Shāfi'ī/Ḥanafī differences are of course but one of six categories of one-on-one differences between schools. The other five are decidedly fewer in number. Of Shāfi'ī/Ḥanbalī differences I found eleven in the *Iḥkām*; of Ḥanafī/Ḥanbalī, nine; of Shāfi'ī/Mālikī, seven; of Ḥanafī/Mālikī, four; and of Ḥanbalī/Mālikī, two. As with the Shāfi'ī/Ḥanafī differences, these differences are between disparate representations of the schools: as entire schools (insofar as an unquantified designation may be assumed to represent entire schools), as school majorities, as segments of schools and as eponymic authorities. Furthermore, other parties are usually involved in the controversies out of which the differences emerge, parties that are not *madhhab*-related. Finally, it should be kept in mind that these differences do not usually stand alone within the controversies out of which they emerge. In a controversy in which, for example, Mālikīs and Ḥanbalīs are on one side and Ḥanafīs on the other, we have both a Mālikī/Ḥanafī difference and a Ḥanbalī/Ḥanafī difference.

We need not, I think, devote space in this book to a listing of *madhhab* differences with the five other categories, since one can get an impression of what these differences are like from the Shāfi'ī/Ḥanafī differences. In fact, many of the differences in these other categories emerge out of the same controversies and thus relate to the same issues as the Shāfi'ī/Ḥanafī differences. The further exploration of differences would thus contribute rather little to our study. If it is true that the Shāfi'ī/Ḥanafī encounters have a catalytic role in the development of Muslim jurisprudential dialectic, then we can justifiably say that the differences between these two schools are uniquely deserving of our attention.

What then is the significance of the *madhhab* differences reflected in the *Iḥkām*? Looking over the Shāfi'ī/Ḥanafī differences listed above, we can hardly dismiss them as inconsequential. Kevin Reinhart shows in his contribution to this volume how the very first difference in our list reflects major historical cleavages between the Shāfi'ī and Ḥanafī schools that extend beyond the boundaries of jurisprudence into the realm of theology. I have the impression that a similarly thorough exploration of many of the other differences will yield similar findings or even confirm his. One example will suffice to explain what I have in mind. Reinhart's characterization of the Ḥanafī school, in its insistence upon the distinction between *farḍ* and *wājib*, as less willing than the Shāfi'ī to consign human duty to the realm of opinion and as more insistent upon the existence of a realm where duty

is certain and constant and precisely defined seems to be born out by the Ḥanafī positions on several other issues. Take the question of how the integrity of a transmitter of *ḥadīth* is to be determined. The Ḥanafī position is that an outward appearance (*ẓāhir*) of integrity is all that should be required, since it alone can be known with certainty, unlike inner attitudes and dispositions (on which the Shāfi'īs insist), which are unobservable and subject to variations of opinion. There is, furthermore, in this Ḥanafī position an echoing of Murji'ī leanings discussed by Reinhart. One is in Murji'ī thinking, to be judged a believer and member of the community of believers on the basis of outward confession, leaving the state of his heart to the judgment of God.

The Ḥanafī school also, judging from the *Iḥkām*, carries its concern to maximize certainty even further into the realm of *ḥadīth* criticism, insisting that a transmitter of *ḥadīth* be certain of the accuracy of what he is transmitting and not merely be of the opinion that it is accurate (seventh difference) and disallowing the transmission of *ḥadīth* on no other basis than a written license obtained from a recognized teacher of *ḥadīth* (sixth difference). An written license alone does not establish the accuracy of the transmission with complete certainty. These two restrictions of course have the potential effect of reducing the amount of *ḥadīth* material accepted into the canon. The Shāfi'īs, on the other hand, appear in Āmidī's accounts to be more willing to sacrifice certainty for the sake of having a larger body of *ḥadīth* to work with.

Again, in differences relating to the subject of analogical reasoning we seem to encounter a similar Ḥanafī preoccupation with certainty. The Ḥanafīs are presented in Āmidī's as seeking to place certain restrictions on the use of analogical reasoning that the Shāfi'īs do not require. The Ḥanafīs, we are told, object to the use of analogy to establish details of *ḥadd* penalties and acts of penance (*kaffārāt*), as against Shāfi'ī at least, who allowed this practice (twenty-sixth difference); they also refuse to establish an *'illah* (*ratio legis*) on the basis of analogy, whereas the Shāfi'īs (so says Āmidī) do not. Of course, Muslim jurists in general, including Ḥanafīs, recognized that analogical reasoning is generally productive of opinion, not certainty, so that we must apparently understand these Ḥanafī positions to be attempts to restrict the sphere of operation of analogy, not to eliminate the use of analogy.

It would of course be a mistake to suppose that the Shāfi'īs cared nothing about certainty. Āmidī, himself a Shāfi'ī, frequently draws a distinction throughout the *Iḥkām* between certainty (*qat'*) and opinion (*ẓann*) and recognizes that major foundational matters must be subsumed under the heading of "certainties" (*qat'īyāt*). However, at the same time his accounts of Shāfi'ī/Ḥanafī encounters suggest that there are significant differences in the attitudes of the two schools with regard to the subject of certainty. We seem to be told that in the realm of duties, of norms of conduct, the Shāfi'īs are less insistent upon certainty than the Ḥanafīs and are willing to adhere much more steadfastly and consistently to the principle constantly reiterated by Āmidī, *al-ẓann wājib al-ittibā' fi 'l-shar'* (loosely translated: "opinion is normative in the realm of *shar'*").

These observations relate to only a small number of differences picked from the larger list that was given above and are intended only as intimations of the sorts of things one might discover from a more thorough study of these or other differences than I have attempted to undertake here. As Reinhart has noted, there is often more to these differences than at first may be apparent. A particular difference may be a door that when opened leads the investigator into a much vaster panorama of jurisprudential and theological ideas and issues.

Three topics, all having to do with the importance of *madhhab* differences *within* the literature of *uṣūl al-fiqh*, remain to be considered before we may consider our business to be finished: the importance of *madhhab* differences relative to other concerns manifest in the *Iḥkām*, the pattern of distribution of *madhhab* differences within the overall structure of the *Iḥkām*, and the bearing that the differences have on *uṣūl al-fiqh* considered as a system.

With regard to the first of these matters, we may begin with a purely quantitative observation. For this study my first undertaking was to compile a list of all the free-standing numbered *masā'il* in the entire *Iḥkām*, for each of which I took note of the opposing positions as well as the parties—groups or individuals—involved in the controversy. By numbered *masā'il* I mean *masā'il* to which Āmidī himself assigns numbers (*al-mas'alah al-ūlā, al-mas'alah al-thānīyah*, etc.), with each cluster of *masā'il* having its own separate sequence of numbers beginning with *al-mas'alah al-ūlā*. I did not include in my list controversies

over definitions of terms or controversies hidden within discussions of preliminary matters that occur at the beginning of major sections.

When I completed my list, I found that the total number of such *masā'il* that occur in the *Iḥkām* is 275 more or less (I must allow some margin of error). Of these approximately 50 (I counted 51)—or about 18% of the total—contained what could be construed as inter-*madhhab* differences. We should not of course make an final judgment on the importance of these differences on the basis of quantitative findings alone, but at least we can say that, judging from this allocation of space, inter-*madhhab* differences, however great their importance may turn out to be, are but one of a number of concerns of the *Iḥkām* and, doubtless, of the genre of literature it represented.

Other largely quantitative considerations need be taken into account at this point. First of all, it should be noted that there are twenty-four (according to my count) occurrences of differences *within madhhab*s, suggesting that intra-*madhhab* differences are as much a concern to Āmidī—or nearly so—as inter-*madhhab* differences. But even if we broaden our conception of differences to include both inter- and intra-*madhhab* differences, school differences in this broader sense hardly monopolize Āmidī's attention. For one thing, almost everywhere that the school are engaged in controversy we find two or more schools sharing common ground on one side of the controversy. Thus the *Iḥkām* supplies us with material for examining the ways schools agreed with each other as much as it supplies us with material for examining the ways they differ. The two bodies of material are in fact largely one and the same.

Then again, we must take into account Āmidī's frequent inclusion of individuals other than the eponyms among the parties to controversies, renowned scholars of the different law schools as well as thinkers famed more for linguistic, theological or other achievements than for expertise in the law. One can say, in the light of these inclusions, that yet another concern of Āmidī's is to track the contribution of great individuals to the development of Muslim legal dialectic and to note areas of difference between them and areas of agreement.

The fact that practitioners of *kalām* are frequently among the parties and that Mu'tazilīs and Ash'arīs, along with the more generic *mutakallimūn*, often appear as participating groups tells us something more about Āmidī's concerns, and that is that they go beyond the realm of what we might regard as the strictly legal. Although *uṣūl al-fiqh* was distinguished carefully from *kalām* in the Muslim system-

izations of the sciences (Āmidī himself wrote a summa on each), this did not mean that there was a strict division of labor between groups we think of as theological (Ash'arīs and Mu'tazilīs in particular) and groups we think of as jurisprudential (the legal *madhhab*s). Both the Ash'arīs and the Mu'tazilīs frequently appear as parties to controversies that are more jurisprudential than theological or that at least cannot be said to be more theological than jurisprudential. Ash'arī in fact himself frequently appears in the role of an eponym making pronouncements on *uṣūl*-related questions. This cross-over relationship between "theological" and "jurisprudential" schools and scholars works, of course, in both directions. Figures usually associated with "jurisprudential" matters frequently speak forth on "theological" matters. The attribution of famous creedal statements to Abū Ḥanīfah and Shāfi'ī is an especially telling example of this fact.[40]

Two further quantitative observations are in order. According to my count, there are 29 instances in which Shāfi'īs alone among the *madhhab*s or Shāfi'ī alone among the eponyms appear in controversies. Although occasionally other *madhhab*s or eponyms appear alone in a controversy, they do so only very rarely. If we add to this information the fact that in controversies involving two or more *madhhab*s or their eponyms the Shāfi'ī school is more frequently present than any other school, we have what is clearly a special interest in that school, something we can hardly regard as surprising considering that the author of the *Iḥkām* was a Shāfi'ī. It can perhaps be argued that the frequency of attention to the Shāfi'ī school gives the *Iḥkām* the character of a Shāfi'ī work on *uṣūl al-fiqh*. There is certainly more material in the *Iḥkām* that we can use to construct an overview of "Shāfi'ī *uṣūl al-fiqh*" than for any other school.

Yet we must not exaggerate the degree to which the *Iḥkām* is a work in Shāfi'ī *uṣūl*. Of the 275 numbered *masā'il* that emerged out of my count, 160 (around 58%) entail no participation at all of legal schools or their eponyms. Approximately half of these involve no named parties at all: either the parties are anonymous or no reference is made to parties and their existence is entirely implicit. A number of *masā'il* seem not even to have the character of questions at all but appear to be rubrics under which to expound a given principle. I judge Āmidī's reason for using the rubric in this way to

[40] The close relationship between jurisprudence and theology in Islam is especially evident in the studies of Aron Zysow and Kevin Reinhart elsewhere in this volume.

be an implicit insistence that, even if put in a declarative format, the principle in question is not immune from challenge and in that sense remains in the final analysis a question.

To return to our main subject, *madhhab* differences and their significance, we have yet to consider two remaining points. The first has to do with the pattern of distribution of these differences within the *Iḥkām*. The distribution is very uneven. There are areas of *uṣūl al-fiqh* where *madhhab* differences seem not to be found at all. For example, in the sections of the *Iḥkām* that deal with epistemological, theological and linguistic matters the schools are never pitted against each other. The same is true of the section on *ijtihād* and *iftā'* and the sections on argumentation (*i'tirāḍāt*) and on the application of logic (*mantiq*) to the formulation of law. There are surprisingly few *madhhab* differences in the section on what I have called *fiqh*-related postulates, the section on consensus (*ijmā'*) and, most surprisingly of all, in the long section on analogy (*qiyas*). The greater concentrations of *madhhab* differences are found in the sections that deal with *ḥadīth* and its transmission and the sections that deal with issues of interpretation of texts. Perhaps this is so because these sections represent core areas of *uṣūl al-fiqh*, areas that hark back to a time when *uṣūl al-fiqh* was in the crucial stage of its development and opposing movements, preeminently the *ahl al-ḥadīth* and the *ahl al-ra'y*, were contending for supremacy.

But we must bear in mind that even where *madhhab* differences are most concentrated they still are rather sparse. "Concentrated" is thus a relative term. I am saying that they are more concentrated in certain sections of the *Iḥkām* than elsewhere, not that they are densely concentrated anywhere.

The other point to be considered, the final point, relates to the bearing which the *madhhab* differences have on *uṣūl al-fiqh* as a system. Whatever may be said about the importance that these differences can have for the practical business of formulating law from case to case and constructing *fiqh*, it must, I think, be conceded that they do not touch on those matters or principles that must be considered most foundational for *uṣūl al-fiqh* as a system. The most crucial *masā'il*, the ones that take up the greatest number of pages in the *Iḥkām*, do not pit school against school or faction against faction within schools.

There is in the *Iḥkām* no inter-*madhhab* debate over the nature or primary characteristics of language, over the authority of the Qur'ān or the Sunnah, over the efficacy of *tawātur* as a guarantor of reliable transmission, over the authority of consensus, over the interpretation of commands and prohibitions, over the import of general terms, over the legitimacy of analogical reasoning and interpretive rules that governed it, or over the nature of ambiguity and ways of dealing with it. That controversies over many such matters could and did exist is well attested in the *Iḥkām*, but they are not presented as controversies between the four classical *madhhab*s. Thus the parties that debate the question of how the *siyagh al-ʿumūm* are to be construed are not *madhhab*s or capable of being associated with *madhhab*s. They are called simply "the partisans of generality" (*arbāb al-ʿumūm*) and "the partisans of specificity" (*arbāb al-khuṣūṣ*). The debate seems to have crossed over *madhhab* lines. Other controversies over foundational matters must be seen as tied to the process of formation of legal orthodoxy, of mapping out the common ground that the classical schools would share. In such controversies arguments would not be directed by *madhhab* against *madhhab* but by an orthodox establishment against unorthodox groups, such as the Ẓāhirīs and Shīʿīs, or in some cases even against groups outside Islam, such as the Jews (as in certain controversies relating to abrogation). Many of these controversies probably predated the formation of the classical schools, and it could well be for that reason that they do not appear in the *Iḥkām* as inter-*madhhab* controversies, even though they remained as part of the dialectical legacy of *uṣūl al-fiqh*.

What of the famous doctrines of *istiḥsān* and *istiṣlāḥ*, which are so frequently regarded as hallmarks of the Ḥanafī and Mālikī schools. Āmidī insists that only in one sense of the term does *istiḥsān* constitute a distinctive Ḥanafī doctrine, and that sense is the setting aside of a rule based on a revealed indicator of the law in favor of a rule based on custom. At the same time, there are other senses of the terms and in all of these senses *istiḥsān* is not unique to the Ḥanafī school; everyone at some point engages in it. As for *istiṣlāḥ*, this entails reliance upon the concept of benefits known as *maṣāliḥ mursalah*. These are benefits for which there is no evidence either that the Legislator took them into account to or that he excluded them from consideration as a basis for legislation. The question was whether humans could legitimately fashion rules of law on the basis of such benefits. Āmidī seems anxious to dissociate Mālik from the notion

that humans could do precisely that, a notion commonly thought to be Mālikī. In Āmidī's estimation, therefore, *istiḥsān* is only in one narrowly defined sense a distinctive Ḥanafī principle, and *istiṣlaḥ* in the sense just defined is not a distinctive Mālikī doctrine at all.

The conclusions I draw from my survey of the *Iḥkām* may be summed up as follows. Differences between the classical *madhhab*s at the level of theory and methodology are well attested to in the *Iḥkām* and were of undeniable importance for the schools. Accordingly, they should be explored by modern scholarship, and judging from the *Iḥkām* the literature of *uṣūl al-fiqh* is a fruitful resource to use to this end. On the other hand, we should bear in mind that elaboration of *madhhab* differences is not a central concern of the *Iḥkām*, judging from the rather slim amount of attention such differences receive. Whether we can eventually get a comprehensive picture of *uṣūl*-related *madhhab* differences from the *uṣūl al-fiqh* literature is hard to say at this point, though we can certainly make a good beginning. The Shāfiʿī/Ḥanafī differences listed in this study all merit further reflection and exploration. I have only, so to speak, "tossed them out". A model for deeper study of these differences is provided by Kevin Reinhart's study of Shāfiʿī/Ḥanafī differences regarding *farḍ* and *wājib*. Along with in-depth studies like his must come a broadening of our search, beyond the confines of a single *uṣūl* work such as Āmidī's, for other school differences worth exploring. Āmidī, despite his formidable mastery of the discipline, was limited to what he knew, to what was knowable in his time and locale. For example, the controversy over *farḍ* and *wājib* is in his account limited to Shāfiʿīs and Ḥanafīs. Though the debate between these two schools was undoubtably the original and seminal one, the other schools were drawn into the fray, as Reinhart shows. Furthermore, Zysow's study of the issue of *takhṣīṣ al-ʿillah* (twenty-fourth difference in my list) makes it clear that there was more controversy on within the Ḥanafī camp than Āmidī takes into account.

At the same time, judging from the *Iḥkām*, the literature of *uṣūl al-fiqh* will also prove useful for study of common ground between *madhhab*s on a variety of questions. Furthermore, the *Iḥkām* has the unmistakable tone of a Shāfiʿī work and as such can be useful for exploring a broad spectrum of *uṣūl*-related Shāfiʿī school positions, not just those that emerge in the context of differences. Similarly, other *uṣūl* literature will prove equally useful in the exploration of school profiles.

Despite the undeniable tinge of Shāfi'ism that one encounters in the *Iḥkām*, I nonetheless get from my study of this great dialectical masterpiece a sense is that *uṣūl al-fiqh* is a predominantly universal discipline that undergirds a dialectic not fundamentally unique to any school but common to all schools. Rather than setting schools apart from each other it brings them together in important ways. It fosters diversity of opinion but within limits consisting of a mutually agreed upon body of foundational principles that makes diversity within an over-arching orthodoxy possible. While diversity on issues of principle is clearly evident in this literature, the grand principles are shared principles and the fundamental spirit is that of a remarkably catholic *ahl al-sunnah wa 'l-jamā'ah*.

School differences have of course always been and always will be a topic of great interest for scholars of Islam, whether Muslim or non-Muslim, and the literature of *uṣūl al-fiqh* remains an importance resource for the study of these differences. At the same time, it may be that sustained attempts to articulate separate school identities at the level of abstract principle are more central to another branch of Muslim legal literature, that of the *qawā'id*, which is the subject of Wolfhart Heinrichs contribution to this volume. The forging of school identities furthermore, as Wael Hallaq's contribution shows, owed much to a process of construction of juristic authority that took place under the rubric of *takhrīj*, a subject nowhere discussed in the *Iḥkām*. In the final analysis, it is no doubt as much in institutions and their history as in ideas and their history that the roots of *madhhab* multiplicity are to be found.

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PART FOUR

AUTHORITY, REFORM, UNDERLYING PRINCIPLES

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TAKHRĪJ AND THE CONSTRUCTION OF JURISTIC AUTHORITY

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I

Sometime after the fifth/eleventh century, when the legal schools had attained maturity, juristic typologizing as a discursive activity came into being. Juristic typologizing is a form of discourse that reduces the community of legal specialists into manageable, formal categories, taking into consideration the entire historical and synchronic range of that community's juristic activities and functions. One of the fundamental characteristics of a typology is the elaboration of a structure of authority in which all the elements making up the typology are linked to each other, hierarchically or otherwise, by relationships of one type or another. The synchronic and diachronic ranges of a typology provide a synopsis of the constitutive elements operating within a historical legal tradition and within a living community of jurists. It also permits a panoramic view of the transmission of authority across types, of the limits on legal hermeneutics in each type, and of the sorts of relationships that are imposed by the interplay of authority and hermeneutics.

Perhaps the most salient feature of these typologies is that they sketch the diachronic and synchronic contours of Islamic legal history generally, and the development of the respective schools in particular. They sketch this history in terms of the authority and scope of hermeneutical activity, two separate domains that are nonetheless intimately interconnected. Interpretive activity may be more or less authoritative, and its scope may also be wide or narrow. But in Islamic legal history they stand in a relationship of correlation, for higher hermeneutical authority brings along with it a wide range of interpretive activity.

The most absolute form of these two domains was the lot of the founding Imāms. As time went on, increasing numbers of jurists were to claim less and less competency in these domains. Indeed, diminishing returns in both authority and hermeneutics went hand in hand

with an increasing dependency on former authority, although to a lesser extent on earlier *corpora* of interpretation. Synchronically, therefore, the function of these typologies is not only to describe, justify and rationalize juristic activities of the past but also, and more importantly, to construct the history of the school as a structure of authority which is tightly interconnected in all its constituents. The structure that emerges is both hierarchical and pyramidical. In synchronic terms, then, the achievement is represented in the creation of a pedigree of authority that binds the school together as a guild.

Diachronically, the typologies justify the tradition in which the jurists were viewed as founders of law schools as well as the sustainers of a continuous activity that connected the present with the past. But the connection was also made in concrete terms. The hermeneutics of one type or rank represented a legacy to the succeeding type and rank, a legacy to be accepted, articulated, elaborated, and further refined. The process began with absolute *ijtihād*, passing through more limited *ijtihād*, and ultimately other forms of interpretive activity. Participating at each of these stages was a group of identifiable jurists.

Now, the creation of an archetype, i.e., an ideal authoritative model or standard to which all other types must conform or emulate, is undeniably a prime concern of juristic typologies. In the case of Islamic law, this archetype is the absolute *mujtahid* whose legal knowledge, presumed to be all-encompassing and wholly creative, is causally connected with the founding of a school. The school is not only named after him, but he is purported to have been its originator. The comprehensive and wide-ranging knowledge attributed to the absolute *mujtahid* is matched only by his assumed in-depth knowledge of, among other things, legal methodology or *uṣūl al-fiqh* (which is by necessity of his own creation), Quranic exegesis, *ḥadīth* criticism, the theory of abrogation, legal language, positive and substantive law, arithmetic, and the science of juristic disagreement.

The salient feature of the founders' *ijtihādic* activity is no doubt the direct confrontation with the revealed texts, for it is only this deified involvement with the divine word that requires and presupposes thorough familiarity with so many important fields of knowledge. Even when certain cases require reasoning on the basis of established legal rules and derivative principles, the founding jurist's hermeneutic is held to be, in the final analysis, thoroughly grounded in the revealed texts. The founder's doctrine constitutes therefore the only purely

juristic manifestation of the legal potentiality of revealed language. Without it, in other words, revelation would remain just that, revelation, lacking any articulation in it of the legal element. His doctrine lays claim to originality not only because it derives directly from the texts, but also because it is gleaned systematically, by means of clearly identifiable principles, from these sources. Its systematic character is seen as a product of a unified and cohesive methodology which only the founder could have forged, but a methodology, it must be asserted, that is itself inspired and dictated by revelation.

Now, what is striking about this typological conception of the founder-*mujtahid* is its absoluteness not only in terms of credentials or epistemic, and indeed moral, authority,[1] but also in terms of chronological rupture with antecedents. At the juncture of this rupture, the precise point at which the most accomplished type of *mujtahid* is formed, the typology suffers from a memory loss, overlooking in the process the existence in reality of the founder's predecessors and his own immediate intellectual history. For it was with the latter that the *mujtahid*-Imāms formed a continuity, and of the former that they were necessarily a product. In the constructed typology, as perceived by the later legal profession, the founders became disconnected from previous generations of jurists as well as from a variety of historical processes that culminated in the very achievements of the Imāms.[2]

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[1] That the founders' authority also contained a strong moral element is abundantly attested by the *manāqib* literature. See, for instance, Aḥmad b. Ḥusayn Abū Bakr al-Bayhaqī, *Manāqib al-Shāfiʿī*, ed. Aḥmad Ṣaqr, 2 vols. (Cairo: Maktabat Dār al-Turāth, 1971), 1:260–385, 486–550, and passim; Shams al-Dīn Muḥammad b. Muḥammad al-Rāʿī, *Intiṣār al-faqīr al-sālik li-tarjīḥ madhhab al-Imām Mālik*, ed. Muḥammad Abū al-Ajfān (Beirut: Dār al-Gharb al-Islāmī, 1981), 139ff., 167ff., 173ff.; Muḥammad b. Yūsuf al-Ṣāliḥī, *ʿUqūd al-jummān fī manāqib al-imām al-aʿẓam Abī Ḥanīfah al-Nuʿmān* (Haidarabad: Maṭbaʿat al-Maʿārif, 1394/1974), 211–31, 239–96. On epistemic and moral authority, see E. D. Watt, *Authority* (London and Camberra: Croom Helm, 1982), 45–54, 55–63; Richard T. De George, *The Nature and Limits of Authority* (Lawrence, Kansas: University of Kansas Press, 1985), 26–61, 191–209; Stanley I. Benn, "Authority", *Encyclopedia of Philosophy*, 8 vols. (New York: Macmillan Publishing Co., 1967), 1:215–18.

[2] Shams al-Dīn b. Shihāb al-Dīn al-Ramlī, *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj*, 8 vols. (Cairo: Muṣṭafā Bābī al-Ḥalabī, 1357/1938), 1:41, reports, on the authority of Ibn al-Ṣalāḥ, that none other than the four Imāms may be followed, either in the issuing of *fatwās* or in courtroom litigation. Representing the authority of school affiliation, this opinion of Ibn al-Ṣalāḥ became widely accepted by many later jurists of all four schools. Muḥammad b. Muḥammad al-Ḥaṭṭāb, *Mawāhib al-jalīl li-sharḥ Mukhtaṣar Khalīl*, 6 vols. (Ṭarāblus, Libya: Maktabat al-Najāḥ, 1969), 1:30–31, quotes Ibn al-Ṣalāḥ's statement and enhances it with another by Ghazālī

II

As jurists, the founding fathers were highly accomplished, but not as absolutely and as categorically as they were made out to be. Dissociating them from the achievements of their past was only one of many ways to increase their prestige and augment the resumé of their accomplishments. True, they were *mujtahids*—or some of them were, at any rate[3]—but not without qualification and certainly not absolutely. Elsewhere,[4] we show that none of them exercised *ijtihād* across the board, in each and every case they addressed or opinion they held; for much of the body of opinion they espoused was inherited from other authorities.

Another way in which the authority of the Imāms was constructed and augmented was by means of attributing later doctrines to them which they never held, doctrines arrived at by means of the so-called *takhrīj*. It is the juristic constitution of these doctrinal contributions and the manner in which they underwent the process of attribution that will be our concern here.

It may at first glance seem a contradiction to speak of *ijtihād* as part of the *muqallid*'s activity, but this is by no means the case. Juristic typologies acknowledge a group of jurists who stood below the rank of the absolute *mujtahids*, a group that was distinguished by the dual attribute of being *muqallids* to the founding-Imām and, simultaneously, *mujtahids* able to derive legal norms through the process of *takhrīj*.[5]

(p. 31) who declares the founders' and schools' legal doctrines superior to those of earlier jurists. See also ʿAbd al-Raḥmān b. Muḥammad Bāʿalawī, *Bughyat al-mustarshidīn fī talkhīṣ fatāwā baʿḍ al-aʾimmah min al-ʿulamāʾ al-mutaʾakhkhirīn* (Cairo: Muṣṭafā Bābī al-Ḥalabī, 1952), 1:274; Wael B. Hallaq, *Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 39ff.

[3] Ibn Ḥanbal, for instance, can hardly be said to have developed the skills of a *mujtahid*, let alone first-rate *mujtahid*. He was in the first place a traditionist and a sort of theologian, and his occupation with law as a technical discipline was rather minimal. This much fact about him was acknowledged by his followers and foes alike. Ṭabarī refused to recognize him as a jurist, a perception that persisted among his followers for centuries. See Abū Jarīr al-Ṭabarī, *Ikhtilāf al-fuqahāʾ* (Beirut: Dār al-Kutub al-ʿIlmīyah, 1980), 10; ʿAbd al-Raḥmān Ibn Rajab, *al-Dhayl ʿalā ṭabaqāt al-Ḥanābilah*, 2 vols. (Cairo: Maṭbaʿat al-Sunnah al-Muḥammadīyah, 1952–53), 1:156–57, where he quotes Ibn ʿAqīl's observation that some of the younger Ḥanbalite legal scholars thought Ibn Ḥanbal lacking in juristic skills. For a more detailed discussion of Ibn Ḥanbal's lack of legal qualifications, see Hallaq, *Continuity and Change in Islamic Law*, ch. 2, section 2.

[4] Hallaq, *Authority*, ch. 2.

[5] The origins of this term's technical meaning are by no means easy to reconstruct. None of the second/eighth century jurists, including Shāfiʿī, uses the term in

Virtually overlooked by modern scholarship,[6] this important activity was largely responsible for the early doctrinal development of the personal schools, its zenith being located between the very beginning of the fourth/tenth century and the end of the fifth/eleventh, although strong traces of it could still be observed throughout the following centuries.[7]

According to Ibn al-Ṣalāḥ, the limited *mujtahid* exercises *takhrīj* on either of two bases: a particular text of his Imām where a specific opinion is stated or, in the absence of such a text, he confronts revelation and derives from it a legal norm according to the principles and methodology established by his Imām. This he does while heeding the type and quality of reasoning that is habitually employed by the Imām,[8] and in this sense *takhrīj* exhibits the same features as the reasoning which constitutes the conventional, full-fledged *ijtihād* of the arch-jurist. In both types of *takhrīj*, however, conformity with the Imām's legal theory and the general and particular principles of the law is said to be the prime concern.

The first type became known as *al-takhrīj wal-naql*,[9] while the second, being a relatively more independent activity, was given the unqualified designation *takhrīj*. This latter involves reasoning, among many things, on the basis of general principles, such as the principle that necessity renders lawful what is otherwise illicit, or that no legal obligation shall be imposed beyond the limit of endurance or

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any obvious technical sense. To the best of my knowledge, the first semi-technical occurrence of it is found in Muzanī's *Kitāb al-amr wa l-nahy*, where the author uses the term *makhraj* (lit. an outlet) to mean something like a solution to a problem, a way, that is, to get out of a problem through legal reasoning. It is quite noticeable, however, that Muzanī employs the term while taking Shāfi'ī's doctrine into account, which in this treatise is nearly always the case. See his *Kitāb al-amr wal-nahy*, in Robert Brunschvig, "Le livre de l'ordre et de la défense d'al-Muzani", *Bulletin d'études orientales*, 11 (1945–46): 145–94, at 153, 156, 158, 161, 162 and passim. Incidentally, it is noteworthy that *takhrīj* as a way of reasoning is not expounded, as a rule, in works of legal theory. As a technical term, it appears in none of the major technical dictionaries; e.g., Tahānawī's *Kashshāf iṣṭilāḥāt al-funūn* and Jurjānī's *Ta'rīfāt*.

[6] The only work that allocates some discussion to the later, not early, activity of *takhrīj* is, to the best of my knowledge, Sherman Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: E.J. Brill, 1996), 91–96. Jackson deals with this issue from the limited perspective of Qarāfī and, at any rate, addresses neither the structure of reasoning involved in this activity nor its role in early legal evolution.

[7] See nn. 55–57, below.

[8] Ibn al-Ṣalāḥ, *Adab al-muftī wa l-mustaftī*, ed. Muwaffaq b. 'Abd al-Qādir (Beirut: 'Alam al-Kutub, 1407/1986), 97.

[9] At times also known as *al-takhrīj bi l-naql*.

optimal capability. In this type of activity, the limited *mujtahid* takes these principles as his rule-of-thumb and solves problems accordingly.

The following example, from Ḥanbalite law, illustrates the activity of *al-takhrīj wal-naql*: If someone intends to perform prayer while wearing ritually impure clothes—the assumption being that ritually pure clothes are not available at the time—, he or she must still pray but must also repeat the prayer when the proper apparel can be had. This is said to have been Ibn Ḥanbal's opinion. Another reported opinion of his concerns prayer in a ritually impure place. He held, contrary to the first case, that if someone prays in such a place, he need not pray again in compensation. Now, in the later Ḥanbalite school, there emerged the principle that both the ritual purity of the location of the prayer and the clothes worn while performing this duty constitute a condition for the validity of prayer. This being so, the two issues become cognate and, therefore, subject to mutual consideration. In other words, the legal norms attached to the two cases become interchangeable, thus creating two, contradictory legal norms for each. Najm al-Dīn al-Ṭūfī explains how this comes about:

> The stipulation that wearing ritually impure clothes requires repetition of the prayer is a legal norm that is transferred (*yunqal*) to the [issue of] place. So a new legal norm emerges in the case of place (*yatakharraj fī-hi*). The stipulation that praying in a ritually impure place does not require repetition of the prayer is a legal norm that is transferred to [the issue of] clothes. Accordingly, a new legal norm emerges in the case of clothes. This is why each of the two cases will have two legal opinions, one held by the founder, the other reached by *al-naql* (*wal-takhrīj*).[10]

On the authority of Majd al-Dīn ibn Taymīyah (d. 652/1254), the grandfather of Taqī al-Dīn, Ṭūfī reports another case of *al-takhrīj wal-naql*: A bequest given in handwriting is considered valid in the opinion of the Imām. But the attestation of a bequest in handwriting is considered null and void if the witnesses are left ignorant of its par-

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[10] Najm al-Dīn al-Ṭūfī, *Sharḥ Mukhtaṣar al-Rawḍah*, ed. ʿAbd Allāh al-Turkī, 3 vols. (Beirut: Mu'assasat al-Risālah, 1407/1987), 3:641; "*wa-man lam yajid illā thawban najisan ṣallā fī-hi wa-aʿāda, naṣṣa ʿalayhi. Wa-naṣṣa fī-man ḥubisa fī mawḍiʿ najis fa-ṣallā, annahu lā yuʿīd. Fa-yatakharraj fī-himā riwāyatān wa-dhālika li'anna ṭahārat al-thawb wal-makān kilāhumā sharṭ fī al-ṣalāt. Wa-hādhā wajh al-shabah bayna al-mas'alatayn. Waqad naṣṣa fī al-thawb al-najis annahu yuʿīd, fa-yanqul ḥukmahu ilā al-makān, wa-yatakharraj fī-hi mithluhu, wa-naṣṣa fī al-mawḍiʿ al-najis ʿalā annahu lā yuʿīd, fa-yanqul ḥukmahu ilā al-thawb al-najis, fa-yatakharraj fī-hi mithluhu, fa-lā jarama ṣāra fī kulli wāḥidatin min al-mas'alatayn riwāyatān, iḥdāhumā bil-naṣṣ wal-ukhrā bil-naql*".

ticulars. The invalidity of the testimony thus renders the bequest itself void. The reasoning we have observed in the case of prayer prevails here too, since the common denominator is the hand-written bequest. The outcome of this reasoning is that each case will acquire two contradictory legal norms, one of validity, the other of nullity.[11]

During the post-formative period of the schools, when the authority of the founder-Imām was at last considered undisputed, the activity of *al-takhrīj wal-naql* came to be restricted, in terms of source material, to the Imām's or his followers' opinions. In actual fact, however, and before the formation of the schools as guilds, this was by no means the case. The early Shāfiʿite jurist Ibn al-Qāṣṣ (d. 335/946) reports dozens, perhaps hundreds, of cases in which *takhrīj* was practised both within and without the boundaries of the Imām's legal principles and *corpus juris*. (In fact he acknowledges, despite his Shāfiʿite affiliation, that his work *Adab al-qāḍī* is based on both Shāfiʿī's and Abū Ḥanīfah's doctrines.)[12] In the case of a person whose speaking faculty is impaired (*akhras*), Shāfiʿī and Abū Ḥanīfah apparently disagreed over whether or not his testimony might be accepted if he knows sign language (*yaʿqil al-ishārah*). Ibn Surayj (d. 306/918), a distinguished Shāfiʿite and Ibn al-Qāṣṣ's professor, conducted *takhrīj* on the basis of these two doctrines, with the result that two contradictory opinions were accepted for this case: one that the testimony is valid, the other that it is void.[13] What is most interesting about Ibn al-Qāṣṣ's report is that Ibn Surayj's activity was deemed to fall within the hermeneutical contours of the Shāfiʿite school. He reports Ibn Surayj to have reached these two solutions "according to Shāfiʿī's way" (*fa-kharrajahā Abū al-ʿAbbās ibn Surayj ʿalā madhhab al-Shāfiʿī ʿalā qawlayn*).[14] A similar attribution may be found in the case of the *qāḍī*'s (un)equal treatment of the plaintiff and defendant

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[11] Ibid., III, 642.

[12] Abū al-ʿAbbās Aḥmad b. Abī Aḥmad al-Ṭabarī Ibn al-Qāṣṣ, *Adab al-qāḍī*, ed. Ḥusayn Jabbūrī, 2 vols. (Ṭāʾif: Maktabat al-Ṣiddīq, 1409/1989), I, 68. The absence of schools, and therefore of school loyalty, during the second/eighth and third/ninth centuries also explains the cross-influences between and among the school's founders. Thus, we should not consider unlikely the report that when Abū Yūsuf and Shaybānī met Mālik, they abandoned nearly one-third of the doctrine which they had elaborated in Kūfah in favour of Mālik's doctrine. Rāʿī, *Intiṣār al-faqīr*, 204. Despite the propagandist uses that were made of this report, it can still be considered authentic in light of what we know about inter-doctrinal influences.

[13] Ibn al-Qāṣṣ, *Adab al-qāḍī*, 1:306.

[14] Ibn al-Qāṣṣ, 1:306.

in his courtroom. Ibn al-Qāṣṣ reports that "the opinion of Shāfiʿī is that the *qāḍī* should not allow one of the two parties to state his arguments before the court without the other being present. Ibn Surayj produced this opinion by way of *takhrīj*" (*qālahu ibn surayj takhrījan*).[15] Ibn Surayj's *takhrīj* becomes Shāfiʿī's authoritative opinion.

Drawing on Abū Ḥanīfah's doctrine appears to have been a frequent practise of Ibn Surayj.[16] The former held, for instance, that if four witnesses testify that an act of adultery took place, but all disagree as to the precise location in the house in which the act took place, then the *ḥadd* punishment should be inflicted nonetheless. Admittedly, Abū Ḥanīfah's reasoning is dictated by *istiḥsān*,[17] since *qiyās* does not allow for the penalty of *ḥadd* when doubt exists; rather it demands that the penalty only be meted out when all witnesses agree on the specific location in which the act was said to have taken place. Now, in another case of adultery, the authoritative doctrine of the Shāfiʿite school held that if two witnesses testify that a man had sexual intercourse with a consenting woman, and two other witnesses attest that he raped her, then he would not be deemed liable to the death penalty dictated by *ḥudūd*. Following the principles of *takhrīj* as outlined above, Ibn Surayj transferred the legal norm in the Ḥanafite case to the Shāfiʿite one, the result being that if doubt exists as to whether sexual intercourse occurred as rape or by mutual consent, the man should suffer capital punishment regardless.[18]

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[15] Ibn al-Qāṣṣ, 1:214. See also Tāj al-Dīn al-Subkī, *Ṭabaqāt al-Shāfiʿīyah al-kubrā*, 6 vols. (Cairo: al-Maktabah al-Ḥusaynīyah, 1906), 2:94–95.

[16] And on Shaybānī's doctrine as well. It should not come as a surprise then that Ibn Surayj, the most illustrious figure of the Shāfiʿite school after Shāfiʿi himself, and the one held responsible for the phenomenal success of Shāfiʿism, should be remembered in Shāfiʿite biographical literature as having elaborated his legal doctrine on the basis of Shaybānī's law and legal principles. In the very words of Shīrāzī, Ibn Surayj "*farraʿa ʿalā kutub Muḥammad ibn al-Ḥasan*", i.e., he derived positive legal rulings on the basis of Shaybānī's doctrine. It is perhaps because of this that the later Shāfiʿites expressed some reservations about the nature of Ibn Surayj's doctrines. One of the oft-quoted utterances is that made by Abū Ḥāmid al-Isfarāʾīnī who said that "we go along with Abū al-ʿAbbās [Ibn Surayj] on doctrine generally, but not on matters of specifics" (*naḥnu najrī maʿ Abī al-ʿAbbās fī zawāhir al-fiqh dūna al-daqāʾiq*). See Abū Isḥāq al-Shīrāzī, *Ṭabaqāt al-fuqahāʾ*, ed. Iḥsān ʿAbbās (Beirut: Dār al-Rāʾid al-ʿArabī, 1970), 109; Taqī al-Dīn Ibn Qāḍī Shuhbah, *Ṭabaqāt al-Shāfiʿīyah*, ed. ʿAbd al-ʿAlīm Khān, 4 vols. (Haidarabad: Maṭbaʿat Majlis Dāʾirat al-Maʿārif al-ʿUthmānīyah, 1398/1978), 1:49.

[17] On *istiḥsān*, see Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1997), 107–111, and passim.

[18] Sayf al-Dīn Abū Bakr Muḥammad al-Qaffāl al-Shāshī, *Ḥulyat al-ʿulamāʾ fī maʿrifat madhāhib al-fuqahāʾ*, ed. Yāsīn Darārka, 8 vols. (Amman: Dār al-Bāzz, 1988), 8:306.

Ibn al-Qāṣṣ too exercised *takhrīj*, harvesting for his school the fruits cultivated by the Ḥanafites and other jurists, including Shaybānī and Mālik.[19] His *takhrīj* is more often than not based on Shāfiʿī's doctrine along with Ḥanafite opinion, but he frequently relies on Abū Ḥanīfah's opinions exclusively[20] and comes up with derivative opinions that he and his successors considered to be of Shāfiʿite pedigree. This practise of borrowing from the doctrinal tradition of another school and attributing the confiscated opinion to one's own school and its founder was by no means limited to the Shāfiʿites. It is not uncommon, for instance, to find Ḥanbalite opinions that have been derived through *takhrīj* from exclusively Ḥanafite, Mālikite and/or other sources.[21] But if the activity of *takhrīj* routinely involved dipping into the doctrinal reservoir of other schools, the Shāfiʿites could be considered the prime innovators, for, as Ṭūfī testifies, they were particularly given to this activity.[22]

But the Ḥanafites were not far behind. In the hierarchical taxonomy of Ḥanafite law, there exist three levels of doctrine, each level consisting of one or more categories. The highest level of authoritative doctrine, known as *ẓāhir al-riwāyah* or *masāʾil al-uṣūl*, is found in the works of the three early masters, Abū Ḥanīfah, Abū Yūsuf and Shaybānī.[23] What gives these works the authority they enjoy is

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[19] Ibn al-Qāṣṣ, *Adab al-qāḍī*, 1:105, 106, 109–10, 112, 114, 136, 146, 195, 198, 213, 251, 253–54, 255; 2:359, 423, and passim.

[20] Ibn al-Qāṣṣ, *Adab*, 1:112, 213; 2:359, 420, 447 and passim. See, for instance, *Adab*, 1:251; 2:417, for exclusive reliance on Abū Ḥanīfah and his two students.

[21] ʿAlāʾ al-Dīn ʿAlī b. Muḥammad b. ʿAbbās al-Baʿlī, *al-Ikhtiyārāt al-fiqhīyah min fatāwā shaykh al-islām ibn Taymīyah* (Beirut: Dār al-Fikr, 1369/1949), 15. Ibn al-Mundhir (d. 318/930) is frequently cited in Ḥanbalite works as an authority, although he was not a Ḥanbalite. In fact, he was said by biographers to have been an independent *mujtahid*, although he is also said to have been a distinguished member of the Shāfiʿite school and heavily involved in *takhrīj* according to Shāfiʿism. On Ibn al-Mundhir, see Sharaf al-Dīn al-Nawawī, *al-Majmūʿ: Sharḥ al-Muhadhdhab*, 12 vols. (Cairo: Maṭbaʿat al-Taḍāmun, 1344/1925), 1:72; Subkī, *Ṭabaqāt*, 2:126–29.

[22] Ṭūfī, *Sharḥ Mukhtaṣar al-Rawḍah*, 3:642. Ṭūfī's explanation is that Shāfiʿī's doctrine, having often included more than one opinion for each case, gave rise to a rich activity of *takhrīj*.

[23] The works embodying the doctrines of the three masters are six, all compiled by Shaybānī. They are *al-Mabsūṭ*, *al-Ziyādāt*, *al-Jāmiʿ al-kabīr*, *al-Jāmiʿ al-ṣaghīr*, *al-Siyar al-kabīr*, and *al-Siyar al-ṣaghīr*. See Ibn ʿĀbidīn, *Ḥāshiya*, I, 69. However, in his *Sharḥ al-Manẓūmah*, Ibn ʿAbidīn introduces Ibn al-Kamāl's distinction between *ẓāhir al-riwāyah* and *masāʾil al-uṣūl*, a distinction which he draws in turn on Sarakhsī's differentiation. The former, according to Ibn al-Kamāl, is limited to the six works enumerated. The latter, on the other hand, may include cases belonging to *nawādir*, which constitutes the second category of doctrine. See his *Sharḥ al-Manẓūma al-musammāt bi-ʿUqūd rasm al-muftī*, in Ibn ʿĀbidīn, *Majmūʿat Rasāʾil*, 2 vols. (n.p., 1970), 1:17–18.