiqh* works authored in the ninth century. Its contents, as well as those of al-Ṭabarī's *al-Bayān ʿan uṣūl al-aḥkām*, suggest that numbers of works were written before them by jurists outside the circle of Ibn Surayj. *Uṣūl al-fiqh* was created and developed during the ninth century, and its roots may indeed go back to al-Shāfiʿī's time. Only further investigation of such early works will allow us to understand the rise of the *uṣūl al-fiqh* genre and the development of Islamic jurisprudence in this crucial, formative period.

[89] Hallaq, "Shafiʿi", 588.

APPENDIX

TRANSLATION OF PASSAGES IN *IKHTILĀF UṢŪL AL-MADHĀHIB* ATTRIBUTABLE TO MUḤAMMAD B. DĀʾŪD

I. *Consensus* [pp. 100–101].

Others have professed the (following) opinion: The (particular type of) consensus the existence of which precludes all objections and removes all doubt is the unanimous agreement of scholars (*al-khāṣṣah*) about which a commoner[90] would inquire only[91] in order to learn, and not in order to debate or to seek a verdict. If he is informed of the (established) position on such a question, he would accept it and dare not object to it or challenge the one who informed him of it. This is the case with the unanimous agreement of the scholars on the location of the Kaʿbah in Mecca, the distinction between al-Ṣafā and al-Marwah, the location of the holy sites of Minā and Muzdalifah, the fact that Ramaḍān is the ninth month of the year, the fact that the Day of Sacrifice is the tenth of Dhū al-ḥijjah, and other similar matters, a discussion of which would be extensive and an exhaustive list of which would render the book too long. Things that are of this type, indisputably God's proof to mankind, cannot be rejected or opposed. For anything else, outside this category, I do not know any established proof. If someone were to claim (consensus on such a matter) and provide proof of his claim, then his opinion must be accepted. Otherwise, the a priori position is that proof is only established when Glorious and Almighty God makes something incumbent. What He is properly shown to have made incumbent is obligatory, and what He is not properly shown to have established as His religion is not valid.

This is the verbatim text of the opinion of Muḥammad b. Dāʾūd, and it is the opinion of his father Dāʾūd b. ʿAlī and those who adopted his doctrine. This opinion is like that of scholars who profess that consensus can only be established through explicit mention in a scriptural proof

[90] Reading *aḥadun min al-ʿāmmah* for *min al-ʿāmmah* in L.
[91] Reading *illā* for *lā* in L.

text from the Koran or the Sunnah. We have mentioned this view already, along with the arguments against those who uphold it. This is so because what Ibn Dāʾūd cited, namely, the location of the Kaʿbah, al-Ṣafā, al-Marwah, and the holy sites, the month of Ramaḍān, and the Day of Sacrifice, are not among those things on which scholars have agreed on the basis of their own opinions, but on the basis of revelatory designation (*tawqīf*) through the Prophet. We have mentioned above that revelatory designation allows one to do without consensus and other such proofs.

II. *Against Legal Analogy* (1) [pp. 142–44].

Among the arguments which the rejecter of legal analogy adduced against those Sunnis who profess it is the following: Legal analogy (*qiyās*) is, in itself, to consider one thing similar to another and to rule on it accordingly. It is to rule on a secondary question according to the ruling of its primary question when the cause of both, on account of which the ruling has come about, is the same. An example of this is that God, the Glorious and Almighty, through the speech of His messenger—God bless him and grant him peace!—prohibited the sale of one *kurr*[92] of wheat for two *kurr*s. The upholders of legal analogy said, "Similarly, one must prohibit the sale of one *kurr* of rice for two, because it is equal to the first case in the cause on account of which the sale was declared forbidden". Then they disagreed concerning the cause of this ruling. Some claimed that the differential sale of wheat was declared forbidden because wheat is weighable, and rice is likewise weighable. Others said that it is because wheat is weighable and a foodstuff, and rice is also weighable and a foodstuff. Others said that it was declared forbidden because (wheat) is a foodstuff which is stored, and so is rice. Others said that it was declared forbidden because alms must be paid for (wheat), and rice[93] must have alms reckoned for it too.

[92] The term *kurr*, deriving from Assyrian *gur*, is a dry measure of capacity equivalent to six donkey loads, overloaded, or 3,250 liters, the weight of which varied according to region and period. Massignon estimates that a *kurr* of wheat in medieval Baghdad weighed roughly 2,012 kg. Massignon, *Hallaj*, 1:236.

[93] Reading *urz* "rice" for *burr* "wheat" in L.

This author (*qā'il*) said, "Each group among them rejects the opinion of their opponents, and claims that the truth lies in what they claimed for themselves, but they cannot bring a proof[94] to support their opinions and invalidate that of their opponents, except that one could imagine a similar proof for their opponents".

Then he said: Do you see that they assume their opponents are unable to produce opinions even more numerous than their own, mutually contradictory just as theirs are? Moreover, they do not support their own opinions with any proof beyond their mere claim. One of them says that the differential sale of wheat has been declared forbidden because it is something which sprouts forth[95] from the ground. Another says that it has been declared forbidden since the earth causes wheat to flourish[96] with the passing of days. Another claims that (such a sale) has been declared forbidden because of wheat's color. Another says that it has been declared forbidden because of the small size of wheat's kernels. Another says that it has been declared forbidden because wheat does not have a living soul in it. Opinions of this kind are of incalculable number. If an opinion has no proof, then how can[97] its upholder claim that it is God's proof to mankind? Even if (this opinion) were granted to him, it cannot be imagined that he, or any of those who agree with him on the validity of his fundamental principle, even if they disagree with him on its specific characteristics, could find evidence for the cause he claimed for himself. Moreover, the opponents who reject his opinion can always[98] produce opinions similar to his which seem equivalent to their audience, since there is no evidence to distinguish between them, and one must grant the truth of that one of two possible opinions for which proof has been established. Their opponents,[99] because they go against them, adopting the opposite of that which they adopt, cannot legitimately be demanded to show the validity of what they believe.

This is if it has been proved in their favor that ruling by analogy is at base necessary. But how could this be so, when it is fundamentally invalid in itself and contradicts those who uphold it?

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[94] Reading *ḥujjah* for *'illah* in L.
[95] Reading *tunbitu* for *yunbitu* in L.
[96] Reading *tunammī* for *yunammī* in L.
[97] Reading *fa-annā for bi-an* in L.
[98] Reading the variant *lā ya'jizu* for *lā yu'jizuhu*, L, 144 n. 2.
[99] Reading *fa-khuṣamā'uhum* for *fa-khuṣamā'uhu* in L.

This is the opinion of the one who rejected legal analogy and professed inference (*istidlāl*), as he claims, concerning that which he did not find in the Book of God or the Sunnah of the Messenger.

III. *Against Legal Analogy* (2) [pp. 151–52].

One of those who rejected legal analogy and professed *istidlāl* objected, in refuting legal analogy, against its upholders:

One should say to whoever upholds legal analogy: "Tell us of the cause on account of which, you claim, a ruling occurs in cases of analogy. (Does the ruling occur) as the result of a cause which has been proven to your satisfaction, or has it been indicated by revelatory designation, so that one could not imagine your opponent refuting it?" If he says by designation, one should demand that he show this, and he will not be able to do so. If he answers, "Because of a cause which has been proved to my satisfaction and is valid to my mind", he should be asked, "Could one of your opponents who agree with you on the validity of the principle of legal analogy and oppose you on this particular ruling claim for his understanding the like of what you have claimed for yours, and consider it proved for himself, so that his claim would render your claim for yourself invalid, just as you have claimed the same thing?" This is of course possible; one cannot imagine guarding against it.

This speaker (scholar) has spoken the truth and hit the mark in stating the crux of the argument against his opponent. This argument defeats him and defeats other groups we have mentioned who uphold their own fancies and refer what they do not know to their own whims, despite the fact that they are ignorant concerning these questions, going against the command of God, may His mention be manifest, that one should refer this to the "Ones in Charge" among His worshippers.[100]

[100] Al-Qāḍī al-Nu'mān intends by "the Ones in Charge" (*ūlū 'l-amr*) the Imams of the Fatimid Shiite line. The phrase occurs in Q 4:59, known as *āyat al-umarā'*, which is often cited in arguments ascribing religious authority to particular groups in society.

IV. *Against Legal Analogy* (3) [pp. 153–54].

One of those who rejected legal analogy among the upholders of *istidlāl*, as he claims, objected to those who professed it and said: One should object to the champion of legal analogy, if, as he claims, the causes in an instance of legal analogy are the same in his estimation: "Then why have you given the ruling for the secondary case according to the ruling of the primary case, despite the fact that the cause of one is the same as the cause of the other? Is it because God, the Glorious and Almighty, designated this for you, or because you derived it by logical inference (*istidlāl*)?" If he says that it is because it has been designated for him explicitly, in a way which precludes all divided opinion and figurative interpretation, and which renders compliance and acceptance the only possible course, then he should be asked for the evidence of this, and he will find no path thereto, God willing. If he says, "I have ruled this way because of evidence which has been proved to my satisfaction. That is, I have observed that God—may His praise be manifest!—gave similar rulings on similar matters. When I found that He explicitly recorded the practice of giving equal rulings on many matters when their causes were the same, then left off mentioning some equivalent things and did not give their rulings explicitly, I appended them to the former cases, following the example of what God, the Glorious and Almighty, did in what we have just mentioned". One should say to him: "This statement is itself an instance of analogy! We asked you to establish the validity of legal analogy, and the original matter of debate cannot serve as a convincing proof of itself. However, (suppose) we grant this to you, then demand of you to show its validity in and of itself.[101] Whenever someone's opinion is invalid on account of the proof that he chooses to support his doctrine and which he considers proper according to his fundamental principle, his opinion is more fittingly disproved by that than[102] shown incorrect by the proof that his opponent proposes expressly in order to disprove his opinion and invalidate his fundamental principle.

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[101] L has *thumma nuṭālibuka bi-ʿunūdihi fī ʿaynih*; Gh has *thumma nuṭālibuka bi-ʿawdatihi fī ʿaynih*, both of which appear to be corrupt. I propose the emendation *thumma nuṭālibuka bi-tathbītihi fī ʿaynih*; at least this appears to be in accordance with the context.

[102] Reading *min* for *minhu* in L.

Consider your statement, "When I saw that God made the rulings of matters that have the same causes the same in Scriptural texts, I would be justified in making matters equal which He did not make equal, on the grounds that their causes are the same". Could you not have stated the opposite opinion and still used this same proof as an argument for that opinion? You could have said, "Since I saw that God, the Glorious and Almighty, ruled differently on similar issues, it behooves me to assign two different rulings to every pair of similar matters concerning which there is no scriptural text stating whether to treat them similarly or differently, just as I saw that God, the Glorious and Almighty, established differences in rulings between similar things". You would then have expressed your earlier opinion letter for letter, and have presented the like of your former argument letter for letter. Should you not rather have said neither this nor that? Instead, if you were to give yourself some good advice and follow the path which would lead to your guidance aright, you should say, "When I saw that God, the Glorious and Almighty, ruled similarly on similar matters, ruled dissimilarly on similar matters, and ruled dissimilarly on dissimilar matters, I realized that legal rulings are not put forth by God for causes that can be perceived by human intellects and that their true state cannot be determined by examining likes and choosing among possible cases. I leave the matter up to God concerning His Verdict and accept obedience to Him according to His command, treating the same that which He treated the same and treating differently that which He treated differently. For a ruling which He did not give explicitly in a scriptural text I seek evidence in other ways, since I am not able to rule on something by giving it the ruling of its like, except that my opponent might see fit to oppose me, giving a ruling opposite that of its like. This is because the cause on the basis of which I argue for my opinion is Exalted God's treatment, in some places, of the rulings of similar things as the same, while my opponent would be able to make a similar argument, and this is that Exalted God in some places treats the rulings of similar things differently".

We say to this author, "You have debated excellently with your opponent in that to which you alerted him and which you pointed out to him concerning the need to abandon legal analogy in the Religion of God and His rulings, the things He has declared permitted or forbidden".

V. *Against Legal Analogy* (4) [pp. 156–61].

The rejecter of legal analogy said, addressing him who upholds it and analogizes on the basis of the causes according to which, he claims, rulings occur: Now, then, we return to him, after having demonstrated that legal analogy is proved invalid by analogy itself, in the same manner that he claimed to show its validity, asking the following: "Why did you claim that Blessed and Exalted God made rulings occur on account of causes, rather than saying that He caused them to occur a priori, without causes?" If he claims evidence such as revelatory designation (*tawqīf*), one should demand that he produce it, and this is something which, God willing, there is no way for him to produce. If he claims to have observed things on which God ruled with specific rulings and seen that their causes[103] are the same, then one should repeat to him what we stated above, concerning the similarity of rulings on dissimilar things and the occurrence of dissimilar rulings on similar things. We say to him: "We grant to you the occurrence of rulings on the basis of causes, but now we demand that you set forth those causes. If you list them exhaustively, without contradiction, we will grant the argument to you. If you cannot produce this exhaustive list of your causes, then you will in effect be expressing deprecation for your own opinion, since you will have failed to show what it consists of, let alone established proof of it. Now, tell us about the causes on account of which the rulings of primary cases have been determined.[104] Did the cause bring about these rulings in and of themselves, or did they come to cause them because of accidents which adhered to them, namely, the coincidence of (God's) command and prohibition with them?" If he says, "They came to cause (the rulings) through a coincidence with the divine command and prohibition", one should say to him, "You cannot rule on something accompanied neither by divine command and nor by prohibition on analogy to something accompanied by command or prohibition, since the cause, if valid, brings about[105] the ruling concerning that on which God expressed a ruling precisely of its concomitant coincidence (with the divine command and prohibition). When you come upon a secondary case where you find

[103] Reading, with Gh, *ʿillatuhā* for *ʿalayhā* in L.
[104] Reading *waqaʿat* for *waqafat* in L.
[105] Reading *ṣārat* for *wa-ṣārat* in L.

a certain cause present without concomitant coincidence,[106] you cannot see the secondary case as similar to the primary case, because the cause (of the primary case) does not completely obtain in it, since[107] coincidence[108] does not support it the same way it supports the primary case. So do not rule analogously on its basis, because one does not match the other[109] completely with regard to the cause of its being declared forbidden or permitted". If someone were to say, "Rather, causes bring about rulings in their essences and do not require to be changed[110] through the support of[111] the coincidence (of the divine command and prohibition),[112] for it is not permissible for the ruling to have occurred in any other way. Since causes bring about rulings in and of themselves, then we have no need of waiting for the occurrence (of coincidence)". One should say to him, "There is a question against you concerning the One Who made the causes effective. How did they come to cause God—may His praise be manifest—to rule in a certain way, and not to give any other ruling besides, when He is Creator of all things and their Controller, the One Who commands and prohibits concerning them? (God) should not be asked about what He does, yet they ask. One should not object to Him concerning what He commands. However, your question about this leads to a scandalous opinion which reflects heinously on you, and is a shame and disgrace, but we are averse to letting (the matter) reach such an extent, since there is a another alternative short of this. Moreover, in what we have avoided mentioning[113] is an indication of that which we have declined to spell out explicitly".

"Now tell us[114] about that which had been forbidden in the early stages of the Sacred Law of our Prophet, then became permitted, according to the Law, after that, and what had been permitted and became forbidden, and about those things that had been forbidden in the Sacred Laws of former prophets, then were declared permitted

[106] Reading *tawfīq* for *tawqīf* in L.
[107] Reading *idhā* for *idhā* in L.
[108] Reading *tawfīq* for *tawqīf* in L.
[109] Reading the variant *yushākiluhu* (158 n. 1) for *yushākilu* in L.
[110] Reading *taghyīr* for *ta'bīr* in L.
[111] Reading *bi-musānadat* for *bi-mushāhadat* in L.
[112] Reading *tawfīq* for *tawqīf* in L.
[113] Reading *a'raḍnā 'an dhikrih* for *'araḍnā min dhikrih* in L.
[114] Reading *akhbir* for *kh-b-r* in L.