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ABŪ HANĪFA AND THE LEGAL LOGIC OF 2ND/8TH CENTURY IRAQ

EBÛ HANÎFE VE 2./8. YÜZYIL IRAK'INDA HUKUK MANTIĞI

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ABSTRACT

This article explores how Abū Ḥanīfa balanced the two concepts of *qiyās* (analogy) and *istiḥsān* (juristic preference) to fashion a legal logic that esteemed analogical consistency while simultaneously recognizing its dangers and occasionally departing from it. It first argues that Iraqi legal logic was defined by an ambitious view of *qiyās* best termed analogical structuralism. It then argues that Iraqis also recognized the limitations of *qiyās*, particularly in its potential to conflict with a hadith/sunna or to lead to absurd results. In these cases, Iraqis made exceptions to *qiyās*, calling those exceptions *istiḥsān*. I show how Abū Ḥanīfa similarly struck this balance and how he espoused a surprisingly subjective conception of *istiḥsān*, one from which even his students retreated. Overall, this paper hopes to show how Abū Ḥanīfa represents a unique inflection point in the development of Islamic legal logic just before the rise of the Shafii paradigm.

Keywords: Istiḥsān, Qiyās, Abū Ḥanīfa, Legal Reasoning, Early Hanafism.

ÖZ

Bu makale, Ebû Hanîfe'nin iki farklı kavram olan kıyas (benzetme) ve istihsanı (hukukî tercih), eşzamanlı olarak, bunların içerdiği riskleri fark edip zaman zaman bu kavramlardan uzaklaşırken analojik tutarlılığa değer veren bir hukukî mantık oluşturmak için nasıl dengelediğini incelemektedir. İlk olarak, Irak hukuk mantığının, benzeşen yapısalcılık olarak adlandırılan iddialı bir kıyas görüşüyle tanımlandığını ileri sürmektedir. Daha sonra Iraklıların, özellikle bir hadis / sünnet ile çelişme veya saçma sonuçlara yol açma olasılığı bakımından, kıyasların sınırlamalarının da farkında olduklarını savunmaktadır. Bu tür durumlarda Iraklılar, kıyaslara istisnalar yaparak bu istisnaları istihsan olarak adlandırmışlardır. Bu çalışmada Ebû Hanîfe'nin benzer şekilde bu dengeyi nasıl sağladığı ve zaman zaman öğrencilerinin bile geri adım attığı şaşırtıcı derecede öznel bir istihsan anlayışını nasıl benimsediği incelenecektir. Genel olarak, bu makale Ebû Hanîfe'nin Şafiî örneğinin yükselişinden hemen önce İslamî hukuk mantığının gelişiminde benzersiz bir dönüm noktasını temsil ettiğini göstermeyi amaçlamaktadır.

Anahtar Kelimeler: İstihsan, Kıyas, Ebû Hanîfe, Hukukî Çıkarım, Erken Hanefîlik.

ABŪ HANĪFA AND THE LEGAL LOGIC OF 2ND/8TH CENTURY IRAQ

SUMMARY

Scholars have long argued that systematic legal thought originated in Iraq, usually pointing to the Kufan jurist Ibrāhīm al-Nakhaʿī (d. 96/714-5), who taught Ḥammād b. Abī Sulaymān (d. 120/737), who in turn taught Abū Ḥanīfa. However, considerable evidence also shows that there was some tension even within Iraq over what systematic legal thought should like – over how logical a jurist could be before he started veering away from *fiqh* and toward misguidance.

Different jurists held different beliefs about the proper bounds of legal logic, a difference scholars often reduce to the distinction between the *ahl al-raʾy* and the *ahl al-ḥadīth*. However, scholarship must also consider the tension from within the *ahl al-raʾy*, even within the same jurist. I argue in this article that Abū Ḥanīfa provides an excellent example of this tension, specifically in how he balanced the two concepts of *qiyās* (analogy) and *istiḥsān* (juristic preference) to fashion a legal logic that esteemed analogical consistency while simultaneously recognizing its dangers and occasionally departing from it.

I argue in Part I that Iraqi legal logic was generally defined by analogical structuralism, an ambitious view of *qiyās* grounded in the belief that all of God's laws should analogically relate to each other to form an elegant, coherent whole. I show how Abū Ḥanīfa aligned with this Iraqi tradition, and how it was distinct from the Shafii paradigm that later emerged.

In Part II, I show that Iraqis also recognized the limitations of *qiyās*: that they saw analogical structuralism as a baseline, but not an unbreakable rule. This was particularly true when the *qiyās* outcome either directly conflicted with a hadith/sunna or simply resulted in an absurd or unjust outcome. In these cases, Iraqis made exceptions to *qiyās*, and they called those exceptions *istiḥsān*. I show how Abū Ḥanīfa also upheld the necessity of these occasional exceptions both in theory and in practice, and how he espoused a surprisingly subjective conception of *istiḥsān*, one from which even his students Abū Yūsuf (d. 182/798) and Muḥammad al-Shaybānī (d. 189/804-5) retreated.

Overall, I hope this paper shows how Abū Ḥanīfa represents a unique inflection point in the development of Islamic legal logic just before the rise of the Shafii paradigm.

EBÛ HANÎFE VE 2./8. YÜZYIL IRAK'INDA HUKUK MANTIĞI

ÖZET

Akademisyenler uzun zamandır sistematik hukuk düşüncesinin Irak'ta ortaya çıktığını ileri sürdüler ve genellikle Ebû Hanîfe'nin hocası olan Hammad bin Ebî Süleyman'ın (ö. 120/737) hocası Kûfeli fakih İbrahim en Nehaî'yi (ö. 96 / 714-5) işaret ettiler. Ancak, Irak'ta bile sistematik hukukî düşüncenin ne olması gerektiği ve bir hukukçunun fıkıhtan uzaklaşıp yanlış yola sapmaya başlamadan önce ne kadar mantıklı olabileceği konusunda farklı düşünceler vardı. Dönemin fıkıh âlimleri, hukuk mantığının uygun sınırları hakkında farklı inançlara sahiptiler, farklı âlimler genellikle *ehl-i hadis* ve *ehl-i re'y* arasındaki ayrımı azaltmaktaydı. Bununla birlikte ilim, bir fıkıh âliminin *ehl-i re'y'den* kaynaklanan farklı düşüncelerini de dikkate almalıdır. Bu makalede, Ebû Hanîfe'nin özellikle *kıyas* ve *istihsân* gibi iki kavramı dengeleyerek hem analojik tutarlılığa değer veren hem de tehlikelerini fark eden ve ara sıra ondan uzaklaşan bir hukuk mantığı oluşturarak farklı görüşlerin dengelenmesinin mükemmel bir örneğini sunduğu öne sürülmüştür. Makalenin ilk bölümünde, Irak hukuk mantığının genel olarak analojik yapısalcılık ile tanımlandığını, Allah'ın tüm kanunlarının zarif, tutarlı bir bütün oluşturmak için benzer şekilde birbiriyle ilişkilendirilmesi gerektiği inancına dayanan iddialı bir "*kıyas*" görüşü ile tanımlandığı gösterilmiştir. Sonrasında Ebû Hanîfe'nin, Irak geleneğiyle nasıl uyumlu olduğu ve daha sonra ortaya çıkan Şafiî paradigmadan hangi açılardan farklı olduğu ele alınmıştır.

II. Bölümde Iraklıların, *kıyaslardaki* sınırlamaları, analojik yapısalcılığı bir temel olarak gördüklerini, ancak kırılmaz bir kural olarak görmediklerini öne sürülmüştür. Bu, özellikle *kıyas* sonucunun doğrudan bir hadis/sünnet ile çeliştiği veya sadece mantıksız veya haksız bir sonuçla sonuçlandığı durumlarda geçerli olmuştur. Bu durumlarda Iraklılar *kıyaslara* istisnalar yaptılar ve bu istisnalara *istihsân* dediler. Makalede Ebû Hanîfe'nin hem teoride hem de pratikte bu istisnaların gerekliliğini nasıl savunduğunu ve öğrencilerinden Ebû Yûsuf (ö. 182/798) ve Muhammed bin Hasan eş-Şeybânî'nin (ö. 189 / 804-5) bile geri adım attığı şaşırtıcı derecede öznel bir *istihsân* anlayışını nasıl benimsediği ortaya konulmuştur. Genel olarak, bu makalenin Ebû Hanife'nin Şafiî paradigmanın yükselişinden hemen önce İslâmî hukuk mantığının gelişiminde benzersiz bir dönüm noktasını temsil ettiğini gösterme yolunda yararlı olmasını umarım.

INTRODUCTION

When Abū Ḥanīfa (d. 150/767) met Imam Jaʿfar al-Ṣādiq (d. 148/765), the sixth Shiʿi imam, Jaʿfar asked, "Is this the man who analogizes the faith with his opinions (*yaqīs al-dīn bi-raʾyih*) . . . al-Nuʿman b. Thābit?" Abū Ḥanīfa responded, "Yes, [that is I]." Jaʿfar responded, "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.'"[1]

Scholars have long argued that systematic legal thought originated in Iraq, usually pointing to the Kufan jurist Ibrāhīm al-Nakhaʿī (d. 96/714-5),[2] who taught Ḥammād b. Abī Sulaymān (d. 120/737), who in turn taught Abū Ḥanīfa. Joseph Schacht, for example, believed that Iraq – and specifically Kufa – was the "intellectual center of the first theorizing and systematizing efforts" of Islamic law,[3] and that "the doctrinal development of the school of Medina often lagged behind that of the school of Kufa."[4] However, the above story with Imām Jaʿfar indicates that there was some tension even within Iraq over what systematic legal thought should like – over how logical a jurist could be before he started veering away from *fiqh* and toward misguidance.

Different jurists held different beliefs about the proper bounds of legal logic, a difference scholars often reduce to the distinction between the *ahl al-raʾy* and the *ahl al-ḥadīth*. However, scholarship must also consider the tension from within the *ahl*

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1 Wakīʿ, *Akhbār al-Quḍāt*, ed. ʿAbd al-ʿAzīz Muṣṭafā al-Marāghī, 3 vols. (Cairo: al-Maktaba al-Tijāriyya al-Kubrā, 1947), 3:78.

2 See 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.

3 Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 29.

4 Ibid.

al-raʾy, even within the same jurist. I argue in this article that Abū Ḥanīfa provides an excellent example of this tension, specifically in how he balanced the two concepts of *qiyās* (analogy) and *istiḥsān* (juristic preference) to fashion a legal logic that esteemed analogical consistency while simultaneously recognizing its dangers and occasionally departing from it.

I argue in Part I that Iraqi legal logic was generally defined by analogical structuralism, an ambitious view of *qiyās* grounded in the belief that all of God's laws should analogically relate to each other to form an elegant, coherent whole. I show how Abū Ḥanīfa aligned with this Iraqi tradition, and how it was distinct from the Shafii paradigm that later emerged.

In Part II, I show that Iraqis also recognized the limitations of *qiyās*: that they saw analogical structuralism as a baseline, but not an unbreakable rule. This was particularly true when the *qiyās* outcome either directly conflicted with a hadith/sunna or simply resulted in an absurd or unjust outcome. In these cases, Iraqis made exceptions to *qiyās*, and they called those exceptions *istiḥsān*. I show how Abū Ḥanīfa also upheld the necessity of these occasional exceptions both in theory and in practice, and how he espoused a surprisingly subjective conception of *istiḥsān*, one from which even his students Abū Yūsuf (d. 182/798) and Muḥammad al-Shaybānī (d. 189/804-5) retreated. Overall, I hope this paper shows how Abū Ḥanīfa represents a unique inflection point in the development of Islamic legal logic just before the rise of the Shafii paradigm.

Part I: The Iraqi Rubric of Analogical Structuralism

A few scholars have written on the nature of Iraqi analogical structuralism. Ahmed El Shamsy writes that, "Hanafi structuralism…operated on a strong presumption of consistency in the law, which generally did not admit the existence of individual exceptions."[5] Sohail Hanif argues the same in a recent article, writing:

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

[5] *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.

individual jurist, therefore, strives to develop a system of rules that complement other established rules.[6]

This structuralism is also obvious in Kufan dialectical exchange with the use of rhetorical challenges such as "You have abandoned your own opinion (*qad tarakta qawlak*)!",[7] or "Why should this case not be like the first case (*lima lā yakūn hādha ka-l-bāb al-awwal*)?",[8] or "Why, when elsewhere you claim that (*lima wa qad zaʿamta anna*)…?".[9]

Many 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, Rabīʿa b. Abī ʿAbd al-Raḥmān (d. 136/753-4), about a conversation with the great Medinan jurist Saʿīd b. al-Musayyab (d. 94/712-3):

I asked Saʿīd 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 camels." I responded, "When her wound is greater… her blood-money decreases?" Saʿīd responded, "Are you an Iraqi?…It's the sunna, my nephew."

The story appears in a number of early sources, most famously the *Muwaṭṭaʾ* of Mālik,[10] but also the *Aḥādīth* of Ismāʿīl b. Jaʿfar (d. 180/796-7),[11] the *Jāmiʿ* and the *Muwaṭṭaʾ* of Ibn Wahb (d. 197/813),[12] and the *Muṣannaf* of ʿAbd al-Razzāq al-Ṣanʿānī (d. 211/826-7).[13]

If accurate, this story shows that, already at the beginning of the 8th century, it was stereotypically Iraqi to prioritize simple analogical consistency

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[6] 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.

[7] Muḥammad al-Shaybānī, *al-Aṣl*, ed. Mehmet Boynukalın, 13 vols. (Beirut: Dār Ibn Ḥazm, 2012), 1:36.

[8] Ibid., 1:75.

[9] Ibid., 1:126.

[10] Mālik b. Anas, *Muwaṭṭà al-Imām Mālik*, ed. Muḥammad Fuʾād ʿAbd al-Bāqī (Beirut: Dār Ihyāʾ al-Turāth al-ʿArabī, 1985), 2:860.

[11] Ismāʿīl b. Jaʿfar, *Ḥadīth ʿAlī b. Ḥajar al-Saʿdī ʿan Ismāʿīl b. Jaʿfar al-Madanī*, ed. ʿUmar b. Rufūd b. Rafīd al-Satafyānī (Riyadh: Maktabat al-Rushd, 1998), 1:404. Ismāʿīl was reported to have taken hadith directly from Rabīʿa. Al-Dhahabī, *Siyar Aʿlām al-Nubalāʾ*, 8:229.

[12] ʿAbd Allāh Ibn Wahb, *al-Jāmiʿ*, ed. Rifʿat Fawzī ʿAbd al-Muṭṭalib and ʿAlī ʿAbd al-Bāsiṭ Mazīd (Mansoura: Dār al-Wafāʾ, 2005), 1:286; *Muwaṭṭà ʿAbd Allāh Ibn Wahb*, ed. Hishām Ismāʿīl al-Ṣaynī (Dammam: Dār Ibn al-Jawzī, 1999), 1:144.

[13] ʿAbd al-Razzāq al-Ṣanʿānī, *al-Muṣannaf*, 9 vols. (Cairo: Dār al-Tàṣīl, 2015), 8:75.

over sunna precedent. If inaccurate, the story's genesis and proliferation still shows that the same stereotype had already emerged by the mid-8th century.

The inception of this Iraqi analogical structuralism may start all the way back with al-Nakhaʿī. Zafar Ansari writes of al-Nakhaʿī's "conscious search for greater coherence and consistency" and his "notion that the teachings of the Prophet were embodiments of general principles, rather than arbitrary fiats."[14] Ansari speaks also of al-Nakhaʿī'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*."[15]

Reports surrounding Ḥammād b. Abī Sulaymān, al-Nakhaʿī's student and Abū Ḥanīfa's teacher, similarly reflect this characterization 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 ʿAṭāʾ[16] and Ṭāwūs[17] and Mujāhid,[18] and your children, nay even your children's children, have more legal acumen (*afqah*) than they do."[19]

Another report tells that when Ḥammād visited Basra, 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, clearly satirizing *qiyās* by analogically extending paternity to bestiality.[20] The mob similarly asked about a man who divorces his wife with the exclamation "I divorce her enough to fill up a bowl (*milʾ sukurruja*),"[21] 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 (*bāʾin*) divorce, rather than a revocable (*rajʿī*) divorce, since "*milʿ al-bayt*" is an expression of exaggeration.[22] The mob was therefore clearly satirizing this analogical extension of exaggerated statements, asking what would happen if the man makes an

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[14] Ansari, "The Early Development of Islamic Fiqh in Kufa with Special Reference to the Works of Abū Yūsuf and al-Shaybānī," 106.

[15] Ibid.

[16] ʿAṭāʾ b. Abī Rabāḥ (d. ca. 114/732-3), prominent early Meccan jurist.

[17] Ṭāwūs b. Kaysān (d. 106/725), of Persian origin, one of the premier jurists and hadith narrators of Yemen and of the Successor (*tābiʿī*) generation at large. Al-Dhahabī, *Siyar Aʿlām al-Nubalāʾ*, ed. Shuʿayb Arnāʾūṭ and Ḥusayn al-Asad, 30 vols. (Beirut: Muʾassasat al-Risāla, 1982), 5:38-49.

[18] Mujāhid b. Jabr (d. ca. 100/718-19), famous Meccan jurist and scholar of Qurʾan. Andrew Rippin, "Mudjāhid b. Djabr al-Makkī," in *EI*$_2$.

[19] Al-Dhahabī, *Siyar Aʿlām al-Nubalāʾ*, 5:235.

[20] Ibid.

[21] Ibid.

[22] Aḥmad b. Muḥammad al-Qudūrī, *Mukhtaṣar al-Qudūrī*, ed. Kāmil Muḥammad Muḥammad ʿUwayḍa (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), 1:156.

ironic "exaggeration" of divorcing his wife enough to fill up a small bowl.[23]

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*)."[24] Another report is the one told at the beginning of this piece – of the meeting between Abū Ḥanīfa and Imām Jaʿfar – in which Imām Jaʿfar labels Abū Ḥanīfa "the one who analogizes in the faith with his opinion (*yaqīs al-dīn bi-raʾyihi*)."[25]

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 connoting systematic thought and analogical reasoning, to be contrasted with the stereotypical Medinan jurist deriving rulings from an encyclopedic knowledge of the sunna.

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 Qurʾan?" 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?"[26] 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 Qurʾan 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."[27] In another report, Abū Bakr

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[23] In addition to satirizing *qiyās*, the mob is likely also satirizing the Hanafi proclivity for far-fetched hypotheticals.

[24] Al-Khaṭīb al-Baghdādī, *Tārīkh Baghdād*, ed. Bashshār ʿAwwād Maʿrūf, 17 vols. (Beirut: Dār al-Gharb al-Islāmī), 15:444.

[25] Wakīʿ, *Akhbār al-Quḍāt*, 3:78.

[26] El Shamsy, *The Canonization of Islamic Law*, 46.

[27] Al-Dhahabī, *Manāqib al-Imām Abū Ḥanīfa wa-Ṣāḥibayhi*, ed. Muḥammad Zāhid al-Kawtharī and Abū al-Wafāʾ al-Afghānī (Hyderabad: Lajnat Iḥyāʾ al-Maʿārif al-Nuʿmāniyya, 1408/1987-8), 32.

b. ʿAyyāsh (d. 193/808-9) states, "[Abū Ḥanīfa] was the most systematic jurist of his time (*kāna…afqah ahl zamānih*)."[28] In another report, Yazīd b. Hārūn (d. 206/821) writes, "The most systematic (*afqah*) jurist I ever saw was Abū Ḥanīfa."[29] Another report specifically 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 (*daqāʾiq*), then [go to] Abū Ḥanīfa."[30]

We even see the association of Iraqi law with analogical consistency bear out in al-Shāfiʿī's criticism of Iraqi legal reasoning. Al-Shāfiʿī called Iraqis the "adherents of *qiyās*" and said that "the Iraqis allowed none to diverge from *qiyās*."[31] Of course, al-Shāfiʿī also criticized the Iraqis for arbitrarily departing from *qiyās* due to *istiḥsān*, so these statements were not meant to criticize 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-Shāfiʿī's project was to re-orient the basic rubric of the law to hadith consistency, and thus he frequently criticized the Iraqis for ignoring authentic hadith in favor of analogical consistency.[32] 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 *raʾy* over hadith reports.[33] Thus, in his treatise *Ikhtilāf ʿAlī wa-Ibn Masʿūd*, al-Shāfiʿī goes painstakingly through Iraqi doctrine to note rulings in which the Iraqis uphold systematic reasoning over the known precedents and rulings of ʿAlī and Ibn Masʿūd, and therefore prophetic sunna by proxy.[34]

In actual Iraqi doctrine, one finds many examples of jurists prioritizing simple analogical consistency over the apparent meaning of a hadith. For example, al-Shāfiʿī himself cites the example of the Iraqi principle, derived from a hadith, that "with liability comes the right to profit (*al-kharāj bi-l-ḍamān*)."[35] The Hanafis take this as a maxim and build many rulings upon

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[28] Ibid., 29.

[29] Ibid., 30.

[30] Ibid., 29.

[31] Ansari, "The Early Development of Islamic Fiqh in Kūfa with Special Reference to the Works of Abū Yūsuf and al-Shaybānī," 290.

[32] Al-Shāfiʿī, *al-Umm*, ed. Rifʿat Fawzī ʿAbd al-Muṭṭalib, 11 vols. (Mansoura: Dār al-Wafāʾ, 2001), 10:276.

[33] Al-Khaṭīb al-Baghdādī, *Tārīkh Baghdād*, 15:544.

[34] Al-Shāfiʿī, *al-Umm*, 7:185.

[35] Al-Shāfiʿī, *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.

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 for free, since he was liable for the cow when he milked it. However, a different hadith speaking specifically to this case instructs that the man should 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.[36]

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 hadith, "The seller and the buyer have the right of option [to rescind or conclude] 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?"[37] 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?"[38] One can see in these narratives Abū Ḥanīfa's insistence on systematic logical progressions. Admittedly, these reports come from historical sources by authors considered hostile to Abū Ḥanīfa, so this paper entertains these reports not as true, but as reflecting a broader tension

All of this evidence illustrates how the early Iraqis believed the law must be sensible, and how Abū Ḥanīfa fit perfectly within this trend. Iraqis 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 that are the direct subject of revelation, should come together to form an elegant and consistent whole.

How did this differ from al-Shāfiʿī's legal paradigm? To put it most simply: if two rulings exist, and both of those rulings derive directly from the Qurʾan or hadith, then for al-Shāfiʿī the analysis ends there. For the Iraqis, however, there is still one more consideration, which is to ask how those two rulings analogically relate to each other. See Figure 1 for a simple diagram of this. If the two rulings are not analogically consistent with each other (as in the earlier story about Rabīʿa asking why 1 finger = 10 camels, 2 fingers = 20 camels, 3 fingers = 30 camels, but 4 fingers = 20 camels), then the Iraqis must choose between analogical consistency and the sunna. When the Iraqis do choose to violate the analogical consistency, they call that violation "*istiḥsān*."

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36 El Shamsy, *The Canonization of Islamic Law*, 27.

37 Al-Khaṭīb al-Baghdādī, *Tārīkh Baghdād*, 15:530.

38 Ibid.

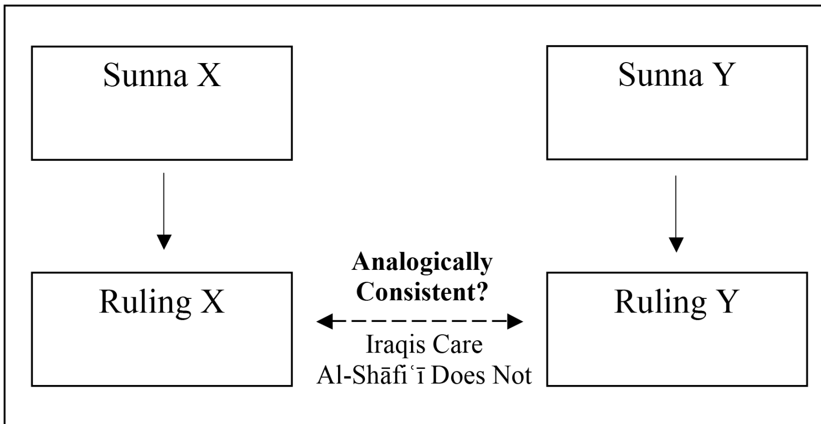

Figure 1

Part II: The Dangers of Analogical Structuralism

While Iraqi jurists esteemed the elegance of *qiyās*, they also recognized its dangers, specifically: 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. They therefore preached violating *qiyās* when necessary, terming this violation "*istiḥsān*." This section first shows how anxiety about the dangers of *qiyās* began to arise during the lifetime of Abū Ḥanīfa. Schacht argues that these Iraqi traditions criticizing *qiyās* are polemical forgeries by later traditionists, mostly based on a logical argument that Iraqis utilized *qiyās* so would not then criticize it.[39] However, this shows how the rigid distinction between *ahl al-raʾy* and *ahl al-ḥadīth* has led scholars to misinterpret historical evidence concerning the nuance within the *ahl al-raʾy*, specifically how they simultaneously admired and were wary of *qiyās*. The section then shows how Abū Ḥanīfa shared these sentiments regarding the dangers of *qiyās*, how he positioned *istiḥsān* as the solution, and how this bore out in his actual rulings in a way that differed from Abū Yūsuf and al-Shaybānī.

In terms of the anxiety that *qiyās* might contradict the sunna, the previous section noted numerous examples of Iraqis prioritizing analogical reasoning over hadith and the criticism they received in that regard from the Medinans and then al-Shāfiʿī. 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-Shaʿbī (d. ca. 103/721-2)[40] narrates a story remarkably similar to the Medinan story narrated in Part I regarding the number of camels needed for blood-money for a woman's finger.

In the story, a man asks the famous Kufan qadi Shurayḥ (d. ca. 76/695-

[39] Schacht, *The Origins of Muhammadan Jurisprudence*, 130.

[40] G.H.A. Juynboll, "Al-Shaʿbī," in EI_2.

6) about the blood-money for fingers. Shurayḥ replies, "Ten by ten (*ʿashr ʿashr*)." 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,[41] 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*)."[42] In another report, al-Shaʿbī similarly cautions that *qiyās* might violate the sunna, stating, "If you rule by analogies (*maqāyīs*), you will prohibit that which is permissible, and permit that which is prohibited."[43]

A similar report emerges later in the Maliki tradition. The Egyptian Maliki jurist Aṣbagh b. al-Faraj (d. 225/839) reportedly stated, "A person immersed in *qiyās* could go as far as to violate the sunna, and *istiḥsān* is the pillar of knowledge (*inna al-mughriq fī al-qiyās yakādu yufāriq al-sunna, wa-inna al-istiḥsān ʿimād al-ʿilm*)."[44] This quote also shows Aṣbagh positioning *istiḥsān* as a way of protecting the sunna, which is ironic since scholars stereotypically associate *istiḥsān* with flouting the conventional sources of law.

As for the objection that *qiyās* can produce unwise, incorrect, or absurd results, we have already seen a glimpse of this in the story in which Imām Jaʿfar 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.'"[45] 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*)."[46] 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)[47] says, "[al-Ḥasan] read the verse, 'You made me from fire and you made him from clay'[48] then said, 'Satan analogized,

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41 Meaning that if one's ear were to be maimed, one could hide the injury, unlike with one's arm.

42 ʿAbd Allāh al-Dārimī, *Sunan al-Dārimī*, ed. Ḥusayn Asad, 4 vols. (Riyadh: Dār al-Mughnī, 2000), 1:283.

43 Ibid., 1:281.

44 Al-Shāṭibī, *al-Muwāfaqāt*, ed. Abū ʿUbayda Mashhūr b. Ḥasan ʾĀl Salmān, 7 vols. (Cairo: Dār Ibn ʿAffān, 1997), 5:199.

45 Wakīʿ, *Akhbār al-Quḍāt*, 3:78.

46 Al-Dārimī, *Sunan al-Dārimī*, 1:280; Ibn Abī Shayba, a*l-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.

47 Al-Dhahabī, *Siyar Aʿlām al-Nubalāʾ*, 5:452-53.

48 Q. 7:12.

and he was the first to analogize (*qāsa iblīs, wa-huwa awwal man qās*).'"[49]

Again, we also see within this line of warnings the positioning of *istiḥsān* as a solution. We first see this in two sayings of the Basran qadi Iyās b. Muʿāwiya (d. ca. 121/739-40). In the first of these, Iyās states, "Analogize judgements so long as people remain righteous, but when people grow corrupt, then use *istiḥsān* (*qīsū al-qaḍāʾ mā ṣalaḥa al-nās, fa-idhā fasadū fa-istaḥsinū*)."[50] In his second, he states, "I have found judgeship to be nothing but [doing] that which people regard highly (*mā wajadtu al-qaḍāʾ illā mā yastaḥsin al-nās*)."[51] In both quotes, Iyās expresses the importance of rulings being flexible, wise, and well-regarded, advocating the necessity of checking strict legal derivation when making judgments in the real world.

We see the same reasoning 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.[52] It is noteworthy that Ibn al-Muqaffaʿ 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 his *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-Muqaffaʿ 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 (*maḥāsin*). So if that which *qiyās* points to is good (*ḥasan*) and well-regarded (*maʿrūf*), 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 (*maḥāsin al-umūr wa-maʿrūfihā*) and to protect people's rights.[53]

Ibn al-Muqaffaʿ continues elaborating on this point, then finally con-

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[49] Al-Dārimī, *Sunan al-Dārimī*, 1:280.

[50] Wakīʿ, *Akhbār al-Quḍāt*, 1:341.

[51] Wakīʿ, *Akhbār al-Quḍāt*, 1:341.

[52] Francesco Gabrieli, "Ibn al-Muḳaffaʿ," in EI_2.

[53] Ibn al-Muqaffå, "*Risāla fī al-Ṣaḥāba*," in *Rasāʾil al-Bulaghāʾ*, ed. Muḥammad Kurd ʿAlī (Cairo: Dār al-Kutub al-ʿArabiyya al-Kubrā, 1913), 126; Charles Pellat, *Ibn al-Muqaffaʿ: "Conseilleur" du calife* (Paris: Maisonneuve, 1976), 47. Pellat's work includes a critical edition of the text.

cludes 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 (*raʾy*) would be for him to abandon that command and turn instead to what is agreed upon (*mujmaʿ ʿalayhi*) and well-regarded (*maʿrūf*) and *mustaḥsan*.[54]

Schacht calls this statement by Ibn al-Muqaffaʿ "a common-sense but non-technical description of the proper function and limitations of analogy and the proper use of *raʾy* and *istiḥsān*, by which undesirable consequences of strict systematic reasoning can be avoided."[55]

The *Risāla* of Ibn al-Muqaffaʿ also provides a thorough treatment of the third major anxiety which mid-8th century Iraqis expressed about *qiyās*, which was that *qiyās* permitted too much legal variability. Ibn al-Muqaffaʿ's *Risāla* was itself primarily geared to solving this problem of legal variation. Éric Chaumont ties Ibn al-Muqaffaʿ to "some of the first reactions [showing] dissatisfaction with the uncontrolled diversity of the legal order."[56] In writing to the Caliph al-Manṣūr, Ibn al-Muqaffaʿ saw the crisis of legal variation as a crisis of political legitimacy, as it granted 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 (*ʿadl*)."[57] The second source of unacceptable legal variation is, of course, *qiyās*. This is either through jurists analogizing 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 criticizes the Iraqis by saying, "whenever [you follow] *raʾy*, someone else who is stronger in *raʾy* comes along, and then you follow him . . . I see no end to this."[58] Then there

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54 Ibn al-Muqaffȧ, "*Risāla fī al-Ṣaḥāba*," 126-27; Pellat, *Ibn al-Muqaffaʿ: "Conseilleur" du calife*, 47.

55 Schacht, *The Origins of Muhammadan Jurisprudence*, 103.

56 Abū Isḥāq al-Shīrāzī, Kitāb al-Lumaʿ fī Uṣūl al-Fiqh*: Traité de theorie légale Musulmane*, trans. Éric Chaumont (Berkeley: Robbins Collection, 1999), 6.

57 Ibn al-Muqaffȧ, "*Risāla fī al-Ṣaḥāba*," 126.

58 Cited in El Shamsy, *The Canonization of Islamic Law*, 28.

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 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 (*raʾy raʾaytuhu*), 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 I could do that." The man said, "I do know that God's curse is upon you (*ʿalayka laʿnat Allah*)."[59]

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

Thus, consistent with this long line of Iraqi warnings about the dangers of *qiyās*, Abū Ḥanīfa himself also warned repeatedly about the dangers of *qiyās*. He reportedly once stated, "Urinating in the mosque (*al-bawl fī al-masjid*) is better than some kinds of *qiyās*."[60] In another report he stated, "Whoever does not abandon analogy when sitting to make judgment (*fī al-majlis*) is not performing *fiqh* (*lam yafqah*),"[61] the implication being that *qiyās* can produce unwise results in the real world, so must be checked by a jurist's good sense.

Also consistent with this Iraqi trend is that Abū Ḥanīfa positioned *istiḥsān* as a solution to the pitfalls of *qiyās*. Indeed, the first evidence of this is in the specific wording of his recommendation to "abandon analogy (*yadaʿ al-qiyās*)" when sitting to make judgment. Early Hanafi positive law is replete with the phrase "I/we abandon *qiyās* (*adaʿ/nadaʿ al-qiyās*)." The phrase is virtually synonymous with the expression "I/we use *istiḥsān* (*astaḥsinu/nastaḥsinu*)," 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 recommendation – of "*yadaʿ al-qiyās*" – undeniably implicates *istiḥsān* as well and shows him positioning *istiḥsān* as crucial to the proper functioning of *fiqh* in the real world.

Of course, such a legal logic quickly gave rise to accusations of subjective reasoning. Al-Shāfiʿī famously called *istiḥsān* "doing what is agreeable to one's mind (*taladhdhudh*),"[62] and declared, "It is clearly prohibited

[59] Ibn Qutayba, *Taʾwīl Mukhtalif al-Ḥadīth* (Beirut: al-Maktab al-Islāmī, 1999), 102.

[60] Al-Dhahabī, *Manāqib al-Imām Abū Ḥanīfa wa-Ṣāḥibayhi*, 34.

[61] ʿAbd al-Razzāq, a*l-Muṣannaf*, 8:214.

[62] Al-Shāfiʿī, a*l-Risāla*, ed. Aḥmad Muḥammad Shākir (Beirut: al-Maktaba al-ʿIlmi-

(*ḥarām*) for anyone to rule by *istiḥsān*."[63] Later Hanafis were quick to defend Abū Ḥanīfa against these charges, arguing that al-Shāfiʿī and later critics misunderstood *istiḥsān* and that it actually relied upon perfectly conventional processes of legal derivation.[64]

However, Abū Ḥanīfa's statements and his actual *fiqh* rulings show that he may indeed have had a somewhat subjective conception of *istiḥsān* that even Abū Yūsuf and al-Shaybānī did not endorse. To begin with the narrative reports, one definition of *istiḥsān* attributed to Abū Ḥanīfa is to make a ruling without evidence according to what a jurist thinks is better.[65] Another definition attributed to him and other early supporters of *istiḥsān* was "proof that occurs to the mind of the scholar that he is unable to put into words."[66] These are both admittedly reported by Shafiis in a polemical context, but narrative reports and evidence also show that Bishr al-Marīsī (d. 218/833), a prominent early Hanafi, reported similarly subjective definitions from Abū Ḥanīfa,[67] then in his actual *fiqh* rulings rejected *istiḥsān* for that reason (and he therefore appears in classical Hanafi *fiqh* works as holding an extreme *qiyās* position on many issues).[68]

Moreover, when using *istiḥsān*, Abū Ḥanīfa frequently did not explicitly justify the ruling, and when asked why he was overruling *qiyās*, he would often simply responded, "We use *istiḥsān* here."[69] In one report, al-Shaybānī even expressed frustration with this, stating "Abū Ḥanīfa would debate his disciples about analogies (*maqāyīs*), and they would object to his [reason-

yya, 1938), 503.

63 Ibid., 504.

64 Abū Bakr al-Jaṣṣāṣ, *al-Fuṣūl fī al-Uṣūl*, ed. ʿAjīl Jāsim al-Nashamī, 4 vols. (Kuwait: Wizāra al-Awqāf wa-l-Shuʾūn al-Islāmiyya, 1994), 223; Abū Zayd al-Dabūsī, *Taqwīm al-Adilla fī Uṣūl al-Fiqh*, ed. Khalīl al-Mays (Beirut: Dār al-Kutub al-ʿIlmiyya, 2001), 404.

65 Abū Isḥāq 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 ʿAbd al-Jabbār Ṣaghīrī, 7 vols. (Dubai: Dār al-Buḥūth li-l-Dirāsāt al-Islāmiyya wa-Iḥyāʾ al-Turāth, 2004), 6:2665.

66 Abū Ḥāmid al-Ghazālī, *al-Mustaṣfā*, ed. Muḥammad ʿAbd al-Salām ʿAbd al-Shāfī (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.

67 Reported by the Muʿtazili Zaydī scholar al-Nātiq b-l-Ḥaqq (d. 424/1033) in *al-Mujzī fī Uṣūl al-Fiqh*, erroneously published as Abū al-Ḥusayn al-Baṣrī, *Sharḥ al-ʿUmad*, ed. ʿAbd al-Ḥamīd b. ʿAlī Abū Zunayd, 2 vols. (Medina: Maktaba al-ʿUlūm wa-l-Ḥikam, 1410/1989-90), 2:189; al-Shīrāzī, *al-Tabṣira fī Uṣūl al-Fiqh*, 1:492.

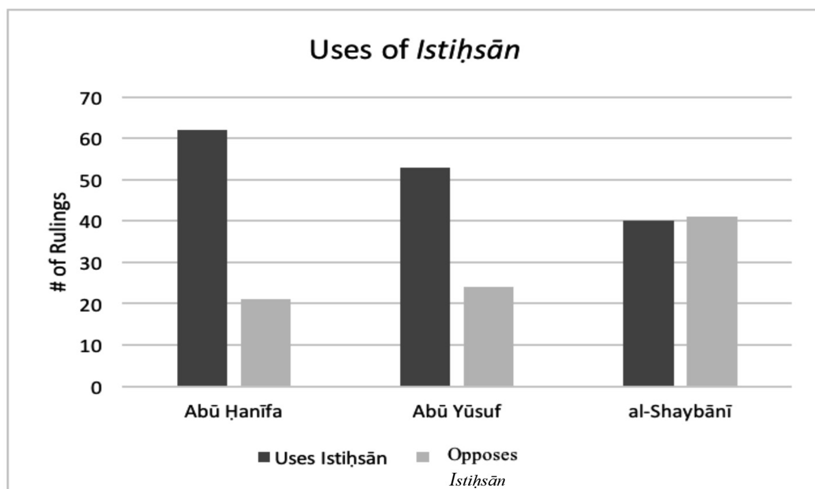
68 Hassaan Shahawy, "How Subjectivity Became Wrong: Early Hanafism and the Scandal of *Istiḥsān* in the Formative Period of Islamic Law (750 – 1000 CE)" (DPhil diss., University of Oxford, 2020). 206.

69 Dozens of examples, but for one, see al-Shaybānī, *al-Aṣl*, 9:113.

ing] and oppose him (*fa-yantaṣifūn minhu wa-yuʿāriḍūnahu*), until he would simply say, 'I use *istiḥsān* here.'"[70] 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.

This seems to align with the broader narrative that Abū Ḥanīfa was more comfortable with nontextual juristic reasoning than his students. The story goes that Abū Yūsuf was "more dependent on traditions than his master,"[71] and that al-Shaybānī "[depended] even more on traditions than [did] Abū Yūsuf."[72] In a previous work,[73] I analyzed this hypothesis empirically, examining every *istiḥsān* ruling (approx. 500) reported in al-Shaybānī's *Kitāb al-Aṣl* in order to test, among other things, whether there was a noticeable difference between Abū Ḥanīfa and his students in his use of *istiḥsān*. Indeed, I found that there was.

Figure 2 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, while vice versa for al-Shaybānī, to the extent that al-Shaybānī actually objects to *istiḥsān* more frequently than he uses it.



Of course, these numbers might not be as meaningful as they appear. Perhaps Abū Ḥanīfa only has the fewest reported oppositions to *istiḥsān*

[70] Al-Dhahabī, *Manāqib al-Imām Abū Ḥanīfa wa-Ṣāḥibayhi*, 25.

[71] Schacht, *The Origins of Muhammadan Jurisprudence*, 301.

[72] Ibid., 306.

[73] Hassaan Shahawy, "How Subjectivity Became Wrong: Early Hanafism and the Scandal of *Istiḥsān* in the Formative Period of Islamic Law (750 – 1000 CE)" (DPhil diss., University of Oxford, 2020).

because he is chronologically the first of the three, meaning he does not yet have the doctrines of the other two in order to oppose them. Similarly, perhaps al-Shaybānī has the most reported oppositions to *istiḥsān* simply because he is chronologically the last of the three. 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 employed or opposed.[74] Thus, again relying on my previous work, in which I catalogued over 60 different types of reasoning that can underlie an *istiḥsān* ruling, I conducted an analysis to compare the reasoning underlying the *istiḥsān* rulings of the three jurists. True to form, among all of Abū Ḥanīfa's uses of *istiḥsān*, the most common type of reasoning is "Unclear Reasoning" (13 of 62 cases, 21%). Moreover, of the 30 cases of "Unclear Reasoning" in the entire dataset, 13 are attributed to Abū Ḥanīfa, while only 5 are attributed to Abū Yūsuf and only 2 to al-Shaybānī.

In these cases, Abū Ḥanīfa's 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. Furthermore, while Abū Ḥanīfa's most frequent type of reasoning is "Unclear," "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.

The sample sizes here are admittedly small and so should be taken with a grain of salt. However, the empirical data seems to confirm the narrative reports regarding Abū Ḥanīfa's subjective conception of *istiḥsān* and the stories of al-Shaybānī's frustration with it. The data also supports the broad narrative that Abū Yūsuf and al-Shaybānī represented successive stages of increased reliance on hadith and a budding aversion to subjective or arbitrary reasoning, likely due to the increasing need to defend Iraqi doctrine from external attacks on *istiḥsān* and subjective legal reasoning, particularly by al-Shāfiʿī.

CONCLUSION

In this article, I hope to have revealed the surprisingly nuanced early Iraqi discourse regarding analogical legal reasoning. Far from Schacht's logic that we should disregard Iraqi criticism of *qiyās* as unreliable simply

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74 Shahawy, "How Subjectivity Became Wrong: Early Hanafism and the Scandal of *Istiḥsān* in the Formative Period of Islamic Law (750 – 1000 CE)," 66-67.

because Iraqis used it in their *fiqh*, this article shows that even Abū Ḥanīfa himself both endorsed but also cautioned against *qiyās*. The article shows how this tension dates back surprisingly early – to the mid-2nd/8th century – and how *istiḥsān* first arose in this context to connote the solution to the potential pitfalls of *qiyās*. Of course, Abū Ḥanīfa's particular brand of *istiḥsān* attracted serious criticism, and in response his students worked to use it more systematically. However, I see Abū Ḥanīfa's own conception of the balance between *qiyās* and *istiḥsān* as a valuable glimpse into the legal logic of an early age, and I see his subjective conception of *istiḥsān* not as a blemish or liability, but a cogent theory that recognized a jurist's wisdom and intuition as critical to the proper functioning of the law. Later *fiqh* discourses work to systematize these intuitions with frameworks like *ḍarūra* and *maqāṣid al-sharīʿa*, but were undeniably influenced by this particular legal logic of the early Iraqis and of Abū Ḥanīfa in particular.

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