

How Subjectivity Became Wrong:  
Early Hanafism and the Scandal of *Istiḥsān*  
in the Formative Period of Islamic Law  
(750-1000 CE)



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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

وإذا ما ازددت علما زادني علما بجهلي

محمد بن إدريس الشافعي رحمه الله

And whenever I grow in knowledge,  
I only grow in knowledge of my ignorance.

Muhammad b. Idrīs al-Shāfi‘ī (d. 204/820), May God Have Mercy On Him

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## Abstract

Abū Ḥanīfa (d. 150/767) notoriously used *istiḥsān* (juristic preference) to make apparently subjective rulings. In response, al-Shāfiʿī (d. 204/820) declared *istiḥsān* invalid. Later Hanafis retorted that al-Shāfiʿī had misunderstood the term, causing modern scholars to similarly disagree on its definition. To resolve this debate, this thesis analyses *istiḥsān* in early Hanafi practice. However, beyond just understanding the term itself, this dissertation uses it to explore early Muslim attitudes towards a universal legal question: can a jurist overrule the letter of the law based on their own sense of justice or social impact?

The dissertation argues that in early Iraq, subjectivity went from being embraced (8<sup>th</sup> cen., Chapters 1-3), to contested (9<sup>th</sup> cen., Chapter 4), to universally denounced (10<sup>th</sup>-11<sup>th</sup> cen., Chapter 5). As part of demonstrating the embrace, the dissertation analyses a dataset of every *istiḥsān* ruling (approx. 500) in the *Kitāb al-Aṣl* of Muḥammad al-Shaybānī (d. 189/804-5), mapping the pragmatic and moral considerations that early Hanafis incorporated into their doctrine. Analysing the period of contestation then reveals, among other things, a school of 9<sup>th</sup>- century Iraqis who prized juristic subjectivity but did not survive into classical Islam. The dissertation then explores how, in the period of denunciation, Hanafis theorised *istiḥsān* to make it abide by objective standards, while in practice it became a potent mechanism for legal change. Throughout these analyses, the dissertation also highlights how *istiḥsān* is an underutilised tool for addressing perennial questions in the field of Islamic law. In all, this dissertation tells the untold story of *istiḥsān*, and in so doing, tells a broader story about the rise of Islamic legal orthodoxy.

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*Wa-l-Ḥamdu li-l-Lāhi Rabb al-ʿĀlamīn*

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## Note on Transliteration and Dates

For transliteration, I follow the IJMES style guide, except that I give diacritics to book titles and to all individuals who died before the 20<sup>th</sup> century, e.g. “al-Shaybānī” not “al-Shaybani”. For individuals of the 20<sup>th</sup> and 21<sup>st</sup> centuries, I use their preferred English spelling, reverting to diacritics in the absence of one. I rely on the IJMES word list for anglicising designated words, e.g. “Sunni” not “*sunni*”, “Qur’an” not “Qur’ān”. I do not transliterate words found in *Merriam-Webster’s Collegiate Dictionary*, most notably “sunna,” “hadith,” “madhhab,” and the madhhabs themselves (e.g. “Hanafi” not “Ḥanafī”). This also means that the scholar “al-Shāfi‘ī” receives diacritics when the “Shafii” madhhab or a group of “Shafiis” does not. In alphabetical lists, I ignore “al-“ at the beginning of a name, but not the middle. I capitalize “al-“ at the beginning of sentences, but not in citations.

For dates, when I mention a century, I intend the Common Era century. For an individual’s date of death, I present years on both the Islamic and Common Era calendars, separating the two with a forward slash, putting the Islamic year first. When the conversion from the Islamic to the Common Era calendar is uncertain, usually due to a scholar’s month of death being uncertain, I present a split date, e.g. “al-Shaybānī (d. 189/804-5)”. In cases where a scholar has a range of reported dates of death, I approximate with “ca.” for “circa”, e.g. “Ibrāhīm al-Nazzām (d. ca. 220/835-6)”. If a scholar’s date of death is completely unknown – or if reported dates differ by over 20 years – I approximate to the part of the century, e.g. “Muways b. ‘Imrān (d. early 3<sup>rd</sup>/9<sup>th</sup> century)”.

## Introduction

A woman dies leaving behind her husband, mother, two full-brothers, and two maternal half-brothers.<sup>1</sup> Going strictly by the Qur'an, the Caliph 'Umar b. al-Khaṭṭāb (r. 13/634 – 23/644) rules that the half-brothers should inherit one-sixth of the estate and the full-brothers should inherit nothing. The full-brothers complain that this is absurd and say, “Suppose that our father were a donkey, [would we count as maternal half-brothers then]?”<sup>2</sup> By common sense, they say, they should have the same rights as the half-brothers and more. At this, 'Umar changes his mind and gives them an equal share of the estate.<sup>3</sup>

The case goes down in infamy as the “Donkey Case (*ḥimāriyya*)” and is one of many in which 'Umar seems to let his personal judgment overrule the Qur'an.<sup>4</sup> Underlying these cases is a dilemma not unique to Islamic law, the dilemma that drives this thesis: can a jurist overrule the law based on their sense of justice? Applied to Islamic law, the question can be put differently: is there room for human subjectivity in a divine law? What follows is a study of the controversy over this question in the formative period of Islamic jurisprudence (*fiqh*).

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<sup>1</sup> For the case to work, they must be maternal (“uterine”), rather than paternal (“germane”), half-brothers.

<sup>2</sup> The more loyal translation is “...are we not still from the same mother?”. This obscures their logical argument, which is not simply their being on par with the half-brothers, but the absurdity of their also sharing a father then demoting them. Coulson and Dutton both do not translate the second half of the sentence, perhaps to avoid the confusion. Noel J. Coulson, *Succession in the Muslim Family* (Cambridge: Cambridge University Press, 1971), 73; Yasin Dutton, *The Origins of Islamic Law: The Qur'an, the Muwaṭṭa', and Madinan 'Amal* (Richmond: Curzon, 1999), 109.

<sup>3</sup> See case in Shams al-Dīn al-Ramlī, *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj*, 8 vols. (Beirut: Dār al-Fikr, 1984), 3:102.

<sup>4</sup> In another, 'Umar suspends the Qur'anic penalty for theft during a famine. 'Abd al-Razzāq al-Ṣan'ānī, *al-Muṣannaf*, 9 vols. (Cairo: Dār al-Ta'ṣīl, 2015), 10:242.

By “subjectivity”,<sup>5</sup> this dissertation intends a jurist’s opinion about a ruling based not on the strength of its evidence, but on its real-world effect. We might also call this “juristic activism,” adapting the Western legal concept of judicial activism “whereby judges allow their personal view about public policy, among other factors, to guide their decisions.”<sup>6</sup> Here, “juristic” replaces “judicial” because we are interested in this activity at the level of the *faqīh* (jurist) deriving a general ruling, not the *qāḍī* (judge) applying the ruling in a given case. A jurist might disagree with a potential ruling for a host of reasons, such as its being unfair, impractical, or socially harmful. In these cases, the question becomes twofold: what kinds of concerns can a jurist take into account in the process of making a ruling, and how does a jurist prove that these concerns justify changing the law?

Those familiar with Islamic law will already be thinking of a number of concepts at play here, such as independent legal reasoning (*ijtihād*), the objectives of the law (*maqāṣid al-sharīʿa*), welfare (*maṣlaḥa/istiṣlāḥ*), and necessity (*ḍarūra*). This thesis does not focus on any of these, firstly because so many exemplary studies have looked at them already, but also because the majority of these studies take similar approaches: analysing the discourses around these concepts in Islamic legal theory (*uṣūl al-fiqh*). This is of course a critical line of

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<sup>5</sup> Readers should take care not to interpret this study’s use of the term “subjectivity” as pejorative. Granted, “subjectivity” certainly has a negative connotation, but this study sticks with the term to highlight that this negative connotation is not inevitable, pushing readers to consider a pithy question: is subjectivity whim or wisdom? This study traces how Muslim thinkers of the formative period negotiated the same binary.

<sup>6</sup> Definition from *Black’s Law Dictionary*, ed. Bryan A. Garner et al., 7th ed. (St. Paul: West Group, 1999), 850.

inquiry, but it leaves two major gaps by definition: 1) it only captures the theoretical dimension of an inherently practical issue, and 2) it only captures discourses from the 10<sup>th</sup> century onwards – after the birth of Islamic legal theory (*uṣūl al-fiqh*) – while the vast majority of *fiqh* rulings date to the 8<sup>th</sup> and 9<sup>th</sup> centuries. In this way, modern scholarship has studied the questions of subjectivity and exigency primarily through the retrospective lens of *uṣūl*.

This study instead tackles these questions through one term that proves perfect for our purposes: *istiḥsān* (juristic preference). Those familiar with Islamic law might now be crying foul. Above we discarded *ijtihād*, *maqāṣid al-sharīʿa*, *maṣlaḥa/istiṣlāḥ*, and *ḍarūra* as not useful to our study. How have we simply replaced those words with *istiḥsān*, a term known to Western scholarship and often tied to the terms above?

The answer is that *istiḥsān* differs from the above terms on the precise issues that made us hesitant to use them. First, unlike the other terms, *istiḥsān* appears prevalently in early *fiqh* rulings, rather than just later *uṣūl* discourses. Second, *istiḥsān* is much older than the other terms, meaning it reflects developments beginning in the mid-8<sup>th</sup> century in sources from that time, not simply in retrospective theorisations using new terminology. Third, many of the other terms connote *justifications* for juristic activism, not the process itself. *Ḍarūra* (necessity), *maṣlaḥa* (welfare), and *maqāṣid al-sharīʿa* (objectives of the divine law) are all reasons *why* a jurist might object to a law, but not mechanisms by which a jurist

changes the law.<sup>7</sup> Finally, *istihsān* was among the defining controversies of the formative period, making it a unique tool by which to analyse juristic activism not only in practice, but also in theoretical discourses that predated the rise of *uṣūl al-fiqh*.

## The State of the Field on *Istihsān*

*Istihsān* derives from the root “ḥ-s-n (good/beauty)” and literally means “to prefer” something or “to see it as good”. In *fiqh*, *istihsān* appears most prominently in early Iraq, specifically in the rulings of Abū Ḥanīfa (d. 150/767) and his students Abū Yūsuf (d. 182/798) and Muḥammad al-Shaybānī (d. 189/804-5),<sup>8</sup> who together constitute the central authorities of the Hanafi school, or madhhab (we henceforth refer to the three as the “Hanafi founders”, though they did not “found” the madhhab).

The Hanafi founders often used *istihsān* in ways that later scholars argued were subjective. It did not help that the Hanafi founders frequently did not justify the *istihsān* ruling, or that when asked why they were overruling clear evidence, they would usually respond, “We use *istihsān* here.”<sup>9</sup> It also did not help that one definition of *istihsān* attributed

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<sup>7</sup> This is made obvious by the fact that later theorisations of *istihsān* include subtypes such as “*istihsān* by *ḍarūra*” or “*istihsān* by *maṣlaḥa*.”

<sup>8</sup> For *istihsān* in Maliki *fiqh*, see Ch. 1.4. For *istihsān* in Shafii and Hanbali *fiqh*, see Ch. 4.1. On Malikism, the dissertation shows that *istihsān* was imported into Maliki doctrine from Iraq and did not achieve the same prominence or technicality in its actual *fiqh* usage. On Shafiism and Hanbalism, the dissertation shows that the uses of *istihsān* were rare and did not connote the subjectivity with which we are concerned.

<sup>9</sup> Dozens of examples, but for one, see Muḥammad al-Shaybānī, *al-Aṣl*, ed. Mehmet Boynukalın, 13 vols. (Beirut: Dār Ibn Ḥazm, 2012), 9:113.

to Abū Ḥanīfa was to rule by what one judges to be better without evidence,<sup>10</sup> or that another definition attributed to early supporters of *istiḥsān* was “proof that occurs to the mind of the scholar that he is unable to put into words.”<sup>11</sup>

The Hanafi founders were soon taken to task for this apparent subjectivity by al-Shāfi‘ī (d. 204/820), who called *istiḥsān* “doing what is agreeable to one’s mind (*taladhdhudh*),”<sup>12</sup> and declared, “It is clearly prohibited (*ḥarām*) for anyone to rule by *istiḥsān*.”<sup>13</sup> Later Hanafis, however, argued that al-Shāfi‘ī and later critics had misunderstood the term, and that these seemingly subjective rulings were in fact perfectly conventional processes of legal derivation.

The secondary scholarship on *istiḥsān* reflects this disparity, with scholars falling into two camps. The first equates *istiḥsān* with the Western concept of “equity,” a mechanism that gives “recourse to principles of justice to correct or supplement the law as applied to particular circumstances.”<sup>14</sup> Chief proponents of this camp are Émile Tyan<sup>15</sup> and

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<sup>10</sup> See Ch. 4.2 for how al-Shāfi‘ī (d. 204/820) and the Hanafi jurist Bishr al-Marīsī (d. 218/833) both attribute this definition to Abū Ḥanīfa. Abū Ishāq al-Shīrāzī, *al-Tabṣira fī Uṣūl al-Fiqh*, ed. Muḥammad Ḥasan Hīto (Damascus: Dār al-Fikr, 1983), 1:492; Taqī al-Dīn al-Subkī and Tāj al-Dīn al-Subkī, *al-Ibhāj fī Sharḥ al-Minhāj*, ed. Aḥmad Jamāl al-Zamzamī and Nūr al-Dīn ‘Abd al-Jabbār Ṣaghīrī, 7 vols. (Dubai: Dār al-Buḥūth li-l-Dirāsāt al-Islāmiyya wa-Iḥyā’ al-Turāth, 2004), 6:2665.

<sup>11</sup> Abū Ḥāmid al-Ghazālī, *al-Mustaṣfā*, ed. Muḥammad ‘Abd al-Salām ‘Abd al-Shāfi (Beirut: Dār al-Kutub al-‘Ilmiyya, 1993), 173; al-Āmidī, *al-Iḥkām fī Uṣūl al-Aḥkām*, 4:157; al-Subkī and al-Subkī, *al-Ibhāj fī Sharḥ al-Minhāj*, 6:2659; al-Zarkashī, *al-Baḥr al-Muḥīṭ*, 8:103.

<sup>12</sup> al-Shāfi‘ī, *al-Risāla*, ed. Aḥmad Muḥammad Shākīr (Beirut: al-Maktaba al-‘Ilmiyya, 1938), 503.

<sup>13</sup> *Ibid.*, 504.

<sup>14</sup> *Black's Law Dictionary*, 560.

<sup>15</sup> Émile Tyan, "Méthodologie et sources du droit en Islam (*Istiḥsān*, *Istiṣlāḥ*, *Siyāsa shar‘iyya*)," *Studia Islamica*, no. 10 (1959), 84-85.

Chafik Chehata.<sup>16</sup> The second camp argues that, while early jurists may have used *istiḥsān* as equity, it soon became strictly controlled by the recognized sources of law. Proponents of this view are Joseph Schacht, Rudi Paret, and John Makdisi. Schacht writes that, while *istiḥsān* in early times reflected “the personal choice of the [jurist], guided by his idea of appropriateness,”<sup>17</sup> it became “confined to very narrow limits” and “never superseded the recognized rules of the material sources.”<sup>18</sup> Paret<sup>19</sup> and Makdisi<sup>20</sup> echo this sentiment, with Makdisi translating *istiḥsān* as “reasoned distinction of authority.”<sup>21</sup>

The debate has therefore crystallised around two radically different notions of *istiḥsān*, a subjective *istiḥsān* by which a jurist departs from the law due to considerations of ease and justice (equity), and an objective *istiḥsān* which weighs the strengths of two forms of evidence (reasoned distinction of authority). Perhaps the state of the field is best summed up by Sherman Jackson’s translation of *istiḥsān* as “?equity.”<sup>22</sup>

Murteza Bedir brings the two camps together with the insightful point that “Those two understandings of the notion of *istiḥsān* are in fact based on the investigation of the two

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<sup>16</sup> Chafik Chehata, "L'Équité en tant que source du droit Hanafite," *Studia Islamica*, no. 25 (1966), 123-38.

<sup>17</sup> Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950), 98-99.

<sup>18</sup> Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 204.

<sup>19</sup> R. Paret, “*Istiḥsān* and *Istiḥlāḥ*,” in *Encyclopaedia of Islam*, 2<sup>nd</sup> ed., ed. P. J. Bearman et al., 12 vols. (Leiden: E. J. Brill, 1960-2004) [henceforth *EI*]. Consulted online.

<sup>20</sup> John Makdisi, "Legal Logic and Equity in Islamic Law," *American Journal of Comparative Law* 33, no. 1 (1985): 73.

<sup>21</sup> John Makdisi, "A Reality Check on *Istiḥsān* as a Method of Islamic Legal Reasoning," *UCLA Journal of Islamic & Near Eastern Law* 2 (2002): 99.

<sup>22</sup> Sherman A. Jackson, "Fiction and Formalism: Toward a Functional Analysis of *Uṣūl al-Fiqh*," in *Studies in Islamic Legal Theory*, ed. Bernard G. Weiss (Leiden: Brill, 2002), 195.

different genres of Muslim writings, i.e. *furūʿ al-fiqh* and *uṣūl al-fiqh*...In the *uṣūl* literature the aim of the jurist is to show the divine character of the law, whereas in *furūʿ* he is supposed to respond to actual human conditions.”<sup>23</sup>

This dissertation agrees with Bedir here, that to ask “what is *istiḥsān*?” requires specifying when, to whom, and in what genre. For that reason, this dissertation is largely uninterested in defining *istiḥsān* at all. Instead, it characterises the original conception of *istiḥsān* as used by the Hanafi founders, then how the controversy over that conception became a substantial debate over the validity of juristic activism in the formative period.

Beyond the theme of subjectivity, this study also implicates many perennial questions in the field of Islamic law, including:

- 1) Was al-Shāfiʿī really an influential figure during his own time?
- 2) How did theological controversies influence *fiqh*?
- 3) How was the genre of *uṣūl al-fiqh* born?
- 4) What is the nature of the relationship between *uṣūl* and *fiqh*?
- 5) How do Islamic laws change?

This study will of course not resolve all of these, but it manages to contribute to quite a few.

## Dissertation Outline and Major Arguments

This dissertation argues that in early Iraq, juristic subjectivity went from being embraced (8<sup>th</sup> century, Chapters 1-3), to contested (9<sup>th</sup> century, Chapter 4), to universally denounced (10<sup>th</sup>-11<sup>th</sup> century, Chapter 5).

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<sup>23</sup> Murteza Bedir, "The Power of Interpretation: Is *Istiḥsān Qiyās*?", *Islamic Studies* 42, no. 1 (2003): 8.

Chapter 1 argues that *istiḥsān* emerged as a technical legal term in mid-8<sup>th</sup> century Iraq to mean any departure from analogical reasoning (*qiyās*). The chapter shows that early Iraqi legal methodology was unique in its emphasis on analogical consistency between rulings, but that Iraqi jurists simultaneously recognized the dangers of unchecked analogy. They therefore preached violating that consistency when necessary, terming this violation “*istiḥsān*”. The chapter also shows how *istiḥsān* was used similarly in the field of grammar, supporting this chapter’s conception of *istiḥsān*, while also implying that analogical consistency was a common logic fundamental to systematic thought across the sciences in 8<sup>th</sup>- century Iraq. The chapter ends by showing that, despite its association with Malikism, *istiḥsān* was imported into Medinan doctrine from Iraq, explaining our focus on Hanafism.

Chapters 2 and 3 explore how the Hanafi founders used *istiḥsān*. To do this, the chapters analyse a dataset of every *istiḥsān* ruling in the *Kitāb al-Aṣl* of Muḥammad al-Shaybānī (approx. 500 rulings). Through this, the chapters show that, while *istiḥsān* did often connote conventional reasoning, it more often connoted the subjectivity with which it was often associated. The chapter then articulates the justifications underlying the Hanafi founders’ uses of *istiḥsān*. In this way, the chapter develops a mind-map of the Hanafi founders, revealing their sensibilities and piecing together their conception of natural law.

Chapter 4 discusses al-Shāfi‘ī’s refutation of *istiḥsān* to reveal an underappreciated fact: al-Shāfi‘ī was a legal minimalist. The chapter then analyses two direct responses to al-Shāfi‘ī’s arguments by his contemporaries. One of these contemporaries, Bishr al-Marīsī (d.

218/833), agrees with al-Shāfi‘ī in rejecting *istiḥsān* even though he would later go down as a Hanafi. The chapter documents their surprisingly dramatic personal relationship, as well as Bishr’s known rulings, to show that al-Shāfi‘ī had an undeniable influence on Bishr’s legal thought. This raises the question of how certain early figures earned their later madhhab affiliations. The second response to al-Shāfi‘ī comes from a line of thinkers, represented chiefly by al-Jāḥiẓ (d. 254/868-9) and Muways b. ‘Imrān (d. early 3<sup>rd</sup>/9<sup>th</sup> cen.), who disagree with al-Shāfi‘ī on *istiḥsān*, radically arguing that a jurist’s subjectivity is in fact critical to the proper functioning of the law. The chapter shows that this argument gained later adherents and even a theoretical framework, then disappeared by the 10<sup>th</sup> century, raising the question of which ideas survived into classical *uṣūl*, which did not, and why.

Chapter 5 analyses the theorisation of *istiḥsān* in classical Hanafi *uṣūl* to show how later Hanafis fashioned such a controversial term into a rigorous theory that neutralised the issue of subjectivity. The chapter shows these thinkers adopting then modifying the works of their predecessors, sometimes to improve upon theoretical weaknesses, but other times due to theological disagreements, illustrating how 11<sup>th</sup>- century Hanafis purged their *uṣūl* of Mu‘tazilism. The chapter then discusses how Hanafis continued using *istiḥsān* in their *fiqh* to respond to social conditions. The chapter does this through a particularly fascinating case study: how the Hanafis made it permissible for a scholar to earn money for teaching religious knowledge. The case study is an example of how *istiḥsān* in the classical period

retained its vitality from the days of the Hanafi founders while abiding by its new theorisation through the broad concept of necessity (*ḍarūra*).

In all, this dissertation aims to depict *istiḥsān*'s dramatic journey through the formative period, and how that journey makes it a unique and underutilised tool by which to explore major debates in the field of Islamic law.

## On the Normative Implications of this Study

A topic like legal subjectivity merits a few words at the outset on what this study is *not*. Firstly, this study is not a revisionist challenge to the orthodox notion that the Hanafi founders derived law systematically. Indeed, Chapter 1 shows the deeply systematic nature of Iraqi reasoning, while Chapter 3 shows that just under 350 rulings in the early Hanafi corpus rely on subjective forms of *istiḥsān*, while the remaining tens of thousands remain nominally within the ambit of conventional legal reasoning. *Istiḥsān* is in some sense the exception that proves the rule, since its existence shows that the Hanafi founders accepted and utilized such reasoning, but only did so rarely.

Secondly, in showing that classical Hanafi *uṣūl* could not accommodate many of the subjective forms of *istiḥsān*, this study does not challenge the genuineness of the enterprise of legal theory. Rather, as the end of Chapter 4 suggests, this mismatch points to something more fundamental: any theoretical enterprise will by definition work to minimize the role of human subjectivity. It is remarkable that any jurists even *tried* to theorize the acceptability of juristic subjectivity, which is what makes the arguments discussed in

Chapter 4 so fascinating. However, in reading those arguments, it becomes obvious what is at play: study of Islamic law cannot be (but for too long has been) divorced from the reality of Islam as a spiritual and ethical tradition that prizes embodied knowledge.

Thus, invoking something akin to Aristotelian virtue ethics, the thinkers discussed in Chapter 4 make a logical next step: a scholar's moral perfection endows them with a sometimes inarticulable knowledge that should still carry legal authority. In this light, the reported definition of *istihsān* as "proof that occurs to the mind of the scholar that he is unable to put into words"<sup>24</sup> does not endorse subjectivity as whim, but as wisdom. In any legal system, virtues like prudence, sensibility, and good judgment are crucial, but simultaneously impossible to define, thus seldom appearing in that tradition's works of legal theory. This study examines how this same paradox played out in Islamic legal history.

Finally, this study does not propose, as have many other studies of *istihsān*,<sup>25</sup> that because Muslim jurists embraced pragmatic reasoning in the past, they should do so again, nor does this study propose that recognizing the role of subjectivity in early Islamic legal

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<sup>24</sup> Abū Ḥāmid al-Ghazālī, *al-Mustaṣfā*, ed. Muḥammad ʿAbd al-Salām ʿAbd al-Shāfi (Beirut: Dār al-Kutub al-ʿIlmiyya, 1993), 173; al-Āmidī, *al-Iḥkām fī Uṣūl al-Aḥkām*, 4:157; al-Subkī and al-Subkī, *al-Ibhāj fī Sharḥ al-Minhāj*, 6:2659; al-Zarkashī, *al-Baḥr al-Muḥīṭ*, 8:103.

<sup>25</sup> See, as evidenced in the title, Saim Kayadibi, "*Istihsān* (Juristic Preference): The Forgotten Principle of Islamic Law" (PhD diss., University of Durham, 2006).

reasoning calls for democratizing modern discourses of Islamic legal reform.<sup>26</sup> This study will hopefully show how subjectivity as a concept is too nuanced to be used as such.

Of course, this section has only told readers what this study does *not* normatively say. The dissertation's Conclusion will consider what the study *does* normatively say, but before that, let us embark on the study itself.

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<sup>26</sup> See the dissertation's Conclusion for how recognizing the role of subjectivity in legal reasoning might actually be a call to *restrict* the class of individuals entrusted with intellectual authority.

## Chapter 1: Law in 8<sup>th</sup>- Century Iraq and *Istiḥsān* as Praiseworthy Subjectivity

Felicitas Opwis writes, “A precise history of the early development of *istiḥsān* has yet to be written.”<sup>27</sup> This chapter attempts to write that history. It argues that *istiḥsān* emerged as a technical legal term in mid-8<sup>th</sup> century Iraq to mean any departure from analogical reasoning (*qiyās*). The chapter begins by showing that the basic rubric of mid-8<sup>th</sup> century Iraqi law was elegant analogical consistency, and that this differed from the Shafii paradigm of legal reasoning. However, while Iraqi jurists esteemed the elegance of *qiyās*, they also recognized its dangers and preached violating it when necessary, terming this violation “*istiḥsān*.” They therefore saw the jurist’s wisdom as paramount in choosing when to use *istiḥsān* to ensure that the law functioned sensibly.

The chapter then presents new evidence on the extensive use of *istiḥsān* in early Iraqi works of grammar to support this chapter’s argument that *istiḥsān* originally connoted any violation of *qiyās* consistency. This also suggests that analogy was fundamental to the definition of systematic thought across the sciences of 8<sup>th</sup>- century Iraq. Finally, the chapter briefly discusses *istiḥsān* in the Maliki tradition to show that, despite its frequent association with Malikism, *istiḥsān* was not native to Medinan law, but was imported from Iraq.

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<sup>27</sup> Felicitas Opwis, *Maṣlaḥa and the Purpose of the Law*, Studies in Islamic Law and Society (Leiden: Brill, 2010), 10.

## 1.1 The Rubric of Analogical Consistency in Early Iraqi Law

As N.J. Coulson writes, “*Istiḥsān* represents a more advanced stage in the development of legal thought since it presupposes as normal the method of reasoning by analogy.”<sup>28</sup> Thus, to appreciate *istiḥsān*, one must appreciate the centrality of *qiyās* to early Iraqi law.<sup>29</sup> Scholars have long argued that systematic legal thought originated in Iraq, chiefly in the legacy of the Kufan jurist Ibrāhīm al-Nakha‘ī (d. 96/714-5).<sup>30</sup> Zafar Ansari writes of al-Nakha‘ī’s “conscious search for greater coherence and consistency” and his “notion that the teachings of the Prophet were embodiments of general principles, rather

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<sup>28</sup> Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1978), 40.

<sup>29</sup> In most secondary scholarship, “Iraqi law” is synonymous with “Kufan law.” Where does that leave Basra? We know much more about Kufan than Basran law, just as we know much more about Medinan than Meccan law. Schacht argues that “the picture gained” from Kufa can be taken as “typical” of Basra, and similarly from Medina of Mecca. However, Christopher Melchert meticulously reveals an 8<sup>th</sup>- century Basran legal tradition self-aware of (and quite sensitive about) its distinction from the Kufans. The question is whether Basrans differed from Kufans on theoretical points like *qiyās* and *istiḥsān*, as opposed to simply having different rulings. This dissertation inclines to the latter. There is some evidence of a difference between the two with regards to *qiyās*, namely 1) a report of the Basran jurist Ḥammād b. Salama (d. 167/783) criticising Abū Ḥanīfa for putting his own *ra’y* over authentic hadiths, and 2) a story of a Basran mob mocking the Kufan Ḥammād b. Abī Sulaymān (d. 120/737) for the extent of his *qiyās*. However, evidence shows that Kufans and Basrans aligned on *istiḥsān*, as found in Ch. 1.2 with the sayings of the Basran qadi Iyās b. Mu‘āwiya (d. ca. 121/739-40), in Ch. 1.3 with the use of *istiḥsān* in the Basran school of grammar, and in Ch. 4.3 - 4.4 with the Basran defence of subjective *istiḥsān*. For these reasons, this dissertation tentatively holds to “Iraqi law” rather than “Kufan law,” while acknowledging that the discussion in this chapter is almost exclusively derived from the Kufan legal tradition. However, more evidence showing principled differences between Kufan and Basran jurists on *qiyās* and *istiḥsān* would certainly justify changing the term of our argument to “Kufan law.” Schacht, *An Introduction to Islamic Law*, 29; Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries CE* (Leiden: Brill, 1997), 41-47; al-Khaṭīb al-Baghdādī, *Tārīkh Baghdād*, ed. Bashshār ‘Awwād Ma‘rūf, 17 vols. (Beirut: Dār al-Gharb al-Islāmī, 2001), 15:544; al-Dhahabī, *Siyar A‘lām al-Nubalā’*, ed. Shu‘ayb Arnā‘ūṭ and Ḥusayn al-Asad, 30 vols. (Beirut: Mu‘assasat al-Risāla, 1982), 5:235.

<sup>30</sup> He taught Ḥammād b. Abī Sulaymān (d. 120/737), who taught Abū Ḥanīfa.

than arbitrary fiats.”<sup>31</sup> Ansari speaks also of al-Nakha‘ī’s “attempt to deduce general propositions from the authoritative sources and then apply them to all relevant cases,” namely entailing “a more frequent use of *qiyās*.”<sup>32</sup> Along these same lines, Schacht uses numerous case studies to show that “early Iraqi *qiyās* spread into Hijaz”<sup>33</sup> such that “the doctrinal development of the school of Medina often lagged behind that of the school of Kufa.”<sup>34</sup> He thus called Iraq the “intellectual centre of the first theorising and systematising efforts” of Islamic law.<sup>35</sup>

More recently, Ahmed El Shamsy has characterised early Iraqi law as a system defined by analogical structuralism. As El Shamsy puts it, “Hanafi structuralism...operated on a strong presumption of consistency in the law, which generally did not admit the existence of individual exceptions.”<sup>36</sup> Sohail Hanif argues the same in a recent article defending the existence of an identifiable Kufan school of law. Hanif writes:

The lines of legal reasoning attributed to Abū Ḥanīfa point to the essential premise of *ra’y*-based jurisprudence, at least in Kufa, namely, that the law is inherently sensible. In other words, the law is not a haphazard collection of

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<sup>31</sup> Zafar Ishaq Ansari, "The Early Development of Islamic Fiqh in Kufa with Special Reference to the Works of Abū Yūsuf and al-Shaybānī" (PhD diss., McGill University, 1966), 106.

<sup>32</sup> Ibid.

<sup>33</sup> Schacht, *The Origins of Muhammadan Jurisprudence*, 220.

<sup>34</sup> Schacht, *An Introduction to Islamic Law*, 29.

<sup>35</sup> Ibid.

<sup>36</sup> *Istiḥsān* rulings are precisely those exceptions, making them exceptions that prove the rule. El Shamsy also likens Hanafi law to a “system of differences,” as defined by Ferdinand de Saussure, in which “the meanings of signs come about through their relationship with and relative distance from other signs, rather than through a connection to an outside referent.” Ahmed El Shamsy, *The Canonization of Islamic Law* (New York: Cambridge University Press, 2013), 72.

statements that are arrived at through the primary, revelatory sources; rather, the primary sources point to the larger legal system that the juristic community is devising, and this larger legal system makes sense to the human mind; its parts fit together to form a harmonious whole. Each individual jurist, therefore, strives to develop a system of rules that complement other established rules.<sup>37</sup>

This structuralism is obvious in Kufan dialectical exchange with the use of rhetorical challenges such as “You have abandoned your own opinion (*qad tarakta qawlak!*)”,<sup>38</sup> or “Why should this case not be like the first case (*lima lā yakūn hādha ka-l-bāb al-awwal?*)”,<sup>39</sup> or “Why, when elsewhere you claim that (*lima wa qad za‘amta anna*)...?”.<sup>40</sup>

Many scholars therefore agree on the unique nature of systematic legal thought in early Iraq, but what does this mean in terms of actual rulings, and how does this differ from other legal approaches of the time? One story in particular elegantly answers these questions. The story is of old Medinan provenance, told by one of Mālik b. Anas’s (d. 179/795) teachers, Rabī‘a b. Abī ‘Abd al-Raḥmān (d. 136/753-4), about a conversation with the great Medinan jurist Sa‘īd b. al-Musayyab (d. 94/712-3):

I asked Sa‘īd b. al-Musayyab, “How much [is the blood-money] for a woman’s finger?” He responded, “Ten camels.” I asked, “How much for two fingers?” He responded, “Twenty camels.” I asked, “How much for three?” He responded, “Thirty camels.” I asked, “How much for four?” He responded, “Twenty

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<sup>37</sup> Sohail Hanif, "A Tale of Two Kufans: Abū Yūsuf's *Ikhtilāf Abī Ḥanīfa wa-Ibn Abī Laylā* and Schacht's Ancient Schools" *Islamic Law and Society* 25, no. 3 (2018): 199.

<sup>38</sup> al-Shaybānī, *al-Aṣl*, 1:36.

<sup>39</sup> *Ibid.*, 1:75.

<sup>40</sup> *Ibid.*, 1:126.

camels.” I responded, “When her wound is greater...her blood-money decreases?” Sa‘īd responded, “Are you an Iraqi?...It’s the sunna, my nephew.”

The story appears in a number of early sources, most famously the *Muwattaʿ* of Mālik,<sup>41</sup> but also the *Aḥādīth* of Ismā‘īl b. Ja‘far (d. 180/796-7),<sup>42</sup> the *Jāmi‘* and the *Muwattaʿ* of Ibn Wahb (d. 197/813),<sup>43</sup> and the *Muṣannaḥ* of ‘Abd al-Razzāq al-Ṣan‘ānī (d. 211/826-7).<sup>44</sup>

If accurate, the story shows that, already at the beginning of the 8<sup>th</sup> century, it was stereotypically Iraqi to prioritise simple analogical consistency over sunna precedent. If inaccurate, the story’s genesis and proliferation still shows that the same stereotype had already emerged by the mid-8<sup>th</sup> century.

The paradigmatic difference between the Iraqi and Medinan approaches also manifests in the reputation of Rabī‘a himself. Many gave him the nickname “Rabī‘a al-Ra’y” to indicate his association with the Iraqi style of systematic reasoning, while some Medinans objected, such as Mālik’s student Ibn al-Mājishūn (d. ca. 213/828-9), who retorted, “You say ‘Rabī‘a al-Ra’y’, but no, by God, I have never seen anyone keener on protecting the

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<sup>41</sup> Mālik b. Anas, *Muwattaʿ al-Imām Mālik*, ed. Muḥammad Fu‘ād ‘Abd al-Bāqī (Beirut: Dār Ihyā’ al-Turāth al-‘Arabī, 1985), 2:860.

<sup>42</sup> Ismā‘īl b. Ja‘far, *Ḥadīth ‘Alī b. Ḥajar al-Sa‘dī ‘an Ismā‘īl b. Ja‘far al-Madanī*, ed. ‘Umar b. Rufūd b. Rafīd al-Satafyānī (Riyadh: Maktabat al-Rushd, 1998), 1:404. Ismā‘īl was reported to have taken hadith directly from Rabī‘a. Al-Dhahabī, *Siyar A‘lām al-Nubalā’*, 8:229.

<sup>43</sup> ‘Abd Allāh Ibn Wahb, *al-Jāmi‘*, ed. Rif‘at Fawzī ‘Abd al-Muṭṭalib and ‘Alī ‘Abd al-Bāsiṭ Mazīd (Mansoura: Dār al-Wafā’, 2005), 1:286; *Muwattaʿ ‘Abd Allāh Ibn Wahb*, ed. Hishām Ismā‘īl al-Ṣaynī (Dammam: Dār Ibn al-Jawzī, 1999), 1:144.

<sup>44</sup> ‘Abd al-Razzāq, *al-Muṣannaḥ*, 8:75.

sunna than him.”<sup>45</sup> Also to distance Rabī‘a from the Iraqis, Mālik claimed that during Rabī‘a’s stay in Iraq, Rabī‘a remained indoors, refused contact with Iraqis, and refrained from issuing fatwas or transmitting hadiths.<sup>46</sup>

Still, some Medinans clearly harboured reservations about Rabī‘a, as reflected in a letter written to Mālik by the famous Egyptian jurist al-Layth b. Sa‘d (d. 175/791), who states, “You know Rabī‘a’s divergence from what came before. I heard your opinion about him, and the opinion of the prominent Medinans...about what compelled you to leave his teaching circle. I mentioned to you and [al-Mājishūn] some of his faults, and both of you agreed with me regarding what I detest so intensely.”<sup>47</sup> By their own words, then, Medinans clearly perceived a fault-line between their sunna-centric legal methodology and the *qiyās*-centric methodology of the Iraqis.

Reports surrounding Ḥammād b. Abī Sulaymān (d. 120/737), Abū Ḥanīfa’s teacher, similarly reflect this characterisation of Iraqi legal reasoning as uniquely systematic. For example, Ḥammād reportedly stated after his return from Hajj, “Be glad, people of Kufa! For I visited the people of the Hejaz, and I saw ‘Aṭā’<sup>48</sup> and Ṭāwūs<sup>49</sup> and Mujāhid,<sup>50</sup> and your

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<sup>45</sup> al-Khaṭīb al-Baghdādī, *Tārīkh Baghdād*, 9:417.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid., 9:420-21.

<sup>48</sup> ‘Aṭā’ b. Abī Rabāḥ (d. ca. 114/732-3), prominent early Meccan jurist.

<sup>49</sup> Ṭāwūs b. Kaysān (d. 106/725), of Persian origin, one of the premier jurists and hadith narrators of Yemen and of the Successor (*tābi‘ī*) generation at large. al-Dhahabī, *Siyar A‘lām al-Nubalā’*, 5:38-49.

<sup>50</sup> Mujāhid b. Jabr (d. ca. 100/718-19), famous Meccan jurist and scholar of Qur’an. Andrew Rippin, “Muḍjāhid b. Ḍjābr al-Makkī,” in *EI*<sub>2</sub>.

children, nay even your children’s children, have more legal acumen (*afqah*) than they do.”<sup>51</sup> Another report tells that when Ḥammād visited Basra,<sup>52</sup> a mob ridiculed him for the extent of his *qiyās*. They asked whether a man who fornicates with a dead chicken earns paternity of an egg that later comes out of the chicken,<sup>53</sup> clearly satirising *qiyās* by extending fornication and paternity to bestiality.<sup>54</sup> The mob similarly asked about a man who divorces his wife with the exclamation “I divorce her enough to fill up a bowl (*milʿ sukurruja*),”<sup>55</sup> relating to the Iraqi opinion that a man who says “I divorce her enough to fill up a house (*milʿ al-bayt*),” establishes a standing (*bāʿin*) divorce, rather than a revocable (*rajʿī*) divorce, since “*milʿ al-bayt*” is an expression of exaggeration.<sup>56</sup> The mob was therefore clearly satirising this analogical extension of exaggerated statements, asking what would happen if the man makes an ironic “exaggeration” of divorcing his wife enough to fill up a small bowl.<sup>57</sup>

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<sup>51</sup> al-Dhahabī, *Siyar Aʿlām al-Nubalāʾ*, 5:235. Cited in Muḥammad Rawwās Qalʿajī, *Mawsūʿat Fiqh al-Ṭabarī wa-Ḥammād b. Abī Sulaymān*, *Mawsūʿat Fiqh al-Salaf* (Beirut: Dār al-Nafāʾis, 1994), 2:17-18.

<sup>52</sup> If we are calling *qiyās* Iraqi, and these Basrans are mocking *qiyās*, then where does Basra fit into our characterisation of Iraqi law? See Footnote 29.

<sup>53</sup> It is unclear how an egg might come out of a dead chicken. Internet searches of “dead chickens laying eggs” were fruitless and gruesome. Consultation with a local farmer confirmed that dead chickens do not lay eggs, though one does find partially-formed eggs in chickens after slaughter, and in some places these are even a delicacy, though they are essentially just yolk with a small amount of egg-white and a very weak shell.

<sup>54</sup> al-Dhahabī, *Siyar Aʿlām al-Nubalāʾ*, 5:235.

<sup>55</sup> *Ibid.*

<sup>56</sup> Aḥmad b. Muḥammad al-Qudūrī, *Mukhtaṣar al-Qudūrī*, ed. Kāmil Muḥammad Muḥammad ʿUwayḍa (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), 1:156.

<sup>57</sup> In addition to satirising *qiyās*, the mob is likely also satirising the Hanafi proclivity for far-fetched hypotheticals.

After Ḥammād, Abū Ḥanīfa then becomes the subject of stories identifying him with *qiyās*. One report, though likely apocryphal, states, “Abū Ḥanīfa began at first by studying grammar, and attempted to make analogies (*yaqīs*)...So he said, ‘*Qalb* (heart) and *qulūb* (hearts), therefore *kalb* (dog) and *kulūb*.’ He was told, ‘No, *kalb* and *kilāb* (dogs).’ So he left grammar at that point and turned instead to *fiqh*, and made analogies in it (*kāna yaqīs*).”<sup>58</sup>

Another fascinating story tells of the first meeting between Abū Ḥanīfa and Imām Ja‘far al-Ṣādiq (d. 148/765), the sixth Shi‘i imam, in which a man brings Abū Ḥanīfa to Ja‘far and says:

“This is a man from the people of Iraq, a man of *fiqh* and reason (*‘aql*).” Ja‘far responded, “Is this the one who analogises in the faith with his opinion (*yaqīs al-dīn bi-ra’yihī*)...al-Nu‘man b. Thābit?” Abū Ḥanīfa responded, “Yes, [that is I].” So Ja‘far said, “Fear God, and do not use analogy in the faith...for the first to use *qiyās* was Satan, when God commanded him to prostrate to Adam and he said, ‘I am better than him. You made me from fire and him from clay.’”<sup>59</sup>

Many reports also praise Abū Ḥanīfa for having more legal acumen (*afqah*) than other jurists, in the same way that Ḥammād said the children of Iraq had more legal acumen (*afqah*) than the foremost jurists of the Arabian peninsula. In both cases, I argue that “*afqah*” should be read as specifically connoting systematic thought and analogical reasoning, to be contrasted with the stereotypical Medinan jurist deriving rulings from an encyclopaedic knowledge of the sunna.

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<sup>58</sup> al-Khaṭīb al-Baghdādī, *Tārīkh Baghdād*, 15:444.

<sup>59</sup> Wakī‘, *Akhbār al-Quḍāt*, ed. ‘Abd al-‘Azīz Muṣṭafā al-Marāghī, 3 vols. (Cairo: al-Maktaba al-Tijāriyya al-Kubrā, 1947), 3:78.

This is apparent in a report in which one of Abū Ḥanīfa’s students debates with one of Mālik’s students over which of their teachers is superior. Mālik’s student asks, “Which of the two has more knowledge of the Qur’an?” Abū Ḥanīfa’s student replies, “Mālik, of course.” Mālik’s student asks, “Which of the two has more knowledge of the sunna?” Abū Ḥanīfa’s student replies again, “Mālik, of course.” Mālik’s student states, “Then all that is left is *qiyās*, but how can one do *qiyās* upon something of which he is ignorant?”<sup>60</sup> Here, Mālik’s student concedes that Abū Ḥanīfa is superior in *qiyās*, while Abū Ḥanīfa’s student concedes that Mālik is superior in knowledge of the Qur’an and sunna, aptly capturing the archetypal difference between their two approaches.

Continuing to read “*afqah*” as connoting analogical and systematic thought, we see a flurry of reports identifying Abū Ḥanīfa as distinct in that regard. In a report again comparing Abū Ḥanīfa to Mālik, someone asks Ibn al-Mubārak (d. 181/797), “Is Mālik more legally systematic (*afqah*), or Abū Ḥanīfa?” He replies, “Abū Ḥanīfa.”<sup>61</sup> In another report, Abū Bakr b. ‘Ayyāsh (d. 193/808-9) states, “[Abū Ḥanīfa] was the most systematic jurist of his time (*kāna...afqah ahl zamānih*).”<sup>62</sup> In another report, Yazīd b. Hārūn (d. 206/821) writes, “The most systematic (*afqah*) jurist I ever saw was Abū Ḥanīfa.”<sup>63</sup> Another report specifically

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<sup>60</sup> El Shamsy, *The Canonization of Islamic Law*, 46.

<sup>61</sup> al-Dhahabī, *Manāqib al-Imām Abū Ḥanīfa wa-Ṣāhibayhi*, ed. Muḥammad Zāhid al-Kawtharī and Abū al-Wafā’ al-Afghānī (Hyderabad: Lajnat Iḥyā’ al-Ma‘ārif al-Nu‘māniyya, 1408/1987-8), 32.

<sup>62</sup> *Ibid.*, 29.

<sup>63</sup> *Ibid.*, 30.

contrasts Abū Ḥanīfa's systematic thought with the hadith expertise of Sufyān al-Thawrī (d. 161/778), another prominent Iraqi jurist of the time and a critic of Abū Ḥanīfa. The report states, "If you seek reports (*āthār*), then [go to] Sufyān al-Thawrī, but if you want subtle points of logic (*daqā'iq*), then [go to] Abū Ḥanīfa."<sup>64</sup>

Building on this trend, al-Shāfi'ī himself explicitly identifies *qiyās* as particularly Iraqi, calling Iraqis the "adherents of *qiyās*," saying that the "Iraqis allowed none to diverge from *qiyās*,"<sup>65</sup> and stating that "People are children compared to Abū Ḥanīfa when it comes to his *qiyās* and *istiḥsān*."<sup>66</sup> Of course, al-Shāfi'ī also criticises the Iraqis for arbitrarily departing from *qiyās* due to *istiḥsān*, so his statements here are not meant to criticise the Iraqis for literally never departing from *qiyās*. Rather, his statements reflect precisely the point that analogical consistency was their basic rubric.

In contrast, al-Shāfi'ī's project was to re-orient the basic rubric of the law to hadith consistency, and thus he frequently criticises the Iraqis for ignoring authentic hadith in favour of analogical consistency.<sup>67</sup> This echoes similar arguments from countless other early figures, like the Basran jurist Ḥammād b. Salama (d. 167/783), who stated that Abū Ḥanīfa preferred his own *ra'y* over hadith reports.<sup>68</sup> Then in his treatise *Ikhtilāf 'Alī wa-Ibn Mas'ūd*,

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<sup>64</sup> Ibid., 29.

<sup>65</sup> Ansari, "The Early Development of Islamic Fiqh in Kūfa with Special Reference to the Works of Abū Yūsuf and al-Shaybānī," 290.

<sup>66</sup> al-Ḥusayn b. 'Alī al-Ṣaymarī, *Akḥbār Abī Ḥanīfa wa-Aṣḥābihi* (Beirut: 'Ālam al-Kutub, 1985), 1:26.

<sup>67</sup> al-Shāfi'ī, *al-Umm*, ed. Rif'at Fawzī 'Abd al-Muṭṭalib, 11 vols. (Mansoura: Dār al-Wafā', 2001), 10:276.

<sup>68</sup> al-Khaṭīb al-Baghdādī, *Tārīkh Baghdād*, 15:544.

al-Shāfi‘ī means to show the hypocrisy of the Iraqis by undermining their claimed loyalty to the sunna of the two most prominent companions to have moved to Iraq, and so Prophetic sunna by proxy. To accomplish this task, al-Shāfi‘ī goes painstakingly through Iraqi doctrine to note rulings in which the Iraqis uphold systematic reasoning over the known precedents and rulings of ‘Alī and Ibn Mas‘ūd.<sup>69</sup>

Then in actual Iraqi doctrine, one finds many examples of jurists prioritising simple analogical consistency over the apparent meaning of a hadith. Al-Shāfi‘ī himself cites the Iraqi principle, derived from a hadith, that “with liability comes the right to profit (*al-kharāj bi-l-ḍamān*).”<sup>70</sup> The Hanafis take this as a maxim and build many rulings upon it. Thus, in the case of a man who buys a cow, milks it, then discovers a defect in the cow and returns it for a full refund, the principle from the hadith would allow the man to keep the milk, since he was liable for the cow when he milked it. However, a different hadith speaking specifically to this case obligates the man to pay a fixed measure of dates as compensation for the milk. Here, the Hanafis override the hadith in the interest of broader analogical consistency, holding to the principle and allowing the man to keep the milk without payment.

Narrative reports similarly show instances in which Abū Ḥanīfa challenges a hadith in the interest of analogical consistency. One story says that when Abū Ḥanīfa heard the

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<sup>69</sup> al-Shāfi‘ī, *al-Umm*, 7:185.

<sup>70</sup> al-Shāfi‘ī, *The Epistle on Legal Theory*, trans. Joseph E. Lowry, Library of Arabic Literature (New York: New York University Press, 2013), 403. El Shamsy calls this “the liability-profit principle.” El Shamsy, *The Canonization of Islamic Law*, 27.

hadith, “The seller and the buyer have the right to rescind a transaction as long as they have not separated,” he rejected it, responding, “What if they are together on a ship? What if they are in a prison? What if they are on a journey? How do they separate from each other then?”<sup>71</sup> Another example regards the hadith report that “Ablution is half of faith,” to which Abū Ḥanīfa reportedly replied, “So why does one not perform ablution twice so as to perfect their faith?”<sup>72</sup> One can see in these narratives Abū Ḥanīfa’s insistence on systematic logical progressions.

All of this evidence illustrates how the early Iraqis believed the law must be sensible. They were not content to simply gather proof-texts, rule according to them, then use analogy to fill in the gaps, for they did not consider the law a series of arbitrary fiats. Rather, they believed that the entire legal system, including those things which are the direct subject of revelation, should come together to form an elegant and consistent whole. How precisely did this differ from al-Shāfi‘ī’s legal paradigm? To put it most simply, if two rulings exist, and both of those rulings follow directly from the Qur’an or hadith, then for al-Shāfi‘ī there are no more considerations to be made. For the Iraqis, however, there is still one more consideration, which is to see how those two rulings analogically relate to each other. See Figure 1 for a simple diagram of this.

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<sup>71</sup> al-Khaṭīb al-Baghdādī, *Tārīkh Baghdād*, 15:530.

<sup>72</sup> Ibid.

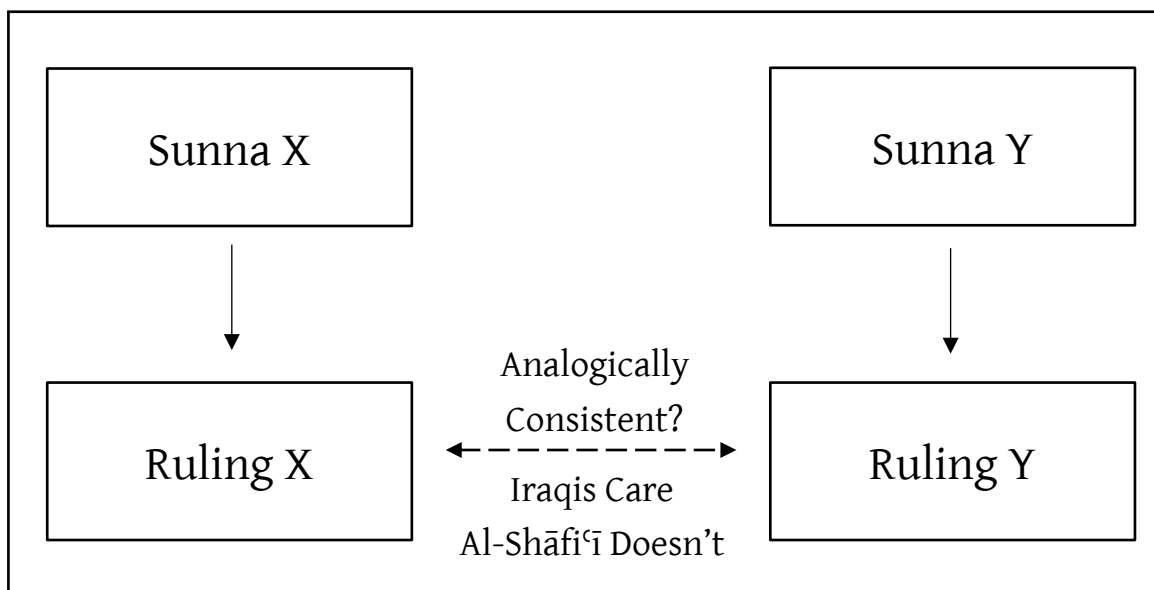


Figure 1: The Difference Between the Iraqi and Shafii Rubrics of Law

If the two rulings are not analogically consistent with each other (e.g. 1 finger = 10 camels but 4 fingers = 20 camels), then the Iraqis must choose between analogical consistency and breaking that consistency to abide by the sunna. When the Iraqis do choose to violate the analogical consistency, they call that violation “*istiḥsān*”. This is why *istiḥsān* can be motivated by either hadith or subjective considerations, for in both cases it is a departure from analogy.

Of course, the analogical consistency for which the Iraqis were known does not simply mean plain analogy, but any kind of rationalisation by which rules make sense in light of other rules. Schacht notes that in al-Shāfi'ī's evaluation of Iraqi thought, “*qiyās*

often means not a strict analogy, but consistent systematic reasoning in a broader sense.”<sup>73</sup> Al-Shāfi‘ī highlights the strength of reasoning both *a maiore ad minus* and *a minor ad maius* with his statement, “The strongest kind of *qiyās* is [deducing], from the commendation of a small act of piety, the presumably stronger commendation of a greater act of piety...[and reasoning], from the permission of a great quantity, the presumably even more unqualified permission of a smaller quantity.”<sup>74</sup>

Both of these fall under reasoning *a fortiori* (literally “from the stronger,” in Arabic: “*bi-l-awlā*”), a deep grasp of which is critical to understanding *istiḥsān*. To illustrate reasoning *a fortiori*, suppose a woman lives on a road, and 5 miles down the road is a café, and 10 miles down the road is a supermarket. If she does not have time to make it to the café, then *a fortiori* she more certainly does not have time to make it to the supermarket. In *fiqh*, a common example of this is that the Qur’anic verse, “Do not even say ‘Oof’ to [your parents],”<sup>75</sup> *a fortiori* entails that one is also not allowed to physically harm one’s parents, because if one cannot express mild frustration with them, then one more certainly cannot commit actions further down the spectrum of disrespect and harm. Note, however, that this type of reasoning assumes 1) the reason behind a specific law, and prior to that, 2) the

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<sup>73</sup> Schacht, *The Origins of Muhammadan Jurisprudence*, 126.

<sup>74</sup> al-Shāfi‘ī, *al-Risāla*, 513. Wael Hallaq dedicates an article to the forms of non-analogical systematic reasoning that fall under the rubric of *qiyās*. Wael Hallaq, "Non-Analogical Arguments in Sunnī Juridical *Qiyās*," *Arabica* 36 (1989).

<sup>75</sup> Q. 17:23

existence of rationally-intelligible reasons behind the law, and then 3) a spectrum of sensibility linking these reasons, like the “road” that the woman lives on.

Each of these assumptions became hotly contested in the 9<sup>th</sup> century. For example, the early Mu‘tazili figure Ibrāhīm al-Nazzām (d. ca. 220/835-6) famously rejected any rational sensibility in the law, saying that God’s commandments are, from the human perspective, arbitrary and only confirmed by God’s speech.<sup>76</sup> It was precisely this arbitrariness that 8<sup>th</sup>- century Iraqis rejected. With this view, al-Nazzām also then rejected *qiyās*. Aron Zysow comments that the mainstream Sunni tradition “appears to be unanimous” in regarding al-Nazzām as the first to do so.<sup>77</sup>

An obvious evolution of this thought lies with the famous *Zāhirīs*, chiefly represented by Dawūd b. Khalaf (d. 270/884), his son Ibn Dāwūd (d. 297/909), and Ibn Ḥazm (d. 456/1064), all of whom rejected the rationally-intelligible sensibility of the law, and with it, *qiyās*.<sup>78</sup> One can see the practical consequences of this in regards to the previously-mentioned verse about saying “oof” to one’s parents. Ibn Ḥazm famously argued that this

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<sup>76</sup> Josef van Ess, *Theologie und Gesellschaft im 2. und 3. Jahrhundert Hidschra: Eine Geschichte des religiösen Denkens im frühen Islam*, 6 vols. (Berlin: Walter de Gruyter, 1991-1997), 6:168-69. For further discussion see Ahmed El Shamsy, "The Wisdom of God's Law: Two Theories," in *Islamic Law in Theory: Studies on Jurisprudence in Honor of Bernard Weiss*, ed. A. Kevin Reinhart and Robert Gleave (Leiden: Brill, 2014), 26.

<sup>77</sup> Aron Zysow, "The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory" (PhD diss., Harvard University, 1984), 294. Notably, al-Nazzām was also among the first to reject *ijmā‘*, though the Sunni tradition is split over whether this was a categorical or qualified rejection. *Ibid.*, 264.

<sup>78</sup> For an excellent discussion of Ibn Ḥazm’s views on attributing purpose (*gharaḍ*) to God’s laws, see Carl Sharif El-Tobgui, "The Epistemology of *Qiyās* and *Ta‘līl* between the Mu‘tazilite Abū al-Ḥusayn al-Baṣrī and Ibn Ḥazm al-Zāhirī" (PhD diss., McGill University, 2000), 90.

commandment did not prohibit physical violence against one's parents, or indeed anything other than saying "oof," for further extrapolation assumed that humans could rationally make sense of God's laws.<sup>79</sup>

There is a clear link, then, between a) believing in sensible spectrums of reasoning undergirding the law, b) using *qiyās* to derive rulings along those spectrums, and c) using *istiḥsān* to justify departing from one particular spectrum and moving along other competing spectrums. In this way, *istiḥsān* was a mechanism by which to avoid the pitfalls of blind analogical consistency. We shall see in the next section how Iraqi jurists explicitly articulated these pitfalls and positioned *istiḥsān* as the solution to them.

## 1.2 The Dangers of *Qiyās* and the Solution: *Istiḥsān*

In mid-8<sup>th</sup> century Iraq, numerous voices emerged expressing three particular anxieties about *qiyās*: 1) that it can contradict the sunna, 2) that it can lead to unwise rulings, and 3) that it can cause too much variation in the law. It is within these anxieties that *istiḥsān* first emerged as a safeguard against blind analogical reasoning, namely in the reported sayings of Iyās b. Mu'āwiya (d. ca. 121/739-40), the writings of Ibn al-Muqaffa' (d.

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<sup>79</sup> Robert Gleave, *Islam and Literalism: Literal Meaning and Interpretation in Islamic Legal Theory* (Edinburgh: Edinburgh University Press, 2012), 169. Ibn Ḥazm of course did not hold that it was therefore permissible to harm one's parents. However, to show this, he instead cited the broad directive in the first half of the same verse to "treat parents with excellence (*wa-bi-l-wālidayn iḥsānan*).” The fact that Ibn Ḥazm cited a different phrase from the same verse is a tell-tale sign that this was a rhetorical exercise with little practical significance on the matter of parents, but with tremendous implications for other areas of the law.

ca. 139/756-7), and various reports of late-8<sup>th</sup> century jurists. These examples leave no doubt that, at its inception, *istiḥsān* connoted any departure from *qiyās* consistency.

In terms of the anxiety that *qiyās* might contradict the sunna, the previous section noted numerous examples of Iraqis prioritising systematic reasoning over hadith and the criticism they received in that regard from the Medinans and later from al-Shāfi‘ī. Unappreciated, however, is the extent to which this same anxiety emerged within the Iraqi tradition. In one report, the Kufan jurist and hadith expert al-Sha‘bī (d. ca. 103/721-2)<sup>80</sup> narrates a story remarkably similar to the Medinan story of the blood-money for a woman’s finger. In the story, a man asks the famous Kufan qadi Shurayḥ (d. ca. 76/695-6) about the blood-money for fingers. Shurayḥ replies, “Ten by ten (‘*ashr ‘ashr*).” The man responds, “By God, are these two really equal?” indicating his thumb and his pinky. Shurayḥ responded, “By God, are your ear and your arm equal? But the [blood-money for] the ear, which could be hidden by one’s hair or a turban,<sup>81</sup> is [still the same amount as] the arm!” Shurayḥ then concludes, “The sunna came before your *qiyās*, so follow it and do not innovate. You cannot go astray as long as you hold fast to a precedent (*athar*).”<sup>82</sup> In another report, al-Sha‘bī similarly cautions that *qiyās* might violate the sunna, stating, “If you rule by analogies

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<sup>80</sup> G.H.A. Juynboll, "Al-Sha‘bī," in *EL*.

<sup>81</sup> As in if one’s ear were to be maimed, one could hide the injury, unlike with one’s arm.

<sup>82</sup> al-Dārimī, ‘Abd Allāh. *Sunan al-Dārimī*, ed. Ḥusayn Asad, 4 vols. (Riyadh: Dār al-Mughnī, 2000), 1:283.

(*maqāyīs*), you will prohibit that which is permissible, and permit that which is prohibited.”<sup>83</sup>

Schacht argues that all of these Iraqi traditions criticising *qiyās* are polemical forgeries by later traditionists, mostly out of the logical point that Iraqis clearly utilised *qiyās* so would not then criticise it.<sup>84</sup> However, this is improbable given the overwhelming number of Iraqi reports expressing reservations concerning *qiyās*, even if some of those reports, like the one above, appear in different versions in the mouths of different speakers, indicated that they are apocryphal at face value. The much more likely historical explanation is that Iraqis, even while using *qiyās*, warned against some of its dangers, and also that many of these reports might originate from the well-known line of Iraqi traditionists who were themselves sceptical of Abū Ḥanīfa and the early Kufans.

A similar report emerges later in the Maliki tradition which then articulates the role of *istiḥsān* in protecting the sunna. The major Egyptian Maliki jurist Aṣḥab b. al-Faraj (d. 225/839) reportedly states, “A person immersed in *qiyās* could go as far as to violate the sunna, and *istiḥsān* is the pillar of knowledge (*inna al-mughriq fi al-qiyās yakādu yufāriq al-sunna, wa-inna al-istiḥsān ‘imād al-‘ilm*).”<sup>85</sup> This quote shows Aṣḥab positioning *istiḥsān* as a way of protecting the sunna, which is ironic since scholars stereotypically associate *istiḥsān*

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<sup>83</sup> Ibid., 1:281.

<sup>84</sup> Schacht, *The Origins of Muhammadan Jurisprudence*, 130.

<sup>85</sup> al-Shāṭibī, *al-Muwāfaqāt*, ed. Abū ‘Ubayda Mashhūr b. Ḥasan ‘Āl Salmān, 7 vols. (Cairo: Dār Ibn ‘Affān, 1997), 5:199.

with flouting the conventional sources of law. Again, this is a reminder that, at its birth, *istihsān* very particularly meant the departure from analogical reasoning to any other form of reasoning, even a conventional one. Indeed, we will see in Chapter 2 that sunna was a common justification for *istihsān* in Hanafi doctrine.

As for the objection that *qiyās* can produce unwise, incorrect, or absurd results, we've already seen a glimpse of this in the story in which Ja'far al-Ṣādiq (d. 148/765) tells Abū Ḥanīfa, "Satan was the first to use *qiyās*, when he was ordered to prostrate to Adam and refused, saying, 'I am better than him, you made me from fire and you made him from clay.'"<sup>86</sup> A version of the story also exists in the mouth of the Basran mystic Ibn Sīrīn (d. 110/728), who states, "The first to use *qiyās* was Satan, and indeed the sun and the moon were worshipped through analogies (*maqāyīs*)."<sup>87</sup> Yet another version of the story exists in the mouth of the famous Basran mystic (and close friend of Ibn Sīrīn) al-Ḥasan al-Baṣrī (d. 110/728), of whom the Basran narrator Maṭar al-Wāriq (d. 129/746-7)<sup>88</sup> says, "[al-Ḥasan] read the verse, 'You made me from fire and you made him from clay'<sup>89</sup> then said, 'Satan analogised, and he was the first to analogise (*qāsa iblīs, wa-huwa awwal man qās*).'"<sup>90</sup>

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<sup>86</sup> Wakīʿ, *Akhbār al-Quḍāt*, 3:78.

<sup>87</sup> al-Dārimī, *Sunan al-Dārimī*, 1:280; Ibn Abī Shayba, *al-Kitāb al-Muṣannaf fī al-Aḥādīth wa-l-Āthār*, ed. Kamāl Yūsuf al-Hūt, 7 vols. (Riyadh: Maktabat al-Rushd, 1409/1988-9), 7:253.

<sup>88</sup> al-Dhahabī, *Siyar Aʿlām al-Nubalāʾ*, 5:452-53.

<sup>89</sup> Q. 7:12.

<sup>90</sup> al-Dārimī, *Sunan al-Dārimī*, 1:280.

Abū Ḥanīfa himself then warned repeatedly against the danger of unwise rulings caused by *qiyās*. He reportedly once stated, “Urinating in the mosque (*al-bawl fī al-masjid*) is better than some kinds of *qiyās*.”<sup>91</sup> In another report he says, “Whoever does not abandon analogy when sitting to make judgment (*fī al-majlis*) is not performing *fiqh* (*lam yafqah*),”<sup>92</sup> the implication being that *qiyās* can produce unwise results in the real world, so must be checked by a jurist’s good sense.

The specific wording here for “abandon analogy (*yada‘ al-qiyās*)” is also noteworthy because the corpus of early Hanafi positive law is replete with the phrase “I/we abandon *qiyās* (*ada‘/nada‘ al-qiyās*).” The phrase is virtually synonymous with the expression “I/we use *istiḥsān* (*astahsinu/nastahsinu*),” such that the two nearly always appear side-by-side in the text to express that the jurist has departed from a *qiyās* position to an *istiḥsān* position. Thus, Abū Ḥanīfa’s use of “*yada‘ al-qiyās*” undeniably implicates *istiḥsān* as well, which he positions as crucial to the proper functioning of *fiqh* in the real world.

It is within this line of warnings – that *qiyās* can result in unwise rulings – that we find the first reported uses of *istiḥsān* as a legal term in two sayings of the Basran qadi Iyās b. Mu‘āwiya (d. ca. 121/739-40). Iyās was appointed qadi of Basra in 99/718 by the Umayyad Caliph ‘Umar b. ‘Abd al-‘Azīz (r. 99/717-101/720), and as a qadi, became notorious for his

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<sup>91</sup> al-Dhahabī, *Manāqib al-Imām Abū Ḥanīfa wa-Ṣāhibayhi*, 34.

<sup>92</sup> ‘Abd al-Razzāq, *al-Muṣannaf*, 8:214.

cleverness, such as deceiving plaintiffs into revealing information that proved their guilt.<sup>93</sup>

Indeed, his trickery became proverbial in the Arabic language, with the phrase “Cleverer than Iyās (*adhkā min Iyās*)” surviving in modern Arabic parlance.<sup>94</sup>

In the first of these reported mentions of *istiḥsān*, Iyās states, “Analogue judgements so long as people remain righteous, but when people grow corrupt, then use *istiḥsān* (*qīsū al-qaḍā’ mā ṣalaḥa al-nās, fa-idhā fasadū fa-istaḥsinū*).”<sup>95</sup> Strikingly, nearly every modern scholar who has cited this report has fundamentally mistranslated it,<sup>96</sup> with one exception.<sup>97</sup> The errant translation renders the statement as, “Analogue in judgement so far as it benefits people, but if it harms people, then use *istiḥsān*.”<sup>98</sup> These scholars likely did not notice the

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<sup>93</sup> Wakīʿ, *Akhbār al-Quḍāt*, 1:342.

<sup>94</sup> Cited in Charles Pellat, “Iyās b. Muʿāwiya,” in *EL*.

<sup>95</sup> Wakīʿ, *Akhbār al-Quḍāt*, 1:341.

<sup>96</sup> Errant translation found in Saim Kayadibi, “*Istiḥsān* (Juristic Preference): The Forgotten Principle of Islamic Law” (PhD diss., University of Durham, 2006), 125–6; Ridwan Aremu Yusuf, “The Theory of *Istiḥsān* (Juristic Preference) in Islamic Law” (PhD diss., McGill University, 1992), 29; Ahmad Shaleh, “Ibn Taymiyya's Concept of *Istiḥsān*” (MA diss., McGill University, 1995), 9. Even in Indonesian in Ahmad Imam Mawardi, “*Qiyās Dan Istiḥsān Dalam Rasionalitas Usūl al-Sarakhsī*,” *ISLAMICA: Jurnal Studi Keislaman* 7, no. 1 (2014): 94. It is likely that one scholar’s error has simply carried through subsequent scholarship, since 1) the translations in these studies are identical nearly word-for-word, 2) these studies elsewhere cite each other frequently, and 3) none of the studies cite the quote from Wakīʿ, the original source, but rather from later *uṣūl* texts.

<sup>97</sup> Ahmed Fekry Ibrahim translates it correctly in a tangential discussion of *istiḥsān*. Given that he cites the quote from Ibn ʿAqīl, whom he cites extensively elsewhere in the article, and not the more usual source of al-Jaṣṣās, he may have simply stumbled upon the quote and so translated it unaffected by previous scholarship. Ahmed Fekry Ibrahim, “Customary Practices as Exigencies in Islamic Law: Between a Source of Law and a Legal Maxim,” *Oriens* 46 (2018): 241.

<sup>98</sup> This translation is grammatically untenable. The verb “*fasadū*” – being masculine, plural, and intransitive – can only take “*al-nās*” as its subject, to mean “when the people grow corrupt.” For the errant translation – “but if [the judgements] harm people” – to work, the verb “*fasadū*” would have to be feminine, singular, and transitive, and would still be a strange usage of the word.

error because it aligns with the stereotypical understanding of *istiḥsān* as ease, aptly showing how scholarly misconceptions persist by distorting our interpretation of primary sources.

With the correct translation, Iyās is in fact saying that standard analogical rulings are desirable so long as society is upright, but that moral decay necessitates *istiḥsān*. This reasoning clearly parallels the concept of *fasād al-zamān* (corruption of the times), which is prevalent in early Hanafi doctrine, as well as in doctrinal changes of classical and post-classical Hanafism justified through *istiḥsān*.<sup>99</sup> Still, Iyās is not only saying that *istiḥsān* becomes necessary as time goes on, but in any cases which present morally-wayward people with perverse incentives or easily-exploitable loopholes. It is also important to note that Iyās’s usage here exhibits the two trademarks of the fully-technical meaning of *istiḥsān*. The first is that, in commanding a hypothetical qadi to perform *istiḥsān*, Iyās frames it as a legal procedure, and the second is the explicit contrast of *istiḥsān* with *qiyās*, thus positioning *istiḥsān* as an outlet from analogical reasoning.

Meanwhile, Iyās’s second reported use of *istiḥsān* appears to be much less technical. He states, “I have found judgeship to be nothing but [doing] that which people regard highly (*mā wajadtū al-qaḍā’ illā mā yastaḥsin al-nās*).”<sup>100</sup> Shockingly, only one modern scholar

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<sup>99</sup> See Chapter 5 for one such case.

<sup>100</sup> Wakīf, *Akhbār al-Quḍāt*, 1:341.

cites the report in relation to *istiḥsān*, and his translation is untenable.<sup>101</sup> In the quote, Iyās expresses the importance of rulings being wise and well-regarded. However, the particular usage of *istiḥsān* is clearly not its fully-technical meaning, since it does not characterise *istiḥsān* as a direct contrast with *qiyās*, nor does it frame *istiḥsān* as a legal procedure to be conducted by a jurist. Rather, the *istiḥsān* is simply people’s admiration of the ruling. This closely mirrors the idiomatic usage of the word in fields like poetry, biography, and history, which show hundreds of statements like “I hold his poetry in high regard (*astaḥsin shi‘rahu*).”<sup>102</sup> Still, the quote does implicate *istiḥsān* by advocating the necessity of checking strict legal derivation when making judgments in the real world. That this quote only partially captures *istiḥsān*’s meaning might even represent a semi-technical stage of *istiḥsān*’s development.

Despite Iyās’s two reported uses of *istiḥsān* in the early 8th century, we cannot yet alter our dating of *istiḥsān*’s birth, since the earliest actual source for both reports is the *Akhbār al-Quḍāt* of Wakīʿ (d. 306/918).<sup>103</sup> The question becomes the reliability of these

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<sup>101</sup> Kayadibi puzzlingly translates it as “I understand that judgments given in the courts should be in accordance with *istiḥsān*.” Kayadibi, “*Istiḥsān* (Juristic Preference): The Forgotten Principle of Islamic Law,” 126.

<sup>102</sup> See for example Ibn al-Muqaffaʿ, *al-Adab al-Ṣaghīr*, ed. Wāʿil b. Ḥāfiẓ b. Khalaf (Alexandria: Dār Ibn al-Qayyim, n.d.), 1:22. al-Jāḥiẓ, *al-Maḥāsīn wa-l-Aḍḍād* (Beirut: Dār wa-Maktabat al-Hilāl, 1423 AH/2002-3), 1:171; Ibn Qutayba, *al-Shiʿr wa-l-Shuʿarāʾ*, 2 vols. (Cairo: Dār al-Ḥadīth, 1423/2002-3), 2:711.

<sup>103</sup> Muḥammad b. Khalaf al-Ḍabbī, known as Wakīʿ, historian and hadith expert. Little is known about his life other than that he was born and died in Baghdad and served as a qadi in Ahvaz, in the southwest of modern Iran. A. Kevin Reinhart, “Wakīʿ,” in *EL*.

reports. *Akhbār al-Quḍāt* reads very much like a standard hadith text, even listing a chain of transmissions (*isnād*) for each report, except that most reports trace back to early qadis rather than to Companions or the Prophet.

It is likely that Iyās's semi-technical usage of *istiḥsān*, "I have found judgeship to be nothing but [doing] that which people regard highly (*mā yastaḥsin al-nās*)," is the more reliable. Meanwhile, the highly technical usage – "Analogise judgements so long as people remain righteous, but when people grow corrupt, then use *istiḥsān*." – seems anachronistic. This would accord with recent work by Mathieu Tillier, who argues that 9<sup>th</sup>- century jurists often invoked Iyās to personify legal principles so as to justify them as having precedent among the righteous predecessors (*salaf*).<sup>104</sup>

A quick *isnād* analysis even aligns with these hypotheses. The *isnād* of the semi-technical report is very strong by conventional metrics. The first narrator from Iyās is the major Iraqi jurist Sufyān al-Thawrī (d. 161/778) who, though Kufan, spent the years 115/732 – 120/737 travelling extensively to collect hadith, especially in Basra, where he would have met Iyās before the latter's death circa 121/739-40.<sup>105</sup> Meanwhile, the fully technical report is much weaker. The first narrator, ʿĪsā b. Maʿmar, is relatively unknown and lived between

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<sup>104</sup> Mathieu Tillier, *L'Invention du cadi: La justice des Musulmans, des Juifs et des Chrétiens aux premiers siècles de l'Islam* (Paris: Publications de la Sorbonne, 2017). Early classical *uṣūl* authors similarly invoke Iyās as precedent from the *salaf* justifying *istiḥsān*. See Abū Yaʿlā, *al-ʿUdda fī Uṣūl al-Fiqh*, ed. Aḥmad al-Mubārakī, 5 vols. (Riyadh: Jāmiʿat al-Malik Muḥammad b. Suʿūd al-Islāmiyya, 1990), 5:1606.

<sup>105</sup> Hans-Peter Raddatz, "Sufyān al-Thawrī," in *EL*.

Mecca and Medina. He could have of course met Iyās during Iyās's travels or Hajj, or on his own possible travels to Iraq, but we know too little about ʿĪsā to find out. In any case, his reputation as a narrator is mixed, with Ibn Ḥajar al-ʿAsqalānī (d. 852/1449) reporting that, while some accept him, others consider him weak.<sup>106</sup>

These facts, combined with the content of each report, strongly suggest that we should accept the semi-technical report but remain sceptical about the fully-technical one. This would put *istiḥsān* in a semi-technical phase in the mid-8<sup>th</sup> century, which aligns closely with the next reported usage of *istiḥsān* in the *Risāla fī al-Ṣaḥāba* of the Persian litterateur ʿAbd Allāh b. al-Muqaffaʿ (d. ca. 139/756-7).

Ibn al-Muqaffaʿ was at first an Umayyad secretary to various governors in the Persian city of Kerman, then became a renowned Abbasid statesman, living between Basra and Kufa as secretary to the caliph al-Manṣūr (r. 136/754 -158/775) and associating with the premier political and literary figures of the time.<sup>107</sup> He is perhaps most famous for the Arabic book of fables *Kalīla wa-Dimna*, which he translated from literature of the Indian subcontinent. More valuable to historians, however, have been his *Adab al-Kabīr* and *Risāla fī al-Ṣaḥāba*, the former a work of counsel to men of high society, and the latter a work of

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<sup>106</sup> Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 12 vols. (India: Maṭbaʿat Majlis Dāʾirat al-Maʿārif al-Nizāmiyya, 1325/1907-8), 8:231; al-Mizzī, *Tahdhīb al-Kamāl fī Asmāʾ al-Rijāl*, ed. Bashshār ʿAwwād Maʿrūf, 35 vols. (Beirut: Muʾassasat al-Risāla, 1980), 23:33-34; al-Dhahabī, *al-Mughnī fī-l-Ḍuʿafāʾ*, ed. Nūr al-Dīn ʿItr, 2 vols. (Aleppo: Dār al-Maʿārif, 1971), 2:501.

<sup>107</sup> Francesco Gabrieli, "Ibn al-Muqaffaʿ," in *EL*.

social, political, and legal advice addressed directly to the caliph. The *Risāla* dates to approximately 137/755,<sup>108</sup> making this the earliest written source in which *istiḥsān* appears.<sup>109</sup>

It is noteworthy that Ibn al-Muqaffa<sup>c</sup> is neither a jurist nor a qadi, and thus his legal thought is that of an outsider. Regardless, his writings reveal much about the legal milieu of early Abbasid Iraq. Indeed, in the *Risāla*, we find a lengthy objection to the potentially absurd results of *qiyās*, along with the invocation of *istiḥsān* to protect against that absurdity. Commenting specifically on the dangers of blindly following *qiyās*, Ibn al-Muqaffa<sup>c</sup> writes:

Whoever sticks to *qiyās* and never parts from it....closes his eyes to doubtful and unseemly (*qabīḥ*) results...However, *qiyās* is simply an indicator that can point towards positive outcomes (*maḥāsīn*). So if that which *qiyās* points to is good (*ḥasan*) and well-regarded (*ma'rūf*), then one should take the *qiyās*, but if it points to the unseemly (*qabīḥ*) and the rejected (*mustankar*), then one should abandon it, for the objective is not simply to follow *qiyās*, but rather to pursue the best of affairs (*maḥāsīn al-umūr wa-ma'rūfihā*) and to protect people's rights.<sup>110</sup>

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<sup>108</sup> Najm al-Din Yousefi, "Islam without *Fuqahā*? Ibn al-Muqaffa<sup>c</sup> and His Perso-Islamic Solution to the Caliphate's Crisis of Legitimacy (70–142 AH/690–760 CE)," *Iranian Studies* 50, no. 1 (2017): 9.

<sup>109</sup> Iyās's usages would have predated this but are only recorded in a later source. For more on the *Risāla fī al-Ṣaḥāba*, see Schacht, *An Introduction to Islamic Law*, 54–56; Joseph E. Lowry, "The First Islamic Legal Theory: Ibn al-Muqaffa<sup>c</sup> on Interpretation, Authority, and the Structure of the Law," *Journal of the American Oriental Society* 128, no. 1 (2008).

<sup>110</sup> Ibn al-Muqaffa<sup>c</sup>, "*Risāla fī al-Ṣaḥāba*," in *Rasā'il al-Bulaghā*, ed. Muḥammad Kurd 'Alī (Cairo: Dār al-Kutub al-‘Arabiyya al-Kubrā, 1913), 126; Charles Pellat, *Ibn al-Muqaffa<sup>c</sup>: "Conseilleur" du calife* (Paris: Maisonneuve, 1976), 47. Pellat's work includes a critical edition of the text.

Ibn al-Muqaffaʿ continues elaborating on this point, then finally concludes with a thought-experiment on the dangers of unfiltered systematic legal reasoning:

If one commands a man to speak the truth and never say a single lie, he would agree. If one then asks him what the aim of that command is, he would say to always be honest. Then suppose that an oppressor asks him for the location of someone in hiding so that he can torture and kill him. His sense of the command would shatter, and the opinion (*raʿy*) would be for him to abandon that command and turn instead to what is agreed upon (*mujmaʿ ʿalayhi*) and well-regarded (*maʿrūf*) and *mustaḥsan*.<sup>111</sup>

At the end of this thought experiment comes the invocation of *istiḥsān*, in the uncommon object form of the word (“*mustaḥsan*”), likely why no previous studies on *istiḥsān* have noticed it. The question becomes whether this usage is simply idiomatic or relates to *istiḥsān*’s technical meaning in any way.

Like Iyās’s first report, Ibn al-Muqaffaʿ’<sup>c</sup>s usage seems to represent a semi-technical stage in *istiḥsān*’s development. Its lack of full maturity is indicated by 1) the uncommon object form “*mustaḥsan*,” which is practically non-existent in later legal sources, 2) the parallelism with “agreed upon (*mujmaʿ ʿalayhi*)” and “well-regarded (*maʿrūf*)” implying synonymity with a non-technical meaning, and 3) the frequent appearance of other words with the root “*ḥ-s-n*,” such as “*ḥasan* (good)” and “*maḥāsin* (good things),” along with their opposite, “ugly (*qabīḥ*).”

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<sup>111</sup> al-Muqaffaʿ, “*Risāla fī al-Ṣaḥāba*,” 126-27; Pellat, *Ibn al-Muqaffaʿ: “Conseiller” du calife*, 47.

At the same time, the invocation of *istiḥsān* here exhibits unmistakable features of its technical meaning, such as 1) that the passage explicitly condemns rigid adherence to *qiyās*, and 2) that the term describes a ruling deemed better than a competing *qiyās* ruling and justifies departing from it. Schacht, with brilliant insight for his time, similarly notes that Ibn al-Muqaffaʿ “gives a common-sense but non-technical description of the proper function and limitations of analogy and the proper use of *raʿy* and *istiḥsān*, by which undesirable consequences of strict systematic reasoning can be avoided.”<sup>112</sup> This only furthers the claim of this chapter that, from its inception, *istiḥsān* in any legal context was inherently linked to rejecting the rigid application of *qiyās*, prizing a jurist’s rational and moral abilities to filter objective edicts through a subjective, common-sense lens.

The *Risāla* also provides a thorough treatment of the third major anxiety which mid-8<sup>th</sup> century Iraqis expressed about *qiyās*, which was that *qiyās* permitted too much legal variability. Of the three concerns, this is the only one which jurists did not argue could be resolved by *istiḥsān*. On the contrary, later critics of *istiḥsān* complained about its allowing too much legal variation, while later defenders of *istiḥsān* stayed silent on the matter.

Ibn al-Muqaffaʿ’*s* *Risāla* is itself primarily geared to solving this problem of legal variation. Éric Chaumont ties Ibn al-Muqaffaʿ to “de premières réactions de

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<sup>112</sup> Schacht, *The Origins of Muhammadan Jurisprudence*, 103.

mécontentement face à la diversité incontrôlée de l'ordre légal.”<sup>113</sup> In writing to the Caliph al-Manṣūr, Ibn al-Muqaffaʿ sees the crisis of legal variation as a crisis of political legitimacy, as it grants legal interpretative authority not to the caliph, but to an independent class of jurists. Ibn al-Muqaffaʿ points to two main causes for the proliferation of disparate legal rulings. First are variations in the hadith corpus, which Ibn al-Muqaffaʿ argues is easily solved, requiring the Caliph to simply compare all of the legal arguments stemming from the disparate usages of the hadith corpus and judge “which of the two parties are more deserving of validation, and which of the two rulings is more in line with justice (ʿ*adl*).”<sup>114</sup> The second source of unacceptable legal variation is, of course, *qiyās*. This is either through jurists analogising cases improperly based on faulty logic, or through jurists pursuing *qiyās* blindly to its utmost end.

Warnings against the excessive legal variation caused by *qiyās* appear in numerous other sources. In one report, Mālik criticises the Iraqis by saying, “whenever [you follow] *raʿy*, someone else who is stronger in *raʿy* comes along, and then you follow him...I see no end to this.”<sup>115</sup> Then there is the entertaining story found in Ibn Qutayba (d. 276/889):

A man came from the East to Abū Ḥanīfa with a book [of rulings] that he had recorded from Abū Ḥanīfa one year prior in Mecca. He reviewed these questions with Abū Ḥanīfa, but Abū Ḥanīfa disagreed with all of his previous opinions. The man put dirt on his own head, then said, “Oh people, I came to

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<sup>113</sup> Abū Ishāq al-Shīrāzī, *Kitāb al-Lumaʿ fi Uṣūl al-Fiqh: Traité de théorie légale Musulmane*, trans. Éric Chaumont (Berkeley: Robbins Collection, 1999), 6. The same point is noted by Coulson, *A History of Islamic Law*, 52.

<sup>114</sup> al-Muqaffaʿ, “*Risāla fi al-Ṣaḥāba*,” 126.

<sup>115</sup> Cited in El Shamsy, *The Canonization of Islamic Law*, 28.

this man one year ago, and he gave me rulings (*aftānī*) that I recorded in this book, and I have spilled blood according to it, and I have permitted intercourse according to it, and now he has reneged on all of his previous rulings!...How is this?” Abū Ḥanīfa responded, “It was one opinion that I held (*raʿy raʿaytuhu*), and this year I have a different opinion.” The man said, “Then assure me that after this you will not have yet another opinion.” Abū Ḥanīfa responded, “I do not know how that could be.” The man said, “I do know that God’s curse is upon you (*ʿalayka laʿnat Allah*).”<sup>116</sup>

Jurists therefore criticised the Iraqis, and Abū Ḥanīfa in particular, for a mode of analogical derivation which left the law too prone to variation, either between different jurists, or in one jurist’s doctrine over time.

As mentioned before, no jurists positioned *istiḥsān* as addressing this concern about legal variation, for *istiḥsān* was an even greater cause for anxiety in this regard. The charge of legal variation figures in nearly all later criticisms of *istiḥsān*, beginning with al-Shāfiʿī himself, as we will see in Chapter 4. However, it is important to note that, while al-Shāfiʿī criticises the excessive variation made possible by *istiḥsān*, he rigorously defends the stability of *qiyās*. This is a reminder that identical legal concerns manifest differently depending on the polemical context, a theme which re-emerges throughout this dissertation.

In total, then, 8<sup>th</sup>- century jurists from various regions, including Iraq, were acutely aware of the dangers of excessive adherence to *qiyās*. *Istiḥsān* thus emerged as the safeguard

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<sup>116</sup> Ibn Qutayba, *Taʿwīl Mukhtalif al-Ḥadīth* (Beirut: al-Maktab al-Islāmī, 1999), 102.

by which a jurist departed from *qiyās* due to any type of alternative reasoning. Chapter 2 will show how the fully technical form of *istiḥsān* in the legal doctrine of the early Hanafi founders abided by this definition. But first, we can cement this definition of *istiḥsān* by discussing its appearance in an unexpected but important genre: 8<sup>th</sup>- century Iraqi grammar.

### 1.3 *Qiyās* and *Istiḥsān* in 8<sup>th</sup>- Century Arabic Grammar

The fascinating uses of *istiḥsān* in early grammar categorically support the definition of *istiḥsān* as any departure from analogical consistency. We will limit our focus to the two most notable works of the time: the *Kitāb* of Sībawayh (d. 180/796), and the *Kitāb al-ʿAyn* of al-Khalīl al-Farāhīdī (d. ca. 175/791-2) and al-Layth b. al-Muẓaffar (d. ca. 187/802-3).

The *Kitāb al-ʿAyn*, composite in its authorship, constitutes the first Arabic dictionary. Scholars credit its inception to al-Khalīl, often called the founder of Arabic philology. Even medieval Muslims scholars, however, held that the *Kitāb al-ʿAyn* is likely only al-Khalīl's work insofar as he conceived of arranging the work phonetically, which he likely borrowed from Indian philology, as well as perhaps penning the introduction and a few other sections. Much of the work is then credited to al-Khalīl's long-time student, al-Layth.<sup>117</sup> This is convincingly confirmed by the fact that grammarians shortly after this time attribute the work mostly to al-Layth, as found in the work of the philologist Abū Manṣūr al-Azharī (d. 370/980), who quotes the *Kitāb al-ʿAyn* copiously in his *Tahdhīb al-Lughā*, but introduces

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<sup>117</sup> Rudolf Sellheim, "al-Layth b. al-Muẓaffar," in *EL*<sub>2</sub>.

those quotes with “al-Layth said,” as opposed to “al-Khalīl said.”<sup>118</sup> The final form of the *Kitāb al-ʿAyn* is thus typically dated to the end of the 8<sup>th</sup> century. Both al-Khalīl and al-Layth are thoroughly Iraqi. Al-Khalīl moved to Basra at a young age and lived there until his death, while al-Layth came of age and studied in Kufa, then became the close disciple of al-Khalīl in Basra. Both were chief representatives of the Basran school of grammar.

The first section of interest in the *Kitāb al-ʿAyn* comes in the dictionary entry on the root “ḥ-j-r,” in a discussion justifying why the word *ḥajar* (stone) can take the regular plural *aḥjār* (stones), but also the irregular plural *ḥijāra* (stones). This is reminiscent of the previously-mentioned anecdote that Abū Ḥanīfa was so put off by how irregular plurals violated analogical consistency that he abandoned grammar and turned to *fiqh* instead. The quote in *Kitāb al-ʿAyn* states, “[This irregular plural] is contrary to *qiyās*, but *istiḥsān* is valid in [the science of] Arabic, just as it is valid in *fiqh*, and the *qiyās* is abandoned here for the *istiḥsān*.”<sup>119</sup>

Though brief, this quote provides numerous valuable insights for the purposes of this analysis. Firstly, consistent with the other findings of this chapter, *istiḥsān* here is fundamentally characterised by its opposition to *qiyās*. Indeed, this is even more true in this

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<sup>118</sup> Al-Azharī even devotes a discussion to the authorship of the work, explicitly stating when he says “al-Layth said” he is referring to *Kitāb al-ʿAyn*. Abū Maṣūʿ al-Azharī, *Tahdhīb al-Lughā*, ed. Muḥammad ʿAwaḍ Murʿib, 8 vols. (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, 2001), 1:25.

<sup>119</sup> al-Khalīl al-Farāhīdī, *Kitāb al-ʿAyn*, ed. Maḥdī al-Makhzūmī and Ibrāhīm al-Sāmarāʾī, 8 vols. (Beirut: Dār wa-Maktabat al-Hilāl, n.d.), 3:73-4.

context, for in determining the acceptable plurals of a word, one cannot entertain other factors which come into play with legal *istiḥsān*, such as choosing a ruling for its positive social outcomes. Indeed, the only conceivable parallel reasoning is to discard *qiyās* due to conflicting precedent, paralleling the legal usage of *istiḥsān* due to sunna.

We then find a fascinating discussion of the topic in the previously-mentioned *Tahdhīb al-Lughā* of Abū Maṣṣūr al-Azharī (d. 370/980). At the end of his entry on “ḥajar” and its irregular plural “ḥijāra”, al-Azharī quotes the justification based on *istiḥsān* in the *Kitāb al-ʿAyn*, but then rejects that explanation with a more systematic analogy, stating:

The Arabs have appended the letter “ha” to every plural that follows the pattern *fiʿāl* or *fuʿūl*. They added this “ha” simply because without it, if the word were to have a silent case ending (*sukūn*), then the word would end with two case-silent (*sākin*) letters: the “alif,” then the last letter of the word. Therefore, the Arabs say both *ʿiḏām* and *ʿiḏāma*, and *niqād* and *niqāda*...So I say that this is the reason (*ʿilla*) which the grammarians have agreed upon [for the validity of the word *ḥijāra*]. As for the *istiḥsān* which [al-Layth] likened to *istiḥsān* in *fiqh*, it is invalid to begin with.<sup>120</sup>

This fascinating quote shows the legal debate over *istiḥsān* transcending its context to invade other fields. This is true also of al-Azharī’s fascinating use of the word *ʿilla*, relating to the legal concept of a *ʿilla* as a *ratio legis* (the reason for a ruling). Through this, he clearly means to undermine *istiḥsān* and show that standard analogical reasoning is sufficient to produce the same result. Al-Azharī’s animus against *istiḥsān* aligns with the fact that he is a

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<sup>120</sup> al-Azharī, *Tahdhīb al-Lughā*, 80-81.

loyal Shafii, even authoring a lexicographical work on difficult words found in al-Shāfi‘ī’s writings.<sup>121</sup>

*Istiḥsān* appears again in the *Kitāb al-‘Ayn* in a highly technical sense concerning the word “*faqaman*” (gravely/seriously). Al-Layth writes, “*wa laysa fī fa‘ala yaf‘alu qiyās illā bi-samā‘ wa-istiḥsān,*” meaning that “*faqaman*” does not extend analogically from other word forms – since one cannot say “*fa‘alan*” – but that it is valid by *istiḥsān* since it is a heard precedent of the language (*samā‘*).<sup>122</sup> This is very similar to the previous example in that an analogically invalid word is validated through *istiḥsān* due to precedent, which in language is the heard precedent (*samā‘*) of the Arabs.

More broadly, even when *istiḥsān* is not explicitly mentioned, the *Kitāb al-‘Ayn* still exemplifies the broader rubric of beginning with analogical reasoning as the default, then departing from that *qiyās* for some other reason. For example, the text states at one point, regarding the word “*dhu‘āba* (strand/lock of hair)”, that “Its plural is *dhawā‘ib*, and by *qiyās* [its plural] would be *dha‘ā‘ib*, like the word *du‘āba* (joke) and *da‘ā‘ib* (jokes), but because of the meeting of two consecutive *hamza* letters...[the Arabs] softened the first [*hamza*], because [they] find the meeting of two consecutive *hamza* letters to be heavy on the tongue.”<sup>123</sup>

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<sup>121</sup> Entitled *al-Zāhir fī Gharīb Alfāz al-Imām al-Shāfi‘ī*. Tilman Seidensticker, "Al-Azharī, Abū Manṣūr," in *Encyclopaedia of Islam, Three* [henceforth *EI*], ed. Kate Fleet, et al. (Brill). Consulted online.

<sup>122</sup> al-Farāhīdī, *Kitāb al-‘Ayn*, 5:182.

<sup>123</sup> *Ibid.*, 8:202.

One finds numerous other examples of this dichotomy between *qiyās* and non-*qiyās* positions, such as statements that a certain position is “contrary to *qiyās* (*‘alā ghayr qiyās*).”<sup>124</sup> In another place, al-Layth reports that al-Khalīl upheld the validity of a certain usage by *qiyās* even though it had no linguistic precedent,<sup>125</sup> a rare case which mirrors how Hanafi jurists would occasionally choose the *qiyās* position over the *istiḥsān*.

*Istiḥsān* also appears repeatedly in the *Kitāb* of Sībawayh (d. 180/796), who was himself a dedicated student of al-Khalīl and also a principal representative of the Basran school of grammar. In one section, Sībawayh discusses the grammatical conventions of praising an individual through an appositive (e.g. I saw ‘Abd Allāh, the honest). The grammatical point itself is dense, but at the conclusion of his argument, Sībawayh writes, “So I use *istiḥsān* here...to validate [this grammatical practice] just as the Arabs validated it.”<sup>126</sup> Again, we see the validation of non-analogical grammar due to the precedent and common usage of the Arabs.

Sībawayh uses *istiḥsān* again in a highly technical sense in regards to whether one can say “Standing in it is a man (*qā’iman fihā rajul*),” in the same way one can say “Zayd passed by riding (*rākiban marra Zayd*).”<sup>127</sup> Sībawayh comments that by *qiyās*, the two are equivalent, and “in it (*fihā*)” can function analogically equivalently to the verb “passed by

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<sup>124</sup> Ibid., 1:135, 1:96.

<sup>125</sup> Ibid., 1:193.

<sup>126</sup> Sībawayh, *al-Kitāb*, ed. ‘Abd al-Salām Muḥammad Hārūn, 4 vols. (Cairo: Maktabat al-Khānjī, 1988), 2:69.

<sup>127</sup> Ibid., 2:124.

(*marra*).” Sībawayh then comments, “However, [the Arabs] disliked that (*karihū dhālik*), since ‘in it (*fihā*)’ and the words related to it do not act in the same way as verbs, and are not verbs, but they simply take a grammatical position which frees the subject from needing a verb. So I follow that position, as the Arabs have, and I use *istiḥsān*.”<sup>128</sup> Again, here, Sībawayh contrasts his *qiyās* position with *istiḥsān* based on the actual usage of the Arabs as authoritative precedent.

It is therefore amply clear that in the late 8<sup>th</sup> century, *istiḥsān* was not only a key component of Iraqi law, but also grammar and lexicography. Michael Carter, perhaps the preeminent scholar on Sībawayh, has written extensively on the influence of legal logic on Sībawayh and grammar at large. Regarding *istiḥsān*, Carter writes:

The legal occurrence of such value-terms [like *qiyās*]...follows, as we might expect, the pattern laid down in ethical writings. The most obvious example, and one which I do not propose to deal with here, is *istiḥsān*, which figures prominently in Hanafi legal reasoning as evidence for overruling strict *qiyās* in favour of considerations of expediency.<sup>129</sup>

Unfortunately, Carter has fallen into the trap of identifying *istiḥsān* with expediency. Our above analysis shows that grammatical uses of *istiḥsān* are rarely associated with expediency, but more usually connote abandoning *qiyās* in favour of authoritative

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<sup>128</sup> Ibid.

<sup>129</sup> Michael G. Carter, *Sībawayh's Principles: Arabic Grammar and Law in Early Islamic Thought*, Resources in Arabic and Islamic Studies (Atlanta: Lockwood Press, 2016), 84.

precedent, again showing how scholarly misconceptions can distort our interpretation of sources.

In all of these examples, we see that understanding *istiḥsān* has clear implications not only for the study of early law, but all types of systematic thought in late-8<sup>th</sup> century Iraq. This calls for further research on the centrality of analogical consistency to systematic thought at the time, and how concepts like *qiyās* and *istiḥsān* might play similar roles in even more fields. In any case, for our purposes, this foray into early grammar has further supported that 1) analogical consistency formed the methodological rubric of elegant systematic reasoning in 8<sup>th</sup> - century Iraq, and 2) *istiḥsān* connoted necessary departures from that consistency for any competing type of reasoning.

#### 1.4 The Importation of *Istiḥsān* into Early Malikism

Before moving on to our discussion of *istiḥsān* as practised by the Hanafi founders, we must briefly address *istiḥsān* in Malikism. Other than the Hanafis, the Malikis are most implicated in discussions of *istiḥsān* since the term appears in their early *fiqh*.<sup>130</sup> However, given that it does not appear nearly as frequently, coupled with the relative marginality of Eastern Malikism, the early controversy over *istiḥsān* revolved almost exclusively around the Hanafis.<sup>131</sup> This section does not pretend to fully examine *istiḥsān* in early Malikism.

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<sup>130</sup> See Chapter 4.1 for *istiḥsān* in Shafii and Hanbali *fiqh*.

<sup>131</sup> Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries CE*, 170-77.

However, it suggests that *istiḥsān* was only later applied to Medinan doctrine by Mālik's students and "grand-students" who were immersed in Iraqi legal discourses.<sup>132</sup>

The first question is whether Mālik himself used *istiḥsān* as a technical term in his rulings. No derivative of the term appears in any recension of Mālik's *Muwaṭṭa'*, but this is not a surprise since the work is primarily a hadith collection and contains few technical legal terms. Derivatives of "*istiḥsān*" appear at least 18 times in the *Mudawwana*, quite a high number given that derivatives of "*qiyās*" only appear around 12 times. Interestingly, the two words are only directly contrasted to each other once,<sup>133</sup> implying a lower degree of technicality than their usage in the *Aṣl* of al-Shaybānī (see Ch. 2 of this dissertation). This would align with Calder's argument that the *Mudawwana* does not exhibit extensive technical terminology as does the *Aṣl*.<sup>134</sup>

The question remains, however, whether the usages of *istiḥsān* in the *Mudawwana* are those of Mālik himself or of his students. The *Mudawwana* was not directly authored by Mālik, but rather by Saḥnūn b. Sa'īd al-Tanūkhī (d. 240/854). It is a heavily revised rendition of the *Asadiyya*, by Asad b. al-Furāt (d. 213/828), who had been a direct student of Mālik in Medina, but thereafter a student of several disciples of Abū Ḥanīfa in Iraq. For that reason,

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<sup>132</sup> This aligns with Paul Gledhill's arguments that *qiyās* entered Maliki doctrine in the same manner. Paul Gledhill, "The Development of Systematic Thought in Early Mālikī Jurisprudence, 8th-9th Centuries A.D." (PhD diss., University of Oxford, 2014), 18.

<sup>133</sup> Mālik b. Anas, *al-Mudawwana*, 4 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1994), 3:320.

<sup>134</sup> Norman Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Clarendon Press, 1993), 52-53.

the *Asadiyya* was a Hanafi-Maliki hybrid. Saḥnūn, with his own copy of the *Asadiyya*, visited Medina after the death of Mālik and studied with Mālik's most prominent disciple, Ibn al-Qāsim (d. 191/806-7), who had studied with Mālik for over 20 years. With Ibn al-Qāsim narrating Mālik's opinions, Saḥnūn authored the *Mudawwana*, which quickly became the authoritative source for Mālikī *fiqh* in the Muslim West. It, along with Saḥnūn's return to Qayrawān, helped transform the Muslim West into the bastion of Malikism.

Saḥnūn is therefore a degree of separation removed from Mālik, and most likely visited Medina around 188/804,<sup>135</sup> a full decade after Mālik's death. For that reason, reports of Mālik's rulings in the *Mudawwana* may not be pure representations of his thought, and thus any technical terms could very well be anachronistic and not the words of Mālik himself. Following that reasoning, Schacht argues that *istiḥsān* appears most often in the *Mudawwana* in the mouth of Ibn al-Qāsim, and that the few times it does appear as a direct quote of Mālik, Ibn al-Qāsim has put the words in Mālik's mouth.<sup>136</sup>

The term appears in the *Mudawwana* in three ways: 1) a direct quote of Ibn al-Qāsim or another scholar, 2) Ibn al-Qāsim describing one of Mālik's rulings as *istiḥsān*, or 3) a direct quote of Mālik using the term. As an example of (1), Ibn al-Qāsim states at one point in the text, "This is my opinion (*ra'yī*) and what [I have decided] through *istiḥsān* (*alladhī*

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<sup>135</sup> Mohamed Talbi, "Saḥnūn," *El*<sub>2</sub>.

<sup>136</sup> Schacht, *The Origins of Muhammadan Jurisprudence*, 118.

*astaḥsinuhu*).<sup>137</sup> As an example of (2), Ibn al-Qāsim states, “And Mālik used *istiḥsān* in this (*istaḥsana dhālika*), and said....”<sup>138</sup>

Then come the instances of (3). Mālik is quoted directly as saying, “The Prophet Muḥammad would go to the Eid prayer by one road, then return by another. I prefer this (*astaḥsinu dhālika*) but do not make it obligatory on people.”<sup>139</sup> In another instance, Mālik is quoted as saying, “I use *istiḥsān* to rule that there should be an expiation in the case of [a pregnant woman being beaten until she miscarries].”<sup>140</sup>

We therefore only have two examples of Mālik actually using the term *istiḥsān*. Otherwise, the remainder of the mentions come from Mālik’s students, namely Ibn al-Qāsim. Another observation is that the use of *istiḥsān* in the *Mudawwana* is blatantly less technical than its use in the *Aṣl*, connoting a casual sense of preference more often than reasoning departing from *qiyās*. Therefore, *istiḥsān* as a casual expression of legal preference for a ruling might have developed in Iraq then spread to Medina, or might have naturally developed in both places from its linguistic meaning of “to prefer”. However, the technical usage of *istiḥsān* with which we are concerned, one that indicates a type of reasoning departing from *qiyās*, is certainly of Iraqi provenance and does not seem to have been prominent in Mālik’s *fiqh*.

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<sup>137</sup> Mālik, *al-Mudawwana*, 1:283.

<sup>138</sup> *Ibid.*, 1:183.

<sup>139</sup> *Ibid.*, 1:246.

<sup>140</sup> *Ibid.*, 4:631.

The last mystery regarding Mālik’s use of *istiḥsān* is the infamous quote attributed to him, “*Istiḥsān* is nine-tenths of knowledge (*‘ilm*).” It frames Mohammad Fadel’s important article, “*Istiḥsān* is Nine-Tenths of the Law: The Puzzling Relationship of *Uṣūl* to *Furū’* in the Mālikī *Madhhab*,”<sup>141</sup> in which he uses it to argue that, in the classical period, actual Maliki *fiqh* relied far more upon *istiḥsān*-type reasoning than the hermeneutics of *uṣūl* debates. However, the citation Fadel gives for Mālik’s quote is from al-Ṣāwī’s (d. 1241/1825) *Bulghat al-Sālik*, an important late work of Maliki *fiqh*, but far too late to tell us anything about the attribution of this quote to Mālik. Meanwhile, Umar Faruq Abd-Allah in his *Malik and Medina* similarly attributes the quote to Mālik, citing the *I’tiṣām* of al-Shāṭibī (d.790/1388), again too late to tell us much about the quote’s provenance.<sup>142</sup>

The earliest surviving source for the quote appears to be the *Iḥkām* of Ibn Ḥazm, who cites it in his section on the invalidity of *istiḥsān*.<sup>143</sup> Ibn Ḥazm himself cites it from a much earlier work, the *Kitāb al-Mustakhraja* of the Maliki jurist al-‘Utbi (d. 255/868-9). Ibn Ḥazm writes, “The Malikis used *istiḥsān* in many of their rulings. Muḥammad b. Aḥmad al-‘Utbi narrated from Aṣḥāb b. al-Faraj, who said he heard Ibn al-Qāsim say, that Mālik said,

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<sup>141</sup> Mohammad Fadel, “‘*Istiḥsān* Is Nine-Tenths of the Law’: The Puzzling Relationship of *Uṣūl* to *Furū’*,” in *Studies in Islamic Legal Theory*, ed. Bernard G. Weiss (Leiden: Brill, 2002), 161-76.

<sup>142</sup> Cited in Umar F. Abd-Allah, *Mālik and Medina: Islamic Legal Reasoning in the Formative Period*, Islamic History and Civilization (Leiden: Brill, 2013), 162.

<sup>143</sup> Ibn Ḥazm, *al-Iḥkām fī Uṣūl al-Aḥkām*, ed. Aḥmad Muḥammad Shākīr, 8 vols. (Beirut: Dār al-Āfāq al-Jadīda), 6:16.

‘*Istihsān* is nine-tenths of knowledge.’...This was in the chapter of the *Umm Walad*<sup>144</sup> in the [work] *al-Mustakhraja*.<sup>145</sup>

Fuat Sezgin documents surviving manuscript fragments of the *Mustakhraja*, but we need not turn to them, as the text is preserved in its entirety within the commentary of Abū al-Walīd Ibn Rushd (d. 520/1126)<sup>146</sup> entitled *Kitāb al-Bayān wa-l-Taḥṣīl*. The quote indeed appears there with the same wording that Ibn Ḥazm reports,<sup>147</sup> showing that al-ʿUtbī did report the quote, meaning it dates to at least the mid-9<sup>th</sup> century.

Al-ʿUtbī was himself from Cordoba, but in the West studied with the famous Yaḥya b. Yaḥyā al-Laythī (d. 234/849), transmitter of the canonical version of the *Muwaṭṭʿā*. On a trip to the East, al-ʿUtbī studied with both Aṣbagh, the first narrator in the chain of this quote, as well as with Saḥnūn, which is significant since Saḥnūn studied with Ibn al-Qāsim, who is the following name in the chain of narrators. At this point, then, we reach a historical impasse, and one must choose whether to believe the two short steps up the chain. However, even if Mālik did make this statement, it is clear enough from his rulings in the *Mudawwana* that his conception of *istihsān* was not technical.

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<sup>144</sup> A slave-woman who she bears her owner’s child.

<sup>145</sup> Ibn Ḥazm, *al-Iḥkām fī Uṣūl al-Aḥkām*, 6:16.

<sup>146</sup> The grandfather of the famous philosopher Averroes/Ibn Rushd (d. 595/1198).

<sup>147</sup> Abū al-Walīd Ibn Rushd, *al-Bayān wa-l-Taḥṣīl*, ed. Muḥammad Ḥajjī, 20 vols. (Beirut: Dār al-Gharb al-Islāmī, 1988), 8:206.

There is more evidence to show that Mālik’s Eastern students, namely Ibn al-Qāsim and Aṣḥab b. al-Faraj, began to view *istiḥsān* with its more technical definition. For Ibn al-Qāsim, we have the previously-mentioned instances from the *Mudawwana* which show him contrasting *istiḥsān* to *qiyās* in just a few rulings. As for Aṣḥab, we have two fascinating quotes that show him understanding *istiḥsān* in the more technical Iraqi sense.

The first is the more reliable of the two. In it, Aṣḥab gives a ruling in which he contrasts a *qiyās* position with an *istiḥsān* position and picks the *istiḥsān*. He then states, “*Istiḥsān* in [legal] knowledge takes precedence over *qiyās* (*al-istiḥsān fī al-‘ilm yakūnu aghlab min al-qiyās*).”<sup>148</sup> This is again found in *al-Bayān wa-l-Taḥṣīl* of Ibn Ruṣhd, and Ibn Ḥazm similarly cites it in his *Iḥkām* from the *Mustakhraja*.<sup>149</sup> We therefore know that it was found in the *Mustakhraja*, and given that al-‘Utbī was a direct student of Aṣḥab, it proves to be a very reliable quote. Both the usage of *istiḥsān* in the ruling and the actual maxim from the quote show the technical Iraqi understanding of *istiḥsān*.

Aṣḥab’s second reported quote is, however, of much less reliable provenance, as it seems to only appear many centuries later in the 14<sup>th</sup>-century work of al-Shāṭibī, who writes, “And Aṣḥab went to far extents in *istiḥsān*, such that he said, ‘A person immersed in *qiyās* could go as far as to violate the *sunna*, and *istiḥsān* is the pillar of knowledge.”<sup>150</sup>

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<sup>148</sup> Ibid., 4:155.

<sup>149</sup> Ibn Ḥazm, *al-Iḥkām fī Uṣūl al-Aḥkām*, 6:16.

<sup>150</sup> al-Shāṭibī, *al-Muwāfaqāt*, 5:199.

Interestingly, this version appears in the *Muwāfaqāt*, whereas in the *I'tiṣām*, al-Shāṭibī attributes the quote directly to Mālik instead.<sup>151</sup> It is puzzling that no earlier traces of this quote exist. If reliable, however, it would support the notion that Aṣḥab shared a more Hanafi notion of *istiḥsān* as preventing *qiyās* from contradicting the sunna, which we already saw was one of the Iraqi anxieties about *qiyās* which they used *istiḥsān* to address. Overall, then, evidence indicates that Ibn al-Qāsim and Aṣḥab both understood *istiḥsān* in its more technical Iraqi sense, while no such evidence exists for Mālik nor for those of Mālik's students who settled farther West. *Istiḥsān* in Medinan doctrine is thus likely a result of Iraqi influence in the early 9<sup>th</sup> century. This means that, whereas Hanafis had to confront the controversy over *istiḥsān* given its usage in hundreds of their rulings, Malikis did not. This explains why the discourse over the issue in the ensuing centuries revolves almost exclusively around the Hanafis.

## 1.5 Conclusion

Altogether, this chapter shows a simple progression. Early Iraqi jurists believed that the law should make sense and pursued that sensibility through analogical consistency. At the same time, they recognized the pitfalls of unchecked analogy: that it could violate the sunna, that it could cause absurd results, and that it could cause too much legal variation. Iraqi jurists addressed the first two concerns by departing from analogical consistency

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<sup>151</sup> al-Shāṭibī, *al-I'tiṣām*, ed. Salīm b. ʿĪd al-Hilālī, 2 vols. (Khobar: Dār Ibn ʿAffān, 1997), 1:140.

when necessary, terming that violation *istiḥsān*. The same dynamic between *qiyās* and *istiḥsān* also emerges in early Iraqi grammar, solidifying our conception of *istiḥsān*, while also implying a common logic that defined systematic thought across the sciences of 8<sup>th</sup> - century Iraq. The next chapter will show how the Hanafi founders use this conception of *istiḥsān* in their *fiqh*.

## Chapter 2: *Istiḥsān* in Early Hanafism – An Empirical Approach

Chapter 1 showed that *istiḥsān* at its birth meant departing from *qiyās* due to any type of reasoning. This chapter argues that *istiḥsān* meant the same to the Hanafi founders. The question is, did they use *istiḥsān* subjectively, as they were accused of doing by al-Shāfi‘ī, or did they rely on conventional sources of law, as argued by later Hanafis? To answer this question, this chapter presents a dataset of every *istiḥsān* ruling (approx. 500) in the *Kitāb al-Aṣl* of Muḥammad al-Shaybānī (d. 189/804-5).

Through this analysis, the chapter shows that the Hanafi founders often justified *istiḥsān* by conventional reasoning, but more often employed the subjectivity that al-Shāfi‘ī criticised. This chapter focuses on the conventional types of reasoning and the interesting findings to be gleaned from them, while the next chapter will analyse the subjective types. This chapter also analyses the differences between the Hanafi founders in their uses of *istiḥsān*, confirming the stereotypical narrative that Abū Ḥanīfa more frequently made subjective rulings, while Abū Yūsuf and al-Shaybānī were more concerned with shoring up Iraqi doctrine with objective reasoning and hadith.

### 2.1 On al-Shaybānī’s *Kitāb al-Aṣl* and This Study’s Methodology

Al-Shaybānī’s *Kitāb al-Aṣl* offers the most comprehensive picture of early Hanafi doctrine, since it is similar in structure and scope to a classical *fiqh* manual. As a reminder that modern scholarship only covers a fraction of surviving manuscripts, this chapter’s

analysis would have been impossible merely 10 years ago before Mehmet Boynukalın published the first complete edition of the *Aṣl* in 2012. Prior to that, the only published versions were:

- 1 vol. by Joseph Schacht in 1930 on legal stratagems (*Kitāb al-Ḥiyal*)<sup>152</sup>
- 1 vol. by Chafik Chehata in 1954 on transactions (*Kitāb al-Buyūʿ*)<sup>153</sup>
- 4 vols. by Abū al-Wafāʾ al-Afghānī in 1966-1973 on worship and other topics<sup>154</sup>
- 1 vol. by Majid Khadduri in 1975 on the law of nations (*Kitāb al-Siyar*)<sup>155</sup>

In the 1990s, various publishers printed al-Afghānī's four volumes with Chehata's work as the fifth volume.<sup>156</sup> Many thus assumed that the *Ḥiyal* and *Siyar* were separate from the *Aṣl*, and that the Afghānī/Chehata hybrid represented the *Aṣl*'s only surviving fragments.<sup>157</sup>

However, Boynukalın reports 42 surviving manuscripts of the *Aṣl*,<sup>158</sup> 17 of which he consults for his critical edition.<sup>159</sup> Figure 2 compares Boynukalın's work with the previous editions,

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<sup>152</sup> al-Shaybānī, *al-Makhārij fī al-Ḥiyal*, ed. Joseph Schacht (Leipzig: J.C. Hinrichs'sche Buchhandlung, 1930).

<sup>153</sup> al-Shaybānī, *al-Aṣl: al-Qism al-Awwal Kitāb al-Buyūʿ wa-l-Salam*, ed. Chafik Chehata (Cairo: Maṭbaʿat Jāmiʿat al-Qāhira, 1954).

<sup>154</sup> al-Shaybānī, *Kitāb al-Aṣl*, ed. Abū al-Wafāʾ al-Afghānī, 4 vols. (Hyderabad: Maṭbaʿat Majlis Dāʾirat al-Maʿārif al-ʿUthmāniyya, 1966).

<sup>155</sup> al-Shaybānī, *al-Qānūn al-Duwalī al-Islāmī: Kitāb al-Siyar li-l-Shaybānī*, ed. Majid Khadduri (Beirut: al-Dār al-Muttaḥida li-l-Nashr, 1975).

<sup>156</sup> al-Shaybānī, *Kitāb al-Aṣl al-Maʿrūf bi-l-Mabsūt*, 5 vols. (Beirut: ʿĀlam al-Kutub, 1990).

<sup>157</sup> Ahmed El Shamsy, "Al-Aṣl, by Muḥammad b. al-Ḥasan al-Shaybānī. Edited by Mehmet Boynukalın. Qatar: Wizārat Al-Awqāf and Beirut: Dār Ibn Ḥazm, 2012. 13 Volumes. \$150 (Cloth). (Book Review)," *Journal of Near Eastern Studies* 75, no. 1 (2016): 194.

<sup>158</sup> This very high number for such an early work invites new analysis of the work's reception history.

<sup>159</sup> al-Shaybānī, *al-Aṣl*, ed. Mehmet Boynukalın, 13 vols. (Beirut: Dār Ibn Ḥazm, 2012), Introduction: 139-70.

showing that much of the *Aşl* has only become accessible in the last decade. Boynukalın estimates that the previous editions together only capture a fourth of the *Aşl*.<sup>160</sup>

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<sup>160</sup> Ibid., Introduction: 174.

Figure 2: Boynukalın's Aşl Compared to Previous Editions

<b>Kitāb (Book/Chapter)</b>	<b>Boynukalın Vol</b>	<b>Previous Eds.</b>
Şalāt (Prayer)	1	Afghānī Vol 1
Ḥayḍ (Menstruation)	2	Afghānī Vol 1
Zakāt (Charity)	2	Afghānī Vol 2
Khums (One-Fifth Tax)	2	Afghānī Vol 2
Şawm (Fasting)	2	Afghānī Vol 2
Nawādir al-Şawm (Other Topics on Fasting)	2	Afghānī Vol 2
Manāsik (Rites of Pilgrimage)	Missing	Afghānī Vol 2
Taḥarrī (Personal Judgment in Uncertainty)	2	Afghānī Vol 2
Istiḥsān (Assorted Prohibitions)	2	Afghānī Vol 3
Aymān (Oaths)	2	Afghānī Vol 3
Buyū' wa-l-Salam (Transactions)	2	Chehata
Şarf (Currency Exchange)	2	Missing
Rahn (Collateral)	3	Missing
Qisma (Wealth Division)	3	Missing
Hiba (Gift)	3	Missing
Ijāra (Wage Contract)	3	Missing
Sharika (Business Partnerships)	4	Missing
Muḍāraba (Type of Business Partnership)	4	Missing
Raḍā' (Breastfeeding)	4	Missing
Ṭalāq (Divorce)	4	Missing
'Atāq (Manumission)	5	Missing
Mukātab 1 (Slave Working to Earn Freedom)	5	Afghānī Vol 3
Laqīt (Foundling)	5	Missing
'Itq fī al-Maraḍ (Manumission on Deathbed)	5	Missing
Şayḍ wa-Dhabā'iḥ (Hunting/Animal Slaughter)	5	Missing
Waşāyā (Wills and Testaments)	5	Missing
Waşāyā fī Dayn (Bequest Concerning a Debt)	5	Missing
Farā'id (Inheritance)	5	Missing
Mukātab 2 (Slave Working to Earn Freedom)	6	Missing
Walā' (Clientage)	6	Afghānī Vol 4

Figure 2 (Cont'd): *Boynukalın's Aşl Compared to Previous Editions*

<b>Kitāb (Book/Chapter)</b>	<b>Boynukalın Vol</b>	<b>Previous Eds.</b>
<i>Jināyāt</i> (Wounds)	6	Afghānī Vol 4
<i>Diyāt</i> (Indemnities)	6	Afghānī Vol 4
<i>Dawr</i> (Attacks/Indemnities)	7	Missing
<i>Ḥudūd</i> (Ḥadd Punishments)	7	Missing
<i>Sariqa</i> (Theft)	7	Missing
<i>Ikrāh</i> (Coercion)	7	Missing
<i>Siyar</i> (Conquest/Foreign Relations)	7	Khadduri
<i>Kharāj</i> (Agricultural Production Tax)	7	Khadduri
‘ <i>Ushr</i> (One-Tenth Tax)	7	Khadduri
<i>Da‘wā wa-Bayyināt</i> (Claims and Evidence)	7	Missing
<i>Shirb</i> (Water Rights)	8	Missing
<i>Iqrār</i> (Confession)	8	Missing
<i>Wadī‘a</i> (Safe-Keeping)	8	Missing
‘ <i>Āriya</i> (Lending)	8	Missing
<i>Ḥijr</i> (Freezing Assets)	8	Missing
<i>Ma‘dhūn</i> (Slave Permitted to Trade)	8	Missing
<i>Shuḥ‘a</i> (Right of First Purchase)	9	Missing
<i>Khunthā</i> (Hermaphrodite)	9	Missing
<i>Mafqūd</i> (Missing Person)	9	Missing
<i>Ju‘l</i> (Ransom)	9	Missing
‘ <i>Āqila</i> (Those Involved with Indemnities)	9	Afghānī Vol 4
<i>Ḥiyal</i> (Legal Stratagems)	9	Schacht
<i>Luqṭa</i> (Found Item)	9	Missing
<i>Muzāra‘a</i> (Sharecropping)	9	Missing
<i>Nikāh</i> (Marriage)	10	Missing
<i>Ḥiwāla wa Kafāla</i> (Transfers and Guarantors)	10	Missing
<i>Şulh</i> (Settlements)	10	Missing
<i>Wakāla</i> (Agency)	11	Missing
<i>Shahādāt</i> (Testimony)	11	Missing
<i>Rujū‘ ‘an al-Shahāda</i> (Retracting Testimony)	12	Missing
<i>Waqf</i> (Endowment)	12	Missing
<i>Şadaqa Mawqūfa</i> (Endowed Charities)	12	Missing
<i>Ghaşb</i> (Wrongful Appropriation)	12	Missing

The dataset consists of all 496 rulings in the *Aṣl* that explicitly mention *istiḥsān*, though this of course leaves out the many *istiḥsān* rulings that do not mention the term.<sup>161</sup> The rulings were identified by digitally searching the *Aṣl* for derivatives of the word “*istiḥsān*” using the software *al-Maktaba al-Shāmila*. Figure 3 shows the derivative words found in the *Aṣl* along with their frequencies.

Figure 3: Terms Used in the *Aṣl* to Connote *Istiḥsān*

Term Used	Translation	Count
<i>Astaḥsinu</i>	I use <i>istiḥsān</i>	275
<i>Istiḥsān</i>	-	39
<i>Nastaḥsinu</i>	We use <i>istiḥsān</i>	37
<i>Istaḥsantu</i>	I used <i>istiḥsān</i>	33
<i>al-Istiḥsān</i>	The <i>istiḥsān</i>	32
<i>Bi-l-Istiḥsān</i>	With <i>istiḥsān</i>	23
<i>Istaḥsannā</i>	We used <i>istiḥsān</i>	10
<i>Istaḥsana</i>	He used <i>istiḥsān</i>	8
<i>Istiḥsānan</i>	Due to <i>istiḥsān</i>	5
<i>Yastaḥsinu</i>	He uses <i>istiḥsān</i>	4
<i>Yustaḥsanu</i>	It results from <i>istiḥsān</i>	4
<i>Istaḥsanū</i>	They used <i>istiḥsān</i>	1
<i>Istaḥsanā</i>	They both used <i>istiḥsān</i>	1

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<sup>161</sup> E.g. “abandoning (*tark*) *qiyās*” or “divergent (*maʿdul bihi*) from *qiyās*” are synonymous with *istiḥsān*, but are not captured by our dataset. For discussion of the latter phrase, see Sohail Hanif, “A Theory of Early Classical Ḥanafism: Authority, Rationality, and Tradition in the *Ḥidāyah* of Burhān al-Dīn ‘Alī Ibn Abī Bakr al-Marghīnānī (d. 593/1197)” (DPhil diss., University of Oxford, 2017), 156.

28 of the 496 rulings are redundant, appearing elsewhere in the text, sometimes three or four times. Redundancies are combined into one entry so as not to double count.<sup>162</sup> 11 more cases are excluded for complexity or ambiguity. This leaves 457 rulings which undergo this chapter's full analysis. Each ruling was catalogued, translated, and classified according to the ten criteria shown in Figure 4. The main criterion of interest was "Type of Reasoning," to understand the many ways in which the Hanafi founders used *istiḥsān*. This analysis derives 62 types of reasoning. A ruling could rely on one or multiple types. Figure 5 lists these types of reasoning and their frequencies.

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<sup>162</sup> A separate project now in progress uses these redundancies to study the textual history of the *Aṣl*, to evaluate Norman Calder's arguments that the *Aṣl* was not a fixed text until a few generations after the lifetime of al-Shaybānī. Redundancies can help trace which sections of the *Aṣl* emerged when. For example, in some cases, a speaker says in the first person "I use *istiḥsān*," then in the redundant mention of that case in a different section, a narrator says, "Abū Ḥanīfa ruled by *istiḥsān*, and Abū Yūsuf and al-Shaybānī ruled by *qiyās*." This indicates that, in the first section, the first-person speaker was Abū Ḥanīfa in conversation with al-Shaybānī, confirming the early provenance of that section. In other cases, the narrator says, "Abū Ḥanīfa, Abū Yūsuf, and al-Shaybānī ruled by *qiyās*, but I rule by *istiḥsān*," clearly showing that the narrator is a later figure. Through cross-reference, these redundancies reveal the textual history of individual sections. For Calder's arguments on the *Aṣl* and other early texts, see Norman Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Clarendon Press, 1993). For a study which uses a similar text-based approach to argue for the authenticity of al-Shaybānī's *Kitāb al-Āthār*, see Behnam Sadeghi, *The Logic of Law-Making in Islam: Women and Prayer in the Legal Tradition*, Cambridge Studies in Islamic Civilization (Cambridge: Cambridge University Press, 2013), Appendix 177-99.

Figure 4: Criteria for Evaluating Istiḥsān Rulings in the Aṣl

Criteria #	Criteria	Possible Values
1	Which chapter ( <i>kitāb</i> ) does it occur in?	Title of Chapter
2	Which term for <i>istiḥsān</i> does it use?	See Fig. 1 (Can Have Multiple)
3	Does it contrast with a <i>qiyās</i> ruling?	Yes - Explicitly / Yes - Implicitly / No
4	What type(s) of reasoning justifies it?	See Fig. 5 (Can Have Multiple)
5	Is the reasoning explicit in the text?	Explicit / Partial / Implicit
6	Is it more lenient than the <i>qiyās</i> ?	Lenient / Neutral / Stringent
7	Is it attributed to particular jurists?	Name of Jurist(s)
8	Is it opposed by particular jurists?	Name of Jurist(s)
9	Does it cite any earlier figures ( <i>salaf</i> )?	Name of Early Figure(s)
10	Does the <i>qiyās</i> overrule the <i>istiḥsān</i> ?	Yes / No

Figure 5: The 62 Types of Reasoning Underlying Istih̄sān

Name	Count
Alternative Qiyās	98
Language Considerations	34
Unclear Reasoning	30
Avoid Ḥadd Punishments	26
Fulfil Contract for Fairness	24
Free Slave	19
Grant Guardianship/Clientage	18
Qiyās From Own Ruling	18
Sunna/Athar	18
Necessity	14
Custom	13
Technically vs. Functionally True	12
Limit Setting	11
Unintentional/Forced	11
Don't Need Perfect Certainty	10
Appropriate/Tasteful	10
Promoting Social Status of Islam	9
Naturally Falls Under Contract	9
Currencies are Interchangeable	8
Everyone Consents	8
Precaution	7
Same Ends, Wrong Procedure	7
Geographic Proximity	7
Better Legal Solution	6
Punish Those Deserving	6
Non-Qiyāsī Authority Over Young	6
Enforce Someone's Intention	6
Old Contract Can Survive	6
Reasonable Knowledge	5
Prohibitive Element is Small	5
Vested Interest in Family	5

Figure 5 (Cont'd): Types of Reasoning Underlying Istih̄sān

Name	Count
Minor Treated as Rational	5
Don't Waste	5
Validate/Fix Contract	5
Tacit Consent	5
Don't Incentivize/Reward Bad Behaviour	5
Parental Priority	3
Women Know Their Bodies Best	4
Victims Forgive	4
Guarding Against Ill Intent	4
"Ṭa'ām" Means "Ḥinṭa"	4
Food is Not Money	4
Pay Back Debtors	4
Transaction Before Conversion	3
Consent <i>A Fortiori</i>	3
At Impasse, Split It	3
Did Important Part of Obligation	2
Statute of Limitations	2
Don't Undo Qadi Judgment	2
Difference of Opinion	2
Muslim Dealings in Non-Muslim Lands	2
Avoid Logical Absurdity	2
Uphold Judicial Procedure	2
Transactions by Non-Muslims	2
Ease/Practicality	2
Don't Enforce a Bad Agent's Decision	2
Don't Punish Good Actions	1
Want Contracts to be Meaningful	1
Don't Mix Family Into Slavery	1
Ignorance is an Excuse	1
Corruption of Our Day and Age	1
Patriarchy	1

As an example of how the dataset classifies one ruling, consider Case #2, in which the narrator asks a jurist:

“What happens if a man has been making ablutions from a well, then finds a bloated dead chicken in the well...and does not know when it fell in?” [The jurist] responded, “He must repeat his ablutions and prayers from the previous three days and nights....I use *istiḥsān* (*astaḥsinu*) in this and take what is safer (*thiqa*), because this is prayer, and for him to pray what is no longer obligatory upon him is more preferable to me (*aḥabb ilayya*) than his not doing something obligatory.” But Abū Yūsuf and [al-Shaybānī] said, “His previous prayers suffice. He is not required to repeat prayers unless he is certain that when he made his ablutions, [the chicken] had already fallen [into the well].” The *qiyās* is the opinion of Abū Yūsuf and [al-Shaybānī], and the *istiḥsān* is the opinion of Abū Ḥanīfa.<sup>163</sup>

Classifying the ruling according to the ten criteria, the dataset records that 1) it occurs in the chapter on prayer (*Kitāb al-Ṣalāt*), 2) it uses the terms “*astaḥsinu*” and “*al-istiḥsān*,” 3) it explicitly contrasts with *qiyās*, 4) the reasoning is “Precaution”, 5) the reasoning is mentioned explicitly, 6) the ruling is stringent,<sup>164</sup> 7) Abū Ḥanīfa supports the *istiḥsān*, 8) Abū Yūsuf and al-Shaybānī oppose the *istiḥsān*, 9) the ruling does not cite any early authorities (*salaf*), and 10) the *qiyās* does not overrule the *istiḥsān*.<sup>165</sup>

There are a few difficulties with the methodology which reflect the broader difficulties of understanding Islamic legal thought in the early period. First, determining a

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<sup>163</sup> al-Shaybānī, *al-Aṣl*, 1:28.

<sup>164</sup> See Chapter 3.1 on how the dataset defines “stringent,” “lenient,” and “neutral.”

<sup>165</sup> In this case, Abū Yūsuf and al-Shaybānī take the *qiyās*, but this criterion specifically connotes the fascinating cases in which the same jurist articulates the *qiyās* and *istiḥsān* positions, then chooses the *qiyās*. See Chapter 2.2 for discussion of these cases.

jurist's reason for a ruling can be very speculative. In the above case, the jurist is remarkably explicit about his reasoning. However, in the dataset as a whole, the results for Criterion #5 – “Is the reasoning mentioned explicitly?” – show that 186 cases (40.4%) mention the reasoning explicitly and 54 cases (11.7%) mention it partially. In the remaining 217 cases (47.2%), the reasoning must be inferred.

Sometimes this inference is obvious. For example, Case #50 states that Emily<sup>166</sup> cannot make Andrew her guarantor for a contract with Jane without Andrew's consent. However, if Andrew is present when Emily and Jane agree upon the contract and does not say anything, then by *istihsān* the contract is valid.<sup>167</sup> The text does not explain why, but this clearly relies on “Tacit Consent” reasoning, where if someone is aware and does not object, then *istihsān* assumes their consent, whereas *qiyās* still requires their explicit approval. Other times, the reasoning is truly ambiguous. This can sometimes be due to a reader's ignorance, as the *istihsān* might rely on a particular hadith or analogically-related ruling, while a reader unaware of these will read different reasoning into the case.

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<sup>166</sup> To make cases clearer, this study assigns parties random English names. It is admittedly jarring, but still preferable to the alternatives of anonymity (e.g. “one's contract with another”), variables (e.g. “X's contract with Y”), or Arabic names (e.g. “Zayd's contract with ‘Amr”). Using Arabic names initially seems most natural, but it quickly proves confusing when discussing both a case and the opinions of actual jurists about that case, and it adds even more Arabic to a study already replete with foreign words. Interestingly, using English names also challenges us to imagine these cases applied to a different time and people, rather than stereotypical images of Arabs in a desert village 1000 years ago. Since *fiqh* clearly governs more modern non-Arabs outside of a desert than it ever governed medieval Arabs in a desert, this is a useful exercise to change who we imagine the hypothetical subjects of *fiqh* to be.

<sup>167</sup> al-Shaybānī, *al-Aṣl*, 2:441.

The most useful way of combatting these pitfalls is cross-reference with other early legal sources. For example, many *istiḥsān* rulings in the *Aṣl* rely on an *athar* (transmitted report), but the text does not clarify what the *athar* is. Cross-reference with al-Shaybānī’s *Kitāb al-Āthār* often reveals it. Section 2.3 discusses many such cases.

Cross-reference with later legal sources is also critical, but not conclusive, since the justifications for rulings can change over time. For example, in Case #97, *istiḥsān* permits using a bathhouse (*ḥammām*) even though the amount of time/water/soap is unspecified. To explain this, the *Aṣl* only cites “Custom” (*‘amal al-nās*),<sup>168</sup> whereas later authors like al-Sarakhsī also cite “Avoiding Difficulty” (*ḥaraj*) and “Consensus” (*ijmā’*).<sup>169</sup> While “Avoiding Difficulty” likely did factor into the *Aṣl*’s reasoning, “Consensus” likely did not, given Chapter 2.3’s finding that the *Aṣl* never once cites consensus to support *istiḥsān*. Later Hanafis might have retroactively applied it after “Consensus” had matured as a conventional source of law, or borrowed it from another madhhab’s treatment of the same case.

This dilemma of the changing reasons for rulings touches on a major debate in the field of Islamic law. Behnam Sadeghi writes:

...if legal reasons were motives and causes, one would expect them to be more stable than the laws....On the other hand, if legal reasons were after-the-fact justifications, one would expect them to be less stable than the laws since more

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<sup>168</sup> Ibid., 3:506.

<sup>169</sup> al-Sarakhsī, *Kitāb al-Mabsūṭ* (Beirut: Dār al-Ma‘rifa, 1993), 15:160.

than one justification can be devised for a law. Of these two patterns, the second one – relative instability – characterises legal reasons in the Hanafi tradition, pointing to their justificatory function and secondary status.<sup>170</sup>

Sadeghi uses this to argue that the classical Hanafi *uṣūl* tradition is “descriptive” rather than “prescriptive,” meaning that it justifies early Hanafi rulings rather than creating new ones. No matter one’s stance on the seminal “descriptive vs. prescriptive” debate, scholars must at least accept that the reasons articulated by later scholars for particular rulings might not be those of the original jurists. This is particularly true for classical discussions of the early period, as the birth of *uṣūl* and a broader Sunni orthodoxy in the intervening centuries enshrined the centrality of certain legal arguments (like consensus) and the unacceptability of others. Regardless, cross-referencing cases with later sources is critical, particularly for revealing relevant hadiths and analogically-related rulings. Even then, however, one must consider whether the early jurist was aware of the hadith.

Another difficulty in the methodology is the overlap between some of the 62 types of reasoning. For example, “Naturally Follows from Contract” might really be part of “Custom.” This is a small concern, however, since overlapping categories still group together for broader analyses, thus reflecting the same truths about how often the ruling was conventional vs. subjective, lenient vs. stringent, and so on.

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<sup>170</sup> Sadeghi, *The Logic of Law-Making in Islam*, 148.

A final difficulty concerns reasons which are themselves legal ends, such as “Free Slave” or “Grant Lineage.” Yes the jurists consider these ends desirable, but there are only two options: either the slave goes free, or not. If in one case Abū Yūsuf rules that a slave should go free, he does not necessarily do so just *because* he wants slaves to go free. There could be a perfectly straightforward analogy or hadith underpinning the ruling. The dataset therefore takes care to select these types of reasoning only when they are causal.

Despite these issues, we can be confident about our findings because none of these methodological difficulties seem to act in a particular direction in any of the criteria. In other words, while they may add *noise* to the data, they should (hopefully) not cause a *bias* in the data. But let us turn to the findings for readers to judge for themselves.

## 2.2 *Istiḥsān* Means Any Departure from *Qiyās*

The dataset confirms that *istiḥsān* means the departure from *qiyās*, as opposed to the stereotypical notions of it meaning a more preferable or lenient ruling. Figure 3 shows that *istiḥsān* contrasts with *qiyās* in 446 of 457 rulings (97.6%). Figure 4 breaks these down into “Explicit” and “Implicit.” “Explicit” means that the text uses the word “*qiyās*” for one ruling, then contrasts it with *istiḥsān*, such as, “I use *istiḥsān* (*astaḥsinu*) and abandon (*adaʿ*) the *qiyās*.”<sup>171</sup> This occurs in 309 of 457 rulings (67.6%), so often that it feels redundant.<sup>172</sup>

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<sup>171</sup> al-Shaybānī, *al-Aṣl*, 2:515.

<sup>172</sup> Interestingly, the word “*qiyās*” itself rarely appears in the *Aṣl* except for explicit contrast with “*istiḥsān*”. Boynukalın writes, “*Istiḥsān* and *qiyās* are among the most commonly used terms in the *Aṣl*. The mention of

“Implicit” connotes when *istiḥsān* contrasts with a ruling which is clearly the *qiyās*, but the word “*qiyās*” does not appear. For example, Case #144 states, “If [a woman] apostatises from Islam on her deathbed then dies...by *istiḥsān* her husband still inherits from her.”<sup>173</sup> The clear implication is that by *qiyās* her husband would not inherit.<sup>174</sup> 137 of 457 rulings (30%) exhibit this kind of implicit contrast. These cases are not weaker examples of contrast, but simply omit mentioning *qiyās* to avoid stating the obvious.

There remain only 11 of 457 cases (2.4%) that do not contrast with *qiyās*, but even these cases fit elegantly within our definition, for all of them represent one type of reasoning – “Limit Setting” – which is conceptually distinct from *istiḥsān*. A simple example is Case #151, which rules that, when a man’s wife gives birth, he cannot one year later deny the child and accuse his wife of adultery. For how long after the birth can the man question the child’s paternity? Abū Ḥanīfa rules one or two days by *istiḥsān*, whereas Abū Yūsuf and al-Shaybānī rule 40 days by *istiḥsān*. The jurists have no strict evidence to base this on, and

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*qiyās* in many cases is the result of the presence of *istiḥsān* in the case. When a case relies on *qiyās* and there is no departure from it...then al-Shaybānī does not mention *qiyās*. But if there is a departure from it...then he mentions *qiyās* and clarifies that the ruling by *qiyās* must be such-and-such, then he departs from the *qiyās*...to the *istiḥsān*. In this way, *qiyās* and *istiḥsān* are paired terms, complementary in meaning.” Ibid., Introduction: 211.

<sup>173</sup> Ibid., 4:537.

<sup>174</sup> The *qiyās* – that he would not inherit – is because Muslims do not inherit from non-Muslims. The *istiḥsān* is due to “Guarding Against Ill Intent” – that the woman may have apostatised specifically to prevent her husband from inheriting. Similar reasoning treats the case of a man divorcing his wife on his deathbed to prevent her from inheriting, called *ṭalāq al-firār*, meaning “divorce to get out of” her inheriting.

so are not departing from any *qiyās*. Instead, in these types of cases, the jurists set an amount in the absence of other indicators to make a ruling more functional.

Classical Hanafi *uṣūl* authors note with acute clarity that “Limit Setting” might share the term *istiḥsān*, but is conceptually distinct. Al-Jaṣṣāṣ begins his discussion of *istiḥsān* with:

*Istiḥsān* has two meanings. The first is...setting amounts (*ithbāt al-maqādīr*) which have been left to our *ijtihād* and opinions (*ārāʾinā*). [An example of this] is the amount for the divorce payment (*mutʿa*)...God said, “Give them a provision (*mutʿa*), the rich according to his means and the poor according to his, according to what is well-regarded (*maʿrūf*)...”<sup>175</sup> God defined its measure according to a man’s wealth or poverty, so its amount is not set except by opinion and supposition...And there is no difference of opinion concerning [the permissibility of] this meaning of *istiḥsān*, and none can deny it. As for the second meaning of *istiḥsān*...<sup>176</sup>

Al-Jaṣṣāṣ structures the discussion as two meanings of *istiḥsān*, showing that “Limit Setting” shares the same term but is conceptually distinct. Other rulings which al-Jaṣṣāṣ cites as “Limit Setting” are 1) the amount of a husband’s maintenance payment (*nafaqa*) to his wife, 2) the amounts of indemnities (*urūsh*) with no textual precedent (*naṣṣ*), and 3) judging the uprightness (*ʿadāla*) of a witness. In all of these cases, al-Jaṣṣāṣ says that God uses phrases like “those of whom you approve (*tarḍawn*)”<sup>177</sup> or “well-regarded (*bi-l-maʿrūf*)”<sup>178</sup> to leave the matter to human judgment. But one can imagine jurists being pestered with, “So what is a

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<sup>175</sup> Q. 2:236.

<sup>176</sup> al-Jaṣṣāṣ, *al-Fuṣūl fi al-Uṣūl*, ed. ʿAjil Jāsim al-Nashamī, 4 vols. (Kuwait: Wizāra al-Awqāf wa-l-Shuʿūn al-Islāmiyya, 1994), 4:233-34.

<sup>177</sup> Q. 2:282.

<sup>178</sup> Q. 2:236.

good amount to pay as the *mut‘a*?” The jurists therefore stipulate amounts to give the rulings functionality and prevent abuse.

Al-Jaṣṣāṣ’s statement that there is “no difference of opinion” over “Limit Setting” and that “none can deny it” aligns with (and explains) the fact that al-Shāfi‘ī, arch-nemesis of *istiḥsān*, occasionally uses the term. These rulings all prove to be cases of “Limit Setting.”<sup>179</sup> One of these examples is the same case of the divorce payment (*mut‘a*) which al-Jaṣṣāṣ cites as an example of “Limit Setting.” Thus, “Limit Setting” should be understood as theoretically distinct from *istiḥsān*, with the unfortunate confusion that it uses the same term.

A final group of rulings which entrench this contrast between *qiyās* and *istiḥsān* is identified by Criterion #10, “Does the *qiyās* overrule the *istiḥsān*?”. In these cases, a jurist articulates both a *qiyās* and *istiḥsān* position, then selects the *qiyās* over the *istiḥsān*. This occurs in only 8 of 457 rulings (1.75%) in our dataset, but is a known phenomenon of early and classical Hanafism.

A good example is Case #456. If Emily owns a house, and John and Jack dispute over it, each claiming that Emily had temporarily granted him the house as collateral (*rahn*) for a loan, then, as the author writes, “*Qiyās* necessitates that none of it be collateral for either of them, and we take this opinion (*bi-hādhā na’kudh*), whereas by *istiḥsān*, each of them would

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<sup>179</sup> For further discussion of al-Shāfi‘ī’s occasional uses of the term in his *fiqh*, as well as Aḥmad b. Ḥanbal’s, see the conclusion of Chapter 4.1.

receive half of the house as collateral for half of his debt.”<sup>180</sup> The *istiḥsān* comes from the “At Impasse, Split It” reasoning which prevails in similar cases, but in this case, the jurist upholds the *qiyās*.

Confusing as they are, these cases confirm our definition of *istiḥsān* as the departure from *qiyās*. By the stereotypical understanding of *istiḥsān* as a preferable or more lenient ruling, these cases would be incoherent, with the jurist paradoxically overruling the “preferable” ruling. This apparent paradox caused much confusion. Bibliographies report a work by the later Hanafi jurist Najm al-Dīn al-Ṭarsūsī (d. 758/1356) entitled “Easing the Burden on the Brothers Concerning Cases in which *Qiyās* Overrules *Istiḥsān*.”<sup>181</sup> If we understand *istiḥsān* as the departure from *qiyās*, these cases pose no issue, for while departure usually entailed preference, the jurist could sometimes depart from *qiyās*, derive the *istiḥsān* by other reasoning (in these cases, almost always “Alternative *Qiyās*”), compare the two, then maintain the *qiyās*. Again, this only occurs in 8 of 457 cases (1.75%). The other 449 (98.25%) maintain the *istiḥsān*.

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<sup>180</sup> al-Shaybānī, *al-Aṣl*, 11:541.

<sup>181</sup> In Arabic, “*Raʿ al-Kulfa ‘an al-Ikhwān fī Dhikr mā Quddima fī-hi al-Qiyās ‘alā al-Istiḥsān*”. It has not been published but is attested to in many bibliographical works; e.g. Ibn Quṭlūbūghā, *Tāj al-Tarājim*, ed. Muḥammad Khayr Ramaḍān Yūsuf (Damascus: Dār al-Qalam, 1992), 90; Kātib Ḥalebī, *Kashf al-Zunūn*, ed. Muḥammad Sharaf al-Dīn Yāltaqāyā, 2 vols. (Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī, 1941), 830.

## 2.3 *Istiḥsān* Through Conventional Reasoning

The standard four sources of Islamic law are 1) Qur'an, 2) sunna, 3) consensus (*ijmā'*), and 4) analogy (*qiyās*). Classical Hanafi *uṣūl* authors split *istiḥsān* into three subtypes based on these categories: 1) *istiḥsān* through textual evidence (*naṣṣ*), encompassing Qur'an and sunna, 2) *istiḥsān* through consensus, and 3) *istiḥsān* through alternative *qiyās*.<sup>182</sup> They add a variable fourth category – sometimes custom (*'amal al-nās*),<sup>183</sup> sometimes necessity (*darūra*)<sup>184</sup> – to cover the remaining cases. In this way, they frame *istiḥsān* as mostly constituted by conventional reasoning. Does this align with the *Aṣl*?

The short answer is no. Neither Qur'an nor consensus ever appears in the *Aṣl* to explicitly justify *istiḥsān*. Conventional reasoning does still figure into *istiḥsān*. The *Aṣl* cites “Sunna/Athar” in 18 cases,<sup>185</sup> making it the seventh most prevalent justification for *istiḥsān*, and cites “Alternative Qiyās” in 98 cases, making it the most prevalent by far (the runner up only numbers 34 cases). However, putting these two together, conventional reasoning only

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<sup>182</sup> al-Jaṣṣāṣ, *al-Fuṣūl fī al-Uṣūl*, 4:243; Abū Zayd al-Dabūsī, *Taqwīm al-Adilla fī Uṣūl al-Fiqh*, ed. Khalīl al-Mays (Beirut: Dār al-Kutub al-ʿIlmiyya, 2001), 405.

<sup>183</sup> al-Jaṣṣāṣ, *al-Fuṣūl fī al-Uṣūl*, 4:248. While he distinguishes *ijmā'* and *'amal al-nās*, al-Jaṣṣāṣ's definition of *'amal al-nās* is clearly *ijmā'*. He says that *'amal al-nās* connotes what the Companions and *salaf* saw occurring around them and never prohibited, meaning their universal tacit consent. This again points to the conceptual overlap between consensus and custom, like we saw in Case #97 on the permissibility of paying to use a bathhouse. See Chapter 5.1 for further discussion of al-Jaṣṣāṣ's theorisation of *istiḥsān*.

<sup>184</sup> al-Dabūsī, *Taqwīm al-Adilla fī Uṣūl al-Fiqh*, 404. See Chapter 5.1 for further discussion of al-Dabūsī's theorisation of *istiḥsān*.

<sup>185</sup> Recall that the dataset only includes rulings which explicitly mention *istiḥsān*. There are of course many more instances of sunna/athar in the *Aṣl*, some of which are also implicit cases of *istiḥsān*.

accounts for 116 of 457 cases (25.4%) and 2 of 62 reasons. Still, they are major components of *istiḥsān* and therefore critical to understand. The remainder of this section goes through each of the four sources in turn.

## **Qurʾan**

While the *Aṣl* never cites Qurʾan to justify *istiḥsān*, later Hanafis do.<sup>186</sup> For example, al-Sarakhsī comments that by *qiyās*, a Muslim man should not have to support his elderly, non-Muslim parents, since he does not inherit from them either. However, by *istiḥsān*, he must, based on the Qurʾanic verse, “Accompany them in this world with appropriate kindness.”<sup>187</sup> In another case, al-Jaṣṣāṣ considers the waiting period (*ʿidda*) if a woman is pregnant from a previous marriage, gets married to a young boy, then the young boy dies. Al-Jaṣṣāṣ states that by *qiyās* the waiting period should be four months and ten days, since the pregnancy is not from her husband, but by *istiḥsān* the waiting period stops when she

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<sup>186</sup> For a thorough list of such cases, see Kayadibi, "*Istiḥsān* (Juristic Preference): The Forgotten Principle of Islamic Law," 249-51. However, Kaydibi lists some cases here incorrectly. For example, on al-Sarakhsī's ruling that a repentant highway robber should not receive the *ḥadd*, Kayadibi cites this as *istiḥsān* based on the verse “Except for those who return (repenting) before you apprehend them” Q. 5:34. However, al-Sarakhsī's discussion does not mention the verse at all. Furthermore, al-Sarakhsī's discussion is not about a repentant highway robber, but a highway robber whose crime was long ago and has since changed his ways. Al-Sarakhsī's justification is thus based on “Statute of Limitations” reasoning, supported with an *athar* that ʿAlī did not prosecute a former highway robber in Basra. al-Sarakhsī, *Kitāb al-Mabsūṭ*, 9:204. Kayadibi similarly misattributes al-Marghīnānī's discussion of which types of people unable to fast during Ramadan must feed the poor instead. al-Marghīnānī, *al-Hidāya Sharḥ Bidāyat al-Mubtadī* (Cairo: Dār al-Salām, 2000), 1:124.

<sup>187</sup> Q. 31:15. al-Sarakhsī, *Kitāb al-Mabsūṭ*, 5:206.

delivers her child, due to the verse, “Those who are pregnant, their waiting period is until they give birth.”<sup>188</sup>

These cases are logically similar to *istihsān* based on *sunna/athar*, in that a textual precedent justifies departing from *qiyās*. Why does the *Aṣl* not call these *istihsān*? Likely because Qur’anic verses are so authoritative and well-known that they merit straightforward *qiyās* in their own right. Calling a ruling based on a Qur’anic verse “*istihsān*” would only be for the rhetorical effect of contrasting it with a ruling that might have obtained through pure analogy. This is indeed what al-Jaṣṣāṣ and al-Sarakhsī do in the previously-mentioned cases.

Regardless, rulings in the *Aṣl* which explicitly cite Qur’anic verses and could be called *istihsān* are rare. Even if we included them, Qur’an would still be a minor justification for *istihsān* in the *Aṣl*. The classical Hanafi jurists seem aware of this, explaining why their first category is “*istihsān* by textual evidence (*naṣṣ*),” encompassing both Qur’an and *sunna/athar*, rather than making each a separate category.

### ***Sunna/Athar***

The umbrella term for this category in the *Aṣl* is “*athar* (transmitted report),” which could go back to the Prophet, a Companion, a Successor (*tābi‘ī*), or a Kufan jurist (namely Ibrāhīm al-Nakha‘ī and Ḥammād b. Abī Sulaymān, respectively the “grand-teacher” and

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<sup>188</sup> Q. 65:4. al-Jaṣṣāṣ, *al-Fuṣūl fī al-Uṣūl*, 4:245.

teacher of Abū Ḥanīfa). In this way, the category elides Prophetic authority with that of the pious predecessors (*salaf*) by virtue of their being his model students and exemplars of his sunna. The line between Prophetic and *salaf* authority is further blurred by the fact that the *salaf* are themselves the transmitters of hadith. A particular Prophetic hadith will therefore carry with it the ethos – and sometimes the known rulings and actions – of its transmitter.

Of the dataset's 18 cases based on sunna/*athar*, 14 cite one or more individuals:

**Prophet Muḥammad** – 5 Cases<sup>189</sup>

‘**Alī b. Abī Ṭālib** – 3 Cases<sup>190</sup>

**Shurayḥ** – 3 Cases<sup>191</sup>

‘**Umar b. al-Khaṭṭāb** – 2 Cases<sup>192</sup>

**Ibrāhīm al-Nakha‘ī** – 2 Cases<sup>193</sup>

‘**Abd Allāh Ibn Mas‘ūd** – 1 Case<sup>194</sup>

**Al-Sha‘bī** – 1 Case<sup>195</sup>

**Ḥammād b. Abī Sulaymān** – 1 Case<sup>196</sup>

Of the five cases which cite the Prophet Muḥammad, three do so directly. For example, in Case #399, the jurist states about someone accused of a minor crime:

If the accused is a person of honour...and this is their first offense...by *istiḥsān* I do not punish them.<sup>197</sup> [Al-Shaybānī narrated]...that the Messenger of God,

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<sup>189</sup> al-Shaybānī, *al-Aṣl*, 2:364, 2:504, 3:273, 6:559, 10:526.

<sup>190</sup> Ibid., 2:278, 7:249, 10:190.

<sup>191</sup> Ibid., 7:26, 8:469, 11:523.

<sup>192</sup> Ibid., 2:515, 7:295.

<sup>193</sup> Ibid., 1:56, 5:208.

<sup>194</sup> Ibid., 10:190.

<sup>195</sup> Ibid., 8:469.

<sup>196</sup> Ibid., 5:208.

<sup>197</sup> The term used for “punish” is “*u‘azziruhu*” – from “*ta‘zīr*,” the discretionary punishment applied by a ruler/qadi.

peace be upon him, said, “Avoid punishing the honourable, except for a *ḥadd*.”<sup>198</sup>

Case #59 similarly states, “because it has reached us (*balaghanā*) from the Messenger of God, peace be upon him,”<sup>199</sup> that he made a particular form of payment in a transaction, proving its permissibility. Case #39 shows that the *Aṣl* sometimes intends Prophetic hadith by “*athar*,” stating, “due to the *athar* that has come from the Messenger of God, peace be upon him.”<sup>200</sup>

Meanwhile, the other two cases which rely on the Prophet Muḥammad simply invoke the phrase “by the *athar* and sunna (*bi-l-athar wa-l-sunna*).”<sup>201</sup> For example, in Case #81, Abū Ḥanīfa states, “Drawing lots (*qur‘a*) is invalid by *qiyās*, but we abandon *qiyās* here and rule by the *athar* and sunna (*bi-l-athar wa-l-sunna*).”<sup>202</sup> Case #227 states about the indemnity for a particular type of wound, “I use *istiḥsān* in this due to the evidence concerning it from the *athar* and sunna.”<sup>203</sup> Sunna certainly refers to Prophetic authority here since both drawing lots and the indemnity for wounds are the subject of many known Prophetic hadiths. Meanwhile, sunna is never used in clear reference to figures other than

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<sup>198</sup> al-Shaybānī, *al-Aṣl*, 10:526.

<sup>199</sup> Ibid., 2:504.

<sup>200</sup> Ibid., 2:364.

<sup>201</sup> Ibid., 3:273, 6:559.

<sup>202</sup> Ibid., 3:273. Bishr al-Marīsī notoriously rejected this ruling, consistent with his rejecting *istiḥsān*, putting him in blatant conflict with the sunna. See Chapter 4.2 for further discussion.

<sup>203</sup> Ibid., 6:559.

the Prophet. Thus, sunna appears to be specific to the Prophet while *athar* encompasses both sunna and the *salaf*.

After the 5 cases citing the Prophet, 9 cases cite other individuals, such as Case #235, which reads, “We abandon *qiyās* and use *istiḥsān* due to the *athar* that has come about this from Shurayḥ.”<sup>204</sup> In this case, as in most of these cases, the text does not actually give the *athar*. It is even ambiguous whether the *athar* is *about* Shurayḥ vs. reported *through* Shurayḥ about a Companion or the Prophet, the upshot being whose authority the ruling invokes.

In most cases, the report originates with (so invokes the authority of) the named individual, with potentially controversial results. For example, Case #262 concerns a repeat-offending thief. It states that, after one conviction, the thief’s right hand should be amputated, and, after a second, the left leg. By *qiyās*, this should continue, with the left hand for the third conviction and the right leg for the fourth. However, by *istiḥsān*, there should be no third or fourth amputations, “due to the *athar* from ‘Alī.”<sup>205</sup> What is this *athar*?

Al-Shaybānī’s *Kitāb al-Āthār* contains a report of ‘Alī saying, “If a man steals, his right hand should be amputated, and if he steals again, his left leg should be amputated, but if he steals again, he should be imprisoned until he changes his ways, for I would be embarrassed before God to leave him without a hand with which to eat and clean, or without a leg with

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<sup>204</sup> Ibid., 7:26.

<sup>205</sup> Ibid., 7:249.

which to walk.”<sup>206</sup> The *Muṣannaf* collections of both ‘Abd al-Razzāq and Ibn Abī Shayba contain the same report,<sup>207</sup> as well as others stating that ‘Alī did not amputate repeat-offending thieves more than twice.<sup>208</sup>

However, both *Muṣannaf* works juxtapose ‘Alī’s reports with contradictory reports that ‘Umar,<sup>209</sup> Abū Bakr,<sup>210</sup> and even the Prophet Muḥammad<sup>211</sup> amputated the third and fourth limbs of repeat-offending thieves. The controversy devolves from there. Some reports retort that ‘Umar never did,<sup>212</sup> including one where ‘Umar is about to do so, then ‘Alī stops him.<sup>213</sup> Some reports say that Abū Bakr never did,<sup>214</sup> including one of the hadith transmitter Ibn Shihāb al-Zuhri (d. 124/741-2) saying that the report of Abū Bakr’s doing so is simply a transmission error in which the narrator mistakenly inserted the amputation of an extra limb.<sup>215</sup> Early jurists then split over the issue. Al-Nakha‘ī predictably follows ‘Alī, with his own statement that he would not want to leave a human being to eat like an animal

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<sup>206</sup> al-Shaybānī, *Kitāb al-Āthār*, 2:545.

<sup>207</sup> ‘Abd al-Razzāq, *al-Muṣannaf*, 10:186-87, #18764; Ibn Abī Shayba, *al-Kitāb al-Muṣannaf fī al-Aḥādīth wa-l-Āthār*, 5:489-90, #28261, #28270.

<sup>208</sup> ‘Abd al-Razzāq, *al-Muṣannaf*, 10:186-87, #18767; Ibn Abī Shayba, *al-Muṣannaf*, 5:489-90, #28260, #28271.

<sup>209</sup> ‘Abd al-Razzāq, *al-Muṣannaf*, 10:187, #18768; Ibn Abī Shayba, *al-Muṣannaf*, 5:490, #28266.

<sup>210</sup> ‘Abd al-Razzāq, *al-Muṣannaf*, 10:187-9, #18769, #18775.

<sup>211</sup> ‘Abd al-Razzāq, *al-Muṣannaf*, 10:188, #18773; Ibn Abī Shayba, *al-Muṣannaf*, 5:490, #28269.

<sup>212</sup> Ibn Abī Shayba, *al-Muṣannaf*, 5:489, #28263.

<sup>213</sup> ‘Abd al-Razzāq, *al-Muṣannaf*, 10:186, #18766.

<sup>214</sup> Ibn Abī Shayba, *al-Muṣannaf*, 5:489, #28262.

<sup>215</sup> ‘Abd al-Razzāq, *al-Muṣannaf*, 10:187, #18770.

without hands.<sup>216</sup> ‘Aṭā’ similarly rules to not amputate more than two limbs.<sup>217</sup> Meanwhile, Qatāda supports continuing up to four.<sup>218</sup>

This disagreement carries into the schools. The Hanafis stop at two limbs, the Shafiis<sup>219</sup> and the Malikis<sup>220</sup> continue to four, and the Hanbalis (as usual) narrate both opinions from Aḥmad.<sup>221</sup> The Hanafi ruling in the *Aṣl* thus clearly draws on the authority of ‘Alī, conflicting with other Companions and potentially even the sunna. This is a prime example of the many cases when Kufan doctrine, citing ‘Alī or Ibn Mas‘ūd, puts the Hanafis at odds with other schools citing ‘Umar, Abū Bakr, and minor hadiths from the Prophet Muḥammad himself.

The last 4 of the 18 sunna/*athar* cases do not cite any individual nor specify what the *athar* is.<sup>222</sup> For example, Case #51 discusses if Albert sells something to Victoria, but dies before Victoria has paid. Albert’s heirs then dispute with Victoria over the price of sale, the heirs saying that Albert and Victoria had agreed on 50 dirhams, but Victoria saying that she and Albert had only agreed to 30. By *istiḥsān*, the claim goes to whoever has the item in their

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<sup>216</sup> Ibn Abī Shayba, *al-Muṣannaf*, 5:490, #28264.

<sup>217</sup> *Ibid.*, #28267.

<sup>218</sup> ‘Abd al-Razzāq, *al-Muṣannaf*, 10:187, #18772.

<sup>219</sup> al-Ramlī, *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj*, 7:466.

<sup>220</sup> Muḥammad b. Aḥmad al-Dasūqī, *Ḥāshiyat al-Dusūqī ‘alā al-Sharḥ al-Kabīr*, 4 vols. (Beirut: Dār al-Fikr, n.d.), 4:332.

<sup>221</sup> Shams al-Dīn Ibn Qudāma, Muwaffiq al-Dīn Ibn Qudāma, and ‘Alā’ al-Dīn al-Mardāwī, *al-Muqni‘ wa-l-Sharḥ al-Kabīr wa-l-Inṣāf*, ed. ‘Abd Allāh b. ‘Abd al-Muḥsin al-Turkī, 32 vols. (Cairo: Dār Hajr, 1993), 26:570.

<sup>222</sup> al-Shaybānī, *al-Aṣl*, 1:60, 2:447, 7:29, 7:270.

possession (i.e. did Victoria take the item before the dispute arose). The text then states, “The *qiyās* here...would be that the claim...goes to the buyer, but we abandon that due to the *athar* that has come concerning this.”<sup>223</sup> Unfortunately, the “*athar*” here is left undefined. Cross-referencing these ambiguous cases can come to our rescue, but can also open up a new can of *fiqh*-worms.

For example, cross-referencing Case #5 reveals a multitude of authorities at play in just one of these ambiguous appeals to *athar*. The case rules that one who falls asleep lying down has lost ritual purity (*wuḍūʿ*) and must make ablutions again, but that, by *istiḥsān*, one who falls asleep “sitting, prostrating, standing, or bowing” has not lost ritual purity. A questioner asks why this is so, and the jurist responds, “An *athar* has come regarding this, so I rule according to it, while I rule in the case of someone losing consciousness by *qiyās*.”<sup>224</sup>

Cross-reference reveals multiple possibilities for this *athar*. Firstly, al-Shaybānī narrates in his *Kitāb al-Āthār* a report with the golden Kufan chain “Abū Ḥanīfa - Ḥammād b. Abī Sulaymān - Ibrāhīm al-Nakhaʿī” that al-Nakhaʿī said, “If you sleep sitting, standing, bowing, prostrating, or riding then you do not have to repeat your ablutions.”<sup>225</sup> Abū Yūsuf narrates the same report with the same chain in his own *Kitāb al-Āthār*.<sup>226</sup> However, hadith

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<sup>223</sup> Ibid., 2:150.

<sup>224</sup> Ibid., 1:60.

<sup>225</sup> al-Shaybānī, *Kitāb al-Āthār*, 1:181.

<sup>226</sup> Abū Yūsuf, *Kitāb al-Āthār*, ed. Abū al-Wafāʿ al-Afghānī (Hyderabad: Lajnat Ihyāʿ al-Maʿārif al-Nuʿmaniyya, 1355/1936-7), 1:12.

sources show possibly older roots for the *athar*. The *Muṣannaf* of Ibn Abī Shayba narrates a report with the chain “Ibrāhīm al-Nakha‘ī - ‘Alqama - [Ibn Mas‘ūd]” of Ibn Mas‘ūd stating that the Prophet Muḥammad would sometimes fall sleep in prostration, then awaken and continue praying, proving it does not break ritual purity.<sup>227</sup>

The hadith then exists in the mouth of the Prophet himself, in two variations through the Companion Ibn ‘Abbās, with the Prophet stating that ritual ablutions are only obligatory on one who falls asleep lying down. This hadith appears in two of the six canonical hadith books (Abū Dāwūd and al-Tirmidhī) along with the *Muṣannaf* of Ibn Abī Shayba.<sup>228</sup> Might al-Nakha‘ī have been aware of this Prophetic variant? Was al-Shaybānī? The revisionist would even say that al-Nakha‘ī’s ruling came first, after which it was put in the mouth of Ibn Mas‘ūd, after which it was put in the mouth of the Prophet Muḥammad.

In any case, what we do know is that in the *Aṣl*, al-Shaybānī mentions simply “an *athar*,” then in the *Kitāb al-Āthār*, he cites this *athar* only as a direct quote from al-Nakha‘ī, without reference to Ibn Mas‘ūd, Ibn ‘Abbās, or the Prophet Muḥammad. Abū Yūsuf does the same in his *Kitāb al-Āthār*. The functional authority for this ruling therefore extends most concretely to al-Nakha‘ī, then loosely to Ibn Mas‘ūd, since al-Shaybānī was very

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<sup>227</sup> Ibn Abī Shayba, *al-Muṣannaf*, 1:124, #1414.

<sup>228</sup> Ibid., 1:122; Abū Dāwūd, *Sunan Abī Dāwūd*, ed. Muḥammad Muḥyī al-Dīn ‘Abd al-Ḥamīd, 4 vols. (Beirut: al-Maktaba al-‘Aṣriyya), 1:52; Abū ‘Īsā al-Tirmidhī, *al-Jāmi‘ al-Kabīr*, ed. Bashshār ‘Awwād Ma‘rūf, 6 vols. (Beirut: Dār al-Gharb al-Islāmī, 1998), 1:132. The *Muṣannaf* also reports it as a direct statement of Ibn ‘Abbās. Ibn Abī Shayba, *al-Muṣannaf*, 1:123, #1399.

possibly aware of the hadith of Ibn Mas‘ūd, or believed that al-Nakha‘ī took the opinion from Ibn Mas‘ūd as with much of Kufan doctrine. This is another case where, like the ruling on multiple amputations, Kufan loyalty to ‘Alī and Ibn Mas‘ūd puts the Hanafis at odds with the other schools.

Thus, in the sunna/*athar* category as a whole, the *salaf* are crucial intermediaries and representatives of Prophetic authority. This is particularly true for Hanafism when it comes to ‘Alī and Ibn Mas‘ūd at the Companion level and al-Nakha‘ī at the *salaf* level. Many inter-madhab disagreements clearly stem from the identities of the *salaf* involved. *Istiḥsān* was thus one of the mechanisms by which Iraqi doctrine maintained its Kufan character.

### Consensus (*Ijmā‘*)

The *Aṣl* never directly justifies *istiḥsān* with *ijmā‘*, and even outside of *istiḥsān* appeals to *ijmā‘* only rarely. Cases of *istiḥsān* which later Hanafis justify with *ijmā‘* are justified in the *Aṣl* with “Custom” (*‘amal al-nās*) and other types of reasoning. This falls in line with arguments that *ijmā‘* was an immature concept well into the 9<sup>th</sup> century,<sup>229</sup> and even then, one finds figures denying it.<sup>230</sup>

The words “*ijmā‘*” and “*al-ijmā‘*” are strikingly rare in the *Aṣl*, occurring only 11 times, all in a single four-page section concerning the relatives one is prohibited from

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<sup>229</sup> See Monique Bernards, “*Idjmā‘*”, *EL*.

<sup>230</sup> Most famously Ibrāhīm al-Nazzām, as well as the Khārijīs. See *Ibid*. Also see Badr al-Dīn al-Zarkashī, *al-Baḥr al-Muḥīt*, 8 vols. (Cairo: Dār al-Kutubī, 1994), 6:384.

marrying.<sup>231</sup> The section begins by stating that the Qur'an prohibits some relatives, while others "the sunna prohibits and Muslims have reached consensus on."<sup>232</sup> For example, the first line of the section reads, "In His book, God has prohibited the mother, then sunna and consensus have prohibited (*ḥarramat al-sunna wa-l-ijmā'*) the grandmother, great-grandmother, on up."<sup>233</sup> The section continues, "God has prohibited (*ḥarrama*) the daughter...and sunna and consensus have prohibited (*ḥarramat al-sunna wa-l-ijmā'*) the daughter's daughter and son's daughter, on down."<sup>234</sup>

The subsequent two pages of the section repeat this refrain ten times, that "God has prohibited..." in the Qur'an one relationship, then "sunna and *ijmā'* have prohibited..." a relationship extending from that one. Besides this formula of "*ḥarramat al-sunna wa-l-ijmā'*," the term "*ijmā'*" does not appear a single time in the *Aṣl*. This section might therefore be a later insertion, both because its format markedly differs from the rest of the *Aṣl*, and because the term "*ijmā'*" became prominent soon after.

Outside of this section, the expressions which the *Aṣl* uses for consensus are sometimes related to "*ijmā'*" by the root "j-m-". These include "*ijtama'a 'alayhi al-fuqahā'* (jurists have reached a consensus on it),"<sup>235</sup> "*ijtama'a 'alayhi al-muslimūn* (Muslims have

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<sup>231</sup> al-Shaybānī, *al-Aṣl*, 4:358-361.

<sup>232</sup> Ibid., 4:358

<sup>233</sup> Ibid., 4:358

<sup>234</sup> Ibid., 4:358

<sup>235</sup> Ibid., 5:396.

reached a consensus on it),”<sup>236</sup> and “*ijtama‘a ‘alayhi ahl al-kūfa* (Kufans have reached a consensus on it).”<sup>237</sup> Other times, the *Aṣl* only indicates consensus in meaning, as in “*qawl al-nās kullihim* (the opinion of all people).”<sup>238</sup> It is also noteworthy that, even outside of the previously-mentioned anomalous section, consensus and sunna frequently appear together.

That Hanafi *uṣūl* authors later tied *ijmā‘* to *istiḥsān* (such as the previously-mentioned Case #97 of the bathhouse) indicates the effort to shore up *istiḥsān* with the conventional sources of law, *ijmā‘* having later become one of them. *Qiyās* and *istiḥsān* therefore predate *ijmā‘* in technical maturity, as seen plainly in the *Aṣl*. This aligns with Joseph Lowry’s arguments that *ijmā‘* was an immature legal concept well into the 9<sup>th</sup> century, including in the writings of al-Shāfi‘ī.<sup>239</sup>

### Alternative *Qiyās*

Alternative *qiyās* is by far the most common reason for *istiḥsān*, occurring in 98 out of 457 cases (21.4%). At times, the *Aṣl* mentions alternative *qiyās* explicitly, with statements like, “And some *qiyās* enters into this *istiḥsān* (*wa-qad yadkhulu fī hādihā al-istiḥsān ba‘ḍ al-qiyās*).”<sup>240</sup> Usually, however, the *Aṣl* simply explains the analogical basis for the new ruling.

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<sup>236</sup> Ibid., 7:200.

<sup>237</sup> Ibid., 5:168.

<sup>238</sup> Ibid., 5:591.

<sup>239</sup> Joseph E. Lowry, *Early Islamic Legal Theory: The Risāla of Muḥammad Ibn Idrīs al-Shāfi‘ī*, Studies in Islamic Law and Society (Leiden: Brill, 2007), 319.

<sup>240</sup> al-Shaybānī, *al-Aṣl*, 4:478.

A straightforward example of alternative *qiyās* is Case #1, in which a questioner asks the jurist whether a predatory bird drinking from a container of water makes that water impure. The jurist responds that it does not, and thus one can make ablutions with that water and pray. The questioner asks why this differs from the ruling for other predators. The jurist responds that they are equivalent by *qiyās*, but different by *istiḥsān*, saying “Do you not see that I also dislike the leftover water of a chicken, but do not rule that one should repeat their ablutions and prayer from it?”<sup>241</sup> Through *istiḥsān*, the jurist analogises predatory birds to all birds rather than to all predators. Later Hanafi *uṣūl* authors even point out that the bird analogy is more accurate because a predatory bird drinks water with a beak, which is bone and not flesh, thus more analogous to the bony beaks of other birds than to the fleshy mouths of predators.<sup>242</sup>

Since both of these rulings are straightforward analogies, why does one earn the title “*qiyās*” and the other “*istiḥsān*”? Classical Hanafi *uṣūl* authors explain the distinction as one of obviousness, saying that *qiyās* is a more obvious (*ẓāhir/jalī*) analogy while *istiḥsān* is a hidden analogy (*qiyās khafī*).<sup>243</sup> Of course, they do not intend obviousness as an objective measure. Rather, with this demarcation, the *uṣūl* authors ingeniously capture how, in these cases, *istiḥsān* is no less analogical than *qiyās*.

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<sup>241</sup> Ibid., 1:25.

<sup>242</sup> al-Sarakhsī, *Kitāb al-Mabsūṭ.*, 1:50.

<sup>243</sup> Chapter 5 shows that al-Dabūsī was the first to articulate this dichotomy, which al-Sarakhsī and al-Bazdawī then utilise in their works. al-Dabūsī, *Taqwīm al-Adilla fī Uṣūl al-Fiqh*, 405.

To show just how rigorously analogical *istiḥsān* can be, take the fascinating pair of Cases #39 and #40. #39 considers a man who swears by God that he will not get married that day, then the same day marries a woman without witnesses. Since a marriage without witnesses is invalid (*fāsid*) in the Hanafi school, has this man violated his oath? By *qiyās* he has, but by *istiḥsān* he has not. The jurist explains, “Do you not see (*alā tarā*) that if he married his mother, or his sister, or a woman who is already married, he would not have violated his oath? So similarly if he marries a woman without witnesses.”<sup>244</sup> This is straightforward enough, but what about the second case?

Case #40 holds that if a man swears not to buy a slave, then buys a slave in an invalid (*fāsid*) sale, then he *has* violated his oath, unlike Case #39. Why is an invalid slave purchase different from an invalid marriage contract? The jurist explains, “This and marriage are equal by *qiyās*...but I use *istiḥsān*...Do you not see (*alā tarā*) that if the man frees the slave, the slave actually becomes free, whereas if the man divorces the woman, that does not cause the legal effects of divorce?”

The jurist shows two ways of relating the rulings: 1) they are similar because they are both *fāsid*, or 2) they are dissimilar because only one can engender new legal events. *Istiḥsān* chooses the latter, holding that the ruling which can engender new legal events “counts” as a legal occurrence in a way that the other ruling does not. These cases also

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<sup>244</sup> al-Shaybānī, *al-Aṣl*, 2:364.

show tiered levels of analogy. Case #39 rejects the *qiyās* with *istiḥsān* due to alternative analogy, then Case #40 rejects that *istiḥsān* with another *istiḥsān* due to another analogy.

Together, alternative *qiyās* and *sunna/athar* only constitute 116 of 457 cases (25.4%). Does this make the other 75% of *istiḥsān* cases completely subjective? No, for there are many types of reasoning which, though distinct from *sunna/athar* or alternative analogy, are still grounded in them. For example, the principle of “Avoiding the *Ḥadd* Punishment” is clearly rooted in some conception of *sunna/athar*, given the overwhelming number of transmitted reports on the issue. Similarly, the principle that “Currencies Are Interchangeable” is rooted in alternative *qiyās*, holding that the value underlying the currency is more analogically relevant than the currency itself. Still, even with these cases, subjectivity comes into play regarding when and how to apply them. Then, outside of these cases, there are many types of reasoning which cannot be attributed to *sunna/athar* or *qiyās*. Thus, more fruitful than simply collapsing *istiḥsān* into *sunna/athar*, alternative *qiyās*, and necessity (*ḍarūra*) is to tease apart the many discrete types of reasoning at play. We will pursue this at length in Chapter 3 after a brief discussion of how the Hanafi founders themselves differed in their uses of *istiḥsān*.

## 2.4 Differences Between the Hanafi Founders' Uses of *Istiḥsān*

The story goes that Abū Ḥanīfa was particularly subjective or unclear in his rulings, while Abū Yūsuf was “more dependent on traditions than his master,”<sup>245</sup> and al-Shaybānī “[depended] even more on traditions than [did] Abū Yūsuf.”<sup>246</sup> Our findings show that this story bears out in the actual rulings. Figure 6 shows the inverse relationship between the seniority of the Hanafi founder and his use of *istiḥsān*. Abū Ḥanīfa has the most reported uses of *istiḥsān* and the fewest reported oppositions to it,<sup>247</sup> while al-Shaybānī shows the opposite, to the extent that he objects to *istiḥsān* more often than he uses it.

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<sup>245</sup> Schacht, *The Origins of Muhammadan Jurisprudence*, 301.

<sup>246</sup> *Ibid.*, 306.

<sup>247</sup> In the *Aṣl*, it is also often unclear whether Abū Ḥanīfa is in fact directly disagreeing with an *istiḥsān* ruling of Abū Yūsuf/al-Shaybānī or whether the text simply means to contrast it with his. For that reason, our number for Abū Ḥanīfa's reported “oppositions” should be taken with a grain of salt. However, the number for his reported uses and the numbers for the reported uses/oppositions of Abū Yūsuf and al-Shaybānī are concrete.

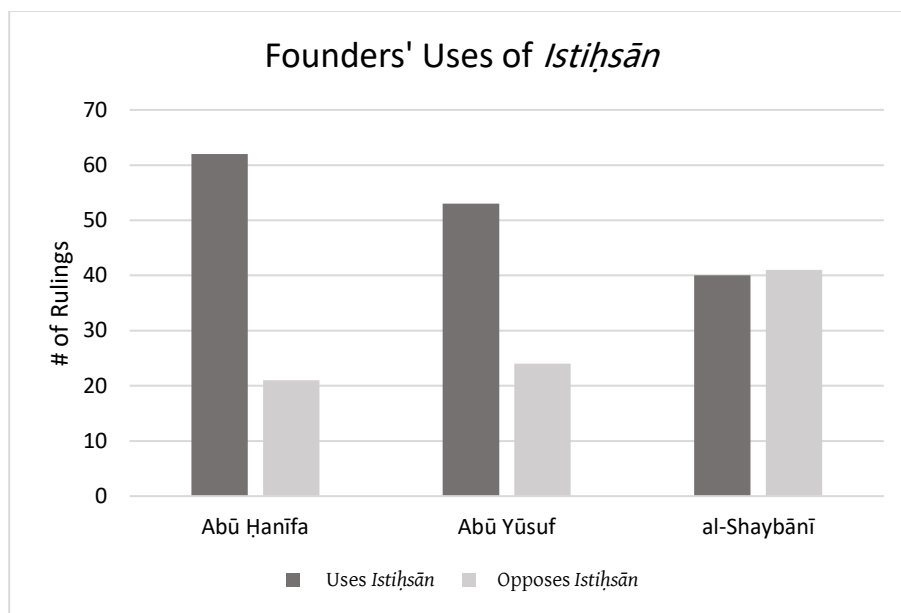


Figure 6: Differences Between the Hanafi Founders' Uses of Istiḥsān

Of course, these numbers might not be as meaningful as they appear. Perhaps Abū Ḥanīfa only has the fewest reported oppositions to *istiḥsān* because he is the first of the three so does not yet have as much of the others' doctrines to oppose, while al-Shaybānī only has the most reported oppositions to *istiḥsān* because he is the last. Given the many numbers and figures in this chapter, this is an important reminder of the dangers of letting numbers do the talking. We thus need further analysis to confirm that the above graph represents something more than just the chronological development of a doctrine.

We can get this granularity by looking at the types of reasoning each jurist employs or opposes. This analysis confirms our initial reading of these numbers. True to form, the type of reasoning most frequently attributed to Abū Ḥanīfa is "Unclear Reasoning," in which it is difficult to deduce any reasoning at all. Of the 30 cases of "Unclear Reasoning,"

13 are attributed to Abū Ḥanīfa, while only 5 are attributed to Abū Yūsuf and only 2 to al-Shaybānī.

His reasoning is not simply unclear to us modern readers with limited knowledge of the *fiqh* or sunna. The data shows that Abū Yūsuf and al-Shaybānī were also not fond of these instances. Abū Yūsuf objects to 8 of Abū Ḥanīfa’s 13 cases of “Unclear Reasoning,” while al-Shaybānī objects to 10, making this the single category to which either of them objects the most. In one report, al-Shaybānī depicts this situation when he complains, “Abū Ḥanīfa would debate his disciples about analogies (*maqāyīs*), and they would object to his [reasoning] and oppose him (*fa-yantaṣifūn minhu wa-yu‘ārīḍūnahu*), until he would simply say, ‘I use *istiḥsān* here.’”<sup>248</sup> As al-Shaybānī puts it, Abū Ḥanīfa’s students would simply give up arguing at this point and “concede to him (*yusallimūn lahu*),” since he left them with no clear argument to debate. Furthermore, while Abū Ḥanīfa’s most frequent type of reasoning is “Unclear” (13 of 62 cases, 21%), “Alternative *Qiyās*” is the most frequent type for both Abū Yūsuf (9 of 53 cases, 17%) and al-Shaybānī (4 of 40 cases, 10%), aptly encapsulating the difference between Abū Ḥanīfa and the other two.

This analysis can also reveal how one of the founders might have differed with the other two about particular types of reasoning. For example, Abū Yūsuf stands alone in never using “Precaution” and instead objecting to it twice, once against Abū Ḥanīfa<sup>249</sup> and

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<sup>248</sup> al-Dhahabī, *Manāqib al-Imām Abū Ḥanīfa wa-Ṣāḥibayhi*, 25.

<sup>249</sup> al-Shaybānī, *al-Aṣl*, 1:28.

the second time against al-Shaybānī.<sup>250</sup> Similarly, al-Shaybānī is never named as supporting “Everyone Consents” reasoning, and is instead reported to have objected to it twice, one case of which was supported by both Abū Ḥanīfa and Abū Yūsuf.<sup>251</sup>

Interestingly, in two cases, al-Shaybānī opposes rulings derived through *athar*,<sup>252</sup> while Abū Yūsuf only does so once and Abū Ḥanīfa never does. This seems to contradict the notion that al-Shaybānī was more textually oriented. However, this finding actually reflects the more advanced stage of *athar* and hadith at his time, since more competing hadiths had come into circulation and undermined earlier appeals to the *athar* of certain companions or *salaf*. This appears to be the case in Case #384, where the original *athar* motivating Abū Ḥanīfa and Abū Yūsuf’s *istiḥsān* comes from ‘Alī and Ibn Mas‘ūd, but al-Shaybānī overrules it with an appeal to a Prophetic hadith.<sup>253</sup>

The sample sizes of these last few points are small and so should be taken with a grain of salt. However, a significant body of evidence supports the stereotype that Abū Ḥanīfa was far more prone to using subjective *istiḥsān*, and that the latter two represented successive stages of increased reliance on hadith and a budding aversion to subjective or arbitrary reasoning, though they still clearly employ it, as we shall see in Chapter 3. Still,

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<sup>250</sup> Ibid., 4:369.

<sup>251</sup> Ibid., 3:303. In al-Shaybānī’s other reported objection, the jurist in support of the *istiḥsān* goes unnamed. Ibid., 6:335.

<sup>252</sup> Ibid., 2:447, 10:190.

<sup>253</sup> Ibid., 10:190.

this foreshadows the inflection point soon after-Shaybānī's death (d. 189/804-5) from what we have called the period of “embrace” to the period of “contestation” of subjectivity, as we shall see in Chapter 4.

## 2.5 Conclusion

This chapter has shown that the Hanafi founders' conception of *istiḥsān* was precisely the departure from analogical reasoning discussed in Chapter 1. This chapter then showed that about 25% of the Hanafi founders' uses of *istiḥsān* were departures from *qiyās* due to conventional reasoning, namely *sunna/athar* and alternative *qiyās*, while most of the other 75% were for the subjective and pragmatic considerations with which *istiḥsān* is more often associated. Within the conventional types of reasoning, the chapter showed that the *Aṣl* never once cites Qur'an or *ijmā'* to support *istiḥsān*. The later application of these terms onto earlier cases aptly represents the pitfalls of retrospectively theorising an already-developed body of positive law. As for *sunna/athar*, this chapter showed how the conception of precedent and Prophetic authority in the *Aṣl* centred around the Companions/*salaf* as conduits and exemplars of the *sunna*. The chapter then showed that *istiḥsān* through alternative *qiyās* was just as rigorously analogical as standard *qiyās*. Finally, the chapter confirmed the stereotype that, of the Hanafi founders, Abū Ḥanīfa was the most prone to subjectivity and al-Shaybānī was the least. Still, this chapter has not characterised the considerations that constituted the other 75% of cases, nor has it truly delved into the *Aṣl* on a case level. The next chapter will do both of these.

## Chapter 3: *Istiḥsān* in Early Hanafism – The Many Types of Subjective

### Reasoning

The previous chapter confirmed that the Hanafi founders used *istiḥsān* to mean a departure from analogical reasoning. This is not a ground-breaking discovery. Many previous studies have noted the same. The problem is, however, that many of these studies then associate a particular justification with that departure; e.g. that *istiḥsān* is to depart from *qiyās* for “fairness and justice”,<sup>254</sup> or for “securing ease and avoiding hardship”.<sup>255</sup> There are clearly many instances of *istiḥsān* which do not fall into these categories. We therefore only have a vague sense of the different reasons for which the Hanafi founders used *istiḥsān*. This chapter hopes to bring clarity here by articulating these many types of reasoning, revealing all kinds of moral and pragmatic considerations that the Hanafi founders made in the process of legal derivation, most of which cannot simply be attributed to necessity (*ḍarūra*) or a hidden *qiyās*.

Most studies also associate *istiḥsān* with lenience. This chapter argues against this stereotype, showing that *istiḥsān* sometimes connoted lenience, but more often did not, instead connoting neutrality or even stringency. By confusing one effect of *istiḥsān* for *istiḥsān* itself, this stereotype therefore misses the point, that more fundamentally than

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<sup>254</sup> Ridwan Aremu Yusuf, "The Theory of *Istiḥsān* (Juristic Preference) in Islamic Law" (PhD diss., McGill University, 1992), ii.

<sup>255</sup> Kayadibi, "*Istiḥsān* (Juristic Preference): The Forgotten Principle of Islamic Law", 114.

lenience, the Hanafi founders used *istiḥsān* to filter *qiyās* through their intuitions and moral sensibilities – in other words, to make the law wise.

As a final note before delving in: this chapter devotes three sections to cataloguing the many different types of reasoning that constitute *istiḥsān*, which includes providing interesting cases exemplifying each one. It can admittedly become difficult reading to work through case after case. However, as Sohail Hanif writes, “arriving at a theory of what the Islamic legal tradition was...will entail the arduous task of working through a large number of mundane legal cases, but...[w]hen the rewards are great, then the expenditure of effort is the only reasonable course of action.”<sup>256</sup> Still, this “arduous task” is more the task of authors than readers. When they reach the catalogue sections, readers should focus on the *types* of reasoning at issue, rather than grasping every sample case, so that they may more broadly consider what these types of reasoning reveal about the sensibilities of the Hanafi founders.

### 3.1 What It Means for a Jurist to be Subjective

Before diving into our study, let us first reflect on how juristic activism translates into actual rulings. By conventional reasoning, a jurist objects to how a ruling was derived, arguing that the evidence for the ruling is not as strong as the evidence for a competing ruling. We might call this “derivation-based reasoning.” With juristic activism, however,

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<sup>256</sup> Hanif, "A Theory of Early Classical Ḥanafism: Authority, Rationality, and Tradition in the *Ḥidāyah* of Burhān al-Dīn ‘Alī Ibn Abī Bakr al-Marghīnānī (d. 593/1197)," 360.

jurists object to the effect of a ruling, exhibiting what we will call “ends-based reasoning.”

The same jurist might believe that a ruling has the strongest evidence but still try to overrule it due to its potential effects.

Within ends-based reasoning, there are three possibilities for how a jurist might object to a law:

- 1) A ruling intervenes in the case and the jurist seeks to ignore it.
- 2) A ruling intervenes and the jurist seeks to amend it.
- 3) No ruling intervenes and the jurist seeks to make a ruling that *will* intervene.

The first type represents “Lenience.” On a *fiqh* level, lenience changes the scope of a law either by making optional what was mandatory (e.g. not having to make ablutions after sleeping sitting up)<sup>257</sup> or permitting what was prohibited (e.g. allowing paying to use a bathhouse).<sup>258</sup> The second type represents “Neutrality,” since it does not change the scope of the law’s application, but merely amends its outcome. However, do not be fooled by the word “neutral,” since both neutrality and lenience still entail jurists putting their own judgment above the letter of the law.

The third type represents “Stringency,” and connotes when the *istihsān* ruling either mandates what was optional (e.g. having to make up prayers after finding a dead chicken in the well)<sup>259</sup> or prohibits what was permissible (e.g. not letting people pray a funeral prayer

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<sup>257</sup> al-Shaybānī, *al-Aṣl*, 1:60.

<sup>258</sup> Ibid., 3:506.

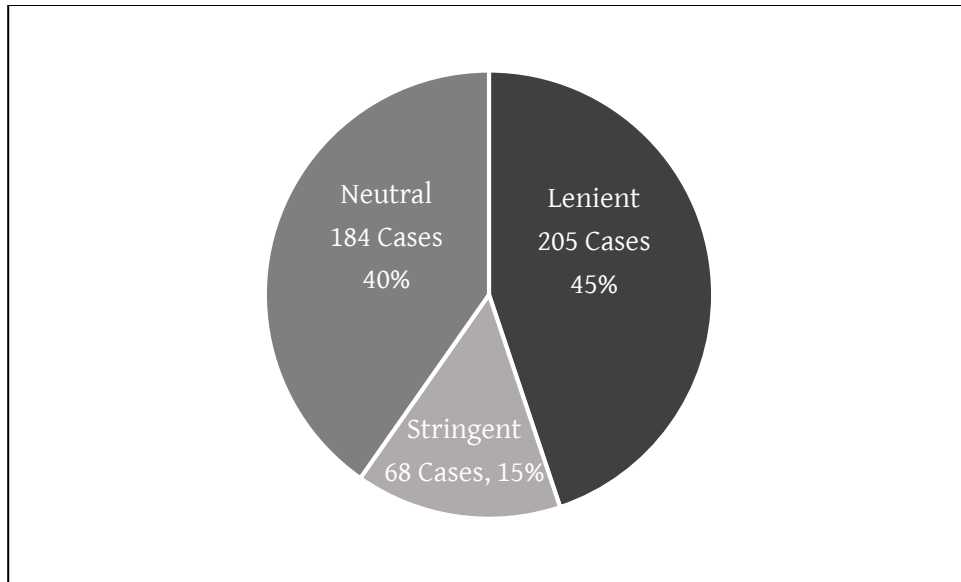
<sup>259</sup> Ibid., 1:28.

sitting down).<sup>260</sup> This requires a different type of authority than neutrality or lenience, since by stringency, a jurist expands the scope of the law, creating a new intervention, rather than just limiting or amending an existing one. In this way, whereas the first two entailed the jurist's authority to resist the law, stringency entails the jurist's authority to make law. We will see in Chapter 4 how it is stringency in particular which draws the ire of al-Shāfi'ī. Note also that stringency does not simply refer to punitive measures, but any instance in which the jurist makes the law more involved, often completely unrelated to punishment.

Criterion #6 in the dataset asks, "Is the *istiḥsān* lenient, neutral, or stringent?" The results reveal that, in the majority of cases in the *Aṣl*, *istiḥsān* does not connote lenience. 205 out of 457 (44.9%) *istiḥsān* rulings are lenient, while 184 (40.3%) are neutral and 68 (14.9%) are stringent (see Figure 7). The stereotype that *istiḥsān* connotes lenience therefore excludes over half of all cases of *istiḥsān*.

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<sup>260</sup> Ibid., 1:355.



*Figure 7: Istiḥsān as Not Lenient in a Majority of Cases*

Still, the concepts of lenience, stringency, and neutrality are useful for sorting between the types of reasoning, since each type is usually associated with one of the three (e.g. “Avoiding the *Ḥadd* Punishment” is usually lenient, “Precaution” is usually stringent). On a data level, a type of reasoning is associated with lenience if over 50% of the rulings which invoke that reasoning are lenient (and similarly for stringency and neutrality). This gives 20 types of reasoning associated with lenience, 10 associated with stringency, and 25 associated with neutrality.

Before delving into the types of reasoning, we must first dispel any sense that lenience is “good/nice,” stringency is “bad/mean,” and neutrality is “whatever.” Many

cases of lenience in the Aṣl are unpleasant, such as allowing a *mukātab*<sup>261</sup> slave to buy and sell his wife,<sup>262</sup> or not punishing an oppressive qadi who admits to unjustly executing someone.<sup>263</sup> Meanwhile, readers would find most stringent rulings sensible, such as 1) if a group of thieves robs a home, but only one of them carries the goods out of the home, the whole group is liable,<sup>264</sup> or 2) someone who gives a gift to a poor person cannot take it back.<sup>265</sup> Then neutral cases are not just “whatever,” but often manipulate the law towards important ends, such as freeing a slave, ensuring fair compensation, or avoiding linguistic and logical absurdities.

Thus, lenience/stringency/neutrality describe how the jurists manipulate the scope of the law to achieve certain ends (i.e. whether the law becomes more or less involved), but not the nature of the ends themselves. This requires a more discrete measure, which is our 62 types of reasoning underlying *istiḥsān*. The next three sections discuss the types of reasoning most associated with each category, beginning with lenience. Finally, in interrogating the jurists’ subjectivity, this study also forces readers to interrogate their own. Each “unpleasant” ruling is a discovery of how exactly a jurist’s sensibilities differ

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<sup>261</sup> A slave who has engaged in a *mukātaba* contract with their owner. The slave becomes free upon payment of a stipulated amount and in the meantime has the right to do business and own property.

<sup>262</sup> Ibid., 6:327.

<sup>263</sup> Ibid., 7:354

<sup>264</sup> Ibid., 7:238.

<sup>265</sup> Ibid., 3:402.

from one's own, and by extension, the profound ways in which wisdom and morality change across time and civilization.

## 3.2 Lenient Types of Reasoning

20 of the 62 types of reasoning are associated with lenience, 13 of them in 100% of cases. This section discusses these 20 types of reasoning by grouping related types together. The groups are 1) Custom, 2) Necessity, 3) Avoiding *Ḥadd* Punishments, 4) Avoiding Technicalities, 5) Avoiding Impracticalities, 6) Avoiding When No One Wants What the Law Demands, 7) Close Enough/Not a Big Deal, 8) Dealing with Non-Muslims, and 9) *Fiqh* as Scholarship.

### Custom

Though classical *fiqh* discourses refer to custom as “*urf*,” the *Aṣl* refers to it as “*ʿamal al-nās* (people’s practice).”<sup>266</sup> Custom appears in 16 *istiḥsān* cases, connoting lenience in 11 cases, neutrality in 4, and stringency in 1.

In typical cases, something impermissible by *qiyās* is permissible through *istiḥsān* due to *ʿamal al-nās*. The common example is Case #97. By *qiyās*, paying to use a bathhouse (*ḥammām*) is invalid because the contract does not stipulate how long one will spend there or how much soap and water one will use. However, the jurist states, “I use *istiḥsān* based on

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<sup>266</sup> Al-Jaṣṣāṣ uses “*ʿamal al-nās*” instead of “*urf*” when he makes “Custom” his fourth subtype of *istiḥsān*. al-Jaṣṣāṣ, *al-Fuṣūl fī al-Uṣūl*, 4:248.

[what people do] (*fīmā baynahum*) and I permit it.”<sup>267</sup> Similarly, in Case #93, Abū Ḥanīfa rules that it is invalid for someone to buy clothing on the condition that the seller also sews the clothing,<sup>268</sup> but if someone buys shoes on the condition that the seller sews the straps on, then “these two cases are equal by *qiyās*, but I use *istiḥsān* in the case of shoes, because it is people’s custom (*ʿamal al-nās*), whereas they do not do this with clothes.”<sup>269</sup> Footwear appears again in Case #92, which rules that a particular form of prepayment is valid for shoes, while for clothes “it is not people’s custom and so is not permissible.”<sup>270</sup> This is an example of how *istiḥsān* cases also reveal social history, in this case, how people bought shoes in 8<sup>th</sup>- century Iraq.

Custom sometime functions neutrally to define practices or terms according to common understanding. Case #125 discusses when an investor gives a merchant capital to travel, buy foodstuffs, and return to trade it. The question becomes what the merchant may count as a business expense (clearly relevant in modern times as well). The ruling states:

[The merchant] may rent a riding animal for himself, and another to haul the foodstuffs, or he may buy a riding animal in the way customarily done by merchants. He may buy a carrier to haul the food if he cannot find one to rent, but if he buys an entire boat to haul the food, the investor is not responsible, since this is not what merchants customarily do. However, if he is in a land

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<sup>267</sup> al-Shaybānī, *al-Aṣl*, 3:506.

<sup>268</sup> Since sewing is a service, it should be listed as an item of sale, even if the total price is unchanged.

<sup>269</sup> al-Shaybānī, *al-Aṣl*, 3:445.

<sup>270</sup> *Ibid.*, 3:435.

where a particular thing is customarily bought to haul the food and he buys one of those, then this expense does go back to the investor.<sup>271</sup>

Thus, in this and other cases of neutrality, custom delimits what is reasonable.

Finally, custom functions stringently in one fascinating case. Case #36 regards a man who declares, “I swear to God I will not do X, and I will walk to the Ka‘ba if I do!” The jurist rules that if the man had said “travel” or “ride” to the Ka‘ba instead of “walk,” then breaking the oath would only necessitate the standard expiation<sup>272</sup> and not actually traveling to the Ka‘ba. In the case of “walk,” however, the jurist holds that by *istihsān*, the man is required to travel to the Ka‘ba, and must either walk there, or ride and sacrifice a sheep to make up for not walking. To explain the discrepancy, the jurist states, “[Swearing to ‘travel’ to the Ka‘ba] and swearing to ‘walk’ there are equal by *qiyās*, except that I rule in swearing to ‘walk’ there by *istihsān*, because this is a common oath that people [make] (*aymān al-nās*).”<sup>273</sup>

Here, the jurist seems to object to the fact that people swore so often on the threat of walking to the Ka‘ba without meaning it (i.e. it had become colloquial, like “I swear to God!”). To combat this practice of empty oath-making, the jurist seeks to enforce its actual consequence. This is an interesting case where rather than 1) changing the law to

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<sup>271</sup> Ibid., 4:154.

<sup>272</sup> The expiation for breaking an oath is to either free a slave, feed 10 poor people two meals each, clothe 10 poor people, or fast for 3 consecutive days.

<sup>273</sup> al-Shaybānī, *al-Aṣl*, 2:278.

accommodate a custom, or 2) not changing the law to hold firmly against a custom, the jurist actually pursues 3) changing the law to actively combat a custom. This is our first glimpse of how the Hanafi founders used stringent *istihsān* to achieve particular social goals.

Otherwise, the application of custom through *istihsān* does not differ conceptually from the role of custom in the other madhhab traditions, evidenced also by the fact that, in trying to defend *istihsān* from criticism, al-Jaṣṣāṣ saw fit to make “*istihsān* through custom” the fourth subtype after the conventional 1) *naṣṣ*, 2) *ijmāʿ*, and 3) alternative *qiyās*.<sup>274</sup> *Istihsān* through custom is also never attacked by al-Shāfiʿī or later critics.

### **Necessity**

Just as custom in the *Aṣl* never appears as “*urf*,” necessity never appears as “*ḍarūra*.” However, while custom appears as “*amal al-nās*,” necessity does not get a term at all, but is simply apparent in various rulings. Necessity justifies 14 cases of *istihsān* in the *Aṣl*, 9 of them lenient and 5 neutral.

In one set of cases, *istihsān* ensures that people do not lose their basic provisions. Case #117 states that two men who declare a complete financial partnership (*mufāwada*) would by *qiyās* co-own all of their possessions. By *istihsān*, however, each man retains full ownership of his family’s food, clothes, and homeware.<sup>275</sup> In Case #310, if someone confesses

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<sup>274</sup> al-Jaṣṣāṣ, *al-Fuṣūl fī al-Uṣūl*, 4:248.

<sup>275</sup> al-Shaybānī, *al-Aṣl*, 4:74. Interestingly, by *istihsān*, both individuals also retain full ownership of any slaves living in their household, as well any female slaves who bore them children (*umm walad*), while any other

that everything they own belongs to another, then by *qiyās* everything would become the other's property, whereas by *istiḥsān*, food and clothes would not.<sup>276</sup> Then in Case #356, if a man goes missing and someone owes him a debt, by *istiḥsān* the judge can order the debtor to pay the man's family to support their needs, whereas by *qiyās* the debtor should only pay the man himself.<sup>277</sup>

Besides basic provisions, *istiḥsān* through necessity takes on many forms. Case #142 states that by *qiyās*, a mute person would not be able to transact, but out of necessity their transactions are valid by *istiḥsān*.<sup>278</sup> Cases #303 - #305 regard water rights, ruling that a landowner without rights to a certain waterway gets those rights by *istiḥsān* due to the necessity that agricultural land have irrigation.<sup>279</sup> Case #324 is then a straightforward example of necessity due to a valid excuse (*ʿudhr*). If someone is given an item for safekeeping and is instructed to keep it in their house, then their house catches fire, by *qiyās* they still must not move the item, but by *istiḥsān* the obvious necessity allows them to move the item.<sup>280</sup>

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slaves become co-owned, showing that beyond the *umm walad*, slaves living in one's home were more akin to family than others.

<sup>276</sup> Ibid., 8:360.

<sup>277</sup> Ibid., 9:354.

<sup>278</sup> Ibid., 4:517.

<sup>279</sup> Ibid., 8:151, 8:182, 8:183.

<sup>280</sup> Ibid., 8:441.

## *Guardianship of Orphans*

Nested within necessity, this type of reasoning concerns fulfilling parental functions for orphans when, obviously not their parent, one technically does not have that authority. Case #86 states that, by *qiyās*, the executor (*waṣī*) of an estate can accept gifts on behalf of the estate's orphans as part of managing the orphans' finances until they mature. A questioner then asks, "If a man supports an orphan but is not an executor nor a relative, but the orphan has no one except for this man, may this man hold the gift on the orphan's behalf?" The jurist responds that by *istiḥsān* he may.<sup>281</sup> Case #414 rules the same for a distant relative of the orphan,<sup>282</sup> and Case #353 rules the same for the temporary guardian of a foundling (*laqīṭ*).<sup>283</sup> Case #415 even rules that by *istiḥsān*, guardians can force orphans to become apprentices in order that the orphans be educated and learn a trade for their eventual well-being.<sup>284</sup>

These rulings are certainly a type of alternative *qiyās*, since they define when parental rights/responsibilities extend to guardians. However, the determining factor in each case is the orphan's need. Regarding "necessity" more generally, no *istiḥsān* case in the *Aṣl* treats a life-threatening situation, which is the more typical form of *ḍarūra* in later texts. These rulings appear in the *Aṣl* without recourse to *istiḥsān*. Thus, the "Necessity"

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<sup>281</sup> Ibid., 3:370.

<sup>282</sup> Ibid., 11:246.

<sup>283</sup> Ibid., 9:306.

<sup>284</sup> Ibid., 11:246.

underlying *istiḥsān* still falls prey to the charge of subjectivity when it comes to which necessities are necessary enough to justify departing from analogical reasoning.

### **Avoid *Ḥadd* Punishments**

“Avoiding *Ḥadd* Punishments” is the fourth most prevalent type of reasoning in the dataset, appearing in 26 cases. It is a well-known feature of Islamic law, but appears in the *Aṣl* almost exclusively as *istiḥsān*. It does not differ substantially from the type of *ḥadd*-avoidance found in the other madhhabs,<sup>285</sup> but a few points are worth noting.

First is that in the *Aṣl*, “Avoiding *Ḥadd* Punishments” is rooted in Kufan *athar*. The famous maxim states, “Ward off *ḥadd* punishments with doubts (*idraʿū al-ḥudūd bi-l-shubuhāt*.)” Though later jurists cite this as a Prophetic hadith, most early hadith collections attribute it to various Companions and *salaf*.<sup>286</sup> Consistent with this, the *Aṣl* cites this maxim twice as ‘Umar b. al-Khaṭṭāb saying, “Ward off (*idraʿū*) the *ḥadd* punishments from Muslims as much as you are able (*mā istaṭaʿtum*). It is better for the Imam to err in mercy than punishment, so if you find an escape (*makhraj*) for the Muslim, then ward off (*idraʿū*) [the *ḥadd*].”<sup>287</sup> Al-Shaybānī cites the same variant (and no other) in his *Kitāb al-Āthār* with the

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<sup>285</sup> For more on avoiding the *ḥadd* in Islamic law, see Intisar A. Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law*, Cambridge Studies in Islamic Civilization (New York: Cambridge University Press, 2015).

<sup>286</sup> On the report’s transmission history, see “Islamic Legal Maxims as Substantive Canons of Construction: *Ḥudūd*-Avoidance in Cases of Doubt,” *Islamic Law and Society* 17, no. 1 (2010). For a comprehensive list of variants with their sources and chains of transmission, see *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law*, Appendix A.

<sup>287</sup> al-Shaybānī, *al-Aṣl*, 7:150, 7:273.

golden Kufan chain of “Abū Ḥanīfa - Ḥammād –al-Nakha‘ī.”<sup>288</sup> The *Muṣannaf* collections of ‘Abd al-Razzāq and Ibn Abī Shayba reinforce the Kufan provenance of this maxim with 1) a similar variant through al-Nakha‘ī to ‘Umar,<sup>289</sup> 2) a variant of al-Nakha‘ī reporting it anonymously as “they would say (*kānū yaqūlūn*),”<sup>290</sup> 3) variants in the mouth of Ibn Mas‘ūd,<sup>291</sup> and 4) chains through other Kufans like Sufyān al-Thawrī.<sup>292</sup> The most-cited individual across the variants is al-Nakha‘ī.<sup>293</sup>

Second, an interesting set of cases revolves around judicial procedure, namely *talqīn* (instruction), by which the qadi instructs a confessor or witness not to pursue a charge. In Case #246, a questioner asks, “Is it preferred (*mustahsan*) for a judge before hearing the witnesses...to say, ‘Leave this (*utruk hādhā*)’ or ‘Go away (*inṣarif*)?’” The jurist responds, “Yes, how good this is (*mā aḥsana hādhā*).”<sup>294</sup> In Case #264, the questioner asks, “Is it preferred (*yustahsan*) for the judge to instruct (*talqīn*) the confessor with, ‘Do not confess?’” The jurist responds, “Yes, I use *istiḥsān* in this and rule by it.” *Talqīn* is explicitly rooted in sunna/*athar*.

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<sup>288</sup> al-Shaybānī, *Kitāb al-Āthār*, 2:536.

<sup>289</sup> ‘Abd al-Razzāq, *al-Muṣannaf*, 7:402, #13641; Ibn Abī Shayba, *al-Muṣannaf*, 5:511, #28493.

<sup>290</sup> Ibn Abī Shayba, *al-Muṣannaf*, 5:511, #28496.

<sup>291</sup> ‘Abd al-Razzāq, *al-Muṣannaf*, 7:402, #13640; Ibn Abī Shayba, *al-Muṣannaf*, 5:511, #28498.

<sup>292</sup> Ibid.

<sup>293</sup> Schacht argued that this maxim, like most Kufan sayings, cannot be attributed to al-Nakha‘ī, but at the earliest would have started with Ḥammād putting it in al-Nakha‘ī’s mouth. Maribel Fierro disagrees, saying that al-Nakha‘ī “could well have transmitted it on his own (hence the fact that he used the [anonymous] formula *kānū yaqūlūn*) and Ḥammād just took it from him.” Schacht, *The Origins of Muhammadan Jurisprudence*, 184, 235-240; Maribel Fierro, “*Idra‘ū al-Hudūd bi-l-Shubuhāt*: When Lawful Violence Meets Doubt,” *Hawwa* 5, no. 2-3 (2007), 220-221.

<sup>294</sup> al-Shaybānī, *al-Aṣl*, 7:195.

Case #264 cites a hadith of the Prophet doing *talqīn* of a confessor, then the entertaining story that the Companion Abū Mas‘ūd al-Anṣārī (d. ca. 40/660-1), when confronted with a woman confessing, told her, “Have you stolen? Say, ‘No.’ (*qūlī lā*).”<sup>295</sup>

An off-putting type of doubt (*shubha*) is when the perpetrator holds a position of political authority. Case #273 regards if the caliph’s deputy forces someone to murder another. Abū Ḥanīfa and al-Shaybānī rule that he is liable for the *ḥadd* like anyone else. However, Abū Yūsuf rules by *istiḥsān* that he is only liable for the blood-money (*diyya*), because as the caliph’s representative, it is as if the caliph himself had done it, and the caliph – as the enforcer of *ḥadd* punishments on God’s behalf – is not himself liable to the *ḥadd*.<sup>296</sup> Case #277 then lets an oppressive qadi off the hook. If the qadi admits to executing someone knowing that the testimony was not strong enough, then by *qiyās* the qadi should himself be executed for wrongly taking a life, but by *istiḥsān* the qadi only owes the blood-money “due to this *shubha*.”<sup>297</sup> These remind us that lenience is not always rosy.

Finally, Case #399 uniquely avoids punishment for a crime other than a *ḥadd*. The jurist states about a man guilty of cursing another, “If he is a man of honour (*murū’a*)...and this is first offense...I use *istiḥsān* that he not be imprisoned or punished.” The jurist supports this with a hadith of the Prophet, “Avoid punishing those of honour except in the

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<sup>295</sup> Ibid., 7:270. This story also appears in al-Shaybānī’s *Kitāb al-Āthār*, as well as a variant attributing the event to the Companion Abū al-Dardā’ (d. ca. 33/653-4). al-Shaybānī, *Kitāb al-Āthār*, 2:547-548.

<sup>296</sup> al-Shaybānī, *al-Aṣl*, 7:322.

<sup>297</sup> Ibid., 7:354.

case of a *ḥadd*.”<sup>298</sup> Why “except in the case of a *ḥadd*” given the overwhelming effort dedicated to avoiding the *ḥadd*? Due to the also significant legal principle that the *ḥadd*, being the right of God, cannot simply be excused. Thus, while working to avoid the *ḥadd*, jurists simultaneously recognized that, once established, the *ḥadd* must be carried out.<sup>299</sup>

### *Statute of Limitations*

Nested within “Avoiding *Ḥadd* Punishments” is a particular *shubha* which prevents someone from being punished for an old crime. In Case #252, a questioner asks, “Does the perpetrator receive the *ḥadd* if the witnesses have testified to his committing adultery and have accurately described it, establishing it, except that it is an old occurrence (*shay’ qadīm*)?”. The jurist responds, “No...if the crime is old (*taqādama*) then I use *istiḥsān* to avoid the *ḥadd*.”<sup>300</sup>

Case #270 then shows that this concept, like the entire category of “Avoiding the *Ḥadd*,” is ultimately rooted in *athar*. A questioner asks, “If a man commits highway robbery, but the matter is left for a long time, then brought to court, should he receive the *ḥadd*?”

The jurist responds:

No...It has reached us that ‘Umar b. al-Khaṭṭāb said, “If a people testify against a man for a *ḥadd* but did not testify against him when he first did it, then they

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<sup>298</sup> Ibid., 10:526.

<sup>299</sup> For a case showing the division between the rights of people and the rights of God, see Ibid., 7:273. For numerous reports that before the *ḥadd* is established, one can intercede on the accused’s behalf to avoid the *ḥadd*, but once it has been established, none can intercede, see Ibn Abī Shayba, *al-Muṣannaḥ*, 5:473.

<sup>300</sup> al-Shaybānī, *al-Aṣl*, 7:202.

are simply testifying against him out of a grudge (*ḍighn*).” So if it has been a long time and the man has repented then I use *istiḥsān* to avoid the *ḥadd*.<sup>301</sup>

Still, it is interesting that, whether the *shubha* is a grudge, or the perpetrator having repented, or the witnesses’ memories, many legal traditions share an aversion to prosecuting old crimes.

Overall in the *Aṣl*, “Avoiding *Ḥadd* Punishments” is rooted in *sunna/athar* and resembles its use in the other madhhabs except for being termed *istiḥsān*. However, the cases of political authority as a *shubha* remind us of the pitfalls of lenience, namely that those deserving of punishment might get away with their crimes. The jurists recognized this pitfall and responded with the stringent “Punish Those Deserving” which we will discuss in the section on stringency.

### **Avoid Technicalities**

The jurists use three types of reasoning to avoid technicalities: 1) “Technically vs. Functionally True,” 2) “Unintentional/Coerced Actions,” and 3) “Wrong Procedure, Same Result.”

#### *Technically vs. Functionally True*

Cases #56 and #57 aptly depict this reasoning. If Emily purchases an item, then discovers a flaw (*ʿayb*) in it, she can return it. Her right to return it ends if she indicates satisfaction with the item despite the flaw. Besides explicitly stating “I still like this item,”

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<sup>301</sup> Ibid., 7:295.

her continuing to make normal use of the item also indicates satisfaction. Sometimes, however, what is technically normal use does not really indicate satisfaction. For example, if she buys a horse, then discovers a flaw in it, by *qiyās*, if she rides the horse even once after discovering the flaw, she loses the right to return it, since she technically made normal use of the horse. But what if she simply rode the horse to take it to drink, or to take it back to the seller to return it? Clearly these do not indicate satisfaction with the flaw. By *istiḥsān*, then, she still has the right to return the animal.<sup>302</sup>

In Case #325, the technicality is uniquely quite substantive, but not functionally relevant and so still overruled. Someone rents an animal with the stated purpose of hauling 100 pounds of wheat, then hauls 100 pounds of barley. If the animal is injured during the haul, is the renter liable? By *qiyās*, yes, because the renter technically violated the contract. However, since the weight in both cases is 100 pounds, this should not make a functional difference in the animal's burden, so by *istiḥsān*, the renter is not liable.<sup>303</sup>

#### *Coerced/Unintentional Actions*

Law must clearly respond differently when someone does not act of their own volition. This plays out in both coercion and unintentionality.

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<sup>302</sup> Ibid., 2:491.

<sup>303</sup> Ibid., 8:451.

A few cases aptly illustrate coercion (*ikrāh*). In Case #271, if a group forces a man to declare unbelief (*kufr*), by *qiyās* his marriage becomes void,<sup>304</sup> but by *istiḥsān*, his marriage remains valid.<sup>305</sup> In Case #32, if a man is in a period of seclusion (*i'tikāf*) in a mosque and someone forcefully moves him to a different mosque, then by *istiḥsān* his *i'tikāf* remains valid.<sup>306</sup> Finally, in Case #285, a group threatens a man with, “Commit adultery or we will kill you!” and in another variation “...or we will kill your friend!” In both cases, the man still may not commit adultery.<sup>307</sup> If he does, is he liable for the *ḥadd* punishment? By *qiyās* yes, but by *istiḥsān*, no.<sup>308</sup>

Related to coercion is unintentionality, in that people should not always<sup>309</sup> bear the consequences of accidental actions. Case #175 regards if, when someone is about to sacrifice an animal, the knife slips and injures the animal’s eye. To be valid for ritual sacrifice, an animal must be free of major wounds, so by *qiyās*, the animal would no longer suffice. By

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<sup>304</sup> If the wife is Muslim, since a Muslim woman cannot be married to a non-Muslim man.

<sup>305</sup> al-Shaybānī, *al-Aṣl*, 7:317.

<sup>306</sup> Ibid., 2:186.

<sup>307</sup> Why may one not commit adultery even under threat of death? After all, one can pronounce disbelief, the greatest sin of all. The explanation is twofold. First, even if coerced, one cannot infringe on the rights of others, and adultery infringes on the right of the woman with whom he commits the act. But when the man is threatened with his friend’s death rather than his own, both alternatives infringe on the right of another, so should he not prioritise human life? Apparently still not. This could be because allowing the group to murder his friend is not the same as his directly transgressing (getting into Islamic conceptions of the trolley problem). However, if the transgression is lighter than fornication, such as stealing something cheap, then the law still has him steal rather than let his friend be killed. Thus, this ruling testifies to the weight of fornication on the moral scale.

<sup>308</sup> al-Shaybānī, *al-Aṣl*, 7:400.

<sup>309</sup> Clearly they sometimes do, such as in manslaughter.

*istiḥsān*, however, the animal remains valid.<sup>310</sup> There is clearly also an element of practicality here in that it would burden the individual to have to purchase a second animal.

An entertaining twist on unintentionality comes in Case #261, which deals with deception. A thief is sentenced to have his right hand amputated, but when he is brought to the executioner, he intentionally shows his left hand and says, “Here is my right hand.” Failing to notice this, the executioner proceeds with the amputation. By *qiyās*, the executioner would be liable to the thief at least for blood-money. However, by *istiḥsān*, the executioner is not liable in any way, since he did not intend to amputate the incorrect limb.<sup>311</sup> Interestingly, the thief is also no longer liable to have his right hand amputated, opening a clever door by which a right-handed thief who knows his *fiqh* can keep his primary hand.

#### *Wrong Procedure, Same Result*

Nested within “Avoiding Technicalities,” this reasoning excuses someone who achieves the desired ends but with incorrect legal procedure. In Case #30, if a man declares *zihār*<sup>312</sup> of his 4 wives, then he must offer an expiation for each of the 4. A single expiation requires freeing a slave, or fasting for 2 months, or feeding 60 poor people. If the man frees 4 slaves, or fasts for 8 months, or feeds 240 poor people, without designating which

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<sup>310</sup> al-Shaybānī, *al-Aṣl*, 5:410.

<sup>311</sup> *Ibid.*, 7:257.

<sup>312</sup> A pre-Islamic practice whereby one ends his marriage with his wife by declaring, “You are like the back of my mother (*anti ka-zahr ummī*).” It is explicitly prohibited in Q. 58:2.

expiation was for which *ḡihār*, then by *qiyās* the expiation is invalid. However, by *istiḡsān*, it suffices.<sup>313</sup>

In Case #76, John gives Emily collateral (*rahn*) for a loan,<sup>314</sup> then wants to add more collateral. By *qiyās* this is invalid, since they must technically undo the original contract then make a new one. This is not a purely semantic difference, as having to make a new contract forces them to renegotiate. However, since John and Emily could renegotiate then decide on the original, the difference is procedural, so *istiḡsān* permits simply adding more collateral.<sup>315</sup>

### **Avoid Impracticalities**

Another thrust of lenient *istiḡsān* is to avoid impracticalities, either by 1) not requiring contracts to be perfectly defined, or 2) avoiding a requirement that would be difficult (but not impossible) to perform.

#### *Don't Need Perfect Certainty*

In this surprisingly common form of reasoning, found in 10 cases, a contract which would be invalid by *qiyās* due to particular uncertainties is valid by *istiḡsān* because more certainty would be impractical. For example, in Case #109, if two men rent two camels to travel from Kufa to Mecca, one camel to carry them and the other to haul their provisions,

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<sup>313</sup> al-Shaybānī, *al-Aṡl*, 2:161.

<sup>314</sup> See Footnote 166 for my reasoning on using English names to represent parties in hypothetical cases.

<sup>315</sup> *Ibid.*, 3:233.

then by *qiyās* this is invalid, because they have not stipulated the exact contents and weight of their provisions. By *istiḥsān*, however, the contract is valid, and the acceptable amount is that which two men of their size would ordinarily need for a trip of that length.<sup>316</sup>

Case #112 similarly says that if someone hires a gravedigger without specifying the size or location of the grave, then by *qiyās* this is invalid, but by *istiḥsān* it is valid and the gravedigger should simply dig an average-sized grave in the local cemetery.<sup>317</sup> Case #113 states that if the contract stipulates that the gravedigger should plaster the grave but does not specify how much plaster, then this is invalid by *qiyās*, but valid by *istiḥsān*, and the amount is assumed to be that needed for an average grave. In this last case, the text also invokes custom, allowing the contract “according to what people do (*‘alā mā ya‘mal al-nās*).”<sup>318</sup>

This overlap between “Don’t Need Perfect Certainty” and “Custom” is reminiscent of Case #97, the case of the bathhouse (*ḥammām*), in which *istiḥsān* permits the contract despite the uncertainty over the amount of soap/water/time one is paying for.<sup>319</sup> In the *ḥammām* case, though, the *Aṣl* only explicitly mentions “Custom,” but “Don’t Need Perfect Certainty” is certainly at play as well, and is what later authors like al-Sarakhsī intend by

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<sup>316</sup> Ibid., 3:578.

<sup>317</sup> Ibid., 4:34.

<sup>318</sup> Ibid., 4:34.

<sup>319</sup> Ibid., 3:506.

“avoiding difficulty (*ḥaraj*).”<sup>320</sup> This reminds us that cases of custom can have other reasoning at play, since there is often a reason *why* something is customary (e.g. it is the custom *because* to do otherwise would be impractical).

### *Difficult to Perform*

There are surprisingly few examples of *istiḥsān* justified solely by the impracticality of performing the *qiyās*. The only notable example is Case #19, but it is a good one. If John knows he missed a mandatory prayer, then without making it up continues praying mandatory prayers for a month, by *qiyās* he must make up the missed prayer and every prayer after it, since obligatory prayers must be prayed in order (*tartīb*). By *istiḥsān*, however, Abū Ḥanīfa rules that he must only make up the missed prayer, while Abū Yūsuf and al-Shaybānī rule – also by *istiḥsān* – that he must only make up the missed prayer and the prayers of the 24 hours after it. These are two different *istiḥsān* rulings, but in both cases, the remainder of the month’s prayers stay valid because it would be burdensome to make them up.<sup>321</sup>

The *Aṣl* does not state this reasoning explicitly, but it is the obvious implication and is confirmed by reference to al-Sarakhsī’s discussion of the case. Al-Sarakhsī states that a “great number of missed prayers (*kathrat al-fawā’it*)” exempts one from praying them in order (*tartīb*), and he defines a “great number” as six prayers, in line with Abū Yūsuf and al-

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<sup>320</sup> al-Sarakhsī, *Kitāb al-Mabsūṭ*, 15:160.

<sup>321</sup> al-Shaybānī, *al-Aṣl*, 1:248.

Shaybānī’s limit of 24 hours (5 mandatory prayers in 24 hours, the 6<sup>th</sup> becomes a “great number”). Al-Sarakhsī then notes that Bishr al-Marīsī (d. 218/833), the infamous student of Abū Yūsuf, disagreed and said:

If a man misses a prayer, not a single prayer for the rest of his life will be valid if he is aware of having missed it and does not make it up. The only reason he has a great number of missed prayers (*kathrat al-fawā’it*) is the great number of times that he neglected [them] (*kathrat tafriṭihi*). That does not deserve any lenience (*lā yastahiqq bihi al-takhfif*).<sup>322</sup>

Chapter 4 shows how this is one of many cases in which Bishr holds to an impractical *qiyās* position over its *istiḥsān* remedy, aligning with his rejection of *istiḥsān*. Indeed, when classical Hanafi works cite Bishr’s opinions, it is nearly always to show him doing this, making him a trope as “Mr. Impractical *Qiyās*.”

Overall, *istiḥsān* acts to avoid impracticalities, usually through avoiding the need for perfect certainty in contractual stipulations, but examples of other forms of practicality are rare in the *Aṣl*. This is very surprising given the prominence of terms like “*ḥaraj* (difficulty)” and “*umūm al-balwā* (unavoidable affliction)”<sup>323</sup> in classical Hanafi discussions.<sup>324</sup> Neither of

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<sup>322</sup> Ibid., 1:154. Al-Sarakhsī also notes that Zufar b. al-Hudhayl (d. 158/774-5), another of Abū Ḥanīfa’s major students, puts the limit at one month instead of one day. Zufar is also traditionally famous for his *qiyās*, but not for the impractical extremes of Bishr.

<sup>323</sup> In the sense that something is so widespread that the ruling would be very impractical to enact. For example, al-Sarakhsī notes that cat saliva should be impure by *qiyās*, but is pure due to the hadith of the Prophet saying that cats “are constantly around you (*min al-ṭawwāfīn ‘alaykum*),” which al-Sarakhsī says shows that the reason (*illa*) for this exception is “the unavoidability of the affliction (*kathrat al-balwā*).” al-Sarakhsī, *Kitāb al-Mabsūṭ*, 1:49.

<sup>324</sup> See Boynukalın’s section on “Avoiding Hardship (*raf’ al-ḥaraj*),” which he defines excellently as “an instance of difficulty (*mashaqqā*) or restriction (*ḍiq*) which does not reach the severity of necessity (*ḍarūra*).” He notes

these terms appear in the *Aṣl*. Very occasionally one sees colloquial equivalents like “it cannot be prevented (*lā yustaṭā‘ al-imtinā‘ minhu*)”<sup>325</sup> or “it is easier and more accommodating for people (*arfaq bi-l-nās wa-awsa‘*),”<sup>326</sup> but these are not actually called *istiḥsān*. For *istiḥsān* rulings which classical Hanafi discussions attribute to impracticality, the *Aṣl* will usually cite custom (like the bathhouse ruling) or *athar* precedent of the Companions/*salaf* (like the rulings on how much water to remove from a well into which an impurity has fallen).

### **Avoid When No One Wants What the Law Demands**

The jurists often prevent legal solutions which none of the involved parties want, either because: 1) “Everyone Consents” to a different arrangement, or 2) in the case of a crime, because the “Victims Forgive” the perpetrator.

#### *Everyone Consents*

In these situations, *qiyās* mandates a certain arrangement, but *istiḥsān* permits another because all parties agree to it. A good example is Case #183. If the heirs of an estate testify that the deceased named someone else a beneficiary, by *qiyās* the testimony would not be valid without additional evidence. However, by *istiḥsān*, the testimony is valid because the heirs themselves are the ones who stand to lose when a new beneficiary is

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that the term does not appear in the *Aṣl*, but lists a few cases which utilise the reasoning. al-Shaybānī, *al-Aṣl*, Introduction: 289-290.

<sup>325</sup> Ibid., 1:20.

<sup>326</sup> Ibid., 11:236.

added to the estate. Thus, since everyone consents to the new beneficiary, including those who would be adversely affected by it, the testimony is valid.<sup>327</sup>

Another example is Case #311. Eric testifies, “I bought this from Jack and owe him 1000 dirhams,” but then later says, “No, I bought this from Jill and owe her 1000 dirhams.” If both Jack and Jill claim the sale, then Eric owes a debt to each of them, since he technically testified to both. However, if Jack himself agrees that Eric’s first testimony was an error, by *qiyās* Eric would still owe both of them due to having confessed twice, but by *istiḥsān* he only owes 1000 to Jill, since Jack is the one who stands to lose but still supports Eric’s claim.<sup>328</sup>

### *Victims Forgive*

Even outside of *istiḥsān*, there are many cases in which a victim’s forgiveness exempts a perpetrator from punishment. Other times, however, *qiyās* would still necessitate punishment, so the jurists use *istiḥsān* to achieve the same effect.

For example, in Case #233, Eric seriously wounds Andrew, then Andrew forgives Eric, then Andrew dies from his wounds. By *qiyās*, Eric should still be liable for punishment, since Andrew’s forgiveness was only for wounding him. By *istiḥsān*, however, Andrew’s forgiveness extends to his death as well, and Eric is not liable for the blood-money.<sup>329</sup>

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<sup>327</sup> Ibid., 5:528.

<sup>328</sup> Ibid., 8:302. Note that this is not simply a case of Jack forgiving Eric’s debt, because in other similar cases, even if Jack does not claim the debt, Eric has still confessed to a debt of 1000 dirhams and it is redirected to Jill, who would end up getting 2000. In this case, however, Jack’s supporting Eric’s claim, as well as the reasonable knowledge that Eric simply made an error, forgives the extra 1000 dirham debt entirely.

<sup>329</sup> Ibid., 6:591.

This reasoning also extends to forgiveness by a victim's heirs. In Case #231, Eric wounds Andrew, then Andrew's heirs forgive Eric, then Andrew dies. By *qiyās* the forgiveness should not be valid, since the right to forgive would not pass from Andrew to his heirs before Andrew's own death. However, by *istiḥsān*, the forgiveness is valid.<sup>330</sup>

Elsewhere, the *Aṣl* reaffirms that in some cases, it does not matter if the "Victims Forgive," since some punishments are God's right. In one exchange, a questioner asks, "If the qadi sentences someone to the *ḥadd* for slander, then the victim says he forgives the slanderer, does this suspend the *ḥadd*?" The jurist responds, "No...because this is one of the rights of God (*ḥudūd Allah*) and has been established with the Imam...so [the victim] no longer has the right to forgive."<sup>331</sup>

As we saw when discussing "Avoiding the *Ḥadd*," the jurists must balance the victim's forgiveness with honouring God's rights. Outside of the *ḥadd*, the same is true for contract law, that certain things are prohibited regardless of whether "Everyone Consents" (e.g. usurious contracts in Islamic law, prostitution/gambling in Western law). Still, in cases not so concrete, the jurists use *istiḥsān* to avoid legal arrangements not sought by any of the relevant parties.

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<sup>330</sup> Ibid., 6:584.

<sup>331</sup> Ibid., 7:195

## Close Enough/Not a Big Deal

These related types of reasoning evoke the image of a jurist simply saying “Close enough!”. The jurist sometimes offers alternative analogies for the position, but other times the reasoning seems quite subjective, making this category a prime target of criticism.

### *Prohibiting Factor is Small*

In this type of reasoning, something is invalid by *qiyās* but valid by *istiḥsān* because the invalidating factor is small. For example, in Case #33, a man is in seclusion (*i'tikāf*) in a mosque and leaves for a valid reason (such as using the restroom), but while out sees someone who owes him a debt. He pursues that person for an hour to collect his debt, then returns to the mosque to resume his seclusion. By *qiyās*, his seclusion (*i'tikāf*) should be void, since he spent time outside of the mosque for an invalid reason. However, by *istiḥsān*, Abū Yūsuf and al-Shaybānī rule that if he only pursued the man for an hour or so, then his *i'tikāf* remains valid. Abū Ḥanīfa disagrees and maintains that any time outside of the mosque for an unsanctioned reason invalidates *i'tikāf*. The deciding factor for Abū Yūsuf and al-Shaybānī is clearly that the man is only away for an hour, for they explicitly state that if he had been away for longer, his *i'tikāf* would be invalid. They apparently feel that an hour is simply short enough to ignore.<sup>332</sup>

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<sup>332</sup> Ibid., 2:186.

A similarly perplexing ruling is Case #53. If Emily says that she will buy any one of ten pieces of clothing on display for 10 dirhams, then this sale is invalid, since the exact item of sale is unspecified. However, if Emily says she will buy any one of three pieces of clothing on display, then this is valid by *istiḥsān*, even though the item to be sold is still unspecified, since the uncertainty here is more negligible.<sup>333</sup>

Case #361 uses this reasoning to facilitate a righteous deed. By *qiyās*, an executor (*waṣī*) cannot spend from the wealth of an orphan under their care, not even for the mandatory zakat charity. However, Abū Ḥanīfa rules by *istiḥsān* that the *wasī* can pay *zakāt al-fiṭr* on behalf of the orphan, since it is only the value of one meal as opposed to normal zakat which is 2.5% of the entire estate. Al-Shaybānī notably disagrees with this ruling, making this one of Abū Ḥanīfa's many *istiḥsān* rulings which Abū Yūsuf and/or al-Shaybānī reject.<sup>334</sup> Still, this type of reasoning shows each of the jurists making seemingly subjective rulings.

### *Food is Not Money*

In this type of “Not a Big Deal” reasoning, someone technically not permitted to spend money is allowed to give food or invite guests for dinner since it is of more negligible value and is part of living in a community. For example, Case #119 says that if Ryan and Michael are in a complete financial partnership (*mufāwaḍa*), and Michael gifts Emily an

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<sup>333</sup> Ibid., 2:465.

<sup>334</sup> Ibid., 9:502.

expensive item without Ryan’s knowing, then this is not permissible and Ryan can demand that Michael repay him half of the value of the gift.<sup>335</sup> However, by *istiḥsān*, Michael would not be liable like this for giving Emily a small amount of “fruit, meat, bread, or similar foodstuffs.”<sup>336</sup>

It is not simply about the value here, since Michael cannot give Emily any amount of gold or silver, no matter how small. It is rather that people commonly serve and exchange foodstuffs on social occasions or as house gifts. The jurist even makes it clear that Michael would be liable if he gave Emily an entire animal, or gave her a sack of wheat or seeds, since these are objects of trade and not foodstuffs that people commonly exchange.

The same logic justifies Case #345, that a slave with permission to trade (*ma’dhūn*) is not allowed to give any of his wealth away without his owner’s permission, but by *istiḥsān* he is allowed to give food as a gift or when hosting guests.<sup>337</sup> Later Hanafi works justify this by saying that hosting and showing generosity to clients is “of the necessities of business (*min ḍarūrāt al-tijāra*),” therefore invoking “Necessity” to facilitate the slave’s social and commercial life.<sup>338</sup> At bottom, then, this fascinating type of reasoning allows individuals technically unable to give away money to still function in society.

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<sup>335</sup> Ryan could even demand the money directly from Emily, and if she does not have it in cash, she would have to sell the item, keep half the value for herself, and give Ryan his half.

<sup>336</sup> al-Shaybānī, *al-Aṣl.*, 4:80.

<sup>337</sup> *Ibid.*, 9:169.

<sup>338</sup> ‘Abd al-Ghanī al-Ghunaymī, *al-Lubāb fī Sharḥ al-Kitāb*, 2 vols. (Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī, 2013), 2:117.

### *Geographic Proximity*

By this reasoning, the jurists very literally say “close enough” regarding some physical distance relevant to the case. A clear example of this is home delivery, such as in Case #46. If Peter buys food from Amy on the condition that Amy also deliver the food to Peter’s home, then by *qiyās* this is invalid, since delivery is a service and should be listed as an item of sale. However, Abū Ḥanīfa and Abū Yūsuf rule that if the delivery is within the same neighbourhood, then it is valid by *istiḥsān*. Al-Shaybānī disagrees and maintains its invalidity.<sup>339</sup>

Proximity also comes into play in judicial procedure. In Case #249, Amy claims to a qadi that Peter slandered her and brings a witness testifying to that. Amy says that she has a second witness ready to testify and requests that the qadi imprison Peter until she can bring the second witness. By *qiyās*, the qadi cannot imprison Peter since his guilt has not yet been established. However, if the second witness is nearby and could testify within a day or two, then by *istiḥsān* the qadi may imprison Peter, but if the second witness is “out in Khorasan” or “somewhere outside of the city,” then the qadi cannot.<sup>340</sup> Case #454 similarly relates to judicial procedure, regarding if one qadi’s letter to another is a valid legal

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<sup>339</sup> al-Shaybānī, *al-Aṣl*, 2:420.

<sup>340</sup> *Ibid.*, 7:196.

document. By *qiyās*, no, but if the two *qadis* are in the same city, then by *istiḥsān* it is valid. If the *qadis* are in different cities, the letter requires multiple witnesses and a judicial seal.<sup>341</sup>

Finally, proximity reasoning even applies to diverging from a stipulated location in a contract. In Case #124, if Rebecca gives Daniel items with the specific instruction to trade them in the main market of Kufa, but Daniel trades them in one of Kufa's smaller markets, Abū Yūsuf and al-Shaybānī hold that the trade is valid by *istiḥsān* as long as the other market is still in Kufa.<sup>342</sup> Similarly, Case #323 regards if Waleed gives Imran an item for safe-keeping and tells Imran to keep it in a specific room in his house, but then Imran keeps it in an adjacent room. By *qiyās*, Imran is liable if the item gets stolen or damaged, since he violated the stipulated location. However, by *istiḥsān*, the jurist rules, "If the first room is near the second room, then I dislike (*astaqbiḥ*) holding him liable. However, if they are in different houses or different cities, then those are clearly separate (*mutafarriq mutabāyin*) and he is liable."<sup>343</sup> This is perhaps the most controversial form of proximity-based reasoning, since it allows someone to violate a contract. Even in its other forms, though, proximity-based reasoning certainly falls prey to the charge of subjectivity.

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<sup>341</sup> Ibid., 11:550.

<sup>342</sup> Ibid., 4:148.

<sup>343</sup> Ibid., 8:438.

### *Achieved Important Part of Obligation*

In this infrequent type of reasoning, fulfilling the important part of an action counts as completing the action (“close enough”). This appears in the *Aṣl* in the context of ablutions. Case #136 regards how long a man has the right to return to his divorced wife before their reunion requires a new marriage contract. The standard period is three menstrual cycles, ending when the woman completes her major ablutions (*ghusl*) after her third cycle. This means that even while the woman is in the shower making ablutions, if she has still not washed one of the major limbs, then the husband can still return (making a shower reunion fit for Hollywood). However, if the woman has only one finger unwashed, by *qiyās* he still has the right to return, but by *istiḥsān* she is considered to have completed the ablutions and the husband has lost his right to return.<sup>344</sup>

This ruling is clearly coming from the standpoint of precaution. Other rulings exhibit the opposite, such as Case #3, which says that if someone wipes the head but not the ears as part of their *wuḍūʿ*, then this suffices, despite the Prophetic hadith that “the ears are of the head (*al-udhunān min al-raʿs*).”<sup>345</sup> The jurist’s interlocutor even criticises the subjective inconsistency here, exclaiming, “You have abandoned your opinion! (*qad tarakta qawlak*).”<sup>346</sup> Thus, even in the *Aṣl* itself, this type of reasoning falls prey to the charge of subjectivity.

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<sup>344</sup> Ibid., 4:402.

<sup>345</sup> Ibid., 1:36.

<sup>346</sup> Ibid.

## Dealing With Non-Muslims and Non-Muslim Lands

*Istiḥsān* facilitates some transactions by Muslims visiting non-Muslim lands (*dār al-ḥarb*) as well some dealings of non-Muslims in Muslim-ruled lands. This is one of the few categories associated with lenience which falls comfortably within alternative *qiyās* and does not appear very subjective.

### *Muslims in Non-Muslim Lands*

In two rulings in the *Aṣl*, *istiḥsān* recognizes contracts conceived and executed by a Muslim in *dār al-ḥarb*, which is otherwise a legal black hole. In Case #168, a Muslim buys a Muslim slave in *dār al-ḥarb*, then makes the slave a *mukātab*. By *qiyās* the *mukātaba* would be invalid, because “he did this in a place where the law of the land is not the law of Muslims (*lā yajrī ḥukm al-muslimīn*).” However, the jurist states, “we abandon this *qiyās* and use *istiḥsān* to validate it because he is Muslim and the slave is Muslim.”<sup>347</sup> The same holds even if the slave is not Muslim but had been purchased in Muslim lands then entered *dār al-ḥarb* with his owner, since he would fall under the jurisdiction of Muslim law. Thus, *istiḥsān* works to permit certain contracts despite the legal complications caused by different jurisdictions.

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<sup>347</sup> Ibid., 5:237.

### *Non-Muslims Visiting Muslim Lands*

*Istihsān* works similarly to allow some transactions in Muslim lands by non-Muslims from *dār al-ḥarb*. For example, Case #445 regards two individuals, Peter and George, living in *dār al-ḥarb*. Peter is George's agent and gains permission (*amān*) to enter Muslim lands to do business on George's behalf. By *qiyās*, once Peter returns to *dār al-ḥarb* after his visit, then the Muslim state would no longer recognize him as George's agent, since the act of entering *dār al-ḥarb* usually voids one's legal status (legally akin to death). However, by *istihsān*, since Peter had clearly entered for the purposes of trading then returning, and was granted *amān* on that basis, then his agency and contracts remain valid.<sup>348</sup>

### ***Fiqh as a Human Enterprise***

In this category, the jurists acknowledge that *fiqh* is a human enterprise, accommodating difference of opinion between legal schools, or in one case, showing that ignorance can indeed be an excuse.

### *Difference of Opinion*

This fascinating type of reasoning gives leeway in cases where Iraqi doctrine differs from others. This only occurs twice in the *Aṣl*, but is mentioned very explicitly both times.

Case #243 regards the ruling that if a man has sexual contact with a woman (including kissing or touching with desire), then the man can never marry or have relations

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<sup>348</sup> Ibid., 11:453.

with the woman's ancestors (mother, grandmother, on up) or progeny (daughter, granddaughter, on down). It is therefore possible that a married man, by having sexual contact with his mother-in-law, makes his wife impermissible on himself, voiding their marriage. So if a man has sexual contact with his mother-in-law, then has sexual relations with his wife, should he be punished with the *ḥadd*? By *qiyās*, yes, but by *istiḥsān*, no, even if the man knew that their marriage had been voided, specifically because, "Some jurists (*ba'ḍ al-fuqahā'*) say on this matter that if a man [has sexual contact with] his mother-in-law, the impermissible does not prohibit the permissible (*lam yuḥarrim al-ḥarām al-ḥalāl*)," meaning that his impermissible contact with his mother-in-law cannot void his permissible marriage. The jurist continues, "So due to this doubt (*shubha*), I use *istiḥsān* to ward off the *ḥadd* from him and I abandon *qiyās* in this."<sup>349</sup> It is striking here that even if the perpetrator follows the opinion that what he was doing was wrong, the jurists still invoke "Difference of Opinion" to avert the *ḥadd*.

This reasoning is employed even more plainly in Case #332, which says that a man with his assets frozen (*mahjūr*) is only allowed to spend on basic provisions or religious obligations such as zakat or Hajj. Is he allowed to pay for a smaller pilgrimage to Mecca

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<sup>349</sup> Ibid., 7:175.

outside of the Hajj season (*‘umra*)? By *qiyās*, no, since the Hanafi founders did not consider it obligatory to ever perform *‘umra*.<sup>350</sup> However, the *Aṣl* rules:

If he wants to perform one *‘umra*, then he is not prevented from doing so, because people differ in regards to *‘umra*. Some say, “It is mandatory like hajj, due to God’s words, ‘And complete the hajj and *‘umra* for God.’”<sup>351</sup> Others say, “The *‘umra* is supererogatory.” So if he seeks to perform the *‘umra* we use *istiḥsān* that he is permitted to – even though we hold that the *‘umra* is supererogatory – due to the difference of opinion (*ikhtilāf al-nās*).<sup>352</sup>

Again, it is striking that the man’s own legal affiliation is not a factor here. Perhaps this is because in both cases, the ruling facilitates a desirable end, in the former case avoiding the *ḥadd*, and in the latter case allowing someone to perform a great act of worship.

### *Ignorance*

One ruling explicitly exempts a man from punishment due to his ignorance of the law. In Case #284, if a group threatens Christopher with, “Say you disbelieve in God or we will kill Robert!”, then Christopher is obligated to say that he disbelieves, since it is not his own life on the line. If Christopher still refuses to say that he disbelieves and the group kills Robert, then by *qiyās* Christopher is liable for the *ḥadd* of capital punishment since his actions led directly to Robert’s death. However, the jurist rules, “I use *istiḥsān* to avert

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<sup>350</sup> The Hanafi founders, as well as Mālik, held that *‘umra* is purely optional. However, both al-Shāfi‘ī and Aḥmad b. Ḥanbal held that it is obligatory to perform once. This was also the opinion of a few other 8<sup>th</sup>-century Iraqis, most notably Sufyān al-Thawrī, as well as earlier figures from among the *salaf*. The *Aṣl* might be referring to the *salaf*, al-Thawrī, and/or even al-Shāfi‘ī. Ibn Ḥazm, *al-Muḥallā bi-l-Āthār*, ed. ‘Abd al-Ghaffār Sulaymān al-Bandarī, 12 vols. (Beirut: Dār al-Kutub al-‘Ilmiyya, 1988), 5:12.

<sup>351</sup> Q. 2:196.

<sup>352</sup> al-Shaybānī, *al-Aṣl*, 8:475.

(*adra'u*) capital punishment from him and he is only liable for the blood-money...if he did not know that he was permitted to declare disbelief in these circumstances (*in lam yakun 'āliman bi-'anna al-kufr yasa'u hu fi hādhā al-wajh*).”<sup>353</sup> This is not just an example of “Avoiding the *Ḥadd*” due to coercion, since if Christopher knew that he could declare disbelief but did not, then he would have received the *ḥadd* punishment. Rather, ignorance is the determining factor.

This section on *istiḥsān* as lenience has articulated many types of reasoning which previous studies have overlooked or left implicit. Putting them all together shows that, while some types of reasoning could have a basis in sunna/*athar* or alternative *qiyās*, many more are perplexingly subjective and do not align with the theorisations of *istiḥsān* put forward in classical Hanafi *uṣūl*. The next section shows that this is even more true for *istiḥsān* as stringency.

### 3.3 Stringent Types of Reasoning

The previous section discussed the already stereotypical understanding of *istiḥsān* as lenience. However, *istiḥsān* does not connote lenience in a majority of cases, instead connoting stringency or neutrality. The following two sections treat each of these in turn. As a reminder, an *istiḥsān* ruling is stringent if it 1) makes obligatory what was optional (i.e. “You are required to do this even though by *qiyās* you were not”) or 2) prohibits what was

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<sup>353</sup> Ibid., 7:399.

permissible (i.e. “You are not allowed to do this even though by *qiyās* you were”). Again, stringency here does not connote punishment, but rather the law’s becoming more involved. Stringent *istiḥsān* rulings are therefore the most enlightening about the jurists’ sensibilities, for they show the jurists using the law as a tool to achieve particular objectives or safeguard certain values.

68 of the dataset’s 457 cases (14.9%) exhibit stringency, all through 10 types of reasoning. These group into: 1) Precaution, 2) Tasteful/More Appropriate, 3) Combatting Immorality, and 4) Contractual Concerns. Together, these types of reasoning show – even more than those associated with lenience – the subjectivity underlying some of Hanafi doctrine, and as Chapter 4 shows, it is stringent *istiḥsān* that draws the bulk of al-Shāfi‘ī’s criticism.

### **Precaution**

Precaution is the most well-known type of reasoning associated with stringency. The popular notion, as stated by Ibn Quṭlūbughā (d. 879/1474), holds that “in matters of worship (*‘ibādāt*), the *istiḥsān* is that which is more precautionary (*aḥwaṭ*).”<sup>354</sup> Like Ibn Quṭlūbughā, most classical texts refer to precaution as *iḥtiyāṭ*, but precaution appears in the *Aṣl* as “*thiqa* (safe, reliable).”

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<sup>354</sup> Ibn Quṭlūbughā, *al-Taṣḥīḥ wa-l-Tarjīḥ ‘alā Mukhtaṣar al-Qudūrī*, ed. Ḍiyā’ Yūnus (Beirut: Dār al-Kutub al-‘Ilmiyya, 2002), 144.

The standard example is Case #2. People have been making ablutions from a certain well, then find a bloated dead chicken in the well, but do not know when it fell in. The jurist rules by *istiḥsān* that they must repeat their ablutions and prayers from the previous three days. The questioner asks, “Why, if they do not know when it fell in?” The jurist responds, “I use *istiḥsān* (*astaḥsinu*) in this and take what is safe (*thiqa*), because this is prayer, and for people to pray what is no longer obligatory upon them is more beloved to me (*aḥabb ilayya*) than their not doing something obligatory.”<sup>355</sup> Cases #13,<sup>356</sup> #14,<sup>357</sup> and #15<sup>358</sup> all similarly show *istiḥsān* obligating something related to prayer which was not obligatory by *qiyās*.

Besides matters of worship (*‘ibādāt*), the jurists invoke precaution to prevent illicit sexual relations. An example is the previously-cited Case #136. A man divorces his wife but later wants to return to her at the very end of her waiting period, which is while she is making major ablutions (*ghusl*) after her third menstrual cycle. If one major limb is still unwashed, they may resume relations, but if only one finger is unwashed, then by *istiḥsān* her ablutions are complete and the two cannot resume relations without a new marriage contract.<sup>359</sup>

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<sup>355</sup> al-Shaybānī, *al-Aṣl*, 1:28.

<sup>356</sup> Ibid., 1:194.

<sup>357</sup> Ibid., 1:202.

<sup>358</sup> Ibid., 1:213.

<sup>359</sup> Ibid., 4:402.

Why do the jurists finalise this divorce earlier than necessary despite their usual aversion to divorce? Out of precaution, since she was so close to finishing her ablutions that maybe she actually did (perhaps the water rinsed her finger without her noticing), in which case if they returned to each other without a new marriage contract, their relations would be adulterous. This precaution is made clear by the fact that if this same woman now seeks to marry someone else, she must first wash her finger, now out of precaution that her ablutions may have indeed been incomplete, in which case her new marriage would be invalid.

These two rulings are contradictory. In the first, her ablutions are considered complete despite her unwashed finger, while in the second her ablutions are incomplete. The text signals the precaution underlying both rulings with the statement “I rule in this [second ruling] by precaution (*bi-l-thiqa*) also.”<sup>360</sup> This trademark contradiction born out of precaution appears again in Case #389,<sup>361</sup> while Case #134 shows precaution against illicit sexual relations extending to breastfeeding.<sup>362</sup> For our purposes, it suffices to note that the two main avenues of precaution are: 1) to ensure the fulfilment of ritual obligations in matters of worship (*‘ibādāt*), and 2) to prevent illicit sexual relations. Al-Shāfi‘ī explicitly criticises both, as we will see in Chapter 4.

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<sup>360</sup> Ibid., 4:402.

<sup>361</sup> Ibid., 10:254.

<sup>362</sup> Ibid., 4:369.

## More Appropriate/Tasteful

In this intriguing category, jurists enforce a stringent ruling because it is better decorum, revealing much about the jurists' moral and social intuitions. Case #25 considers whether people may pray the funeral prayer (*janāza*) while riding on animals or sitting down. By *qiyās*, yes, since they can do so for any supererogatory prayer, but by *istiḥsān*, no. The jurists do not state their reasoning, but it appears to be because praying the funeral prayer riding is simply bad taste and potentially disrespectful.<sup>363</sup>

A more explicit example is Case #6. If an imam of a congregational prayer breaks his ablutions, he should pull someone from the row behind him to be the imam, then step away, make ablutions, and return to pray behind the new imam. It is also valid, however, for the imam to step away without appointing a new imam, make his ablutions at the facilities in the mosque, then return and resume leading the prayer. What if the mosque has no ablution facilities and he must exit the mosque to make ablutions? By *qiyās* this should be equivalent. By *istiḥsān*, however, if the imam exits the mosque to make ablutions, the congregation's prayer is void and must be repeated. Why? The jurist states, "I see it as ugly (*qabīḥ*) that people are in prayer in the mosque while their imam is out among the people."<sup>364</sup>

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<sup>363</sup> Ibid., 1:355.

<sup>364</sup> Ibid., 1:152.

A final illuminating example is Case #331. If a man allows his slave-woman to trade (making her *ma'dhūn*), then she bears his child (becoming an *umm walad*), does her permission to trade remain valid? By *qiyās*, yes, but by *istihsān*, no. The *Aṣl* itself does not make explicit why, but al-Sarakhsī fascinatingly explains, “because what is most usually the case is that a man is protective of his *umm walad* and is not content with her going out and mingling with people for business and trade.”<sup>365</sup> Thus, because the jurists expect that the man would have more protective jealousy over her once she becomes his *umm walad*, he would have to explicitly renew his permission.<sup>366</sup> This case shows the intersection of two social sensibilities: 1) a man does not want women of his family mingling in the market, and 2) an *umm walad* is akin to a woman of the family and takes on many of those social and class expectations. This demonstrates well how *istihsān* rulings reveal the jurists’ sensibilities and social realities.

### **Combat Immorality**

The Hanafi founders often make the law more stringent to combat or safeguard against moral waywardness, reminiscent of Iyās b. Mu‘āwiya’s statement, “Use *qiyās* as long as the people remain righteous, but when they grow corrupt, then use *istihsān*.”<sup>367</sup>

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<sup>365</sup> al-Sarakhsī, *Kitāb al-Mabsūṭ*, 25:36.

<sup>366</sup> al-Shaybānī, *al-Aṣl*, 8:523.

<sup>367</sup> Wakī‘, *Akhbār al-Quḍāt*, 1:341.

### *Punish Those Who Deserve It*

Though *istiḥsān* often acts leniently to avoid *ḥadd* punishments, it also acts stringently to do the opposite: punish someone who by *qiyās* would go free on a technicality.

In Case #258, a group of thieves robs a house, but only one of the thieves carries the goods out. By *qiyās*, only the one who carried the goods would be liable for the *ḥadd*. This seems clearly amiss, however, so by *istiḥsān*, all of the thieves are liable for the *ḥadd*.<sup>368</sup>

In other cases, *istiḥsān* enforces punishment when the evidence is overwhelming, but still not technically sufficient. For example, in Case #230, if two witnesses testify that someone committed murder, and they accurately describe all circumstances of the killing, except that neither can remember the murder weapon, then by *qiyās* the murderer would not be liable in any way. However, by *istiḥsān*, the testimony establishes the murderer's guilt, and he is liable for the blood-money, though not the *ḥadd*.<sup>369</sup>

This occurs again in the notorious Case #244. Four witnesses testify that a man committed adultery, agreeing on all the details except the corner of the room in which the act occurred. By *qiyās*, this testimony is insufficient, but by *istiḥsān*, the man is guilty and liable for the *ḥadd*.<sup>370</sup> Critics of *istiḥsān* cite this ruling, impugning the Hanafis for using

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<sup>368</sup> al-Shaybānī, *al-Aṣl*, 7:238.

<sup>369</sup> Ibid., 6:564.

<sup>370</sup> Ibid., 7:177. This case is known as “the case of the corners (*mas'alat al-zawāyā*).”

subjective reasoning to allow something as grave as the *ḥadd*. The Shāfi‘ī jurist al-Māwardī (d. 450/1058) writes, “There is no justification for this (*lā wajh li-hādhā*). *Ḥadd* punishments should be warded off by doubts, not applied because of doubts.”<sup>371</sup>

Later Hanafis justify the ruling by saying that the testimonies do not actually contradict each other, but simply indicate that the man moved around the room while committing the act, or that the room was so small that if the witnesses were in different corners they would each perceive the act as being in their corner.<sup>372</sup> In the *Aṣl*, however, no such reasoning is mentioned, and it appears much more akin to the case of not knowing the murder weapon, that the testimony is technically insufficient, but the witnesses agree on so many other details that the accused is most likely guilty.

#### *Guarding Against Ill Intent*

*Istiḥsān* closes loopholes easily exploitable by ill intent. This reasoning appears frequently in inheritance law. Case #144 rules that if a woman on her deathbed declares apostasy then dies soon after, by *qiyās*, her husband should not inherit from her.<sup>373</sup> However, by *istiḥsān*, the husband still inherits.<sup>374</sup> Why? The *Aṣl* does not explicitly say, but al-Sarakhsī quotes Abū Yūsuf as saying, “By apostatising, she intends to invalidate his claim

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<sup>371</sup> Abū al-Ḥasan al-Māwardī, *al-Ḥāwī al-Kabīr Sharḥ Mukhtaṣar al-Muzanī*, ed. ‘Alī Muḥammad Mu‘awwad and ‘Ādil Aḥmad ‘Abd al-Mawjūd, 19 vols. (Beirut: Dār al-Kutub al-‘Ilmiyya, 1999), 17:240.

<sup>372</sup> Ibn al-Humām, *Fatḥ al-Qadīr*, 10 vols. (n.p.: Dār al-Fikr), 5:286.

<sup>373</sup> Since by her apostasy their marriage would have ended.

<sup>374</sup> al-Shaybānī, *al-Aṣl*, 4:537.

to her estate and prevent him from inheriting, so it is rejected because of her intention.”<sup>375</sup>

The jurists combat this ill intent by closing the loophole.

Outside of inheritance, this reasoning also handles conflicts of interest, such as in Case #232. If a murder victim’s closest living relatives are his two uncles, Daniel and Robert, the two split the blood-money 50-50. But Daniel, trying to get all of the blood-money, testifies to a qadi that Robert forgave the murderer. Clearly, as the text indicates, Daniel’s testimony cannot be trusted, “because by his testimony he’s redirecting half of the blood-money towards himself (*yajurru ilā nafsihi nişf al-diya*).” The jurists even punish this by voiding Daniel’s right to half of the blood-money, granting the entire amount to Robert.<sup>376</sup>

### *Corruption of the Times*

Only one case in the *Aşl* cites corruption of the times (*fasād al-zamān*), which becomes a very prevalent trope in classical Hanafism. Case #452 holds that, due to conflict of interest, one may not serve as a witness in a case involving their business partner. The jurist explains the ruling with, “I take what is more precautionary (*thiqa*) here and use *istihsān* due to what has come down to us from Shurayḥ, and due to the condition that we see people are in today.”<sup>377</sup> Although aided by appeals to *athar* and precaution, the jurist also clearly invokes

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<sup>375</sup> al-Sarakhsī, *Kitāb al-Mabsūṭ*, 6:163-164.

<sup>376</sup> The jurist then entertainingly considers if both of them try to testify this about each other. In that case, whichever of them testifies first loses his right and the entire amount goes to the other. What if they both testify at the same time? Neither of them gets anything and the murderer owes nothing.

<sup>377</sup> al-Sarakhsī, *Kitāb al-Mabsūṭ*, 11:523.

the notion that people “today” have become corrupt, once again echoing the words of Iyās b. Mu‘āwiya that when people grow corrupt, jurists must accommodate this with *istiḥsān*.

*Don’t Incentivise/Reward Bad Behaviour*

Still within “Combatting Immorality,” this form of stringent *istiḥsān* combats perverse incentives. In Case #383, a landowner plants seeds, then a random man with no right to the land waters and tends the seeds until they grow. By *qiyās*, this man would be entitled to the produce, since it was the product of his labour. However, this rewards misappropriating another’s property. Thus, by *istiḥsān*, the landowner gets the produce.<sup>378</sup> Case #407 similarly states that, by *qiyās*, a thief and his victim could negotiate a settlement (*ṣulḥ*) by which the thief returns a portion of the stolen goods and is forgiven for the rest. However, this lets the thief profit with no repercussions. Thus, by *istiḥsān*, even if the victim consents to the settlement for some reason, the thief must still return all of the goods to the original owner.<sup>379</sup>

One case in the *Aṣl* then complements this type of reasoning, that if the law should not incentivise/reward bad behaviour, it should also not disincentivise/punish good behaviour. This appears in Case #238. If Michael makes improvements to the local mosque as charity (such as “affixing a new door” or “hanging up new lamps”), but did not get permission from local officials to do so, then by *qiyās*, if someone is injured by one of his

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<sup>378</sup> Ibid., 10:151.

<sup>379</sup> Ibid., 11:98.

new additions, then Michael is liable for the blood-money. However, Abū Yūsuf and al-Shaybānī rule that “he is not liable, because this was something done to improve the mosque. I use *istiḥsān* in this, except in the case of major building or digging work.”<sup>380</sup>

### **Contractual Concerns**

In our final category of stringency, the jurists use *istiḥsān* to manage various contractual concerns.

#### *Avoid Logical Absurdities*

The jurists use *istiḥsān* to avoid logically absurd arrangements. In Case #351, Michael has a right of first purchase (*shufʿa*) on a property, then makes Eric an agent to represent that right, but Eric is himself interested in buying the property. By *qiyās*, Eric could perform both functions, but this is clearly absurd, since he would be negotiating against himself. By *istiḥsān*, then, Eric cannot serve as Michael’s agent.<sup>381</sup> In Case #353, the text itself points out the logical absurdity of a ruling with the words “the *qiyās* here is ugly (*yafshah*), so we do not rule by it.”<sup>382</sup>

#### *Pay Back Debtors*

This reasoning ensures that debts are repaid promptly. For example, Case #333 holds that if Michael’s slave Eric, who is permitted to trade (*maʿdhūn*), amasses huge debts.

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<sup>380</sup> Ibid., 7:42

<sup>381</sup> Ibid., 9:289.

<sup>382</sup> Ibid., 9:304.

Normally, Michael could take portions of Eric's profits. However, since Eric's debts are significant, then by *istihsān* the qadi should limit Michael's shares so that Eric can pay off the debts.<sup>383</sup>

Similarly, in Case #335, if Eric travels for trade and amasses huge debts abroad, then by *qiyās* the qadi would have to wait until Michael arrives before selling off Eric's possessions to repay the debtors, since all of Eric's possessions are ultimately Michael's. However, by *istihsān*, the qadi can sell Eric's possessions (but not Eric himself) in order to repay the debts.<sup>384</sup>

### *Keep Contracts Meaningful*

This type of reasoning, which is particularly associated with Abū Yūsuf, prevents someone from opting-out of a contract with no repercussions. Take Case #47. Emily makes Michelle her agent to deal with a food caterer.<sup>385</sup> Emily also gives Michelle 100 dirhams to pay the caterer. Michelle does nothing for a while, then decides she does not want to be Emily's agent any more. By *qiyās*, Michelle would only have to give back the 100 dirhams. By *istihsān*, however, Michelle owes Emily the actual catered food, to ensure that Emily receives what she had been expecting from the contract (e.g. so that Michelle cannot simply drop out and leave Emily scrambling to find a caterer).<sup>386</sup>

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<sup>383</sup> Ibid., 8:539.

<sup>384</sup> Ibid., 8:565.

<sup>385</sup> In the language of the *fiqh*, a *salam* purchase, meaning paying someone now to deliver food later.

<sup>386</sup> Ibid., 2:423.

## *Avoid Waste*

The jurists often use *istiḥsān* to maintain contracts that should have otherwise ended but would have led to waste. In Case #326, a woman allows a farmer to work her land for free, then after he plants crops, wants to revoke the farmer’s permission to use the land. By *qiyās*, she is free to do so, but by *istiḥsān*, she must wait until the harvest.<sup>387</sup> This even applies if they had already agreed upon an end date, such that if she told the farmer he could use the land for 6 months, then at 6 months the produce is not yet ripe, she must wait until the harvest.<sup>388</sup> Similarly, in Case #366, if she agrees to a sharecropping contract (*muzāra‘a*) with a farmer, then dies during the contract, by *qiyās*, the contract ends and the farmer loses access to the land. However, by *istiḥsān*, the contract persists until the harvest, to be managed by her heirs.<sup>389</sup>

In all, the types of reasoning associated with stringency appear much more subjective than those associated with lenience, explaining why al-Shāfi‘ī’s criticism revolves almost exclusively around stringent *istiḥsān*.

### 3.4 Neutral (But Still Important) Types of Reasoning

Having covered both lenience and stringency, let us now discuss the many types which are neither. Again, do not be deceived by the term “Neutrality.” These are vital forms

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<sup>387</sup> al-Sarakhsī, *Kitāb al-Mabsūṭ*, 8:453.

<sup>388</sup> *Ibid.*, 8:453.

<sup>389</sup> *Ibid.*, 9:563.

of reasoning by which the jurists accommodate important concerns and achieve particular goals. This is with the exception of the last category, “Unclear Reasoning,” which shows no discernible reasoning at all, later landing the Hanafis in deep trouble. Chapter 2 discussed how “Unclear Reasoning” was particularly exemplified by Abū Ḥanīfa.

184 of 457 cases (40.3%) exhibit neutrality through 25 different types of reasoning. These can be grouped into 1) Language Concerns, 2) Social Goals, 3) Better Legal Solutions, 4) Legal Arrangements and Definitions, 5) Contractual Concerns, 6) Establishing Fact, 7) Judicial Procedure, and 8) Unclear Reasoning.

### **Language Concerns**

The jurists accommodate the reality that, while law is technical, language is conventional. Purely analogical extensions of language can give meanings neither intended by the speaker nor understood by the listener. *Istiḥsān* intervenes.

One manifestation of language reasoning recognizes meanings not stated explicitly but still clearly implied. In Case #122, Emily gives Michael 1000 dirhams of capital with which to trade on the condition that she receive 1/3 of the profits. By *qiyās*, the contract is invalid (*fāsid*) because Emily did not explicitly state that Michael would receive the other 2/3, but by *istiḥsān* it is valid.<sup>390</sup> Identical reasoning appears in Case #123.<sup>391</sup>

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<sup>390</sup> Ibid., 4:127.

<sup>391</sup> Ibid., 4:128.

Another manifestation of language reasoning recognizes that speech takes time. In Case #141, a man tells his wife, “If I do not divorce you with a single divorce then you are triple divorced.” He then says, “I divorce you with a single divorce.” By *qiyās*, his wife is triple divorced, since for an instant between the two statements, he had not yet divorced her. However, since speech takes time, a condition of not having said something can only obtain after a reasonable amount of time. Therefore, by *istiḥsān*, his wife is only singly divorced.<sup>392</sup>

Of course, custom and language are intimately intertwined, as we see in Case #128. A merchant says to a customer, “I will sell this piece of clothing to you at a surplus of 15 over [the original price of] 10 (*bi-ribḥ al-‘ashara khamsat ‘ashar*).” By *qiyās*, the price should be 25, the literal surplus of 15 over 10. However, by *istiḥsān*, the final price is 15, since the merchant meant that 15 be the price at a surplus of 5 over the original price of 10. The jurist indicates that this is based on “the typical meaning of how people talk (*ma‘ānī kalām al-nās*).”<sup>393</sup>

Finally, language reasoning grapples with metaphor, such as in Case #147. A man tells his wife, “Choose between me and your family,” intending that she choose whether to stay with him or get divorced. By *qiyās*, this would not connote divorce, but by *istiḥsān* it

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<sup>392</sup> Ibid., 4:488.

<sup>393</sup> Ibid., 4:204.

does.<sup>394</sup> An interesting extension of this is Case #148. If the man says “Choose between me and your father” or “mother,” then by *istiḥsān* these can also connote divorce, since her parents metaphorically represent her home before marriage.<sup>395</sup> However, if the man says, “Choose between me and your sister,” or some other specific family member, then this cannot connote divorce even if intended as such, showing that the jurists do not grant legal authority to all metaphors. Still, this is not theoretically absolute. What if she was an orphan and was raised by her sister who is 20 years older and like a mother to her? Would her sister not then represent her home before marriage? One sees the difficult work *istiḥsān* does to bridge the exactitude of legal analogy with the obscurities of language.

### **Social Goals**

These types of reasoning secure particular social goals and legal ends. “Avoiding *Ḥadd* Punishments” could have fallen into this category, but it always functions leniently by definition. Meanwhile, in these types of reasoning, *istiḥsān* works in whichever direction brings about the desired result – sometimes leniently, sometimes stringently, sometimes neutrally – making them neutral as a whole.

### *Free Slaves*

The jurists make pronounced efforts through *istiḥsān* to free slaves who by *qiyās* would remain in bondage. 19 cases in our dataset exhibit this reasoning, making it the sixth

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<sup>394</sup> Ibid., 4:592.

<sup>395</sup> Ibid.

most common justification for *istiḥsān*. The cases largely function in the same way, so for the sake of brevity, we will limit our discussion to one case.

In Case #315, Michelle appears to be a free woman, but confesses that she is actually Cindy's slave. This confession is legally binding and Michelle becomes Cindy's slave. If Cindy sells Michelle, the sale is valid. What if Michelle now comes after the sale and claims that she is in fact free, contradicting her previous confession? Then she must produce witnesses to that effect. Even if she does, however, she would still be a slave by *qiyās*, but the jurist states, "I use *istiḥsān* in this and abandon *qiyās* because it is an outlet (*faraj*) for her."<sup>396</sup>

#### *Promoting the Social Status of Islam*

The jurists also use *istiḥsān* to promote the status of Muslims over non-Muslims. In Case # 241, Christians testify that another Christian committed murder, so the qadi sentences him to death, but then the murderer converts to Islam. By *istiḥsān*, he can no longer suffer execution and simply owes the blood-money.<sup>397</sup> Abū Ḥanīfa, Abū Yūsuf, and al-Shaybānī all shared this opinion. The questioner asks, "Why, when this involves the rights of other people (*ḥuqūq al-nās*)?" The jurist responds, "I use *istiḥsān* in this, because I would hate to kill a Muslim on the testimony of two infidels (*akrahu an aqtul musliman bi-shahādat kāfirayn*)."<sup>398</sup>

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<sup>396</sup> Ibid., 8:370.

<sup>397</sup> Ibid., 7:163.

<sup>398</sup> Ibid., 7:235. This is an alternative analogy of sorts, since witnesses against a Muslim in a *ḥadd* case must themselves be Muslim. This ruling extends that principle to when the perpetrator only later converts to Islam.

This reasoning also appears often regarding foundlings. In Case #295, a baby is found in a large Muslim city, then a *dhimmī*<sup>399</sup> claims the baby and accurately describes its features. The foundling becomes the *dhimmī*'s child, but by *istiḥsān* is still legally Muslim and the *dhimmī* must rear it as such.<sup>400</sup>

Finally, outside of our dataset, this reasoning appears in a notorious case of *istiḥsān* in Abū Yūsuf's *Kitāb al-Kharāj*. A Muslim who cuts off a non-Muslim's hand should by *qiyās* have his own hand amputated. However, by *istiḥsān*, Abū Yūsuf holds that the Muslim is not liable for amputation and only owes the blood-money.<sup>401</sup>

## Family Values

A major social goal that the jurists pursue through *istiḥsān* is family, giving family ties to people who might not otherwise have any, as well as ensuring that certain values and hierarchies are respected within the family.

### *Lineage and Clientage*

The jurists frequently use *istiḥsān* to grant lineage (*nasab*) or clientage (*walā'*) to someone who would otherwise not have any.

An example of lineage is the foundling. In Case #297, if a man claims a foundling and describes some of its physical characteristics, then *istiḥsān* considers the foundling his child,

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<sup>399</sup> Christians, Jews, or other religious minorities living under Muslim rule.

<sup>400</sup> Ibid., 8:74.

<sup>401</sup> Abū Yūsuf, *Kitāb al-Kharāj* (Cairo: al-Maṭba'a al-Salafiyya, 1933), 117.

even though by *qiyās* the testimony does not conclusively prove paternity. Another example is Case #63. If a man testifies that a boy born into his household is his slave, then he frees him, then he testifies that the boy is his son, then by *qiyās* the man must give additional evidence since he has contradicted his previous testimony. However, *istiḥsān* validates the man's claim and considers the boy his son, shifting the burden of evidence onto the first claim.<sup>402</sup>

*Istiḥsān* acts similarly to grant patronage (*walāʾ*) to newly freed slaves. Patronage bears many of the same social and financial obligations as family, such as inheritance, financial support, and paying indemnities/blood-money for those convicted of crimes. Thus, by maximising the number of people with family and/or patronage, the jurists seek the well-being of each individual and of society by minimising the number of people on public support.

We therefore see many cases granting clientage to a freed slave who would otherwise not receive it, but we will restrict this discussion to one. In Case #223, if a man testifies that his father freed a slave, and the father does not have any other heirs, then the slave goes free, but by *qiyās* has no clientage, because this would force the father into a big liability. However, by *istiḥsān*, the father is indeed forced to be the freed slave's patron.<sup>403</sup>

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<sup>402</sup> al-Shaybānī, *al-Aṣl*, 2:526. This case is also an example of "Free Slaves."

<sup>403</sup> *Ibid.*, 6:404.

### *Vested Interest in Family*

This reasoning recognizes that one's family can feel akin to oneself. In Case #286, if someone demands, "Give me your money or I will imprison your father," then by *qiyās* this does not count as coercion (*ikrāh*), but by *istiḥsān* it does.<sup>404</sup> In Case #359, if a man finds and returns a family member's runaway slave, then by *qiyās* he should receive the standard reward for returning a runaway (*ju'ī*). However, if the slave belongs to the man's parent, wife, or child, then by *istiḥsān* he does not receive the reward (*ju'ī*), since one customarily helps one's family without any expectation of compensation.<sup>405</sup>

### *Parental Priority*

A number of cases give deference to a parent over a child in a claim or dispute. Case #292 holds that if a slave woman is co-owned by a man and his son, then she gives birth and both claim the child as theirs, then by *istiḥsān* the claim automatically goes to the father.<sup>406</sup> Case #293 rules the same if the dispute is between a grandfather and grandson, and clarifies that in all other cases, the child is attributed to both of them.<sup>407</sup>

Case #393 extends this to financial support. If an elderly father is unable to provide for himself, then his adult son is obligated to support him. If the son refuses or is away travelling, then by *qiyās* the father would have to take the claim to the qadi. However, by

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<sup>404</sup> Ibid., 7:406.

<sup>405</sup> Ibid., 9:379.

<sup>406</sup> Ibid., 8:72.

<sup>407</sup> Ibid., 8:73.

*istiḥsān*, Abū Ḥanīfa rules that the father may sell off any of his son's possessions to support himself.<sup>408</sup> Abū Yūsuf and al-Shaybānī disagree.<sup>409</sup>

#### *Avoid Mixing Family Into Slavery*

One case avoids mixing family into slavery. In Case #196, John, a *mukātab* slave, makes Rachel, his slave-woman, a *mukātaba*. They then have relations and she bears his child. By *qiyās*, if Rachel later gives up on the *mukātaba* contract, then both her and her child come under John's full ownership again. However, by *istiḥsān*, only Rachel comes under John's ownership, while their child becomes owned by John's owner, who pays John the child's value. Why is this? The jurist explains, "I use *istiḥsān* in this, because I would hate (*akrah*) to make his son his own slave."<sup>410</sup>

#### *Patriarchy*

Finally, one ruling seems apparently attributable to patriarchy. In Case #390, if a slaveowner wants to marry off a slave (male or female) and the slave does not want to get married, then the slaveowner can still force the slave to get married. However, if the slave challenges the fact that a marriage occurred (e.g. instead of saying, "I did not want to get married!" says "My owner did not actually marry me off!"), then the marriage is invalid. However, Abū Ḥanīfa rules that this *qiyās* position only holds for a male slave, whereas for a

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<sup>408</sup> Though he cannot sell any of the son's land.

<sup>409</sup> al-Shaybānī, *al-Aṣl*, 10:341.

<sup>410</sup> *Ibid.*, 6:221.

female slave, *istiḥsān* takes the owner's claim over hers. Abū Ḥanīfa explains, "I use *istiḥsān* in the case of the slave-girl. I take his word over hers, and I validate the marriage even if she dislikes it."<sup>411</sup>

One could interpret this as an alternative analogy from the principle that a man's testimony is equivalent to that of two women, but this analogy is ill-fitting given that the slave woman is a claimant and not a merely a witness. Thus, an apparent justification surfaces here that a female slave, more than a male slave, cannot overrule her owner.

This makes explicit what has so far been implicit in this study. If *istiḥsān* is an inlet for jurists' sensibilities, it could also be an inlet for their biases. This echoes a common critique of the madhhab tradition, by both Salafis and modernists, that the madhhabs uphold many doctrines not actually called for by textual evidence. Modernists point to many rulings as being the result of the jurists' misogyny/racism/homophobia rather than religious text.<sup>412</sup> See the end of Chapter 5, as well as the dissertation's Conclusion, for further discussion on the paradoxes of juristic activism.

### **Better Legal Solutions**

By this type of reasoning, the jurists find a legal solution that better resolves the situation at hand. A famous example is Case #135, regarding if two brothers get married to

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<sup>411</sup> Ibid., 10:276.

<sup>412</sup> For an excellent discussion of the different facets of these arguments as they relate to legal reasoning, see Marion Katz, "Gender and Legal Fluidity," in *Locating the Shari'a: Legal Fluidity in Theory, History, and Practice*, ed. Sohaira Z.M. Siddiqui (Leiden: Brill, 2019), 50-1.

two sisters on the same day, but then each mistakenly enters upon the other's wife and spends the wedding night with her. By *qiyās*, the original marriages remain valid, leaving complicated paternity, discord within each marriage, tension between siblings, and inevitable social stigma.

*Istiḥsān* intervenes with a more elegant solution. Each brother should divorce their original wife, then marry the one with whom he had relations. As for bridal gifts, each brother pays the former wife half of a bridal gift (since they divorced without consummating their marriage), then pays the new wife a full bridal gift for the first time they had relations, then a full bridal gift for their contractual marriage. Both women thus receive two and a half bridal gifts, honouring them when they may have felt shame, while keeping their sexual relations with the same partner, simplifying paternity, and hopefully minimising gossip.<sup>413</sup>

Another entertaining example is Case #95, in which an infant's parents hire a wet nurse, but that wet nurse hires a different wet nurse to do it at a lower rate and pockets the difference. By *qiyās*, the parents should not pay the fraudster since she violated the contract. However, this is not ideal because if the parents do not pay the fraudster, then the fraudster might be unable to pay the real wet nurse. The fraudster could be declared in debt to the real wet nurse, but debts are not desirable legal solutions either. The parents could

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<sup>413</sup> al-Shaybānī, *al-Aṣl*, 4:383.

pay the real wet nurse directly, but this requires invalidating two contracts (parents to fraudster, fraudster to wet nurse) and requiring a payment where there was no contract (parents to wet nurse), which is legally inelegant and opens the door for further disputes.

*Istiḥsān* finds a better legal solution: the parents pay the fraudster and the fraudster pays the wet nurse, then donates any profits to charity. This way: 1) the child is nursed, 2) the child's parents pay the amount they were already happy to pay, 3) the wet nurse receives the amount she was already happy to receive, 4) the fraudster does not profit from her scheme, 5) both contracts are preserved, 6) there is no debt or necessity for further legal action, and 7) the charity morally beautifies an otherwise messy situation.<sup>414</sup>

#### *At Impasse, Split It*

In this subset of “Better Legal Solution,” *istiḥsān* makes disputing parties split what *qiyās* would not grant to either of them. In Case #78, Michael dies in debt to both Eric and Andrew. Eric testifies, “Michael gave me this house a mortgage (*rahn*) against the value of his debt to me.” Andrew testifies, “No, Michael gave *me* the house as a mortgage!” Ordinarily, the claim goes to whichever has the *rahn* in his possession, meaning whoever has the keys to the house. What if they both have keys? By *qiyās*, the *rahn* goes to neither of them, and Abū Yūsuf takes this position. However, by *istiḥsān*, the *rahn* is split between

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<sup>414</sup> Ibid., 3:461.

them evenly.<sup>415</sup> Case #453 similarly shows *istihsān* splitting a *rahn* which *qiyās* would not grant to any of the claimants.<sup>416</sup>

### **Defining Legal Consent**

These two types of reasoning regard someone as consenting when they did not explicitly consent.

#### *Assume Tacit Consent*

In these cases, *istihsān* assumes someone's tacit consent by their presence. In Case #50, Michael buys something from Emily saying that he will pay later and that Andrew is his guarantor. By *qiyās*, this contract would not be valid without Andrew's explicit consent.

However, if Andrew is present and does not object, he is assumed to have consented.<sup>417</sup>

Cases #206<sup>418</sup> and #451<sup>419</sup> are also good examples of this reasoning.

#### *Consent A Fortiori*

In these cases, *istihsān* assumes that if someone consents to paying an amount, they even more certainly consent to paying a lesser amount. In Case #447, Emily makes Rachel her agent to negotiate a settlement payment (*ṣulḥ*) with Andrew. Emily tells Rachel to offer something worth 10 dirhams. Rachel then offers something worth 20 dirhams, which

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<sup>415</sup> Ibid., 3:190.

<sup>416</sup> Ibid., 11:541. Case #453 is one of those cases where the jurists end up choosing the *qiyās* position over the *istihsān*.

<sup>417</sup> Ibid., 2:441.

<sup>418</sup> Ibid., 6:263.

<sup>419</sup> Ibid., 11:500.

Andrew quickly accepts. Once Emily hears of this, she can overturn it, since this was not what she had instructed Rachel to offer. However, if Rachel offers Andrew an item worth only 5 dirhams, and Andrew accepts it, then by *istihsān* this is legally final, since if Emily consented to paying 10 dirhams, she should *a fortiori* be even more willing to pay only 5.<sup>420</sup>

### **Legal Arrangements and Definitions**

These types of neutral *istihsān* stipulate certain arrangements and definitions, not for any moral or social goal, but to produce a ruling more reflective of reality.

#### *Currencies Are Interchangeable*

By *qiyās*, different currencies are distinct goods, whereas by *istihsān*, currencies are liquid and interchangeable mediums of exchange. Priority goes to the value underlying the currency over the form of the currency itself. The *Aṣl* articulates this with statements like, “I abandon *qiyās* here and use *istihsān*, because dirhams and dinars are equivalent (*sawāʾ*) in this.”<sup>421</sup> This liquidity has implications across many types of rulings.

This begins with Case #448, which has a complicated premise, but expresses a basic point:<sup>422</sup> if Michael lends Emily 1000 dirhams, Emily does not have pay Michael back with the exact coins he loaned her. She simply has to give him the same amount of the same currency.

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<sup>420</sup> Ibid., 11:471.

<sup>421</sup> Ibid., 2:506.

<sup>422</sup> Ibid., 11:489. The case in the *Aṣl* does not resemble this premise, but clearly relies upon the principle explained.

Most cases deal with moving between currencies. A fascinating example is Case #71, which specifically deals with when a currency completely loses value and is replaced by another currency. Suppose we are in Zimbabwe in the year 2000. A man takes a loan of 10,000 Zimbabwean dollars to be repaid after 15 years. However, in the years 2000-2010, the Zimbabwean dollar hyperinflated, going from an exchange rate of USD 1 = 100 ZWD in 2001 to USD 1 = 10<sup>30</sup> ZWD in 2009. Zimbabwe eventually eliminated the Zimbabwean dollar and transitioned fully to USD by 2015. Now in 2015, that man's loan repayment is due. Does he still owe 10,000 Zimbabwean dollars, when the currency is not even in use anymore? By *qiyās*, yes. However, by *istiḥsān*, Abū Yūsuf rules that the man must pay back the equivalent value in the new currency of the land (in our example, USD).<sup>423</sup> This is not simply an argument from fairness, for if he borrowed any other good, he would still owe the original good even if it had become worthless. This ruling hinges on the fact that a currency is a store of value, not a product in itself.

#### *Legal Minor Treated as Rational*

Another straightforward type of reasoning treats a pre-pubescent minor as an adult if they are rational (*ʿāqil*). For example, Case #61 rules that if a Christian owns a Christian slave who is pre-pubescent but rational (*ʿāqil*), and that slave converts to Islam, then by

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<sup>423</sup> Ibid., 3:17.

*qiyās* the conversion is not valid since the slave is still a minor. However, by *istiḥsān* the conversion is valid, and the Christian owner must free the slave or sell him to a Muslim.<sup>424</sup>

Cases #87 and #88 similarly rule that a pre-pubescent but rational minor can legally take possession (*qabḍ*) of a good in a transaction.<sup>425</sup> Case #88 partially clarifies the meaning of a rational (*‘āqil*) minor as someone who has not yet hit puberty while others their age have.<sup>426</sup> Therefore, while not pubescent, the minor likely has the same rational faculties as an adolescent just beginning puberty, so by *istiḥsān* takes on some of that legal status.

*“Food” Equals “Wheat”*

This peculiar variant of *istiḥsān* contractually defines “*ṭa‘ām* (food),” which by *qiyās* encompasses all foodstuffs, as only equivalent to wheat (*ḥinṭa*) and wheat products. In Case #38, if one swears not to buy any food, then by *qiyās* any kind of food would violate the oath, whereas by *istiḥsān*, only wheat, flour, bread, or other wheat products would.<sup>427</sup> One would think that this is a practical concession that allows the person to still be able to purchase food. However, the principle carries through to similar cases which have nothing to do with practicality. For example, Case #48 states that if someone makes another an agent to purchase food without specifying the food, then by *istiḥsān*, the agent is only entitled to

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<sup>424</sup> Ibid., 2:513.

<sup>425</sup> Ibid., 3:370-371.

<sup>426</sup> Ibid., 3:371.

<sup>427</sup> Ibid., 2:362.

purchase wheat products. The jurist explicitly states what appears to be a definition, “Food (*ṭa‘ām*) for us is wheat (*ḥiṭṭa*), we use *istiḥsān* in this.”<sup>428</sup>

The reason for this definition may be purely linguistic. Edward Lane, author of the dictionary of classical Arabic, defines *ṭa‘ām* as, “Food...of any kind...and especially *wheat*...to which it is applied by the people of the Hejaz, and *barley*...and *corn* in general...and *dates* when said not to mean wheat...and one says ‘*huwa yaḥtakir al-maṭā‘im*’ meaning ‘He collects and withholds wheat waiting for a time of scarcity and dearness.’”<sup>429</sup> Lane cites classical dictionaries to support all of these positions. Thus, it is clear that even by the time of the Hanafi founders, *ṭa‘ām* in common usage had come to mean food of any kind, and by *istiḥsān* they sought to restrict it to its technical definition of wheat, perhaps based on some conception of *sunna/athar* since Lane indicates that the people of Hejaz seem keen on the distinction.

No matter the explanation, these cases all exemplify a sophisticated alternative analogy in which a web of related rulings are termed *istiḥsān* only because they follow analogically from a single principle termed *istiḥsān*: the principle that *ṭa‘ām* means wheat. This exemplifies how *istiḥsān* sometimes functions as its own analogical regime.

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<sup>428</sup> Ibid., 2:424.

<sup>429</sup> Edward William Lane and Stanley Lane-Poole, *Arabic-English Lexicon* (Cambridge: Islamic Texts Society, 1984), 1854.

### *Enforce An Intention*

Some instances of *istiḥsān* define a statement or act by a person's intentions rather than the surface level reading obtained by *qiyās*. Case #150 states that if a man repeats a statement of divorce three times in one sitting, intending emphasis rather than multiple divorces, then by *qiyās* this would constitute a permanent triple divorce, whereas by *istiḥsān* it is still only a single divorce.<sup>430</sup> The same reasoning appears in Case #153. If a man declares that every slave he owns is free, then by *qiyās* this would not include slaves that he co-owns, but if he intended to include them, then by *istiḥsān* he gives up his shares of those slaves as well.<sup>431</sup>

### **Contractual Concerns**

A number of reasons work either to preserve the integrity of a contract or to ensure a fair outcome.

### *Fulfil Contract for Fairness*

This type of reasoning honours a technically invalid contract to ensure that all parties are fairly compensated. This is the fifth most common type of reasoning underlying *istiḥsān*, found in 24 cases. One set of cases applies this to *mukātaba* contracts, saying that if a

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<sup>430</sup> al-Shaybānī, *al-Aṣl*, 5:34.

<sup>431</sup> *Ibid.*, 5:78.

*mukātaba* contract is invalid, but the slave earns and pays the agreed-upon amount, then by *istiḥsān* the slave should still go free. This occurs in both Case #189 and Case #192.<sup>432</sup>

Cases outside of *mukātaba* similarly fulfil invalid contracts for fairness. In Case #360, a man rents a riding animal, agreeing to pay 100 dirhams if he rides it to Egypt but 70 dirhams if he rides it to Ramla (in Palestine). This form of contract is invalid, but if the man does actually ride the animal to one of the two places, then by *istiḥsān* he owes the corresponding amount.<sup>433</sup>

#### *Validate/Fix Contract*

In these cases, *istiḥsān* fixes contracts which by *qiyās* would dissolve. In Case #42, if Mariam gives Benjamin money to buy goods for her, then Benjamin discovers that the money is debased (*zuyūf*),<sup>434</sup> by *qiyās* the contract is invalid. However, by *istiḥsān*, Benjamin can go back to Mariam and exchange the bad money, then continue with the contract.<sup>435</sup>

Cases #74 and #75 show a different form of this reasoning, which is to reinterpret a contract to keep it valid. A man buys two items for 20 dirhams, one of them a piece of silver worth 10 dirhams. He pays 10 dirhams now and will pay the remaining 10 dirhams later. By *istiḥsān*, his payment must be interpreted as being entirely for the silver, otherwise the

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<sup>432</sup> Ibid., 6:205, 6:211.

<sup>433</sup> Ibid., 9:413.

<sup>434</sup> Meaning the silver/gold in the coins is heavily mixed with cheap metals.

<sup>435</sup> al-Shaybānī, *al-Aṣl*, 2:380.

transaction is usurious.<sup>436</sup> Indeed, even if he says explicitly that the 10 dirhams are for the other item, by *istiḥsān* they are interpreted as being for the silver, keeping the contract valid.<sup>437</sup>

#### *Naturally Part of Contract*

This reasoning recognizes things which, though not technically part of the contract, naturally follow from it. In Case #424, Jessica makes Eric her agent to buy wheat from the Euphrates. Eric does so, then rents an animal to carry the wheat back. By *qiyās*, Jessica does not have to pay for the rental since it was not mentioned in the contract, but by *istiḥsān*, Jessica must, because hauling the goods back is naturally part of buying them from a distant place.<sup>438</sup>

An even simpler example is Case #426. If Jessica makes Eric her agent to handle a debt, without specifically mentioning that Eric can receive repayment of that debt on her behalf, then by *istiḥsān* Eric can still receive repayment of the debt, since this is naturally part of serving as an agent to handle someone's debt.<sup>439</sup>

#### *Transaction Before Converting to Islam*

This set of cases regards when a non-Muslim transacts, then becomes Muslim. In Case #55, if a Christian buys wine from another Christian, but does not actually take

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<sup>436</sup> Ibid., 3:123.

<sup>437</sup> Ibid., 3:124.

<sup>438</sup> Ibid., 11:289.

<sup>439</sup> Ibid., 11:313.

possession (*qabḍ*) of the wine before converting to Islam, then by *qiyās* the sale is still valid, but by *istiḥsān* the sale is undone and the wine remains the property of the seller.<sup>440</sup>

In Case #67, if a Christian buys a slave girl, he is not required to wait until her next menstrual cycle before having relations with her (*istibrāʿ*), since this is not Christian law. If he buys her then converts to Islam, by *qiyās* he still would not be required to observe the *istibrāʿ*, since he took possession of her while he was Christian. However, by *istiḥsān*, he must.<sup>441</sup>

### *Bad Agent Decision*

This type of reasoning seeks to protect someone whose agent makes a bad decision. In Case #73, Jessica makes Eric her agent to buy a riding animal. Eric buys the animal, then discovers a flaw in it. Eric may either undo the sale or maintain it. If Eric chooses to maintain it, and the flaw is not fatal such that the animal is still useful, then the sale is final and Jessica must accept it. However, if the flaw is fatal, such that the animal is useless, then by *qiyās* if Eric still chooses to maintain the sale then Jessica would be stuck with it. However, by *istiḥsān*, if Jessica rejects the animal, then Eric is liable for the sale.<sup>442</sup>

### **Establishing Fact**

Two reasons establish legal fact in a way other than as *qiyās* would have mandated.

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<sup>440</sup> Ibid., 2:471.

<sup>441</sup> Ibid., 2:543.

<sup>442</sup> Ibid., 3:85.

*Women Know Their Bodies Best*

In menstruation, pregnancy, post-partum bleeding, menopause, and breastfeeding, *istihsān* defers some judgments to the woman involved, taking her word for whether a particular bodily function occurred (e.g. “Did she menstruate?”) or for the biological nature of the bodily function (e.g. “Was this bleeding menstrual or irregular?”).

A basic example is Case #139. A man tells his wife that she is divorced effective from her next menstruation. She tells him soon after that she has menstruated. By *qiyās*, this would not automatically trigger the divorce, which would require further evidence of its having occurred. However, *istihsān* defers to the woman’s word, so the divorce occurs.<sup>443</sup> This contrasts interestingly with Case #140. If the divorce is upon when the woman gives birth, and the woman says she has, then like the previous case, *qiyās* requires further evidence, whereas *istihsān* takes her word.<sup>444</sup> However, this is one of those rare cases where the jurists choose the *qiyās* over the *istihsān*, in this case because childbirth is a more significant event than menstruation and would typically involve other people. Thus, her midwives or family members must testify to establish whether she gave birth.

An entertaining tangent of these cases is #146, in which he husband tells his wife, “If you love me, then you are divorced.” It is clearly impossible to have legal certainty about

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<sup>443</sup> Ibid., 4:478.

<sup>444</sup> Ibid., 4:481.

her emotions, so again the wife's word prevails. If she says she loves him, they are divorced, and if she says she does not, then they remain awkwardly married.<sup>445</sup>

### *Reasonable Knowledge*

In some rulings, even if *qiyās* cannot establish certain knowledge, *istiḥsān* establishes reasonable knowledge. In Case #297, if a man can describe a foundling's physical features, then by *qiyās* this does not prove paternity. However, by *istiḥsān*, this gives reasonable knowledge, so coupled with the desire to give the child a family, the man is declared the child's father.<sup>446</sup>

### **Judicial Procedure**

These cases show concern for judicial procedure. In Case #349, Michael is Emily's agent, and Michael declares in the market one day that Emily has withdrawn her right for first purchase (*shuḥḥa*) of a property. By *qiyās*, this terminates Emily's right. However, by *istiḥsān*, Michael's declaration is only admissible in front of a qadi, and so Emily still has her right.<sup>447</sup>

In Case #251, if a qadi witnesses a theft, then by *qiyās* he should be able to apply the *ḥadd* punishment without the usual requirement of two witnesses, since the purpose of witness testimony is to prove to the qadi that the accused committed the crime. However,

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<sup>445</sup> Ibid., 4:574.

<sup>446</sup> Ibid., 8:74.

<sup>447</sup> Ibid., 9:285.

by *istihsān*, the qadi must still call two witnesses.<sup>448</sup> This same case appears in Abū Yūsuf's *Kitāb al-Kharāj*, where he states that this would be true even if the Caliph himself witnessed it.<sup>449</sup>

What if a qadi makes a ruling, then new evidence shows that the ruling was incorrect? In these cases, the jurists dislike undoing the qadi's judgment, so instead of amending the case, enforce a new solution by *istihsān*. For example, Case #217 concerns when a master and his *mukātab* slave dispute over the value that had been set for his freedom, the master saying they had agreed to 2000 dirhams and the *mukātab* insisting that they had agreed to 1000. The qadi rules in favour of the *mukātab* and frees him, then new evidence shows that the master was correct and the amount was 2000 dirhams. Is the *mukātab* returned into slavery to pay off the additional 1000? By *qiyās*, yes, but by *istihsān*, no, for as the jurist says, "I use *istihsān* in this and abandon *qiyās*, because the qadi has already judged for his freedom (*amdā 'itqahu*)." <sup>450</sup> The *mukātab* remains free and simply owes an additional 1000 dirhams.

### Unclear Reasoning

Our final type of "reasoning," found in 30 cases, connotes when the reasoning is not clear at all. This could be due to our own ignorance of a sunna/*athar* or alternative analogy

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<sup>448</sup> Ibid., 7:216.

<sup>449</sup> Abū Yūsuf, *Kitāb al-Kharāj* (Beirut: Dār al-Ma'rifa, 1979), 178.

<sup>450</sup> al-Shaybānī, *al-Aṣl*, 6:314.

relevant to the case. However, as mentioned in Chapter 2.4, even Abū Yūsuf and al-Shaybānī complained of Abū Ḥanīfa’s unclear reasoning. Of the 30 cases of “Unclear Reasoning,” 13 are attributed to Abū Ḥanīfa, while 5 are attributed to Abū Yūsuf and only 2 to al-Shaybānī. Meanwhile, Abū Yūsuf objects to 8 of Abū Ḥanīfa’s 13 cases of “Unclear Reasoning” and al-Shaybānī objects to 10. It is still most likely that an obscure alternative *qiyās* underlies most of these 30 cases. However, at a certain point, an “alternative” or “hidden (*khafī*)” *qiyās* becomes so alternative/hidden that it blurs the line with subjectivity. Later critics of *istiḥsān* complain about the opacity and apparent arbitrariness of many of these cases.

The prototypical cases of unclear *istiḥsān* show Abū Ḥanīfa making a particular ruling, then both Abū Yūsuf and al-Shaybānī disagreeing with it. For example, in Case #10, a questioner asks a jurist:

“If a man begins prayer standing, why have you allowed him (*rakhkhaṣṭa lahu*) to sit for the remainder of the prayer? Why is this not like the case of a man who says, ‘I swear by God to pray two prayer cycles (*raka‘āt*) standing?’” He responded, “They are equal by *qiyās*, but I use *istiḥsān* in this.” This is the opinion of Abū Ḥanīfa, whereas Abū Yūsuf and al-Shaybānī said, “[His sitting for the remainder of the prayer] is not valid.”<sup>451</sup>

It is not clear why Abū Ḥanīfa allows someone to change from standing to sitting in the middle of the prayer without excuse.

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<sup>451</sup> Ibid., 1:182.

This occurs again in the notorious Case #155. By *qiyās*, a *mukātab* slave cannot sell any relatives whom he owns. However, Abū Ḥanīfa rules by *istiḥsān* that, although the *mukātab* cannot sell his parent or child, he can sell any other relative.<sup>452</sup> In Case #218, Abū Ḥanīfa even makes it clear that the *mukātab* can sell his wife so long as she has not borne him a child.<sup>453</sup> Abū Yūsuf and al-Shaybānī disagree, upholding the prohibition on selling any *maḥram* relative.

The cases of “Unclear Reasoning” attributed to Abū Yūsuf (5 rulings) or al-Shaybānī (2 rulings) are nearly always simply in agreement with an existing ruling by Abū Ḥanīfa. A notable exception is Case #29, in which Abū Yūsuf stands out. If someone finds gold on someone else’s land, is the landowner entitled to it, or the one who found it? Both Abū Ḥanīfa and al-Shaybānī say that the landowner is entitled to it, based on *athar* from ‘Alī no less. However, Abū Yūsuf disagrees, saying, “As for me, I rule that [the gold] belongs to the one who found it. I use *istiḥsān* here.”<sup>454</sup> This is a surprising case in which Abū Yūsuf contradicts an *athar*. Again, it is unclear what justifies the *istiḥsān* here.

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<sup>452</sup> Ibid., 5:123.

<sup>453</sup> Ibid., 6:327. This case appears at least four more times in the *Aṣl*, making it one of the most prominent redundancies. Ibid., 5:155, 5:209, 5:336, 5:219.

<sup>454</sup> Ibid., 2:116.

### 3.5 Conclusion

This chapter has depicted how the Hanafi founders turned many of their pragmatic, social, and moral concerns into law. In particular, the stringent types of reasoning show how the Hanafi founders sometimes expanded the scope of the law to achieve these goals, intervening where the law would otherwise not intervene. If the authority to subjectively limit or amend law was not controversial enough, the Hanafi founders added onto this controversy with the authority to make law. We will see in the next chapter how it is precisely this type of authority to which al-Shāfi‘ī most objects. For now, it suffices to say that, while previous studies mostly group these many types of reasoning together under “fairness” or “necessity (*ḍarūra*),” this chapter has hopefully shown how teasing them apart can teach us much about the sensibilities and social visions of these jurists and the ends they sought to achieve. It is also critical to remember that these rulings become standard Hanafi doctrine, meaning that much of Hanafi *fiqh* is still imbued with these sensibilities.

## Chapter 4: The Controversy over *Istiḥsān* and Subjectivity in 9<sup>th</sup>- Century Iraq

Al-Shāfi‘ī was the first to refute *istiḥsān*. This chapter begins by distilling this refutation into four principles that together reveal one underappreciated fact: al-Shāfi‘ī was a legal minimalist. After that, the chapter proceeds from the hypothesis that, since Iraqi doctrine was replete with *istiḥsān* (as shown in Chapter 3), and since al-Shāfi‘ī explicitly refuted it, some Iraqis must have responded to him on the topic. This invokes a central question in the field of Islamic law: if al-Shāfi‘ī was so influential, where are the voices of his contemporaries responding to him?<sup>455</sup> It is in the debates surrounding *istiḥsān* that we find some of these voices.

The responders fall into two camps. The first, represented by Bishr al-Marīsī (d. 218/833), agrees with al-Shāfi‘ī, suggesting that some who would later be called Hanafi might have been more Shafii in their legal thought. The second, headlined by al-Jāḥiẓ (d. 254/868-9) and Muways b. ‘Imrān (d. early 3<sup>rd</sup>/9<sup>th</sup> century), disagrees with al-Shāfi‘ī, but only by embracing subjectivity as necessary for the proper functioning of the law. The chapter shows that this second camp even gains later adherents and develops a basic legal theory, implying the existence of a radical school of proto-Hanafis which did not survive into classical Hanafism. These radical Hanafis appear to have died out in the early 10<sup>th</sup>

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<sup>455</sup> See Wael Hallaq, "Was al-Shafi'i the Master Architect of Islamic Jurisprudence?". *International Journal of Middle East Studies* 25, no. 4 (1993): 587-605.

century. In all, this chapter depicts the clash between two legal visions, one that demanded objective proof, and another that endowed a jurist's wisdom with legal authority. It is clearly the former that triumphed.

#### 4.1 Al-Shāfi'ī's Four Arguments Against *Istiḥsān*

Al-Shāfi'ī refutes *istiḥsān* in two places in his corpus. One is a section of the *Risāla* entitled *Bāb al-Istiḥsān*.<sup>456</sup> The second is the treatise *Ibṭāl al-Istiḥsān* (The Invalidity of *Istiḥsān*), which appears in the *Umm*.<sup>457</sup> In both, al-Shāfi'ī unequivocally rejects *istiḥsān*, stating in the *Risāla*, "It is clearly forbidden (*ḥarām*) for anyone to rule by *istiḥsān*."<sup>458</sup>

Al-Shāfi'ī builds his argument upon four principles: (1) law must be based on what is apparent (*ẓāhir*), (2) law must be based on proof (*khabar lāzim*), (3) only scholars can make law, whereas *istiḥsān* would let anyone do so, and (4) *istiḥsān* makes God's law too variable. The *Risāla* contains only (2) and (3), while the *Ibṭāl* contains all four. This section analyses each argument to understand not only al-Shāfi'ī's stance on *istiḥsān*, but his broader legal vision. These arguments then form the bedrock of the later debates over *istiḥsān*.

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<sup>456</sup> al-Shāfi'ī, *al-Risāla*, 503-60.

<sup>457</sup> al-Shāfi'ī, *al-Umm*, 9:57-85. For a useful outline of the *Ibṭāl*, see Joseph E. Lowry, "A Preliminary Study of al-Shāfi'ī's *Ibṭāl al-Istiḥsān*: Appearance, Reality, and Legal Interpretation," in *ʿAbbasid Studies IV*, ed. Monique Bernards (Great Britain: Gibb Memorial Trust, 2013), 200-02.

<sup>458</sup> al-Shāfi'ī, *al-Risāla*, 504.

## Argument #1: Jurists Must Rule by What is Apparent (*ẓāhir*)

With this argument, which only appears in the *Ibṭāl*,<sup>459</sup> al-Shāfi‘ī insists that *istiḥsān* is invalid because jurists should rule only on the basis of what is apparent (*ẓāhir*). By this, al-Shāfi‘ī means to attack the many types of *istiḥsān* that base rulings on people’s hidden motives. Al-Shāfi‘ī states:

Whoever condemns people on the basis of something other than their outward appearances, on the basis that what they have made manifest implies something other than what they have made manifest...is not safe, in my view, from going against revelation and the sunna.<sup>460</sup>

Elsewhere, al-Shāfi‘ī writes, “[It is] forbidden (*ḥarām*) for a judge (*ḥākim*) to rule concerning any of God’s servants except with the best of what is apparent (*mā yazḥar*) and the most lenient (*akḥaff*) towards the one being judged.”<sup>461</sup>

The most obvious example of the Hanafis doing what al-Shāfi‘ī criticises here is “Guarding Against Ill Intent.” Chapter 3 discussed the famous cases of *ṭalāq al-firār* (divorce

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<sup>459</sup> There is considerable debate over whether this argument is part of the *Ibṭāl* at all. This is because a section in the middle of the *Ibṭāl*, marked off as *Bāb Ibṭāl al-Istiḥsān*, is the only section which explicitly mentions *istiḥsān*, while the section before it deals with ruling by what is *ẓāhir*. Given that in the *Fihrist*, Ibn al-Nadīm mentions a *Kitāb al-Ḥukm bi-l-Ẓāhir* immediately before mentioning *Kitāb Ibṭāl al-Istiḥsān*, and given that no separate *Kitāb al-Ḥukm bi-l-Ẓāhir* exists today, Schacht argues that the first half of what is usually called *Kitāb Ibṭāl al-Istiḥsān* is in fact this *Kitāb al-Ḥukm bi-l-Ẓāhir*, making the *Ibṭāl* a composite work. This dissertation agrees that the first part of the *Ibṭāl* is likely *Kitāb al-Ḥukm bi-l-Ẓāhir*, but this section shows how al-Shāfi‘ī links the topic intimately to *istiḥsān*, such that he intended the two to be read together. Ibn al-Nadīm, *al-Fihrist*, ed. Ibrāhīm Muḥammad Ramaḍān (Beirut: Dār al-Ma‘rifa, 1994), 296; Lowry, "A Preliminary Study of al-Shāfi‘ī's *Ibṭāl al-Istiḥsān*: Appearance, Reality, and Legal Interpretation," 180-81; Schacht, *The Origins of Muhammadan Jurisprudence*, 125n6.

<sup>460</sup> al-Shāfi‘ī, *al-Umm*, 9:65.

<sup>461</sup> *Ibid.*, 9:64.

to get out of giving inheritance), and the related ruling in Case #144 that if a woman on her deathbed apostatises then dies, by *istihsān* her husband should still inherit. To justify that ruling, Abū Yūsuf states, “By apostatising, she intends to invalidate his claim to her estate and prevent him from inheriting, so it is rejected because of her intention.”<sup>462</sup> This is precisely the type of reasoning to which al-Shāfi‘ī objects, and this bears out in his actual *fiqh*. Al-Shāfi‘ī states elsewhere in the *Umm* concerning a man who apostatises on his deathbed, “I hold that [his wife] still does not inherit, whereas she does inherit according to others (*fī qawl ghayrī*) because he is trying to get out of giving inheritance (*li-annahū fārrun min al-mīrāth*).”<sup>463</sup> Rather than read into his intentions, al-Shāfi‘ī rules based on what is apparent (*zāhir*), which is simply that the man apostatised.

Al-Shāfi‘ī uses Qur’an and sunna to argue that it is obligatory to rule by the *zāhir*. The Qur’an says that faith had not yet entered the hearts of certain bedouins who had recently converted,<sup>464</sup> but al-Shāfi‘ī notes that they were still treated as Muslims. Similarly, the Qur’an testifies that the hypocrites (*munāfiqūn*) were in their hearts unbelievers,<sup>465</sup> but al-Shāfi‘ī notes that still they had to be treated as Muslim “because they put up the appearances of faith (*bi-mā aẓharū min al-īmān*).”<sup>466</sup>

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<sup>462</sup> al-Sarakhsī, *Kitāb al-Mabsūṭ*, 6:163-64.

<sup>463</sup> al-Shāfi‘ī, *al-Umm*, 6:647.

<sup>464</sup> Q. 49:14.

<sup>465</sup> Q. 4:137.

<sup>466</sup> al-Shāfi‘ī, *al-Umm*, 9:64.

As for the sunna, al-Shāfi‘ī cites the case of a man who accused his wife of being pregnant from adultery. The Prophet stated, “If the baby comes out dark-skinned (*ashām*), black-eyed (*ad‘aj al-‘aynayn*), and with a large buttocks (*‘azīm al-alyatayn*), then I believe his accusation will have been true.”<sup>467</sup> The baby came out as such, causing the Prophet to say, “The matter seems clear now.” But even then, as al-Shāfi‘ī states, God did not provide any means (*sabīl*) for the adulterers to be punished, for without a confession or witnesses, “God has made no Earthly ruling against them possible (*abṭala fī ḥukm al-dunyā ‘alayhimā*).”<sup>468</sup>

In a similar case, a man said to the Prophet, “My wife gave birth to a black-skinned child.” Al-Shāfi‘ī states, “Most who hear this would say that, by this statement, the man has accused his wife of adultery,” the significance being that without witness testimony, he would be liable for slander. Al-Shāfi‘ī continues, “But the Prophet did not apply the *ḥadd* punishment to him, for his expression was not explicitly an accusation of adultery.”<sup>469</sup>

Al-Shāfi‘ī then draws on established *fiqh*, arguing, “We cannot invalidate transactions just by saying, ‘Here is a loophole (*dharī‘a*).’<sup>470</sup> or ‘Here is a bad intention.’”<sup>471</sup> To prove this, he makes a brilliant argument *a fortiori*. He first notes that, even if a party in a

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<sup>467</sup> Ibid.

<sup>468</sup> Ibid.

<sup>469</sup> Ibid.

<sup>470</sup> The Malikis are of course more notorious for *sadd al-dharā‘ī‘*, meaning closing the door to things which, though permissible, easily lead to the prohibited. His use of the term here likely indicates that his argument is not restricted to the Iraqis and also addresses the Medinans.

<sup>471</sup> al-Shāfi‘ī, *al-Umm*, 9:66.

transaction intends to do something prohibited, that transaction is still valid. For example, if someone buys a sword intending to commit murder, the sale is still valid,<sup>472</sup> and if a man marries a woman secretly intending to divorce her after one day, the marriage is still valid.<sup>473</sup> Having established this, al-Shāfi‘ī concludes:

If the Qur’an, sunna, and known laws...all show that transactions stand just by appearing valid and that the intentions of the parties involved cannot invalidate them...then transactions even more certainly (*awlā*) cannot be invalidated due to the suspicions of others about the intentions of the parties involved!<sup>474</sup>

Thus, according to al-Shāfi‘ī, the “mere suspicions” that jurists have about a party’s ill intentions cannot affect the ruling. In these cases, as al-Shāfi‘ī said before, the jurists must accept that God will hold people accountable in the next life, but in this life, “has made no Earthly ruling against them possible (*abṭala fī ḥukm al-dunyā ‘alayhimā*).”<sup>475</sup>

Al-Shāfi‘ī is clearly concerned here with the stringent types of *istiḥsān* which push the law beyond its usual boundaries, such as “Guarding Against Ill Intent” or “Punish Those Who Deserve It.” This is further confirmed by the fact that al-Shāfi‘ī equates ruling by the *ẓāhir* to lenience, saying that jurists must rule “with the best of what is apparent (*mā yazḥar*) and the most lenient (*akhaḥf*) towards the one being judged.”<sup>476</sup> Similarly, all of his examples

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<sup>472</sup> Ibid., 9:66-67.

<sup>473</sup> Ibid., 9:67. If these people commit these acts, then they have sinned, but their original transactions were valid.

<sup>474</sup> Ibid.

<sup>475</sup> Ibid., 9:64.

<sup>476</sup> Ibid.

are situations in which someone is likely guilty, but the law must stay uninvolved. This again shows the value of Chapter 3's overturning the stereotype that *istiḥsān* means lenience, for al-Shāfi'ī does not object to *istiḥsān*'s lenience, but its stringency. Thus, by his intervention, al-Shāfi'ī advocates legal minimalism, to limit juristic activism, and to insist that in some matters, God has left no path (*sabīl*) for worldly justice.<sup>477</sup>

Finally, the word *ẓāhir* in a legal context undoubtedly brings to mind the *Ẓāhirīs*, the famous literalists of Islamic law. While al-Shāfi'ī was certainly not a *Ẓāhirī* (they nominally rejected his beloved *qiyās*, let alone that they did not exist yet), his arguments in this section parallel some of theirs, a fact noted by the *Ẓāhirīs* themselves. Al-Jaṣṣāṣ narrates a story of the *Ẓāhirī* jurist Ibrāhīm b. Jābir (d. 310/922-3) being asked, "What compelled you to reject *qiyās* after having been for it?" Ibrāhīm responds, "I read al-Shāfi'ī's *Ibtāl*...and found that every argument he levelled against *istiḥsān* applied against *qiyās* too."<sup>478</sup> The later Hanafi scholar al-Ṭarsūsī (d. 758/1356)<sup>479</sup> puts this in the mouth of the founder of *Ẓāhirism*, Dāwūd b. Khalaf (d. 270/884).<sup>480</sup> This is not absurd since Dāwūd studied under al-Shāfi'ī's students and is described as having been a fanatical (*muta'aṣṣib*) Shafii until his rejection of

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<sup>477</sup> Ibid.

<sup>478</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, 4:226.

<sup>479</sup> The same scholar mentioned in Chapter 2 for authoring the work "Easing the Burden on the Brothers Concerning Cases in which *Qiyās* Overrides *Istiḥsān*."

<sup>480</sup> Najm al-Dīn al-Ṭarsūsī, *Tuḥfat al-Turk fī-mā Yajibu an Yu'mala fī al-Mulk*, ed. Raḍwān al-Sayyid (Beirut: Dār al-Ṭalī'a, 1992), 24.

*qiyās*.<sup>481</sup> This would align with the idea of him studying al-Shāfi‘ī’s arguments then realising that they also applied against *qiyās*. In any case, in the mid-9<sup>th</sup> to mid-10<sup>th</sup> century,<sup>482</sup> Zāhirīs discussed the links between al-Shāfi‘ī’s arguments in the *Ibtāl* and their own ideology. As for which arguments in the *Ibtāl* specifically, the Zāhirīs were likely not only referring to this first argument about the *zāhir*, but also the argument of our next section – the necessity of ruling by proof – for it is there where al-Shāfi‘ī argues for why *istiḥsān* is too subjective while *qiyās* is not, which is precisely the step of al-Shāfi‘ī’s argument that the Zāhirīs reject.

### **Argument #2: Laws Must Have Proof (*Khabar Lāzim*)**

This argument, found in both the *Ibtāl* and the *Risāla*, holds that a jurist cannot obligate or prohibit something without proof, again criticising the over-reach of stringent *istiḥsān*. Al-Shāfi‘ī holds that any law must be rooted in a *khabar lāzim*, meaning some report (*khabar*) which necessitates (*lāzim*) that ruling. He states, “It is not permissible (*lā yajūz*) for one who claims to be a judge (*ḥākim*) or a jurist (*mufti*) to rule without a *khabar lāzim*.”<sup>483</sup> This argument, along with the argument for the *zāhir*, become critical to later 9<sup>th</sup>- century debates on *istiḥsān* and subjectivity.

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<sup>481</sup> al-Dhahabī, *Siyar A‘lām al-Nubalā’*, 13:98.

<sup>482</sup> Al-Jaṣṣāṣ dates the story to the reign of al-Muttaqī (r. 329/940-333/944) whereas al-Zarkashī (d. 794/1392) dates the story to the reign of al-Musta‘īn (r. 248/862–252/866). al-Zarkashī, *al-Baḥr al-Muḥīṭ*, 8:102. Or one could accept al-Ṭarsūsī’s attribution of the story directly to Dāwūd b. ‘Alī (d. 270/884).

<sup>483</sup> al-Shāfi‘ī, *al-Umm*, 9:67.

As for what qualifies as a *khavar lāzim*, al-Shāfi‘ī gives the four sources, stating just after the previous quote, “And [*khavar lāzim*] is the Qur’an, then the sunna, then what scholars do not differ over, then *qiyās*. And it is not permissible (*lā yajūz*) to rule or judge by *istihsān* if that *istihsān* is uncalled for.”<sup>484</sup> This shows that the central thrust of the four sources theory is exclusionary, again reinforcing our image of al-Shāfi‘ī as a legal minimalist. The remainder of this section outlines al-Shāfi‘ī’s argument for the *khavar lāzim*, then why *qiyās* qualifies as a *khavar lāzim*.

Al-Shāfi‘ī first levels Qur’anic proofs for the *khavar lāzim*. He cites the verse, “Does man think that he will be left unguided (*sudā*)?”<sup>485</sup> then states, “Whoever rules or judges when not commanded to has let themselves become unguided (*sudā*), when God has informed them that they will not be left unguided.”<sup>486</sup> For al-Shāfi‘ī, creating law without explicit guidance violates this Qur’anic decree. Al-Shāfi‘ī also cites the verse, “Oh David, We have made you a ruler on the Earth, so rule between people with the truth.”<sup>487</sup> He explains, “None can ‘rule with the truth’ except that they also know the truth, and truth cannot be known except from God by text (*naṣṣ*) or indication (*dalāla*),”<sup>488</sup> i.e. not from *istihsān* by one’s own moral judgment or sensibilities.

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<sup>484</sup> Ibid., 9:68.

<sup>485</sup> Q. 75:36.

<sup>486</sup> al-Shāfi‘ī, *al-Umm*, 9:68.

<sup>487</sup> Q. 38:26.

<sup>488</sup> al-Shāfi‘ī, *al-Umm*, 9:69.

Al-Shāfi‘ī then cites the sunna as proof for the necessity of the *khbar lāzim*, noting instances in which the Prophet Muḥammad did not act based on his own judgement but rather awaited revelation. In one case, a woman came to complain to the Prophet Muḥammad about her husband, and as al-Shāfi‘ī states, “He did not give her a verdict until God revealed the verse, ‘God has heard the one complaining to you about her husband...’”<sup>489</sup> Similarly, a man came to the Prophet Muḥammad accusing his wife of adultery and the Prophet responded, “No revelation has come concerning you two,” and he awaited revelation, then when it came he called them back and judged as God had commanded.<sup>490</sup>

Al-Shāfi‘ī’s argument is that the Prophet Muḥammad would have been the most entitled to rule in the absence of revelation, but if even he did not, then others certainly may not.<sup>491</sup> Thus, al-Shāfi‘ī says, law can only proceed from revealed commands.<sup>492</sup> It is here that we can make sense of al-Shāfi‘ī’s famous quote, “Whoever uses *istiḥsān* has legislated

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<sup>489</sup> Q. 58:1. Ibid., 9:68.

<sup>490</sup> Ibid., 68-69. The judgment was *li‘ān*, a set procedure for when one spouse accuses the other of adultery, which ends with the spouses making oaths then their marriage ending.

<sup>491</sup> Another argument *a fortiori*.

<sup>492</sup> Al-Shāfi‘ī elaborates that these commands fall into two categories: *naṣṣ* and *juṃla*. For *naṣṣ* commands, God both commands the act and describes how to perform it (e.g. in the Qur’an, God both commands Muslims to perform ablutions and describes *how* to perform ablutions). For *juṃla* commands, God commands the act but does not describe how to perform it, leaving that to the sunna (e.g. in the Qur’an, God commands Muslims to pray, but does not describe how to pray, which is therefore known only through the sunna). al-Shāfi‘ī, *al-Umm*, 69.

(*man istahsana fa-qad shara'a*).<sup>493</sup> He means that jurists who use *istihsān* create law where God did not reveal any grounds for it (*khavar lāzim*), thus essentially creating their own law.

The question now is why *qiyās* qualifies as a *khavar lāzim*,<sup>494</sup> since, as al-Shāfi'ī says, *qiyās* is only an indication (*dalāla*), while the Qur'an and sunna are proof-texts (*naṣṣ*). It is this point in the argument which separates Shafiism from Zāhirism. Recall the Zāhirīs who said that they came to reject *qiyās* because they read al-Shāfi'ī's arguments against *istihsān* in the *Ibṭāl* only to find that the same arguments undermined *qiyās* as well. Thus, in the actual structure of the *Ibṭāl*, those Zāhirīs must have loved al-Shāfi'ī's proofs for the *zāhir* and the *khavar lāzim*, then been unconvinced by his argument for why *qiyās* is a *khavar lāzim*.

Regardless of how convincing it is, al-Shāfi'ī's argument for *qiyās* in the *Ibṭāl* is some of his finest hermeneutical work. Al-Shāfi'ī's proof for *qiyās* is the fact that God commanded Muslims to face the Ka'ba in prayer. How does this follow? Al-Shāfi'ī explains, "God commanded people to face [the Ka'ba], so whoever can see it finds it by sight...while others face it through indicants (*mutawajjih bi-dalāla*)."<sup>495</sup> What are those indicants? Al-Shāfi'ī

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<sup>493</sup> Al-Juwaynī appears to be the earliest citation for the statement. al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, ed. 'Abd al-'Azīm Maḥmūd al-Dīb, 20 vols. (Jeddah: Dār al-Minhāj, 2007), 18:473. Muḥyī al-Dīn Ibn 'Arabī (d. 638/1240), the mystic, argued that scholars had all misunderstood this statement and that al-Shāfi'ī actually meant it as praise. Muḥammad Bakhīt al-Muṭī'ī, *Nihāyat al-Sūl Sharḥ Minhāj al-Wuṣūl ilā 'Ilm al-Uṣūl*, ed. Muḥammad Ḥasan Ismā'īl and Aḥmad Farīd al-Mazīdī, 4 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1971), 4:367.

<sup>494</sup> The same question holds for *ijmā'*, but al-Shāfi'ī takes care of it briefly by rooting it in the well-known hadith that Muslims will never agree upon an error.

<sup>495</sup> al-Shāfi'ī, *al-Umm*, 9:71.

quotes the verse, “And signs (*‘alāmāt*), and by the stars they are guided.”<sup>496</sup> The indicants are natural phenomena, which is why God created “mountains whose locations [people] know, and a sun, and a moon, and stars...and winds whose directions [people] know and which point them towards [the Ka‘ba].”<sup>497</sup> Finally, al-Shāfi‘ī declares, “[God] commanded them to face [the Ka‘ba] by seeking these indicants, not their own *istiḥsān*, nor what comes to their hearts, nor what occurs to their whims without any indication (*dalāla*) that God created for them, because God decreed that he would not leave them unharnessed (*sudā*).”<sup>498</sup>

Al-Shāfi‘ī insists that God created all the indicants which man requires for judgment. Kecia Ali notes that for al-Shāfi‘ī, “to suggest a lack of clear guidance in a given situation implied a shortcoming in God's revelation.”<sup>499</sup> Thus, in the metaphor above, the Muslim who can see the Ka‘ba is akin to a jurist who faces a case with directly applicable evidence from Qur’an, sunna, or *ijmā‘*. It requires no further extrapolation. The Muslim who is distant from the Ka‘ba is like a jurist facing a case where no Qur’an, sunna, or *ijmā‘* exists. Here, the jurist cannot simply face whichever direction feels right (*istiḥsān*), but must use God’s revealed indicants to find the correct direction. For the jurist, the “stars” and “mountains”

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<sup>496</sup> Q. 16:16. He also quotes the verse, “And He is the One who made the stars for you so that you may be guided by them in the darkness of land and sea.” Q. 6:97.

<sup>497</sup> al-Shāfi‘ī, *al-Umm*, 9:71.

<sup>498</sup> Returning to the Qur’anic verse with which he started. One cannot help but appreciate the power of al-Shāfi‘ī’s rhetoric. *Ibid.*

<sup>499</sup> Kecia Ali, *Imam Shafi'i: Scholar and Saint*, Makers of the Muslim World (Oxford: Oneworld, 2011), 91.

are God’s commands and prohibitions, upon which the jurist builds *qiyās* to systematically derive new conclusions.

Finally, in cases where the indicants do not suffice, or where there are no relevant indicants at all, the Muslim cannot simply face in any direction and say, “The Ka’ba is this way.” Rather, the Muslim would have to concede that they do not know the direction of the Ka’ba. Similarly, if jurists cannot arrive at a verdict through the existing indicants, then they must hold back from giving any verdict at all, for this is a domain where God “has made no Earthly ruling possible (*abṭala fī ḥukm al-dunyā*).”<sup>500</sup> Again, al-Shāfi’ī advocates legal minimalism, restricting the acceptable sources of law, then restricting any legal activity outside of the bounds of those sources, in particular, stringent *istiḥsān* by which jurists create obligations and prohibitions where there were none.

### **Argument #3: Only Scholars Can Make Law**

While al-Shāfi’ī roots his first two arguments –the *ẓāhir* and the *khābar lāzim* – in proof-texts, he grounds his next two in logic and dialectics. Again, they form the bedrock of rhetorical arguments against *istiḥsān* which emerge later in the 9<sup>th</sup> century, as we will see at the end of this chapter. In this third argument, found in both the *Ibṭāl* and the *Risāla*, al-Shāfi’ī argues that *istiḥsān* blurs the line between scholars and laypeople, and that anyone who accepts *istiḥsān* would have to accept that laypeople are entitled to make law.

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<sup>500</sup> al-Shāfi’ī, *al-Umm*, 9:64.

In the *Risāla*, al-Shāfi‘ī articulates this argument in one sentence. He states, “If it were permissible to abandon *qiyās*, then it would be permissible for laypeople who are not scholars to make rulings by whatever *istiḥsān* pleases them.”<sup>501</sup> Here al-Shāfi‘ī distinguishes between two groups: 1) laypeople (*ahl al-‘uqūl*),<sup>502</sup> meaning anyone with normal rational faculties (*‘uqūl*), and 2) scholars (*ahl al-‘ilm*), meaning those with deep knowledge (*‘ilm*) of the Qur’an, sunna, and law.

Al-Shāfi‘ī takes as a shared premise with the Iraqis that only scholars are qualified to make law, then argues that *istiḥsān* would violate that premise. He shows this through a fascinating dialectical exchange with a hypothetical Iraqi:<sup>503</sup>

**Al-Shāfi‘ī:** “Why is it prohibited for laypeople, who have many of the same rational abilities as scholars, to rule on matters...in which there is no Qur’an, sunna, or consensus?”

**Hypothetical Iraqi:** “Because they have no knowledge of the [basic legal rulings upon which *qiyās* rulings are built].”<sup>504</sup>

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<sup>501</sup> al-Shāfi‘ī, *al-Risāla*, 505.

<sup>502</sup> In his translation of the *Risāla*, Lowry translates *ahl al-‘uqūl* as “rationalists,” intending some specific party of scholars that he believes al-Shāfi‘ī is criticising. This is unlikely, for the term occurs repeatedly in the *Ibtāl* to mean any “rational person,” and reading it this way in the *Risāla* gives the same argument found in the *Ibtāl*. *The Epistle on Legal Theory*, trans. Joseph E. Lowry, Library of Arabic Literature (New York: New York University Press, 2013), 363.

<sup>503</sup> al-Shāfi‘ī, *al-Umm*, 9:74.

<sup>504</sup> The word used is “*uṣūl*,” which in the early period does not mean *uṣūl al-fiqh*, but the set of major/foundational rulings (*uṣūl*) upon which *qiyās* builds derivative rulings (*furū‘*). This terminological overlap has confused many. For example, Ibn al-Nadīm’s *Fihrist* shows that several early authors wrote works entitled “*Kitāb Uṣūl al-Fiqh*,” leading some to cite these as early works of legal theory. Éric Chaumont does this with al-Shaybānī himself, writing, “al-Shaybānī seems also to be the author of a small number of writings on topics of legal theory...a *K. al-Istiḥsān* and a *K. Uṣūl al-Fiqh* are attributed to him in the *Fihrist*.” Chapter 2 already covered that *Kitāb al-Istiḥsān* is a conventional chapter of *fiqh* rather than legal theory. Similarly, *Kitāb Uṣūl al-*

**Al-Shāfi‘ī:** “But how can you claim it is necessary to know these basic legal rulings if you yourselves sometimes rule without them and without *qiyās* upon them?...If it is permissible for you to abandon them, then it is permissible for them to do so as well!”<sup>505</sup>

Thus, al-Shāfi‘ī argues that the only thing that differentiates scholars from laypeople is knowledge, and therefore their ability to make rulings *by virtue of* that knowledge. If their ruling is not by virtue of that knowledge, then it is no different from a layperson’s. Al-Shāfi‘ī drives this home with a thought experiment found in both the *Ibtāl* and the *Risāla*.<sup>506</sup>

If a man wants to assess the value of a slave, he would not ask just anyone to do so. He would not even ask a religious scholar. Rather, he would ask someone with knowledge of the market. Why? Because that person would base their assessment *upon* their knowledge of the market, and would “compare this slave to a different slave and analogise the two (*fa-yaqīsahu ‘alayhi*)” to find “how much a similar slave on that day would cost.”<sup>507</sup> Suppose that the man finds someone who knows the market conditions, but that person says, “By *qiyās* I have compared this item with a similar item...and the *qiyās* would determine that it is worth X, but I use *istihsān* and prefer a different amount.”<sup>508</sup> Al-Shāfi‘ī says that this renders the

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*Fiqh* is almost certainly not a work of legal theory, but more likely a treatise listing major legal rulings. Éric Chaumont, “al-Shaybānī,” *El*<sub>2</sub>.

<sup>505</sup> al-Shāfi‘ī, *al-Umm*, 9:74.

<sup>506</sup> *Ibid.*, 9:74-75; *al-Risāla*, 505-07. The two differ slightly but express the same principle. This summary more closely captures the variant in the *Risāla* since it is simpler.

<sup>507</sup> al-Shāfi‘ī, *al-Risāla*, 506.

<sup>508</sup> al-Shāfi‘ī, *al-Umm*, 9:75.

valuation meaningless, even though the person is of *ahl al-‘ilm*, such that before a judge, it would not be legally admissible.<sup>509</sup> Finally, al-Shāfi‘ī says that if this is true for a simple issue like market value, then it is even truer<sup>510</sup> for God’s commands and prohibitions.<sup>511</sup> These grave matters must be decided by scholars (*ahl al-‘ilm*) of requisite knowledge *by virtue of* that knowledge, not “mere conjecture (*ta‘assuf*) and *istihsān*.”<sup>512</sup> Scholars who judge by *istihsān* ignore that knowledge, making their judgment as valid as a layperson’s. This clever logical argument against *istihsān* becomes very popular and is echoed by many at the end of the 9<sup>th</sup> century, as we shall see at the end of the chapter.

#### **Argument #4: *Istihsān* Makes God’s Law Too Variable**

Al-Shāfi‘ī’s final argument against *istihsān* appears only in the *Ibtāl*. By this line of reasoning, *istihsān* is invalid because it allows for too much variation in the law. He writes:<sup>513</sup>

Suppose a ruler or jurist says that there is no provision for a certain case either in text or by analogy, and suppose they have recourse to *istihsān*. Would it not be incumbent upon them to concede to others the right to use *istihsān* to arrive at an entirely different ruling? Consequently, every ruler and jurist in the various cities would rule according to his own *istihsān* and there would be many contradictory rulings for the same case.

Furthermore, al-Shāfi‘ī says that if a layman happens to disagree with a jurist’s *istihsān*, then he could simply ignore it, for he is only obligated to obey God, while the jurist’s *istihsān* is

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<sup>509</sup> Ibid.

<sup>510</sup> Another argument *a fortiori*.

<sup>511</sup> al-Shāfi‘ī, *al-Risāla*, 507.

<sup>512</sup> Ibid.

<sup>513</sup> al-Shāfi‘ī, *al-Umm*, 9:75-76.

not grounded in God's command.<sup>514</sup> Thus, with *istiḥsān*, not only could every jurist come up with their own laws, but all laypeople could legitimately challenge those laws and prefer the laws of any other jurist (or as we saw in the previous section, make their own laws).

This ironically mirrors the anxiety that Ibn al-Muqaffa' and others expressed about *qiyās* a half-century earlier. As discussed in Chapter 1, Ibn al-Muqaffa' complains about *qiyās* causing, "contradictory rulings, the level of which has reached a grave degree...such that blood or intercourse are permissible...in one part of Kufa and prohibited in another."<sup>515</sup>

Again, one can see why, for some *Zāhirīs*, al-Shāfi'ī's arguments against *istiḥsān* also refuted *qiyās*. Al-Shāfi'ī is aware of this dilemma. If *istiḥsān* causes too much variation, then how does one understand differences of opinion that have nothing to do with *istiḥsān*?

Anticipating this, al-Shāfi'ī transitions in the *Ibtāl* to discussing the qualifications for legal scholars (*mujtahid*) and how to make sense of disagreements between them. These are not relevant for our purposes, so we shall end our discussion of al-Shāfi'ī's arguments here.

### ***Istiḥsān* in the *Fiqh* of al-Shāfi'ī and Aḥmad b. Ḥanbal**

Before moving on to the reception of these arguments in the 9<sup>th</sup> century, we must briefly resolve a common source of confusion: if al-Shāfi'ī rejected *istiḥsān*, then why does the term occasionally appear in his *fiqh*? The answer is quite simply that al-Shāfi'ī's uses of

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<sup>514</sup> Ibid., 9:76.

<sup>515</sup> Ibn al-Muqaffa', "Risāla fī al-Ṣaḥāba," in *Rasā'il Al-Bulaghā'*, ed. Muḥammad Kurd 'Alī (Cairo: Dār al-Kutub al-‘Arabiyya al-Kubrā, 1913), 125.

*istiḥsān* are mostly the “Limit Setting” variety which, as shown in Chapter 2, was theoretically distinct and entailed a jurist recommending an amount or limit in matters explicitly left up to human judgment. Some uses are then conventional alternative *qiyās*, and some are the purely colloquial meaning of *istiḥsān* as “to see something as good.”

10<sup>th</sup>- century Shafiis address the issue head-on by listing the handful of cases (at the most, six) in which al-Shāfi‘ī used the term. One of the earliest examples of this is in a manuscript housed in the Chester Beatty Library in Dublin entitled *al-Aqsām wa-l-Khiṣāl*, which the catalogue attributes to Ibn Surayj (d. 306/918),<sup>516</sup> but is in fact the work of a little-known Shafii named al-Khaffāf (d. mid-10<sup>th</sup> century).<sup>517</sup> The manuscript is a short work of *fiqh*, numbering 43 folios, but the first 4 folios consist of an introduction in which al-Khaffāf treats various theoretical points, making this manuscript one of the few extant writings on legal theory from the early 10<sup>th</sup> century. One section of this theoretical introduction is on *istiḥsān*. However, the entire section, only a few lines long, simply lists the 6 times that al-Shāfi‘ī used the term “*istiḥsān*” to describe one of his own rulings. The section reads as follows:

[Al-Shāfi‘ī used] *istiḥsān* in 6 places. These include: 1) considering marriage to be consummated by the spouses being alone with each other, for this is a type

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<sup>516</sup> Dublin: Chester Beatty Library, MS Arabic 5115 (43 fols., copied 660/1262).

<sup>517</sup> The error was only recently discovered by Ahmet Temel. Ahmet Temel, "The Missing Link in the History of Islamic Legal Theory: The Development of *Uṣūl al-Fiqh* between al-Shāfi‘ī and al-Jaṣṣāṣ During the 3rd/9th and Early 4th/10th Centuries" (PhD diss., University of California, Santa Barbara, 2014), 22-23. The manuscript has received a preliminary study from El Shamsy. Ahmed El Shamsy, "Bridging the Gap: Two Early Texts of Islamic Legal Theory," *Journal of American Oriental Society* 137, no. 3 (2017).

of *istiḥsān*; 2) the acceptance of evidence of a judge writing to another judge, for that is *istiḥsān*; 3) the time of *shuḥṭa*<sup>518</sup> being 3 days is *istiḥsān*; 4) making someone swear on a copy of the Qurʾan is *istiḥsān*; 5) the *mutʿa* being 30 dirhams is *istiḥsān*; 6) what al-Shāfiʿī mentioned of using *istiḥsān* for the *mursal*<sup>519</sup> reports of Saʿīd b. al-Musayyab.<sup>520</sup>

A nearly identical list appears in another work of the same era, the *Kitāb al-Talkhīṣ* of Ibn al-Qāṣ (d. 335/946-7), who was a direct student of Ibn Surayj, in a section entitled, “The Chapter on Imitation (*Taqīd*), *Istiḥsān*, and the Acceptance of *Mursal* Reports.” In this list, Ibn al-Qāṣ only lists three cases, corresponding to al-Khaffāf’s (3), (4), and (5), while (6) appears in his discussion of *mursal* reports and is not called *istiḥsān*.<sup>521</sup> Together, these lists show that al-Shāfiʿī’s uses of *istiḥsān* do not fall into the technical definition with which we are concerned, and that later jurists and theorists all recognized this type of *istiḥsān* as conceptually distinct from the controversial one.<sup>522</sup>

Like al-Shāfiʿī, Aḥmad b. Ḥanbal (d. 241/855) also used the term in his *fiqh* despite his denunciation of *istiḥsān*.<sup>523</sup> This triggered a more substantial disagreement over the topic

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<sup>518</sup> The “right of first purchase” for a neighbor when a property goes on sale.

<sup>519</sup> *Mursal* reports refer to those missing a Companion in the chain (*isnād*), meaning they go straight from a Successor (*tābiʿī*) to the Prophet Muḥammad.

<sup>520</sup> MS Arabic 5115, fol. 4b.

<sup>521</sup> Ibn al-Qāṣ, *al-Talkhīṣ*, ed. ʿĀdil Aḥmad ʿAbd al-Mawjūd and ʿAlī Muḥammad Muʿawwad (Mecca: Maktabat Nizār Muṣṭafá al-Bāz, 1999), 74.

<sup>522</sup> See Chapter 2’s discussion of al-Jaṣṣāṣ’s treatment of “Limit Setting.” Also see al-Zarkashī, *al-Baḥr al-Muḥīṭ fi Uṣūl al-Fiqh*, 6:95.

<sup>523</sup> For his denunciation, see George Makdisi, “Ibn Taymiyya’s Autograph Manuscript on *Istiḥsān*,” in *Arabic and Islamic Studies in Honor of Hamilton A. R. Gibb*, ed. George Makdisi (Leiden: Brill, 1965), 454. For examples of his using it, see Felicitas Opwis, “The Construction of Madhhab Authority: Ibn Taymiyya’s Interpretation of Juristic Preference (*Istiḥsān*),” *Islamic Law and Society* 15, no. 2 (2008): 222.

among later Hanbalis, as evidenced by Ibn Taymiyya's (d. 728/1328) treatise on the topic, which has been the subject of multiple studies.<sup>524</sup> Unlike al-Shāfi'ī, Aḥmad did occasionally use *istiḥsān* very technically to mean alternative *qiyās* rather than just "Limit Setting", but he never showed the types of reasoning that we saw from the Hanafis in Chapter 3. Thus, the Hanbali debate over Aḥmad's use of *istiḥsān* did not deal with subjectivity.<sup>525</sup>

Overall, al-Shāfi'ī objects to *istiḥsān* for 1) allowing rulings not based on the apparent (*ẓāhir*), 2) allowing rulings not based on proof (*khabar lāzim*), 3) giving laypeople the right to make law, and 4) causing too much legal variation and anarchy. So how did Iraqis, their doctrine replete with *istiḥsān*, respond? Two fascinating lines of thinking emerge, one which agrees and another which disagrees. Tracing these lines reveals much about the unpredictable intellectual milieu of 9<sup>th</sup>- century Iraq.

## 4.2 A Response Agreeing with al-Shāfi'ī: Bishr al-Marīsī

This section tells the surprisingly dramatic story of an unexpected friendship: that of al-Shāfi'ī and Bishr al-Marīsī (d. 218/833). Bishr is known to Western scholarship, but he has been studied almost exclusively for his theology. No studies have dealt substantially with Bishr's legal thought even though he was one of the foremost Iraqi jurists in the

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<sup>524</sup> First published in full in Makdisi, "Ibn Taymiyya's Autograph Manuscript on *Istiḥsān*." For studies of it, see: Abdul-Hakim al-Matroudi, "Ibn Taymiyyah's Evaluation of *Istiḥsān* in the Ḥanbalī School of Law," *Islamic Studies* 47, no. 2 (2008); Ahmad Shaleh, "Ibn Taymiyya's Concept of *Istiḥsān*" (MA diss., McGill University, 1995); Opwis, "The Construction of Madhhab Authority."

<sup>525</sup> As Opwis shows, the debate revolved around different theories of *qiyās*, and particularly *takḥṣīs al-ʿilla* (specification of the *ratio legis*), which we will discuss in Chapter 5. Ibid.

generation after Abū Yūsuf and al-Shaybānī.<sup>526</sup> Bishr's legal thought is very relevant to our study, for as this section discovers, he categorically rejected *istiḥsān*. How did Bishr, a direct student of the Hanafi founders, come to reject *istiḥsān*? What makes Bishr a Hanafi if he rejected *istiḥsān* and adopted many of al-Shāfi'ī's rulings? Why do the Hanafis cite Bishr in their works of *fiqh* when, in the words of theologians and biographers, he was a heretic worthy of crucifixion? These questions reflect many of the dilemmas of Islamic legal history in the 9<sup>th</sup> century.

This section addresses these questions by offering perhaps the first profile of Bishr the jurist, towards understanding not only the debate surrounding *istiḥsān*, but also the nature of Iraqi responses to al-Shāfi'ī. This section has two major implications: 1) some 9<sup>th</sup>-century Iraqis later claimed as Hanafi might have been more Shafii in their legal thought, and 2) al-Shāfi'ī had a demonstrable effect on his contemporaries.

### **How Bishr Became One of the Foremost Jurists of Iraq**

Bishr b. Ghiyāth (d. 218/833) was born to a Kufan Jewish family. He converted to Islam as an adolescent then moved to Baghdad.<sup>527</sup> Some claim that Bishr attended a few of Abū Ḥanīfa's final lessons before the latter's death in 150/767 (Bishr was probably born in

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<sup>526</sup> By far the finest study of Bishr's legal thought is a section of a PhD dissertation by Aḥlām Bāḥamdān, though her focus is still overwhelmingly on his theology. Aḥlām Muḥammad Sa'īd Bāḥamdān, "Bishr al-Marīsī wa-Ārā'uḥu al-I'tiqādiyya Ta'aththuran wa-Ta'thīran" (PhD diss., Umm al-Qura University, 1998).

<sup>527</sup> al-Khaṭīb al-Baghdādī, *Tārīkh Baghdād*, 7:531.

138/755-6, making him 12 when Abū Ḥanīfa died).<sup>528</sup> More certain is that Bishr attended Abū Yūsuf's popular *fiqh* lessons for many years.

In those years, Bishr excelled as one of Abū Yūsuf's most distinguished students. The famous historian al-Dhahabī (d. 748/1348) writes, "He learned *fiqh* from Abū Yūsuf, excelling in it and perfecting the craft,"<sup>529</sup> echoed by Ibn Taghrībirdī (d. 874/1470) who writes, "He learned *fiqh* from Abū Yūsuf and distinguished himself."<sup>530</sup> Precocious and hard-working, he quickly became one of Baghdad's premier jurists. They called him "the leader of the jurists (*sayyid al-fuqahā'*)"<sup>531</sup> and "from among the great jurists (*min kibār al-fuqahā'*)".<sup>532</sup> Another source names him as one of Abū Ḥanīfa's ten major followers of the time, the others being the "who's who" of early Hanafism (Abū Yūsuf, al-Shaybānī, Zufar, etc).<sup>533</sup>

These same sources praise not only his juristic prowess, but also his piety. One report states, "He was a man of sincere faith (*dīn*) and scrupulousness (*wara'*)."<sup>534</sup> Another

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<sup>528</sup> Muḥammad 'Abd al-Ḥayy al-Laknawī, *al-Fawā'id al-Bahiyya fī Tarājim al-Ḥanafīyya*, ed. Muḥammad Badr al-Dīn al-Na'asānī (Cairo: Maṭba'at al-Sa'āda, 1324/1906-7), 54.

<sup>529</sup> al-Dhahabī, *Mizān al-Itidāl fī Naqd al-Rijāl*, ed. 'Alī Muḥammad al-Bijāwī, 4 vols. (Beirut: Dār al-Ma'rifa, n.d.), 1:322.

<sup>530</sup> Ibn Taghrībirdī, *al-Nujūm al-Zāhira fī Mulūk Miṣr wa-l-Qāhira*, 16 vols. (Cairo: Wizārat al-Thaqāfa wa-l-Irshād al-Qawmī, 1963), 2:228.

<sup>531</sup> al-Dārimī, *Naqd al-Imām Abī Sa'īd 'Uthmān b. Sa'īd 'alā al-Marīsī al-Jahmī al-'Anīd*, ed. Abū 'Āṣim Muḥammad al-Shawāmī (Cairo: al-Maktaba al-Salāmiyya, 2012), 24. This exchange actually shows the caliph calling him "sayyid al-fuqahā'," then another scholar doing so facetiously. Found also in al-Khaṭīb al-Baghdādī, *Tārīkh Baghdād*, 7:531.

<sup>532</sup> al-Dhahabī, *Siyar A'lām al-Nubalā'*, 10:200.

<sup>533</sup> Muḥammad al-Shahrastānī, *al-Milal wa-l-Niḥal*, ed. Aḥmad Fahmy Muḥammad, 3 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1992), 2:46.

<sup>534</sup> al-Dhahabī, *Siyar A'lām al-Nubalā'*, 10:200.

report describes him as so scrupulous that he refused to marry any woman within ten years of his age in case she might be his nursing-sister,<sup>535</sup> and that he refused to have relations with his wife after nightfall in case, her face obscured by darkness, the woman might not in fact be his wife.<sup>536</sup>

It is shocking that this praise survives in biographies by later scholars who simultaneously call Bishr a heretic. Indeed, biographical entries on Bishr contain some of the harshest language found in the genre. The famous *Tārīkh Baghdād* reports statements like:<sup>537</sup>

- 1) “May God not have mercy on him. He was a hypocrite.”
- 2) “He is an infidel (*kāfir*). It is permissible to spill his blood.”
- 3) “He should be asked to repent, and if he does not, he should be beheaded.”

The famous *Siyar Aʿlām al-Nubalāʾ* similarly reports the statement of a qadi upon hearing one of Bishr’s heresies, “Get me another witness and we’ll crucify him.”<sup>538</sup>

Given Bishr’s association with the *miḥna*, one expects the accusations of heresy, as well as the *ad hominem* attacks that he was “short and ugly, with dirty clothes and wispy

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<sup>535</sup> As in, any woman 10 years younger to 10 years older could have nursed from one of the same women as he did without anyone remembering, in which case it would be impermissible for him to marry her. Ibid.

<sup>536</sup> Ibid., 10:200-01.

<sup>537</sup> al-Khaṭīb al-Baghdādī, *Tārīkh Baghdād*, 7:531.

<sup>538</sup> al-Dhahabī, *Siyar Aʿlām al-Nubalāʾ*, 10:200.

hair,”<sup>539</sup> or that he frequently fell asleep and snored in Abū Yūsuf’s lessons.<sup>540</sup> However, one does not expect the praise of his juristic prowess and ascetic piety. This is strong evidence for the reliability of his reported prominence as a jurist in 9<sup>th</sup>- century Iraq.

A second strong indication is that, despite his poor reputation, Bishr’s opinions are frequently cited in works of classical Hanafism. Khalīl al-Mays counts that al-Sarakhsī cites Bishr 23 times in the *Mabsūt*,<sup>541</sup> making Bishr the tenth most cited Hanafī<sup>542</sup> and the sixth most cited 9<sup>th</sup>- century Iraqi. This makes him one of only a handful of Abū Yūsuf’s students whose opinions survive in any meaningful way.

More startling is that, while one would expect Bishr’s name to recede after the 11<sup>th</sup> century due to his reputation, evidence shows that he only grew more prominent. Christopher Melchert finds that in a 189-page sample from the *Bināya* of Badr al-Dīn al-ʿAynī (d. 855/1451), Bishr is the sixth most cited figure *including* the Hanafi founders,<sup>543</sup> meaning

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<sup>539</sup> al-Khaṭīb al-Baghdādī, *Tārīkh Baghdād*, 7:531.

<sup>540</sup> Ibid. Interestingly reported by Aḥmad b. Ḥanbal.

<sup>541</sup> Our own count later in this section puts this number over 30, but we preserve al-Mays’s number here to compare it to his counts for other scholars. Khalīl al-Mays, *Fahāris al-Mabsūt li-Shams al-Dīn al-Sarakhsī* (Beirut: Dār al-Maʿrifa, 1980).

<sup>542</sup> Christopher Melchert gives a useful table of al-Mays’s counts along with dates and locations of the scholars named. Sorting this table by number of mentions shows that Bishr is the tenth most cited Hanafi. He is the 15<sup>th</sup> most cited figure overall, but we can exclude Mālik, al-Shāfiʿī, and the three Hanafi founders. Christopher Melchert, "The Early Ḥanafīyya and Kufa," *Journal of Abbasid Studies* 1, no. 1 (2014): 33-34.

<sup>543</sup> Ibid., 33.

he only trails Abū Ḥanīfa, Abū Yūsuf, al-Shaybānī, Zufar, and al-Luʿluʿī (d. 204/819-20).<sup>544</sup>

This result is so surprising that one is tempted to attribute it to a sampling error.

Thus, in scholarly memory, Bishr is on the one hand an infidel (*kāfir*), a hypocrite (*fāsiq*), a heretic (*zindīq*), and an innovator (*mubtadiʿ*) worthy of decapitation and crucifixion, and on the other hand a scrupulous ascetic, “one of the great jurists,” “the leader of the jurists,” one of a handful of Abū Yūsuf’s students whose opinions survive in classical Hanafism, and one whose opinions continue to survive even as his contemporaries fall out of mention. Bishr is an enigma, but within this enigma lies one of the earliest responses to al-Shāfiʿī. Let us return, then, to the tale at hand: Bishr goes on Hajj and has a chance meeting with al-Shāfiʿī.

### **How Bishr and al-Shāfiʿī Became Friends**

The circumstances of Bishr and al-Shāfiʿī’s meeting beautifully illustrates the scholarly cosmopolitanism of the Hajj. We can tentatively date their meeting to the last 5 years of the 8<sup>th</sup> century, after the death of Mālik (d. 179/795), still during the reign of Hārūn al-Rashīd (r. 170/786 – 193/809), when al-Shāfiʿī lived between Mecca and Medina with a brief spell in Yemen. In one of these years, Bishr travelled from Baghdad to Mecca with a number of Iraqi scholars including al-Shaybānī himself. While there, Bishr and al-Shaybānī visit Masjid al-Khayf in the Mina neighbourhood of Mecca. Accompanied by the Meccan

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<sup>544</sup> Al-Ḥasan b. Ziyād al-Luʿluʿī was a Baghdadi qadi who studied with Abū Ḥanīfa, Abū Yūsuf, and Zufar. al-Dhahabī, *Siyar Aʿlām al-Nubalāʾ*, 10:543.

historian Abū al-Walīd al-Azraqī (d. ca. 250/864-5), they encounter al-Shāfi‘ī.<sup>545</sup> As the report goes:

[Al-Shaybānī] greeted al-Shāfi‘ī...with, “Oh father of ‘Abd Allāh! I hear you’ve authored a work<sup>546</sup> refuting our school. I’d like to debate you on it.” Al-Shāfi‘ī responded, “I would rather not, for debate scars the heart, whereas I feel friendship towards you.” So [al-Shāfi‘ī] refused [to debate], but [accepted] that [al-Shaybānī] raise objections [to which he would respond]. So they debated in this way, and in the end al-Shāfi‘ī tore him apart<sup>547</sup> on all kinds of questions. So al-Azraqī...asked Bishr, “What did you think of our companion compared with yours?” Bishr responded, “Yours was atop the very crest of the ocean (*thabaj al-baḥr*), while ours was gargling with its froth (*yatamaḍmaḍ min thimādiḥā*).”<sup>548</sup>

Bishr was clearly impressed by al-Shāfi‘ī, and upon returning to Baghdad, spread word of him. Bāḥamdān notes that Bishr was one of a few scholars reported to have made al-Shāfi‘ī famous in Baghdad before al-Shāfi‘ī had ever visited, the others being Aḥmad b. Ḥanbal (d. 241/855) and Ishāq b. Rāḥawayh (d. ca. 238/853).<sup>549</sup> Bishr described al-Shāfi‘ī as, “A man I

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<sup>545</sup> The story does not appear in al-Azraqī’s *Kitāb Akhbār Makka*, nor does Bishr appear at all. Al-Shāfi‘ī appears once but only in the chain of a hadith. This does not necessarily undermine the story since al-Azraqī’s work narrates existing reports about historical events, not his own experiences and current events. Abū al-Walīd al-Azraqī, *Akhbār Makka wa-mā jā’a fi-hā min al-Āthār*, ed. Rushdī al-Ṣāliḥ Malḥas, 2 vols. (Beirut: Dār al-Andalus li-l-Nashr, 1983).

<sup>546</sup> This could be a reference to any of 1) *al-Radd ‘alā Muḥammad b. al-Ḥasan*, 2) *Ikhtilāf al-‘Iraqiyyayn*, or 3) *Ikhtilāf ‘Alī wa-Ibn Mas‘ūd*. However, this would disagree with El Shamsy’s dating of these works to after al-Shāfi‘ī’s first visit to Iraq. Ahmed El Shamsy, *The Canonization of Islamic Law* (New York: Cambridge University Press, 2013), 150.

<sup>547</sup> Literally “*qaṭa‘ahu*.”

<sup>548</sup> Abū Bakr al-Bayhaqī, *Manāqib al-Shāfi‘ī*, ed. Aḥmad Ṣaqr, 2 vols. (Cairo: Maktabat Dār al-Turāth, 1970), 1:200. Another story has the three of them first meeting in Raqqa in 180/796-7, when al-Shāfi‘ī was summoned to the caliphal court to respond to charges of aiding a rebellion in Yemen.

<sup>549</sup> Bāḥamdān, “Bishr al-Marīsī wa-Ārā’uhu al-‘itiqādiyya Ta’aththuran wa-Ta’tḥiran,” 175.

saw in Mecca with half of humanity's intelligence."<sup>550</sup> To others, Bishr said "I saw a young man in Mecca....I do not fear for our school of thought from anybody except for him."<sup>551</sup> At Hajj, Bishr had also studied with Mecca's great hadith masters, but it was al-Shāfi'ī who impressed him.<sup>552</sup>

This respect was apparently mutual, for when al-Shāfi'ī visited Baghdad a few years later, he stayed in Bishr's home.<sup>553</sup> It was likely the ensuing period of close friendship and intellectual exchange that caused Muḥammad b. Ḥusayn al-Āburri (d. 363/974),<sup>554</sup> in his work *Manāqib al-Shāfi'ī*, to call Bishr one of al-Shāfi'ī's close associates.<sup>555</sup> It was also likely in this period that al-Shāfi'ī had his tremendous effect on Bishr's legal thought. However, it was all not to last.

### **Bishr and al-Shāfi'ī Grow Apart**

The beginning of the end for Bishr and al-Shāfi'ī came from an unexpected source: Bishr's mother. Al-Shāfi'ī himself tells the tale:

I entered Baghdad and stayed with Bishr al-Marīsī, who provided me with a room. Then one day his mother said to me, "Why have you come to stay with

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<sup>550</sup> al-Bayhaqī, *Manāqib al-Shāfi'ī*, 1:201.

<sup>551</sup> Bāḥamdān, "Bishr al-Marīsī wa-Ārā'uḥu al-I'tiqādiyya Ta'aththuran wa-Ta'thīran," 175.

<sup>552</sup> Namely Ḥammād b. Salama (d. 167/783) and Sufyān b. 'Uyayna (d. 198/814). Sufyān was also reported to have criticised Bishr for his views on the createdness of the Qur'an. A.J. Arberry, "A Hanbali Tract on the Eternality of the Qur'an," *Islamic Quarterly* 3, no. 1 (1956): 32.

<sup>553</sup> al-Bayhaqī, *Manāqib al-Shāfi'ī*, 1:229.

<sup>554</sup> al-Dhahabī, *Siyar A'lām al-Nubalā'*, 16:299-301.

<sup>555</sup> Tāj al-Dīn al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, ed. Maḥmūd Muḥammad al-Ṭanāḥī and 'Abd al-Fattāḥ al-Ḥulw, 10 vols. (Cairo: Maṭba'at 'Īsā al-Bābī al-Ḥalabī, 1964), 3:147-48.

him?” I responded, “To learn from him.” She responded, “He’s a heretic (*zindīq*).”<sup>556</sup>

In another narration, Bishr’s mother came to al-Shāfi‘ī with more sympathy for her son, saying, “My son admires and loves you, and when you’re mentioned around him he praises you, so tell him to forgo these things he’s been saying that cause people to oppose him, and to speak of things that will cause people to admire and love him.”<sup>557</sup> As the next reports show, she means for Bishr to stop talking about theology and stick to law.

This triggers several confrontations between Bishr and al-Shāfi‘ī. Al-Shāfi‘ī says, “Bishr’s mother told me to talk to him and get him to step away from theology (*kalām*). When I spoke to him, he brought me close and said, ‘[What I speak of] is faith!’ I responded, ‘It is your own mother who told me to speak to you.’”<sup>558</sup>

In another report, al-Shāfi‘ī asks Bishr, “Tell me [the grounds] for [discussing these things]. Is there some explicit text? Or a known legal obligation? Or a known sunna? Or precedent from the *salaf* that one should ask questions about these matters?” Bishr answers no to all of these, so al-Shāfi‘ī responds, “You’ve confessed to your error then! Why not return to speaking of law and transmitted reports (*akhbār*), so that people may admire you

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<sup>556</sup> In another narration, “What are you doing here with this heretic (*zindīq*)?” al-Khaṭīb al-Baghdādī, *Tārīkh Baghdād*, 7:531.

<sup>557</sup> al-Bayhaqī, *Manāqib al-Shāfi‘ī*, 1:204.

<sup>558</sup> Ibn Abī Ḥātim al-Rāzī, *Ādāb al-Shāfi‘ī wa-Manāqibuhu*, ed. ‘Abd al-Ghanī ‘Abd al-Khāliq (Cairo: Maktabat al-Khānjī, 1993), 187.

again for it, and leave all of this?” Bishr responds, “I have a craving (*nahma*) for it.” He exits, and al-Shāfi‘ī sighs, “He will not do well (*lā yaflah*).”<sup>559</sup>

Thus begins the rift between Bishr and al-Shāfi‘ī, a period of uncertainty reflected in multiple reports. For example, Bishr and al-Shāfi‘ī meet once more after al-Shāfi‘ī has found somewhere else to stay. They debate, then Bishr finally says, “Oh father of Abd ‘Allāh, I didn’t think this would be your opinion. You’ve changed (*qad taghayyart*).” Al-Shāfi‘ī responds, “And I, father of ‘Abd al-Raḥmān, didn’t think you would think what you do.”<sup>560</sup>

Thus, Bishr, among the great jurists of Iraq, clearly loses much of his popularity and becomes a controversial figure when he starts dabbling in *kalām*. This is reflected by the Hanafi jurist and historian Ḥusayn b. ‘Alī al-Ṣaymarī (d. 436/1044-5) in his *Akhbār Abī Ḥanīfa wa-Aṣḥābihi* when he writes, “Among the disciples of Abū Yūsuf in particular was Bishr al-Marīsī. He had many works and related much from Abū Yūsuf. He was among the people of scrupulousness and renunciation. However, the people of that time found him repugnant because of his notoriety for *kalām* and his plunging into it.”<sup>561</sup> Still, the next section shows that, while they may have differed greatly over theology, and while their personal relationship may have ended, al-Shāfi‘ī left an undeniable mark on Bishr’s legal thought.

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<sup>559</sup> al-Bayhaqī, *Manāqib al-Shāfi‘ī*, 1:204.

<sup>560</sup> *Ibid.*, 1:201.

<sup>561</sup> al-Ḥusayn b. ‘Alī al-Ṣaymarī, *Akhbār Abī Ḥanīfa wa-Aṣḥābihi* (Beirut: ‘Ālam al-Kutub, 1985), 161-62.

## Bishr's Rejection of *Istihsān* and al-Shāfi'ī's Influence on Bishr's Legal Thought

All of this back story helps make sense of one curious fact: Bishr, like al-Shāfi'ī, rejected *istihsān* as subjective judgment without evidence. This section first shows this through narrative reports, then through an analysis of Bishr's actual rulings.

The earliest narrative evidence that Bishr rejected *istihsān* comes in *al-Mujzī fī Uṣūl al-Fiqh* by the Mu'tazili Zaydī scholar al-Nātiq bi-l-Ḥaqq (d. 424/1033), who writes, "The scholars differ on [the validity] of *istihsān*....Some of them prohibit it, and this is the opinion of al-Shāfi'ī and his companions and Bishr al-Marīsī."<sup>562</sup> The same idea reappears half a century later in *al-Tabṣira fī Uṣūl al-Fiqh* by the major Shafii scholar Abū Ishāq al-Shirāzī (d. 476/1083), who begins his discussion of *istihsān* with, "Al-Shāfi'ī and Bishr al-Marīsī reported that Abū Ḥanīfa's conception of *istihsān* was to abandon *qiyās* due to that which a person judges to be better without any evidence, though the later scholars of Abū Ḥanīfa's madhhab reject this."<sup>563</sup> The report appears again in *al-Ibhāj fī Sharḥ al-Minhāj*, a work begun

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<sup>562</sup> Abū al-Ḥusayn al-Baṣrī, *Sharḥ al-Umad*, ed. 'Abd al-Ḥamīd b. 'Alī Abū Zunayd, 2 vols. (Medina: Maktabat al-'Ulūm wa-l-Ḥikam, 1410/1989-90), 2:189. Published erroneously as *Sharḥ al-Umad* of Abū al-Ḥusayn al-Baṣrī (d. 436/1045), Devin Stewart notes that it is in fact the *Mujzī*. Devin Stewart, "Muḥammad B. Dawūd Al-Zāhirī's Manual of Jurisprudence, *al-Wuṣūl ilā Ma'rifat al-Uṣūl*," in *Studies in Islamic Legal Theory*, ed. Bernard G. Weiss (Leiden: Brill, 2002), 108. Ansari and Schmidtke note the same, then show that the actual *Sharḥ al-Umad* is not by Abū al-Ḥusayn al-Baṣrī, but his teacher, al-Qāḍī 'Abd al-Jabbār (d. 415/1025). Also see Ahmet Temel's enlightening discussion of al-Nātiq bi-l-Ḥaqq, including how the editor confused the works. Hassan Ansari and Sabine Schmidtke, "The Mu'tazili and Zaydī Reception of Abū al-Ḥusayn al-Baṣrī's *Kitāb al-Mu'tamad fī Uṣūl al-Fiqh*," *Islamic Law and Society* 20, no. 1-2 (2013): 94; Ahmet Temel, "Was There a Zaydī *Uṣūl al-Fiqh*?" *İnsan & Toplum* 6, no. 1 (2016): 73-74.

<sup>563</sup> Abū Ishāq al-Shirāzī, *al-Tabṣira fī Uṣūl al-Fiqh*, ed. Muḥammad Ḥasan Hīto (Damascus: Dār al-Fikr, 1983), 1:492.

by the Shafii scholar Taqī al-Dīn al-Subkī (d. 756/1355) and completed by his son Tāj al-Dīn al-Subkī (d. 771/1370).<sup>564</sup> The work defines *istiḥsān* as “whatever the scholar prefers through pure reason and opinion (*raʿy nafsihi*) without any evidence, and indeed this is the apparent literal meaning of the term, and how Bishr al-Marīsī and al-Shāfiʿī considered Abū Ḥanīfa to have defined it.”<sup>565</sup>

Of course, these are only narrative reports. Luckily, we can confirm these reports and deeply understand Bishr’s stance on *istiḥsān* due to one simple fact: the previously-mentioned statistic that Bishr is one of the most cited 9<sup>th</sup> - century jurists in classical Hanafi *fiqh*. This section therefore presents another dataset (fear not, it is much smaller than Chapter 2’s) consisting of the 30 cases in which al-Sarakhsī mentions Bishr in the *Mabsūṭ*. These cases are cross-checked with various other classical Hanafi *fiqh* works.<sup>566</sup>

The *Mabsūṭ* sometimes cites Bishr as “Bishr al-Marīsī,” sometimes as “Bishr b. Ghiyāth,” sometimes as “al-Marīsī,” and sometimes just as “Bishr.”<sup>567</sup> Sorting through these

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<sup>564</sup> The son, Tāj al-Dīn, records precisely where his father’s commentary ends and his begins. Our quote falls in Tāj al-Dīn’s part of the work.

<sup>565</sup> Taqī al-Dīn al-Subkī and Tāj al-Dīn al-Subkī, *al-Ibhāj fi Sharḥ al-Minhāj*, ed. Aḥmad Jamāl al-Zamzamī and Nūr al-Dīn ‘Abd al-Jabbār Ṣaghīrī, 7 vols. (Dubai: Dār al-Buḥūth li-l-Dirāsāt al-Islāmiyya wa-Iḥyā’ al-Turāth, 2004), 6:2665.

<sup>566</sup> Such as *Tuḥfat al-Fuqahā’* by ‘Alā’ al-Dīn al-Samarqandī (d. 540/1145), its commentary *Badā’i’ al-Ṣanā’i’* by ‘Alā’ al-Dīn al-Kāsānī (d. 587/1191), and various others.

<sup>567</sup> Citations by “Bishr” open the door for mistaken identity, particularly with Bishr b. al-Walīd al-Kindī (d. 238/853), one of the most prominent narrators of Abū Yūsuf’s opinions. The *Mabsūṭ* is replete with phrases like “And Bishr narrated from Abū Yūsuf,” referring to Bishr b. Walīd. At the same time, al-Marīsī is also occasionally cited for narrations of Abū Yūsuf’s opinions. For that reason, a statement like “And Bishr narrated from Abū Yūsuf...” usually refers to Bishr b. al-Walīd, but can sometimes mean Bishr al-Marīsī. Meanwhile, Bishr b. al-Walīd is almost never cited for his own legal opinions. For that reason, statements like “And Bishr’s

gives 30 total references to Bishr al-Marīsī.<sup>568</sup> 7 are redundant, and 1 has Bishr narrating an opinion from Abū Yūsuf. This reduces the sample to 22 distinct rulings, all of which show Bishr disagreeing with the Hanafi founders. The dataset evaluates these 22 rulings by three criteria: 1) does it adhere more staunchly to *qiyās*, 2) does it contrast with *istiḥsān*, and 3) is it annoyingly impractical.<sup>569</sup> See Figure 8.

Criteria	Values
Staunchly <i>Qiyās</i>	Yes/No
Contrast with <i>Istiḥsān</i>	Explicit/Implicit/No
Annoyingly Impractical	Yes/No

Figure 8: Criteria for Evaluating Bishr al-Marīsī's Rulings

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opinion was..." almost exclusively refer to Bishr al-Marīsī. Ambiguities can also be resolved through cross-reference. For example, one ruling is attributed to "Bishr" in the *Mabsūṭ*, but appears in *Tuḥfat al-Fuqahā'* attributed to "Bishr al-Marīsī," settling the ambiguity. 'Alā' al-Dīn al-Samarqandī, *Tuḥfat al-Fuqahā'* (Beirut: Dār al-Kutub al-'Ilmiyya, 1994), 1:237.

<sup>568</sup> This is noticeably higher than al-Mays's number of 23. Al-Mays likely disregarded references only to "Bishr" for fear of mistaken identity. Cross-reference reveals at least 8 references to "Bishr" in the *Mabsūṭ* which must refer to Bishr al-Marīsī, taking us from al-Mays's number of 23 up to 31, very close to our count of 30.

<sup>569</sup> Note that negative responses to these criteria do not undermine Bishr's rejection of *istiḥsān*. If none of the rulings exhibited any of the criteria, that would still be a neutral result, since those rulings would simply be standard differences of opinion. The only results which would undermine Bishr's rejection of *istiḥsān* would show him actually ruling by *istiḥsān*. This means that the already very high number of cases which match our criteria lend even more support to our conclusion than they might seem to.

Of the 22 rulings, 14 exhibit staunch *qiyās*, 13 contrast with *istiḥsān* (3 explicit and 10 implicit), and 11 are annoyingly impractical. These numbers are so high that Bishr feels like a trope in the *Mabsūṭ*, usually cited to contrast his impractical *qiyās* with *istiḥsān*.

A few cases illustrate this well. One of the rulings for which Bishr is most notorious regards when an impurity (*najāsa*) falls into a well. In the *Mabsūṭ*, al-Sarakhsī reports a number of opinions on how to handle the situation, all based on reports from the *salaf*. Al-Sarakhsī writes, “And we abandon *qiyās* for the hadith of ‘Alī...who said that if a rat dies in a well, then a bucket of water should be removed from the well [to purify it], and in another narration, seven buckets.”<sup>570</sup> Al-Sarakhsī then gives other opinions, such as al-Nakha‘ī’s that 20 buckets should be removed. He then arrives at Bishr, writing, “And the *qiyās*...is Bishr’s opinion that the top of the well should be caved in and a well should be dug in a new place, because even if all the water in the well were removed, the remaining mud and stone would remain ritually impure.”<sup>571</sup>

This case exemplifies all three criteria: 1) al-Sarakhsī himself identifies Bishr’s position as staunch *qiyās*, 2) the other opinions are all *istiḥsān* by *athar*, making Bishr’s ruling

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<sup>570</sup> al-Sarakhsī, *Kitāb al-Mabsūṭ*, 1:58. Al-Sarakhsī notes that the hadith from ‘Alī is anomalous (*shādhah*), hinting at another controversy in which Bishr takes a unique stance: the *khābar wāḥid* (solitary transmission). See the next section.

<sup>571</sup> Ibid.

a rejection of the *istiḥsān*,<sup>572</sup> and 3) Bishr’s opinion is clearly annoyingly impractical, requiring people to destroy the well and build another.<sup>573</sup> The contrast here is almost comedic, such that one could imagine a student asking al-Sarakhsī, “What do you do if a rat falls in a well?”, and al-Sarakhsī responding, “Some say remove a bucket of water, some say seven buckets, some say twenty buckets. Bishr says destroy the well.” This palpable sense of what we have called “annoying impracticality” runs throughout the mentions of Bishr in the *Mabsūṭ* and other later Hanafi *fiqh* texts.

A similar case considers whether a garment with a ritual impurity (*najāsa*) can be washed in a tub of water. Technically, as soon as the impurity touches the water, the whole tub would become impure. The Hanafis use *istiḥsān* to say that if the garment is washed in three separate tubs of water, it becomes pure again. As expected, however, Bishr disagrees, holding that even if the garment is washed in 10 tubs of water, it will never become pure. This ruling again exhibits all three criteria.

A case unrelated to ritual impurity shows that Bishr’s rejection of *istiḥsān* extends beyond matters of worship. In this case, Mary and Robert co-own a slave, then Mary sets

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<sup>572</sup> Though the *Mabsūṭ* does not explicitly call the original rulings *istiḥsān*, *Tuḥfat al-Fuqahā’* does, again reminding us that the difference between implicit and explicit contrast shows nothing more than an author avoiding redundancy. al-Samarqandī, *Tuḥfat al-Fuqahā’*, 1:237.

<sup>573</sup> Al-Sarakhsī shows that practicality is at play in this issue by noting that when a large animal falls into the well, al-Shaybānī rules that all the water should be removed, while Abū Ḥanīfa rules that only 100 buckets should be removed, and that al-Shaybānī made this ruling in the context of Baghdad and its huge wells, whereas Abū Ḥanīfa made this ruling in the context of Kufa and its dryer wells. al-Sarakhsī, *Kitāb al-Mabsūṭ*, 1:59.

her share of the slave free. By the standard Hanafi position, Robert has a few options, one of which is to free the slave but hold Mary liable for the value of his share. However, by *istiḥsān*, Robert can only do this if Mary is wealthy, and if she is not, then he must pick one of the other options.<sup>574</sup> Of course, Bishr disagrees. Al-Sarakhsī himself recognizes that, by *qiyās*, Mary’s wealth should be immaterial to whether Robert can hold her liable for his share. Bishr holds staunchly to this *qiyās* and judges that even if Mary is poor, Robert can make her liable. Note that the *istiḥsān* in this case not only prevents Mary from being burdened with a debt, but also ensures that she is not disincentivised from freeing a slave simply because Robert might hold her liable. This *istiḥsān* therefore falls under both “Free Slaves” and “Do Not Disincentivise/Punish Good Actions.” Bishr ignores these and holds tightly to the *qiyās*.

Finally, one mention of Bishr in the *Mabsūṭ* is the exception that proves the rule. The case concerns if Mary appoints Robert as her agent (*wakīl*) to buy something on her behalf. Al-Sarakhsī writes that if Mary names the item and describes its general characteristics, but not its exact qualities, then by *qiyās* Robert’s agency is invalid. However, it is clearly difficult to perfectly describe an item, so by *istiḥsān*, the Hanafi school rules that the agency is valid with just a general description. Al-Sarakhsī then relates a comedic story about Bishr:

Bishr al-Marīsī – may God have mercy on him – at first took the *qiyās* position. Then one day he had a guest staying with him, so he gave a man some money

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<sup>574</sup> There are two other options: 1) Robert frees his share of the slave as well, and 2) Robert makes the slave work to pay the value of his share, at which point the slave becomes free.

to go buy him some grilled meat. Bishr began describing the exact characteristics of the meat he wanted, but the man still did not get the picture. Finally, Bishr told him, “Just do what you judge is best.” So the man went and bought the meat, then took it to his family and ate it with them, then returned to Bishr. Bishr asked, “Where is the meat I asked you to buy?” The man responded, “You told me to do what I judged was best, and I judged it was best to eat it with my family.” So Bishr went back on his opinion that day and took the *istiḥsān* position.<sup>575</sup>

The story shows Bishr taking one of his trademark positions, only for it to backfire with comedic irony to highlight the impracticality of his thought.<sup>576</sup> Overall, then, this dataset shows that Bishr undoubtedly rejected *istiḥsān*, both in word and doctrine.

All of this does not categorically prove al-Shāfi‘ī’s influence on Bishr. However, the narrative evidence of Bishr’s tremendous respect for and close relationship with al-Shāfi‘ī, coupled with Bishr’s anomalous rejection of *istiḥsān*, makes it likely. Then there is one more fact which supports our claim: many of Bishr’s legal opinions are in fact Shafii.

In one case, al-Sarakhsī reports the *istiḥsān* opinion that someone without access to clothing should modify their prayers by not bowing or prostrating, since those positions would be distasteful when naked. This falls under “More Appropriate/Tasteful” reasoning. Bishr rejects this and rules that a naked person should not modify the prayer in any way, and al-Sarakhsī notes that Bishr shares this opinion with al-Shāfi‘ī.<sup>577</sup>

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<sup>575</sup> al-Sarakhsī, *Kitāb al-Mabsūṭ*, 19:38-39.

<sup>576</sup> The story sounds apocryphal, but its historicity is not important for our purposes, for it expresses the basic idea that Bishr usually made these types of rulings, and that this is how classical Hanafism remembers him.

<sup>577</sup> al-Sarakhsī, *Kitāb al-Mabsūṭ*, 1:186.

In another case, Bishr shares al-Shāfi‘ī’s opinion even though the Hanafi position is not an *istiḥsān*. This is even better evidence of direct influence, since if they both reject *istiḥsān* then they could arrive at the same anti-*istiḥsān* ruling independently. In this case, al-Sarakhsī reports the standard Hanafi ruling that if a man marries a woman, it becomes impermissible for him to ever marry that woman’s mother (i.e. even if his wife dies or they get divorced). However, Bishr and al-Shāfi‘ī disagree, ruling that this prohibition only results from consummation of the marriage, not the marriage contract itself. Thus, if a man marries a woman, then they divorce without consummating the marriage, the Hanafis would still prohibit him from marrying that woman’s mother, whereas Bishr and al-Shāfi‘ī would allow it.<sup>578</sup>

To conclude, their reportedly close relationship, mutual rejection of *istiḥsān*, and shared legal opinions all point to significant intellectual exchange between Bishr and al-Shāfi‘ī. Given that Bishr was the one who radically departed from his Iraqi pedigree, this is evidence of al-Shāfi‘ī’s influence on Bishr, rather than vice versa.

### **Bishr, ‘Īsā b. Abān, and the *Khabar Wāḥid* (Solitary Report)**

So was Bishr just a Shafii in Hanafi clothing? Not quite. Consider again the case of an impurity falling into a well. Hanafis ruled that removing a bucket of water purifies the well, abandoning *qiyās* for the hadith of ‘Alī.<sup>579</sup> Bishr rejected this and held that the well can

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<sup>578</sup> Ibid., 4:199.

<sup>579</sup> Ibid., 1:58.

never become pure again. Rejecting hadith for *qiyās*? That does not sound very Shafii at all. The same conflict arises when al-Shāfi‘ī asks Bishr about hadiths which depict the Prophet Muḥammad drawing lots. Bishr responds, “This is gambling,” causing a qadi who hears of this to say, “Get me another witness and we’ll crucify him.”<sup>580</sup> Here is the intellectual diversity of the 9<sup>th</sup> century on full display. While Bishr agreed with al-Shāfi‘ī about *qiyās*, *istiḥsān*, and avoiding subjectivity, he did not agree with al-Shāfi‘ī about hadith, and specifically, the *khavar wāḥid*.

The controversy over the *khavar wāḥid* is a defining moment in early Islamic law. *Khavar wāḥid* means a hadith with only one (or few) direct transmitters from the Prophet Muḥammad. In the case of removing water from a well, al-Sarakhsī notes that the hadith from ‘Alī is anomalous (*shādhah*), making it a *khavar wāḥid*, explaining why Bishr rejected the ruling. Meanwhile, a section of al-Shāfi‘ī’s *Risāla* entitled *Bāb fī Khavar al-Wāḥid* clearly supports the authority of a *khavar wāḥid*.<sup>581</sup>

The question was whether a *khavar wāḥid* is a binding legal proof. This relates intimately to *istiḥsān* since a major avenue of *istiḥsān* was *sunna/athar*, *khavar wāḥid* being a form of it. Bishr clearly did not like the idea of overruling *qiyās* for any report which happened to have just one valid chain of transmission. This all leads to another dramatic

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<sup>580</sup> al-Dhahabī, *Siyar A‘lām al-Nubalā’*, 10:200.

<sup>581</sup> al-Shāfi‘ī, *al-Risāla*, 369-471.

story, told by the Hanafi jurist and historian Ḥusayn b. ʿAlī al-Ṣaymarī (d. 436/1044-5) in his *Akhbār Abī Ḥanīfa wa-Aṣḥābihi*.

The story begins with Abū ʿĪsā b. Hārūn (d. 210/825-826),<sup>582</sup> son of the fourth Abbasid caliph Hārūn al-Rashīd (r. 170/786-193/809), and half-brother to both the fifth caliph al-Amīn (r.193/809-198/813) and sixth caliph al-Maʿmūn (r. 198/813-218/833). In their youth, the three studied hadith together with the prestigious scholars that Hārūn al-Rashīd brought to teach his sons.

The story goes that one day, during al-Maʿmūn’s reign, Abū ʿĪsā approaches him with a book containing the hadiths that they had studied together in their youth. Abū ʿĪsā states:

Here are the hadiths that I heard with you from the scholars that [Hārūn] al-Rashīd brought to teach you. [These hadiths] are a disastrous proof against your scholarly counsel, for [your counsel] contradicts [these hadiths]. Among them are Ismāʿīl b. Ḥammād, Bishr b. al-Walīd, Bishr b. Ghiyāth [al-Marīsī], Muḥammad b. Samāʿa, Yaḥyā b. Aktham, and many others...If [your counsel] are upon the truth, then al-Rashīd was in error for what he had us learn. But if al-Rashīd was correct, then you must cast out those who are in error!<sup>583</sup>

Al-Maʿmūn takes the book and says, “Perhaps they have a proof. I shall ask them about it.”<sup>584</sup>

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<sup>582</sup> The text refers to a “ʿĪsā b. Hārūn al-Hāshimī,” whom Murteza Bedir calls one of al-Maʿmūn’s tutors. However, it is likely Abū ʿĪsā b. Hārūn given that the story later has him talking to al-Maʿmūn about how they studied hadith together in their youth. Murteza Bedir, "An Early Response to Shāfiʿī: ʿĪsā b. Abān on the Prophetic Report (*Khabar*)," *Islamic Law and Society* 9, no. 3 (2002): 289.

<sup>583</sup> al-Ṣaymarī, *Akhbār Abī Ḥanīfa wa-Aṣḥābihi*, 147.

<sup>584</sup> *Ibid.*

The first scholar with whom al-Maʿmūn speaks is Ismāʿīl b. Ḥammād (d. 212/827-8),<sup>585</sup> who takes the book and pens a response, but al-Maʿmūn finds that it only contains *ad hominem* attacks (“*ḍarb min al-sibb*”).<sup>586</sup> Al-Maʿmūn approaches a second scholar, our very own Bishr al-Marīsī. Bishr pens a radical response denying the validity of any *khābar wāḥid*. Al-Maʿmūn again finds this unsatisfactory, stating, “Your own party cites these hadiths in some cases<sup>587</sup>....If the *khābar wāḥid* is valid to use in one case then it should be valid to use in similar cases. If it is not valid in any cases, then why have they put it in their books?”<sup>588</sup> After Bishr, al-Maʿmūn approaches Yaḥyā b. Aktham (d. 242/857),<sup>589</sup> who stalls until al-Maʿmūn grows frustrated.

Finally, as the story goes, news of this all reaches ʿĪsā b. Abān (d. 221/836),<sup>590</sup> who takes it upon himself to write a response. Al-Ṣaymarī says that in it:

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<sup>585</sup> Abū Ḥanīfa’s grandson, his full lineage reading Ismāʿīl b. Ḥammād b. Abī Ḥanīfa. He was a major jurist and at various times qadi in Baghdad, Basra, and Raqqa. Note also that Abū Ḥanīfa named his son Ḥammād, after his own teacher Ḥammād b. Abī Sulaymān.

<sup>586</sup> al-Ṣaymarī, *Akhbār Abī Ḥanīfa wa-Aṣḥābihi*, 147.

<sup>587</sup> E.g. cases of *istiḥsān* due to *sunna/athar*, such as the case of removing water from a well based on the *khābar wāḥid* from ʿAlī.

<sup>588</sup> al-Ṣaymarī, *Akhbār Abī Ḥanīfa wa-Aṣḥābihi*, 147.

<sup>589</sup> Twice the chief qadi of the Abbasids, first under al-Maʿmūn (r. 198/813-218/833) then under al-Mutawakkil (r. 232/847-247/861). See Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries C.E* (Leiden: Brill, 1997), 44-45. Interestingly, the gap between his two terms was the *miḥna*, implying that he was unwilling to carry it out. Sources differ over whether he 1) disagreed with the doctrine of the createdness of the Qurʾan, 2) agreed with the doctrine but did not agree with the *miḥna*, or 3) actually agreed with the *miḥna* and was dismissed from his position as chief qadi for unrelated reasons.

<sup>590</sup> He studied for only a short time (possibly as little as 6 months) under al-Shaybānī and was more primarily a student of hadith. The encounter in the story apparently won him favour with the caliph, and he was appointed a qadi in Baghdad, then in Basra. al-Ṣaymarī, *Akhbār Abī Ḥanīfa wa-Aṣḥābihi*, 141.

[ʿĪsā b. Abān] describes the hadiths, how they were transmitted, which must be accepted, which must be rejected, which are proofs, and what to do with contradictory hadiths....Then he organises the hadiths into chapters, then mentions in every chapter the claims of Abū Ḥanīfa and his madhhab, which of them were based on transmitted reports (*akhbār*), and which were based on *qiyās*. With all this, he reached the pinnacle of achievement.<sup>591</sup>

This work is now lost, but Murteza Bedir reconstructs many of its arguments through the words of al-Jaṣṣāṣ, who cites it often in the *Fuṣūl*.<sup>592</sup> There is some confusion over its title, but al-Jaṣṣāṣ cites it once as “A Refutation of Bishr al-Marīsī On Transmitted Reports (*al-Radd ʿalā Bishr al-Marīsī fi-l-Akhbār*)”<sup>593</sup> and another time as “A Refutation of Bishr and al-Shāfiʿī.”<sup>594</sup>

What emerges is a system of hadith evaluation radically different from al-Shāfiʿī’s. The biggest difference is that, while al-Shāfiʿī focuses on chain of transmission (*isnād*), ʿĪsā focuses on content (*matn*).<sup>595</sup> Critically, one of ʿĪsā’s criterion is to reject a hadith if no *salaf* cited it in a debate to which it would have been relevant.<sup>596</sup> This reflects what we saw in

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<sup>591</sup> Ibid., 148.

<sup>592</sup> Bedir, "An Early Response to Shāfiʿī: ʿĪsā b. Abān on the Prophetic Report (*Khabar*)."

<sup>593</sup> al-Jaṣṣāṣ, *al-Fuṣūl fi al-Uṣūl*, 3:35.

<sup>594</sup> Ibid., 1:103. The *Fihrist* contains neither of these titles, but instead has a *Kitāb Khabar al-Wāḥid*. Al-Ṣaymarī in his story calls it *Kitāb al-Ḥujja al-Ṣaghīr*, which may align with the *Kitāb al-Ḥujaj* listed in the *Fihrist* and the *Kitāb al-Ḥujaj al-Ṣaghīr* listed in al-Jaṣṣāṣ. Bedir, "An Early Response to Shāfiʿī: ʿĪsā b. Abān on the Prophetic Report (*Khabar*)," 290-91.

<sup>595</sup> Al-Shāfiʿī fought against *matn*-criticism for its potentially undermining Prophetic authority. In his view, rejecting a hadith because its content is disagreeable risks making the Prophet Muḥammad’s authority secondary to the jurist’s, heavily overlapping with the issues of authority at play in *istiḥsān*. Schacht, *The Origins of Muhammadan Jurisprudence*, Part I, Ch. 6

<sup>596</sup> Bedir notes this principle’s similarity to Schacht’s *argumenta e silentio* for hadith-dating. Schacht says, “The best way of proving that a tradition did not exist at a certain time is to show that it was not used as a legal

Chapter 2, that the authority for *sunna/athar* was ultimately grounded in the doctrines and practices of the *salaf*. True to the story, ʿĪsa b. Abān captures at least one facet of *sunna/athar* in Iraqi doctrine.<sup>597</sup>

This section leaves us with two major takeaways. First, Bishr is clearly neither a Hanafi nor a Shafii. No one inherited his brand of staunch *qiyās*, annoying impracticality, and hadith minimalism, but he goes down as Hanafi for his pedigree. This depicts the problems with grouping 9<sup>th</sup>- century Iraqis into distinct parties with internally consistent doctrines.

Second, al-Shāfiʿī, Bishr, and ʿĪsā are all implicated in one discourse on legal authority. Ultimately, the purpose of this dissertation is not to prove al-Shāfiʿī's influence in the early 9<sup>th</sup> century, but the topic merits a note. Bedir called his article "An Early Response to Shāfiʿī" to argue that ʿĪsā was in direct conversation with al-Shāfiʿī writings on the *khobar wāḥid*.<sup>598</sup> Alone, ʿĪsā's story does not prove that. From the challenge that some hadiths

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argument in a discussion which would have made reference to it imperative, if it had existed." Schacht even hints that this technique was inspired by al-Shaybānī's arguments against the Medinans. Ibid., 141.

<sup>597</sup> Two of ʿĪsā's arguments are jaw-dropping by later standards: 1) he attacks the reliability of Companions, including Abū Hurayra, and 2) he prefers *mursal* reports (missing the narrator directly from the Prophet Muḥammad) to *musnad* reports (having a continuous chain), believing that *musnad* reports were more likely to be forgeries. Al-Jaṣṣāṣ works hard to justify ʿĪsā's criticism of Companions, saying that ʿĪsā criticised their intellectual capacity not their honesty. Later Hanafis revise ʿĪsā's views on the *mursal* and *musnad* to say the two are at most equal. Bedir, "An Early Response to Shāfiʿī: ʿĪsā b. Abān on the Prophetic Report (*Khobar*)," 306.

<sup>598</sup> al-Shāfiʿī, *al-Risāla*, 369-471.

contradicted Iraqi doctrine, to ʿĪsā reconciling the two, the story makes sense without al-Shāfiʿī, even if some narrative evidence states that ʿĪsā was responding to al-Shāfiʿī.<sup>599</sup>

However, things change when we add Bishr. Between the narrative evidence of Bishr and al-Shāfiʿī's relationship, their rejection of *istiḥsān*, and their shared opinions, al-Shāfiʿī's influence on Bishr seems hard to deny. Bishr and ʿĪsā then engage in direct conversation over many of the same problems of authority at stake with *istiḥsān*, making it seem more likely than not that ʿĪsā was at some level responding to al-Shāfiʿī. This paints a picture of a broader legal theoretical discourse occurring in early 9<sup>th</sup> - century Baghdad, a discourse in which *istiḥsān* was, if not primary, still central. The next section augments this picture, discussing those who participated in this discourse but disagreed with al-Shāfiʿī's ideas from the *Ibṭāl* and instead offered a radical argument for why jurists should embrace subjectivity.

### 4.3 A Response Disagreeing with al-Shāfiʿī: The Basran Defence

This section reveals a unique argument from a line of thinkers defending the importance of subjectivity in the law. This chapter has so far covered al-Shāfiʿī's arguments against *istiḥsān*, then showed how Bishr al-Marīsī agreed with these arguments, joining al-Shāfiʿī in rejecting *istiḥsān* as subjective judgment without proof. Note, however, that this stance requires two separate claims: 1) *istiḥsān* is subjective, then 2) it is therefore invalid. Those who reject *istiḥsān* accept both, while the classical Hanafis defend *istiḥsān* by denying

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<sup>599</sup> Ibn al-Nadīm, *al-Fihrist*, 289; Wakīʿ, *Akhbār al-Quḍāt*, 2:171.

both, responding: 1) *istihsān* is not subjective but is just a hidden *qiyās*, therefore 2) *istihsān* is valid. But what if a middle path was possible? Indeed, this is what we see in the following section. A group of scholars, most prominently al-Jāḥiẓ and Muways b. ʿImrān, agree that 1) *istihsān* is subjective, but then say that 2) its subjectivity is critical to the proper functioning of the law. The progression of their arguments show an undeniable familiarity and direct engagement with al-Shāfiʿī's arguments in the *Ibṭāl* and the *Risāla*.

### **Al-Jāḥiẓ's Familiarity with al-Shāfiʿī**

ʿAmr b. Baḥr al-Fuqaymī (d. 254/868-9), known as al-Jāḥiẓ due to a physical deformity ("jāḥiẓ" describes a person with a protruding eyeball), was born in Basra in approximately 160/776-7. He was a member of Basra's cultural and intellectual circles, most notably of Muʿtazili influence. He later authored polemical tracts on the imamate that won him favour with the caliph al-Ma'mūn, at which point al-Jāḥiẓ began spending long periods of time in Baghdad devoted to the literary arts.

Given his status as a litterateur, scholars have only recently begun to appreciate al-Jāḥiẓ's engagement with hadith and law. Devin Stewart shows that al-Jāḥiẓ authored a full work of legal theory which has not survived.<sup>600</sup> As for his surviving works, recent studies by

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<sup>600</sup> As Stewart shows, al-Jāḥiẓ elsewhere refers to one of his work with the title *Uṣūl al-Fuṭyā wa-l-Aḥkām*, and many later citations of the work show that it engaged deeply with at least *ijmāʿ*, *qiyās*, and *ijtihād*. Stewart, "Muḥammad b. Dawūd al-Zāhiri's Manual of Jurisprudence, *al-Wuṣūl ilā Maʿrifat al-Uṣūl*," 108.

Joseph Lowry<sup>601</sup> and Ignacio Sánchez<sup>602</sup> have revealed his rigorous engagement with the religious sciences. Thus, as Sánchez notes, recent scholarship has begun “revising the stereotyped image of the author as a mercurial *adīb* eager to pander to his many patrons.”<sup>603</sup>

Also becoming clear is that al-Jāḥiẓ was aware of and responded directly to al-Shāfi‘ī’s writings.<sup>604</sup> Ibn ‘Asākir (d. 571/1176) reports that al-Jāḥiẓ praised al-Shāfi‘ī as “stringing pearls (*naẓama durrān ilā durr*)” in his writings.<sup>605</sup> Al-Jāḥiẓ’s tracts on the imamate, and particularly his *Kitāb al-‘Uthmāniyya*, show full comprehension and employment of al-Shāfi‘ī’s categorisation of hadith.<sup>606</sup> Similarly, his work *al-Bayān* recapitulates almost verbatim al-Shāfi‘ī’s own definition of *bayān* as an epistemological category.<sup>607</sup>

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<sup>601</sup> Joseph E. Lowry, *Early Islamic Legal Theory: The Risāla of Muḥammad ibn Idrīs al-Shāfi‘ī*, Studies in Islamic Law and Society (Leiden: Brill, 2007), 51-55.

<sup>602</sup> Ignacio Sánchez, "Reading Adab as Fiqh: Al-Ġaḥiẓ's Singing-Girls and the Limits of Legal Reasoning (*Qiyās*)," *Bulletin d'Études Orientales* 60, no. 1 (2012); "Al-Jāḥiẓ (d. 255/869) on Ḥadīth Criticism," *Journal of Abbasid Studies* 2, no. 2 (2015).

<sup>603</sup> Sánchez, "Reading Adab as Fiqh: Al-Ġaḥiẓ's Singing-Girls and the Limits of Legal Reasoning (*Qiyās*)," 203.

<sup>604</sup> As for whether al-Jāḥiẓ and al-Shāfi‘ī met, it is possible, but unreported. Lowry notes Pellat’s estimation of al-Jāḥiẓ’s year of birth as 160/776-7, making him only about 10 years younger than al-Shāfi‘ī, meaning they could have easily met during al-Shāfi‘ī’s stay in Iraq in the early 9<sup>th</sup> century before al-Shāfi‘ī’s move to Egypt. Charles Pellat, *Le Milieu Baṣrien et la formation De Ġaḥiẓ* (Paris: Librairie d'Amérique et d'Orient Adrien-Maisonneuve, 1953), 49-50. Lowry, *Early Islamic Legal Theory: The Risāla of Muḥammad ibn Idrīs al-Shāfi‘ī*, 52n24.

<sup>605</sup> Ibn ‘Asākir, *Tārīkh Madīnat Dimashq*, ed. ‘Umar b. Gharāma al-‘Amrawī, 80 vols. (Beirut: Dār al-Fikr, 1995), 51:370.

<sup>606</sup> For an excellent side-by-side comparison of a passage from al-Shāfi‘ī’s *Risāla* with a passage from al-Jāḥiẓ’s *‘Uthmāniyya*, see Sánchez, "Al-Jāḥiẓ (d. 255/869) on Ḥadīth Criticism," 203-04.

<sup>607</sup> First published in James E. Montgomery, "Al-Jāḥiẓ's *Kitāb al-Bayān wa-l-Tabyīn*," in *Writing and Representation in Medieval Islam*, ed. Julia Bray, Muslim Horizons (London: Routledge, 2005). Montgomery has since published a series of articles on al-Jāḥiẓ’s *Kitāb al-Bayān*.

Al-Jāhīz is also implicated in the *khavar wāḥid*. Al-Bāqillānī (d. 403/1013) attributes to him a *Kitāb fī Khavar al-Wāḥid*.<sup>608</sup> In another work, al-Jāhīz refers to al-Shāfi‘ī directly as the author of *al-Risāla fī Ithbāt Khavar al-Wāḥid*,<sup>609</sup> likely referring to al-Shāfi‘ī’s *Bāb Khavar al-Wāḥid* in the *Risāla*. This is elegantly proven by the fact that al-Jāhīz cites the work to support his appealing to the authority of ‘Alī b. al-Ḥusayn (d. ca. 95/713-14),<sup>610</sup> and indeed in the *Bāb Khavar al-Wāḥid* of the *Risāla*, al-Shāfi‘ī appeals to the authority of ‘Alī b. al-Ḥusayn.<sup>611</sup> Still, is there evidence that al-Jāhīz read al-Shāfi‘ī’s arguments against *istiḥsān*? Indeed there is, in a different treatise underappreciated for the sophistication of its legal theory: the *Risāla fī al-Qiyān* (Singing-Girls).<sup>612</sup>

### **The Absurdity of Ruling Without Subjectivity**

The *Risāla fī al-Qiyān* revolves around singing-girls, Abbasid slave-women known for their charms whom wealthy men would visit to enjoy their company. A singing-girl would work to entice a man until he purchased her for an exorbitant price from her merchant, or *muqayyin*. After having relations with her, the man would sell her back to the *muqayyin* at a lower price, meaning in the end that the man would have paid to have relations with the

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<sup>608</sup> Abū Bakr al-Bāqillānī, *Ijāz al-Qurʿān*, ed. Aḥmad Saqr (Cairo: Dār al-Maʿārif, 1981), 377.

<sup>609</sup> al-Jāhīz, "Faḍl Hāshim ‘alā ‘Abd al-Shams," in *Rasāʾil al-Jāhīz*, ed. Ḥasan al-Sandūbī (Cairo: al-Maktaba al-Tijāriyya al-Kubrā, 1933), 106.

<sup>610</sup> The 4<sup>th</sup> Twelver Shi‘ī Imam, grandson of ‘Alī.

<sup>611</sup> al-Shāfi‘ī, *al-Risāla*, 455.

<sup>612</sup> Sánchez’s article is a brilliant foray into the legal dimension of the *Qiyān*, but he mentions *istiḥsān* only tangentially. Sánchez, "Reading Adab as Fiqh: Al-Ġaḥīz’s Singing-Girls and the Limits of Legal Reasoning (*Qiyās*)."

singing-girl for one night and that the *muqayyin* would have profited. It is, colloquially, a matter of pimps and prostitutes.

Could some really hold that this was legal? Al-Jāḥiẓ takes on this question and shows that at the core of the issue lies the controversy over *istiḥsān*. He thus mentions *istiḥsān* directly while also engaging with al-Shāfi‘ī’s arguments concerning both the *ẓāhir* (apparent) and the *khavar lāzim* (obligating proof). As this section shows, al-Jāḥiẓ in many places mirrors or ironically inverts some of al-Shāfi‘ī’s specific examples and wording in the *Ibṭāl*, making it almost certain that al-Jāḥiẓ is responding to the *Ibṭāl* directly. This is supported by Schacht’s dating of the *Ibṭāl* to before al-Shāfi‘ī’s move to Egypt in 198/814,<sup>613</sup> making the work one of al-Shāfi‘ī’s Iraqi works which would have been easily available to al-Jāḥiẓ and other Iraqis.

Al-Jāḥiẓ argues that if one were to embrace al-Shāfi‘ī’s legal minimalism and rule purely based on *ẓāhir* and *khavar lāzim*, then one would have to concede the legality of these practices involving singing-girls. His point, then, is that al-Shāfi‘ī’s legal minimalism opens the door to moral absurdities. Therefore, to function properly, the law needs *istiḥsān*, by which a jurist can look past the appearance (*ẓāhir*) of a situation, evaluate its end result, then based on good sense and moral judgment, prohibit what might have technically been permissible, even if there is no specific proof (*khavar lāzim*) for it.

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<sup>613</sup> Schacht, *The Origins of Muhammadan Jurisprudence*, Appendix I:330.

The *Risāla fi al-Qiyān*, like many of al-Jāḥiẓ's works, is structurally complex, with al-Jāḥiẓ speaking at different times through the voices of 1) Abbasid notables defending the permissibility of socialising with the singing-girls, 2) merchants (*muqayyinūn*) defending their trade of the singing-girls, 3) jurists criticising these practices, and 4) occasionally himself. When speaking through the voices of the notables or merchants, he is speaking satirically,<sup>614</sup> levelling apparently sound arguments only to show the absurd results that those arguments make possible.

*Istiḥsān* itself first appears in the voice of the Abbasid notables arguing for the permissibility of socialising with the singing-girls. The notables first argue that men and women are natural partners, that as the Qur'an states, women were created "so that man could find solace in her"<sup>615</sup> and as "a tillage ground for men."<sup>616</sup> The notables argue that for these reasons, men could have enjoyed women without any restrictions, had it not been for God's desire to safeguard certain rights, namely paternity and inheritance.<sup>617</sup> With this conception, the notables frame enjoyment of women as the default from which certain things are then restricted, as opposed to the more standard notion that abstinence and separation from women is the default from which certain things are then permitted.

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<sup>614</sup> Sánchez supports this with, "The references to legal arguments should be interpreted, therefore, as satirical allusions that provoke the opposite effect to the one intended." Sánchez, "Reading Adab as Fiqh: Al-Ġaḥiẓ's Singing-Girls and the Limits of Legal Reasoning (*Qiyās*)," 206.

<sup>615</sup> Q. 7:189; Q. 30:21.

<sup>616</sup> Q. 2:223.

<sup>617</sup> Sánchez, "Reading Adab as Fiqh: Al-Ġaḥiẓ's Singing-Girls and the Limits of Legal Reasoning (*Qiyās*)," 207.

The consequence of this reframing is that, for the notables, any type of interaction with women is permissible unless explicitly prohibited. This idea of “explicitly prohibited” brings to mind the *khavar lāzim*, and indeed, this is where *istiḥsān* comes into play. The notables argue, “Anything not explicitly prohibited by the Qur’an or the sunna...is completely permissible, and people’s *istiḥsān*...is no basis for *qiyās*.”<sup>618</sup> By this, al-Jāḥiẓ clearly captures al-Shāfi‘ī’s argument for the *khavar lāzim*. Thus, the notables argue that the prohibition on socialising with women is not based on proof, but on the jurists simply feeling by *istiḥsān* that it is wrong.

The *muqayyinūn* then take over to argue for the permissibility of selling singing-girls and buying them back for a profit, the two transactions that simulate prostitution. Again, their argument hinges on rejecting *istiḥsān*, but this time by al-Shāfi‘ī’s argument for the *ẓāhir*. Indeed, they use the same terminology and phrases as al-Shāfi‘ī, stating, “Verdicts only apply to what is apparent (*ẓāhir al-umūr*) and God has not imposed upon his subjects the moral obligation of judging according to the hidden (*bāṭin*), nor of taking action concerning their intentions.”<sup>619</sup>

The transactions with the singing-girls are even similar to al-Shāfi‘ī’s example that if a man marries a woman while secretly intending to divorce her after one day, the marriage

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<sup>618</sup> al-Jāḥiẓ, “*Risāla fī al-Qiyās*,” in *Rasā’il al-Jāḥiẓ*, ed. ‘Abd al-Salām Muḥammad Hārūn (Cairo: Maktabat al-Khanjī, 1932), 2:147.

<sup>619</sup> *Ibid.*, 2:164.

is still valid. This same reasoning would support the validity of the clients' transactions even if they are intending to simulate prostitution or temporary marriage, since it is valid for the man to purchase a singing-girl, then it is valid for him to have relations with her, then it is valid for the man to sell her back to the original *muqayyin* at a lower price. In this way, the whole affair simulates prostitution, but taking the *zāhir* approach, no single step is invalid. Al-Jāhiz has therefore put forward a fascinating case by which *istihsān* is necessary to allow good sense and wisdom to avoid absurd loopholes.

### **A Proof that Scholars Can Rule Without Evidence**

Al-Jāhiz's argument is still missing one critical component: a proof that it is actually permissible for jurists to make laws based not on evidence, but on their own moral sensibilities. Could any scholars really have made such a radical claim? Indeed, some did. The argument originates with one of al-Jāhiz's mentors, Muways b. ʿImrān (d. early 3<sup>rd</sup>/9<sup>th</sup> century).<sup>620</sup> Though he was relatively unknown, later scholars remember him for his unique brand of Muʿtazilism, then with regards to his legal thought, for one notorious opinion.

Al-Ḥākim al-Jushamī (d. 494/1100-1) says about him, "He believed that God entitled the Prophet [Muḥammad] and the scholars to make law of their own accord."<sup>621</sup> Al-Nātiq bi-

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<sup>620</sup> His first name is sometimes reported as Mūsā, Muʿnis, or even Yūnus, but Muways is the clear favourite. Ibn Ḥajar al-ʿAsqalānī, *Tabṣīr al-Muntabih*, ed. Muḥammad ʿAlī al-Najjār, 4 vols. (Cairo: al-Dār al-Miṣriyya li-l-Taʿlīf wa-l-Tarjama, 1964?), 4:1330. Cited in Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries C.E.*, 37n20.

<sup>621</sup> Abū al-Qāsim al-Balkhī, al-Qāḍī ʿAbd al-Jabbār, and al-Ḥākim al-Jushamī, *Faḍl al-Iʿtizāl wa-Ṭabaqāt al-Muʿtazila*, ed. Fuʾād Sayyid (Tunis: al-Dār al-Tūnisiyya li-l-Nashr, 1974), 279n526.

l-Ḥaqq writes even more explicitly, “One of the Basrans, namely Muways b. ‘Imrān, held that scholars can reach a level after which they are permitted to rule without evidence (*min ghayr rujū’ ilā shay’ min adillat al-shar’*)...for it becomes known from their moral character (*ḥāl*) that they only select the truth.”<sup>622</sup> Al-Nātiq bi-l-Ḥaqq then relates the arguments for this radical perspective.<sup>623</sup> Recall that the crux of al-Shāfi‘ī’s argument for the *khavar lāzim* was that even prophets awaited revelation before passing judgment, meaning *a fortiori* that scholars must rule by revelation. Muways undermines this with instances in which prophets *did* rule without revelation.

This starts with prophets other than the Prophet Muḥammad. Muways cites,<sup>624</sup> for example, the Qur’anic verse, “All foods were permissible for the Children of Israel except for what Israel prohibited to himself,”<sup>625</sup> the second “Israel” meaning the Prophet Jacob.<sup>626</sup> Similarly, Muways cites that “reports (*akhbār*) have made clear that God only revealed 10 legal verses in the Torah while the rest of its laws were established by Moses.”<sup>627</sup>

Muways then cites a number of instances in which the Prophet Muḥammad passed judgment on his own authority. In one, the Prophet is asked, “Is it obligatory [to perform

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<sup>622</sup> al-Baṣrī, *Sharḥ al-‘Umad*, 19-35.

<sup>623</sup> It is not clear whether the specific arguments are by Muways or by later adherents of this opinion.

<sup>624</sup> A reminder that this is all transmitted through the *Muzjī* (published as the *Sharḥ al-‘Umad*), but we have phrased it with Muways as the author for clarity.

<sup>625</sup> Q. 3:93.

<sup>626</sup> al-Baṣrī, *Sharḥ al-‘Umad*, 20.

<sup>627</sup> *Ibid.*, 25.

the Hajj]...every year?” He responds, “No, but had I said yes, then that would have become obligatory.”<sup>628</sup> The *Mujzī* similarly points to the hadith, “If I were not afraid of overburdening my community, I would have commanded them to brush their teeth (*siwāk*) with every ablution (*wuḍūʿ*).”<sup>629</sup> In another example, the Prophet Muḥammad sentences a man to punishment, but then someone intercedes on the man’s behalf, leading the Prophet to forgive him. Muways reasons that, had the command to punish the man been from God, then the Prophet would not have accepted anyone’s intercession for the man. Thus, the Prophet’s decisions to punish then forgive the man were both of his own accord.<sup>630</sup>

These arguments are straightforward and indeed are not controversial. Many later scholars held the same view.<sup>631</sup> However, while this view undermines al-Shāfiʿī’s *a fortiori* argument (that scholars may not rule without proof because the prophets could not), it does not actively prove that scholars may rule without proof. For this, Muways and his adherents give different arguments grounded in pure logic, and they are quite astounding.

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<sup>628</sup> Ibid., 24.

<sup>629</sup> Ibid., 24-25.

<sup>630</sup> Ibid., 24. A more detailed explanation of this point can be found in Fakhr al-Dīn al-Rāzī, *al-Maḥṣūl*, ed. Ṭāhā Jābir Fayāḍ al-ʿAlwānī (Beirut: Muʿassasat al-Risāla, 1997), 6:141-43.

<sup>631</sup> Indeed, some of these arguments about prophetic actions are likely not from Muways but from these later scholars. For a list of scholars, as well as confirmation that the idea was not controversial, see ʿAlī b. Muḥammad al-Āmidī, *al-Iḥkām fī Uṣūl al-Aḥkām*, ed. ʿAbd al-Razzāq ʿAfīfī, 4 vols. (Beirut: al-Maktab al-Islāmī, 1402/1981-2), 4:253.

The *Mujzī* relates four in total. We translate them here in full because they are utterly unique, representing perhaps the only instance in the Islamic legal corpus where jurists seriously consider the idea that someone can rule without evidence.<sup>632</sup>

**Argument #1:** There is no difference between a man 1) obeying God by doing what God explicitly commands him to do, and 2) obeying God based on what the man believes [God wants him to do], if he knows of his own moral character (*ḥāl*) that he only chooses what is good (*ṣalāḥ*) and wise (*luṭf*).<sup>633</sup>

**Argument #2:** If it is permissible for a man to intend to worship by what he thinks is most likely (*ghālib ḥannihī*) correct, in that what is “good” (*ṣalāḥ*) from his perspective is tied to what he thinks is most likely, then likewise it is permissible for him to intend to worship by whatever [ruling] he chooses, since he knows he only chooses the good (*ṣalāḥ*).

**Argument #3:** If it is permissible for a layman to follow any scholarly opinion he pleases, then it is *a fortiori* (*awlā*) more permissible for a scholar to do the same. For the scholar, this means following whichever of his own opinions he pleases.

**Argument #4:** If it is permissible for a man to choose any of the three expiations (*kaffārāt*),<sup>634</sup> and what he chooses then becomes what is good (*ṣalāḥ*), then it is permissible for him to choose like this in all laws and matters of worship.

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<sup>632</sup> All four arguments are found in al-Baṣrī, *Sharḥ al-ʿUmad*, 22-23.

<sup>633</sup> Meaning that whether he believes a particular thing is permissible or prohibited, he is still being worshipful of God if he acts in accordance with that belief. This argument is a slippery slope to moral relativism, for in the extreme: are terrorists morally blameworthy before God if they believe they are acting by God’s command? We will see how later critics pick up on this moral relativism with regards to the adherents of other faiths.

<sup>634</sup> This refers to instances (such as the expiation for *ḏihār*) when the three options (freeing slaves, fasting, and charity) are equal, as opposed to instances (such as the expiation for intentionally breaking the fast in Ramadan) in which one must choose the first option, and only if unable then the second option, then the third.

Clearly these arguments are not quite as logically sound or mature as al-Shāfi‘ī’s. However, two elements are worthy of mention. First is the use of the term “*ṣalāḥ* (good)” in Arguments 1, 2, and 4. The usage appears to be highly technical and implies that the legal theory of this party revolves around a conception of *ṣalāḥ* inhering in correct rulings. Finding the term in other 9<sup>th</sup>- century legal debates may be a way to discover more about this mysterious group of thinkers. Second is the use of the term “*ḥāl*” in Argument 1, which is central to Islamic conceptions of character. Its invocation here articulates precisely the idea that a scholar’s wisdom and moral sense have legal authority.

The disagreement between Muways and al-Shāfi‘ī is never explicit. Muways never mentions al-Shāfi‘ī, nor does al-Shāfi‘ī mention Muways, not even anonymously with a statement like “and some people have argued”. However, Muways’s list of instances in which prophets acted on their own authority mirrors and subverts al-Shāfi‘ī’s list of instances showing the opposite. The contrast between their two perspectives does not go unnoticed. The *Mujzī*, the *Mu‘tamad* of Abū al-Ḥusayn al-Baṣrī (d. 436/1044), and the *Maḥṣūl* of Fakhr al-Dīn al-Rāzī (d. 606/1210) all put Muways’s ideas in direct conversation with al-Shāfi‘ī’s writings on the *khabar lāzim*.<sup>635</sup>

Given that Muways is relatively unknown, these arguments must have been transmitted through later figures. Lo and behold, in any discussion about Muways, the one

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<sup>635</sup> Abū al-Ḥusayn al-Baṣrī, *al-Mu‘tamad fī Uṣūl al-Fiqh*, ed. Khalīl al-Mays, 2 vols. (Beirut: Dār al-Kutub al-‘Ilmiyya, 1983), 3:329; al-Rāzī, *al-Maḥṣūl*, 6:141-3.

figure most strongly associated with him is al-Jāḥiẓ. Later works confirm that al-Jāḥiẓ was the one who transmitted Muways's argument that scholars may rule without proof. One source writes of Muways, "He has a position on law-giving of which al-Jāḥiẓ spoke (*wa bi-hi madhhab fi al-futyā qad ḥakāhu al-Jāḥiẓ*)."<sup>636</sup> Al-Jāḥiẓ's extant writings do not describe Muways's legal thought, but they do make frequent and glowing mention of him. Recall also that al-Jāḥiẓ's lost work on legal theory is entitled *Uṣūl al-Futyā wa-l-Aḥkām*, commonly referred to as just *Kitāb al-Futyā*. The parallel between the title and Muways being described as having "a madhhab in *futyā*" might not be coincidental. Furthermore, Muways having a "madhhab" in *futyā* might not be just "a position," but a madhhab akin to its classical meaning: a group of known adherents on this position. Perhaps al-Jāḥiẓ was among them.

The beginning of al-Jāḥiẓ's love for Muways appears to be when Muways gifted 50 dinars to him so that the young al-Jāḥiẓ could impress his mother.<sup>637</sup> After that, they became very close. Some sources transmit the full text of a letter written by al-Jāḥiẓ to Muways which is filled with expressions of admiration.<sup>638</sup> In another work, al-Jāḥiẓ writes, "Muways and dishonesty were never found together, and he had no difficulty being honest due to his

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<sup>636</sup> al-Balkhī, al-Qāḍī 'Abd al-Jabbār, and al-Ḥākim al-Jushamī, *Faḍl al-Itizāl wa-Ṭabaqāt al-Mu'tazila*, 279.

<sup>637</sup> Aḥmad b. Yaḥyā al-Murtaḍā, *Ṭabaqāt al-Mu'tazila*, ed. Susanna Diwald-Wilzer (Beirut: Dār Maktabat al-Ḥayāt, 1961), 68.

<sup>638</sup> Ibn Ḥamdūn, *al-Tadhkira al-Ḥamdūniyya*, ed. Iḥsān 'Abbās and Bakr 'Abbās, 10 vols. (Beirut: Dār Ṣādir, 1996), 6:381-87.

love of it, such that it was of no difference to him whether [the truth] harmed him or helped him.”<sup>639</sup>

To make another connection, Muways and al-Jāḥiẓ were also both students of Ibrāhīm al-Nazzām (d. ca. 220/835-6).<sup>640</sup> Pellat even suggests that al-Jāḥiẓ may have met al-Nazzām at Muways’s home, which was a hub for Basran intellectuals.<sup>641</sup> The significance of this is that, beyond his prominence as an early Mu‘tazili, al-Nazzām is also famous for rejecting *ijmā‘*, *qiyās*, and the *khobar wāḥid*.<sup>642</sup> Furthermore, he vociferously criticised some of the *salaf* and even some companions, leading to his rejection of *ijmā‘* and the *khobar wāḥid*. This foreshadows ‘Isā b. Abān’s critique of certain companions to reject certain kinds of *khobar wāḥid*.

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<sup>639</sup> al-Jāḥiẓ, *Kitāb al-Ḥayawān*, ed. Muḥammad Bāsil ‘Uyūn al-Sūd, 7 vols. (Beirut: Dār al-Kutub al-‘Ilmiyya 1998), 5:249.

<sup>640</sup> Al-Nazzām was the nephew of Abū al-Hudhayl al-‘Allāf (d. ca. 227/841-2), another known associate of Muways’s based on a comedic story narrated by al-Jāḥiẓ. The story goes that Abū al-Hudhayl once gifted Muways a particularly plump chicken then never stopped reminding him about it. When speaking to Muways, Abū al-Hudhayl would always find a way to slip the chicken in, such as making time comparisons with “It was just after I gave you that chicken,” or size comparisons like “That camel is even bigger than the chicken I gifted you.” al-Jāḥiẓ, *Kitāb al-Bukhalā’* (Beirut: Dār wa-Maktabat al-Hilāl, 1419/1998-9), 179.

<sup>641</sup> Charles Pellat, “Muways b. ‘Imrān,” *EL*.

<sup>642</sup> For *ijmā‘*, see Stewart, “Muḥammad b. Dawūd al-Zāhiri’s Manual of Jurisprudence, *al-Wuṣūl ilā Ma’rifat al-Uṣūl*,” 107. For *qiyās*, see Aron Zysow, “The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory,” 294. For *khobar wāḥid*, see al-Qāḍī ‘Iyāḍ, *Ikmāl al-Mu‘lim bi-Fawā’id Muslim*, ed. Yaḥyā Ismā‘īl, 8 vols. (Mansoura: Dār al-Wafā’, 1998), 5:504. He rejects the hadith that says married adulterers should be stoned, which Ibn al-‘Arabī (d. 543/1148, the qadī, not the mystic) attributes to the fact that he, along with the “Basran Mu‘tazilis,” rejected the *khobar wāḥid*. Muḥammad Ibn al-‘Arabī, *al-Maḥṣūl fī Uṣūl al-Fiqh*, ed. Ḥusayn ‘Alī al-Yadrī and Sa‘īd Fawda (Amman: Dār al-Bayāriq, 1999), 88.

To make yet another connection, al-Jāḥiẓ relates many stories of himself, al-Nazzām, and Abū al-Hudhayl al-‘Allāf (d. ca. 227/841-2) disputing with Bishr al-Marīsī in al-Ma’mūn’s court. Most of these are not legal disputations. One story in al-Jāḥiẓ’s *Kitāb al-Ḥayawān* shows a poetry competition between the three.<sup>643</sup> In another work, al-Jāḥiẓ mocks Bishr for making a statement with particularly poor grammar.<sup>644</sup> In one work, however, al-Jāḥiẓ reports that he and Bishr discussed at length the legal rulings on *nabīdh*<sup>645</sup> and presented their arguments (and in Bishr’s case, an actual written treatise) to al-Ma’mūn.<sup>646</sup>

What emerges then is a discourse on legal theory that believed strongly in a scholar’s subjective authority and was in direct discourse with al-Shāfi‘ī’s writings on the topic. We will call this group “the Basrans” – and their argument “the Basran defence” – simply because all of the individuals associated with it are notably Basran (Muways, al-Jāḥiẓ, al-Nazzām, and Abū al-Hudhayl). This aligns interestingly with Devin Stewart’s arguments concerning an obscure “Basran school of *ra’y*”. Stewart argues that its members were

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<sup>643</sup> al-Jāḥiẓ, *Kitāb al-Ḥayawān*, 7:101.

<sup>644</sup> al-Jāḥiẓ, *al-Bayān wa-l-Tabayīn*, ed. ‘Abd al-Salām Muḥammad Hārūn, 4 vols. (Cairo: Maktabat al-Khānjī, 1998), 212-13.

<sup>645</sup> Beeston gives an excellent summary of *nabīdh*: “*Nabīdh* was (in Abbasid times) a drink made from boiling dates or dried raisins in water. These ingredients do not contain the bacilli which in fresh grapes cause strong fermentation; hence, the resultant drink was only mildly alcoholic, and there was a good deal of discussion about whether or not *nabīdh* was to be treated as ‘wine’ (*khamr*) and thus subject to total prohibition...Abū Ḥanīfa held that it might be drunk in moderation so long as intoxication did not ensue.” A. F. L. Beeston, “Jāḥiẓ On the Difference Between Enmity and Envy,” *Journal of Arabic Literature* 18, no. 1 (1987): 26n8.

<sup>646</sup> al-Jāḥiẓ, “*Risālat Faṣl mā Bayn al-‘Adāwa wa-l-Ḥasad*,” in *Rasā’il al-Jāḥiẓ*, ed. ‘Alī Abū Malḥim (Beirut: Dār wa-Maktabat al-Hilāl, 1987), 1:370.

among the founders of *uṣūl al-fiqh* itself, and that their legacy is obscure not only because of the ravages of time on their manuscripts, but because their ideas were so radical that later Hanafis, even Muʿtazilis, did not cite them.<sup>647</sup> This section has suggested possible members of this group and has reconstructed some of their radical arguments for subjectivity.

#### 4.4 Subjectivity at the Turn of the Century (850 – 950 CE)

This discussion has so far masked one problem with the Basran argument for subjectivity: none of the individuals implicated in it were conventional jurists. Even if we say that they engaged more deeply with the law than previous scholarship has recognized, they were by no definition Hanafi and were never claimed as such. Thus, there is no evidence of their arguments ever being adopted by the Hanafi founders' students or their students' students. That leaves us with two questions. Firstly, did anyone adopt the arguments of these early Basrans for the importance of subjectivity in law-making? Secondly how did the debate over *istiḥsān* evolve in the 150 years between al-Shāfiʿī (d. 204/820) and the earliest extant Hanafi treatment of *istiḥsān* by Abū Bakr al-Jaṣṣāṣ (d. 370/981)?

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<sup>647</sup> Devin Stewart, "Muḥammad b. Jarīr al-Ṭabarī's *al-Bayān ʿan Uṣūl al-Aḥkām* and the Genre of *Uṣūl al-Fiqh* in Ninth-Century Baghdad," in *ʿAbbasid Studies: Occasional Papers of the School of Abbasid Studies, Cambridge, 6-10 July 2002*, ed. James E. Montgomery (Leuven: Peeters, 2004), 341-47.

This question implicates a seminal debate in Islamic legal studies: the mystery of the birth of *uṣūl al-fiqh*.<sup>648</sup> The common depiction of the problem goes that after al-Shāfi'ī's writings on legal theory in the early 9<sup>th</sup> century, modern scholarship knows of no formal works of *uṣūl* until the late 10<sup>th</sup> century, a gap of 150 years. However, these later works by al-Jaṣṣāṣ (d. 370/981),<sup>649</sup> Ibn al-Qaṣṣār (398/1008),<sup>650</sup> and al-Bāqillānī (d. 403/1013)<sup>651</sup> show with certainty that the genre of *uṣūl* predates them, both because the contents of the works reveal well-established debates and partisan positions, and because the works share a similar structure, indicating a convention in a pre-existing genre.

The issue is not only that manuscripts of earlier *uṣūl* works have not survived, but that we do not even know the titles of possible works nor the names of possible authors. A few scholars in the past two decades have made significant progress towards filling this gap, namely Devin Stewart and Ahmed El-Shamsy,<sup>652</sup> and they have indeed been able to name names and reproduce parts of works. It is fascinating, however, that they have both only

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<sup>648</sup> For a good articulation of this mystery, see Stewart, "Muḥammad b. Dawūd al-Zāhiri's Manual of Jurisprudence, *al-Wuṣūl ilā Ma'rifat al-Uṣūl*," 3.

<sup>649</sup> al-Jaṣṣāṣ, *al-Fuṣūl fī al-Uṣūl*.

<sup>650</sup> Ibn al-Qaṣṣār, *Muqaddima fī Uṣūl al-Fiqh*, ed. Muṣṭafā b. Karāmat Allāh Makhdūm (Riyadh: Dār al-Ma'lama, 1999).

<sup>651</sup> Abū Bakr al-Bāqillānī, *al-Taqrīb wa-l-Irshād al-Ṣaghīr*, ed. 'Abd al-Ḥamīd 'Alī Abū Zunayd (Beirut: Mu'assasat al-Risāla, 1993).

<sup>652</sup> For Stewart's contributions, see Stewart, "Muḥammad b. Dawūd al-Zāhiri's Manual of Jurisprudence, *al-Wuṣūl ilā Ma'rifat al-Uṣūl*"; "Muḥammad b. Jarīr al-Ṭabari's *al-Bayān 'an Uṣūl al-Aḥkām* and the Genre of *Uṣūl al-Fiqh* in Ninth-Century Baghdad". For El-Shamsy's contributions, see El Shamsy, "Bridging the Gap: Two Early Texts of Islamic Legal Theory". See also Temel, "The Missing Link in the History of Islamic Legal Theory: The Development of *Uṣūl al-Fiqh* between al-Shāfi'ī and al-Jaṣṣāṣ During the 3rd/9th and Early 4th/10th Centuries".

been able to identify traditionalist authors and works, mostly Shafii and Zāhirī. Clear from the content of these works is that they are responding to some other, non-traditionalist interlocutors, most likely Hanafi Mu‘tazilis. Stewart even points out the centrality of *istiḥsān* to this discourse, for nearly every work identified by him and El Shamsy contains a section on the invalidity of *istiḥsān*. As Stewart writes, “They must have been writing...against earlier or contemporary jurists in the Hanafi tradition who upheld *istiḥsān*.”<sup>653</sup>

The last puzzle is why al-Jaṣṣāṣ, himself a Hanafi, cites no Hanafis from this period other than ‘Īsā b. Abān. Stewart proposes that this is because other Hanafi theorists in this period had such radical arguments that even al-Jaṣṣāṣ, a Mu‘tazili, avoids citing them. One of those radical arguments may have been the Basran defence of *istiḥsān*. We are therefore looking in the years 850 – 950 CE for Hanafis who wrote works of legal theory, who echoed the Basran defence of *istiḥsān*, and whose reputations in law and theology would have made them so unattractive that even later Hanafi Mu‘tazilis like al-Jaṣṣāṣ avoided citing them. This section does not reveal new names of such individuals, but it does find their ideas. In other words, there did exist later iterations of the Basran defence, meaning that there were later jurists who continued to argue for a scholar’s right to rule without evidence, and this argument survived until at least the early 10<sup>th</sup> century.

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<sup>653</sup> Stewart, "Muḥammad b. Dawūd al-Zāhirī's Manual of Jurisprudence, *al-Wuṣūl ilā Ma‘rifat al-Uṣūl*," 135.

In tracing the debate over *istiḥsān* in this period (roughly 850 – 950 CE), this section makes a few findings: 1) *istiḥsān* becomes a hot-button issue, appearing in nearly every known work on legal theory from this period, 2) critics of *istiḥsān* build upon al-Shāfi‘ī’s arguments but also develop their own, and 3) there is decisive evidence of thinkers taking up the Basran defence of *istiḥsān* and it surviving until the early 10<sup>th</sup> century. As for the broader question of the birth of *uṣūl*, these findings support Stewart’s argument for a mysterious group of radical Hanafi defenders of *istiḥsān* who may have written some of the genre’s earliest works.

### **New Arguments Against *Istiḥsān***

After Bishr and al-Shāfi‘ī reject *istiḥsān*, it becomes a hot-button issue, appearing in theoretical discourses with remarkable consistency. Some of these are works already well-known to modern scholarship. For example, *istiḥsān* appears prominently in the *Taʿwīl Mukhtalif al-Ḥadīth* of Ibn Qutayba (d. 276/889),<sup>654</sup> though no scholars seem to have analysed Ibn Qutayba’s arguments on *istiḥsān*.<sup>655</sup>

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<sup>654</sup> See Ibn Qutayba, *Taʿwīl Mukhtalif al-Ḥadīth*, ed. Muḥammad Muḥyī al-Dīn al-Aṣfar (Beirut: al-Maktab al-Islāmī, 1999), 1:63-68, 142.

<sup>655</sup> Lowry simply mentions, “Both Shāfi‘ī and Ibn Qutayba dislike *istiḥsān* immensely,” and cites the discussion in the *Taʿwīl*. Gérard Lecomte in his monograph on Ibn Qutayba mentions it once and considers it simply synonymous with *raʿy*, writing, “Tous les succédanés du *raʿy*, qu’on les appelle *istiḥsān* ou à plus forte raison *naẓar* (raisonnement spéculatif) ou *ʿaql* (preuve rationnelle) qui ne sauraient être considérés comme des critères de raisonnement sunnites, sont fermement écartés par Ibn Qutayba.” Lecomte does, however, cite several different places where Ibn Qutayba discusses *istiḥsān* in the *Taʿwīl*. Joseph Lowry, “The Legal Hermeneutics of al-Shāfi‘ī and Ibn Qutayba: A Reconsideration,” *Islamic Law and Society* 11, no. 1 (2004): 35;

*Istiḥsān* then appears in nearly all of the works that Stewart and El-Shamsy identify as discourses of legal theory during the gap period. A section on the invalidity of *istiḥsān* appears in the *Wuṣūl ilā Maʿrifat al-Uṣūl* of Muḥammad b. Dāwūd al-Ẓāhirī (d. 297/909), son of the founder of the Ẓāhirī school. The work does not survive, but is quoted extensively in al-Qāḍī al-Nuʿmān’s (d. 363/974) *Ikhtilāf Uṣūl al-Madhāhib*, which does survive.<sup>656</sup> It is in both of these works that a new form of the Basran defence of *istiḥsān* appears, as we will discuss shortly. The invalidity of *istiḥsān* then appears as the last section of the *uṣūl* manual *al-Bayān ʿan Uṣūl al-Aḥkām* of Muḥammad b. Jarīr al-Ṭabarī (d. 310/923), whose table of contents Stewart manages to reproduce, but which does not tell us about his arguments.<sup>657</sup>

*Istiḥsān* then appears again in the previously-mentioned *fiqh* work *al-Talkhīṣ*, by Ibn al-Qāṣṣ (d. 335/946), whose introduction treats several topics of legal theory. Indeed, *istiḥsān* appears in the title of that introduction, “The Chapter on Imitation (*Taqlīd*), *Istiḥsān*, and the Acceptance of *Mursal* Reports.”<sup>658</sup> This section does survive, but as shown earlier, its discussion of *istiḥsān* is not particularly exciting, for it simply lists the few cases in which al-

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Gérard Lecomte, *Ibn Qutayba (mort en 276/889): L'Homme, son oeuvre, ses idées* (Damas: Institut Français de Damas, 1965), 258.

<sup>656</sup> al-Qāḍī al-Nuʿmān, *Ikhtilāf Uṣūl al-Madhāhib*, ed. Muṣṭafā Ghālib (Beirut: Dār al-Andalus, 1983). For Stewart’s reconstruction of the work, see Stewart, “Muḥammad b. Dawūd al-Ẓāhal-Ẓāhirī’s Manual of Jurisprudence, *al-Wuṣūl ilā Maʿrifat al-Uṣūl*.” Stewart has also translated it. al-Qāḍī al-Nuʿmān, *Disagreements of the Jurists: A Manual of Islamic Legal Theory*, trans. Devin J. Stewart (New York: New York University Press, 2015).

<sup>657</sup> Stewart, “Muḥammad B. Jarīr Al-Ṭabarī’s *al-Bayān ʿan Uṣūl al-Aḥkām* and the Genre of *Uṣūl al-Fiqh* in Ninth-Century Baghdad.”

<sup>658</sup> al-Qāṣṣ, *al-Talkhīṣ*, 73-75.

Shāfi‘ī used *istiḥsān* to show that they are “Limit Setting.”<sup>659</sup> The same goes for the section on *istiḥsān* in the *Kitāb al-Aqṣām wa-l-Khiṣāl* of al-Khaffāf (d. mid-10<sup>th</sup> century), the previously-mentioned manuscript held in the Chester Beatty Library in Dublin which is falsely attributed to Ibn Surayj.<sup>660</sup> Obvious through this whole list is that extant treatments of *istiḥsān* from this period come from those arguing for its invalidity, which again raises the question of why we do not have or know of any early Hanafi theoretical writings.

The new critics of *istiḥsān* clearly build upon some of al-Shāfi‘ī’s arguments while also developing new ones. The most exciting for our purposes are those of Ibn Dāwūd al-Zāhirī (d. 297/909) in his *Wuṣūl ilā Ma‘rifat al-Uṣūl*. Stewart cleverly reconstructs large portions of the *Wuṣūl* based on extensive quotations in the *Ikhtilāf Uṣūl al-Madhāhib* of al-Qāḍī al-Nu‘mān (d. 363/974). Luckily, one of these portions is the section on *istiḥsān*. It is also clear that in his own treatment of *istiḥsān*, al-Qāḍī al-Nu‘mān borrows heavily from Ibn Dāwūd. For that reason, this section also discusses the arguments found in the *Ikhtilāf* which, even if they do not extend back to Ibn Dāwūd, still reflect the discourse surrounding *istiḥsān* in the gap period (850 – 950 CE).

Together, these arguments show that the debate over *istiḥsān* in this period was a full-fledged debate over the validity of legal subjectivity. This is noteworthy because, as the next chapter shows, classical Hanafis make the debate more semantic, arguing over the

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<sup>659</sup> See Chapter 4.1, which quoted Ibn al-Qaṣṣ’s list of cases.

<sup>660</sup> Dublin: Chester Beatty Library. MS Arabic 5115, fol. 4b.

definition of *istiḥsān*. Again, this clearly signals the difference between the Basran defence – that *istiḥsān* is subjective but subjectivity is necessary – and the classical Hanafi defence that *istiḥsān* is not subjective and its critics have misunderstood it.

Both the *Wuṣūl* and the *Ikhtilāf* try to refute subjectivity through logical arguments rather than extensive quotations of Qur’an or hadith. Some of these arguments are more developed forms of al-Shāfi‘ī’s, while some are completely distinct. As for the arguments which build upon al-Shāfi‘ī’s, the first of these is the *a fortiori* argument that the prophets could not rule without revelation therefore scholars must not. Al-Qāḍī al-Nu‘mān states:

From where have you decided that it is permissible to make your *istiḥsān* a binding decree from God upon His creation?...Did God grant that to any of his prophets?...Did any of His Messengers claim this for themselves? Did they not permit and prohibit only what God commanded them to permit and prohibit?<sup>661</sup>

Al-Qāḍī al-Nu‘mān deploys al-Shāfi‘ī’s *a fortiori* argument with a flurry of rhetorical questions. Recall that Muways b. ‘Imrān argued the opposite of this, indicating that al-Qāḍī al-Nu‘mān’s argument here is indeed responding specifically to the Basran defence.

Another of al-Shāfi‘ī’s arguments which al-Qāḍī al-Nu‘mān adopts is that *istiḥsān* makes God’s law too variable. Al-Qāḍī al-Nu‘mān states that if God permitted jurists to rule based on what they like or dislike, then “they would never agree, due to the simple

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<sup>661</sup> al-Qāḍī al-Nu‘mān, *Ikhtilāf Uṣūl al-Madhāhib*, 188-89.

differences in their natures (*ikhtilāf ṭabāʿiḥim*), and the same thing would be permissible to one who likes it but prohibited to one who dislikes it.”<sup>662</sup>

Al-Qāḍī al-Nuʿmān then augments this argument with a theological note, updating it from al-Shāfiʿī’s time since theological discourse has clearly matured since then. He adds that legal variability is theologically problematic because the same thing cannot be both “good in itself (*ḥasan li-ʿaynihi*)” and “bad in itself (*qabīḥ li-ʿaynihi*)”. However, by *istiḥsān*, two jurists could declare the same thing both good and bad. Only one of those verdicts is correct, due to the verse of the Qurʾan, “And they are not equal, the good (*al-ḥasana*) and the bad (*al-sayyiʿa*),”<sup>663</sup> which al-Qāḍī al-Nuʿmān interprets to mean that, on a metaphysical level, something must be either *ḥasan* or *qabīḥ*. Thus, *istiḥsān* cannot be a proof, since it would allow two individuals to disagree on their evaluation of the same thing, and only one of their evaluations is correct, meaning there must be separate criteria by which to know the good.

In a way, the rest of al-Qāḍī al-Nuʿmān’s arguments flow from this, for they all touch on the theme of moral relativism. For example, one argument deals with moral relativism on a dialectical level. Al-Qāḍī al-Nuʿmān says that if a jurist accepts their own *istiḥsān* as proof, then they must also accept their opponent’s *istiḥsān* as a proof. Thus, in any disagreement, jurists would either have to 1) claim their own *istiḥsān* as proof and reject

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<sup>662</sup> Ibid., 189.

<sup>663</sup> Q. 41:35.

their opponent's, which is inconsistent, or 2) regard their opponent's *istiḥsān* as equally valid, in which case they would have to believe that the same thing is simultaneously permissible and prohibited.<sup>664</sup>

Moral relativism comes up again in a truer sense regarding God's judgement. Al-Qāḍī al-Nu'mān argues that everyone is always acting by their own *istiḥsān*, in the sense that everyone believes what seems best to them. Thus, if God accepted *istiḥsān* as a valid criterion, then no one would ever be in disobedience to Him, since they are all acting by their *istiḥsān*. Al-Qāḍī al-Nu'mān states, "If God permitted people to do whatever their *istiḥsān* led them to do, then he would never punish anyone."<sup>665</sup> He makes the moral relativism even plainer when he states, "If you judge in this way, then you have also decreed that the Jews and the Christians and the Magians and the idol-worshippers are also correct in [believing in] whatever faith their *istiḥsān* leads them to."<sup>666</sup> Al-Qāḍī al-Nu'mān emphasises that there must be some objective criteria by which to know the true moral value of things.

We then arrive at al-Qāḍī al-Nu'mān's long quotation of the earlier Ibn Dāwūd, whose arguments similarly rely on clever logic. For our purposes, two of these arguments are worth outlining. The first relies on the idea of something being "good in itself (*ḥasan li-*

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<sup>664</sup> al-Qāḍī al-Nu'mān, *Ikhtilāf Uṣūl al-Madhāhib*, 188.

<sup>665</sup> *Ibid.*, 189.

<sup>666</sup> *Ibid.*, 188. This same argument appears in Ibn Qutayba in regards to *ijtihād*. Ibn Qutayba, *Ta'wīl Mukhtalif al-Ḥadīth*, 1:221.

‘aynihi),” showing that al-Qāḍī al-Nu‘mān built his own argument upon Ibn Dāwūd’s. For clarity, we reproduce the argument here in a diagrammatic format.<sup>667</sup>

**Premise:** Something good must be either 1) good in itself (*ḥasan li-‘aynihi*), or 2) good through evidence outside of itself.

**Intermediate Premise:** If it is good in itself (*ḥasan li-‘aynihi*), then either every truth is good in itself (*ḥasan li-‘aynihi*), or only one truth among many is good in itself.

**Intermediate Conclusion:** Then there still must be criteria to identify the truth which is good in itself.

**Intermediate Premise:** If you say it can be known by natural instinct and needs no evidence...

**Intermediate Conclusion:** An opponent could simply deem reprehensible that which you prefer. If you disagree with that, you are obstinately not allowing for your opponent what you allow for yourself.

**Conclusion:** A claim therefore cannot be established through *istiḥsān*.

The second of the logical progressions is then truly fascinating and perhaps the soundest in terms of pure logic. It focuses on a particular set of cases, here cases of abrogation (*naskh*),<sup>668</sup> in which the opponent’s larger metaphysical claim cannot hold. It proceeds as follows:<sup>669</sup>

**Premise:** If God abrogates the prohibition of something, then that thing must either 1) become good (*ḥasan*), or 2) remain evil (*qabīḥ*).

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<sup>667</sup> al-Qāḍī al-Nu‘mān, *Ikhtilāf Uṣūl al-Madhāhib*, 190-91.

<sup>668</sup> Abrogation refers to something which the Qur’an or sunna initially permitted, then later prohibited, or vice-versa. This becomes a much-debated concept, such as the question of whether sunna can abrogate Qur’an.

<sup>669</sup> al-Qāḍī al-Nu‘mān, *Ikhtilāf Uṣūl al-Madhāhib*, 191.

**Intermediate Conclusion:** It if becomes good, then good and evil do not lie in the essence (‘*ayn*) of things, but rather by God’s command (*ḥukm*), since it became good simply due to the new law.<sup>670</sup>

**Intermediate Conclusion:** If it remains evil...and if it is obligatory, as you say, to follow the good and prohibit the evil, then it has become obligatory to prohibit that which God has just declared permissible.

**Conclusion:** This shows the invalidity of *istiḥsān*.

None of these arguments seem to respond directly to any of Muways’s. However, the next section shows that both al-Qāḍī al-Nu‘mān and Ibn Dāwūd quote the interlocutors to whom their arguments are responding, and in so doing, reveal their arguments. As we shall see, these arguments are different from Muways’s, and in one case, the argument is explicitly a response to one of Ibn Dāwūd’s arguments, indicating that it was not one of Muways b. ‘Imrān’s original arguments, thus evidencing a later line of thinkers who continued to pursue the Basran defence.

### **The Persistence then Disappearance of the Radical “Basrans”**

We begin with Ibn Dāwūd, who quotes an interlocutor responding to his argument on abrogation. Recall that by Ibn Dāwūd’s argument, abrogation disproves the validity of *istiḥsān* because if something is permissible and *ḥasan*, then later God prohibits it, either it 1) becomes *qabīḥ*, in which case human judgment is no criterion for what is *ḥasan* or *qabīḥ*, or

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<sup>670</sup> Meaning that *istiḥsān* cannot be a criterion since the definition of *ḥasan* and *qabīḥ* are completely reliant on revelation.

2) remains *ḥasan*, in which case *istiḥsān* would deem it permissible when God has clearly just prohibited it.

After making this argument, Ibn Dāwūd cites the response of his interlocutors. Ibn Dāwūd writes, “And they have now gone to the extent of arguing that if the good (*ḥasan*) becomes prohibited, then it should be called ‘Good but not followed (*ḥasan wa-ghayr muttabaʿ*),’ even though this contradicts their own principle that it is obligatory to follow what is [*ḥasan*] (*yajib al-qawl bihi*).”<sup>671</sup>

This tremendous piece of evidence offers us three clear insights. First, this must have been a response to the specific case study of abrogation, showing that there was a back-and-forth on the topic. The Basrans articulated their defence of subjectivity, then opponents formulated the case study of abrogation as a refutation, then the Basrans (or whoever they are at this point) responded specifically to that case study. This could have all been in the same generation, but it is more likely a later party, for Ibn Dāwūd introduces their argument with “And they have now gone to the extent of arguing (*wa-qad ṣārū yazʿumūn*),” which heavily implies chronological development.

A second insight from this quote is the presence of a highly technical classification, “good but not followed (*ḥasan wa-ghayr muttabaʿ*),” which is only useful for accommodating this case study of abrogation. This again implies later evolutions of an initial doctrine made

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<sup>671</sup> al-Qāḍī al-Nuʿmān, *Ikhtilāf Uṣūl al-Madhāhib*, 191.

in response to interlocutors. It also implies that these later evolutions reach a high level of technicality, and that the proponents of the Basran defence have a well-developed theory which hinges on the concepts of *ḥasan* and *qabīḥ*.

This is supported by a third insight from the quote, their principle that “it is obligatory to rule by [the good] (*yajib al-qawl bihi*),” which Ibn Dāwūd says contradicts their formulation of “good but not followed.” Again, this implies a well-developed theory of *ḥasan* and *qabīḥ* as applied to law-making. Of course, these terms are also central to theological debates of the same time period, such as the debate over *taḥsīn ‘aqli*, i.e. whether what is *ḥasan* can be known rationally or only through revelation. *Istiḥsān* clearly aligns more with the former, for it is an easy step to say that if good and evil are rationally knowable without God’s command, then rational assessments of good and evil can filter God’s command as applied to particular situations. Given the terminological and conceptual overlap between these debates, theological sources from this period might also hold valuable insights into the Basran defence.

Outside of this quote, Ibn Dāwūd does not cite any of the Basrans’ other arguments, but al-Qāḍī al-Nu‘mān does. He mentions verses of Qur’an that his interlocutors cite as proof that a scholar can rule by subjective judgment. These verses again make clear that these interlocutors are arguing the Basran defence and that they are citing the verses to argue that the moral character (*ḥāl*) of scholars makes them from a class of people that the Qur’an testifies is guided by God.

Al-Qāḍī al-Nu‘mān begins this section with, “they have claimed as evidence the words of God that...,” then cites two sets of Qur’anic verses supporting the argument that jurists have the authority to rule by their *ḥāl*.<sup>672</sup> The verses are:

**Verse #1:** Give good tidings to My servants. Those who listen to the word and follow the best of it (*aḥsanahu*). They are the ones whom God has guided and they are the ones of subtle wisdom (*ulū-l-albāb*).<sup>673</sup>

**Verse #2:** The one whom God has opened his heart to Islam, he is upon light from his Lord (*‘ala nūr min rabbihi*)...God revealed the best of speech, a book that is consistent and draws comparisons, which causes the skins of those in awe of their Lord to shiver. Then their skins and their hearts soften at the mention of God. Such is God’s guidance. He guides with it whoever He will. No one can guide those whom God leaves to stray.<sup>674</sup>

Both of these verses speak of a certain party of people: those “whom God has guided,” those “of subtle wisdom,” those “upon light from their Lord,” those “whose hearts soften at the mention of God,” for “such is God’s guidance. He guides with it whoever He wills.” The Basran defence is clearly invoking these verses as evidence that a certain class of people, by their character and perfection of *ḥāl*, are guided by God. Naturally, the most pious and righteous of scholars are of this elite class, and since they are guided by God and upon His light, then their inclination or sensibility can be authoritative. Here, then, is a Qur’anic argument for why scholars can rule without direct evidence.

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<sup>672</sup> Quote and verses cited at *ibid.*, 186-87.

<sup>673</sup> Q. 39:17-18.

<sup>674</sup> Q. 39:22-23.

Al-Qāḍī al-Nu‘mān retorts with a few Qur’anic verses to refute this, such as “Do not say falsely, ‘This is lawful (*hādha ḥalāl*) and that is forbidden (*hādha ḥarām*),’ inventing a lie about God. Those who invent lies about God will not prosper.”<sup>675</sup> More interesting, however, is another verse he cites which he endows with intriguing subtext.

He cites the verse, “Follow what has been sent down to you from your Lord. Do not follow other masters (*awliyā’*) besides Him. How seldom you take heed.”<sup>676</sup> It can be no coincidence that al-Qāḍī al-Nu‘mān cites a verse with the word “*awliyā’* (sing. *walī*),” which is of course the term for a Sufi saint. This is a pointed reference to those scholars claiming they can rule through their *ḥāl*. With this reading, al-Qāḍī al-Nu‘mān adds subtext to the Qur’anic verse to make it read, “Do not follow these *walīs*,” i.e. those who claim that their knowledge and spiritual perfection gives them authority to rule without evidence.<sup>677</sup>

With these verses, it is clear that the adherents of the Basran defence have begun to argue that divine inspiration is a source of authority for a scholar’s subjectivity. This explains why in later *uṣūl* works, faint traces of the radical Basrans survive not in discussions of *istiḥsān*, but of *ilhām* (divine inspiration). For example, al-Jaṣṣāṣ, author of the earliest extant work of Hanafi *fiqh*, the *Fuṣūl*, makes no mention in his long treatment of *istiḥsān* of any trace of the Basran defence. However, in his treatment of *ilhām*, al-Jaṣṣāṣ cites

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<sup>675</sup> Q. 16:116

<sup>676</sup> Q. 7:3

<sup>677</sup> Future scholarship might study how this interplays with al-Qāḍī al-Nu‘mān’s views on Sufism, if his views on the topic survive.

the same arguments against subjectivity that Ibn Dāwūd makes against *istiḥsān*, namely the argument that those who allow *istiḥsān* for themselves must necessarily allow it for their opponents, showing that it cannot be a valid criterion.<sup>678</sup>

Parallels appear again in the *uṣūl* manual *Taqwīm al-Adilla* of Abū Zayd al-Dabūsī. Al-Dabūsī defines *ilhām* as “knowledge that moves the heart calling you to act in a certain way without any evidence or proof.”<sup>679</sup> This is eerily similar to the reported definition of *istiḥsān* as “proof that occurs to the mind of the scholar that he is unable to put into words,” a definition that later critics of *istiḥsān* say was articulated and defended by a group of *istiḥsān*’s early supporters.<sup>680</sup> Al-Dabūsī’s arguments against *ilhām* then parallel many of those found in Ibn Dāwūd.<sup>681</sup> Al-Dabūsī also quotes a number of Qur’anic verses and hadiths cited by the proponents of *ilhām*, many of them overlapping with the verses mentioned by al-Qāḍī al-Nu‘mān. However, al-Dabūsī adds one interesting hadith that the proponents of *istiḥsān* apparently claimed, which is the Prophet’s statement, “Put your hand on your chest. What sits uncomfortably in your heart, leave it, no matter how many rulings people give you [permitting it] (*wa-in aftāka al-nās*).”<sup>682</sup> One can see how this hadith is directly applicable

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<sup>678</sup> al-Jaṣṣāṣ, *al-Fuṣūl fī al-Uṣūl*, 3:382.

<sup>679</sup> al-Dabūsī, *Taqwīm al-Adilla fī Uṣūl al-Fiqh*, 392.

<sup>680</sup> Abū Ḥāmid al-Ghazālī, *al-Mustaṣfā*, ed. Muḥammad ‘Abd al-Salām ‘Abd al-Shāfi (Beirut: Dār al-Kutub al-‘Ilmiyya, 1993), 173; al-Āmidī, *al-Iḥkām fī Uṣūl al-Aḥkām*, 4:157; al-Subkī and al-Subkī, *al-Ibhāj fī Sharḥ al-Minhāj*, 6:2659; al-Zarkashī, *al-Baḥr al-Muḥīṭ*, 8:103.

<sup>681</sup> Al-Dabūsī may have taken the arguments from al-Jaṣṣāṣ, since we know al-Dabūsī built upon al-Jaṣṣāṣ directly, including for his treatment of *istiḥsān*, as we will see in Chapter 5

<sup>682</sup> al-Dabūsī, *Taqwīm al-Adilla fī Uṣūl al-Fiqh*, 393.

to the stringent types of *istiḥsān* by which jurists prohibit things that are technically permissible out of their own moral sensibilities.

These arguments similarly appear in discussions of *ilhām* in works of theology (*kalām*). The *Tabṣirat al-Adilla* of Abū al-Muʿīn al-Nasafī (d. 508/1115), a work of Māturīdī *kalām*, states in its treatment of *ilhām*, “There is a party which said (*qāla qawm*), ‘Whoever becomes certain of something being *ḥasan* is obligated (*yajibu*) to then act upon it.’”<sup>683</sup> Note that this is exactly the principle that Ibn Dāwūd alluded to when he said that the Basrans’ category of “good but not followed (*ḥasan wa-ghayr muttabaʿ*)” contradicts their principle that “it is obligatory to rule by [the good] (*yajib al-qawl bihi*).”<sup>684</sup> Al-Nasafī then retorts that if one accepts the obligation to rule by what is *ḥasan*, then one would have to concede that every religion is correct, or that two contradictory arguments are correct simultaneously, and this is clearly impossible. Again, these are exactly the arguments that we already saw in the *Wuṣūl* against *istiḥsān*, which were themselves evolutions of al-Shāfiʿī’s own arguments.

Ibn Ḥazm gives us proof that *istiḥsān* and *ilhām* are indeed directly linked. He states, “As to what someone believes without evidence...it must be one of two things. The first is that it is something he simply prefers (*istaḥsanahu*) from his own whim, and in this category falls *raʿy*, *istiḥsān*, and claiming *ilhām*. The second is that he believes it because

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<sup>683</sup> Abū al-Muʿīn al-Nasafī, *Tabṣirat al-Adilla fī Uṣūl al-Dīn*, ed. Ḥusayn Ātāy (Ankara: Nashriyyāt Riʾāsat al-Shuʿūn al-Dīniyya, 1993), 34.

<sup>684</sup> al-Qāḍī al-Nuʿmān, *Ikhtilāf Uṣūl al-Madhāhib*, 191.

someone other than the Prophet believes it, and this is imitation (*taqlīd*).”<sup>685</sup> Ibn Ḥazm joins *ilhām* with *istiḥsān* in a single category, and the list of terms, including *taqlīd*, are all technical terms with legal connotations, implying that *ilhām* should be treated as such.

Lastly, to take a speculative turn, it might not be a coincidence that al-Ghazālī and other critics cite the subjective definitions of *istiḥsān* in their treatments of *istiḥsān*, while al-Jaṣṣāṣ and al-Dabūsī only cite them when discussing *ilhām*. By Stewart’s argument, al-Jaṣṣāṣ intentionally avoids citing even the names of these early radical Hanafis. Perhaps he did the same with their ideas on *istiḥsān*, relegating those arguments instead to *ilhām*, since they would undermine his own argument that *istiḥsān* never connoted subjectivity. Once again, this aligns with Stewart’s argument that al-Jaṣṣāṣ and other 10<sup>th</sup>- century Hanafis purposefully ignored or disassociated themselves from these more radical adherents of Hanafi doctrine. This does not necessarily entail some kind of subterfuge on al-Jaṣṣāṣ’s part. In the early 10<sup>th</sup> century, identities like “Hanafi” were not yet formal, so al-Jaṣṣāṣ and his peers might have legitimately seen themselves as completely unrelated to these other figures. It is perhaps only in retrospect that we are tempted to call both parties “Hanafi”.

## 4.5 Conclusion

This chapter has traced al-Shāfi‘ī’s arguments against *istiḥsān*, Bishr al-Marīsī’s agreement with those arguments, then a line of reasoning that disagrees with those

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<sup>685</sup> Ibn Ḥazm, *al-Iḥkām fī Uṣūl al-Aḥkām*, 6:60.

arguments and defends a scholar's authority to rule without evidence. We call this latter line the "Basran defence" only because the early figures associated with it were Basran, but we have no sense where its later adherents might have been or what their other legal opinions were. We do find, however, evidence for a well-developed legal theory hinging on terms like "ṣalāḥ", "ḥasan", and "qabīḥ", as well as the principle that what is "ḥasan" must always be followed.

As the next chapter shows, classical Hanafis take up a different line of defence for *istiḥsān* and relegate the Basran defence to discussions of *ilhām*, likely to aid their theorisation of *istiḥsān* as objective. None of these classical Hanafis entertain the idea that subjectivity might be valid. It is important to consider, then, whether by the orthodoxy that emerged in *uṣūl*, certain arguments became untenable that might have remained acceptable in the spiritual discourses of Sufism or in the pragmatic discourses of *fiqh*. It may be impossible to define wisdom and defend it with proofs, and therefore wisdom became an indefensible theoretical proposition in *uṣūl*. Still, isn't the whole point of wisdom that it is impossible to define?

## Chapter 5: The Theorisation and Practice of *Istiḥsān* in Classical Hanafism

As the previous chapter showed, al-Shāfiʿī argued that *istiḥsān* was subjective and therefore invalid. The “Basrans” agreed that *istiḥsān* was subjective, but embraced that subjectivity as necessary to the proper functioning of the law. This chapter shows that the classical Hanafis pursued a completely different strategy for defending *istiḥsān*. In short, they agree with al-Shāfiʿī that subjectivity is unacceptable, but disagree that *istiḥsān* is in any way subjective, saying that al-Shāfiʿī misunderstood the term, and that while it might appear to be subjective, it is in fact supported entirely by conventional sources of law. With this, the focus of the controversy over *istiḥsān* transitions from subjectivity to the definition of the term itself.

To win this fight, classical Hanafis define and theorise *istiḥsān* in the genre of *uṣūl al-fiqh*. This chapter traces the evolution of *istiḥsān* in the works of four foundational Hanafi *uṣūl* authors: al-Jaṣṣāṣ (d. 370/981), al-Dabūsī (d. ca. 430/1038-9), al-Bazdawī (d. 482/1089), and al-Sarakhsī (d. 490/1096).<sup>686</sup> Together, these authors achieve the remarkable: they take a seemingly-subjective and heavily-criticised concept and theorise it so rigorously that critics start complaining about it being too conventional instead, i.e. redundant with the conventional sources of law.

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<sup>686</sup> Murteza Bedir performs a preliminary analysis of *istiḥsān* in these works in a section of his PhD thesis. This chapter’s analysis builds on Bedir’s. Murteza Bedir, "The Early Development of Ḥanafī Uṣūl Al-Fiqh" (University of Manchester, 1999), 211-44; "The Power of Interpretation: Is *Istiḥsān Qiyās*?", *Islamic Studies* 42, no. 1 (2003).

By studying this process, this chapter shows how the classical Hanafis balanced loyalty to their *fiqh* with the theoretical expectations of the genre of *uṣūl*. The chapter also reveals dramatic differences between these authors' theorisations of *istiḥsān*. It shows how each author adopts then modifies the work of his predecessors, sometimes due to theoretical weaknesses in the previous work, and sometimes due to theological disagreements. This chapter therefore also depicts how later Hanafis purged earlier Hanafi works of Muʿtazilism.

Finally, the chapter looks at how classical Hanafis continued to use *istiḥsān* in their *fiqh*. The chapter addresses this question through a case study: while the Hanafi founders prohibited scholars from earning money for teaching, later Hanafis declared it permissible by *istiḥsān*. By looking at the causes of this new ruling and how later Hanafis justified it, this chapter shows how classical Hanafis used *istiḥsān* to actively respond to political and social developments, justifying it under the umbrella of *ḍarūra* such that it was still consistent with *istiḥsān*'s new theorisation in *uṣūl*. In this way, *istiḥsān* achieved many of the same ends while not being demonstrably more subjective than the *ḍarūra*-reasoning already practised by the other madhhabs. *Istiḥsān* therefore becomes a critical mechanism for legal change in classical and post-classical Hanafism.

## 5.1 The First Theorisations of *Istiḥsān* by al-Jaṣṣāṣ and al-Dabūsi

Abū Bakr al-Jaṣṣāṣ (d. 370/981) and Abū Zayd al-Dabūsi (d. ca. 430/1038-9) are a generation apart, but their theorisations of *istiḥsān* are remarkably similar, making it

sensible to analyse them together. Their treatments of *istiḥsān* appear in their respective works of *uṣūl*: al-Jaṣṣāṣ's *al-Fuṣūl fī al-Uṣūl*<sup>687</sup> and al-Dabūsī's *Taqwīm al-Adilla*.<sup>688</sup> Both of these works were foundational for later Hanafis, including al-Bazdawī and al-Sarakhsī.

Together, al-Jaṣṣāṣ and al-Dabūsī make one major contribution to the topic of *istiḥsān*: they give it a typology that tries to accommodate its varied uses. Al-Dabūsī then makes his own contribution by defining *istiḥsān* as a hidden *qiyās*, which becomes fundamental to the Hanafi conception of the topic. Meanwhile, al-Jaṣṣāṣ gets into trouble for his equation of *istiḥsān* with *takhṣīṣ al-illa* (specification of the *ratio legis*), a Mu'tazili concept that later Hanafis reject.

### Precursors to al-Jaṣṣāṣ

Devin Stewart dates al-Jaṣṣāṣ's *Fuṣūl* to between 340/952 and 370/980.<sup>689</sup> Apparent from the technicality of al-Jaṣṣāṣ's discussion is that other Hanafis had already begun theorising *istiḥsān* as objective. External evidence supports this claim. For example, multiple sources mention that the Egyptian Hanafi jurist Abū Ja'far al-Ṭaḥāwī (d. 321/933) rejected the validity of *istiḥsān*.<sup>690</sup> This claim should be treated with some caution, as these sources trace it to the Zāhirī jurist Ibn Ḥazm (d. 456/1064), who only mentions it in a polemical

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<sup>687</sup> al-Jaṣṣāṣ, *al-Fuṣūl fī al-Uṣūl*, ed. 'Ajil Jāsim al-Nashamī, 4 vols. (Kuwait: Wizāra al-Awqāf wa-l-Shu'ūn al-Islāmiyya, 1994).

<sup>688</sup> al-Dabūsī, *Taqwīm al-Adilla fī Uṣūl al-Fiqh*, ed. Khalīl al-Mays (Beirut: Dār al-Kutub al-ʿIlmiyya, 2001).

<sup>689</sup> Devin Stewart, "Muḥammad b. Jarīr al-Ṭabarī's *al-Bayān 'an Uṣūl al-Aḥkām* and the Genre of *Uṣūl al-Fiqh* in Ninth-Century Baghdad," 322.

<sup>690</sup> al-Zarkashī, *al-Baḥr al-Muḥīṭ fī Uṣūl al-Fiqh*, 6:88.

attempt to undermine the Hanafi defence of *istiḥsān* (i.e. by showing that even a prominent Hanafi rejected it).<sup>691</sup> Thus, it is likely that al-Ṭaḥāwī discussed the issue with more nuance than the complete rejection that Ibn Ḥazm reports. This is further supported by the fact that Ibn Ḥazm himself wrote a treatise entitled, “A Refutation of al-Ṭaḥāwī on *Istiḥsān*,” meaning al-Ṭaḥāwī must have supported *istiḥsān* in some way for Ibn Ḥazm to have refuted him about it.<sup>692</sup>

It is therefore more likely that al-Ṭaḥāwī rejected subjectivity in the law but tried to argue that *istiḥsān* was not subjective. This also makes sense given al-Ṭaḥāwī’s Shafii leanings. Al-Ṭaḥāwī was himself originally a Shafii, having studied under his uncle, the foundational Shafii scholar al-Muzanī (d. 264/877-8), before later becoming Hanafi. Al-Ṭaḥāwī also spent the majority of his life in Egypt, which in the 9<sup>th</sup> century was overwhelmingly Shafii and Maliki, while hostile to Hanafism due to its association with the *miḥna*, the political inquisition that led to the imprisonment of many non-Hanafi scholars in Egypt and elsewhere.<sup>693</sup> El Shamsy states concerning al-Shāfi‘ī’s influence on al-Ṭaḥāwī that “in spite of al-Ṭaḥāwī’s overall adherence to the Hanafi legal position, he adopted al-Shāfi‘ī’s justification for the systematic incorporation of hadith into jurisprudence...and

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<sup>691</sup> Ibn Ḥazm, *Mulakhkhaṣ Ibtāl al-Qiyās wa-l-Ra’y wa-l-Istiḥsān*, ed. Sa‘īd al-Afghānī (Damascus: Maṭba‘a Jāmi‘a Dimashq, 1960), 51.

<sup>692</sup> Majd al-Dīn al-Fayrūzābādī, *al-Bulgha fī Tarājim A‘immat al-Naḥw wa-l-Lughā*, ed. Ḥassān Aḥmad Rātib al-Miṣrī (Damascus: Dār Sa‘d al-Dīn, 2000), 201.

<sup>693</sup> Nurit Tsafir, "Abū Ja‘far Al-Ṭaḥāwī," in *Islamic Legal Thought: A Compendium of Muslim Jurists*, ed. Oussama Arabi, David S. Powers, and Susan A. Spector (Leiden: Brill, 2013), 124-5.

concluded with many of al-Shāfi‘ī’s positions on legal theory.”<sup>694</sup> Thus, al-Ṭahāwī’s reported rejection of *istiḥsān*, a hallmark of Hanafi subjectivity, would be consistent with his role in pushing Hanafi law towards traditionalism and theoretical objectivity. Still, given that Ibn Ḥazm refuted him on the topic, and given that al-Ṭahāwī does not seem to reject many *istiḥsān* opinions, al-Ṭahāwī was likely the first in a long line of classical Hanafis who rejected subjectivity but defended Hanafi *istiḥsān* as not subjective.

Al-Jaṣṣāṣ names another scholar who participated in this discourse: his own teacher, Abū al-Ḥasan al-Karkhī (d. 340/952). Al-Jaṣṣāṣ quotes al-Karkhī’s definition of *istiḥsān* as “departing from a ruling to a more preferable ruling, without which the first ruling would have applied.”<sup>695</sup> This definition appears prominently in many later works of *uṣūl*.<sup>696</sup>

Christopher Melchert calls al-Karkhī “the first teacher of the classical Hanafi school.”<sup>697</sup> He was chief of the Hanafis in Baghdad, but more importantly, “he was the first to leave students who wrote commentaries on his *Mukhtaṣar*,” akin to Ibn Surayj (d. 306/918) among the Shafiis, and he “had many more known students than any Hanafi teacher before him,” other than the Hanafi founders.<sup>698</sup> By “first teacher,” Melchert means

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<sup>694</sup> El Shamsy, *The Canonization of Islamic Law*, 205.

<sup>695</sup> al-Jaṣṣāṣ, *al-Fuṣūl fi al-Uṣūl*, 234.

<sup>696</sup> The 20<sup>th</sup>- century scholar Muḥammad Abū Zahra considers al-Karkhī’s definition the most precise because it encompasses all the known usages of the term. Muḥammad Abū Zahra, *Uṣūl al-Fiqh* (Cairo: Dār al-Fikr al-‘Arabī, 1957), 251.

<sup>697</sup> Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries C.E.*, 125.

<sup>698</sup> Melchert also gives a list of these students. *Ibid.*, 125-28.

that al-Karkhī marks the beginning of classical Hanafism as a mature madhhab. This is a reminder that al-Jaṣṣāṣ’s *Fuṣūl* also reflects the discourses of al-Karkhī and his students.

### Al-Jaṣṣāṣ’s Typology

Al-Jaṣṣāṣ begins his discussions of *istiḥsān* on defensive footing, stating in his first sentence, “Some of those who oppose us [Hanafis] have argued for the invalidity of *istiḥsān*, thinking that it means to derive rulings by mere inclination or desire, but they do not know what we mean by the term.”<sup>699</sup> This depicts the previously-mentioned point that, beginning with al-Jaṣṣāṣ, the fight over *istiḥsān* becomes about the definition of the term itself.

Al-Jaṣṣāṣ defines *istiḥsān* as, “To depart from *qiyās* to a ruling which is preferable to it (*tark al-qiyās ilā mā huwa awlā minhu*).”<sup>700</sup> He is then keen to dispel the notion that “preferable” connotes subjectivity, so establishes a four-part typology for what makes another ruling preferable to *qiyās*. According to his typology, *istiḥsān* functions through:

1. *naṣṣ* (textual evidence, i.e. Qur’an and sunna/*athar*)
2. *ijmā’* (consensus)
3. *qiyās ākhar* (alternative analogy)<sup>701</sup>
4. *‘amal al-nās* (custom)<sup>702</sup>

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<sup>699</sup> al-Jaṣṣāṣ, *al-Fuṣūl fi al-Uṣūl*, 223.

<sup>700</sup> Ibid., 234. Before this, al-Jaṣṣāṣ discusses the “Limit Setting” variant of *istiḥsān* discussed in Chapter 2.2. For simplicity, we omit mention of it here since, as already discussed, it is a separate concept which happens to share the same term.

<sup>701</sup> Note it is not yet “a hidden (*khafī*) analogy,” a concept only introduced later by al-Dabūsī.

<sup>702</sup> Note that this aligns with the term used for custom in the *Aṣl*, as opposed to the later “*urf*.”

He then gives examples of each. For *naṣṣ*, he cites that if someone forgetfully eats while fasting, by *istiḥsān* the fast remains valid due to a hadith from the Prophet Muḥammad.<sup>703</sup> For *ijmāʿ*, he cites that if a ritual impurity (*najāsa*) falls into a well, by *istiḥsān* the well becomes pure after the removal of a few buckets of water.<sup>704</sup> However, Chapter 4.2 showed that even Hanafis reported Bishr al-Marīṣī's rejection of this ruling, challenging al-Jaṣṣāṣ's claim of consensus (or complicating what he counts as consensus). This is our first hint at the weakness of some of al-Jaṣṣāṣ's examples and of his typology. We will see how al-Dabūsī actively addresses these issues, including by replacing this example of *ijmāʿ* with another.

For alternative *qiyās*, al-Jaṣṣāṣ cites Case #258 from our dataset from the *Aṣl*, that if a group of thieves breaks into a home but only one thief carries the goods out, by *istiḥsān* the entire group is still liable for the *ḥadd* punishment.<sup>705</sup> Interestingly, al-Jaṣṣāṣ mentions that Hanafis were severely criticised for this ruling and accused of using subjectivity to allow something as serious as the *ḥadd*.<sup>706</sup> This again shows that it is stringent *istiḥsān* which bears

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<sup>703</sup> al-Jaṣṣāṣ, *al-Fuṣūl fī al-Uṣūl*, 246.

<sup>704</sup> *Ibid.*, 247-8.

<sup>705</sup> He argues that the alternative *qiyās* is to the principle of conspiracy, which finds precedent in other legal cases such as highway robbery, and is generally based on the Qurʾanic verse condemning those who “spread corruption in the Earth.” (Q. 5:33.) al-Jaṣṣāṣ, *al-Fuṣūl fī al-Uṣūl*, 238.

<sup>706</sup> Similar to the criticism they received for Case #244 in our dataset, using *istiḥsān* to apply the *ḥadd* for adultery even though witnesses disagree over the corner of the room in which the act occurred.

the brunt of the criticism. Al-Jaṣṣāṣ also cites al-Shaybānī’s comment about this case in the *Aṣl* that “some *qiyās* is involved in this *istiḥsān*” to further prove its rootedness in *qiyās*.<sup>707</sup>

Finally, for custom, al-Jaṣṣāṣ cites a number of cases, such as the validity of wage contracts (*ijāra*), impermissible by *qiyās* because they do not specify a total payment (only an hourly one).<sup>708</sup> Al-Jaṣṣāṣ also cites Case #97 from our dataset, the validity of paying to use a public bathhouse, which indeed the *Aṣl* explicitly attributes to *‘amal al-nās*.<sup>709</sup>

Interestingly, al-Jaṣṣāṣ defines *‘amal al-nās* as practices that occurred during the time of the Companions (*ṣaḥāba*), Successors (*tābi‘ūn*), and Pious Predecessors (*salaf*) that they all witnessed but did not condemn, indicating their tacit approval. This construction of *‘amal al-nās* is problematic, for in appealing to the universal tacit approval of the *salaf*, al-Jaṣṣāṣ conceptually invokes *ijmā‘*. It is no coincidence that al-Dabūsī modifies this category.

Ultimately, al-Jaṣṣāṣ does not admit any subjective reasoning into his theorisation of *istiḥsān*. Still, his subtypes (*naṣṣ*, *ijmā‘*, alternative *qiyās*, and custom) cannot capture many of the types of reasoning from Chapter 3. We also have already seen a few cracks in al-Jaṣṣāṣ’s typology. Al-Dabūsī works to address both of these objections.

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<sup>707</sup> al-Shaybānī, *al-Aṣl*, 4:478.

<sup>708</sup> al-Jaṣṣāṣ, *al-Fuṣūl fi al-Uṣūl*, 247.

<sup>709</sup> *Ibid.*, 248.

## Al-Dabūsī's Typology

Like al-Jaṣṣāṣ, al-Dabūsī begins his discussion of *istiḥsān* by saying that its critics have misunderstood the term, writing, “Due to [the meaning of the word],<sup>710</sup> some jurists think that whoever rules using *istiḥsān* has abandoned *qiyās* without any evidence, and many of our [Hanafi] scholars have been impugned in this way.”<sup>711</sup> Al-Dabūsī argues against this by adopting al-Jaṣṣāṣ's four-part typology, though he amends it in two significant ways. Al-Dabūsī's four categories are:

1. *naṣṣ* (textual evidence)
2. *ijmā'* (consensus)
3. *qiyās khafī* (hidden analogy)
4. *ḍarūra* (necessity)

While preserving al-Jaṣṣāṣ's first two categories, al-Dabūsī modifies the last two, replacing “a different *qiyās*” with “a hidden *qiyās*” and replacing “custom” with “necessity.”

With “a hidden *qiyās*,” al-Dabūsī begins the Hanafi trend of equating *istiḥsān* to *qiyās* despite the fact that they contradict each other at face value. Al-Dabūsī himself notes that, based on the contrast between *qiyās* and *istiḥsān* in the *Aṣl*, “one would think that they are two distinct sources of evidence, in the same way that the Qur'an and sunna are distinct.”<sup>712</sup> However, al-Dabūsī means to undermine this by showing that *qiyās* and *istiḥsān* are not so

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<sup>710</sup> I.e. its literal meaning of “preference” or “seeing something as good.”

<sup>711</sup> al-Dabūsī, *Taqwīm al-Adilla fī Uṣūl al-Fiqh*, 404.

<sup>712</sup> Ibid.

distinct. While al-Jaṣṣāṣ did some work here by including “alternative *qiyās*” in his typology, al-Dabūsī makes the largest contribution in this regard.

This contribution is evident in his very definition of *istiḥsān* as “acting upon evidence which opposes a more obvious (*jalī*) *qiyās*.”<sup>713</sup> Al-Dabūsī constructs *istiḥsān* not as an indication of how strong the evidence is, but how obvious it is. For al-Dabūsī, the *qiyās* position is merely a more obvious *qiyās*, while the *istiḥsān* is a more hidden *qiyās*, thus not abandoning the regime of *qiyās*, but reinforcing the regime itself.<sup>714</sup> Al-Dabūsī does not define what makes one *qiyās* more “obvious” than another, but as mentioned in Chapter 2.2, the distinction is not meant to be technical, but rather expresses that the *istiḥsān* ruling is no less analogical than the *qiyās*. Under “a hidden *qiyās*,” al-Dabūsī then lists many of al-Jaṣṣāṣ’s examples of “a different *qiyās*.” According to Murteza Bedir, al-Dabūsī was the first to use the terms “*jalī* (obvious)”<sup>715</sup> and “*khafī* (hidden)” in this way, a significant contribution given that, after al-Dabūsī, these terms become integral to Hanafi approaches to *istiḥsān*.<sup>716</sup>

Al-Dabūsī’s “obvious-hidden” construction also addresses one of the most troublesome aspects of *istiḥsān*, which is the set of cases discussed in Chapter 2.2 in which a jurist selects the *qiyās* opinion over the *istiḥsān*. By al-Jaṣṣāṣ’s definition of *istiḥsān* as a more

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<sup>713</sup> Ibid.

<sup>714</sup> Ibid., 405.

<sup>715</sup> In the course of the discussion, al-Dabūsī uses the terms “apparent (*zāhir*)” and “obvious (*jalī*)” interchangeably.

<sup>716</sup> Bedir, “The Power of Interpretation: Is *Istiḥsān Qiyās*?,” 11.

preferable ruling, these cases would be paradoxes in which the less “preferable” ruling overrules the preferable one. Al-Dabūsī’s “obvious-hidden” construction addresses this problem by stressing that the terms “*qiyās*” and “*istiḥsān*” are not correlated with the strength of the ruling but with its obviousness. Therefore, the jurist could sometimes depart from *qiyās*, derive the *istiḥsān* by other reasoning, compare the two, then maintain the *qiyās* without violating the typology.

As for the replacement of “custom (*‘amal al-nās*)” with “necessity (*ḍarūra*),” this is certainly an improvement upon al-Jaṣṣāṣ’s theorisation since many more *istiḥsān* rulings fit under the umbrella of “necessity.” This is best illustrated by how al-Dabūsī rearranges al-Jaṣṣāṣ’s sample cases. For example, al-Jaṣṣāṣ cited the case of a wage contract (*ijāra*) as an example of custom,<sup>717</sup> but al-Dabūsī cites it as an example of necessity, claiming that it is a socially necessary form of economic activity.<sup>718</sup> As for the case of an impurity (*najāsa*) falling into a well, whereas al-Jaṣṣāṣ cited it as an example of consensus, al-Dabūsī recategorizes it as necessity, due to the hardship or potential impossibility of building a new well (as we saw with Bishr’s annoyingly impractical *qiyās* position). Still, the changing justification for

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<sup>717</sup> Though recall that al-Jaṣṣāṣ’s definition of custom was more akin to consensus.

<sup>718</sup> al-Dabūsī, *Taqwīm al-Adilla fī Uṣūl al-Fiqh*, 406.

individual cases shows the fluidity of concepts like *ijmāʿ*, custom, and necessity in the formative years of Hanafi *uṣūl*.<sup>719</sup>

However, like al-Jaṣṣāṣ, al-Dabūsī leaves little room for many of the types of reasoning found in Chapter 3. Both authors have their fourth “wild-card” category – “custom” for al-Jaṣṣāṣ and “necessity” for al-Dabūsī – but these are both particular types of reasoning and cannot accommodate all of the types of reasoning we saw. Thus, the typology does not encompass all of the *istiḥsān* rulings found in Hanafi doctrine, unless one embraces such a loose definition of *qiyās* that it can include any rational process at all.

Overall, the four-part typologies developed by al-Jaṣṣāṣ and al-Dabūsī, as well as the “obvious-hidden” construction developed by al-Dabūsī, are both adopted by al-Sarakhsī and al-Bazdawī. However, the next section discusses an additional element of al-Jaṣṣāṣ’s discussion of *istiḥsān* that al-Sarakhsī and al-Bazdawī certainly do not adopt.

### **Specification of the *Ratio Legis* (*Takhṣīṣ al-ʿilla*)**

Al-Jaṣṣāṣ argues as a central part of his discussion that *istiḥsān* is synonymous with *takhṣīṣ al-ʿilla* (specification of the *ratio legis*).<sup>720</sup> A *ʿilla* is the reason behind a ruling that a jurist can then use to derive other rulings through *qiyās*. For example, if the *ʿilla* for

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<sup>719</sup> This also echoes Sadeghi’s argument that the reasons for rulings often changed while the rulings themselves remained the same. Sadeghi, *The Logic of Law-Making in Islam: Women and Prayer in the Legal Tradition*, 148.

<sup>720</sup> al-Jaṣṣāṣ, *al-Fuṣūl fī al-Uṣūl*, 243. For an excellent discussion of *istiḥsān* and *takhṣīṣ al-ʿilla*, see Aron Zysow, “Muʿtazilism and Māturīdism in Ḥanafī Legal Theory,” in *Studies in Islamic Legal Theory*, ed. Bernard G. Weiss (Leiden: Brill, 2002), 248-51.

prohibiting wine is intoxication, then *qiyās* prohibits other intoxicants. *Takhṣīṣ al-‘illa* entails that a *‘illa* can be present while the ruling usually associated with it is absent. Through *takhṣīṣ*, a jurist would argue that the *‘illa* of a case is X, and that the rule usually generated by X is Y, but that due to some impediment (*māni‘*), the ruling associated with X in that case is not Y but Z. Relating this to an example of *istiḥsān*, a jurist using *takhṣīṣ* would say that consumption of food while fasting is the *‘illa* (X) which usually results in the ruling (Y) that the fast is invalidated. However, due to some specific circumstance (forgetful consumption), the ruling is not Y (invalidation), but Z (that the fast is still valid), although the *‘illa* remains X (consumption of food while fasting).

Though the resultant ruling in this example is not controversial, what is controversial is that through *takhṣīṣ*, the *‘illa* of the case remains unchanged, and therefore the same *‘illa* X could result in either Y or Z. Critics of *takhṣīṣ* maintained that a *‘illa* can never be separated from its legal effect, and so in the above case of fasting, the *‘illa* X (consumption of food while fasting) must change to an entirely new *‘illa* (forgetful consumption of food while fasting). In this way, as made clear by Hallaq, the debate is semantic, not over the ruling itself, but the theoretical *‘illa* of the resultant ruling and whether that *‘illa* has changed.<sup>721</sup>

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<sup>721</sup> Wael Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Uṣūl al-Fiqh* (Cambridge: Cambridge University Press, 1997), 109-11.

Characterising the relationship of *takhṣiṣ al-‘illa* with *istiḥsān*, al-Jaṣṣāṣ holds that there are two broad subtypes of *istiḥsān*: 1) a piece of evidence takes precedence over another due to its relative strength, and 2) *takhṣiṣ al-‘illa*.<sup>722</sup> It is under *takhṣiṣ al-‘illa* that al-Jaṣṣāṣ lists the typology discussed earlier, giving us types 2a (*naṣṣ*), 2b (*ijmā‘*), 2c (alternative *qiyās*), and 2d (custom). It is not clear, however, how type (1) of *istiḥsān* is distinct from *takhṣiṣ al-‘illa*, and specifically how the cases of “a different *qiyās*” within *takhṣiṣ al-‘illa* (type 2c) differ from the examples that al-Jaṣṣāṣ provides for type (1). The conceptual lines here are blurred, exhibiting a subtype of a subtype (type 2c) which is functionally equivalent to a different type (type 1).

It is perhaps due to this theoretical ambiguity that al-Dabūsī makes no mention of *takhṣiṣ al-‘illa* in his treatment of *istiḥsān* even though it forms a central part of al-Jaṣṣāṣ’s theorisation. It is likely not for theological reasons (as it is with the later authors) for there is strong evidence that al-Dabūsī was an ardent supporter of *takhṣiṣ al-‘illa*. His *Taqwīm* itself contains a section on the valid impediments of a *‘illa*,<sup>723</sup> and another section on the separation of a *‘illa* from its ruling (*ḥukm*).<sup>724</sup> Many later authors then mention al-Dabūsī’s approval of *takhṣiṣ al-‘illa*, such as al-Ghazālī, who calls al-Dabūsī one of its most extreme

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<sup>722</sup> al-Jaṣṣāṣ, *al-Fuṣūl fī al-Uṣūl*, 234.

<sup>723</sup> al-Dabūsī, *Taqwīm al-Adilla fī Uṣūl al-Fiqh*, 334.

<sup>724</sup> *Ibid.*, 327.

adherents.<sup>725</sup> Thus, al-Dabūsī most likely removed *takhṣiṣ al-‘illa* from his discussion of *istiḥsān* simply for theoretical elegance. Note in the difference between Figures 9 and 10 how al-Dabūsī dramatically simplifies al-Jaṣṣāṣ framework for *istiḥsān*. We will see in the next section how al-Bazdawī and al-Sarakhsī explicitly reject the equivalence of *istiḥsān* with *takhṣiṣ al-‘illa* due to their rejecting *takhṣiṣ al-‘illa* itself on theological grounds.

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<sup>725</sup> Cited in Aron Zysow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory*, Resources in Arabic and Islamic Studies (Atlanta: Lockwood Press, 2013), 243. Other scholars who mention the link include al-Zarkashī and al-Mardāwī. al-Zarkashī, *al-Baḥr al-Muḥīṭ fī Uṣūl al-Fiqh*, 5:161; al-Mardāwī, *al-Taḥbīr Sharḥ al-Taḥrīr fī Uṣūl al-Fiqh*, ed. ‘Abd al-Raḥmān al-Jibrīn (Riyadh: Maktabat al-Rushd, 2000), 3216.

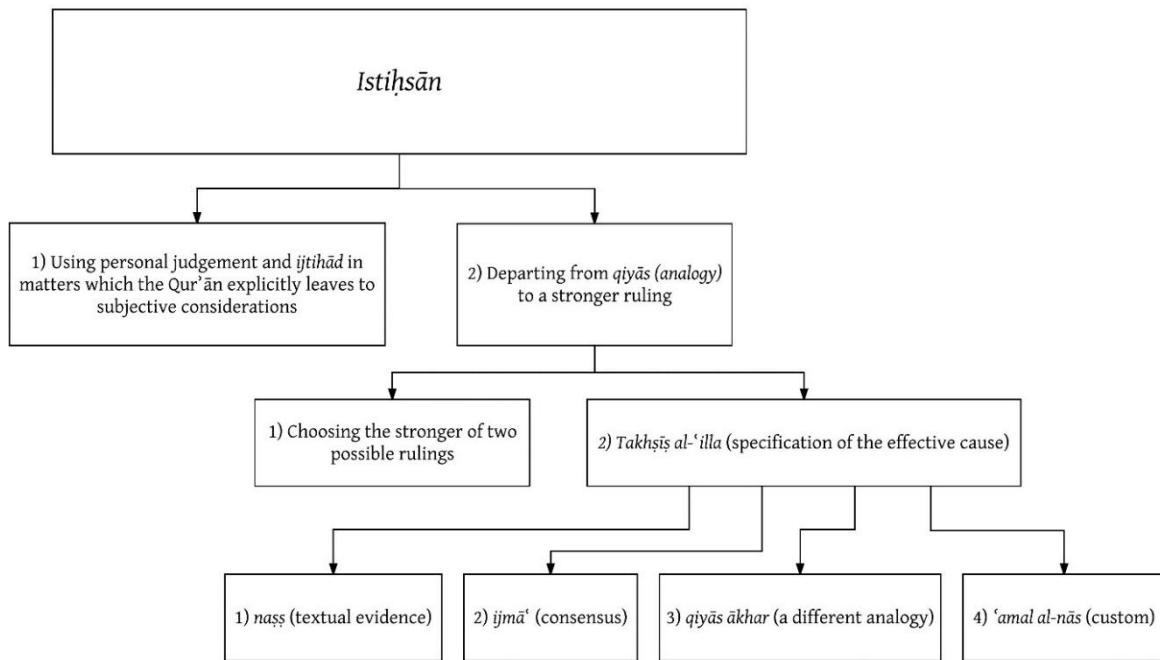


Figure 9: al-Jaṣṣāṣ's Typology of *Istiḥsān*

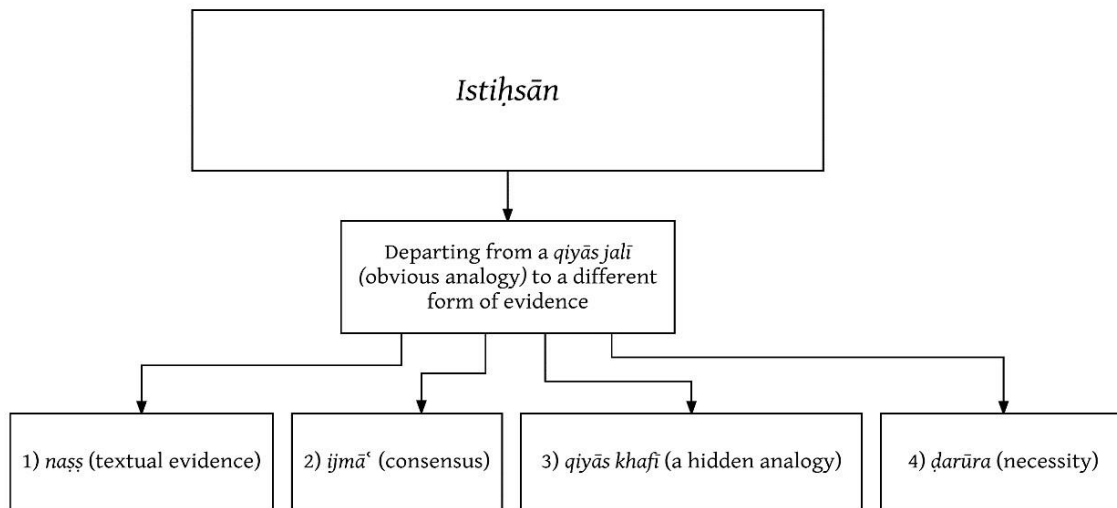


Figure 10: al-Dabūsi's Typology of *Istiḥsān*

## 5.2 The Classical Theorisation of *Istiḥsān* by al-Bazdawī and al-Sarakhsī

The Hanafi *uṣūl* works of the 11<sup>th</sup> century formed the backbone of Hanafi *uṣūl* from then onwards. Chief among these were the *Uṣūl al-Fiqh* of Shams al-Aʿimma al-Sarakhsī (d. 483/1090)<sup>726</sup> and the *Kanz al-Wuṣūl* of Fakhr al-Islām al-Bazdawī (d. 482/1089).<sup>727</sup> This section analyses how their treatments of *istiḥsān* build upon the work of al-Jaṣṣāṣ and al-Dabūsī. Reference to future Hanafi *uṣūl* works then shows that these treatments of *istiḥsān* become the conventional Hanafi positions, such that most later Hanafis use the same structures and typologies as do al-Sarakhsī and al-Bazdawī.

In general terms, al-Sarakhsī and al-Bazdawī construct *istiḥsān* as 1) not *takhṣīṣ al-ʿilla*, and 2) squarely a form of *qiyās*, with a new typology relating *qiyās* and *istiḥsān*. In some ways, however, this theorisation was too successful, for whereas previous critics had panned *istiḥsān* as subjective, they now complained that it was entirely redundant with the conventional sources of law.

### The Rejection of *Takhṣīṣ al-ʿilla* as Muʿtazili

Refuting some of their Hanafi predecessors, both al-Sarakhsī and al-Bazdawī categorically reject the equivalence of *istiḥsān* with *takhṣīṣ al-ʿilla* based on their rejection of

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<sup>726</sup> al-Sarakhsī, *Uṣūl al-Sarakhsī*, ed. Abū al-Wafāʾ al-Afghānī (Beirut: Dār al-Kutub al-ʿIlmiyya, 1993).

<sup>727</sup> al-Bazdawī, *Kanz al-Wuṣūl ilā Maʿrifat al-Uṣūl*, ed. Sāʾid Bakdāsh (Beirut: Dār al-Bashāʾir al-Islāmiyya, 2016).

*takhṣiṣ al-‘illa* itself on theological grounds. Al-Sarakhsī writes, “It is clear after this discussion that ruling through *istiḥsān* is in no way equivalent to *takhṣiṣ al-‘illa*”<sup>728</sup> Similarly, al-Bazdawī writes, “*Istiḥsān* is by way of evidence, not by way of *takhṣiṣ al-‘illa*.”<sup>729</sup> Thus, whereas *takhṣiṣ* had formed a central component of al-Jaṣṣāṣ’s typology of *istiḥsān*, al-Sarakhsī and al-Bazdawī reject the equivalence, then reject *takhṣiṣ* itself in separate sections immediately following their sections on *istiḥsān*.<sup>730</sup>

Both al-Sarakhsī and al-Bazdawī embrace the fact that their rejection of *takhṣiṣ al-‘illa* puts them at odds with earlier Hanafis. Al-Sarakhsī writes, “and some of our [Hanafi] scholars have insisted that *takhṣiṣ* is permissible according to divine law...but this is an egregious error (*khaṭa’ azīm*).”<sup>731</sup> By this statement, al-Sarakhsī not only impugns al-Jaṣṣāṣ and al-Dabūsī, but al-Karkhī and the many other Iraqi Hanafis of the 10<sup>th</sup> century who approved of *takhṣiṣ*.<sup>732</sup> This is perhaps a point of difference between the Iraqi and Central Asian Hanafis. Al-Sarakhsī and al-Bazdawī also make clear that this rejection is based on theological rather than legal considerations. Al-Sarakhsī writes that, “whoever approves of [*takhṣiṣ al-‘illa*] opposes *ahl al-sunna* and inclines towards the opinions of the Mu‘tazilis.”<sup>733</sup>

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<sup>728</sup> al-Sarakhsī, *Uṣūl al-Sarakhsī*, 2:207.

<sup>729</sup> al-Bazdawī, *Kanz al-Wuṣūl ilā Ma‘rifat al-Uṣūl*, 612.

<sup>730</sup> al-Sarakhsī, *Uṣūl al-Sarakhsī*, 2:208; al-Bazdawī, *Kanz al-Wuṣūl ilā Ma‘rifat al-Uṣūl*, 622.

<sup>731</sup> al-Sarakhsī, *Uṣūl al-Sarakhsī*, 2:208.

<sup>732</sup> George Makdisi, "Ibn Taymiyya's Autograph Manuscript on *Istiḥsān*," in *Arabic and Islamic Studies in Honor of Hamilton A. R. Gibb*, ed. George Makdisi (Leiden: Brill, 1965), 446-47, 73.

<sup>733</sup> al-Sarakhsī, *Uṣūl al-Sarakhsī*, 208.

Though their rejection of *takhṣiṣ* is exceedingly technical, it ultimately stems from one tenet of *takhṣiṣ*: that a *‘illa* can exist while its corresponding ruling is absent (*‘adam al-ḥukm ma‘ wujūd al-‘illa*).<sup>734</sup> According to al-Sarakhsī and al-Bazdawī, this idea implies contradiction (*tanāquḍ*) in God’s sovereignty and echoes other Mu‘tazili heresies like the doctrine of the intermediate status of a Muslim who commits a grave sin (*al-manzila bayn al-manzilatayn*) or the doctrine of eternal punishment for a Muslim who commits a grave sin and dies without repenting.<sup>735</sup> As Zysow insightfully notes, the link between *takhṣiṣ* and these cases is that the *‘illa* of faith is present in a person but does not produce its expected effect: salvation.<sup>736</sup>

The point is lucidly treated by al-Bazdawī’s younger brother, Abū al-Yusr al-Bazdawī (d. 493/1100), in his *Ma‘rifat al-Ḥujaj al-Shar‘iyya*, in which he explains that a *‘illa* existing without its associated ruling implies that God would not be discerning enough to give each case its due. Thus, more appropriate than one broad *‘illa* with exceptions for given cases is to hold that God’s law has no true “exceptions,” as those would imply legal contradiction (*tanāquḍ*). For God, then, each case has its own right, and therefore carries its own *‘illa* and associated ruling. In this discussion, Abū al-Yusr al-Bazdawī quotes extensively from Abū

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<sup>734</sup> Scholars held that in metaphysics, this was certainly impossible. The *‘illa* of motion can never inhere in an object at rest. The question was whether this extended to God’s law. The Central Asians clearly held that it did.

<sup>735</sup> al-Sarakhsī, *Uṣūl al-Sarakhsī*, 211.

<sup>736</sup> Zysow, "Mu‘tazilism and Māturidism in Ḥanafī Legal Theory," 250.

Manṣūr al-Māturīdī (d. 333/944-5), eponymous founder of the school of Sunni theology, who also rejects *takhṣīṣ al-‘illa*.<sup>737</sup>

It seems, however, that *takhṣīṣ al-‘illa* was not written off for the remainder of Islamic history as Mu‘tazili heresy. Even Abū al-Yusr al-Bazdawī equivocates as to whether *takhṣīṣ al-‘illa* is truly so offensive, then concludes, “Nonetheless, since the doctrine has become a mark (*shi‘ār*) of the Mu‘tazilis in these regions, one must avoid it just as one avoids wearing a signet ring on one’s right hand as do the [Shiis] or dressing like the infidels (*kuffar*).”<sup>738</sup>

Among the Hanafis, *takhṣīṣ* enjoyed a later resurrection, tentatively first by Manṣūr b. Aḥmad al-Qa‘ānī (d. 775/1373), then fully by Ibn al-Humām (d. 861/1457) and Muḥibb Allāh al-Bihārī (d. 1119/1708).<sup>739</sup> This is likely because – the Mu‘tazilis long gone at this point – the issue could be revisited without so much of its theological baggage.

For the purposes of our analysis, it suffices to say that al-Sarakhsī and al-Bazdawī reject the equivalence of *takhṣīṣ* with *istiḥsān* due to a very recent (within the 50 years since al-Dabūsī) Māturīdī theological trend of rejecting *takhṣīṣ* itself. This is a strong reminder that theological affiliations of the formative and early classical periods were volatile even

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<sup>737</sup> Abū al-Yusr al-Bazdawī, *Ma‘rifat al-Ḥujaj al-Shar‘iyya*, ed. Ya‘qūb al-Bāḥusayn (Beirut: Mu‘assasat al-Risāla, 1999), 167.

<sup>738</sup> Quoted in ‘Abd al-‘Azīz al-Bukhārī, *Kashf al-Asrār ‘an Uṣūl Fakhr al-Islām al-Bazdawī*, 4 vols. (Beirut: Dār al-Kitāb al-‘Arabī, 1974), 4:39.

<sup>739</sup> Zysow, "Mu‘tazilism and Māturīdism in Ḥanafī Legal Theory," 251.

within individual madhhabs, and that the development of legal theory within a madhhab must be contextualised with concurrent theological trends.

### A New Typology Relating *Qiyās* and *Istiḥsān*

Al-Dabūsī's "obvious-hidden" construction subverted the charge that *istiḥsān* abandoned *qiyās*, arguing that *istiḥsān* was simply a hidden *qiyās*. Al-Sarakhsī and al-Bazdawī fully develop "jali" and "khafi" as technical terms, deploying them in yet another four-part typology, this time to characterise the relationship between *istiḥsān* and *qiyās*.

Before delving into this new typology, it is important to note that, while al-Sarakhsī and al-Bazdawī's treatments of *istiḥsān* are relatively distinct in wording and structure, they are conceptually identical. This indicates either a common ancestor or at least broader development of the doctrine among Hanafis of the time, making this new typology not the unique innovation of either author but a reflection of a general trend.<sup>740</sup> According to the typology, *qiyās* and *istiḥsān* each have two types:<sup>741</sup>

#### *Qiyās*

**Type 1:** That which is more apparent (*ẓāhir/jalī*), but whose evidence is weak.

**Type 2:** That whose weakness seems apparent (*ẓāhir*), but is strong in a hidden way.

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<sup>740</sup> On a whole, the two *uṣūl* works themselves are also similar, sharing what Hallaq calls "single-minded [legalism]" with "persistent reference to *furūʿ*." Osman Tastan adds that, in frequently referring to the Hanafi founders, these two works establish the uniquely Hanafi methodology of legal interpretation. Wael Hallaq, "Usūl al-Fiqh: Beyond Tradition," *Journal of Islamic Studies* 3, no. 2 (1992): 182; Osman Tastan, "al-Sarakhsī," in *Islamic Legal Thought: A Compendium of Muslim Jurists*, ed. Oussama Arabi, David S. Powers, and Susan A. Spectorosky (Leiden: Brill, 2013), 251.

<sup>741</sup> al-Sarakhsī, *Uṣūl al-Sarakhsī*, 203; al-Bazdawī, *Kanz al-Wuṣūl ilā Maʿrifat al-Uṣūl*, 611.

### *Istiḥsān*

**Type 1:** That which is more hidden (*khafī*), but whose evidence is strong.

**Type 2:** That whose strength seems apparent (*ẓāhir*), but is weak in a hidden way.

Worth noting here is the remarkable similarity between the wordings of this typology in al-Sarakhsī and al-Bazdawī, for other than one additional phrase found in al-Sarakhsī's definition of Type 1 of *qiyās*, the constructions are identical word-for-word.

These types then interact in a paired manner, meaning Type 1 of *istiḥsān* always interacts with and overrules Type 1 of *qiyās*, while Type 2 of *qiyās* always interacts with and overrules Type 2 of *istiḥsān*. The Type 1 interaction is the more conventional form in which a hidden *istiḥsān* overrules the more apparent *qiyās*. Meanwhile, the Type 2 interaction is the subset of cases where *qiyās* overrules *istiḥsān*. Overall, this typology cements the reduction of *istiḥsān* to the obvious-hidden construction. Figure 11 shows the basic structure of the typology and the paired interaction patterns.

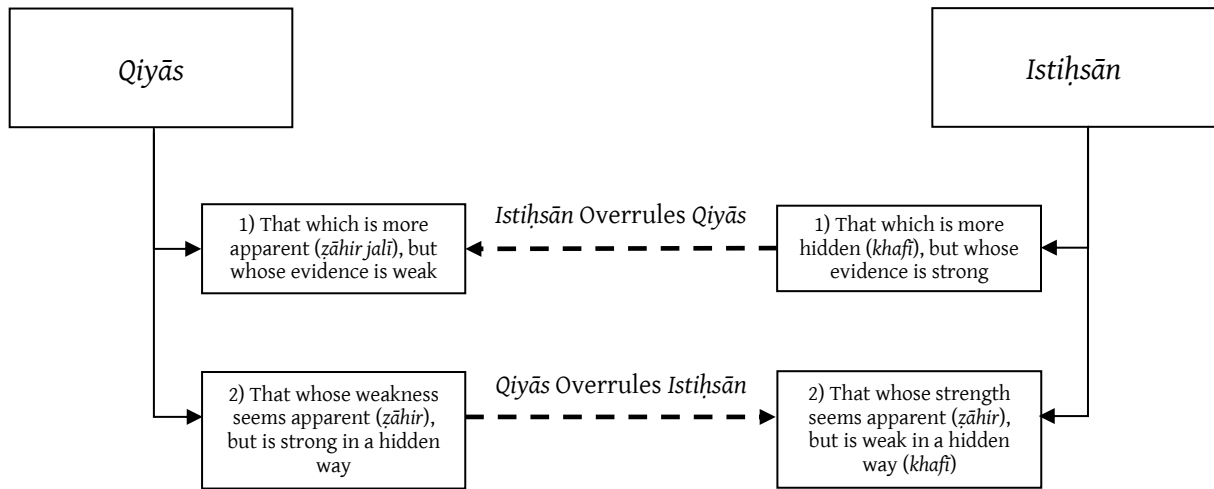


Figure 11: Al-Bazdawī and al-Sarakhsī's Paired Interactions of Qiyās and Istiḥsān

This new typology faces several theoretical ambiguities. The first of these is the problem – present since al-Jaṣṣāṣ - with the subset of cases in which *qiyās* overrules *istiḥsān*. Later commentaries address this question, such as the *Kashf al-Asrār* by ‘Abd al-‘Azīz al-Bukhārī (d. 730/1329), a commentary on al-Bazdawī, in which al-Bukhārī proposes several ways the typology handles this problem. By one justification, “the ruling which was abandoned was called *istiḥsān* because it was stronger than the *qiyās* by itself, but then an additional meaning (*ma‘nā ākhar*) became connected (*ittaṣala*) to the *qiyās*, such that this new combination (*majmū‘*) became stronger than the *istiḥsān*, and for that reason the *istiḥsān* was abandoned in favour of *qiyās*.”<sup>742</sup>

In another explanation, al-Bukhārī distinguishes between *istiḥsān* as a term and as a meaning. By this explanation, *istiḥsān* as a term indicates whichever *qiyās* is more hidden (*khafī*), uncorrelated with preferability of the ruling. He explains that in these cases, jurists first used “*istiḥsān*” – which literally implies preference – only because the hidden *qiyās* was usually, but not always, the preferred ruling. Thus, in cases where *istiḥsān* overrules *qiyās*, the *istiḥsān* ruling is *istiḥsān* both in name (*tasmiyatan*) and in meaning (*ma‘nan*), whereas in cases in which *qiyās* overrules *istiḥsān*, it is *istiḥsān* in name but not meaning (*lā ma‘nan*).<sup>743</sup> Despite the rigor of these explanations, the problem remains confusing and not wholly theoretically resolved, as evidenced by the fact that no single explanation takes hold in

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<sup>742</sup> al-Bukhārī, *Kashf al-Asrār ‘an Uṣūl Fakhr al-Islām al-Bazdawī*, 4:3.

<sup>743</sup> Ibid.

later Hanafi *uṣūl* works, and that Najm al-Dīn al-Ṭarsūsī (d. 758/1356) authors a work addressing the confusion entitled “Easing the Burden on the Brothers Concerning Cases in which *Qiyās* Overrides *Istiḥsān*.”<sup>744</sup>

Another problem with this new typology is how it interacts with the first typology, found in al-Jaṣṣāṣ and modified by al-Dabūsī, of *istiḥsān* meaning overruling *qiyās* by either 1) *naṣṣ*, 2) *ijmāʿ*, 3) hidden *qiyās*, or 4) necessity. Al-Sarakhsī and al-Bazdawī still uphold this original typology and discuss it at length, but if their new typology hinges on *istiḥsān* being “one of two forms of *qiyās*,”<sup>745</sup> as al-Bazdawī calls it, then what constitutes *istiḥsān* through *naṣṣ*, *ijmāʿ*, or necessity? Al-Bukhārī proposes that the new typology of *qiyās* and *istiḥsān* found in al-Sarakhsī and al-Bazdawī is only applicable under the category of hidden *qiyās*, but not under the categories of *naṣṣ*, *ijmāʿ*, or necessity.<sup>746</sup> By this explanation, it is unclear what *istiḥsān* through *naṣṣ*, *ijmāʿ*, or necessity would mean, other than the implementation of these types of evidence through the standard process of *tarjih* (comparing the strength of different rulings).

A third problem is that in the new typology, *istiḥsān* is indistinguishable from *qiyās*. Note that in the typology, Type 1 of *qiyās* is identical to Type 2 of *istiḥsān*, and Type 2 of *qiyās* identical to Type 1 of *istiḥsān*. Whereas al-Dabūsī defines *istiḥsān* as a hidden *qiyās*, in this

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<sup>744</sup> Mentioned in Ibn Quṭlūbūghā, *Tāj al-Tarājim*, 90; Kātib Ḥalebī, *Kashf al-Zunūn*, 830.

<sup>745</sup> al-Bazdawī, *Kanz al-Wuṣūl ilā Maʿrifat al-Uṣūl*, 611.

<sup>746</sup> al-Bukhārī, *Kashf al-Asrār ʿan Uṣūl Fakhr al-Islām al-Bazdawī*, 4:4.

new typology, *istiḥsān* has a Type 2 in which it is the more obvious ruling, and is then overruled by the Type 2 of *qiyās* which is more hidden. If in these cases the *istiḥsān* ruling is neither hidden nor preferable, then why is *istiḥsān* not simply *qiyās*? Al-Bazdawī and al-Sarakhsī both note this, for al-Bazdawī writes, “for us [Hanafis], *istiḥsān* is just one of two forms of *qiyās*,”<sup>747</sup> and al-Sarakhsī states, “in reality, *istiḥsān* and *qiyās* are just two types of *qiyās*.”<sup>748</sup>

This marriage with *qiyās* is so complete that several later Hanafis, such as Ibn al-Humām (d. 861/1456)<sup>749</sup> and Muḥibb Allāh al-Bihārī (d. 1119/1707),<sup>750</sup> do not preserve the discussion of *istiḥsān* as a separate section at the end of the work. Instead, they incorporate it into the chapter of *qiyās* as a discussion of the different types of *qiyās*. Just this structural shift, moving discussion of *istiḥsān* out of the end of *uṣūl* works where other controversial topics were usually addressed, reflects the complete marriage between *istiḥsān* and *qiyās*.

Now that *istiḥsān* as *naṣṣ*, *ijmāʿ*, and necessity so closely parallels *tarjih*, and *istiḥsān* as hidden *qiyās* is indistinguishable from *qiyās*, *istiḥsān* falls prey to a new chief criticism: redundancy. The later Shafii jurist al-Zarkashī (d.794/1392) makes this point, questioning the Hanafis with, “If you now reject the rational (‘*aqlī*) *istiḥsān* and agree that it is not part of

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<sup>747</sup> al-Bazdawī, *Kanz Al-Wuṣūl Ilā Maʿrifat Al-Uṣūl*, 611.

<sup>748</sup> al-Sarakhsī, *Kitāb al-Mabsūṭ*, 10:145.

<sup>749</sup> Ibn Amīr al-Ḥājj, *al-Taqrīr wa-l-Taḥbīr ‘alā Tahrīr al-Kamāl*, ed. ‘Abd Allāh Maḥmūd Muḥammad ‘Umar (Beirut: Dār al-Kutub al-‘Ilmiyya, 1983), 3:281.

<sup>750</sup> Muḥammad b. Muḥammad al-Laknāwī, *Fawātiḥ al-Raḥamūt Sharḥ Musallam al-Thubūt*, ed. ‘Abd Allāh Maḥmūd Muḥammad ‘Umar, 2 vols. (Beirut: Dār al-Kutub al-‘Ilmiyya, 2002), 2:373.

the divine law (*sharʿ*), and the legal *istiḥsān* which you now uphold is simply a collection of other types of evidence, then in what way is the term ‘*istiḥsān*’ part of the divine law at all?”<sup>751</sup> He furthers this criticism by enumerating the various Hanafi typologies of *istiḥsān*, then in apparent frustration stating,

If *istiḥsān* is as you now say it is then it is just a type of *qiyās*, so there is no grounds for your giving it a name other than *qiyās*. And if you defend this by saying, “It is just a terminological difference, not substantive,” we respond that this term has previously been confused as a type of evidence distinct from *qiyās*. So now simply declare that it is identical to *qiyās*...and the debate will have ended.<sup>752</sup>

The Ḥanafīs would never truly escape this accusation of redundancy, for later works of Hanafi *uṣūl* continue to utilise the typology developed by al-Sarakhsī and al-Bazdawī, while later critics, such as the Yemeni jurist al-Shawkānī (d. 1250/1834), continue to write, “if it relies on other proofs then it is a form of repetition, and if it is outside this framework, it is not a part of the sharia.”<sup>753</sup> Some later Hanafi works concede this criticism, holding that *istiḥsān* is nothing more than *qiyās*, and going on to justify that some terms do not have to be theoretically exclusive to indicate a useful meaning.<sup>754</sup> However, it is precisely by this criticism that Hanafi authors succeeded fantastically in distancing themselves from subjectivity.

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<sup>751</sup> al-Zarkashī, *al-Baḥr al-Muḥīṭ fī Uṣūl al-Fiqh*, 6:87.

<sup>752</sup> *Ibid.*, 6:93.

<sup>753</sup> Muḥammad b. Alī al-Shawkānī, *Irshād al-Fuḥūl ilā Taḥqīq ʿIlm al-Uṣūl*, ed. Sāmi Ibn al-ʿArabī al-Asharī (Beirut: Muʾassasat al-Kutub al-Thaqāsiyya, 1998), 223.

<sup>754</sup> al-Laknāwī, *Fawātiḥ al-Raḥamūt Sharḥ Musallam al-Thubūt*, 2:373.

## Is *Istiḥsān* No Longer Subjective?

In their respective *uṣūl* works, al-Sarakhsī and al-Bazdawī are adamant that *istiḥsān* does not grant authority to a jurist's subjective judgment. Al-Sarakhsī states that “*istiḥsān* is to act upon the stronger of two pieces of evidence, and is not at all to follow one's inclination or desire.”<sup>755</sup> Similarly, al-Bazdawī writes of early jurists who used *istiḥsān* that, “it is clear that they did not depart from evidence due simply to their own opinion or inclination.”<sup>756</sup> They both stress that this reputation is due to critics misunderstanding *istiḥsān*, and argue that seemingly subjective early cases of *istiḥsān* actually rely on other forms of evidence. After this Hanafi concession that subjectivity has no place in the law, later critics turned their criticism of *istiḥsān* to its redundancy. Did this put the controversy over subjectivity to rest?

The story here is complicated. Recall that in Western scholarship there are still two contradictory characterisations of *istiḥsān*, one championed by Tyan and Chehata of *istiḥsān* as legal equity allowing departure from the letter of the law,<sup>757</sup> and the other championed by Schacht, Paret, and Makdisi in which it is strictly controlled by objective sources of law.<sup>758</sup> Murteza Bedir brings the two together with the point that, “It seems that those two

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<sup>755</sup> al-Sarakhsī, *Uṣūl al-Sarakhsī*, 2:201.

<sup>756</sup> al-Bazdawī, *Kanz al-Wuṣūl ilā Maʿrifat al-Uṣūl*, 611.

<sup>757</sup> Tyan, “Méthodologie et sources du droit en Islam (*Istiḥsān*, *Istiṣlāḥ*, *Siyāsa Sharʿiyya*),” 84-85; Chafik Chehata, “L'Équité en tant que source du droit Hanafite,” 123-38.

<sup>758</sup> Paret, “*Istiḥsān* and *Istiṣlāḥ*,” *EI*; Schacht, *An Introduction to Islamic Law*, 204; Makdisi, “Legal Logic and Equity in Islamic Law,” 73.

understandings of the notion of *istiḥsān* are in fact based on the investigation of the two different genres of Muslim writings, i.e. *furūʿ al-fiqh* and *uṣūl al-fiqh*...In the *uṣūl* literature the aim of the jurist is to show the divine character of the law, whereas in *furūʿ* he is supposed to respond to actual human conditions.”<sup>759</sup>

Thus, characterisations of *istiḥsān* in the classical period cannot be based simply on its treatment in Hanafi *uṣūl*. This is particularly true for *istiḥsān*, whose theorisation occurred in a defensive posture, meaning that jurists undertaking this theorisation may have worked to idealise and justify the concept by the objective standards of *uṣūl* even if they did not abide by those objective standards in the reality of the *furūʿ*.

This might help explain why in his works of *fiqh*, al-Sarakhsī gives quite a different explanation of *istiḥsān*. In the *Mabsūt*, al-Sarakhsī defines *istiḥsān* as “to depart from *qiyās* to a ruling that is easier (*arfaq*) on people.”<sup>760</sup> In his *Uṣūl*, al-Sarakhsī did not once mention ease, the closest equivalent being his discussion of necessity (*ḍarūra*). As the discussion in the *Mabsūt* continues, al-Sarakhsī embraces ease wholeheartedly. He states “it is also said that *istiḥsān* is simply seeking ease (*ṭalab al-suhūla*)...or to pursue lenience (*ibtighāʾ al-samāḥa*),”<sup>761</sup> then instead of disagreeing, al-Sarakhsī defends this, saying, “in short, *istiḥsān* is to leave the difficult (*ʿusr*) for the easy (*yusr*), and this is a principle in the religion (*aṣl fī al-*

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<sup>759</sup> Bedir, "The Power of Interpretation: Is *Istiḥsān* *Qiyās*?", 8.

<sup>760</sup> al-Sarakhsī, *Kitāb al-Mabsūṭ*, 10:145.

<sup>761</sup> *Ibid.*

*dīn*).<sup>762</sup> Al-Sarakhsī justifies this by citing hadith and verses of Qurʾan which recommend the pursuit of lenience, such as the verse, “God wants for you ease (*yusr*), and not hardship (*ʿusr*).”<sup>763</sup>

It is only after justifying ease that al-Sarakhsī briefly outlines the objective definition of *istiḥsān* found in his *uṣūl* work, that “*istiḥsān* is in reality two cases of *qiyās*, one of them obvious (*jālī*) but weak, whereas the other is hidden (*khafī*) but strong, and so the former is called *qiyās* and the latter called *istiḥsān*.”<sup>764</sup> This spans only a few lines, after which he provides examples of *istiḥsān*. Even his example cases, however, use a notably different form of reasoning.

He mentions, for example, that it is forbidden for a man to look at a woman’s body, but that “it is permissible in some cases, such as sickness, out of necessity (*ḍarūra*), and it is called *istiḥsān* because it is easier (*arfaq*) on people.”<sup>765</sup> Thus, even when citing a case of *ḍarūra*, al-Sarakhsī emphasises that the *istiḥsān* ruling is defined by its being easier (*arfaq*, *aysar*) on people, transcending the concept of *ḍarūra* and delving into the exact type of subjective utility-based reasoning that originally garnered so much criticism. In these instances, al-Sarakhsī’s justification of *istiḥsān* aligns more closely with that found in

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<sup>762</sup> Ibid.

<sup>763</sup> Q. 2:185.

<sup>764</sup> al-Sarakhsī, *Kitāb al-Mabsūṭ*, 10:145.

<sup>765</sup> Ibid.

Chapters 2 and 3, except that he holds tightly to *istiḥsān* as lenience and seems to ignore stringent *istiḥsān*, perhaps because stringent *istiḥsān* drew so much more controversy.

It is clear that despite the objective theorisation of *istiḥsān* in *uṣūl*, the conception and practice of it in al-Sarakhsī's *fiqh* connotes much of what it did to the Hanafi founders. Sohail Hanif similarly notes in his comprehensive study of al-Marghīnānī's *fiqh* manual *al-Hidāya* that in the work, one finds "parts of the theory of *istiḥsān* which are not mentioned in *uṣūl al-fiqh* works."<sup>766</sup> Hanif concludes that in the *Hidāya*, "*istiḥsān* starts to resemble the early *istiḥsān* of which Abū Ḥanīfa was accused and which al-Shāfi'ī vehemently opposed."<sup>767</sup> Of course, one can say that in many of these cases there is no true mismatch since they can fit loosely under the concept of "necessity (*ḍarūra*)."<sup>767</sup> However, there is clearly a tension between *istiḥsān* as *qiyās*, *istiḥsān* as necessity, and *istiḥsān* as a way of achieving broader goals that are too soft to be called necessity.

### 5.3 Being Paid to Teach: A Case Study of *Istiḥsān* in Classical Hanafi Practice

Given these hints that Hanafi practice of *istiḥsān* retained some of its original subjectivity despite its objective theorisation in *uṣūl*, how can we understand the place of

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<sup>766</sup> Hanif, "A Theory of Early Classical Ḥanafism: Authority, Rationality, and Tradition in the *Hidāyah* of Burhān al-Dīn 'Alī Ibn Abī Bakr al-Marghīnānī (d. 593/1197)," 359.

<sup>767</sup> Ibid.

*istihsān* in classical Hanafi practice? As some scholars have already noted,<sup>768</sup> it seems that *istihsān*'s primary function in classical Hanafism was as a potent mechanism of legal change by which later Hanafis modified or completely departed from established doctrine. These departures were rarely due to the conventional reasoning enshrined in *uṣūl al-fiqh*, but were instead responses to new political, economic, and social realities to which Hanafi jurists felt they had to adjust in order to safeguard greater objectives. Still, jurists clearly worked to justify these cases under the umbrella of *ḍarūra* to remain consistent with the new theorisation of *istihsān* in classical Hanafi *uṣūl*.

To see how precisely classical Hanafis continued using *istihsān* in practice, this section explores one particularly interesting case: how the Hanafis overturned their original ruling to make it permissible for scholars to earn money for teaching.<sup>769</sup> Originally, Mālik and al-Shāfiʿī permitted this, while the Hanafi founders strictly prohibited it. Some

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<sup>768</sup> Previous scholarship by Baber Johansen and Haim Gerber has revealed how later Hanafi jurists such as Khayr al-Dīn al-Ramlī (d. 1082/1671) and Ibn ʿĀbidīn (1252/1836) cited *istihsān* to justify substantial changes in various domains of Hanafi positive law. Baber Johansen, *The Islamic Law on Land Tax and Rent* (New York: Croom Helm, 1988), 98-112; Haim Gerber, "Rigidity Versus Openness in Late Classical Islamic Law: The Case of the Seventeenth-Century Palestinian Muftī Khayr al-Dīn al-Ramlī," *Islamic Law and Society* 5, no. 2 (1998): 186-90.

<sup>769</sup> No modern studies seem to cover the timing and nature of this legal shift. This includes studies of Islamic educational history. George Makdisi's seminal *The Rise of Colleges* includes an entire chapter on the livelihood of Islamic scholars, but focuses on the ethical dimension of the question rather than its formalisation in legal opinions, writing, "Some teachers were reluctant to accept fees for teaching the religious sciences." Jonathan Berkey and Michael Chamberlain similarly note the existence of the ethical tension but not how jurists discussed it at that time. George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh: Edinburgh University Press, 1981), 162; Michael Chamberlain, *Knowledge and Social Practice in Medieval Damascus, 1190-1350* (Cambridge: Cambridge University Press, 1994); Jonathan P. Berkey, *The Transmission of Knowledge in Medieval Cairo: A Social History of Islamic Education* (Princeton: Princeton University Press, 1992).

time later, however, a Hanafi opinion appeared permitting the practice, and this eventually became the dominant Hanafi position. This section traces the development of this new Hanafi opinion to show that, in *fiqh* as opposed to *uṣūl*, later Hanafis still conceived of and used *istiḥsān* much like the Hanafi founders did, responding acutely to their economic and social contexts. The case is also potentially significant as social history, for it shows Hanafi jurists responding to two developments: 1) Abbasid decline threatening the livelihood of many scholars reliant upon public stipends, and 2) employment opportunities appearing with the birth of a new ground-breaking institution: the madrasa. Needless to say, the Hanafi response to these realities also tells us much about the causes and mechanisms of legal change.

### **The Original Opinions on Accepting Money for Teaching**

While Mālik and al-Shāfiʿī permitted scholars to earn money for teaching,<sup>770</sup> the Hanafi founders prohibited it.<sup>771</sup> The issue relates to the legal rulings on accepting money for performing righteous acts, so the ruling on teaching often appears tied to whether one may accept money for giving the call to prayer (being the *muʾadhdhin*), leading prayer (being the imam), or giving Friday sermons (being the *khaṭīb*).<sup>772</sup>

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<sup>770</sup> The issue was with teaching the religious sciences, not logic, grammar, natural sciences, etc.

<sup>771</sup> The Hanbalis (as always) narrate both opinions from Aḥmad.

<sup>772</sup> As we shall see, these rulings are also relevant to the Hanafi change of opinion since these positions become available in madrasas.

As for the Malikis, the *Mudawwana* quotes Malik as saying, “There is no problem with...a teacher accepting money, stipulated or not. If the teacher stipulates an amount for teaching the Qur’an, that is permissible.”<sup>773</sup> No later Malikis dispute this opinion.<sup>774</sup> As for the Shafiis, al-Shāfi‘ī writes in the *Umm*, “There is no problem with earning wages for performing the Hajj or minor pilgrimage (*‘umra*) or for any righteous action (*‘alā al-khayr kullihī*). In fact, it is even better [to earn a wage] from a righteous action than from what is merely permissible but not righteous.”<sup>775</sup> Al-Shāfi‘ī then anticipates objections with, “Someone might ask, ‘What is the proof that it is permissible to earn money for righteous actions or teaching the Qur’an?’”<sup>776</sup> Al-Shāfi‘ī responds, “That the Messenger of God married a man to a woman upon [the dower of the man teaching her] a chapter of the Qur’an, and marriage is not permissible except if upon some kind of monetary value.”<sup>777</sup> Elsewhere, al-Shāfi‘ī shows that he is aware of the Hanafi opinion on the issue, writing, “One/some people (*ba‘ḍ al-nās*) said...that it is impermissible to earn a wage on teaching something of

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<sup>773</sup> Mālik b. Anas, *al-Mudawwana*, 4 vols. (Beirut: Dār al-Kutub al-‘Ilmiyya, 1994), 1:160.

<sup>774</sup> There is some discussion over whether it was disliked (*makrūh*). Mālik held that it was *makrūh* to sell books of *fiqh*, leading Ibn al-Qāsim to think that Mālik may have considered it *makrūh* to earn money by teaching. Other Malikis held that it was *mubāḥ* (acceptable, implying neutrality) for a teacher to accept money if a student offered it, but that it was *makrūh* to stipulate payment. Other Malikis disagreed, citing prominent Malikis who sold books or taught for a wage. *Ibid.*, 3:430; Ibn Nāǧī al-Tanūkhī, *Sharḥ Ibn Nāǧī al-Tanūkhī ‘alā Matn al-Risāla*, ed. Aḥmad Ibn Farīd Mazīdī (Beirut: Dār al-Kutub al-‘Ilmiyya, 2007), 2:177; Ibn Ḥajar al-‘Asqalānī, *Fatḥ al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī* (Riyadh: Maktabat Dār al-Salām, 2000), 4:530.

<sup>775</sup> al-Shāfi‘ī, *al-Umm*, 8 vols. (Beirut: Dār al-Ma‘rifa, 1990), 2:140.

<sup>776</sup> *Ibid.*

<sup>777</sup> *Ibid.*

righteousness.”<sup>778</sup> It is well known that when al-Shāfi‘ī says “one/some people (*ba‘ḍ al-nās*),” he often intends Abū Ḥanīfa.<sup>779</sup>

Indeed, the Hanafis disagree with the Shafiis and the Malikis here.<sup>780</sup> Al-Shaybānī’s *Aṣl* quotes Abū Ḥanīfa as saying, “If a man hires someone to teach his son the Qur’an for a certain wage every month, then this is not correct and is not permissible (*lā yaṣluḥ wa-lā yaḥill*)...And similarly if it is to teach him *fiqh*.”<sup>781</sup> Al-Marghīnānī (d. 593/1197) confirms that by the original Hanafi position, “[It is not allowed] to seek a wage for the *adhān*, prayer, Hajj, or teaching Qur’an or *fiqh*.”<sup>782</sup>

Of course, even scholars who held that it was permissible recognized the ethical tensions in seeking wealth through knowledge. The jurist Muḥammad b. al-Ḥajj (d. 737/1336) complained, “Before, a man spent money to acquire knowledge, now he acquires money through knowledge.”<sup>783</sup> Ibn Jamā‘a (d. 733/1333), in his manual on the etiquette of

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<sup>778</sup> Ibid., 5:173.

<sup>779</sup> Al-Shāfi‘ī’s prominent disciple, al-Rabī‘ b. Sulaymān al-Murādī (d. 270/884), reports that when al-Shāfi‘ī quotes “*ba‘ḍ al-nās*” he intends the Hanafis, and when he quotes “one/some of our fellows (*ba‘ḍ aṣḥābinā*)” or “one/some of our compatriots (*ba‘ḍ ahl baladinā*)” he intends the Malikis. al-Shāfi‘ī, *al-Umm*, ed. Rif‘at Fawzī ‘Abd al-Muṭṭalib, 11 vols. (Mansoura: Dār al-Wafā‘, 2001), 7:417.

<sup>780</sup> The hadith scholar and jurist Ibn Shihāb al-Zuhrī (d. 124/741-2) also held this opinion. Muḥammad Shams al-Ḥaqq ‘Azīmābādī, *‘Awn al-Ma‘būd Sharḥ Sunan Abī Dāwūd* (Medina: al-Maktaba al-Salafiyya, 1968), 283.

<sup>781</sup> al-Shaybānī, *al-Aṣl*, 4:20.

<sup>782</sup> al-Marghīnānī, *al-Hidāya Sharḥ Bidāyat al-Mubtadī* (Cairo: Dār al-Salām, 2000), 2:235.

<sup>783</sup> Chamberlain, *Knowledge and Social Practice in Medieval Damascus, 1190-1350*, 95.

scholarship, writes that one should only accept a madrasa stipend if necessary, and only with the intention of being free from worldly pursuits and fully devoted to knowledge.<sup>784</sup>

The famous al-Ghazālī (d. 505/1111) took an even harsher stance. He famously left his post at the Nizāmiyya in Baghdad, the most prestigious madrasa of the time, due to the status-seeking and greed of his fellow academics. He later wrote in the *Ihyāʾ ʿUlūm al-Dīn*, “[the teacher] should seek no remuneration for his services,” and that, “anyone who would seek riches through knowledge is like the person who, in order to clean the soles of his shoes, wipes them against his own face, reducing the master into a servant and making of the slave a lord.”<sup>785</sup> However, al-Ghazālī, being a Shafii, still held that it was legally permissible for a scholar to accept money for teaching, as attested to in his works of *fiqh*.<sup>786</sup>

This contrast exemplifies the distinction between permissibility and righteousness, and that a scholar might consider something legally permissible but warn against it on a spiritual and ethical level. This would particularly hold for the actions of scholars, for as Ibn Jamāʿa indicates, scholars should avoid actions that, although technically permissible, are ethically dubious.<sup>787</sup> Thus, no matter their ethical directives, Shafiis and Malikis still held that it was permissible to accept money for teaching, while Hanafis did not.

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<sup>784</sup> Ibn Jamāʿa, *Tadhkirat al-Sāmiʿ wa-l-Mutakallim fī Adab al-ʿĀlim wa-l-Mutaʿallim*, ed. Muḥammad b. Maḥdī ʿAjami (Beirut: Dār al-Bashāʾir al-Islāmiyya, 2008), 127.

<sup>785</sup> Abū Ḥāmid al-Ghazālī, *The Book of Knowledge: Being a Translation with Notes of the Kitāb al-ʿIlm of Al-Ghazzālī's Ihyāʾ ʿUlūm al-Dīn*, trans. Nabih Amin Faris (Lahore: Sh. Muhammad Ashraf, 1962), 138.

<sup>786</sup> al-Ghazālī, *al-Wāsiṭ fī al-Madhhab* (Cairo: Dār al-Salām li-l-Ṭibāʿah wa-l-Nashr wa-l-Tawzīʿ. 1997), 4:164.

<sup>787</sup> Ibn Jamāʿa, *Tadhkirat al-Sāmiʿ wa-l-Mutakallim fī Adab al-ʿĀlim wa-l-Mutaʿallim*, 46.

## The Birth of a New Hanafi Opinion

This legal disagreement is clear in theory, but conflicts with one simple fact: Hanafis did, and still do, get paid for teaching. Madrasas clearly employed Hanafis, not to mention the existence of exclusively Hanafi madrasas.<sup>788</sup> Were all of these Hanafis in outright disobedience of their school's original ruling? In a way, yes.

The new Hanafi ruling first appears two centuries after Abū Ḥanīfa's death (d. 150/767). The Hanafi scholar Abū al-Layth al-Samarqandī (d. 373/983), in his *Fatāwā al-Nawāzil*, first presents the standard ruling that “contrary to the Shafii opinion, it is impermissible to seek a wage for acts of obedience, such as the *adhān*, or teaching the Qurʾan or *fiqh*.”<sup>789</sup> At the end of the discussion, however, al-Samarqandī writes, “And some [Hanafi] scholars in our times have now made this practice permissible by *istiḥsān*, due to the clear neglect of religious matters (*tahāwun fī al-umūr al-dīniyya*) in this day and age. Upon this, they based their ruling (*fatwā*).”<sup>790</sup>

Though brief, al-Samarqandī touches on two of the new opinion's key features: 1) Hanafi scholars justified it as *istiḥsān*, and 2) the reasoning behind the *istiḥsān* was a new social reality, rather than a reinterpretation of sources. This clearly invokes *fasād al-zamān* (corruption of the times), by far the most common trope in these later cases of

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<sup>788</sup> Such as the famous Madrasa of Sarghatmish built in the 14<sup>th</sup> century in Cairo.

<sup>789</sup> Abū al-Layth al-Samarqandī, *Fatāwā al-Nawāzil fī al-Fiqh al-Ḥanafī* (Hyderabad: Maṭbaʿat Shams al-Islām, 1355/1936-7), 279.

<sup>790</sup> *Ibid.*

*istiḥsān*. The fact that al-Samarqandī refers to the new ruling as current to his time, as well as the lack of evidence for the ruling earlier than this, indicates that it was born in the mid-10<sup>th</sup> century.

The next question is how this opinion became the accepted opinion of the madhhab. Moving a century on from al-Samarqandī, we find that al-Sarakhsī similarly states at first that it is impermissible, rooting the opinion in various hadiths, such as one in which the Companion Ubayy b. Kaʿb teaches someone a chapter of Qurʾan and is gifted an arrow, to which the Prophet Muḥammad says, “Do you want God to strike you with an arrow of fire?...Return his arrow to him.”<sup>791</sup> Still, at the end of his discussion, al-Sarakhsī mentions, “As for in our times...we say that it is permissible so that [knowledge is not lost], and it is clear that rulings must change as the times change (*lā yabʿud an yakhtalif al-ḥukm bi-ikhtilāf al-awqāt*).”<sup>792</sup> Soon after, al-Marghīnānī (d. 593/1197) similarly states in his seminal *al-Hidāya*, “And some of our scholars have by *istiḥsān* allowed earning wages for teaching in this era, because of the clear deficit (*tawānī*) in religious matters, such that by prohibiting wages, the memorisation of the Qurʾan would be lost. Upon this they based their ruling (*fatwa*).”<sup>793</sup>

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<sup>791</sup> al-Sarakhsī, *al-Mabsūṭ*, 16:37.

<sup>792</sup> Ibid.

<sup>793</sup> Al-Marghīnānī’s wording is so similar to al-Samarqandī’s that al-Marghīnānī likely borrowed from him directly. In one clause, al-Marghīnānī’s phrasing only differs from al-Samarqandī’s by the word “*tawānī*” (massive loss) instead of “*tahāwun*” (neglect). The two are so similar that it suggests al-Marghīnānī was reading directly from a manuscript of al-Samarqandī’s work and either: 1) the scribe had incorrectly copied

Al-Sarakhsī and al-Marghīnānī both mention a new factor which completes the logic for why the “clear deficit in religious matters” should allow scholars to accept a wage for teaching: that “in prohibiting wages, the memorisation of the Qur’an would be lost.” By this reasoning, wages would allow scholars to spend more time teaching, or even incentivise more people to pursue scholarly careers, ensuring the survival of religious knowledge.<sup>794</sup>

We find two new components of the debate in the work *al-Ikhtiyār li-Ta’līl al-Mukhtār* of the jurist ‘Abd Allāh al-Mawṣilī (d. 683/1287).<sup>795</sup> He writes:

And many latter-day [Hanafi] scholars (*muta’akhhirūn*) say it is permissible in our age [to accept a wage] for leading the prayer and for teaching, because of people’s need for it, and because of the clear loss (*tawānī*) of religious matters, and the laziness of people to pursue the hereafter, such that if wages were impermissible, the memorisation of the Qur’an would be lost.<sup>796</sup>

The first new component is the term “*muta’akhhirūn*,” or latter-day scholars. As Talal Al-Azem shows, “[the term] is relative: while it definitely stands in contradistinction to the earliest Hanafi jurists of [the] foundational period (ca. 150–200 AH)...it could be used for any

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the word, 2) another transmission of al-Samarqandī’s work exists which uses “*tawānī*” instead of “*tahāwun*,” or 3) al-Marghīnānī himself misread it. al-Marghīnānī, *al-Hidāya Sharḥ Bidāyat al-Mubtadī*, 2:235.

<sup>794</sup> Unlike al-Sarakhsī, al-Marghīnānī does not explicitly endorse the ruling. However, the fact that he lists it at the end indicates his endorsement, for elsewhere in the *Hidāya*, al-Marghīnānī states the Hanafi convention that “the final position presented is deemed the most decisive.” Talal Al-Azem articulates this in an excellent list of the many principles, explicit and implicit, underlying rule-formulation (*taṣḥīḥ* and *tarjīḥ*) in classical and post-classical Hanafism. Talal Al-Azem, *Rule-Formulation and Binding Precedent in the Madhhab-Law Tradition: Ibn Quṭlūbūghā’s Commentary on the Compendium of Qudūrī*, Islamicate Intellectual History (Leiden: Brill, 2016), 214.

<sup>795</sup> ‘Abd Allāh al-Mawṣilī, *al-Ikhtiyār li-Ta’līl al-Mukhtār*, ed. Shu‘ayb Arna’ūt and Aḥmad Muḥammad Barhūm (Beirut: Dār al-Risāla al-‘Ālamiyya, 2009), 2:142.

<sup>796</sup> *Ibid.*, 2:143.

scholar following the earliest of periods.”<sup>797</sup> Anonymous *mutaʿakhhirūn* are nearly always the agents of these later cases of *istiḥsān*. The second new component is that, beyond permitting wages for teaching, al-Mawṣilī also permits wages for leading prayer. None of al-Samarqandī, al-Sarakhsī, or al-Marghinānī had mentioned this additional allowance.

Finally, two new components appear in a major late work of the Hanafi school, *Majmaʿ al-Anhur* by Shaykhzādah (d. 1077/1667), itself a commentary on *Multaqā al-Abḥur* by Burhan al-Dīn al-Ḥalabī (d. 956/1549). Shaykhzādah states, “And now the general opinion is...that it is permissible to accept a wage for leading the prayer, giving the call to prayer, or teaching the Qurʾan or *fiqh*...for rulings change as the times change (*al-aḥkām takhtalif bi-ikhtilāf al-zamān*).”<sup>798</sup> The first new component is that he now adds “giving the call to prayer” to the list. The second is that he later attributes the origins of the new opinion to an interesting party, “the latter-day scholars (*mutaʿakhhirūn*) of Balkh.”<sup>799</sup>

Balkh, a city in the far north of modern Afghanistan, was a hub of Hanafi activity in the early period.<sup>800</sup> As Al-Azem shows through an empirical count of regional references in later Hanafi works, “in our first two periods [300-500 AH]<sup>801</sup> immediately following that of

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<sup>797</sup> Al-Azem, *Rule-Formulation and Binding Precedent in the Madhhab-Law Tradition: Ibn Quṭlūbūghā's Commentary on the Compendium of Qudūrī*, 87.

<sup>798</sup> Shaykhzādah, *Majmaʿ al-Anhur fi Sharḥ Multaqā al-Abḥur*, ed. Aḥmad Ibn ʿUthmān Ḥuṣarī (Istanbul: Maṭbaʿa Dār al-Khilāfa al-ʿIlmiyya, 1857), 2:384.

<sup>799</sup> Ibid.

<sup>800</sup> For an excellent study of the scholarly milieu of Balkh in the early classical period, see Arezou Azad, *Sacred Landscape in Medieval Afghanistan: Revisiting the Faḍāʾil-i Balkh* (Oxford: Oxford University Press, 2014).

<sup>801</sup> By “our first two periods”, Al-Azem refers to the periodisation which he sets out earlier in his work.

Abū Ḥanīfa and his students, it is Balkh that is the centre of juristic activity in the East.”<sup>802</sup>

Given their distance from the Muslim heartlands, the Hanafis of Balkh famously developed unique opinions on many issues.<sup>803</sup>

According to Shaykhzādah, the Hanafis of Balkh argued that the Hanafi founders had prohibited wages for teaching based on their own social reality, in which there was a dearth of people who had memorised the Qur’an (*ḥuffāz*), but these *ḥuffāz* commanded respect. As such, early scholars could rely on private patronage and on stipends from the public treasury (*bayt al-māl*), both of which came without stipulations to teach.<sup>804</sup> Thus, given the lack of *ḥuffāz*, coupled with the fact that scholars had a secure livelihood, the Hanafis of Balkh argued that the Hanafi founders rightly mandated that scholars teach for free.

The Hanafis of Balkh then claimed (according to Shaykhzādah) that by their time, this had all changed, that “injustice [had] ascended to the throne and cut off payments from the treasury,”<sup>805</sup> making scholars busy earning their livelihoods and unable to teach. Thus, the Hanafis of Balkh ruled that scholars should now be allowed to earn a wage from teaching. The *mut’akhhirūn* of Balkh are similarly quoted in the 17<sup>th</sup> – century work *al-*

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<sup>802</sup> Al-Azem, *Rule-Formulation and Binding Precedent in the Madhhab-Law Tradition: Ibn Quṭlūbūghā's Commentary on the Compendium of Qudūrī*, 90.

<sup>803</sup> See, for example, the modern work which translates as, “The Hanafi Scholars of Balkh and their Unique Legal Opinions.” Muḥammad Maḥrūs ‘Abd al-Laṭīf Mudarris, *Mashāyikh Balkh Min Al-Ḥanafīyah Wa-Mā Infaradū Bi-Hi Min Al-Masā’il Al-Fiqhīyya* (Baghdad: Wizārat al-Awqāf, 1978).

<sup>804</sup> Al-Sarakhsī mentions this reasoning as well but not attributed to the scholars of Balkh. al-Sarakhsī, *al-Mabsūṭ*, 16:37.

<sup>805</sup> Shaykhzādah, *Majma‘ al-Anhur fī Sharḥ Multaqā al-Abḥur*, 2:384.

*Fatāwā al-Hindiyya*, prepared by a committee of Hanafi jurists at the behest of the Mughal emperor Aurangzeb (r. 1068/1658-1118/1707),<sup>806</sup> as well as the 19<sup>th</sup> - century work *Radd al-Muḥtār* by Ibn ‘Ābidīn (d. 1258/1842).<sup>807</sup>

As for who these mysterious scholars of Balkh may have been, one candidate is Abū al-Layth al-Samarqāndī himself. As his name indicates, he was born in Samarqand, near Balkh, and some biographers report that he died in Balkh (in 373/983).<sup>808</sup> There is also evidence that al-Samarqāndī may have himself given an influential *fatwa* with the new opinion, but the evidence is complicated because there are in actuality two scholars named Abū al-Layth al-Samarqāndī.

The first is the one above, the famous jurist and the author of *Fatāwā al-Nawāzil* who died in 373/983, possibly in Balkh. The other is the Abū al-Layth al-Samarqāndī known as al-Ḥāfiẓ (“the memoriser,” indicating his specialty in hadith), who died in 294/906-7. A biographical entry on al-Ḥāfiẓ reports him stating in the first person that, while he had previously prohibited accepting money for teaching, he had changed his mind to permit it.<sup>809</sup> It is possible that the biographer has confused the two and that the quote should be attributed to our first Abū al-Layth. This is because al-Ḥāfiẓ, as his nickname suggests, was

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<sup>806</sup> Aurangzeb, *al-Fatāwā al-Hindiyya* (Beirut: Dār al-Ma‘rifa, 1973), 4:448.

<sup>807</sup> Ibn ‘Ābidīn, *Ḥāshiyat Radd al-Muḥtār*, 8 vols. (Cairo: al-Bābī al-Ḥalabī, 1966), 5:52.

<sup>808</sup> Abū al-Layth al-Samarqāndī, *Tafsīr al-Samarqāndī*, ed. ‘Alī Muḥammad Mu‘awwad (Beirut: Dār al-Kutub al-‘Ilmiyya, 1993), 1.

<sup>809</sup> Ibn Abī al-Wafā’ al-Qurashī, *al-Jawāhir al-Mūḍiyya fī Ṭabaqāt al-Ḥanafīyya*, 2 vols. (Hyderabad: Majlis Dā‘irat al-Ma‘ārif al-Nizāmiyah, 1914), 4:84.

known for hadith, while the later al-Samarqandī was known for *fiqh*, and because we know that the latter engaged with the issue directly in his *Fatāwā al-Nawāzil*. In either case, we now have two candidates for who later Hanafis intended by the “*muta’akhhirūn* of Balkh.”<sup>810</sup>

A third candidate emerges in Muḥammad Mudarris’s modern work, “The Hanafi Scholars of Balkh and their Unique Legal Opinions.”<sup>811</sup> Mudarris mentions a Muḥammad b. al-Faḍl al-Balkhī as one of the progenitors of the new ruling. This time, the case is certainly one of mistaken identity. There was a famous Muḥammad b. al-Faḍl al-Balkhī (d. 317/929-30) known as al-Wā‘iz who was a major Sufi figure of his time. He lived in Balkh for most of his life, then was forced out due to accusations of heresy, after which he moved to Samarqand, where he died.<sup>812</sup> However, Mudarris is not referring to him, for a biographical footnote gives the biography of Muḥammad b. al-Faḍl al-Kamārī (d. 381/991-2), a Hanafi jurist from Bukhara.<sup>813</sup> Al-Kamārī would make more sense given that he was a major Hanafi jurist actively engaged in jurisprudential decisions relevant to Samanid Transoxiana in the 10<sup>th</sup> century,<sup>814</sup> whereas al-Wā‘iz was a Sufi mystic not known for legal decisions. Al-Kamārī was also of the same generation as our first Abū al-Layth (d. 373/983). They could have

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<sup>810</sup> In this case. This is not making a claim for a group of scholars consistently referred to by later Hanafis as “*muta’akhhirūn*” or “*muta’akhhirūn* of Balkh,” for as previously mentioned, the term was always relative.

<sup>811</sup> Mudarris, *Mashāyikh Balkh min al-Ḥanafīyya wa-mā Infaradū bi-hi min al-Masā’il al-Fiqhīyya*, 569.

<sup>812</sup> al-Dhahabī, *Siyar A‘lām al-Nubalā’*, 18:525.

<sup>813</sup> Dimitri Gutas, “Avicenna's ‘Madhhab’ with an Appendix on the Question of His Date of Birth,” *Quaderni di Studi Arabi* (1987): 327.

<sup>814</sup> *Ibid.*, 329.

easily participated in the same discourse over the issue, giving us two good candidates for Transoxianan Hanafis who gave the new ruling in the 10<sup>th</sup> century, though neither is technically from Balkh.<sup>815</sup>

The timeline for the ruling is therefore fairly straightforward. In the early 8<sup>th</sup> century, Abū Ḥanīfa makes the original Hanafi ruling of prohibition based on various specific and foreboding hadith. In the mid-10<sup>th</sup> century, a minority Hanafi *istiḥsān* opinion of permissibility appears in Transoxiana. In the 11<sup>th</sup> - 12<sup>th</sup> centuries, the ruling becomes the main Hanafi opinion, and includes not only teaching, but also serving as an imam or *muʾadhdhin*. Finally, works in the 16<sup>th</sup> - 19<sup>th</sup> centuries all attribute the opinion to the *mutaʾkhhirūn* of Balkh. In the end, every jurist uses a single justification for this *istiḥsān*: times have changed, necessitating a ruling that will have a better social impact. It is

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<sup>815</sup> Perhaps the opinion emerged in Transoxiana but not specifically Balkh. After all, the attribution to Balkh does not first appear until the 17<sup>th</sup> century with Shaykhzādah. But why then? Taking a very speculative turn, Balkh may have become a symbol of decline among later generations. During Abbasid decline, Balkh suffered from political instability like all Muslim cities, but then suffered destruction at the hands of the Oghuz Turks in the 12<sup>th</sup> century, then complete annihilation in the 13<sup>th</sup> century at the hands of Genghis Khan, who sources say slaughtered every citizen in the city. Of course, the Mongols destroyed other Muslim cities too, but Balkh may have been unique because: 1) its destruction began prior to the Mongol invasion, during the era of infighting between different Muslim dynasties, and 2) because its destruction was particularly permanent. After the Mongol massacre, Balkh never rose again. This might have been particularly well-known among the scholarly class in subsequent centuries, for Ibn Baṭṭūṭa famously wrote after his visit to Balkh in the 14<sup>th</sup> century, “Balkh is completely dilapidated and uninhabited.” For this reason, later sources may have found it particularly compelling to mention Balkh in regards to this issue. Ibn Baṭṭūṭa, *The Travels of Ibn Baṭṭūṭa, A.D. 1325-1354: Volume I*, trans. H. A. R. Gibb (Farnham: Hakluyt Society, 1986), 571. For the political history of Balkh, see Richard N. Frye, “Balkh,” *EI*<sub>2</sub>.

fascinating that this *istiḥsān* overrules not only the original Hanafi ruling, but the multiple specific hadiths that the Hanafis had originally interpreted as prohibiting the practice.

So how exactly had times changed, and why did the new opinion appear when it did? As Khaled El-Rouayheb writes, “Lamenting the ‘decline of the times’ is a well-known *topos*. It is risky to treat such laments as anything more than this unless they offer, or are supported by, other evidence.”<sup>816</sup> Luckily, the jurists’ statements themselves do give some good indications of what went wrong, helping us to see how the jurists used *istiḥsān* to adjust acutely to new economic and social pressures. Ultimately, this thesis is a work of intellectual history, not political or economic history. It is dangerous to make conclusions about the latter two just from the statements of scholars. However, this section cannot help but follow the trail of breadcrumbs already laid out, proposing a theory that perhaps social and economic historians of Islam can substantiate.

### **Reason #1: No More Stipends from the Treasury**

From the onset, early Hanafis had intimate ties to the caliphal court. Abū Yūsuf himself was the first Abbasid chief qadi (*qāḍi al-quḍāt*), and as the story goes, Hārūn al-Rashīd created the position specifically for him.<sup>817</sup> Hārūn al-Rashīd similarly appointed al-Shaybānī as a qadi in Raqqa. Thus, as Ira Lapidus writes, “Hanafism spread in part because it

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<sup>816</sup> Khaled El-Rouayheb, *Islamic Intellectual History in the Seventeenth Century: Scholarly Currents in the Ottoman Empire and the Maghreb* (Cambridge: Cambridge University Press, 2015), 19.

<sup>817</sup> Al-Tanūkhī narrates the story. Abū ‘Alī al-Tanūkhī, *Nishwār al-Muḥāḍara wa-Akhbār al-Mudhākara*, ed. ‘Abbūd al-Shālji (Beirut: Dār Ṣādir, 1971), Case 135.

had the support of the Abbasid regime and was propagated by appointments to judgeships.”<sup>818</sup>

Abbasid support for Hanafism was not limited to judgeships. Many scholars received stipends for their work as jurisconsults. Abū Muḥammad al-Ḥamdāni (d. 210/825-6), credited with bringing Hanafism to Isfahan in the 9<sup>th</sup> century, received 100,000 dirhams annually from the caliphal court,<sup>819</sup> though he was reportedly still poor because he gave much of it away to his students.<sup>820</sup> This should not be written off as hagiography, for it could indicate that these stipends not only supported prominent scholars but also their clusters of students and associates, forming a web of financial support all stemming from the treasury and drawing prospective students to study with those established Hanafis.

This is precisely the reality alluded to by the Hanafis of Balkh who, according to Shaykhzādah, argued that the original Hanafi ruling reflected a bygone era of patrons and treasury stipends. In this way, the livelihood of Hanafis was linked to the health of the caliphate, and so it may be no coincidence that the appearance of the new opinion coincides with the beginnings of Abbasid decline in the 10<sup>th</sup> century.

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<sup>818</sup> Ira M. Lapidus, *Islamic Societies to the Nineteenth Century: A Global History* (Cambridge: Cambridge University Press, 2012), 157. For an excellent study on the financial implications of judgeships, see Wadād Al-Qāḍī, "The Salaries of Judges in Early Islam: The Evidence of the Documentary and Literary Sources," *Journal of Near Eastern Studies* 68, no. 1 (2009).

<sup>819</sup> Cited in Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West*, 163.

<sup>820</sup> al-Qurashī, *al-Jawāhir al-Mūḍīyya fī Ṭabaqāt al-Ḥanafīyya*, 1:210.

Both temporally and geographically, Abbasid decline was gradual; the Abbasids were not dramatically overthrown, but maintained their symbolic authority while losing functional control of various regions to different autonomous dynasties, including the Buyids, the Samanids, and the Saffarids.<sup>821</sup> It also happens that Balkh was one of the first territories to fall out of Abbasid control. Situated in the far northeast of the empire, Balkh came under Samanid rule in approximately 287/900.<sup>822</sup> The scholars of Balkh may therefore have been the first to experience a growing trend: Hanafis in frontier regions left without the Abbasid judgeships and stipends that had previously maintained their livelihood.

Of course, the new powers had their own systems of patronage, but the instability and jostling for power may have been disruptive enough, let alone the sectarianism that may have favoured others over the Hanafis. Even the wording used by the scholars of Balkh points to this period, as they lamented that “injustice constantly competes to ascend to power,”<sup>823</sup> referring to the tumultuous era of political rivalry between the various dynastic groups. Indeed, Balkh underwent numerous political transitions throughout the 10<sup>th</sup> and 11<sup>th</sup> centuries. By this reasoning, then, the first source of pressure on scholars to change the Hanafi ruling, and the reason it did not emerge until two centuries after Abū Ḥanīfa’s death,

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<sup>821</sup> As Lapidus writes, “the caliphate lost control of virtually all of its provinces except the region around Baghdad...the caliphs were allowed to continue in nominal authority...but they no longer ruled; the Abbasid Empire had ceased to exist.” Lapidus, *Islamic Societies to the Nineteenth Century: A Global History*, 111.

<sup>822</sup> Richard N. Frye, “Balkh,” *EI*.

<sup>823</sup> Shaykhzādah, *Majma‘ al-Anhur fī Sharḥ Multaqā al-Abḥur*, 2:384.

was that the instability caused by Abbasid decline disrupted the flow of stipends from the treasury.

## **Reason #2: New Job Opportunities with the Rise of the Madrasa**

Evidence in the legal literature subtly points to a second factor that guided the development of the new ruling: the rise of the madrasa. The madrasa as an independent institution began in the 11<sup>th</sup> century at the hands of Niẓām al-Mulk (d. 485/1092), who founded numerous schools around the Abbasid empire, including the famous Niẓāmiyya in Baghdad in 457/1065.<sup>824</sup> As Makdisi writes, the madrasa quickly spread, proliferating in Damascus in the 12<sup>th</sup> century, then Cairo in the 13<sup>th</sup> century when the city became the centre of the Muslim world after the Mongols sacked Baghdad.<sup>825</sup>

These new institutions were funded by the charitable endowments of private benefactors (*awqāf*, sing. *waqf*).<sup>826</sup> A *waqf* would go towards building and maintaining the madrasa, as well as paying salaries for professors, wages for workers, and stipends for students. However, by the nature of the *waqf* contracts, scholars were hired under specific terms (*shurūṭ*) to teach a particular subject or perform certain duties.<sup>827</sup> These *shurūṭ* could be exactly what the scholars of Balkh mean when they say that in earlier times, Hanafis

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<sup>824</sup> He also founded a Niẓāmiyya in Balkh. George Makdisi, "Muslim Institutions of Learning in Eleventh-Century Baghdad," *Bulletin of the School of Oriental and African Studies* 24, no. 1 (1961).

<sup>825</sup> *Ibid.*, 1-56.

<sup>826</sup> Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West*, 35.

<sup>827</sup> *Ibid.*, 38.

could receive stipends because they came without specific terms, but now, the money came with conditions (*shurūṭ*).<sup>828</sup>

These *shurūṭ* are explicit, as evidenced by the *waqf* contracts of different madrasas. The ʿImādiyya College of Law, founded in the 12<sup>th</sup> century, endowed multiple positions, including a professor to teach law with a monthly stipend of 60 dirhams, and an imam to lead prayer with a monthly stipend of 40 dirhams.<sup>829</sup> Another madrasa, the 14<sup>th</sup> century Tankīziyya College for Qurʾan and Hadith, designated 120 dirhams a month to a combination imam and professor of Qurʾanic recitation, 40 dirhams a month to the person who gave the call to prayer (*muʾadhdhin*), and 15 dirhams a month to the professor of hadith.<sup>830</sup> The subjects and practices involved in these positions (giving *adhān*, leading the prayer, and teaching Qurʾan, law, or hadith) are exactly the practices that later Hanafis explicitly made permissible.

Recall that al-Samarqandī, who died before the rise of the madrasa, only changed the original ruling to allow wages for teaching, but that others added the permissibility of earning a wage for leading prayer and giving the call to prayer.<sup>831</sup> This must have followed from the availability of these positions in madrasas. This is evidenced by the statement of

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<sup>828</sup> Shaykhkhzādah, *Majmaʿ al-Anhur fī Sharḥ Multaqā al-Abḥur*, 2:384.

<sup>829</sup> ʿAbd al-Qādir al-Nuʿaymī, *al-Dāris fī Tārīkh al-Madāris*, ed. Jaʿfar Ḥasanī, 2 vols. (Damascus: Maṭbaʿat al-Taraqqī, 1948), 1:413.

<sup>830</sup> *Ibid.*, 1:127.

<sup>831</sup> al-Mawṣilī, *al-Ikhtiyār li-Taʿlīl al-Mukhtār*, 2:142.

Ibn ʿĀbidīn about the new *istiḥsān* ruling that, “This ruling does not permit accepting a wage for all acts of worship, but only those acts that have been specifically mentioned, those that show a clear need (*ḍarūra*) and thus allow for the departure from the original ruling of the madhhab.”<sup>832</sup> On his list of permitted acts, Ibn ʿĀbidīn also includes not only teaching, but also leading prayer and giving the call to prayer. This is all evidence that the new ruling evolved to accommodate the types of employment becoming available to Hanafis after the rise of the madrasa.

## 5.4 Conclusion

This chapter shows that the classical Hanafis theorised *istiḥsān* to abide by the conventional sources of law, but that by trying to accommodate all of the subjective types of *istiḥsān* into *ḍarūra*, they did not capture many its uses by the Hanafi founders. The chapter then shows how in their actual *fiqh*, Hanafis continued using *istiḥsān* through *ḍarūra* to respond to new social conditions and secure the best outcomes for society.

Of course, these matters could still be tremendously subjective, but with the same subjectivity inherent to *ḍarūra*, making it a problem shared by all madhhabs. It is therefore important to note that the 11<sup>th</sup> century also sees the Shafiis objectively theorising *ḍarūra* and developing the entire *maqāṣid al-sharīʿa* framework, attempting to objectify and standardise what the Hanafi founders had left to a jurist’s judgment. Thus, our calling the

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<sup>832</sup> Ibn ʿĀbidīn, *Ḥāshiyat Radd al-Muḥtār*, 5:52.

10<sup>th</sup> and 11<sup>th</sup> centuries the beginning of the “universal denunciation” of juristic subjectivity does not mean that jurists ceased making moral and pragmatic considerations in the law. It simply means that jurists now sought to root those considerations in theoretically sound concepts and categories (e.g. *maqāṣid*).

In a sense, the enterprise of *uṣūl* aims towards an algorithm of legal derivation in which the jurist is a processor, evaluating the strength and admissibility of textual evidence and driving the process of analogy. One could even imagine that in the modern era, if a software could be loaded with this algorithm, the jurist might be out of a job altogether. That is the goal of any theory: to standardise and objectify. Clearly, however, if one were to propose this to jurists today, even the most ardent supporter of *uṣūl* would reject the idea. Jurists are of course not mere processors. Their wisdom and good judgment are crucial to the proper functioning of the law. But read that sentence again. Is that not the Basran defence? Again, we return to the point made at the end of Chapter 4. Any theoretical enterprise will by definition work to exclude human subjectivity from the equation. To understand attitudes towards subjectivity in classical Islam, scholars must turn to less analytical disciplines, such as Sufism, *fiqh* (rather than legal theory), and the judgments of qadis.

## Conclusion

Through *istiḥsān*, this thesis has told the story of how legal subjectivity went from being embraced (Chapters 1-3), to contested (Chapter 4), to wrong (Chapter 5). Our story goes that, in a time before al-Shāfi‘ī or *uṣūl al-fiqh*, Iraqi jurists readily practised subjectivity to address the pitfalls of a blindly analogical law, prizing the wisdom and good judgment of the jurist. With al-Shāfi‘ī’s objections and the increasing prominence of the *ahl al-ḥadīth*, the stakes changed. Law was no longer a system of elegant analogies to be violated in cases of pragmatic necessity or out of loyalty to a particular hadith. Instead, law became centred around hadith, with elegant analogies there only to fill in the gaps. It is the nature of a legal system as it matures that it becomes subject to increasingly rigorous theorisation, and wisdom inherently defies theorisation. Still, as we discovered with the Basran defence, some people tried, but their arguments did not withstand the test of time.

We have at this point restated the dissertation’s central claims and conclusions a few times. The remainder of the conclusion will reflect on what this narrative suggests about major debates in the field of Islamic law, then conclude with what this narrative implies about conceptions of legal subjectivity in modern Islamic law.

## How the Story of *Istiḥsān* Impacts Perennial Debates in Islamic Law

On the manner in which the *ahl al-ra‘y* were subjective, Chapters 1-3 show early Iraqis deferring to the wisdom of a jurist to combat the pitfalls of blind analogical

reasoning. They advocated this in theory (Chapter 1) and exercised it in practice (Chapters 2-3). Of course, *istiḥsān* only forms a small part of early Iraqi legal doctrine and is in a sense the exception that proves the rule. The fact that *istiḥsān* was a departure means that the default was objective *qiyās*. In the end, the reported words of Abū Ḥanīfa seem most reflective of legal reasoning at the time: “Whoever does not abandon analogy when actually making judgment is not performing *fiqh* (*lam yafqah*).”<sup>833</sup> The words speak both to the primacy of analogical reasoning, as well as the importance of a jurist’s wisdom in choosing when to abandon that reasoning.

On al-Shāfi‘ī’s influence in early Iraq, Chapter 4 comes down squarely on the side of the conventional narrative, arguing that al-Shāfi‘ī really did have a demonstrable effect on his contemporaries. This was evident in Bishr al-Marīsi’s rejection of *istiḥsān* and adoption of many of al-Shāfi‘ī’s opinions, as well as the arguments of al-Jāḥiẓ and Muways b. ‘Imrān who appear to be responding in detail to specific arguments that al-Shāfi‘ī makes in his refutation of *istiḥsān*. The narrative evidence then gives a web of legal discourses connecting al-Shāfi‘ī, Bishr, al-Jāḥiẓ (and his associates), and ‘Isā b. Abān, all in the court of al-Ma’mūn, and all concerning *istiḥsān*, the *khbar wāḥid*, and related topics. Schacht dates the *Ibṭāl* as being one of al-Shāfi‘ī’s Iraqi works, and this dissertation suggest that it was an influential one.

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<sup>833</sup> ‘Abd al-Razzāq, *al-Muṣannaḥ*, 8:214.

On the birth of *uṣūl al-fiqh*, Chapter 4 gives strong support to Stewart’s hypothesis of a radical group of Hanafi Muʿtazilis whose legacy did not survive into classical Hanafism. Stewart hypothesised that a key part of their platform would have been a defence of subjective *istiḥsān*, and indeed this dissertation has reconstructed major parts of this defence. However, it is not clear how “Hanafi” these thinkers were nor where they might have been (beyond their initially being Basran). The glaring hole in the story is of course the lack of names or known works after the death of al-Jāḥiẓ. However, this dissertation has identified their arguments and interlocutors, opening the door for new analyses. Names and works should hopefully soon follow.

On the relationship between law and theology (*kalām*), Chapters 4 and 5 showed that much of the debate surrounding *istiḥsān* necessarily implicated theological debates. Most fundamental to this was whether humans can know the good absent of God’s command (and relatedly, the Euthyphro dilemma: is something good because God commands it, or does God command something because it is good?). This was apparent in the arguments of Ibn Dāwūd and al-Qāḍī al-Nuʿmān against the Basran defence, as well as by the fact that the controversy over subjectivity spills over into *kalām* works from the 10<sup>th</sup> century onwards. *Kalām* works might therefore hold the critical evidence for piecing together the nature of legal theory from 850-950 CE.

On the question of Islamic legal change, Chapter 5 showed one example of how the Hanafis adapted to specific economic and social pressures, challenging the conventional

narrative of Islamic law's stagnation. Of course, one case is hardly evidence of a trend. Still, whereas most studies on Islamic legal change approach the question in theory (e.g. the debate over the gate of *ijtihād*), this dissertation has again shown the value of taking a *fiqh*-based approach. This follows in the footsteps of scholars like Baber Johansen who does the same in one of his own works,<sup>834</sup> and states explicitly in a later work, "Any comment on the mechanisms of change within Islamic law should...be based on the analysis of changes of important legal ordinances as developed by the jurists."<sup>835</sup> He means that to study legal change, we must study how actual laws actually changed, not just how jurists talked about it. This dissertation has hopefully shown the value of this *fiqh*-based approach not only for the question of legal change, but also subjectivity.

Finally, let us reflect more extensively on the purpose of al-Shāfi'ī's intervention and his overall legal vision. Recall our point that, with the rise of the Shafii paradigm, the very conception of *fiqh* changed. For the early Iraqis, *fiqh* revolved around elegant analogies, whereas for al-Shāfi'ī, *fiqh* revolved around Qur'an and hadith. This point is critical because it reveals how one's conception of *fiqh* determines the role of subjectivity within that *fiqh*. In

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<sup>834</sup>Baber Johansen, *The Islamic Law on Land Tax and Rent* (New York: Croom Helm, 1988). It was published four years after Wael Hallaq's famous article "Was the Gate of *Ijtihād* Closed?", which ignited the theoretical discourse on the topic. Johansen clearly means to intervene and redirect the focus of the discourse from the theoretical to the practical. Wael Hallaq, "Was the Gate of *Ijtihād* Closed?," *International Journal of Middle East Studies* 16, no. 1 (1984).

<sup>835</sup> Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh*, *Studies in Islamic Law and Society* (Leiden: Brill, 1999), 447.

other words, to call anything a subjective departure from the law assumes that the law does not include that activity in the first place, a question that comes down to the definition of law itself. For this reason, this dissertation suggests that the difference between the Hanafi founders and al-Shāfi‘ī might be best viewed as one of natural law vs. legal positivism.

In 20<sup>th</sup>- century Western legal thought, discourses on judicial activism were similarly inseparable from the famous debates on legal positivism, namely the Hart-Fuller and the Hart-Dworkin debates.<sup>836</sup> Hart, representing legal positivism,<sup>837</sup> argued against any connection between law and morality, while Fuller and Dworkin, representing natural law theory, argued that morality is the very source of law’s binding power. This has a clear impact on the question of juristic subjectivity. For the positivists, if a jurist departs from the law in a given case, then that departure, even when morally incumbent, cannot be called law. For the natural law theorists, a jurist’s morally-justified departure is part of the law. This is not a purely theoretical distinction. The issue practically manifested itself in post-WWII Germany when jurists had to determine how to treat immoral acts that were

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<sup>836</sup> The Hart-Fuller debate consisted of two articles published in the same issue of the *Harvard Law Review*, Fuller’s responding to Hart’s. Hart later published his positivist legal philosophy as a monograph, to which Dworkin authored a long article in response. H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71, no. 4 (1958); Lon Fuller, "Positivism and Fidelity to Law — A Reply to Professor Hart," *Harvard Law Review* 71, no. 4 (1958); H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961); Ronald Dworkin, "The Model of Rules," *The University of Chicago Law Review* 35, no. 1 (1967).

<sup>837</sup> Earlier stalwarts of legal positivism include Jeremy Bentham (d. 1248/1832) and John Austin (d. 1276/1859). Perhaps this is the first study to have given their Islamic dates of death.

committed “legally” under Nazi rule.<sup>838</sup> One famous case regarded a wife who, during the war, wanted to be rid of her husband and so reported him for making disparaging remarks about Hitler. The husband was imprisoned for a time, then after the war, prosecuted both the wife *and the judge who presided over the case* for depriving him of his freedom. The post-war court acquitted the judge, but famously declared that “that the wife is guilty since she utilised out of free choice a Nazi law contrary to the sound conscience and sense of justice of all decent human beings.”<sup>839</sup> To positivists, this was a moral statement masquerading as law, while for natural law theorists, this was law.

We can roughly apply this distinction of positivism vs. natural law to the controversy over *istiḥsān*. The early Iraqis and those who embraced subjectivity clearly align with the natural law theorists. They had a sense that moral considerations could be “law” just as much as explicit edicts, enabling the instances of stringent *istiḥsān* in which they seem to make law themselves. Meanwhile, al-Shāfi‘ī aligns with the positivists. His arguments on the *ẓāhir* show that he wanted to rule strictly based on explicit edicts (or analogical extensions of those edicts). For him, to overstep those bounds and attempt to rule based on moral considerations was to tread on divine authority.

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<sup>838</sup> The jurist Gustav Radbruch famously “converted” from positivism after seeing how it had enabled some of the horrors of Nazi rule and how natural law theory might assuage them. Cited in Hart, “Positivism and the Separation of Law and Morals,” 617. Fuller disagrees with Hart’s interpretation of Radbruch’s conversion, but in any case, at stake for Radbruch was the actual ability of jurists to deal with the realities of moral accountability in post-war Germany. Fuller, “Positivism and Fidelity to Law — A Reply to Professor Hart,” 633.

<sup>839</sup> Cited in Hart, “Positivism and the Separation of Law and Morals,” 619.

Of course, the categories of positivism and natural law do not map perfectly onto the medieval Islamic context. However, what we called al-Shāfiʿī's "legal minimalism" in Chapter 4 undeniably implicates legal positivism. Meanwhile, we could take Chapter 3's different types of reasoning underlying *istiḥsān* as an articulation of the Hanafi founders' conceptions of natural law. Approaching the 9<sup>th</sup> century with this framework might reveal links between arguments previously regarded as unrelated, just as this dissertation showed that honing in on the question of subjectivity in the 9<sup>th</sup> century revealed clear parallels and a common discourse between disparate pieces of evidence that had not been put in conversation with each other before.

With all of these findings, this dissertation at least hopes to have demonstrated how, on many fronts, *istiḥsān* is a key line of inquiry for resolving major debates in the field of Islamic law, as well as key historical mysteries of the formative period.

## Subjectivity in Modern Islamic Law and a Normative Proposal of this Study

Just like the classical jurists, no modern Muslim jurists would say that the law is or should be subjective. Still, as mentioned in Chapter 5, none would say that *uṣūl* gives an algorithm that, if it could be loaded onto a computer, could replace the jurist. All would say that a jurist's wisdom is crucial to the proper functioning of the law, echoing the Basran defence. So how can we understand the role of subjectivity today?

While the substance of an argument is (or at least should be) the primary criterion by which it is evaluated, subjectivity still plays a major role. Marion Katz has discussed how, even when using conventional reasoning, jurists can fashion the arguments needed to support the ruling they already have in mind, something Katz calls “interpretive fluidity”.<sup>840</sup> Sadeghi similarly discusses the “hermeneutical flexibility” of Hanafi scholars, exemplified by the fact that doctrinal rulings stay the same while the justifications for them change, which Sadeghi takes as showing that, ultimately, the jurist’s opinion of what the ruling should be can guide the process of derivation.<sup>841</sup>

Then, outside of conventional reasoning, concepts like *ḍarūra* and *ḥaraj* give jurists considerable scope for subjectivity. For example, the early 20<sup>th</sup> century saw some jurists, such as the famous Egyptian reformer Muḥammad ‘Abdu (d. 1905) and his pupil Rashīd Riḍā (d. 1935), begin to argue for the permissibility of usury (*ribā*). They reasoned that in the modern world, nations needed to operate with usury to be competitive in the global economy, and so if Muslim nations did not permit usury, their citizens would suffer and the global Muslim community (*umma*) would remain inferior to the West.<sup>842</sup> But how certain was this? Could Muslim nations become wealthy without usury? Would permitting usury be

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<sup>840</sup> Marion Katz, "Gender and Legal Fluidity," in *Locating the Sharīʿa: Legal Fluidity in Theory, History, and Practice*, ed. Sohaira Z.M. Siddiqui (Leiden: Brill, 2019), 49.

<sup>841</sup> Sadeghi, *The Logic of Law-Making in Islam: Women and Prayer in the Legal Tradition*, 174.

<sup>842</sup> Abdullah Saeed, *Islamic Banking and Interest: A Study of the Prohibition of Riba and Its Contemporary Interpretation* (Leiden: Brill, 1999), 43.

certain to have this effect? One sees the subjectivity involved in justifying that a *ḍarūra* is certain and urgent enough to merit a departure from God’s explicit command. Sohail Hanif even suggests that the subjectivity inherent to *ḍarūra* was, at least in the Hanafi tradition, intentional: that Hanafi *uṣūl* works do not precisely define *ḍarūra* “to ensure it is only discoverable by the agreement of the living tradition of masters: What the masters of the tradition in any time agree to be *ḍarūrah* is a case of *ḍarūrah*, and what they do not accept as *ḍarūrah* is not.”<sup>843</sup>

Then, even outside of these terms, there exists the broad framework of *maqāṣid al-sharīʿa* (the objectives of the divine law). Although not originally intended to drive the derivation of rulings, the *maqāṣid* framework has certainly taken on this role in the modern period. Through *maqāṣid*, a jurist can get into softer “policy” considerations, like the considerations the Hanafi founders made through *istiḥsān*, simply by saying that a ruling promotes certain broader principles.

Thus, in the end, much still rides on a jurist’s sense of what is right. Much also rides on the ethos of the jurist. When a prominent scholar like Yūsuf al-Qaraḍāwī gives a controversial fatwa, like his permitting Western Muslims to buy houses with conventional usurious mortgages,<sup>844</sup> laypeople and scholars alike treat the opinion with more respect

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<sup>843</sup> Hanif, "A Theory of Early Classical Ḥanafism: Authority, Rationality, and Tradition in the *Ḥidāyah* of Burhān al-Dīn ‘Alī Ibn Abī Bakr al-Marghīnānī (d. 593/1197)," 360.

<sup>844</sup> Muhammad Qasim Zaman, *Modern Islamic Thought in a Radical Age: Religious Authority and Internal Criticism* (Cambridge; New York: Cambridge University Press, 2012), 128.

than if it had come from a layperson or lesser-known scholar, perhaps because the fatwa is better argued, but also because it has al-Qaraḍāwī's name on it. Likewise, many scholars advocate that a reputable scholar's opinion deserves respect even if one disagrees with it.

On a normative level, then, Muslims must decide whose subjectivity they trust, which first requires deciding how they feel about the fact that the identity of a jurist is critical to the success of an argument. Many will naturally object that this reality further silences marginalized voices, particularly women, who face countless obstacles, both social and educational, to gaining legitimacy in the eyes of others. On the other hand, in any tradition, and particularly in the Islamic tradition – which prizes the importance of embodied knowledge (as symbolized by the importance of practicing the sunna) – the status and reputation of an authority lends an argument more credibility. Moreover, many Muslims would agree that questions of Islamic legal reform should be handled by scholars who not only have adequate knowledge and training, but intangible qualities like wisdom, good judgment, character, and spiritual status.

Each Muslim, scholar or layperson, likely already has a range of authorities with whom they are willing to “agree to disagree.” Perhaps, as an interesting exercise, Muslims should articulate and interrogate those lists, see whom they have put there and why, and understand what characteristics make a religious figure worthy of respect in their eyes. Muslims can also take this chance to interrogate what kind of qualifications they believe modern religious authorities should have. A set or number of traditional texts? A seminary

education? A Western education? This entire inquiry follows in the long tradition of *uṣūl* debates over the qualifications for various levels of scholars, up to the *mujtahid*.

It is certainly a tall order to have even a majority of Muslims agree on any set of criteria, but I suspect that these lists are already more similar than they are different. Thus, even if unable to agree on major issues, perhaps many Muslims could at least agree on who they trust, and therefore the acceptable scope of disagreement. If not, then at least through this process, and aided by this study's exploration of the early debates on subjectivity, we might better understand how it is that the intellectual battles of the *umma* are decided.

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