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.

in our Law: What is the explanation concerning the causes which brought about these rulings? Did they change, so that the rulings then changed as a result? Or have they remained the same, while the rulings have been liable to change?" If (the opponent) says that the causes can change, and therefore the rulings have changed, he should be asked about strong drink: "Did it become all of a sudden intoxicating after not being intoxicating? Or did it become liquid after being solid, and so was declared forbidden on that account?" (He should be asked) also about the types of fat which were forbidden and then became permitted: "What causes of (these rulings) changed?" (And he should be asked) about many cases similar to these, the exposition of which would make the book lengthy. His inability to explain the change (of the cause)[115] while the ruling changed compels him to admit that no cause exists. The removal of the ruling, such that, as he will admit, the cause is constant while the condition of the caused item changes is a proof of the invalidity of the explanation that he claimed, since it is impossible for the presence of something to be a necessary cause of the existence of something else and for that second thing to be removed while the first remains in its former condition. An example of this is speech, which can only be present with the existence of life; it is impossible for speech to exist if life is removed. It is also like sight, which may only exist through the existence of a seer; it is impossible for the seer to be destroyed and sight to remain. It is like motion, which may only occur on the part of a moving creature; it is impossible for motion to remain after the death of the mover. Similarly, if prohibition exists because of the existence of some cause, it is impossible for the cause to remain while the prohibition has fallen away. Nor is it possible for the cause to be removed while the effect remains as it was. This is so clear, according to reason, that one who claims it need not prove it. Success is granted through God alone.

Then this author mentioned a hadith which he related through his chain of authorities from the Prophet—God bless him and grant him peace!—that he said: "My community will divide into seventy-odd sects, the greatest of which in terms of their potential misguidance of my community are a group who compare (*yaqīsūna*) matters according to their personal opinions, making forbidden things permitted and permitted things forbidden. . . ."

[115] Reading *ʿan īḍāḥ al-taghayyur* for *ʿan al-īḍāḥ ʿan al-taghayyur* in L.

This author, whose statement we have quoted, is one of the critics of legal analogy from the people of Baghdad among the Sunnis, the well-known Muḥammad b. Dā'ūd b. ʿAlī. He and his father were among those who used to deny legal analogy, respond to those who adopted it, profess opinions contrary to those of the people of Iraq and others who adopted it, express scorn for their opinions, and profess, as he claimed, *istidlāl*.

VI. *Against Legal Analogy* (4) [pp. 171–73].

Some practitioners of legal analogy went to the utmost extents of ignorance, claiming that Glorious and Almighty God used legal analogy—May He be far above their opinion!—and citing the word of God—May His praise be manifest!—: "He coineth for you a similitude of yourselves. Have ye, from among those whom your right hands possess, partners in the wealth We have bestowed upon you, equal with you in respect thereof, so that ye fear them as ye fear each other?" (Q 30:28). Concerning this (claim) also, there responded to them one of the Sunni (jurists) who rejected legal analogy, as follows: Using this as an argument to establish the validity of legal analogy is a tremendous error. One of the ways of demonstrating that it is a tremendous error is to note that legal analogy is fitting for someone for whom a question has become difficult and who therefore appends it, by way of analogy, to something the ruling of which is known—May God be above this opinion and all others that approach it! The reasoning behind their argument is as follows. The polytheists claimed that God had partners in His dominion—May He be above what they ascribed to Him!—but then He forced them to admit that they themselves did not have partners in that over which He had given them control. He then showed them that He who is able to create someone with exclusive control over his property, without there being anyone to vie with his person, oppose him in his affairs, or bother him in his dealings, is yet more likely to be able to remove that annoyance from Himself. If He is able to repel from His slave what harms the slave, then His repelling of such harm as this from Himself is all the more likely, a fortiori. Will you not consider the word of Glorious and Almighty God?: "He coineth for you a similitude of yourselves. Have ye, from among

those whom your right hands possess, partners in the wealth We have bestowed upon you, equal with you in respect thereof, so that ye fear them as ye fear each other? Thus We display the revelations for people who have sense". (Q 30:28) This argument, on the part of[116] one whose mind allows him to consider it permissible to claim that the Prophet—God bless him and grant him peace!—gives one ruling on analogy to another, not to mention that he gives his tongue free reign to claim that Glorious and Almighty God considers one thing in analogy to another—may God the Glorious and Almighty be above this opinion and able to do without it!—has no merit in it. Its error is clear even to the common people, let alone to scholars.

He said: If someone were to say, "God—May His praise be manifest!—does not use analogy, nor does He have any need to use it, but coined this similitude for us so that we might know how to use analogy", one should reply, "This is a claim[117] on your part, and your claim has not been proved against your opponent. Demonstrate that Exalted God did that, as you said, by providing a command from Him to us that we should determine the rulings of our faith through analogy, or through evidence that we admit is convincing to us and makes incumbent on us that to which we promised to adhere, or through a proof which compels us even if we do not admit that we are convinced by it. But you will not find,[118] God willing, a way to do this. If, however, you succeed in doing so, your statement would be acceptable". Suppose he were to say, "The evidence for that is God's word, at the beginning of the passage, 'He coineth for you a similitude of yourselves.' (Q 30:28)". One should reply to him, "Your claim that this similitude means that people should learn from it and use analogy like the analogy it uses also forces you to concede on this question, just as we forced you to concede in your claim about the cause on account of which rulings occur, since your opponent is certainly capable of making the cause something else beside what you claimed, and yet you cannot bring evidence which distinguishes between you and him. Furthermore, if your cause were to be valid, for you, then there would not be in this verse, nor in others like it, evidence of the permissibility of analogy, except in the rhetor-

[116] Reading *ʿinda* for *ʿalā* in L.
[117] Reading *daʿwā* for *al-daʿwā* in L.
[118] Reading *lan tajida* for *lam tajid* in L.

ical comparison (*tamthīl*) that the verse contains. There is, however, a proof against the polytheists in their admission, since a debater's admission against himself is among the weightiest of arguments for his opponent. They do not have any partners in what they own, and He Whom they worship, the One Who repelled from them the harm of having partners, is more likely to repel that harm from Himself and to be able to avert it. This proof is more fitting according to reason. If someone protects his slave from something, then his protection of himself from the same thing is more necessary. Whoever is able to avert harm[119] from his slaves should be better able to divert similar harm from himself. Our opponent should not allow himself to say to us the like of what we have stated. When someone claims something in his mind, it is conceivable for his opponent to oppose him with the like thereof, but if you desire to oppose us in what we have stated, this is not conceivable unless you refute what God the Glorious and Almighty made a proof for Himself against his enemies.[120] It is better for you to come to a decisive ruling[121] on a matter which the scholars (jurists) of the Muslims have disputed than to declare God's proof against the polytheists invalid.

This author said: I have seen many of the analogizers supposing that we deny that there exist in the world pairs of things one of which resembles its counterpart in most of its aspects, or that the noun *qiyās* ("comparison", "analogy") has an actual reality in human discourse. They attribute this opinion to us and insult us thereby. For anyone to relate this about his opponents indicates a weakness of opinion on his own part. We do not deny, nor does anyone deny, the validity of the meaning of analogy, or the resemblance of things in certain aspects and their dissimilarity in other aspects. We do not declare impossible[122] comparisons and analogies among those things for which limits have not been established and conditions have not been imposed upon us. So we can say, "So-and-so has missed the point in making an analogy to his original case",[123] "So-and-so made an excellent comparison", "Your comparison is like his", "So-and-so made an analogy between two things, and hit the mark in the

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[119] Reading *adhan* for *idhā* in L.

[120] Reading, with Gh, *aʿdā'ih* for *aʿdāh* in L.

[121] Reading, with Gh, *taqṭaʿu* for *tanqaṭiʿu* in L.

[122] Reading *namnaʿu* for *yamtaniʿu* in L.

[123] Reading *qad asā'a l-wajha fulānun fīmā qāsahu ʿalā aṣlih* for *qad asā'a ilayka fulānun fīmā qāsahu ʿalā fiʿlih* in L.

point of comparison". "So-and-so made an excellent analogy", and "So-and-so made an analogy and erred in the point of comparison". Rather, we declare it impossible[124] to give rulings on the basis of analogy, because the rulings of the faith are not to be referred ultimately to the intellects of humans. Instead, they must be carried out as they were imposed. Even if we see that two things resemble one another and are comparable in most of their aspects, we cannot make their rulings equal, because Exalted God is in charge of rulings. He gives a dissimilar ruling if He so desires, and He gives similar ruling if He so desires. He does not point out to us[125] the causes of His rulings and order us, whenever we find these causes present, to make the rulings match the rulings of similar things. They have no right to say, arguing against us, that Exalted God said (describing the houris of paradise), "As if they were rubies and coral". (Q 55:58) and "As if they were hidden eggs". (Q 37:49), because this may only be used as an argument against one who claims that no thing may resemble another. (It may not be used against) someone who professes that things resemble each other but that we have not been commanded to give rulings on matters based on their mutual resemblance and that we have been prohibited from presuming to come before God and His Messenger. If He commands us, we give a ruling. If He leaves us (without a command), we remain silent. Instead, we must seek[126] it in the Koran. (Our opponents) do not benefit from this and that which indicates the same meaning.

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.

VII. *Against on Juristic Preference (istiḥsān)* [pp. 183–86].

There responded to those Sunnis who professed *istiḥsān* a certain Sunni who rejected it as we have, even though he professed something similar to it in meaning, saying: "He who assigns a ruling by juristic preference must either have made that ruling obligatory because God commanded it or have assigned

[124] Reading *namnaʿu* for *yamtaniʿu* in L.
[125] Reading, with Gh, *lam yuwaqqifnā* for *lam yaqifnā* in L.
[126] Reading, with Gh, *naṭlubuhu* for *naṭlubu lahu* in L.

the ruling in this manner because he examined it and considered it preferable in his estimation. If he assigned a ruling by juristic preference because he found the method itself preferable, as the result of a similar act of estimation, then the question still stands concerning the proof he put forward, just as it stood concerning the cause of the ruling which he was demanded to prove. A proposition can only be proved by evidence which supports it; it cannot be proved by itself or its like. Something good must either be good in itself or have become good through an indication, from outside itself, of its good. If it became good in its essence, then each truth must either be good in itself, or else good resides in one truth and not in another. If good belongs to one truth among many and not to any others, then there must be evidence which indicates where the goodness itself lies, so that it be distinguished from all else. If one arrives at an assessment by natural instinct and deems it unnecessary to find evidence concerning it, then it is impossible for there to occur disagreement on this issue, except through obstinacy. This being the case, one cannot imagine that one of the two opponents could blame his counterpart as obstinate in his opinion, considering heinous what (the first of the two) considers preferable according to his own instinct, without it being possible that his opponent could say something similar. An argument cannot be proved in such a fashion.

If every truth is good, and every falsehood evil, then good and evil lie in the essences of things. If a ruling forbidding a certain thing is abrogated, then it must either have shifted and become good, or it must have remained as it was, evil. If it shifted with the shift of the ruling, then evil is an attribute of the ruling, and not of the matter's essence. If it remained evil, as it was, after it has become licit, and similarly if what used to be licit remained good after it has become forbidden, given that it is necessary to adopt what is good and shun what is evil, it would then become necessary to declare something licit forbidden because it is evil and declare something forbidden licit because it is good. If it is necessary to declare forbidden what was once licit, even though it is at present still good, and to declare licit what was once forbidden, even though it is at present still evil, then this argument disproves the validity of juristic preference.

(The upholders of *istiḥsān*) have then taken to claiming that when what is good is declared forbidden, it is still good but is merely not observed (*muttabaʿ*). If they are worried that their principle will contradict them and prove them wrong, they say, "No; rather, one must

profess this if (the matter in question) is good, whether it was declared forbidden or not". Debate with them then becomes unnecessary, since they have claimed that they render their estimation of goodness capable of declaring licit that which God declared forbidden, and their estimation of evil capable of declaring forbidden that which God declared licit in the text of His Book and the practices of His prophets. There therefore applies to them what we presented above in the introduction to this book, and they will find no way to escape this (logical result), God willing.

Since all of these possible cases have been shown to be invalid, then the opinion that things are good in their essences or evil in their essences has been shown invalid. Essences are created, and the One Who created them determines whether they are good or evil. They do not have attendant indicators in men's minds so that, by them, they may be considered good or evil. Rather, they are good if their use has been declared licit, and they are evil if it has been declared that one must avoid them. Whatever has been shown to have been declared licit, in a sound manner by clear evidence is good, and whatever has been shown in a sound manner to be forbidden by such evidence is evil. This is the meaning of the word of Mighty and Glorious God: "(Those) who hear (God's) speech and follow the best thereof (*aḥsanah*) . . ." (Q 39:18). Whoever adopts this type of estimation of goodness (*istiḥsān*) arrives at the correct evidence we have just mentioned. Whoever adopts other evidence besides this should be demanded to produce proof of his claim. How could the estimation of goodness on the part of a man be a proof for God—may His praise be manifest?! A man does not give precedence to the opinion of another man whose nature differs from his own, so that whatever the latter considers good is permissible for him to do and necessary for him to command others to do, though[127] he may have no proof of it himself, and so that if a third person considers evil what the second man considered good and actually considers its opposite good, he is commanded to go against his counterpart in all of his actions, with the result that one thing in one set of conditions is both licit and forbidden. The same argument also applies to the adherents of personal opinion (*aṣḥāb al-ra'y*), because they profess

[127] Reading *wa-lā* for *lā* in L.

assessments concerning legal cases, licit and forbidden things, according to their personal opinions, just as those above do according to their estimation of goodness (*istiḥsān*). Though the terms are different, the meaning is one and the same. Whoever adopts his own opinion, whim, analogical comparison, estimation of goodness, or other things which he comes up with and professes that it is God's proof to mankind, has claimed to be a partner of Mighty and Glorious God in His commands and rulings, but Mighty and Glorious God did not even give this status—as we have discussed and explained above—to any of his prophets or messengers. Rather, he sent them to carry out His command and to relay it to mankind. How could anyone whose station is beneath theirs and who has adopted as part of his worship of Mighty and Glorious God the obligation to obey them, comply with their commands, and adopt them as arbiters in disputes, claim such a thing! May God be far above the opinions of the ignorant and the lies of those who spread falsehood!

VIII. *On Inference (Istidlāl)* [pp. 186–87].

Those who profess *istidlāl* said: The Book of God, the Glorious and Almighty, is itself the (ultimate) evidence, and every authoritative proof is derived from it. The Sunnah (of the Prophet) is an authoritative proof only because the Koran commanded obedience to its founder, and the Koran is the source of every authoritative proof.

They said: What is explicitly mentioned in the Koran, set forth unambiguously by name and description, removes all doubt from the audience, like God's word—may His mention be manifest!—"Obey God and obey the Messenger" (Q 4:59), God's word, "Carrion, blood, and swine flesh are forbidden to you". (Q 5:3), God's word, "Forbidden unto you are your mothers, your daughters, your sisters, your father's sisters, your mother's sisters, your brother's daughters and your sister's daughters, your foster mothers, your foster sisters, your mothers-in-law, your step-daughters who are under your protection (born) of your women unto whom ye have gone in—but if ye have not gone in unto them, then it is no sin for you (to marry their daughters), and the wives of your sons who (spring) from your own loins. (It is forbidden unto you) that ye should have two sisters together, except what hath already happened (of that nature in the past). God is Forgiving, Merciful". (Q 4:23), and other similar texts.

They said: "The meaning of texts in the Koran that indicate rulings implicitly, or present symbols and comparisons, may be determined by inference (*istidlāl*). Similarly, the reports of the Messenger include what is clear and obvious, that allows us to do without proof, and what is general or ambiguous (*mujmal*), that requires explanation.

They said: That which we find in the Book of God—May His praise be manifest!—or in the Sunnah of the Messenger—May God bless him and grant him peace!—clear and well known, obvious and unconcealed, allows us to do without inference (*istidlāl*), for that scriptural text is itself proof. What we do not find clear, we seek to prove using that which is clear to us. We find it out, investigate it, and deduce it.

They said: An example of this is God's word, "Establish prayer". (Q 2:43 etc.) God, the Glorious and Almighty, imposed prayer on the believers, and the Messenger—May God bless him and grant him peace!—set forth its definitions, requirements, and proper times. If someone were to ask us about being carried away with talking or other things at the time of prayer, from the beginning of prayer time until the time is up, then we would say: "This is not permitted, because God, the Glorious and Almighty, made prayer incumbent, and the Messenger—Peace be upon him!—established the practice that it be performed[128] at that time. When someone is occupied for the entire prayer time, without praying, he has abandoned prayer, and to abandon prayer is not permissible".

This and the like of it are inference (*istidlāl*). This is the fundamental principle on which (the Ẓāhirīs) built their doctrine.[129]

IX. *Against Ijtihād* [pp. 199–202].

Those who profess *ijtihād* have claimed that it is incumbent upon them to exert their judgment in those cases and matters of permitted and forbidden things which they do not find in the book of God—

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[128] Reading *tuqḍā* for *yuqḍā* in L.

[129] A full treatment of the Ẓāhirīs' *istidlāl* awaits further research, but from Ibn Dā'ūd's treatment, it seems to refer to non-analogical arguments which, though often treated by other Sunni jurists under the rubric of *qiyās*, are seen by Ibn Dā'ūd as being purely linguistic modes of inference, based entirely in the text itself. The example he gives here is one of reductio ad absurdum, and it seems likely that he would include the a fortiori arguments as acceptable types of *istidlāl* as well. See Wael Hallaq, "Non-Analogical Arguments in Sunni Juridical Qiyās", *Arabica* 36 (1989): 286–306.

May His mention be manifest!—or in the Sunnah of His Messenger—God bless him and grant him peace!. After this exertion, they give a ruling, declaring the matter permitted or forbidden according to what appears to them. They cite as evidence for this claim a hadith that they claim to have related from the prophet—God bless him and grant him peace!—(which reads as follows): "He (the Prophet) sent Mu'ādh to Yemen and asked him, 'How will you rule when a case is brought before you?' He replied, 'By the Sunnah of His Messenger—God bless him and grant him peace!' He asked, 'And if it is not in the Sunnah of the Messenger of God?' He replied, 'I will exert my judgment'". They said, "The Messenger of God struck him on his chest and said, 'Praise be to God, Who has guided the messenger of the Messenger of God to what pleases the Messenger of God'".

A Sunni (jurist) who does not uphold *ijtihād* rejected this hadith and said: This hadith has an incomplete chain of transmitters, and a hadith with an incomplete chain of transmission, according to them, is not reliably established. This is the case because, though this hadith was related, according to them, through many paths, the farthest back reached by those who relate it is to the nephew of al-Mughīrah b. Shu'bah. (In these versions), the nephew of al-Mughīrah said, "Men from Homs", whom he did not name, "related to me from Mu'ādh b. Jabal", and then mentioned the hadith.

They said: The weakness of this hadith and the corruption of its chain of authorities spares us the effort of examining it, since its transmitters are anonymous and the report of an anonymous transmitter cannot be used to establish proof.

They said: Even if this hadith were established soundly, it would certainly be possible that the meaning intended by it be exertion of one's judgment in seeking evidence from the Book and the Sunnah, as was the case when the Prophet—God bless him and grant him peace!—said to 'Umar when he asked him about (the inheritance of) a man who dies without surviving children or parents (*kalālah*) and was insistent towards him concerning this question. He—Peace be upon him—said to ('Umar), "The verse which was revealed in the text should suffice you".[130] (Here) he ordered him to seek (the

[130] The term *kalālah*, which became the subject of long controversy in Islamic inheritance law, appears twice in the Koran, both times in *Sūrat al-nisā'* (Q 4:12,

answer to) this in the text. Or (do you think that), instead, he commanded (ʿUmar) to adopt his personal opinion, refer to his own whim and choice, and resort to his own discernment and judgment? For, if he intended this meaning—and God forbid that he should have intended this!—he would then have been commanding ʿUmar to adopt that which God, the Glorious and Almighty, had prohibited the Prophet himself—God bless him and grant him peace!—from adopting, despite God's knowledge that (the Prophet) was[131] the most sound of mankind in his perception[132] and discernment, and the most excellent of them[133] in his judgement, and consideration. God—May His praise be manifest!—said, "We have revealed the Book unto you with the truth so that you may judge between mankind by that which God shows you. Do not be a pleader for the treacherous". (Q 4:105) God did not say, "by that which you think for yourself" or "by that to which your choice and perception lead you". God—Blessed be His name!—said, "Who is more a miscreant than he who follows his own desire, with no guidance from God?" (Q 28:50).

They said: If the report which they cited as proof, as we have said, implies two possible meanings, it may not be made to follow one of these definitely without some proof, and the a priori position is that no one has the right to profess views according to his personal opinion and *ijtihād*, to give rulings based on his desire and whim, or to declare something forbidden or permitted, except by a proof from his Lord.

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176). David Powers has throughly analyzed this term and the controversy surrounding it. *Kalālah* is generally understood to mean either a deceased who has left no immediate heirs, that is, who has no surviving children or parents, or the heirs of such a person. Powers proposes an alternative interpretation, arguing from the text of the Koran itself and from exegetical material that *kalālah* originally meant a female in-law, but Ibn Dāʾūd intends here the conventional interpretation. One version of the hadith report to which he refers appears in the *Exegesis* of al-Ṭabarī: "Yaʿqūb informed me, saying: Ibn ʿUlayyah informed me, on the authority of Qatādah, on the authority of Sālim b. Abī al-Jaʿd, on the authority of Maʿdān b. Abī Ṭalḥah, that ʿUmar b. al-Khaṭṭāb said: 'There was nothing about which I questioned the Messenger of God so frequently as *al-kalālah*, until he poked me in the chest and said: "Let the summary verse which occurs at the end of *Sūrat al-nisāʾ* be sufficient for you". (Powers, 33, translating al-Ṭabarī, *Jāmiʿ al-bayān fi tafsīr al-Qurʾān*, 6:43, with slight modifications). See David S. Powers, *Studies in Qurʾān and Ḥadīth: The Formation of the Islamic Law of Inheritance* (Berkeley: University of California Press, 1986), 21–49.

[131] Reading *maʿa ʿilmihi bi-annahu* for *wa-laʿallahu an yakūna* in L.

[132] Reading, with Gh, *naẓaran* for *khāṭiran* in L.

[133] Reading *wa-ajwadahum* for *wa-jūdatan wa-* in L.

They said: He who claims that it is permissible to profess views on the basis of arbitrary personal opinion and *ijtihād* should be appended to this group as well. If two people were to perform *ijtihād* and arrive at different opinions, the truth would lie in two contradictory answers at the same time. Especially concerning someone whom the Prophet—God bless him and grant him peace!—sent as a judge, who should exert his discernment to judge over others. Someone other than the Prophet had to command the people what to believe, and they had to obey (Muʿādh in particular) because he was the messenger of the Messenger of God—God bless him and grant him peace! The Messenger had appointed him in charge over them, and (Muʿādh) decided cases between them on the basis of that according to which the Prophet had ordered him to judge between them. They cannot oppose God's proof with which he came to them by relying on that[134] to which their opinions and *ijtihād* led them, for this would go against the effective application of the rulings of a judge in cases when he makes a mistake in interpretation. (This is so) because these people were certain that their judge would reach the correct ruling in actuality, since he would not go beyond the *ijtihād* that he was commanded to perform, yet they could give a ruling opposite his, and would have reached a correct ruling also, because they would not have transgressed the *ijtihād* which was prescribed for them. Therefore, something and its opposite would be permissible in actuality or forbidden in actuality.

They said: According to us, if someone is not in error in actuality when[135] he gives an interpretation declaring our interpretation an error, then we must be in error in actuality. The truth is that which God, the Glorious and Almighty, enjoined upon us. It is impossible for it to lie in something and in its opposite. If we resort to the Koran, which God made the signpost of the faith and a proof for mankind, to settle our dispute, it can only judge between us by providing a proof which would indicate error on the part of one of us. If, however, they allow the matter to be decided by their own choice, and resort to accepting their own whims, it would be permissible for each one to judge by his fancy, (giving a ruling) opposite that determined by the fancy of his companion. According to this

[134] Reading *bi-llatī* for *allatī* in L.
[135] Reading, with Gh, *idhā* for *idh* in L.

doctrine, the two rulings would both be correct, despite their contradiction.

This is the speech of Muḥammad b. Dāʾūd al-Baghdādī, following the doctrine of his father and his fellow Ẓāhirīs (*aṣḥāb*) and their arguments against those who uphold *ijtihād*.

X. *Against* ijtihād [pp. 205–206].

There went against al-Shāfiʿī concerning facing the *qiblah* a certain Sunni jurist among those who reject (al-Shāfiʿī's) opinion concerning his use of this as an argument for *ijtihād*. He said: The *qiblah* may be known to us under most circumstances, and when we know it, we must face it in prayer. But if it is hidden from us, then we must seek it. When God's ruling on something has itself been removed from our intellects, we may not perform *ijtihād* and adopt our own arbitrary opinions. Rather, we must seek and find that ruling the knowledge and awareness of which has been removed from us, and not profess a view concerning it by adopting arbitrary personal opinion. This would be as if the rulings that the punishment for the slanderous accuser of adultery is eighty lashes and that the punishment for the unmarried fornicator is one hundred lashes were removed from our minds. It would not be permissible (under such circumstances) for us to adopt our arbitrary personal opinion and declare that the slanderer should have his limbs cut off and the adulterer should be killed. Rather, we must search for the rulings on these cases[136] which we do not know and which have been removed from our minds, and we should not transgress this to adopt *ijtihād*, because in those matters which are decided explicitly in scriptural texts, the texts render *ijtihād* unnecessary.

This speaker hit the mark in what he mentioned, showing the invalidity of *ijtihād* in matters on which God the Glorious and Almighty has given an explicit ruling and for which He has assumed authority to determine assessments and duties.

[136] Reading, with Gh, *ḥukmahumā* for *ḥukmahā* in L.

PART TWO

THE FUNCTION OF *UṢŪL AL-FIQH*

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"*ISTIḤSĀN* IS NINE-TENTHS OF THE LAW": THE PUZZLING RELATIONSHIP OF *UṢŪL* TO *FURŪ'* IN THE MĀLIKĪ *MADHHAB*

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The "conventional wisdom" in the study of Islamic legal history goes something like this: for approximately the first two centuries following the death of the Prophet Muḥammad, the nascent Islamic community had yet to develop a self-consciously Islamic jurisprudence that was conceptually distinct from the customs of the early Arab Muslims themselves.[1] This formative period of Islamic jurisprudence was characterized by direct appeals to informal practical reason, i.e., *ra'y*, as well as to custom. The latter was generically termed *sunnah*. What this proto-Islamic jurisprudence lacked in self-conscious theoretization and universality, however, it made up for in flexibility, adaptability and pragmatism.

The arrival of al-Shāfi'ī in the last quarter of the second Hijrī century, however, put this all to an end: Unlike the members of the "ancient schools" of law whose concerns were relatively parochial, al-Shāfi'ī attempted a great synthesis, to wed the proto-rationalism of 'Irāqī jurisprudence with the conservative "*sunnah*-centered" approach of the Ḥijāzīs. The product of this great synthesis was al-Shāfi'ī's *Risālah*, a work that is commonly considered the first in *uṣūl al-fiqh*. The breakthrough of al-Shāfi'ī, the conventional account tells us, is that legal reasoning, viz., the logic that was to guide a jurist in explicating rules for unprecedented situations, no longer was to depend upon the seemingly arbitrary justifications of the "ancient schools", namely, "*ra'y*" and "*sunnah*", but rather, would rest on the more objective formal grounds of a hierarchy of material legal sources, beginning first with the Qur'ān, then the Sunnah of the Prophet, but only if authoritatively documented, consensus (*ijmā'*) and finally,

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[1] See, for example, N. J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964); Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1964).

analogy (*qiyās*). Furthermore, the Qur'ān and Sunnah, being textual, had to be understood according to the objective rules of interpretation derived from a scientific study of the Arabic language.[2]

Presumably, al-Shāfi'ī's objective method would render legal reasoning more transparent and hence, more public, universal and therefore, accountable. Although the "ancient schools" did not abandon their particular doctrines, their informal—and in comparison to al-Shāfi'ī—almost naive approach to legal problems, gave way to his more rigorous method. Henceforth, all jurists would be forced to use either al-Shāfi'ī's method, or some variation thereof, or risk being castigated as one who followed mere habit (*muqallid*) or, worse, capricious desire (*hawā*). In the opinion of the conventional wisdom, then, al-Shāfi'ī is fundamental because he defined, or helped define, the structure of what counts as an argument within Islamic law—one that is based on evidence drawn from an authoritative source and is consistent with the logical implications of the hierarchy of legal sources—and at the same time what is not an Islamic argument at all, but rather is something else, e.g., blind adherence to unsubstantiated "custom" (*sunnah*) or pursuit of "capricious desire" (*hawā*).

At first blush, this account of the structure of legal argument seems irrefutable: More and more of the great minds of Islamic jurisprudence indubitably became preoccupied with questions of method and ascertaining the formal structure of a proper Islamic legal argument. Even the Mālikī school, which has been accused of being relatively indifferent to the discipline of *uṣūl al-fiqh*, produced important works of *uṣūl al-fiqh* that seem to owe more to al-Shāfi'ī than they do to Mālik b. Anas. These authors include such notable Mālikīs as Ibn al-Ḥājib (d. 646/1248),[3] author of the famous *mukhtaṣar* in *uṣūl al-fiqh*; al-Bājī (d. 474/1081), author of *Iḥkām al-fuṣūl fī aḥkām al-uṣūl*;[4] and, al-Qarāfī's (d. 684/1285) *Tanqīḥ al-fuṣūl*.[5] Structurally, these works do

[2] In recognition of al-Shāfi'ī's critical role in the development of Islamic jurisprudence, he is often dubbed the "Master Architect" of Islamic jurisprudence. This view of al-Shāfi'ī's role, however, has not gone unchallenged in recent scholarship. See Wael Hallaq "Was al-Shāfi'ī the Master Architect of Islamic Jurisprudence?" *International Journal of Middle East Studies*, 25 (1993), 587–605.

[3] Jamāl al-Dīn 'Uthmān b. 'Amr b. Abī Bakr.

[4] Abū al-Walīd Sulaymān b. Khalaf al-Bājī, *Iḥkām al-fuṣūl fī aḥkām al-usūl*, ed. 'Abdallah Muḥammad al-Jabūrī (Beirut: Mu'assasat al-Risālah, 1409/1989).

[5] Abu al-'Abbas Shihāb al-Dīn Aḥmad b. Idrīs al-Qārafī, *Sharḥ tanqīḥ al-fuṣūl fī ikhtiṣār al-maḥṣūl fī al-uṣūl*, ed. Ṭāhā 'Abd al-Ra'ūf Sa'd (Cairo: Maktabat al-Kullīyāt al-Azharīyah, 1414/1993).

not seem to differ significantly from the works of their Shāfi'ī colleagues. Pride of place is given to the textual sources of revelation, and much of the work is devoted to hermeneutical questions.[6]

Mālikī works of *uṣūl* seem to share the fundamental premise of al-Shāfi'ī, namely, that Islamic law in the first instance means rules derived from revelation. Thus, the pedigree of a rule depends on its affiliation to revelation. This leads to a natural hierarchy of sources (s. *dalīl*/pl. *adillah*) into those that are strictly revelatory, i.e., Qur'ān, Sunnah and Ijmā', and those that are derivative, e.g., *qiyās, istiḥsān, maṣlaḥah* and *istiṣḥab al-ḥāl.*[7] Despite substantial disagreements on the details of what constitutes Sunnah and Ijmā', or whether *maṣlaḥah* and *istiḥsān* constitute valid alternatives to analogy, Mālikī works of *uṣūl al-fiqh* apparently agree with Shāfi'ī works that the rules of Islamic law need to be derived from authentic historical sources in a manner consistent with the ontological priority of revelatory sources to ancillary ones.

This bias toward textual sources manifests itself in some *khilāf*-works, such as Ibn Rushd the Grandson's (d. 595/1198) *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid* (hereafter, *Bidāyah*).[8] Ibn Rushd himself

[6] Compare the previous Mālikī works to those authored by the Shāfi'ī authors Abū Ḥāmid Muḥammad b. Muḥammad b. Muḥammad al-Ghazālī, *al-Mustaṣfā fī 'ilm al-uṣūl* (Beirut: Dār al-Kutub al-'Ilmīyah, 1414/1993); Abū al-Ḥasan Sayf al-Dīn 'Alī b. Abī 'Alī b. Muḥammad al-Āmidī, *al-Iḥkām fī uṣūl al-aḥkām* (Beirut: Dār al-Kutub al-'Ilmīyah, 1403/1983), 4 vols.; Fakhr al-Dīn Muḥammad b. 'Umar b. al-Ḥasan al-Rāzī, *al-Maḥṣūl fī 'ilm uṣūl al-fiqh* (Beirut: Ma'assat al-Risālah, 1312/1992), 6 vols. I do not wish it to be understood that the works of these various authors are indistinguishable. Obviously, they are. The point I wish to make, however, is simply that affiliation to a particular school of *fiqh* did not "translate" into a particular approach to *uṣūl al-fiqh.* Instead, authors in the *uṣūl al-fiqh* tradition appear to analyze a discrete set of problems as problems of *uṣūl al-fiqh*, rather than analyzing problems particular to the rules of their madhhab. The generic independence of *uṣūl al-fiqh* from the particular rulings of a school of positive law is perhaps best demonstrated by the fact that al-Qārafī, a Mālikī, chose the *uṣūl*-work of a Shāfi'ī, Fakhr al-Dīn al-Rāzī, as the text which he would first summarize, and then, upon which he would compose a commentary, as is evident from the title of his *Tanqīḥ*. Conversely, many Shāfi'īs wrote commentaries on the text of Ibn al-Ḥajib's *Mukhtaṣar.*

[7] Thus, al-Bājī, for example, divides the proofs of the revelation into three categories. The first he terms *aṣl*, the second he terms *ma'qūl al-aṣl* and the third he terms *istiṣḥāb al-ḥāl. Aṣl*, in turn, includes the Qur'ān, the Sunnah and Ijmā'. *Ma'qūl al-aṣl* refers to certain hermeneutic techniques, e.g., *faḥwā al-khiṭāb*, and includes *qiyās*, referred to obliquely in the introduction as *ma'nā al-khiṭāb. Al-Iḥkām*, p. 69, 456.

[8] Abū al-Walīd Muḥammad b. Aḥmad b. Muḥammad Ibn Rushd al-Ḥafīd, *Bidāyat al-mujtahid wa-nihāyat al-muqtaṣid*, ed. 'Alī Muḥammad Mu'awwaḍ and 'Ādil Aḥmad 'Abd al-Mawjūd (Beirut: Dār al-Kutub al-'Ilmīyah, 1416/1996), 6 vols. Citations to *Bidāyah* will be made in the text.

is aware of the limited scope of his book, and in his (very brief) introduction he reminds his readers that the purpose of his book is limited to "cases having a textual basis in revelation or are closely related thereto" (*wa hādhihi al-masā'il fī al-akthar hiya al-masā'il al-manṭūq bihā fī al-sharʿ aw tataʿallaq bi al-manṭūq bihi taʿalluqan qarīban*) (*Bidāyah*, 1:325). While not surprising, his failure to explain rules that are not "closely related" to revelatory sources is disappointing because it certainly must be the case that, at least in purely quantitative terms, rules derived from non-revelatory sources make up the vast majority of actual Islamic law, viz., the rulings found in the *furūʿ* manuals, at least in the Mālikī school. Indeed, Mālik is reported as having said, "*Istiḥsān* is nine-tenths of [legal] knowledge (*Al-istiḥsān tisʿat aʿshār al-ʿilm*)".[9]

Interestingly, the Mālikī *uṣūlīs* such as al-Qarāfī, al-Bājī and Ibn al-Ḥājib were also masters of Mālikī *furūʿ*, each one having authored an important work on Mālikī *furūʿ*: Ibn al-Ḥājib authored his *mukhtaṣar* in *fiqh, Jāmiʿ al-ummahāt*, which served as the basic *matn* of Mālikī *fiqh* until the *mukhtaṣar* of Khalīl;[10] al-Bājī authored the, *Muntaqā*, which is really a work of Mālikī *furūʿ* in the guise of a commentary on the *Muwaṭṭa'*; and, al-Qarāfī published the monumental *al-Dhakhīra*. The persistent interest of Mālikī *uṣūlīs* in *furūʿ* appears in stark contrast to the careers of two of their prominent Shāfiʿī *uṣūlī* colleagues, Fakhr al-Dīn al-Rāzī (d. 606/1209) and Sayf al-Dīn al-Āmidī (d. 631/1233). I do not mean to suggest that Shāfiʿīs were more "theoretical" than Mālikīs or that the Mālikīs were more "practical" than the Shāfiʿīs. The contrast is useful, however, to the extent that it reveals that a scholar could be a master of *uṣūl al-fiqh* without being a recognized expert in *furūʿ*. Likewise, one could also be recognized as a master of *furūʿ* without gaining such recognition in *uṣūl al-fiqh*. Of course, as the three Mālikī authors demonstrate, it was possible to be accomplished in both, but it was by no means necessary. Yet,

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[9] Aḥmad b. Muḥammad al-Ṣāwī, *Bulghat al-sālik li-aqrab al-masālik* (hereafter, *al-Bulghah*), on the margin of Abū al-Barakāt Aḥmad b. Muḥammad b. Aḥmad al-Dardīr, *al-Sharḥ al-ṣaghīr* (hereafter, *Sharḥ*), ed. Muṣṭafā Kamāl Waṣfī (Cairo: Dār al-Maʿārif, n.d.), 4 vols. 3:638.

[10] See Mohammad Fadel, "Adjudication in the Mālikī Madhhab: A Study of Legal Process in Medieval Islamic Law" (Ph.D. diss., University of Chicago, 1995), 237–42. Ibn al-Ḥājib's important work has recently been published. Jamāl al-Dīn ʿUthmān b. ʿAmr b. Abī Bakr, *Jāmiʿ al-ummahāt*, ed. Abū ʿAbd al-Raḥmān al-Akhḍar al-Akhḍarī (Beirut: Dār al-Yamāmah, 1418/1998).

if there is no necessary relationship between mastery of *uṣūl al-fiqh* and mastery of *furū'*, one is tempted to question whether al-Shāfi'ī's insistence on adherence to a rigorous method had the impact on legal argument that is commonly supposed. What if legal reasoning within the "ancient" schools continued by developing their own criteria for legitimate argumentation, but one whose validity did not transcend the limits of a particular school?

This essay raises, but does not seek to answer that question. Instead, it desires to explore the impact of *uṣūl*-based legal argumentation on the *furū'* doctrine of the Mālikī school through Ibn Rushd the Grandson's famous *khilāf* work, *Bidāyat al-mujtahid*. Specifically, I will focus on an innocuous topic, that of pledges (*ruhūn*). The goal is to show that an *uṣūl*-inspired work such as that of Ibn Rushd not only is incapable of explaining the actual corpus of what constitutes the law of pledges, but also that the portion of the corpus that it does explain can only be described as marginal.

Ibn Rushd begins his discussion of this topic by noting its revelatory source, namely, *Baqarah* 283, which states, "If you are on a journey and find not a scribe [to record the debt], then pledges, possessed" (*Bidāyah*, 5:236). Leaving aside the fact that the pledges referred to in this verse seem to refer exclusively to evidentiary problems arising from contracting far away from urban centers, the verse is utterly silent on the rights and obligations of the pledgor (*al-rāhin*) and the pledgee (*al-murtahin*).[11] It is also silent as to what types of property can be pledged by a debtor as collateral.

Nonetheless, Ibn Rushd notes that the principal right the pledgee obtains by virtue of his agreement with the pledgor is the right to retain possession of the pledge until the pledgor repays his debt to the pledgee. Furthermore, when the pledgor fails to repay his debt in a timely fashion, the pledgee has the right, with the pledgor's permission, to sell the collateral and satisfy his debt from the proceeds of that sale. If the pledgor refuses to permit the sale of the collateral, the pledgee has the right to seek a judicial sale of the collateral. The

[11] Part of the difficulty of this area of the law is the ambiguity of the terms used, especially in the early sources. Later sources consistently use *rāhin* to mean pledgor and *murtahin* to mean the pledgee. Early sources, however, might use the terms interchangeably, viz., *rāhin* and *murtahin* may mean either pledgor or pledgee. For that reason, one has to be very sensitive to the linguistic context in the early sources to determine whether the text is discussing a pledgor or a pledgee.