

The Dialectical Forge, Part I:
Proto-System Juridical Disputation in the *Kitāb Ikhtilāf al-‘Irāqīyyīn*

by

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Abstract

Dialectic (*jadāl* or *munāẓara*) is undoubtedly the primary formative dynamic in the evolution of Islamic legal systems, whether in the expansion and justification of doctrinal bodies of substantive law (*fiqh*), or in the elaboration and refinement of legal theory (*uṣūl al-fiqh*). Despite this most critical role, however, relatively few studies have been dedicated to juridical dialectic (*al-jadāl al-fiqhī*); and, to my knowledge, none have attempted to explore or explain its powerful function in the shaping of legal systems and attendant literary discourse. A principal objective of this current project is to bring the formative dynamic of *jadāl* to the forefront of considerations in Islamic legal studies, with special regard to the evolution of both legal-theoretical and juridical-dialectical sciences.

Significantly, one may easily discern the dynamic of a sophisticated juridical dialectic at work in our earliest extant legal literature, particularly in works which preserve details of legal argumentation and/or extended Q&A sequences of dialectical debate. One such work is the *Kitāb al-Umm* of Muḥammad b. Idrīs al-Shāfiʿī (d.204/820), and it is a particular treatise found in this early compendium — the *Ikhtilāf al-ʿIrāqīyyīn* — with which the current project will be most concerned. Part II of this dissertation comprises a parallel, annotated translation of this treatise; Part I is chiefly occupied with: 1) an analysis of its dialectical elements; 2) my arguments with regard to their implications; and 3) the elaboration of a theoretical model to account for the formative dynamic of juridical *jadāl* in the evolution of legal-theoretical and dialectical systems.

My procedure in Part I is as follows. First, I will draw attention to the “dialectical milieu” of early Islamic intellectual history and provide a background of current evolutionary narratives for *jadāl*-theory systems (Chapter I.2). Following this, I will fashion a “lens for analysis” from certain of our earliest extant (fifth century H) “full-system” treatises on juridical *jadāl* (Chapter II). With this lens, I will proceed to analyze the “proto-system” dialectic of our subject-treatise, the *Ikhtilāf al-ʿIrāqīyyīn* (Chapter III). The implications of these analyses will then be explored; and a natural, symbiotic co-evolution of dialectical and legal-theoretical teaching and practice, from the start of the Islamic jurisprudential project, will be asserted (Chapter IV.1). Finally, a “Unified Dialectical Forge Theory” will be developed (Chapter IV.2). This latter is intended as a preliminary working model for the formative dynamic of juridical dialectic in the evolution of *uṣūl al-fiqh* and *jadāl* systems, both. Overall, it is hoped that our theoretical model, translation of the *Ikhtilāf al-ʿIrāqīyyīn*, and analyses of its contents, together with the window onto proto-system dialectic and legal theory which these subprojects afford us, will constitute the primary contributions of this dissertation.

Précis

La dialectique (*jadal* ou *munāzara*) est sans doute la dynamique formatrice principale dans l'évolution des systèmes juridiques de l'Islam. Elle joue un rôle fondamental dans le développement et la justification des corps doctrinaux du droit positif (*fiqh*), ainsi que l'élaboration et le raffinement de la théorie juridique (*uṣūl al-fiqh*). Cependant, malgré ces fonctions essentielles, il existe peu d'études abordant le sujet de la dialectique juridique (*al-jadal al-fiqhī*). À ma connaissance, aucune étude n'a jusqu'ici tenté d'examiner ou d'expliquer son rôle indispensable dans la formation des systèmes juridiques et les discours littéraires de droit. L'un des principaux objectifs de cette thèse sera donc de souligner l'importance de la dynamique formatrice du *jadal* pour l'étude de la loi islamique, surtout en ce qui concerne l'évolution des sciences légales-théoriques ainsi que celle des sciences juridiques-dialectiques.

Notons que la plus ancienne littérature juridique de l'Islam fait preuve déjà d'une dialectique juridique sophistiquée et que de nombreux exemples d'argumentation juridique et de séquences prolongées de questions et réponses en forme de débat dialectique y sont préservées. Cette thèse est principalement dédiée à un traité pourvu de tels exemples, l'*Ikhtilāf al-ʿIrāqīyyīn*, qui se trouve dans le *Kitāb al-Umm*, un recueil ancien de droit (et d'argumentation) de Muḥammad b. Idrīs al-Shāfiʿī (m. 204/820). La deuxième partie de cette étude comprend une traduction parallèle (arabe-anglais) et annotée de l'*Ikhtilāf al-ʿIrāqīyyīn*. La première partie, à son tour, comprend : a) une analyse des dimensions dialectiques du texte; b) mes arguments à propos de leurs implications; et c) l'élaboration d'un modèle théorique qui puisse expliquer la dynamique formatrice du *jadal* juridique dans l'évolution des systèmes théoriques-juridiques et dialectiques.

La première partie se déroule comme suit : je commence en abordant la question du <<milieu dialectique>> dans l'histoire du développement intellectuel de l'Islam classique et je tâche de fournir un contexte pour les récits évolutionnistes employés de nos jours pour expliquer les systèmes du *jadal* théorique (Chapitre I.2). Ensuite (Chapitre II), j'établis un <<guide d'analyse>> formé d'après quelques-uns des premiers traités de *jadal* juridique complets et systématisés parvenus à nous (datant du cinquième siècle de l'Hégire). À l'aide de ce guide, je passe à l'analyse du <<proto-système>> dialectique trouvé dans l'*Ikhtilāf al-ʿIrāqīyyīn* (Chapitre III). Par la suite, il devient possible d'évaluer les implications de ces analyses; je prétends que, depuis la naissance du projet jurisprudentiel islamique, il y a eu une coévolution, à la fois naturelle et symbiotique, de l'enseignement et de la pratique de la dialectique juridique et la théorie juridique (Chapitre IV.1). Enfin, je tâche de développer une <<Théorie unifiée de la forge dialectique>> (Chapitre IV.2). Cette théorie est proposée comme modèle fonctionnel préliminaire pouvant expliquer la dynamique formatrice de la dialectique juridique dans l'évolution des systèmes des *uṣūl al-fiqh* tout comme ceux du *jadal*. Dans l'ensemble, il est à espérer que ce modèle théorique, la traduction de l'*Ikhtilāf al-ʿIrāqīyyīn*, et les analyses de son contenu — ainsi que l'exposé des proto-systèmes dialectiques et légales-théoriques fourni par ces sous-projets — constitueront la contribution principale de cette thèse.

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Addendum:

Between the initial and final submissions of this dissertation, I have found myself the fortunate recipient of yet more kindness from several parties. First of all, I would again thank Drs. Hallaq, Wisnovsky, and Abisaab; and to these kind advisors I would add Drs. Stephen Menn and Joseph Lowry. To all of these generous mentors: my sincere gratitude for your insightful questions, comments, and truly constructive criticisms in examining my work. It goes without saying that such faults as persist in the following pages are a measure of my falling away from the sound advice of these examiners.

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A Note on Conventions

The current dissertation may be said to be *unconventional* from a number of perspectives which, I most ardently hope, do not inconvenience the reader. In the main, such procedures as earn this label may be relegated to the category of “space-saving devices.” The numerous dialectical sequences and arguments for analysis, the many analytical categories with subspecies and subtypes, the important but complicated evolutionary narratives and expositions of current scholarship, and the general complexity of our subject matter and its many material resources have conspired to produce a dissertation which is unconventional in volume alone — despite my best attempts at limitation and concision.

Among the devices in which I took refuge may be numbered the following: First, works referenced in footnotes will, on the whole, only appear in “short-title” format — the reader will find full renderings of cited works in the bibliography. Second, I have perforce dispensed with a conventional literature review and instead plunged directly into the most comprehensive secondary sources relevant to our project. Writings in the critical, yet somehow neglected, field of juridical dialectic are relatively scarce in any case; I have focused most attention upon the contributions of Larry Miller and Wael Hallaq, while attempting at least to acknowledge the important, but less comprehensive, contributions of other scholars.¹ Third, because of the astonishing amount of material — be it arguments for analysis from our “subject-text,” analytical categories from our “lens-texts,” or pertinent titles and chapters from the larger realm of dialectical theory, etc. — the reader will be confronted with a countless array of tables in which important materials and analyses will be listed in the most compact presentation possible. It is vital to our project that these materials be included; but expanding these listings into prose discussions would easily double the size of an already too-voluminous work.

Fourth, I have left a great many Arabic terms — technical and otherwise — in transliteration, both here and in Part II of this dissertation. For the most part, it is hoped that the meanings of the relevant technical terms will be adequately explained in associated discussions, with more commonplace terms inferred from contexts; generally speaking, I must, at present, rely upon both the patience and expertise of the

¹ I am speaking, of course, in terms of evolutionary narratives. The contributing of edited texts from the realm of juridical *jadāl* is paramount to raising this field to the acknowledgment it most certainly is due; all scholars who have done so may be considered founders of the field.

reader. Although footnoted English definitions and a comprehensive glossary will certainly attend any future publications derived from this research, present considerations of space-limitation do not allow for them.

Finally, I will necessarily resort to a great many abbreviations in Chapters III and following, as summarized in tables at the end of this section. Although I will largely avoid using these abbreviations before Chapter III, it has been thought best to include these tables here and so prepare the reader. Note that the categories and signs which follow will not be explained now, but will be fully treated at the start of Chapter III. The objective here is to provide a quick reference which may easily be accessed at a later stage, if necessary.

Addendum: A Note on “Translations”

If there has been a single, persistent category of concern expressed by most of the examiners of this dissertation, it would relate directly to my method and general approach to translation. It was only after such recurrent, but constructive, criticisms as I received that I began to reflect upon my initial motives in rendering the Arabic of our texts into the frequently unidiomatic “half-English” which has been the cause of these concerns. What I discovered, in fact, is that my intentions were never in full consonance with the more conventional ideas of what a translation ought to be, and I would like to take this opportunity to explain both my intentions and my approach.

From the start, and with regard to all “translations” from Parts I and II of this dissertation, my objective was, in so many words, to “put the reader into the Arabic text,” rather than to render the Arabic text into an easily-digestible English. I hoped to press the reader into that world created by the semantics and syntax of our texts; it was an approach to immersion — insofar as we can ever be capable of it — into the mindset of our authors and their jurist peers. My method was simply to preserve, as closely as possible, the vocabulary and syntax of the text: technical terms would be translated or explained but once or twice, and appear in transliteration thereafter; non-technical but polysemous terms would receive the same treatment; and sentence structures would reflect — as far as possible — the idiom of Arabic, not English. It was never destined to be a pleasurable reading experience; and indeed, I also took pains to preserve the vagaries which our texts often pose to readers (and interpreters) at so many removes of “otherness” from their authors — readers and interpreters who are in no way as immersed in this highly technical field as their subject-authors were.

Again, my intention was more to prod the reader into “thinking in the Arabic of our texts,” rather than to render the text into idiomatic English for easy (and, I would posit, easily misleading) consumption. As such, it may indeed be questionable if the term “translation” is appropriate in the first place. Lacking another suitable term (“interpretation,” in my opinion, does not capture my intentions as I have expressed them above), I will persist in referring to this unidiomatic “half-English” as a “translation;” at the same time, I have settled upon — and implemented — the following compromise: 1) I have changed a great deal of the first-submission “translations,” rendering far more words into English (near-) equivalents than I was originally comfortable in doing, and removing a great deal of transliterated phrases (particularly when they appeared in parallel with the Arabic text); but 2) I have held to my original intention of “putting the reader into the Arabic text,” leaving a great many terms in transliteration, and a great many sentences in unidiomatic syntax.

The benefits or frustrations of this compromise will doubtless vary from reader to reader; as a final word, however, I will say this much: this is also the sort of “translation” approach from which I feel I would myself most benefit were it more common in our very technical fields of Islamic substantive law, legal theory, and dialectics — fields where so many terms without English equivalents are used by our author-jurists, and with such painstaking precision. I would far prefer to see قياس rendered as “*qiyās*,” rather than “analogy,” because *qiyās* encompasses so much more than mere analogy;² I would rather نقض and معارضة were rendered “*naqd*” and “*mu‘āraḍa*” than “inconsistency” and “counter-objection,” because these dialectical moves are so much more than these terms convey; I would rather بيع were “*bay*” than “sale,” which latter term does little justice to this genus of contract; and I believe that something is lost when *mustadill*, *mu‘allil*, and *mujīb* are all rendered as “proponent” or “respondent.”³

It is my hope that the Arabic terms of our text will make themselves known — in transliteration — through initial explanations and in-context repetitions; let us acquire “*qiyās*” and “*mu‘āraḍa*” into our own categories of analysis, rather than impose “analogy” and “counter-objection” where they do not fit (and indeed distort).

² Wael Hallaq’s “Non-Analogical Arguments in Sunnī Juridical *Qiyās*” more than proves the extent to which this is true.

³ The same goes for non-technical polysemes: I would rather read *qawl* for قول, than “saying” in one place, “statement” in another, and “doctrine” in another.

Part I: The Dialectical Forge
Key to Categories and Abbreviations

Key to Categories and Abbreviations

“Presentation Categories”

Presentations which are “Overtly Dialectical”	
A	Extended dialectical sequences (sequence = “ <i>in qāla</i> [X]; <i>fa-qāla lahu</i> [Y]”, or the like), with several Q&A exchanges
B	Short dialectical sequences, with only one Q&A exchange
C	Non-sequence arguments employing dialectical formulae (e.g., “ <i>ara’ayta</i> ” and “ <i>alā tarā</i> ”), which plainly signify past or recurrent disputation
Presentations which are not “Overtly Dialectical”	
D	Extended arguments with no dialectical formulae
E	Short arguments with no dialectical formulae
F	Plainly-stated substantive rulings supported only by a brief reference to evidence (<i>naql</i> , <i>‘aql</i> , or both)
G	Plainly-stated substantive rulings with no reference to evidence whatsoever

Abbreviations for Jurists and Disputants

AH = Abū Ḥanīfa	AY = Abū Yūsuf
IAL = Ibn Abī Laylā	MIH = Muḥammad b. al-Ḥasan al-Shaybānī
SH = al-Shāfi‘ī	RB = al-Rabī‘
P = Proponent	Q = Questioner
SHAP = al-Shāfi‘ī introduced Anonymous Proponent	SHAQ = al-Shāfi‘ī introduced Anonymous Questioner

Identifications from al-Shīrāzī’s and al-Bājī’s Objection and Argument-Strategy Outlines

Example: al-Shīrāzī’s <i>Ma’ūna fī l-Jadal</i>	Example: al-Bājī’s <i>Minhāj fī Tartīb al-Ḥijāj</i>
Shīr.VII.15.2.2.3 = <i>al-Farq bi-Qiyās al-Shabah</i> - Shīr.VII [istidlāl-domain of objection] <i>al-Kalām ‘alā Ma’nā al-Khiṭāb wa huwa «al-Qiyās»</i> - Shīr.VII.15 [genus of <i>i’tirād</i>] <i>I’tirād 15: al-Mu’āraḍa</i> - Shīr.VII.15.2 [species of <i>i’tirād</i>] <i>al-Mu’āraḍa</i> by way of the <i>‘illa</i> - Shīr.VII.15.2.2 [type] <i>Ḍarb 2: Mu’āraḍa</i> as regards the <i>Aṣl</i>, which is <i>al-Farq</i> - Shīr.VII.15.2.2.3 [subtype] <i>al-Farq bi-Qiyās al-Shabah</i>	Bāj.IX.B.15.2.2.4 = “he makes distinction by way of a <i>ḍarb</i> of <i>al-shabah</i>” - Bāj.IX [istidlāl domain of objection] <i>al-I’tirād ‘alā al-Istidlāl bi-Ma’nā al-Khiṭāb, wa huwa al-Qiyās</i> - Bāj.IX.B [full treatment of 15 <i>wujūh</i>] <i>mā ya’tariḍu bihi ‘alā al-qiyās</i> - Bāj.IX.B.15 [genus of <i>i’tirād</i>] <i>al-i’tirād ‘alā al-‘illa bi’l-mu’āraḍa</i> - Bāj.IX.B.15.2 [species of <i>i’tirād</i>] <i>mu’āraḍat al-‘illa bi’l-‘illa</i> - Bāj.IX.B.15.2.2 [type] <i>al-mu’āraḍa bi-‘illat al-aṣl; which is al-farq</i> - Bāj.IX.B.15.2.2.2 [subtype] <i>farq bi-dalālat al-ḥukm</i> - Bāj.IX.B.15.2.2.2.4 [subtype of subtype] - he makes distinction by way of a <i>ḍarb</i> of <i>al-shabah</i>

Chapter I.1: The Project

Project Title

The title of this dissertation is “The Dialectical Forge.” As this phrase was meant to encapsulate the core essence of the current project, an explication of its twin elements will provide a suitable launching point. As for the first element: the Arabic for “dialectic” is *jadal* or *munāẓara*. These terms denote *formal* disputation and debate between scholars in a given domain, with regard to a specific thesis.¹ A dialectical confrontation is between two scholars, in question and answer format, with the ultimate aims of testing a thesis, destroying a thesis, or supplanting one thesis with another. The “Proponent” maintains a thesis, and the “Questioner” seeks to test it, undermine it, and/or supplant it with his/her own counter-thesis. This is attempted, of course, through questioning the proponent — all the while endeavouring to gain the proponent’s concession to such premises as from which one’s counter-thesis necessarily flows, or by which one’s critique is validated or justified.

Ultimately — and this is very important — a *truly* dialectical exchange is guided by a cooperative, truth-seeking ethic: a sincere avoidance of fallacy, an abhorrence of self-contradiction (whether intra-thesis or intra-doctrinal). Thus, dialectic is to be distinguished from sophistical or eristic argument, persuasive argument, rhetorical argument, etc. And dialectic, again, is *formal* — it is an ordered enterprise, with norms and rules, with a real and committed aim of advancing knowledge.

As for the second element of our title: the “forge” is a place where metals are combined and recombined, shaped, moulded, refined, and given an edge; the ultimate contour, sharpness, and utility of an implement is determined here, by continued hammering and grinding in extremes of heat, and through the prolonged exertions of the blacksmith. In our case, it is a great collective of blacksmiths, for our “Dialectical Forge” is, of course, a metaphor: our metals are various epistemological, hermeneutical, rational-inferential, and argumentative axioms; the heat is provided by competitive (albeit cooperative) disputation; our forged-tools are of course intellectual tools: theories, methods, species of argument and counter-argument; our blacksmiths are Muslim jurists; and the forge itself is the venue of dialectical disputation.

¹ When one encounters the term “dialectical” in this dissertation, one should think foremost of *formal* debate, disputation, and the logic of this species of discourse.

Thus, “the Dialectical Forge” is meant to convey *the formative dynamic of dialectical debate* — and, specifically for this project, debates within the Islamic juridical domain. My argument throughout this thesis is that dialectical debate was the most important dynamic in the evolution not only of doctrinal bodies of substantive rulings and norms, but of Islamic legal theories *and* of Islamic dialectical theory itself. The exigencies of dialectical debate provided key motives, and forged key structures, elements, principles, and concepts for what would eventually become known as the ‘ilm of *uṣūl al-fiqh*, and the ‘ilm of *jadal* or *munāẓara*, not to mention other juristic ‘ulūm (e.g., *furūq*; *ashbāh wa naẓā’ir*; etc.) This, then, is the meaning of “the Dialectical Forge:” the formative dynamic of juridical *jadal* in the evolution of *fiqh*, *uṣūl al-fiqh*, and *jadal*-theory itself.

Project Background

The general parameters of this dissertation were conceived during the coursework for my doctoral program, with special regard to the lectures of three outstanding professors: Dr. Wael Hallaq, Dr. Robert Wisnovsky, and Dr. Rula Abisaab. As for Dr. Hallaq, his teaching and writing has revealed for me the exquisite argumentation which everywhere marks the ‘ilm *uṣūl al-fiqh*, and has provided most important contributions — starting points, in fact — for my current research.² As for Dr. Wisnovsky, it is to his course on Islamic Dialectic to which I owe my introduction not only to the vital contribution of Larry Miller, but to the works of Aristotle, al-Fārābī, Ibn Sīnā — in short, the whole gamut of *jadal*-theorists through to and including the era of the *ādāb al-baḥth*. This course forever altered my research aspirations; it brought dialectic into sharp focus, and provided the great advantage of being able to recognize dialectical material when it appears (and it is, indeed, ubiquitous). And as for Dr. Rula Abisaab, it was in her excellent course “Problems in Shī‘ī Thought” where I was introduced to the *Dharī‘a ilā Uṣūl al-Sharī‘a* of al-Sharīf al-Murtaḍā (d.436/1044) — my first conscious glimpse of juridical dialectic, *in practice*, in a literary medium.

After these formative experiences, the clear, stylistic marks of *jadal* began to appear nearly everywhere I looked in the legal literature. But I was particularly astounded to come across the overtly dialectical material of the *Kitāb al-Umm*, that massive and early compendium of treatises and chapters compiled from the teachings of Muḥammad b. Idrīs al-Shāfi‘ī (d.204/820). This happy discovery, resultant of the

² See, e.g., his *History*, 94, 136-7; and “Treatise.”

experiences outlined above, and coupled with a longstanding interest in Islam's "Formative Period," led directly to the current project.

The original plan was impossibly vast in scope, as I all too quickly found out. I am embarrassed to confess my intention of analyzing the arguments of several early compendia, but the whole of the *Umm* is alone so bursting with overtly dialectical material that it rapidly proved unmanageable for a single project. I then narrowed my intentions to nine important *khilāf* and legal-theoretical treatises incorporated into the *Umm* compendium,³ but this, too, soon proved too ambitious. In some ways, then, my selection of the *Ikhtilāf al-ʿIrāqīyyīn* was arbitrary — it is the first of these treatises presented in the *Umm*, and the first which I subjected to scrutiny via the arduous path of translation.⁴ It was a fortuitous selection nonetheless, as its copious overtly dialectical material is just barely manageable for the current project (hopefully, the first of many). One thing is certain, however: there are treatises in the *Umm* which have even more to offer as windows onto proto-system *jadal* than the *Ikhtilāf al-ʿIrāqīyyīn*, and a great deal of exploration awaits.

Starting Points

As those who have contributed to this field openly acknowledge: Islamic Dialectics, or Islamic Disputation Practice and Theory, in general, is critically, gravely understudied. To date, the most comprehensive and detailed contribution remains Larry B. Miller's unpublished, 1984 doctoral dissertation for Princeton University: *Islamic Disputation Theory*. And to be certain, Miller's dissertation is an extraordinary contribution to Islamic Studies in general — for it defines a field which I believe is essential to understanding key dynamics for the whole of the Islamicate Intellectual-Historical enterprise. In other words, Islamic Dialectics is not merely an obscure genre of theory-literature.

Great praise is thus due to Miller, but with certain caveats; for I have come to recognize two, general problem areas in his dissertation: 1) the evolutionary narratives — especially for the earlier periods with which I am concerned; and 2) some of the expositions and analyses of particular dialectical moves. This first problem — Miller's evolutionary narratives — was in fact a major starting point for this dissertation. In

³ These are the "Treatises I-IX" frequently referenced by Schacht in his *Origins*. See his bibliography (p.338) for a listing, and Appendix I (p.330) for a proposed chronology. See also Ḥassūn's introduction to his edition of the *Umm* (vol. 1, 93-103), where each of these treatises is summarized in some detail.

⁴ The result of this effort — constituting, in fact, a first level of analysis — has been included with this dissertation as Part II.

brief, Miller states clearly his belief that the early literature of juridical disagreements — the literature of *ikhṭilāf* or *khilāf* — is *not* dialectical in nature, and argues that a distinctly “theological” *jadāl* developed first, found its literary manifestation, and was then “taken over” sometime later by “the jurists” (presumably in the late 4th/10th century).

In direct contradiction to this, I found a formulaic, systematic, and relatively sophisticated juridical dialectic where Miller had claimed none was to be found — in the early *ikhṭilāf* literature, and specifically in and among the many treatises and chapters of al-Shāfiʿī’s *Kitāb al-Umm*. Nor does the *Umm* merely contain the odd dialectical argument; rather, it is full to bursting with dialectical sequences — real question and answer disputations with: “*fa-in qāla X, qāla lahu Y* (if one should say: X, it is said to him: Y);” or “*fa-qāla ba’d al-nās X, fa-qultu lahu Y* (one of ‘the people’ said: X, so I said to him: Y);” etc. — long, transcript-like sequences of dialectical disputation.

Having selected a singular treatise from this compendium — the *Kitāb Ikḥṭilāf al-ʿIrāqīyyīn* — I thus set to translating it as a first layer of analysis. I then read through, partially translated, and outlined certain of our earliest extant treatises on juridical dialectical theory and method. Finally, I set to analyzing the dialectical sequences and elements of the subject-text through the lens — i.e., using the analytical categories, concepts, principles, and terms — of the later *jadāl*-theory texts. The objective all along, of course, was to plumb the true character of this early juridical dialectic which — according to the most current narrative in the field — ought not to have existed.

Project Questions

The questions which guided subsequent research and determined the eventual shape of this dissertation were all, from the first instance, exploratory. Surely the Q&A sequences of the *Ikḥṭilāf al-ʿIrāqīyyīn* were dialectical in both style and content, but what *kind* of dialectic is it? How do we qualify it? What are its elements, what is its character, what dialectical moves and strategies do we find? How does it compare to the dialectical system propounded in Aristotle’s *Topics* and *Sophistical Elenchi*? How “Aristotelian” is it? More importantly, how does it compare to the juridical dialectical systems elaborated by our *jadāl*-theorists of the fifth century H?

Other questions were of a more historical-evolutionary bent; again, I had come across a distinctly Islamic juridical dialectic, bearing the formulaic marks of some level of systematization, where it had been suggested I ought not find it at all — a century and more before the first specialized treatises on *jadāl*-theory and procedure were said

to be writ. Moreover, I discovered that the *jadāl* of the *Ikhtilāf al-ʿIrāqīyyīn* is both similar and different to that of later *jadāl* theorists; I thus began to make a distinction between what I called “proto-system” juridical dialectical teaching and practice, and “full-system” juridical *jadāl*-theory. So what is this “proto-system” juridical dialectic, and what does it tell us about current evolutionary narratives for Islamic legal dialectic?

As is the nature of an exploration, many more questions were to arise through the processes of analysis and review; and the first stage of analysis, as we mentioned, was translation (see Part II). It was only through methodical, and at times quite frustrating translation of our subject-text that I could hope to acquire a full understanding of its contents and style.⁵ During this stage, too, a great many interesting discoveries were made which fine-tuned procedures for the next stages of analysis. Primary among these discoveries was the common usage of clearly legal-theoretical premises in early dialectical arguments. And what is more, these legal-theoretical premises were sometimes *themselves* the object of debate, not merely tools of justification and critique; i.e., even at this early stage we see *jadāl* not only about substantive rulings, but about legal theory and method. What do such phenomena tell us about current evolutionary narratives for *uṣūl al-fiqh*?

At first, it was thought, subsequent analyses would best be undertaken in a sort of scythe-sweeping approach. First, the text would be analyzed through the lens of later juridical *jadāl* theory, so that all dialectical features it exhibits might be brought forth and either: 1) identified in terms of the most appropriate analytical categories; or 2) provided new appellations whenever they are not consonant with those categories. Then a sweep through the text with the lens of later *uṣūl al-fiqh* literature would be made; another sweep with the lens of early grammar theory; and another with the lens of formal/informal logic (be it Aristotelian, Stoic, etc.); and so forth and so on through multiple lenses. Unfortunately, this also proved too ambitious. In fact, the first analytical sweep with the lens of juridical *jadāl* theory produced such an astounding number of parallels and distinctions that, on the whole, the other analytical projects

⁵ Importantly, the translation comprising Part II must be seen as a preliminary attempt, and is not being promoted as definitive. There are outstanding questions aplenty, and doubtless errors and mistaken meanings here and there which only my seniors and peers will be able to point out. With regard to the dialectical sequences which form the focus of our study, I am more confident that translation errors will be few. The intent of the participants in these sequences is to explain and justify; this is often a great aid to the translator who is nowhere near as immersed in the theoretical and substantive realms of Islamic law as his subject-jurists were, and this explanatory quality is often missing from the terse presentations of arguments and substantive solutions outside of dialectical sequences (i.e., the bulk of material in our treatise).

have been left as open doors, and we have focused on interpreting the dialectical moves identified in this manner. Such is the wealth of argument which even this one treatise provides us, never mind the *Umm* as a whole; and further studies may elucidate the features of our subject-text even more.

The point here is that many questions have arisen throughout various stages of study; some have been answered, some have received tentative suggestions, and many more have been set aside for future projects. As for what these many questions are, I will not reproduce them here. They are left for the reader to discover as we proceed through Chapters II, III, and IV. This is not a shirking of duty, it is an invitation to join the exploration. All questions are treated in their place to the extent I was capable of, and doubtless the reader will have some questions and answers of his/her own.

Project Aims

The aims of this project devolved, in the main, from the initial questions which kindled our exploration, and from the questions which arose thereafter. In short, they may be divided into two larger objectives: 1) to open a window onto what we have come to call “proto-system” juridical dialectic; that is, to bring the many and fascinating features of our subject-text’s dialectical sequences, and their high level of sophistication, to the attention of scholars in the field; and 2) having come across numerous indicants of a larger, formative dynamic at work — what we will call, in the end, the “Dialectical Forge” —, to account for the complex workings of this dynamic, and to fashion a working model for use as a framework in future studies of *jadāl* and *uṣūl al-fiqh*.

As for the first objective, the more modest, it is hoped to have been achieved in Chapters III and IV.¹ the analyses themselves, and the assessment of our findings. Of course, the *Ikhtilāf al-ʿIrāqīyyīn* will also be allowed to speak for itself, in Arabic, and accompanied in parallel by my translation and notes in Part II. And as for the second objective, somewhat more ambitious, I hope to have produced a theoretical model which may be of some utility, while recognizing at the same time that it may require adjustment and reworking. On a grander scale, it is hoped this model may even find a more general application in fields such as the History of Ideas and Evolutionary Epistemology. As for questions of necessary adjustments and reformulation, not to mention the specific (i.e., Islamic legal) and more general (i.e., broader intellectual-historical) utility of this model, I will rely upon the comments and suggestions of seniors and peers who read this dissertation.

Other, subsidiary aims include: 1) to supplant certain evolutionary narratives which do not account for the sophistication and formulaic consistency of proto-system *jadāl* as we find it in the *Kitāb al-Umm*; 2) to integrate our model of the Dialectical Forge into current narratives for the evolution of *uṣūl al-fiqh*, as a means of highlighting what I believe to be the most important of intellectual dynamics and attendant motives; 3) to present a more complete exposition on the organizing principles and contents of certain fifth century H full-system *jadāl* treatises than I believe has been offered to date; and 4) to put my analytical method, as we will describe it below, to the test, and to assess its utility. If I have achieved any of these objectives, whether they are more modest or ambitious of scope, let them be counted as the contributions of this dissertation.

Project Approach: Procedure and Presentation

Having decided to focus attention upon the dialectical arguments of the *Kitāb Ikhtilāf al-ʿIrāqīyyīn* (known also by the alternate title: *Kitāb mā Ikhtalafa fīhi Abū Ḥanīfa wa Ibn Abī Laylā ʿan Abī Yūsuf*),⁶ I was confronted with two problems: 1) how best to analyze them — i.e., by which categories of analysis; and 2) how best to divide them up for analysis, as it quickly became apparent that even this relatively small treatise (139 pages in Ḥassūn’s edition of the *Umm*, but only 63 in the Būlāq edition) contained far too many arguments for a single dissertation.

As regards the first problem, I decided to employ the analytical categories devised (or inherited) by the fifth century theorists of juridical *jadāl* themselves, and I may justify that decision quite easily. In short, the many categories of *istidlāl* and *iʿtirāḍ* systematically arranged and explained in our earliest extant full-system treatises are at once the most comprehensive, most detailed, most refined, and most *appropriate* set of analytical tools for the project at hand as one could conceive of. With special regard to their appropriateness, it stems not only from their being born of and “tailor-made” for the very species of dialectic with which we are most concerned, but from their chronological proximity to the proto-system era of the *Kitāb al-Umm*.⁷ Accordingly, I

⁶ Please note that questions with regard to the authorship and transmission of our subject-text, which we have called the *Umm* Version (as opposed to the Shaybānī Version, upon which it is an expansion and commentary), are addressed in the introduction to Part II of this dissertation. On the whole, we will concern ourselves only with analyses of its dialectical elements in Part I.

⁷ Which is to say, there may be even more refined and comprehensive *jadāl*-theory treatises from later eras, but ours will reflect the “state of the theoretical field” close to its first inception sometime in the fourth century H. Relying upon these texts thus has the additional benefit of providing indicants of continuity and change from older “proto-systems” of *jadāl* teaching and practice.

have selected from among the earliest extant theory-treatises of juridical *jadāl*, and fashioned my lens for analysis from them.

In particular, I have relied upon the *Kitāb al-Qiyās al-Sharʿī* of Abū al-Ḥusayn al-Baṣrī (Muʿtazilī-Ḥanafī; d.436/1044), the *Maʿūna fiʾl-Jadal* of Abū Ishāq al-Shīrāzī (Shāfiʿī; d.476/1083); and the *Minhāj fi Tartīb al-Ḥijāj* of Abū al-Walīd al-Bājī (Mālikī; d.474/1081). I have also made occasional reference to the *Kāfiya fiʾl-Jadal* of Imām al-Ḥaramayn Abū Maʿālī al-Juwaynī (Shāfiʿī; d.478/1085) and the *Kitāb al-Jadal ʿalā Ṭarīqat al-Fuqahāʾ* of Abū al-Wafāʾ ʿAlī, Ibn ʿAqīl (Ḥanbalī; d.513/1119). The many and refined genera, species, and subtypes of *istidlālāt*, *iʿtirāḍāt*, and *tarjīhāt* defined in these texts are the analytical categories comprising the primary material of my *jadāl*-theory lens.⁸

Returning to the *Ikhtilāf al-ʿIrāqīyyīn*, I soon devised a method of dividing up its arguments according to what I call “presentation categories.” These will be described in Chapter III in more detail, but suffice it to say that inclusion in one category or the other depends upon how “overtly dialectical” the presentation of an individual argument, or group of arguments, may be. The presentation categories are labelled A through G, and range from transcript-like extended dialectical Q&A sequences (A) to plain statements of substantive rulings accompanied by neither *naql* nor *ʿaql* (G). Now, all of the arguments of the *Ikhtilāf al-ʿIrāqīyyīn* may be considered “dialectical” simply by virtue of their location in a work of *ikhtilāf*. In the main, however, my analyses have focused only upon the most “overtly dialectical;” to wit, the twelve “*masāʾil*-sets” concluding with category A extended sequences, and the ten category B “short sequences.” I may justify this selection in the plainest terms: they are by far the easiest materials to work with in our subject-text.⁹

Turning to the presentation of this dissertation itself, I may briefly describe its chapters as follows. In Chapter I.2, I attempt to provide a contextual backdrop for studying the evolution of juridical dialectic in Islam. In large part, this consists in examining current historical narratives and substantive expositions with regard to

⁸ As I will reiterate a number of times throughout this dissertation, ours is not a project of back-projection; that is to say, it is not being argued that our proto-system jurist-dialecticians (Abū Ḥanīfa, al-Shāfiʿī, et al.) recognized and employed the categories and terms under which we subsume their arguments. Certainly they would be familiar with many of these terms and categories, but theirs was not a dialectical system anywhere near as refined as those which we find in the fifth century H (however sophisticated in its own right). This is the very reason I insist on calling the juridical dialectic of al-Shāfiʿī et al. a “proto-system.” And as for the terms *istidlāl*, *iʿtirāḍ*, and *tarjīh*, we will be defining them shortly.

⁹ Which is to say: the contexts and explanations attending a dialectical Q&A sequence allow for a much greater insight into the intentions and strategies of proponents of opposing positions than we can attain with regard to the non-sequence presentation categories.

jadāl and *munāẓara* system-theory in the domains of theology, philosophy, and jurisprudence.¹⁰ Moving on to Chapter II, I explore to the fullest extent that space allows the contents and organization of our full-system treatises on juridical *jadāl*, with particular attention paid to those listed above. I also review Miller’s exposition of “early period” juridical *jadāl* (for I am employing, with a singular addition, the same treatises for my analytical lens), and what Miller and Hallaq have observed with specific regard to *qiyās*-oriented *ī’tirāḍāt*. Finally, I turn briefly to Aristotle’s *Topics* and *Sophistical Elenchi* in order to assess how “Aristotelian” is the flavour of our fifth-century treatises.

Only after having fashioned our “*jadāl*-theory lens” in this way, do I proceed to analyze the material selected from the *Ikhtilāf al-‘Irāqīyyīn*. Beginning with the twelve *masā’il*-sets concluding in extended dialectical sequences, I provide tables of my analyses, in parallel with the Arabic text, for all. Only the first five, however, are accompanied by full-prose discussions. Following this, analytical tables are presented for the ten short dialectical sequences; and, finally, a number of important dialectical formulae employed throughout our treatise (indeed, throughout the *Umm* and many other early works, legal and otherwise) are discussed, with special attention paid to the functions of “*ara’ayta*” and “*alā tarā.*”

In Chapter IV.1, I review and assess our findings from Chapter III and their implications. In brief, I have found the differences we may observe between proto-system *jadāl* (and legal theory) and full-system *jadāl* theory (and *uṣūl al-fiqh*) are just as significant as the similarities. The phenomena observed throughout analysis and review are then extended into discussions in Chapter IV.2, where they are expanded upon and abstracted into components for the Dialectical Forge model. This, in turn, is further developed until it reaches its full contours as a “Unified Dialectical Forge Theory.” Finally, I propose an abstracted “background narrative” for the evolution of both *jadāl*-theory and *uṣūl al-fiqh* systems, before proceeding to closing remarks.

Findings, Conclusions, and Theories

The findings and conclusions (firm or tentative) which I have reached through argument analysis of the dialectical material in our subject-text are simply too many to list here; I will therefore only list the larger categories of findings. But before we may even attempt this much, we must have at least a general sense of the categories of

¹⁰ Most of our focus will be maintained upon the seminal contributions of Larry Miller to these sub-fields, although, with all due respect to his foundational dissertation, I will be quite critical with regard to a number of its interpretations and conclusions.

argument — of justification and critique — which we find in our *jadāl*-theory lens-texts. These, after all, are our categories of analysis.

First, the reader must know that the primary texts upon which I relied always treat, in an opening chapter, the full gamut of modes of drawing forth indicants (*istidlālāt*) in hierarchical order; which is to say: *Aṣl*, *Ma'qūl Aṣl*, and *Istiṣhāb Hāl* — with *Aṣl* comprised of *Kitāb*, *Sunna*, *Ijmā'*, and *Qawl al-Wāḥid min al-Ṣaḥāba*; and *Ma'qūl Aṣl* comprised of *Laḥn al-Khiṭāb*, *Faḥwā al-Khiṭāb*, *Dalīl al-Khiṭāb* or *al-Ḥaṣr*, and of course *Ma'nā al-Khiṭāb* which is *Qiyās*.¹¹ Having reviewed these domains of *istidlāl*, our *jadāl*-theorists proceed, in very precise and orderly fashion, to detail a comprehensive range of objections/critiques (*i'tirāḍāt*) for each of these *istidlāl* domains, along with appropriate responses (*ajwiba*) for each and every *i'tirāḍ*, all supported with plentiful illustrations (example-*masā'il*).¹² Finally, all of our *jadāl*-theorists conclude their discussions of *i'tirāḍāt* with a listing of *tarjīḥāt* — that is, orderly, step-by-step procedures for “preponderating” one Sunnaic *dalīl* over another, or one *ma'nā* or *'illa* over another.¹³

What I found when peering at the dialectical material of our more ancient subject-text through this analytical lens was quite surprising. Even in the small amount of dialectical material I analyzed within this relatively small treatise, I found nearly the full gamut of *istidlālāt* treated by our *jadāl* theorists, and a fairly large sampling of their *i'tirāḍāt*, *ajwiba*, and *tarjīḥāt*. However — and this is important — I also found much more than our *jadāl*-theorists discuss. There is a small host of dialectical moves and strategies which I could not identify according to the categories of our theorists, or which I could describe only by making alterations to their categories. For such as matched well with our lens-texts, I not only found plentiful examples of al-Bājī's dialectical questions ##3-5, but a great host of dialectical moves pertaining to reasoning from the *Kitāb*, from the Prophet's *qawl* and *fi'l*, from subtypes of *ijmā'*, from *qawl al-wāḥid min al-Ṣaḥāba*, not to

¹¹ The meanings of these terms will be made quite clear in Chapter II and following.

¹² Should one's opponent justify his solution to the *mas'ala* at hand by way of *istidlāl bi'l-Kitāb*, for instance, al-Shīrāzī lists some eight dialectical objections which may be of use to the questioner in testing or undermining the proponent's argument. (NB: *Istidlāl*, too, is a type of argument, every bit as much as the *i'tirāḍ* directed against it.) And for the very important domain of *ma'nā al-khiṭāb* (*qiyās*) we find no less than fifteen dialectical objections, with very specific (and consistent) designations such as *man'* or *mumāna'a*; *'adam al-ta'thīr*; *naqḍ* or *munāqaḍa*; *kasr*; *fasād al-waḍ'*; *mu'ārada*; etc. — each of these comprising a different genus of dialectical move.

¹³ This is the briefest possible overview of the analytical categories distilled from our *jadāl*-theory lens-texts; bear in mind that what I have mentioned so far are merely first-tier categories: for every genus of *istidlāl* and *i'tirāḍ* there are species, types, and subtypes, resulting in literally hundreds of dialectical justifications, critiques, and responses. Our lens-texts are very thorough, very comprehensive, very detailed treatments of juridical-dialectical theory.

mention instances of *faḥwā al-khiṭāb* and *dalīl al-khiṭāb* and a very impressive showing indeed of *istidlālāt*, *i'tirāḍāt*, and *tarjīḥāt* for *ma'nā al-khiṭāb* (which is *qiyās*).

For such as did not match well with our lens-texts, there were three larger areas to consider. First, there were *istidlālāt*, *i'tirāḍāt*, and *tarjīḥāt* that fell outside their usual scope of application in the lens-texts. For example, I found *naqḍ* in domains besides *qiyās al-'illa*; *man'* in the domain of *istidlāl bi'l-Sunna*; transmission-oriented objections in the domain of *qawl al-wāḥid min al-ṣaḥāba*; and *tarjīḥ* in the domain of *qawl al-wāḥid min al-ṣaḥāba*. Second, there were question strategies which fell outside the categories of our lens-texts. I found, for example: objection-oriented (as opposed to *istidlāl*-oriented) *as'ila* and *muṭālabāt*; a *Topics*-like procuring of premise after premise for *elenchus*; and other unfamiliar features.

Third, there were *istidlālāt* and *i'tirāḍāt* which fell completely outside the *adilla* domains of our lens-texts. These proved quite numerous, in fact, and include: *istiḥsān*; *taqlīd* of the *qawl* of a Successor (and objections against it); charges of what I call *method-naqḍ* and *method-mu'āraḍa*; a strategy I call “*naqḍ dilemma*”; argument to the *ma'qūl*; argument to custom or convention; *iḥtiyāṭ* as a guiding principle; etc. Additionally, there were genera of *formulaic arguments* which evinced a marked concern for doctrinal consistency — this was a family of “super-*qiyās*,” and I called these arguments *manzila*-subsumption (with such formulae as “X is in the *manzila* of Y for all Z”), and *taswiya*-subsumption (“wa sawā'un X and Y”), and *farq*-extension (whereby a critical difference between particular species of cases are extended to their genera). Most intriguing of all were certain species of argument which appeared unique to the proto-system *jadal* of our subject-text, and which generally exhibited an “ancient tenor.” There were, for example, charges of *tanāquḍ* (*fa qawluka mutanāqiḍ*); reductions *ad absurdum* and *ad impossibile*; arguments *ad verecundiam*; objections to affirming the consequent, and to *petitio principii* and mistaken cause; *a fortiori* arguments (outside the domain of *faḥwā al-khiṭāb*); charges of *taḥakkum*; etc.

From all of these findings, in all their detail, certain patterns began to emerge. These (and my hypotheses with regard to them) were eventually to form the components of a larger theoretical model explaining the “dialectical forge:” what I was to call, in due course, “Unified Dialectical Forge Theory.” In other words, from an investigation into what proto-system dialectic had in common with full-system *jadal*-theory, and what proto-system legal theory had in common with full-system *uṣūl al-fiqh*, and as to where these systems diverged, and as to how legal-theoretical premises

were employed in dialectical exchanges, and how *jadāl*-theory itself appears to have developed through its own practice — through abstracting the key patterns emerging from the phenomena observed in these texts —, the components of a Unified Dialectical Forge Theory were derived and assembled. And, as plainly as possible, Unified Dialectical Forge Theory — meant to account for the dynamic engine powering the evolution of both *uṣūl al-fiqh* and *jadāl*-theory — may be considered to have two “engine-compartments,” if you will: one for dialectical exchange and legal theory, the other for dialectical exchange and *jadāl*-theory.

As for the first: dialectic and legal theory, a number of processes and considerations were patently at work: 1) what I call the “three-stage cycle;” 2) dynamic symbiosis and co-evolution; 3) the bequeathing of dialectical axioms; 4) *ijtihād*ic anticipation of *jadāl*; and 5) what I call the “first principles parallel.”¹⁴ As for the second: dialectic and *jadāl*-theory, other processes were quite obviously at work: 1) the very phenomenon of *jadāl* exchange itself shaping what *jadāl*-theory was to become; 2) the processes of dialectic defining the *endoxa*; and 3) the transmission and study of past *jadāl* — the continuity of practice and the backwards-looking analysis of our *jadāl* theorists. Together, these comprise the components of the Unified Dialectical Forge model: the engine (with its two “compartments”) powering the simultaneously intertwined evolutions of *uṣūl al-fiqh* and *jadāl*-theory.

Finally, although I consider this model and its components the primary theory put forward by this dissertation, it is appropriate also to recognize here the evolutionary narrative this dissertation proposes. In brief, rather than a “linear trajectory with absolute priority” (as Miller’s narrative entails), I have proffered a model of “common origins, parallel development, and cross-germination.” That is to say, rather than a narrative whereby “the jurists” are made to “take over” the systematized *jadāl* theory and practice of “the theologians,” I would propose a more organic narrative marked by: 1) the emergence of a spectrum of dialectical “proto-systems” (e.g. grammatical, juridical, theological, etc.) from a common collective of argumentation epistemes, at the dawn of Islam; 2) the subsequent parallel and divergent development of such proto-systems according to the dictates of their variant (e.g., speculative vs. normative) scholarly projects; 3) the elaboration of “full-system” theory treatises during that great literary florescence of the fourth/tenth century —

¹⁴ All of these (and following) components are born throughout the course of Chapters III and IV.1, and then developed more fully in Chapter IV.2. For complete expositions, the reader is especially referred to this latter chapter (see the table of contents for relevant headings).

the culmination of a systematizing impetus recognizable across all scholarly projects; and 4) cross-germination between these projects at every stage of development, due to the close proximities and interactions between epistemic communities and the “many hats” of our polymath theorists, throughout the breadth and length of the “formative period” of Islamic sciences.

Certainly, the patent juridical dialectic in such works as the *Kitāb al-Umm* problematizes any notion of an absolute priority for fourth/tenth century theological *jadāl* theory. This, in combination with other indicants recorded in the following chapters, leads me to conclude that a model of “common origins, parallel development, and cross-germination” may best account for both the similarities *and* dissimilarities of theological, philosophical, and juridical *jadāl*.

Intended Contributions

The two greatest aims of this project have been, from the start, as follows: 1) to open a window onto “proto-system” juridical dialectic — i.e., to provide as thorough an analysis as I may of this snap-shot of second-century disputation (the *Ikhtilāf al-ʿIrāqīyyīn*), its dialectical moves, strategies, formulae, and principles; and 2) to account for the complex workings of this formative dynamic I’ve come to call the “Dialectical Forge” — to make of it a model for use (and critique and refinement) in future studies of Islamic legal theory and juridical *jadāl*.

In pursuit of these aims, I hope not only to have opened that window and explained that formative dynamic, but to have contributed the following: 1) a more thorough exposition on the organizing principles and contents of our earliest extant (5th c. H) juridical *jadāl*-theory treatises than has been provided to date; 2) the same with regard to crossovers, parallels, and differences between Aristotelian dialectic and Islamic *jadāl*-theory; 3) new paradigms for the origins and evolution of Islamic dialectical systems, and for the natural, symbiotic co-evolution of dialectical and legal-theoretical systems (and the supplanting of evolutionary narratives which do not account for the sophistication or formative dynamic of proto-system *jadāl*); 4) a procedural model for the analysis of early (“proto-system”) juridical texts (i.e., an illustration as to how proto-system dialectic might best be analyzed); 5) the “Unified Dialectical Forge Theory” itself; and 6) the translation of a very extraordinary and very early treatise of *ikhtilāf*, complete with detailed arguments, dialectical sequences, and a treasure-trove of fascinating details — legal-historical and otherwise.

Key Terms and Definitions

Now, before closing this introduction, we must turn to certain terms and phrases which I will employ with some frequency throughout this dissertation. For example, we have already made use of the term “subject-text” in the above discussions; this will always refer to the *Ikhtilāf al-‘Irāqīyyīn*, the subject of our analyses in Chapters III and following. As for the term “lens-texts,” this will always refer to the full-system *jadāl*-theory treatises from which we fashion our analytical lens in Chapter II. And as for the “Umm Version” this will always refer to the *Ikhtilāf al-‘Irāqīyyīn* as we find it in the *Umm* compendium (i.e., with the additional layers of argument and commentary provided by al-Shāfi‘ī and al-Rabī); it is to be contrasted with the “Shaybānī Version,” which is the *Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā* compiled by Abū Yūsuf, transmitted to Muḥammad b. al-Ḥasan al-Shaybānī, and thence to al-Shāfi‘ī (i.e., with only the *ikhtilāf* layers of Abū Ḥanīfa and Ibn Abī Laylā, Abū Yūsuf, and Muḥammad b. al-Ḥasan).

Moving on to more technical terms, we have already employed “proto-system” on more than one occasion. This is an important distinction to maintain, and “proto-system” will only be applied to *jadāl* teaching and practice before the appearance of the first, comprehensive “full-system” theory treatises in the fourth and fifth centuries H.¹⁵ This same important distinction will be maintained with regard to “proto-system legal-theory” and “full-system *uṣūl al-fiqh*.” The reader will note that I never refer to the legal theory of our subject-text as *uṣūl al-fiqh*, and there are a number of important reasons for this which will be made plain in later discussions. For now, suffice it to say that “*uṣūl al-fiqh*” will not be used as a descriptor for any legal-theoretical phenomena or less choate systems prior to our first, full-system *uṣūl al-fiqh* treatises, which also appeared — and far from coincidentally — in the fourth and fifth centuries H.

An important technical term I will use with great frequency is “*endoxon*” (pl. *endoxa*). This is a descriptor I have borrowed from Aristotle’s dialectical theory, and will be employed in a very similar sense as he employed it.¹⁶ In short, it means both: 1) “that (premise, method, ruling, etc.) which is accepted as valid or true by an authoritative community, group of individuals, or individual,” and 2) “that (premise, method, etc.)

¹⁵ In other words, the dialectic we observe in our subject-text belongs to the “proto-system,” while the dialectical theory (and accompanying practice) of our lens-texts belongs to the “full-system.”

¹⁶ Perhaps the most lucid discussion of the meaning of *endoxon* (and an excellent introduction to Aristotle’s dialectic, in general), as recommended by an examiner of this dissertation, is Robin Smith’s “Aristotle on the Uses of Dialectic.”

which one's dialectical opponent is expected to accept." For example, P might consider *istidlāl* by way of *dalīl al-khiṭāb* from an unambiguous *qawl* of the Prophet as *endoxon* (for both himself, and for Q).¹⁷ Now, being that the Prophet said: «Regarding such as are pasturing (*sā'ima*) of the sheep/goats there is *zakāt*,» P might therefore claim that there is *no zakāt* for such sheep/goats which are *not* pasturing (this is *dalīl al-khiṭāb* in a broader form). Q, on the other hand, might not consider *dalīl al-khiṭāb* as *endoxon* unless the *aṣl* is formulated as a conditional.¹⁸ Of course, if P's broader *dalīl al-khiṭāb* is condoned by Q's doctrinal *madhhab*, then P might rightly expect Q to consider it *endoxon*. If Q does not, however, the debate may shift to an examination of the *ḥujjiyya* of P's broader *dalīl al-khiṭāb* method.

Importantly, my usage of the term *endoxon*, unless otherwise indicated, is as a *descriptor*, not an *identification*. That is to say, when I use "endoxon" to describe a dialectical phenomenon in subject-text or lens-texts, I am not implying an identity with Aristotle's method. My calling something "endoxon," in short, is not a genetic claim.

Three particularly important technical terms belonging to juridical *jadal* are *istidlāl*, *i'tirāḍ*, and *tarjīḥ*. As for *istidlāl*, it may best be understood as the drawing forth of an indicant (*dalīl*), from authoritative or *endoxic* sources and by authoritative or *endoxic* methods, with regard to the *problēma* (*mas'ala*) at hand, in order to obtain or develop a solution to that *mas'ala*, or to further support a proffered solution. *Istidlāl*, in other words, is the primary activity of the Proponent (P). Against this we find *i'tirāḍ*, which is the critique of, or objection to, an opposing *istidlāl* (and thus the primary activity of the Questioner [Q]). And as for *tarjīḥ*, it refers to the preponderating of seemingly equivalent indicants (*adilla*) against each other, with the aim of discovering which has more epistemic mass, and thus outweighs the other. *Tarjīḥ* occurs primarily between conflicting reports (*akhbār* or *āthār*), but is also important in the preponderating of potentially-efficient properties (*ma'ānī*) and occasioning factors (*'ilal*).

Finally, there is a set of terms I will employ with regard to more abstracted notions of the "givens" or "motives" of argumentation as assumed, or studied and developed, within particular epistemic communities, in different regions and at different times, and according to the dictates of different intellectual projects. The first

¹⁷ Throughout, I will employ "P" to represent "Proponent" or "R" for "Respondent," and "Q" to represent "Questioner." These are not to be confused with the P and Q commonly used to denote antecedent and consequent for hypothetical syllogisms, though I will make occasional use of these variables in that context as well. The relevant discussions, it is hoped, will make all contexts clear.

¹⁸ For this, he might cite the authority of Ibn Surayj; see al-Shīrāzī, *Luma'*, Mustū ed., 106.

component of this terminological set is “episteme,” and I will use this term in a similar sense to that which I understand Michel Foucault to have used it.¹⁹ Upon this basis I have constructed the concepts of “argumentation episteme” and “argumentation axiom;” and I will now attempt to explain what I mean by these.

I will employ the term “argumentation episteme” for that set of foundational first principles — all of which are concerned with “what constitutes knowledge,” “what constitutes proof,” “what justifies an assertion,” “what advances one probability over another,” and the like — which the builders of a system of knowledge (a “science”) assume, and from the basis of which their arguments are constructed (and their argument methods developed). An argumentation episteme is, in this sense, a collection of epistemological and inferential axioms — the first principles of argumentation.

These “argumentation axioms” in turn, though not necessarily true in and of themselves,²⁰ are nevertheless the “starting points” from which any number of intellectual projects may be launched. It is in the course of employing and building upon these axioms through various (e.g., speculative vs. normative) intellectual projects, and of refining or reformulating them, that different “schools of thought” may emerge within the domain of the same project (e.g., different theological schools develop within the same speculative project, and different legal schools within the same normative project). These schools may continue to develop and justify variant argument systems, emerging as distinct argumentative entities from within the older, shared, argumentation episteme (or an older collective of argumentation epistemes).

In the briefest terms possible, an “argumentation episteme” is a set of axioms from the larger realms of epistemology and argumentation. As such, any one argumentation episteme may be peculiar to a certain region or era, or to a specific

¹⁹ See *Power/Knowledge*, p.197, where, in the course of a multi-party discussion, he says: “If you like, I would define the *episteme* retrospectively as the strategic apparatus which permits of separating out from among all the statements which are possible those that will be acceptable within, I won't say a scientific theory, but a field of scientificity, and, which it is possible to say are true or false. The *episteme* is the ‘apparatus’ which makes possible the separation, not of the true from the false, but of what may from what may not be characterised as scientific.”

²⁰ By way of example, we might draw attention to the so-called “problem of induction.” Even though recognized — axiomatically — as problematic, the utility of induction and the great effects which may be achieved through “controlled” inductive reasoning ensures that induction is a “given” axiom in most (but not all) argumentation epistemes. That is to say, even though axiomatically recognized to be flawed in certain epistemes, we may still find the axiom “induction yields valid conclusions” to be a “given” within that same episteme, much less within epistemes which do not problematize it.

epistemic community among other epistemic communities in the same region and era. An “argumentation axiom,” on the other hand, is a discrete unit — a “given” or “motive” — belonging to a particular argumentation episteme, or shared between several. As an example axiom of the “given” variety, we might cite the law of non-contradiction. Whether developed in theoretical discourse or not, this particular axiom plays a role in a great many argumentation epistemes, be they “scientific,” speculative, normative, or what have you. As an example of an axiom of the “motive” variety, we might cite “avoidance of contradiction is desirable” as twinned to the given axiom of the law of non-contradiction. As such, it may also be seen to play a role in a great many epistemes.²¹

To underscore how axioms can be *different* between argumentation epistemes, we might cite, in normative projects: 1) the axiom “*a fortiori* argument is epistemically valid;” versus 2) the axiom “*a fortiori* argument must be grounded in a clear, revelatory indicant.” Whereas #1 is shared by a great many normative projects across numerous epistemes (modern or pre-modern, religious, secular, or otherwise), #2 is not even shared by all argumentation epistemes within the greater superset of Islamic normative projects, much less outside of it.²² Similarly, the “motive” axiom of “avoiding legal solutions which contradict the Qur’ān” is not really to be found outside of Islamic argumentation epistemes (theological, normative, and otherwise), and in fact it is not to be found in a number of modern Islamic argumentation epistemes (e.g., in those that incorporate the axiom “certain Qur’ānic injunctions are specific to the time of revelation, and are not necessarily applicable to modern societies”).

²¹ The difference between an “argumentation episteme” and a “system” is important to point out. In brief, a “system” of argument would be the product of concentrated efforts of analysis and categorization — a conscious organizing of argumentative elements into a theoretical/practical pattern or series of patterns (such as Aristotle contributed). An argumentation episteme, on the other hand, may consist entirely of unexamined assumptions, motives, and modes of reasoning — elements which were never scrutinized and organized by anyone participating in that episteme; or it may contain — along with the unexamined elements — individual axioms from a “system” of argument, or even entire systems themselves. For example, the “argumentation episteme” of a fifth century CE Nestorian community in Iraq might contain, along with relatively unexamined modes of reasoning (e.g., induction) and givens/motives peculiar to a Christian scheme of salvation, axioms or even entire sub-systems from the “systems” of Aristotelian and Stoic logic. The “argumentation episteme” is every mode of reasoning and argumentative element upon which that Nestorian community might draw in the course of argument, including such “systems” (or parts of systems) which they inherited or themselves devised.

²² Axioms of this sort may also appear in certain developmental stages of a project, and not others.

With this quick overview of procedures and definitions behind us, then, we will turn to our project itself. A few notes before we do, however. First of all, I have not gone into great depth with regard to the conclusions of this dissertation in the current introductory chapter, and for certain reasons: 1) they are rather numerous, considered on an individual basis; and 2) I do not wish to promote my conclusions too extensively before the many paths of analysis and argument by which they were reached have been made as clear as I can make them. This is the job of succeeding chapters, though of course the reader may proceed directly to Chapter IV if general conclusions need be known at this point. As for now, it is asked that my general objectives be born in mind; namely: 1) to open the small window onto proto-system juridical *jadāl* which the *Ikhtilāf al-ʿIrāqīyyīn* affords us; and 2) to draw much-needed attention to the role of dialectic as a *formative dynamic*, and to develop a working, theoretical model of that dynamic — not only to understand the phenomena unearthed by the current project, but to serve as a framework for similar analytical projects in days to come.

A final word: as will soon be apparent, this dissertation raises many more questions than it answers. We will note these “open doors” as we go along, and point the way towards research projects which may be undertaken with regard to our subject-text, the remainder of the *Umm*, and other extant early legal materials. Moreover, I will list additional “open doors” — largely the unrealized subprojects which were once part of my original, over-ambitious objectives — at the end of Chapter IV.2. These open doors, all of them, are to be understood in the spirit of invitation. There is a great deal yet to be explored, and a great many benefits to be derived in the process. With that, let us proceed to the full-system *jadāl* theory of our lens-texts, the proto-system dialectic of the *Ikhtilāf al-ʿIrāqīyyīn*, and onwards to the dialectical forge.

Chapter I.2: The Evolution of Dialectical Theory Systems in Islam

Introduction

In this latter half of our first chapter, I will attempt to provide something of a historical-developmental background for Islamic dialectical theory-systems. With this, we may consider both the dialectical sequences of our second century subject-text and the contents and arrangements of our fifth century lens-texts in their proper contexts; i.e., as stages in the development of a juridical argumentation episteme evolving in parallel with related epistemes in theology and philosophy (and, to be sure, in other domains).

We will begin with a quick statement regarding the pervasiveness of dialectical debate across all intellectual enterprises in the late antique and early Islamic Near East. Then we will plunge straight away into an examination of evolutionary paradigms for theological and philosophical *jadāl* theory, with particular regard for the major contributions of Larry Miller. Only after this will we examine current paradigms for the evolution of juridical *jadāl*, this time with regard not only to Larry Miller, but to Wael Hallaq. Finally, we will: 1) briefly review some of what has been said regarding the dialectical nature of the *Kitāb al-Umm* (among whose treatises our subject text is to be found); 2) confirm the fact that all of the jurists with whom we will be dealing in this dissertation — from both the proto-system and full-system eras — were themselves master dialecticians; and 3) confirm the presence of a pervasive “truth-seeking” ethic in the dialectic of our jurists.

Although certainly critical to the aims of this dissertation, we will take the unconventional step of postponing an examination of evolutionary paradigms for *uṣūl al-fiqh* until after we have developed our own model for the formative dynamics of juridical *jadāl* in Islam — the Dialectical Forge theory — in our concluding chapter.

A Word on the Dialectical World of the Late Antique and Early Islamic Near East

My purpose here is simply to highlight an important — perhaps the *most* important — feature of late antique and early Islamic intellectual-historical dynamics; namely, dialectical debate. This is not an idealized repainting of intellectual developments for the sake of reinforcing a thesis. To the contrary, I am calling attention to what most historical works — be they modern or ancient —, and what vast bodies of literature in religious, philosophical, legal, and other domains — from late

antiquity and onwards —, clearly attest: Intellectual developments across all disciplines were accompanied by formal disputations in a variety of dialectical styles; whether within or between confessional communities, epistemic communities, and schools of thought; whether before the prince’s court, in private salons, in academy and library, or in temple, church, or mosque; whether on themes of theology, philosophy, grammar, jurisprudence, *belles lettres*, science, or politics; and whether proponents of opposing positions stood face to face, or traded argument and counter-argument through a literary medium. If one feature might be said to mark the intellectual landscape of the Near East in Late Antiquity and Islam, above all others it is dialectical debate.

It is also of great import to our current project to make this intellectual setting plain, for the jurists of our subject-text, the *Ikhtilāf al-‘Irāqīyyīn*, were born into the truly dialectical world of Islam’s second and third centuries; and, as we shall see, the earliest Arabic treatises dedicated specifically to the *theory* of a distinctly Islamic dialectic did not surface until a century or more later. Nevertheless, our “proto-system” jurists were practiced dialecticians, immersed in a cultural milieu permeated with dialectical debate — in philosophical, theological, and juridical domains and others besides. Islamic disputation praxis and dialectical theory — in any of its thematic domains — did not emerge suddenly in full-system format from a three-century vacuum and only then begin to take hold in Islam’s many and already-sophisticated sciences. Rather, it grew forth from a synthetic mixture of prior and early Islamic argumentation epistemes, guided by the dictates of various intellectual projects and their variant agendas, and, throughout all stages, provided a primary dynamic for the refinement and systematization of such sciences with which it was intertwined.

Now, due to the vast body of intellectual-historical events, scholarly trends, and socio-political, cultural, and religious movements which doubtless played active roles in the evolution of Islamic dialectical systems — be they pre- or early Islamic—, it is impossible to go into any detail at all without adding another hundred pages at least to this dissertation. At the same time, I have been confounded by every attempt to produce a reasonably short overview of major historical dynamics and intellectual trends. The general statements to which I was reduced were often little more informative than the titles and chapter headings belonging to the many secondary sources from which, ultimately, they were derived. After giving the problem much thought, I have therefore decided upon the following course of action: the reader will be referred to the essays I prepared at an earlier stage of comprehensive background

research. There, in broad strokes, but with adequate detail culled from the many secondary works consulted in preliminary studies, many of the numerous historical dynamics of this patently dialectical world are made plain, and a number of its prior and early Islamic argumentation epistemes are touched upon.¹

At the very least, it is hoped that the world of the *Ikhtilāf al-‘Irāqīyyīn* — at the heartland of Islamicate civilization in the second and third Islamic centuries — may be affirmed to have been exactly as our sources tell us it was: overflowing with prolifically debating epistemic communities, alive with intellectual competition, driven by the agendas of variant speculative and normative projects, drawing upon complex, interwoven, and continually evolving sets of prior and Islamic argumentation epistemes, and guided overall by the truth-seeking imperative of dialectical disputation and its accompanying modes of epistemic justification and critique. Having expressed this hope, we will proceed directly to evolutionary narratives for Islam’s dialectical theory-systems, before narrowing our focus to the contents of our earliest extant treatises on juridical *jadāl* in Chapter II.

Evolutionary Narratives for Theological and Philosophical *Jadāl* in Islam

Our objective in this section is not to present a *status quaestionis* for the fields of theological and philosophical dialectic in Islam; although the early development within these sets of dialectical traditions are indeed relevant to our project, we will be hard pressed to present a full picture of early juridical traditions in a reasonable amount of space. In the main, our exposition here will be through the medium of Larry Miller’s seminal dissertation: *Islamic Disputation Theory*, and we will have to be selective even with regard to this one source. Fortunately, it answers to our needs; Miller has been exceedingly thorough, and has expanded our knowledge of both fields considerably beyond many works which precede his. This is not to downplay the extraordinary contributions of scholars like Joseph van Ess,² or the many and important contributions in the realm of Arabic-Aristotelian Logical traditions (which often incorporate

¹ The essays in question were prepared for the comprehensive examination of my doctoral program, and include the following: 1) “Readings in the Historical Dynamics of Early Islamic Thought;” 2) “Readings in the Dialectical and Logical Dynamics of Early Islam;” and 3) “The Early Islamic Quest for Dialectical Authority.” All were submitted for review in December of 2009, and all are available in electronic format (.pdf) upon request.

² See, e.g., his “Disputationspraxis in der Islamischen Theologie” and “Logical Structure of Islamic Theology.”

important sections on dialectic).³ But a more thorough comparison of the dialectical material of our subject text with theological and philosophical dialectical traditions will simply have to remain an open door for the time being.

Miller on “Theological *Jadal*”

Miller initiates his exposition on theological *jadal* by attempting to reconstruct the *Adab al-Jadal* of Ibn al-Rāwandī (wr. near the end of the 3rd/9th c.; critiqued by al-Kaʿbī al-Balkhī, defended by al-Ashʿarī and al-Māturīdī). His method is to examine the major themes treated by extant 4th-5th/10th-11th century works subsequent to this first treatise, as follows: 1) *jadal* and *naẓar* (as synonyms); 2) Q&A procedure, the “four questions,” and related discourse; 3) the dialectical move of *muʿāraḍa* and related discussions;⁴ 4) the “signs of defeat;” and 5) the *adab al-jadal*, or rules of conduct in debate.⁵ The *jadal*-theorists who receive mention, or whose works are relied upon in this chapter of Miller’s dissertation, include: 1) Ibn al-Rāwandī [d. 298/910?]; 2) Abū al-Qāsim al-Kaʿbī al-Balkhī [Muʿtazilī; d.319/931]; 3) Abū al-Ḥasan ʿAlī al-Ashʿarī [possibly a Shāfiʿī/Ḥanbalī; d.324/935]; 4) al-Qirqisānī [Karaite; d. after 325/937]; 5) Abū Manṣūr al-Māturīdī [Ḥanafī; d. btwn. 332-6/944-8]; 6) Ibn Wahb al-Kātib [Shīʿī; fl. ca. 335]; 7) al-Muṭahhar b. Ṭāhir al-Maqdisī [Muʿtazilī; fl. ca. 355]; 8) Abū Bakr Muḥammad Ibn Fūrak [Shāfiʿī; d.406/1015]; 9) Ibn Ḥazm [Zāhirī; d.456/1064]; and 10) al-Khaṭīb al-Baghdādī [Shāfiʿī; d.463/1071].⁶

Before proceeding to certain particulars of Miller’s reconstruction project and general exposition, I would first raise a larger critique from the perspective of certain arguments he maintains in later chapters. In short: after Miller constructs “theological *jadal*” from these texts, he refers back to his construction from the perspective of Muslim philosophers and jurists, considering it a singular entity critiqued by the former (74ff.), and adopted by the latter (87, *passim*). Unfortunately, this is not only

³ E.g., the contributions of Tony Street (“Logic,” and “Arabic Logic”), Fehmi Jadaane (*L’Influence du stoïcisme sur la pensée musulmane*), Ibrāhīm Madkūr (*L’Organon d’Aristote dans le monde arabe*), David DiPasquale (dissertation on the *Kitāb al-Jadal* of al-Fārābī), et al.

⁴ More complete expositions on *muʿāraḍa* are forthcoming. For now we may loosely define it as Q’s opposing P’s *dalīl*/thesis with another (contrary/contradictory) *dalīl*/thesis which P is expected or bound to accept.

⁵ Miller, *Disputation Theory*, 5-9.

⁶ NB: Miller does not go much into the juridical orientations of his theological authors; I have supplied these myself, to the best of my understanding. Importantly, al-Khaṭīb al-Baghdādī and Ibn Fūrak were Shāfiʿīs, and possibly even al-Ashʿarī himself. Already, considering the advanced juridical dialectical practice of al-Shāfiʿī and other jurists in the *Kitāb al-Umm* raises certain questions regarding the overall evolutionary trajectory of the *ilm al-jadal* which, in turn, problematize certain of Miller’s assertions, as we shall see.

reductive in the chronological sense of Fischer's "fallacy of absolute priority,"⁷ which our research in the *Kitāb al-Umm* quite definitely shows it to be. Miller's construction of "theological *jadal*" also has the subsidiary effect of asserting something of a unified theological tradition, where in fact a marked plurality seems to be the case. This is especially highlighted by the incorporation of al-Maqdisī's introduction to dialectic in his *Bad' wa'l-Ta'rīkh*, which appears to have been of a more universal, rather than strictly theological, orientation.

At any rate, and bearing in mind the overtly dialectical disputation-sequences and argument-presentations in the *Umm*, I believe it more realistic to envision a wider variety of disputation teachings from earlier periods and onward — not only different in theory and formulation from one discipline to the next, but different *within* disciplinary domains. At the same time, it is quite obviously the case that these teachings were parallel in a great many regards — this may be due to a common set of "source" teachings and practices, cross-discipline practitioners (polymaths wearing "many hats"),⁸ and the theoretical and practical exigencies common to the "truth-seeking" sciences of theology, philosophy, and law. In short: shared prior argumentation epistemes, with shared Islamic axioms, similar "truth-seeking" agendas, and subsequent parallel development. Whatever the case may in fact have been, I believe it somewhat distorting to constrict *jadal*-teaching to three discipline-based categories; and certainly it cannot be correct to treat them in terms of a chronologically linear development.

Returning to Miller's discussion, we may summarize his comments with regard to the theological-dialectical themes of "Jadal, Speculation, and Truth" as follows: 1) that *jadal* as "a valid method for attaining truth" is a *topos* of "the early interconfessional debate literature;"⁹ 2) *jadal* was considered "a method used by God in disputing with the Jews, and a method which God taught (*addaba... bihi*) his prophet;"¹⁰ 3) *jadal* was considered either incumbent upon every Muslim (in dealing with *uṣūl al-dīn*, and "defending the truth against doubters"); or "recommended" (in dealing with *furū'*

⁷ *Historians' Fallacies*, 178.

⁸ I am indebted to Dr. Wael Hallaq for this conception of scholars "wearing many hats," an important phenomenon he has oft reminded his students to bear in mind.

⁹ Miller, *Disputation Theory*, 9 and n.9. He cites passages from Ibn Fūrak, al-Kātib, and al-Maqdisī, and a few modern scholars including van Ess ("Disputationspraxis").

¹⁰ *Ibid.* To this we might add the discussion in al-Ṭūfī's *ʿĀlam al-Jadhal fī ʿIlm al-Jadal* (Heinrichs ed.); with its important chapters analyzing God's own *jadal* in the Qur'ān. Equally important are Rosalind Gwynne's discussions in *Logic, Rhetoric, and Legal Reasoning in the Qur'ān*.

al-dīn);¹¹ 4) Miller agrees with both Vajda and van Ess that, despite “several instances in which theological *jadāl* may have borrowed from Aristotle’s teaching on dialectic,” there appears to be no evidence for “direct borrowing;”¹² and 5) all of Miller’s theological *jadāl* authors “stipulate that *jadāl* must be in search of the truth.”¹³ Importantly, and regarding the early understandings of the nature of *jadāl*: al-Ash‘arī notes that *jadāl* requires two people;¹⁴ and al-Kātib observes that “in dialectic one bases the premises on what the opponent agrees to even though this may not be evident to the intellect (‘*aql*).”¹⁵ Finally, Miller describes the epistemological bases of dialectic/*jadāl*, which are in perfect accord with Aristotle against the sophists: “knowledge must derive from indemonstrable premises.”¹⁶ He concludes: “Truth-oriented *jadāl* is related to the epistemology of Aristotle’s *Posterior Analytics*.”¹⁷

The next two themes of Miller’s reconstruction and general exposition are quite important for our project, so we will treat them in some detail. As for the first: Q&A procedure and the “four questions,” we will note that for all of Miller’s authors “*jadāl* is synonymous with question and answer.” They are concerned with showing what is proper to *jadāl* and what is not; Q&A procedure is the basis, and defining the types of allowable questions is at the heart of the enterprise.¹⁸ We next learn the “four questions” hierarchy according to al-Maqdisī: 1) “What the opinion is (*mā’iyat al-madhhab*);” 2) “The evidence (*dalīl*) for it;” 3) “The cause (*al-‘illa*);” and 4) “The verification of the cause (*taṣḥīḥ al-‘illa*).”¹⁹ For each of these, Miller footnotes a

¹¹ Miller, *Disputation Theory*, 9, nn.10-11.

¹² Ibid., 10, n.11; citing Vajda’s “Etudes” and van Ess’s “Disputationspraxis.”

¹³ Ibid., 11.

¹⁴ For which Miller cites his MS of Ibn Fūrak’s *Mujarrad*.

¹⁵ Miller cites al-Kātib’s *Burhān*, 224, 225; also Van Ess, “Logical Structure of Islamic Theology,” 25. He notes that these views “tend to give... an Aristotelian flavor,” but then distinguishes *jadāl* as “in the service of the truth” (*Disputation Theory*, 10-11) — thus implying that Aristotelian dialectic made no such claim. This, as we shall see in other readings, is not the case. Aristotle’s dialectical premises and conclusions must still be valid; and dialectic may thus be put into service for philosophy.

¹⁶ *Disputation Theory*, 11ff.

¹⁷ Ibid., 14. What Miller means by this is not immediately clear, but it should be pointed out that Aristotle does indeed maintain a strict separation between demonstration (developed in the *Posterior Analytics*) and dialectic (developed in the *Topics* and *Sophistical Elenchi*).

¹⁸ *Disputation Theory*, 15. He cites al-Kātib’s *Burhān*, 225, line 16ff. The bulk of Miller’s discussion rests on the accounts of al-Maqdisī and al-Qirqisānī.

¹⁹ Al-Maqdisī’s fourth question (*taṣḥīḥ al-‘illa*) is “making sure that the cause is commensurable.” Again, it would appear that al-Maqdisī’s examples are purposefully selected from both *kalām* and *uṣūl* domains, which fact is not truly acknowledged by Miller, and continues to problematize his developmental trajectory (*Disputation Theory*, 20). As for the “*mā’iyya*” of the first question (and the first two of al-Qirqisānī’s questions, below), see the first paragraph of the *ET*² entry on

matching “question” as per Ibn Fūrak’s *Mujarrad*, which corresponds to: 1) “...about the opinion. It is asking ‘What do you say about that?’”; 2) *an yuṭāliba bil-dalāla ‘alayhi*; 3) *al-muṭālaba bi-wajh al-dalāla*; and 4) *ijrā’ al-‘illa... taṣḥīḥuhā....*²⁰ From what I have seen of al-Maqdisī’s original text, and Miller’s translations, with their frequent juridical applications and examples,²¹ I believe it may safely be argued that al-Maqdisī meant to describe a generic *jadāl* as applied in both theological and juridical projects. Again, an absolute priority (not to mention an absolute genre-distinction) is continuing, in my view, to be problematic.²²

Moving on, Miller notes that al-Qirqisānī’s four questions are different from al-Maqdisī’s, and “more in line with al-Ash‘arī’s terminology, and perhaps, with Ibn al-Rīwandī’s.”²³ They are: 1) *mā’iyyat al-madhhab*;²⁴ 2) *mā’iyyat al-burhān* [these first two seek information, no objections allowed]; 3) *muṭālaba bi-wajh dalālat al-burhān ‘alā al-madhhab*; 4) *akhdh al-mūjib bi-ijrā’ ‘illatihi fī ma’lūlātihā*.²⁵ Importantly, al-Qirqisānī claims that these four questions “must be asked in precisely the order in which he presents

“Māhiyya” for the relationship between these two terms. For our purposes, we may consider *mā’iyya* and *māhiyya* as synonyms, with the sense of “quiddity” and “essence.”

²⁰ Ibid., *Disputation Theory*, 15-16 and nn.27-31. Unfortunately, I believe Miller’s translation of Maqdisī and Ibn Fūrak betray a tendency to “theologize” the texts, which are more universal in application, quite obviously juridical as well as theological. For example, ‘*illa*’ is “cause”; *ma’ānī* are “things”; *fasād al-shay’* becomes “X is not the case” (i.e., as though it were denial [*nahy*], rather than invalidity); and *ṣiḥḥatuhu* becomes “X is the case” (i.e., as though it were affirmation [*ithbāt*], rather than validity). Miller himself notes — after reviewing al-Maqdisī’s distinction between “intellectual” (*‘aqlī*) and “religious-juristic” (*shar‘ī*) “causes” — that “the discussions which occur seem to concern the juristic-religious cause exclusively” (ibid., 17. The rendering of ‘*aqlī*’ as “intellectual” and *shar‘ī* as “religious-juristic” belongs to Miller. I would agree with Dr. Wael Hallaq that such might better be rendered as “intellective” vs. “textual” causes, respectively.)

²¹ Ibid., 17ff.

²² NB: As we note that much of the technical language of the earliest extant juridical *jadāl* works is that of the theological *jadāl* works, we must also note that it is the language of *uṣūl al-fiqh*, as well. Could it be that Miller is wrong to claim, e.g., al-Maqdisī as describing only “theological” *jadāl*? It would certainly seem so, as he discourses upon, *inter alia*, the difference between ‘*illa*’ *‘aqliyya* and ‘*illa*’ *shar‘iyya*, and other *uṣūl* matters. Or was there a common *jadāl*-jargon from the start (between *kalām* and *uṣūl*)? Or was *uṣūl al-fiqh* in fact, as some argue, the “intrusion” of *kalām* ideas and argumentation methods into the realm of *fiqh*? And, we might ask, does such a notion continue to make sense, when confronted with that of “wearing many hats?” (Consider, e.g., that Abū Ḥanīfa and a great many scholars after him were engaged in both theological and juridical projects.)

²³ *Disputation Theory*, 21.

²⁴ With regard to the first question; Miller lists a few sources and discussions re: the influence of the Stoic logic of “signs” (*Disputation Theory*, 22, n.46).

²⁵ *Disputation Theory*, 21-2. Miller notes the “terminological differences” from al-Maqdisī, which I would attribute to al-Maqdisī’s attempt to be universal, or even juridically-oriented.

them.”²⁶ Again, Miller evinces the *tartīb* of questions as a mark of a “truth seeking” enterprise, over the formal logical aim of the philosophers: “... the entire operation of getting the opponent to agree is secondary to the primary intention of attaining the truth. For our authors, the questions of dialectic are questions that seek knowledge, epistemic, and not logical questions, although the latter may be of use in debate.”²⁷

Intriguingly, Miller next points to al-Qirqisānī’s distinction between the *aṣḥāb al-mantiq* and the *jadaliyyūn*, in that the former mention restrictive (*ḥajr*) and non-restrictive (*tafwīd*) questions.²⁸ He then locates this *ḥajr/tafwīd* distinction, using the same terms, in Ibn al-Muqaffa’s *Mantiq*,²⁹ and contributes the following revelatory remark:

“But who are these logicians and where do they get this teaching from? The answer is rather curious for those people who suppose that the study of Arabic logic begins with the translations of the late ninth and early tenth centuries; for, the source of this teaching is Aristotle’s *De Interpretatione* according to the ‘translation’ of Ibn al-Muqaffa!”³⁰

Moving on, Miller observes that al-Qirqisānī’s four questions all belong to the *pusmatic*, seeking-information type; this, coupled with the insistence on *tartīb*, “points to their belonging to the category of ‘scientific’ questions.”³¹ Then, in attempting to uncover the origins of these questions, he delves into Aristotle’s *Posterior Analytics*. Cautiously, Miller concludes there is a connection between Aristotle’s “four questions of scientific inquiry” and the four questions of theological *jadal*.³² Finally, he follows up with an observation that Arabic philosophers critiqued theologians on two counts: 1) “they

²⁶ Ibid., 22, n.46. Miller believes that certain indicants in the text confirm al-Qirqisānī’s source as Ibn al-Rāwandī (24).

²⁷ Ibid.

²⁸ It has been pointed out by an examiner of this thesis that translating *ḥajr* vs. *tafwīd* as “restrictive vs. non-restrictive” is less instructive; the difference, rather, is between “yes/no” and “WH” questions.

²⁹ Page 51, line 5ff. of the Tehran edition.

³⁰ *Disputation Theory*, 25. Miller translates the relevant passage from Ibn al-Muqaffa’ (25-6, and n.56), then discusses the restrictive/non-restrictive distinction as treated by 1) the Greek rhetoricians (*erōtēma* = short reply, “yes-or-no” question; *pusma* = long reply, “information” question), 2) John of Damascus, 3) an anonymous commentator, and 4) al-Fārābī (following Ammonius) (*Disputation Theory*, 26-8). In short, the restrictive question is the “dialectical” question, a selection between contradictory alternatives, whereas the non-restrictive is that of logic or science. Miller translates from al-Fārābī’s commentary on the *De Interpretatione*: “The person who uses non-restrictive questions in dialectic is either seeking instruction, or to deceive (*mughālata*) or simply does not understand what dialectic is” (*Disputation Theory*, 27).

³¹ *Disputation Theory*, 29-30.

³² In fact, as an examiner of this dissertation has pointed out, they don’t match very well at all. A comparison of the “theological questions” with the early Arabic translation of Aristotle’s discussion (at the start of Book II of the *Posterior Analytics*) by Abū Bishr Mattā b. Yūnus (d.328/940) makes this abundantly clear (see Badawī, *Mantiq Aristū*, vol. 2, 427ff.)

applied the method of science to dialectical matters;” and 2) “they were inconsistent in applying the method.”³³

As for the second theme of “theological *jadāl*” which most concerns us, it is the dialectical move of *mu‘āraḍa* as discussed by Miller’s authors. In short, some theologians deny the use of *mu‘āraḍa* (Miller translates: “counter-objection”) in that it does not constitute a question in their view, while others defend it as a question.³⁴ As for al-Maqdisī, he lists four types, as follows: 1) *mu‘āraḍat al-su‘āl bi’l-su‘āl* (invalid); 2) *mu‘āraḍat al-da‘wā bi’l-da‘wā* (controversial); 3) *mu‘āraḍat al-‘illa bi’l-‘illa* (accepted); and 4) *mu‘āraḍat al-dalīl bi’l-dalīl* (accepted).³⁵ As for al-Qirḳisānī, he notes that most theologians divide the types of speech used in *kalām* into four categories: 1) question; 2) answer; 3) objection; 4) distinction. Others add: 5) *ta’ṣīl* (Miller translates: “foundation”); and 6) *tafrīṭ* (Miller translates “ramification”).³⁶

Returning to al-Maqdisī, Miller provides a clear answer as to how *mu‘āraḍa* was considered a question, from the *Bad’ al-Ta’rīkh* (32, line 2ff.):

“The person who has been subjected to *mu‘āraḍa* must either reply or admit his inconsistency (read *munāqaḍatihi*); should he abstain from replying to the *mu‘āraḍa* then R could abstain from answering any question since Q seeks information (read *mustakhbir*) and the person subjected to *mu‘āraḍa* must give information (al-*mu‘āraḍ mukhbīr*).”³⁷

As for Miller’s translation of al-Maqdisī’s definition of *mu‘āraḍa*: “it is setting down (two things as) equal and comparing them to each other.” As he himself admits, however, this translation requires altering the printed text by omitting a *waw*.³⁸ I have therefore chosen to render my own translation from the same printed text, as follows:³⁹

³³ Ibid., 30ff. I would presume that Miller’s “scientific” and “science” allude to the demonstrative method whose systematic exposition remains the core focus of the *Posterior Analytics*.

³⁴ Citing certain primary sources, and also Vajda “Etudes” and van Ess “Disputationspraxis.” Intriguingly, Miller suggests not only that there was a pre-system style or practice of *jadāl*, but that the “four questions” topos was a systematic development which had to account for prior methods. Such techniques as *mu‘āraḍa* and *farq/ḥaṣl* are seen by Miller as belonging to something older which had to be incorporated into a new system which is “essentially question and answer” (*Disputation Theory*, 33). Generally, I would agree with this theory. The dialectic of our subject-text is redolent with nearly the full-range of *mu‘āraḍāt* as described in our lens-texts, and numerous moves of *farq* employing the term itself. The problem for Miller’s narrative is that this is a distinctly juridical dialectic, easily identifiable through the categories of al-Shīrāzī, al-Bājī, et al. Again, it would seem most likely that both theological and juridical projects drew from a common well of argumentation epistemes at a very early date, but had evolved distinctions by the era of our first systematic treatises.

³⁵ Ibid., 33-9.

³⁶ Ibid., 34. Again, there is an obvious connection to *uṣūl al-fiqh* here, unmentioned by Miller.

³⁷ Ibid., 35, n.78.

³⁸ Ibid., 36, n.79. Unfortunately, Miller misinterprets an example of *mu‘āraḍa* as presented by al-Ash‘arī or Ibn al-Rāwandī, and recorded in the *Mujarrad* of Ibn Fūrak, then finds that it matches

Part I: The Dialectical Forge
Chapter I.2: The Evolution of Dialectical Theory Systems in Islam

And I hold that <i>al-mu'āraḍa</i> is the <i>taṣhīḥ</i> (determining-as-valid) of that whose <i>ifsād</i> (invalidity) your opponent aims at, as pertains to your <i>madhhab</i>-opinion, by way of the like of his <i>madhhab</i>-opinion. And the meaning of <i>al-mu'āraḍa</i> and <i>al-muqābala</i> (opposition) are one and the same and analogous; for when it [the <i>mu'āraḍa</i>] occurs as the <i>khilāf</i> (contrary/contradictory) of that to which the opponent holds opinion, it (f.) is <i>sāqiṭa</i> (cancelled), <i>fāsida</i> (invalid).	وأقول أن المعارضة تصحيح ما رام خصمك إفساده من مذهبك. يمثل مذهبه ومعنى المعارضة والمقابلة على السواء والمماثلة فإذا وقعت على خلاف ما يذهب الخصم إليه فهي ساقطة فاسدة

Note first that *mu'āraḍa* is equated with *muqābala*, which latter might be translated as “confrontation with an opposing viewpoint.”⁴⁰ In this light, I would propose that al-Maqdisī’s definition comprises the following sequence: 1) the Proponent claims: “In situation A, X is the case;” 2) by way of *mu'āraḍa*, the Questioner takes a like opinion (*mithl madhhabihi*), A¹, for which the Proponent holds the opinion “¬X is the case,” and he says: “But in parallel situation A¹, you say ¬X is the case. And it cannot be that X is the case in A and, at the same time, ¬X is the case in A¹.” In other words, there is a significant overlap here between al-Maqdisī’s *mu'āraḍa*, the classic *reductio ad impossibile* argument, and the charge of intra-doctrinal *naqd* which we will examine thoroughly in Chapter II. Collectively, these are tactics we will see employed innumerable times

his (mis)translation of al-Maqdisī’s definition of *mu'āraḍa* (*Disputation Theory*, 35-6). He says: “Q has forced R to set on equal footing his belief in Jesus and Muḥammad.” The focus of the example, however, is clearly upon R’s *dalīl* (which in this case is *iṭbāq* of the Muslims): what Q in fact has done is to show that R’s *dalīl* also holds for the Jesus case, but that R has denied the Jesus case. That is to say, R must either abandon his *dalīl* for the Muḥammad case, or affirm the Jesus case. Again, this shows remarkable similarity to that family of “reductions to inconsistency” we see time and again in the *Umm*. Moreover, we can easily see, now, how *mu'āraḍa* can be presented in the form of a rhetorical hypothetical *reductio*, using the staple formula of *ara'ayta*. The questioner poses his question thus: “You say, for situation A, that X is the case. But have you considered what would happen in situation B (which has the same *dalīl*)? Would you still say that X is the case?” The upshot of it all, and the main focus of al-Maqdisī’s *mu'āraḍa*, I believe, is that R must abandon his *dalīl* for his solution to the *mas'ala* at hand: “X is the case.” Certainly, if I am correct that al-Maqdisī’s *mu'āraḍa* may be formulated with *ara'ayta* (and we find plentiful support in our subject-text), then the following observation of Miller’s will be problematized; for he says: “the explanation that *mu'āraḍa* is a type of question is clearly wanting. The establishment of counter-objection as a firm part of dialectics was only accomplished much later” (*Disputation Theory*, 36).

³⁹ The source is: Muṭahhar b. Ṭāhir al-Maqdisī [note there may be a question as to the author], *Kitāb al-Bad' wa'l-Ta'rīkh*, Ed. and French transl. C. Huart, 6 vols. (Paris: Ernest Leroux Éditeur, 1899-1919). [Vol. I, *al-Faṣl al-Awwal: fī Tathbīt al-Nazar wa Tahdhīb al-Jadal*, pp.18-55; French transl. pp.15-50]. The relevant section to which I have returned is on p.32, lines 10-13 (French transl. p.29, lines 10-15).

⁴⁰ Note that Sānū’s definitions of *mu'āraḍa* also incorporate *muqābala*, and that he defines some thirteen different types of *mu'āraḍa* in his *Mu'jam Muṣṭalahāt Uṣūl al-Fiqh*.

throughout our subject-treatise — a staple family of objections in the dialectic of the *Umm*.

With regard to Miller on al-Maqdisi's four types of *mu'āraḍa*,⁴¹ I will again prefer my own translation from the same printed Arabic text:⁴²

Thereupon, those who attest the validity of <i>mu'āraḍa</i> placed it in four <i>manāzil</i> (domains), of which three are valid, but one is nullified — and [this latter] is <i>mu'āraḍa</i> of the question by way of the question. Like [when] he questions a man: “What is your <i>qawl</i> (doctrinal solution) regarding such-and-such?” And he repeats back to him: “And what is your <i>qawl</i> regarding such-and-such?” And this [is invalid], because there is nothing in it of a <i>jawāb</i> ([valid] response) for what he was asked.	ثم نزل المعارضة من صحتها أربع منازل يصحّ منها ثلاث ويبطل واحدة وهي معارضة السؤال بالسؤال كسائل رجلاً ما قولك في كذا فيكرّ عليه وما قولك أنت في كذا فهذا لأنه ليس فيه شيء من جواب ما سئل
And the second is <i>mu'āraḍa</i> of the <i>da'wā</i> (asserted claim) by way of the <i>da'wā</i>. Like the one who holds: “Indeed the world is <i>qadīm</i> (eternally pre-existent);” and the opponent says to him: “What is the <i>farq</i> (critical difference) between you and the one who claims that it is <i>muḥdath</i> (created)?” And he [Q] obligates the one who maintains [the world's] pre-eternity [P] to establish the <i>burhān</i> (proof) and the <i>tafrīq</i> (critical distinction) between the two claimed-things. And when the <i>qawl</i> of the one who claims that it is <i>muḥdath</i> [P] is nullified, his [Q's] <i>da'wā</i> for pre-eternity is validated for him [Q]; because in the <i>ṣiḥḥa</i> (validity) of the thing is the <i>fasād</i> (invalidity) of not-the-thing.	والثانية معارضة الدعوى بالدعوى كقائل إن العالم قديم فيقول له الخصم ما الفرق بينك وبين من يدعى أنه مُحدث فيلزم مدعى القدم إقامة البرهان والتفريق بين المدعويين ومتى بطل قول من ادّعى أنه محدث صحّت له دعواه في القدم لأنّ في صحّة الشيء فساد غيره
And the third is <i>mu'āraḍa</i> of the <i>'illa</i> (theol.: cause; jur.: occasioning factor) by way of the <i>'illa</i>. Like the <i>qawl</i> of the <i>muwahḥid</i> (strict monotheist) to the <i>mujassim</i> (corporealist): “When you profess that the Creator is a body, because you cannot rationally conceive of a <i>fā'il</i> (agent) except as a body; then why don't you say: <i>murakkab</i> (complex), [and] <i>mu'allaf</i> (composite), since you have never seen	والثالثة معارضة العلة بالعلة كقول الموحد للمجسم إذا قلت أنّ الباري جسم لأنك لا تعقل فاعلاً إلا جسماً فلم لم تقل مركّب مؤلف لأنك لم ترَ إلا جسماً مركّباً مؤلفاً

⁴¹ Appearing on pp.36-7 of *Disputation Theory*.

⁴² *K. al-Bad' wa'l-Ta'rikh*, Huart ed., vol.1, 33.

Part I: The Dialectical Forge
Chapter I.2: The Evolution of Dialectical Theory Systems in Islam

anything save a complex, composite body? ⁴³	
And the fourth is <i>mu'āraḍa</i> of the <i>dalīl</i> (indicant) by way of the <i>dalīl</i> ; which is that it is said: "When your <i>dalīl</i> is such-and-such, then what is the <i>farq</i> between you and the one who claims that the <i>dalīl</i> is something else, besides that?" And the <i>jawāb</i> is that you do not confront an ' <i>illa</i> by an ' <i>illa</i> , and your <i>muṭālaba</i> (demand) for the <i>farq</i> is a <i>muṭālaba bi-taṣhīḥ al-dalīl</i> (demand for validation of the indicant).	والرابعة معارضة الدليل بالدليل فهو أن يقال إذا كان دليلك كيت وكيت فما الفرق بينك وبين من يزعم أن الدليل شيء آخر غير ذلك فالجواب أنك لا تقابل علة بعلة ومطالبتك بالفرق مطالبة بتصحيح الدليل

Of paramount import is that all of these types of *mu'āraḍa* are consistent with al-Maqdisī's definition, with its focus on *muqābala* (confrontation with an opposing viewpoint). Moreover, we will see a plethora of similar objections in our subject-text on juridical themes.

Moving on, Miller deliberates whether or not devoting a special chapter to *mu'āraḍa* is superfluous. First, he provides an argument for the validity of *mu'āraḍa* from al-Qirḡisānī: "The one who uses counter-objection asks for a distinction between the two theses; however, this is nothing more than asking for a proof (*dalīl*) that confirms his thesis and refutes yours."⁴⁴ This (*mu'āraḍa*) is thus seen by Miller as covered by the third and fourth questions of theological *jadāl*, unless "we assume that Q is not obliged to have an opinion of his own, which he is trying to defend—if he is only interested in silencing his opponent or proving that his 'system' is inconsistent."⁴⁵ Having reached this conclusion, Miller interprets it as an indicant that *mu'āraḍa* represents a "‘native’ pre-systematic" technique which could not be ignored by later systematization efforts:

⁴³ NB: Q is actually attacking P's *method of reasoning* here, which belongs to that species known as *al-istidlāl bi'l-shāhid 'alā al-ghā'ib*.

⁴⁴ *Disputation Theory*, 37 and n.82.

⁴⁵ *Ibid.*, 37. Again, I am uncertain why this must be so. First of all, this assessment contradicts the argument of al-Qirḡisānī which Miller has just translated — it clearly states that the questioner's true intention is to confirm his own thesis and refute that of the proponent. This is fully in line with Aristotle's dialectic as propounded in the *Topics*, where the goal of the questioner is to get the proponent to concede such generally-accepted (*endoxa*) premises as from which his own conclusion necessarily flows. Clearly, this is reflected in al-Qirḡisānī's argument, by which we might understand *mu'āraḍa* as the following strategy: 1) the questioner confronts the proponent with an opposing thesis, simply asking: "And how do you account for this opposing thesis?"; 2) the proponent is obliged to explain why his thesis is correct, and the opposing thesis is not (which process narrows to the distinction between them); 3) however it plays out, it is the questioner's hope that in the process the proponent will commit to the very *dalīl* which proves the questioner's own thesis. It is not necessary that the questioner subscribe to the opposing thesis which he presents by way of *mu'āraḍa*; the dialectical move of *mu'āraḍa* is ultimately aimed, as al-Qirḡisānī says, at getting the proponent to commit to the questioner's own *dalīl* for whatever his thesis may be.

“Everything possible was done to bring it into the new system, even though the arguments brought forth cloud the difference between it and distinction (*faṣl*, *farq*).”⁴⁶

Miller next notes that Abū Hilāl al-‘Askarī (d. ca. 400/1010) “contrasts *mu‘āraḍa* with the fourth question.... In the latter, he says, Q admits R’s reasoning from the cause (*i‘tilāl*); this is not true of *mu‘āraḍa*.”⁴⁷ In addition, Miller claims that “the method of *mu‘āraḍa* is similar to that of the *methodos kata sugkrousin* of classical rhetoric, which consisted in placing the various charges of the plaintiff alongside one another and showing their inconsistency;”⁴⁸ and that van Ess “compares it with the *methodos kata peritropēn*.”⁴⁹ Following his citation, we indeed find van Ess describing the *mu‘āraḍa* of the theologians as:

“the familiar μέθοδος κατὰ περιτροπήν of Hellenistic rhetoric: one agreed with the ‘*illa* the partner had found in his *dalīl*, which means one agreed with the proof for his premise, but then one slyly drew from it the contrary conclusion.”⁵⁰ Islamic theological literature is full of such *mu‘āraḍāt*: if a Mu‘tazilite argues that the so-called *taklīf bimā lā yuṭāq* (charging somebody with a duty he cannot fulfill) is inadmissible with God because of His justice and His mercy, an Ash‘arite may ask in using the same ‘*illa* — and this is what makes the question a *mu‘āraḍa* —: Why is it not inadmissible for God for the same reason to let someone fall into temptation who He knows will not withstand it?” [citing al-Qirqisānī].

Van Ess then implies that *mu‘āraḍa* is a non-productive strategy, not leading to truth, and “merely dialectical.” Whatever the case, what is important is how van Ess describes *mu‘āraḍa*, and the example he provides. The *K. al-Umm* is replete with this dialectical move (or, more correctly, family of moves) — we see it time and time again.

⁴⁶ *Disputation Theory*, 37-8. Again, I am in agreement with regard to a prior tradition of *mu‘āraḍa*, but disagree with this assessment of botched attempts at incorporation into later systems. First of all, as we will see in the works of al-Shīrāzī and al-Bājī, among others, the relationship between *mu‘āraḍa* and *farq* is quite clear: the dialectical *i‘tirāḍ* of *farq*: showing that an opposite *ma‘nā* of R’s *aṣl* obtains in the *far‘* is, in effect, Q’s production of a counter-‘*illa*, established in a counter-*aṣl*, occasioning a counter-*ḥukm*. That is to say, the result of Q’s charge of *farq* is the production of a counter-*qiyās*, which is *mu‘āraḍa*. Not all *qiyās*-related *mu‘āraḍāt* begin with a charge of *farq*, however, and thus we find that *farq* is subsumed by *mu‘āraḍa* among our juridical *jadāl* authors. This relating of *farq* and *mu‘āraḍa* is not the result of some kind of confusion on the part of theorists, it is *inherent to the nature of the objections*, recognized as such, and admirably accounted for. Moreover, the nature of this *mu‘āraḍa-farq* relationship is just as plainly writ in the dialectical sequences of our subject-text as it is in the full-system treatises of the fourth and fifth centuries H.

⁴⁷ Notably, Miller has moved outside the sources of his “theological” authors, citing al-‘Askarī’s *al-Furūq fi’l-Lughā* (*Disputation Theory*, 38, n.83).

⁴⁸ Citing Volkmann’s *Die Rhetorik der Griechen und Römer*, 244.

⁴⁹ Citing “Disputationspraxis,” 53-4; and “Logical Structure,” 41.

⁵⁰ van Ess cites (“Logical Structure,” 41, n.108) that same definition of al-Maqdisī’s for *mu‘āraḍa* as was (mis)translated by Miller, and other sources, including Volkmann.

Moving on to the theme of “the signs of defeat,” these *dalā'il al-inqitā'*, according to Miller's theological *jadal* authors, are: 1) “silence [*al-sukūt li'l-'ajz*];” 2) “denial of necessary knowledge [*jaḥd al-ḍarūrāt*], rejection of evidence from the senses [*daḥf al-mushāhada*], and peevishness in debate [*al-mukābara*];” 3) “self-contradiction [*naqd, munāqaḍa*];” 4) “digression [*intiqāl*];” 5) “appeal to crowd;” 6) “commensurability;” 7) “reduction ad absurdum;” 8) “distinction;” 9) “answering other question” [*ignoratio elenchi?*]; 10) “incapacity;” and 11) “mixture.”⁵¹ Of particular import is Miller's observation with regard to the *reductio ad absurdum*; in short, he finds a “partial parallel” to the *iḥāla* of al-Maqdisī (*Bad'*, 51, lines 14-17) and Ibn Fūrak (*Mujarrad* MS)⁵² in Aristotle's *Topics* (159a19-22; [p.701 of the Loeb edition]): “The business of the questioner is so to develop the argument as to make the answerer utter the most extravagant paradoxes that necessarily follow because of his position.”⁵³ This is of major import to this dissertation, especially considering the very notable frequency of

⁵¹ *Disputation Theory*, 39ff. Such transliterations as I have supplied in brackets come from elsewhere in Miller's discussion, and/or from referencing his cited sources, while quoted translations re his. Miller, without explanation, next claims: “A close study... reveals that there is hardly any connection between the signs of defeat and the four questions” (*Ibid.*, 39). To the contrary, it seems easy enough to imagine any one of these as ways which Q might stifle his opponent with *elenchus*. Numbers one and two, but especially three, four, seven, and eight, in fact, may alone be seen as the natural results of a successful *mu'āraḍa* on the part of Q. Unless he abandons his 'illa/*dalīl* and finds another way to explain his opinion, he is caught in self-contradiction (3); we have already seen how Q himself must avoid *intiqāl* (4) when introducing his *mu'āraḍa*; if Q's *mu'āraḍa* extends P's 'illa/*dalīl* into an absurd case, and P refuses to abandon it, then he must concede to the absurdity (7); and if Q is successful in his quest to prove a distinction between the 'illa of P's source case/phenomenon and the 'illa of the case/phenomenon to which he maintains his opinion may be extended, then P must concede to the *farq* (8). Miller also observes: “The diversity of the signs [of defeat] points to their being taken from the practice of debate” (*Disputation Theory*, 39). But later, in his descriptions of individual signs, he finds precedents not only in earlier Islamic accounts, but in Aristotle and others: *Topics* and Alexander of Aphrodisias for *mukābara* and related signs of stubbornness (43 and nn.91-3); *Topics*, *Sophistical Elenchi*, Alexander of Aphrodisias, and even the Syro-Roman Lawbook for *intiqāl* (44 and nn.96-8).

⁵² Throughout this dissertation, the abbreviation MS will stand for “manuscript,” and MSS for the plural “manuscripts.”

⁵³ *Disputation Theory*, 45, nn.100-1. Miller also observes a “unique” sign of defeat attributed to al-Ash'arī (in Ibn Fūrak's *Mujarrad*), then correctly attributes it to the natural result of Q's successful *mu'āraḍa*; he translates: “R holds an opinion such that he should hold another similar opinion, but he does not and is unable to distinguish between the first and second case” (*Disputation Theory*, 45). This sign of defeat at once vindicates our understanding of what *mu'āraḍa* meant to these early theorists: 1) Q would ask: “You hold to *dalīl*/*'illa* X to maintain your opinion for case/phenomenon A; but have you considered (*ara'ayta*) case/phenomenon B, where *dalīl*/*'illa* X also obtains?”; 2) R would not hold the same opinion for case/phenomenon B; and therefore 3) just as al-Ash'arī states for his third sign of defeat, R must successfully distinguish between A and B — if he does not, he must either abandon his *dalīl*/*'illa* X (defeat), or admit to self-contradiction (defeat). Again, there is significant overlap here with the juridical-dialectical *i'tirāḍ* of *naqd*, as we shall see in Chapter II. At present, I am uncertain as to what this might imply, except for argumentation epistemes diverging from a common origin.

reductio arguments from all the jurists whose arguments are recorded in the *K. al-Umm*. We will revisit this in Chapter II; for now, it is sufficient to note that, according to Aristotle, Q's very agenda will inevitably materialize as some species of *reductio* argument. Perhaps this is a natural consequence to the back-and-forth of dialectic, but it is most certainly a common feature in the dialectic of the *Umm*.

Finally, with regard to the theme of the *adab al-jadal*, we will note the following of import to our project: 1) Miller suggests al-Ash'arī influenced al-Juwaynī;⁵⁴ 2) while stressing that the *adab al-jadal* chapters of his theological authors show all the signs of derivation from actual *jadal* practice, Miller finds certain remarks of al-Qirqisānī to be "loosely based upon Aristotle's *Topics*;"⁵⁵ and 3) Miller observes: "...the rules of conduct seem to belong to another tradition [than *Topics* and *Sophistical Elenchi*] — that of classical rhetoric and the law courts of classical antiquity."⁵⁶ As for this last comment, I would suggest the following: Although there is every possibility of a classical/late-antique continuity of cross-germinations between law court procedure and *jadal*-session procedure, this observation of Miller's may equally be used to underscore the more "natural" cross-germination which would occur due to: 1) shared epistemological concerns (burden of proof, benefit of assumption, etc.); and 2) the "many hats" of both law-court and *jadal*-session participants.⁵⁷

In the end, Miller, in his own words, has attempted a "systematic account of theological *jadal* as it was understood in the tenth century," and as derived from "a common tradition... initiated by Ibn al-Rīwandī." Overall, he sees a "virtually complete system of the rules of disputation;" and as for his final assessment: "while all the various parts are not systematically thought out, the theory still is basically sound."⁵⁸ It

⁵⁴ *Disputation Theory*, 46. Of course, there are numerous other potential explanations than this sort of linear absolute priority. Perhaps, considering al-Ash'arī's professed proto-Ḥanbalism (and potential Shāfi'ism), we might consider something more along the lines of a common Baghdadian *jadal* heritage practiced not only by al-Ash'arī (d.324/935-6), but by his Shāfi'ī predecessors al-Anmāṭī (d.288/901) and Ibn Surayj (d.306/918). Certainly, this latter "wore the hat" of the theologian, as al-Ash'arī also wore the hat of jurist.

⁵⁵ *Disputation Theory*, 48-9 and nn.113-15. Further on he adds that the advice to disputants might also derive from the *Topics* and *Sophistical Elenchi*, and directs us to van Ess, "Disputationspraxis," 52-3, for a summary (*Disputation Theory*, 49 and n.119).

⁵⁶ He cites al-Muḥāsibī and Quintillian, noting "striking" parallels (*Disputation Theory*, 49-50 and n.120-1).

⁵⁷ In this regard, it could even be used to support a priority for juridical-*jadal* — as present from the start or even influencing theological *jadal*, rather than borrowing wholesale from it at some later date. Of course, however, such a narrative will not be proposed by this dissertation, which adheres to a model of common origins, parallel development, and continuous cross-germination.

⁵⁸ *Disputation Theory*, 50-1.

is hoped that my reservations with regard to this first part of Miller's narrative have been made clear; further evidence will be adduced as we proceed through Chapters II and III.

Miller on "Philosophical *Jadal*"

In the second chapter of his dissertation, Miller proceeds to paint a picture of the Arabic philosophical *jadal* tradition by discussing such works as relate to Aristotle's *Topics* (*Ṭūbiqā/K. al-Mawāḍi'* / *K. al-Jadal*). In so doing, he treats the following themes: 1) purpose, 2) benefits, 3) procedure, 4) participants, and 5) rules; and he mentions or relies upon the works of Abū Yūsuf Ya'qūb b. Ishāq al-Kindī (d. ca. 252/866); Abū Naṣr al-Fārābī (d.339/950); Ibn Sīnā (d.428/1037); and Ibn Rushd (al-Ḥafīd; d.587/1198).⁵⁹ We will expand much on Miller's discussions here, but the reader should bear in mind that we will revisit a great deal of the *Topics* and *Sophistical Elenchi* near the end of our own Chapter II.

With regard to the first theme of "purpose," Miller describes what dialectic meant according to various philosophical teachings: 1) for Aristotle and Avicenna, it was a method of reasoning from the *endoxa* of every problem put forth, and for avoiding self-contradiction in support of an argument;⁶⁰ 2) to Arabic philosophers in general (all of whom speak of its benefits) it was an art (*ṣinā'a*) / method (*ṭarīq*)⁶¹ involving Q&A, using *endoxa* premises to defend or destroy any thesis; 3) to al-Fārābī it was *fahṣ* (investigation), where two people help each other to find the syllogism or discover methods of proof, the role of the victor is acknowledged, and syllogisms of dialectic (based on *endoxa*) are inferior to those of demonstration (based on prior truths);⁶² 4) to Socrates it was arriving at truth, and to Aristotle: defeating one's opponent; and 5) to all the Arabic philosophers, *certain* results may only be attained by Aristotle's methods of proof. He then proceeds to a translation of al-Fārābī's definition of *jadal*.⁶³

⁵⁹ *Disputation Theory*, 52-86. We will note that al-Fārābī and Ibn Sīnā were contemporaries of Ibn Surayj's circle and its immediate intellectual descendents.

⁶⁰ *Ibid.*, 53f. and n.3; 55 and n.12. He cites *Topics*, 100a18-21 (corresponding to p.273 of the Loeb ed.)

⁶¹ Miller attributes the conception of dialectic as art [*technē*] to Stoic origins (*ibid.*, 53, n.4).

⁶² We will note that al-Fārābī terms non-syllogistic contentious/eristic arguments *qawl mirā'i*, or *mirā'* (Miller, *Disputation Theory*, 58-9). This coincides with the term *al-mirā'* which is employed by both Yaḥyā b. 'Adī and Ibn Zur'a in translating ἀμφοβία (*Soph. El.* 4, 165b26, 166a7ff.; *passim*). See our discussion on Aristotelian fallacy-types near the end of Chapter II.

⁶³ *Disputation Theory*, 54-5 and n.10. We will treat this definition later, in our concluding chapter, where both Miller's and my own translation of this important exposition may be found. For now, we will only mention that it constitutes as handy a measure for determining how "Aristotelian

Among other important discussions, Miller approaches the dialectical thesis itself, writing: “Aristotle calls the dialectical thesis a problem (*problēma*/*mas’ala*), while the Arab philosophers refer to a thesis, *wad’*.”⁶⁴ This is of particular interest to our project, for as we shall see with the jurists of both our subject-text and lens-texts, it is *mas’ala* which denotes the point of debate; *masā’il* are the difficult cases around which *ikhtilāf* hovers and which remain open for disputation. *Wad’* on the other hand has a decidedly linguistic orientation and application with our jurists.⁶⁵

Returning to Ibn Sīnā’s definition of *jadāl*, Miller notes that he prefers “bringing an argument (*ḥujja*)” to “fashioning syllogisms,” explaining that *ḥujja* is “more encompassing than *qiyās*.”⁶⁶ Now, this bears great significance for us; there is an obvious juristic predilection for the term *ḥujja*, and it enjoys great currency throughout the *Umm* and the early *jadāl*-theory literature. Perhaps the most useful insight with regard to Ibn Sīnā’s preference, however, may be gained through Robin Smith’s comments on the term *συλλογισμός*.⁶⁷ In short, he explains that our conception of what a syllogism is has become very much narrowed over time to mean only that sort developed in *An. Pr.* 1-6. Regardless, Smith maintains:

“...Aristotle’s definition of *sullogismos* comprehends a much wider class: pretty much any valid argument, or at least any argument with a conclusion different from any of its premises. If we translate *sullogismos* as ‘syllogism,’ the broad scope of this definition is obscured, and with it the nature of some of Aristotle’s logical theorizing.”

Bearing this in mind when reading early legal-theoretical and disputation literature opens a new range of considerations and possibilities — not only as regards the term *ḥujja* and any potential relationship to *sullogismos*, but as regards the origins and semantic development of the term *qiyās*. Whatever further investigation might reveal, we may certainly say at this point that Ibn Sīnā’s *ḥujja* is not likely the “more serious objection or change of Aristotle’s definition” that Miller claims it to be.⁶⁸ In fact, *ḥujja* is

dialectical” a particular debate might be as one could wish for, especially with its emphases on destroying/defending theses with universal subjects, and on exposing/avoiding contradiction. Not surprisingly, the avoidance of contradiction plays a major role in our Dialectical Forge theory, for it is an important dialectical “motive” axiom bequeathed to, among other things, the premises of *uṣūl al-fiqh*.

⁶⁴ *Disputation Theory*, 55-6; see also n.14.

⁶⁵ The significance of a juristic preference for *mas’ala* to denote the “problem at hand” is a question of terminological evolution well worth looking into, but we must leave it an open door for the time being.

⁶⁶ *Ibid.*, 56.

⁶⁷ “Logic,” in *The Cambridge Companion to Aristotle*, 30.

⁶⁸ *Disputation Theory*, 56.

perfectly in line with Aristotle's broader intentions with *sullogismos*; a fact which also brings the disputation practice, teaching, and literature of Islamic jurisprudence closer to what we might term the "spirit" of Aristotelian dialectic.

Also of interest to our concerns is Miller's contrasting al-Fārābī's and Ibn Sīnā's purposes for dialectic. As for the former, he understands it to be a *cooperative investigation* into an issue, with each party taking a role (Q or R), but neither pre-committed to a conclusion. Each is a *mushārik fī'l-faḥṣ*, and they are cooperatively engaged (*muta'āwinūn*), rather than competitively. Dialectic may thus be put into the service of philosophy, as a means to "the discovery of the true methods of proof."⁶⁹ Ibn Sīnā, however, makes a distinction between this type of cooperative and wholly truth-seeking enterprise, which he calls *munāẓara*, and the more competitive, strategizing form of disputation for which he reserves the term *jadal*.⁷⁰ Miller then traces these and other variant conceptions of dialectic and its "benefits" to "partly contradictory statements" of Aristotle.⁷¹

Moving on to the theme of questions, Miller expands upon the difference between the dialectical and the epistemic. In brief: al-Fārābī, Ibn Sīnā and Ibn Rushd all recognize two species of dialectical question, which distinction appears to have its roots in Aristotle's division between *problēma* ("dialectical problem") and *protasis* ("dialectical proposition").⁷² As for al-Fārābī, his two dialectical questions are: 1) *mas'alat takhyīr* (*hal X am -X?*); and 2) *mas'alat taqrīr* (*a-laysa X?*) Ibn Sīnā, on the other hand, has: 1) *su'āl tafwīd* (*hal X am -X?*); and 2) *su'āl al-ḥajr* (*a-laysa X?*)⁷³ The "choice

⁶⁹ Miller draws our attention to *Top.* I.9, 104b1-2 (*Disputation Theory*, 61-2 and nn.35-6).

⁷⁰ *Disputation Theory*, 61-2 and nn.36. A similar distinction in dialectical practice may be observed should one compare al-Shāfi'ī's more "pedagogical" dialectical style in the *Risāla* with his more "combative" style in the *Ikhtilāf al-ʿIrāqīyyīn*. On the whole, however, I would argue that both styles mentioned by Ibn Sīnā are in the service of truth-seeking, so long as the participants respect an ethic of "following the *ḥujja*" (i.e., refraining from eristic and stubborn contention). Aristotle himself recommends eliciting premises-for-*elenchus* out of order and intermixed with less relevant ones, so as to reduce P's chances of predicting the direction and shape of Q's counter-argument before it is sprung. This is not a deceitful strategy; the premises must still be *endoxic*, and the argument forms valid. The truth-seeking intent, in fact, is not only maintained, but strengthened — both parties must proceed with extreme caution and thoroughness, so that every important premise receive sufficient examination. See Smith, "Logic," *Cambridge Companion to Aristotle*, 62.

⁷¹ *Ibid.*, 63-7.

⁷² Quoted translations are Miller's. All authors are careful, like Aristotle (*De Int.* 9, 20b22; *Top.* VIII.2, 15ba14ff.), to keep these separate from the epistemic "what is" question (Miller, *Disputation Theory*, 68-70).

⁷³ Importantly, Ibn Sīnā notes that epistemic "what is / wherefore" questions, out of place in dialectic, may yet be reformulated into dialectical questions. That is, in dialectic Q cannot ask: "What is the essence of X?" But he can ask: "Do you say the essence of X is Y?" Q cannot ask

question” (1) is identified with Aristotle’s *protasis*; while the affirmation/restricted question is identified with his *problēma*. Importantly, both Alexander and al-Fārābī note that the “choice” of the *protasis/takhyīr/tafwīd* question is between contradictory alternatives.⁷⁴

Miller proceeds to another important division, this time with regard to linguistic coinage. Al-Fārābī, in the *Ḥurūf*, makes a distinction between: 1) *al-ma’ānī al-mashhūra* (“generally accepted meanings... for whose sake these expressions [*al-alfāz al-mashhūra*] were originally posited”); 2) such words “as have been referred (*manqūla*) to philosophical concepts (*al-ma’ānī al-falsafiya*)”;⁷⁵ and 3) such words as have attained additional meanings after their referral by philosophers (*ba’da naqlihim*), when other people appropriate them.⁷⁶ Importantly, we find the same distinction, or at least #1 and #2, in al-Shīrāzī’s *Ma’ūna fi’l-Jadal*, where the Ḥanafī proponent takes the position (against a Shāfi’ī) that the *asmā’* are not *manqūla*, in order to maintain his interpretation (*al-nikāḥ* = *al-waṭ’*) against the Shāfi’ī’s position (*al-nikāḥ* = *al-‘aqd*).⁷⁷ This parallel may well provide indication for a common fund of argumentation epistemes and/or an early cross-germination between the *jadal* of the Aristotelians, the *jadal* of the jurists, and the first formulators of the ‘ilm *al-waḍ’*. Whatever the case, Miller relates al-Fārābī’s position that tropical usage occurs in sophistic as a ploy, and in dialectic to “establish the language of question and response,” but that it does not belong in philosophical debate.⁷⁸

Moving on to the next theme, Miller has attempted to cull al-Fārābī’s “rules of debate” from certain sections of the *K. al-Jadal*, explaining simply that “al-Fārābī’s discussion had two forms,” and then proceeding to systematically lay out a “Type I”

“Why is Y the essence of X?” But he can ask: “Why did you say what you said?” and “Is ___ the reason that Y is the essence of X, or not?” (Miller, *Disputation Theory*, 76-7).

⁷⁴ *Disputation Theory*, 70. We would do well to note the similarity between *alaysa* X? and *ara’ayta* X? The difference is that *ara’ayta* maintains focus upon the respondent’s opinion, in the attempt to draw him into upholding an absurdity or a self-contradiction. As we see in Smith’s description (*Topics I and VIII*, xiv-xv), this is the very aim of Aristotelian dialectic. It is important, then, when analyzing the dialectic of the *Umm*, to keep track of the types of questions which are asked. The more they hold to the *takhyīr/taqrīr* side, and avoid the epistemic “what is,” the more they may be said to be dialectical in the Aristotelian sense. As we shall see, the great majority of questions in our subject-text conform to the “dialectical.”

⁷⁵ As pointed out by an examiner of this dissertation, *manqūla* is better translated as “transferred,” or “extended.”

⁷⁶ Miller, *Disputation Theory*, 72-3.

⁷⁷ al-‘Umayrīnī ed., p.42, lines 3-4; Princeton MS 867, fol. 4a, lines 6-7.

⁷⁸ *Disputation Theory*, 73.

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(with numbered sequence 1-6a), and a “Type II” (with numbered sequence 1-7).⁷⁹ In reading the concerned passages from the *K. al-Jadal*,⁸⁰ I found it difficult, at first, to follow how Miller arrived at two “types” from al-Fārābī’s relatively continuous discourse.⁸¹ Moreover, although Miller’s paraphrasing (and, in the end, his typology) is accurate, it tends to obscure certain concepts and terms of import to our own project. I have therefore attempted my own translation of the concerned passages, inserting Miller’s Type and sequence numbers in [brackets] where I believe his paraphrase matches the text, and inserting folio numbers thus: [/188b/], where they are indicated in the margins of the ‘Ajam ed. I have referenced.

Miller citation (“K. al-Jadal,” fol.188b ff.) = (al-‘Ajam ed., 14-16, fols.188b-188a)	
[/188b/] [Mill. I.1 and II.1:] Which is that the method of Q is that he first obtain as concession from R the <i>wad’</i> (thesis), by way of a question. [Mill. I.2 and II.2:] And when the <i>wad’</i> transpires in an assumed/premised manner, then the most successful of his actions after that is that he obtain as concession, also by way of question, from R, such premises as he opines that they are beneficial for the nullification of that <i>wad’</i> , [Mill. 1.3] premise after premise.	[/188b/] وذلك أن السائل سبيله أن يتسلم أولاً من المجيب الوضع بالسؤال، فإذا حصل الوضع مفروضاً فأنجح أفعاله بعد ذلك أن يتسلم أيضاً بالسؤال من المجيب المقدمات التي يرى أنها نافعة في إبطال ذلك الوضع مقدمة مقدمة.
[Mill. 1.4] And when there come into his possession, of premises conceded by R, such premises as, when he [Q] composes them, there necessarily arises from them the <i>naqīd</i> (contradictory) of the <i>wad’</i> ; he combines them, and concludes from them the <i>naqīd</i> , addressing them to R by way of direct report, not by way of question.	فإذا حصل عنده من المقدمات التي سلمها المجيب مقدمات، إذا ألفها لزم عنها نقيض الوضع، جمعها وأنتج عنها النقيض مخاطباً بها للمجيب على طريق الأخبار لا على طريق السؤال.
[Mill. 1.5] And when he [Q] completes that against R, then he has achieved <i>tabkīt</i> (<i>elenchus</i>). And the <i>tabkīt</i> : it is the <i>qiyās</i> (syllogism) from which Q concludes the <i>munāqid</i> (contradictory) of that for the preservation of which R was entrusted, of <i>ra’y</i> (considered opinion) or <i>wad’</i> . And there does not belong to Q the right to fashion a	فإذا تم ذلك على المجيب فقد حصل عليه تبكيث. فالتبكيث هو القياس الذي ينتج عنه السائل مناقض ما تضمن المجيب حفظه من رأي أو وضع، وليس للسائل أن يعمل تبكيثاً

⁷⁹ Ibid., 78-80.

⁸⁰ The ‘Ajam ed. I referenced is based upon the same Bratislava MS [231] for which Miller obtained a Typescript [by M. Galston].

⁸¹ This difficulty was further compounded by Miller’s citing the same folio (“K. al-Jadal,” fol.188b ff.) for both “Type I” (79, n.78) and “Type II” (80, n.80); and his inserting, for Type I.6a, without explanation, a paraphrased passage from fol.213b (79, n.79), the corresponding text for which I cannot determine in the folio indicated.

<i>tabkīt</i> against a dialectician R from premises which R did not concede. And R, when he prescribes/presupposes as true the <i>waḍ'</i> which he chose for himself; his method, after that, is that he be on guard against conceding to Q the premises by which Q will benefit as regards the invalidation of the <i>waḍ'</i>. Rather, it is only right that he should, at each question, propose — for each thing that [Q] will obtain as concession pertaining to the two parts of the <i>naqīd</i> — that part by which Q does not benefit for the <i>munāqaḍa</i> (contradiction) of R.	على مجيب جدلي من مقدّمات لا يسلمها المجيب. والمجيب إذا فرض الوضع الذي يختاره لنفسه فسيبيله بعد ذلك أن يتحفّظ من أن يسلم للسائل المقدّمات التي ينتفع بها السائل في إبطال الوضع، بل إنّما ينبغي عند كل سؤال أن يتحرّى في كلّ ما يتسلّمه من جزئي النقيض الجزء الذي لا ينتفع به السائل في مناقضة المجيب.
[Mill. 1.6] And when R concedes, of premises, such as from which he deems it probable Q will not benefit; and Q combines against him, from what he conceded, premises, just as he conceded them, and he composes them and announces them to him with the understanding that they produce-as-conclusion the <i>naqīd</i> of the <i>waḍ'</i>; then there belongs to R the right to examine the form of the <i>qawl</i> (statement) which Q composed against him — is it a producing-conclusion form, or not? And as for: Does he have the right to examine premise after premise as pertains to that <i>qawl</i>? It may be deemed that such a right does not belong to him, nor that he contend, regarding knowledge, premise after premise, as pertains to it [the <i>qawl</i>], since he has already proffered his concession for each one of them [the premises]. There only belongs to him the right to examine, and object, as pertains to that which Q announced, regarding what he has not conceded; and [regarding] that which he has not conceded in what the form of the <i>qawl</i> — which Q composed against him — puts forward. [/188a/] And if it [the form] is not <i>qiyāsī</i> (syllogistic); no <i>tabkīt</i> is imposed upon R. But if it is syllogistic, the <i>waḍ'</i> of R is nullified, and the <i>tabkīt</i> is enjoined upon him.	فإذا سلم المجيب من المقدّمات ما ظنّ أن السائل لا ينتفع به فجمع عليه السائل ممّا سلّمه مقدّمات كما سلّمها وألفها وخاطبه بها على أنّها أنتجت نقيض الوضع، فللمجيب أن ينظر في شكل القول الذي ألفه عليه السائل، هل هو شكل منتج أو لا. وأما هل له أن ينظر في مقدمة مقدمة من ذلك القول فقد يظنّ أنه ليس له ذلك، ولا أن ينازع في معرفة مقدمة مقدمة منه، إذ كان قد تقدم تسليمه لكل واحدة منها. وإنّما له أن ينظر ويمنع ممّا خاطبه به السائل في ما لم يكن سلّم، والذي لم يكن سلّم فيما تقدّم هو شكل القول الذي ألفه عليه السائل. [/188a/] فإن كان غير قياسي لم يلزم المجيب تبكيّت، وإن كان قياسياً بطل وضع المجيب ولزمه التبكيّت.
However, it may be that what R conceded of premises are such premises as, when they	ولكن ربما كان الذي يسلمه المجيب من

are taken up in the conditions/contexts in which R conceded them, are neither true nor *endoxa* in reality; or they are in a condition/context in which there be not constructed from them a *qiyās* which contradicts the *waḍ'* of R; and Q believes that they are valid and that there be linked from them a *qiyās*, so he combines them, and announces them to R, proceeding with the understanding that they have necessitated the *muqābil* (opposite) of the *waḍ'* of R; or Q distorts what R conceded, and there is, after Q's distortion of it, a *qiyās* by which there occurs the *munāqaḍa* of R. There belongs to R, at the occurrence of these conditions/contexts, the right to examine the premises. And if they are in accordance with what he conceded, and they are in such a manner as Q does not benefit from them, nor a *qiyās* be constructed from them in reality, and Q believes that there be constructed from them, against R, a *qiyās*; it is [enjoined] upon R that Q be instructed as to what eliminates from him that belief, in that the conditions/contexts in which he conceded them: Q does not benefit from them, nor is there constructed from them the *qiyās* which Q believes to be so constructed.

And if Q has distorted what R conceded; it is [enjoined] upon R that he clarify that. And Q may not have been conceded the premises by question of premise after premise; rather, he is intent, after his obtaining as concession of the *waḍ'* by way of a question, upon the premises which he opines that they nullify the *waḍ'*, so he combines them or announces them, and their conclusion, either from the direction of direct report, or in the manner of a question. And it is only right that he should do that regarding what he believes that R conceded, when they are announced.

المقدمات مقدمات إذا أخذت بالأحوال التي سلّمها المجيب لم تكن صادقة أو مشهورة في الحقيقة أو تكون بحال لا يأتلف منها قياس يناقض وضع المجيب، فيظن السائل أنها صحيحة وأنها يأتلف منها قياس، فيجمعها ويخاطب بها المجيب عاملاً على أنها قد ألزمت مقابل وضع المجيب أو يحرف السائل ما سلّمه المجيب فيكون بعد تحريف السائل له قياساً تقع به مناقضة المجيب، فيكون للمجيب عند هذه الأحوال أن ينظر في المقدمات، فإن كانت على ما سلّمها وكانت بحيث لا ينتفع بها السائل ولا يأتلف عنها قياس في الحقيقة، فظنّ السائل أنها يأتلف منها على المجيب قياس، فعلى المجيب أن يتلقى السائل بما يزيل عنه ذلك الظن بأن الأحوال التي سلّمها بها لا ينتفع بها السائل ولا يأتلف عنها القياس الذي ظنّ السائل أنه يأتلف.

وإن كان السائل حرف ما سلّمه المجيب فعلى المجيب أن يبين ذلك، والسائل ربما لم يسلم المقدمات بالسؤال عن مقدمة مقدمة، بل يعتمد بعد تسلّمه الوضع بالسؤال إلى المقدمات التي يرى أنها تبطل الوضع فيجمعها أو يخاطب بها. وبتيجتها، إما على جهة الأخبار، وإما على طريق السؤال. وإنما ينبغي أن يفعل ذلك فيما يظنّ أن المجيب يسلمها إذا خوطب بها.

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Miller citation ("K. al-Jadal," fol.213b) = (al-'Ajam ed., 14-16, fols.188b-188a?)	
[Mill. 1.6a] ???	؟؟؟
Miller citation ("K. al-Jadal," fol.188b ff.) = (al-'Ajam ed., 16, fols.188a-189b)	
«The Manner of <i>al-Jadal</i>» And the first type of question is the question about the premises, premise after premise, with the leaving off of mention of the conclusion. [Mill. II.3] And the second: it is the direct announcement of the premises and the conclusion, together. [Mill. II.4] And when the second type is employed; there belongs to R the right, at such a time, to investigate into the premises of the <i>qawl</i> which Q brings from his own keeping, and into [/189b/] its [the <i>qawl</i>'s] form. [Mill. II.5, 6] And if he requires the invalidation of a premise from the premises of the <i>qawl</i>, or the invalidation of its form; there belongs to him the right to bring forth a <i>qiyās</i> by which there is nullified whichever of these two the invalidation of which he aims at, and announces it to Q by way of direct pronouncement of it, not by way of question. [Mill. II.7] And whichever of these two R nullifies; his <i>waḍ'</i> is redeemed, and there vanishes, by means of it, the <i>tabkīt</i> from himself, and there occurs [valid] opposition (<i>al-'inād</i>). And the <i>'inād</i>: it is the <i>qiyās</i> from which R produces-as-conclusion the <i>muqābil</i> of the premise for which Q requested of him its <i>taslīm</i> (concession). And indeed, in <i>al-jadal</i> there are [1] places in which it is permitted for Q to request of R the <i>taslīm</i> of something for which R objects to its <i>taslīm</i>, and at which [places] R has need of <i>al-'inād</i>; and [2] places where it is not permitted that he request of him the <i>taslīm</i> of that which he objects to, and at which he does not have need for <i>al-'inād</i>. And we will clarify, in what follows, what places are these. However, the question about the premises and the conclusion together is not among the most successful of what is in <i>al-jadal</i>; rather, the most successful of what is in <i>al-jadal</i> is employment of the method by means of which Q obtains as concession, premise after premise, singly; then he combines	«كيفية الجدل» فالضرب الأول من السؤال هو السؤال عن المقدمات مقدمة مقدمة بترك ذكر النتيجة. والثاني هو المخاطبة بالمقدمات والنتيجة معاً، فإذا استعمل الضرب الثاني فللمجيب حينئذ أن ينظر في مقدمات القول الذي أتى به السائل من عند نفسه وفي [/189b/] شكله، فإن احتاج إلى إبطال مقدمة من مقدمات القول، أو إلى إبطال شكله فله أن يأتي بقياس يبطل به، أي هذين قصد إبطاله، ويخاطب به السائل على طريق الإخبار به لا على طريق السؤال. فأَي هذين أبطله المجيب فقد خلص وضعه وزال به عن نفسه التبكيك وحصل العناد. والعناد هو القياس الذي ينتج عنه المجيب مقابل المقدمة التي يطالبه السائل بتسليمها. فإن في الجدل أمكنة يجوز فيها للسائل أن يطالب المجيب بتسليم الشيء الذي امتنع المجيب من تسليمه، وعندها يحتاج المجيب إلى العناد. وأمكنة لا يجوز أن يطالبه بتسليم ما يمتنع منه، وعندها ليس يحتاج إلى العناد. وسنبين فيما بعد أي أمكنة هذه، إلا أن السؤال عن المقدمات والنتيجة معاً ليس هو من أنجح ما في الجدل بل أنجح ما في الجدل

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from that what produces-as-conclusion the *naqīd* and the *muqābil* of the *madhhab* (doctrinal opinion) of R, and that he conceal, upon his questioning, the *mawḍiʿ* (locus) of the *taqābul* (opposition), and veil/disguise it, so that R does not sense it.⁸²

استعمال الطريق التي بها يتسلم السائل مقدمة
مقدمة على انفراد ثم يجمع من ذلك ما ينتج
نقيض ومقابل مذهب المسؤول وأن يخفي
عند سؤاله موضع التقابل ويستره لئلا يحس
به المسؤول.

After a close reading of al-Fārābī's discourse on the manner and sequence of dialectical disputation, in combination with Miller's paraphrasing, I now believe I can explain Miller's constructed typology. As for Type I: Q gets R to concede to such premises as from which he can attain *tabkīt*, one after the other, then he announces it; R then has a chance to object to the form of the *tabkīt*-syllogism, but not the premises (since he already conceded them to him), unless Q distorted them to fashion his *tabkīt*-syllogism. And as for Type II: Q announces his *tabkīt*-syllogism from premises and conclusion he draws entirely from himself, or only partially from R; R then has a chance to object to whatever he finds wrong of premises or syllogism form (having no prior commitment to the premises); R's refutation of Q's attempted *tabkīt* is called *ʿinād*.

Of further interest in al-Fārābī's discourse on the manner and sequence of dialectical disputation are the points at which he specifically enjoins *sā'il* (Q) or *mujīb* (R) to proceed via direct notification of his opposing *qiyās* (*ʿalā ṭarīq al-akhbār/al-ikhbār*), as opposed to via questioning (*ʿalā ṭarīq al-suʿāl*). Both injunctions obtain at the point at which *sā'il* or *mujīb* brings forth his refutation-syllogism, the conclusion of which is deemed to logically flow from premises he has either 1) gotten his opponent to commit to during questioning, or 2) produced on his own. That al-Fārābī goes out of his way to underscore the manner of this announcement is important, and it is reminiscent of the contentious issue among Miller's theological *jadāl* authors as to whether the *muʿāraḍa* may be considered a question or not.⁸³ Here, al-Fārābī says the *tabkīt*-syllogism must be announced, not asked.

⁸² First of all, as we shall see, this is a fair description of al-Shāfiʿī's dialectical style in our subject-text. This will make itself plain in Chapters III and IV of our dissertation. Second, compare al-Fārābī's closing description of the "most successful" dialectical method with Smith's observations ("Logic," *Cambridge Companion to Aristotle*, 62). Altogether, there is a significant Aristotelian "flavour" to proto-system juridical dialectic as we see it in the *Ikhtilāf al-ʿIrāqīyyīn*. The reasons I suspect this to be so will be elaborated in Chapters II and IV.

⁸³ *Disputation Theory*, 34.

Moreover, if we examine the two issues closely, we will see that they coincide in that both involve the Q's production of what he deems to be the *naqīd* of the *mujīb*'s thesis (which will trap him into committing to an absurdity, or inconsistency), and that they are both followed by a kind of role-reversal, wherein it is the original *mujīb*'s prerogative to test the soundness of the original *sā'il*'s opposing *naqīd*-thesis via questioning. In short, then, there is either a close resemblance, or even an identity, between the *mu'āraḍa* of Miller's theological and juridical *jadāl* authors, and the *sā'il*'s initial announcement of what he deems *tabkīt*, according to Miller's philosophical *jadāl* authors. If my assessment is accurate, and I believe it is, then this constitutes a significant convergence between theological, philosophical, and juridical genres of *jadāl* which has been overlooked by Miller. This of course further problematizes his developmental trajectory; but it also goes some way towards explaining the apparent lack of reference to *mu'āraḍa* in the philosophical genres — it being subsumed by, or replaced with, “announcing the intended *tabkīt*-syllogism.”⁸⁴

Indeed, the resemblance between al-Fārābī's and Aristotle's description of the essence of dialectic,⁸⁵ and the dialectical move of *mu'āraḍa* — especially the fact that both involve affirmation of the *naqīd* of the *mujīb*'s thesis — might lead us to conclude that a successful *mu'āraḍa* on the part of the *sā'il* is in fact the equivalent of a successful intended *tabkīt*-syllogism. As for the dialectical sequences we shall see in our subject-text, this drawing together of concepts will have significant impact upon our analyses. Time and again we find either rhetorical implications (in open-ended questions), or direct announcements of the absurdity/inconsistency of an opposing stance, in combination with an implied or directly explicated *mu'āraḍa*.

Finally, in a closing section subtitled “Jadāl in Theology and Philosophy: An Overview,” Miller attributes the Arab philosophers' critique of theologians' “epistemic oriented” *jadāl* (dialectic should only be “opinion oriented”) to “a rekindling of the clash between Aristotelians and Stoics or Platonists.” The final word goes to Aristotle who, according to Miller: “while recognizing the role of belief (*doxa*) in helping to arrive at the truth, gives belief an inferior place, in his philosophy, to that of knowledge.”⁸⁶ In my opinion, however, this goes against a very clear statement of

⁸⁴ We will note that *mu'āraḍa* always appears as the last of the dialectical moves in the juridical *jadāl*-theory texts; and indeed, there is a very logical reason for this. See our exploration of *qiyās*-oriented *mu'āraḍa* in the following chapter.

⁸⁵ Cf. al-'Ajam ed., 13; and Smith, *Topics I and VIII*, xiv-xv.

⁸⁶ Miller, *Disputation Theory*, 84-5.

Aristotle's (*Top.* I.10, 104a34ff.) to the effect that dialectical premises *include* all such as accord with the various *technēs* and their practitioners (citing the opinions of physicians and geometers as examples).⁸⁷

Now, if I understand correctly, a key difference between dialectic and demonstration is that the former may build upon *endoxa* propositions which have not been established via demonstration (without excluding such as have been), whereas the latter may build only upon demonstrative premises which hark back, ultimately, to “self-evident,” indemonstrable *archai*. There is certainly no sound reason to assume that dialectic cannot incorporate the results of the demonstrative sciences as *endoxa* premises,⁸⁸ and *Top.* I.10, 104a34ff. shows clearly that Aristotle included them within the larger *endoxa*-set.⁸⁹

Evolutionary Narratives for Juridical *Jadal*

Only a small number of modern scholars have treated juridical *jadal* to any considerable extent; and, in the main, their contributions have been superseded — and at times corrected — by those of Larry Miller and Wael Hallaq. There are other reasons why we will give these two scholars the last word on juridical *jadal* evolution, however. George Makdisi's accounts, for example, though on the whole very informative and at times even entertaining (citing many anecdotes of dialectical disputations gone wrong), are chronologically inconsistent. On more than one occasion, he implies that jurists had no interest in *jadal* until the fourth century (citing al-Qaffāl al-Shāshī [d.365/976] and

⁸⁷ Geometry, of course, is among Aristotle's favourite examples of a demonstrative science.

⁸⁸ Which is not to imply that dialectic and demonstration are the same — to the contrary, they are very different projects indeed, and we will reiterate that Aristotle (as well as later commentators and Arabic Aristotelians) maintained a strict epistemic and procedural distinction between them.

⁸⁹ Miller cites a passage from the *Topics* commentary of Alexander of Aphrodisias which seems to uphold this (95, n.95). He also cites (in the same note) *Top.* VIII.11, 161a27ff., by which he aims to show that “for Aristotle dialectic is not suited to discussing scientific questions since, among other things, it allows the use of false premises;” but the cited passage in has nothing to say about “scientific questions” at all. The topic is *ad hominem* arguments and contentious vs. dialectical arguments in the context of “practice and experiment” (trans. Forster). At any rate, I am stressing this conception — whereby the *endoxa*-set of dialectical premises includes opinions generated in demonstrative sciences — for a reason. This will become most clear when we develop our dialectical forge model in Chapter IV. For now, suffice it to say that — as a certain eminent scholar of Islamic legal theory has pointed out — the premises of juridical dialectic are the premises of *uṣūl al-fiqh*. I have expanded upon this by something called the “three-stage cycle,” and its details must wait until Chapter IV.2. The main point here is that Aristotle's acknowledgment — that premises born of demonstration are obviously included in the *endoxa*-set of dialectic — provides a strong parallel to the very important dynamic we observe between juridical dialectic and *uṣūl al-fiqh*.

Abū ‘Alī al-Ṭabarī [d.350/961] as first authors),⁹⁰ but then he relates anecdotes and in other ways makes reference to formal juridical disputations from as early as the start of the second century H.⁹¹ Importantly, however, we should note that he recognizes the central role of juridical dialectic in the legal-pedagogical enterprise and the elaboration of law,⁹² the relationship between *khilāf* and *jadāl*,⁹³ and the connection between *jadāl* and *uṣūl al-fiqh*.⁹⁴ The general introduction to *jadāl* one finds in his *Rise of Colleges* is an important contribution, but there is no coherent evolutionary trajectory to be found, and his discussions in no way account for the sophisticated dialectic we find in the *Kitāb al-Umm*.

As for the important contributions of ‘Abd al-Majīd Turkī with regard to juridical *jadāl* evolution, they are, in the main, echoed in, corrected by, and surpassed (in terms of scope and detail) by Miller’s dissertation, and in other ways covered by the accounts of Muḥammad Abū Zahra and Khalīl al-Mays.⁹⁵ The same may be said for the

⁹⁰ “By the first half of the fourth/tenth century, the jurisconsults became interested in the study of dialectic, adapting it to their own purpose...” (*Colleges*, 108; and again on 147, citing the same early authors: al-Qaffāl al-Shāshī and Abū ‘Alī al-Ṭabarī). And: “After the first works on dialectic had adapted it to the needs of legal studies, jurisconsults, becoming fully cognizant of its value to their work, began to study it in earnest” (ibid., 109).

⁹¹ “Disputation is usually connected with theology; but some of the earliest disputations were in the fields of law and grammar.” He cites a juridical disputational *majlis* held before the Umayyad Caliph ‘Umar b. ‘Abd al-‘Azīz, and then presents a fascinating overview of early disputations in the domain of grammar studies (ibid., 123ff.) Importantly, Makdisi presents a listing of “regular sessions of legal disputation” — his first example being the court of Hārūn al-Rashīd, where a student of Mālik would dispute Abū Yūsuf (133ff.) Of interest, too, are two anecdotes of Ibn Surayj’s humour in disputation (ibid., 134). Indeed, Makdisi even relates the famed session in Egypt which supposedly resulted in al-Shāfi‘ī’s death (ibid., 136), and elsewhere references juridical disputation’s “long period of development” (ibid., 139).

⁹² “So important was dialectic for the development of law and legal studies in Islam that it became a sine qua non of these studies in the colleges of law, both masjids and madrasas” (ibid., 109f.) Also, Makdisi notes the importance of *jadāl* with regard to *riyāsa*; but then contradicts his assertions of a late (fourth c. H) interest by citing anecdotes of Abū Ḥanīfa and Abū Yūsuf (ibid., 131ff.)

⁹³ “To deal with *khilāf*, one had to be skilled in *jadāl*, dialectic, and in *munazara*, *nazar*, disputation” (ibid., 109).

⁹⁴ “With the rise of dialectic, *jadāl*, as applied to the study of legal theory and methodology, *uṣūl al-fiqh*, the literary arts were relegated to the background” (ibid., 76). And: “They [jurisconsults, after “adapt[ing *jadāl*] to the needs of legal studies”] devoted individual works to it; and more significantly, they incorporated the subject, in more or less detail, in their works on legal theory and methodology” (ibid., 109). We will of course argue that *jadāl* and legal theory were inseparably intertwined from the very beginning of the Islamic jurisprudential enterprise; this “dynamic symbiosis” and co-evolution is a core element of our Dialectical Forge theory, and, among other things, accounts for the inclusion of *jadāl*-oriented chapters in early *uṣūl al-fiqh* works.

⁹⁵ See his introductions to al-Bājī’s *Minhāj* (7-11); and his own *Polémiques* (especially at 27-45 [= 31-52 of the Arabic edition]). Importantly, however, Turkī underscores certain phenomena which Miller either neglects or implicitly denies. Among them, the following are of great significance to our current project: 1) that the Prophet’s Companions engaged in *jadāl*

important discussions of Wolfhart Heinrichs.⁹⁶ This is in no way to subtract from the significance of the works of these scholars, both of whom —especially through their contributions of critical editions — are founding figures in this understudied field (and this goes for Makdisi, too).⁹⁷ I mean only to say that their historical trajectories for the evolution of juridical *jadāl* (which is our focus here) have generally been supplanted by Miller’s far more comprehensive (if problematic) treatment. The same may be said with regard to E. Wagner’s entry for *Munāẓara* in the *Et*,⁹⁸ which cites both Makdisi and Miller.⁹⁹

Wael Hallaq

Importantly, in the introduction to his translation of al-Baṣrī’s *Kitāb al-Qiyās al-Shar‘ī*, Hallaq acknowledges: “with the emergence of *uṣūl al-fiqh* as an independent ‘science’ towards the end of the third/ninth century, the art of dialectic (*jadāl* or *munāẓara*) had become an important ingredient in legal education and legal theoretical

(*Polémiques*, 9); and 2) that there is «une évolution parallèle du *ḡadal* dans le *kalām* et le *fiqh*» (ibid., 29; compare this statement with the “common source, parallel development, and cross-germination” model we propose near the end of Chapter II). Turkī also goes some way towards explaining the relationship between the genres of *khilāf*, *ādāb al-baḥṡh*, *uṣūl al-fiqh*, and *jadāl* (ibid., 32ff.) Finally, although we would disagree with him regarding al-Shāfi‘ī’s role as “founder,” Turkī yet acknowledges an early history — potentially, even a priority — for the study and technical practice of juridical *jadāl*: «En effet, on est en droit de considérer Šāfi‘ī... comme le véritable fondateur de la science des *uṣūl al-fiqh*..., et, par là-même de la science et de la technique du *ḡadal* et du *hīlāf* que l’historien maghrébin [Ibn Khaldūn] fait dépendre de l’autre science; toutefois, on peut se demander si, en un certain sens et dans une mesure limitée, le mouvement dogmatique mu‘tazilite qui imprégnait tout le deuxième siècle de l’Hégire et précédait donc notre imam de quelques décennies, ne fut pas susceptible d’une influence quelconque sur une pensée juridique contemporaine ou légèrement postérieure» (ibid., 29-30).

⁹⁶ See his Arabic introduction (the German one deals mostly with MSS descriptions) of al-Ṭūfi’s *‘Alam al-Jadhal* (especially at ١٥ - ١٦). Importantly, Heinrichs tells us: “I have chosen to edit and publish al-Ṭūfi’s book on *jadāl* for two reasons: First, the infrequency with which the *kutub al-jadaliyya* are printed, and what is printed of them as a specialized science; and that is despite the fact that there is no understanding the *manhaj* of the ‘*ilm uṣūl al-fiqh* — the most important of the ‘*ulūm al-naẓariyya* in Islam — nor the intellectual style to which this ‘*ilm* conforms, except from the likes of these treatises....” (ibid., ١٦).

⁹⁷ See his edition of Ibn ‘Aqīl’s *Kitāb al-Jadal ‘alā Ṭarīqat al-Fuqahā’*: *Le Livre de la Dialectique d’Ibn ‘Aqīl*.

⁹⁸ Importantly, Wagner also speaks of *munāẓara* in its poetic forms, and highlights links to pre-Islamic genres.

⁹⁹ I must reiterate that, although I am going to be particularly critical of Miller in this section, and even more so in Chapter II, this should not be taken for a moment to deduct from the weight of his contribution. The larger field of “Islamic Disputation Theory” may boast Miller, above all others, as a real “founder” in terms of comprehensive history and analytical discussion; and his dissertation is astounding in terms of depth and scope, survey and translation of as yet unedited manuscripts, etc.; it is in all ways a model. My criticisms are levelled at certain particular interpretations and general conclusions, and despite these, my estimation of Miller’s contribution has not been damaged in the least. It is hoped that the reader bears this in mind throughout the course of the following review, and my critical comments in Chapter II.

formulations.”¹⁰⁰ This recognition is significant, and in line with the evidence of the *K. al-Umm*, for what it suggests of a role for dialectic in legal pedagogy, and for what it allows of the potential for a formative dynamic with regard to *uṣūl* principles and methods *before* the appearance of specialized genres. Following this, we get an idea of Hallaq’s evolutionary narrative for juridical dialectic in this, one of his earliest (1987) contributions.

In sum, Hallaq presents a trajectory by which: 1) Greek works on dialectic were translated into Arabic (in the first half of the third century H); 2) “Immediately afterwards dialectic was studied and rapidly assimilated in the Muslim religious sciences;” and 3) specialized (Sunnī) juridical-*jadāl* treatises, “totally Islamicized and, like juridical logic, its link to the ‘ancient sciences’... dissipated,” were being composed by the mid-fourth century H.¹⁰¹ Now, there is no doubt that this narrative holds true in the main; what I would suggest, however, is that what we see after the translation of Greek dialectic may best be understood as a *re-invigoration* — a new systematization along more strictly Aristotelian lines, in certain quarters and among certain theorists. Certainly, from the evidence of the *Umm* and pre-Translation Movement disputation practice on juridical and theological themes, we may claim that a tradition — or traditions — of dialectical disputation preceded the (fresh) infusion of Aristotelian dialectical method resultant of the TM.¹⁰² If, however, this suggested trajectory (pre-TM *jadāl* tradition[s] → TM → assimilation of Greek dialectic → systematized juridical-*jadāl* genre) is to be tested, it must be done so by: 1) analyzing the argumentation method (and associated concepts, terms, categorizations, and orderings) employed in disputations on juridical and theological themes through to the early stages of the TM; 2) analyzing the concepts, terms, categorizations, and orderings as they manifested in Arabic after translation from systematic works of Greek dialectic; and 3) analyzing the same in the earliest extant works of *jadāl/munāẓara* (Miller’s dissertation makes great strides [despite certain problems] with respect to these last two priorities, but neglects the first).

It is by examining in detail the argumentation, the dialectical moves, and their associated terms and formulae, that we can come to determine something of the

¹⁰⁰ “Treatise,” 197.

¹⁰¹ *Ibid.*, 197-8.

¹⁰² TM = “Translation Movement.” The most diligent and comprehensive study of this prolonged and far-reaching intellectual-historical event remains *Greek thought, Arabic culture*, by Dimitri Gutas.

“grammar and lexicon” of juridical dialectic before, during, and after the TM;¹⁰³ and it is by comparing these with the “grammar and lexicon” of systematic Greek dialectic in translation that we can assess the impact of the TM as regards the systematization of Islamic juridical *jadāl* tradition(s). This passage from Hallaq’s introduction serves, then, as another starting point of this dissertation; and, so far as we see from the arguments and dialectical sequences of our subject-text, the earliest extant works of juridical *jadāl* theory exhibit a strong connection to pre-TM disputation method, while certain terms, formulae and structures/orderings may well bear the marks of a post-TM Greek dialectical influence.

Importantly, Hallaq’s contributions to the study of juridical dialectic continue in his *History of Islamic Legal Theories*. Here, the important role of *jadāl* with regard to the *ijtihādīc* elaboration of substantive rulings is asserted in no uncertain terms:

“In one sense, dialectic constituted the final stage in the process of legal reasoning, in which two conflicting opinions on a case of law were set against each other in the course of a disciplined session of argumentation with the purpose of establishing the truthfulness of one of them. The aim of this exercise, among other things, was to reduce disagreement (*ikhtilāf*) among legists by demonstrating that one opinion was more acceptable or more valid than another. Minimizing differences of opinion on a particular legal question was of the utmost importance, the implication being that truth is one, and for each case there exists only one true solution.”¹⁰⁴

Likewise, and especially important for our current project, Hallaq not only asserts the “essential” role of dialectic in legal theory, but also implies a *formative dynamic*, and indicates the variety of argument types which may arise during the course of a Q&A debate:

“This function of narrowing down disagreements by establishing where truth resides rendered the art of disputation... essential to legal theory, although one can find numerous treatises that do not devote any space to a discussion of this art. *The systematic effect of dialectic on the modes of exposition of legal theories is readily obvious, reflecting the background against which this theory grew to maturity.* The most common method of exposition — though exceptions are many — is that of the question-answer: ‘If someone says such and such, we reply with such and such.’ But this method is versatile, and an analysis of the logical structure of questions, and especially answers, shows that theorists adopted for their use the entire gamut of arguments we nowadays subsume under logic and rhetoric.”¹⁰⁵

¹⁰³ The current dissertation may be considered a first, small step with regard to this project.

¹⁰⁴ Hallaq, *History*, 136-7.

¹⁰⁵ *Ibid.*, 137; emphasis is mine.

The significance of the sentence we italicized above cannot be overstressed. Not only is it a starting point for this dissertation, but the greater part of our project aims at: 1) bringing this consideration to the forefront of Islamic legal-theoretical studies; 2) demonstrating that this dynamic relationship has played a role in the evolution of *jadāl* and *uṣūl* systems since their earliest stages; and 3) formulating a general theory explaining this relationship (our “Unified Dialectical Forge Theory”), that it may serve as a framework for evolutionary narratives.

Returning to Hallaq’s exposition, we again gain insight into his narrative for juridical *jadāl* evolution, in a preceding discussion:

“In the initial stages of its development, legal theory seems to have incurred another debt to *kalām*, namely, dialectic (*jadāl* or *munāẓara*), which occupied a prominent place in the overall structure of this theory. Defining the precise extent of this debt is not an easy task, for *kalām* itself was influenced in this respect by the new Greek ideas that infiltrated Muslim religious sciences. Whether the dialectical method entered legal theory via *kalām* or was directly borrowed from Greek translations is a question that must await further research. But that the Muslim art of dialectic was significantly influenced by the Greek sources seems beyond dispute. And here, as elsewhere, borrowing was highly selective, as suggested by the distinction drawn between the dialectic of the philosophers — who in the view of the orthodox, are not far removed from heresy — and the “good dialectic” (*al-jadāl al-ḥasan*) which was harmonious with the spirit of law and legal theory.”¹⁰⁶

Again, we see here more than one starting point for this dissertation. Of course, I would also argue that whether or not juridical *jadāl* at its *earliest stage* (and afterwards) owes a “debt to *kalām*” (or, for that matter, Greek dialectic) remains to be seen; as I will suggest in later discussions (in the following chapter and afterwards), the similarity between *kalām* method and juridical dialectic is most likely the result of the origins of both in a common pot of “prior argumentation epistemes” (including, but not exclusively so, the Aristotelian and Stoic) infused with newer Islamic epistemes, followed by parallel development (as directed by variant normative vs. speculative agendas), and accompanied at every stage by a mutual cross-germination. The evidence provided by dialectical sequences in the *Umm* however, demonstrates that one thing is certain: a distinctly *juridical* dialectic had already acquired a high level of sophistication by al-Shāfiʿi’s day.

Finally, Hallaq summarizes the advent and subsequent history of full-system *jadāl* theory, thus:

¹⁰⁶ Ibid., 136.

“By the middle of the fourth/tenth century, entire treatises on juridical dialectic appear to have come into existence, and the name of al-Qaffāl al-Shāshī is associated with the first composition on ‘good dialectic.’ Writings on the subject grew steadily, culminating in such imposing and recondite contributions as Juwaynī’s *al-Kāfiya fī al-Jadal*. Beginning with the fifth/eleventh century, dialectic as a method of argumentation was incorporated into works of legal theory, a practice that became increasingly popular in the following centuries.”¹⁰⁷

In his “Treatise,” Hallaq lists a number of references for the earliest work in juridical dialectic;¹⁰⁸ importantly, he cites al-Shīrāzī’s claim (in the *Ṭabaqāt al-Fuqahā*)¹⁰⁹ that Abū Bakr Muḥammad b. ‘Alī b. Ismā‘īl al-Qaffāl al-Shāshī (d.336, a student of Ibn Surayj) was the first among *fuqahā* to compose a work on *al-jadal al-ḥasan*. We note also that, according to al-Shīrāzī, he composed a *kitāb* on *uṣūl al-fiqh*, a *sharḥ* on the *Risāla*, and that he is credited with spreading the *fiqh* of al-Shāfi‘ī in Transoxiana.¹¹⁰

Larry Miller

In briefest summation, Miller constructs a four-century trajectory for the evolution of *jadal* to *ādāb al-baḥth* along the following stages: 1) the Q&A objection dialectic of the theologians (and discussions of theoretical implications); 2) the juristic take over of *jadal*, the development of good vs. bad *jadal*, and the reformulation of old teachings with logic; and 3) the *ādāb al-baḥth* as a final stage and synthesis of all that came before.¹¹¹ Thus his narrative is one in which juridical *jadal* blossomed from theological *jadal*, took root and became an essential part of jurisprudence. He treats the evolution of juridical *jadal* in three periods: 1) earliest works; 2) a century later when logic is first applied; and 3) a final period before the transition from the strictly legal to the universal dialectic of al-Samarqandī.¹¹² Of course, this trajectory — certainly the earlier stages — is problematic not only in light of what we see in the *Umm*, but by what we see of juridical *jadal* in the *Mu‘tamad* — and especially the *K. al-Qiyās al-Shar‘ī* — of al-Baṣrī.¹¹³

¹⁰⁷ Ibid.

¹⁰⁸ 198, n.6.

¹⁰⁹ Page 120 of the Khalīl al-Mays ed.

¹¹⁰ These other contributions are noted by Hallaq elsewhere.

¹¹¹ Miller, *Disputation Theory*, 1-4.

¹¹² Ibid., 87-8.

¹¹³ Miller considers the earliest “direct source” to be the *Ma‘ūna* of al-Shīrāzī, who died forty years after al-Baṣrī (ibid., 88). He also suggests that a “long and close association between

Intriguingly, Miller also speaks of two genres — appearing in the 4th/10th c. — resulting from “the incursion of *jadāl* in jurisprudence.” He mentions 1) “works with the *jadāl* method devoted to *uṣūl al-fiqh*” (and which “usually had the word *jadāl* somewhere in their title”); and 2) “works devoted to the *furū*” (which “were generally called *ṭarīqa*”).¹¹⁴ Due to the obvious parallel here with the two “functions” (prescriptive vs. descriptive) of *uṣūl al-fiqh*, and the variant-objective Shāfiʿī/Mutakallimūn vs. Ḥanafī/Fuqahāʾ *ṭarīqas* (as described by Ibn Khaldūn and others), it is unfortunate that Miller lists no titles for his two genres, nor even the source of his knowledge of them. Certainly, Ibn Khaldūn mentions two juridical-*jadāl* *ṭarīqas*, but describes them thus: 1) that of the first to write on the subject, al-ʿAmīdī (in his *Irshād*), which is “general, for any indicant (*dalīl*) which may provide indicant, as pertains to any science (*ilm*) which may be”; and 2) that of al-Bazdawī, which is “specifically according to God’s legal indicants (*al-adilla al-sharʿiyya*).”¹¹⁵

Miller’s “Early Period” of Juridical Dialectic

Although we will examine Miller’s discussion of this (relatively) early stage in full-system juridical *jadāl* theory in much more detail in the following chapter (for the *jadāl*-theory texts he references include the very same from which our analytical lens will be fashioned), we will here take a brief look at his narrative concerns. The theorists whom Miller consults consist of the following: 1) Abū Ishāq Ibrāhīm al-Shīrāzī [Shāfiʿī, d.476/1083]; 2) Abū al-Walīd al-Bājī [Mālikī, student of Shīrāzī, d.474/1081]; 3) Abū al-Wafāʾ b. ʿAqīl [Ḥanbalī, student of Shīrāzī, d.513/1119]; and 4) Imām al-Ḥaramayn al-Juwaynī [Shāfiʿī, d.478/1085].¹¹⁶ Importantly, Miller notes that both al-Bājī and Ibn ʿAqīl were students of al-Shīrāzī, and he refers to the *Kāfiya* of al-Juwaynī as “the final work we have for this period.” He also laments that al-Shīrāzī’s *Mulakhkhaṣ fiʾl-Jadal* remained

theology and jurisprudence from the very beginning of Islamic thought” should make the jurists’ take over of *jadāl* from the theologians seem unsurprising (*Disputation Theory*, 87).

¹¹⁴ Unfortunately, he does not provide a list of titles for each genre, and proceeds only by noting that his focus will be upon “works written on juristic *jadāl*,” according to his tripartite periodization (*ibid.*)

¹¹⁵ *Muqaddima*, Shaḥāda ed., 579 [trans. is mine]; Rosenthal transl., vi.13, 33-4.

¹¹⁶ Note that Miller does not include al-Baṣrī’s (d.436) *K. al-Qiyās al-Sharʿī*, nor make reference to *jadāl*-oriented discussions in his *Muʿtamad*, nor in the *uṣūl* work of al-Jaṣṣāṣ (d.370). As for his focal sources, the earliest he cites is the Princeton MS of al-Shīrāzī’s *Maʿūna*. We may note that he depends upon ʿAbd al-Majīd Turkī’s 1978 ed. of al-Bājī’s *Minhāj fi Tartīb al-Ḥijāj*; G. Makdisi’s publication of Ibn ʿAqīl’s *K. al-Jadal ʿalā Ṭarīqat al-Fuqahāʾ* in the 1967 *Bulletin d’Études Orientales*; and the 1978/9 Ḥusayn Maḥmūd ed. of al-Juwaynī’s *Kāfiya fiʾl-Jadal* (*Disputation Theory*, 88-9, and nn.1-3).

unavailable to him.¹¹⁷ With regard to Ibn ‘Aqīl, Miller finds that he is most dependent upon al-Shīrāzī, with al-Bājī less so, as the latter “will occasionally profess a different opinion or explicitly criticize al-Shīrāzī.” As for al-Juwaynī, however, Miller states that he “comes from the Islamic east, and from an apparently different tradition.” Moreover, he opines that, although al-Juwaynī “often refers in his work to al-Ustādh Abū Ishāq” (which *kunya* belongs to al-Shīrāzī), he is “referring most probably to the Ash‘arite theologian al-Isfarā’inī (d.1027).”¹¹⁸

Finally, Miller observes that al-Juwaynī, al-Bājī, and Ibn ‘Aqīl all cite other *jadāl*-authors, from both theological and juridical realms. He adds that this should not surprise us, as “our authors were writing a good century after b. al-Rīwandī’s opus on *jadāl* and about a half century after the first attempts at making *jadāl* a part of jurisprudence were carried out, if we can believe our sources, by the likes of b. al-Surayj, A. ‘Alī al-Ṭabarī, and others.”¹¹⁹ Of course, our thrust in this dissertation is to show that such a narrative would hold, if at all, only to the production of *jadāl*-theory *treatises* — as for the *practice and teaching* of juridical-*jadāl*, it goes back to the very dawn of the jurisprudential enterprise, and certainly at least to the first half of the second century H. Again, we will revisit Miller’s remarks with regard to the composition of his “early

¹¹⁷ Ibid., 88-9, and n.4. Fortunately for our project, we may note that ‘Alī b. ‘Abd al-‘Azīz al-‘Umayrīnī had access to this MS, and made many references to it in his edition of the *Ma‘ūna* (published three years after Miller’s dissertation).

¹¹⁸ Miller, *Disputation Theory*, 89. Why this is so is difficult to fathom, due to the many factors which tie al-Shīrāzī not only to the east and its traditions, but to the person of al-Juwaynī himself. From al-Subkī’s *Ṭabaqāt* (and E. Chaumont’s rendering of much of its detail in his *El*² article on al-Shīrāzī), we learn: 1) that Abū Ishāq al-Fīrūzābādī al-Shīrāzī (note the *nisbas*) studied with Shāfi‘īs in Fīrūzābād and Shīrāz, as well as in Baṣra and Baghdād (where his teachers also bear many an eastern *nisba*); 2) the Nizāmiyya *madrassa* in Baghdād — where he was to teach for nearly twenty years — was constructed in his honour; and 3) late in life he journeyed to Nīshāpūr and met al-Juwaynī (there directing the *madrassa* also built in his honour by Nizām al-Mulk), “with whom he conducted several sessions of judicial controversy (the text of these *disputatio*s is preserved in al-Subkī [*Ṭabaqāt*])” (Chaumont, “al-Shīrāzī,” *El*²). Whatever the case of the inter-relationships of Miller’s authors for the “early period” (with al-Bājī and Ibn ‘Aqīl as al-Shīrāzī’s students, and al-Juwaynī as his colleague) I believe we may safely consider each of their extant works — however distinct as regards specific conclusions and their combinations — as emanating from a larger body of *jadāl*-theory discourse whose “hotspots” were in Iraq, Persia, and Khurāsān, and which was eventually to be disseminated through Nizām al-Mulk’s *madrassa* system (by teachers such as al-Shīrāzī and al-Juwaynī, who were trained in those “hotspots”).

¹¹⁹ *Disputation Theory*, 89-90, and nn. 5-6. Importantly, we should point out that Ibn al-Rāwandī may have been either a contemporary of Ibn Surayj, or even of his students. The gap in *jadāl*-theory compositions which Miller here attempts to establish is by no means certain; nor is it certain that a priority would belong to Ibn al-Rāwandī in anything other than the *composition* of a treatise. The century preceding Ibn Surayj — himself a master dialectician — is replete with master jurist-dialecticians, stretching all the way back to al-Shāfi‘ī’s time (himself included among them, as we shall have good opportunity to see), and before.

period” treatises, but for now we will proceed to his narrative concerns for the subsequent period.

Miller’s “Middle Period” of Juridical Dialectic¹²⁰

Opening his exposition on the “middle period” of juristic *jadāl* by turning to Ibn Khaldūn’s (d.808/1406) account in the *Muqaddima* (as he claims later bio-bibliographical authors did), Miller presents the great historian’s observation “that in his time there were two important methods (*ṭarīqa*) one of Abū Yusr Muḥammad al-Pazdawī [Ḥanafī, d.482/1089] and another of Rukn al-Dīn al-‘Amīdī [Ḥanafī, d.615/1218].” Miller goes on to claim: “The ‘method’ of al-Pazdawī has not been preserved; but that of al-‘Amīdī has.”¹²¹ He then continues his review of “middle period” *jadāl* works by noting: “there exist other ‘methods’ from an earlier period [i.e., prior to al-‘Amīdī], one of al-Marwazī [Shāfi‘ī, d.461/1069],¹²² and another of Raḍī al-Dīn al-Sarakhsī [Ḥanafī, d.544/1149].”¹²³ Miller then proceeds to compare these three methods.¹²⁴

As for the former, al-Marwazī, he is indeed “from an earlier period.” In fact, one is left to wonder why his work is not considered with that of his “early period” contemporaries — for al-Marwazī predeceases al-Bājī by 13 years, al-Shīrāzī by 15, al-Juwaynī by 17, and Ibn ‘Aqīl by 52. This fact is of no small consequence, for it pushes back a parallel literary tradition of juridical *jadāl* (which is quite different from that of al-Shīrāzī, et al.) so that at least two simultaneous literary traditions are apparent by the first half of the fifth century H.¹²⁵ Miller’s linear periodizations are developing problems again, and he appears not to have moved to a new “period” so much as shifted to a parallel juridical-dialectical genre.

Miller is certainly aware that these works are different, however, and opens his comparison of the *ṭarīqa* MSS of al-Marwazī, al-Sarakhsī/Nisabūrī, and al-‘Amīdī with: “If we examine these three ‘methods’ as members of a genre of juristic literature, we find several shared characteristics in form and style.” In brief: 1) each work’s arguments support the author’s *madhhab* against another; 2) the familiar dialectical

¹²⁰ I will not pursue a discussion of Miller’s dissertation past this period, as the subject matter is chronologically too far-removed beyond our primary concerns.

¹²¹ *Disputation Theory*, 143. We are fortunate in that al-Bazdawī’s *Kitāb fīhi Ma‘rifat al-Hujaj al-Shar‘iyya* did, in fact, survive, and has been recently edited (2003) by Marie Bernand and Eric Chaumont.

¹²² In a footnote, Miller identifies him as al-Ḥasan b. Shu‘ayb.

¹²³ Confusingly identified in footnote and bibliography as Raḍī al-Dīn al-Nisabūrī.

¹²⁴ *Disputation Theory*, 143-8.

¹²⁵ We should note that al-Bazdawī, too, was a contemporary of al-Bājī, al-Shīrāzī, and al-Juwaynī.

arguments are employed, “but their theoretical foundations are ignored;” 3) they are more practice than theory oriented; 4) their contents are arranged by substantive legal category, beginning with *ṭahāra*, etc.; and 5) “there is a uniformity of method employed” in the three works.¹²⁶

Along with these observations, we ought also to consider the full titles of Miller’s MSS, which are, in chronological order of author’s death-date: al-Marwazī’s *Ṭarīqat al-Khilāf bayn al-Shāfi’iyya wa’l-Ḥanafīyya ma’a Dhikr al-Adilla li-kull minhumā*,” al-Sarakhsī/Nisabūrī’s “*al-Ṭarīqa al-Raḍawiyya*,” and al-‘Amīdī’s “*al-Ṭarīqa al-‘Amīdiyya fi’l-Khilāf wa’l-Jadal*.”¹²⁷ We can see that not only is *ṭarīqa* the primary element for all three, but that two also incorporate the term *khilāf*. It should also not be ignored that all but one of the *ṭarīqa* authors Miller has mentioned so far for his “middle period” — including Abū al-Yusr al-Pazdawī — are Ḥanafīs (al-Marwazī being the sole exception), whereas not a single one of his “early period” authors belonged to that doctrinal *madhhab*. In short, this does not appear to be an issue so much of developmental stages, as of subgenres within a larger genre (or subprojects within a larger argumentation episteme of juridical *jadal*).

Moving on, Miller continues to compare each of his three *ṭarīqa* MSS, and we may summarize his conclusions thus: 1) “al-Raḍī’s method is somewhat different [from al-Marwazī’s]”; 2) “al-‘Amīdī’s method is similar to al-Raḍī’s in form and style”; 3) for all three texts: “the basic method is to state the problem, the evidence, the objections and their solutions.”¹²⁸ Of considerable interest is that, in detailing Raḍī al-Dīn al-Sarakhsī/Nisabūrī’s presentation-style step by step, Miller explains the third and fourth steps thus: “3. He lists the opponent’s objections in kalām-style” and “4. He then responds to the objections in kalām-style.” For each of these, Miller supplies the corresponding formulae: (3) *ammā qawluhu... qulnā lā nusallim*, and *la’in sallamnā... wa lākin lima qultum...*;¹²⁹ (4): *mā dhakartum min al-dalīl wa in dalla ‘alā... wa lākin hāhunā dalīl ākhar yadullu ‘alā al-musāwa baynahumā....*¹³⁰ This formulaic method is striking indeed, for it is nothing less than a literary abstraction and abridgment of a sequence from juridical disputation, and for didactic purposes — rather in consonance to what we find throughout the *Umm*. In fact, we might suggest that what Miller calls “kalām-style” is in

¹²⁶ *Disputation Theory*, 143-4.

¹²⁷ *Ibid.*, 143 nn.147-8; 145 n.153.

¹²⁸ *Disputation Theory*, 143-6.

¹²⁹ *Ibid.*, 145 n.151.

¹³⁰ *Ibid.*, 145 n.152; noting: “This is an example of *mu‘araḍa* in its classic formulation.”

fact one and the same with the dialectical style of the *Umm*, although obviously structured more to the dictates of a later system of juridical *jadal*.¹³¹

Having thus compared the three *ṭarīqa* MSS and their commonality of method, Miller returns once again to the question of a developmental narrative for juridical dialectic. He begins by stating his problem with George Makdisi's narrative, saying:

“This is the method that Makdisi discovered in the *Wāḍiḥ* of b. ‘Aqīl and that he claimed derived from (juristic) sources prior to al-Qirqisānī [citing Makdisi's “Scholastic Method,” 650; and his *Rise of Colleges*, 117ff.] This was a method which he said b. ‘Aqīl applied ‘to any field’ of investigation. His argument is implausible on several counts.”

We may summarize Miller's argument thus: 1) juridical *jadal* is indeed “indebted” to older *khilāf* works, but “we have shown that this earlier literature was not dialectical in character;” 2) the first works of juridical dialectic were written “a good generation or two after al-Qirqisānī and long after b. al-Rīwandī's heyday;” 3) the development by jurists’ “praise-worthy” vs. “blameworthy” dialectic “is another sign of the transfer of dialectics from the controversy-steeped books of the theologians;” 4) the continued attempts by jurists to order objections “is a continuation of the dialectical tradition first found in b. al-Rīwandī's book;” 5) terminology provides “indication of the ‘theological’ origins of juristic dialectic” — the first “question” for both theological and juridical *jadal* is about the *madhhab*, “But in jurisprudence, the term *madhhab* usually has the meaning of ‘school of law’”; 6) Makdisi [“Scholastic Method,” 653] says “...a *su’āl* is not a question, it is an objection...,” but (Miller responds) for theologians, philosophers, and jurists, “*jadal* was question and answer,” and “the objections were understood primarily as questions, and secondarily as objections” (supported with further discussion re: al-Bājī); and 7) “In the face of such evidence, Makdisi's position is no longer tenable.”¹³²

Of course, Miller's argument against Makdisi rests upon a number of premises which my own research undermines, and I would respond to each of the above points in order of appearance, as follows: 1) the *ikhṭilāf* treatises in al-Shāfi'ī's *Umm* — indeed the entirety of the *Umm* itself — are more than eloquent in proving incorrect this claim that “earlier literature was not dialectical in character;” 2) Ibn al-Rāwandī was either a contemporary of Ibn Surayj or of his students, al-Qirqisānī was a contemporary of his students, and it is a student of Ibn Surayj credited with writing the first work of

¹³¹ Miller does not note this “*kalām*-style” of al-Marwazī's *ṭarīqa*, but, as we have seen, he observes that al-‘Amīdī is similar to Raḍī al-Dīn al-Sarakhsī/Nisabūrī “in form and style.”

¹³² Miller, *Disputation Theory*, 146-8.

juridical *jadāl*; 3) the notion of “praiseworthy” vs. “blameworthy” dialectic may easily be discerned in Aristotle’s *Topics* and *Sophistical Elenchi*, and did not require a juridical response to “theological” *jadāl* for conception — moreover, if it did, juridical *jadāl* might better be described as a “reaction against” rather than a “take over from” theologically-themed *jadāl*; 4) the attempts by theologians and jurists alike to develop a strict *tartīb* for questions and objections was driven by the common principle that Q cannot retract something he has conceded to, and so must take special care in the dissection of R’s argument step-by-step, without jumping ahead and mistakenly conceding to something he later finds problematic; 5) that both theologically and juridically themed *jadāl* open with the question about the *madhhab* proves nothing in the way of chronological considerations — moreover, *madhhab* bore no less than four common meanings in the juridical literature of the time,¹³³ including the *mujtahid*’s *madhhab*-opinion;¹³⁴ and 6) Miller’s difference with Makdisi over the conception of *su’āl* is one of semantics, and has no bearing on the question of chronological development.

In sum, I would maintain that Miller has provided nothing which undermines Makdisi’s claim that both al-Qirḡisānī and Ibn ‘Aqīl drew from a common, older source tradition. Again, the *Umm* alone is evidence enough that the practice and teaching of juridical dialectic far predates the specialized *jadāl*-theory treatises in either the theological or juridical domains. Being that this narrative is of some importance to our current project, however, I would pursue the argument further.¹³⁵

To begin with, it is evident from the start that the terminology of *jadāl* employed by al-Maqdisī and Ibn Fūrak (as detailed by Miller in his chapter on theological *jadāl*) is the same as that employed later by al-Shīrāzī in his *Ma’ūna* (*istidlāl, dalīl, bayyina, taṣḥīḥ al-‘illa, al-sabab al-mūjib, ma’ānī, ḥukm muqtaḍā*, etc.) This fact appears at first to support Miller’s evolutionary trajectory. However, having first described his “early [juridical] period” authors’ works as “the earliest preserved books” (p.87) and “our first direct sources for *jadāl* in the *uṣūl al-fiqh*” (with al-Shīrāzī’s *Ma’ūna* as the earliest), he observes much later, in a footnote (146, n.155), that “the first book on purely juristic *jadāl* was written by al-Qaffāl al-Shāshī (d.976) student of Abū l-‘Abbās

¹³³ See Hallaq, *Sharī’a*, 61ff.

¹³⁴ We would also note that Miller’s reference to *madhhab* as “school of law” is counter-productive to his argument; for if he is implying that the first question of juridical *jadāl* was “Are you a Ḥanafī?” he has argued a difference, not a commonality, with “theological” *jadāl*.

¹³⁵ The contended statements are those of *Disputation Theory*, 146 and nn. 154-5.

b. Suraij (d.336/9 [sic]).”¹³⁶ This he notes in the context of his rebuttal to Makdisi’s thesis that Ibn ‘Aqīl drew on sources older than al-Qirqisānī, as we have outlined above.

Unfortunately, Miller then errs on two important counts (p.146): 1) he repeats an earlier error re: early *ikhtilāf* works, saying this time: “we have shown that this earlier literature was not dialectical in character” (whereas earlier he had merely assumed such to be the case based on his reading of al-Ṭabarī’s *Ikhtilāf al-Fuqahā*); and 2) he claims (referencing al-Qaffāl al-Shāshī) that the first juristic *jadāl* works “were written at the end of the tenth century—a good generation or two after al-Qirqisānī and long after b. al-Rīwandī’s heyday.” This second statement, like the first, is patently false. First of all, all sources I have encountered place Ibn Surayj’s death at 306/918 (not 336), and all acknowledge he was a master dialectician. Secondly, van Ess estimates the death of Ibn al-Rāwandī as 298/910, but nothing is known with certainty about either his birth or death dates;¹³⁷ the latter has been placed as late as the middle or end of the 4th/10th c.¹³⁸ This would mean he was either a contemporary of Ibn Surayj, or of his students, or of both. What is not disputed, however, is that the first juridical-*jadāl* authors (and *uṣūl al-fiqh* authors) were the students of Ibn Surayj, the master dialectician, and themselves master dialecticians.

All of this points to the presence of a juridical-dialectical practice and teaching which either predates or is contemporary to Ibn al-Rāwandī (and certainly does the same for al-Qirqisānī, who died after 325/937). When combined with the plainly-writ juridical-dialectical practice of al-Shāfi‘ī, his contemporaries, and his predecessors evident in the *Umm*, there is every reason to discard Miller’s early trajectory for both theological and juridical *jadāl* practice and literature. Moreover, the “take over” paradigm (jurists from theologians) no longer has a leg to stand on; by far the more realistic stance in light of the evidence is to suggest that *jadāl* practice and teaching developed in numerous streams, side-by-side, with juridical and theological themes, driven by variant normative and speculative agendas, sometimes through the teachings of master dialecticians who were both jurist and theologian, with perhaps regional variants, and in full flow by the time of al-Shāfi‘ī. And to be certain, *jadāl* was employed differently, and evolved differently, in different projects — theological, philosophical, juridical. And its practice in different projects forged different sciences (e.g., *kalām* vs. *uṣūl al-fiqh*). And, all along the way, different *firaq* and *madhāhib* crystallized as their

¹³⁶ Citing al-Shīrāzī’s *Ṭabaqāt*, and Makdisi’s *Colleges*, 108, 147.

¹³⁷ In the *Encyclopaedia Iranica*, s.v. “Ebn Rāwandī.”

¹³⁸ See the entry “Ibn al-Rāwandī or al-Rēwendī” in the *Et*.

variant first principles were hammered out in disputation, with divergent bodies of doctrine branching off from contested starting points.

A Note re: Our Postponement of Evolutionary Narratives for *Uṣūl al-Fiqh*

As mentioned earlier, we will take the unorthodox step of postponing a review of *uṣūl al-fiqh* narratives until our concluding chapter. The reason is simple: our objective in this dissertation is not to supplant current paradigms of *uṣūl al-fiqh* development; rather, it is to supply a vitally important dynamic which is entirely missing, or at best only vaguely alluded to, in current narratives.¹³⁹ Before integrating our model of these dynamics, which I have opted to call the Dialectical Forge, we must first proceed through the explorations, analyses, and consequent hypotheses of chapters II-IV.1. Only then can we, in our concluding chapter, adequately demonstrate the manner by which this model integrates — on the whole with nothing more than minor conflicts — into more comprehensive, current narratives for the evolution of Islamic Legal Theory.

The *Kitāb al-Umm*, Our Jurist Dialecticians, and the Truth-Seeking Ethic

For the most part, we will let our subject-text — only one treatise of many in that treasure-trove of proto-system argument known as the *Kitāb al-Umm* — speak for itself when it comes to dialectical style and sophistication.¹⁴⁰ I am certainly not the first to notice the abundance and refinement of the *Umm*'s collective dialectic, however, and will here present a number of observations made by the editor (and Syrian Muftī) — Dr. Aḥmad Badr al-Dīn Ḥassūn — upon whose edition of the *Umm* I have most relied. By way of saving space, I have collected a number of paraphrases and quotes in the following table:

¹³⁹ Note that Hallaq is exceptional in having long recognized — and described — a particularly important relationship between juridical *jadāl* and the premises of *uṣūl al-fiqh*. Nor have certain other authors missed a more general relationship between the *ʿulūm of jadāl* and *uṣūl al-fiqh* (mainly Heinrichs, Makdisi, and Turkī). Notably, all of these are editors of *jadāl* works (Hallaq, of course a translator). What is important, and what I hope this dissertation contributes a real understanding of, is the *formative* role of dialectic with regard to the evolution of *uṣūl al-fiqh*. To this dynamic belong half of the components of “Unified Dialectical Forge theory,” the other half belongs to the formative role of dialectical disputation in the evolution of *jadāl*-theory itself. Together, these are the elements missing from current narratives for the evolution of both systems: the *formative dynamic of dialectic*, the dialectical forge.

¹⁴⁰ Among other important works (such as Joseph Lowry's *Early Islamic Legal Theory: the Risāla of Muḥammad ibn Idrīs al-Shāfiʿī*), significant insights into al-Shāfiʿī's legal theory and method, not to mention his life, his works, and his comportment as a jurist, may be gained from Mohyiddin Yahia's *Šāfiʿī et les deux sources de la loi islamique* (his dissertation, published by Brepols in 2009).

- The *Umm* is one of a kind; singular in its era and what came after; Ḥassūn extols its virtues, among them:
 - “potent dialectic (*munāẓara qawīyya*), he [al-Shāfiʿī] does not merely present the *problēma* (*masʿala*), but, much more, he encompasses it in a solid enclosure of transmitted and rational indicants (*adilla al-naqliyya waʿl-aqliyya*), and deep research, and constructive criticism (*al-naqd al-bannāʾ*), and a sound drawing of conclusions”¹⁴¹
- “And the *K. al-Umm* is dominated by debate (*ḥiwār*); ‘He said such-and-such, so I said: Have you considered (*araʿayta*) if such-and-such is claimed? And if a speaker says such-and-such, I would respond to him with such-and-such. One of them said such-and-such to me, so I said to him...’; this sort of thing, which predominates in *jadāl*, and *munāẓara*, and *ḥiwār*; and how frequently it [the *Umm*] presents opposing opinions, and notes their arguments/proofs (*ḥujja*), then refutes them with its *ḥujja*, while it disposes one towards the determination of general legal principles (*qawāʾid*), and their elaboration/derivation, and their attestation.”¹⁴²
- “And in the *Umm*, the power of al-Imām al-Shāfiʿī in *jadāl* is made manifest, for the style of the book – almost all of it – is a dialectical (*jadālī*) style, to the extent that he even postulates [the position of] a dialectical opponent debating him, and then rebuts him, then he brings a counter-argument (*yaʿtarīdu*), and responds; “and if one should profess such and such we rebut him with such and such” (*fa-in qāla qāʾil kadhā raddadnā ʿalayhi kadhā*); “He said: the two parties to a contract of commutation (*mutabāyʿān*) have option (*khiyār*) re: what they did not verbally apportion; I said: That which you’ve opined (*dhahabta ilayhi*) is absurd (*muḥāl*), not permitted on the tongue. He said: And what is its absurdity (*iḥāla*), and how does the tongue not tolerate it? I said: etc.” And thus he proceeds in many subjects in this style of debate, which was influenced by the method (*namaṭ*) of the Iraqis, and their argumentation (*ḥijāj*), and their invariable use of *araʿayta*.”¹⁴³
- Ḥassūn reminds us that al-Shāfiʿī was a student and proponent of Mālik’s *madhhab* until his second coming to Iraq, where he benefited from the books of Muḥammad b. al-Ḥasan, et al., and that he benefited from “his knowledge of the method (*ṭarīqa*) of the Ahl al-ʿIrāq, since he opined re: their *ṭarīqa* and their procedure (*manhaj*) that no good would come from taking it up completely, nor in abandoning it completely, for they had *qiyās*, which is a valid (*ṣaḥīḥ*) *manhaj*, but – in his view – not absolutely. Rather, it must necessarily be back-ranked behind the valid Prophetic reports (*aḥādīth al-ṣaḥīḥa*), even such as are of singular transmission (*ḵabar aḥād*), and they [also] had a *ṭarīqa* of elaborating (*tafīr*) many *masāʾil* from their *uṣūl*, and the infinitesimal division (*taftīt*) of meanings/properties (*maʿānī*), and a *ṭarīqa* of their elaboration, and *al-jadāl*, and *al-istidlāl* by way of equity (*ʿadāla*) and public welfare considerations (*maṣlaḥa*), and rationalized juristic preference (*istiḥsān*), and the appending of like to like (*ilḥāq al-shabīḥ biʿl-shabīḥ*), and what there is among things

¹⁴¹ Ḥassūn, *Mawsūʿat al-Imām* (Intro.), i.83.

¹⁴² Ibid., i.84.

¹⁴³ Ibid., i.84-5. Re: *iḥāla* and *muḥāl*: The term *muḥāl* occurs some twenty-five times in the *Umm*, in the same sense as we see it here, and quite often in reference to an opponent’s *kalām*. Although we will leave it an open door, it is a worthwhile project to collate all occurrences of the term, compare their contexts, and determine the consistency of its use. Is it possible that *muḥāl* references a specific type of fallacy? Or is it simply the “absurdity” of the *reductio ad absurdum* which is to be avoided at all costs?

- so far as agreement (*muwāfaqāt*) and differences (*furūq*), and the ardent engaging in *munāzara*, and the composition of *hujaj* and *barāhīn* (proofs) and *adilla*.”¹⁴⁴
- Al-Shāfiʿī took the best of all this [Iraqi method], and added it to the Hijāzi wealth of 1) language and refinement (*adab*); 2) *ḥadīth*, the *ijmāʿ* of the *Ahl al-Madīna*, and the Hijāzī *ṭarīqa* of rational inference (*istinbāt*); this was all combined in his *madhhab*, and broadcast in Iraq, and it attracted some of his pupil-companions (*aṣḥāb*): al-Karābīsī (d.256) – who was a famed scholar in his own right in Iraq, and Abū Thawr al-Kalbī, who wrote on the *ikhtilāf* of al-Shāfiʿī and *Mālik*, leaning towards al-Shāfiʿī in his books, and al-Zaʿfarānī, who recited al-Shāfiʿī’s books before he came to Egypt.¹⁴⁵

Ḥassūn, of course, is not alone with regard to an unreserved praise of al-Shāfiʿī as master dialectician. Aḥmad Shākir, famed editor of the *Risāla*, suggests he had no equal “in the *fiqh* of the Kitāb and the Sunna, and the penetration of his analytical-insight (*naẓar*) with regard to them, and in the refinement of rational inference (*diqqat al-istinbāt*); with eloquence, perspicacity, a singular ability in the establishing of *hujja* and the silencing of his dialectical opponent (*ifḥām munāzirihī*); perfectly articulate, clear in explication (*bayān*), at the very apex of eloquence (*balāgha*).” Speaking of al-Shāfiʿī’s career in general, Shākir also gives us a sense of the dialectical milieu in which our proto-system jurists thrived:

“He was well-educated in the cultural refinement (*adab*) of the desert Bedouin; he took up the sciences (*al-ʿulūm al-maʿārif*) of civilized folk, until he towered above every scholar before and after him; he distinguished himself in the Hijāz, and was an authoritative source (*marjīʿ*) of transmission (*riwāya*) and *sunna* to its scholars, while they were authoritative masters (*asāṭīn*) of *ʿilm* with regard to the *fiqh* of the Qurʾān; but not many of them were folk of eloquence and *jadāl*, and they were close to being incapable of *munāzara* with the *Ahl al-Raʿy*. Then along came this youth, debating and defending, knowing how to establish his *hujja*, and how to enjoin upon the *Ahl al-Raʿy* the obligation of following the Sunna, and how to fix for them the *hujja* in a solitary report (*khabar al-wāḥid*), and how to set forth in detail for the people the methods of understanding the Kitāb by what he knew of the *bayān* of the Arabs and their fluency, and how to provide them indicants by the abrogator (*nāsikh*) and the abrogated (*mansūkh*) of the Kitāb and the Sunna, and by the integration of what appears contradictory between them, or in one of them, until the folk of Mecca named him the ‘Vindicator of Ḥadīth (*nāṣir al-ḥadīth*)’; and his reports (*akhbār*) spread via multiple, uninterrupted transmissions (*tawātarat*) to the scholars of Islam of his era, and they travelled to Mecca for the Ḥajj, debating him (*yunāzirūnahu*) and acquiring knowledge from him [even] in the lifetime of his *shaykhs*. This, to the point that even

¹⁴⁴ Ḥassūn, *Mawsūʿat al-Imām* (Intro.), i.85-6. Note well the major role Ḥassūn reserves for Muḥammad b. al-Ḥasan and Iraqi scholars as providing bases for the science of legal theory. If we consider al-Shāfiʿī as a systematizer, then it was the Meccan, Medinan, and Iraqi scholars who supplied the raw material for dialectic, epistemic-justification, etc. We will approach this question in more detail in chapter IV.2.

¹⁴⁵ *Ibid.*, i.86.

Aḥmad b. Ḥanbal once sat at his teaching-session (*jalasa... ma'ahu*), and one of his brothers came to him, scolding him for leaving the teaching-session (*majlis*) of Ibn 'Uyayna – the *shaykh* of al-Shāfi'ī – and attending the *majlis* of 'this Bedouin,' and Aḥmad said to him: 'Be silent! Verily, if a *ḥadīth* should escape you on the way up, you will find it on the way down. But if the rational-intellection (*'aql*) of this one eludes you, I fear you will never find it. I have seen no one more deeply understanding of the Book of God than this young man.'"¹⁴⁶

Of course, there are *manāqib*-works and *madhhab*-histories filled with praise for al-Shāfi'ī, and it is upon these that Ḥassūn draws when he speaks of his qualities, as in the following passage with regard to al-Shāfi'ī's career in Mecca and Baghdād:

“Al-Imām al-Shāfi'ī continued teaching the people the Sunna, and the *fiqh* of the Kitāb and Sunna, and he engaged those who differed from him in dialectic and disputed them, and most of them were among the followers of his *shaykh* Mālik b. Anas – zealots (*muta'aṣṣibīn*) of his *madhhab* – and al-Shāfi'ī dazzled them with his knowledge, his guidance, and his intellect. They saw a man the likes of whom the eye had never beheld, and they adhered to his teaching-session (*majlis*), acquiring from him the sciences of *Kitāb* and *ḥadīth*, and learning from him language, and genealogy, and poetry, and with some of his time he provided them the benefits of his medicine, then they learned from him the prescribed mannerisms (*adab*) of *jadal* and *munāẓara*, and he composed books in his hand, then they would read to him what they had copied down from them, or he would dictate to them some of them, and most of them turned back on what they had zealously adhered to, and learned *ijtihād* from him, and the rejection of *taqlīd*, and al-Shāfi'ī filled the strata of the earth with knowledge.”¹⁴⁷

We could go on quoting in this vein, but need not say more than we have — al-Shāfi'ī will speak for himself soon enough in Chapter III.

As for the other key jurists of the *Ikhtilāf al-'Irāqīyyīn*, we may say the same — their voices will be heard soon enough in the dialectic of our subject text. Pressed for space and eager to move on to further exposition and analysis, I can only direct the reader to the *El*² entries for Abū Ḥanīfa, Ibn Abī Laylā, Abū Yūsuf, Muḥammad b. al-Ḥasan, and al-Rabī. There one will find further evidence that these scholars, all of them, were masters of dialectic in their own right; and one will also find a listing of biographical and historical materials replete with accounts of prowess in *munāẓara* and

¹⁴⁶ Shākir's introduction to his edition of the *Risāla*, 5-6; also quoted in full in Ḥassūn, *Mawsū'at al-Imām* (Intro.), i.9-10.

¹⁴⁷ Ḥassūn, *Mawsū'at al-Imām* (Intro.), i.10. Of particular import to our project is the statement “they learned from him the *adab* of *jadal* and *munāẓara*.” This is more than effusive praise for a beloved master; our subject-text is filled with indicants pointing to the didactic intent of al-Shāfi'ī's dialectical sequences, as we shall soon see. The point here is that juridical dialectic was not only systematic to a considerable extent in al-Shāfi'ī's day, but it was also *transmitted* from teacher to student.

all manner of dialectical anecdotes. The main point here is simple: our proto-system jurists, all of them, were master dialecticians in their day.

And as for the authors of our fifth century lens-texts, the question hardly needs to be asked. Nevertheless, for biographical information about our *jadāl*-theorists (and master dialecticians) the reader is directed first to the introductions of the editions I have employed. All of our *jadāl*-theorists were engaged in the *ikhtilāf* of their day, and not only with regard to *mas'ala*-solutions in the substantive realm of *fiqh*. Also debated were the very premises of *uṣūl al-fiqh* (what we will call *uṣūl*-oriented *jadāl*), and the very procedural and argumentative premises of *jadāl*-theory itself (what we will call *jadāl*-oriented *jadāl*).¹⁴⁸ At any rate, the editors of the works we employ provide plentiful background on our theorists, and further may be found in the *El*² and the sources listed therein.

Needless to say, other important figures which will surface during the course of discussions (notably Ibn Surayj and his students) were master dialecticians as well. Thus, the most important *mujtahids* (the eponyms of *madhāhib*, their opponents, and their *aṣḥāb*), the most eminent contributors to *uṣūl al-fiqh* (Ibn Surayj and students, al-Jaṣṣāṣ, al-Baṣrī, et al.), and of course, our *jadāl*-theorists themselves, were all master dialecticians. Not surprisingly, the genres of *uṣūl* and *jadāl* appeared at the same time, and — in the case of al-Qaffāl al-Shāshī and others — by the same hands.¹⁴⁹ The key jurists in the evolution of Islamic legal theory and dialectic, from proto-system to full-system and beyond, were born into a dialectical world; they thrived in it, excelled in it, and through them the sophisticated legal sciences of Islam flourished.

Lest we be remiss, however, we must always bear in mind that our jurists also thrived in a world of tangible, pious morality. Despite the untoward events which are bound to — and did — occur in heated discussion, there was yet a permeating “truth-seeking” ethic which guided the often intense debates on juridical *masā'il*. In other words, whether or not individual jurists were always capable of toeing the line, there was an ideal of the “good” dialectic, and our subject-text is satiated with indicants that this ideal was honoured to an extent that would surprise many of us in the modern world. It is this “truth-seeking” ethic, in fact, which allows us to distinguish dialectic

¹⁴⁸ Importantly, as we shall soon see, these categories hold just as true for proto-system juridical *jadāl*.

¹⁴⁹ This, along with countless other indicants, supports Hallaq's observation that the genesis of both genres may be found in the circle of Ibn Surayj.

from sophistry in the first place. Hallaq, for example, has this to say about the truth-seeking role of juridical *jadāl*:¹⁵⁰

“In the Islamic context, juridical dialectic was viewed as an efficient means to reach the truth about a particular legal question. It constituted the final stage in the process of legal reasoning, a stage whereby two conflicting views on one question were set against each other through a disciplined session of argumentation with the purpose of establishing the truthfulness of one of them. In the tradition of Aristotle, Muslim scholars reckoned that success is achieved when one secures the agreement of his opponent on a view which one advocates. Minimizing differences of opinion on a particular legal question was of utmost importance, the implication being that truth is one, and for each case there is only one true solution. At least on the theoretical level—and presumably in practice—dialectic served to minimize legal pluralism in Islam.”¹⁵¹

In a sense, this represents yet another starting point for this dissertation, for our aim is simply to broaden the vision of dialectic’s role to include not only the ordered and truth-oriented resolution of variant juridical opinions, but the formation and refinement of the *‘ilm* itself — *uṣūl al-fiqh* — in arriving at and justifying those juridical opinions. Juridical dialectic, as is evident from the earliest recorded arguments and debates, is a contest of *ḥujja*; its points of contention and attack, inevitably, are concerns of epistemology, hermeneutics, and rational-inference.

In the context of truth-seeking dialectic, abiding by (*endoxa*) base premises and principles which the contestants cannot easily circumvent, it is easy to see how: 1) whichever opponent’s textual source-material is proven to be of higher epistemic value, it must win out in the end; 2) whichever opponent’s interpretation of source-material is proven to be most probably accurate, it must win out in the end; and 3) whichever opponent’s rational-inference making from source to case-at-hand is proven most probably accurate, it must win out in the end. And as for the concerns of legal

¹⁵⁰ “Treatise,” 198; citing al-Juwaynī’s *Kāfiya*; and Evans, *Aristotle’s Concept of Dialectic*.

¹⁵¹ Hallaq (“Treatise,” 199) also explains the role of dialectic in curbing *ikhtilāf*, highlighting certain important moral imperatives:

“Dialectic was instrumental in narrowing down the volume of *ẓannī* legal judgments, and consequently responsible for enlarging the base of consensus. Normally, two compatible jurists who represent their school in a certain geographical area would meet with the intent of convincing one another of the validity of their opinion on a *ẓannī* case of law. Should one of the disputants be successful in establishing that his adversary’s legal reasoning is erroneous with regard to the disputed case and should he also persuade him that his own reasoning and conclusion are sound, the adversary is morally, if not legally, bound to abandon his views on that case and adopt those of the other. Once this is done, the number of legal opinions on that case is minimized, and it may be that the disputation is pursued until there remains only one *qatʿī* and irrevocable legal opinion.”

epistemology, hermeneutics, and rational-inference making? These are nothing less than the primary domains of *uṣūl al-fiqh* — no matter the *uṣūl*-tradition or doctrinal affiliation of the disputant-jurist; it is dialectical disputation which provided the intense focus and heat required to forge elaborations and refinements in these domains.¹⁵² Finally, as a further note on the real, truth-seeking motivation inherent to juridical dialectic, we should mark well the following observation of Hallaq's, which not only underscores a patent concern for mutual arrival at a (singular) truth on a given *mas'ala*, but that such a concern is as *pietistic* as it is philosophical:

“The religious implication of reaching a single legal judgment, which through the process of elimination proves to be the ‘truest’ judgment, is highly significant; it not only confirms that the Muslim community has come closest to the law decreed by God, but also that the much sought after certainty and consistency in law have been achieved.”¹⁵³

As indicated earlier, our proto-system jurists, too, thrived in an intellectual milieu heavily marked by such pious and moral imperatives. Indicants are everywhere to be found — not the least of which, with regard to al-Shāfi'ī specifically, is the very fact that an “Old” and “New” Doctrine exist in the first place. Al-Shāfi'ī, in other words, did not spend his career doggedly insisting upon his older opinions in the face of superior *ḥujja*.¹⁵⁴ Ḥassūn notes, with regard to the *mas'ala* of one who sleeps during prayer: “Thus we observe the evolution (*taṭawwur*) of the *ra'y* of al-Imām al-Shāfi'ī, may God be pleased with him, in this *mas'ala*, for he wasn't long in developing it and meticulously refining it before he arrived at the best of it, in his ‘new’ (*jadīd*) *madhhab*.”¹⁵⁵

An even better illustration arises with regard to the *mas'ala* of *wuḍū'* after eating the meat of the slaughter camel (*laḥm al-jazūr*). Ḥassūn notes that al-Shāfi'ī's opinion *before* the “old” (*qadīm*) doctrine mirrored that of Mālik, Abū Ḥanīfa, et al. Then he changed it in his *qadīm*-doctrine; and then, in Egypt, reverted to what he held before

¹⁵² As we shall see, Hallaq (“Treatise,” 199-200) was far from unaware of the critical relationship between dialectic and *uṣūl al-fiqh*, and in many ways presaged the larger conclusions of this dissertation. This dissertation, in fact, may be considered, in part, both an illustration, and extension, of Hallaq's views on juridical dialectic as expressed in his introduction and translation of al-Baṣrī's *K. al-Qiyās al-Shar'ī*. Moreover, it is hoped we will adequately demonstrate that this dynamic relationship was just as alive in proto-system disputation as it was in al-Baṣrī's day and after.

¹⁵³ “Treatise,” 199.

¹⁵⁴ Ḥassūn also stresses that al-Shāfi'ī would not solidly commit to any opinion unless the *thubūt* of its source had been realized; he reminds us once again of al-Shāfi'ī's zeal for *al-masā'il al-tashrī'iyya*, and, as a consequence, many unresolved *masā'il* were left to his followers to investigate more deeply (*Mawsū'at al-Imām* (Intro.), i.168).

¹⁵⁵ Ḥassūn, *Mawsū'at al-Imām* (Intro.), i.181.

the *qadīm* — so his *jadīd* position actually reflects his pre-*qadīm* position, all due to his continual (and conscientious) assessment of the strength of supporting *ḥadīth*. What, asks Ḥassūn, could have motivated al-Shāfiʿī to take what looks like a step backward? He hypothesizes that perhaps “it occurred to him that what he opined (*dhahaba ilayhi*) before his *qadīm madhhab* was more in synch from the perspective of practicability, and more in step with the political exigencies (*siyāsa*) of law-making (*tashrīʿ*) and the binding spirit of the *Sharʿa*....” Ḥassūn also mentions avoidance of undo hardship (*ḥaraj*) as a factor;¹⁵⁶ and speaks of the practice of the *Ṣaḥāba*, especially the Rāshidūn, since:

“the actions of the *Ṣaḥāba* and their doctrines (*aqwāl*), and especially the Khulafāʾ al-Rāshidūn, were considered by al-Shāfiʿī as among the preponderating proofs (*muraḥijihāt*);”¹⁵⁷ and it is likely that one of the *ḥadīths* was abrogator (*nāsikh*), the other abrogated (*mansūkh*) — all of this served as basis for the decision of al-Shāfiʿī to revert, in his *jadīd* doctrine, to his pre-*qadīm* doctrine.”¹⁵⁸

Of course, with regard to the jurists of our subject-text, al-Shāfiʿī is not alone in exhibiting this “follow the *ḥujja*,” truth-seeking ethic. By way of driving the point home, I will produce a number of indicants from our subject-text, even before we turn to our analyses in Chapter III (where many another indicant will be made plain). To be certain, we may mark the following as indicants for the “good” dialectic:

- in §464, Abū Yūsuf reports Abū Ḥanīfa’s retreat from an old opinion, and proposal of a new opinion (*thumma rajaʿa ʿan dhālika fa-qāla...*)¹⁵⁹
- the example of Abū Yūsuf throughout the entire treatise — sometimes adhering to Ibn Abī Laylā’s *qawl*, sometimes to Abū Ḥanīfa’s, and sometimes expressing his own, variant *ijtihādīc* solution — he is clearly “following the *ḥujja*,” not polemically defending a regional or “school” loyalty
- Abū Yūsuf adheres to Ibn Abī Laylā’s opinion in §1068, but supplies supporting *naql* and explanation (§§1069-70) for Abū Ḥanīfa’s position (§1067)

¹⁵⁶ *Mawsūʿat al-Imām* (Intro.), i.185-6.

¹⁵⁷ We will see that the *aqwāl* of the *Ṣaḥāba* are just as Ḥassūn describes them — for all the jurists in the *Ikhtilāf al-ʿIrāqīyyīn*. I have likened them in forthcoming discussions to glass weights, adding to the epistemic mass of a *dalīl*, and tipping the balance in favour of one solution over another.

¹⁵⁸ *Ibid.*, i.186. Ḥassūn notes that for some *masāʾil* there may be as many as five *aqwāl* of al-Shāfiʿī, and the later is to be considered a *nāsikh* of the earlier; if that can’t be determined, then one considers the one that al-Shāfiʿī himself seems to have preponderated; and if one can do neither (this only occurs with 15-16 *masāʾil* according to al-Nawawī), one must preponderate for oneself, “and here the *bāb* of *tarjīḥ* is opened before the *aṣḥāb*” (*Mawsūʿat al-Imām* (Intro.), i.190).

¹⁵⁹ Here, with regard to Abū Ḥanīfa’s ethic, we should make note of a particular contribution from Oussama Arabi; mainly, a chapter entitled “The Law and the Truth: Abu Hanifa’s Critical Constructivism” (in *Early Muslim Legal Philosophy: Identity and Difference in Islamic Jurisprudence*, 58ff.); and, specifically, a certain anecdote in which Abū Ḥanīfa says to Abū Yūsuf: “Yaʿqūb! Don’t write what you hear from me. I might hold an opinion today and abandon it tomorrow! And I might hold an opinion tomorrow and abandon it the day after!” (60, and n.18; the referenced anecdote is in al-Khaṭīb al-Baghdādī’s *Taʾrīkh Baghdād* [14 vols., Cairo, 1931] 13:402.)

- in §§1250-1, Abū Yūsuf transmits supporting *naql* for Ibn Abī Laylā, even though he adheres to the *qawl* of Abū Ḥanīfa
- an excellent example of Abū Yūsuf “following the *ḥujja*” via “opinion collection:”
 - in §1040 he asks Abū Ḥanīfa for his opinion
 - in §1041 he audits Ibn Abī Laylā’s transmission (*yuḥaddithu*) of *naql*
 - in §1042 he relates the transmission of an anonymous *shaykh*’s *naql* (supporting Abū Ḥanīfa’s ruling in §1040, to which he eventually adheres)
- another example of Abū Yūsuf “following the *ḥujja*” via “opinion collection:”
 - in §1036 he asks Abū Ḥanīfa for his opinion
 - in §1037 he asks Ibn Abī Laylā for his opinion
 - in §1038 he asks al-Ḥajjāj b. Arṭāt for his opinion, and this latter relates his own seeking after the opinion of ‘Aṭā’ b. Abī Rabāḥ (to which Abū Yūsuf eventually adheres)
- in §1412 al-Rabī reports that Muḥammad b. al-Ḥasan changed his own opinion to match that expressed by al-Shāfi‘ī; al-Rabī closes his discussion with *wa Allāhu a‘lam*¹⁶⁰
- in §640-1 al-Shāfi‘ī first brings *āthār* in support of his own opinion (three Ṣaḥāba), then adds another (to make four), but then reports another five *āthār* for the *khilāf* of his opinion and in support of Abū Ḥanīfa’s position. He has actually raised the opposing *āthār* to outnumber his own supporting *āthār*.
- in §1119 al-Shāfi‘ī concludes with *Allāhu Ta‘ālā A‘lam*, mitigating what is, in effect, an *e silentio* assumption on his part

Perhaps the greatest indicant of all, however, for a real, palpable “truth-seeking” ethic in the juridical dialectic of Islam is the very evolution of systematic *jadal*-theory and *uṣūl al-fiqh* itself. How, after all, can a scientific enterprise continue to advance its premises and refine its argumentation episteme when proponents of opposing opinions do not concede in the face of epistemically-superior *ḥujja*? Sophistry and eristic argument simply do not produce functioning systems; in fact, if practiced on a large enough scale, they militate against systematic, universal formulations, and point towards relativism. And the full-system *jadal*-theory to which we will shortly turn our attention was anything but relativistic.

Towards a New Paradigm

As mentioned earlier, it is hoped that this dissertation may be considered a contribution in two separate regards: 1) as opening a window onto proto-system juridical *jadal*; and 2) as providing a preliminary, working model of the formative

¹⁶⁰ By such pious expressions, following upon expressed solutions which are still *zannī* in terms of epistemic quality, we are provided strong indicant of the truth-seeking ethic. Other examples are numerous, and include the following: al-Shāfi‘ī concludes his argument with *wa-Allāhu... al-Muwaffiq* in §607; *Allāhu a‘lam* in §§135, 929, 1035, 1044; and *wa bi-Allāh... al-tawfiq* in §1124. Abū Yūsuf or Muḥammad b. al-Ḥasan, reporting the opinions of Abū Ḥanīfa and Ibn Abī Laylā, concludes with *in shā’ Allāh Ta‘ālā* in §1353. Either Abū Ḥanīfa, Abū Yūsuf, or Muḥammad b. al-Ḥasan concludes with *Allāhu a‘lam* in §1431. And Ibn Abī Laylā concludes with *Allāhu a‘lam* in §131.

dynamics of dialectical disputation in the evolution of both legal-theoretical and juridical-dialectical systems. This latter is the model we have chosen to call, in its fullest manifestation, “Unified Dialectical Forge Theory.” At this point, we will not elaborate upon this theory; it is best left for the reader to observe how its bits and pieces — the “component” theories to the “unified” theory — came about through various analyses and examinations. We will gather all of these threads together again in the concluding chapter (IV.2).

For the present, I would only note that the dialectical materials of our subject-text are more than sufficient, on their own, to render Miller’s juridical “take over” (from systematized theological dialectic) highly problematic, if not downright impossible.¹⁶¹ This evidence, of course, is compounded a hundredfold by the remainder of the *Umm*, and yet even more by the dialectical material of other extant proto-system texts. With regard to the narrative I would offer to supplant Miller’s, it will be partly developed in Chapters II-IV.1, and then presented as a “background narrative” within the framework of “Unified Dialectical Forge Theory” near the end of our conclusion.

On the whole, this narrative will remain rather abstracted, as we shall see. This is nothing more than a sign of how much more research remains to be done with regard to both proto-system *jadal* and legal theory. This much, however, is certain: juridical *jadal* theory was not “taken over” from theologically-themed *jadal* theory sometime in the fourth or fifth centuries. The practice and teaching of juridical dialectic has been continuously refining itself since long before even al-Shāfi‘ī appeared on the scene — he is at the middle, in fact, of our proto-system —, and the first formulators of juridical *jadal*-theory (which honour appears to belong to the circle of Ibn Surayj) were participants in a much-evolved teaching and practice of juridical dialectic whose roots are as old as Islam itself. It is my hope that all of this will be quite clear, not to mention adequately argued or demonstrated, by the time we reach our concluding chapter.

Now, having discussed — but only to the extent that space allows us — the “dialectical world” forming the backdrop to developments in juridical *jadal*, we will turn to full-system juridical *jadal* itself. Here, we will fashion our *jadal*-theory lens before proceeding to analyze the proto-system dialectic of the *Ikhtilāf al-‘Irāqīyyīn*.

¹⁶¹ As noted before, I do not believe this subtracts from the overall significance of Miller’s contribution to the field. However, it is vitally important that his historical trajectory for juridical *jadal*, in particular, be immediately corrected.

Chapter II: The Lens of Early Juridical *Jadal*-Theory

Introduction

Our primary objective in this chapter is to compile a set of analytical argumentation-categories suitable for our proposed examination of dialectical material in the *Kitāb Ikhtilāf al-ʿIrāqīyyīn*. Fortunately, our work has already been done for us in thoroughly sophisticated fashion by fourth and fifth century H systematizers of Islamic juridical *jadal*. We have had but to review such treatises as are extant, select from them such as are most amenable to our analytical project (in terms of thoroughness, organization, and accessibility), and examine our selections closely so as to gain a thorough understanding of them. The end result of these labours has been the composition, grinding, and fine-polishing of what we might term our “*jadal*-theory lens for analysis.”

As it is hoped will be made abundantly clear, this is not a project of back-projecting systems and terms into a period where they did not exist. Nor do we proceed as we do in order to claim the proto-system of juridical *jadal* teaching and practice in the second and third century H was every bit as refined as fourth and fifth century fully-systematized dialectic. Rather, the nature of our proposed analysis requires as refined and meticulous a set of definitions, categories, and typologies as may be obtained for the study of early samples of Islamic juridical dialectic; and polymath scholars such as Abū al-Ḥusayn al-Baṣrī, Abū Ishāq al-Shīrāzī, and Abū al-Walīd al-Bājī — among others — have provided the most exquisite, and appropriate, set of materials. As we shall see in the following chapter, we rarely have need of inventing terms of our own to label the argumentation phenomena we encounter; these later systematizers have indeed been exceedingly thorough.

In order to properly ground ourselves in juridical *jadal*-theory before proceeding to analysis, and to examine the materials comprising our lens from as many angles as constraints of time and space will allow, I have adopted the following program. First we will examine the literary genre to which our subject-text properly belongs: the literature of *ikhtilāf*; and that more systematic science which emerged from

it: the *‘ilm al-khilāf*.¹ These genres — two parts of a whole — are themselves parallel to, and in some ways precursor to, the *jadal*-theory systems of our lens-texts. Second, we will provide a few notes as regards our selection of texts for the composition of our *jadal*-theory lens, and attempt to justify this selection. Third, we will outline and review the categories of *istidlāl* which form the organizing principle of our lens-texts. Fourth, we will explore the dialectical questions as systematized in one of our lens-texts (al-Bājī’s *Minhāj*), and examine what previous studies (Miller’s dissertation, in the main) have had to say about the dialectical questions of juridical *jadal*.

Fifth, we will briefly outline and review the many categories of dialectical objection peculiar to juridical *jadal*, for each of the domains of *istidlāl*, and with particular focus on the *Ma’ūna fi’l-Jadal* of al-Shīrāzī and the *Minhāj* of al-Bājī. This is an important section, for many of these categories will provide the definitions and subtypes by which we identify dialectical elements in the *Ikhtilāf al-‘Irāqīyyīn*. Sixth, we will proceed to a more detailed examination of that all-important category-set: the modes of *qiyās*-oriented objection. A major component of our review of these *i’tirāḍāt* will consist of examining what previous studies have said of them (Hallaq and Miller, in the main). Finally, after a brief review of Miller’s observations on the “Signs of Defeat” and procedure of “early period” juridical *jadal*, we will examine our *jadal*-theory lens through another lens: that of Aristotelian dialectic as systematized in the *Topics* and *Sophistical Elenchi*. The objective in this closing section will be to take note of any parallels as arise in the arrangement and contents of our *jadal*-theory texts.

Throughout this program, a number of important observations and hypotheses with regard to the developmental history of Islamic juridical dialectic will arise, and we will treat each of them in their place. Overall, it is hoped that the expositions and theses put forward in this chapter, backed by the analyses and conclusions of the following chapter, will constitute some of the more significant contributions of this dissertation.

¹ Note that our subject-text itself will not be introduced here, and all questions relating to the history, authorship, etc. of both the *Kitāb al-Umm* and the *Umm* Version of the *Ikhtilāf al-‘Irāqīyyīn* will be treated in our introduction to the translation (Part II of this dissertation).

On The Literature of *Ikhtilāf*

As I hope will become apparent throughout the course of this dissertation, *all* of the literary genres of pre-modern Islamic law may be said to have been touched in some degree by the practice and/or theory of juridical *jadal*. That is not to say that all legal literature may be subsumed under a super-category of *jadal* literature, but merely to point out that — from the very beginning — treatises and their authors across all juridical projects were participants in a larger Islamic legal episteme, or set of epistemes, marked by *ikhtilāf* and disciplined debate — whether in: 1) face-to-face Q&A disputation, or 2) refutational, treatise-vs.-treatise literary “encounters.” That being noted, such treatises and compendia which are related to, or subsumed by, the larger genre of *uṣūl al-fiqh*, are particularly marked by the argument epistemes of juridical dialectical disputation. Primary among these, of course, is the literature of *jadal*-theory itself, whether it appears as chapters in *uṣūl al-fiqh* works or as specialized, systematic treatises; these are to be the focus of this chapter, and select early works the primary materials from which our *jadal*-theory lens is fashioned. But also relevant are the genres of *qawā'id fiqhiyya*, *furūq*, *ashbāh wa naẓā'ir*, *maqāṣid al-Sharī'a*, etc. which were not only born and refined in dialectical encounter, but provided critical material and method for the jurist engaged in the complementary processes of private *ijtihād* and public disputation.

As regards these latter genres, the most important for our purposes is that which comprises the categories of *Ikhtilāf* and '*Ilm al-Khilāf*', both of which form the genre to which our subject-treatise — the *Umm* Version of the *K. Ikhtilāf al-'Irāqīyyīn* — properly belongs. As pertains to our subject-treatise itself, I will explore its particular features as an exemplar of this genre in later sections. Our purpose now is to briefly explore the genre of *ikhtilāf* and '*ilm al-khilāf*', before moving on to the *jadal*-theory treatises from which our lens for analyzing the *Ikhtilāf al-'Irāqīyyīn* will be fashioned. As a consequence, it is hoped, the relationship between the genre of our subject-treatise, and the genre of our lens-for-analysis treatises, will also become apparent.

Definition of, and Introduction to, the '*Ilm al-Khilāf*'

Schacht provides a brief definition of *ikhtilāf* itself, as follows:²

“difference, also inconsistency; as a technical term, the differences of opinion amongst the authorities of religious law, both between the several schools and within each of them; opp. *idjmā'* ..., *ittifāk*.”

² EI², s.v. “*Ikhtilāf*.”

Our current concern is the science of *ikhtilāf*, or the *‘ilm al-khilāf*, and its literature; in particular I have chosen a specific (and relatively early) treatise as exemplar of this genre in a *systematized* stage.³ The *Ta’sīs al-Nazar*⁴ commonly attributed to Abū Zayd ‘Abd Allāh b. ‘Umar b. ‘Isā al-Dabbūsī (d.430/1038). I have emphasized “systematized” in the preceding sentence in order to highlight that the *‘ilm al-khilāf*, just as the *‘ulūm* of juridical dialectic and legal theory, appears to have developed in stages from a less choate “proto-system” — inherent to the early *ikhtilāf* treatises — to a period of fully-systematized *‘ilm al-khilāf* treatises.⁵

Fortunately for us, the editor of our edition of the *Ta’sīs al-Nazar*, the prolific *shaykh* Khalīl al-Mays, opens his introduction with an instructive overview of the *‘ilm al-khilāf*.⁶ He begins with a pair of definitions from the *Abjad al-‘Ulūm* of Muḥammad Ṣiddīq Ḥasan (citing an Indian edition): 1) “It is the science (*‘ilm*) by means of which is known/defined the means of production of legal arguments (*kayfiyyat īrād al-ḥujaj al-shar‘iyya*), and rebuttal of sophisms (*daf al-shubah*), and critiques (*qawādiḥ*) of the contended primary indicants (*al-adilla al-khilāfiyya*), via the production of decisively-certain [or, “categorical”] demonstrative proofs (*īrād al-barāhīn al-qaṭ‘iyya*);” and 2) “*‘ilm al-khilāf* is the *‘ilm* which investigates (*bāḥith*) the various modes of rational inference (*istinbāṭ*) from the general or particular primary indicants (*al-adilla al-ijmāliyya aw al-taṣṣiliyya*).”⁷ Al-Mays then quotes the larger part of Ibn Khaldūn’s description of the *khilāfiyyāt* in his *Muqaddima*,⁸ ending on the point that most writers in this genre are Shāfi‘īs and Ḥanafī’s — the latter because so much of their elaborated substantive rulings (*furū‘*) are derived via *qiyās*, and due to which they are “the *Ahl al-Nazar wa’l-Baḥth*.”⁹

³ As we shall see, there is quite some difference between the *Ta’sīs al-Nazar* and our “proto-system” subject-text, the *Ikhtilāf al-‘Irāqiyyīn*, even though they both properly belong to the same genre of *ikhtilāf*. Of course the intent for which these two works were composed is somewhat different, but markedly different is the organizing principle of the later work: a mark of the refinements and systematic approaches developed over the intervening two hundred years.

⁴ Note that the very title of this work itself provides indicant for the overlapping concerns of *khilāf* and *jadal*-theory literature.

⁵ Importantly, and also like the *‘ulūm* of *jadal* and *uṣūl al-fiqh*, the first appearance of systematized *‘ilm al-khilāf* works appears to belong to the fourth century H. See our notes regarding the Ḥanafī Abū al-Layth al-Samarqandī (d.373/983), below.

⁶ *Ta’sīs al-Nazar*, al-Mays ed., 3ff.

⁷ *Ta’sīs al-Nazar*, al-Mays ed., 3. The latter definition is quoted in the *Abjad* from the *Madīnat al-‘Ulūm*.

⁸ Corresponding to 577-8 of the *Shahāda* ed.; and vol. 3, vi.13, 30-2 of Rosenthal’s translation.

⁹ *Ta’sīs al-Nazar*, al-Mays ed., 3-4.

On the Relationship between the *‘ilm al-khilāf*, *Jadal*, and *Uṣūl al-Fiqh*

Importantly, al-Mays ties the *‘ilm al-khilāf* to the *‘ilm al-jadal* — both directly and indirectly — a number of times. He quotes from the *Madīnat al-‘Ulūm*, as conveyed in the *Abjad al-‘Ulūm*, the following points: 1) “the best and most exemplary of the *‘ulamā’* in the *technē* (*fann*) of *al-khilāf* are Abū Ḥanīfa, and his *aṣḥāb* Abū Yūsuf, Muḥammad, and Zufar; and al-Shāfi‘ī, Mālik, and Aḥmad b. Ḥanbal”;¹⁰ 2) “the research (*baḥth*) into [the modes of rational inference (*wujūh al-istinbāṭāt*)] is according to the confirmation and refutation-by-contradiction (*al-ibrām wa’l-naqḍ*)”¹¹ for any *waḍ’* which is intended regarding these *wujūh*; 3) “its principles (*mabādi*) are derived from the *‘ilm al-jadal*, and *al-jadal* is in the status of material (*bi-manzilati al-māddati*), while *al-khilāf* is in the status of form (*bi-manzilati al-ṣūratī*)”;¹² 4) “there belongs to it a reinforcement (*istimdād*) from the *‘ulūm al-‘Arabiyya wa’l-Shar‘iyya*”; 5) “its goal is the attainment of the faculty of confirmation and refutation-by-contradiction (*malkat al-ibrām wa’l-naqḍ*)”; 6) “its benefit (*fā’ida*) is the repulsion of doubts (*shukūk*) from the *madhhab*, and causing them to fall on the *madhhab* of the opponent (*mukhālīf*).” Al-Mays closes this section by giving particular mention to the *K. al-Ma‘ālim* (and other unnamed treatises and commentaries) of Fakhr al-Dīn al-Rāzī (d.606/1209), with special regard to the *‘ilm al-khilāf wa’l-jadal*.¹³

Moreover, al-Mays’s introduction to the *Ta’sīs al-Nazar* highlights this *‘ilm al-jadal* and *‘ilm al-khilāf* relationship in the person of the purported first-systematizer of the latter genre (*awwal man akhraj al-‘ilm al-khilāf*): i.e., al-Dabbūsī himself, who was a dialectician of repute. With regard to al-Dabbūsī,¹⁴ al-Mays quotes from the *Jawāhir al-Muḍī’a* of al-Qurashī, the *Ansāb* of al-Sam‘ānī, and the *Fikr* of al-Sāmī:¹⁵

“He [al-Dabbūsī] is the first to set down (*waḍa’a*) the *‘ilm al-khilāf*, and to bring it into being; and he is one of those for whom proverbs were struck, as regards *al-nazar*, and the extraction of *al-hujaj* and *al-ra’y*. And he had, in Samarqand and Bukhārā, *munāẓarāt* with luminaries (*al-fuḥūl*); and he was the *shaykh* of those parts. It is narrated that he disputed (*nāẓara*) one of the

¹⁰ Note that four of these figures are key jurists of our subject-treatise.

¹¹ *Naqḍ*, as we shall see, is a category of objection of the most primary import to both proto-system and fully-systematized juridical *jadal*.

¹² Note that this artful rendering of the *jadal-khilāf* relationship twice employs the formula “*bi-manzila X*.” As we shall see in our analyses, this formula enjoyed great currency in juridical dialectic from the earliest times.

¹³ *Ta’sīs al-Nazar*, al-Mays ed., 4-5.

¹⁴ Such a spelling of his name being confirmed by the *Ansāb* of al-Sam‘ānī.

¹⁵ *Ta’sīs al-Nazar*, al-Mays ed., 7. Unfortunately, it is difficult to determine where one citation ends and the other begins.

jurists (*fuqahā'*), and every time Abū Zayd [al-Dabbūsī] refuted him [*alzamahu*; i.e., brought him to a point where he must either explain, or commit to, an apparent contradiction], he [the jurist] smiled or laughed. So Abū Zayd fortified himself by way of a poem:

‘Why is it, when I refute him by way of *hujja*,
He opposes me by chuckling and laughing?
If the laughter of man comes from his *fiqh*,
How much more *fiqh* has the desert-hyena!’”¹⁶

Of further note is that al-Dabbūsī authored respected *uṣūl al-fiqh* works, mainly the *Asrār* and the *Taqwīm al-Adilla*.¹⁷

On the Historical Development of *Ikhtilāf* Literature

In his introduction, al-Mays claims al-Dabbūsī as the first “in the world” to extract (*akhraja*) — that is, to systematize — the ‘ilm al-khilāf. Importantly, he then proceeds to list all such *fiqh* works as fall into this *fann*, as both precede and follow al-Dabbūsī (*min al-salaf wa'l-khalaf*).¹⁸ We may list them as follows:

- 1) The *Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā*,¹⁹ the *Ikhtilāf Abī Ḥanīfa wa'l-Awzā'ī* (known as *al-Radd 'alā Siyar al-Awzā'ī*), the *Ikhtilāf al-Shāfi'ī ma'a Muḥammad b. al-Ḥasan*, the *Ikhtilāf al-Shāfi'ī ma'a Mālik*, and the *Hujja* of Muḥammad b. al-Ḥasan²⁰
- 2) the *Ikhtilāf al-Fuqahā'* of Abū Ja'far al-Ṭahāwī (d.321)
- 3) the *Tajrīd* of al-Qudūrī al-Ḥanafī (d.428)
- 4) [al-Dabbūsī and the *Ta'sīs al-Nazar* would appear here]
- 5) the *Khilāfiyyāt* of al-Bayhaqī al-Shāfi'ī (d.458)
- 6) the *Wasā'il fī Furūq al-Masā'il* of Ibn Jamā'a al-Shāfi'ī (d.480)
- 7) the *Mukhtaṣar al-Kifāya* of al-'Abdurī al-Shāfi'ī (d.493)
- 8) the *Ḥilyat al-'Ulamā' fī Ikhtilāf al-Fuqahā'* of Abū Bakr Muḥammad b. Aḥmad al-Shāshī al-Mustazharī al-Shāfi'ī (d.507)
- 9) the *Manzūmat al-Nasafī* of al-Nasafī al-Ḥanafī (d.537)
- 10) the *Ṭarīqat al-Raḍawiyya* of Raḍī al-Dīn al-Sarakhsī al-Ḥanafī (d.544)²¹
- 11) the *Mukhtalif al-Riwāya* of 'Alā' al-Dīn Muḥammad b. 'Abd al-Ḥamīd al-Samarqandī al-Ḥanafī (d.552)
- 12) the *Ishrāf 'alā Madhāhib al-Ashrāf* of Ibn Hubayra al-Ḥanbalī (d.555 or 560)
- 13) the *Taqwīm al-Nazar* of al-Dahhān al-Shāfi'ī (d.589)

¹⁶ I have assumed the “*dubb fi'l-ṣaḥrā'*” to be a hyena, partly due to context, and partly due to Lane’s listing of *dabāb* as “a call to a female hyena” (*Lexicon*, 841).

¹⁷ *Ta'sīs al-Nazar*, al-Mays ed., 7. See Sezgin, *Tārīkh*, vol. 1, pt. 3, 125f. re: manuscripts and materials for the *Taqwīm al-Adilla fī Uṣūl al-Fiqh* and the *Kitāb al-Asrār (wa'l-Taqdīm li'l-Adilla) fī'l-Furū'* of al-Dabbūsī.

¹⁸ *Ta'sīs al-Nazar*, al-Mays ed., 5-6.

¹⁹ NB: significantly, the very first compilation noted is our subject-text in this dissertation.

²⁰ With the exception of the *Hujja*, all of these works may be found in the editions of the *Umm* cited in our bibliography.

²¹ NB: this is the very same treatise we have seen Miller include among those of his “middle period” authors of juridical *jadal*.

With special regard to early works of *ikhtilāf*, another (somewhat more abbreviated) literary history has been offered by Abū al-Wafā' al-Afghānī, the editor of what we have called the Shaybānī Version of Abū Yūsuf's *Kitāb Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā* (the source text for the *Umm* Version of the *Ikhtilāf al-'Irāqiyyīn*). Al-Afghānī opens his introduction by asserting the following points: 1) the *ikhtilāf* of the Imams over the *furū'* is a mercy to the Muslim community (*rahma li'l-Umma*); 2) the *ṣaḥāba* differed among themselves, and the *fuqahā'* after them — yet had there not been *ikhtilāf*, decrees would have become too narrow, and hardship would have reigned; and 3) *ikhtilāf* works have been written since opposing *āthār* were first collected. After this, he gives his brief history of these works. Beginning with the oldest, they are as follows:²²

- 1) the *K. Ikhtilāf al-Ṣaḥāba* of Abū Ḥanīfa [d.150/767]
- 2) the *K. Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā* of the Qāḍī Abū Yūsuf [d.182/798]²³
- 3) the *Ikhtilāf Ya'qūb wa Zufar* of Abū 'Abd Allāh Muḥammad b. Shujā' al-Thaljī [d.267/880]
- 4) the general compilation: *Ikhtilāf al-Fuqahā'* of al-Ṭahāwī [d.321/933]
- 5) the *Ishrāf fi'l-Khilāf* of Ibn al-Mundhir [d.319/856]
- 6) the *Ikhtilāf al-Fuqahā'* of Ibn Jarīr [al-Ṭabarī; d.310/923]²⁴

We will note that, with the exception of the last two “independents,”²⁵ these are all authors affiliated with the Ḥanafī *madhhab*. We will also note the early termination of this list, and suggest that what al-Afghānī means by the literature of *ikhtilāf* is not quite the same as what al-Mays means by the literature of *'ilm al-khilāf*. Again, it would seem best to presume a multi-stage development of *ikhtilāf* literature, with a less choate “proto-system” building towards the first fully-systematized treatises of *'ilm al-khilāf*.

Yet another history of *ikhtilāf* and its literature has been compiled by Joseph Schacht. He opens his entry on *ikhtilāf* in the *EI*² with a summary of his well-known paradigms for the formation of legal schools, the rise of Prophetic Sunna, the role of al-Shāfi'ī, etc. As Schacht's assessments bear upon the subject-matter of this dissertation (which, indeed, hopes to complement certain more nuanced paradigms of more recent times), we will reproduce them in full:²⁶

²² *Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā*, 3.

²³ Our “Shaybānī Version,” and the text of al-Afghānī's edition.

²⁴ Al-Afghānī claims that the author of this last work denuded it of *dalā'il*. Having employed the work to some extent in the course of my analyses, however, I am not certain I understand this claim.

²⁵ Ibn al-Mundhir is both *mustaqill* and claimed by the Shāfi'iyya; Ibn Jarīr is the eponym of a short-lived *madhhab* all his own.

²⁶ *EI*², s.v. “*Ikhtilāf*.” I have placed numbers in brackets to divide the text into themes for brief re-assessment.

“[1] The ancient schools of law, on the one hand, accepted geographical differences of doctrines as natural; on the other hand, they voiced strong objections to disagreement within each school, an opinion which was mitigated by their acceptance as legitimate of different opinions if based on *idjtihād*.... [2] The rising tide of traditions from the Prophet, in particular, threatened the continuity and uniformity of doctrine in the ancient schools, and reinforced their aversion to disagreement. [3] The opportunity for disagreements on questions of principle arose only from the time of *Shāfiʿī*... and his systematic innovation. [4] But the several schools arrived at a compromise, and the consensus (*idjmāʿ*), which acted as the integrating principle of Islam, succeeded in making innocuous those differences of opinion which it could not eliminate. [5] The four schools, then, are equally covered by *idjmāʿ*, their alternative interpretations of *Qurʾān* and *sunna* are equally legitimate, they are all equally orthodox. [6] This view has found expression in a saying which occurs first in the *Fikḥ al-akbar* of Abū Ḥanīfa... and was later attributed to the Prophet, to the effect that “difference of opinion in the community of Muslims is a concession (*rahma*) on the part of Allāh”.²⁷ The work of *Shāʿrānī*... expresses the attitude underlying this tradition with monotonous regularity.”

Most of these assertions have been problematized and supplanted by the research of more recent scholarship. For now, I would only contend with certain of them. As for #1, the abhorance of *ikhtilāf* within a “school” in a period before the formation of doctrinal *madhāhib* is problematic, and impossible to reconcile with the spirit of *ikhtilāf* we find in our subject-text. Abū Ḥanīfa and Ibn Abī Laylā were both Kūfans, and the behaviour of Abū Yūsuf — which is best described as “following the *hujja*” whether it supported Ibn Abī Laylā, Abū Ḥanīfa, or required a new, independent formulation — suggests a far different ethic at work than an obsession with regional or “school” consistency.

As for #2 and #4, it seems to me that the role which Prophetic Sunna and *ijmāʿ* came to play was determined by a natural interaction of prior and developing argumentation epistemes with new (and epistemically hierarchical) Islamic axioms.²⁸ That is to say, I would supplant these conceptions of: (#2) a linear dynamic whereby a “rising tide of traditions” served to bolster an “aversion to disagreement” between “schools;” and: (#4) a “compromise” of schools and the role of *ijmāʿ* as “making innocuous those differences of opinion which it could not eliminate;” with a different conception altogether. I would propose, instead, that the refinement and ranking of epistemically-authoritative *uṣūl* (Prophetic Sunna and *ijmāʿ* among them); the techniques of verifying,

²⁷ Cf. al-Afghānī’s repetition of this proverb in the opening of his introduction, above.

²⁸ See our discussion near the end of this chapter, where the ranking of primary *uṣūl* is portrayed, in part, as an hierarchical reformulation of the old Aristotelian episteme of *endoxa* dialectical premises.

interpreting, preponderating, and arguing from these *uṣūl* (the nascent sciences of *uṣūl al-fiqh*); and the formation of doctrinal *madhāhib* were all resultant of a singular, powerful, intellectual dynamic: the evolution of argumentation epistemes via proto-system juridical dialectic, guided throughout by a palpable “truth-seeking” ethic of “following the *ḥujja*.”

Finally, as regards #3 (“The opportunity for disagreements on questions of principle arose only from the time of *Shāfiʿī*... and his systematic innovation”): the evidence in the *Ikhtilāf al-ʿIrāqīyyīn* alone proves this assertion patently false. Taken together with other treatises from the *Umm*, the evidence is overwhelming: “questions of principle” were debated long before al-Shāfiʿī arrived on the scene, and the history of Islamic legal theory neither begins nor culminates in this remarkable jurist.

Returning to Schacht’s brief history of *ikhtilāf*, he next turns his attention towards the literature itself, saying:

“The recording of these differences of opinion has produced a considerable literature since the beginnings of the study of *fiqh*. The earlier works reflect the discussions between the several schools, the later ones are simply handbooks.”

Largely unfamiliar with the later works of *ikhtilāf*, I would only add to this the following: 1) the “discussions” of earlier works, as we shall see, often included detailed arguments in which sources, proofs, and modes of inference are all laid bare; 2) such arguments are frequently supported by lengthy, transcript-like sequences of dialectical debate; and 3) these earlier works exhibit a patently didactic intent — not merely records of disagreement, they (too) were manuals for the jurist-dialectician taking up the defence and critique of variant opinions, in the spirit of *jadal*.

Schacht then introduces a series of works in roughly chronological order, distinguishing an earlier and later period; the detailing of later period works was not meant to be comprehensive, and we may allow that his early period discussion is in the same spirit. I have attempted an outline, as follows:²⁹

Early Period

- 1) the *Radd ʿalā Siyar al-Awzāʿī* and the *Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā* of Abū Yūsuf
 - a. both appear in the *Umm* with al-Shāfiʿī’s commentary
- 2) the *Kitāb al-Ḥujaj* of al-Shaybānī
 - a. part of which appears in the *Umm*, with al-Shāfiʿī’s commentary³⁰
- 3) the *Kitāb Ikhtilāf Mālik waʾl-Shāfiʿī* of al-Shāfiʿī (in the *Umm*)
- 4) the *Kitāb Ikhtilāf ʿAlī wa-ʿAbd Allāh b. Masʿūd* of al-Shāfiʿī (in the *Umm*)

²⁹ Schacht, *ET*², s.v. “*Ikhtilāf*.”

³⁰ I assume Schacht is referring to al-Shāfiʿī’s *Kitāb al-Radd ʿalā Muḥammad b. al-Ḥasan*.

- 5) the *Kitāb Ikhtilāf al-Ḥadīth* of al-Shāfiʿī
- 6) the *Jāmiʿ* of al-Tirmidhī³¹
- 7) the *Kitāb Mukhtalif al-Ḥadīth* of Ibn Qutayba³²
- 8) the *Kitāb Ikhtilāf al-Fuqahāʾ* of al-Ṭabarī³³
- 9) the *Sharḥ Maʿānī al-Āthār* of al-Ṭaḥāwī³⁴

Later Handbooks

- 1) the *Ishrāf ʿalā Masāʾil al-Khilāf* of ʿAbd al-Wahhāb al-Baghdādī (d.422/1031)
- 2) the *Bidāyat al-Mujtahid* of Ibn Rushd (d.595/1198)
- 3) the *Ishrāf* of Ibn Hubayra (d.560/1165)
 - a. [derivation] the *Raḥmat al-Umma* of Muḥammad b. ʿAbd al-Raḥmān al-Dimashqī (wr. 780/1378)
 - i. [derivation] the *Mizān al-Kubrā* of al-Shaʿrānī (d.973/1565)
- 4) the (modern) *Kitāb al-Fiqh ʿala al-Madhāhib al-Arbaʿa* [of al-Jazīrī, d.1360/1941]

The *Taʾsīs al-Nazar* of al-Dabbūsī

With this brief history of *ikhtilāf* and its literature behind us, we may now turn to what may be the first — or certainly a very early — attempt at systematizing the *ʿilm al-khilāf*: the *Taʾsīs al-Nazar* attributed to al-Dabbūsī. Now, the importance of this work for our purposes in this dissertation stems from both its contents and its relatively early date (al-Dabbūsī died 430 H). As to the contents, the *Taʾsīs* serves as an excellent illustration of the intertwining and mutually-contributive dynamics of the *ʿulūm* of *jadal*, *uṣūl al-fiqh*, and *khilāf*. Al-Dabbūsī, however, was also a contemporary of al-Baṣrī (d.436), whose treatise on *qiyās*-oriented *jadal* is perhaps the earliest extant *jadal*-theory material,³⁵ and which we will be examining in detail shortly. Moreover, it seems likely that a considerable amount of the material in the *Taʾsīs* can be pushed further back in time; mainly, to the *Taʾsīs al-Nazāʾir* of the Ḥanafī Abū al-Layth al-Samarqandī (d.373).

In his *Madkhal al-Mufaṣṣal li-Madhhab al-Imām Aḥmad*,³⁶ Bakr b. ʿAbd Allāh Abū Zayd asserts that it is more correct to think of al-Samarqandī's *Taʾsīs al-Nazāʾir* as the first *uṣūl* composition in the Ḥanafī *ṭarīqa*, since “the *kitāb* of al-Dabbūsī is extracted

³¹ Schacht includes this canonical *ḥadīth* work, as al-Tirmidhī “indicates for which doctrine each tradition serves as authority, so that his work is an important source for the comparative study of early *ikhtilāf*.”

³² Schacht notes Ibn Qutayba “tries to reconcile the contradictions of traditions.”

³³ Schacht comments that al-Ṭabarī composed this work “as a kind of systematic justification of his own *madhhab*.” He also notes: “it consists mostly of extracts from the works of his predecessors and, as many of them have been lost, is very valuable as a source, but unfortunately only two fragments of this very extensive work have survived.”

³⁴ Schacht concludes: “The early period of the works on *ikhtilāf* comes to an end with the *Sharḥ maʿānī l-āthār* of Ṭaḥāwī...; the author argues from the Ḥanafī point of view but unfortunately does not mention the adherents of the numerous divisions of doctrine which he discusses.”

³⁵ With the exception of the considerable *jadal* material we might cull from the *Fuṣūl fī l-Uṣūl* of al-Jaṣṣāṣ (d.370/981).

³⁶ 2 vols. (Riyadh: Dār al-ʿĀṣima, 1997), ii.940.

from it (*mustall minhu*), with additions to it.”³⁷ He then cites a modern *risāla* by Shāmil Shāhīn entitled “*al-Taḥqīq al-Mu’tabar fī Nisbat Kitāb Ta’sīs al-Nazar*,” in which it is argued that the attribution of the *Ta’sīs* to al-Dabbūsī is wrong, and that the correct attribution is to al-Samarqandī. If this is true, then the composition of much of the contents of the *Ta’sīs* may be placed in the latter half of the fourth century H, i.e., at the heart of that literary florescence which saw the birth of both systematic *uṣūl al-fiqh* and *jadal/munāẓara* genres.

Whatever the case may be, the author of the *Ta’sīs* (be it al-Dabbūsī or al-Samarqandī) begins by explaining why, and by which organizing principles, he composed it. Because of the importance of this book for reasons mentioned earlier, I will here attempt a partial translation of the author’s introduction, that we might benefit from such insights as it offers. First, the author’s goal in composition:³⁸

“When I observed the difficulty of the matter as regards the memorization of contended problem-questions (*masā’il al-khilāf*) for the aspiring jurists (*fuqahā*)... and the hardship of the methods (*ṭuruq*) of rational inference (*istinbāt*) [re: the *masā’il*] for them, and the insufficiency of their knowledge for the examination of the real meaning (*ḥaqīqa*) of the sources/procedures (*ma’ākhidh*) [re: the *masā’il*], and the dubiousness of the *loci* of statements (*mawāḍi’ al-kalām*) during disputation regarding [the *masā’il*] (*al-tanāẓur fīhā*); I gathered together in this, my book, such words as when the disputant (*al-nāẓir*) contemplates them and meditates upon them, he will know the *loci* of the contention (*maḥāll al-tanāzu’*) [محال]³⁹; and the axis of controversy (*madār al-tanāẓuḥ*) during the disputation-contest (*al-takhāṣum*), and he will devote his particular care to the proper-ordering of statements (*tartīb al-kalām*), and the fortification (*taqwiya*) of the arguments/proofs (*hujaj*) for the *loci* (*mawāḍi’*) which he knows to be the axis (*madār*) of the stated-solution (*qawl*), and the *loci* [محال] of the contention, in the *locus* of the dispute (*mawḍi’ al-nizā’*); and that memorization [of the *masā’il*] be made easy for them [the aspiring jurists], and there be facilitated for them the means (*sabīl*) of arriving at knowledge (*irfān*) of the sources/procedures (*ma’ākhidh*) [re: the *masā’il*], and there be made possible for them the *qiyās* [in the juristic sense] of other things upon their bases.”

Quite a number of features in this manifesto are of immediate import, most striking of which is a repeated concern for *mawāḍi’*, *maḥāll*, and *madār* — three terms

³⁷ The Arabic text reads “فإن كتاب الدبوسي مستل منه مع زيادات عليه” and I am interpreting “مستل” as the passive participle of form VIII *istalla*. This verb carries the sense of “to extract gently” and “to steal a. th.” (Hava, *al-Farā’id*, 329, s.v. “سَلَّ”), from whence I infer the more neutral “extracted” for *mustall*.

³⁸ *Ta’sīs al-Nazar*, al-Mays ed., 11.

³⁹ NB: another edition has مجال.

which, in the context of debate, all parallel Aristotle's *topoi* in one way or another.⁴⁰ We are reminded, moreover, that the purpose behind memorizing *masā'il* of *khilāf*, and becoming conversant in the methods of *istinbāṭ* employed by the venerated exemplar *mujtahids* who disputed them, is not a function of preserving legal history. Rather, it is a critical study by means of which the aspiring *faqīh* perfects his skills as a dialectician (and, perhaps, as a *mujtahid*, which is suggested by the author's final aim of extending the student's range of *qiyās*). Specifically, the author aims to facilitate a student's ability to: 1) isolate, in the heat of disputation, the core point(s) of contention; 2) arrange his *kalām* and fortify his *hujja* as concerns the *mawāḍi'* (the very term used to translate *topoi*) of the axis of his opponent's *qawl*. Already, this procedure bears a striking resemblance to Aristotelian dialectical method: having obtained the premises from which P's thesis-argument flows, Q turns his attention to carefully arranging his counter-argument, with special focus on the *mawāḍi'* at the heart of his opponent's *qawl*.

This is the method of the *Topics*,⁴¹ and would only become more so could we read محال, not as *maḥāll*, but as *muḥāl* (i.e., *muḥāl al-tanāzu'*). It has been pointed out to me, however, that such a construction constitutes an *idāfa ghayr al-ḥaqīqiyya*, and would mean something like "impossible of dispute" (rather than "impossibility of the contention," as I had first entertained as being close in meaning to *naqīḍ*).⁴² Regardless, correspondence, at this point, with the dialectic of the *Topics* is difficult to ignore; a further measure of the disputation teaching and practice prompting the author's composition of the *Ta'sīs*, however, should be sought through the author's organizing principle. Does it reflect in any way the organizing principles of Aristotle's *Topics*?⁴³

The author of the *Ta'sīs*, in fact, continues his introduction by explaining by which organizing principle he composed it:⁴⁴

"Which is to say that, when I examined the *masā'il* over which the *fuqahā'* disagree, I found them to be divided into eight divisions (*aqsām*):

⁴⁰ This is not to say that the author necessarily employed these as technical terms; as one examiner of this dissertation has pointed out, the appearance of these terms may simply reflect a rhetorical repetition of synonyms. Regardless, the concern with a dialectical device paralleling that of the *topoi* is plain to see.

⁴¹ See our discussions re: Aristotelian dialectic in the previous chapter, and at the end of the current chapter.

⁴² I would here thank Dr. Robert Wisnovsky for this correction.

⁴³ See Smith, *Topics I and VIII*, xxxff.

⁴⁴ *Ta'sīs al-Nazar*, al-Mays ed., 11-12.

[1] A division of them [of *masā'il*] being the *khilāf* between Abū Ḥanīfa [on one side]... and his two *ṣāhibs*, Muḥammad b. al-Ḥasan and Abū Yūsuf... [on the other];

[2] a division of them being the *khilāf* between Abū Ḥanīfa and Abū Yūsuf [on one side], and Muḥammad b. al-Ḥasan... [on the other];

[3] a division of them being the *khilāf* between Abū Ḥanīfa and Muḥammad [on one side], and Abū Yūsuf... [on the other];

[4] a division of them being the *khilāf* between Abū Yūsuf and Muḥammad...;

[5] a division of them being the *khilāf* between our three '*ulamā'*' Muḥammad b. al-Ḥasan and al-Ḥasan b. Ziyād [on one side], and Zufar... [on the other];

[6] a division of them being the *khilāf* between our '*ulamā'*' [on one side], and the oldest *imām* Mālik b. Anas... [on the other];

[7] a division of them being the *khilāf* between our three '*ulamā'*' Muḥammad b. al-Ḥasan and al-Ḥasan b. Ziyād and Zufar [on one side], and Ibn Abī Laylā [on the other];

[8] a division of them being the *khilāf* between our three '*ulamā'*' [on one side], and Abū 'Abd Allāh, al-Imām al-Qurashī, and Muḥammad b. Idrīs al-Shāfi'ī... [on the other].

Then I made for each *qism* of these eight *aqṣām* a chapter (*bāb*); and I mentioned for each *bāb* such *uṣūl* as pertain to it; and I set forth in it, for each *aṣl*, a paradigm (*ḍarb*) from among the model-cases (*amthila*) and parallels (*naẓā'ir*); and placed, at the end of these eight *aqṣām*, another *qism* in which I mentioned such *uṣūl* as for which each *aṣl* comprises a variety of contended *problēmata* (*masā'il khilāfiyya*). And what these eight *aqṣām* pass over as pertains to the doctrinal solutions (*aqwāl*) of the doctrinally-opposed (*mukhālifin*) — such as the *qawl* of Ibrāhīm al-Nakha'ī, and Sufyān al-Thawrī, and al-Awzā'ī, and al-Sha'bī, and others — I avoided mentioning them [f., re: *aqwāl*], and the setting-forth of their *uṣūl*, from their [m.pl.] posited solutions, out of distaste for over-prolongation; and I did not occupy myself with the analytical-commentary (*sharḥ*) of these *amthila* which I set forth, except to the measure by which is clarified their connection to the *uṣūl* which we have mentioned....”

The organizing principle of the *Ta'sīs*, then, is quite different from the Aristotelian *topoi* (these latter being organized by categories of predicable).⁴⁵ Yet, in conjunction with the stated objectives of the author in composing this treatise, there is remarkable convergence with the organizational aims of the *Topics*.⁴⁶ Moreover, we have gained from al-Dabbūsī's manifesto a new insight into the nature and function of the *uṣūl-qawā'id* of al-Karkhī and others, and the ultimately central role they play in dialectical disputation. In brief, an *aṣl*, in this genre of *khilāf*, is one from among a collection of dialectical (*endoxa*) juridical premises, organized according to who

⁴⁵ Again, see our discussion of the *Topics* at the end of this chapter.

⁴⁶ At the end of this chapter I will propose which developmental model I believe best accounts for this type of simultaneous convergence and divergence of features.

employed them against whom and in which *mas'ala*, in such a manner as echoes the Aristotelian objective of “location.” The *Ta'sīs*, like the *Topics*, is a handbook for the dialectician. Its major difference is the following: whereas the *Topics* relies upon predicables and argument form to aid in locating such premises which — if the opponent concedes to them — commit him to the *naqīd* of his own thesis, the *Ta'sīs* relies upon a historical catalogue of *ikhtilāf*, categorized by disputant. Nevertheless, the objective of both “location” systems is the same: to produce whatever might commit P to the *naqīd*. But how might we envisage the *Ta'sīs* location system in practice?

First, we must remember that the *masā'il al-khilāf* are, like the categories of *topoi*, meant to be memorized, and with the explicit practical intent of providing a readily-accessible structure by which Q might “locate” such propositions as are suitable for the nullification of P's thesis (via impossibility, absurdity, or inconsistency). Ultimately, the *Ta'sīs* is written for the Ḥanafī disputant; and the only conceivable motive for disputation in the first place is that an opponent holds a juristic opinion which is contrary or contradictory to the Ḥanafī disputant's stance. This is the starting point of the *Ta'sīs*, and it is organized in such a manner so as to provide the greatest utility to the Ḥanafī disputant — note that one “side” of each *qism* always contains a figure or group with whom a Ḥanafī disputant might be comfortably aligned, even if his opponent upholds a variant Ḥanafī stance.⁴⁷

Here is how it works: First, although the *masā'il* of *ikhtilāf* are legion, there are still only so many variant opinions for each *mas'ala*, and the history of *ikhtilāf* has provided us with a stockpile of such variants and who held to them. So the first task of the Ḥanafī disputant Q, once the *mas'ala* of the dispute-at-hand is established, is to “locate” both his own, and his opponent's, stances from among what most resembles them in past opinions. For example, let us say that the *mas'ala* at hand considers the *mutayammim*⁴⁸ whose gaze, at the end of his prayer-cycle (*ṣalāt*), before the utterance of salaams (*taslīm*), falls upon a source of water he might have used for ablutions (*wuḍū'*) had he seen it earlier. Is his *tayammum*-initiated *ṣalāt* invalidated, or not? P says “No, his *ṣalāt* is not invalid (*fāsīd*).” Now, because Q has a great store-house of *masā'il* readily at hand, neatly memorized in the eight distinct compartments of the *Ta'sīs*, he can

⁴⁷ In fact, it is noteworthy indeed that five of the eight *aqṣām* of the *Ta'sīs al-Nazar* comprise competing Ḥanafī opinions. This speaks volumes with regard to the role of juridical dialectic within *madhāhib*, as well as between them. That is to say, it is very plain here that *jadal* was a significant dynamic in the internal, doctrinal development of the Ḥanafī *madhhab* — it was not merely a “defense of the *madhhab*” polemic for use against extra-*madhhabic* opponents.

⁴⁸ One performing ablutions with sand or earth.

immediately access the proposition he requires for *elenchus*, simply because he recognizes P's stance to be that of both Abū Yūsuf and Muḥammad b. al-Ḥasan against Abū Ḥanīfa.

In other words, once Q has obtained P's thesis, he will go immediately to compartment #1 of his *mas'ala* of *khilāf* store-house and extract the key premise which, combined with the particulars of the case at hand, necessarily produces the *naqīd* of his opponent's stance. This key premise is called an *aṣl*, and, in this case, it is: "whatever alters a textually-fixed obligation (*farḍ*) at its initial stage of performance, also alters it at its concluding stage (*mā ghayyara al-farḍ fī awwalihī, ghayyarahū fī ākhirihī*)."⁴⁹ So much for the first task of Q. Now he must embark upon the more difficult task of getting P to concede to this *aṣl*, and he might follow any of a number of paths to assure this. For example, he might ask P's opinion regarding a parallel case of fasting (*ṣawm*): Does drinking water at the beginning of the fast not invalidate it? Does drinking water near the end of the fast not invalidate it? Would you not agree, then, that what invalidates the fast at its beginning also invalidates it at its end? Whatever path Q decides to take, once he gets P to concede to his *aṣl*-premise, he need only announce his *elenchus* in such a form as is composed of elements conceded by P.

So what is an *aṣl*, as per the *Uṣūl* of al-Karkhī, the *Ta'sīs al-Nazar*, and like sources? It is nothing less than a *dialectical (endoxon) legal premise* which 1) the Ḥanafī disputant believes he might get his opponent to concede to; and which 2) produces, after insertion into the common hypothetical-syllogistic form of most legal opinions, a ruling contrary/contradictory to that of his opponent (while comfortably consistent with the Ḥanafī disputant's corpus of *fiqh*).

As for our current *mas'ala*, the whole procedure might appear thus in a simplified dialectical form:

- **P [states his thesis]:** If a *mutayammim* does not see *wuḍū'*-water until near the end of his *ṣalāt*, his *ṣalāt* suffices him — it is not *fāsid*.
- **Q [having "located" his *aṣl*, elicits a component premise]:** But do you not opine (*alā tarā*) that, if he sees *wuḍū'*-water at the beginning of his *ṣalāt*, his *ṣalāt* is *fāsid*?
- **P:** Yes.
- **Q [introduces parallel case, in order to "veil" his *aṣl*]:** And do you not also opine that drinking water at the beginning of the fast invalidates it?
- **P:** Yes.
- **Q:** And would you not also say that drinking water near the end of the fast invalidates it?
- **P:** Yes.

⁴⁹ *Ta'sīs al-Nazar*, al-Mays ed., 13.

- **Q [elicits his *aṣl*]:** Would you not agree, then, that whatever alters a *farḍ* at its initial stage of performance, also alters it at its concluding stage?
- **P:** Yes.
- **Q:** Then, in the case of the *mutayammim* who does not see *wuḍū'*-water until near the end of his *ṣalāt*, you are wrong to say his *ṣalāt* is not *fāsid*. Because if — as you concede — for any *mutayammim* who sees *wuḍū'*-water at the beginning of his *ṣalāt*, his *ṣalāt* is *fāsid*; and if — as you concede — whatever makes a *farḍ* *fāsid* at its initial stage of performance, also makes it *fāsid* at its concluding stage; then, in this case, since the *mutayammim* sees water at the concluding stage of his *ṣalāt*, you must also say that his *ṣalāt* is *fāsid*.

This examination of the *Ta'sīs*, then, in conjunction with what we know of Aristotelian dialectic, has suggested some rather important possibilities which ought to be pursued with more rigor, in future research.⁵⁰ Among questions for further investigation are the following: To what extent, after deeper analyses, can we claim a shared conception between the *uṣūl* of al-Karkhī, the *uṣūl* of the author(s) of the *Ta'sīs* and like works, and the *topoi* of Aristotle's *Topics*? And if these "*uṣūl*" works may in fact be considered the first of the Ḥanafī *ṭarīqa* of *uṣūl al-fiqh*, then to what extent may we claim this tradition to have incorporated a patently Aristotelian dialectical episteme? Are the parallels we observe resultant of a direct application of the *Topics* to juridical argumentation, or simply a "natural" convergence of dialectical objectives? How do these convergences bear upon the developmental history of the term *aṣl/uṣūl*; and what other terms — besides *waḍ'*, *mawḍi'*, *hujja*, and (possibly) *muḥāl* — are shared by these early Ḥanafī "*uṣūl*" works and the Arabic translations of Aristotle?

There is a great deal which may be done to pursue these, and other, questions. Our focus, however, must remain, for now, on grinding and polishing our *jadal*-theory lens in order to analyze the argument and dialectic of the *K. Ikhtilāf al-'Irāqīyyīn*. What we can say at this point, however, and unequivocally, is that the *uṣūl* of al-Karkhī and of the author(s) of the *Ta'sīs* were recognized critical components of juridical *jadal*. *Jadal*, in fact, is both the birthplace and *raison d'être* of these early Ḥanafī *uṣūl*; and this is no mere conjecture, but derived from the manifestos, organizing principles, and *khilāf* material as stated and presented by the authors themselves.

⁵⁰ Although he says nothing about dialectic *per se*, an important analysis of the "logic" of the *Ta'sīs al-Naẓr* may be found in Brannon Wheeler's *Applying the Canon in Islam: The Authorization and Maintenance of Interpretive Reasoning in Ḥanafī Scholarship* (pp.132-50, "Logical Structure of the Opinions").

“Uṣūl” as *Qawā'id Fiqhiyya*

As our *mutayammim* example clearly shows, these early “uṣūl” were in fact the *qawā'id fiqhiyya* of later times.⁵¹ Wolfhart Heinrichs has noted this, and I would like to reproduce a few comments of his before proceeding to a brief review of certain of the uṣūl of al-Karkhī. Expositing upon the origins of the *qawā'id* literary genre, Heinrichs says:⁵²

“Historically, general rules can be found already strewn throughout early *furū'* works. They were first collected by Ḥanafīs like Abu 'l-Ḥasan al-Karkhī (d. 340/952), but under the title of *uṣūl* rather than *qawā'id*. (As a result, the term *aṣl* acquires, minimally, a fourfold meaning: (1) an act that has already been legally determined and now serves as a “model” for similar cases; (2) a scriptural pronouncement (Qur'ān or Ḥadīth) that is considered decisive for the legal determination of a given act; (3) a legal principle, under which several individual cases are subsumed; (4) a source of the law, such as the Qur'ān.) But this early start hardly bore fruit, and it is only around the 7th/13th century that all the legal schools began to produce books on *qawā'id* (predominantly with this term in the title of their books), except (!) the Ḥanafīs. This strange gap in the latter's record is probably not to be attributed to a loss of their works, because the Ḥanafī scholar, Ibn Nudjāym (d. 970/1562), complains about the fact that his school has nothing to compete with against the Shāfi'īs in this respect —a situation that he tries to redress by writing a *qawā'id* book on the model of the Shāfi'ī Tādj al-Dīn al-Subkī's (d. 771/1370) work.”

With regard to the practice of later jurists in their *qawā'id* works, Heinrichs offers another important observation:

“The school-specific *qawā'id* were collected from the *furū'* works or, where the imāms and other earlier authorities had not been explicit about their principles, were arrived at by induction from their *furū'* decisions (*qawā'id istiḳrā'iyya*). Ibn al-Wakīl (d. 716/1317) and Abū 'Abd Allāh al-Maḳḳarī (d. 758/1357) are said to have done their own *istiḳrā'* of the major Shāfi'ī and Mālikī sources respectively...”

Although this latter observation has little bearing on our current discussions, I had thought to point out a parallel concern with which we will be faced in the course of analyzing the *Ikhtilāf al-'Irāqīyyīn*. In short: as with induction of unspoken *qawā'id* from the corpus of an early *mujtahid*'s doctrine, so too with the extraction of the unrecorded argumentation which lay behind an early *mujtahid*'s substantive rulings. That is to say, we will sometimes be confronted in our analyses of the *Ikhtilāf al-'Irāqīyyīn* with plain

⁵¹ Importantly, another sense of the term “uṣūl” in our early legal literature has been noted by Hallaq (“Master Architect,” 588ff.) In short, works of uṣūl ascribed to the 3rd/9th century were, in the main (if not entirely), works of positive law (*furū'*) and *khilāfiyyāt* – not legal theory.

⁵² *Et*², s.v. “*Qawā'id Fiqhiyya*.” Parentheses are Heinrichs'; references have been omitted.

substantive solutions which are not accompanied by the arguments which produced them; although, in the main, I have only selected “overtly dialectical” material in which supporting arguments are laid bare. Now, a jurist thoroughly trained in the *fiqh* of venerated exemplar *mujtahids* from the past might be able to accurately “reconstruct” the arguments of his predecessors when they do not appear in our text. Fortunately, we have recourse — when faced with plain solution-statements — to the works of later jurists like al-Ṭabarī (*Ikhtilāf al-Fuqahā*) and al-Sarakhsī (*Mabsūṭ*) which sometimes supply the arguments “missing” from our subject-text. It is possible that these arguments are supplied through a process of extraction — as in later *qawā'id* works; but it is also possible that al-Ṭabarī and al-Sarakhsī had recourse to sources which are no longer extant.⁵³ Either way, such later sources as the *Mabsūṭ* will prove invaluable for a more complete analysis of the *Ikhtilāf al-'Iraqiyyīn* in future, as it has in tackling some of the more terse presentations in our current analyses of Chapter III.

Some Notes Regarding the *Uṣūl al-Karkhī*

It is self-evident that the entirety of al-Karkhī's (d.340) *uṣūl* were meant to play a role in *ijtihād*; thus, indirectly, they may all be considered “principles” belonging to the *'ilm uṣūl al-fiqh*. A certain number of these, however, are of special note, for they are *explicitly* oriented towards step-by-step procedures of *istidlāl* and *i'tirāḍ* — in other words, they are clearly dialectical procedural *uṣūl*. Moreover, there is at least one *aṣl* (noted by Miller, *Disputation Theory*, 95 and n.18) which is unambiguously oriented to the Q&A procedure of juridical *jadal*. These are important, for they predate the bulk of our extant *jadal* and *uṣūl* theory treatises by a hundred years, and provide a glimpse at early fourth century H developments.

⁵³ An examiner of this dissertation has asked why it is we would not assume later authors to have “invented” arguments to “fill in” unexplained lacunae in a founding *mujtahid*'s earlier doctrine. In answer, I would simply stress the likelihood that these arguments and proofs were attributed to founding *mujtahids* by jurists who were themselves engaged in dialectical confrontations. That is to say: if the argument was not in fact drawn from an older text (lost to us, but known to the citing jurist's dialectical opponent), and if it was not in consonance with the (consistent) method and principles of legal reasoning known to have been practiced by the founding *mujtahid* to whom it was attributed (thus opening the way to method-*naqd* and other objections), then the attribution itself would not likely have survived the heat of dialectical encounter. A jurist, in other words, could not simply “make something up” which was dissonant with the accepted methodology of a founding *mujtahid*, and then expect to be able to attribute the same to that *mujtahid*; it is most likely that the arguments which al-Ṭabarī, al-Sarakhsī, et al. convey from older authorities were either carefully reconstructed / extracted “in the way of” such authorities, or simply transmitted from older materials or teachings which were still available to them (and to their dialectical opponents).

Whatever the exact thrust of a particular *aṣl*, they are, all of them, useful premises for the Ḥanafī dialectician. It is quite obvious that al-Karkhī — like al-Dabbūsī after him — did not intend his collection of *uṣūl* only for the jurist labouring in private; al-Karkhī’s *uṣūl* are also — and sometimes explicitly — for the jurist engaged in dialectical disputation. I have therefore extracted such *uṣūl* as appear most relevant to *ijtihād*ic and dialectical concerns in the following table, in order that we might assess something of the flavour of dialectic in al-Karkhī’s time:⁵⁴

Explicitly <i>Uṣūl al-Fiqh</i> and <i>Jadal</i>-Oriented <i>Uṣūl</i> from the <i>Uṣūl al-Karkhī</i>	
28 – <i>Al-Aṣl</i> : That, for every <i>āya</i> (Qur’ānic verse) opposing the <i>qawl</i> (doctrinal solution) of our <i>aṣḥāb</i> ; <i>naskh</i> (abrogation) or <i>tarjih</i> (preponderating) is assumed. And the <i>awlā</i> (superior or more fitting solution) is that <i>ta’wīl</i> (interpretation) with respect to <i>tawfiq</i> (harmonization) ⁵⁵ is assumed.	28- الْأَصْلُ: أَنَّ كُلَّ آيَةٍ تُخَالِفُ قَوْلَ أَصْحَابِنَا فَإِنَّهَا تُحْمَلُ عَلَى النَّسْخِ أَوْ عَلَى التَّرْجِيحِ. وَالْأَوَّلَى أَنْ تُحْمَلَ عَلَى التَّأْوِيلِ مِنْ جِهَةِ التَّوْفِيقِ.
29 – <i>Al-Aṣl</i> : That, for every <i>khbar</i> (Prophetic report) which comes by way of <i>khilāf</i> (contradiction/contrariety) to the <i>qawl</i> of our <i>aṣḥāb</i> ; <i>naskh</i> is assumed, or [it is assumed] that it is <i>mu’āraḍun bi-mithlihi</i> (opposed and supplanted by its like [in epistemic valuation]); then one proceeds to another <i>dalīl</i> (indicant), or to <i>tarjih</i> (preponderating) regarding it, by way of what our <i>aṣḥāb</i> draw <i>ḥujja</i> from among the modes of <i>tarjih</i> ; or <i>tawfiq</i> is assumed. And that is only done according to the establishing of the <i>dalīl</i> . And if the <i>dalāla</i> (indicant) of <i>naskh</i> is established; it is assumed for it. And if the <i>dalāla</i> is established for something else, we proceed to that.	29- الْأَصْلُ: أَنَّ كُلَّ خَبَرٍ يَجِيءُ بِخِلَافِ قَوْلِ أَصْحَابِنَا فَإِنَّهُ يُحْمَلُ عَلَى النَّسْخِ أَوْ عَلَى أَنَّهُ مُعَارَضٌ بِمِثْلِهِ ثُمَّ يُصَارُ إِلَى دَلِيلٍ آخَرَ أَوْ تَرْجِيحٍ فِيهِ بِمَا يَحْتَجُّ بِهِ أَصْحَابُنَا مِنْ وَجْهِهِ التَّرْجِيحِ أَوْ يُحْمَلُ عَلَى التَّوْفِيقِ وَإِنَّمَا يُفْعَلُ ذَلِكَ عَلَى حَسَبِ قِيَامِ الدَّلِيلِ فَإِنْ قَامَتْ دَلَالَةُ النَّسْخِ يُحْمَلُ عَلَيْهِ وَإِنْ قَامَتْ الدَّلَالَةُ عَلَى غَيْرِهِ صِرْنَا إِلَيْهِ.
30 – <i>Al-Aṣl</i> : That the <i>ḥadīth</i> — when it is cited on the authority of the <i>Ṣaḥābī</i> , as a <i>mukhālif</i> (contrary/contradictory) to the <i>qawl</i> of our <i>aṣḥāb</i> ; if it is not valid with regard to the <i>aṣl</i> , we are sufficed by the provision (<i>mu’na</i>) of its <i>jawāb</i> (proper rebuttal). But if it is <i>ṣaḥīḥ</i> (valid) in its	30- الْأَصْلُ: أَنَّ الْحَدِيثَ إِذَا وَرَدَ عَنِ الصَّحَابِيِّ مُخَالَفًا لِقَوْلِ أَصْحَابِنَا فَإِنْ كَانَ لَا يَصِحُّ فِي الْأَصْلِ كُفِينَا مُؤَنَّةَ جَوَابِهِ وَإِنْ كَانَ

⁵⁴ al-Karkhī, *Uṣūl*, ‘Ināyat Allāh ed., 314-17; cf. al-Mays ed., 152-6.

⁵⁵ A fitting definition for *tawfiq* is found in Sānū’s *Mu’jam Muṣṭalahāt Uṣūl al-Fiqh*: “Binding together (*al-tarābuṭ*) and combination (*al-jam*’); making two opposing indicants (*al-dalīlayn al-muta’āridayn*) to be in conformity with one another (*mutawāfiqayn*). And such is through rejecting their mutual incompatibility (*daf’ ta’āridihimā*), and the elimination of the *ikhtilāf* between them by some mode of *ta’wīl*, such as limiting the unrestricted (*taqyīd al-muṭlaq*), and particularizing the general (*takhṣīṣ al-’amm*); and this *tawfiq* is [also] called *jam*’ (combination).”

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citation; then the mention of its <i>aqsām</i> has preceded [in our discussions], except that the best of the modes and most distant from <i>shubah</i> (sophisms) is — when a <i>ḥadīth</i> of the <i>Ṣaḥābī</i> is cited for something besides a <i>mawḍiʿ</i> (locus) of <i>ijmāʿ</i> — that <i>al-taʿwīl</i> or <i>al-muʾāraḍa</i> between him and a <i>Ṣaḥābī</i> of his like is assumed.	صَحِيحًا فِي مَوْرِدِهِ فَقَدْ سَبَقَ ذِكْرُ أَقْسَامِهِ إِلَّا أَنَّ أَحْسَنَ الْوُجُوهِ وَأَبْعَدَهَا عَنِ الشُّبْهِ أَنَّهُ إِذَا وَرَدَ حَدِيثُ الصَّحَابِيِّ فِي غَيْرِ مَوْضِعِ الْإِجْمَاعِ أَنْ يُحْمَلَ عَلَى التَّأْوِيلِ أَوْ الْمُعَارَضَةِ بَيْنَهُ وَبَيْنَ صَحَابِيٍّ مِثْلِهِ.
31 - <i>Al-Aṣl</i>: That, when it [the <i>masʿala</i>] concludes by way of <i>ijtihād</i>, it is not cancelled by an <i>ijtihād</i> of its like [in epistemic valuation]. But it is cancelled by way of the <i>naṣṣ</i> (univocal textual directive).	31- الْأَصْلُ: أَنَّهُ إِذَا مَضَى بِالِاجْتِهَادِ لَا يُفْسَخُ بِاجْتِهَادٍ مِثْلِهِ وَيُفْسَخُ بِالنَّصِّ.
32 - <i>Al-Aṣl</i>: That the <i>naṣṣ</i> requires <i>taʿlīl</i> (justification of the occasioning factor) by way of the <i>ḥukm</i> (associated norm) of another besides it, not by way of its own <i>ḥukm</i>.	32- الْأَصْلُ: أَنَّ النَّصَّ يَحْتَاجُ إِلَى التَّعْلِيلِ بِحُكْمٍ غَيْرِهِ لَا بِحُكْمِ نَفْسِهِ.
33 - <i>Al-Aṣl</i>: That he draw a distinction between the <i>ʿilla</i> (occasioning factor) of the <i>ḥukm</i> and its <i>ḥikma</i> (the rationale behind God's ruling); for indeed its <i>ʿilla</i> is a <i>mūjiba</i> (necessitating cause), while its <i>ḥikma</i> is not a <i>mūjiba</i>.	33- الْأَصْلُ: أَنَّهُ يُفَرِّقُ بَيْنَ عِلَّةِ الْحُكْمِ وَحِكْمَتِهِ فَإِنَّ عِلَّتَهُ مُوجِبَةٌ وَحِكْمَتُهُ غَيْرُ مُوجِبَةٍ.
35 - <i>Al-Aṣl</i>: That the <i>ḥāditha</i> (case under consideration), when it occurs and the <i>muʾawwil</i> (interpreter) does not find, regarding it, a <i>jawāb</i> (response) and a <i>naẓīr</i> (parallel) in the books of our <i>aṣḥāb</i>; it is right for him that he should rationally infer its <i>jawāb</i> from something other than them [our books]: from the <i>Kitāb</i>, or from the <i>Sunna</i>, or besides that, from what is the strongest [in epistemic valuation]. For the strongest: indeed it does not go beyond these <i>uṣūl</i>.	35- الْأَصْلُ: أَنَّ الْحَادِثَةَ إِذَا وَقَعَتْ وَلَمْ يَجِدِ الْمُؤَوِّلُ فِيهَا جَوَابًا وَنَظِيرًا فِي كُتُبِ أَصْحَابِنَا فَإِنَّهُ يَنْبَغِي لَهُ أَنْ يَسْتَنْبِطَ جَوَابَهَا مِنْ غَيْرِهَا إِمَّا مِنَ الْكِتَابِ أَوْ مِنَ السُّنَّةِ أَوْ غَيْرَ ذَلِكَ مِمَّا هُوَ أَقْوَى فَالْأَقْوَى فَإِنَّهُ لَا يَعْدُو حُكْمَ هَذِهِ الْأُصُولِ.
36 - <i>Al-Aṣl</i>: That the <i>lafẓ</i> (word/phrase), when it conveys / extends two meanings, one of which is <i>ajlā</i> (more conspicuous) than the other, and the other is <i>akhfā</i> (more concealed); verily the <i>ajlā</i> is <i>amlak</i> (more dominant) than the <i>akhfā</i>.	36- الْأَصْلُ: أَنَّ اللَّفْظَ إِذَا تَعَدَّى مَعْنَيْنِ أَحَدُهُمَا أَجْلَى مِنَ الْآخَرِ وَالْآخَرُ أَخْفَى فَإِنَّ الْأَجْلَى أَمْلَكُ مِنَ الْأَخْفَى.
37 - <i>Al-Aṣl</i>: That it is allowed that the first part of the <i>āya</i> be in the manner of <i>al-ʿumūm</i> (general of scope) and the latter part in the manner of <i>al-khuṣūṣ</i> (particular of scope).	37- الْأَصْلُ: أَنَّهُ يَجُوزُ أَنْ يَكُونَ أَوَّلُ الْآيَةِ عَلَى الْعُمُومِ وَآخِرُهَا عَلَى الْخُصُوصِ.

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38 - <i>Al-Aṣl</i>: That the two <i>tawfiqayn</i> (i.e., the indicants subjected to <i>tawfiq</i>), when they come together and mutually oppose (<i>talāqayā wa ta'āraḍā</i>), but regarding one of them there is an abandonment of the two <i>lafẓs</i> for the <i>ḥaqīqa</i> (the originally-coined sense of the <i>lafẓ</i>); it is <i>awlā</i> (superior or more fitting).	38- الْأَصْلُ: أَنَّ التَّوْفِيقَيْنِ إِذَا تَلَقَّيَا وَتَعَارَضَا وَفِي أَحَدِهِمَا تَرَكُّ اللَّفْظَيْنِ عَلَى الْحَقِيقَةِ فَهُوَ أَوْلَى.
An Explicitly <i>Jadal</i>-Procedure-Oriented <i>Aṣl</i> from the <i>Uṣūl al-Karkhī</i>	
34 - <i>Al-Aṣl</i>: That the <i>sā'il</i> (Q), when he asks a <i>su'āl</i> (question): it is right for the <i>mas'ul</i> (P; the questioned) that he should not respond unrestrictedly and with full conveyance (<i>'alā al-itlāq wa'l-irsāl</i>), but that he look into it [the <i>su'āl</i>] and reflect, [and] that it [the <i>su'āl</i>] be divided into a single <i>qism</i> (portion), or two <i>qisms</i>, or <i>aqṣām</i>. Then, he [should] confront each <i>qism</i> word for word; then put his <i>jawāb</i> (rebuttal) in order according to what the <i>su'āl</i> conveys to him. And this <i>aṣl</i> is of multiple benefit, because, when he unrestrictedly conveys the <i>kalām</i> (justificatory statements), perhaps it will be swiftly undone (<i>sarī al-intiqāḍ</i>). Because the <i>lafẓ</i> — how infrequently does it conform to its <i>'umūm</i> (general application)!	34- الْأَصْلُ: أَنَّ السَّائِلَ إِذَا سَأَلَ سُؤلاً يَنْبَغِي لِمَسْئُولٍ أَنْ لَا يُجِيبَ عَلَى الْإِطْلَاقِ وَالْإِرْسَالِ لَكِنْ يَنْظُرُ فِيهِ وَيَتَفَكَّرُ أَنَّهُ يَنْقَسِمُ إِلَى قِسْمٍ وَاحِدٍ أَوْ إِلَى قِسْمَيْنِ أَوْ أَقْسَامٍ ثُمَّ يُقَابِلُ فِي كُلِّ قِسْمٍ حَرْفًا فَحَرْفًا ثُمَّ يُعَدِّلُ جَوَابَهُ عَلَى مَا يَخْرُجُ إِلَيْهِ السُّؤَالُ. وَهَذَا الْأَصْلُ تَكْثُرُ مَنْفَعَتُهُ لِأَنَّهُ إِذَا أُطْلِقَ الْكَلَامَ فَرُبَّمَا كَانَ سَرِيعَ الْإِنْتِقَاضِ لِأَنَّ اللَّفْظَ قَلَمًا يَجْرِي عَلَى عُمُومِهِ.

These remarkable *uṣūl* will appear all the more so once we have completed our overview of the domains of *istidlāl* and *i'tirāḍ* for our early *jadal*-theory authors. First of all, the first four in our list of *uṣūl* (28-31) conform to concerns of *istidlāl* and *i'tirāḍ* in four domains of our *jadal*-theory texts, in precisely the same order of appearance: *Kitāb*; *Sunna*; *Qawl al-Wāḥid min al-Ṣaḥāba*; and *qiyās* (here: *ijtihād*).⁵⁶ Each of these in turn contains references to methods and techniques specifically related in our *jadal* texts regarding these domains: For *Kitāb*: *naskh*, *tarjīḥ*, and *ta'wīl*; for *Sunna*: *naskh*, *mu'āraḍa*, and *tarjīḥ*; for *Qawl al-Wāḥid min al-Ṣaḥāba*: *ta'wīl* and *mu'āraḍa* (i.e., the conveyance of *khilāf* from another *Ṣaḥābī*); and for *ijtihād/qiyās*: *mu'āraḍa bi'l-nuṭq* (here: cancellation by way of *naṣṣ*). Although quite simplistic in comparison with the extraordinary refinement of later *jadal*-theory texts, there is a remarkable consonance between these *uṣūl* of al-Karkhī and the techniques of *istidlāl* and *i'tirāḍ* of al-Shīrāzī, al-Bājī, et al. Moreover, these four *uṣūl* reflect *procedural* considerations of dialectic; i.e., step-by-step

⁵⁶ NB: al-Shāfi'ī refers to *ijtihād* and *qiyās* as “two *isms* for a single *ma'nā*” (*Risāla*, Shākir ed., 477, §1323-4; Khadduri trans., 288, §490-1). Note also that in this sequence of *uṣūl* there does not appear to be an *aṣl* with specific regard to *al-istidlāl bi'l-ijmā'*.

instructions for responding to an opposing *dalīl* brought by one's opponent. As for al-Karkhī's *uṣūl* 32-3 and 35-8, they are of equal use in the procedure of private *ijtihād* and in the procedure of real-time-disputation *istidlāl*, reflecting a variety of techniques from the nascent systematization of *uṣūl al-fiqh*. What we are witnessing here is something on the threshold between proto-system legal theory and full systematization, as compiled by an author living at the time the first full systems were said to be developed (al-Karkhī is a contemporary of the students of Ibn Surayj).

As for al-Karkhī's *aṣl* #34, it is of even greater concern to our study. The procedural guidelines provided by this *aṣl* find a number of parallels in our *jadal*-theory texts wherever the respondent is cautioned to be economical in response. The motive for this is made plain in the *aṣl* itself, and suggests, among other things, that the respondent might avoid falling victim to a questioner's sophistical *elenchus* via the "many questions" fallacy (see our discussion of this fallacy near the end of this chapter).

The upshot of all this is that al-Karkhī's *uṣūl* provide testimony to a nascent (early fourth century H) systematization of juridical *jadal* which — in combination with the *jadal* teaching and practice we shall be analyzing in the *Ikhtilāf al-ʿIrāqīyyīn* — assures that Miller's juridical "take over" paradigm is unfeasible. A picture is beginning to emerge of a far more "organic" continuity of juridical *jadal* teaching and practice, from the earliest proto-systems (as we observe them in the *Umm*), through to the earliest extant procedural systematizing (as in the *uṣūl* of al-Karkhī), and onwards to our earliest extant full-system treatises (al-Baṣrī, al-Shīrāzī, et al.) As I will suggest in later discussions, this natural evolution would have unfolded in tandem with the evolution of theological *jadal*, and the two branches — heavy laden with both prior argument epistemes and Islamic axioms — would have enjoyed great cross-germination throughout every stage of their respective evolutions.

At any rate, a great deal more will likely be uncovered through a comparative analysis between the *uṣūl* of al-Karkhī and: 1) the *jadal* practice which precedes him (such as we find in the *Umm*); and 2) the *jadal* treatises which follow him. Unfortunately, this lies outside the scope of this dissertation, and must await future research for the full treatment it surely deserves. In the meantime, we have cracked open the door, and the glimpse of what lays beyond is tantalizing indeed.

A Few Notes on the Texts which will Comprise our Early *Jadal*-Theory Lens

The primary texts whose materials comprise the greater part of our lens for analysis for the dialectical material of the *Ikhtilāf al-ʿIrāqīyyīn* are: 1) the *Kitāb al-Qiyās al-Sharʿī* of Abū al-Ḥusayn Muḥammad al-Baṣrī (Muʿtazilī-Ḥanafī; d.436/1044); 2) the *Maʿūna fiʾl-Jadal* of Abū Ishāq Ibrāhīm al-Shīrāzī (Shāfiʿī; d.476/1083); and 3) the *Minhāj fi Tartīb al-Ḥijāj* of Abū al-Walīd Sulaymān al-Bājī (Mālikī; d.474/1081). We will gain what I hope is a more than sufficient acquaintance with the organizing principles and contents of these texts in the following sections. For the present, I will simply relate the motives for choosing to rely chiefly upon them. Primary among such motives is the provenance and early date of these treatises, representing as they do juridical *jadal* theories taught at the geographical heart of Islamicate civilization in the first half of the fifth century H (and in Andalusia, thanks to al-Bājī's return to his homeland and subsequent forty years of scholarship there). In fact, these three works are among the earliest extant treatises dedicated specifically to juridical *jadal*-theory which we possess, and which have been edited.⁵⁷

These are not the only ones to survive from this early period, however, which brings me to the secondary motives prompting my reliance upon them: their well-ordered arrangement, concision of presentation, and clarity of explanation — in a word, their accessibility. As for the impressive *Kāfiya fiʾl-Jadal* of Abū al-Maʿālī ʿAbd al-Malik al-Juwaynī, Imām al-Ḥaramayn (d.478/1085) — an exceedingly thorough tome made all the more important due to its representation of an “Eastern” teaching and practice of juridical *jadal* — I have, unfortunately, found it far more difficult to navigate and interpret.⁵⁸ For this reason alone, I have more or less abandoned it in favour of our

⁵⁷ Notably, the *Mulakhkhaṣ fiʾl-Jadal* of al-Shīrāzī has also survived, but remains unedited. Fortunately, al-ʿUmayrīnī makes frequent reference to a manuscript of this impressive work in the collection of the Great Mosque at Ṣanʿā, and supplies a number of passages from it wherever the *Maʿūna* was deemed lacking.

⁵⁸ We must acknowledge here that attribution of the *Kāfiya* to al-Juwaynī has been contested by Daniel Gimaret. His argument (in *La doctrine d'al-Ashʿarī*, 183, n. 2.) is brief, and we may present it in full:

« Qui n'est probablement pas Ḡuwaynī, contrairement à ce qu'assure l'éditeur [Fawqiya Ḥusayn Maḥmūd]. J'en vois pour preuves — outre le fait que ce titre n'apparaît nullement dans les bibliographies de l'Imam — les deux définitions de *naẓar* (§44) et de *ʿilm* (§64), totalement différentes de celles du *Ṣāmīl* pour l'un (éd. Frank 4,5), de l'*Iršād* pour l'autre (7,4). Dans l'*Iršād* (7,6-7 et 11-14), Ḡuwaynī rejette explicitement la définition ašʿarienne du *ʿilm* reprise dans la *Kāfiya*. Un autre indice dans le même sens me paraît être l'absence, dans la *Kāfiya*, de toute mention de Bāqillānī, si souvent cité tant dans le *Ṣāmīl* que dans le *Burhān*. »

three primary treatises, referencing the *Kāfiya* only in review of certain observations and assessments made by Miller. And as for the *Kitāb al-Jadal fī Ṭarīqat al-Fuqahā'* of Abū al-Wafā' 'Alī b. 'Aqīl (Ḥanbalī; d.513/1119), although it is every bit as accessible as our three primary treatises, it is somewhat less orderly in arrangement; and, by and large, reproduces a great amount of material (definitions, explanations, and example-*masā'il*) from the *Ma'ūna* of al-Shīrāzī (one of Ibn 'Aqīl's teachers). For this reason it has mostly been relegated to the footnotes of our analyses of the *Ikhtilāf al-'Irāqiyyīn*.

It is imperative that I here make the following disclaimer: my primary reliance upon the works of al-Baṣrī, al-Shīrāzī, and al-Bājī is not in any way meant to suggest that the works of al-Juwaynī and Ibn 'Aqīl are somehow less important or inferior. To the contrary, they are every bit as important, and exhibit every quality of sophistication and erudition. My reservations towards full-employment of these works — besides restrictions of time and space — have been as I expressed them above: accessibility, organization, and repetition of material. As a final note — with regard to all the *jadal*-theorists mentioned thus far: we must acknowledge that each of them, in addition to being master dialecticians in their own right (not merely theorists), were the authors of seminal *uṣūl al-fiqh* works. The dynamic symbiosis of juridical dialectic

On the whole, though Gimaret has certainly sustained the possibility of a different author through these “proofs,” I do not believe they indicate a probability. With regard to the absence of mention of the *Kāfiya* in bio-bibliographical works: this is hardly a proof at all, especially when we consider that al-Juwaynī is supposed to have authored so many works that al-Subkī (in his *Ṭabaqāt*) proclaimed: “the abundance of his literary production could be explained only by a miracle” (cited in the *El*², s.v. “al-Djuwaynī”). The same goes for the absence of mention of al-Bāqillānī in the *Kāfiya*: it does not constitute, in my opinion, an indicant either way. As for the differing definitions cited by Gimaret, I would make the following points: 1) variant definitions are not proofs of different authorship, as we must allow that a scholar will rethink and reformulate his/her opinions over time (see Fischer, *Historians' Fallacies*, 199f., where he discusses a variant of the “Idealist Fallacy,” concluding: “Surely many thinkers have been inconsistent within their own limits. A presumption of logical consistency is as unjustified as a presumption of the opposite.”); 2) the *Irshād* and the *Shāmil* are theological works, while the *Kāfiya* is a work of distinctly juridical *jadal*, and we will soon see proofs that al-Juwaynī understood variant epistemological first principles for theology and law (acknowledging, *inter alia*, a difference between *'ilal 'aqliyya* and *'ilal shar'iyya*); 3) al-Juwaynī's definition for *al-naẓar* in his *Waraqāt fī Uṣūl al-Fiqh* (al-Qāsimī and al-Balkhī ed., 46) — “*huwa al-fikr fī ḥāl al-manẓūr fihi*” — is in full consonance with his definition and arguments in the *Kāfiya*; indeed, in the *Kāfiya* he argues *against* two *qawls* which seek to distinguish *naẓar* from *fikr* (Maḥmūd ed., 16-18, §§44-46; note that Gimaret does not cite the full discussion with its arguments); and 4) al-Juwaynī's definition for *al-'ilm* in his *Waraqāt fī Uṣūl al-Fiqh* (op. cit.) — “*ma'rifat al-mālūm 'alā mā huwa bihi fi'l-wāqī'*” — is, again, in full consonance with his definition and arguments in the *Kāfiya*; in this latter, he in fact links *'ilm* and *ma'rifa* more than once in his arguments against opposing positions (Maḥmūd ed., 25-7, §§64-5; note, again, that Gimaret does not cite the full discussion). If we add to this various inter-*kitāb* references in the *Kāfiya* (which, in the main, seem to point to the *Burhān*), I would stand by the editor (Maḥmūd) in attributing this important work to al-Juwaynī.

and legal theory should already be quite clear — will only become more so as we proceed — and nowhere is this symbiosis more evident than in the persons of our *jadal*-theorists themselves.

As should also have been made abundantly clear, none of the above treatises in fact represent the earliest systematizations of juridical *jadal*. Rather, they represent the earliest *extant* treatises dedicated *solely* to juridical disputation theory and procedure. We not only have reports of earlier, full-system treatises which appear to be no longer extant (e.g., the *jadal* work of Abū Bakr Muḥammad al-Shāshī, al-Qaffāl al-Kabīr; Shāfiʿī student of Ibn Surayj, d.336/947), but — as we have already seen in the *Uṣūl* of al-Karkhī and the *Taʾsīs al-Naẓar* of al-Samarqandī / al-Dabbūsī — systematic juridical *jadal*-theory material may be found in works predating those of our specialized treatises by as much as a century and more. In particular, and as with al-Baṣrī's *Muʿtamad* and many later works of full-system *uṣūl al-fiqh*, we should find — in our earliest full-system *uṣūl al-fiqh* treatises — chapters relevant to juridical *jadal*. Now, we must again make a distinction between “earliest” and “earliest extant,” with al-Baṣrī's *Muʿtamad* thankfully among the latter. Once again, however, we have reports of earlier full-system *uṣūl al-fiqh* treatises which appear to have been lost (e.g., the *uṣūl* works of the students of Ibn Surayj, al-Shāshī among them). There are, however, two works which have arisen as candidates for the extraction of early, systematic *jadal* material predating al-Baṣrī: the *Fuṣūl fi'l-Uṣūl* of al-Jaṣṣāṣ, and the so-called *Uṣūl al-Shāshī*.

As for the former, the *Fuṣūl* of Abū Bakr Aḥmad al-Rāzī al-Jaṣṣāṣ (Ḥanafī and student of al-Karkhī; d.370/981) is a compendious and thorough tome of *uṣūl al-fiqh* from a mere generation or two after the first full-system treatises were said to be writ (and a generation or two before al-Baṣrī's *Muʿtamad*). Moreover, it is extant, has been published in more than one edition, and contains many a chapter relevant to the *istidlāl* and *iʿtirāḍ* concerns of juridical dialectic. It is therefore my great misfortune — and, consequently, perhaps the largest lacuna in this current project — that I came to realize the availability of this text at so late a stage in my research and writing. I have subsequently reconciled myself to the absence of the *Fuṣūl fi'l-Uṣūl* in this dissertation due to: 1) the thoroughness of treatment of al-Shīrāzī and al-Bājī for all matters of juridical *jadal*; 2) my primary reliance upon specialized *jadal*-theory treatises (as opposed to chapters in *uṣūl* works); and 3) my primary objective of analyzing the *proto-system* dialectic of the *Ikhtilāf al-ʿIrāqīyyīn* (rather than re-writing the developmental history of systematized juridical dialectic). Nevertheless, a thorough analysis of the *jadal*

material in the *Fuṣūl* of al-Jaṣṣāṣ remains a door wide open to further research, and comparison of its contents with the treatises of al-Baṣrī, al-Shīrāzī, et al. is bound to reveal much of import.

But we have mentioned a second candidate *uṣūl al-fiqh* treatise, extant and (purportedly) prior to al-Baṣrī's *Mu'tamad*: the so-called *Uṣūl al-Shāshī*. In this case, however, I was cognizant of the availability of this treatise from early on. Nevertheless, and subsequent to further research, I found firm enough grounds to justify its rejection for the purposes of this dissertation, and despite its many and tempting *jadal*-relevant chapters. Here, I will attempt to explain this revelation as briefly as possible.⁵⁹

As a systematic treatment of *uṣūl*, the *Uṣūl al-Shāshī* is very *jadal*-oriented, and contains, among other things, a chapter entitled *al-Qiyās al-Shar'ī* — like al-Baṣrī's *Kitāb* — and which includes an outline of “*al-As'ila al-Mutawajjiha 'alā al-Qiyās*,” listing: 1) *al-Mumāna'a*; 2) *al-Qawl bi-Mūjib al-'Illa*; 3) *al-Qalb*; 4) *al-'Aks*; 5) *Fasād al-Waḍ'*; 6) *al-Farq*; 7) *al-Naqḍ*; and 8) *al-Mu'āraḍa*; all with examples.⁶⁰ With its Ḥanafī orientation, however, the text may not be ascribed to the Shāfi'ī Abū Bakr al-Qaffāl al-Shāshī (d.336), as we might be tempted to do.⁶¹ However, if the *Uṣūl al-Shāshī* may be attributed to the Ḥanafī Abū 'Alī al-Shāshī (d.344), it would still significantly predate our other extant systematic juridical *jadal* material — the specialized treatises of al-Baṣrī, al-Shīrāzī, et al. — by a century and more. As Nadwī points out in the introduction to his edition,⁶² however,

⁵⁹ Although my argument as to “why I do not employ the *Uṣūl al-Shāshī*” is something of a digression from our main task in this section, I have felt it necessary to present it here, in the main text, for a singular purpose. In short, my reasoning for abandoning an early authorship for the *Uṣūl al-Shāshī* serves as a counter-balance to my argument against Calder's post-dating of the *Umm* corpus. I will develop this latter argument in an opening section on “Authenticity Questions” in Part II of this dissertation. The importance of the current argument re: the *Uṣūl al-Shāshī* is this: the text itself contains unambiguous anachronisms providing clear indicants that the text cannot (at least not entirely) be ascribed to Abū 'Alī al-Shāshī. Calder's arguments, on the other hand (with regard to the *Umm*), have no such unambiguous bases upon which to rest. Rather, they rely upon features which he *predetermines* to be anachronistic (they are not at all self-evident, as in the *Uṣūl al-Shāshī*). If post-dating the *Umm* is a probabilistic enterprise, then Calder, in my opinion, has failed to argue more than a *possibility*; whereas an ascription of the *Uṣūl al-Shāshī* to a later generation is indeed made *probable* by the sort of anachronisms it contains.

⁶⁰ *Uṣūl al-Shāshī*, Nadwī ed., 237-44; al-Mays ed., 341-52.

⁶¹ Hallaq (“Treatise,” 198, n.6) lists a number of references for the earliest works in juridical dialectic; importantly, he cites al-Shīrāzī's claim (which may be found in *Ṭabaqāt al-Fuqahā'*, p.120 of the Khalīl al-Mays ed.) that Abū Bakr Muḥammad b. 'Alī b. Ismā'īl al-Qaffāl al-Shāshī (d.336, a student of Ibn Surayj) was the first among *fuqahā'* to compose a work on *al-jadal al-ḥasan*. We note also that he is claimed by al-Shīrāzī to have composed a *kitāb* on *uṣūl al-fiqh*, a *sharḥ* on the *Risāla*, and that he is credited with spreading the *fiqh* of al-Shāfi'ī in Transoxiana.

⁶² *Uṣūl al-Shāshī*, 6ff.

there are two considerable difficulties which provide indicants preventing us from making this attribution.

Khalīl al-Mays, however, attributes his text of the *Uṣūl al-Shāshī* to Abū ‘Alī al-Shāshī (d.344); i.e., “Aḥmad b. Muḥammad b. Ishāq, Abū ‘Alī, al-Shāshī, Nizām al-Dīn, al-Faqīh al-Ḥanafī;” who took *fiqh* from ‘Alī b. al-Ḥasan al-Karkhī (d.340).⁶³ He proceeds to list a few descriptions of this particular Shāshī from various references. Importantly, he mentions (bottom p.6) al-Laknawī’s observation that “Two great imāms from the two *madhhabs* were known by ‘al-Shāshī.’ As for the Ḥanafī: Abū ‘Alī Aḥmad b. Muḥammad b. Ishāq.... And the Shāfi’ī: Abū Bakr Mūḥammad b. Ismā’īl, known by al-Qaffāl (d.413).”⁶⁴ As for a Shāfi’ī Qaffāl al-Shāshī dying in 413 H, I am not yet certain who that might be (unless this is simply an error of al-Mays or Laknawī) — and the death date for the Shāfi’ī Abū Bakr Muḥammad b. ‘Alī b. Ismā’īl al-Qaffāl al-Shāshī is significantly earlier in al-Mays’s own edition of al-Shīrāzī’s *Ṭabaqāt*.⁶⁵ Al-Shīrāzī’s *Ṭabaqāt* also has an entry for the Ḥanafī Abū ‘Alī al-Shāshī,⁶⁶ where indeed his death is recorded for 344. Again, with its Ḥanafī orientation, the text may not be easily ascribed to a Shāfi’ī Abū Bakr al-Qaffāl al-Shāshī, whichever of the two (if there are indeed two) is meant. But if it does indeed belong to the Ḥanafī Abū ‘Alī al-Shāshī, we might consider it not only among the earliest — if not *the* earliest — of extant systematic treatments of *uṣūl al-fiqh*, but of *al-jadal al-fiqhī* as well.

Muḥammad Akram al-Nadwī’s edition of the *Uṣūl al-Shāshī*, however, appears to be subtitled in conscious rebuttal to this claim: *Mukhtaṣar fī Uṣūl al-Fiqh al-Islāmī, ta’līf Nizām al-Dīn al-Shāshī, min Rijāl al-Qarn al-Sābi‘ al-Hijrī*. This — in combination with his inconclusive discussion of the authorship problem — provides confirmation as to whom he believed was most probably the author. In brief, Nadwī approaches the authorship question by reviewing three past attributions, then discounting two of them as impossible, and apparently concluding the best we have is an attribution to a certain Nizām al-Dīn al-Shāshī of the seventh century H.⁶⁷

First, he considers Ishāq b. Ibrāhīm, Abū Ya‘qūb al-Khurāsānī al-Shāshī (Ḥanafī, d.325) — our third Shāshī at this point —, to whom authorship of the *Uṣūl al-Shāshī* was

⁶³ al-Mays ed., *Uṣūl al-Shāshī*, 5-6.

⁶⁴ The editor refers, without mention of edition, to p.244 of al-Laknawī’s *al-Fawā’id al-Bahiyya* (al-Mays ed., *Uṣūl al-Shāshī*, 7, n.4). This is the *Fawā’id al-Bahiyya fī Tarājim al-Ḥanafīyya* of Muḥammad ‘Abd al-Ḥayy al-Laknawī (d.1304/1886).

⁶⁵ al-Mays ed., 120; where it is mentioned he was a student of Ibn Surayj (d.306), and himself died in 336.

⁶⁶ al-Mays ed., 149.

⁶⁷ *Uṣūl al-Shāshī*, 6-10.

attributed by the modern scholars ‘Abd Allāh Muṣṭafā al-Marāghī (in his *Faḥ al-Mubīn fī Ṭabaqāt al-Uṣūliyyīn*); al-Ziriklī (d.1976; in his *A’lām*); and Yūsuf Ilyān Sarkīs (d.1932/3; in his *Mu’jam al-Maṭbū’āt*). He then cites older *tarājim* for Abū Ya’qūb al-Shāshī, but none of them attribute a book of *uṣūl al-fiqh* to him. Second, Nadwī considers Aḥmad b. Muḥammad b. Ishāq, Abū ‘Alī, Niẓām al-Dīn al-Shāshī (Ḥanafī, d.344), noting first that a previous 1402 H Beirut edition of the *Uṣūl al-Shāshī* (i.e., the al-Mays ed.) affirms him as the author, as we indeed see that al-Mays has done. Nadwī cites a few *tarājim*, then laments that none of these works refer to Abū ‘Alī al-Shāshī as “Niẓām al-Dīn” (although al-Mays has done so), nor do any of them attribute to him a work of *uṣūl al-fiqh*.

Moreover, and this is important, Nadwī notes two references in the text of the *Uṣūl al-Shāshī* to scholars who died in the fifth century H. The first is the very Abū Zayd al-Dabbūsī (d.430) we have already introduced,⁶⁸ and the second is to Ibn al-Ṣabbāgh (Shāfi’ī; d.477).⁶⁹ This is indeed a valid basis upon which to cancel the authorship of Abū Ya’qūb al-Shāshī and Abū ‘Alī al-Shāshī, both of whom, as Nadwī observes, died a hundred years or more before al-Dabbūsī and Ibn al-Ṣabbāgh. However, we cannot rule out the possibility of later editorial intrusions — notes from the margins incorporated into the main text during copying, and such a copy becoming the base-text for a branch-recension in the redactional history of the *Uṣūl al-Shāshī*. On the other hand, Nadwī relied upon three manuscripts, one from the late thirteenth H, and the other two with no date (although the type of paper in one suggests the 11th or 12th c. H). As for al-Mays, he simply neglects to mention his manuscript sources altogether. Ultimately, the only way to affirm or deny whether these references to al-Dabbūsī and Ibn al-Ṣabbāgh are later intrusions is to collate every existing copy of the *Uṣūl al-Shāshī* from the world over, and establish a complete redactional history for the text.

In any case, and returning to Nadwī, he next considers an attribution of the *Uṣūl al-Shāshī* made by the organizer of the Bankipur Library catalogue, and mentioned by Muḥammad al-Jaylamī (d.1904) in his *Ḥadā’iq al-Ḥanafīyya*, to one Niẓām al-Dīn al-Shāshī, who was among the Ḥanafī scholars of the seventh century H — our fourth Shāshī at this point. Unfortunately, no mention is made in these sources of his full name, the date of his death, nor of any teachers, students, or biographical sources. Al-Jaylamī does mention, however, that the book was also called *al-Khamsīn*, as the author

⁶⁸ Nadwī ed., 85 and n.7; al-Mays ed., 108. This is the same Dabbūsī to whom the *Ta’sīs al-Nazar* is attributed.

⁶⁹ Nadwī ed., 219-20 and n.7; al-Mays ed., 312.

was fifty years old at the time he composed it. This alternate title led Nadwī to an entry in the 1835-58 London edition of the *Kashf al-Zunūn*, wherein a *Kitāb al-Khamsīn* is attributed, once again, to a Nizām al-Dīn al-Shāshī, and a commentary on the same to a Shams al-Dīn al-Shāshī (fl. 781 H). Nadwī believes this entry in the *Kashf al-Zunūn* to be al-Jaylamī's source, but concludes his investigation by lamenting the lack of reference to all but the author of the *Khamsīn*'s name. Finally, we should note that al-Mays makes note of the *Khamsīn* mentioned in the *Kashf al-Zunūn* as well;⁷⁰ no doubt it is from here that he brought the appellation of Nizām al-Dīn to Abū 'Alī al-Shāshī, who does not seem to bear it in other sources.

In addition to all this, we find the article of one Murteza Bedir: "The Problem of *Uṣūl al-Shāshī*."⁷¹ At the end of his research, Bedir concludes (p.435):

"*Uṣūl al-Shāshī* in this development most probably belongs to the post-Pazdawī period. Apart from lacking a historical basis for its being a fourth century work, this study has indicated that structure as well as terminology of this work in fact displays the features of the above mature style [which Bedir believes to have begun with Pazdawī], sometimes even surpassing it in terms of brevity. It must have been intended as an introductory work aiming to describe the school positions on *uṣūl al-fiqh*."

Now, from what I have read, there is little in Bedir's article which transfers post-Pazdawī authorship of the *Uṣūl al-Shāshī* from the sphere of possibility to that of probability, any further than the two anachronistic references to al-Dabbūsī and Ibn al-Ṣabbāgh (noted also by Bedir) already have done (Ibn al-Ṣabbāgh died in 477, al-Pazdawī in 482). His style-comparison approach appears, at times, vague, even arbitrary — "brevity and conciseness," after all, are qualities found in a great many legal works both before and after Pazdawī. They do not constitute a chronological indicant of any sort whatsoever, in my opinion. Moreover, Bedir presumes something of a linear development of absolute priority, wherein "earliest extant Ḥanafī text influenced next extant Ḥanafī text" and so on, with apparent disregard for variants within the Ḥanafī tradition (al-Baṣrī, after all, was a Ḥanafī), or authors' variant literary or functional aims. On top of all this, we have the *Fuṣūl fi'l-Uṣūl* of al-Jaṣṣāṣ (d.370), which is a highly organized and concise work of systematized *uṣūl al-fiqh*.

All things considered, my final decision was as follows: 1) although it is very tempting to follow the attribution of Khalīl al-Mays (and certain modern bio-bibliographers) to the Ḥanafī Abū 'Alī al-Shāshī (d.344); and 2) although we might

⁷⁰ *Uṣūl al-Shāshī*, 7.

⁷¹ *Islamic Studies* 42:3 (2003): 415-36.

conjecture that the anachronistic in-text references to al-Dabbūsī and Ibn al-Ṣabbāgh (noted by al-Nadwī; unnoticed by al-Mays) as later editorial intrusions; 3) there is simply no comfortable basis from which to do so until a larger collation of extant manuscripts has been undertaken, and a more complete redactional history of the text compiled (tasks obviously far outside the time and material limitations of this dissertation).

And so, at this point, and considering all of the above, I hope to have justified my primary reliance upon the specialized *jadal*-theory treatises of al-Baṣrī, al-Shīrāzī, and al-Bājī for the principal material of our *jadal*-theory lens. All things said and done, the objective of this dissertation is to analyze the dialectic of the *Ikhtilāf al-ʿIrāqīyyīn* according to the terms and categories which would be employed by *jadal* theorists from the early era of *jadal* systematization. The thoroughness of these three works — especially that of al-Bājī (the *Maʿūna* being an epitome of the *Mulakhkhaṣ*, and the *K. al-Qiyās al-Sharʿī* being dedicated only to that domain of *istidlāl*) — will very soon become apparent to the reader. We will now turn to our primary lens-texts, and jump right in with a synopsis of al-Shīrāzī’s and al-Bājī’s introductory overviews of the domains of *istidlāl*.

The Categories of Juridical *Istidlāl*

Considering that an opposing position's *ijtihād* lies at the center of any juridical-dialectical disputation, it is not surprising that the *jadal*-theory texts of al-Shīrāzī, al-Bājī, Ibn 'Aqīl, and al-Juwaynī all open with systematic overviews of the various domains of *istidlāl*.⁷² These opening chapters are essentially primers in *uṣūl al-fiqh*, and follow the hierarchical ordering of the *uṣūl* themselves. By way of illustration we will introduce the presentations of al-Shīrāzī and al-Bājī (being the most orderly and concise) in outline format. Of primary import here is the centrality of *istidlāl* — and thus of its science: *uṣūl al-fiqh* — to the enterprise of juridical *jadal*. Indeed, as is clearly evident in the works of all our *jadal*-theory authors, the domains of *istidlāl* constitute the very organizing principle for systematic elaborations of dialectical theory.⁷³ This is hardly surprising, considering that these very domains of theory and right-derivation of *aḥkām* had been developed and refined in dialectical venues from the start, as it is hoped our analyses in Chapter III will demonstrate. Certainly, we are again reminded of the dynamic symbiosis which these sciences share, and nowhere is it made clearer than in the composition and contents of our earliest extant *jadal*-theory texts.

Al-Shīrāzī's Hierarchy of *Istidlāl*

The *Bāb Bayān Wujūh Adillat al-Shar'* of al-Shīrāzī's *Ma'ūna fi'l-Jadal* is quite simply and concisely organized by domain of *istidlāl*, and each sub-category is accompanied by definitions, examples, and procedural norms. The whole may be outlined as follows, according to al-Shīrāzī's first-rank ordering of the *Adillat al-Shar'* by *aṣl*, *ma'qūl aṣl*, and *istiṣhāb al-hāl*.

⁷² al-Shīrāzī, *Ma'ūna*, al-'Umayrīnī ed., 26-39; al-Bājī, *Minhāj*, Turkī ed., 15-33, §§19-63; Ibn 'Aqīl, *K. al-Jadal*, 3-13, §§10-65 (note that Ibn 'Aqīl follows his "*Bāb fi Aqsām Adillat al-Shar'*" with an additional chapter treating "*Masā'il al-Qiyās*" [13-20, §§66-108]). Al-Juwaynī's approach varies significantly from that of al-Shīrāzī and his students, and appears to be based upon a variant organizing principle. He begins with a long and thorough discussion of definitions (indeed, beginning with the definition of "definition" [*ḥadd*] itself) for all of the terms which one is likely to encounter in a discussion of legal theory and disputation (*Kāfiya*, 1-73, §§4-176), the ordering of which is difficult at times to determine, and even includes definitions of substantive legal categories (e.g., *al-tāhir* and *al-najas*). He then proceeds to a discussion of *jadal* and the types of dialectical questions, with yet more definitions (73-87, §§177-94), and eventually reaches discussions on the various means of deriving *aḥkām*. Discussions after this are wide ranging, and interspersed with species of *i'tirāḍ*, with especial focus upon *qiyās*-oriented dialectical moves. It is precisely because of this more difficult arrangement that I have favoured the more simply and concisely ordered texts of al-Shīrāzī and al-Bājī to provide the base material for our *jadal*-theory lens.

⁷³ This parallels, of course, the principle of *topoi* in classical dialectic as we have previously discussed it; and we will revisit the subject at the end of this chapter.

Aṣl

*Kitāb*⁷⁴

- *al-Naṣṣ*: “the word/phrase (*lafẓ*) which may not possibly bear other than a single meaning (*maʿnā*)”
 - “Its procedural norm (*ḥukm*): That it be brought to bear, and not abandoned except by way of such *naṣṣ* as opposes it (*yuʿarīḍuhu*)”
- *al-Zāhir*: “every *lafẓ* which may possibly bear two injunctions (*amrayn*), but is, as regards one of them, more apparent (*aẓhar*)”
 - *Zāhir* by Way of Linguistic Positing (*bi-Waḍʿ al-Lughā*)⁷⁵
 - “Its *ḥukm*: That it be correlated with the *aẓhar* of the two *maʿnās*, and that it not be correlated with something else except by way of an indicant (*dalīl*)”
 - *Zāhir* by Way of Sharīʿa Positing (*bi-Waḍʿ al-Sharʿ*)⁷⁶
 - “Its *ḥukm*: That it be correlated with such as has been transferred to it in the *Sharʿ*, and that it not be correlated with something else except by way of a *dalīl*”
- *al-ʿUmūm*: “every *lafẓ* which comprises (*ʿamma*) two things — two or more — in a singular mode (*ʿalā wajh wāḥid*), there being no priority for one of them over the other”⁷⁷
 - “Its *ḥukm*: That [such *alfāẓ*] be correlated with the generality (*al-ʿumūm*), and that there not be particularized anything of it except by way of a *dalīl*”

*Sunna*⁷⁸

- Saying (*Qawl*) [of the Prophet]
 - With Inherent Cause (?) (*Mubtadaʿ*)⁷⁹
 - *al-Naṣṣ*: [same as with *Kitāb*, with same *ḥukm*]
 - *al-Zāhir*: [same as with *Kitāb*, with same *ḥukm*]
 - *al-ʿUmūm*: [same as with *Kitāb*, with same *ḥukm*]
 - With External Cause (*Khārij ʿalā Sabab*)

⁷⁴ al-Shīrāzī, *Maʿūna*, al-ʿUmayrīnī ed., 27-9. For the most part, neither al-Shīrāzī’s examples, nor his explanations, nor his relating of variant opinions will be provided in this table. Only categories, definitions, and procedural norms will be presented. It is hoped that by incorporating these latter, we will have sufficiently introduced many of the *istidlāl*-relevant concepts and terms playing a key role in our subsequent analyses of the *K. Ikhtilāf al-ʿIrāqīyyīn*.

⁷⁵ Examples include the injunction (*amr*) which may possibly bear obligation (*ijāb*) or recommendation (*nadb*), but is *aẓhar* as regards the *ijāb*; and the proscription (*nahī*) which may possibly bear prohibition (*tahrīm*) or aversion (*karāha*) and abstention (*tanzīh*), but is *aẓhar* as regards the *tahrīm*.

⁷⁶ Examples include such nouns as acquire a more technical legal meaning than that of their origins in common language, such as *ṣalāt* and *ḥajj*.

⁷⁷ The four *alfāẓ* of this category are listed as: 1) plural nouns; 2) definite singular nouns; 3) demonstrative pronouns; and 4) and negative constructions with indefinite nouns.

⁷⁸ al-Shīrāzī, *Maʿūna*, al-ʿUmayrīnī ed., 29-33.

⁷⁹ After a great deal of searching, I am still uncertain as to the precise sense of *mubtadaʿ* in this, and other, contexts (e.g., *illa mubtadaʿa*, mentioned in the context of *qiyās*-oriented *muʿāraḍāt*). We will note, however, that here *qawl mubtadaʿ* appears in contradistinction with *qawl khārij ʿalā al-sabab*. From al-Shīrāzī’s and al-Bājī’s examples, we can see that in this latter category, the *sabab* — that which may be considered the cause of the Prophet’s ruling — lies outside of his *qawl* itself, in the context of the *ḥadīth* (e.g., someone asked him something, and within that something lies the *sabab* for the Prophet’s ruling). From this we might infer that a *qawl mubtadaʿ* is one for which the *sabab* prompting the ruling is contained within the *lafẓ* of the *qawl* itself.

- *Ḍarb* 1: Independent Without the Cause (*Mustaqill dūna al-Sabab*)⁸⁰
 - [same *ḥukm* as with the *qawl al-mubtada'*]
- *Ḍarb* 2: Not Independent Without the Cause (*Lā Yustaquillu dūna al-Sabab*)⁸¹
 - [no *ḥukm* mentioned]
- Act (*Fi'l*) [of the Prophet]
 - *Ḍarb* 1: “What he did in other than a *wajh al-qurba*,⁸² like walking and eating and other things”
 - “It provides indicant for allowance (*al-jawāz*)”
 - *Ḍarb* 2: “What he did in a *wajh al-qurba*”
 - *Ḍarb* 1: “It [the *fi'l*] is obeying a command (*amr*), so it is considered, due to that, as belonging to the *amr*”
 - “If it [the *amr*] was obligatory (*wājib*), then it [the *fi'l*] is *wājib*; and if it was recommended (*nadb*), then it is *nadb*”
 - *Ḍarb* 2: “It [the *fi'l*] is providing explication (*bayān*) for something ambiguous (*mujmal*), so it is considered in the way of the explicator (*mubayyin*)”
 - “If it [the *mujmal*] was *wājib*, then it [the *fi'l*] is *wājib*; and if it was *nadb*, then it is *nadb*”
 - *Ḍarb* 3: “It [the *fi'l*] is cause-inherent (?) (*mubtada'*)”⁸³
 - *Wajh* 1: “It [the *fi'l*] necessitates obligation (*al-wujūb*)”
 - “It is not diverted to anything else except by way of a *dalīl*”
 - *Wajh* 2: “It [the *fi'l*] necessitates recommendation (*al-nadb*)”
 - “It is not diverted to anything else except by way of a *dalīl*”
 - *Wajh* 3: “It [the *fi'l*] is in the way of suspension (*alā al-waqf*)”
 - “It is not correlated with either one of them [i.e., with either of the two choices] except by way of a *dalīl*”
- Tacit Acknowledgement (*Iqrār*) [of the Prophet]
 - *Ḍarb* 1: “He hears a *qawl*, and confirms it”
 - “Its *ḥukm* is the *ḥukm* of his [the Prophet’s] *qawl*”
 - *Ḍarb* 2: “He sees a man do something and confirms him in it”
 - “Its *ḥukm* is the *ḥukm* of his [the Prophet’s] *fi'l*”

⁸⁰ al-Shīrāzī’s example is a *qawl* of the Prophet who, having been informed that he had performed *wuḍū'* from a polluted well, said: “Water is pure (*ṭahūr*), nothing pollutes it.”

⁸¹ The example provided is a *qawl* of the Prophet who, when a Bedouin confessed to daytime sexual intercourse during Ramaḍān, replied: “Manumit a *raqaba*.” Al-Shīrāzī then explains: “And so the *qawl* of the Messenger becomes, along with the *sabab*, like a single sentence, as though he said — upon him be peace — ‘When you have sexual intercourse; manumit.’”

⁸² By the phrase *alā ghayr wajh al-qurba*, we understand such acts as have no moral or religious significance; the aim of the act was not “nearness to God” (*qurba*).

⁸³ Again, we find *mubtada'* in contradistinction to other categories. If we carry over the contradistinction with *khārij alā al-sabab* from the Sunnaic *aqwāl*, we can see that in the first category of *afāl* in a *wajh al-qurba*, the Prophet’s act is also *khārij alā al-sabab*; i.e., the *sabab* prompting his *fi'l* lies in the *amr* which he is obeying. The same might be said for the second category: the *sabab* lies in the *mujmal* for which his *fi'l* plays the role of providing *bayān*. Thus, we might again make inference: a *fi'l mubtada'* is one in which the *sabab* prompting the *fi'l* is somehow present in the *fi'l* itself.

*Ijmā'*⁸⁴

- [Definition]: “It is: The agreement (*ittifāq*) of the scholars of the age (*‘ulamā’ al-‘aṣr*) upon an occasioned norm (*ḥukm al-ḥāditha*)”
 - *Ḍarb* 1: “What is established by their *ijmā’* by way of the *qawl* of all of them”⁸⁵
 - *Ḍarb* 2: “What is established by the *qawl* of some of them, or their *fi’l*, and the silence (*sukūt*) of the remainder, with the propagation (*intishār*) of such among them”
 - “And such is an authoritative proof/argument (*ḥujja*)”

*Qawl al-Wāḥid min al-Ṣaḥāba, idhā lam yantashir*⁸⁶

- *Qawl* 1: “He [al-Shāfi‘ī] professed, in his New Doctrine (*fi’l-jadīd*), that such is not an authoritative proof/argument (*ḥujja*)”
 - “So according to this, one does not draw *ḥujja* by way of it, but one preponderates by way of it (*yurajjahu bihi*)”⁸⁷
- *Qawl* 2: “He [al-Shāfi‘ī] professed, in his Old Doctrine (*fi’l-qadīm*): It is a *ḥujja*”
 - “So according to this, one draws *ḥujja* by way of it, and it is advanced over *qiyās*”⁸⁸

Ma’qūl Aṣl / Adillat al-Ma’qūl⁸⁹

*Faḥwā al-Khiṭāb*⁹⁰

- [Definition]: “That he [God or the Prophet] cite (*an yanuṣṣa ‘alā*) the greater (*al-a’lā*) and [thus] indicate (*fa-yunabbiha ‘alā*) the lesser (*al-adnā*) [*a maiore ad minus*]. Or

⁸⁴ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 33-4.

⁸⁵ Examples provided are “their *ijmā’* upon the allowance (*jawāz*) of *al-bay’*, *al-mushāraka*, *al-muḍāraba*, etc.”

⁸⁶ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 34. Al-Shīrāzī earlier points out (al-‘Umayrīnī ed., 26-7) that al-Shāfi‘ī added this to the *uṣūl* in his Old Doctrine (*fi’l-qadīm*). This is here confirmed.

⁸⁷ al-Shīrāzī notes: “Some/one of our *aṣḥāb* professed: One draws *ḥujja* by way of it, along with a weak *qiyās*. But this is nothing.”

⁸⁸ al-Shīrāzī asks: “But is the *‘umūm* particularized by way of it? Regarding this there are two *wajhs*.” He does not elaborate further here, but al-‘Umayrīnī (34, n.5) fills in the gap from al-Shīrāzī’s *Luma’*: “One of them is that it is particularized by way of it, because if it is advanced over *qiyās*, then *takḥṣīs al-‘umūm* is *awlā* [NB: this is an *a fortiori* argument employed in a *mas’ala* of legal theory]. And the second: It is not particularized by way of it, because they [the *Ṣaḥāba*?] were referring back to the *‘umūm*, and abandoning what they were enjoined of it (*li-annahum kānū yarjī’ūna ilā al-‘umūm wa yatrūkūna mā kānū ‘alayhi*).”

⁸⁹ Al-Shīrāzī begins by stating “the *adillat al-ma’qūl* are three,” and lists the second rank categories of *faḥwā al-khiṭāb*, *dalīl al-khiṭāb*, and *ma’nā al-khiṭāb*. As al-‘Umayrīnī notes (35, n.1), however, al-Shīrāzī — in his *Mulakhkhaṣ fi’l-Jadal* (which has yet to be edited) — states that the *adillat al-ma’qūl* are four, and among them lists *laḥn al-khiṭāb*. This he defines as “the *ḍamīr* without which the *kalām* is not completed.” In other words, it refers to such a locution from which an element has been omitted, but which is easily understood to include that element. A common example is when God says in Q.12:82: «Ask the village (*wa is’al al-qaryata*),» meaning: “the folk of the village (*ahl al-qarya*)” (see al-Shīrāzī, *al-Luma’*, Mustū ed., 104-5, §114). As we shall see, al-Bājī treats *laḥn al-khiṭāb* as a category of *ma’qūl al-aṣl*, and we will leave off further discussions until then.

⁹⁰ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 35. Note that al-Bājī also calls *faḥwā al-khiṭāb*: *mafḥūm al-khiṭāb*, and *al-tanbīh*; and that he says: “This is what the Shāfi‘ī [or al-Shāfi‘ī himself?] calls *al-qiyās al-jalī*” (*Minhāj*, Turkī ed., 24, §45). Cf. Hallaq on *a fortiori* arguments in general, and *al-qiyās al-jalī* in particular (*History*, 96-9, 102-3, 105).

[that] he cite the *adnā*, so that he indicate the *a'lā* [a *minore ad maius*]"

- "And the *ḥukm* of this is the *ḥukm* of the *naṣṣ* [i.e., what is *naṣṣ* of Kitāb and Sunna]"

*Dalīl al-Khiṭāb*⁹¹

- [Definition]: "That he [God or the Prophet] make the *ḥukm* conditional upon (an *yu'alliqa al-ḥukm 'alā*) one of two [potential] properties of the thing (*aḥad waṣṣay al-shay'*), so [that] he provide indicant that what he omits (*mā 'adāhu*) [i.e., the other potential property] is [to be judged] by its contrary/contradictory (*khilāf*)"⁹²

*Ma'nā al-Khiṭāb, fa-huwa al-Qiyās*⁹³

- [Definition]: "It is the correlation of a case-to-be-determined (*far'*) with an authoritatively-determined-case (*aṣl*) by way of an occasioning factor (*'illa*) uniting them (*jāmi'a baynahumā*), and the execution (*ijrā'*) of the associated norm (*ḥukm*) of the *aṣl* upon the *far'*"
 - *Ḍarb 1: Qiyās al-'Illa*⁹⁴
 - [Definition]: "That the *far'* be correlated with the *aṣl* by way of the shared potentially-efficient property (*ma'nā*) upon which the *ḥukm* is made conditional in God's Law (*Shar'*)"
 - *Ḍarb 2: Qiyās al-Dalāla*
 - *Ḍarb 1: [Type I Qiyās al-Dalāla]*
 - [Definition]: "That a *dalīl* be drawn for it"⁹⁵ [i.e., for the case under consideration] by way of a special characteristics

⁹¹ al-Shīrāzī, *Ma'ūna*, Turkī ed., 138-9, §18. I am referring first to Turkī's ed. due to certain lacunae which have been missed by al-'Umayrīnī, who depended upon a single MS (cf. al-'Umayrīnī ed., 35-6).

⁹² Examples provided include God's *qawl* in Q.65:6: «And if they are pregnant, then pay maintenance (*nafaqa*) for them;» and the Prophet's *qawl*: «Regarding such as are pasturing (*sā'ima*) of the sheep/goats there is *zakāt*.» As for the first, it "provides indicant that there belongs no *nafaqa* to the one who is not pregnant;" and as for the second, it provides indicant that "there is no *zakāt* as regards other than the *sā'ima*." This matches with al-Shīrāzī's definition in that God makes His *ḥukm* conditional upon the potential property (*waṣf*) of "pregnant," and thus indicates that the other potential *waṣf* ("not pregnant") occasions the opposite *ḥukm*; whereas the Prophet makes his *ḥukm* conditional upon the potential *waṣf* of "pasturing," and thus indicates that the other potential *waṣf* ("not pasturing") occasions the opposite *ḥukm*. Importantly, al-Shīrāzī cites Abū al-'Abbās b. Surayj — a most important figure in the early systematization of both *uṣūl al-fiqh* and *jadal* —, reporting that he said: "That which goes beyond the mentioned (*mā 'adā al-madhkūr*) does not provide indicant for a *ḥukm*." At first this sounds as though Ibn Surayj denied the *ḥujjiyya* of *dalīl al-khiṭāb* (al-Shīrāzī states his disagreement by saying: "And the *madhhab* is the first" [i.e., the definition as al-Shīrāzī states it is a *ḥujja*]). When we read al-Shīrāzī's citation of Ibn Surayj in the *Luma'*, however, we find that he denied the *ḥujjiyya* of *dalīl al-khiṭāb* only when the *khiṭāb* was not presented with a *lafẓ al-sharṭ* (Mustū ed., 106). From the examples here in the *Ma'ūna*, then, it would appear that the first example would have had Ibn Surayj's sanction as a *ḥujja*, but not the second.

⁹³ al-Shīrāzī, *Ma'ūna*, Turkī ed., 139-40, §19. Again, I am referring first to Turkī's ed. due to certain omissions missed by al-'Umayrīnī (cf. al-'Umayrīnī ed., 36-8).

⁹⁴ We will shortly illustrate this and other species of *qiyās* according to al-Shīrāzī's descriptions, after outlining al-Bājī's hierarchy of *istidlāl*.

⁹⁵ The verb here is *استدلّ*. The most literal (yet still idiomatic) rendering of this important technical term I can conceive of would be something like "to draw forth an indicant (*dalīl*);" i.e., with regard to the *mas'ala* at hand, in order to derive a solution, or to further support a solution. There being no precise English equivalent, I will frequently render *istadalla/yastadillu* as the

(<i>khaṣṣa</i>) from among the special characteristics (<i>khaṣā'is</i>) of the thing”⁹⁶ ▪ <i>Ḍarb</i> 2: [Type II <i>Qiyās al-Dalāla</i>] • [Definition]: “That a <i>dalīl</i> be drawn for the parallel (<i>naẓīr</i>) by way of the <i>naẓīr</i>” ▪ <i>Ḍarb</i> 3: [Type III <i>Qiyās al-Dalāla</i> = <i>Qiyās al-Shabah</i>] • [Definition]: “That a <i>dalīl</i> be drawn by way of a type of resemblance (<i>bi-ḍarb min al-shabah</i>) [i.e., by way of a shared <i>waṣf</i> or <i>awṣāf</i>]”⁹⁷	<i>Istiṣhāb al-Ḥāl</i>⁹⁸ <i>Istiṣhāb Ḥāl al-‘Aql fī Barā’at al-Dhimma</i> • [No definition provided] • [Examples]: “Like our <i>qawl</i> regarding the falling away (<i>isqāt</i>) of the blood-money (<i>diya</i>) of the Muslim when he is killed in the <i>Dār al-Ḥarb</i>, or regarding the <i>isqāt</i> of what exceeds a third of the <i>diya</i> for the killing of the Jew: Verily the status quo (<i>al-aṣl</i>) is absolution from liability (<i>barā’at al-dhimma</i>) and a ‘clean slate’ and a path [cleared] of the concern of the <i>Shar‘</i> with it (<i>farāgh al-sāḥa wa ṭarīq ishtighālihā al-Shar‘</i>); and there is not found in the <i>Shar‘</i> what provides indicant for concern regarding the killing of the Muslim in the <i>Dār al-Ḥarb</i>, nor for concern regarding what exceeds a third for the killing of the Jew; so it remains in the status quo (<i>fabāqiya ‘alā al-aṣl</i>). And this is a <i>dalīl</i> which the <i>mujtahid</i> takes refuge in upon lack of [other] <i>al-adilla</i>.”

rather unidiomatic “to draw indicant.” Again, my intention is not to transform the Arabic into a digestible (or even proper) English, but to bring the reader as close to my own, current understanding of the Arabic term as possible.

⁹⁶ Al-Shīrāzī’s example along with al-Bājī’s explanation and examples confirm that *khaṣā’is* can refer to, among other things, an established *ḥukm* shared by *aṣl* and *far‘*, which indicates that the *far‘* shares that ‘illa which occasions that *ḥukm* in the *aṣl*. Sānū’s definition (*Mu’jam*, s.v. “قياس الدلالة”) of *qiyās al-dalāla* underlines three categories of uniting element (*jāmi‘*), all of which provide indicant (hence: “*dalāla*”) that the *far‘* shares the same ‘illa as the *aṣl*. First is when the *jāmi‘* is one of the properties inseparable from the ‘illa (*waṣflāzim min lawāzim al-‘illa*), e.g., the smell shared by *khamr* and *nabīdh*, which provides indicant that *nabīdh* shares the same ‘illa of “intoxicant.” [Note that “smell” is not efficient in occasioning the *ḥukm*, even though it is inseparable from the ‘illa.] Second is when the *jāmi‘* is one of the effects of the ‘illa (*athar min āthār al-‘illa*); e.g., the effect of “he commits a sin” shared between killing with a blunt instrument and killing with a cutting instrument — this provides indicant that they share the same ‘illa occasioning the *ḥukm* of *qisās*. [Note once again that “he commits a sin” is not efficient in the ‘illa itself, but is merely one of its effects.] Third is when the *jāmi‘* is one of the norms occasioned by the ‘illa (*ḥukm min aḥkām al-‘illa*), e.g., the *ḥukm* of “*diya* is *wājib* for it” shared by the cutting of one hand (*aṣl*) and the cutting of both hands (*far‘*), which provides indicant that the *far‘* shares the same ‘illa occasioning the *ḥukm* of *qisās* in the ‘illa.

⁹⁷ Al-Shīrāzī notes: “Among our *aṣḥāb* are those who say: It is a *dalīl*. And among them are those who say: It is not a *dalīl*, but indeed something else may be preponderated by means of it (*yurajjahu bihi ghayruhu*). And it [this latter opinion] is the more correct (*al-aṣaḥḥ*).” As al-‘Umayrīnī notes (38, n.3), al-Shīrāzī seems to have been more decisive elsewhere, claiming that *qiyās al-shabah* is not valid. Sānū (*Mu’jam*, s.v. “قياس الشبه”) defines *qiyās al-shabah* as follows: “The joining (*ilhāq*) of a *far‘* to an *aṣl* due to the abundance of its resemblance (*li-kathrat shabahihi*) to the *aṣl* as regards *al-awṣāf*, without believing that the *awṣāf* by which the *far‘* resembles the *aṣl* constitute the ‘illa for the *ḥukm* of the *aṣl*.”

⁹⁸ al-Shīrāzī, *Ma’ūna*, Turkī ed., 141, §20.

Istiṣhāb Ḥāl al-Ijmāʿ

- [No definition provided]
- [Example]: “That is like his saying, as regards the one who does ablutions with sand/earth (*mutayammim*) when he sees water during his prayer cycle (*ṣalāt*): Verily he proceeds with his *ṣalāt*, because his *ṣalāt* was effected (*inʿaqadat*) by way of *al-ijmāʿ*. So he does not abandon that except by way of a *dalīl*. And regarding this there are two opinions:”
 - “Among our *aṣḥāb* are those who say: It is a *dalīl*.”
 - “And among them are those who say: It is not a *dalīl*. And it [this latter opinion] is the more valid (*al-aṣaḥḥ*).”

We earlier described al-Shīrāzī’s brief overview of domains of *istidlāl* as a primer in *uṣūl al-fiqh*. Rather, we should say it is a primer in the *uṣūl* themselves, as current to the Shāfiʿī *madhhab*;⁹⁹ the more detailed epistemological, hermeneutical, rational-inferential, and practical concerns of *uṣūl al-fiqh* texts have been omitted. Regardless, it is quite evident that this introduction comprises the laying-out of al-Shīrāzī’s organizing principle — subsequent discussions of *ʿitirāḍ* (objection/critique) and *jawāb* (rebuttal/response) are arranged according to these domains of *istidlāl* in precisely the same order, and it is not difficult to ascertain the utility of such an arrangement to the dialectician-in-training. The domains of *istidlāl* thus presented constitute, in effect, a parallel to Aristotle’s *topoi*,¹⁰⁰ and we may assume a parallel intention is at work. In short, the domains of *istidlāl* are the first rank of *topoi*, which is to say that the questioner — once he has ascertained the domain of *istidlāl* by which the proponent has derived his solution to the *masʿala* at hand — “locates” the relevant set of *ʿitirāḍāt* which apply to that domain of *istidlāl*. Having done so, he may proceed to further questions (all the while bearing in mind the premises necessary to his own solution), until he “locates” that specific species of *ʿitirāḍ* by which he might attain *elenchus*. Whether Q’s intention is simply the problematizing and deconstruction of P’s *istidlāl*, or forcing P’s concession to his own solution, or both, the obvious starting place is identification of the domain — the *topos* — of P’s *istidlāl* (and thus, the body of applicable objections). Al-Shīrāzī’s introductory *Bāb Bayān Wujūh Adillat al-Sharʿ* outlines, in concise order, exactly what these *istidlāl-topoi* may be.

⁹⁹ As we shall see, al-Bājī’s hierarchy of *istidlāl* treats additional categories current to the Mālikī *madhhab* (e.g., *Ijmāʿ Ahl al-Madīna*), and problematizes other categories current to his legal-theoretical milieu, including certain conceptions of his teacher, al-Shīrāzī.

¹⁰⁰ Aristotle’s *topoi*, of course, are quite differently organized according to types of predicable.

Al-Bājī's Hierarchy of *Istidlāl*

Al-Bājī's *Minhāj fi Tartīb al-Hijāj* opens with a short justification for his composition of this work, and for the study of *jadal*-theory in general,¹⁰¹ before proceeding to a brief introduction to the comportment (*adab*) of the dialectician (*al-munāẓir*).¹⁰² He then continues with a useful chapter on definitions, including most of the terms of *istidlāl* and *i'tirād* one is likely to encounter in juridical disputation: the *Bāb Bayān Ḥudūd al-Alfāẓ al-Dā'ira bayn al-Munāẓirayn*.¹⁰³ After this we find his *Bāb Aqṣām Adillat al-Shar'*, which we may consider — as with the *Bāb Bayān Wujūh Adillat al-Shar'* of his teacher — to constitute the organizing principle by which later chapters of *i'tirādāt* and *ajwiba* are arranged.¹⁰⁴ A notable characteristic of the *Minhāj*, setting it apart from the *Ma'ūna*, is its greater refinement of categories, more extended discussions of objection and response, and more thorough treatment of variant theories. In other words, the *Minhāj* is more in the way of a *mabsūt* than a *mukhtaṣar*, and in this sense more comparable to al-Shīrāzī's *Mulakhkhaṣ fi'l-Jadal* than to his *Ma'ūna*.¹⁰⁵ This more detailed approach is just as apparent in al-Bājī's introduction to the *aqṣām adillat al-Shar'* as it is in his later chapters on objections and responses. Still, his organizing principle is the same as al-Shīrāzī's, and we may assume the same intention (i.e., a first rank ordering of *topoi*) to be at work. Like his teacher, al-Bājī states his largest categories of *adillat al-Shar'* as *aṣl*, *ma'qūl aṣl*, and *istiṣhāb ḥāl*; a brief outline of these domains, however, will reveal the greater detail and refinements of the *Minhāj*:¹⁰⁶

¹⁰¹ *Minhāj*, Turkī ed., 7-9, §§1-7.

¹⁰² *Ibid.*, 9-10, §§8-13.

¹⁰³ *Ibid.*, 10-14, §§14-18. Notably, these definitions are roughly grouped in the order we usually find them in *uṣūl al-fiqh* treatises. Epistemological terms are first (e.g., *ḥadd*, *ilm*, *shakk*, etc.), followed by hermeneutical terms for Kitāb and Sunna (e.g., *naṣṣ*, *ẓāhir*, *naskh*, etc.), then definitions of norms (*wājib*, *jā'iz*, *fāsid*, etc.), then *ḥadīth* transmission terms (*tawātur*, *āḥād*, *mursal*, etc.), then terms for *ijmā'*, *qiyās*, and various genera of *i'tirād*.

¹⁰⁴ *Ibid.*, 15-33, §§19-63.

¹⁰⁵ Al-Shīrāzī, in the opening section justifying his composing of the *Ma'ūna* (al-'Umayrīnī ed., 26), describes his prior work, the *Mulakhkhaṣ fi'l-Jadal*, as a *mabsūt*. This is why he composed the *Ma'ūna*, as a primer for beginners, and a review for initiates. We will note that it is a far more abbreviated work than the *Minhāj*, not just in terms of the contents of chapters, but in the absence of chapters themselves. The *Ma'ūna*, for example, treats neither *adab*, nor definitions, nor dialectical questions, but plunges straight into our above outlined domains of *istidlāl*, before proceeding directly to the identically-organized domains of *i'tirādāt*.

¹⁰⁶ For the most part, we will dispense with such definitions as have appeared in our outline of the *Ma'ūna*, except where they differ from al-Shīrāzī's. Al-Bājī's examples, extended explanations, and reporting / refuting of variant opinions are also omitted from our outline, except where deemed necessary. Finally, a number of terms which have already appeared in the previous outline will not be translated here, but remain in transliteration.

al-Aṣl

al-Kitāb¹⁰⁷

- *Ḍarb* 1: *Mufaṣṣal*¹⁰⁸
 - *Ghayr Muḥtamal*¹⁰⁹
 - *al-Naṣṣ*: “Such as is raised, in its explication (*bayān*), to the furthest extent of its intentions (*ilā ab’ad ghāyātihi*).”
 - *Muḥtamal*
 - *Ḍarb* 1: *Zāhir*: “Such as whose meaning (*ma’nā*) arrives first to the understanding of the one who hears it, from its *lafẓ*; and no obstacle (*māni*) prevents him from the knowledge/understanding (*fahm* / *‘ilm*) of it, from the perspective of the *lafẓ*.”¹¹⁰
 - *Ḍarb* 1: *Zāhir* by Way of [Linguistic] Positing (*bi’l-Waḍ’*): “Every *lafẓ* posited/coined (*wuḍi’a*) in the [Arabic] language (*lugha*) with a meaning (*ma’nā*), and employed according to that for which it was posited/coined; like injunctions of the *Shar’*, and its proscriptions.”
 - *Ḍarb* 2: *Zāhir* by Way of Customary Usage (*bi’l-‘Urf*)
 - *Ḍarb* 1: *Zāhir* by Way of the *Shar’*’s Customary Usage (*bi-‘Urf al-Shar’*): “Such words/phrases (*alfāz*) as were posited/coined (*mawḍū’a*) in the original linguistic sense (*aṣl al-lugha*) for a genus among genera (*bi-jins min al-ajnās*), then were cited in the *Shar’* for a *ma’nā* from that very same genus”
 - *Ḍarb* 2: *Zāhir* by Way of the Linguistic and Practical Customary Usage (*bi-‘Urf al-Lugha wa’l-Isti’māl*)¹¹¹
 - *Ḍarb* 3: *Zāhir* by Way of Indicant (*bi’l-Dalāla*): “The *lafẓ* is posited/coined (*mawḍū’*) for a *ma’nā*, except the *dalīl* has established that something else besides that *ma’nā* is meant

¹⁰⁷ al-Bājī, *Minhāj*, Turkī ed., 15-18, §§20-7.

¹⁰⁸ Al-Bājī provides no definition for *mufaṣṣal* — neither here, nor in his opening chapter on definitions. It is evident from his presentation, however, that *mufaṣṣal* is to be understood in contradistinction to *mujmal*. In other words, it is more or less synonymous with *mufassar*, which he earlier defines (12, §15) as: “Such as whose intended meaning (*al-murād bihi*) is understood from its *lafẓ*, and does not require something else for its *bayān*.” The *Zāhirī* Ibn Ḥazm (d.456/1064), an Andalusian contemporary (and dialectical opponent) of al-Bājī, provides as decent a definition of *mufaṣṣal* as we have been able to find, in his *Iḥkām fī Uṣūl al-Aḥkām* (Shākir ed., vol. 1, 48). It is: “Such as whose *aqsām* are clarified (*buyyināt*); and it is, in the *aṣl al-lugha*, such as part of which has been separated (*furriqa*) from another part; you say: I cut apart (*faṣṣaltu*) the *thawb*, or the *lahm*, etc.” We might add that, as the passive participle of Form II *faṣṣala*, *mufaṣṣal* bears the sense of “that which is explicated in detail.”

¹⁰⁹ Again, al-Bājī provides no definition for *muḥtamal*, but the meaning of “probable” and “possibly bearing X” are easy enough to infer from the contexts. That which may be classified as *naṣṣ*, as we have seen, does not possibly bear more than one meaning (i.e., it is univocal), hence: *ghayr muḥtamal*. On the other hand, that which is *zāhir* or *‘amm* may possibly bear more than one meaning (hence: *muḥtamal*), but a primary meaning can be preponderated over the others.

¹¹⁰ Al-Bājī’s definition for *zāhir* in §15 (with *fahm*) differs slightly from his definition in §22 (with *‘ilm*).

¹¹¹ Al-Bājī’s example, *al-ghā’it*, makes clear that this category comprises such words as acquired a different meaning through customary usage. He concludes: “and it is obliged that one correlate with it [i.e., with the acquired meaning] unless the *dalīl* provides indicant that something else is intended by it.”

- by it”
- *Ḍarb* 2: ‘*Āmm*; *Lafẓ al-‘Umūm*: [similar to al-Shīrāzī’s definition]
 - Plural Expression (*Lafẓ al-Jam*)¹¹²
 - Expression of Genus (*Lafẓ al-Jins*)¹¹³
 - Indeterminate Expressions (*al-Alfāẓ al-Mubhama*)¹¹⁴
 - Singular Definite Noun (*al-Ism al-Mufrad*, with *alif* and *lām*)¹¹⁵
 - Negative Expressions (*Alfāẓ al-Nafy*)¹¹⁶
 - Noun Governed by Genitive Construction (*al-Muḍāf ilayhi*)¹¹⁷
 - *Ḍarb* 2: *Mujmal*¹¹⁸
- al-Sunna*¹¹⁹
- *Ḍarb* 1: *Aqwāl* [of the Prophet]
 - *Ḍarb* 1: *Mubtada*: “It is divided into that which the Kitāb is divided into...”¹²⁰
 - *al-Naṣṣ*
 - *al-Zāhir*
 - *Zāhir bi’l-Waḍ’*
 - *Zāhir bi’l-‘Urf*
 - *Zāhir bi-‘Urf al-Shar’*
 - *Zāhir bi-‘Urf al-Isti‘māl fi’l-Lughā*
 - *Zāhir bi’l-Dalāla*
 - *al-‘Umūm*; *al-‘Āmm*
 - *al-Mujmal*
 - *Ḍarb* 2: *Khārij ‘alā Sabab*
 - *Ḍarb* 1: “It is not independent in itself without the *sabab*, and so is constrained to its [unspoken] *sabab*”¹²¹
 - *Ḍarb* 2: “What is independent in itself, and has no need for a *sabab*”¹²²

¹¹² Examples are: *al-mu’minīn*, *al-Muslimīn*, *al-abrār*, and *al-fujjār*.

¹¹³ Examples are: *al-ḥayawān*, *al-ibil*, and *al-nās*.

¹¹⁴ Examples are: *man*, *mā*, *ayy*, *ayna*, and *matā*.

¹¹⁵ Examples are: «*wa’l-sāriq wa’l-sāriqa*» (Q.5:38).

¹¹⁶ Example: “*lā rajul fi’l-dār*.”

¹¹⁷ Examples include: “*fi mā al-Muslim al-zakāt*.” Al-Bājī concludes: “And these *alfāẓ*, when they are cited, are correlated with (*humilat ‘alā*) their ‘*umūm*, and effect their *aḥkām* upon all that falls under them, unless a *takhṣīs* is revealed by way of *nuṭq* or *istinbāt*.”

¹¹⁸ Al-Bājī defines *mujmal* in his introductory chapter on definitions (12, §15): “Such as whose *ma’nā* is not understood from its *lafẓ*, and so requires something else for its *bayān*.” Here in this current section (18, §27), he notes: “And as pertains to the Kitāb there is a fourth type [i.e., after *naṣṣ*, *zāhir*, and ‘*āmm*] by which *al-istidlāl* does not occur, but the Ahl al-Jadal have appended it to these three types. It is *al-mujmal*, and such is like His *qawl*, Most High: «And render [unto him] his *ḥaqq*, on the day of his harvest» [Q.6:141]. For this is *mujmal* — there is understood from the *zāhir* of the *lafẓ* neither the genus of the *ḥaqq*, nor its measure; so compliance with it is not possible, nor its usage, except by means of that which unites it with such as explains it (*illā bi-mā yuqārinuhu bi-mā yufassiruhu*).”

¹¹⁹ al-Bājī, *Minhāj*, Turkī ed., 18-21, §§28-36.

¹²⁰ As with al-Shīrāzī, we find *qawl mubtada* in contradistinction to *qawl khārij ‘alā al-sabab*. We will therefore continue to infer that, in the first category, the *sabab* prompting the Prophet’s ruling is somehow included within his *qawl* itself.

¹²¹ Having provided an example, al-Bājī concludes: “Thus, for this and what resembles it, there is no *khilāf* among our *aṣḥāb* in that it is constrained to its *sabab*, and there is not extended [a *ḥukm*] by way of it to anything else [besides its *sabab*].”

- *Ḍarb* 2: *Af'āl* [of the Prophet]
 - *Ḍarb* 1: “It is a *bayān* for something else”¹²³
 - *Ḍarb* 2: “What appears of his *fi'l* with inherent cause (*ibtidā'an*)”¹²⁴
 - “Such [a *fi'l*] as is *min al-qurb*”¹²⁵
 - “Such [a *fi'l*] as is not *min al-qurb*”¹²⁶
- *Ḍarb* 3: *Iqrār* [of the Prophet]:
 - *Ḍarb* 1: “The Messenger of God... saw [it] and confirmed it”
 - “[His confirmation comes] as a *qawl*”
 - “[His confirmation comes] as a *fi'l*”
 - *Ḍarb* 2: “What was done in his era, and was widespread to the extent that it was not possibly hidden from him”
 - [Problematic Type]: “What was done in his time of what most likely was not visible to him”¹²⁷

*al-Ijmā'*¹²⁸

- [Definition]: “It is the *ijmā'* of the Ahl al-'Aṣr upon a *ḥukm al-ḥāditha*”¹²⁹
- *Ḍarb* 1: “It is known by way of agreement (*al-ittifāq*)”
 - “Like when the scholar (*ālīm*) professes a doctrine (*maqāla*), and it is learned, and publicized to the extent that neither its learning nor publication is hidden from us; moreover, there is no known *khilāf*, or critique (*ṭa'n*), or rebuttal (*radd*) from anyone regarding that. This is an *ijmā'*”

¹²² Al-Bājī reports *ikhtilāf*: “And regarding this our *aṣḥāb* disagreed (*ikhtalafa... fihi*); for some of them said: Verily it is constrained to its *sabab*,” while [al-Qāḍī] Ismā'īl [Abū Ishāq (Mālikī, d.282/895)] said: It is correlated with its *'umūm*, and not constrained to its *sabab*. And it [this latter opinion] is the valid one (*al-ṣaḥīḥ*).” Turkī's footnote (20, n.2) explains that the Qāḍī Ismā'īl is here being referenced.

¹²³ Al-Bājī explains: “Like his *af'āl* regarding *al-ṣalāt*, *al-ḥajj*, etc. from among the *'ibādāt* regarding which the *lafz* by which it was revealed is *mujmal*, according to the one who claims such. And what is of this species, it functions in the same manner with regard to *wujūb* and *nadb* and *ibāḥa* as that which was a *bayān* for it.”

¹²⁴ Although al-Bājī's ordering of categories is different, this particular category corresponds to *ḍarb* 2.3 of al-Shīrāzī's Sunnaic *af'āl*. Here, the adverb *ibtidā'an* appears again in contradistinction to “*bayān* for something else,” and we will continue to infer that a *fi'l muḥtadā'* is one for which the *sabab* prompting that *fi'l* is somehow integral to the *fi'l* itself (whereas for the *bayān* category, the *sabab* lies in that something for which the *fi'l* acts as *bayān*).

¹²⁵ This is the same as al-Shīrāzī's *fi'l* “in a *wajh al-qurba*.” Al-Bājī notes *ikhtilāf* within his *madhhab*: The *zāhir al-madhhab* is that such a *fi'l* be correlated with *al-wujūb*; “But among our *aṣḥāb* are those who say: It is [correlated] with *al-nadb*. And among them are those who say: It is [correlated] with *al-waqf*.”

¹²⁶ Al-Bājī's examples are eating, drinking, and *bay'*; he concludes: “And this provides indicant for normative neutrality (*al-ibāḥa*).”

¹²⁷ Al-Bājī provides an example, then concludes: “And this provides indicant for permissibility, but drawing *ḥujja* from it is not valid, because it is of the *umūr al-khafiyya*, and it is possible that the Prophet did not know of that.”

¹²⁸ al-Bājī, *Minhāj*, Turkī ed., 21-3, §§37-41. NB: at the start of his discussion of the *adillat al-Shar'*, al-Bājī lists this third *aṣl* as “*Ijmā' al-Umma*.”

¹²⁹ Cf. al-Shīrāzī's definition, and note that al-Bājī states *Ahl al-'Aṣr*, and not *'Ulamā' al-'Aṣr*. Perhaps this apparently broader definition allows him the Mālikī incorporation of *ijmā' Ahl al-Madīna* as a subcategory.

of the *ahl* of that era (*‘aṣr*) upon the validity (*ṣiḥḥa*) of what he [the *‘ālim*] professed, and a contentment with it.”¹³⁰

- *Ḍarb* 2: “It is known by way of disagreement (*al-ikhtilāf*)”
 - “It is that the *Ṣaḥāba* are divided on two *qawls*, there being no third, nor even the possibility that another besides them originate a third *qawl*” [thus, any *qawl* outside these two is against *ijmā‘*, and is null and void (*bāṭil*)]¹³¹
- *Ḍarb* 3: *Ijmā‘ Ahl al-Madīna* “according to such as whose *ṭarīq* is sound-transmission (*al-naql*)”¹³²
- [Problematic Type]: “And there has been adjoined to that [i.e., to valid *ijmā‘*] the *qawl* of the *Ṣaḥābī* when no opposing [*qawl*] (*mukhālīf*) is known for it; for it is narrated on Mālik that it is an authoritative proof (*ḥujja*). But some of our *aṣḥāb* said: It is not a *ḥujja*. And Abū Ḥanīfa said: When it goes against (*khālaḥa*) the *qiyās*, it is like prevention/suspension (*al-tawqīf*).”

Ma‘qūl al-Aṣl / Adillat al-Ma‘qūl

*Lahn al-Khiṭāb*¹³³

- [Definition]: “It is the implication of the omitted (*taqdīr al-maḥdhūf*)”¹³⁴
 - *Ḍarb* 1: “The statement (*kalām*) is not completed except by means of it”
 - *Ḍarb* 1: “The omission (*ḥadhḥ*) of the response (*jawāb*) when there is, in the *kalām*, such as provides indicant for it”¹³⁵

¹³⁰ Al-Bājī notes two opposing opinions: 1) that of Dāwūd (the famed *imām* of the *Zāhirī* school, d.270/883), who claimed *ijmā‘* “is not a *ḥujja* except for the *ijmā‘* of the *fuqahā’* of the *‘aṣr al-Ṣaḥāba*, specifically, with the condition that the *qawl* of all of them be manifest;” and 2) that of the *Shāfi‘ī faqīh* Ibn Abī Hurayra (a disciple of Ibn Surayj, d.345/956), who claimed that if the original *qawl* gaining the sanction of *ijmā‘* was uttered by an *imām* (in the sense of *imām al-Umma*), then it is not a *ḥujja*, because it is possible that rebuttals were abandoned from fear of treason (*iftiyāt*) against the *imām*. Al-Bājī concludes by referring us to his book on *uṣūl al-fiqh* (Turkī, 22, n.6, cites the *Iḥkām al-Fuṣūl*), wherein: “We have provided indicant for the *ibtāl* of that, all of it.”

¹³¹ Al-Bājī reports the variant opinion of the *Ahl al-Zāhir* and *ba’d aṣḥāb* Abī Ḥanīfa that bringing a third *qawl* is allowed, and that he has explained his *ibtāl* of this in his *Kitāb al-Uṣūl*.

¹³² Importantly for the purposes of this dissertation, al-Bājī references, as one of his examples: “Like that by which Mālik drew *ḥujja* against Abū Yūsuf in the *majlis* of [Hārūn] al-Rashīd with regard to the *mas’alat al-ṣā’*, and Abū Yūsuf recanted and submitted to the validity of *ijmā‘ Ahl al-Madīna* as regards such as whose *ṭarīq* is this [i.e., *al-naql*].” He concludes, after a second example: “And this is a *ḥujja* obliging adherence to it and performance (*al-‘amal*) by way of it.” Whether or not such a *majlis* took place (and, in the absence of evidence to the contrary, there is no reason to believe it did not) is irrelevant to our purpose. Either way, it 1) provides support for our theory that early *jadal* theory (and in this case, *uṣūl* theory) was developed in part from an analysis of past juridical disputation; and 2) shows us that, at least in this instance, the dialectical forge was *recognized* by later theorists as fine-honing the *ḥujjiyya* of certain *uṣūl*. That is to say, Abū Yūsuf may have rejected the *ḥujjiyya* of the *ijmā‘* of the *Ahl al-Madīna* in general; but when confronted by Mālik in dialectical disputation at the court of Hārūn al-Rashīd, he was unable to refute that subtype of *ijmā‘ Ahl al-Madīna* whose *ṭarīq* is *al-naql*. Abū Yūsuf’s conceding to this is a prime illustration of a legal theory — an *aṣl*, in fact — gaining *ḥujjiyya* through dialectic. Whether or not such an event actually occurred, it is important that al-Bājī makes reference to it in his *jadal*-theory treatise.

¹³³ al-Bājī, *Minhāj*, Turkī ed., 24, §§43-4.

¹³⁴ The *Hans Wehr Dictionary of Modern Written Arabic* (4th ed., 874b, s.v. “تقدير”) accurately locates *taqdīr* as a technical term of grammar, meaning: “implication of a missing syntactical part.”

¹³⁵ Al-Bājī’s first example is from Q.26:63: «[We revealed to Moses]: “Strike the sea with your staff;” and it was split.» Al-Bājī explains: “So he struck, and it was split.” The omission in the

- *Ḍarb* 2: “The *ḥadhf* of the governing noun (*muḍāf*) and the standing of the governed noun (*muḍāf ilayhi*) in its place”¹³⁶
- *Ḍarb* 2: “Such as the *kalām* is completed without it”¹³⁷

Faḥwā al-Khiṭāb; Maḥmūm al-Khiṭāb; al-Tanbīh¹³⁸

- [Definition]: “It is what the revelatory text (*khiṭāb*) provides indicant for by way of [indirect] notification (*al-tanbīh*)...”¹³⁹

[*al-Istidlāl bi-*] *al-Ḥaṣr*¹⁴⁰

- [Definition]: “It is a single *lafẓ*, which is *innamā*”¹⁴¹

Ma‘nā al-Khiṭāb, fa-huwa al-Qiyās¹⁴²

- *Ḍarb* 1: *Qiyās al-‘illa*: “That the *far‘* be correlated with the *aṣl* by way of an occasioning factor established in the *Shar‘a* (*‘illa shar‘iyya*)”
 - *Ḍarb* 1: Conspicuous (*Jalī*)
 - “the *‘illa* is learned by way of *naṣṣ*”
 - “the *‘illa* is known by way of *ijmā‘*”
 - *Ḍarb* 2: Clear (*Wāḍiḥ*)
 - “[the *‘illa*] is established by *al-ẓāhir*, which is a

original, as we can see, is “so he struck;” God’s *kalām* is, in this way, incomplete without our assuming the unspoken response (*jawāb*) of Moses’ action. We can, however, supply the omission for ourselves thanks to the indicants provided by the *kalām* (God’s command to strike, coupled with the result of striking), and thus is the nature of *laḥn al-khiṭāb*.

¹³⁶ Al-Bājī employs the same example as al-Shīrāzī (Q.12:82) in his *Mulakhkhaṣ fi’l-Jadal* (see our note attached to *Adillat al-Ma‘qūl* in al-Shīrāzī’s hierarchy of *istidlāl*, above). Having confirmed that the *ma‘nā* of «*is‘al al-qarya*» is in fact, “ask the *ahl al-qarya*,” al-Bājī concludes: “And this obliges its *taqdīr* in the *khiṭāb*, and it is in the status of that which is spoken (*wa huwa bi-manzilat al-manṭūq bihi*).” As a quick aside, note the persistence of the formula “X is in the *manzila* of Y” here in this work of *jadal* theory; it is a common feature of the *Kitāb al-Umm*, and we will treat its occurrences in our analyses. In the realm of legal argument, we have termed it “*manzila*-subsumption.”

¹³⁷ Al-Bājī’s procedural norm: “the *taqdīr* of this [*maḥdhūf*] is not allowed without a supporting *dalīl* [...] because the *kalām* is independent without the *taqdīr* of a *maḥdhūf*.”

¹³⁸ al-Bājī, *Minhāj*, Turkī ed., 24, §45. Al-Bājī considers these terms synonymous. Importantly, after his definition and example, he concludes: “And this is what the Shāfi‘ī [or al-Shāfi‘ī himself?] calls *al-qiyās al-jalī*.”

¹³⁹ The remainder of al-Bājī’s definition is essentially the same as al-Shīrāzī’s, and includes both a *maior ad minus* and a *minore ad maius* (see above).

¹⁴⁰ al-Bājī, *Minhāj*, Turkī ed., 25-6, §46.

¹⁴¹ Al-Bājī’s first example is the Prophet’s *qawl*: “Works are only by way of intentions (*innamā al-‘māl bi’l-niyyāt*).” He concludes: “And it is understood from this that it is not an *‘amal* when it is devoid of *al-niyya*.” Importantly, he proceeds to list the *alfāz* which “*shaykhunā*” Abū Ishāq al-Shīrāzī considered as belonging to the category of *al-ḥaṣr*: 1) *innamā*; 2) the definite article *alif* and *lām*; 3) *dhālika*; and 4) *al-idāfa*. Al-Bājī disagrees, however, accepting only *innamā*, and directs us to his *uṣūl* book for a full explanation. He also cites an indication that Mālik held the *lām kay* (in the sense of “due to”) to be a *lafẓ* belonging to the category of *al-ḥaṣr*. Whether or not it has any significance, we may note that al-Bājī’s referring of the reader to another of his treatises for a more complete exposition or argument is also practiced by al-Shāfi‘ī a number of times in the *Ikhtilāf al-‘Irāqīyyīn*. We will make note of such editorial comments in our analyses, for they reveal something in the way of doctrinal consistency, as well as provide support for the “traditional status quo” of authorship and compilation.

¹⁴² al-Bājī, *Minhāj*, Turkī ed., 26-7, §§47-8.

- property/characteristic (*ṣifa*)”¹⁴³
 - “[the ‘*illa*’] is established by *al-ẓāhir*, which is of general scope (*‘umūm*)”
 - *Ḍarb* 3: Concealed (*Khafī*)
 - “such as whose ‘*illa*’ is known by way of rational inference (*al-istinbāt*)”¹⁴⁴
 - *Ḍarb* 2: *Qiyās al-Dalāla*
 - *Ḍarb* 1: “That one draw indicant, by way of the confirmation (*thubūt*) of a *ḥukm* of the *aḥkām* of the *aṣl* in the *far‘*, for their equivalence (*tasāwīhimā*) with regard to the contended norm (*al-ḥukm al-mukhtalaf fihi*) [i.e., the norm whose discovery is the objective of the *qiyās*]”¹⁴⁵
 - *Ḍarb* 2: “That one draw indicant, by way of the confirmation (*thubūt*) of the parallel (*naẓīr*) of the contended norm (*ḥukm al-mukhtalaf fihi*) in the *far‘*, for its *thubūt* in the *far‘*”¹⁴⁶
 - *Ḍarb* 3: *Qiyās al-Shabah*: [no definition provided]¹⁴⁷
 - “*Faṣl* on the Mention of What is Connected to *Qiyās* in Terms of Modes (*Wujūh*) of *Istidlālāt*”¹⁴⁸

¹⁴³ NB: al-Bājī’s example is a variant of the Prophetic *qawl* employed by al-Shāfi‘ī in a dialectical sequence (§§248ff.) See our analyses for *masā’il*-set #2 in Chapter III of this dissertation. This is an important indicant of continuity in *jadal* teaching and practice from proto-system to full-system theory.

¹⁴⁴ Al-Bājī’s example: “Like our *qawl* regarding the ‘*illa* of *tahrīm al-khamr*: it is *al-shidda al-muṭriba*; and this is known by way of taking away and presence (*al-salb wa’l-wujūd*). Which is to say that *al-shidda al-muṭriba*, when it is present in the *khamr*, the *tahrīm* is established, and when it is absent the *tahrīm* is absent; so the *ẓāhir* is that it [*al-shidda al-muṭriba*] is an ‘*illa* for it [*tahrīm*].”

¹⁴⁵ This definition not only confirms that shared *aḥkām* may be among the *khaṣā’iṣ* of al-Shīrāzī’s definition for Type I *qiyās al-dalāla* (see above), but that it might in fact be the prominent focus of this type of *qiyās*. Indeed, had we only read al-Bājī’s definition, we would have inferred that the distinctive marker of this species of *qiyās* is the indicant provided by a shared *ḥukm*; i.e., in attempting to determine a *ḥukm* X for the *far‘*, the jurist notes that a certain *aṣl* shares a *ḥukm* A with the *far‘*, and that there is also confirmed for this *aṣl* a *ḥukm* B which is relevant to the *far‘*. Thus, it is argued that unknown *ḥukm* X in the *far‘* must be known *ḥukm* B in the *aṣl*. See our diagrams illustrating al-Shīrāzī’s typology of *qiyās*, following.

¹⁴⁶ That is to say that, as *naẓā’ir* (parallels), a pair of *aḥkām* always have the same relationship. If we know that whenever A is *wājib*, so is B; we assume that whenever A is *ḥarām*, so is B. If we know that A is *ḥarām* in the *far‘*, then we assume that B — discovering the *ḥukm* for which is the object of our *qiyās*, and which is the *naẓīr* of A — must also be *ḥarām*. See the typology of *qiyās* diagrams following upon this outline of al-Bājī’s hierarchy of *istidlāl*.

¹⁴⁷ See al-Shīrāzī, above, and our *qiyās* typology diagrams, below.

¹⁴⁸ al-Bājī, *Minhāj*, Turkī ed., 27-9, §§49-53. The importance of this appendix to al-Bājī’s *qiyās* typology is self-evident, so we have included it in the outline. The emphasis here, in addition to types of *qiyās*, is the right procedure of justifying one’s *qiyās* in a dialectical disputation, and/or of justifying one’s refutation of an opposing *qiyās*. The overlap here with the various modes of *ta’līl* and *ithbāt al-‘illa* outlined in *uṣūl al-fiqh* works is quite obvious. We are thus provided a small body of indicants supporting a theory proposed by this dissertation; mainly, that the methods developed for private *ijtihād* were shaped in part by an anticipation of dialectical confrontation. The epistemes of *jadal*, in other words, seem once again a primary dynamic in shaping the epistemes of *uṣūl al-fiqh*. Al-Bājī notes: “The *wujūh* of *istidlālāt* are many, but those which are repeated between the *mutanāẓirayn*, and are most frequent, are five *awjah*.” These he lists as above. Notably, al-Shīrāzī also discusses such species of *istidlāl* in his *Luma‘*, in the *Bāb Aqsām al-Qiyās*. He begins by stating (Mustū ed., 210, §261): “And as for *al-istidlāl*, verily it branches out from what we have mentioned of it as pertains to the *aqsām al-qiyās*. And it is according to

Part I: The Dialectical Forge
Chapter II: The Lens of Early Juridical *Jadal*-Theory

- *Wajh 1: al-Istidlāl by Way of What is Superior/More Fitting (bi'l-Awlā)*: “That one clarifies in the *far'* the *ma'nā* upon which the *ḥukm* is made conditional in the *aṣl* and more (*wa ziyāda*)”¹⁴⁹
- *Wajh 2: al-Istidlāl by Way of Analytical Division (bi'l-Taqsīm)*¹⁵⁰
 - *Ḍarb 1*: “That one states the parts (*aqsām*) upon which it is possible the opponent (*khaṣm*) make conditional the *ḥukm*, and explains the invalidity of all of them, and so establishes that the truth (*ḥaqq*) lies in their contrary/contradictory (*khilāf*)”
 - *Ḍarb 2*: “That one states the *aqsām* upon which the suspension (*ta'liq*) of the *ḥukm* is possible, and explains the invalidity (*fasād*) of all of them but one, and so establishes that the *ḥaqq* is in that one”
- *Wajh 3: al-Istidlāl by Way of Explication of the Occasioning Factor (bi-Bayān al-'illa)*
 - *Ḍarb 1*: “That one explains (*an yubayyina*) the *'illa* of the *ḥukm*, then draws indicant by its presence in the locus of disagreement (*mawḍi' al-khilāf*), for the confirmation (*thabāt*) of the *ḥukm*”
 - *Ḍarb 2*: “That one explains (*an yubayyina*) the *'illa*, then draws indicant, by its absence, for the absence (*intifā'*) of the *ḥukm*”
- *Wajh 4: al-Istidlāl by Way of “Testimony of the Sources” (bi-Shahādat al-Uṣūl)*: [no definition provided]¹⁵¹
- *Wajh 5: al-Istidlāl by Way of Co-Absence (bi'l-'Aks)*: [no definition provided]¹⁵²

types....” He then discusses all of: 1) *al-istidlāl bi-bayān al-'illa* (two *ḍarbs*; cf. al-Bājī above); 2) *al-istidlāl bi'l-taqsīm* (two *ḍarbs*; cf. al-Bājī); and 3) *al-istidlāl bi'l-'aks* (cf. al-Bājī).

¹⁴⁹ As the term *awlā* would indicate, al-Bājī's example reveals this species of *qiyās*-related *istidlāl* as an *a fortiori* argument. The rejection of the *shahāda* of the Ahl al-Dhimma is justified in that 1) the *shahāda* of a Muslim *fāsiq* is rejected due to his *fiṣq*; 2) it is known that the *fiṣq* of the *kāfir* is greater (*a'ṣam*) than the *fiṣq* of the Muslim; thus 3) it is confirmed that the *shahāda* of the *kāfir* is *awlā* (more fitting) and *ahṛā* (more appropriate) in that it not be accepted. In these terms, we may also define this species of *istidlāl* as an *a potiori* argument.

¹⁵⁰ NB: this is nothing less than the *ijtihādīc* procedure of *al-sabr wa'l-taqsīm*, as it appears in full-system *uṣūl al-fiqh* treatises. See Hallaq, *History*, 92.

¹⁵¹ Al-Bājī's example clarifies the manner of this species of *istidlāl*: “It is like the *istidlāl* of the Mālikī against the Ḥanafī — with regard to the one who slanders (*qadhafa*) his wife, then irrevocably separates from her (*abānahā*), [and ought to] do *li'ān* — that what Abū Ḥanīfa opined (*dhahaba ilayhi*) as regards this is the *khilāf* of the *uṣūl*. For he [Abū Ḥanīfa] voided (*ahdara*) his *qadhaf*, and did not oblige for it a *ḥadd*, nor a *li'ān*. And this is the *khilāf* of the *uṣūl* because the *uṣūl* are clear (*mubayyana*) that whosoever slanders a free, chaste [woman]; there must be either the *ḥadd* or the *li'ān*.”

¹⁵² Al-Bājī's example does not at first shed much light on this mode of *istidlāl*. He says: “It is like the *istidlāl* of the Mālikī for [the ruling] that hair (*al-sha'r*) does not become *najas* by way of death; indeed, if it became *najas* by death, then the taking of it in the *ḥāl* of life would not have been permitted, like the meat and the bones.” The problem is that this example does not tell us the *'illa*. However, when we review another explanation of al-Bājī's from his *Ihkām* (Turkī ed., ii.679, §736), the current example becomes clear: “When the *mu'allil* clarifies (*bayyana*) that the *'illa* for the prevention (*man'*) of the taking of an organ from an animal in the *ḥālat* of its life is that the *rūḥ* is resident in that organ, and he provides indicant for the conditionality (*ta'alluq*) of that *ḥukm* due to this *'illa*; it is permitted for him that he draw indicant by means of that for the *rūḥ* not being resident in the hair; because if the *rūḥ* was resident in it, then its taking in the *ḥālat* of its life would have been prevented, like [for] the meat. And if it is allowed that the *rūḥ* be resident in the hair, while its taking in the *ḥālat* of life is allowed, then the *'illa* which he appointed for the prevention of that would be eliminated (*intaqaḍat*).” Combining the two examples, and bearing in mind that meat taken from a living animal is *najas*, we may make sense of this complicated species of *istidlāl*. The first step is a type of reverse *qiyās al-'aks*, wherein the

What is Connected to the *Adillat al-Ma'qūl*, but is Not of Them¹⁵³

- *al-Istidlāl* by Way of Association (*bi'l-Qarā'in*) [Some Mālikīs and Medinese]¹⁵⁴
- Correlating the Unrestricted (*Muṭlaq*) with the Restricted (*Muqayyad*) without an 'illa [Some Mālikīs]¹⁵⁵
 - Qism 1: “Their two *sababs* are different”
 - Qism 2: “Their *sababs* are of one genus (*jins*)”¹⁵⁶
- *al-Istidlāl bi-Dalīl al-Khiṭāb* [Some Mālikīs and Shāfi'īs]: “It is that the *ḥukm* be made conditional by way of a property (*ṣifa*), and that provides indicant, according to them, for the absence (*intifā'*) of the *ḥukm* from what goes beyond it [i.e., beyond that *ṣifa*]¹⁵⁷
- *al-Istidlāl* by Way of Some of the “Sources” (*bi-Ba'd al-Uṣūl*) [Some Ḥanafīs]¹⁵⁸

naqīḍ (not prohibited) of the *ḥukm* (prohibited) of the *aṣl* (taking meat/organ while alive) is known to also apply to the *far'* (taking hair while alive). This provides indicant for us that the 'illa of the *far'* must also be the *naqīḍ* of the 'illa (the soul resides in it) which occasions the *ḥukm* in the *aṣl* — i.e., the 'illa of the *far'* must be “the soul does not reside in it,” which in turn occasions the known *ḥukm* of permission. The second step is to take what we have learned from this reverse *qiyās al-'aks* (reverse, in that the *ḥukm* indicates the 'illa and not vice versa), to combine it with our knowledge that the same 'illa (the soul resides in it) is what occasions the *ḥukm* of *najas* for meat taken from a living animal, and to apply all of this to the *mas'ala* at hand. We can now say that the *ḥukm* (not *najas*) for the *aṣl* (meat taken from a dead [and, we assume, properly slaughtered] animal) is occasioned by the 'illa of “the soul does not reside in it.” Since the same 'illa has already been established for hair — whether attached to a living animal or otherwise — we may transfer that *ḥukm* (not *najas*) to the *far'* (hair taken from a dead animal). Thus, hair taken from a dead animal is not *najas*, just as meat and bones taken from it are not *najas*, due to the shared 'illa of “the soul does not reside in it,” which we established as obtaining in hair by way of a reverse *qiyās al-'aks* (if the soul resided in it, then the taking of it from a living animal would not be allowed, as with the taking of meat from it). Cf. Hallaq, *History*, 100, where he reviews the very same explanation from al-Bājī's *Iḥkām* in his discussion of *reductio ad absurdum* arguments under the rubric of *qiyās*.

¹⁵³ al-Bājī, *Minhāj*, Turkī ed., 29-31, §§54-7. Al-Bājī explains: “There has preceded the *kalām* regarding the types of valid indicants (*al-adilla al-ṣaḥīḥa*) from among the *adillat al-ma'qūl*. The *kalām* here will now be for such as is connected to them, but is not of them.”

¹⁵⁴ In al-Bājī's example, we see the following pattern: 1) a Prophetic *ḥadīth* compares circumcision to trimming of the moustache; 2) there is *ijmā'* that trimming the moustache is not *wājib*; 3) thus, circumcision is not *wājib*. Al-Bājī claims this is not a valid *ṭarīq* of *ithbāt al-ḥukm*, and directs us to his *Iḥkām al-Fuṣūl* for his explanation.

¹⁵⁵ In his introductory chapter on definitions (12, §15), al-Bājī defines *muṭlaq*: “It is the *lafẓ* occurring with *ṣifāt* which was not restricted by some/one of them.” And he defines *muqayyad*: “It is that which is restricted by some/one of its *ṣifāt*.”

¹⁵⁶ Al-Bājī dismisses these species of *istidlāl* unless the *muṭlaq* and *muqayyad* are correlated by way of an 'illa uniting them. He then directs us to his *bayān* in his *Uṣūl al-Fiqh* (which again appears to be his *Iḥkām*).

¹⁵⁷ This is a major departure from al-Shīrāzī, who lists *dalīl al-khiṭāb* among his valid forms of *adillat al-ma'qūl* (see the outline above). Again, al-Bājī claims that this is not a valid *istidlāl*, and directs us to his *Uṣūl*.

¹⁵⁸ Al-Bājī's example and rejoinder are instructive, especially considering that both employ rhetorical *alā tarā* objections (a common dialectical feature of the *Umm* and other early works, as we shall see in our analyses). He says: “That is like the *istidlāl* of Abū Ḥanīfa that most of the *ṭawāf* stands in for all of it as regards the *suqūṭ* of the *fard*, in that most of something might stand in for all of it in the *uṣūl*. Don't you see/opine (*alā tarā*) that who attains most of the *rak'a* with the *imām* is like the one who attains all of it? And so is it here [in the *mas'ala* of *ṭawāf*]. But this is nothing [rejoins al-Bājī], because even if, in this *mas'ala*, most of the *rak'a* stands in for all of it,

Istiṣhāb al-Ḥāl

*Istiṣhāb Ḥāl al-‘Aql*¹⁵⁹

- *Qism 1*: “*Istiṣhāb al-Ḥāl* regarding absolution from obligation (*barā’at al-dhimma*), and emptiness-of-slate (*khuluww al-sāḥa*), and absence of God’s Law instigating concern with obligation (*‘adam al-Shar’ al-mūjib li-ishtighāl al-dhimma*)”¹⁶⁰
- *Qism 2*: “The agreement (*al-ittifāq*) upon the extent (*miqdār*) of what pertains to a right (*ḥaqq*) established (*thābit*) for the obligation (*dhimma*), and the disagreement (*al-ikhtilāf*) as to what exceeds it. And the *aṣl* is such as is agreed upon, while what is disagreed about is a *far’* requiring a *dalīl*.”¹⁶¹

What is Connected to this, but is Not of It¹⁶²

- *Istiṣhāb Ḥāl al-ljmā’* [some Shāfi’īs]¹⁶³
- *Istiṣhāb Ḥāl al-‘Umūm* [some Shāfi’īs, and Abū Bakr al-Bāqillānī (Mālikī, d.403/1013)]¹⁶⁴
- “The *istidlāl*, by way of the absence of a *dalīl* for something, for its negation (*naḥīhi*)”

the general part of the *uṣūl* is the *khilāf* of that. Don’t you see/opine (*alā tarā*) that the greater part of members in *al-ṭahāra* do not stand in for the whole; and that most of the *rak’as* in *ṣalāt* do not stand in for all of them; and the *ṣawm* for most of the day does not stand in for all of it? So his [Abū Ḥanīfa’s] correlating of the *ṭawāf* with what he mentioned is not *awlā* than his correlating it with the rest of the *uṣūl*.”

¹⁵⁹ al-Bājī, *Minhāj*, Turkī ed., 31, §§58. NB: at the start of his discussion of the *adillat al-Shar’*, al-Bājī lists this third domain as “*Istiṣhāb Ḥāl Barā’at al-Dhimma*.”

¹⁶⁰ In al-Bājī’s example *mas’ala* (the Mālikī’s assertion that there is no *kaffāra* enjoined upon the killer of a slave), the arguing jurist appeals to the *aṣl* of: 1) *barā’at al-dhimma*; 2) *farāgh al-sāḥa*; and 3) [*farāgh*] *ṭarīq ishtighālīhā al-Shar’*. He then claims: “And I have sought in the *Shar’*, and have not found what provides indicant for obligation (*al-wujūb*), so it is necessary that he continue in a *ḥukm* [i.e., in the *aṣl* to which he has appealed].”

¹⁶¹ Al-Bājī’s example *mas’ala* is the *ikhtilāf* between the Mālikī (the *diya* for the Majūsī is 800 dirhams) and the Ḥanafī (it is the same as the *diya* for the Muslim). The former argues: “What I have asserted is *muttafaq ‘alayhi*, but what you have claimed is of *al-ziyāda*; and the *aṣl* regarding it is *barā’at al-dhimma*, so a concern with it [*dhimma*] requires a *dalīl shar’ī*.” Al-Bājī concludes: “And the Ahl al-Jadal call this: That the *ḥukm* is less than what is professed (*an al-ḥukm bi-aqalla mā qīla*).”

¹⁶² al-Bājī, *Minhāj*, Turkī ed., 31-3, §§59-62.

¹⁶³ Al-Bājī provides no definition, but his example *mas’ala* is the same as al-Shīrāzī’s, above. We will also note that al-Shīrāzī, as we have seen, was not one of those Shāfi’īs who subscribed to the validity of this species of *istiṣhāb*. Al-Bājī’s refutation follows the example: “And this is not a *dalīl*, because the *ijmā’* obtains in something besides the locus of disagreement (*mawḍi’ al-khilāf*), and no *ijmā’* falls upon the *mawḍi’ al-khilāf*.” In other words, the *mas’ala* at hand (the *mawḍi’ al-khilāf*) is the *mutayammim* who learns there is water for ablution after having begun his prayer. There is no *ijmā’* for a solution to this situation. Rather, the *ijmā’* which some Shāfi’īs appeal to is that the prayer of the *mutayammim* is valid in its components; this is not the *mawḍi’ al-khilāf* proper. In this light, we may interpret al-Bājī’s objection as a charge of *ignoratio elenchi*.

¹⁶⁴ The example is the argument that *kaffāra* is still enjoined upon the one who has sexual intercourse during the day in Ramaḍān, then grows ill or insane, because the Prophet equated the *kaffāra* of the fast-breaker to that of the one who does *ṣihār*. Who claims it is not enjoined due to such maladies must bring a *dalīl*. To this al-Bājī objects, saying: “This is not *istiṣhāb al-ḥāl*; rather, it is only *istidlāl* by way of the ‘*umūm* of the *lafz*.” As he explains, the Prophet’s *qawl* in the example is general, and establishes the *ḥukm* for the one who goes insane and the one who doesn’t — “it is correlated with its ‘*umūm*, except what the *dalīl* particularizes of it.” In other words, the onus of a *dalīl* lies with the one employing this type of *istidlāl*, because it is not *istiṣhāb*.

[al-Shāfiʿī]¹⁶⁵

- “That one says: I am negating (*anā nāfin*), so furnishing a *dalīl* is not enjoined upon me; rather, the *dalīl* is only enjoined upon the one confirming (*al-muthbit*)” [Some *Zāhirīs*]¹⁶⁶

The general picture provided by this outline reveals what is essentially the same hierarchy of *istidlālāt* as that presented by al-Shīrāzī in his *Maʿūna* and elsewhere. Considering that this latter was a teacher of al-Bājī’s, we ought not to be surprised by this. We may note, however, that such differences as do occur may reflect not only al-Bājī’s continued research and elaboration of theory-oriented argument (e.g., his disagreement with al-Shīrāzī regarding the *alfāz* of *istidlāl bi’l-ḥaṣr*), but “first principle” *madhhabic* differences (Mālikī vs. Shāfiʿī) regarding primary *uṣūl* (e.g., al-Bājī’s inclusion of the consensus of the Ahl al-Madīna as a subtype of *ijmāʿ*). The commonalities of presentation — structurally and content-wise — reveal a common intent, however, that these summary chapters on the domains of *istidlāl* should serve as 1) a primer or review of *uṣūl al-fiqh* for the dialectician-in-training (for presenting his own *istidlāl* in dialectal debate); and 2) an ordering of first-rank *topoi* (that he might “locate” the relevant objections for testing and critiquing his opponents *istidlāl*).

Perhaps these aims are best expressed by al-Bājī himself, in his conclusion to this *Bāb Aqsām Adillat al-Sharʿ*:

We have mentioned, in the domain of dialectical disputation (*bayn yaday al-jadal*), definitions (*ḥudūd*) and subdivisions (*fuṣūl*) of the *uṣūl*, in abridged format (*mulakhkhaṣatan*), the knowledge of which the dialectician (*ṣāhib al-jadal*) requires, so that he might know such as by which he may draw

¹⁶⁵ Al-Bājī’s example is the *istidlāl* of al-Shāfiʿī himself for the negation (*naḥī*) of *zakāt* from vegetables, by saying: “If *zakāt* had been obliged for vegetables, there would have been a *dalīl* for it; and had there been a *dalīl* for it, we would have known it with research (*maʿa al-baḥṭh*).” Remarkably, al-Shāfiʿī rules against *zakāt* for vegetables in our very subject treatise, the *Ikhtilāf al-ʿIrāqīyyīn* (see §977). He does not employ al-Bājī’s argument, however, but appeals only to specific efficient properties linking *zakāt* to wheat, corn, and the like which is dried and stored. Still, although the argument which al-Bājī attributes to al-Shāfiʿī does not appear to be a direct quote, or even paraphrase (I have certainly not yet found it in such a form elsewhere), this does not preclude al-Shāfiʿī’s having employed this type of *istidlāl*. Whatever the case, al-Bājī summarizes the argument, and then draws a conclusion, thus: “So when it is not known, it provides indicant for that there is no *dalīl* for it, and it is necessary that it not be obliged. And this is merely *istidlāl* by way of *istishāb al-ḥāl fī barāʾat al-dhimma*.”

¹⁶⁶ Al-Bājī’s example is the *Zāhirī* who claims the *taḥrīm* of unequal exchange (*al-tafāḍul*) for rice and corn, and when pressed for a *dalīl*, says: “I am negating, so a *dalīl* is not obliged for me.” Al-Bājī suggests the following response: “This is erroneous (*ghalaṭ*); because you have confirmed the *ḥukm* of *ibāḥa* by way of your *naḥī* of the *ḥukm* of *taḥrīm*, and the *nāḥī* must not give preference to the *naḥī* except by way of a *dalīl*, like the *muthbit*.” He then provides a Sunnaic *dalīl* for this objection, and directs us to his full explanation in his *Iḥkām al-Fuṣūl*.

indicant (*mā yastadillu bihi*), then turn towards the method of drawing indicant (*kayfiyyat al-istidlāl*). And we have omitted from it indicants (*adilla*), and many of the *masā'il* of the *uṣūl*, in aversion to long-windedness; and we have obliged the researcher (*tālib*) of such [to reference] our *Kitāb fī Uṣūl al-Fiqh*. So we will begin, now, and we will mention the categories of question and response (*aqsām al-su'āl wa'l-jawāb*), and their method. Then we will turn, after that, to the rest of the 'chapters' of dialectic (*abwāb al-jadal*) — and through God comes success!¹⁶⁷

This conclusion is followed, just as al-Bājī says, by a *Bāb Aqsām al-Su'āl wa'l-Jawāb*.¹⁶⁸ This in turn is followed by a series of chapters on *wujūh al-i'tirāḍ* exactly arranged according to the domains of *istidlāl* and their subcategories as outlined above. All of this taken together reveals a highly precise and systematic organizing principle which can only have been of great benefit to the dialectician-in-training. The same may be said for al-Shīrāzī's *Ma'ūna* (although in a far more abridged form), and it is due to the utility of these works, and the relative ease with which one may navigate the astounding plurality of objections, that we have chosen them as the primary material for our *jadal*-theory lens. Like the fifth/eleventh century dialecticians-in-training who first beheld them, we have benefited greatly from the organizing principle by which the *Ma'ūna* and *Minhāj* are structured.

As a final note, we may observe that — so far as I know — these introductory outlines of *istidlālāt* have not been the focus of any modern studies.¹⁶⁹ Nor, for that matter, have the greater bulk of chapters on *i'tirāḍāt* (such studies as there are restrict themselves to *qiyās*-oriented objections). The greater amount of material in these, and other, early *jadal*-theory treatises remains, therefore, a rich and untapped resource for further research; there is much yet to be learned. We are moving now, however, into an area — the dialectical questions — which has received some attention, particularly by Miller in his "Islamic Disputation Theory." Following this, we will briefly review the larger domains of *i'tirāḍāt*, before examining in more detail that other area of juridical dialectic which has received detailed treatment (particularly by Miller and Hallaq): the domain of *qiyās*-oriented *i'tirāḍāt*.

Before we move on to a treatment of dialectical questions, however, and considering that the domain of *qiyās*-oriented objections will play such a significant role in our analyses, we ought first to firmly establish our understanding of the major

¹⁶⁷ *Minhāj*, Turkī ed., 33, §63.

¹⁶⁸ *Ibid.*, 34-41, §§64-79.

¹⁶⁹ Outside, of course, of the notes and introductory chapters of the editors of the texts themselves.

modes of *qiyās* as we find them in our theory texts. I have chosen simply to diagram the main species of *qiyās* described by al-Shīrāzī and al-Baṣrī (whose *Kitāb al-Qiyās al-Sharʿī* will supplement the material for our *jadal*-theory lens) as I have come to understand them. It is hoped that the following diagrams will prove, in the main, self-explanatory, and provide sufficient review, so as to shore up our understanding of this crucial domain of *istidlāl*.

A Typology of al-Shīrāzī's *Ma'nā al-Khiṭāb* (which is *Qiyās*)¹⁷⁰

Qiyās al-'Illa¹⁷¹

<u><i>Asl</i></u> X		<u><i>Far'</i></u> Y
<u><i>'Illa</i></u> A (Established)	← SAME →	<u><i>'Illa</i></u> A (Established)
<u><i>Hukm</i></u> B (Established)	THUS, ALSO SAME →	<u><i>Hukm</i></u> B

Type I *Qiyās al-Dalāla*

<u><i>Asl</i></u> X		<u><i>Far'</i></u> Y
<u><i>Khaṣṣa</i></u> <i>Hukm</i> A (Established)	← SAME →	<u><i>Khaṣṣa</i></u> <i>Hukm</i> A (Established)
<u><i>Hukm</i></u> B (Established)	THUS, ALSO SAME →	<u><i>Hukm</i></u> B

Type II *Qiyās al-Dalāla*

<u><i>Asl</i></u> X		<u><i>Far'</i></u> Y
<u><i>Nazīr</i></u> <i>Hukm</i> A (Established)	← OPPOSITE →	<u><i>Nazīr</i></u> <i>Hukm</i> ¬A (Established)
↯ (<i>Nazā'ir</i>) ↯	[<i>Nazā'ir</i> must have same relationship]	↯ (<i>Nazā'ir</i>) ↯
<u><i>Nazīr</i></u> <i>Hukm</i> B (Established)	THUS, ALSO OPPOSITE →	<u><i>Nazīr</i></u> <i>Hukm</i> ¬B

Type III *Qiyās al-Dalāla* = *Qiyās al-Shabah*

<u><i>Asl</i></u> X		<u><i>Far'</i></u> Y
<u><i>Awsāf</i></u> A, B, C	← SAME →	<u><i>Awsāf</i></u> A, B, C
<u><i>Hukm</i></u> D (Established)	THUS, ALSO SAME →	<u><i>Hukm</i></u> D

¹⁷⁰ As culled from a study of al-Shīrāzī's *Ma'ūna fi'l-Jadal* (al-'Umayrīnī ed., 36-8, 116-118; Turkī ed., 139-40; 262-5). Notably absent from the *jadal*-theory works of al-Shīrāzī, al-Bājī, and Ibn 'Aqīl (but not al-Baṣrī) is direct mention of *qiyās al-'aks*. We find a brief discussion of *al-istidlāl bi'l-'aks* in al-Shīrāzī's *Luma'*, however (Mustū ed., 211, §261; and see above note attached to al-Bājī's *faṣl* on other modes of *qiyās*-related *istidlālāt*); and, as we have seen, al-Bājī includes *istidlāl bi'l-'aks* among his five additional modes. Why *qiyās al-'aks* is not listed among the main types of *qiyās* in these works, however, is not clear.

¹⁷¹ See al-Bājī's hierarchy above for his *jalī*, *wāḍiḥ*, and *khaṭfī* subtypes of *qiyās al-'illa*.

A Typology of al-Baṣrī's *Qiyās*

Qiyās al-Ṭard.¹⁷²

<u><i>Aṣl</i></u> X		<u><i>Far'</i></u> Y
<u><i>'Illa</i></u> A	← SAME →	<u><i>'Illa</i></u> A
<u><i>Ḥukm</i></u> B	← THUS, ALSO SAME →	<u><i>Ḥukm</i></u> B

Qiyās al-'Aks.¹⁷³

<u><i>Aṣl</i></u> X		<u><i>Far'</i></u> Y
<u><i>'Illa</i></u> A	← NAQĪḌ →	<u><i>'Illa</i></u> ¬A
<u><i>Ḥukm</i></u> B	← THEREFORE ALSO NAQĪḌ →	<u><i>Ḥukm</i></u> ¬B

¹⁷² See al-Baṣrī, *Mu'tamad*, Ḥamīd Allāh ed., vol. 2, 697ff.; and K. *al-Qiyās al-Shar'ī*, 1031-3 (trans. of the latter in Hallaq, "Treatise," 207-9). Note that *qiyās al-ṭard*, according to the definition of al-Baṣrī, matches the definitions of al-Shīrāzī, al-Bājī, et al. for *qiyās al-'illa*.

¹⁷³ See al-Baṣrī, *Mu'tamad*, Ḥamīd Allāh ed., vol. 2, 698-9; and K. *al-Qiyās al-Shar'ī*, 1031-2 (trans. of the latter in Hallaq, "Treatise," 207-8). This matches well with Sānū's definition (*Mu'jam*, s.v. "قياس العكس"): "The *ithbāt* of the *naqīḍ* [¬B] of a *ḥukm* [B] of a *ma'lūm* [X], in another *ma'lūm* [Y], due to the presence of the *naqīḍ* [¬A] of its [X's] *'illa* [A] in it [Y]." I am unsure as to the significance of the absence of *qiyās al-'aks* among the main categories of *qiyās* in the *jadal* works of all but al-Baṣrī.

The Categories of Dialectical Questions

Having familiarized ourselves with the topic of dialectical questions in the realms of theology and philosophy in Chapter I.2, our focus will now turn to dialectical questions as discussed by our juridical *jadal* theorists. We will begin simply by presenting al-Bājī's *Bāb Aqsām al-Su'āl wa'l-Jawāb* in outline format. Having done so, and hoping that al-Bājī will, in the main, explain himself through our translations, we will proceed to examine Miller's observations and arguments regarding dialectical questions in general, and as regards al-Bājī and al-Juwaynī specifically.

Al-Bājī's Typology of Question (*Su'āl*) and Response (*Jawāb*)¹⁷⁴

<i>Su'āl</i> #1:¹⁷⁵ "The question about the confirmation (<i>ithbāt</i>) of the doctrinal opinion (<i>madhhab</i>) of the Respondent (<i>mas'ūl</i>)" • "The <i>su'āl</i>: Does there belong to R a <i>madhhab</i> regarding the case-at-hand (<i>al-ḥāditha</i>) or not?" ○ <i>Qism</i> 1: "[Q] asks: Does there belong to him, as regards this <i>mas'ala</i>, a <i>madhhab</i>-opinion?" ○ <i>Qism</i> 2: "That [Q] conveys two <i>qawls</i> belonging to the one whose <i>madhhab</i> the <i>mas'ūl</i> follows (<i>yataqalladu</i>), and asks him: Does he prefer (<i>yakhtāru</i>) one of the two?"¹⁷⁶ • [<i>faṣl</i>: al-Bājī discusses the proper comportment of R, and the procedural norms of response (<i>jawāb</i>) to <i>su'āl</i> #1] <i>Su'āl</i> #2:¹⁷⁷ "The question about the quiddity (<i>māhiya</i>) of the <i>madhhab</i>-opinion" • "The <i>su'āl</i> falls sometimes on the <i>ḥukm</i>, and other times on the method (<i>ṭarīq</i>) of the <i>ḥukm</i>:" ○ "The <i>su'āl</i> about the <i>ḥukm</i>. It is that [Q] says: Date-wine (<i>al-nabīdh</i>) is lawful (<i>ḥalāl</i>) or forbidden (<i>ḥarām</i>)? And: Does usury (<i>ribā</i>) obtain for fruits, or not?"

¹⁷⁴ *Minhāj*, Turkī ed., 34-41, §§64-79. Al-Bājī begins by listing his five *ḍarbs* of *su'āl* in the precise order he will discuss them (outlined above). Having done so, he adds: "And according to the *madhhab* of the one who allows *taqlīd*, the questions are six. For the third [*al-su'āl 'an dalīl al-madhhab*, see our table] is the question: "Does he have a *dalīl* for the *mas'ala*, or does he practice *taqlīd* regarding it?" Importantly, he then notes: "And belonging to every *ḍarb* of *su'āl* is a *ḍarb* of *jawāb* specifically associated with it." He concludes his introduction: "I will explain that, and put it into order (*urattibuhu*), if God wills, in such a manner as will draw close its comprehension, and by which its *ḥukm* will be made clear. And from God comes success!"

¹⁷⁵ *Ibid.*, 34-5, §§65-6. As with previous outlines, al-Bājī's examples and extended discussions will be omitted unless deemed necessary.

¹⁷⁶ In al-Bājī's example, Q relates two *riwāyas* on Mālik, then asks P whether he prefers one, or whether the two *dalīls* are equal according to him. Following this, al-Bājī notes: "All of these are valid questions in disputation (*al-naẓar*), and calculated methods (*ṭuruq maqṣūda*)."

¹⁷⁷ *Minhāj*, Turkī ed., 35-6, §§67-9.

And such as resembles that, pertaining to such *aḥkām* as the jurists (*fuqahā*) disagree about (*ikhtalafa fīhi*).”¹⁷⁸

- “The *su’āl* about the *ṭarīq* of the *ḥukm*. Which may be...
 - about an associated name (*ism*)...¹⁷⁹
 - about a property (*ṣifa*) upon which the *ḥukm* is made conditional (*yata’allaqu bihā*)...¹⁸⁰
 - about an ‘*illa*...¹⁸¹
 - about a report (*khabar*)...¹⁸²
- [faṣl: al-Bājī warns the questioner against 1) asking open-ended questions which may cause him to make retractions; and 2) asking ambiguous questions which may forestall a response]
- [faṣl: on the proper comportment of P, and the procedural norms of response (*jawāb*) to *su’āl* #2]¹⁸³

***Su’āl* #3:**¹⁸⁴ “The question about the indicant (*dalīl*) [of the *madhhab*]”

- “It is that Q say to R, after the response (*jawāb*) about the *madhhab*: What is the *dalīl* for that?” So he confronts R with [the task of] furnishing the *dalīl*.”
- [Al-Bājī outlines a step by step procedure for the *jawāb* of R, depending on whether he knows Q’s *madhhab*,¹⁸⁵ or he does not¹⁸⁶]
- [faṣl: al-Bājī outlines three methods (*ṭuruq*) of indicant (*dalāla*) for R]:
 - *Ṭarīq* 1: “That he provides indicant for the *mas’ala* as it is (*bi-‘aynihā*)”

¹⁷⁸ The relationship between the legal literary genres of ‘*ilm al-khilāf*’ and ‘*ilm al-jadal*’, with the former providing material and past practice, and the latter providing theory and systematic method, should be self-evident. Al-Bājī’s description of this first subtype of the second *su’āl*, however, brings this relationship into sharp focus.

¹⁷⁹ Among al-Bājī’s examples: “Like that [Q] asks about *nabīdh*: Is it called (*yusammā*) *khamr*?” Cf. al-Baṣrī’s objections to *al-ta’līl bi’l-ism*, as we discuss them below.

¹⁸⁰ Al-Bājī’s examples: “For one may disagree (*yakhtalifu*) about the *ṣifa*, like the *khilāf* regarding hair: Is the *rūḥ* resident in it? And about bone: Is the *rūḥ* resident in it?” A typical mark of al-Bājī’s consistency, we have already encountered this *mas’ala* in our above outline of his *Aqsām Adillat al-Shar’*; see the section and attached notes for *al-istidlāl bi’l-‘aks*.

¹⁸¹ Al-Bājī’s examples: “[Q] says to him: What is the ‘*illa* for the *tahrīm* of disparity of exchange (*al-tafaḍḍul*) for wheat? And: What is the ‘*illa* for the *tahrīm* of *khamr*?”

¹⁸² Among al-Bājī’s examples: “Like the *su’āl* about the conquest of Mecca: Was it by peaceable surrender (*ṣulḥan*), or by force (*‘anwatan*)?” Al-Bājī concludes his subtypes and examples by saying: “And the *su’āl* about this, all of it, is valid, because its confirmation leads to confirmation of the *ḥukm*, and the *su’āl* about it is like the *su’āl* about the *ḥukm*.”

¹⁸³ Importantly, al-Bājī recommends that both P and Q be guardedly conservative (*yataḥarrazu*) in *su’āl* and *jawāb*. The danger, of course, lies in accidentally conceding something which cannot be retracted. As we will see in our analyses of extended dialectical sequences in the *ikhtilāf al-‘Irāqīyyīn*, al-Shāfi‘ī — in the role of P — is often notably parsimonious in his *jawāb*. The same is true when he is questioner, for he seems at times to so carefully craft his questions as to elicit precisely the *jawāb* necessary for *elenchus*.

¹⁸⁴ *Minhāj*, Turkī ed., 36-9, §§70-5. In his initial listing of the questions (34, §64), al-Bājī calls number three: *al-su’āl ‘an dalīl al-madhhab*.

¹⁸⁵ If the *mas’ul* knows the *sā’il*’s *madhhab*, he indicates this, and then has two permissible choices: 1) he may provide indicant for the validity (*ṣiḥḥa*) of his own *qawl*; or 2) he may provide indicant for the invalidity (*fasād*) of the *qawl* of his opponent (*khaṣm*).

¹⁸⁶ In this case: if, “for the *mas’ala* there are variant *aqwāl* and various *madhāhib*, and the *dalīl* differs due to the *ikhtilāf* of the *madhhab* of the one professing it, he [P] asks the *sā’il* about his *madhhab* so that the *dalīl* [which P defends against or critiques, as above] may be in accordance with it.”

- [procedure and examples]
- *Ṭarīq* 2: “That he fixes the indicant (*dalāla*) for some of its parts (*shu‘ab*) and sections (*fuṣūl*)”
 - [permissible and impermissible procedures with examples]
- *Ṭarīq* 3: “That he constructs the *mas‘ala* on the basis of another”¹⁸⁷
 - *Ḍarb* 1: “That he [P] constructs it [his *dalāla*] upon a *mas‘ala* of the *uṣūl*”¹⁸⁸
 - *Ḍarb* 2: “That he constructs it upon one of the *masā’il* of the *furū*”¹⁸⁹
 - [*faṣl*: al-Bājī explains two *ḍarbs* of constructing a *mas‘ala* upon a *mas‘ala*]¹⁹⁰

***Su‘āl* #4:**¹⁹¹ “The question about the mode/manner (*wajh*) of the *dalīl*”

- “It is that he [P] draws indicant by way of a Qur’ānic verse (*āya*) or a Report (*khabar*), and his *dalīl* from it is not clear, so he [Q] demands (*yutālību*) the

¹⁸⁷ Al-Bājī justifies the permissibility of this *ṭarīq*, in that: “the construction is a *bayān* for a *ṭarīq* of the *ṭuruq* of the *mas‘ala*; it is in the *manzila* of the rest of the *ṭuruq* of the *mas‘ala*.” Importantly, what al-Bājī is suggesting here is a kind of methodological “*manzila*-subsumption.” We will be discussing what I have termed *manzila*-subsumption in our forthcoming analyses of the *Ikhtilāf al-‘Irāqīyyīn*. Moreover, we will see several instances wherein an obvious crossover between *fiqh*-oriented charges of inconsistency (*naqḍ*) and method-oriented charges of inconsistency (what I have termed *method-naqḍ*) occur. What we see here in al-Bājī’s allowance of a kind of methodological *manzila*-subsumption is indicative of the same phenomenon; mainly, crossovers — in the realm of *jadal* — between *fiqh*-oriented justifications (substantive *manzila*-subsumption) and critiques (*naqḍ*), and method-oriented justifications (methodological *manzila*-subsumption) and critiques (*method-naqḍ*). The implication is simply that *jadal*, whether from the perspective of *istidlāl* or *ī’tirāḍ*, comprised justifications and critiques at two levels: 1) the substantive legal level (justifying or critiquing a ruling); and 2) the legal-theoretical level (justifying or critiquing a method). Based upon our analyses, this was just as true in al-Shāfi‘ī’s day as it was in al-Bājī’s; and, perhaps, we may consider it natural, if not indeed unavoidable.

¹⁸⁸ In al-Bājī’s example, a Mālikī P constructs his *dalāla* on the basis of *qiyās*, and informs the Ṣāhīrī Q that 1) if he accepts *qiyās* as valid, he will construct his *dalāla* for the *mas‘ala* on its basis; 2) if he does not accept *qiyās*, he will first provide indicant that *qiyās* is valid.

¹⁸⁹ Al-Bājī’s example is important, for he once again refers to the *mas‘ala* of hair as we encountered it in his exposition on *al-istidlāl bi’l-‘aks*. Here, he explains: “It is like when the Mālikī is asked about hair: Does it become *najas* through death? So he [the Mālikī P] says: This *mas‘ala*, according to me, is constructed upon the fact that the hair is something in which the soul is not resident. So if you concede [that] to me [I will build upon it]; and if not, I will transfer the *kalām* to it [i.e., I will shift topic to this more primary *mas‘ala*].” Al-Bājī explains that this can only be done when the *ṭarīqas* of the two *mas‘alas* are one and the same (as with the hair-*najas* and hair-soul *masā’il*).

¹⁹⁰ There is no *khilāf* as to the permissibility of the first, which is that P constructs *mas‘ala* upon *mas‘ala* before commencing his *istidlāl*. As for the second, when he begins his *dalāla* but does not mention he intends construction, al-Bājī provides two sets of procedures. In the first case, if P builds on a *mas‘ala* of *uṣūl* particular to his *madhhab*, the debate shifts to that *mas‘ala* if Q does not accept it. In the second case, if P builds on a *mas‘ala* of *furū*, and Q objects, requesting a shift to debating that *mas‘ala*, al-Bājī records two opinions. Abū ‘Alī al-Ṭabarī (Shāfi‘ī, d.350/961; a noted dialectician and *uṣūl*ist, and author of works in both genres) said: “That right does not belong to him, because it is shifting ground (*intiḳāl*).” Abū Ishāq al-Shīrāzī, on the other hand, said: “That right belongs to him.” Al-Bājī agrees with his teacher, so long as it is constructed upon an *aṣl* of the *uṣūl al-zāhira*.

¹⁹¹ *Minhāj*, Turkī ed., 39-40, §§76-7.

mode/manner (*wajh*) of the *dalīl*. And in general, the *wajh* of the *dalīl* must be either clear (*wāḍiḥ*) or unclear (*ghāmiḍ*).¹⁹²

- [faṣl: al-Bājī clarifies that all questions up to this point are presented in the order they must be asked]¹⁹³

Su’āl #5:¹⁹⁴ “The question according to the mode/manner of critique (*‘alā wajh al-qadh*) [for the *dalīl*]”

- *Ḍarb* 1: *al-Muṭālaba*: “It is the demand (*muṭālaba*) for the verification/validation (*taṣḥīḥ*) of the *akhbār*, and for the establishment (*ithbāt*) of their chains of transmission (*asānīd*); and the *muṭālaba* for the *taṣḥīḥ* of *ijmā’* and for its *ithbāt*; and the production (*ījād*) of the *‘illa* and its *taṣḥīḥ*; and other things besides from the modes (*wujūh*) of *muṭālabāt*.¹⁹⁵
- *Ḍarb* 2: *al-I’tirād*: “It is the objection/critique (*i’tirād*) as regards the selfsame *dalīl* [proffered by P], by way of what nullifies it (*bimā yubṭiluhu*). And such is like the

¹⁹² Al-Bājī explains that if the *wajh* of the *dalīl* is *wāḍiḥ*, then Q’s requesting a *bayān* is disapproved of. Qualification as *wāḍiḥ* means that it is either *naṣṣ*, or *zāhir*, or *‘amm*; al-Bājī provides examples for each. *Ghāmiḍ*, of course, is none of these, and “*al-muṭālaba bi’l-bayān* for its like” is deemed appropriate. The import of this question is obvious to the objectives of the questioner, for P — proceeding cautiously as al-Bājī recommends — may merely cite an authoritative *dalīl* as a proof for his solution to the *mas’ala* at hand. If the relationship between that *dalīl* and the *mas’ala* at hand is not obvious, however, and Q does not demand clarification of their correlation, then P’s solution might slip past on the authority of the *dalīl* alone. In this manner an error of correlation, by which the *dalīl* itself ought to be rejected as irrelevant, might be overlooked.

¹⁹³ “And these *as’ila* are arranged according to the order in which we arranged them, so that one depart from the first to the second, and from the second to third, and so on to the last of them. And it is not allowed that one begin with the *su’āl* about the *madhhab*, then follow it with the *su’āl* about the *wajh* of the *dalīl* which has not been presented, yet ask about its *wajh*. Likewise, it is not allowed for him [Q] to begin with a critique against the *madhhab* until he asks about the *dalīl*, and about its *wajh* if it is not clear. But some of the Ahl al-Nazar have allowed *al-i’tirād* by way of critique (*qadh*) before the *su’āl* about the *dalīl* and its *wajh*. And this is erroneous, because the *sā’il* at such a time becomes the *mas’ul*, and he has no right to such.”

¹⁹⁴ *Minhāj*, Turkī ed., 40-1, §§78-9. In his initial listing of the questions (34, §64), al-Bājī calls number five: *al-su’āl ‘an wajh al-qadh fi’l-dalīl*. Here, however, it is *al-su’āl ‘alā wajh al-qadh* (in the chapter heading) and *al-su’āl ‘alā wajh al-qadh fi’l-dalīl* (at the start of §78).

¹⁹⁵ It is important to recognize that, with al-Bājī’s fifth question, we are shifting from a phase of information-gathering to a phase of objection, critique, rebuttal, and refutation. Although distinct from the categories of *i’tirād* and *mu’āraḍa*, the *muṭālabāt* still qualify as objections insofar as Q is initiating the problematizing of P’s solution to the *mas’ala* at hand through his demand for *taṣḥīḥ* of X, Y, or Z. In some ways, this is a shadowy area between the *su’āl* about the *wajh* of the *dalīl* (the final phase of information-gathering) and outright objection (the *i’tirādāt*). As we shall see in our analyses, it is often difficult to identify the dialectical questions we encounter by the *muṭālabāt* which al-Bājī defines here and in later discussions; such an identification relies upon indication of the questioner’s intentions, which are not always evident in the presentations of the *Ikhtilāf al-‘Irāqīyyīn*. This may also be a general quality of proto-system *jadal* (i.e., a less systematic practice of question order and formulation), for we also find questions which are oriented towards an opponent’s objection (a category we do not find in the *jadal*-theory works), as well as those oriented towards an opponent’s *istidlāl*. At any rate, as regards the *muṭālabāt*, al-Bājī concludes: “So the *mas’ul* is confronted with the *taṣḥīḥ* of such according to what we will explain in its proper place.” As we are able to observe in following chapters, such objections as are designated “*al-muṭālaba bi-X*,” or which are in other ways linked to *muṭālabāt*, constitute the first among the ordered objections pertaining to each mode of *istidlāl*.

- contestation of (*al-ṭaʿn fi*) the chains of transmission (*asānīd*) of the *ḥadīth* by way of proving-the-weakness (*taḍʿīf*) of its transmitter, or the contestation of *ijmāʿ* by way of the explication (*bayān*) of disagreement [in the community] (*khilāf*), or the contestation of the *ʿilla* by way of ‘inconsistency’ (*al-naqd*) and ‘breaking’ (*al-kasr*), etc.”¹⁹⁶
- *Ḍarb* 3: *al-Muʿāraḍa*: “It is that he [Q] opposes (*yuqābila*) his [P’s] *dalīl* by way of its like, or by what is stronger than it; and R responds to him by way of all that Q puts forth against the *dalīl* of R [i.e., R takes on the role of Q], from among the *muṭālabāt* and *ʿitirāḍāt*; or he [R] preponderates (*yurajjiḥu*)¹⁹⁷ his statement of the *dalīl* over that by which it was opposed.”¹⁹⁸
 - [*faṣl*: *al-Bāji* explains further procedural considerations re: the number of questions, and the order in which they must be asked]

Miller on the Dialectical Questions of “Early Period” Juridical *Jadal*

Miller begins his discussion by noting that all of al-Bāji, Ibn ʿAqīl, and al-Juwaynī occupy themselves with the types of questions considered in juridical dialectic, while asserting that such is a “debt to theological *jadal*.”¹⁹⁹ He first pursues this claim with a translation of al-Juwaynī’s “state of the field” overview of accepted and disputed

¹⁹⁶ Al-Bāji concludes: “The *masʿūl* is obliged to the elimination (*isqāt*) of the *suʿāl*, and its repulsion, by way of what suspends / halts it, so that he [Q] concede for him the *dalīl*.”

¹⁹⁷ It has been brought to my attention that the English verb “to preponderate” is, in fact intransitive, and that my transitive usage here is unidiomatic — if not entirely incorrect. I will, however, persist in employing it in this fashion (as a transitive verb) to translate *rajjaḥa/yurajjiḥu*. My English rendering of the operation of *tarjiḥ* will be as follows: 1) “to preponderate X and Y” is to determine which of the two outweighs the other in terms of epistemic authority, or relevance, soundness of transmission, clarity, etc.; and 2) “to preponderate X over Y” is to bring an argument that X outweighs Y in terms of epistemic authority, relevance, etc.

¹⁹⁸ It is important to note that the last chapters of both al-Shīrāzī’s *Maʿūna* and al-Bāji’s *Minhāj* are dedicated to ordered listings of species of *tarjiḥ*. The above description of *muʿāraḍa* makes clear why this is so, for among P’s responses to Q’s *muʿāraḍa* is that he trump the opposing *dalīl* by way of *tarjiḥ*. It is also important to recognize some of the hallmarks of *muʿāraḍa* here. The first is that the modality of Q’s role has become “constructive” as opposed to merely “destructive.” That is to say, he has moved onwards from undermining and in other ways invalidating P’s solution to the *masʿala* at hand, to supplanting that solution with one of his own. Q’s opposing P’s *dalīl* with another *dalīl* initiates the process by which P may eventually be forced to concede Q’s solution. And this in turn brings about another hallmark characteristic of *muʿāraḍa*: the switching of roles. For as Q is now himself *proposing* a solution, rather than merely undermining P’s proposed solution, he must defend his solution against all that P may bring against it by way of *muṭālabā* and *ʿitirāḍ*. Thus the original questioner becomes the new proponent, and the original proponent the new questioner. At any rate, al-Bāji closes his description of the dialectical questions by saying: “And this is the whole collective of *wujūh* of critique (*qadh*) and response (*jawāb*). And as for the details of such, I will mention it according to the ordering (*tartīb*) of the *adilla*, one by one, and I will explain the *jawāb* for it, if God wills.” Thus are we reminded, once again, of the organizing principle of this (and al-Shīrāzī’s) *jadal*-theory work. The questions, objections, and responses are all ordered according to the hierarchy of *istidlāl*, and a parallel objective to Aristotle’s ordering of *topoi* is easy to discern.

¹⁹⁹ *Disputation Theory*, 90. Indeed, he suggests that this preoccupation is the “most evident” manifestation of this debt.

question types. Al-Juwaynī, we may corroborate, concludes by stating that four is the most common view regarding the number of question types.²⁰⁰ We must note, however, the distinct absence of any direct reference by al-Juwaynī to theological themes, groups, or individual scholars in this particular discussion (“*wa minhum man qāla*” being the standard reference to a variant view). At any rate, Miller prepares to delve deeper into an analysis of the questions of juridical *jadal*, using al-Bājī’s five-question account (the very same as we have outlined above) as his base, while asserting that we will derive from this account “an accurate understanding of how *jadal* became juristic.”²⁰¹

Miller on *Su’āl* #1 and *Su’āl* #2

With regard to al-Bājī’s first question, Miller claims it is “the restrictive question of the theologians, but it is here firmly in the fold of jurisprudence.” He then asserts al-Juwaynī as “the only author who knows the distinction between restrictive [*su’āl ḥajr wa man*] and non-restrictive [*su’āl al-tafwīd*] questions (translating a passage from the *Kāfiya* in support),²⁰² while yet observing “al-Khaṭīb al-Baghdādī [d.463/1071] also knows about the non-restrictive type of question.”²⁰³ Miller also notes that neither al-Juwaynī nor al-Khaṭīb al-Baghdādī mention “logicians” in their accounts of the *su’āl al-tafwīd*, citing al-Juwaynī’s claim of Q.26:71 as a source in support of this question type, and concluding “by the time of al-Juwaynī and al-Baghdādī it would seem that these technical questions have lost their previous association with logic.”²⁰⁴

²⁰⁰ *Disputation Theory*, 90ff.; citing *Kāfiya*, [Maḥmūd ed.], 77, line 8ff. NB: al-Juwaynī certainly describes other types of questions and arrangements, however, and it is unclear as to his own opinion.

²⁰¹ *Disputation Theory*, 92.

²⁰² *Kāfiya*, [Maḥmūd ed.], 80, lines 3ff.

²⁰³ *Disputation Theory*, 93 and nn.13-14; citing the 1981 al-Anṣārī ed. of the *K. al-Faqīh wa’l-Mutafaqqih*. Missing from Miller’s comments, however, is that al-Khaṭīb al-Baghdādī was himself a pre-eminent traditionist, a convert to the Shāfi’ī *madhhab*, and a contemporary of both al-Shīrāzī (who maintained a “cordial link” with him [see Chaumont’s *El*² entry on al-Shīrāzī]) and al-Juwaynī. Nor, unfortunately, does he note that the *Kitāb al-Faqīh wa’l-Mutafaqqih* (the very source he cites) is, in essence, a *ḥadīth*-oriented justification of, and introduction to, the *‘ilm uṣūl al-fiqh*. Moreover, this early *uṣūl* text includes some two dozen and more relevant (if summary) chapters on *qiyās*-oriented *jadal* and juridical *jadal* in general (see especially i.551-ii.113 of the 1996 al-‘Azzāzī ed.) Although Miller cites the work a number of times in following sections, we must wonder why — with well over 100 pages dedicated to juridical *jadal*, certainly enough to be considered a treatise on its own — he does not include it more officially among the works of his “early period” of juridical *jadal*.

²⁰⁴ *Disputation Theory*, 93-4. This question seems somewhat out of place, considering Miller’s continued insistence on a juridical take over of theological *jadal*. Moreover, this sort of justification of *jadal* questions and moves by reference to the Qur’ān finds parallels elsewhere (e.g., in the work of al-Ṭūfī, as we have mentioned), and bears the possibility of a continuous justification from the earliest times. Certainly, although we have left it an open door for future

Moving on, Miller, after discussing al-Bājī’s warning against the use of unqualified and ambiguous questions (see our outline for *su’āl* #2, above), translates an *aṣl* from the *Uṣūl al-Karkhī*.²⁰⁵ He then directs us to a passage from Aristotle’s *Topics*,²⁰⁶ which also appears focused upon P’s avoiding an unqualified response.²⁰⁷ As a final note, Miller observes that al-Bājī, al-Khaṭīb al-Baghdādī, and al-Juwaynī all show concern that Q take care in formulating his *māhiya* of the *madhhab* question (al-Bājī’s *su’āl* #2), so as not to concede in it something of P’s position. This, he ties back to al-Qirqisānī’s justification for the ordering of questions: that “one must avoid conceding something and then going back and denying it.”²⁰⁸

Miller on *Su’āl* #3: “What is your evidence?”

From the start, Miller sees the formulation of the “What is the *dalīl* for that?” question as exhibiting that point where “the *jadal* of the jurists most sharply differs with that of the theologians,” he then ties this to differing “standards and definitions” for “*dalīl*” among his jurist authors.²⁰⁹ They are, he says, “broad enough to include syllogistic reasoning; however, syllogism is not at home in jurisprudence, or for that matter, in juristic *jadal*.”²¹⁰

research, an overall comparison between the *jadal* of the Qur’ān (its styles and formulae) and that of proto- and full-system juridical *jadal*, is bound to reveal a great many parallels which undermine any proposed dependence upon the works of logicians. A primary example is the continued usage of the (Qur’ānic) *ara’ayta* and *alā tarā* formulae by dialecticians of proto-system and full-system alike.

²⁰⁵ See our discussion of this *aṣl* in the first part of this chapter. It is, in fact, about P’s avoiding an unqualified response (al-Karkhī, *Uṣūl*, al-Mays ed., 155), and we must remind the reader that it is very explicitly *jadal*-oriented. Moreover, as we have seen, there are some ten or so of the 39 *uṣūl* which are explicitly oriented to epistemological, hermeneutical, and rational-inferential concerns of *uṣūl al-fiqh*. Of course, all of the *uṣūl* in this work may be used as premises for the jurist — in private *ijtihād*, or public *jadal*. My point here is that Miller, though citing the most pertinent, explicitly dialectical example from the *Uṣūl al-Karkhī*, does not discuss the significance of this treatise as a whole. In effect, though not a treatise *about* juridical dialectic, the *Uṣūl al-Karkhī* is yet a handbook — like the *Ta’āsīs al-Nazar* of al-Dabbūsī — *for* the juridical dialectician. It belongs within a larger genre of dialectical literature, and serves to push back the teaching and practice of a specifically juridical *jadal* to perhaps 150 years before al-Shīrāzī, et al. Notably, al-Karkhī was a contemporary of the students of Ibn Surayj, and, like them, resided in Baghdād. His *Uṣūl* provides a glimpse at that era and locale wherein both the literary genres of (fully-systematized) *al-jadal al-fiqhī* and *uṣūl al-fiqh* are said to have been born.

²⁰⁶ *Top.* VIII.7, 160a17ff.

²⁰⁷ With no explanation as to why, however, Miller then concludes: “More likely than not, we have here a coincidence of themes rather than a case of Aristotle’s influence” (*Disputation Theory*, 95-6 and nn.18-19). Although I agree that much of what appears “Aristotelian” in juridical *jadal* may be parallels arisen through the natural exigencies of debate, I am uncomfortable with making “more than likely” assertions without supporting indicants or arguments.

²⁰⁸ *Disputation Theory*, 96-7.

²⁰⁹ “*Dalīl*” he translates as “evidence.”

²¹⁰ *Disputation Theory*, 97. Unfortunately, he does not pursue the point further, so we cannot understand exactly what is meant. We must take note, however, of: 1) the ubiquitous presence

As the ultimate design of *su'āl* #3 is to elicit P's *istidlāl*, Miller next turns his attention to the *adillat al-Shar'*. First, he lists al-Shīrāzī's and al-Bājī's largest categories of *adilla* as: 1) *aṣl* (Kitāb, Sunna, *ijmā'*); 2) *aṣl ma'qūl* [sic] (*fakhwā al-khiṭāb* [sic] and *ma'nā al-khiṭāb*); and 3) *istiṣhāb al-ḥāl*.²¹¹ Notably, Miller prefers to focus (here, and elsewhere in this chapter) upon the *ma'nā al-khiṭāb*, or analogical *qiyās*.²¹² More specifically, he narrows focus to *qiyās al-'illa* (as opposed to the types of *qiyās al-dalāla*), translating al-Shīrāzī's definition for it.²¹³ It is certainly understandable that he should keep so narrow a focus due to the limitation of space (and to the broad scope of his project), but we must remember to bear in mind that our early *jadal* treatises consider *i'tirāḍāt* and *ajwiba* across the full gamut of *istidlālāt*.²¹⁴

Importantly for our forthcoming analyses, Miller provides a helpful observation regarding al-Shāfi'ī's use of *ma'nā*, in a footnote attached to his translation of al-Shīrāzī's definition for *ma'nā al-khiṭāb* (n.25). He writes: "The word *ma'nā* occurs in the writings of al-Shāfi'ī in the meaning of common characteristic according to R. Brunschvig...."²¹⁵ Despite this, however, Miller next translates al-Shīrāzī's definition of *qiyās al-'illa* as: "the understanding of the test case (*far'*) on the basis of the principle case on account of some causative entity (*ma'nā*) with which the juristic status is connected in the Law;" he continues: "This is like comparing date-brandy to wine because the former is (also) strongly intoxicating."²¹⁶ It seems to me, however, that "causative entity" goes beyond al-Shīrāzī's intent, and we might in fact understand *ma'nā* in the sense that Brunschvig claims al-Shāfi'ī used it: "common characteristic." Importantly, in al-Shīrāzī's definition we find the use of the verb *ta'allaqa* in the same way as al-Baṣrī employs it, and might offer our own translation: "*Qiyās al-'Illa*: It is that the case-to-be-determined (*far'*) be correlated with (*yuḥmala 'alā*) the authoritatively-

of hypothetical conditional syllogisms in Islamic substantive law and legal argument in general, through all of its eras; 2) Ibn Ḥazm's demonstration that substantive rulings can be presented in syllogistic form, throughout the whole of his *Taqrīb*; and 3) the fresh infusion of Aristotelian syllogistic logic into *uṣūl al-fiqh*, beginning with the work of al-Ghazālī, and forever a part of the juridical *madrasa* curriculum thereafter (for this, see Hallaq, *History*, 39-40, 137ff., *passim*).

²¹¹ Miller has reversed the order of *ma'qūl* and *aṣl* (in both the *Ma'ūna* and *Minhāj*, as we have seen, it is *ma'qūl aṣl* and *ma'qūl al-aṣl*), and misread *fahwā al-khiṭāb* as *fakhwā al-khiṭāb*; he has also neglected any mention of *dalīl al-khiṭāb* or *al-ḥaṣr*.

²¹² *Disputation Theory*, 97-8.

²¹³ *Disputation Theory*, 98.

²¹⁴ This holds true even for al-Baṣrī (whose work has not been considered by Miller); for although his *K. al-Qiyās al-Shar'ī* is obviously limited to *qiyās*-oriented *jadal*, we find *jadal* theory for the other domains of *istidlāl* throughout his *Mu'tamad*.

²¹⁵ Citing: *Etudes d'Islamologie*, ed. A. Turkī, 2 vols. (Paris: G.P. Maisonneuve et Larose, 1976) 2:357.

²¹⁶ *Disputation Theory*, 99.

determined-case (*aṣl*) by way of the common characteristic (*ma'nā*) upon which the associated norm (*ḥukm*) is made conditional (*yata'allaqu... bihi*) in the *Shar'*.²¹⁷ Indeed, an understanding of *ma'nā* as “common characteristic” works quite well in this definition of *qiyās al-'illa*, and we might better confine notions of “causation” to the implications of *ta'allaqa... bihi*, however they were understood by al-Baṣrī and al-Shīrāzī.

Whatever the case, Miller next notes his jurists' acknowledgement of “stringency” issues when *al-qiyās al-shar'ī* is compared to other methods of reasoning, and he gives a brief trajectory for the final acceptance of juridical *qiyās* among the four schools. Interestingly, he implies that while, by the eleventh century CE, “the objections to analogical reasoning *per se* were dying out,” that it was “the objections to particular analogical arguments, especially those used by members of opposing law schools, [which] became the rule of the day.”²¹⁸ To this we would add that early material such as we find in the *Umm* shows clearly that particular *qiyās*-based arguments were hotly debated, in no unsophisticated manner, from at least the mid-second century H onwards. Nor was it only a matter of inter-school contest (preceding, in fact, the doctrinal *madhāhib* as they came to be). Moreoever, *qiyās*-oriented *jadal* — or *jadal* regarding any domain of *istidlāl*, for that matter — has its place *within* a *madhhab* just as much as between *madhāhib*, especially in its peirastic function of “testing” whether a particular instance of *ijtihād* holds water.²¹⁹

This brings us to one of the most significant starting points for this dissertation; for Miller next acknowledges the existence of early *ikhtilāf* works, including those within the *K. al-Umm*, but bases his assessment of the entire genre on the *K. Ikhtilāf al-Fuqahā'* of al-Ṭabarī. Because of this, he comes to a number of incorrect conclusions.²²⁰ Overall, Miller sees *ikhtilāf* works as devoid of *jadal*, “for,” as he says, “in these texts there is no argumentation as to what is faulty in the other school's reasoning. The techniques of argumentation are ignored.” Of course, as our translation and analyses will show — and, indeed, as the whole corpus of the *Umm* (among other works) stands witness — this assertion is patently false.

Moreover, Miller appears committed to a restricted view of the nature and function of the science of *uṣūl al-fiqh*, deeming it purely descriptive, and not intended

²¹⁷ *Ma'ūna*, al-ʿUmayrīnī ed., 36-7.

²¹⁸ *Disputation Theory*, 100.

²¹⁹ Again, we would point out that five of the eight *aqsām* of the *Ta'sīs al-Nazar* are devoted to intra-Ḥanafī *ikhtilāf*.

²²⁰ *Ibid.*, 101-4.

for “polemics.” He then says: “Indeed, it was probably the widespread acceptance of the science of *uṣūl al-fiqh* which was responsible for the penetration of the *jadal* method into jurisprudence.” Again, the *K. al-Umm* alone is testimony enough that this assertion is incorrect; an analysis of the *K. Ikhtilāf al-‘Irāqīyyīn*, in fact, is alone sufficient, as this dissertation hopes to demonstrate.

Finally, Miller attempts to draw support for these statements via his interpretation of the opening remarks of al-Shīrāzī, al-Bājī, and al-Juwaynī in their *jadal*-theory works. We must protest, however, that although it is certainly true that these authors well understood the connection between *uṣūl al-fiqh* and *jadal*, and that they expected their readers to have had some training in the ‘*ilm al-uṣūl*,²²¹ this in no way comprises evidence that the science of *uṣūl al-fiqh* was first systematized, and only then generated a need for a science of *jadal*. As this dissertation hopes to show, the very opposite is the case: an already sophisticated “proto-system” of *jadal* teaching and practice constituted the very forge in which particular concerns and methods of *uṣūl al-fiqh* were hammered out and refined.

Miller on *Su’āl* #4: “The Mode of Signification”

Regarding al-Bājī’s fourth question, Miller states the following:²²²

“In the *jadal* of the theologians, the question about the mode of signification was used against ‘rational evidence.’ It operated under the old Mu‘tazilite scheme of argumentation from the signifier (*dalīl*) to the signified (*maḍlūl*), where often the *way* in which the sign signifies this significate or its connection with it is not clear. But on juristic analogy, the mode of signification or the *ratio legis* was evident. In regard to it, the question about the mode of proof had become superfluous. But come what may, the old system had to be preserved, so the third question (of theological *jadal*) was kept but significantly reinterpreted to include only argument from the Qur’ān and *sunna*.”

I find it very difficult to follow Miller’s line of reasoning here. To begin with, he has apparently reduced the domains of juridical *istidlāl* to “juristic analogy” — the dangers of which we have before pointed out. Moreover, he seems to have conflated *wajh al-dalīl* (his “mode of signification”) with ‘*illa* (his *ratio legis*), somehow concluding that either must be “evident,” and, thus, al-Bājī’s fourth question “superfluous.” And yet, as al-Bājī makes quite clear in his explanations and examples, this question of mode of *dalīl* is pertinent only when P’s *dalīl* — elicited by the previous question — is neither *naṣṣ*, nor

²²¹ As we have seen, our earliest extant *jadal*-theory treatises open with brief “primers” in *uṣūl al-fiqh* concerns.

²²² *Disputation Theory*, 106.

ẓāhir, nor *‘āmm*. First of all, this may apply to the entire gamut of *istidlāl* — not only “juristic analogy” — as witnessed by the bulk of chapters in the *Minhāj*. In other words, if P’s source *dalīl* is not *naṣṣ* (univocal: allowing but one interpretation), then he must clarify *which interpretation* he is drawing indicant from; and if P’s *dalīl* is not the *ẓāhir* of an equivocal source, he must again clarify which interpretation he is drawing indicant from; and if P’s source *dalīl* is not general in scope (*‘āmm*), he must clarify the particular he draws indicant from. This is hardly superfluous. Indeed, al-Bājī’s fourth question regarding the *wajh* of the *dalīl* is absolutely critical to the entire enterprise of juridical *jadal*, for it opens the way to the real heart of any prolonged dispute: the *muṭālabāt*, *i’tirādāt*, and *mu‘āraḍāt* which constitute al-Bājī’s fifth question. How, after all, is Q to proceed to an objection to P’s *istidlāl* before he has clarified the precise mode (which is neither *naṣṣ*, nor *ẓāhir*, nor *‘āmm* — and thus not at all “evident”) of P’s *dalīl*?²²³

Moreover, we find in al-Shīrāzī’s *Mulakhkhaṣ* a confirmation of the important role played by the *wajh al-dalīl* question. In a treatment of *mu‘āraḍa* in the context of *al-istidlāl bi’l-Sunna*,²²⁴ we see immediately that whether the *ḥāl* of P’s source Sunna is *naṣṣ*, *ẓāhir*, or *‘umūm*, has great bearing upon whether and how Q can oppose him by way of *mu‘āraḍa*. How can Q “locate” a potential *mu‘āraḍa*, when he is unaware of the *ḥāl* (al-Bājī’s *wajh*) of P’s Sunna? He cannot oppose *naṣṣ* by *qiyās*, but he can oppose *ẓāhir* by *ta’wīl*, and *‘umūm* by *takhsīṣ*. We can only conclude, in the end, that Miller has misinterpreted al-Bājī according to the aprioristic dictates of showing a juridical “take over” of dialectical method from theologians; hence his comment: “come what may, the old system had to be preserved.”²²⁵

Miller on *Su’āl* #5: “Objection”

Miller, insisting on a juridical “take over,” equates al-Bājī’s fifth question to “the old ‘fourth question’ of theological *jadal*” after translating a short passage from al-Juwaynī’s *Kāfiya*. This latter he suggests to have been penned “in apparent reminiscence of theological *jadal*.” The connection of the passage to “theological *jadal*” is not immediately evident to me; but what is clear, and underscored by Miller, is that this question of objection is *different* in the juridical literature, particularly in that “it

²²³ Cf. al-Juwaynī, *Kāfiya*, Maḥmūd ed., 79, §192, where he makes a similar comment.

²²⁴ *Ma’ūna*, al-‘Umayrīnī ed., 67-8, n.6.

²²⁵ Additional arguments may be levelled against Miller’s assumption here, not the least of which is the frequent occurrence of questions of this species throughout the dialectical sequences of the *Umm*, including a number within our own subject treatise. With *su’āl* #4 being common to juridical *jadal* from at least the second century H, the conception of its appearance in a fifth century *jadal*-theory work as the “preservation” of a (somehow superfluous) fourth century theological system is no longer tenable.

has been greatly enlarged.”²²⁶ Returning to al-Bājī’s fifth question, Miller states the following:²²⁷

“We noted earlier how certain ancient debating techniques such as counter-objection (*mu‘āraḍa*) and distinction (*farq*) were haphazardly sheltered in the ‘new systematic’ theological *jadal*. In juristic *jadal*, this fault has been repaired. The new fourth question is called ‘question in the manner of rejection of evidence (*dalīl*)’ [*al-su‘āl ‘alā wajh al-qadh fi’l-dalīl*, see our outline, above]. This new appellation succeeded in encompassing all the techniques of debate at Q’s disposal under the rubric of one question.”

Again, this exposition rests upon a premise of a late juridical take over of “theological” *jadal* which is demolished by the evidence of the *Umm* and other early texts. There is no doubt that dialectical moves of *farq* and *mu‘āraḍa* are indeed “ancient” — they are overwhelmingly present in the arguments and dialectical sequences of the *Umm*. It cannot be right to conceive of these moves, therefore, as “haphazardly sheltered” in “theological” *jadal*, only to be “repaired” once the jurists had taken over. In fact, if one were to insist upon linearity and an absolute priority, it would make more sense — based on the *Umm* evidence — to claim that what “theological” *jadal* purportedly failed to convincingly incorporate was, in fact, a set of dialectical moves first employed in the juridical domain.

It is not the intent of this dissertation, however, to make such an argument. First of all, there is no evidence of any fumbling in the *jadal* works of a theological theme when it comes to *mu‘āraḍa* and other moves, nor of any artificial attempts to incorporate something foreign, or “ancient” — this is a construct of Miller’s, in consonance with his linear “take over” paradigm. Moreover, it appears most realistic to envisage dialectic as employed in both theological and juridical domains from the start, with practices and methods diverging subsequently according to the variant (speculative vs. normative) dictates of these projects. As for the exact nature and components of source traditions upon which scholars drew for their various dialectical projects: we might consider it a common, if mixed, pot.

Whatever the case, Miller now turns his attention back to al-Juwaynī. Having noted his alternate terminology as pertains to the objection-question — *muqābala*, or *ilzām bi’l-muqābala* — Miller next translates al-Juwaynī’s definition for *ilzām ‘alā al-dalāla* (also tied to the objection-question), as: “making the person demonstrating [that is, P] show the proof’s commensurability.” He follows this with a pair of comments: 1) “The

²²⁶ *Disputation Theory*, 107.

²²⁷ *Ibid.*, 107-8.

demand to show the proof's commensurability was the fourth question of theological *jadal*;" and 2) "al-Juwainī explicitly associates the new juristic question with the old theological one."²²⁸ Now, in the spirit of objection, I would raise three. Before doing so, I would show al-Juwainī's definition for *al-ilzām 'alā al-dalāla* in its context (the *tartīb* of questions), and offer a different translation:²²⁹

And know that <i>al-ilzām 'alā al-dalāla</i>, it is: The critiquing of P by way of its [the <i>dalāla</i>'s] <i>ṭard</i> (co-presence). And such will be after the demand for the mode/interpretation of the <i>dalāla</i>; because you [Q] will not critique him by way of its [the <i>dalāla</i>'s] <i>ṭard</i> except after having conceded to him that which he has claimed to be a <i>dalāla</i>.²³⁰	واعلم أن الإلزام على الدلالة — هو مؤاخذه المستدل بطردها — ويكون ذلك بعد المطالبة بوجه الدلالة؛ لأنك لا تؤاخذه بطردها إلا وقد سلّمت له ما ادّعاه دلالة.

As a first point, al-Juwainī's focus in this definition of *al-ilzām 'alā al-dalāla* is Q's objection, rather than what P must do after he has made it. In brief, it is an objection to what has been proposed as a potentially-efficient link between source *dalīl* and case-at-hand. By translating the above as "making the person demonstrating... show the proof's commensurability," Miller has in fact rendered al-Juwainī's *al-ilzām 'alā al-dalāla* much closer to al-Qirḡisānī's fourth question of *akhdh al-mūjib bi-ijrā' illatihi fī ma'lūlātiḥā*. We would note also that al-Maqdisī's fourth question is simply "*taṣḥīḥ al-'illa*." As a second point, I would simply reiterate one made earlier: a common source of dialectical theories, with subsequent parallel elaborations, and taking into account the "many hats" of early scholars, would just as easily account for shared conceptions (if not always terminology) between theologically and juridically themed *jadal* treatises. Certainly, al-Juwainī's use of *ṭard* in this definition need not mean "he explicitly associates the new juristic question with the old theological one."²³¹ Quite importantly as regards *jarayān*, we must also note that al-Baṣrī — himself a Mu'tazilī and Ḥanafī —

²²⁸ *Disputation Theory*, 108, and nn.46-7.

²²⁹ *Kāfiya*, Maḥmūd ed., 79, §192.

²³⁰ NB: We have mentioned that al-Bājī provides brief definitions for many *jadal*-relevant terms at the start of his treatise, in a thematically-arranged glossary (*Minhāj*, Turkī ed., 10ff.) Among them we find *dalāla*, which is synonymous with *dalīl*; and *ṭard*: "The presence of the *ḥukm* due to the presence of the '*illa*.' This latter corresponds to al-Juwainī's definition for *ṭard al-'illa* in the *Kāfiya* (Maḥmūd ed., 65, §155): "And as for *ṭard al-'illa*, it is its [the '*illa*'s] occurrence-of-effect (*jaryuhā*) as regards the *ḥukm*, in conformity with the *uṣūl*; and when it is sound according to the *uṣūl*, and its being an '*illa* is possible, its occurrence-in-effect in conformity with the *uṣūl* provides indicant for its validity."

²³¹ Miller explains in n.47: "al-Juwainī uses the term *ṭard* which is a later equivalent of the old *jarayān al-'illa fī ma'lūlātiḥā*."

uses nearly the same formulation: “the co-presence-and-co-absence (*jarayān*) of the occasioning factor (*‘illa*) in that-which-is-occasioned (*ma’lūl*) provides indicant for its validity,” while arguing *against* this opinion.²³² Finally, and referring back to Miller’s assessment of al-Bājī’s fourth question as “superfluous,” I believe that al-Juwaynī’s definition of *al-ilzām ‘alā al-dalāla* shows clearly why this is not the case: one cannot critique by way of the *ṭard* of P’s *dalāla* until after one has conceded to the precise mode of P’s *dalāla* — if Q did not accept P’s *dalāla*, they would not have proceeded past al-Bājī’s questions three and four.

Moving on, Miller again acknowledges that some of his authors “discuss objections against opponents who use Qur’ān, *ḥadīth*, *ijmā’*, and *qiyās*.” He then notes that al-Bājī and al-Juwaynī “give us a catalogue of the objections used” and proceeds to use them as base-sources for discussion of the *i’tirāḍāt* in following pages. Importantly, however, he reaffirms his narrowed focus on *qiyās*, saying: “We will be confining our remarks to objections against analogical reasoning since the argumentation there was at its most technical level and because it reveals the strongest bond with the old theological system of *jadal*.”²³³

Miller on *Muṭālaba* (“Request”)

Miller accurately relates al-Bājī’s higher-level division of the objection-question into three categories: 1) *muṭālaba*; 2) *i’tirāḍ*; and 3) *mu’āraḍa*. For each of these, he reviews al-Bājī’s brief, introductory explanations,²³⁴ and compares these conceptions with those of al-Juwaynī. Importantly, al-Juwaynī explains that, according to the “*urf al-‘ulamā’*,” *muṭālaba* is employed — along with *mumāna’a* — as a name for *man’*.²³⁵ As such, it is subsumed by al-Juwaynī, according to Miller, by the category of *i’tirāḍ*.²³⁶ He concludes: “Thus, in al-Juwainī’s system, *muṭālaba* is a subdivision of the third question about the verification of the proof (*burhān*), although it could be used in the fourth question where objections are brought forward.”²³⁷

²³² K. *al-Qiyās al-Shar’ī*, Ḥamīd Allāh ed., 1038; Hallaq, “Treatise,” 215.

²³³ *Disputation Theory*, 108-9. Unfortunately, this latter comment reveals a certain level of apriorism re: the selection of material for analysis.

²³⁴ *Minhāj*, Turkī ed., 40-1.

²³⁵ *Kāfiya*, Maḥmūd ed., 67, §159.

²³⁶ *Disputation Theory*, 109-10.

²³⁷ *Ibid.*, 110; citing *Kāfiya*, [Maḥmūd ed.], 77, line 13. We do not find such a suggestion where Miller has cited it, however. Moreover, though it has been claimed, based on al-Juwaynī’s opening discussion (*Kāfiya*, Maḥmūd ed., 77, §190), that he subscribes to the *mashhūr* ordering of four questions, his approach in subsequent expositions is far more descriptive than prescriptive, and it becomes difficult to determine the precise scheme to which al-Juwaynī himself adheres. By way of illustration, we will note: when discussing the *tartīb* of questions, al-Juwaynī includes

Miller next interprets al-Juwaynī's insistence on a logical ordering of dialectical questions as "operating in the old theological four question scheme."²³⁸ I would argue, however, that — no matter the potentially variant sources of al-Juwaynī's training in *jadal*, and any differences between his *tartīb* and al-Bājī's — the two jurists are merely operating under the same safe-guarding impetus common to all dialectical question schemes: Q's avoidance of having to retract a concession made too early.²³⁹ We must also bear in mind that with al-Bājī and al-Juwaynī both, the objection-question cannot come about until P has successfully — and succinctly — both rendered his solution-thesis, and *precisely described* the *dalīl* by which he supports that solution-thesis. In the end, whether a four or five question scheme, the objective is the same: Q must be sure he knows P's thesis and *dalīl* as well as P does himself, so that no ambiguity should lead him to an unintended concession.

Miller on *I'tirāḍ* ("Objection")

Miller's treatment here is brief; he notes that al-Bājī has fifteen types of *i'tirāḍ* whereas al-Juwaynī has nine, and translates their definitions of *i'tirāḍ*. Importantly, he then draws the "tropical" sense of *i'tirāḍ* from al-Juwaynī's discussion: "*I'tirāḍ* in its non-technical meaning has the sense of interposing something between a person and his goal, so that tropically, the one who makes an *i'tirāḍ* prevents P from proving his point."²⁴⁰ As we shall see, Miller later treats the nine categories of al-Juwaynī in quite some detail. We will discuss his observations after our own summaries and outlines.

Miller on *Mu'āraḍa* ("Counter-objection")

Again, Miller's treatment here is brief (he will revisit *mu'āraḍa* in his exposition on objection types); he proposes, among other things, that the *mu'āraḍa* of the theologians and of the jurists is essentially one and the same, and that al-Bājī explicitly points out the subsequent reversal of roles of Q and P. He also notes al-Juwaynī's

all five of the potential question types, regardless of whether a particular group believes one — or more — to be subsumed by another. He says: "Moreover, know that these questions (*as'ila*) are sequentially-arranged (*tatarattabu*): For the *su'āl* about the *māhiya* of the *madhhab* [2] is consequent to (*murattab 'alā*) the *su'āl* about the *madhhab* [1], according to the *qawl* of the one who professes it. And the *su'āl* about the *dalāla* [3] is after the *su'āl* about the knowledge (*ma'rifat*) of the *madhhab* [2]; and [the *su'āl*] about the *wajh* of the *dalāla* [4] is after the knowledge of whatever he claims to be a *dalāla* [3]. And the *elenchus* by way of 'opposition' and other [dialectical moves] (*al-ilzām bi'l-muqābala wa ghayrihā*) [5] is after knowledge of the *wajh* of the *dalāla* [4]; except according to the *qawl* of those who permit *ilzām* [immediately] against the *madhhab*," etc. (*Kāfiya*, Maḥmūd ed., 78-9, §191).

²³⁸ *Disputation Theory*, 109.

²³⁹ As we have seen, it is especially important not to concede to a *dalīl* before knowing which "mode" it is in.

²⁴⁰ *Disputation Theory*, 110-11; citing *Kāfiya*, [Maḥmūd ed.], 67, line 8.

favourable response as to the status of *mu'āraḍa* as a “question;” indeed, al-Juwaynī considers P’s response to Q’s *mu'āraḍa* as essential to the project of cooperative investigation: “*wa’l-gharaḍ min al-munāzara al-ta’āwun ‘alā al-baḥṭh wa’l-fahṣ.*”²⁴¹

On the Prescribed Ordering of Questions and Objections

We will briefly turn our attention to matters of procedure, before continuing on to more detailed discussions of the *i’tirāḍāt*. In a later section, “The Order of the Objections,” Miller again notes al-Juwaynī’s assertion that questions and objections ought to occur in a certain order. He translates al-Juwaynī’s prescription as to what that order should be, then underscores his insistence “that Q may not grant the existence of something and then go on to challenge it.”²⁴² However, finding “the explanation is rather wanting,” Miller turns to al-Juwaynī’s student al-Ghazālī for another account of the ordering of questions, noting: “The guiding principle is again not to deny what one has previously conceded.”²⁴³ He proceeds to detail and compare the ordering of yet later *jadal* authors (Fakhr al-Dīn al-Rāzī, al-Barawī, Ibn al-Ḥājib), concluding, in part: “From the evidence of these three sources, it would appear that the jurists had as late as the thirteenth century still disputed about the order of questions used against analogical reasoning.”²⁴⁴ To these observations, we would also add that a primary concern for systemizing and ordering disputation is everywhere apparent in the works of “early period” *jadal* theorists. This is most easily illustrated with al-Bājī, whose very work is entitled “*al-Minhāj fī Tartīb al-Ḥijāj*.” We might render this in English: “The System for Ordering Dispute.”

In treating this same matter of *tartīb*, Hallaq draws upon al-Juwaynī’s *Kāfiya*, al-Khaṭīb al-Baghdādī’s *al-Faṣīḥ wa’l-Mutaḥaqqiqh*, and Ibn ‘Aqīl’s *K. al-Jadal* in order to present a general portrait of the sequence and procedural concerns of juridical disputation.²⁴⁵ I will here attempt an outline of his prose description:

- 1) Q asks P’s opinion re: the *ḥukm*
- 2) Q asks P “to adduce the evidence and proof” justifying his *ḥukm*
- 3) Q “casts doubt” on P’s evidence and proof, causing P to validate them
 - If P fails at any stage, he must either adopt Q’s opinion, or another which he is capable of defending
 - If P succeeds at all stages, then Q proceeds to #4
- 4) Q raises objections to P’s indicants

²⁴¹ *Disputation Theory*, 111-12; citing al-Juwaynī’s *Burhān fī Uṣūl al-Fiqh*. Miller translates: “after all the purpose of dialectic is that each party help the other to investigate the matter thoroughly.”

²⁴² *Disputation Theory*, 134-6.

²⁴³ *Ibid.*, 137.

²⁴⁴ *Ibid.*, 136-9.

²⁴⁵ “Treatise,” 203ff.

- If P's indicant is Qur'ānic
 - Q makes the charge that it is equivocal or abrogated
 - Or, Q objects to the interpretation, and suggests another
 - Or, Q discredits the indicant, and produces a stronger one
- If P's indicant is Sunnaic
 - Q makes charges against the chain of transmission, or against the text
 - Q may charge (as with Qur'ānic evidence) abrogation, or produce a more reliable, or univocal, *ḥadīth*
- If P's indicant is claimed to be established by consensus
 - Q demands P confirm such consensus has taken place
 - Q attempts to prove "the existence of a dissenting voice"
- If P's *ḥukm* is derived through *qiyās*
 - Q objects to P's *qiyās*, in that:
 - P's *ḥukm* contradicts text or consensus
 - P's derivation of *ḥukm* from *aṣl* is not precise (thus *ḥukm* of *far'* is compromised)
 - P's *aṣl* is itself a *far'* based on another *aṣl* (he must prove that the 'illa of both first and second *aṣl* occasion the same *ḥukm*)
 - P's *far'* does not have all the properties comprised by the 'illa of his *aṣl*, or vice versa
 - P's 'illa is not efficient as a whole, or its properties are not efficient in particular
 - co-absence and co-presence must be proven for all properties of the 'illa, otherwise, there is *naqḍ*

Importantly, we may note that Hallaq's description of juridical *jadal* procedure covers most of the domains of *istidlāl*, though not to the full extent presented in the works of al-Shīrāzī, al-Bājī, et al. Nevertheless, we are granted an insight into the organizing principle behind our *jadal*-theory works, and a portrait of how this principle plays out in the course of a disputation. In other words, we can clearly see how the ordering of questions, and the approach by domain of *istidlāl*, mesh together into a seamless and efficient *jadal* procedure, designed to provide maximum support to an overall "truth-seeking" agenda.

Although we will see that the components of *i'tirāḍ* and *jawāb* for each domain of *istidlāl* go far beyond this basic outline, it nevertheless stands as an excellent model of the cohesiveness of the systems put forward by our early *jadal* theorists. Indeed, Hallaq closes his description by noting the systematic checking and "methodical interrogation" of dialectic. He concludes: "It is precisely this question-and-answer

method which characterizes juridical dialectic in general and al-Baṣrī's treatise in particular."²⁴⁶

²⁴⁶ "Treatise," 205.

On The Larger Categories of Objection

We will now turn our attention to the many categories of objection we find in our early *jadal*-theory treatises. In the main, the reader is asked to make reference to the outlines al-Shīrāzī's and al-Bājī's modes (*wujūh*) of *kalām*/*i'tirād* against the various domains of *istidlāl*, and their lists of *tarjihāt*, which we have provided in the appendices. For the time being, we will here combine both systems into a condensed, general outline of only the larger categories, in order to bring broader organizational features to light:²⁴⁷

Al-Shīrāzī	Al-Bājī
Against Istidlāl by way of Kitāb	
1) “ <i>annaka lā taqūlu bihi</i> ” 2) <i>an yaqūla bi-mūjibihā</i> 3) <i>an yaddaṭ ṭijmāl al-āya</i> 4) <i>al-mushāraka fī l-dalīl</i> 5) <i>ikhtilāf al-qirā'a</i> 6) <i>al-naskh</i> 7) <i>al-ta'wīl</i> 8) <i>al-mu'āraḍa</i>	1) <i>bi-anna al-mustadill lā yaqūlu bihi</i> 2) <i>al-qawl bi-mūjib al-dalīl... wa'l-munāza'a fī muqtaḍāhi</i> 3) <i>bi-da'wā al-mushāraka fīhi</i> 4) <i>bi-ikhtilāf al-qirā'āt</i> 5) <i>bi-da'wā al-naskh</i> 6) <i>min jihat al-ta'wīl</i> 7) <i>bi'l-mu'āraḍa</i> 8) [related, but problematic, objections]
Against Istidlāl by way of Sunna	
From the Perspective of Rejection 1) <i>radd al-Rāfiḍa</i> 2) <i>radd Aṣḥāb Abī Ḥanīfa fī mā ya'ummu bihi al-balwā</i> 3) <i>radd Aṣḥāb Mālik fī mā khālafa al-qiyās</i> 4) <i>radd Aṣḥāb Abī Ḥanīfa fī mā khālafa qiyās al-uṣūl</i> 5) <i>radd Aṣḥāb Abī Ḥanīfa fī mā yūjibu ziyādat fī naṣṣ al-Qur'an</i>	[...]
From the Perspective of the Isnād 1) <i>al-muṭālaba bi-ithbātihi</i> 2) <i>al-qadh fī l-isnād</i> 3) Other <i>wujūh</i> of the Aṣḥāb Abī Ḥanīfa	From the Perspective of the Isnād 1) <i>an yuqāla hādhā akhbār āḥād wa naḥnu lā naqūlu bihā</i> 2) <i>min jihat al-muṭālaba wa'l-taṣḥīḥ</i> 3) <i>min jihat al-qadh wa'l-tajrīḥ</i>

²⁴⁷ Our outline is distilled from the *Ma'ūna* and *Minhāj*, in the precise chapter order of treatment; objection categories will be left in transliteration for the sake of brevity. The reader is asked to bear in mind that, although I have consistently used the word “against” in domain headings, it would be more accurate to use “about;” every one of these chapters contains both objections and responses. That is to say, one will find not only how to object (as Q) to *istidlālāt* from each of these domains, but how to defend (as P) against such objections. Our treatises are not manuals only for the questioner; they offer a complete, systematic structure for both sides of a disputation.

Part I: The Dialectical Forge
Chapter II: The Lens of Early Juridical *Jadal*-Theory

From the Perspective of the Matn: Qawl Muḥtadā' 1) <i>an yastadilla bimā lā yaqūlu bihi</i> 2) <i>an yaqūla bi-mūjibihī</i> 3) <i>an yadda'ī al-ijmāl</i> 4) <i>al-mushāraka fi'l-dalīl</i> 5) <i>ikhtilāf al-riwāya</i> 6) <i>al-naskh</i> 7) <i>al-Ta'wīl</i> 8) <i>al-mu'āraḍa</i>	From the Perspective of the Matn: Qawl Muḥtadā' 1) <i>bi-anna al-mustadill lā yaqūlu bihi</i> 2) <i>bi'l-munāza'a fī muqtaḍāhi; al-munāza'a fī muqtaḍā lafẓ al-Sunna wa'l-qawl bi-mūjibihā</i> 3) <i>bi'l-mushāraka fi'l-dalīl</i> 4) <i>bi-ikhtilāf al-riwāya</i> 5) <i>bi-da'wā al-naskh</i> 6) <i>min jihat al-ta'wīl</i> 7) <i>min jihat al-mu'āraḍa</i>
Qawl Khārij 'alā al-Sabab 1) <i>al-lafẓ mustaqill bi-nafsihi dūna al-sabab</i> [same as for <i>al-Sunna al-Muḥtadā'a</i>] 2) Additional <i>i'tirāḍ</i> of the <i>Aṣḥāb Mālik</i>: <i>inna hādhā wārid 'alā sabab, fa-yajibu an yaqtaṣira 'alayhi</i> 3) <i>mā lā yastaqillu bi-nafsihi dūna al-sabab</i> [da'wā al-ijmāl]	Qawl Wārid 'alā al-Sabab 1) <i>Sunna wārida fī ghayr mu'ayyan</i> [already treated] 2) <i>Sunna wārida fī mu'ayyan; yunqal ḥukm al-Nabī fī 'ayn</i>
Fi'l 1) <i>bi-an al-mustadill lā yaqūlu bihi</i> 2) <i>an yunāzi'uhu fī muqtaḍāhu</i> 3) <i>da'wā al-ijmāl</i> 4) <i>al-mushāraka fi'l-dalīl</i> 5) <i>ikhtilāf al-riwāya</i> 6) <i>da'wā al-naskh</i> 7) <i>al-ta'wīl</i> 8) <i>al-mu'āraḍa</i>	Fi'l 1) <i>an yamna'a al-istidlāl bihā; bi'l-man' min al-iḥtijāj bihi</i> 2) <i>an al-mustadill lā yaqūlu bihi</i> 3) <i>bi'l-munāza'a fī muqtaḍāhi</i> 4) <i>da'wā al-ijmāl</i> 5) <i>al-mushāraka fi'l-dalīl</i> 6) <i>ikhtilāf al-riwāya</i> 7) <i>da'wā al-naskh</i> 8) <i>al-ta'wīl</i> 9) <i>al-mu'āraḍa</i> 10) [related problematic objections]
Iqrār 1) <i>Iqrār 'alā al-qawl</i> [same as for Prophet's qawl] 2) <i>Iqrār 'alā al-fi'l</i> [same as for Prophet's qawl]	Iqrār 1) <i>an yarā amran fa-yuqirru bihi</i> [same as for Sunnaic <i>aqwāl</i> and <i>af'āl</i>] 2) <i>an yuf'ala fī zamānihi... 'alā wajh lā yukhfā 'alayhi</i> [same as for Sunnaic <i>aqwāl</i> and <i>af'āl</i>]
Against Istidlāl by way of Ijmā'	
1) <i>min jihat al-radd</i> 2) <i>al-muṭālaba bi-taṣḥīḥ al-ijmā'</i> 3) <i>an yanqula al-khilāf 'an ba'ḍihim</i> 4) <i>an yatakallama 'alayhi bi-kulli mā yatakallamu 'alā matn al-Sunna</i>	1) [ijmā'] <i>yu'rafu bi'l-ittifāq</i> a. <i>al-muṭālaba bi-taṣḥīḥ al-ijmā' wa zuḥūrihi</i> b. <i>naql al-khilāf</i> c. <i>an yatakallama 'alā mā nuqila minhu</i> d. [related objection] 2) [ijmā'] <i>yu'rafu bi'l-ikhtilāf</i> 3) [related, but problematic, objections]

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Against Istidlāl by way of <i>Ijmāʿ</i> Ahl al-Madīna	
[....]	1) <i>an yablughā ḥadd al-tawātur</i> [no <i>iʿtirāḍ</i>] 2) <i>an yaqṣura ʿanhu</i> 3) [additional discussion: <i>mā ajmaʿū ʿalayhi min jihat al-raʾy waʾl-qiyās</i>]
Against Istidlāl by way of <i>Qawl al-Wāḥid min al-Ṣaḥāba</i>	
1) <i>an yaqūla qawl al-wāḥid min al-Ṣaḥāba laysa bi-ḥujja</i> 2) <i>an yuʿarīdahū bi-naṣṣ Kitāb aw Sunna</i> 3) <i>an yanqula al-khilāf ʿan ghayrihi min al-Ṣaḥāba</i>	[not a <i>ḥujja</i>] 1) <i>an yaqūla inna ḥādhā qawl wāḥid min al-Ṣaḥāba waʾl-qiyās muqaddam ʿalayhi</i> 2) <i>an yanqula al-khilāf fiʾl-masʿala</i> 3) <i>an yatakallama ʿalayhi bimā yufaqqihu</i>
Against Istidlāl by way of <i>Laḥn al-Khiṭāb</i>	
[....]	1) <i>li-tatmīm al-kalām</i> 2) <i>li-yaṣiḥḥu al-taʾwīl</i>
Against Istidlāl by way of <i>Faḥwā al-Khiṭāb</i>	
1) <i>an yuṭālibahu bi-taṣḥīḥ al-maʿnā alladhī yaqtaḍī taʾkīd al-farʿ alā al-aṣl</i> 2) <i>an yaqūla bi-mūjib al-taʾkīd</i> 3) <i>al-ibtāl</i> 4) <i>an yuṭālibahu bi-ḥukm al-taʾkīd</i> 5) <i>an yajʿala al-taʾkīd ḥujja ʿalayhi</i> 6) <i>an yuqābila al-taʾkīd bimā yusqīṭuhu</i>	1) <i>jalī</i> [no <i>iʿtirāḍ</i>] 2) <i>khaṭfī</i> a. <i>an yamnaʿa mushārakat al-mukhtalaf fihi liʾl-muttafaq ʿalayhi fi ʾillat al-ḥukm</i> b. <i>an yuʿalliqa al-ḥukm alā ghayr al-ʾilla allatī ʾallaqa al-mustadill ʿalayhi</i>
Against Istidlāl by way of <i>Dalīl al-Khiṭāb</i>	
1) <i>al-radd</i> 2) <i>an yuʿarīdahū bi-nuṭq aw bi-faḥwā al-nuṭq, wa huwa al-tanbīh, aw biʾl-qiyās</i> 3) <i>an yatakallama ʿalayhi biʾl-taʾwīl, wa huwa an yubayyina fāʾidat al-takhṣīṣ</i>	[....]
Against Istidlāl by way of <i>al-Ḥaṣr</i>	
[....]	1) <i>an yaqūla inna ḥādhā istidlāl bi-dalīl al-khiṭāb, wa lā taqūlu bihi</i> 2) <i>muʿaraḍat dalīlihi biʾl-nuṭq</i>
Against Istidlāl by way of <i>Maʿnā al-Khiṭāb (Qiyās)</i>	
1) <i>min jihat al-radd</i> 2) <i>an yaqūla anta lā taqūlu biʾl-qiyās fi ḥādhā al-ḥukm</i> 3) <i>manʿ al-ḥukm fiʾl-aṣl</i> 4) <i>manʿ al-waṣf fiʾl-aṣl, aw fiʾl-farʿ, aw fihimā</i> 5) <i>al-muṭālaba bi-taṣḥīḥ al-ʾilla</i> 6) <i>ʾadam al-taʾthīr</i> 7) <i>al-naqḍ</i> 8) <i>al-kasr</i> 9) <i>al-qawl bi-mūjib al-ʾilla</i> 10) <i>lā yūjibu al-ʾilla aḥkāmahā</i> 11) <i>fasād al-waḍʿ</i>	1) <i>bi-an al-mukhtalaf fihi lā yajūzu ithbātihi biʾl-qiyās</i> 2) <i>bi-an mā qāsa ʿalayhi lā yajūzu an yujʿala aṣlan</i> 3) <i>bi-an mā jaʿalahu ʾillatan lā yajūzu an yujʿala ʾillatan</i> 4) <i>bi-an mā jaʿalahu ḥukman lā yajūzu an yakūna ḥukman</i> 5) <i>biʾl-mumānaʿa fi ḥukm al-aṣl; al-kalām fi manʿ al-aṣl</i> 6) <i>biʾl-mumānaʿa fiʾl-waṣf</i> 7) <i>al-muṭālaba bi-taṣḥīḥ al-ʾilla</i>

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12) <i>fasād al-i'tibār</i> 13) <i>an ya'tariḍa al-'illa 'alā aṣliḥā</i> 14) <i>al-qalb</i> 15) <i>al-mu'āraḍa</i>	8) <i>'alā al-qawl bi-mūjibihā</i> 9) <i>bi'l-qalb</i> 10) <i>bi-fasād al-waḍ'</i> 11) <i>bi'l-naqḍ</i> 12) <i>bi'l-kasr; al-naqḍ min jihat al-ma'nā</i> 13) <i>bi-annahā lā tajrī fī ma'lūlātihā; al-muṭālaba bi-ijrā' al-'illa fī ma'lūlātihā</i> 14) <i>bi-'adam al-ta'thīr</i> 15) <i>bi'l-mu'āraḍa</i>
[....]	<i>al-Kalām 'alā al-Istidlāl bi'l-Awlā</i> 1) <i>al-muṭālaba bi-taṣḥīḥ al-ma'nā alladhī yaqtaḍī ta'kīd ḥukm al-far' 'alā ḥukm al-aṣl</i> 2) <i>al-naqḍ</i> 3) <i>al-kasr</i> 4) <i>an yaj'ala [al-ta'kīd] ḥujja 'alayhi</i> 5) <i>muqābala ta'kīd al-far' bi-ma'nā yasquṭuhu</i> 6) <i>al-farq</i> <i>al-Kalām 'alā al-Istidlāl bi'l-Taqsīm</i> <i>Ḍarb 1</i> 1) <i>al-naqḍ</i> 2) <i>al-kasr</i> 3) <i>an yubayyina qisman ākhar akhalla bihi al-mustadill, fa-yu'alliqa al-ḥukm 'alayhi</i> 4) <i>an yadda'ī ta'līq al-ḥukm 'alā ba'd al-wujūh allatī istadalla bihā al-mustadill 'alā ibṭālīhā, wa yuṣaḥḥihahu</i> <i>Ḍarb 2</i> 1) [complex example] <i>al-Kalām 'alā al-Istidlāl bi'l-'Aks</i> 1) <i>al-naqḍ</i> 2) <i>al-kasr</i> 3) <i>al-farq</i> <i>al-Kalām 'alā al-Istidlāl bi-Bayān al-'İlla</i> <i>Ḍarb 1</i> 1) <i>al-man'</i> 2) <i>al-naqḍ</i> <i>Ḍarb 2</i> 1) [same as 1.1 above] 2) [same as 1.2 above] <i>al-Kalām 'alā al-Istidlāl bi-(Shahādat) al-Uṣūl</i> 1) <i>al-naqḍ</i> 2) <i>al-farq</i>
Against Istidlāl by way of Istiṣḥāb Ḥāl	
<i>Istiṣḥāb Ḥāl al-'Aql fī Barā'at al-Dhimma</i> 1) <i>al-mu'āraḍa bi-mithlihā</i> 2) <i>an yanqulahu 'an al-aṣl bi-dalīl</i>	<i>Istiṣḥāb Ḥāl al-'Aql</i> 1) <i>al-mu'āraḍa</i> 2) <i>an yanqulahu 'an al-ḥāl bi-dalīl</i>

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<i>Istiṣhāb Ḥāl al-ʿijmāʿ</i> 1) [not a <i>ḥujja</i>]	<i>Istiṣhāb Ḥāl al-ʿijmāʿ</i> 1) [not a <i>ḥujja</i>] 2) <i>al-muʿāraḍa</i> 3) <i>al-naql bi-dalīl</i>
Tarjīḥāt	
• <i>Tarjīḥ al-Zawāhir</i> ○ Re: the Isnād ▪ [twelve modes] ○ Re: the Matn ▪ [thirteen modes] • <i>Tarjīḥ al-Maʿānī</i> ○ [sixteen modes]	• <i>Tarjīḥ al-Zawāhir</i> ○ Re: the Isnād ▪ [twelve modes] ○ Re: the Matn ▪ [thirteen modes] • <i>Tarjīḥ al-Maʿānī</i> ○ [fifteen modes]

From this condensed, comparative outline, a number of characteristics of early *jadal*-theory should now be quite plain. First of all, and bearing in mind that we have listed only the largest categories (none of the numerous subtypes, nor a single *jawāb*, has been represented above), these systems are — even in barest outline — sophisticated, highly complex, and ingeniously organized. There is a systematic genius at work here, and a penetrating *thoroughness*, for a method-structure with wide scope of application. Second, and as we have before indicated, the *qiyās*-oriented objections — though indeed very important — represent but a fraction of the overall number: only fifteen categories out of some sixty-five or so *iʿtirāḍāt*, and some forty *tarjīḥāt*. The scope of juridical *jadal*, in other words, goes far beyond what *qiyās*-oriented studies have shown us. Third, and despite the great similarity between the systems of al-Shīrāzī and his Mālikī student, there are more than a few points of difference, especially in the domains of *ijmāʿ*, and with regard to the categories of *maʿqūl al-aṣl*. These and other divergences are substantive as well as organizational, and worthy of further study.²⁴⁸

Fourth, and perhaps most importantly, we see that *iʿtirāḍāt* are presented according to domains of *istidlāl* by precisely the same hierarchy found in the introductory chapters on *adillat al-Sharʿ*. We are much confirmed in our estimation of an early *jadal*-system organizing principle: the domains of *istidlāl* are themselves the first rank of *topoi* wherein a disputant may “locate” the arguments for his critique or defence. We ought also to keep in mind that, with all of our early *jadal*-theory texts, the aspiring dialectician would find an illustrative example at each “location,” for each and every subtype of objection and response. In other words, every *iʿtirāḍ* and matching

²⁴⁸ Especially if further comparisons are drawn with Ibn ʿAqīl, al-Shīrāzī’s famed Ḥanbalī student, and the latter’s distant Shāfiʿī colleague al-Juwaynī.

jawāb is shown *in practice*; and we find in these texts a pragmatic pedagogy of the highest order. Finally, we might note there are a number of *i'tirāḍ* categories which crop up in more than one domain of *istidlāl*. *Mu'āraḍa* is prominent among these multi-domain objection types, but we also find *al-qawl bi-mūjib* X; *al-mushāraka fi'l-dalīl*; *da'wā al-naskh*; *al-ta'wīl*; *da'wā al-ijmāl*; and *al-muṭālaba bi-taṣḥīḥ* X in more than one domain. This is important not only for what it shows of terminological consistency, but of a consciousness of argument form.

Considering the complexity we hope this bare outline has conveyed, we cannot examine all of the categories of objection in this dissertation. Instead, we will deal with such *i'tirāḍāt*, subtypes, *qiwiba*, and example-*masā'il* as arise during the course of our analyses of the *Kitāb Ikhtilāf al-'Irāqīyyīn*. We will, however, take a closer look at certain *qiyās*-oriented objection categories in order to examine what has been said about them in previous studies, as well as to strengthen our grasp on these more complicated species; and it is to this task we shall now turn.

On *Qiyās*-Oriented Objections

We have noted that Miller justifies his narrowed focus on *qiyās*-oriented objections in that: “it is here that the terminology is at its most difficult level, and it is here that the tradition of *jadal* has been expanded upon.”²⁴⁹ As to this latter statement, it may be problematized from at least two directions. First, if we are to consider the *qiyās*-related *jadal* discussions an “expansion” of *jadal* tradition, then how are we to consider the equally-sophisticated treatments of *ītirāḍāt* for the other domains of juridical *istidlāl*, as we have outlined them above? If, by “the tradition of *jadal*” Miller means “theological” *jadal* (as continued stressing of the “take over” paradigm suggests), do the eight and more objection domains besides *qiyās* not also represent an “expansion?” Secondly, we would note that these other domains, along with other complex discussions in our earliest extant juridical *jadal*-theory treatises, are eloquent testimony to a long-standing, comprehensive, and specialized teaching and practice of juridical *jadal*, far beyond what a linear model of borrowing and expansion upon “theological” *jadal* treatises would suggest. We will see much more evidence for this in following sections, and, ultimately, in our analyses of the *K. Ikhtilāf al-‘Irāqīyyīn*.

At any rate, we have seen Miller recount al-Juwaynī’s insistence that *ītirāḍāt* follow a prescribed order; he then uses this order as the base-structure of his own analyses of certain *qiyās*-oriented objection categories, bringing in al-Shīrāzī, al-Bājī, and Ibn ‘Aqīl when appropriate.²⁵⁰ As for Hallaq’s overview and translation of al-Baṣrī’s *K. al-Qiyās al-Shar‘ī*, he is dealing specifically with a single treatise whose focus is *qiyās*, and which may represent the earliest discussion of juridical *jadal* that has survived (with the exception of what *jadal* material may be culled from the *Fuṣūl fi’l-Uṣūl* of al-Jaṣṣāṣ). It does not appear, in other words, that his intention was to paint such broad strokes as Miller attempts in his dissertation. Regardless, Hallaq’s supplemental overview of disputation procedure, as outlined above, went a considerable distance towards illustrating the much broader scope of objection domains. Our focus will now turn, like the scholars who have preceded us, to the specifically *qiyās*-oriented. We will begin with an overview of al-Baṣrī’s *qiyās* treatise, and certain of Hallaq’s important observations regarding *qiyās* in general.

²⁴⁹ *Disputation Theory*, 113.

²⁵⁰ *Ibid.*, 113ff.

A Brief Outline of the *K. al-Qiyās al-Sharʿī*

Al-Baṣrī's treatise on *qiyās*, like the *jadal* works of following generations of theorists, is marked by a high degree of organization, precision of detail, and systematic approach. He begins with definitions for *qiyās al-ṭard* and *qiyās al-ʿaks*, formulates a more general definition of *qiyās* incorporating both types, fully details the components necessary to *qiyās*, and then launches directly into a logically-arranged series of discussions which may all be said to treat *qiyās* in the context of dialectical debate. Having concluded that *kalām* regarding *qiyās* invariably focuses upon either the *ḥukm* or the *ʿilla*,²⁵¹ he first develops an ordered sequence of questions by which one might examine one's own, or one's opponent's, *qiyās* — first with regard to the *ḥukm*,²⁵² then with regard to the *ʿilla*.²⁵³

On the whole, we might characterize these questions as occurring on two levels: 1) internally, insofar as P/Q asks himself “Is the presence of the *ḥukm* possible in the *farʿ*, or not,” etc.; and 2) externally, insofar as these internal questions prompt dialectical questions, objections, and defences in real-time disputation. Al-Baṣrī provides, for each internal question, the reason for asking it, and the sort of dialectical question or objection which might ensue. Overall, it is an ordered approach by which P/Q might examine the particulars of the contended *qiyās* and thus construct his defence/critique.²⁵⁴ Al-Baṣrī next proceeds to outline the methods by which P might validate his *ʿilla*, again providing an ordered apparatus — this time for Q's assessment of P's *taṣḥīḥ al-ʿilla*;²⁵⁵ and, finally, he presents a set of discussions covering the familiar

²⁵¹ This, and all topics preceding, are in the “*Faṣl: On the Definition (ḥadd) of Qiyās*” (al-Baṣrī, *K. al-Qiyās al-Sharʿī*, Ḥamīd Allāh ed., 1032-3; Hallaq, “Treatise,” 207-9).

²⁵² The “*Faṣl: On the Kalām as regards the Ḥukm*” (*K. al-Qiyās al-Sharʿī*, Ḥamīd Allāh ed., 1033-5; Hallaq, “Treatise,” 209-12). For the ordered questions suggested by al-Baṣrī, the reader is referred to our outline of al-Baṣrī's modes of *qiyās*-oriented dialectic, in the appendices.

²⁵³ The “*Faṣl: On the Kalām as regards the ʿIlla*” (*K. al-Qiyās al-Sharʿī*, Ḥamīd Allāh ed., 1035; Hallaq, “Treatise,” 212-13).

²⁵⁴ Again, this parallels the function of *topoi*, insofar as Q begins through this process to “locate” any problematic elements of P's *qiyās*-reasoning upon which to focus his dialectical questions and objections. Already at this stage, the dialectical move of *al-qawl bi-mūjib al-ʿilla* and the charge of *ikhtilāf mawḍūʿ al-aṣl waʿl-farʿ* (i.e., *fasād al-waḍʿ*), among others, may become open possibilities for Q (see our outline in the appendices).

²⁵⁵ The “*Faṣl: On what Provides Indicant for the Validity (ṣiḥḥa) of the ʿIlla*” (*K. al-Qiyās al-Sharʿī*, Ḥamīd Allāh ed., 1036-8; Hallaq, “Treatise,” 213-16).

qiyās-oriented dialectical objections²⁵⁶ and modes of *tarjīhāt*,²⁵⁷ concluding with an appended mini-treatise on the dialectical move of *qalb al-qiyās*.²⁵⁸

It is upon these latter *faṣls* we will focus in following discussions, and al-Baṣrī's ordering of *wujūh* invalidating the 'illa will be followed with material from the *qiyās*-oriented objections al-Shīrāzī, al-Bājī, and al-Juwaynī, interposed where appropriate. First, however, we will: 1) relate Hallaq's observations as to the central role of *qiyās* in juridical dialectic; 2) present a bare outline of al-Baṣrī's *qiyās*-oriented objections; and 3) make some general comments about the organization and presentation of the *K. al-Qiyās al-Shar'ī* as a whole. Then we will outline the *qiyās*-oriented objections of al-Shīrāzī and al-Bājī, before proceeding to more detailed examinations of certain categories.

Hallaq on al-Baṣrī's *Qiyās*, in General

Hallaq outlines al-Baṣrī's twofold typology of *qiyās*: 1) *qiyās al-ṭard* (the familiar analogical archetype, *argumentum a simile*, wherein the *ḥukm* is transferred from *aṣl* to *far'* via shared 'illa); and 2) *qiyās al-'aks* (*reductio ad absurdum*,²⁵⁹ wherein the solution is achieved "by demonstrating the falsehood or invalidity of its converse").²⁶⁰ Although both of these types appear plentifully in the argument and debate of the *Umm* and other early sources, we should note in particular the many areas of overlap between the *ijtihād*ic method of *qiyās al-'aks* and the dialectical use of *reductio* arguments, be they *ad absurdum*, *ad impossibile* of the "internal" variety (*tanāquḍ*), or to a more general doctrinal inconsistency (*naqḍ*).²⁶¹ This relationship, of course, finds its parallel, too, in the philosophical dialectical procedure described by Aristotle, al-Fārābī, et al.

Hallaq on *Qiyās* as the Focal Point of Dialectic

Hallaq asserts: "*Qiyās*, the primary method of legal reasoning in Islamic law, is indeed the focal point of dialectic;" and: "Equally important are the methods by which

²⁵⁶ The "*Faṣl*: On what Especially Marks (*yakhtaṣṣu*) the 'illa, as pertains to its Modes of Invalidation (*al-wujūh al-muṣṣida lahā*)" (*K. al-Qiyās al-Shar'ī*, Ḥamīd Allāh ed., 1039-45; Hallaq, "Treatise," 216-23).

²⁵⁷ Two *faṣls* "On the *Tarjīh* of the 'illa of the *Aṣl* over another 'illa, and *Tarjīh* of a *Qiyās* over a *Qiyās*" (*K. al-Qiyās al-Shar'ī*, Ḥamīd Allāh ed., 1046; Hallaq, "Treatise," 223-4). These are followed by a fascinating section in which al-Baṣrī discusses a "meta-logical" concern; mainly, the manner in which the familiar *qiyās*-oriented dialectical moves (*mu'āraḍa*, *naqḍ*, etc.) all belong to the domain of *tarjīhāt* (I have labelled this simply as "Additional *Tarjīh*-related Discussion" in our outline in the appendices; *K. al-Qiyās al-Shar'ī*, Ḥamīd Allāh ed., 1047; Hallaq, "Treatise," 224).

²⁵⁸ The "Supplement (*ḍamīma*) Regarding *al-Qalb*" (*K. al-Qiyās al-Shar'ī*, Ḥamīd Allāh ed., 1048-50; Hallaq, "Treatise," 224-8).

²⁵⁹ NB: Hallaq's definition provides a closer match to the *reductio ad impossibile*.

²⁶⁰ "Treatise," 200.

²⁶¹ The differences between these categories will become more apparent in the course of our analyses of the *Ikhtilāf al-'Irāqīyyīn*.

the textual premises of *qiyās* are extracted and verified.”²⁶² We must remember, however, that — as we hope to have made plain — the focal *points* of juridical dialectic, the critical areas of testing and contention, spanned the entire gamut of *istidlālāt*, whether from Kitāb, Sunna, and Ijmā‘, or from the *qawl* of a single Companion, or from the *adillat al-ma‘qūl* of *faḥwā al-khiṭāb*, *dalīl al-khiṭāb*, *ma‘nā al-khiṭāb*, or from *istiṣḥāb* (and, we assume, from whatever other principles and sources — such as *istiḥsān*, *maṣlaḥa*, ‘urf, etc., which a jurist might subscribe to). Hallaq’s rendering of the procedural sequence of juridical disputation stands as a reminder of this, and includes the first three of these primary domains, along with *qiyās*.

The key role of *qiyās*, however, cannot be denied; and Hallaq, in pointing out the centrality of determining the ‘*illa* to the project of legal reasoning as a whole, reminds us that “the nature of the process of discerning the ‘*illa* entails the verification of both the text encompassing the ‘*illa* and the ‘*illa* qua ‘*illa*.”²⁶³ In the main, this is a matter of determining efficiency, and Hallaq next defines *ta’tḥīr*: “By efficiency it is meant that the judgments in both the original and the assimilated cases are effected by the property (*waṣf*) present in the ‘*illa*.... Any irrelevant, that is, inefficient property joined to the ‘*illa* may cause that ‘*illa* to be invalid.”²⁶⁴ Describing how we come to know the ‘*illa* in a text, Hallaq next relates the distinction between *dalāla* (“textual indicant”) and *amāra* (“textual sign”). As for the former, it “represents an unambiguous statement of the cause of judgment revealed in the sources [and] may also be found in a matter upon which the entire Muslim community had agreed to be authoritative;” and as for the latter, it is “merely a sign alluding to the cause for which a judgment was decreed.”²⁶⁵

Hallaq next relates al-Baṣrī’s advocating of the method of co-presence and co-absence for “extract[ing the ‘*illa*] from its textual context, while ensuring that extraneous elements are not attached to it.” Other methods of determining the ‘*illa*, and weighing potentially effective properties against each other, are discussed, including immediacy of effect, subjection of an ‘*illa* to *ijmā‘* of the *mujtahids*, and the practice of grouping together and then methodically eliminating all but one from a set of ‘*ilal*.²⁶⁶ Finally, and continuing to draw from elsewhere in the *Mu‘tamad*, Hallaq reviews al-

²⁶² “Treatise,” 200.

²⁶³ “Treatise,” 200.

²⁶⁴ Ibid., citing earlier discussions in al-Baṣrī’s *Mu‘tamad*.

²⁶⁵ Ibid., 201; citing earlier material in the *Mu‘tamad*.

²⁶⁶ Ibid., 201-2; from the *Mu‘tamad*.

Baṣrī's solutions to other 'illa-verification problems, including: 1) when the *aṣl* has multiple 'ilal, but the *far'* shares but one of them: *qiyās* is based on that single, common 'illa; and 2) a list of *tarjih* considerations, applicable to *aṣl* or *far'*, for deciding between 'ilal with apparently equally strong indicants and/or signs.²⁶⁷

Al-Baṣrī's *Qiyās*-Oriented Objections

A brief outline of al-Baṣrī's *Faṣl fīmā Yakhtaṣṣu al-'illa min al-Wujūh al-Mufṣida lahā* includes, in the order of presentation, the following categories:

- *Wajh 1: al-Ta'līl bi'l-Ism*
- *Wajh 2: Ikhtilāf al-Waḍ'*
- *Wajh 3: 'Adam al-Ta'thīr*
- *Wajh 4: Qalb al-Qiyās*
- *Wajh 5: al-Naqḍ*
- *Wajh 6: al-Kasr*
- *Wajh 7: al-Mu'āraḍa bi-'illa*

We will revisit each of these categories shortly; as for now the reader is referred to our outline of al-Baṣrī in the appendices for details and definitions.

Overall Observations regarding al-Baṣrī's *K. al-Qiyās al-Shar'i*

There are a number of features in al-Baṣrī's treatise which are worthy of highlighting. To begin with, we should note that al-Baṣrī's organizing principle is different from others we have seen. Despite this, however, it is oriented (like the *Topics*, *Ta'sīs al-Nazar*, *Ma'ūna*, and *Minhāj*) so as to provide a *manual* — a step-by-step structured guide for the disputant. Al-Baṣrī's methodical approach is most concerned with examining one's own, or one's opponent's, *qiyās* from a number of different angles. These, we have noted, he first outlines, then systematically discusses in the form of sequential assessments (i.e., first, the *sā'il* must examine aspect X; and if it holds, he must examine aspect Y; and if that holds... etc.) Again, this may also work as a "location" device for Q to achieve *elenchus* — working from larger to more specific observations of the opponent's *qiyās*, until a problematic point is discovered and exploited.

Indeed, al-Baṣrī sets forth his question sequence in such a manner that a student might memorize them in groups; specifically, there are four groups, depending upon the *ḥukm* and its relation to *aṣl* and *far'*. Once memorized, we might think of them as functioning in two ways: 1) as a rigorous plan for examination-testing (such as we might imagine between two companion-scholars within the same *madhhab*), whereby a

²⁶⁷ Ibid., 202-3.

mujtahid's proposed *qiyās* is thoroughly examined from every angle; and 2) as a set of *topoi* for the experienced dialectician. As for this latter function, the disputant, rather than asking question after question to search out problem points, might 1) consider them inwardly, 2) discover the problem-*topos* of attack, then 3) carefully plan the delivery of his juridical premises, so as to 4) trap the *qā'i*s in an impossibility, absurdity, or more general doctrinal inconsistency.

As pertains to the objection types themselves, al-Baṣrī's treatment of *naqḍ* and *mu'āraḍa* underscores a difference which I would loosely refer to as destructive vs. constructive criticism. With *naqḍ*, Q brings forward a case where P's 'illa is present and ought to produce the same *ḥukm*, but doesn't — he merely “destroys” P's 'illa, but he does not supplant it with anything superior. In *mu'āraḍa*, however, he does not destroy P's 'illa (at first), but he brings another 'illa which he claims to be superior or more fitting (*awlā*) in some fashion. Rather than a mere, invalidating critique, in other words, Q offers what is deemed a more valid solution. This in turn explains why *mu'āraḍa* prompts a change of roles for the disputants, because P now has the right to probe and test Q's proposed counter-'illa before conceding or rejecting it.

As for that section of the treatise which begins with “*Tarjīḥ* and *Iṣṣād* of the 'illa do not go outside of the categories we have discussed,”²⁶⁸ it is as fascinating as it is important to our understanding of early *jadal*-theory. Al-Baṣrī's ensuing exposition reveals the inner consistency belonging to his systematic rendering of *qiyās*-related *jadal*. In fact, he has produced another organizing principle — one which is *tarjīḥ*-related, rather than sequential-*jadal*-related, but which contains all of the same “moves” and methods. The advantage of this is to highlight essential features of these moves and methods, while at the same time providing us with another hierarchy by which to memorize them. Moreover, it is made very clear that a large part of what goes on in *qiyās*-related *jadal* is, in fact, a manner of cooperative *tarjīḥ*, and vice versa.

As for al-Baṣrī's appended *qalb* “supplement:” the process of outlining his discussions (see the appendix) has made his objective quite clear. In response to the objections to the move of *qalb* which al-Baṣrī had encountered (and which may have accumulated between stages of treatise composition), he: 1) reviews these objections, 2) concludes (with arguments provided) that *qalb* is valid in three disputation scenarios, and 3) summarizes these scenarios.²⁶⁹ Finally, we may point out two other features of

²⁶⁸ Ḥamīd Allāh ed., 1047; Hallaq, “Treatise,” 224.

²⁶⁹ Ḥamīd Allāh ed., 1048-50; Hallaq, “Treatise,” 224-8.

note in the *K. al-Qiyās al-Sharʿī*: 1) designations for the disputants change according to their dialectical activities: P may be *qāʿis* or *muʿallil*, for example, depending upon his particular project; and 2) there are two instances where al-Baṣrī's paradigm argument is introduced by *alā tarā*.²⁷⁰

The Qiyās-Oriented Objections of al-Shīrāzī and al-Bājī

The discussions of our authors in this domain, as in others, are both detailed and complex, far beyond even what our more complete outlines in the appendices may suggest. We will therefore deal most closely with them only insofar as they are commented upon by Miller and Hallaq, and, of course, when they arise through our attempted identifications in the *K. Ikhtilāf al-ʿIrāqīyyīn*. For now, we will only present a short outline of the *qiyās*-oriented dialectical moves from the *Maʿūna* and the *Minhāj*, in a further stage of translation than that in which they appear in our comparative outline of objection domains, above.

As for al-Shīrāzī, we have noted that he lists fifteen categories of *qiyās*-oriented *ʿtirāḍāt* in his *Bāb al-Kalām ʿalā Maʿnā al-Khiṭāb, wa huwa al-Qiyās*. These may be translated as follows:²⁷¹

- *ʿtirāḍ* 1: “From the perspective of [Q’s] rejection [of *Qiyās*, as a whole] (*min jihat al-radd*)”
- *ʿtirāḍ* 2: “That he [Q] says: You [P] don’t profess *qiyās* regarding this *ḥukm*”
- *ʿtirāḍ* 3: “Obstruction (*manʿ*) of the *ḥukm* in the *aṣl*”
- *ʿtirāḍ* 4: “Obstruction (*manʿ*) of the [purportedly efficient] property (*waṣf*) in the *aṣl*, or in the *farʿ*, or in them both”
- *ʿtirāḍ* 5: “Demand (*muṭālaba*) for validation (*taṣḥīḥ*) of the *ʿilla*”
- *ʿtirāḍ* 6: “Absence of efficiency (*ʿadam al-taʿthīr*); which is the presence of the *ḥukm* with the absence of the *ʿilla*”
- *ʿtirāḍ* 7: “[Charge of] inconsistency (*al-naqḍ*);²⁷² which is the presence of the *ʿilla*, and not a *ḥukm*, according to the *qawl* of one who does not opine (*lā yarā*) [the theory of] particularization (*takhṣīs*) of the *ʿilla*”
- *ʿtirāḍ* 8: “Breaking (*al-kasr*); which is the presence of a shared property (*maʿnā*) of

²⁷⁰ Near the end of 1041 in the Ḥamīd Allāh ed., in al-Baṣrī's *naqḍ* discussion; and early in 1049, in his *qalb* supplement. *Alā tarā*, as we shall see in our analyses, is one of the great “staple” formulae of proto-system dialectic, across thematic domains.

²⁷¹ *Maʿūna*, al-ʿUmayrīnī ed., 90-118; Turkī ed., 225-65. The majority of the following categories are of course further subdivided, and the reader, as always, is referred to our outline in the appendices for a more complete picture. In addition, al-Shīrāzī always illustrates his categories with example *masāʾil*, and accompanies each with the appropriate *qjwiba*. Samplings of these alone can be treated, when appropriate to our following discussions and analyses.

²⁷² Note that *naqḍ* also bears the sense of “destruction.” There is every possibility that this meaning was intended as the term gained its fixed technical sense as a species of objection. As we have noted, *naqḍ* is a purely “destructive” critique by which the opponent's *qiyās* is demolished, not a “constructive” critique by which his *qiyās* is supplanted with something epistemically superior (as in *muʿāraḍa*).

- the *illa*, and not a *ḥukm*”
- *I'tirāḍ* 9: “Profession (*al-qawl*) of the causative efficacy (*mūjib*) of the *illa*”
 - *I'tirāḍ* 10: “That the *illa* does not oblige its *aḥkām*; which is that the *illa* obliges two *ḥukms*, and he [P] makes [only] one of them conditional upon it, without the other”
 - *I'tirāḍ* 11: “Invalid positing (*fasād al-waḍ'*); which is that he [P] makes conditional upon the *illa* the opposite of what it requires (*ḍidd mā yaqtaḍīhi*)”
 - *I'tirāḍ* 12: “Invalid relational consideration (*fasād al-i'tibār*)”
 - *I'tirāḍ* 13: “That he [Q] object to (*ya'tarīḍa*) the *illa* insofar as its *aṣl* is concerned”
 - *I'tirāḍ* 14: “Reversal (*al-qalb*)”
 - *I'tirāḍ* 15: “Opposition [with an epistemically superior *istidlāl*] (*al-mu'āraḍa*)”

In addition to these *i'tirāḍāt*, al-Shīrāzī provides a list of sixteen modes (*wujūh*) of *qiyās*-relevant *tarjīḥāt* in his *Bāb Tarjīḥ al-Ma'ānī*.²⁷³ For a full listing, the reader is referred to our outline in the appendices. For now, we will note that the inclusion of such a chapter is in full accordance with the “meta-logical” concerns expressed by al-Baṣrī in his *K. al-Qiyās al-Shar'ī* (see above).

Like his teacher, al-Bājī's categories of *qiyās*-oriented *i'tirāḍāt*, in his (identically titled) *Bāb al-Kalām 'alā Ma'nā al-Khiṭāb wa huwa al-Qiyās*, are also fifteen in number.²⁷⁴ We will note a few different categories, however, as well as a different ordering. Of course, al-Bājī's treatise is also far more detailed in treatment, with a greater refinement of subcategories. The reasons for this we have mentioned earlier. As for translations of al-Bājī's categories of *qiyās*-oriented dialectical moves, they may be rendered as follows:

- [Muṭālabāt (Demands)]**
- Mode 1: “The objection/critique (*i'tirāḍ*) via: the contended solution (*al-mukhtalaf fīhi*) is not allowed to be confirmed (*lā yajūzu ithbātīhi*) by way of *qiyās*”
 - Mode 2: “The *i'tirāḍ* via: what serves as the basis for *qiyās* (*mā qāsa 'alayhi*) is not allowed to be made an *aṣl*”
 - Mode 3: “The *i'tirāḍ* via: what he made an *illa* is not allowed to be made an *illa*”
 - Mode 4: “The *i'tirāḍ* via: what he made a *ḥukm* is not allowed to be a *ḥukm*”
 - Mode 5: “The *i'tirāḍ* by way of preventive opposition (*mumāna'a*) re: the *ḥukm* of the *aṣl*; The *kalām* re: the obstruction (*man'*) of the *aṣl*”
 - Mode 6: “The *i'tirāḍ* by way of preventive opposition (*mumāna'a*) re: the [purportedly efficient] property (*waṣf*)”
 - Mode 7: “The demand (*muṭālaba*) for validation (*taṣḥīḥ*) of the *illa*”
- [I'tirāḍāt (Objections/Critiques)]**
- Mode 8: “The *i'tirāḍ* against the *illa* in the manner of professing its causative efficacy (*al-qawl bi-mūjibihā*)”
 - Mode 9: “The *i'tirāḍ* against the *illa* by way of reversal (*qalb*)”
 - Mode 10: “The *i'tirāḍ* against the *illa* by way of invalid positing (*fasād al-waḍ'*)”²⁷⁵

²⁷³ *Ma'ūna*, al-'Umayrīnī ed., 125-7; Turkī ed., 281-3.

²⁷⁴ *Minhāj*, Turkī ed., 148-217.

²⁷⁵ NB: for al-Bājī, *fasād al-i'tibār* is a subcategory of *fasād al-waḍ'*.

- Mode 11: “The *i’tirāḍ* against the ‘illa by way of [charging] inconsistency (*naqḍ*)”
 - Mode 12: “The *i’tirāḍ* against the *qiyās* by way of ‘breaking’ (*kasr*); The [charge of] inconsistency (*naqḍ*) from the perspective of the shared property (*min jihat al-ma’nā*)”
 - Mode 13: “The *i’tirāḍ* against the ‘illa via: that it [the ‘illa] is not concomitant with its occasioned-objects [i.e., its *aḥkām*] (*lā tajrī fī ma’lūlātiḥā*); The demand (*muṭālaba*) for the demonstrated concomitance (*ijrā*) of the ‘illa with its occasioned-objects (*ma’lūlātiḥā*)”²⁷⁶
 - Mode 14: “The *i’tirāḍ* against the ‘illa by way of absence of efficiency (*‘adam al-ta’tḥīr*)”
- [Mu’āraḍāt (Oppositions)]**
- Mode 15: “The *i’tirāḍ* against the ‘illa by way of opposition [with an epistemically superior *istidlāl*] (*al-mu’āraḍa*)”

Comparing the above dialectical moves to al-Bājī’s initial tripartite *tartīb* (Bāj.IX.A of our outline in the appendices), we find them precisely ordered according to his organizing principle of *muṭālaba*t (categories 1-7, above), *i’tirāḍāt* (categories 8-14), and *mu’āraḍāt* (category 15). This tripartite *tartīb* must be considered the first-rank of *topoi* for this particular subset of *qiyās*-oriented dialectical moves; and it is noteworthy that al-Bājī’s detailed discussions for each category follows it to the letter, despite his subsequent references to all fifteen categories as *al-i’tirāḍ bi-X*, *al-i’tirāḍ bi-Y*, and so on. Of course, each of these categories is further subdivided, and the reader is referred to our outline in the appendices for a more complete listing.

Following his thorough treatment, al-Bājī systematically approaches the five modes of *qiyās*-oriented *istidlālāt* (*al-istidlāl bi’l-awlā*, *bi’l-taqṣīm*, etc.), precisely in the order he introduced them in his *Bāb Aqsām Adillat al-Shar’*. As we have seen in our comparative objection-domain outline, each of these receives its own chapter of relevant dialectical objections and appropriate responses (*ajwiba*): *Bāb al-Kalām ‘alā al-Istidlāl bi’l-Awlā*, *Bāb al-Kalām ‘alā al-Istidlāl bi’l-Taqṣīm*, etc. (Bāj.X-XIV in the appendix outline). Also like al-Shīrāzī, al-Bājī’s concluding chapters on domains of *tarjīḥāt* include one which is relevant to *qiyās*: the *Faṣl fī Bayān Mā Yaqa’u bihi al-Tarjīḥ fi’l-Ma’ānī*.²⁷⁷ His treatment includes twelve types of *ma’nā*-related *tarjīḥāt*, followed by an additional three regarding which there is some *ikhtilāf* (Bāj.XVI.2 in the appendix outline).

²⁷⁶ As Sānū notes (*Mu’jam*, s.v. “الجرىان”), *jarayān* is “that the *ḥukm* be present upon the presence of a *waṣf*, and that it be absent upon its absence, in a singular mode (*ṣūra*); and it is called *al-ṭard wa’l-‘aks*, and *al-dawarān*.”

²⁷⁷ *Minhāj*, Turkī ed., 234-9.

On *Man'* / *Mumāna'a*

We will now turn our attention to certain of the *qiyās*-oriented *i'tirāḍāt*, in order to: 1) tighten our grasp of their various forms and functions; 2) examine what has been said in previous studies; and 3) take note of any revelations with regard to the objectives of this dissertation which arose during my preoccupation with numbers 1 and 2. The following discussions may all be supplemented by reference to our appendices.

As for the category of *man'* or *mumāna'a*, we may observe these two terms as denoting the same sense of “prevention;” and that al-Shīrāzī tends to use *man'*, while al-Bājī tends to favour *mumāna'a*.²⁷⁸ We might also note that al-Bājī has grouped these two instances under his larger category of *muṭālabāt*. Importantly, in discussing *man'* / *mumāna'a*, Miller translates al-Juwaynī's definition of the latter term, having first recounted something of its originally fluid association with related terms: “the word *mumāna'a* has become a *terminus technicus* among the jurists denoting the disallowance of the characteristic (*waṣf*) peculiar to the principal case (*aṣl*) or to the test case (*far'*) or to both together, or to the juristic qualification (*ḥukm*) of the principal case (*aṣl*).”²⁷⁹ This corresponds perfectly to what we have seen in our above outlines.

As we shall now attempt to explain, it is from Miller's comments regarding an illustrative example of al-Juwaynī's²⁸⁰ that yet another significant “starting point” for this dissertation has been culled. Miller first presents an example as brought by al-Juwaynī in order to illustrate *mumāna'a* at work.²⁸¹ Broken down to its components, we may present this example in terms of P's *qiyās* and Q's *man'*, as follows:

²⁷⁸ Shīr.VII.3-4; and Bāj.IX.B.5.6 in our appendices. In al-Bājī's mode #5, above, we find evidence that he saw the terms as synonymous, or nearly so.

²⁷⁹ *Disputation Theory*, 113-15; mistakenly citing *Burhān*, 131, lines 10-12 [these numbers correspond to the definition in the *Kāfiya*, Maḥmūd ed.]

²⁸⁰ *Disputation Theory*, 115-17.

²⁸¹ *Kāfiya*, [Maḥmūd ed.], 140, §235; in fact, the example was intended by al-Juwaynī to illustrate a specific type of *man'* which he terms *al-man' al-mukhtaṣṣ bi'l-aṣl*.

Part I: The Dialectical Forge
Chapter II: The Lens of Early Juridical *Jadal*-Theory

<i>Mas'ala:</i> Is the <i>ijāra</i> contract ²⁸² nullified by the death of one of the contracting parties, or not?		
P's <i>Qiyās</i>		Q's <i>Man'</i>
<i>Aṣl</i> contract of <i>nikāḥ</i>	<i>Far'</i> contract of <i>ijāra</i>	<i>Man'</i> of the <i>Aṣl</i> <i>al-Nikāḥ</i> is not cancelled by death; it merely concludes. Likewise with <i>ijāra</i> : it merely concludes with the completion of the term (<i>mudda</i>).
<i>'Illa</i> it is an ' <i>aqd</i> 'alā <i>manfa'a</i>	<i>'Illa</i> it is an ' <i>aqd</i> 'alā <i>manfa'a</i>	
<i>Hukm</i> it is cancelled (<i>infasakhat</i>) by death	<i>Hukm</i> [should be the same]	Thus, <i>nikāḥ</i> cannot be used as an <i>aṣl</i> for conveying a <i>ḥukm</i> of <i>faskh</i> due to death. ²⁸³

Whatever the intention of the illustration, it is important that Miller notices al-Juwaynī, al-Shīrāzī, al-Bājī, and Ibn 'Aqīl all share the same *ijāra-nikāḥ* example *mas'ala*. He writes:

“The role of R is filled by a Ḥanbalite [*sic*; in fact, it is a Ḥanafite], while the role of Q is filled by a Shāfi'ite in al-Shīrāzī [*Ma'ūna*, al-'Umayrīnī ed., 93], a Mālikite in al-Bājī [*Minhāj*, Turkī ed., 163, §349], and a Ḥanbalite in b. 'Aqīl [*K. al-Jadal*, 1980 Cairo ed., 48]. There are other instances where common examples are used. This coincidence reveals the *topos* character of the examples. They are without a doubt gleaned from the earlier literature on the divergence of the jurists (*ikhtilāf al-fuqahā'*).”²⁸⁴

The import of Miller's statement for our purposes in this dissertation is immediately apparent. Although, unfortunately, Miller supplies no citations for his *ikhtilāf* literature claim, his assumption is more than vindicated by the *Umm* alone. Moreover, we would not contend his interpretation of these shared examples as having a “*topos* character” (although it is uncertain whether he means *topos* in the literary, or Aristotelian dialectical sense). What is important here is that the authors of our earliest extant juridical *jadal* works have researched back — or, more properly, transmitted forward — the arguments of earlier venerated exemplar *mujtahids*. For this particular example, we

²⁸² NB: for the most part, I will not translate substantive legal terms in the example-*masā'il* and proto-system dialectical material presented here in Part I of this dissertation. Future versions for publication will be accompanied by a glossary; our objective at present is to understand the elements and forms of particular dialectical moves.

²⁸³ We will note that Q says nothing about P's proposed '*illa*. Rather, his point of critique is P's interpretation of the conclusion of *al-nikāḥ* by death as constituting *faskh*. In other words, Q has objected to what P claims as the *ḥukm* for the *aṣl*; and this in turn serves as an obstruction (*man'*) to that *aṣl*'s use for conveying P's solution (via *qiyās*) to the *mas'ala* at hand. This is indeed an illustration of al-Juwaynī's *al-man' al-mukhtaṣṣ bi'l-aṣl*, not, as Miller seems to have intended, of the “*terminus technicus*” (his rendering of *ṣāra fī 'urf al-fuqahā'*) of “*mumāna'a*.”

²⁸⁴ *Disputation Theory*, 115-17.

find that al-Māwardī (d.450/1058; a Baṣran and Baghdādian contemporary of al-Baṣrī and al-Khaṭīb al-Baghdādī) examines this *mas'ala* in great detail,²⁸⁵ attributing P's stance above to Abū Ḥanīfa, Sufyān al-Thawrī, and al-Layth b. Sa'd. And as for al-Shāfi'ī: we find his argument against death-induced *faskh* of *ijāra* produced in detailed and extended dialectical format in the *Bāb al-Ijārāt* of the *Umm*.²⁸⁶ In the end, although his dialectical opponent does not appear to draw upon *nikāḥ* as an *aṣl*, al-Shāfi'ī's multi-directional deconstruction of the “*faskh*-due-to-death” thesis is a sure model for our later jurists.

We will make the general claim, then, that the systematization of juridical *jadal* in specialized theory treatises comprised, to a large extent, the study of an older disputation praxis. Much as we do in this dissertation, al-Shīrāzī, al-Juwaynī, et al. (or their teachers, and teacher's teachers before them) engaged in an analysis of proto-system juridical dialectic. This should not seem a surprise at all, but is nevertheless important to mark: it links the literary activities of our fourth and fifth century H authors directly back to the practice and teaching of second and third century H *mujtahids*. There is a continuity here, and if the literary systemization of juridical *jadal* occurred relatively late, it did not do so *ex nihilo*, nor via a restructuring and “take over” of fourth century H “theological” *jadal*. Neither did it impose itself, post-creation, upon the arguments of centuries-dead jurists. Rather, its systematizers derived their system not only from current teachings, but from the transmitted corpus of *ikhtilāf* — replete with dialectical “transcripts” — through argument analysis, categorization, and transmitted procedure. Moreover, we will claim that this *analytical* process was intertwined from the start with the very same processes which produced the systematized literature of *uṣūl al-fiqh*. Indeed, both *jadal* and *uṣūl* theory genres are part and parcel of the same systematizing, analytical dynamic.

On al-Qawl bi-Mūjib al-'Illa

In his treatment of al-Baṣrī's *qiyās* treatise, Hallaq translates *al-qawl bi-mūjib al-'illa* as: “the acceptance of the cause while excluding its application to the case in point.”²⁸⁷ He further notes: “In dialectics this expression is used to indicate that the disputant approves of the cause but excludes its application to the disputed point;” and then directs us to al-Juwaynī's *Kāfiya*.²⁸⁸ Miller, on the other hand, translates *al-qawl bi-*

²⁸⁵ *al-Ḥāwī al-Kabīr*, Ma'ūd ed., vii.401ff.

²⁸⁶ Ḥassūn ed., vol. 4, pt. 8, 73ff., §§11132ff.

²⁸⁷ “Treatise,” 211.

²⁸⁸ *Ibid.*, n.20.

mūjib al-‘illa as: “limited acceptance;” he then presents translations of the definitions of al-Bājī and al-Juwaynī, and a translated example illustrating the latter.²⁸⁹ As for al-Bājī’s definition,²⁹⁰ I would render it thus: “It is a valid question (*su’āl ṣaḥīḥ*) by means of which the ‘illa is removed from being a *dalīl* in the locus of contention (*mawḍi‘ al-khilāf*);” while Miller translates: “Q’s accepting the *ratio legis* while excluding its application to the disputed point.” Notably, Al-Bājī further subdivides this *i’tirāḍ* according to whether P’s *qiyās* is: 1) of a type posited for obligation (*wuḍi‘a li’l-wujūb*); or 2) of a type posited for permissibility (*wuḍi‘a li’l-jawāz*).” As for al-Juwaynī, I would render his definition of *al-qawl bi-mūjib al-‘illa* thus:²⁹¹ “It is an agreement (*muwāfaqa*) of the opponent as regards its [the ‘illa’s] *ḥukm*, with the departure of the locus of contention (*mawḍi‘ al-nizā‘*) from it;” while Miller translates: “Q’s agreeing with P’s argument as to the juristic quality of the *ratio legis*, while excluding its application to the point of dispute.”²⁹²

Now, we have already stressed the importance that *i’tirāḍāt* — for all of our early juridical *jadal* authors — were not confined merely to the realm of *istidlāl* by way of analogical *qiyās*; in addition, certain larger genera, such as *mu‘āraḍa*, find specialized applications in more than one domain of *istidlāl*. “*Al-qawl bi-mūjib X*” is one such genus. Al-Shīrāzī, in fact, catalogues the following: two types of *al-qawl bi-mūjib al-āya*, for *istidlāl bi’l-Kitāb*;²⁹³ two types of *al-qawl bi-mūjib al-matn*, for a subcategory of *istidlāl bi’l-Sunna*;²⁹⁴ one type of *qawl bi-mūjib al-ta’kid*, for *istidlāl bi-Faḥwā al-Khiṭāb*;²⁹⁵ and two types of *al-qawl bi-mūjib al-‘illa*, for *istidlāl bi-Ma’nā al-Khiṭāb*.²⁹⁶ If, from all of this, we were to isolate that characteristic common to all species of genus “*al-qawl bi-mūjib X*,” it would be the following: Q concedes that a premise of P’s is indeed necessary/effective to the production of a *ḥukm* in a particular *mas’ala*, but not in the manner which P has proposed. Taking al-Shīrāzī’s two types of *al-qawl bi-mūjib al-‘illa* as examples, we find that application of this *i’tirāḍ* is dependent upon whether: 1) Q uses the ‘illa to provide indicant for the *ibṭāl* of the *sabab* of P’s *ḥukm*; or 2) Q uses some element of P’s *qiyās* to provide indicant for the same *ḥukm* as P. In either case, Q is conceding, at least in part, to the exigencies of P’s premise, and Miller’s “limited acceptance” appears an apt translation for the broader genus of “*al-qawl bi-mūjib X*.”

²⁸⁹ *Disputation Theory*, 129-30.

²⁹⁰ *Minhāj*, Turkī ed., 173, §381.

²⁹¹ *Kāfiya*, Maḥmūd ed., 69, §166.

²⁹² *Disputation Theory*, 129.

²⁹³ *Ma‘ūna*, al-‘Umayrīnī ed., 41-2.

²⁹⁴ *Ibid.*, 57-9.

²⁹⁵ *Ibid.*, 85.

²⁹⁶ *Ibid.*, 108-11.

Miller also translates one of al-Juwaynī's examples of *al-qawl bi-mūjib al-‘illa*, but unfortunately provides little further explanation to bring out the special qualities of this genre of *i‘tirād*.²⁹⁷ Rather than return to it, I will instead attempt to break down the components of one of al-Shīrāzī's examples.²⁹⁸ If we first outline al-Shīrāzī's typology of *al-qawl bi-mūjib al-‘illa*, it would appear thus:

<i>I‘tirād</i> 9: <i>al-Qawl bi-mūjib al-‘illa</i>	
• <i>Ḍarb</i> 1: For an ‘illa by which indicant is provided for the nullification (<i>ibtāl</i>) of the reason (<i>sabab</i>) of the <i>ḥukm</i>	
○ [three types of <i>jawāb</i>]	
• <i>Ḍarb</i> 2: For that by which indicant is provided for the same <i>ḥukm</i> .	
○ <i>Jawāb</i> 1: He [P] explains that its general scope (<i>‘umūm</i>) prevents [Q's] <i>qawl bi-mūjibihi</i>	
○ <i>Jawāb</i> 2: He [P] explains that its most apparent meaning (<i>ẓāhir</i>) prevents [Q's] <i>qawl bi-mūjibihi</i>	
○ <i>Jawāb</i> 3: He [P] explains that its exegesis (<i>tafsīr</i>) prevents [Q's] <i>qawl bi-mūjibihi</i>	

The example-*mas’ala* we will now present was intended by al-Shīrāzī to illustrate *ḍarb* 2, *jawāb* 2 of the above, and should suffice in highlighting the general character of *al-qawl bi-mūjib al-‘illa*.

<i>Mas’ala:</i> Determining categories of jewellery subject to <i>zakāt</i>		
Shāfi‘ī P’s <i>Qiyās</i>		Mukhālif Q’s <i>Qawl bi-Mūjib al-‘illa</i>
<i>Aṣl</i> zakāt of cattle	<i>Far’</i> zakāt of pieces of jewellery	
<i>Ḥukm A</i> zakāt <i>bi’l-ḥawl wa’l-niṣāb</i> is obliged	<i>Ḥukm A</i> zakāt <i>bi’l-ḥawl wa’l-niṣāb</i> is obliged	
<i>Ḥukm B</i> division into two types is obliged: 1) [kinds of cattle for which] <i>zakāt</i> is enjoined; and 2) [kinds of cattle for which] <i>zakāt</i> is not enjoined	<i>Ḥukm B</i> [thus] division into two types is [also] obliged: 1) [kinds of jewellery for which] <i>zakāt</i> is enjoined; and 2) [kinds of jewellery for which] <i>zakāt</i> is not enjoined	<i>Qawl bi-Mūjib al-‘illa</i> “I myself profess its [<i>ḥukm B</i> ’s] causative efficacy (<i>anā aqūlu bi-mūjibihi</i>); for according to me it [cattle/jewellery] is divided into two types: 1) <i>zakāt</i> is enjoined for it — being what belongs to the <i>bāligh</i> ; and 2) <i>zakāt</i> is not enjoined for it — being what belongs to the <i>ṣabī</i> ”

First of all, we will note that P’s *istidlāl* is in fact a Type I *qiyās al-dalāla*; for in the place of an ‘illa he has proffered a shared *ḥukm A*, which in turn indicates that there must be a shared ‘illa. This reminds us that objections such as *al-qawl bi-mūjib al-‘illa*,

²⁹⁷ *Disputation Theory*, 129-30.

²⁹⁸ *Ma’ūna*, al-‘Umayrīnī ed., 110.

despite being named such, need not be directed only at *qiyās al-‘illa*. Importantly, al-Shīrāzī was exact in his description of *ḍarb* 2 of this objection: *mā dalla bihi ‘alā nafs al-ḥukm*; i.e., he does not mention an *‘illa*, as in the first *ḍarb*. Second, we will note that Q has in fact conceded to nearly the whole of P’s *qiyās*, up to and including the larger requirement of *ḥukm* B: subdivision into two types. His objection, however, is to the guiding principle of this division: P’s principle is by type of *māl*, while Q’s principle is by type of *mālik*. This is made clear by the Shāfi‘ī P’s *jawāb*, as suggested by al-Shīrāzī: “He says: The most apparent meaning (*ẓāhir*) of the *‘illa*-justification (*ta‘līl*) requires that it be type-divided *in itself* (*fī nafsīhi*); but in what you have stated, the property (*māl*) is not type-divided. Rather, only the owner (*mālik*) is type-divided: 1) a *mālik* upon whom it is enjoined; and 2) a *mālik* upon whom it is not enjoined.”²⁹⁹

On *al-Ta‘līl bi’l-Isim*

This being al-Baṣrī’s first *wajh* of the *wujūh* invalidating the *‘illa*, I have yet to locate its equivalent in the theory texts of al-Shīrāzī and al-Bājī. Unfortunately, Miller nowhere references the *Kitāb al-Qiyās al-Shar‘ī* in his work, and thus makes no mention of this earlier species of *qiyās*-oriented objection with its two subtypes; and Hallaq provides no further insights for *al-ta‘līl bi’l-ism* beyond his translation. It was hardly necessary to do so, however, as al-Baṣrī’s example-*masā’il* are more than lucid enough. For these, we will refer the reader to our outline of al-Baṣrī in the appendices, and attached notes.

On *Ikhtilāf al-Waḍ‘*, or *Fasād al-Waḍ‘*, and *Fasād al-I‘tibār*

We have already noted: 1) that al-Baṣrī’s *ikhtilāf al-waḍ‘* appears to correspond to the *fasād al-waḍ‘* of al-Shīrāzī and al-Bājī; 2) that al-Shīrāzī treats *fasād al-waḍ‘* and *fasād al-i‘tibār* as separate categories; and 3) al-Bājī presents the latter as a subtype of the former. As for Miller, he translates *fasād al-waḍ‘* as “false construction,” and presents the definitions of al-Juwaynī, al-Shīrāzī, and al-Bājī.³⁰⁰ For al-Juwaynī, it is the rather cryptic “*‘awḍ al-waḍ‘ bi-mā yaqtaḍī fasād al-mawḍū‘*,”³⁰¹ which Miller translates: “turning back the construction by means of that which necessitates the falsification of the constructed.” As for al-Shīrāzī, it is “*an yu‘alliqa ‘alā al-‘illa ḍidd mā yaqtaḍīhi*,”³⁰² and

²⁹⁹ *Ma‘ūna*, al-‘Umayrīnī ed., 110.

³⁰⁰ *Disputation Theory*, 118.

³⁰¹ *Kāfiya*, [Maḥmūd ed.], 68, §162; Maḥmūd (n.1) informs us that his base MS reads *da‘wā* rather than *‘awḍ*.

³⁰² *Ma‘ūna*, al-‘Umayrīnī ed., 111.

Part I: The Dialectical Forge
Chapter II: The Lens of Early Juridical *Jadal*-Theory

for al-Bājī: “*an yu‘alliqa ‘alā al-‘illa dīd muqtaḍāhā*.”³⁰³ Miller translates both of these as “the attachment to the ratio legis (‘illa) to [sic] the contrary of what it requires.” As an alternative, I would render al-Bājī as: “that he [P] makes conditional upon the ‘illa the opposite of its [the ‘illa’s] legal requirement.”

Miller also provides a summary of one of al-Shīrāzī’s illustrations of *fasād al-waḍ‘* at work. Unfortunately, he has both misread the example and drawn an incorrect conclusion; mainly, that the dialectical moves of *fasād al-waḍ‘* and *qalb* are one and the same. By way of rectifying this misunderstanding, we will first present al-Shīrāzī’s example-*mas‘ala* broken down into its components, as follows:³⁰⁴

Mas‘ala: Does the <i>su‘r</i> (leftover food/drink, or saliva) of beasts of prey (<i>sibā‘</i>) constitute <i>najas</i> ?		
Ḥanafī P’s Qiyās		Shāfi‘ī Q’s charge of <i>Fasād al-Waḍ‘</i>
<i>Aṣl</i> the <i>su‘r</i> of the <i>khinzīr</i>³⁰⁵ <i>‘Illa</i> it is a possessor of canine teeth (<i>dhū nābin</i>) <i>Hukm</i> it qualifies as <i>najāsa</i>	<i>Far‘</i> the <i>su‘r</i> of the <i>sabu‘</i> <i>‘Illa</i> it is a possessor of canine teeth (<i>dhū nābin</i>) <i>Hukm</i> [should be same]	<i>Fasād al-Waḍ‘</i> The <i>Shar‘</i> makes being a <i>sabu‘</i> an ‘illa for <i>ṭahāra</i>. The <i>dalīl</i> is [a <i>ḥadīth</i> wherein the Prophet accepts an invitation from a cat-owner, but declines one from a dog-owner, because the cat is a <i>sabu‘</i>]. The cat’s being a <i>sabu‘</i> was made an ‘illa for <i>ṭahāra</i>, so it is not allowed that it be made an ‘illa for <i>najāsa</i>.

Perhaps in part due to a misreading of the Ḥanafī’s *aṣl* (as dog, rather than pig), Miller has drawn some incorrect conclusions. The first of these is his assertion: “by stating what the real juristic quality should be, Q has turned the argument around using R’s principal case to bring about the contrary of his thesis.”³⁰⁶ We can see from the example, however, that Q has — contrary to Miller — made no use of P’s *aṣl* whatsoever. Nor has he made mention of P’s ‘illa of canine teeth. Q’s argument, in fact, drawn from a Sunnaic *dalīl*, is simply that being a *sabu‘* (which property defines the *far‘*) is, itself, an efficient property for occasioning the quality of *ṭahāra*. Q’s argument thus corresponds precisely to al-Shīrāzī’s and al-Bājī’s definitions for *fasād al-waḍ‘*, for Q has indeed charged P with making conditional upon the [true] ‘illa (being a *sabu‘*) the

³⁰³ *Minhāj*, Turkī ed., 178, §391; NB: for al-Bājī this is the first *wajh* of two, the second being *fasād al-i‘tibār*.

³⁰⁴ *Mā‘ūna*, al-‘Umayrīnī ed., 112.

³⁰⁵ Note: although the Princeton MS utilized by Miller (fol. 15b), and both al-‘Umayrīnī’s and Turkī’s editions read “*ka’l-khinzīr*,” Miller has the Ḥanafī P link his *far‘* to the *aṣl* of dogs.

³⁰⁶ *Disputation Theory*, 119. This, in fact, is a fair description of *al-qalb*, but not, as we shall see, of *fasād al-waḍ‘*.

opposite (*al-najāsa*) of its legal requirement (*al-ṭahāra*). This is a very different operation from that of *qalb*, as we shall see.

As a consequence of this misinterpretation, Miller first links *fasād al-waḍ'* to the “*methodos kata peritropēn*” of the Greek rhetoricians.³⁰⁷ He then concludes: “the usual technical term for this ancient method was *qalb*, reversal. It would appear that, at this stage, some of the technical terms of juristic dialectics had not yet been given their permanent technical meaning.”³⁰⁸ This is clearly mistaken, however, for definitions of *qalb*³⁰⁹ are consistent in that they require Q’s use of P’s *adilla* for *qiyās* — the only difference, in fact between P’s *qiyās* and Q’s *qalb*, is that Q makes P’s *illa* occasion a *ḥukm* contrary to that which P would have it occasion. In other words, Q concedes to P’s *aṣl* and *illa* both, rejecting only P’s *ḥukm*. This is not the case in the *sabu'* example; we can see clearly that Q avoids touching P’s *adilla* (both *aṣl* and *illa*) altogether. Rather, he has charged P with: 1) missing the real *illa* inherent in the *far'*, and, 2) in consequence, causing it to occasion the wrong *ḥukm*. This is the nature of *fasād al-waḍ'*, and not of *qalb*.

Moving on, Miller notes, as we have, that al-Shīrāzī treats *fasād al-i'tibār* (which he translates: “false perspective”) as a stand-alone category of *i'tirād*, while al-Bājī considers it a subtype of *fasād al-waḍ'*.³¹⁰ He does not mention, however, that both authors consider *fasād al-i'tibār* as manifesting itself in two sub-categories, both of which they define in the same way. The first category, according to al-Shīrāzī, is when P’s *fasād al-i'tibār* is known by *al-naṣṣ*, “which is that he [P] considers (*an ya'tabira*) a *ḥukm* by way of a *ḥukm*, while the *naṣṣ* has revealed the distinction (*tafriqa*) between them.”³¹¹ Al-Bājī’s definition of this subtype³¹² is practically identical. In the (different) examples supplied by both authors, we find Q pronouncing — on the basis of a *dalīl* with the epistemic strength of *naṣṣ* — “it [the *naṣṣ*] has made a distinction (*farraqa*) between them [i.e., between the two *ḥukms* considered by P].” As for the second category, it is when P’s *fasād al-i'tibār* is known to Q by way of the *uṣūl* (collectively). Both al-Shīrāzī

³⁰⁷ *Disputation Theory*, 119. In an earlier footnote (38, n.83) Miller mentions van Ess as comparing the “*methodos kata peritropēn*” to *mu'āraḍa* (!) It is becoming apparent that the finer distinctions of our early *jadal* theorists have not always been clearly understood; in addition to other things, genetic projects such as identifying parallels in older argument epistemes may have suffered from this.

³⁰⁸ *Disputation Theory*, 119.

³⁰⁹ See, e.g., al-Bājī, *Minhāj*, Turkī ed., 14, §18; and 174ff., §§385ff.; al-Baṣrī, *K. al-Qiyās al-Shar'ī*, Ḥamīd Allāh ed., 1040f., 1048ff.; and al-Juwaynī, *al-Kāfiya*, Maḥmūd ed., 68, §159.

³¹⁰ *Disputation Theory*, 119-20.

³¹¹ *Ma'ūna*, al-'Umayrīnī ed., 113.

³¹² *Minhāj*, Turkī ed., 179, §398.

and al-Bājī consider various subtypes, but the common characteristic of P’s *fasād al-ʿtibār*, as known to Q by way of the *uṣūl*, is that P has tried to relate two *ḥukms* which each exhibit a non-compatible general quality.³¹³ For example, one may have an expanding (*tawṣīʿa*), and the other a restricting (*taḍyīq*) purpose; or one may embody the easing of something (*takhfīf*), while the other aims at making something more severe (*taghlīz*); etc. Such general qualities of *aḥkām*, it would seem, are learned inductively from the collective *uṣūl* in which they appear.³¹⁴

On ‘Adam al-Ta’tḥīr

According to al-Baṣrī’s definition for this category, the one justifying the ‘*illa* (the *muʿallil*) mentions, among the collective of properties of the ‘*illa*, such a property as which — if it is absent in the *aṣl* — the *ḥukm* yet remains.³¹⁵ Miller translates ‘*adam al-ta’tḥīr*’ as “ineffective *ratio legis*,” he then claims “conflicting accounts about the meaning of this ‘question’” among his authors. In support of this, he brings definitions from al-Juwaynī, al-Shīrāzī, and al-Bājī, along with one of al-Shīrāzī’s examples.³¹⁶ As for al-Juwaynī’s definition,³¹⁷ I have had some difficulty in matching Miller’s translation to the Arabic, so have attempted my own:³¹⁸

163 – And as for efficiency (<i>al-ta’tḥīr</i>): It is the appearance of the conditional dependence of the <i>ḥukm</i> upon the shared property (<i>ma’nā</i>). And the loss of the <i>ta’tḥīr</i> and its absence: That the conditional dependence of the <i>ḥukm</i> does not appear upon that which he claims it conditionally dependent upon. And the <i>sharṭ</i> (required condition) of <i>al-ta’tḥīr</i> is not the loss of the <i>ḥukm</i> through the loss of the ‘<i>illa</i> — indeed, this is the <i>sharṭ</i> of <i>al-ʿaks</i> (co-absence). And that is not obliged except as regards the rational-intellectual ‘causes’ (<i>ʿilal al-ʿaql</i>),	163 — وأما التأثير: فظهور تعلق الحكم بالمعنى. وفقد التأثير وعدمه: ألا يظهر تعلق الحكم بما يدعيه متعلقاً به؛ وليس شرط التأثير فقد الحكم بفقد العلة؛ فإن هذا شرط العكس — ولا يجب ذلك إلا في علل العقل، وفقد التأثير في علل الشرع قد يكون في كل أوصاف العلة وفي بعضها، على ما يرد بيانه، إن شاء الله تعالى.

³¹³ al-Shīrāzī, *Ma’ūna*, al-ʿUmayrīnī ed., 114ff.; al-Bājī, *Minhāj*, Turkī ed., 180ff., §400ff.

³¹⁴ In consideration of the nature of these two subtypes, one might consider translating *fasād al-ʿtibār* as something like “invalid quality-consideration.”

³¹⁵ K. al-Qiyās al-Sharʿī, Ḥamīd Allāh ed., 1040; Hallaq, “Treatise,” 217.

³¹⁶ *Disputation Theory*, 120-2.

³¹⁷ *Kāfiya*, 68, Maḥmūd ed., §163.

³¹⁸ Miller renders only some part of the Arabic, as follows: “...when P claims a connection between a juristic qualification (*ḥukm*) and a certain thing (*ma’nā*) and this claim is not apparent” (ellipsis is his). Among other things, we might first suggest that *ma’nā*, once again, be understood in the sense which al-Shāfiʿī seems to have employed the term: “shared property” (or “common characteristic,” as Miller — with reference to Brunschvig — records earlier [*Disputation Theory*, 98, n.25]). In other words, *ma’nā* carries the sense of a “shared (potentially efficient) property” or “shared (potential) ‘illa;” and, if such is indeed the case, al-Juwaynī’s definitions and discussion correspond well with those of al-Shīrāzī and al-Bājī.

and the loss of *al-ta'thīr* as regards the 'occasioning factors' of the *Sharī'a* (*'ilal al-Shar'*) might be for all the properties (*awṣāf*) of the *'illa*, and for some of them, according to that for which the explanation (*bayān*) shall be set forth, if God Most High wishes it.

As for al-Shīrāzī, his definition of *'adam al-ta'thīr* is simply: “*wujūd al-ḥukm ma'a 'adam al-'illa*.”³¹⁹ We may understand much from this rendering, and al-Shīrāzī's subsequent subdivisions and examples. In brief: 1) Q's focus is upon the components of P's *aṣl* — particularly the *'illa*; 2) Q objects to P's proposed *'illa*, claiming it cannot occasion the *ḥukm* in that *aṣl*; 3) Q demonstrates this to P by mentioning an established case where the very same *ḥukm* is present, but P's proposed *'illa* is not, thus suggesting a lack of *ta'thīr* between the proposed *'illa* and the *ḥukm* of P's *aṣl*. However, al-Shīrāzī is of course cognizant that *'ilal* may consist of more than one efficient property. That is why he immediately subdivides the *i'tirāḍ* of *'adam al-ta'thīr* into two types: 1) *'adam al-ta'thīr* regarding a *waṣf* which, when eliminated from the *'illa*, the *'illa* is destroyed (*tantaqīḍu*); and 2) *'adam al-ta'thīr* regarding a *waṣf* which, when eliminated from the *'illa*, the *'illa* is not destroyed.³²⁰ This more narrow focus upon individual *awṣāf* brings the definitions of al-Shīrāzī and al-Juwaynī into close correspondence.

After translating al-Shīrāzī's definition of *'adam al-ta'thīr*, Miller claims: “This question is a form of the old fourth theological question, then called *jarayān al-'illa fī ma'lūlātiḥā*, applying the cause to its causata;” he then suggests that al-Juwaynī “is being rather cautious in his definition” (in comparison, we assume, with al-Shīrāzī).³²¹ I cannot be certain of following Miller's reasoning here, but there are certainly some shared properties between al-Qirḳisānī's fourth question (*akhdh al-mūjib bi-jrā' illatiḥi fī ma'lūlātiḥā*), al-Maqdisī's fourth question (*taṣḥīḥ al-'illa*), and the juridical *i'tirāḍ* of *'adam*

³¹⁹ *Ma'ūna*, al-'Umayrīnī ed., 100.

³²⁰ Importantly, al-Shīrāzī's first *wajh* of *jawāb* against the first *ḍarb* of *'adam al-ta'thīr* includes an example debate wherein the difference between *qiyās al-'illa* and *qiyās al-dalāla* is laid bare (Shīrāzī, *Ma'ūna*, 100-101). This is an excellent explanation of the key differences between *qiyās* categories, and it receives an even better explanation by Ibn 'Aqīl (*K. al-Jadal*, 56, §275). Most importantly, however, it provides an indicant to us as to how the distinctions between these categories of *qiyās* arose through the medium of dialectical debate. The key consideration between them, in fact, can *only* arise in a disputation, as it revolves around what the proponent *claims*. This is as solid an example of *uṣūl al-fiqh* concepts and definitions refined in the forge of juridical dialectic as one could hope to see, and it certainly deserves further examination.

³²¹ *Disputation Theory*, 120-1.

al-ta'thīr. Perhaps before continuing we should pause here to clarify the meanings of certain relevant terms as I understand them:

- *ṭard*: co-presence of *‘illa* and *ḥukm* in the same locus
- *‘aks*: co-absence of *‘illa* and *ḥukm* from the same locus
- *jarayān*, or *dawarān*: when both *ṭard* and *‘aks* are established for various loci, confirming the concomitance of *‘illa* and *ḥukm*
- *ijrā’*: the demonstration of *jarayān*
- *ta'thīr*: when *‘aks* is established for various loci
- *‘adam al-ta'thīr*: the charge that *‘aks* is decidedly not the case for various loci

From this it should become plain that the dialectical charge of *‘adam al-ta'thīr* is not at all the same as the dialectical demand for evidence of *jarayān al-‘illa fī ma'lūlātiḥā*; for the former constitutes a claim that P's *‘illa-ḥukm* relationship is not confirmed by *‘aks* (indeed, *‘aks* is shown *not* to be the case), while the latter constitutes a request that P confirm his *‘illa-ḥukm* relationship by demonstrating both *ṭard* and *‘aks* (*jarayān*). Not surprisingly, we have seen that al-Bājī has treated these dialectical moves as separate categories, his thirteenth and fourteenth modes of *qiyās*-oriented *i'tirād*:

- *Wajh 13*: *al-i'tirād bi-annahā lā tajrī fī ma'lūlātiḥā; al-muṭālaba bi-ijrā' al-‘illa fī ma'lūlātiḥā*
- *Wajh 14*: *al-i'tirād bi-‘adam al-ta'thīr*

We are left to wonder why Miller connected the “theological” demand for *jarayān al-‘illa fī ma'lūlātiḥā* with *‘adam al-ta'thīr*, from which it differs, while neglecting to mention al-Bājī's thirteenth mode, for which it is a precise match.³²²

As for al-Bājī's definition of *‘adam al-ta'thīr*, it may be rendered: “That the *ḥukm* be not absent due to the absence of the *‘illa* in one of the *loci* (*mawāḍi'*).”³²³ Miller provides a complete translation of this definition and al-Bājī's subsequent comments.³²⁴ In sum, al-Bājī opines: 1) *ta'thīr* is indeed a *dalīl* for *ṣiḥḥat al-‘illa*; but 2) *‘adam al-ta'thīr* is not a *dalīl* for *fasād al-‘illa*, when another *dalīl* provides indicant for its *ṣiḥḥa*. Thus, he

³²² Moreover, and as Miller himself points out, continuing on the theme of al-Juwaynī's caution in defining *‘adam al-ta'thīr*: “[al-Juwaynī] tells us more than once, the *‘illa* of the law are unlike the *‘illa* of the intellect for the latter are correlative while the former are not” (*Disputation Theory*, 121; citing *Kāfiya*, 9, line 5ff.) We might compare this with the last sentence in our rendering of al-Juwaynī's definition: “And [*ḥaqd al-ḥukm bi-ḥaqd al-‘illa*] is not obliged except as regards the *‘ilal al-‘aql*, and the loss of *al-ta'thīr* as regards the *‘ilal al-Shar'* might be for all the *awṣāf* of the *‘illa*, and for some of them.” As a whole, then, al-Juwaynī's definition makes two clear distinctions regarding *‘ilal al-Shar'*: 1) co-absence of *‘illa* and *ḥukm* (*al-‘aks*) is not a necessary condition of *ta'thīr*; and 2) the charge of *‘adam al-ta'thīr* may apply to the *‘illa* as a whole, or to only some of its *awṣāf*. In what sense this constitutes “caution” is not clarified by Miller; nor do the definitions of al-Juwaynī and al-Shīrāzī appear to be “conflicting accounts.”

³²³ *Minhāj*, Turkī ed., 195, §443. In his introductory chapter on definitions, al-Bājī also supplies a definition of *al-ta'thīr*, as follows: “the cessation (*zawāl*) of the *ḥukm* due to the *zawāl* of the *‘illa* in some *mawḍi'*” (14, §18).

³²⁴ *Disputation Theory*, 121.

would have been happier to include ‘*adam al-ta’tthir*’ in the *bāb al-muṭālaba bi-taṣhīḥ al-‘illa*, but “our *shaykhs*” consider it efficient for the invalidation of the occasioning factor (*mūjib li-fasād al-‘illa*), so he discusses it here among the *i’tirāḍāt*. Although I would disagree with Miller’s assessment of al-Bājī as “also very wary about the value of this objection,” it is indeed plainly evident that he does not find ‘*adam al-ta’tthir*’ to be categorically *mūjib li-fasād al-‘illa*. However, he is also sure to qualify this lack of *fasād*-conviction with “when another *dalīl* provides indicant for [the ‘*illa*’s] validity.”

Moreover, after making his own opinion plain, but continuing along the path of “our *shaykhs*,” al-Bājī not only follows his teacher al-Shīrāzī in subdividing ‘*adam al-ta’tthir*’ on the basis of the two types of *awṣāf*, but adds to our understanding of how objections to them were valued. For the first type of *waṣf* (when eliminated, the ‘*illa* is destroyed), he adds: “and this is the one which damages the ‘*illa* through ‘*adam al-ta’tthir*’ in it, according to the one who professes such;” and for the second type of *waṣf* (when eliminated, the ‘*illa* is not destroyed), he adds: “and for this one, ‘*adam al-ta’tthir*’ in it does not damage the ‘*illa*, according to him [who professes such].” So it becomes clear that even among those who professed ‘*adam al-ta’tthir*’ as a clear sign of *fasād al-‘illa*, there was a recognition that it’s “destructive” value lay only within this first category of *awṣāf*.

Miller next explores a potential connection between al-Bājī’s call for ‘*adam al-ta’tthir*’ to be subsumed by *al-muṭālaba bi-taṣhīḥ al-‘illa*, and al-Shīrāzī’s consecutive treatment of the two (*muṭālaba bi-taṣhīḥ al-‘illa* as *i’tirāḍ* 5, and ‘*adam al-ta’tthir*’ as *i’tirāḍ* 6). Of import, however, and evidenced by the very example-*mas’ala* which Miller selects as an illustration,³²⁵ is that the Shāfi’ī P defending the *ta’tthir* of his ‘*illa* cites both co-presence and co-absence of ‘*illa* and *ḥukm*. What Miller selected from the *Ma’ūna* was intended by al-Shīrāzī as an illustration for a specific subcategory; mainly, *ṭarīq* 2, *ḍarb* 1 from the below hierarchy:³²⁶

I’tirāḍ 5: *al-Muṭālaba bi-taṣhīḥ al-‘illa*

- *al-Ṭarīq fī taṣhīḥihā* 1: *Siyāq al-alfāz*
 - *Dalālatuhā min wajh al-naṣṣ*
 - *Dalālatuhā min wajh al-zāhir*
 - The *zāhir* is *nuṭq*
 - The *zāhir* is a *sabab* conveyed with the *ḥukm*
- *al-Ṭarīq fī taṣhīḥihā* 2: *al-Istinbāt*
 - *Ḍarb* 1: *al-Ta’tthir*
 - *Ḍarb* 2: *Shahādat al-Uṣūl*

³²⁵ *Disputation Theory*, 122.

³²⁶ *Ma’ūna*, al-‘Umayrīnī ed., 97-100.

So in fact it was al-Shīrāzī's example for P's response to Q's *muṭālaba bi-taṣhīḥ al-'illa* via the inferential (as opposed to contextual) *ṭarīq* of showing *ta'thīr* which Miller selected (in isolation from al-Shīrāzī's larger *taṣhīḥ al-'illa* typology) to show a connection between *muṭālaba bi-taṣhīḥ al-'illa* and the charge of *'adam al-ta'thīr*. I would render the example thus:³²⁷

- **[Shāfiʿī]:** regarding date-wine (*al-nabīdh*); he says: “It is forbidden (*ḥarām*), because it is a drink in which there is an intensity of intoxicant (*shiddat muṭriba*); so it is *ḥarām*, like grape-wine (*al-khamr*).”
- **Ḥanafī:** He says: “What is the *dalīl* for the validity of this *'illa*?”
- **[Shāfiʿī]:** He says: “The *dalīl* for it is *al-ta'thīr*, which is: the presence of the *ḥukm* due to the presence of the *'illa*, and the absence of the *ḥukm* due to its absence (*wujūd al-ḥukm li-wujūd al-'illa, wa 'adamuhu li-'adamihi*). Don't you see/opine (*alā tarā*) that for pressed-juice — before the occurrence of the intensification (*shidda*) — its making-lawful (*tahīl*) is the object of consensus; then, after the *shidda* occurs — and nothing else occurs — they form consensus as to its making-forbidden (*tahrīm*); then its *shidda* is eliminated, and nothing else is eliminated, and they form consensus as to its *tahīl*? And if we evaluate the intensity (*'ūd*) of the *shidda*, we have evaluated the intensity of the *tahrīm*; So did God say: «and if they were brought back, they would return to what was forbidden» [Q.6:28]. And it provides indicant that it [*shiddat muṭriba*] is the *'illa*.”

First of note is that the Shāfiʿī P responds to the Ḥanafī Q's *muṭālaba* by detailing the steps of an inferential process by which the co-presence and co-absence of *'illa* and *ḥukm* (and thus, the *ta'thīr* of the *'illa*) may be confirmed. We have seen, however, that *'adam al-ta'thīr* consists of a charge by Q that P's *ḥukm* is present in a case where P's *'illa* is not present (thus *'aks* is shown to be lacking). Such a charge, in this example, could only be made by Q *after* his *muṭālaba*. This alone is enough to justify al-Shīrāzī's separate and sequential treatment of *muṭālaba bi-taṣhīḥ al-'illa* (as *i'tirāḍ* 5) and *'adam al-ta'thīr* (as *i'tirāḍ* 6). Perhaps this is what Miller intends to show as a “connection” justifying al-Bājī's call for inclusion of *i'tirāḍ* 6 within *i'tirāḍ* 5, when he comments: “if Q had objected: ‘But pressed grapes before they become intoxicating are forbidden,’ then he would have been making the claim that the *ratio legis* was ineffective.”³²⁸ Whatever the case may be, we should recognize that the differences between al-Juwaynī, al-Shīrāzī, and al-Bājī as regards *'adam al-ta'thīr* represent an ongoing debate among *jadal* and *uṣūl*

³²⁷ *Ma'ūna*, al-'Umayrīnī ed., 99.

³²⁸ *Disputation Theory*, 122.

theorists as to the destructive power of this charge, and whether or not showing the absence of ‘aks is enough to demonstrate *fasād al-‘illa*.³²⁹

On *Qalb*

We have already mentioned that al-Baṣrī twice treats *qalb* in his *qiyās* treatise, once along with the other modes of invalidating the ‘*illa*, and once in a specially designated appendix. He first defines *qalb* as when “the contradictory (*naqīd*) [Hallaq trans. “converse”] of the *ḥukm* mentioned in the *qiyās* [of P] is made conditional upon the ‘*illa* [by Q], and the *far‘* is referred, by means of that ‘*illa*, to the *aṣl* to which the *far‘* of the *qiyās* [of P] is referred.”³³⁰ In his second definition (from the *ḍamīma*-supplement): “the one overturning (*qālib*) the *qiyās* makes conditional, upon the ‘*illa*, the *naqīd* of the *ḥukm* stated in the *qiyās*, and he refers the *far‘* to that exact *aṣl*. Insofar as being conditional upon the ‘*illa*, one of the two *ḥukms* is not superior/more fitting (*awlā*) insofar as the other’s being conditional upon it, nor is it valid that they both, together, be conditional upon it due to their mutual contradiction (*tanāfiḥimā*).”³³¹ In short, then, *qalb* is when Q counters with the same *qiyās*-components as P, except with the *naqīd* of P’s *ḥukm*. For clarification, I have attempted the following diagram, with al-Baṣrī’s example-*mas’ala* included:

<i>Qiyās</i> of P		<i>Qalb</i> of Q	
<i>Aṣl</i> A	<i>Far‘</i> B	<i>Aṣl</i> A	<i>Far‘</i> B
<i>‘Illa</i> efficient property Z	<i>‘Illa</i> efficient property Z	<i>‘Illa</i> efficient property Z	<i>‘Illa</i> efficient property Z
<i>Ḥukm</i> X is the case	<i>Ḥukm</i> X is [also] the case	<i>Ḥukm</i> ¬X is the case	<i>Ḥukm</i> ¬X is [also] the case
Argument: In <i>aṣl</i> A, the ‘ <i>illa</i> of efficient property Z occasions <i>ḥukm</i> X. Thus, in <i>far‘</i> B, because it shares the ‘ <i>illa</i> of efficient property Z, the <i>ḥukm</i> X is also occasioned.		Argument: In <i>aṣl</i> A, the ‘ <i>illa</i> of efficient property Z occasions <i>ḥukm</i> ¬X. Thus, in <i>far‘</i> B, because it shares the ‘ <i>illa</i> of efficient property Z, the <i>ḥukm</i> ¬X is also occasioned.	
Example: For the <i>wuqūf</i> at ‘Arafa, the ‘ <i>illa</i> of tarrying at a specific place occasions the <i>ḥukm</i> that fasting is a required condition (<i>shart</i>). Thus, for <i>i’tikāf</i> , because it shares the ‘ <i>illa</i> of tarrying at a specific		Example: For the <i>wuqūf</i> at ‘Arafa, the ‘ <i>illa</i> of tarrying at a specific place occasions the <i>ḥukm</i> that fasting is NOT a <i>shart</i> . Thus, for <i>i’tikāf</i> , because it shares the ‘ <i>illa</i> of tarrying at a specific place, the <i>ḥukm</i> that	

³²⁹ We might also note that the Shāfi‘ī respondent in al-Shīrāzī’s example-*mas’ala* employs *alā tarā* as a means of introducing his inferential proof of *ta’tḥīr*. As we shall see, this dialectical formula exhibits a variety of “delivery” functions for both defence (as here) and critique in proto-system juridical *jadal*.

³³⁰ K. *al-Qiyās al-Shar‘ī*, Ḥamīd Allāh ed., 1040; Hallaq, “Treatise,” 217.

³³¹ K. *al-Qiyās al-Shar‘ī*, Ḥamīd Allāh ed., 1048; Hallaq, “Treatise,” 224-5.

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place, the *ḥukm* that fasting is a *sharʿ* is also occasioned.

fasting is NOT a *sharʿ* is also occasioned.

We will note in this example that Q is literally “turning over, inverting, reversing” the *qiyās* of P (the very meaning of *qalb*); we can imagine Q saying “Au contraire... for *aṣl* A, due to ‘*illa* Z, not X is the case; thus, for *farʿ* B, which also has ‘*illa* Z, not X must also be the case.”

As for Miller’s opinions regarding *qalb*, they are clear from the start: the heading for his discussion reads “Qalb or Ishtirāk al-dalāla (*methodos kata peritropēn*).” He then opens with:

“al-Juwainī defines it [he does not specify which *iʿtirāḍ*, but we find from his citation³³² that it is *al-ishtirāk fiʾl-dalāla*] as ‘Q’s agreeing with P’s evidence in order to derive an incompatible conclusion.’ He later tells us it is a type of opposition (*muqābala*).”³³³

As for this first definition from the *Kāfiya*, it reads: “*wa ḥadd al-ishtirāk fiʾl-dalāla: musāwāt al-khaṣm khashmahu fīmā yūriduhu ‘alā al-tanāfiʿ*,” we might therefore render the definiens more literally as: “The opponent’s equivalence with his opponent as regards what he sets forth by way of mutual contradiction.” At any rate, Miller proceeds directly from al-Juwaynī’s definition to one by al-Bājī, saying: “al-Bājī defines it [again, not specifying which *iʿtirāḍ*] as Q’s sharing P’s evidence.”³³⁴ Having followed his citation, we are surprised to find that this is al-Bājī’s definition for *al-qalb*.³³⁵

Moving on, Miller translates al-Bājī’s views on *al-qalb* as a category of *iʿtirāḍ*, wherein the latter brings to light two important arguments: 1) that some Shāfiʿīs did not think *qalb* a valid question, “since it amounts to imposing a (new) question [*masʿala*] upon R, and Q is not allowed to demand proof (*dalāla*) of anything other than the point of dispute [*al-mawḍiʿ alladhī furīḍa fīhi al-masʿala*],” which opinion al-Bājī argues against; and 2) that al-Shīrāzī “was of the opinion that *qalb* is a type of counter-objection (*muʿāraḍa*), and that it does not render the ratio legis void [*qad kāna... yarā an al-qalb muʿāraḍa wa annahu lā yufsidu al-ʿilla*].”³³⁶ Now, were we to continue with Miller’s

³³² *Kāfiya*, [Maḥmūd ed.], 68, line -1.

³³³ *Disputation Theory*, 122.

³³⁴ *Disputation Theory*, 122-3; citing *Minhāj*, Turkī ed., 14, line 7.

³³⁵ *Mushārakat al-khaṣm al-mustadill fi dalīlihi*; lit. “the opponent’s sharing with the Mustadill as regards his indicant.” This is clearly misleading, and I must protest in this instance to the equation of different categories of *iʿtirāḍāt* (al-Juwaynī’s *ishtirāk fiʾl-dalāla* and al-Bājī’s *qalb*) behind a screen of ambiguity. Any reader without access to these sources would be under the impression that al-Juwaynī and al-Bājī were defining the same category of *iʿtirāḍ*, but they were not.

³³⁶ Miller, *Disputation Theory*, 123; translating from *Minhāj*, Turkī ed., 174, §385.

translation from this point, we would be under the impression that al-Bājī is in open disagreement with al-Shīrāzī, with al-Bājī saying:

“But this is not entirely correct, for I think we must make a distinction (*taqṣīm*) since there are really two sorts of *qalb*: (1) One with respect to all the qualities of the *ratio legis*, and (2) another which attaches to only some of them.”

The phrase “but this is not entirely correct” is nowhere indicated in the Arabic text, however, which reads only: “*wa hādhā ayḍan ‘indī yaḥtāju ilā taqṣīm.*”³³⁷ But as for al-Bājī’s claim that al-Shīrāzī treated *qalb* as a *mu‘āraḍa*, it is as real as it is inexplicable, for in the *Ma‘ūna* we find *al-qalb* treated independently of, and directly previous to, *al-mu‘āraḍa* — the former as *i‘tirāḍ* 14, and the latter as *i‘tirāḍ* 15.³³⁸

Indeed, in the *Ma‘ūna*, there is no mention of *mu‘āraḍa* in the treatment of *qalb*, nor of *qalb* in the treatment of *mu‘āraḍa*. Still, al-Bājī explains of his own first division (*al-qalb bi-jamī‘ awṣāf al-‘illa*) that it invalidates the ‘*illa*’ of the Mustadill, while the second division (*al-qalb bi-ba‘ḍ awṣāf al-‘illa*) is indeed “of the *bāb al-mu‘āraḍa* according to what our *shaykh* Abū Ishāq [al-Shīrāzī] stated, because it belongs to the Mustadill to say: ‘I have only treated the ‘*illa*’ as all the *awṣāf*, and when you invert (*qalibta*) some of them, the ‘*illa*’ is not invalidated, but you only oblige another.”³³⁹ We might point out that, in this latter division, Q has in effect provided only a counter-‘*illa*’, not a complete counter-*qiyās*. That is to say, he still shares P’s *aṣl*, and we can see why this very specific *i‘tirāḍ* is related to both *qalb* and *mu‘āraḍa*, whereas a full counter-*qiyās* could only be of the latter.³⁴⁰

Proceeding onward, Miller mentions that al-Juwaynī makes reference, in his discussion of *qalb*, to the same *mas’ala* (of *su’r al-sibā*) “which we earlier used to

³³⁷ *Minhāj*, Turkī ed., 175, near the end of §385.

³³⁸ *Ma‘ūna*, Turkī ed., 259ff., §§142-5. We will note here that al-‘Umayrīnī’s ed. of the *Ma‘ūna* is missing the greater part of three categories of *i‘tirāḍāt* due to an unacknowledged lacuna in the editor’s Gotha MS. Miller’s Princeton MS, however, has no such lacuna, while ‘Abd al-Majīd Turkī has collated a number of MSS, and taken note of the Gotha MS’s lacuna. I revert to Turkī’s edition, therefore, for material regarding al-Shīrāzī’s *qiyās*-related *i‘tirāḍāt* 13-15.

³³⁹ *Minhāj*, Turkī ed., 175-6.

³⁴⁰ Ibn ‘Aqīl (*K. al-Jadal*, 62, §296) also considers *qalb* to be a type of *mu‘āraḍa*. He explains: “And *al-qalb* is a *mu‘āraḍa*. And it is only distinguished from among the *mu‘āraḍāt* because it is a *mu‘āraḍa* by way of his [P’s] ‘*illa*’, in his [P’s] *aṣl*; while *al-mu‘āraḍa* is by way of another ‘*illa*’ in his *aṣl*. And it is related concerning some of the Aṣḥāb al-Shāfi‘ī that [they believed] it constitutes an *ifsād*, and not a *mu‘āraḍa*, because two opposite *ḥukms* are made conditional upon his ‘*illa*’. But this is not *ṣaḥīḥ*, because it must only be like that when they are both equal from every perspective. And it must be that there belongs to the *ta‘alluq* of one of the two *ḥukms* upon it [the ‘*illa*’] a *tarjīḥ* over the other, or that one of them be forced towards *ifsād* and the other deemed sound. And they [the two *ḥukms*] run the course of two ‘*illas*’, when they oppose each other.”

demonstrate al-Shīrāzī's and al-Bājī's conceptions of false construction."³⁴¹ We find, however, following a subsequent citation,³⁴² that al-Juwaynī in fact references a different version of this *mas'ala* than that found in al-Shīrāzī's *Ma'ūna*, and for which we earlier found Miller's interpretation and conclusions problematic. Whereas the *qiyās* of al-Shīrāzī's Ḥanafī respondent relates: 1) *Far'*: the *su'r* of *al-sabu'*; 2) *Aṣl*: the *su'r* of *al-khinzīr*; 3) *'Illa*: it is possessor of canine teeth (*dhū nābin*); and 4) *Ḥukm*: it qualifies as *najāsa*; al-Juwaynī draws illustration (as an example of a specific mode of *al-qalb wa'l-aks*) from a rather different argument. My translation of this latter is as follows:³⁴³

“Its like is what they profess regarding the *su'r* of the *sibā'*: that it is an animal (*ḥayawān*) whose meat is not eaten, so it is *najas* of *su'r*; like the dog. And the one ‘overturning’ [the *qiyās*] (*qālib*) says: A *ḥayawān* whose meat is not eaten: it is *tāhir* of *su'r*; like the cat. So the *'illa* is one *'illa*, to which belong two opposite norms (*ḥukmān mutadāddān*), by reference back to two *aṣls* contradictory of norm (*mutanāqīday al-ḥukm*). And it is as if the *ṭahārat su'r* of the cat is a contradiction (*naqḍ*) for the *'illa* of *najāsāt su'r* of the *sibā'*, and the *najāsāt su'r* of the dog is a *naqḍ* for the *'illa* of *ṭahārat su'r* of the *sibā'*. And clarification is drawn by that, that its being something whose meat is not eaten does not rightly allow its being an *'illa* for *ṭahārat al-su'r*, nor for its *najāsa*; and argumentation (*al-iḥtijāj*) by means of it is eliminated.”

Broken down into components, we might chart this example as follows:³⁴⁴

<i>Mas'ala</i> : Are the <i>sibā'</i> <i>najas al-su'r</i> ?			
P's <i>Qiyās</i>		Q's <i>Qalb</i>	
<i>Aṣl</i> su'r of the <i>kalb</i>	<i>Far'</i> su'r of the <i>sibā'</i>	<i>Aṣl</i> su'r of the <i>hīr</i>	<i>Far'</i> su'r of the <i>sibā'</i>
<i>'Illa</i> it is a <i>ḥayawān</i> whose meat is not eaten	<i>'Illa</i> it is a <i>ḥayawān</i> whose meat is not eaten	<i>'Illa</i> it is a <i>ḥayawān</i> whose meat is not eaten	<i>'Illa</i> it is a <i>ḥayawān</i> whose meat is not eaten
<i>Ḥukm</i> it is <i>najas al-su'r</i>	<i>Ḥukm</i> [thus] it is [also] <i>najas al-su'r</i>	<i>Ḥukm</i> it is <i>tāhir al-su'r</i>	<i>Ḥukm</i> [thus] it is [also] <i>tāhir al-su'r</i>
Note: Q finds P's <i>'illa</i> among the properties of the cat, but occasioning the opposite <i>ḥukm</i> . This is in the way of <i>al-naqḍ</i> , as al-Juwaynī indicates, and it invalidates that “being a <i>ḥayawān</i> whose meat is not eaten” be used as an <i>'illa</i> for occasioning a <i>ḥukm</i> of either <i>ṭahārat al-su'r</i> or <i>najāsāt al-su'r</i> .			

³⁴¹ *Disputation Theory*, 123.

³⁴² *Kāfiya*, [Maḥmūd ed.], 233.

³⁴³ *Ibid.*

³⁴⁴ Plainly, this is not the same example employed by al-Shīrāzī to illustrate a type of *fasād al-waḍ'*, and it is not at all clear why Miller portrays it as such. Moreover, he compounds an earlier misreading, calling al-Shīrāzī's *najas al-sibā'* example “a perfect illustration of how the same *ratio legis* can be used to arrive at a contrary juristic qualification” (*Disputation Theory*, 123-4). We saw clearly, however, that Q made no use whatsoever of P's *'illa* (*dhū nābin*) in that example, nor of his *aṣl* (*su'r al-khinzīr*)..

Moving on, Miller translates al-Juwaynī's argument³⁴⁵ against those who believe that the type of *qalb* illustrated in his *najas al-sibā'* example constitutes a kind of *mu'āraḍa*. In brief, though the *aṣls* of Q and P are different, al-Juwaynī argues that they produce one *ḥujja*, one '*illa*, and "a [single] thing cannot be opposed to itself (*lā yu'āriḍ nafsahu*) nor can it be preferred to itself [*lā yurajjiḥu nafsuhu 'alā nafsihi*]."³⁴⁶

Next, Miller again compounds an earlier misreading, saying: "Although al-Shīrāzī, as we noted above, identifies certain species of *qalb* as 'false construction,' he is still aware of this technical word, and identifies several types." He then proceeds to introduce al-Shīrāzī's second *ḍarb* of *qalb*: "One he calls *qalb al-taswīya* [*sic*], 'turning around the juristic qualification where one accepts P's proof in its entirety, with a small addition.'"³⁴⁷ The components of the example-*mas'ala* may be charted thus:³⁴⁸

Mas'ala: Does <i>wuḍū'</i> require <i>al-niyya</i> ?		
Ḥanafī P's <i>Qiyās</i>		Shāfi'ī Q's <i>Qalb al-Taswīya</i>
<i>Aṣl</i> <i>izālat al-najāsa</i>	<i>Far'</i> <i>al-wuḍū'</i>	<i>Qalb al-Taswīya</i> For <i>izālat al-najāsa</i> , there is <i>taswīya</i> between <i>ṭahāra bi-mā'i'</i> and <i>ṭahāra bi-jāmid</i> [neither requires <i>niyya</i>]. But we know that <i>al-tayammum</i> [a <i>ṭahāra bi-jāmid</i> ; a <i>wuḍū'</i> with earth/sand] requires <i>niyya</i> . So there must be <i>taswīya</i> between <i>mā'i'</i> and <i>jāmid</i> as regards <i>wuḍū'</i> [i.e., that they both require <i>niyya</i>], as there is <i>taswīya</i> between them in <i>izālat al-najāsa</i> [neither requires <i>niyya</i>].
<i>'Illa</i> it is a <i>ṭahāra bi-mā'i'</i>	<i>'Illa</i> it is a <i>ṭahāra bi-mā'i'</i>	
<i>Ḥukm</i> it does not require <i>al-niyya</i>	<i>Ḥukm</i> [thus] it [also] does not require <i>al-niyya</i>	

Notably, we see that Q retains P's *aṣl* (*izālat al-najāsa*) along with his '*illa* (it is a *ṭahāra bi-mā'i'*) in this example-*mas'ala*. He argues, however, that: 1) *izālat al-najāsa* may also be a *ṭahāra bi-jāmid*; 2) whether as *ṭahāra bi-mā'i'* or *ṭahāra bi-jāmid*, *izālat al-najāsa* does not require *niyya* (he establishes *taswīya* of the two '*illa*'s); 3) this *taswīya* must be maintained for *wuḍū'*, where the '*illa* of *ṭahāra bi-jāmid* requires *niyya*; therefore, 4) *wuḍū'*

³⁴⁵ *Kāfiya*, [Maḥmūd ed.], 233-4.

³⁴⁶ *Disputation Theory*, 124; brackets are mine. Cf. our above note regarding Ibn 'Aqīl's argument.

³⁴⁷ *Ibid.*, 125 and n.90. As has been pointed out to me by an examiner of this dissertation, the term *تسوية* is an example of that alternate Form II *maṣdar*: *tafiila*. The proper transliteration would thus be *taswīya* (i.e., without the macron). As for this quoted definition for *qalb al-taswīya*, Miller cites the Princeton MS of the *Ma'ūna* (fol. 17a), but we do not find such a definition there, only an example. Regardless of this, and a subsequent attempt to relate the concept of "addition" from this as yet unverified definition to the concept of *taswīya*, Miller proceeds to clearly translate and accurately explain al-Shīrāzī's example of *qalb al-taswīya* at work (*Ibid.*, 125).

³⁴⁸ al-Shīrāzī, *Ma'ūna*, Turkī ed., 260, §144.

as *ṭahāra bi-mā'i* must also require *niyya*. Dissected in such a manner, we can easily see why this is a kind of *qalb*: Q has taken both P's *aṣl* and 'illa and, by the simple act of maintaining the *taswiya* of that 'illa with a sister 'illa, produced the opposite *ḥukm* in the *far'* — he has “inverted” or “reversed” P's *qiyās*.

Miller also introduces and discusses al-Shīrāzī's first *ḍarb* of *qalb*: *qalb bi-ḥukm maqṣūd* (translating: “the reversal of the intended juristic qualification”), and notes that al-Juwaynī treats the same, but by the different term *al-qalb al-ṣarīḥ*. He then relates al-Juwaynī's explanation and example.³⁴⁹ This latter may be broken down and charted as follows:

Mas'ala: Does <i>i'tikāf</i> require <i>al-ṣawm</i> ?		
P's <i>Qiyās</i>		Q's <i>Qalb al-Ṣarīḥ</i>
<u><i>Aṣl</i></u> <i>al-wuqūf bi-'Arafa</i> <u><i>'Illa</i></u> it is a sojourn in a specific place, which does not become a <i>qurba</i> except by a contextual clue (<i>qarīna</i>) <u><i>Ḥukm</i></u> it requires <i>al-ṣawm</i>	<u><i>Far'</i></u> <i>al-i'tikāf</i> <u><i>'Illa</i></u> it is a sojourn in a specific place, which does not become a <i>qurba</i> except by a <i>qarīna</i> <u><i>Ḥukm</i></u> [thus] it [also] requires <i>al-ṣawm</i>	<u><i>Qalb al-Ṣarīḥ</i></u> By way of this same 'illa, there is obliged that <i>al-ṣawm</i> NOT be stipulated for the validity of <i>al-i'tikāf</i>; just like <i>al-wuqūf bi-'Arafa</i>.

Of note is that Q claims — by way of the same *aṣl* and 'illa as P — the opposite *ḥukm*. It is not terribly clear in this, or other examples, by what justification Q makes this claim. I would guess, however, it stems from: 1) an established difference between the doctrinal *madhāhib* of P and Q as regards the *aḥkām* of the *aṣl* (*al-wuqūf bi-'Arafa*); and 2) established *madhhabic* differences regarding the perceived *maqṣid* of God as regards that *aṣl*. In other words, according to P's *madhhab*, the *maqṣid* behind sojourning in a specific place is not *qurba*; *qurba* can only be achieved by *ṣawm* during sojourn. For Q's

³⁴⁹ *Disputation Theory*, 126-7. Miller also earlier records (125-6) al-Juwaynī's discussion of *qalb al-taswiya* in his *Kāfiya* (239ff.), at some length. Al-Juwaynī notes variant terms (*qalb al-tafrīqa*, *qalb al-i'tibār*), and various contentions for and against its validity as an argument. In the end, he argues that *qalb al-taswiya* is indeed valid. Miller also observes (127) that al-Juwaynī makes such an argument in his *Burhān*.

madhhab, however, the *maqṣid* behind sojourning is, in fact, *qurba*. This interpretation of the arguments would also make sense of al-Shīrāzī's appellation of *qalb bi-ḥukm maqṣūd*.

Finally, we ought also to note that al-Juwaynī's example-*mas'ala* is precisely the same that al-Baṣrī employs in his *K. al-Qiyās al-Shar'ī*, and which we have treated earlier. It does not appear among any of al-Shīrāzī's examples for *qalb*, however, nor is it among al-Bājī's examples, nor among Ibn 'Aqīl's. This fact may have some significance with regard to the transmission of variant *jadal*-theory traditions, as the different organizing principle of al-Juwaynī's *Kāfiya* from that of these other jurists would also suggest. Certainly, Miller believes al-Juwaynī to represent a different "eastern" tradition.³⁵⁰

On *Naqḍ*

Al-Baṣrī defines *naqḍ* as "the presence of the 'illa in a locus (*mawḍi'*) from which its *ḥukm* is absent."³⁵¹ He further explains the difference between invalid and valid charges of *naqḍ*, as follows:

- Invalid *naqḍ*: "when the one justifying the 'illa (*mu'allil*) establishes his 'illa for the general/less-precise (*jumla*), then it is contradicted by the particular/precise (*tafṣīl*), it is not *naqḍ*, because the *ḥukm* of the 'illa itself is the *jumla*, and this is not absent from the locus (*mawḍi'*) in which the 'illa is found; rather, only the particularized norm (*ḥukm mufaṣṣal*) is absent, and the *ḥukm mufaṣṣal* is not its [the 'illa's] *ḥukm*, which is made conditional upon it."
- Valid *naqḍ*: "if the *mu'allil* establishes his 'illa for the *tafṣīl*, then he is contradicted by the *jumla*, this is a *naqḍ ṣaḥīḥ*...."

I have attempted to show the difference between the valid and invalid forms of *naqḍ* in the following diagram, using al-Baṣrī's examples:

<i>al-Naqḍ bi'l-Jumla (ṣaḥīḥ)</i> ³⁵²		
<i>Qiyās of P</i>		<i>Naqḍ of Q</i>
<i>Aṣl</i> killing Muslim with intent	<i>Far'</i> killing Dhimmī with intent	<i>Aṣl</i> killing Ḥarbī
<i>'Illa</i> victim is <i>ḥurr mukallaf</i>	<i>'Illa</i> victim is <i>ḥurr mukallaf</i>	<i>'Illa</i> victim is <i>ḥurr mukallaf</i>
<i>Ḥukm</i> <i>qīṣās</i>	<i>Ḥukm</i> [also] <i>qīṣās</i>	<i>Ḥukm</i> NO <i>qīṣās</i>
NB: Q's <i>Naqḍ</i> is by the general/less-precise (<i>jumla</i>) — both the intent- <i>ḥukm</i> and no-intent- <i>ḥukm</i> are negated here [thus the particular <i>ḥukm</i> of P (intent) is negated].		

³⁵⁰ *Disputation Theory*, 89-90.

³⁵¹ *K. al-Qiyās al-Shar'ī*, Ḥamīd Allāh ed., 1041; Hallaq, "Treatise," 218.

³⁵² NB: al-Baṣrī introduces his example with *alā tarā*. As we shall see in our analyses, this is among the "staple formulae" of proto-system *jadal*.

Part I: The Dialectical Forge
Chapter II: The Lens of Early Juridical *Jadal*-Theory

<i>al-Naqḍ bi'l-Taḥṣīl</i> (not a <i>naqḍ ṣaḥīḥ</i>)		
<i>Qiyās</i> of P		<i>Naqḍ</i> of Q
<i>Aṣl</i> killing of Muslim by Muslim	<i>Far'</i> killing of Muslim by Dhimmī	<i>Aṣl</i> Muslim kills a Dhimmī without intent
<i>'Illa</i> they are both <i>ḥurr mukallaḥ maḥqūn al-dam</i>	<i>'Illa</i> they are both <i>ḥurr mukallaḥ maḥqūn al-dam</i>	<i>'Illa</i> they are both <i>ḥurr mukallaḥ maḥqūn al-dam</i>
<i>Ḥukm</i> there is <i>qīṣāṣ</i> between them	<i>Ḥukm</i> there is [also] <i>qīṣāṣ</i> between them	<i>Ḥukm</i> there is NO <i>qīṣāṣ</i> between them
NB: Q's <i>Naqḍ</i> is by the particular/precise (<i>taḥṣīl</i>) — only the no-intent- <i>ḥukm</i> is negated here [thus the general/less-precise <i>ḥukm</i> of P is not negated], even though P's <i>'illa</i> is present in the <i>mas'alat al-naqḍ</i> .		

Drawing from al-Baṣrī, Hallaq notes: “The inability of [an] *'illa* to produce a judgment leads to its refutation (*naqḍ*). According to al-Baṣrī, *naqḍ* and *kasr* constitute particularization (*takhṣīṣ*), a deficiency which prevents the *'illa* from resulting in a judgment.”³⁵³ We must also note here al-Shīrāzī's extensive treatment of *naqḍ* in his *Ma'ūna* (*I'tirāḍ* 7),³⁵⁴ where we have seen it defined as “the presence of the *'illa*, and not a *ḥukm*, against the *qawl* of one who does not opine (*lā yarā*) *takhṣīṣ al-'illa*.” Certainly, there is a great overlap between the terms and concepts of *naqḍ*, *naqīḍ*, *tabkīt*, *mu'āraḍa*, etc., and what might be understood by “refutation”. What al-Shīrāzī means by *naqḍ*, however, refers to a specific type of charge made by Q against P (that P's *'illa* exists in another case, without P's *ḥukm*), and which — if P does not subscribe to the problematic theory of *takhṣīṣ al-'illa*, ought likely to lead to Q's *elenchus*. Al-Shīrāzī then focuses his discussion upon a set of possible replies to a charge of *naqḍ* — three for the Shāfi'ī so charged, and an additional three responses to the charge of *naqḍ* as are propounded by the Aṣḥāb Abī Ḥanīfa.

Miller translates *naqḍ* / *munāqaḍa* as “inconsistency;”³⁵⁵ he then claims “al-Juwainī offers two definitions of *naqḍ*.”³⁵⁶ In fact, al-Juwainī offers three, consecutive definitions.³⁵⁷ They are: 1) “The absence (*intifā*) of the *ḥukm* from what is claimed for it as pertains to the *'illa*” (Miller translates: “it is the denial that the juristic qualification

³⁵³ “Treatise,” 202.

³⁵⁴ al-'Umayrīnī ed., 104ff.; cf. Ibn 'Aqīl, *K. al-Jadal*, 56ff.

³⁵⁵ *Disputation Theory*, 127ff., *passim*.

³⁵⁶ *Disputation Theory*, 127.

³⁵⁷ *Kāfiya*, Maḥmūd ed., 69, §165.

has the alleged *ratio legis*"); 2) "And it is said: The presence of the 'illa with the absence (*faqd*) of what is claimed as pertains to its [the 'illa's] *ḥukm*" (Miller: "The existence of the *ratio legis* with the absence of its alleged juristic qualification"); and 3) "And it is said: The absolution (*ibrā*) of the 'illa wherever there is no *ḥukm*."

Miller continues, without citation: "This type of objection is reminiscent of the 'ineffective cause' but here it is allowed that the cause ('illa) is effective but not in all cases (*ṣuwar/mawāḍi'*); therefore, it is invalid" (*Disputation Theory*, 127). I have not yet come across a similar formulation, but we have seen that allowing the 'illa to be effective in some cases and not others requires that one subscribe to the very contentious doctrine of *takḥṣiṣ al-'illa*. By saying that "here it is allowed that the cause ... is effective but not in all cases," Miller appears to have misunderstood the charge. So, too, when he sees *al-naqd* as "reminiscent" of 'adam al-ta'thīr, which is in fact the opposite of *naqd* (al-Shīrāzī's definition: "the presence of the *ḥukm* with the absence of the 'illa").³⁵⁸ Certainly he is correct, however, in observing that, as with 'adam al-ta'thīr, *al-naqd* was a contended category of *i'tirāḍāt*, not accepted by certain Ḥanafites.³⁵⁹

On another note, Miller again implies a juridical expansion upon "theological" dialectic, saying: "Together with the ineffective cause ['adam al-ta'thīr], it [*al-naqd*] comprises the old category of applying the cause to its causata."³⁶⁰ It is now, with further consideration, that we can understand Miller's earlier claim that 'adam al-ta'thīr is a form of the dialectical demand for *jarayān al-'illa fī ma'lūlātiḥā* (which latter he earlier equated to "applying the cause to its causata"). If we chart the relationships between different species of claims of 'illa-ḥukm relationship (*ta'līl*) and species of objection-claims, the relationship of all should become clear:

<i>Ta'līl</i>-claim	<i>I'tirāḍ</i>-claim
• <i>ṭard</i>: the <i>ḥukm</i> must be present due to the presence of the 'illa	• <i>naqd</i>: the 'illa is shown to be present with the absence of the <i>ḥukm</i> (it is a charge that <i>ṭard</i> is not the case)
• 'aks: the <i>ḥukm</i> must not be present due to the absence of the 'illa	• 'adam al-ta'thīr: the 'illa is shown to be absent with the presence of the <i>ḥukm</i> (it is a charge that 'aks is not the case)
• <i>jarayān</i> / <i>dawarān</i>: the 'illa-ḥukm relationship is confirmed by both co-presence and co-absence	• <i>al-i'tirāḍ 'alā al-'illa bi-annahā lā tajrī fī ma'lūlātiḥā; al-muṭālaba bi-jrā' al-'illa fī ma'lūlātiḥā</i>: the 'illa-ḥukm relationship is claimed to enjoy neither co-presence nor co-absence, so Q demands that P demonstrate <i>jarayān</i> (it is a charge that <i>jarayān/dawarān</i> is not the case)

³⁵⁸ *Ma'ūna*, al-'Umayrīnī ed., 100; cf. Ibn 'Aqīl, *K. al-Jadal*, 56, §276.

³⁵⁹ *Disputation Theory*, 127-8; citing al-Juwaynī's *Burhān*.

³⁶⁰ *Disputation Theory*, 128 and n.101.

If our understanding is correct, than Miller indeed has a point; for *naqd* and *‘adam al-ta’tihir* would each appear as complementary halves for a complete “*i’tirād ‘alā al-‘illa bi-annahā lā tajrī fī ma‘lūlātihā*” (al-Bājī’s thirteenth mode). I would only question why he did not cite this latter mode of *i’tirād*; and, of course, I would object to the implication that this represents “the old category” of the theologian *jadal*-theorists. Although cross-germination between the methods of different dialectical projects (e.g., speculative vs. normative) is quite likely from the beginning of such projects and onwards, what is absolutely certain is that charges of *naqd* where a common — if not the most common — feature of proto-system juridical *jadal*. Our analyses of the *Ikhtilāf al-‘Irāqīyyīn* will prove this time and again.

Miller also relates al-Juwaynī as mentioning “another category of objection, *munāqada*, contradiction or self-contradiction.” He then laments that al-Juwaynī is “somewhat careless in his use of these terms,” using sometimes one, sometimes the other.³⁶¹ From the examples cited, however, it is plain that these terms are largely synonymous. We will also add that both the first- and third-form *maṣḍars* of *n-q-ḍ* bear the connotation of “contradiction;” this is indeed the essence of the *i’tirād* of *naqd*, as is made clear by the examples of all our early juridical *jadal* authors: By bringing P to concede to a case where his *‘illa* is present but does not occasion his *ḥukm*, Q aims to show that P has contradicted himself with regard to that *‘illa*’s efficiency in the *mas’ala* at hand.

On *Naqd* and *Takhṣīṣ al-‘illa*

We have already noted the relationship between the dialectical charge of *naqd* and the much-contended theory of *takhṣīṣ al-‘illa*; mainly, should one deny the theory of *takhṣīṣ al-‘illa*, yet maintain (in practice) an inconsistent doctrine wherein the same *‘illa* does not always occasion the same *ḥukm*, then one may be charged with *naqd* whenever such inconsistent *‘ilal* are pointed out in the course of debate. Of course, subscription to the theory would explain one’s apparently inconsistent practice. The disputation might then shift focus to P’s defence of *takhṣīṣ al-‘illa*. We are fortunate that Hallaq reproduces and explains al-Baṣrī’s argument against *takhṣīṣ al-‘illa*;³⁶² from this we may gain insight into the form such a disputation might take. In fact, al-Baṣrī’s argument is in the form of a *reductio ad impossibile*, and provides a fine example of how this genre of argument was employed. We will attempt a synopsis, as follows:

³⁶¹ *Disputation Theory*, 128 and n.103.

³⁶² “Treatise,” 202; citing from *Mu’tamad*, Ḥamīd Allāh ed., vol. 2, 824.

- Given that, for Gold:
 - *ḥukm*: sale of smaller for larger quantities is forbidden
 - *‘illa*: (because of) its measurability by weight
- Should we say that, for Lead:
 - *ḥukm*: sale of smaller for larger quantities is allowed
 - *‘illa*: (because of) its whiteness of color [NB: measurability by weight has been “particularized” by the added consideration of color]
- Then we are faced with the following impossibility, for Iron:
 - *ḥukm*: sale of smaller for larger quantity is at once forbidden and allowed
 - *‘illa*: (because of) its measurability by weight and its whiteness of color

Among other things, this argument shows how the same dialectical techniques which were employed in disputations regarding substantive legal doctrine were also employed in disputations regarding legal theory: in this case, the theory of *takhṣīṣ al-‘illa* has been refuted by the raising of a case (corresponding to the *mas’alat al-naqd* of *fiqh*-oriented *jadal*) wherein that theory would result in an impossibility (the *ḥukm* for iron is both X and ¬X). We will see many similar instances in our analyses of the *Ikhtilāf al-‘Irāqīyyīn*, and have provided for them the general label of “*method-naqd*.” Most importantly for the purposes of this dissertation, arguments such as al-Baṣrī’s provide patent examples of legal theory crafted through dialectic; the theoretical insistence upon *‘illa*-consistency (and the denial of *takhṣīṣ al-‘illa*) is here gaining the edge of *ḥujjiyya* in the dialectical forge.

On *Kasr*

Al-Baṣrī defines *kasr* (breaking) simply as “*naqd* of the *‘illa* on account of its shared property (*ma’nā*), not its formulation (*lafẓ*).”³⁶³ Hallaq, citing earlier material in al-Baṣrī’s *Mu’tamad*, relates another description of *kasr*, which occurs to an *‘illa* “when one of the *‘illa*’s properties is cancelled due to inefficiency, and when it becomes clear that the remaining properties cannot induce a judgment....”³⁶⁴ Miller, on the other hand, rightly introduces *al-kasr* as “a special case of *naqd*,” while observing that al-Shīrāzī, al-Bājī, and Ibn ‘Aqīl all treat it as an independent category.³⁶⁵ In his *Ma’ūna*, al-Shīrāzī treats *al-kasr* (*i’tirāḍ* 8) immediately after *al-naqd* (*i’tirāḍ* 7);³⁶⁶ so, too, does al-Bājī. Tellingly, al-Bājī names his eleventh *qiyās*-oriented objection: *al-i’tirāḍ ‘alā al-‘illa bi’l-naqd*, and his twelfth: *al-i’tirāḍ ‘alā al-qiyās bi’l-kasr*, or *al-naqd min jihat al-ma’nā*.³⁶⁷ As for

³⁶³ K. *al-Qiyās al-Shar‘ī*, Ḥamīd Allāh ed., 1043; Hallaq, “Treatise,” 220.

³⁶⁴ “Treatise,” 201–2. Cf. al-Shīrāzī (*Ma’ūna*, al-‘Umayrīnī ed., 107–8), where *kasr* is defined as “the presence of the *ma’nā* of the *‘illa*, and not a *ḥukm*,” and Ibn ‘Aqīl, K. *al-Jadal*, 65.

³⁶⁵ *Disputation Theory*, 128.

³⁶⁶ al-‘Umayrīnī ed., 104ff.

³⁶⁷ *Minhāj*, Turkī ed., 185ff., §§412ff.

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al-Shīrāzī, he simply defines *al-kasr* as: “the presence of the *ma’nā* of the ‘*illa*, and not a *ḥukm*.”³⁶⁸ Al-Bājī, on the other hand, after praising this *i’tirāḍ* as “one of the most refined (*adaqq*) and most *fiqh*-inducing (*afqah*),” subdivides *kasr* into two categories: 1) “that he [Q] replace a *wasf* of the *awṣāf* of the ‘*illa* by what is in its [the *wasf*s] *ma’nā*,” and 2) “that he eliminate a *wasf* of the *awṣāf* of the ‘*illa*.”³⁶⁹ Miller’s definition for *kasr* — “the existence of the meaning (*ma’nā*) of the ratio legis without the existence of the corresponding juristic qualification” — is drawn from al-Shīrāzī, al-Bājī, and Ibn ‘Aqīl.³⁷⁰

Returning to al-Shīrāzī, we might shed some light on *kasr* by breaking down his example-*mas’ala*, thus:

Mas’ala: Is the <i>bay’</i> of what the buyer has not seen valid?		
Shāfi’ī P’s Qiyās		Mukhālīf Q’s <i>Kasr</i>
<u>Aṣl</u> bay’ when the seller only says: I sell you a <i>thawb</i>	<u>Far’</u> bay’ of what the buyer has not seen	<u>Aṣl for al-Kasr</u> <i>nikāḥ</i> of a woman the groom has not seen
<u>‘Illa</u> it is a <i>mabī’ majhūl al-ṣifa ‘inda al-‘āqid ḥāl al-‘aqd</i>	<u>‘Illa</u> it is a <i>mabī’ majhūl al-ṣifa ‘inda al-‘āqid ḥāl al-‘aqd</i>	<u>‘Illa</u> she is <i>majhūla ‘inda al-‘āqid ḥāl al-‘aqd</i>
<u>Ḥukm</u> it is not valid	<u>Ḥukm</u> [thus] it is [also] not valid	<u>Ḥukm</u> it is valid

Here we can clearly see the relationship between *al-naqd* and *al-kasr*, for Q has attempted to show inconsistency in P’s doctrine by confronting him with a case which he ought to concede to (the *nikāḥ-aṣl*), but where a similar set of properties do not yield the same *ḥukm*. The difference from *al-naqd* is plain, however, for a woman in a *nikāḥ* contract is not a *mabī’* (object of sale) — we notice that *mabī’* is missing from the *awṣāf* of Q’s ‘*illa*.³⁷¹ So Q, in his *kasr-aṣl*, does not use the self-same ‘*illa* as P; whereas he would have to use P’s exact ‘*illa* in a *mas’alat al-naqd*. Rather, Q is employing that *ma’nā*, or “shared property,” of *majhūl ‘inda al-‘āqid ḥāl al-‘aqd*, which is common to both his own

³⁶⁸ *Ma’ūna*, al-‘Umayrīnī ed., 107.

³⁶⁹ *Minhāj*, Turkī ed., 191, §432. In his earlier chapter on definitions, al-Bājī defines *kasr* simply as “presence of a *ma’nā* of the ‘*illa*, with the absence of the *ḥukm*” (14, §18).

³⁷⁰ *Disputation Theory*, 128-9. We might suggest that *ma’nā* in this context not be translated as “meaning,” but as “shared property.”

³⁷¹ We may also note she is merely “*majhūla*,” and not “*majhūl al-ṣifa*,” which is to say that her qualities are likely to be known by the groom in sufficient detail.

kasr-aṣl, and the *aṣl* of P's *qiyās*. We find confirmation of this in al-Shīrāzī's suggested *jawāb* for the Shāfi'ī P:

“He says: *al-Nikāḥ* is not like *al-bay'* as regards this *ḥukm*, because there belongs to the being-uninformed (*jahāla*), with regard to efficiency (*al-ta'thīr*), in the category of *bay'*, what does not belong to it regarding *al-nikāḥ*. And due to this, if he marries a woman he has not seen, then he sees her, option (*al-khiyār*) is confirmed for him; so it is permitted that lack-of-seeing (*'adam al-ru'ya*) in *al-nikāḥ* be no impediment to validity, but in the *bay'* it impedes.”

This *jawāb*, too, may be related to a suggested *jawāb* for *naqd*; for here, P finds the means to reject Q's *aṣl* as a *kasr-aṣl*, whereas in responding to a charge of *naqd*, he would find the means to reject Q's *mas'alat al-naqd*.

Miller notes that al-Juwaynī also discusses *kasr* in his larger treatment of *naqd* / *munāqaḍa*, with special attention to arguments against its validity.³⁷² Those who support *kasr* as a valid move call it “refuting R by referring to the ‘spirit of the law’ (*ilzām 'alā al-ma'nā*).” Again, we would suggest another translation for *ma'nā*; al-Shāfi'ī's usage of *ma'nā* in the sense of “shared (potentially efficient) property” has held up quite well in expositions on *i'tirāḍāt* thus far. We find even more confirmation for this, and for our interpretation of al-Shīrāzī's example of *kasr*, in a brief statement of al-Juwaynī's: “And because of what is claimed that it [this sort of *naqd*] refutes the *ma'nā* and not the *lafz*,³⁷³ the *fuqahā'* call it: *Kasr*; and such cannot ever be except by the abandoning (*tark*) of some/one of the *awṣāf* of the '*illa*, then the obliging (*ilzām*) of the remainder....”³⁷⁴ We see clearly here the link between *ma'nā* and *waṣf*, not to mention a close description of what Mukhālīf Q attempts to do to Shāfi'ī P's *qiyās*, in al-Shīrāzī's illustration of *kasr*.

On *Qiyās*-Oriented *Mu'āraḍa* and *Farq*

Although acknowledging that *farq* was considered a subcategory of *mu'āraḍa*, Miller yet treats it under a separate subheading, before moving on to his section on *mu'āraḍa*. Translating *farq* as “distinction,” Miller then provides al-Juwaynī's definition from the *Kāfiya*,³⁷⁵ followed by a translated discussion from al-Bājī's *Minhāj*.³⁷⁶ It is evident from al-Juwaynī's definition, and from the *i'tirāḍ*-hierarchies of al-Shīrāzī and al-Bājī, that all three authors considered *farq* a subcategory of *mu'āraḍa*.³⁷⁷ As for al-Juwaynī's definition of *al-farq*, I would render it thus: “It is the opposition (*mu'āraḍa*)

³⁷² *Disputation Theory*, 129.

³⁷³ Cf. al-Baṣṭī's definition, above.

³⁷⁴ *Kāfiya*, bottom of 212.

³⁷⁵ Maḥmūd ed., 69, §167.

³⁷⁶ Turkī ed., 201, §456.

³⁷⁷ *Disputation Theory*, 130.

comprising the inconsistency (*mukhālafa*) of the *farʿ* with the *aṣl* as regards the ‘*illa* of the *ḥukm*” (Miller translates: “a type of counter-objection (*muʿāraḍa*) which contains an objection that the case at hand (*farʿ*) and the principal case (*aṣl*) differ with respect to the *ratio legis* of the juristic qualification.”) We can get a better idea of where *farq* comes into play by examining a more detailed outline of al-Shīrāzī’s *qiyās*-related *muʿāraḍāt*, as culled from his *Maʿūna*.³⁷⁸

Iʿtirāḍ 15: *al-Muʿāraḍa*

- *al-Muʿāraḍa* by way of the *Nuṭq*³⁷⁹
 - [*nuṭq* of] *al-Kitāb*, *al-Sunna*, and *al-Ijmāʿ*
- *al-Muʿāraḍa* by way of the ‘*illa*
 - *Ḍarb* 1: *Muʿāraḍa* by way of ‘*illa* *Mubtadaʿa*³⁸⁰
 - *Ḍarb* 2: *Muʿāraḍa* as regards the *Aṣl*, which is *al-Farq*
 - *al-Farq* by way of *Qiyās al-ʿilla*
 - *al-Farq* by way of *Qiyās al-Dalāla*
 - *Ḍarb* 1: That it be distinguished (*yufarraqa*) by one of the *aḥkām* of the *Sharʿ*
 - *Ḍarb* 2: It is distinguished (*yufarraqa*) by one of the parallels (*naẓāʾir*) of the *ḥukm*
 - *al-Farq* by way of *Qiyās al-Shabah*

As for al-Bājī’s ordering of *qiyās*-related *muʿāraḍāt*, we find *farq* occupying a similar position, as may be seen from a more detailed outline drawn from his *Minhāj*.³⁸¹

15) The *Iʿtirāḍ* against the ‘*illa* by way of *Muʿāraḍa*

- 15.1) *Muʿāraḍa* of the ‘*illa* by way of the *nuṭq*
- 15.2) *Muʿāraḍa* of the ‘*illa* by way of the ‘*illa*
 - 15.2.1) *al-muʿāraḍa* by way of an ‘*illa* *mubtadaʿa*
 - 15.2.2) *al-muʿāraḍa* by way of the ‘*illa* of the *aṣl*; which is *al-farq*
 - 15.2.2.1) *farq* by way of the ‘*illa* of the *ḥukm*
 - 15.2.2.1.1) the *maʿnā* is subject to consensus (*muttafaq ʿalayhi*)
 - 15.2.2.1.2) the *maʿnā* is subject to disagreement (*mukhtalaf ʿalayhi*)
 - 15.2.2.2) *farq* by way of the *dalāla* of the *ḥukm*
 - 15.2.2.2.1) he makes distinction between the *farʿ* and the *aṣl* by way of a *ḥukm* peculiar to the *farʿ* which does not part from it (*lā yufāriquhu*)
 - 15.2.2.2.2) he makes distinction by way of the same *ḥukm*, in

³⁷⁸ Turkī ed., 262ff., §146ff.; [the first half is missing from al-ʿUmayrīnī’s ed.]

³⁷⁹ A pertinent definition of *al-nuṭq* may be found in Rafīq al-ʿAjam’s *Mawsūʿat Muṣṭalahāt Uṣūl al-Fiqh ʿinda al-Muslimīn* (ii.1636f.; s.v. نطق): “It is the *lafẓ* which is found in (*al-wārid fī*) the *Qurʾān* or the *Sunna*, by which indicants are drawn (*al-mustadall bihi*) for the *ḥukm* of things; and it is the *ẓāhir* itself, and might be designated as ‘all the *kalām* cited just as it was said (*kamā qālahu*) by he who spoke it (*al-mutakallim bihi*), univocally (*naṣṣan*).”

³⁸⁰ We will pursue the meaning of ‘*illa* *mubtadaʿa* below.

³⁸¹ Turkī ed., 201ff., §456ff.

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- other than the *loci* (*mawāḍiʿ*) of the *khilāf*
- 15.2.2.2.3) he makes distinction by way of a *ḥukm* which resembles (*yushākilu*) the disagreed-upon norm (*al-ḥukm al-mukhtalaf fihi*)
- 15.2.2.2.4) he makes distinction by way of a *ḍarb* of *al-shabāh*

Miller, as we have noted, provides a translation of al-Bājī's opening discussion on *farq*. Within the first paragraph we find al-Bājī's definition, which Miller renders thus (parentheses and brackets are his):³⁸²

“It consists in mentioning something which necessitates a difference between the test case (*farʿ*) and the principal case. That is, to mention something (*maʿnā* [in the sense of the *ḥukm* of the *ʿilla*]) and its contrary (*ʾaks*) in the point of dispute.”

Again, among other things, I would suggest a more appropriate translation of *maʿnā* in the sense which al-Shāfiʿī appears to have employed it (according to Brunschvig, and our own observations), and would thus render al-Bājī's definition of *farq* as follows: “It is that he state what obliges the distinction (*al-farq*) between the *farʿ* and the *aṣl*; which is to say that he mention a [potentially shared] property (*maʿnā*) in the *aṣl*, but show its absence/opposite (*yaʿkisuhu*) in the *farʿ*.”

The general characteristics of the *iʿtirāḍ* of *al-farq* as found in the definitions of our authors are illustrated, as always, by example-*masāʾil* for each and every subtype. Broken down into its particular components, the following example from al-Bājī's *Minhāj* (meant to illustrate 15.2.2.1.2 in the above outline) is instructive:³⁸³

Masʾala: Does <i>qisās</i> apply to one who has killed with a blunt object (<i>muthaqqal</i>)?		
Mālikī P's <i>Qiyās</i>		Ḥanafī Q's charge of <i>Farq</i>
<i>Aṣl</i> the one who kills with a sharp object (<i>muḥaddad</i>) <i>ʿilla</i> he kills, iniquitously (<i>ẓulman</i>), one who is equal in status to him (<i>man yukāfiʿuhu</i>), by means of what most probably will result in his death <i>Hukm</i> <i>al-qisās</i> is obliged against him	<i>Farʿ</i> the one who kills with a blunt object (<i>muthaqqal</i>) <i>ʿilla</i> he kills, iniquitously (<i>ẓulman</i>), one who is equal in status to him (<i>man yukāfiʿuhu</i>), by means of what most probably will result in his death <i>Hukm</i> [thus] <i>al-qisās</i> is [also] obliged against him	<i>farq bi-ʿillat al-ḥukm</i> where the <i>maʿnā</i> is <i>mukhtalaf ʿalayhi</i>: “The <i>maʿnā</i> in the <i>muḥaddad</i> is that prescribed slaughter (<i>al-dhakāt</i>) occurs by means of it, and due to that we say: ‘Indeed <i>al-qisās</i> is established by way of it.’ But it is not so regarding what pertains to our <i>masʾala</i>, for indeed <i>al-dhakāt</i> does not occur by means of it, so <i>al-qisās</i> is not established by way of it; like [killing with] the small cane/stick (<i>al-ʿaṣā al-ṣaghīra</i>).

³⁸² *Disputation Theory*, 130; translating from al-Bājī, *Minhāj*, Turkī ed., 201, §456.

³⁸³ Turkī ed., 203, §460.

We may first note that Q has gone straight to a *ma'nā* of P's *aṣl*, and then claimed its 'aks in the *far'* — clearly, the *muthaqqal* is not designed for *al-dhakāt*. We can also see why, with our authors, *farq* was subsumed by *mu'āraḍa*:³⁸⁴ through the process of making a charge of *farq*, Q has in effect claimed an opposing 'illa, which he then links to a different *aṣl* — and in this latter the counter-'illa occasions the opposite *ḥukm*. Broken down into its components, the Ḥanafī Q's *farq*-resultant *mu'āraḍa* looks like this:

<u><i>Aṣl</i></u> the one who kills with a small cane/stick (<i>al-'aṣā al-ṣaghīra</i>)	<u><i>Far'</i></u> the one who kills with a blunt object (<i>muthaqqal</i>)
<u>'illa</u> he kills with an object by which <i>al-dhakāt</i> cannot occur	<u>'illa</u> he kills with an object by which <i>al-dhakāt</i> cannot occur
<u><i>Ḥukm</i></u> <i>al-qīṣāṣ</i> is not obliged	<u><i>Ḥukm</i></u> [thus] <i>al-qīṣāṣ</i> is [also] not obliged

Notably, Q's *farq*-resultant *mu'āraḍa-qiyās* is of that familiar species of *qiyās al-'illa*; hence, al-Bājī's category (of which this example-*mas'ala* illustrates a subtype) is termed: *farq bi-'illat al-ḥukm*. This, of course, corresponds to al-Shīrāzī's *farq bi-qiyās al-'illa*, which a comparison of the two hierarchies will show.

Miller also reminds us that we have encountered *farq* among the *jadal* works of theologians, and then notes: "It also seems to have been used as early as the tenth century as a technical term in jurisprudence."³⁸⁵ To this we will add that its use, as a dialectical move employing verbs and nouns of root *f-r-q*, is ubiquitous throughout the *Umm*; and we will see several instances in our analyses of the *Ikhtilāf al-'Irāqīyyīn*. Whatever the date we may consider *farq* to have crystallized as a uniform technical term, its practice and teaching as a dialectical move stretch back at least to the second century H.

We will now return to the larger category of *mu'āraḍāt*, which we noted Miller treats under a separate subheading, after *farq*. He translates *mu'āraḍa* as "counter-objection," and opens his exposition of (*qiyās*-oriented) *mu'āraḍa* with a translation of al-Juwaynī's technical definition, and a short definition of al-Bājī's.³⁸⁶ We will note that al-Juwaynī begins first with the ordinary usage of the term, stating: "it pertains, in

³⁸⁴ Miller also notes, as regards al-Bājī's first type of *farq*: "Q is in effect bringing a counter-claim with respect to both the test case and the principal one. The association with counter-objection [his translation of *mu'āraḍa*]... is transparent" (*Disputation Theory*, 132).

³⁸⁵ *Disputation Theory*, 131; citing van Ess's 1966 monograph on 'Aḍud al-Dīn al-Ījī.

³⁸⁶ *Disputation Theory*, 133; citing *Kāfiya*, 69, §168; and *Minhāj*, Turkī ed., 14.

ordinary linguistic usage, to ‘preventive opposition’ (*wa hiya, fi’l-lugha, min al-mumāna’a*).” He then proceeds to the juridical definition (*fi’urf al-fuqahā*): “The ‘preventive opposition’ (*mumāna’a*) of the opponent by means of the claim of something of equal worth (*bi-da’wā al-musāwāt*), or the equal footing of the opponent (*musāwāt al-khaṣm*) as regards the claim of indicant (*fi da’wā al-dalāla*).” Miller translates (parentheses are his): “preventing one’s opponent(’s argument from prevailing) by making an equal and opposing claim; or it is matching the opponent’s claim to prove his thesis (with another opposed to it).” As for al-Bājī, *mu’āraḍa* is: “The Questioner’s opposition (*muqābala*) of the one doing *istidlāl* (*mustadill*) by means of the like of his *dalīl*, or what is stronger than it;” (Miller: “Q’s opposing... P with a proof of equal weight or weightier.”)

Miller then laments: “al-Juwaynī’s account of counter-objection is confusing. It seems at times that he understands it as a species of *munāqaḍa*... and at other times as another entirely different species of objection.”³⁸⁷ I would be the first to agree that al-Juwaynī’s text is far more difficult to work with than al-Shīrāzī’s and al-Bājī’s, and have, for that reason, mostly avoided it. Having read the two sections of the *Kāfiya* Miller cites, however, I cannot discern an immediate cause for confusion, as al-Juwaynī appears quite clear and consistent. A potential impetus for Miller’s sentiment, however, may lie in a certain enigmatic inversion made by the editor of the text, Fawqīyya Ḥuṣayn Maḥmūd, as I shall attempt to explain. First, we must note that Maḥmūd was forced to base this edition of the *Kāfiya* upon a single Azhar MS, supplemented with images taken from the same MS at some point before it had lost a significant number of folia.³⁸⁸ The upshot of all this is that Maḥmūd’s source MS has not been collated with other MSS of the *Kāfiya*.

Returning to al-Juwaynī’s conception of *mu’āraḍa*, at the start of his full treatment of this category of *i’tirāḍ*,³⁸⁹ we find the text of Maḥmūd’s edition reads:

604 – اعلم ⁽¹⁾ أن المعارضة: ضرب من المناقضة ⁽¹⁾ وهي أقوى أنواع المعارضات...

Following Maḥmūd’s footnote, we then read:

(1-1) في الأصل: « أن المناقضة ضرب من المعارضة »

³⁸⁷ *Disputation Theory*, 133; citing *Kāfiya*, 213, §343 and 418, §604.

³⁸⁸ See editor’s intro, *Kāfiya*, 136-7.

³⁸⁹ *Kāfiya*, 418, §604.

In other words, and without explanation as to why (but diligently recording the editorial change), Maḥmūd has inverted this critical phrase in the main text. Moreover, as we have noted, the “aṣl” has not been collated with other MSS, so we are left even more in the dark as to why one would presume to invert the phrase, unless it simply seemed strange to open the *Faṣl fī Ahkām al-Mu‘āraḍa* with: “Know that *al-munāqaḍa* is a *ḍarb* of *al-mu‘āraḍa*....” Whatever the impetus on Maḥmūd’s part, we might understand this — if unnoticed by Miller — to have contributed to the evaluation of al-Juwaynī’s conception of *mu‘āraḍa* as “confusing.” In fact, as I now hope to show, it is clear and consistent.

If we prefer Maḥmūd’s *aṣl* over the editorial inversion, we would read: “Know that *al-munāqaḍa* is a *ḍarb* of *al-mu‘āraḍa*, and that it is the strongest of the types of *al-mu‘āraḍāt*; and every *munāqaḍa* is a *mu‘āraḍa*, even though not every *mu‘āraḍa* is a *munāqaḍa*.” Clearly, al-Juwaynī considers *munāqaḍa* as a subset of the greater set of *mu‘āraḍāt*, and he proceeds at some length to show this relationship between the two categories of *i‘tirāḍ*.³⁹⁰ As for the other citation of Miller’s (*Kāfiya*, 213, §343), it occurs in the context of a disputant incorrectly claiming *munāqaḍa* where in fact some other type of *mu‘āraḍa* has occurred. Al-Juwaynī says: “And there belongs to *al-mu‘āraḍa* another degree (*daraja ukhrā*) besides that which he claims, and its place (*maḥalluhā*) is not the place of *al-munāqaḍa*....” This is fully consistent with what we have proposed of al-Juwaynī’s conception of *munāqaḍāt* as a subset of *mu‘āraḍāt*.

Moving on, Miller states that al-Juwaynī’s account of *mu‘āraḍa* includes some new additions, along with “some of the old theological types of counter-objection.”³⁹¹ In his ensuing discussion, yet another critical “starting point” for this dissertation may be drawn.³⁹² Before translating a paragraph from al-Juwaynī’s *Kāfiya*, Miller asserts: “What is new and important is that al-Juwaynī provides a formula for using counter-objection.” He then presents his translation (*Kāfiya*, 419), in which al-Juwaynī does indeed portray an instance of *mu‘āraḍa* in formulaic manner, although this is not the only place.³⁹³ Finally, he concludes: “The old controversy about the status of *mu‘āraḍa* as a question has here given birth to formalism in phrasing objections, a new addition to the usual method of bringing definitions of the technique and practical examples.”

³⁹⁰ *Kāfiya*, op. cit.

³⁹¹ *Disputation Theory*, 133.

³⁹² *Disputation Theory*, 133-4.

³⁹³ Cf., among other places, 412, §600; and 413, §601.

Now, whether or not al-Juwaynī was among the first *jadal*-theory authors to include formulaic question-patterns along with his definitions and examples — that is to say, whether or not this is indeed “new,” or related specifically to *mu‘āraḍa*’s status-as-question controversy — would be difficult to say without an extensive survey of earlier *jadal* treatises. What we can say for certain, however, is that our earliest extant juridical dialectic *in practice* shows an amazingly high and consistent order of formalism of expression. Particularly ubiquitous, and consistently employed by Abū Ḥanīfa, Ibn Abī Laylā, Abū Yūsuf, al-Shaybānī, al-Shāfi‘ī, et al., are the *alā tarā* and *ara‘ayta* formulae; both of these, it would seem, are the favoured vehicles for gaining P’s concession to an inconsistency or contradiction — the launching pads for a variety of dialectical moves including such as may be retroactively labelled *munāqaḍa* and *mu‘āraḍa*.³⁹⁴

As a final remark on *mu‘āraḍāt*, we should note al-Baṣrī’s observation that there are only three ways out for the one doing *qiyās* (*qā’is*) who faces *mu‘āraḍa*: 1) “he [P] validates his ‘*illa*, and clarifies that it is more superior/fitting (*awlā*) than the ‘*illa* of his opponent (*khaṣm*) [Q]; or he validates his ‘*illa*, and professes [both] by it and the ‘*illa* of his *khaṣm*, if it is, according to him, valid (*ṣaḥīḥ*);” 2) “he [P] invalidates the ‘*illa* of his *khaṣm* [Q] by means of the modes (*wujūh*) we have mentioned;” and 3) preponderating (*tarjīḥ*) [of his ‘*illa* over his *khaṣm*’s].³⁹⁵ Importantly, this provides an insight as to why, with all of our early *jadal* theorists, *mu‘āraḍa* is treated last among *qiyās*-oriented *i‘tirāḍāt*: because if Q does *mu‘āraḍa*, P may then use the full range of dialectical moves which precede it in the hierarchy, in order to critique Q’s *mu‘āraḍa-qiyās*. The roles now switch, and P becomes Q. Equally important, we are also provided insight as to why, for most of our early *jadal* theorists, treatises close with chapters on *tarjīḥ*. As al-Baṣrī has shown us, *tarjīḥ* constitutes the third refuge of the *qā’is* faced with *mu‘āraḍa* — specifically, as regards al-Shīrāzī and al-Bājī, the closing chapter on *tarjīḥ al-ma‘ānī* may come to his aid.

With regard to al-Baṣrī, we may in fact suggest that he follows his listing of “modes by which the opponent’s ‘*illa* is invalidated” with sections on *tarjīḥ* for two reasons: 1) the last of the modes is *mu‘āraḍa*, and *tarjīḥ* is the third refuge of the *qā’is* confronted with it; and 2) as al-Baṣrī explains in his “meta-logical” discussion later on, the modes of *ifsād al-‘illa* themselves all relate to the larger domain of *tarjīḥāt*. For

³⁹⁴ See our summary of dialectical formulae from the *Ikhtilāf al-‘Irāqīyyīn* near the end of our analyses in Chapter III.

³⁹⁵ K. *al-Qiyās al-Shar‘ī*, Ḥamīd Allāh ed., 1044-5; Hallaq, “Treatise,” 222-3.

translated listings of all species of *tarjīh*, the reader is referred to our outlines in the appendices.

Is *ilzām* a dialectical move?

Miller closes his discussion of “early period” *qiyās*-related objections with what appears a mistaken consideration of *ilzām* as “one other ‘technique’... [which] al-Juwaynī defines... in passing.”³⁹⁶ We will note, however, that this definition occurs at some remove from the listing and defining of *i’tirāḍāt* in the *Kāfiya*, and after the definitions of *al-tarjīh*, *al-su’āl*, *al-jawāb*, and *al-istishhād*. Moreover, judging from the definition itself, and subsequent usage throughout the *Kāfiya*, *ilzām* seems more akin in meaning to *elenchus* than to any particular dialectical move. Al-Juwaynī says: “And as for *al-ilzām*, it is the rebuttal/rejection (*daf*) of the statement (*kalām*) of the opponent (*khaṣm*) by means of what obliges a severance (*faṣl*) between him and such as the support for which he was responsible (*mā taḍammāna nuṣratihi*).”³⁹⁷ Miller’s translation of the same has something of a different cast to it: “It is rejecting (*daf*) P’s discussion by showing something which brings about a difference (*faṣl*) between what P says and what P was entrusted to defend.”³⁹⁸ In such a light, *ilzām* would indeed appear to be a dialectical objection — specifically, that of *ignoratio elenchi*, or the charge that an opponent has indeed proven something, but not his original claim as to the issue at stake. It is questionable as to whether this was al-Juwaynī’s intention with, and usage of, *ilzām*. At any rate, Miller closes by saying: “We shall have cause to return to this technique later in our discussion of the *ādāb al-baḥṭh*.” Surprisingly, we do find a later reference to *ilzām* in Miller’s discussion of al-Samarqandī’s *Qusṭās*, but it does not appear to be a “technique” at all, so much as a result. Miller translates: “The debate continues until P is silenced (*ifhām*) or Q is forced to accept his argument (*ilzām*).”³⁹⁹

A General Typology of *Qiyās*-Oriented *Mu’āraḍa*⁴⁰⁰

Considering the great importance, and frequent occurrence, of *mu’āraḍa* in *qiyās*-oriented juridical dialectic, I have attempted a general typology based on the hierarchies of our early *jadal* theorists. Each category and subtype will be reviewed, and

³⁹⁶ *Disputation Theory*, 134.

³⁹⁷ *Kāfiya*, 70, §173.

³⁹⁸ *Disputation Theory*, 134.

³⁹⁹ *Ibid.*, 211.

⁴⁰⁰ As culled from my study of al-Shīrāzī’s *Ma’ūna fi’l-Jadal* (Turkī ed., 262ff., §§146ff.; mostly missing from al-‘Umayrīnī ed.); al-Bājī’s *Minhāj fi’l-Tartīb al-Ḥijāj* (Turkī ed., 201ff., §§454ff.); and Ibn ‘Aqīl’s *K. al-Jadal ‘alā Ṭarīqat al-Fuqahā* (70f., §§327ff.)

it is hoped that through this exercise we will shore up our understanding of this important genus of objection, before proceeding to our analyses.

General Hierarchy

- I. *al-i'tirād 'alā al-'illa bi'l-mu'āraḍa*
 - a. *mu'āraḍat al-'illa bi'l-nuṭq*
 - b. *mu'āraḍat al-'illa bi'l-'illa*
 - i. *al-mu'āraḍa bi-'illa mubtada'a*
 - ii. *al-mu'āraḍa bi-'illat al-aṣl; which is al-farq*
 1. *farq bi-qiyās al-'illa / bi-'illat al-ḥukm*
 2. *farq bi-qiyās al-dalāla / bi-dalālat al-ḥukm*
 - a. by way of opposing Type I *qiyās al-dalāla*
 - b. by way of opposing Type II *qiyās al-dalāla*
 - c. by way of opposing Type III *qiyās al-dalāla*, which is *qiyās al-shabah*

I.a. *mu'āraḍat al-'illa bi'l-nuṭq*

- Q rejects P's 'illa (and his entire *qiyās*) by way of conveying clear and established directives from an epistemically superior source; in other words, P's *qiyās* is charged as contrary to Kitāb, Sunna, or Ijmā'. Q does not bring a counter-*qiyās* — Kitāb, Sunna, or Ijmā' have authoritatively supplanted P's *qiyās* and solved the *mas'ala*.

I.b. *mu'āraḍat al-'illa bi'l-'illa*

- Q rejects P's interpretation as to what the 'illa is, and attempts to supplant it with his own interpretation of what the 'illa is.
 - If Q rejects P's interpretation of what constitutes the 'illa in the *far'*, **he brings an entirely new counter-'illa in the far'**, which occasions a counter-*ḥukm*, and he refers it back to a counter-*aṣl*; in other words, he brings an entire counter-*qiyās* — **this is *al-mu'āraḍa bi-'illa mubtada'a* (I.b.i.)**⁴⁰¹ [It also appears to be what al-Baṣrī calls *mu'āraḍa* of *qiyās* by *qiyās*.]
 - If Q rejects P's interpretation of what constitutes the 'illa in the *aṣl*, **while not rejecting the existence of P's *ma'nā* in the far'**, he has pointed out a critical difference (*farq*) between them. They do not match, in other words, so Q rejects P's *aṣl*, and implies (or brings) a new *aṣl* which matches the *ma'nā* of the *far'*. **This is *al-mu'āraḍa bi-'illat al-aṣl; which is al-farq* (I.b.ii.)**

I.b.ii.1. *farq bi-qiyās al-'illa / bi-'illat al-ḥukm*

- Q rejects P's interpretation of the efficient *ma'nā* in the *aṣl*, and claims it to be something else which is contrary to the efficient *ma'nā* in the *far'*.
 - P: "Far' Y has *ma'nā* A, and thus *ḥukm* A, as in *aṣl* X."

⁴⁰¹ The form VIII *maṣdar ibtidā'* carries the sense of "start, beginning," with *ibtidā'an min* connoting "from the beginning" or from the start." Perhaps the best way to understand 'illa *mubtada'a*, then, is as "a fresh/original 'illa, brought anew by Q." Q, in other words, has spent little or no effort in undermining P's *qiyās*, but has brought an entirely new *qiyās al-'illa* to replace it, consisting of completely different components.

- Q: “The *ma’nā* in *aṣl* X is B, and the *ma’nā* in *far’* Y is –B.”
- Q is thus insisting that P’s *aṣl* X be rejected, without rejecting P’s *ma’nā* A in the *far’*.⁴⁰²

I.b.ii.2. *farq bi-qiyās al-dalāla* / *bi-dalālat al-ḥukm*

- Q rejects P’s interpretation of the efficient *ma’nā* in the *aṣl*, and brings a *dalīl* to the contrary. Thus he supplants P’s *qiyās*-reasoning with some version of *qiyās al-dalāla*.
 - If, for example, P’s *dalīl* indicating the efficient *ma’nā* in *aṣl* X is *ḥukm* A (which is known to be ruled for *far’* Y), and thus *ḥukm* B of *aṣl* X should also be ruled for *far’* Y (Type I *qiyās al-dalāla*), and Q rejects that *ḥukm* A is a *dalīl* for the efficient *ma’nā* in *aṣl* X; then Q has rejected P’s *aṣl* as an *aṣl* for *qiyās al-dalāla*, and brings a counter-*aṣl* whose *ḥukm*-indicanant matches the *ḥukm*-indicanant of *far’* Y. **This is *farq bi-qiyās al-dalāla* (against P’s Type I *qiyās al-dalāla*) by way of opposing Type I *qiyās al-dalāla* (I.b.ii.2.a.)**
 - P: “*Far’* Y has indicant-*ḥukm* A, and thus it should also have solution-*ḥukm* B, as in *aṣl* X (which has indicant-*ḥukm* A and solution-*ḥukm* B).”
 - Q: “The *ma’nā* in *aṣl* X is indicant-*ḥukm* C, but the *ma’nā* in *far’* Y is indicant-*ḥukm* –C, as in *aṣl* Z (which has indicant-*ḥukm* –C). And since *aṣl* Z also has solution-*ḥukm* –B (the opposite of P’s proposed solution-*ḥukm*), then the solution-*ḥukm* for *far’* Y should also be –B.”
 - [NB: Q has rejected P’s indicant-*ḥukm* A in *aṣl* X, but not in *far’* Y, by pointing out that the *ma’nā* of *aṣl* X is in fact indicated by *ḥukm* C (while *far’* Y has, in addition to *ḥukm* A, *ḥukm* –C). He has thus rejected P’s *aṣl* X, and produced a new *aṣl* Z which matches *far’* Y in terms of indicant *ḥukm* –C, and thus transferred solution –B (also known for *aṣl* Z) to *far’* Y. Q has supplanted P’s Type I *qiyās al-dalāla* with another Type I *qiyās al-dalāla*.]
 - If, for example, P’s *dalīl* indicating the efficient *ma’nā* in *aṣl* X is *waṣf* A (which also obtains in *far’* Y), and thus *ḥukm* B of *aṣl* X should also be ruled for *far’* Y (*qiyās al-shabah*), and Q objects, claiming that a *ḥukm* A in *aṣl* X leads to *ḥukm* B in *aṣl* X, but *far’* Y has *ḥukm* –A which should lead to its having *ḥukm* –B; then Q has rejected P’s *qiyās al-shabah*, but not his *aṣl*. Instead, he uses P’s *aṣl* as a *naẓīr* (alike in appearance, but different in legal status), and argues that *aṣl* X’s *ḥukm* A and *ḥukm* B relationship indicate that *far’* Y (having *ḥukm* –A) should have *ḥukm* –B. **This is *farq bi-qiyās al-dalāla* (against P’s *qiyās al-shabah*) by way of opposing Type II *qiyās al-dalāla* (I.b.ii.2.b.)**
 - P: “*Far’* Y has *waṣf* A, and thus it should also have *ḥukm* B, as in *aṣl* X (which has *waṣf* A and *ḥukm* B).”
 - Q: “*Aṣl* X and *far’* Y indeed share *waṣf* A; but each is the *naẓīr* of the other. And, in *aṣl* X, *ḥukm* A leads to *ḥukm* B, but *far’* Y has *ḥukm* –A, so it must have *ḥukm* –B.”
 - [NB: Q has not objected to *waṣf* A in either *aṣl* or *far’*, nor has he rejected the *aṣl*. Rather, he opposes how P argues from

⁴⁰² This is confirmed by al-Shīrāzī’s second *wajh* of P’s response to Q’s *farq*, where P asks: “Don’t you see/opine (*alā tarā*) that [*aṣl* and *far’*] are, as regards [*ma’nā* A], equivalent; so this provides indicant that they are equal/alike (*siyyān*)?” (al-Shīrāzī, *Ma’ūna*, Turkī ed., 263, §149).

the *aṣl* (*qiyās al-shabah*), and has supplanted this with a different argument (Type II *qiyās al-dalāla*), from the same *aṣl*.]

- If, for example, P's *dalīl* indicating the efficient *ma'nā* in *aṣl* X is *ḥukm* A (which is known to be ruled for *far'* Y), and thus *ḥukm* B of *aṣl* X should also be ruled for *far'* Y (Type I *qiyās al-dalāla*), and Q objects, claiming that a *ma'nā* (C) in *aṣl* X is the opposite of a *ma'nā* (–C) in *far'* Y, then Q brings a different *aṣl* Z (which shares *ma'nā* –C, but has *ḥukm* –B), and transfers its *ḥukm* (–B) to *far'* Y; then Q has rejected both P's Type I *qiyās al-dalāla*, and his *aṣl*, and supplanted them with a *qiyās al-shabah* from a new *aṣl*. **This is *farq bi-qiyās al-dalāla* (against P's Type I *qiyās al-dalāla*) by way of opposing Type III *qiyās al-dalāla*, which is *qiyās al-shabah* (I.b.ii.2.c.)**
 - P: "Far' Y has indicant-*ḥukm* A, and thus it should also have solution-*ḥukm* B, as in *aṣl* X (which has indicant-*ḥukm* A and solution-*ḥukm* B)."
 - Q: "Aṣl X has *ma'nā* C, but *far'* Y has *ma'nā* –C. Thus, I supplant your *aṣl* X with *aṣl* Z, (which has *ma'nā* –C and *ḥukm* –B), and transfer its *ḥukm* –B to *far'* Y."
 - [NB: Q has not denied P's indicant-*ḥukm* A in either *aṣl* X or *far'* Y; rather, he has distinguished a *farq* between a *ma'nā* of *aṣl* X and *far'* Y. Thus he rejects *aṣl* X, and supplants it with *aṣl* Z (with opposite *ḥukm* to *aṣl* X).]

Key Differences between the Types of *Qiyās*-Oriented *Mu'āraḍa*

- I.a. *mu'āraḍat al-'illa bi'l-nuṭq*
 - Q does not bring a counter-*qiyās*, but simply destroys P's *qiyās* by showing that it contradicts the Kitāb, Sunna, or Ijmā'.
- I.b.i. *al-mu'āraḍa bi-'illa muḥtada'a*
 - Q rejects P's interpretation of the 'illa in the *far'*, and supplants it with a counter-'illa, occasioning a counter-*ḥukm*, extended from a counter-*aṣl*. Q brings an entirely new counter-*qiyās*, with all new components.
- I.b.ii.1. *farq bi-qiyās al-'illa / bi-'illat al-ḥukm*
 - Q does not reject P's *ma'nā* in the *far'*, but insists that P's *aṣl* be rejected due to a *farq* between an efficient *ma'nā* of the *aṣl* and the *far'* (the *farq* is between efficient *ma'nās* — i.e., between what Q claims to be the 'illas). Q brings another *aṣl* in which the same *ma'nā* as we find in the *far'* is efficient, and he does a new *qiyās al-'illa*.
- I.b.ii.2.a. *farq bi-qiyās al-dalāla by way of opposing Type I qiyās al-dalāla*
 - Q does not reject P's *dalīl/ma'nā* in the *far'*, but insists that P's *aṣl* be rejected due to a *farq* between another *dalīl/ma'nā* of the *aṣl* and the *far'* (the *farq* is between *ma'nās* or their *dalīls* — 'illa cannot be determined). Q brings another *aṣl* in which we find the same indicant-*ḥukm* as we find in the *far'*, and he does a new Type I *qiyās al-dalāla*.
- I.b.ii.2.b. *farq bi-qiyās al-dalāla by way of opposing Type II qiyās al-dalāla*
 - Q does not reject P's *dalīl/ma'nā* in either *aṣl* or *far'*, but insists that P's *aṣl* has the opposite indicant-*ḥukm* to that of the *far'*, and so the *far'* should have the opposite solution-*ḥukm* to that of the *aṣl* (the *farq* is between indicant-*ḥukms* — 'illa cannot be determined). Q thus uses P's *aṣl* as a *naẓīr* to the *far'*, and he does a new Type II *qiyās al-dalāla* from the same *aṣl*.

- I.b.ii.2.c. *farq bi-qiya's al-dalāla* by way of opposing Type III *qiya's al-dalāla*, which is *qiya's al-shabah*
 - Q does not reject P's *dalīl/ma'nā* in either *a'sl* or *far'*, but insists that P's *a'sl* be rejected due to a *farq* between another *ma'nā* of the *a'sl* and the *far'* (the *farq* is between *ma'nās* — *'illa* cannot be determined). Q brings another *a'sl* which shares the same *ma'nā* as we find in the *far'*, and he does a new *qiya's al-shabah*.

Miller on the “Signs of Defeat” of “Early Period” Juridical *Jadal*

The two primary works (*Ma'ūna* and *Minhāj*) constituting our *jadal*-theory lens for analysis of dialectical material in the *Ikhtilāf al-ʿIrāqīyyīn* do not contain chapters dedicated to disputation procedure *per se*. Nor does al-Baṣrī's *K. al-Qiyās al-Sharʿī*, although Hallaq has provided a helpful overview of procedure in his study of that treatise.⁴⁰³ Miller locates pertinent discussions in other texts, however. As regards “the signs of defeat” discussed by al-Khaṭīb al-Baghdādī, Ibn Ḥazm, Ibn ʿAqīl, and al-Juwaynī, he remarks: “The vocabulary of their accounts is fairly standard and their authors’ debt to the dialectic of the theologians is obvious.”⁴⁰⁴ Of course, as this dissertation hopes to demonstrate, this latter statement is far from obvious. The juridical dialectic which our early *jadal* theorists have systematized is the much-refined culmination of centuries of teaching and practice, harking back to the proto-system juridical *jadal* of al-Shāfiʿī's time and before.

Among the “signs of defeat” listed by Miller (and with clear predecessors in the dialectic of the *Umm*, as we shall see), we find what he terms “self-contradiction (*munāqaḍa*)” and “R’s rejection of *a priori* knowledge or his being forced to say something absurd.”⁴⁰⁵ As for the first, Miller cites al-Khaṭīb al-Baghdādī, al-Juwaynī, and Ibn Ḥazm. Following his citations, however, we do not find “*munāqaḍa*” *per se* as a “sign of defeat;” nor is this surprising, as one would suspect the term — a cognate of *naqd* — would be reserved for the dialectical *charge* which might, or might not, lead to the defeat-by-contradiction of one so accused. Rather, among the “kinds of termination [of the debate] (*aqsām al-inqitāʿ*)” of al-Khaṭīb al-Baghdādī, we find: “that some of his statements contradict each other (*an yanquḍa bi-baʿḍi kalāmihi baʿḍan*).”⁴⁰⁶ More importantly, we find among the “modes of shifting [topic] and termination [of the debate] (*wujūh al-intiqāl waʿl-inqitāʿ*)” of al-Juwaynī: “that there be, in what casts doubt upon him of his statement, incoherence and contradiction (*tahāfut wa tanāquḍ*), some of it rejecting some other part of it.”⁴⁰⁷ The term *tanāquḍ* is of tremendous import in our upcoming analyses of the *Ikhtilāf al-ʿIrāqīyyīn*. For now, we will only mention: 1) the

⁴⁰³ See our outline earlier in this chapter.

⁴⁰⁴ *Disputation Theory*, 139.

⁴⁰⁵ *Disputation Theory*, 140. As we shall see: 1) these are among the primary objectives of dialectic in general; 2) the primary functions of the ubiquitous *araʿayta* and *alā tarā* formulae of the *Ikhtilāf al-ʿIrāqīyyīn* are to press the opponent to contradiction or absurdity; and 3) these formulae are more ancient even than Abū Ḥanīfa, who makes plentiful use of them.

⁴⁰⁶ *al-Faqīh waʿl-Mutafaqqih*, ʿAzzāzī ed., ii.111.

⁴⁰⁷ *Kāfiya*, 551ff., §§820ff.; at 553, line 15.

descriptor “*qawl mutanāqid*” renders final judgment upon an opponent’s argument some 26 times in the *Kitāb al-Umm*; 2) in this same compendium, *tanāquḍ* and *mutanāqid* together enjoy some 40 occurrences, all in dialectical contexts; and 3) al-Shāfi‘ī thrice reduces the opposing opinion to a *qawl mutanāqid* in the *Umm* Version of the *Ikhtilāf al-‘Irāqīyyīn*. Finally, pertaining to the “quality of the one cut off [in debate]” (*ṣifat al-munqaṭi*) of Ibn Ḥazm, we find: “that he produce a *ḥukm*, then contradict it” (an *yahkuma bi-ḥukmin thumma yanquḍuhu*) along with two further references to *tanāquḍ*.⁴⁰⁸ Clearly, then, *munāqaḍa* refers to the *i’tirāḍ*, not the *inqiṭā’* — this latter is described in terms of *tanāquḍ* and “an *yanquḍa* X.”

Also of clear relevance to the dialectic of the *Umm* is the opponent’s “being forced to say something absurd,” the obvious objective of myriad *reductio ad absurdum* arguments recorded for many of the jurists therein. Miller has cited Ibn ‘Aqīl and Ibn Ḥazm for this “sign of defeat,”⁴⁰⁹ but we find the clearest expression in al-Khaṭīb al-Baghdādī’s *al-Faqīh wa’l-Mutafaqqih*. In fact, his presentation of “signs of defeat” is the most straightforward of all, and may be outlined as follows:⁴¹⁰

Kinds of Termination [of the Debate] (*Aqsām al-Inqitā’*)

- 1) Silence in response due to incapability of answering (*al-sukūt ‘an al-jawāb li’l-‘ajz*)
- 2) That he justify the ‘*illa* to no avail (*an yu‘allila wa lā yujdī*)
- 3) That he contradict part of his *kalām* by another part (*an yanquḍa bi-ba‘ḍi kalāmihi ba‘ḍan*)
- 4) That his *kalām* leads to an absurdity/impossibility (*an yu‘addiya kalāmuhu ilā al-muḥāl*)
- 5) That he shift ground from indicant to indicant (*an yantaqila min dalīlin ilā dalīlin*)
- 6) That he be asked about one thing, but give answer about another (*an yus‘ala ‘an al-shay’ fa yujibu ‘an ghayrihi*)
- 7) That he deny necessary truths (*an yajhada al-ḍarūrāt*), and reject what is empirical (*wa yadfa‘a al-mushāhadāt*), and engage in eristic argument and lies in the disputation (*wa yasta‘mila al-mukābara wa’l-buht fi’l-munāzara*)

Moving on, Miller notes that “Ibn ‘Aqīl brings in several signs connected with the failure of R or Q to fulfill their duties as required by the ‘four questions’” Having listed them,⁴¹¹ he concludes: “The relation of these signs to the four questions is so obvious that it requires no comment other than to note how the jurists on the whole took over elements of the theologians’ teaching on disputation.”⁴¹² Although I would agree that some portion of the “signs of defeat” (in all cases, not just Ibn ‘Aqīl) are

⁴⁰⁸ *Taqrīb*, ‘Abbās ed., 197.

⁴⁰⁹ *K. al-Jadal*, 72, §335; and *Taqrīb*, ‘Abbās ed., 188.

⁴¹⁰ *al-Faqīh wa’l-Mutafaqqih*, ‘Azzāzī ed., ii.111.

⁴¹¹ From *K. al-Jadal*, 71-2, §§331 and 336.

⁴¹² *Disputation Theory*, 140-1.

closely tied to the approved questions of dialectic — as they naturally would be —, I would again disagree that this constitutes evidence of a juristic “take over” from “the theologians.” We cannot overstress: cross-germination between dialectical traditions stretching back at least to the second century H, in combination with the “many hats” of our polymath theorists, make much more sense of later overlaps and parallels than an absolute priority of “theological” *jadal*-theory.⁴¹³

Returning to Miller’s “new developments,” we see that he draws two examples from al-Juwaynī: 1) the incorrect ordering of questions; and 2) the giving of proof when only opinion is elicited.⁴¹⁴ Intriguingly, Miller now claims:

“al-Juwainī’s account [of the “signs of defeat”] is also influenced by Aristotle. Thus, he gives four of Aristotle’s five criticisms of an argument....”

These “signs of defeat” of al-Juwaynī he now lists, citing the *Kāfiya*⁴¹⁵ and drawing our attention to “SE 161a26 ff. [sic].”⁴¹⁶ Unfortunately, this argument and citation have proven difficult to follow on several counts.⁴¹⁷ Nevertheless, I have attempted to outline both citations in parallel so that we might gauge for ourselves to what extent al-Juwaynī is “influenced by Aristotle” in this matter of *inqiṭāʿ*:⁴¹⁸

⁴¹³ As for Miller’s recognition that “new developments” have taken place with regard to the “signs of defeat” in juridical *jadal* treatises, we would mark this as an aprioristic interpretation of the *differences* of juridical *jadal*. We will note that Miller has before made a similar claim with regard to the “questions.” This is a common problem of genetic projects in the study of early Islam: what is similar in the subject system is presumed to have been “borrowed” or “taken over” from what is (or in this case, is deemed to be) an older system; what is *dissimilar* in the subject system is presumed to constitute an expansion upon (or, in more extreme examples, a “denaturalization” of) the “borrowed” or “taken over” predecessor system. The upshot is that formulators of the subject system are largely deprived of any originitive or creative agency. With regard to the historical development of Islamic dialectical systems, we would argue that a common collective of argument epistemes at the dawn of Islam — along with: 1) subsequent parallel and divergent development according to the dictates of variant (speculative vs. normative) scholarly projects, and 2) cross-germination between these projects at every stage of development — may best account for both the similarities and dissimilarities of theological and juridical *jadal*. At the very least, the dialectical material in works such as the *Kitāb al-Umm* problematizes any notions of an absolute priority for fourth/tenth century theological *jadal* theory.

⁴¹⁴ *Disputation Theory*, 141.

⁴¹⁵ Maḥmūd ed., 557.

⁴¹⁶ *Disputation Theory*, 141 and n.140.

⁴¹⁷ 1) the Bekker number 161a26 properly belongs to *Topics*, VIII.11; 2) “Aristotle’s five criticisms of an argument” does not occur until 161b19; and 3) it is not an easy task to match al-Juwaynī’s account (or Miller’s interpretation thereof) to Aristotle’s five conditions.

⁴¹⁸ NB: we have not assumed that al-Juwaynī’s and Aristotle’s ordering were presumed by Miller to match. This parallel presentation is merely to set the contents of each in close proximity for comparison.

(Kāfiya, 556ff., §832)	(Top. VIII.11, 161b19ff.; trans. Smith)
1) “His incapability (‘ajz) — such as is in fact an <i>inqiṭāʿ</i> — may be due to a gap (<i>nuqṣān</i>) in his knowledge of the prescriptions of dialectic (<i>rusūm al-jadal</i>) and its <i>uṣūl</i>” (Miller: “ignorance of dialectic”) • “he doesn’t know the manner (<i>kayfiyya</i>) of: positing (<i>waqʿ</i>) the <i>adilla</i> in their <i>loci</i> (<i>mawāḍiʿ</i>); or of their memorization (<i>ḥifẓ</i>); or of their <i>tartīb</i> (ordering); or of the modes of achieving <i>elenchus</i> (<i>wujūh al-ilzāmāt</i>)” 2) “He may be skilled in the <i>rusūm al-jadal</i>, except for a lacuna of knowledge (<i>nāqiṣ al-ʿilm</i>) with regard to the modes of indicant (<i>wujūh al-adilla</i>) and the most certain of them” (Miller: “[ignorance of] proof”) 3) “He may be sound in the <i>rusūm al-jadal</i> and the <i>adilla</i>, yet he is brought to a stop (<i>yanqaṭiʿu</i>) due to an invalidity (<i>fasād</i>) inherent to the very proclamation (<i>maqāla</i>) the support of which he intends” 4) “He may be sound in all, except that he will not refrain — for all that is brought to him — from eliminating the general/imprecise by way of the particular/precise (<i>rafʿ al-jumla biʾl-taḥṣīl</i>), so that his <i>inqiṭāʿ</i> should never materialize” 5) “When he shifts (<i>intaqala</i>) from a rank-in-the-hierarchy (<i>darja</i>) [of question/objection] to what is before it [e.g., from <i>naqd</i> to <i>manʿ</i>]” 6) “When he misnames his move/charge” • [examples of <i>naqd</i> incorrectly claimed] • “he does not complete what he claimed, according to what he claimed, except by way of addition (<i>ziyāda</i>) or leaving out (<i>nuqṣān</i>) or alteration (<i>taghyīr</i>) re: what he claimed as valid (<i>ṣaḥīḥ</i>), besides that which he set forth regarding it, afterwards” (Miller: “inadequate proof either because the disputant has left out something or said too much”)	“Five criticisms of an argument in itself” 1) “whenever, from the premisses asked, neither what was proposed nor anything else at all is concluded (the premisses used to get the conclusion being false or unacceptable, either all or most of them), and the conclusion does not come about either when some premisses are taken away, or when some are added, or when some are taken away and others added” 2) “if the deduction is not about the thesis (and is from the sorts of premisses, and in the same way, as mentioned before)” 3) “if a deduction does come about with certain premisses added, but these are inferior to the ones asked for and less acceptable than the conclusion” 4) “if [a deduction] comes about with certain premisses taken away (for sometimes more premisses are taken than is necessary, so that it is not in virtue of their being so that the deduction comes about)” 5) “if [the deduction] is from premisses more unacceptable and less convincing than the conclusion. Or if it is from premisses which are true but require more work to demonstrate than the problem”

In the table above, I have attempted to match Miller’s list with my reading of al-Juwaynī at Miller’s citation, and have failed to find any match at all for “sound proof of a thesis other than the one at hand.”⁴¹⁹ As far as any similarity between al-Juwaynī’s cited discussion and Aristotle’s five criticisms, I am very hard pressed to find any at all, although the final “except by way of *ziyāda* or *nuqṣān* or *taghyīr*” is reminiscent of Aristotle’s first.

On the other hand, and completely outside of Miller’s objective here, there is a striking feature in al-Juwaynī’s opening: “*nuqṣān ‘ilmihi bi-rusūm al-jadal wa uṣūlihi*” which ties his *Kāfiya* — as it ties the works of other authors — to Aristotle’s *Topics*. I am speaking of the concern expressed for: 1) the *kayfiyyat waḍ‘ al-adilla mawāḍi‘hā* (which we might conceivably render “the method of positing/locating the *adilla* in their *topoi*”); 2) the *kayfiyyat ḥifẓihā* (“the method of memorizing [the *adilla/topoi*]”); and 3) the *kayfiyyat tartībihā* (“the method of arranging/ordering [the *adilla/topoi*]”). Rendered thus, a significant parallel to Aristotelian dialectic is evident, and it is not a far cry to suggest an Aristotelian influence in these particular concerns. It is another question entirely, however, as to positing when, where, and how such an influence came to be.⁴²⁰

⁴¹⁹ Miller, claiming that al-Juwaynī lists four of Aristotle’s criticisms, lists them himself as: “[1] ignorance of dialectic [2] or proof, [3] sound proof of a thesis other than the one at hand, and [4] inadequate proof either because the disputant has left out something or said too much” (*Disputation Theory*, 141; brackets represent my assumption as to how these three phrases were to be divided into four criticisms).

⁴²⁰ To say that al-Juwaynī is “influenced by Aristotle” is not to contribute very much at all, in fact, especially when a comparison between purported “influence” and “influenced” with regard to *inqiṭā‘* reveals so little, and when the greater Islamic corpus of argument epistemes (to which al-Juwaynī’s *Kāfiya* was a relatively late contribution) was already woven with innumerable and untraceable threads. Some of these threads were doubtless Aristotelian in the fullest sense of the word, straight from the *Organon* through a variety of languages, and across several eras and far-flung teaching centers. But other threads were parallels of non-Aristotelian inspiration, both Islamic and pre-Islamic; and some of these latter were so ancient as to have potentially inspired the flowering of “Hellenic” philosophy itself (see, among other works, Walter Burkert’s *Orientalizing Revolution: Near Eastern Influence on Greek Culture in the Early Archaic Age*). Moreover, there were doubtless threads whose distant origins were Aristotelian, but whose long periods of development in different regions, and according to the dictates of different intellectual projects, transformed them into something unique unto themselves.

Miller on the *Adab* of “Early Period” Juridical *Jadal*

With regard to the prescribed dialectical procedure (*adab al-jadal*) of his jurist authors, Miller maintains his now familiar stance: “These basic rules of conduct during the debate were taken over by the jurists from theological *jadal*.”⁴²¹ Again, this assumption is problematic in light of the dialectical material from the *Umm*, marked as it is by a remarkable formulaic consistency and orderly Q&A procedure. Our stance against an absolute priority of fourth/tenth century theological *jadal*-theory literature as a starting point for juridical *jadal* theory remains as we have previously expressed it. In addition to reasserting this “take over” paradigm, Miller observes — with regard to the *adab al-jadal*: “Ibn Ḥazm also has elements of this chapter in his own account of disputation.”⁴²² Additionally, he provides an informative translation of al-Juwaynī’s review of the responsibilities of questioner and respondent.⁴²³ We will pause here, however, to note certain important characteristics of Ibn Ḥazm’s *Taqrīb*, and to ponder why it has received so little attention in Miller’s larger project.

The significance of this work for the developmental histories of fifth/eleventh century philosophical and/or juridical *jadal* theory seems self-evident: the *Taqrīb* represents an early system for applying Aristotelian — and Stoic — logic to legal reasoning. First of all, its author, the famed Andalusian Ḥazmī Ibn Ḥazm (d.456/1063), predeceased al-Shīrāzī (the earliest author upon whom Miller depends for juridical *jadal*) by two decades. Second of all, as suggested by the work’s full title: *al-Taqrīb li-Ḥadd al-Manṭiq wa’l-Madkhal ilayhi bi’l-Alfāz al-‘Āmmiyya wa’l-Amthila al-Fiqhiyya*, Ibn Ḥazm supplies juridical paradigms for his expositions on syllogistic figures and moods, be they categorical or hypothetical. By way of example for the categorical, we would cite Ibn Ḥazm’s illustration of the “Barbara” mood of the first figure, with: “*kull muskir khamr, wa kull khamr ḥarām, fa-kull muskir ḥarām*.”⁴²⁴ And as for the *Bāb min al-Burhān Sharṭī al-Lafz, Qāṭi’ al-Ma’nā*, he provides the following example: “*al-taḥrīm ḥukm kull muskir, wa ba’d al-muskirāt nabīdh al-tīn idhā ghuliya, fa’l-taḥrīm ḥukm nabīdh al-tīn idhā ghuliya*.”⁴²⁵ Finally, after his *Isagoge*-style *Madkhal*, Ibn Ḥazm includes several chapters dedicated to disputation and its concerns, and for which Miller has cited but a few lines in his discussion of the “signs of defeat” and “the *adab al-jadal*.”

⁴²¹ *Disputation Theory*, 141.

⁴²² *Ibid.*; citing *Taqrīb*, ‘Abbās ed., 196.

⁴²³ *Ibid.*, 142; citing *Kāfiya*, 558, line -3 ff.

⁴²⁴ *Taqrīb*, Mazīdī ed., 115.

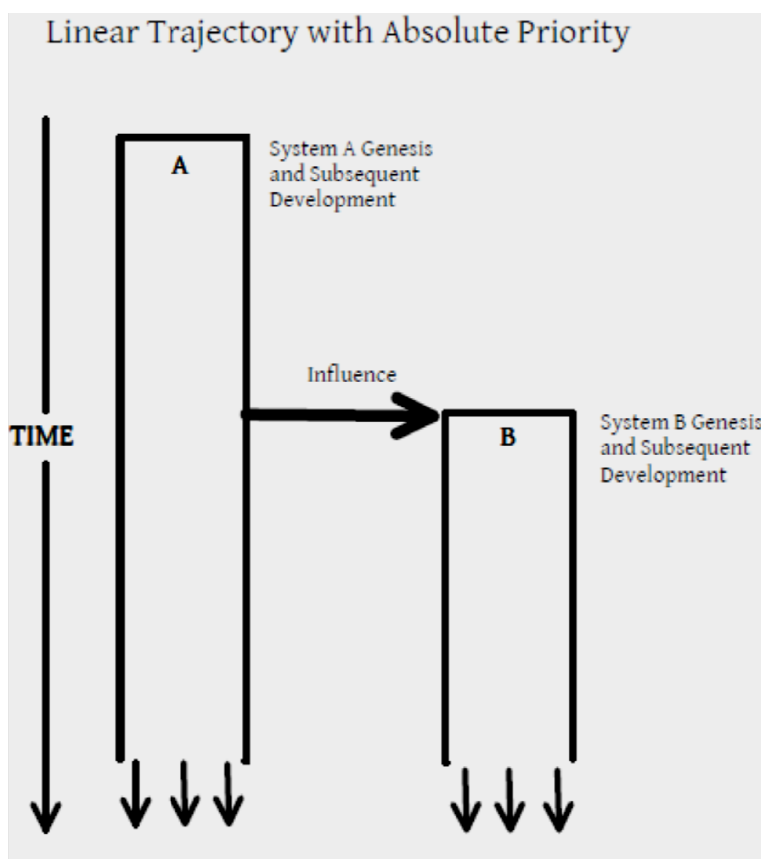
⁴²⁵ *Taqrīb*, Mazīdī ed., 128.

On the whole, the *Taqrīb* is deserving of a great deal of further research as regards the early application of Aristotelian and Stoic logic to juridical dialectic, especially considering its great wealth of juridical *masā'il* rendered into syllogistic forms.⁴²⁶ Recognizing the import of what this work illustrates also directs our attention to another concern; mainly, the parallels, overlaps, and potential influences of Aristotelian and Stoic logic with regard to the juridical *jadal* theory treatises we have introduced in this chapter. It is to this final concern we will now dedicate a brief review, before turning at last to our analyses of the *Ikhtilāf al-ʿIrāqīyyīn*.

⁴²⁶ Although our above examples both deal with intoxicants, the *masā'il* of the *Taqrīb* cover a wide variety of substantive legal domains.

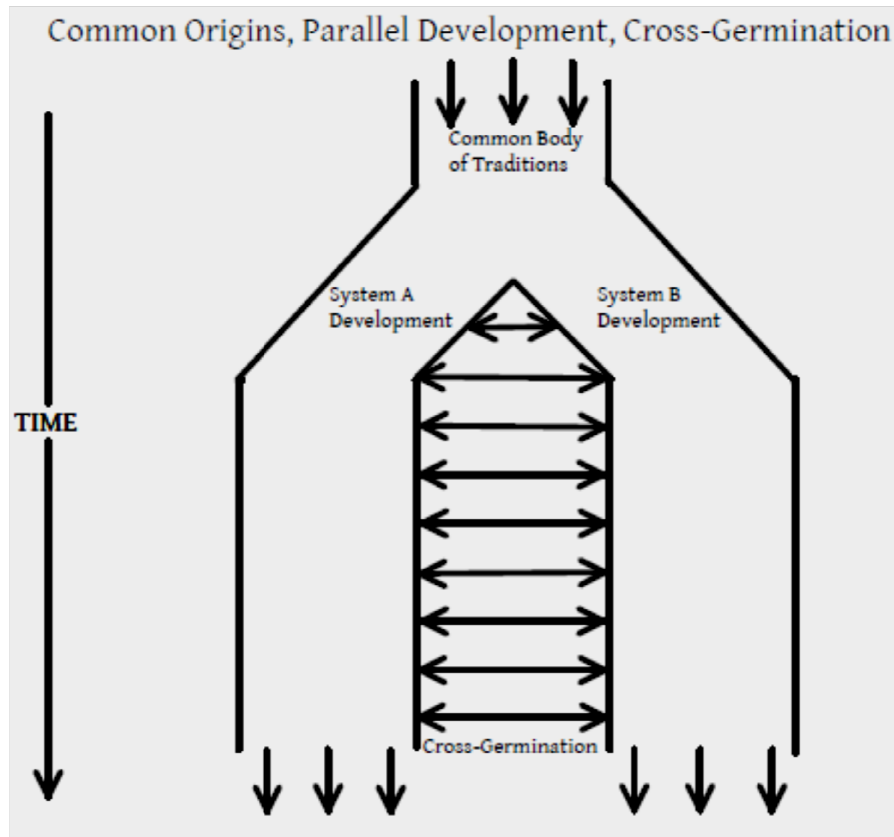
On Aristotelian Dialectic and our Early *Jadal*-Theory Texts

We hope to have sufficiently problematized the “origins and borrowing” paradigms that have arisen in previous discussions, especially with regard to the “take over” from theological *jadal* theory and the influence of Aristotle. On the whole our stance is supported by the dialectical material of the *Kitāb al-Umm*, and the evidence which our analyses of the *Ikhtilāf al-ʿIrāqīyyīn* will soon provide. The general picture is that there was much more going on with regard to the proto-system teaching and practice of dialectic across intellectual projects than what simplistic, linear trajectories of absolute priority can explain. In order to quickly illustrate what we mean by “absolute priority,” we might consider the following diagram.



In this schema: 1) System B is not considered as having any real existence prior to the genesis and partial development of System A; 2) System B owes its genesis entirely to System A; and 3) no cross-germination occurs between systems subsequent to the unidirectional influence which generated System B. In terms of theological and juridical *jadal*, the arrow representing unidirectional influence occurs on the timeline subsequent to the appearance of systematic treatises for theological *jadal*-theory.

In contrast to this schema, we would offer another with regard to the development of both theological and juridical systems of *jadal*. Although the following diagram is still overly-simplistic (not taking into account, among other things, additional systems developing in parallel, and systems-within-systems), it should yet suffice to highlight the major themes of our developmental model.



Besides a great many more arrows, it is hoped that this schema portrays the following: 1) the absence of concrete points of genesis for either system; 2) the continuity of both systems from a common body of traditions; 3) the subsequent divergence and parallel development of both systems (according to the dictates of their intellectual projects); and 4) the bidirectional cross-germination between systems at every stage of development. In terms of theological and juridical *jadal*, the singular stem and diagonal bases of the branches of our diagram represent the “proto-system” period of development for both. The appearance of systematic theory-literature is understood to have occurred for both systems subsequent to this, at roughly the same time; i.e., at the start of the great literary fluorescence of the fourth/tenth centuries.

Now, in terms of “Greek” influence (Aristotelian and Stoic logic and dialectic, for our concerns), we are faced with a number of difficulties. Although we do not doubt

that the teachings and literature of Hellenic logic, dialectic, and rhetoric were woven into the developmental stages of our schema above, throughout the timeline, it is nearly impossible to identify distinct threads unless the literary material under examination makes distinct reference to these teachings (or is formulated in plain consonance with, e.g., a book of the *Organon*). Compounding this is that fact that “parallels” simply cannot be trusted as evidence for “influence,” especially in the proto-system period with which we are most concerned.⁴²⁷

The upshot of all this is that — for both the proto-system period of Islamic juridical *jadal* teaching and practice, and the early treatises from which we have fashioned our analytical lens — we will refrain from calling “parallels” anything but “parallels.” Positive assertions of Aristotelian or Stoic “influence” require indicants which, in the main, do not manifest themselves in our texts clearly enough to support assertions either way.⁴²⁸ Although, in the light of parallels, the *possibility* of “influence” will always be accepted, the *probability* of such influence will not. Unless, that is, an adequate *dalīl* may be raised in support. It is in this spirit that the “parallels” of our *jadal*-theory texts with the following Aristotelian and Stoic dialectical concerns will be discussed.

On Aristotelian Dialectic and Early Juridical *Jadal*-Theory

In his abstract, Miller states the following:⁴²⁹

“Although the earliest writings on dialectic (from around the 10th century) are fairly free of direct Aristotelian influence, there are coincidences of theme and treatments. But after jurisprudence had assimilated the technique of theological dialectic, its own theory became increasingly influenced by logical terminology and techniques.”

⁴²⁷ A distinction may be drawn between the *practice* of various species of reasoning and the elaboration of *systematic theories* of reasoning. Among other things, early Muslim intellectuals did not need to learn inductive, deductive, or analogical reasoning from the *Organon*, or from any other theory-system for that matter. These are species of reasoning common to all human societies, with or without accompanying theory-systems. That is to say, the *practice* of inductive, deductive, and analogical argument in early Islamic disputation, across thematic domains, does not presuppose dependence upon a systematized theory of argument, even though such systems were present in the broader intellectual landscape. It is not our point to say that precursor argument epistemes were not drawn upon in Islamic intellectual projects; we are merely problematizing the ascription of origins to specific epistemes (Hellenic, Judaic, Iranian, etc.) on the basis of parallels alone.

⁴²⁸ Obvious exceptions would include works such as Ibn Ḥazm’s, but the texts of our *jadal*-theory lens do not belong to the sort of intellectual project in which he was engaged, and do not bear the marks of consciously syllogistic argument engineering. They do, however, bear the marks of transmission from older juridical *jadal* teachings, going back at least as far as Ibn Surayj.

⁴²⁹ Miller, *Disputation Theory*, iii.

With the obvious exception of “jurisprudence... assimilated the technique of theological dialectic,” I am in complete agreement with Miller with regard to: 1) his cautious phrasing of “coincidences of theme and treatments;” and 2) the assessment that juridical *jadal* theory “became increasingly influenced by logical terminology and techniques.” This latter has also been asserted for the realm of legal theory in general.⁴³⁰

It is our purpose now to very briefly review a few of the more obvious discussions and chapter headings from the *Organon*, in order simply to highlight parallels and areas of potential influence in the realm of early juridical *jadal* theory as we have come to understand it in this chapter. The reader is reminded to bear in mind that the larger domain of Aristotle’s argument episteme may be qualified as *formal*, *sylogistic logic*, much preoccupied with the determination of valid syllogistic moods. In the more particular domain of dialectics, Aristotle’s argument episteme (with its focus on predicables) will also appear very different from the argument episteme evident in our *jadal*-theory treatises. Such being the case it is the more general themes and methods (rather than substance) which we will come to highlight. In the main, our focus will center upon material from the *Prior Analytics*, *Topics* and *Sophistical Elenchi*, with special attention to the domain of objection, the organizing principle of *topoi*, and the identification of fallacies. Importantly, we must advise the reader that what follows is not at all a thorough comparative analysis of Aristotelian and *jadal*-theory argument forms, and is not intended to be.⁴³¹

**Reduction *ad impossibile* (εἰς τὸ ἀδύνατον; “[argument] to the impossible”);
and Proof *per impossibile* (διὰ τοῦ ἀδυνάτου; “[argument] by means of the impossible”)**

There are a number of parallels between these species of argument as described by Aristotle and certain species of *istidlāl* (e.g., *qiyās al-‘aks*) and objection (e.g., *naqqd*) in our *jadal*-theory treatises. The bulk of Aristotle’s discussions occur in the *Prior Analytics*, and a few excerpts should suffice in bestowing the general disposition of his arguments by way of, or to, the impossible. As for *per impossibile*, we learn, among other things, that it is a kind of “hypothetical” proof:⁴³²

“Now every demonstration and every syllogism must prove that some attribute does or does not apply to some subject, and that either

⁴³⁰ See Hallaq, *History*, 39-40, and 132ff.

⁴³¹ Such a project might constitute a dissertation all its own, and must remain among our “open doors” for further research.

⁴³² *An. Pr.* I.23, 40b17ff.; trans. Tredennick.

universally or in a particular sense. Further, the proof must be either ostensive or hypothetical. One kind of hypothetical proof is proof *per impossibile*. First, then, let us deal with ostensive proofs; for when we have shown the conditions which govern these, the facts will also be made clear with regard to proofs by reduction *ad impossibile* and to hypothetical proofs in general.”

As for arguments *per/ad impossibile* and the “procedure of hypothetical proof,” we learn:⁴³³

“It is evident, then, that ostensive proofs are carried out by means of the figures already described. That proofs by reduction *ad impossibile* are also carried out by their means will be clearly shown by what follows. Everyone who carries out a proof *per impossibile* proves the false conclusion by syllogism and demonstrates the point at issue *ex hypothesi* when an impossible conclusion follows from the assumption of the contradictory proposition. *E.g.*, one proves that the diagonal of a square is incommensurable with the sides by showing that if it is assumed to be commensurable, odd become equal to even numbers. Thus he argues to the conclusion that odd becomes equal to even, and proves *ex hypothesi* that the diagonal is incommensurable, since the contradictory proposition produces a false result. For we saw that to reach a logical conclusion *per impossibile* is to prove some conclusion impossible on account of the original assumption. Therefore since in reduction *ad impossibile* we obtain an ostensive syllogism of falsity (the point at issue being proved *ex hypothesi*), and we have stated above that ostensive syllogisms are effected by means of these figures, it is evident that *per impossibile* syllogisms will also be obtained by means of these figures.”

Now, the first translator of the *Prior Analytics* into Arabic,⁴³⁴ according to the *Fihrist* of al-Nadīm,⁴³⁵ was one Tīdhārī, or Tiyādūrus (= Theodorus).⁴³⁶ Transmissions of his translation show us that the “proof *per impossibile*” of the above excerpts was

⁴³³ *An. Pr.* I.23, 41a20ff.; trans. Tredennick.

⁴³⁴ It is not my intention to suggest that Aristotle’s works, or any other non-Arabic compositions, had to await translation into Arabic before they could be studied or learned by early Muslim scholars. Too often this has been assumed in modern scholarship, and often by scholars who have themselves mastered difficult foreign tongues for the sake of their own studies. Early Muslim scholars were certainly capable of doing the same, and may have been privy to Aristotelian teachings — regardless of whether or not they commanded Greek or Syriac — via the intermediary of teachers and peers. That enormous and lengthy project known as the Translation Movement was without any doubt a seminal event in early Islamic scholarship, but access to the works translated did not hinge upon their translation; a variety of conduits for the teaching and study of these works preceded the TM. Our objective in noting the early Arabic translations of certain terms and concepts is merely to highlight any parallels or divergences as may occur with regard to the Arabic formulations of our early *jadal*-theory treatises.

⁴³⁵ al-Nadīm, *Fihrist*, Ṭawīl ed., 405.

⁴³⁶ Badawī (*Manṭiq Aristū*, vol. 1, [Introduction], 16) believes this cannot be Theodore Abū Qurra, Bishop of Ḥarrān [d.210/820; a contemporary of al-Shāfi‘ī], because Ḥunayn b. Ishāq would only have been 11 years old at the time the *Fihrist* tells us this Theodorus showed his translation to him and his *aṣḥāb*. There is the possibility that this Theodore was the Bishop of Karkh, in Baghdād, but Badawī prefers to leave the question open.

rendered into Arabic as “*al-qiyās alladhī yakūnu bi-raf al-kalām ilā al-muḥāl*,”⁴³⁷ while “proofs by reduction *ad impossibile*” was rendered as “*al-maqāyīs allatī bi-raf al-kalām ilā al-muḥāl*.”⁴³⁸ Phrases such as “since the contradictory proposition produces a false result” appear as “*li-annahu yajibū ‘an naqīḍihi hādhā al-qawl al-kidhb*.”⁴³⁹ In addition to this, we may note that Goichon⁴⁴⁰ thus describes Ibn Sīnā’s (d.428/1037) usage of the term *khulf*: « l’impossible, l’absurde, au sens donné par les expressions ἡ εἰς τὸ ἀδύνατον ἀπαγωγή, *Anal. Pr. A 7, 29 b 5*; et διὰ τοῦ ἀδυνάτου qui correspond à *bil-ḥulf* (le raisonnement, τὸ συλλογίσασθαι) par l’absurde, *Anal. Pr. A 23, 41 a 31*. » Finally, we will note that an extensive discussion regarding “principles applying to syllogisms established *per impossibile*” occurs in *An. Pr. I.29*, and includes a brief reference to another hypothetical syllogism involving “a qualitative relation.” Tredennick links this latter to “A *fortiori* or analogical arguments.”⁴⁴¹

Objection (“Ἐνστάσις), or *Instantia*, or Instance

Objection, or *Instantia*, is that single contrary instance which destroys a universal claim, and thus finds a kind of general parallel in the dialectical move of *naqd*; i.e., when Q brings his *mas’alat al-naqd*, the universality of P’s claimed ‘*illa-ḥukm*’ relationship is destroyed and his *qiyās* invalidated (unless he subscribes to *takḥṣīṣ al-‘illa*). *Instantia* is discussed to some length in *An. Pr. II.26*, where we find the following definition:⁴⁴²

“An objection [Ἐνστάσις] is a premiss which is contrary to another premiss. It differs from the premiss in that it may be particular, whereas the premiss either cannot be particular at all, or at least not in universal syllogisms.”

The parallel concern with universals and particulars is intriguing, especially considering al-Baṣrī’s parameters for valid and invalid *naqd*. As we recall, he said: “When the one justifying the ‘*illa* (*mu‘allil*)’ establishes his ‘*illa*’ for the general/imprecise (*jumla*), then it is contradicted by the particular/precise (*tafṣīl*), it is not *naqd*...” and “if the *mu‘allil* establishes his ‘*illa*’ for the *tafṣīl*, then he is contradicted by the *jumla*; this is a *naqd ṣaḥīḥ*.” We will note that this is quite different from the parameters of Aristotle’s

⁴³⁷ Badawī, *Manṭiq Aristū*, vol. 1, 204, *passim*.

⁴³⁸ *Ibid.*, 207, *passim*.

⁴³⁹ *Ibid.*

⁴⁴⁰ *Vocabulaires Comparés*, 10, s.v. “Ḥulf.”

⁴⁴¹ *Prior Analytics*, Loeb ed., 354, note b; citing Alexander 324. 19. For “proving results in the figures [*ad/per impossibile*],” see: *An. Pr. I.5*, 27a14, 28a7; *I.6*, 28a23, 29, 28b14, 17; *I.7*, 29a35; etc. (more references are in the Loeb ed. index, s.v. “Reduction; *ad impossibile*”); and for comparison of *per impossibile* and other methods, see *An. Pr. II.11-14*.

⁴⁴² *An. Pr. II.26*, 69a37-69b1; trans. Tredennick.

instantia, however.⁴⁴³ As for Tīdhārī, he appears to have preferred a transliteration for this term into Arabic, rendering it “الأنسطاسيس”.⁴⁴⁴ Importantly, however, Badawī equates this to *al-muqaddima al-jadaliyya* (“dialectical premise”) in his table of contents.⁴⁴⁵

Aristotle’s *Topics*

We have touched briefly upon the *Topics* in our review of Miller on “philosophical *jadal*” in the preceding chapter. Our intention now is to highlight certain parallels between Aristotle’s dialectical method and that which has become evident from our review of the juridical *jadal*-theory texts. Certainly, the *Topics* and our *jadal*-theory treatises share a common project: systematizing the questions, methods, objectives, and procedures of dialectical disputation. Such being the case, parallel discussions abound throughout almost the entire work; and a brief overview of the structure and contents of the *Topics* is in order, that we may bring some of these to light. Our guide to the *Topics* is a renowned scholar of Aristotle’s logic, Robin Smith, and a brief outline of its structure may be culled from Smith’s introduction to his translation and commentary for Books I and VIII:⁴⁴⁶

Books I and VIII

- “describe and discuss Aristotle’s dialectical method”

Books II-VII

- “collections of individual argumentative locations”

As regards the organizing principle of the *Topics*, i.e. the “argumentative locations,” or *topoi*, themselves, Smith makes the following important observations:⁴⁴⁷

“The predicables give a highest-level classification of problems or conclusions, and thus a highest level organization of *topoi*. This is explicitly reflected in the arrangement of Books II-VII, which give *topoi* first concerning accidents (II-III), then genera (IV), then unique properties (V), then definitions (VI-VII). When we look to each of these sections, principles of organization are less obvious.... But in fact, there are patterns, and they reveal other categories of classification of conclusions which are actually more important to the *topoi* themselves (and to Aristotle’s implicit theory of logical form) than the predicables. In particular we find a number of closely related *topoi* in each of the four main divisions (i.e. for accidents, for genera, for unique properties, for definitions) which fall under three

⁴⁴³ In fact, *instantia* as objection appears most suited to dismantling an inductive argument, and seems to have little or nothing at all to do with *‘ilal* (whether “causes” or “occasioning factors”).

⁴⁴⁴ Badawī, *Mantiq Aristū*, vol. 1, 310ff.

⁴⁴⁵ Ibid., 323.

⁴⁴⁶ Smith, *Topics I and VIII*, xxxiv.

⁴⁴⁷ Ibid., xxx-xxxiii.

large classifications: *topoi* involving ‘opposites’ (*antikeimena*), *topoi* involving ‘coordinates’ and ‘cases’ [in the grammatical sense] (*sustoicha*, *ptōseis*), and *topoi* involving ‘more and less equal’. Aristotle generally presents these three groups together and in the same fixed order.”

Again, we should note that Aristotle’s overall logic episteme is one of formal syllogistic, and his discussions regarding these *topoi* will be quite different from the discussions we find for the various domains of *istidlāl* forming the organizing principle of our juridical *jadal*-theory texts. Nevertheless, the overall idea of an organizing principle based on categories of potentially problematic argument components, with the objective of “locating” the proper material for critique and refutation, is one and the same. Moreover, we will note that the predicable-categories of Aristotle’s *Topics* have their parallels in similar categories of concern to *uṣūl al-fiqh*, some of which surface with frequency throughout the categories and subdivisions of *istidlālāt* and *i’tirāḍāt*, as we have outlined them earlier in this chapter. Specifically, we would identify such categorizations as occur through genus (*jins*), property (*waṣf*), and definition (*ḥadd*).⁴⁴⁸

Location (τόπος) or *Mawḍiʿ*, and the Dialectician’s Method

More with regard to the meaning and function of *topos/topoi* may be learned from Smith’s introduction to Books I and VIII.⁴⁴⁹ Importantly: “A *topos* is a point at which the answerer’s position may be probed for attack.”⁴⁵⁰ Smith continues, however, to show two more “dimensions” to the meaning of *topos*: 1) “each *topos* serves as a location at which many arguments may be found by appropriate substitutions in the relevant form;” and 2) “the conclusion-form of the *topos* itself serves as a means of finding it when we need it.” He then proceeds to the description of mnemonic devices, “rooms,” etc., familiar to ancient treatises on debate and rhetoric. In sum: “An Aristotelian *topos* may then be described in two ways: as a point of attack in an adversary’s position, and as a location under which to file arguments.”⁴⁵¹ The very same two functions may be observed in the *istidlāl*-arrangement of our juridical *jadal*-theory treatises, regardless of their variant criteria of categorization.

⁴⁴⁸ With regard to *jins*, an examiner of this dissertation has pointed out that — although the Arabic philosophers employed the term according to the Greek tradition (meaning “genus,” something which can always be divided into “species”) — the Mutakallimūn used *jins* in a different sense; namely, as meaning “the minimal species.”

⁴⁴⁹ Smith, *Topics I and VIII*, xxiv-xxviii. In addition to Smith, see Eleonore Stump’s *Dialectic and its Place in the Development of Medieval Logic* (especially at 11-30, “Dialectic and Aristotle’s *Topics*”), for what one examiner of this dissertation describes as “the best description of Aristotelian Dialectic in the English language.”

⁴⁵⁰ Ibid., xxvii.

⁴⁵¹ Ibid., xxviii.

Perhaps the most significant parallels begin to surface once we become familiar with dialectical procedure as described by Aristotle. Of particular import is the comparison of the dialectician's method over and against that of the individual philosopher:⁴⁵²

“He who is about to ask questions must, first of all, choose the ground [τόπον] from which he must make his attack; secondly he must formulate his questions and arrange them separately in his own mind; thirdly and lastly, he must go on to address them to another person. As far as the choice of ground [τόπον] goes, the philosopher and the dialectician are making a similar inquiry, but the subsequent arrangement of material and the framing of questions are the peculiar province of the dialectician; for such a proceeding always involves a relation with another party.”

With some additional observations from Smith regarding dialectical procedure, a familiar pattern will become evident. Having briefly reviewed the argument method of Socrates, Plato, and Zeno, Smith then continues:⁴⁵³

“For the present, what is important is that all these kinds of dialectical argument involve a questioner who secures premisses from an answerer and then uses them to deduce—or at least try to deduce—some conclusion which actually follows from them. This is the fundamental purpose of dialectical argument. To show another that his expressed opinions lead to an absurdity, or at least to a proposition he rejects, is to show him something important about his views. But even if an answerer were only pretending to give sincere answers, the dialectical exercise could show that a certain set of opinions, if held by anyone, would be inconsistent. An examination of this sort of the opinions held by other thinkers, or people in general, would be a plausible first stage in a philosophical inquiry. As a variant of this, an answerer could undertake to impersonate some well-known sage and answer appropriately; the questioner's arguments then are an examination of that sage's philosophical position. By these and similar measures, dialectical argument becomes a general exploration of the consequences of a set of views, with special emphasis on the detection of inconsistencies.”

With this focus on “examination” via the exposing of absurd or impossible consequences, rejected propositions, and inconsistency, Smith could just as easily be describing the dialectic of our juridical *jadal* theorists (or of al-Shāfiʿī himself, and other jurists whose voices are heard in the *Umm*). In fact, this excerpt provides a lucid, if general, overview of the function of dialectic across thematic domains, and holds particularly true for the “good” juridical dialectic of Islam.

⁴⁵² *Top.* VIII.1, 155b3ff.; trans. Forster.

⁴⁵³ Smith, *Topics I and VIII*, xiv-xv.

Most important is the “special emphasis on the detection of inconsistencies.” Juridical *jadal*, as we have seen, is much preoccupied with the exposing, and avoiding, of self-contradiction and larger doctrinal inconsistency. Considering this concern is most evident in Aristotle’s dialectic, we might also consider whether the ultimate reference for a *topos* might not in fact be something like “the locus wherein the contrary / contradictory of the opposing opinion may be found.” We have seen Aristotle employ *topos* as “the ground from which he [Q] must make his attack.” It would seem likely that this “ground” would consist, in many cases at least, of the contrary or contradictory of P’s thesis; Q would aim at P’s concession to such premises. Once accomplished, P’s thesis would be invalidated (the “destructive” aim), and Q’s counter-thesis would necessarily be confirmed (the “constructive” aim). Certainly, as we shall see in our analyses, both of these aims are achieved time and again in the dialectical sequences of the *Ikhtilāf al-‘Irāqīyyīn*, via the dialectical moves of *naqd* (“destructive” for P’s solution) and *mu‘āraḍa* (“constructive” for Q’s solution).

The greatest support for this conception of *topos* in Aristotle’s dialectic comes from Aristotle himself. He opens a lengthy discussion of the use of contraries in *topoi* of accident with the following: “Seeing that contraries may be combined with one another in six ways, and four of these combinations make a contrariety, we must avail ourselves of contraries in whatever way may be useful both for destructive and constructive purposes.”⁴⁵⁴ Further on, he suggests:

“Furthermore, if the accident of anything has a contrary, you must examine whether it belongs to that to which the accident has been said to belong. For, if the former belongs, the latter cannot belong; for it is impossible for two contraries to belong to the same thing at the same time.”⁴⁵⁵

Now, the language of “accident” seems foreign to the discussions we find in our juridical *jadal*-theory treatises. On the other hand, if we consider a *ḥukm* to constitute a kind of accident adherent to a thing, or to an action, on account of an *‘illa* inherent to that thing or action, then this suggested examination for contraries begins to resemble something like the dialectical move of *naqd*. Certainly, we might describe the charge of *naqd* as exposing P’s attaching of contrary *ḥukms* to the same *‘illa*.

Nor is the *topos* concern for contrariety the only parallel we find, for it would seem that, arguably, the *a fortiori* argument itself constitutes a *topos*, as outlined in *Top*.

⁴⁵⁴ *Top*. II.7, 112b27ff.; trans. Forster.

⁴⁵⁵ *Top*. II.7, 113a20–24; trans. Forster.

II.10. A quick summary of the chapter (constituting the first line of the next chapter) reads: “Such then are the various ways in which you can argue from the greater and the less and the like degrees.”⁴⁵⁶ Indeed, Smith recognizes the lines preceding this summation (*Top.* II.10, 115a15-24) as “the type of argument we call a *fortiori*... and several similar principles.”⁴⁵⁷ If such is the case, then we might consider a parallel “*topos*” of the juridical *jadal*-theory treatises to be the *istidlāl* category of *faḥwā al-khiṭāb*.

Importantly, we must recognize that despite the general and thematic resemblances between the Aristotelian and *jadal*-theory parallels we have mentioned thus far, they are all quite different when it comes to particulars and substance. This is true of the many more parallels we might unearth, especially if we made reference to the early Arabic translations of the *Topics* and the Arabic terms employed. For example, we will note that *topos/topoi* is translated as *mawḍiʿ/mawāḍiʿ*, and that we have encountered this latter many times over in the *jadal*-theory treatises. Sometimes, it appears identical to Aristotle’s dialectical *topos*, as in *mawḍiʿ al-khilāf*, and at others it seems merely to designate “place/locus.”⁴⁵⁸ Other terms are too numerous to mention here; not the least among them being the term *jadal* itself, and plentiful references to *masʿala*, *ikhtilāf*, *alfāz*, *taʿmīm*, etc.

Of particular import, however, to the larger purposes of this dissertation’s analyses and hypotheses, is a general area of overlap born, no doubt, of the common exigencies of dialectical debate no matter the thematic content or intellectual project of the disputants. I am speaking of: 1) the nature of the dialectical premise itself, and of its epistemic valuation; 2) the nature of dialectical problems; and 3) the nature of dialectical theses. Perhaps the most important discussions with regard to these concerns occurs in *Top.* I.10-11. I will reproduce a few excerpts from Smith’s translation⁴⁵⁹ so that we may gauge the general tenor of Aristotle’s discussions, and parallel concerns of juridical *jadal*-theory (and *uṣūl al-fiqh* in general) should become quite evident.

***Top.* I.10, 104a9ff.**

- “A *dialectical premiss* is the asking of something acceptable to everyone, most people, or the wise (that is, either all of them, most of them, or the most famous), provided it is not contrary to opinion (for anyone would concede what the wise think, so long as it is not contrary to the opinions of the many). Dialectical premisses also include: things which are similar to what is acceptable; the

⁴⁵⁶ *Top.* II.11, 115a25; trans. Forster.

⁴⁵⁷ Smith, *Topics I and VIII*, xxxiii.

⁴⁵⁸ See, e.g., al-Shīrāzī, *Maʿūna*, al-ʿUmayrīnī ed., 40-1; 42; 57; 58-9; 88-9.

⁴⁵⁹ Smith, *Topics I and VIII*, 9-10. All parentheses, etc. belong to the translation.

contraries of things which appear to be acceptable, put forward by negation; and such opinions as are derived from any established arts.”

Top. I.10, 104a34f.

- “It is also clear that such opinions as are derived from arts are dialectical premisses. For anyone would concede what those who have examined these subjects think, e.g. what a doctor thinks about medical questions, or what a geometer thinks about geometrical questions, and likewise in other cases.”

Top. I.10, 104b1ff.

- “A *dialectical problem* is a point of speculation, directed either to choice and avoidance or to truth and knowledge (either on its own or as working in conjunction with something else of this sort), about which people either have no opinion, or the public think the opposite of the wise, or the wise think the opposite of the public, or each of these groups have opposed opinions within itself.”

Top. I.10, 104b13ff.

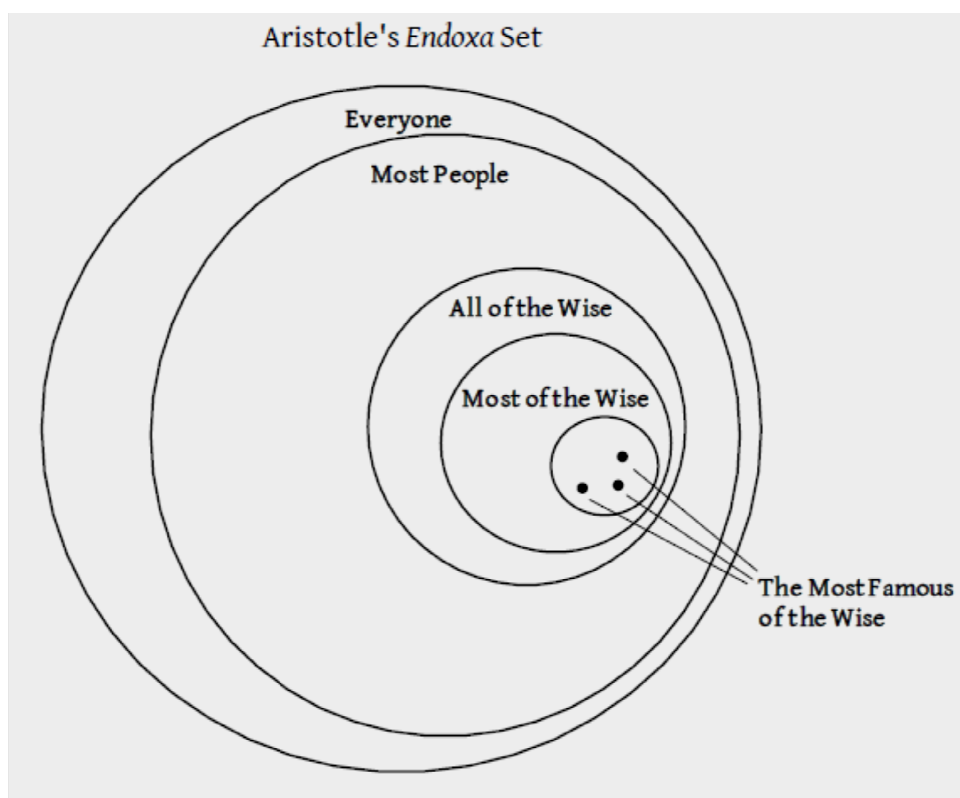
- “Those are also <dialectical> problems concerning which there are contrary deductions (for there is a puzzle whether it is so or not, because there are persuasive arguments about both sides), as well as those about which, because they are vast, we have no arguments, thinking that it is difficult to give the reason why (e.g. whether the universe is eternal or not). For one could also pursue an enquiry about such problems.”

Top. I.10, 104b19ff.

- “A *thesis* is: a belief contrary to opinion held by someone famous for philosophy, e.g. that contradiction is impossible (as Antisthenes used to say), or that everything moves (according to Heraclitus), or that what is is one (as Melissus says). (For to take things contrary to our opinions seriously when just any person declares them is silly.) Or: something about which we possess an argument contrary to our opinions....”

As for *Top. I.10, 104a9ff.*, this formulation of the dialectical premise rests upon a neatly-categorized conception of what is *endoxon*. We have borrowed this latter term throughout this dissertation as a descriptor expressing not only Aristotle’s *endoxa* sets as listed above, but its implications; i.e., what an opponent in disputation *ought to accept*, and what one *expects* one’s opponent to accept. We must also understand that Aristotle’s description of the dialectical premise represents a *fully-comprehensive* framework for premises which *ought to be accepted*. We may best convey this as an inclusive universal set containing smaller subsets; collectively, we will call this “Aristotle’s *Endoxa* Set.” The most important feature the following diagram is meant to show is that all of Aristotle’s subsets (most of the people, all of the wise, most of the wise, and the most famous of the wise) are subsumed by the superset of *everyone*. This is especially important to recognize, for I am under the impression that some might conceive of the “everyone” set as having potential for conflict with the various “wise” subsets; but this is patently false. For when Aristotle says “everyone” he means just that: *everyone, including* all the wise. In other words, when something is *endoxon* by the

superset of everyone, it is in consonance not only with opinions of the layperson, but with the opinions of the most learned scholars.



Major parallels should become evident when we consider Aristotle's *endoxa* set⁴⁶⁰ in conjunction with Islamic axioms inherent to (and partly forged by) the argument epistemes of juridical *jadal* and *uṣūl al-fiqh*. The primary domain of overlap is *istidlāl bi'l-ijmā'*, and becomes clear once we substitute terms such as *Umma* for "everyone" and '*ulamā'*' for "the wise." Additionally, we may consider God as being "the Most Wise;" with the Prophet, Imāms, and Companions considered among "the most famous of the wise." The difference is that in Islamic argument epistemes the *endoxa* set has been further transformed into an *hierarchy of epistemic authority*: God (Qur'ān), His Prophet (Sunna), Companions and/or Imāms (*sunan*, *āthār*), and *ijmā'* (of *Umma*, '*ulamā'*', and Ahl al-Madīna).⁴⁶¹

⁴⁶⁰ With regard to my above diagram of Aristotle's *endoxa* set, an examiner of this dissertation has suggested it is more likely that Aristotle would have placed the "All of the Wise" subset and all its contents *outside* the domain of "Most People," but within the domain of "Everyone." In other words, it is quite possible Aristotle intended a distinction between "Most People" and "The Wise" (all, most, or select famous of them).

⁴⁶¹ Understanding Aristotle's dialectical premises as belonging to an *endoxa* set as we have diagrammed it becomes particularly important when we consider parallel conceptions of *ijmā'*. Some may deem there to be a conflict or inconsistent usage of *ijmā' al-Umma* as over and against

Other parallels from *Top.* I.10, 104a9ff. are the inclusion among dialectical premises of: 1) “the contraries of things which appear to be acceptable, put forward by negation;” and 2) “such opinions as are derived from any established arts.” As for the first, there are parallels in *istidlāl bi-dalīl al-khiṭāb* and *qiyās al-‘aks*; and as for the second there are further parallels in the legal-theoretical discussions of *ijmā‘ al-‘ulamā’* and *taqlīd*. This second set of parallels is made even more evident in *Top.* I.10, 104a34f.: “For anyone would concede what those who have examined these subjects think.”

As for the “dialectical problem,” in *Top.* I.10, 104b1ff. we are reminded of: 1) the “truth-seeking” ethic of juridical *jadal*; 2) the objective of *ijtihād* with regard to both novel cases (“about which people... have no opinion”) and *masā’il* of *khilāf* (where “the wise” set has “opposed opinions within itself”). This latter type of “dialectical problem” constitutes the very substance of both *ikhṭilāf* and *jadal*-theory genres of legal literature. Again the parallel is bolstered in *Top.* I.10, 104b13ff. with the mention of “dialectical problems [read: *masā’il*] concerning which there are contrary deductions [the very domain of *ikhṭilāf*]... because there are persuasive arguments about both sides.” No finer collection of “dialectical problems,” then, might we hope to find than those example-*masā’il* of our *jadal*-theory works, and the core *masā’il* of *ikhṭilāf* of our subject for analysis: the *ikhṭilāf al-‘Irāqīyyīn*. On the other hand, we also find a parallel — not to mention a mark of direct continuity — for theologically-themed *jadal*; mainly, those more speculative dialectical problems “about which, because they are vast, we have no arguments, thinking that it is difficult to give the reason why (e.g. whether the universe is eternal or not).” Finally, we may interpret Aristotle’s “dialectical thesis,” as introduced in *Top.* I.10, 104b19ff., as a fitting parallel-descriptor for such *ijtihād*ic solutions a proponent might bring in dialectical disputation, as either: 1) conflicting with the *ijtihād* of an authoritative *mujtahid* (“contrary to opinion held by someone famous for philosophy”); or 2) conflicting with the opponent’s *ijtihād*.

As a final note before moving on to the *Sophistical Elenchi*, we should highlight one last important parallel. Earlier, we encountered Aristotle’s distinction between the procedures of the independent philosopher and the dialectician. We will recall that he said:

“As far as the choice of ground [τόπον] goes, the philosopher and the dialectician are making a similar inquiry, but the subsequent arrangement of material and the framing of questions are the peculiar province of the

ijmā‘ al-‘ulamā’; again, this is false, for *ijmā‘ al-Umma* includes *ijmā‘ al-‘ulamā’*, though the reverse need not necessarily be the case.

dialectician; for such a proceeding always involves a relation with another party.”

To this we may add an observation of Smith’s. Following his description of dialectic as “a general exploration of the consequences of a set of views, with special emphasis on the detection of inconsistencies,” Smith continues:

“Carrying out such an exploration in a live exchange between questioner and answerer would have some advantages—for instance, two competitors could do a better job of presenting both sides of a case than one—but a skilled practitioner could dispense with the need for a partner and explore the consequences of a set of views alone. This recalls Aristotle’s own practice of beginning his treatments of scientific subjects by first reviewing the ‘puzzles,’ i.e. the inconsistent conclusions which can be deduced from the received opinions on any subject.”⁴⁶²

Now, if we substitute *masā’il* for “puzzles” and *ikhtilāf* for “inconsistent conclusions,” we might be describing the starting points for many a juridical treatise in which, having first stated the problem (*mas’ala*), the author reviews the variant opinions (*ikhtilāf*) as to its solution before supporting one of these solutions or arguing his own.⁴⁶³ Moreover, we are reminded that a *mujtahid* must have a strong knowledge of juridical *ikhtilāf* with regard to substantive rulings. Most importantly, however, we see in both Aristotle’s description of (independent) philosopher and (cooperative) dialectician, and Smith’s description of a sort of internal dialectic, an important interplay between an individual’s private philosophizing and the public procedure of dialectic.

We have mentioned something like this before, and the above in fact parallels one of the hypotheses put forward by this dissertation. The dynamic symbiosis of juridical dialectic and legal theory is not only a consequence of the latter being forged in (and in turn providing additional premises and structure for) the former. It may also be explained through the private activity of *ijtihād* as an *internal dialectic*, in anticipation of the argument epistemes which public disputation will bring to bear. In other words: 1) the argument epistemes of proto-system juridical dialectic forged the systematized epistemes of *uṣūl al-fiqh*; 2) these latter were meant to guide *mujtahids* towards right-*ijtihād*; and 3) the ultimate vindication (or deconstruction) of later *ijtihād* was achieved through fully-systematized juridical dialectical disputation praxis. Thus, whether at the start of one’s private *ijtihād*ic process, or in the final, public stages in which one’s

⁴⁶² Smith, *Topics I and VIII*, xv.

⁴⁶³ This is exactly the spirit in which Abū Yūsuf first compiled the *K. Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā*; and it is in the same spirit which al-Shāfi‘ī expanded upon this work in the *Umm* Version of the *K. Ikhtilāf al-‘Irāqiyīn*.

*ijtihād*ic solution was tested, the “master set” of argument epistemes were those of dialectic.

The *Sophistical Elenchi*

The *Sophistical Elenchi* — as a continuation of the *Topics* — again shares a common project with our juridical *jadal*-theory treatises: this time, it is systematizing the identification, exposing, and refuting of incorrect assumptions and flawed reasoning. As we will see, it is our theorists' system for the *practice* which we find throughout the *K. al-Umm*. With this in mind, parallel concerns and methods between the *Sophistical Elenchi* and our *jadal*-theory texts ought to be pointed out wherever they occur. We should also bear in mind that the *Sophistical Elenchi* is a critical part of Aristotle's overall theory of dialectic, and in fact represents the continuation and conclusion to what is discussed in the *Topics*. Miller considers the *Sophistical Elenchi* to be the ninth book of the *Topics*,⁴⁶⁴ while Smith observes that the *Sophistical Elenchi* is "a treatise which Aristotle intended as the last section of the *Topics*," and "is really Aristotle's closing chapter for the *Topics*, since it begins with a reference to the project laid out in its opening sentence; it gives Aristotle's own assessment of his achievement and its relationship to what came before."⁴⁶⁵

There is a great deal in the way of parallels which might be unearthed here, with regard to the texts of our *jadal*-theory lens. We are constrained by space, however, and will only give the most cursory treatment to such parallels as we have found.⁴⁶⁶ We will begin with a brief outline of problematic argument types discussed in the *Sophistical Elenchi*, so as to gain insight as to the structure and ordering principle of the text. Our guide in this will be Scott Schreiber, a most insightful scholar of Aristotelian dialectic.

The Fallacy Scheme of the *Sophistical Elenchi*⁴⁶⁷

- False Reasoning
 - *Ignoratio Elenchi*
 - Due to Language
 - Double Meaning
 - Homonymy
 - Amphiboly
 - Form of the Expression
 - Non-Double Meaning
 - Accent
 - Composition
 - Division

⁴⁶⁴ *Disputation Theory*, 57.

⁴⁶⁵ Smith, *Topics I and VIII*, xxxiv, xxxv.

⁴⁶⁶ Again, these will remain "open doors" for further research.

⁴⁶⁷ Reordered as an outline from Schreiber's diagram: *Aristotle on False Reasoning*, 4.

- Outside of Language
 - Begging the Question
 - Non-Cause As Cause
 - Accident
 - Consequent
 - *Secundum Quid*
 - Many Questions

By way of moving quickly through these categories of fallacy, I will adopt the following abbreviated approach: 1) variant appellations for each category will be provided along with their Greek forms and early Arabic translations: the names of the translators will appear in brackets;⁴⁶⁸ 2) Bekker numbers for relevant discussions will be footnoted; and 3) any parallels with our *jadal*-theory texts which I have noticed in the course of current research will be noted. Again, a disclaimer: there is much more to be learned from a proper comparative analysis of the *Sophistical Elenchi* and our *jadal*-theory texts. What follows is merely a cracking open of the door.

παρὰ τὴν τοῦ ἐλέγχου ἄγνοιαν = “ignorance of what refutation is” [Schreiber];
“ignorance of the nature of refutation” [Forster]);
“*Ignoratio Elenchi*” (Schreiber; Forster);
***min al-Jahl bi’l-Tabkītāt* [Yahyā b. ‘Adī];**
***min ‘Adam al-‘Ilm bi’l-Tabkīt* [Ibn Zur‘a];**
***min Qillat al-‘Ilm bi’l-Tabkīt* [*naql qadīm*]**

Schreiber notes: “In *S.E.* 4 and 5, Aristotle cites *Ignoratio Elenchi* as one of the thirteen distinct sources, but in *S.E.* 6, he elevates it to the genus under which the other twelve fall.”⁴⁶⁹ Surprisingly, I do not recall running across the term *tabkīt* while researching the texts for our *jadal*-theory lens. On the other hand, we have seen Miller point out a description of *ilzām* which appears related in concept. We have also seen, in al-Juwaynī’s hierarchy of *inqiṭā‘*, that a disputant’s ‘*ajz*’ “may be due to a gap in his knowledge of the *rusūm al-jadal* and its *uṣūl*,” this Miller aptly paraphrases as: “ignorance of dialectic.”

⁴⁶⁸ The intention with the Arabic translations is, once again, merely to highlight any parallels of terminology which may arise between the efforts of the translators and the technical jargon of our *jadal* theorists. Two of the translators edited by Badawī in his *Manṭiq Aristū* belong to the 4th / 10th century, i.e., the century in which the sciences of *jadal* and *uṣūl al-fiqh* were first systematized in literary treatises. They are: Yahyā b. ‘Adī (d.363/974); and ‘Isā b. Ishāk b. Zur‘a (d.398/1008). Badawī’s third source is a “*naql qadīm*” attributed to al-Nā‘imī (d.?) For more on these translators, see Badawī’s introduction to the *Manṭiq Aristū*.

⁴⁶⁹ *False Reasoning*, 192, n.13; see also pp.87-8. For the description of *ignoratio elenchi* as an independent fallacy, see: *Soph. El.* 4, 166b24; 5, 167a21ff. As for its description as a genus of fallacies, see: *Soph. El.* 6, 168a18ff.; and Schreiber, *False Reasoning*, 87-93. And as for its resolution as an independent fallacy, see: *Soph. El.* 26.

As for the large grouping of properly linguistic fallacies, there are doubtless a number of parallels to be found among the hermeneutical concerns of *uṣūl al-fiqh* and the many *lafz*-oriented subcategories of *i'tirāḍāt* in the *jadal* literature. Unfortunately, the sort of detailed analysis this would require is beyond the scope of this dissertation. Here, I will resort to merely listing the categories with their Arabic translations and accompanying references for further investigation. Such parallels as are immediately obvious I have mentioned briefly in the footnotes.

ὁμωνυμία = “Homonymy” [Schreiber];⁴⁷⁰ “Equivocation” (Forster); <i>Ittifāq al-Isīm</i> [Yahyā b. ‘Adī; <i>al-Ittifāq fi’l-Isīm</i> [Ibn Zur‘a]; <i>Ishtirāk al-Asmā’</i> [naql qadīm]
ἀμφιβολία = “Amphiboly” [Schreiber];⁴⁷¹ “Ambiguity” (Forster); <i>al-Mirā’</i> [Yahyā b. ‘Adī, Ibn Zur‘a]; <i>al-Shakk fi’l-Kalām</i> [naql qadīm]
σχῆμα λέξεως = “Form of the Expression” [Schreiber; Forster];⁴⁷² <i>Shakl al-Lafza</i> [Yahyā b. ‘Adī]; <i>Shakl al-Qawl</i> [Ibn Zur‘a]; <i>Ṣūrat al-Kalām wa Shaklihi</i> [naql qadīm]
προσῳδία = “Accent” [Schreiber; Forster];⁴⁷³ <i>al-Ta’jīm</i> [Yahyā b. ‘Adī, Ibn Zur‘a]; <i>I’rāb</i> [of the <i>Kalām</i>] <i>bi’l-‘Alāmāt wa’l-Nuqaṭ</i> [naql qadīm]

⁴⁷⁰ NB: this fallacy has bearing upon categories of *istidlāl* and *i’tirāḍ* preoccupied with determining the *zāhir*. For a description of this fallacy, see: *Soph. El.* 4, 165b26, 30ff.; 6, 168a25; 7, 169a23ff.; and Schreiber, *False Reasoning*, 21-5. As for its resolution, with examples, see: *Soph. El.* 17; 19, 177a10ff.; 22, 178a24ff.; 23, 179a17; and Schreiber, *False Reasoning*, 31-6.

⁴⁷¹ NB: this fallacy has bearing upon categories of *istidlāl* and *i’tirāḍ* preoccupied with *ijmāl* and the *mujmal*. For a description of this fallacy, see: *Soph. El.* 4, 165b26, 166a7ff.; and Schreiber, *False Reasoning*, 25-31. As for its resolution, see: *Soph. El.* 17; 19, 177a16ff.; 23, 179a20; and Schreiber, *False Reasoning*, 31-6.

⁴⁷² Description: *Soph. El.* 4, 165b26, 166b10ff.; 7, 169a37ff.; and Schreiber, *False Reasoning*, 37-54. As a category mistake: *Soph. El.* 6, 168a26; 7, 169a35; 22, 178a6ff., 178b24ff.; and Schreiber, *False Reasoning*, 38-44. As other than a category mistake: Schreiber, *False Reasoning*, 44-48. NB: this latter subcategory has bearing upon categories of *istidlāl* and *i’tirāḍ* preoccupied with distinguishing between ‘*amm* and *khāṣṣ*. Form of the Expression and solecism: *Soph. El.* 3, 165b15; 14, 173b17ff.; and Schreiber, *False Reasoning*, 48-51. As a linguistic fallacy of double-meaning: *Soph. El.* 6, 168a24ff.; Schreiber, *False Reasoning*, 51-4.

⁴⁷³ NB: this fallacy has some bearing upon that category of Kitāb-oriented *i’tirāḍ*: *ikhṭilāf al-qirā’āt*. Description: *Soph. El.* 4, 165b27, 166b1ff.; 6, 168a27; 7, 169a29; and Schreiber, *False Reasoning*, 58-60. Resolution: *Soph. El.* 20, 177b3; 21; 23, 179a15.

σύνθεσις = “Composition” [Schreiber];⁴⁷⁴
 “Combination [of Words]” [Forster];
al-Tarkīb [Yahyā b. ‘Adī, Ibn Zur‘a];
Tarkīb [*al-Kalām*] [*naql qadīm*]

διαίρεσις = “Division” [Schreiber];⁴⁷⁵
 “Division [of Words]” [Forster];
al-Qisma [Yahyā b. ‘Adī, Ibn Zur‘a];
Tajzi‘at and *Qismat* [of the *Kalām*] [*naql qadīm*]

τὸ ἐν ἀρχῇ αἰτεῖσθαι (“asking the original point”)⁴⁷⁶
 or τὸ ἐν ἀρχῇ λαμβάνειν (“assuming the original point [to be proved]”);
 “Begging the Question” [Schreiber];
 “*Petitio Principii*” [Forster];
an ya’khudha alladhī min al-bad’ [Yahyā b. ‘Adī];
min al-umūr al-ma’khūdha bad’an [Ibn Zur‘a];
min Awwal al-Mas’ala [*naql qadīm*]

Although it does not seem readily apparent that this fallacy finds a place among the *istidlāl* and *i’tirādāt* considerations of our *jadal*-theorists, there remains every possibility that such fallacies would occur in juridical debate. That is to say, whenever proponent or questioner supports a solution with evidence which itself rests upon the validity of that solution, this species of fallacy may be said to have occurred. This opens the way for parallels in certain *i’tirādāt* against an opponent who appears to have “gotten it backwards;” e.g., the third *ḍarb* of al-Shīrāzī’s *qalb*: “that he makes the *ma’lūl* an ‘*illa*, and the ‘*illa* a *ma’lūl*.”⁴⁷⁷ An interesting possibility occurs in our subject text as well (§284), where al-Shāfi‘ī points out that the *aṣl* (*muḍāraba*) upon which his opponent relies for *qiyās* to the *mas’ala* at hand (*mu‘āmala*) is in fact itself a *far‘* confirmed via *qiyās* from the *aṣl* of *mu‘āmala*. The opponent has inverted *aṣl* and *far‘*, and thus, from a certain perspective, may be said to have provided evidence for the validity of his solution, which evidence itself rests upon the validity of that solution.⁴⁷⁸

Perhaps most intriguing of all, however, is a certain argument of al-Baṣrī’s which Hallaq has identified as *petitio principii*. In brief, al-Baṣrī is arguing against those

⁴⁷⁴ Description: *Soph. El.* 4, 165b27, 166a23ff.; and Schreiber, *False Reasoning*, 60-76. Resolution: *Soph. El.* 22.

⁴⁷⁵ Description: *Soph. El.* 4, 165b27, 166a34ff.; and Schreiber, *False Reasoning*, 60-76. Resolution: *Soph. El.* 22.

⁴⁷⁶ Description: *Soph. El.* 4, 166b25; 5, 167a37ff.; 6, 168b23ff.; 7, 169b13; Schreiber, *False Reasoning*, 98-105. Resolution: *Soph. El.* 27; Schreiber, *False Reasoning*, 106.

⁴⁷⁷ Shīr.VII.14.3. Cf. al-Bājī: “That he says: I make the *ma’lūl* an ‘*illa*, and the ‘*illa* a *ma’lūl*” (*Minhāj*, Turkī ed., 177, §389). Al-Bājī relates *ikhtilāf* regarding this subspecies of *i’tirād*, and then rejects it.

⁴⁷⁸ See our analysis for §284 in Chapter III.

who would claim the *jarayān* of the ‘*illa* in the *ma’lūl* provides indicant for its validity. His retort consists of the following: 1) *ta’tthīr* of the ‘*illa* means the *mu’allil* has made the *ḥukm* conditional upon it in each *mawḍi’* in which it is found; 2) this is the *mu’allil*’s act, and his act does not provide indicant for the ‘*illa*’s validity; since 3) he must first establish its validity in the *aṣl* before attaching it to the *far’*. After further explanation, Hallaq explains this as a charge of *petitio principii*.⁴⁷⁹ From this, we may assume that any *istidlāl* or *i’tirāḍ* involving *jarayān al-‘illa fī ma’lūlātihā* in juridical dialectic bore the possibility of raising such a charge. As for al-Baṣrī, this fallacy type appears to have been well-known to him; he again refutes an opposing position’s *petitio principii* during a long discourse on the *ḥujjiyya* of *ijmā’*, in his *Mu’tamad*.⁴⁸⁰

παρά τὸ μὴ αἴτιον ὡς αἴτιον = “Non-Cause As Cause” [Schreiber];⁴⁸¹
“Mistaken Cause” [Forster];
an yaḍa’a lā ka-‘illa ka-‘illa [Yahyā b. ‘Adī];
min waḍ’ mā laysa bi-‘illa ‘alā annahu ‘illa [Ibn Zur’a];
bi-ithbāt ‘illa lā ka-‘illa [naql qadīm]

Parallel concerns with this particular category of fallacy in our *jadal*-theory texts are many indeed, in terms of both the implications of the fallacy itself, and the manner in which it has been rendered into Arabic. Any one of the *qiyās*-oriented *i’tirāḍāt* which attempt to destroy or supplant the opponent’s ‘*illa* may be subsumed beneath this larger category of “mistaken cause.” Even those which are less focused upon problematizing *ta’tthīr* are worthy of note, if only for the similarity with which they are formulated in comparison to the Arabic translations in our header. First among these would be al-Bājī’s third *qiyās*-oriented objection: “the *i’tirāḍ*... in that what he made an ‘*illa* is not allowed to be made an ‘*illa*.”⁴⁸²

If indeed we were to consider ‘*illa* as “cause” in the sense that theologians and philosophers did, then any repudiation of the opponent’s justification or establishing of the occasioning factor (*ta’līl* or *ithbāt al-‘illa*) would plainly be subsumed by the charge of “mistaken cause.” If, on the other hand, we acknowledge al-Juwaynī’s warning that the

⁴⁷⁹ “Treatise,” 216, n.31. Elsewhere, Hallaq has noted that Orientalist Snouck Hurgronje assessed the entire institution of *ijmā’* as a singular *petitio principii* (“Authoritativeness of Sunni Consensus,” 429). Building upon an earlier attempt by George Hourani, Hallaq shows in this article, among many other things, how jurists such as al-Ghazālī and al-Āmidī, among others, avoided what was termed *dawr*: “circularity.”

⁴⁸⁰ Ḥamīd Allāh ed., vol.2, 476-7. See Bernard’s entry on *ijmā’* in the *El*², to which I owe this reference. Among other things, al-Ghazālī’s argument in his *Mustaṣfā* is also explained.

⁴⁸¹ Description: *Soph. El.* 4, 166b26; 5, 167b21ff.; 7, 169b14; Schreiber, *False Reasoning*, 107-12.

⁴⁸² Bājī.IX.B.3.

‘*ilal* of the *Shar‘* are not like ‘*ilal* of the ‘*aql*, then such charges as depend upon ‘*aks* would have to be reconsidered.⁴⁸³ In normative domains of *qiyās shar‘ī*, then, we might consider a variant fallacy of “mistaken occasioning factor.”

With regard to the role played by “mistaken cause” in Aristotle’s dialectic, we may refer to *Soph. El.* 5, 167b21ff. Of special note in this passage is the following observation:

“Such a case [mistaken cause] occurs in reasonings leading up to an impossibility; for in these one is bound to destroy one of the premisses. If, therefore, what is not a cause is enumerated among the questions which are necessary for the production of the resultant impossibility, the refutation will often seem to come about as the result of it...” (trans. Forster).

“Mistaken cause” and *reductio ad impossibile* thus appear to be tied in dialectical disputation.⁴⁸⁴ Not surprisingly, we may observe the same phenomenon in juridical *jadal*; for a charge of *naqd* is at once a charge of “mistaken ‘*illa*” and a reduction to inconsistency or contradiction. By raising a *mas‘ala al-naqd*, in other words, Q attempts to show that: 1) P has misidentified the ‘*illa* in the *mas‘ala* at hand; and 2) P, by elsewhere attributing a contrary *ḥukm* to this same ‘*illa*, has contradicted himself with regard to the *mas‘ala* at hand. Alternately, Q may extend P’s ‘*illa* to a hypothetical situation wherein the ‘*illa* obtains, but the proposed *ḥukm* would be absurd, or contradictory, or impossible. As we shall see, both of these objection methods enjoy great frequency in the dialectic of the *Umm*.

παρὰ τὸ συμβεβηκός = “Accident” [Schreiber, Forster];⁴⁸⁵
***min al-A‘rād* [Yahyā b. ‘Adī, Ibn Zur‘a];**
***bi’l-‘Araq* [*naql qadīm*]**

Aristotle describes this fallacy in *Soph. El.* 5, 166b28ff., as follows:

“Fallacies connected with Accident occur when it is claimed that some attribute belongs similarly to the thing and to its accident; for since the

⁴⁸³ *Kāfiya*, 68, Maḥmūd ed., §163. See our discussion of ‘*adam al-ta’tīr*, above.

⁴⁸⁴ An examiner of this dissertation has pointed out that such is the main application of this sophistical *elenchus*: stating in the course of a *reductio ad impossibile* that X is the cause leading to the impossibility, when in fact it is something else (Y).

⁴⁸⁵ Description: *Soph. El.* 4, 166b22; 5, 166b28ff.; 6, 168a34ff., 168b27ff.; 7, 169b3ff.; Schreiber, *False Reasoning*, 113-16, 126-30. Resolution: *Soph. El.* 24; Schreiber, *False Reasoning*, 114-16. Note that Schreiber considers “accident” and “consequent” to be, in fact, “one single fallacy with one single resolution” (113). He also points out that past approaches to the analysis of this fallacy via “appeal to linguistic ambiguity” challenge Aristotle’s typology (whereby “accident” and “consequent” are fallacy-types “outside of language”). As for the formal analytical approach, with specific regard to the fallacy of consequent: “It was rechristened the ‘fallacy of Affirming the Consequent’ by John Neville Keynes in the nineteenth century and continues to thrive under that label in most introductions to modern propositional logic” (Schreiber, op. cit.)

same thing has many accidents, it does not necessarily follow that all the same attributes belong to all the predicates of a thing and to that of which they are predicated” (trans. Forster).

We have grown accustomed to the fact that Aristotle’s formulations and analyses appear, on the whole, couched in a very different language than that of our early *jadal*-theorists. Nevertheless, we may begin to understand a parallel concern of guarding against this fallacy when we make certain alterations to the above-quoted explanation. In short, I would propose that we consider a *ḥukm* to constitute a kind of attribute, and that we consider *awṣāf* as divisible into two classes: such as are accidental, and such as are not (e.g., “red” and “intoxicating” with regard to wine).

If we proceed, then, with that common example of invalid *‘illa*-ascription whereby the *ḥukm* of *taḥrīm* is attributed to wine on account of its redness, we can understand something like Aristotle’s fallacy of accident to be at work. Clearly in this case, “it is claimed that some attribute [*taḥrīm*] belongs similarly to the thing [wine] and to its accident [redness];” for we have invested an accidental *waṣf* (redness) with the power of occasioning the *ḥukm* of *taḥrīm* for its own substrate (wine). Of course, the truly efficient *waṣf* (intoxicant) is not at all accidental to wine, but integral to its quiddity. Among other things, the problem with a fallacious *‘illa*-ascription to redness is that this accident-*waṣf* belongs to a great many other things. If we were to extend, by way of *qiyās*, what we have mistakenly attributed to it (the *ḥukm* of *taḥrīm*), then we would only have compounded our initial error.

I am not at all certain that our alterations and example would withstand deeper scrutiny, and must, at any rate, abandon further exploration for the time being. At this point, however, it does seem that a concern paralleling Aristotle’s with regard to fallacy of accident may be discerned in such *ītirāḍāt* (e.g., *kasr*) by which Q problematizes certain of the *awṣāf* from which P has constituted his *‘illa*. Moreover, as we have seen with al-Bājī’s typology of *kasr*, Q might eliminate an efficient *waṣf* from P’s *‘illa* (Bāj.IX.B.12.2.1), or he might eliminate a non-efficient *waṣf* (Bāj.IX.B.12.2.2). Perhaps further investigation would reveal that the non-efficient variety tend to be more accidental; this awaits to be seen, however.

παρὰ τὸ ἐπόμενον = “Consequent” [Schreiber, Forster];⁴⁸⁶
min allatī talzamu / tulzimu [Yahyā b. ‘Adī];
min al-lawāzim [Ibn Zur‘a];
min Lawāhiq al-Kalām wa min Waq‘ al-Muqaddimāt [*naql qadīm*];
[The Fallacy of Affirming the Consequent]

A concern for this fallacy should be obvious in any intellectual project whose premises and conclusions may be reduced to the forms of propositional logic (such as the “discovery” or formulation of substantive norms). In a previous note, we mentioned Schreiber’s observation that Keynes’s fallacy of Affirming the Consequent remains the most common appellation with regard to the formal analysis of Aristotle’s “consequent.” Aristotle’s own description of this fallacy in *Soph. El.* 5, 167b1ff. makes it clear why this should be so:

“The refutation connected with the consequent is due to the idea that consequence is convertible. For whenever, if A is, B necessarily is, men also fancy that, if B is, A necessarily is. It is from this source that deceptions connected with opinion based on sense-perception arise. For men often take gall for honey because a yellow color accompanies honey; and since it happens that the earth becomes drenched when it has rained, if it is drenched, we think that it has rained, though this is not necessarily true. In rhetorical arguments proofs from signs are founded on consequences; for, when men wish to prove that a man is an adulterer, they seize upon the consequence of that character, namely, that the man dresses himself elaborately or is seen wandering abroad at night—facts that are true of many people, while the accusation is not true” (trans. Forster).

There are a number of reasons this description should capture our attention, not the least of which is Aristotle’s own rhetorical (forensic) example. At the very least, we might say that *ikhtilāf* among the *fuqahā’* with regard to circumstantial evidence is concerned with the fallacy of consequent. There may be more in the way of parallel concerns, however, especially within *qiyās*-related domains of *istidlāl* and *i’tirāḍ*. Although we must postpone comparative analyses for the time being, the *istidlālāt* which concern themselves with *ṭard*, *‘aks*, and *jarayān* — along with the *i’tirāḍāt* directed against them — might be a good area to begin a deeper investigation.

⁴⁸⁶ Description: *Soph. El.* 4, 166b25; 5, 167b1ff.; 6, 168b28ff; 7, 169b7ff.; Schreiber, *False Reasoning*, 130–9. Resolution: *Soph. El.* 28.

παρὰ τὸ πῆ καὶ ἀπλῶς (“due to [something said] in some way and without qualification”) = *secundum quid et simpliciter* [Schreiber, 141];⁴⁸⁷
min ma'nā fi shay'in aw 'alā al-iṭlāq [Yahyā b. 'Adī];
min al-ḥaml min jihat aw 'alā al-iṭlāq [Ibn Zur'a];
mimmā fi'l-shay' aw min al-mursal min al-qawl [naql qadīm]

Schreiber nominates *secundum quid* “as a convenient label for this family of errors;”⁴⁸⁸ while Forster captures its essence with the following header in his translation: “The confusion of absolute and qualified statements.”⁴⁸⁹ I am at present uncertain as to where a concern for this fallacy might be located in the *uṣūl* and *jadal*-theory literature. Forster’s heading and the early Arabic translations would certainly point us towards the hermeneutical categories of *muṭlaq* and *muqayyad*, however. For example, we earlier — in our outline of al-Bājī’s hierarchy of *istidlāl* — encountered a *faṣl* entitled “What is Connected to the *Adillat al-Ma'qūl*, but is Not of Them.” Among these non-valid modes of reasoning was one attributed to certain Mālikīs: “Correlating the Absolute/Unrestricted (*Muṭlaq*) with the Qualified/Restricted (*Muqayyad*) without an ‘*illa*.” It is by investigating this discussion, and other forms of *i'tirāḍ* focusing upon the *muṭlaq/muqayyad* distinction, that we might begin a search for considerations parallel to *secundum quid*.

τὸ τὰ πλείω ἐρωτήματα ἐν ποιεῖν (“the making of several questions into one”);⁴⁹⁰
Many Questions [Schreiber];
Plurality of Questions [Forster];
an yaj'ala masā'il kathīra mas'ala wāḥida [Yahyā b. 'Adī; naql qadīm];
an yaj'ala al-su'ālāt al-kathīra su'alan wāḥidan [Ibn Zur'a]

Again, it is difficult to determine precisely in which domains of *istidlāl* or *i'tirāḍ* the fallacy of many questions is most likely to occur. Schreiber offers the following cogent explanation, however, which allows us some idea of how it might come about in a dialectical debate:⁴⁹¹

⁴⁸⁷ “which depend on whether a statement is made in a limited sense or absolutely” (*Soph. El.* 6, 168b11; trans. Forster]). Description: *Soph. El.* 4, 166b23; 5, 166b37ff; 6, 168b11ff.; 7, 169b11ff.; Schreiber, *False Reasoning*, 141-4, 145-51. Resolution: *Soph. El.* 25; Schreiber, *False Reasoning*, 144. False Resolutions: Schreiber, *False Reasoning*, 144.

⁴⁸⁸ Schreiber, *False Reasoning*, 141.

⁴⁸⁹ *Sophistical Refutations*, Loeb ed., margin of p.85.

⁴⁹⁰ *Soph. El.* 5, 166b27; trans. Forster. Description: *Soph. El.* 4, 166b27; 5, 167b38ff.; 6, 169a6ff.; Schreiber, *False Reasoning*, 153-9, 161-6. With disjunctive premises: Schreiber, *False Reasoning*, 154, 155-6; and with conjunctive premises: *False Reasoning*, 154, 156-9. Resolution: *Soph. El.* 17, 175b39ff.; 30, 181a36ff.; Schreiber, *False Reasoning*, 159-60.

⁴⁹¹ *False Reasoning*, 153.

“Because questions in dialectic become the premises of arguments, this fallacy arises when one concedes a premise having multiple parts as though it were a simple proposition. The problem, then amounts to an inability to individuate premises. As such, these arguments fail to be true refutations, because they violate clause (2) of the definition of refutation: the conclusion does not follow necessarily from the premises. The reason for this is that what appears to be a premise is actually not one.”

At the very least, then, we are reminded of our *jadal* authors’ repeated warnings to be both specific in question and parsimonious in response. The objective, we recall, is that the disputant avoid having to retract something he carelessly or accidentally conceded. Al-Bājī also warns against asking “ambiguous” questions which may forestall a response. Here especially we see where the fallacy of many questions might come into play. By way of illustration of how this fallacy might forestall P’s response (thus violating the objective of “good” dialectic), we might offer the modern, “textbook example.” Q asks: “So, have you stopped beating your wife?” P is flustered, as he will be condemned by either a “Yes” or a “No.” The fallacy occurs should we interpret P’s inability to answer as a confirmation of his wife-beating (Q’s rhetorical *elenchus*). The problem, of course, is that two questions (“[1] Have you ever beaten your wife, and if so, [2] have you stopped yet?”) have been posed as a singular, yes-or-no question.⁴⁹²

Refutations “By seeking the contradictions between the views of your opponent and the school to which he belongs”⁴⁹³

In addition to the identification and dismantling of fallacies, Aristotle provides pragmatic advice to the dialectician in his *Sophistical Elenchi*, just as he does in the *Topics*. The following is of particular note for comparison to our *jadal*-theory texts:⁴⁹⁴

“Moreover, as in rhetorical arguments, so likewise also in refutations, you ought to look for contradictions between the answerer’s views and either [1] his own statements or [2] the views of those whose words and actions he admits to be right, or [3] of those who are generally held to bear a like character and to resemble them, or [4] of the majority, or [5] of all mankind.”

This reads almost as a catalogue of “Aristotelian *i’tirāḍāt*.” Among other things, we might find parallels in: 1) *naqd*; 2) contradictions of Kitāb, Sunna, and *ijmā’*; and 3) contradiction of one’s own doctrinal *madhhab*.

⁴⁹² See, among others, Madsen Pirie, *How to Win Every Argument: The Use and Abuse of Logic* (London; New York: Continuum, 2006), 29: “The complex question (*plurium interrogationum*).”

⁴⁹³ *Soph. El.*, Loeb ed., margin of p.85 (Forster’s heading).

⁴⁹⁴ *Soph. El.* 15, 174b19ff. (trans. Forster; brackets are mine).

Concluding Statement

If, after this summary review of Aristotelian dialectical concerns, we are at all impressed by the number of parallels in our *jadal*-theory texts, we ought to be equally impressed by all the *differences*. Again, as we have argued earlier, this combination of likenesses and dissimilarities is best accounted for by 1) more complex developmental models such as I have attempted to portray in a previous diagram, and 2) by the infusion of prior Near Eastern argument epistemes (including the Hellenic) with new Islamic axioms, and the subsequent development of unique argument epistemes according to the dictates of variant intellectual projects. The question of how “Aristotelian” early Islamic juridical *jadal* is will never be an easy one to answer.

That being said, we are now equipped with what I hope to be a sufficient lens, or set of lenses, for the analysis of proto-system juridical *jadal* as it appears in the dialectical sequences of our subject-text: the *Umm* Version of the *Kitāb Ikhtilāf al-ʿIrāqīyyīn*. In this enterprise we are bound to be impressed by similarities and differences as well — that is, between proto-system disputation practice and fully-systematized *jadal*-theory — but now we are on somewhat firmer ground in terms of the transmission of ideas. What we are about to witness is an early stage in a *continuous developmental process* within a *single* intellectual project: the elaboration of *Sharʿī* norms within a nascent Sunnī juridical episteme, and the justification and “testing” of *ijtihād*.

My analyses and conclusions, though as thorough as my current abilities allow, should hold little in the way of surprises. The window onto proto-system dialectic and legal theory which our subject-text represents illuminates but a small patch of a much larger intellectual scene, and that small patch appears much as we would expect: far less choate than later systems would prove, yet at the same time sophisticated to an extraordinary degree — and, overall, manifestly *ancient* in tenor. Beyond the theses for which I believe the following analyses provide firm support, it is the many and fascinating details afforded us in this glimpse at proto-system *jadal* which I hope proves to be the most significant contribution of this dissertation.

Chapter III: Analyses of “Overtly Dialectical” Presentations in the *Kitāb Ikhtilāf al-‘Irāqīyyīn*

Introduction

Having ground and polished our lens for analysis in the preceding chapter, we may now turn to the analyses themselves, first briefly discussing some features of the text we will be examining.¹ Our subject treatise, which we have labelled the *Umm* Version, is designated in various extant manuscripts of the *Kitāb al-Umm* as either the *Kitāb Mā Ikhtalafa fihi Abū Ḥanīfa wa Ibn Abī Laylā ‘an Abī Yūsuf*, or the *Kitāb Ikhtilāf al-‘Irāqīyyīn*. As for the older source-text — of which our subject treatise may be considered a commentary, partial refutation, and general expansion in terms of argument, justification, and refinement — we have labelled it the Shaybānī Version (after its purported transmitter from Abū Yūsuf: Muḥammad b. al-Ḥasan al-Shaybānī). This, the source-text of our treatise, has been edited by Abū al-Wafā’ al-Afghānī. It appears he was working from a single manuscript,² and we will assume that this manuscript bore, at least in part, the title of his edition: The *Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā li’l-Imām Abī Yūsuf Ya’qūb b. Ibrāhīm al-Anṣārī*.³ My aim in recounting these titles is simply to underscore that our subject text, whatever its appellation, is a work of *ikhtilāf* from start to finish, with all that this implies.⁴

We may think of the *Umm* Version, moreover, as a *layered* work of *ikhtilāf*. That is to say, a first layer of juridical argument is apparent in the *masā’il* and variant opinions of Abū Ḥanīfa and Ibn Abī Laylā as recorded by Abū Yūsuf in his initial composition. While at this task, Abū Yūsuf was sure to add either his adherence to one opinion or another, or his refinement or supporting arguments or objections to one of these opinions, or even the results of his own *ijtihād* — the voice of Abū Yūsuf, wherever

¹ The reader is directed to our Introduction to Part II of this dissertation for a more complete introduction to the *Kitāb al-Umm*, the Shaybānī Version of the *Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā*, and the *Umm* Version of the *Ikhtilāf al-‘Irāqīyyīn* (our subject-text).

² “And the Lajnat Iḥyā’ al-Ma’ārif al-Nu’māniyya desired to publish it, and we found of it naught but a single manuscript in India, and the Lajna was of the opinion that I should attempt its *taṣḥīḥ*...” (from al-Afghānī’s intro. to the *Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā*, 5-6).

³ Al-Afghānī does not tell us the title of his manuscript, nor does he describe it in any way, nor inform us as to its precise location. Brockelmann has missed the title, and Sezgin appears also to have neglected its mention entirely, although noting al-Afghānī’s editions of Abū Yūsuf’s *K. al-Āthār* and *K. al-Radd ‘alā Siyar al-Awzā’ī (Tārīkh al-Turāth al-‘Arabī*, i.3, 54).

⁴ See our discussion on the genre of *ikhtilāf*, at the start of Chapter II.

it may be discerned, thus constitutes another layer of *ikhtilāf*.⁵ On top of this, wherever we may detect it (not an easy task, once the repetition of “*qāla*” becomes untraceable), is another layer consisting of the comments and occasional arguments or objections of the transmitter of the Shaybānī Version, i.e., al-Shaybānī himself, Muḥammad b. al-Ḥasan.⁶

The most significant layer of *ikhtilāf* for the purposes of this dissertation, however, wherein no less than 22 transcript-like sequences of Q&A dialectical disputation occur — is that added by al-Shāfiʿī. The additions of al-Shāfiʿī to the Shaybānī Version, in fact, more than double the size of the work, and consist not only of a refined and detailed exposition of his rulings for each of the *masāʾil* raised in the Shaybānī Version (his source text), but his detailed arguments, objections, and renditions of both “historical” and “instructional” dialectical debates.⁷ Finally, on top of all this is an additional layer consisting of the comments and occasional expositions and arguments of al-Shāfiʿī’s student, al-Rabī b. Sulaymān, to whom we owe the transmission and preservation of the *Umm* Version (not to mention the compilation and preservation of all the treatises and books of the *Umm* itself).⁸ Thus, though the bulk of arguments and objections belong to Abū Ḥanīfa, Ibn Abī Laylā, and al-Shāfiʿī, we must nevertheless bear in mind that the *Umm* Version consists of no less than five layers of *ikhtilāf*:

Original Layers of the Shaybānī Version	
1.	Abū Ḥanīfa vs. Ibn Abī Laylā
2.	Abū Yūsuf vs. either of his teachers
3.	Muḥammad b. al-Ḥasan vs. various preceding opinions of Abū Yūsuf’s compilation
Additional Layers of the <i>Umm</i> Version	
4.	al-Shāfiʿī vs. various of the positions of the Shaybānī version, or vs. an anonymous opponent professing one of these opinions, or vs. an anonymous opponent professing the opinion of an epistemic community (e.g., the Ahl al-Kalām, or Ahl al-Baṣra, or Mashriqīyyūn)
5.	al-Rabī vs. various of the opinions which preceded al-Shāfiʿī

⁵ It is important to bear in mind that even the *support* of a jurist, whether through a statement of adherence, or the contribution of supporting *naql* or argument or explanation, constitutes an instance of *ikhtilāf*; by supporting or arguing a prior ruling, that jurist is not only contributing to its defence, but to the arsenal of proofs which may be levelled against the opposing ruling.

⁶ See §§33–4 (and attached note) in the translation for a particularly illuminating example of what appears an editorial objection (against an opinion of Ibn Abī Laylā), by al-Shaybānī himself. Doubtless there are a number of other instances which represent the voice of Muḥammad b. al-Ḥasan, but it is impossible — and this holds for the greatest part of the treatise in both Shaybānī and *Umm* Versions — to distinguish what may be his voice from that of Abū Yūsuf.

⁷ These descriptors of dialectical sequences in the *Umm* Version will be explained shortly.

⁸ This is what I have termed the “traditional status quo” of compilation and transmission of the *Umm* corpus. The reader will find my arguments in support of this narrative in the introduction to Part II of this dissertation.

Additionally, we should note that the individual layers of *ikhtilāf* within a given set of *masā'il* of the *Umm* Version, though not often easily distinguished, may be said to follow a certain rough pattern of accretion. That is to say, though rarely if ever including *all* of these layers, any given *mas'ala* will typically follow this format:

- Abū Ḥanīfa's ruling(s) on the *mas'ala* at hand
 - supporting *naql*, argument, or explanation of Abū Ḥanīfa's position, or rhetorical objection to the opposing position
 - [Abū Yūsuf's adherence, if he follows Abū Ḥanīfa, or his reversion to the *qawl* of Ibn Abī Laylā, or his independent revision of Abū Ḥanīfa's ruling — possibly the voice of Muḥammad b. al-Ḥasan]
- Ibn Abī Laylā's counter-ruling(s) for the *mas'ala* at hand
 - supporting *naql*, argument, or explanation of Ibn Abī Laylā's position, or rhetorical objection to the opposing position
 - [Abū Yūsuf's adherence, if he follows Ibn Abī Laylā, or his reversion to the *qawl* of Abū Ḥanīfa, or his independent revision of Ibn Abī Laylā's ruling — possibly the voice of Muḥammad b. al-Ḥasan]
- [Abū Yūsuf's independent *ijtihād*, if he does not follow or revise a *qawl* of one of his teachers — possibly the voice of Muḥammad b. al-Ḥasan]
 - [supporting *naql*, argument, or explanation of Abū Yūsuf's position, or rhetorical objection to the opposing position(s) — possibly the voice of Muḥammad b. al-Ḥasan]
- al-Shāfiʿī's (usually more detailed) ruling(s) for the *mas'ala* at hand
 - supporting *naql*, argument (often quite extended), or explanation of his position, or rhetorical objection to the opposing position, or appended dialectical sequence elaborating upon the core of *ikhtilāf* (always terminating with al-Shāfiʿī's *elenchus* against an opposing opinion, or successful defence of his own position)
 - [occasional reference to another *kitāb*, in which the reader is meant to find a more complete rendering of arguments and proofs]
- [al-Rabīʿ's commentary, explanation, or additional argument with respect to al-Shāfiʿī's position (rare)]

Again, the most significant of these layers for our purposes is that added by al-Shāfiʿī. All of the dialectical sequences at the focal point of our analyses occur between al-Shāfiʿī and an anonymous opponent (usually championing a position earlier professed by Abū Ḥanīfa, Ibn Abī Laylā, or Abū Yūsuf), although dialectical formulae and other overt signatures of past and recurrent dialectical disputation are common throughout all layers. This fifth layer of al-Shāfiʿī is by far the richest, however, in terms of overtly dialectical material, and the centerpiece consists of twelve extended sequences of Q&A dialectical disputation, along with another ten short sequences.⁹ As

⁹ Our descriptor “centerpiece” is only an allusion to the importance of these sequences for our project, and is not meant to convey an original ordering or hierarchy; these twenty two sequences are scattered throughout the pages of our treatise, extending from al-Shāfiʿī's arguments re: the *mas'ala* at hand, as appendages, wherever he saw fit.

alluded to earlier, these may be roughly categorized as either “historical” or “instructional” dialectical sequences. The “historical” dialectical sequence is usually initiated by al-Shāfi‘ī with a telltale formula such as “*wa khālafanā ba‘ḍ al-nās fī hādhā, wa qāla: [X],*” followed by “*fa-qultu lahu: [Y],*” and so on. Thus it is made plain that the ensuing dialectic was of real occurrence, even if it has been abstracted or in other ways reduced to a more abbreviated form. As for the “instructional” variety of dialectical sequence, it is usually initiated by al-Shāfi‘ī with the hallmark “*fa-in qāla qā’il: [X],*” followed by “*qāla lahu: [Y],*” and so on. The didactic intent of these formulae is self-evident. Of course, it must also be considered that any one sequence may incorporate vestiges of both categories.¹⁰

Taking these features into account, it would be obvious that our subject text, a literary project spanning several generations, belongs to that genre of legal literature which was to become known as *khilāfiyyāt* or *‘ilm al-khilāf* — even had the term *ikhtilāf* been absent from its title. What is more, the contents and arrangement of the *Umm* Version suggest a purpose fully in consonance with the general aims of the *‘ilm al-khilāf* as they would later be described: exploring the best methods of *istidlāl* and *istinbāt*, and building the faculties of confirmation (*al-ibrām*) and refutation-by-contradiction (*al-naqd*), all with an eye towards dialectical disputation.¹¹ In other words, the *ikhtilāf* treatises of the *Umm* — with our subject-text prominent among them — not only contain examples of *jadāl*, but were composed and elaborated with an eye towards *practical application in jadāl*. This intention is evident through the preservation and transmission of these texts alone, all the more so through an examination of their contents.

Taken all together this adds an important dimension to what we can already discern as a rather sophisticated “proto-system” of juridical *jadāl*. The *Umm* treatises are accounts of *ikhtilāf*, certainly, but to what end were they preserved, transmitted, and studied? Simply as histories of disagreement? Certainly not. They are as much handbooks as histories, and their ultimate objective is far more than providing a record of “who held what opinion.” Rather, the larger objective of the *ikhtilāf* treatises in the

¹⁰ It is likely that sequences which appear purely of the “instructional” variety were motivated by al-Shāfi‘ī’s previous dialectical encounters. On the other hand, those of a purely “historical” appearance have been related by al-Shāfi‘ī for a purpose: to instruct the reader how to defend this position — and/or refute the opposing position — in any future dialectical encounter centering upon the same *mas’ala*. Thus any one sequence may be said to exhibit qualities from both categories.

¹¹ See our earlier discussion re: al-Dabbūsī’s *Ta’sīs al-Nazar*.

Umm is to preserve a knowledge of the *masā’il* of *ikhtilāf* along with the argument styles and strategies of master jurist-dialecticians — to the extent that whole sequences of dialectic are frequently “transcribed” into the text. The *faqīh*-in-training needed to learn more than what the contended *masā’il* were — he needed to learn how to argue them.¹² Simply put, such *ikhtilāf* treatises were as vital a component to proto-system *jadāl* teaching and practice, as the systematic *jadāl*-theory treatises were to juridical dialectic of later centuries.

As a final note to our introduction, we ought to mention — in addition to our considerations of layers of *ikhtilāf*, of categories of dialectical sequence, and of didactic intentions — that there are a number of other qualities and features of import in the *Umm* Version with regard to the window it opens upon proto-system *jadāl*. Primary among these is a marked formulaic consistency — not only in the sequential “transcription” of dialectical debates, but in the very presentation of substantive rulings, of statements of adherence to one ruling or another, of extensions and subsumptions of rulings to and beneath other legal genera, etc. These and other features will become apparent as we proceed through our analyses, and will be summarized and discussed in Chapter IV.1. The sum total of their effect, however, may be stated here: Though far less refined than the systems elaborated by al-Shīrāzī and others, our proto-system *jadāl* was still, to a considerable extent, a *system*, and a rather sophisticated system at that.

¹² For an illuminating example of a student employing one of al-Shāfi‘ī’s treatises to trump a contemporary, and apparent acquaintance, of al-Shāfi‘ī: the famed Murji‘ī *faqīh* Bishr al-Marīsī (d.218/833), see the anecdote related in our note attached to §53, in Part II of this dissertation.

“Presentation Categories” and Procedure

Bearing in mind that 1) my primary objective was to analyze the dialectical material of the *Umm* Version, and 2) technically speaking, the whole of the *Umm* Version may be said to constitute dialectical material, it became necessary — under constraints of page limits and time — to sift through the hundreds of rulings and arguments and objections of the *Ikhtilāf al-‘Irāqīyyīn* in order to isolate as exemplary a core set of arguments for analysis as might be managed. This was not an aprioristic “cherry-picking” enterprise, whereby only such examples as support one’s pre-determined theses are selected; we will state again: *all* of the material in the *Umm* Version, as a work of *ikhtilāf*, may be labelled “dialectical.” Rather, the exigencies of this dissertation prompted my selection based upon criteria of: 1) ease of identification, and 2) receptiveness to straightforward analysis. Put differently, the material selected for analysis (consisting, in the main, of my presentation categories A, B, and C),¹³ was that which was most “overtly dialectical.” That is to say, and bearing in mind the often extremely terse and in other ways abbreviated presentations of arguments in our treatise, that such materials as would require a greater amount of conjecture in analysis (my presentation categories D through G) were, for the most part, set aside for future research.¹⁴ All of this will be made plain once we proceed to the analyses themselves, and the reader will gain a better sense of the principles behind my selections.

As we have just now indicated, my procedure of sifting through the text generated a set of “presentation categories” — derived from my observations of the text as a whole — under which individual sections might be placed. A total of seven categories manifested themselves through this study, and a brief listing of them should adequately exhibit my determining criteria:

¹³ These categories will be explained shortly.

¹⁴ It is certainly true of the *K. Ikhtilāf al-‘Irāqīyyīn* that no single sequence of dialectic presented therein (i.e., belonging to categories A and B) is “complete” — either in the sense of being whole from start to finish, or of preserving all the details and components of a real disputation. We must recognize that, in consonance with the didactic aims of al-Shāfi‘ī in this, and other, *ikhtilāf* treatises, the sequences of dialectic which he presents are both abridged and abstracted, and — often — appear only as segments: singular facets of what can only have been multi-faceted and much longer debates. As far as abridgement is concerned, however, we are placed at a far greater disadvantage when confronted with arguments which do not appear in Q&A sequence (categories C, D, and E), and at an even greater disadvantage by plain statements of substantive rulings unaccompanied by full arguments (categories F and G). These latter require a significant amount of time-consuming background research and conjecture (reconstituting the bases of *istidlāl* and *i’tirād* from later reports of a jurist’s reasoning) in order to identify the components of such arguments, and the role they would have played in the dialectical encounters which are certain to have spawned them.

Part I: The Dialectical Forge Chapter III: Analyses of “Overtly Dialectical” Presentations in the <i>Kitāb Ikhtilāf al-‘Irāqīyyīn</i>

Presentations which are “Overtly Dialectical”	
A	Extended dialectical sequences (sequence = “ <i>in qāla</i> [X]; <i>fa-qīla lahu</i> [Y]”, or the like), with several Q&A exchanges
B	Short dialectical sequences, with only one Q&A exchange
C	Non-sequence arguments employing dialectical formulae (e.g., “ <i>ara’ayta</i> ” and “ <i>alā tarā</i> ”), which plainly signify past or recurrent disputation
Presentations which are not “Overtly Dialectical”	
D	Extended arguments with no dialectical formulae
E	Short arguments with no dialectical formulae
F	Plainly-stated substantive rulings supported only by a brief reference to evidence (<i>naql</i> , <i>‘aql</i> , or both)
G	Plainly-stated substantive rulings with no reference to evidence whatsoever

Again, we must stress that *all* of the material in the *Umm* Version, whatever the presentation category to which it belongs, is “dialectical” insofar as it appears in a book of *ikhtilāf* and is understood to have formed the focus of past and recurring disputation. The above chart, however, should make clear the difference between material I have considered “overtly dialectical” — exhibiting the most direct, the most easily accessible signs of past and ongoing dialectical disputation —, and material I have considered otherwise. Obviously, the core focus of subsequent analyses has been the “overt” material of presentation categories A, B, and C.

Having thus isolated a core set of materials for analysis, I proceeded by examining the arguments and proofs of these sections through the lens of the early *jadal*-theory texts, as described in Chapter II. It is vitally important to the concerns of this dissertation that we here recognize these *jadal*-theory analyses as constituting, at one and the same time, *uṣūl al-fiqh* analyses. As has been made plain in our review of the *jadal*-theory texts, the focal point of any juridical disputation is the opponent’s *istidlāl* — and the science of right-*istidlāl* is the science of *ijtihād*, i.e., the greatest concern of what was to become known as the *‘ilm uṣūl al-fiqh*, with its systematized epistemological, hermeneutical, and rational-inferential domains. Of course, our jurists’ *istidlāl* is often quite clearly stated, or at least indicated, in most of the presentations we have selected for analysis. Even when absent, however, the *i’tirāḍāt* which we attempt to identify in our analyses presuppose a species of *istidlāl* employed by the opposing jurist whose ruling has come under critique, even if the abridged nature of the text does not present his reasoning in full, or at all. Thus, even though our focus remains upon the window to proto-system *jadal* which our treatise provides, it must be remembered we are simultaneously extracting a picture of proto-system legal theory. The theories whose

principles and methods lay behind the disputed *istidlāl* of our dialectical selections were even themselves, as we shall see, at times the very subject of that dialectic.¹⁵

Returning to my procedure, the first analyses were performed for presentation category A. Rather — and by way of illustrating how the formats of *masā’il* presentations in the *Umm* unfold layer-by-layer, and how the various presentation categories interact —, my first analyses treated distinct *masā’il*-sets (twelve in number) concluding in category A extended dialectical sequences. I examined the rulings, arguments, proofs, and objections from each section of each *masā’il*-set, identifying species of *istidlāl* and *i’tirād* according to the categories of early *jadal*-theory, and to the extent which the abbreviated material allowed. As previously noted, this required some conjecture wherever categories D through G were a part of the set, but analyses for the concluding category A sequences were far more straightforward. All of my analyses for these twelve *masā’il* sets are present in this chapter in the form of summary tables, with the Arabic text in parallel for quick reference. Only the first five, however, have been accompanied with full prose discussions.

I next proceeded to analyze the ten category B presentations, without incorporating preceding opinions and arguments (i.e., not as *masā’il*-sets), due to restrictions of space. Also due to such constraints, these analyses are only presented in the form of summary tables, without accompanying prose discussions. Finally, rather than present full analyses of the more abbreviated category C arguments (some fifty in number), I chose instead to distil the functions which various of their distinctive dialectical formulae appear to fulfill, and to discuss these in full. As for categories D through G, I have kept record only of the most obvious features revealing themselves during the process of dividing the text into presentation categories; these will be summarized in the following chapter. Full analyses of these latter categories — a sampling of which proves them very rich indeed — must await future research.

A final note before proceeding to the analyses: I have, as a space saving device, employed two species of convention in the following summaries and discussions.¹⁶ The first consists of abbreviations, rather than full names or descriptors, for the arguing jurists of the text, as follows:

¹⁵ The most prominent illustration of theory-oriented, as opposed to *fiqh*-oriented, dialectic is what we have come to label *method-naqd*. See, among other places, our analyses for §§288, 646-7, 766-7, 1057ff., etc.

¹⁶ The following tables, along with the preceding table of presentation categories, have been listed for quick reference in a “Key to Categories and Abbreviations” at the start of this dissertation.

Abbreviations for Jurists and Disputants

AH = Abū Ḥanīfa	AY = Abū Yūsuf
IAL = Ibn Abī Laylā	MIH = Muḥammad b. al-Ḥasan al-Shaybānī
SH = al-Shāfiʿī	RB = al-Rabīʿ
P = Proponent	Q = Questioner
SHAP = al-Shāfiʿī introduced Anonymous Proponent	SHAQ = al-Shāfiʿī introduced Anonymous Questioner

The second convention consists of abbreviated (if still somewhat bulky) identification markers for quick reference to the summary tables of al-Shīrāzī’s and al-Bājī’s *iʿtirāḍāt* appearing in the appendices. It is hoped the following table will adequately illustrate how these markers were devised:

Identifications from al-Shīrāzī’s and al-Bājī’s Objection and Argument-Strategy Outlines

Example: al-Shīrāzī’s <i>Maʿūna fī l-Jadal</i>	Example: al-Bājī’s <i>Minhāj fī Tartīb al-Ḥijāj</i>
Shīr.VII.15.2.2.3 = <i>al-Farq bi-Qiyās al-Shabah</i> • Shīr.VII [istidlāl-domain of objection] ◦ <i>al-Kalām ʿalā Maʿnā al-Khiṭāb wa huwa «al-Qiyās»</i> • Shīr.VII.15 [genus of <i>iʿtirāḍ</i>] ◦ <i>Iʿtirāḍ 15: al-Muʾāraḍa</i> • Shīr.VII.15.2 [species of <i>iʿtirāḍ</i>] ◦ <i>al-Muʾāraḍa</i> by way of the <i>ʿilla</i> • Shīr.VII.15.2.2 [type] ◦ <i>Ḍarb 2: Muʾāraḍa</i> as regards the <i>Aṣl</i>, which is <i>al-Farq</i> • Shīr.VII.15.2.2.3 [subtype] ◦ <i>al-Farq bi-Qiyās al-Shabah</i>	Bāj.IX.B.15.2.2.2.4 = “he makes distinction by way of a <i>ḍarb</i> of <i>al-shabah</i>” • Bāj.IX [istidlāl domain of objection] ◦ <i>al-Iʿtirāḍ ʿalā al-Istidlāl bi-Maʿnā al-Khiṭāb, wa huwa al-Qiyās</i> • Bāj.IX.B [full treatment of 15 <i>wujūh</i>] ◦ <i>mā yaʿtaridu bihi ʿalā al-qiyās</i> • Bāj.IX.B.15 [genus of <i>iʿtirāḍ</i>] ◦ <i>al-iʿtirāḍ ʿalā al-ʿilla bi-l-muʾāraḍa</i> • Bāj.IX.B.15.2 [species of <i>iʿtirāḍ</i>] ◦ <i>muʾāraḍat al-ʿilla bi-l-ʿilla</i> • Bāj.IX.B.15.2.2 [type] ◦ <i>al-muʾāraḍa bi-ʿillat al-aṣl; which is al-farq</i> • Bāj.IX.B.15.2.2.2 [subtype] ◦ <i>farq bi-dalālat al-ḥukm</i> • Bāj.IX.B.15.2.2.2.4 [subtype of subtype] ◦ he makes distinction by way of a <i>ḍarb</i> of <i>al-shabah</i>

Full Analyses of *Masā’il* Concluding in an Extended Dialectical Sequence

There are a total of twelve extended dialectical sequences (presentation category A) in the *Umm* Version of the *K. Ikhtilāf al-‘Irāqīyyīn*. In order to present a complete picture of the manner in which SH interacts with the past opinions of AH, AY, and IAL, I have chosen to treat category A sequences along with the rulings and opinions which precede them, as forming distinct “*masā’il*-sets.” Thus, the primary analyses of this section of Chapter III are concerned with twelve *masā’il*-sets,¹⁷ each of which begins with a variety of presentation categories, but all of which conclude in a category A extended dialectical sequence. Unfortunately, due to space limitations, I will only accompany a select number (five) of these *masā’il*-sets with a full-prose discussion. The material, as we shall soon see, is so rich as to require a great many pages for each set, and full discussions for all twelve *masā’il*-sets would expand this present volume beyond an acceptable page-range. With apologies, then, for the preponderance of abbreviations and densely-packed information, I will, after the first five *masā’il*-sets, revert to summary tables for the remainder.

It should also be noted that all dialectical sequences in the *Umm* Version of the *K. Ikhtilāf al-‘Irāqīyyīn* (presentation categories A and B) involve a debate between SH and an anonymous opponent (SHAP or SHAQ) — the latter usually defending a position expressed in preceding sections by AH, AY, IAL, or a certain epistemic community (the Mashriqiyyūn, Ahl al-Baṣra, Ahl al-Kalām, et al.) No doubt owing to the presentation format of the original (Shaybānī Version) treatise, we are invariably presented (in the *Umm* Version) with abbreviated AH, AY, and IAL opinions and arguments first, followed by more detailed SH opinions and arguments. In our twelve *masā’il*-sets of present concern, of course, these will in turn be followed by extended SH vs. SHAP/SHAQ dialectical sequences.

¹⁷ They are: 1) §§89-102; 2) §§236-72; 3) §§274-88; 4) §§634-67; 5) §§686-704; 6) §§744-73; 7) §§1051-61; 8) §§1067-80; 9) §§1125-31; 10) §§1217-32; 11) §§1310-26; and 12) §§1402-12.

[masā’il-set #1] §§89-102

Summary of Analysis:¹⁸

(89) وَإِذَا بَاعَ الرَّجُلُ الرَّجُلَ بَيْعًا إِلَى الْعَطَاءِ فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ فِي ذَلِكَ: الْبَيْعُ فَاسِدٌ.	• (89) AH ruling for <i>mas’ala</i> #1 • [<i>dalīl</i> not mentioned; ‘<i>illa</i> implied: <i>ajal ghayr ma’lūm</i>; i’tirād of IAL ‘<i>illa</i> implied: <i>man’ al-waṣf fi’l-far’</i> (Shīr.VII.4; Bāj.IX.6.1.1)] • [Mabsūṭ reports <i>dalīl</i> for AH: <i>athar-qawl</i> of Ibn ‘Abbās; AH <i>istidlāl bi-qawl al-wāḥid min al-Ṣaḥāba</i>; i’tirād of IAL reported <i>istidlāl</i> implied: conveyance of <i>khilāf</i> from one of the Ṣaḥāba (Shīr.IV.3; Bāj.V.2)]
(90) وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الْبَيْعُ جَائِزٌ وَالْمَالُ حَالٌ. وَكَذَلِكَ قَوْلُهُمَا فِي كُلِّ مَبِيعٍ إِلَى أَجَلٍ لَا يُعْرَفُ فَإِنْ اسْتَهْلَكَهُ الْمُشْتَرِي فَعَلَيْهِ الْقِيَمَةُ فِي قَوْلِ أَبِي حَنِيفَةَ، وَإِنْ حَدَثَ بِهِ عَيْبٌ رَدَّهُ وَرَدَّ مَا نَقَصَهُ الْعَيْبُ، وَإِنْ كَانَ قَائِمًا بِعَيْنِهِ فَقَالَ الْمُشْتَرِي: لَا أُرِيدُ الْأَجَلَ وَأَنَا أَتَقَدُّ لَكَ الْمَالُ. جَازَ ذَلِكَ لَهُ فِي هَذَا كُلِّهِ فِي قَوْلِ أَبِي حَنِيفَةَ. وَبِهِ يَأْخُذُ.	• (90[a]) IAL ruling for <i>mas’ala</i> #1: • [<i>dalīl</i> not mentioned; ‘<i>illa</i> implied: <i>ajal ma’lūm</i>; i’tirād of AH ‘<i>illa</i> implied: <i>man’ al-waṣf fi’l-far’</i> (Shīr.VII.4; Bāj.IX.6.1.1) or <i>al-qawl bi-mūjib al-‘illa</i> (?) (Shīr.VII.9.2; Bāj.IX.8)] • [Mabsūṭ reports <i>dalīl</i> for IAL: <i>athar</i> of ‘Ā’isha; IAL <i>istidlāl bi-qawl al-wāḥid min al-Ṣaḥāba</i>; i’tirād of AH reported <i>istidlāl</i> implied: conveyance of <i>khilāf</i> from one of the Ṣaḥāba (Shīr.IV.3; Bāj.V.2)] • (90[b]) AH and IAL rulings for <i>mas’ala</i> #1 extended across entire species of contract • [disputed <i>waṣf</i> is stated] • (90[c]) AH subsidiary rulings ##1a-c • AY adherence (to all AH rulings)
(91) قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا بَاعَ الرَّجُلُ الرَّجُلَ بَيْعًا إِلَى الْعَطَاءِ فَالْبَيْعُ فَاسِدٌ مِنْ قِبَلِ أَنَّ اللَّهَ عَزَّ وَجَلَّ أَذِنَ بِالذَّيْنِ إِلَى أَجَلٍ مُسَمًّى، وَالْمُسَمًّى الْمَوْقُوتُ	• (91) SH ruling for <i>mas’ala</i> #1; supported by: • God’s permission in (Q.2:282) [SH <i>dalīl al-Khiṭāb</i>] • SH <i>tafsīr</i> via <i>dalāla</i> from Q.2:189, 22:28,

¹⁸ Here, and for all subsequent summary tables, the reader is asked first to read the indicated sections of my parallel translation in Part II of this dissertation. An effort has been made not to reproduce text from the translation; summary tables will therefore contain only the briefest assessment as to the contents of each section, followed by my abbreviated analyses and attempted identifications. Perhaps the best course for the reader, then, is to: 1) read through the indicated sections in the translation; and 2) peruse the summary tables with the translation laid open before them; before 3) proceeding to my full-prose discussions (when provided).

بِالْأَهْلَةِ الَّتِي سَمَّى اللَّهُ عَزَّ وَجَلَّ فَإِنَّهُ يَقُولُ: «يَسْأَلُونَكَ عَنِ الْأَهْلَةِ قُلْ هِيَ مَوْقِيَةٌ لِلنَّاسِ وَالْحَجَّ» [البقرة: 189]. وَالْأَهْلَةُ مَعْرُوفَةٌ الْمَوَاقِيَتْ وَمَا كَانَ فِي مَعْنَاهَا مِنَ الْأَيَّامِ الْمَعْلُومَاتِ فَإِنَّهُ يَقُولُ: «فِي أَيَّامٍ مَّعْلُومَةٍ» [الحج: 28]. وَالسَّنِينَ فَإِنَّهُ يَقُولُ: «حَوْلَيْنِ كَامِلَيْنِ» [البقرة: 233]. وَكُلُّ هَذَا الَّذِي لَا يَتَقَدَّمُ وَلَا يَتَأَخَّرُ، وَالْعَطَاءُ لَمْ يَكُنْ قَطُّ فِيَمَا عَلِمْتُ وَلَا تَرَى أَنْ يَكُونَ أَبَدًا إِلَّا يَتَقَدَّمُ وَيَتَأَخَّرُ، وَلَوْ اجْتَهَدَ الْإِمَامُ غَايَةَ جَهْدِهِ لَدَخَلَهُ التَّقَدُّمُ وَالتَّأَخُّرُ.	2:233 SH empirical inductive argument (with <i>lā narā</i>; the ‘<i>aṭā</i>’ is never but early or late, even with <i>imām</i>’s best <i>ijtihād</i>)
(92) أَخْبَرَنَا الرَّبِيعُ: أَخْبَرَنَا الشَّافِعِيُّ قَالَ: أَخْبَرَنَا سُفْيَانُ بْنُ عُيَيْنَةَ عَنْ عَبْدِ الْكَرِيمِ عَنْ عِكْرِمَةَ عَنْ ابْنِ عَبَّاسٍ قَالَ: لَا تُبَايَعُوا إِلَى الْعَطَاءِ وَلَا إِلَى الْأَنْدَرِ وَلَا إِلَى الْعَصِيرِ.	(92) RB relates SH <i>naql</i>: - supporting <i>athar-qawl</i> of Ibn ‘Abbās
(93) قَالَ الشَّافِعِيُّ: وَهَذَا كُلُّهُ كَمَا قَالَ؛ لِأَنَّ هَذَا يَتَقَدَّمُ وَيَتَأَخَّرُ.	(93) RB relates SH’s implied ‘<i>illa</i> for proscription of Ibn ‘Abbās: [SH <i>istidlāl bi-qawl al-wāḥid min al-ṣaḥāba</i>]
(94) وَكُلُّ بَيْعٍ إِلَى أَجَلٍ غَيْرِ مَعْلُومٍ فَالْبَيْعُ فِيهِ فَاسِدٌ.	(94) SH extends ruling for <i>mas’ala</i> #1 across entire genus of contract
(95) قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: فَإِنْ هَلَكَتِ السَّلْعَةُ الَّتِي أُبْتِيعَتْ إِلَى أَجَلٍ غَيْرِ مَعْلُومٍ فِي يَدَيِ الْمُسْتَشْتَرِي رَدَّ الْقِيَمَةَ، وَإِنْ نَقَصَتْ فِي يَدَيْهِ بَعِيبٍ رَدَّهَا وَمَا نَقَصَهَا الْعَيْبُ، فَإِنْ قَالَ الْمُسْتَشْتَرِي: أَنَا أَرْضَى السَّلْعَةَ بِثَمَنِ حَالٍ وَأَبْطَلُ الشَّرْطَ بِالْأَجَلِ، لَمْ يَكُنْ ذَلِكَ لَهُ إِذَا انْعَقَدَ الْبَيْعُ فَاسِدًا لَمْ يَكُنْ لِأَحَدِهِمَا أَنْ يُصْلِحَهُ دُونَ الْآخَرِ.	(95) SH subsidiary rulings ##1a-c; [#1c is counter-ruling to AH #1c] - SH explains <i>sabab</i> behind #1c; [no <i>dalīl</i> provided, but his argument (internal-contradiction) unfolds in the ensuing dialectic]
(96) وَيُقَالُ لِمَنْ قَالَ قَوْلَ أَبِي حَنِيفَةَ: أَرَأَيْتَ إِذَا زَعَمْتَ أَنَّ الْبَيْعَ فَاسِدٌ فَمَتَى صَلَحَ؟	(96) SH (in role of Q) initiates “instructional” dialectic with SHAP of AH ruling #1c (<i>yuqālu li-man qāla qawl Abī Ḥanīfa</i>): [SH <i>ara’ayta</i>: pushes premises #1 and #2, setting stage for SHAP concession to self-contradiction]

Part I: The Dialectical Forge Chapter III: Analyses of “Overtly Dialectical” Presentations in the <i>Kitāb Ikhtilāf al-‘Irāqīyyīn</i>	
(97) فَإِنْ قَالَ: صَلَحَ بِإِبْطَالِ هَذَا شَرْطُهُ.	(97) SHAP <i>jawāb</i> (<i>fa-in qāla</i>): [SHAP concedes premises #1 and #2]
(98) قِيلَ لَهُ: فَلِهَذَا أَنْ يَكُونَ بَائِعًا مُشْتَرٍ، أَوْ إِنَّمَا هَذَا مُشْتَرٍ وَرَبُّ السَّلْعَةِ بَائِعٌ؟	(98) SH dialectical question (<i>qīla lahu</i>): [SH pushes SHAP to concede premise #3; disjunctive question, one option absurd]
(99) فَإِنْ قَالَ: بَلْ رَبُّ السَّلْعَةِ بَائِعٌ.	(99) SHAP <i>jawāb</i> (<i>fa-in qāla</i>): [SHAP concedes premise #3]
(100) قِيلَ لَهُ: فَهَلْ أَحْدَثَ رَبُّ السَّلْعَةِ بَيْعًا غَيْرَ الْبَيْعِ الْأَوَّلِ؟	(100) SH dialectical question (<i>qīla lahu</i>): [SH pushes SHAP to concede premise #4]
(101) فَإِنْ قَالَ: لَا.	(101) SHAP <i>jawāb</i> (<i>fa-in qāla</i>): [SHAP concedes premise #4]
(102) قِيلَ: فَقَوْلُكَ مُتَنَاقِضٌ تَزْعُمُ أَنْ بَيْعًا فَاسِدًا حُكْمُهُ كَمَا لَمْ يَصِرْ فِيهِ بَيْعٌ يَصِيرُ بَيْعًا مِنْ غَيْرِ أَنْ يَبِيعَهُ مَالِكُهُ.	(102) SH springs his objection (<i>qīla</i>): [SH announces his <i>elenchus</i> by charging <i>tanāquḍ</i>: “Your <i>qawl</i> is <i>mutanāqid</i>,” then he demonstrates SHAP’s <i>tanāquḍ</i> by conjoining SHAP’s conceded premises into an abbreviated, self-contradicting sentence.

Discussion of Analysis:

The abridged presentation of AH and IAL rulings in §§89-90a at first precludes any discussion of the arguments which lay behind them. With reference to the *Mabsūṭ* (13:26-7), and later sections of this *mas’ala*, however, we can set the stage for the ensuing SH vs. SHAP dialectic of §§96-102 by noting the conflicting *āthār* and ‘*illa*-interpretations upon which AH and IAL are reported to have based their opposing arguments. As for AH, we are told in the *Mabsūṭ* that he followed an *athar* of Ibn ‘Abbās, who declared *bay’* tied to distribution of ‘*aṭā’* (among other things) as *fāsid* (cf. RB in §92 above); IAL, however, followed an *athar* of ‘Ā’isha, who allowed *bay’* tied to distribution of ‘*aṭā’*. From the start, then, and from one perspective, we can identify the source of AH vs. IAL *ikhtilāf* as *ta’āruḍ al-adilla* — in the broadest sense, the *athar* choice of one represents a *mu’āraḍa* of the *athar* choice of the other.

Of course, by the fourth and fifth centuries H, reliance upon *qawl al-wāḥid min al-ṣaḥāba* for *hujja* had become a far more contentious practice. Still — were we to assume that AH and IAL, or associates and students, actually engaged in disputation

over this *mas’ala* — we can easily locate the broader dialectical objection (which either side might have brought as an initial *i’tirāḍ*) in the *jadāl* works of al-Shīrāzī, Ibn ‘Aqīl, and al-Bājī.¹⁹ For al-Shīrāzī, it is the third *i’tirāḍ* of *al-Kalām ‘alā Qawl al-Wāḥid min al-Ṣaḥāba*, which he defines as: “That he conveys *al-khilāf* on the authority of another one of the *Ṣaḥāba*, in order to make of the *mas’ala* a *khilāf* between the *Ṣaḥāba*” (Shīr.IV.3; Bāj.V.2). The definitions of Ibn ‘Aqīl and al-Bājī for this *i’tirāḍ* follow that of their teacher for the most part, with slight variations regarding methods of response.

That there is a deeper level to this AH vs. IAL *ikhtilāf*, however, is immediately apparent from the following section §90a, wherein the core property of the *mas’ala* in dispute is clearly indicated. Simply put, the distribution of *‘aṭā’* is deemed by all to constitute an *ajal*, but *ikhtilāf* centers upon precisely what species of *ajal* it is: Is it an *ajal ma’lūm*, or *ghayr ma’lūm*? Again, reference to al-Sarakhsī’s explanation in his *Mabsūṭ* brings us back to the respective *āthār* followed by AH and IAL, but we also learn more as regards their purported interpretations and subsequent reasoning; i.e., we gain insight into the *‘aql* as well as the *naql* of *ikhtilāf*. First we learn IAL reasoned that “the *bay’* is *jā’iz* and the *māl* is *ḥāll*, because the *‘aqd*, when it was not sound due to the *ajal* which he mentioned, his mention of it is nonsense/null (*lughīya dhikruhu / laghiya dhikrahu*).” Moreover, al-Sarakhsī informs us “that ‘Ā’isha used to say: The time of the distribution of the *‘aṭā’* is *ma’lūm bi’l-‘urf* — the distribution of it does not come late except rarely — so this is a *bay’ bi-ajal ma’lūm*.” As for the Ḥanafī position reported by al-Sarakhsī, it is, in its base essentials, the same as that argued by SH in §§91-3 above. In brief: 1) the *‘aṭā’* is a *fi’l al-‘ibād* which might come early or late; 2) the *ājāl* are by way of *awqāt*, not *afāl*; 3) Q.2:128 confirms *mawāqīt* as fixed times; 4) Prophetic Sunna (re: *salam*) shows the *shart* of delayed-exchange contracts to be announcement of the *ajal* — an *ajal ma’lūm*; 5) announcement of the *ajal* is by what does not come early or late; and 6) what comes early or late of the *afāl al-‘ibād* is *majhūl*.

If we were to assume, then, that the respective positions of AH and IAL were debated in dialectical venues, we can see that much more would have followed subsequent to the *ta’arūḍ* of opposing *āthār*. We will note that IAL’s position appears to have rested upon two bases: 1) an additional (or continuing) *athar* of ‘Ā’isha in explanation of her *qawl* (*‘aṭā’* is an *ajal ma’lūm*); and 2) his own *ra’y* regarding the non-efficiency of an *ajal ghayr ma’lūm* in occasioning a *ḥukm* of *bay’ fāsīd* — it merely nullifies

¹⁹ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 82f.; Ibn ‘Aqīl, *K. al-Jadal*, 39f.; al-Bājī, *Minhāj*, Turkī ed., 144, §298.

the *shart*, and the *bay‘* persists as that species whose payment/exchange is immediately due (no *dalīl* for this reasoning being given by al-Sarakhsī). As we see in al-Sarakhsī’s report, however, the Ḥanafī position appears much stronger, relying upon Qur’ānic and Sunnaic *adilla* to support a definition of *ajal ma‘lūm* as a term fixed by the clockwork of the heavens, and divorced from the imprecise completion-time of human acts (such as ‘*aṭā*’ distribution). Importantly, we are assured by SH’s nearly identical argument in §§91-3 that these indicants and interpretations were employed by those arguing the AH position as early as the late second century H. We will turn soon to SH’s argument, in an attempt to identify his *istidlāl*, and to infer his *i‘tirāḍ* of the IAL position. Before we do so, however, we might first attempt to do the same for IAL and AH, benefiting from al-Sarakhsī’s explanation.

We are limited by not knowing the *aṣl* of either AH or IAL (although the Q.2:282 presented by SH in §91 is a likely candidate for *istidlāl bi-dalīl al-khiṭāb*), but we have been provided the core focus of *ikhtilāf*: the precise nature of distribution of ‘*aṭā*’ as an *ajal*. We have, in other words, been provided a proposed ‘*illa* and counter-‘*illa* for the *far‘* of *bay‘* tied to the ‘*aṭā*’. For AH, following the *athar* of Ibn ‘Abbās, the ‘*aṭā*’-distribution constitutes a *waṣf* — it is an *ajal ghayr ma‘lūm* — which is efficient in occasioning the *ḥukm* of *fāsid* for the *bay‘*. For IAL, however, following the *athar* of ‘Ā’isha, it constitutes the opposite *waṣf* — it is an *ajal ma‘lūm* — which is efficient in occasioning the *ḥukm* of *jā’iz*. The beginning of a dispute between proponents of these opposing properties, then, would be an objection to the opponent’s proposed *waṣf* as existing in the *far‘*, which is a species of *i‘tirāḍ* — *man‘ al-waṣf fi’l-aṣl* — we find once again in the *jadāl* works of al-Shīrāzī (Shīr.VII.4), Ibn ‘Aqīl, and al-Bājī (Bāj.IX.6.1.1).²⁰

Of particular note is al-Bājī’s discussion. After supplying an example of *man‘ al-waṣf fi’l-aṣl*, he proceeds to delineate three methods of *jawāb* against such an *i‘tirāḍ*: 1) *al-tafsīr*; 2) *bayān mawḍi‘ al-taslīm*; and 3) *al-dalāla*. Now, if we were to imagine a proponent of the AH position (‘*aṭā*’ is an *ajal ghayr ma‘lūm*) faced with an objection (*man‘/mumāna‘a*) to the *waṣf* of *ajal ghayr ma‘lūm* as existing in the *far‘* of *bay‘* tied to the ‘*aṭā*’, we can immediately locate the Ḥanafī reasoning — as reported by al-Sarakhsī — in the first and third of al-Bājī’s response-methods. In other words, al-Sarakhsī’s reported Ḥanafī reasoning constitutes, in fact, two kinds of *jawāb* to an opponent’s objection that ‘*aṭā*’ is

²⁰ al-Shīrāzī, *Ma‘ūna*, al-‘Umayrīnī ed., 96; Ibn ‘Aqīl, *K. al-Jadal*, 50, §251; al-Bājī, *Minhāj*, Turkī ed., 166, §§357 and 359.

not an *ajal ghayr ma‘lūm*: 1) *tafsīr* (the *fi’l al-‘ibād* might come early or late; *ājāl* are by way of *awqāt*, not *afāl*); and 2) *dalāla* (Q.2:128; Prophetic Sunna re: *salam*).

Switching the roles, however, does not produce the same result, and we find that al-Sarakhsī’s reported IAL reasoning does not constitute a defence of ‘Ā’isha’s *wasf* (‘*aṭā*’ is an *ajal ma‘lūm*). In fact, it points to a different line of reasoning altogether: IAL argues that any *shart* which ties the *bay‘* to an *ajal ghayr ma‘lūm* is simply nullified; that is to say, the *wasf* of *ajal ghayr ma‘lūm* is efficient in occasioning the *ibtāl* of the *shart* — not the *ifsād* of the *bay‘*, and the contract lives on as a valid *bay‘* of immediate payment/exchange (the *māl* is *ḥāl*).²¹ We will note that IAL is now making a general argument for all *buyū‘* tied to an *ajal ghayr ma‘lūm*, rather than a particular argument about the *ajal*-nature of ‘*aṭā*’.²² Accordingly, we may perceive a shift in focus from ‘*illa* in the *far‘* to ‘*illa* in the *aṣl* (although IAL’s *dalīl* remains hidden from us). In essence, IAL has accepted the efficiency of the ‘*illa* in the *aṣl*, but objected to what AH purports to be the effect — it is though the same ‘*illa* occasions a different *ḥukm* for IAL (*ibtāl al-shart*) than it occasions for AH (*ifsād al-bay‘*). Imagining an adherent to IAL’s reported reasoning in the role of questioner, then, we might conjecture as to the type of *i’tirād* he would level against a proponent of the AH position. Not knowing the precise *istidlāl* of either position makes this difficult, but most likely it would be similar to that genus of *i’tirād* known as *al-qawl bi-mūjib al-‘illa* (Shīr.VII.9 [especially *ḍarb* 2]; Bāj.IX.8).²³

To this point our analyses have been marked by conjecture and the drawing of reported arguments from a significantly later source: the *Mabsūṭ* of al-Sarakhsī (d.483/1090). Unfortunately, due to the abridged form in which the positions and arguments of AH, IAL, and AY almost invariably occur in the *Kitāb Ikhtilāf al-‘Irāqīyyīn* (my presentation categories F-G), we are usually left with no alternative. This is far less often the case with SH, however, for although his rulings and supporting arguments are also abridged to some extent or another, we are more frequently presented with his *adilla* and explanations of his reasoning — not to mention the occasional Q&A dialectic

²¹ Happily, we find support for our interpretation of this IAL argument in the early *ikhtilāf* work of al-Ṭabarī (d.310/923), wherein this famed polymath mentions: “And the ‘*illa* of one who says: The *bay‘* is *jā’iz* when the *ājāl* are *majhūla*; it is that the *bay‘* is a *ma’nā*, and the *ta’jīl* another *ma’nā* besides it, so the *jā’iz* as pertains to the *bay‘* is not nullified due to the *fasād* of *al-ajal al-majhūl* — and such is like *al-shart al-fāsīd*. And the ‘*illa* of one who nullifies the *bay‘* by way of a *shart* of *al-ajal al-fāsīd* is of a likeness (*shabīhatun bi-*) the ‘*illa* of one who nullifies the *bay‘* by way of *al-shart al-fāsīd*” (*Ikhtilāf al-Fuqahā’*, Kern ed., 54).

²² Cf. §90[b], above, where the respective AH and IAL positions are maintained across all *buyū‘* tied to unknown *ajal*.

²³ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 108ff.; Ibn ‘Aqīl, *K. al-Jadal*, 60f., §290ff.; al-Bājī, *Minhāj*, Turkī ed., 173ff., §§381ff.

against an anonymous opponent, the first of which we are approaching. Before we get to that, however, we ought to conclude our analysis of the *mas’ala* of *bay’* to an unknown *ajal* by taking a look at SH’s ruling (*bay’* tied to *‘aṭā’* is *fāsid*) and accompanying argument.

We may begin with his *istidlāl*, which is clearly indicated in §91 by “due to the fact that God... gave His permission for *dayn ilā ajal musamman*” (a reference to Q.2:282).²⁴ Although this looks like *al-istidlāl bi’l-Kitāb* at first, we must remember that our *mas’ala* is one of *ajal ghayr ma’lūm* — the opposite, in fact, of *ajal musamman*. The *istidlāl* of SH in this instance thus resembles that species known to al-Shīrāzī, et al., as *dalīl al-khiṭāb*. In other words, when we know from the *naṣṣ* of the Qur’ān that God allows *dayn ilā ajal musamman*, we can infer that God does not allow *dayn ilā ajal ghayr musamman*.²⁵ Importantly, al-Shīrāzī (in his *Luma’*) cites Ibn Surayj — a “founding father” of both *uṣūl al-fiqh* and juridical *jadāl* — as saying: “If it [the *khiṭāb*] is via *lafẓ al-sharṭ*, like His *qawl*, Most High: «*in jā’akum fāsiqun*», it provides indicant that what he omitted (*mā ‘adāhu*) is [judged] by its *khilāf*. And if it is not via *lafẓ al-sharṭ*, it does not provide indicant; and it is the *qawl* of some/one of the Aṣḥāb Abī Ḥanīfa.”²⁶ The *istidlāl* of SH in §91 conforms very well to these parameters, as God’s *qawl* in Q.2:282 employs the *lafẓ al-sharṭ* of *idhā*. The association of this form of *dalīl al-khiṭāb* with *ba’d* Aṣḥāb Abī Ḥanīfa also provides indicant for us that the AH ruling of §89 may have depended upon the same *istidlāl* as SH in §91. At any rate, SH proceeds to fine-tune his initial *istidlāl* by

²⁴ «يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَيْتُمْ بِدَيْنٍ إِلَى أَجَلٍ مُّسَمًّى...» Al-Ṭabarī’s juridical *tafsīr* of this āya sheds light upon its connection to *bay’* to a known *ajal* (*al-Aḥkām al-Fiqhiyya*, 189-90). First, he interprets “*idhā tadāyaytum*” as “*idhā tabāya’tum*, or *ishtaraytum*” etc.; and “*ilā ajal musamman*” as “to a *waqt ma’lūm* which you have fixed between yourselves.” He then mentions that such might include *qard* and *salam*, and implies the possibility of “*bay’ al-ḥāqir al-jā’iz bay’ahu min al-amlāk bi’l-athmān al-mu’ajjala*.” All of these, he says, are “*al-duyūn al-mu’ajjala ilā ajal musamman*, when their *ājāl* are *ma’lūma* to a designated *ḥadd*.” Interestingly, he concludes by saying: “And Ibn ‘Abbās used to say: This āya was revealed regarding *al-salam*, specifically (*khāṣṣatan*).” If such a *sabab al-nuzūl* was indeed attributed to Ibn ‘Abbās in SH’s time, then we might conceive of another layer of complexity in SH’s *istidlāl* from this āya as supported by another *qawl* of Ibn ‘Abbās. In other words, if Ibn ‘Abbās was thought to have considered this āya *salam*-specific, an opponent might have objected to the twinning of *istidlāl* from it with his *bay’*-oriented *athar-qawl*.

²⁵ Cf. al-Shīrāzī’s examples of *dalīl al-khiṭāb* (*Ma’ūna*, al-‘Umayrīnī ed., 35-6). Note that the above SH *istidlāl* does not conform, however, to al-Bājī’s *al-istidlāl bi’l-ḥaṣr*, which is restricted to *aḥkām* pronouncements preceded by the *lafẓ* of *innamā*, nor even to the additional markers he attributes to his teacher al-Shīrāzī (*alif lām*, *dhālīka*, and *idāfa*) — with which al-Bājī disagrees (*Minhāj*, Turkī ed., 25-6, §46; cf. al-Shīrāzī, *al-Luma’*, Mustū ed., 105-6, §115). Sānū’s definitions, however (*Mu’jam*, s.v. “*dalīl al-khiṭāb*” and “*mafhūm al-mukhālafa*”), are certainly broad enough to include the SH *istidlāl* above. Finally, we should note al-Shīrāzī reviews all of the variant opinions regarding *dalīl al-khiṭāb* and its restrictions in his *Tabṣira* (Hītū ed., 218-39).

²⁶ al-Shīrāzī, *al-Luma’*, Mustū ed., 106.

fixing a definition of *ajal musamman* — based upon a number Qur’ānic indicants — to the clockwork of the “new moons,” never early or late, and divorcing it from human acts in much the same way as al-Sarakhsī ascribes to proponents of the Ḥanafī position. He then seals his *istidlāl* by assuring us that ‘*aṭā*’ distribution is of the very opposite nature, regardless of the imām’s best *ijtihād*. The Qur’ānic indicants, then, constitute a form of *tafsīr* via Qur’ānic *dalāla*. As for SH’s closing justification, however, it is difficult to identify by the categories of our *jadāl*-theory lens; we will simply consider it an empirical inductive argument (i.e., “from what we have seen, the ‘*aṭā*’ never comes but early or late”).

It is at this point we encounter an editorial comment from RB who, in §92, relates to us an *athar* of Ibn ‘Abbās narrated to him by SH himself, on the authority of his teacher Sufyān b. ‘Uyayna, and which is largely the same as that which al-Sarakhsī reports as a *dalīl* of the Ḥanafī ruling we find in §89 (minus a few acts). Of note is that Ibn ‘Abbās proscribes *buyū’* tied to a number of human act-completions, and RB reports SH’s extraction of the ‘*illa* from this *athar* in §93: because all of this “comes early or comes late.” Thus, with the help of RB’s comments, we gain a rounded picture of SH’s argument: *istidlāl bi-dalīl al-khiṭāb* refined by *tafsīr* from Qur’ānic *adilla* and supported by *istidlāl bi-qawl al-wāḥid min al-ṣaḥāba*. With the general efficiency of his ‘*illa* thus confirmed, we learn in §94 that SH extended his ruling (the *bay’* is *fāsid*) to the entire genus of *buyū’* tied to an unknown *ajal*.

We are now at the point right before the first openly Q&A dialectical sequence of the *K. Ikhtilāf al-‘Irāqīyyīn*,²⁷ and in §95 SH revisits the same subsidiary *masā’il* which received AH rulings in §90[c], agreeing with all but the last. As this disagreement marks the point of departure for the ensuing dialectic, we ought to briefly review it here, noting: 1) we are still within the larger *mas’ala* of *bay’* tied to an unknown *ajal*; and 2) AH has ruled in §90[c] that — if the object of the *bay’* is of a fixed substance (*qā’im bi-‘aynihi*) — it is allowed that the buyer dismiss his *shart* of *ajal* and offer to pay in ready *māl*. SH, to the contrary (and making no mention of a *qā’im bi-‘aynihi* object of *bay’*), declares the buyer to have no such right, pointing out: “When the *bay’* is invalidly contracted (*in‘aqada... fāsīdan*), to neither belongs [the right] to rectify it (*yusliḥahu*) without the

²⁷ §§96-102 as category A; with §§89-90 having been G’s, and §§91-4 a collective D according to my presentation typology.

other.” His argument for this ruling is then laid bare in a concise sequence of “instructional” dialectical disputation with a proponent (SHAP) of the AH ruling.²⁸

SH assumes the role of questioner in §96, and clarifies the disposition of SHAP (which we are normally left to infer by ourselves) by way of the introductory formula: “*Yuqālu li-man qāla qawl Abī Ḥanīfa*” (the referenced *qawl* being AH ruling #1c of §90[c]). He then launches his first dialectical question via one of the two great staples of proto-system dialectical practice across both juridical and theological domains: *ara’ayta* (the other “staple” being *alā tarā*). We will see a number of uses to which this introductory question-formula is put in following discussions, but in this instance it serves the humble purpose of getting SHAP to focus upon the precise moment in which the *bay’* — which SHAP concedes as *fāsid* — purportedly becomes rectified. In other words, SH’s opening *ara’ayta* sets the stage for a premise-by-premise unveiling of SHAP’s self-contradiction — a classic *reductio ad impossibile* in successive stages.

SHAP’s first response (preceded by the “instructional” formula: *fa-in qāla*) is a direct answer to SH’s opening *ara’ayta*: he delivers the precise moment of the claimed rectification, which is at contracting-party X’s *ibṭāl* of his *shart* (i.e., the *shart* of tying payment to an unknown *ajal*). And thus has SHAP delivered the first two of four premises from which SH will construct his charge of self-contradiction (*tanāquḍ*), for SHAP has conceded not only to (#1) the moment of purported *iṣlāḥ* — when the *fāsid bay’* becomes sound —, but to (#2) the agency of contracting-party X.

SH brings his second dialectical question (*qāla lahu*) in §98, presenting SHAP with an absurdity (in essence, a non-*endoxon* situation) for which only a denial can be elicited.²⁹ Is it possible, after all, for contracting-party X to be both buyer and seller?

²⁸ I would label §§96-102 as “instructional” dialectic due to the didactic intent evinced by the formulae employed: “It is said to the one who professes (AH *qawl*): X; And if he says Y; It is said to him: Z; etc.” The sequence thus reads as a manual for the jurist who might find himself in the role of questioner attempting to undermine a proponent of the AH position. I have attempted throughout this dissertation to consistently refer to the proto-system juridical dialectic of the *Umm* as “*jadal* teaching and practice.” This is intended to suggest a mode of *jadal*-tradition transmission from jurist to student across generations, and in lieu of specialized, systematic treatises. §§96-102, and all the many dialectical sequences preserved in the *Umm* for that matter, stand witness to a proto-system *jadal* teaching and practice. Some of these sequences have more of a “historical” slant (“And one of the people [*ba’d al-nās*] said to me: X; so I said to him: Y;” etc.), while others — such as that with which we are presently concerned — have a more “instructional” slant, and yet others appear to meld both intentions together.

²⁹ I would remind the reader that, apart from discussions of Aristotle and the Arabic Aristotelian tradition, my use of the term *endoxon* should nowhere in this dissertation be construed as a positive claim to Aristotelian “influence.” Rather, the term is employed due to its benefit in describing premises which are: 1) generally accepted in the relevant domain of argument; and 2) expected to be conceded by an opponent.

The aim, of course, is to force SHAP’s concession that contracting-party X can only be the buyer, and the owner of the commodity (*rabb al-sil’a*) the seller, thus establishing that the buyer has acted unilaterally in his *ibṭāl* of the *sharṭ*. Inevitably, SHAP denies the absurdity in §99, and concedes the *rabb al-sil’ati* as seller, in effect confirming the seller’s identity, his lack of agency, and the unilateral agency of the buyer. Thus does SH acquire from SHAP the third premise for his charge of *tanāquḍ*.

With his final question in §100, SH pushes for one last concession from SHAP: confirmation that no new *bay’* has been introduced by the seller. SHAP concedes in §101, neatly delivering the fourth premise to SH, and finally, in §102, we may read SH’s succinctly formulated *elenchus*:

“Your *qawl* is *mutanāqid*. You claim that a *bay’ fāsīd* whose *ḥukm* is like one in which no *bay’* occurs becomes a *bay’* without its *mālik* contracting *bay’*.”

As we can see, this *elenchus*-statement consists of two parts. First is the charge of *tanāquḍ*, and second a succinct laying-out of SHAP’s conceded premises in abbreviated form — thus *demonstrating* the *tanāquḍ*. Taking for granted that no *bay’* can be contracted without the participation of the seller (stating it, in fact, would be a tautology), we may read SH’s *tanāquḍ* display in four parts:

“You claim that a <i>bay’ fāsīd</i> whose <i>ḥukm</i> is like one in which no <i>bay’</i> occurs...	• [endoxon definition of <i>bay’ fāsīd</i> pre-conceded by SHAP]
...becomes a <i>bay’</i> ...	• [conceded premise #1]
...without its <i>mālik</i> ...	• [conceded premises #2 and #3]
...contracting <i>bay’</i> .”	• [conceded premise #4]

We are confronted after this preliminary analysis with a surprising realization: the dialectical sequence of §§96-102 — for all that its premises comprise substantive legal matter — does not at all conform to what we would expect from our earliest extant juridical *jadāl* treatises, neither in regard to questions, nor to objections. Granted, there is some resemblance here to the *i’tirād* of *al-naqd*, but the hallmark of *naqd* (Q’s bringing a parallel case — a *mas’alat al-naqd* — where R’s *‘illa* produces a contrary *ḥukm*) is missing. Missing, too, is any mention of *adilla*, or hermeneutic, or modes of *uṣūl*-associated reasoning. In short, the domain of juridical *jadāl* as we have come to understand it should be the domain of *istidlāl* and the problematizing of *istidlāl*. In §§96-102, however, we are presented with the reduction of an opponent’s *qawl* to an internal, logical contradiction (the very meaning of *qawl mutanāqid*).

Taking into consideration what has been pre-conceded by SHAP of the *endoxa* components and effects of *bay‘* and *bay‘ fāsīd*, we might present his *qawl mutanāqid* as follows:

- SHAP concedes that every B requires an S.
- SHAP concedes that $F = \neg B$.
- SHAP claims that F becomes B without an S.

(Universe: B = contract in which *bay‘* occurs; F = *bay‘ fāsīd*, and S = contracting seller)

Our analysis of the first dialectical sequence in the *Kitāb Ikhtilāf al-‘Irāqīyyīn* thus reveals something much closer in appearance to an Aristotelian *elenchus* via *reductio ad impossibile* (as discussed in Chapter II) than an *elenchus* via the *i‘tirāḍāt* of the early *jadāl fiqhī* texts. This is not usually the case with other examples we shall analyze, most of which correspond well to later systems of juridical dialectic. But that this particular example should appear so “Aristotelian” — retaining focus upon an internal, logical contradiction (as opposed to a problem of *istidlāl*) — provides an important insight into the teaching and practice of late second / early third century H juridical *jadāl*, and the prior argumentation epistemes which still manifested themselves in a clearly discernible manner.

[masā’il-set #2] §§236-67; 270-2

Summary of Analysis:

(236) وَإِذَا كَانَتِ الشُّفْعَةُ لِلْيَتِيمِ فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَهُ الشُّفْعَةُ فَإِنْ كَانَ لَهُ وَصِيٌّ أَخَذَهَا بِالشُّفْعَةِ. وَإِنْ لَمْ يَكُنْ لَهُ وَصِيٌّ كَانَ عَلَى شُفْعَتِهِ إِذَا أَدْرَكَ، فَإِنْ لَمْ يَطْلُبِ الْوَصِيَّ الشُّفْعَةَ بَعْدَ عِلْمِهِ، فَلَيْسَ لِلْيَتِيمِ شُفْعَةٌ إِذَا أَدْرَكَ.	• (236) AH ruling for <i>mas’ala</i> #1; followed by subsidiary rulings ##1a-c • [AH ‘illa implied; i’tirād of IAL ‘illa implied: <i>tarjīh al-ma’ānī</i> (indeterminate type)]
(237) وَكَذَلِكَ الْعُلَامُ إِذَا كَانَ أَبُوهُ حَيًّا. وَبِهِ يَأْخُذُ.	• (237) AH extends rulings to <i>mas’ala</i> #2 • AY adherence (to all AH rulings) stated
(238) وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا شُفْعَةَ لِلصَّغِيرِ.	• (238) IAL rulings for <i>mas’ala</i> #1 and <i>mas’ala</i> #2 • [IAL ‘illa implied; i’tirād of AH ‘illa implied: <i>tarjīh al-ma’ānī</i> (indeterminate type)]
(239) وَقَالَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى: الشُّفْعَةُ لِلشَّرِيكِ الَّذِي لَمْ يُقَاسَمْ وَهِيَ بَعْدُهُ لِلشَّرِيكِ الَّذِي قَاسَمَ، وَالطَّرِيقُ وَاحِدَةٌ بَيْنَهُمَا، وَهِيَ بَعْدُهُ لِلجَارِ الْمُلَاصِقِ، وَإِذَا اجْتَمَعَ الْجِرَانُ وَكَانَ التِّصَافُفُهُمْ سَوَاءً فَهُمْ شُرَكَاءُ فِي الشُّفْعَةِ.	• (239) AH ruling for <i>mas’ala</i> #3; followed by subsidiary rulings ##3a-c • [see §271-2 for “tacked on” <i>naql</i> supporting #3b; AH <i>istidlāl bi’l-Sunna</i>: Prophetic <i>qawl</i>] • [AY and MIH adherence recorded in the <i>Mabsūt</i> (14:94)]
(240) وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ يَقُولُ أَبِي حَنِيفَةَ حَتَّى كَتَبَ إِلَيْهِ أَبُو الْعَبَّاسِ أَمِيرُ الْمُؤْمِنِينَ يَأْمُرُهُ أَنْ لَا يَقْضِيَ بِالشُّفْعَةِ إِلَّا لِلشَّرِيكِ الَّذِي لَمْ يُقَاسَمْ، فَأَخَذَ بِذَلِكَ وَكَانَ لَا يَقْضِي إِلَّا لِلشَّرِيكِ الَّذِي لَمْ يُقَاسَمْ. وَهَذَا قَوْلُ أَهْلِ الْحِجَازِ.	• (240) AY/MIH reports initial IAL adherence to AH <i>qawl</i> for <i>mas’ala</i> #3, but IAL — commanded by Caliph al-Saffāh — embraced a different <i>qawl</i> (the <i>qawl</i> of the Ahl al-Ḥijāz)
(241) وَكَذَلِكَ بَلَعْنَا عَنْ عَلِيٍّ وَابْنِ عَبَّاسٍ رَضِيَ اللَّهُ تَعَالَى عَنْهُمَا.	• (241) AY/MIH supporting <i>naql</i> for new IAL <i>qawl</i>: <i>āthār-qawls</i> of ‘Alī and Ibn ‘Abbās • [Thus, IAL position = Caliphal decree; <i>istidlāl bi-qawl al-wāhid min al-Ṣaḥāba</i>: <i>āthār-qawls</i> of ‘Alī and Ibn ‘Abbās] • [see §270 for “tacked on” <i>āthār-qawls</i> of ‘Alī and Ibn ‘Abbās (with full <i>isnads</i> and <i>matn</i>)]
(242) قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى عَنْ عَبْدِ اللَّهِ بْنِ	• (242) SH transmits <i>athar-qawl</i> of ‘Umar

Part I: The Dialectical Forge
Chapter III: Analyses of “Overtly Dialectical” Presentations in the *Kitāb Ikhtilāf al-‘Irāqīyyīn*

مُحَمَّدُ بْنُ عَبْدِ، عَنِ الْعَوَّامِ، عَنْ يَحْيَى بْنِ سَعِيدٍ، عَنْ عَوْنِ بْنِ أَبِي رَافِعٍ، عَنْ عُثَيْدِ اللَّهِ بْنِ عَبْدِ اللَّهِ بْنِ عُمَرَ، قَالَ: قَالَ عُمَرُ بْنُ الْخَطَّابِ: إِذَا وَقَعَتِ الْحُدُودُ فَلَا شُفْعَةَ.	[SH foreshadowed <i>i'tirād</i> against AH <i>istidlāl bi'l-Sunna</i> (jumla vs. <i>mufasssir</i> of §§255ff. sequence); here supported by <i>athar-dalīl</i>]
(243) أَخْبَرَنَا الشَّافِعِيُّ عَنْ عَبْدِ اللَّهِ بْنِ إِدْرِيسَ، عَنْ مُحَمَّدِ بْنِ عُمَارَةَ، عَنْ أَبِي بَكْرٍ بْنِ جَرِيرٍ، عَنْ أَبَانَ بْنِ عُثْمَانَ، قَالَ: إِذَا وَقَعَتِ الْأَرْقَةُ فَلَا شُفْعَةَ. وَالْأَرْقَةُ الْحُدُودُ.	(243) SH transmits <i>athar-qawl</i> of Abān b. 'Uthmān [SH foreshadowed <i>i'tirād</i> against AH <i>istidlāl bi'l-Sunna</i> supported by another <i>athar-dalīl</i>]
(244) قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: أَخْبَرَنَا مُعَلَّى بْنُ أَسَدٍ، قَالَ: حَدَّثَنَا عَبْدُ الْوَاحِدِ بْنُ زِيَادٍ، عَنْ الْحَجَّاجِ، عَنِ الْحَكَمِ، قَالَ: [قال] إِذَا وَقَعَتِ الْحُدُودُ فَلَا شُفْعَةَ.	(244) SH transmits <i>athar-qawl</i> of al-Hakam [SH foreshadowed <i>i'tirād</i> against AH <i>istidlāl bi'l-Sunna</i> supported by another <i>athar-dalīl</i>]
(245) قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ تَعَالَى عَنْهُ: وَإِذَا بَيْعَ الشَّقْصُ مِنَ الدَّارِ وَلِلْيَتِيمِ فِيهِ شُفْعَةٌ أَوْ الْغُلَامِ فِي حِجْرِ أَبِيهِ، فَلَوْلِيَّ الْيَتِيمِ وَالْأَبِ أَنْ يَأْخُذَ لِلَّذِي يَلِيَانِ بِالشُّفْعَةِ إِنْ كَانَتْ غِبْطَةً، فَإِنْ لَمْ يَفْعَلَا فَإِذَا بَلَغَا أَنْ يَلِيَا أَمْوَالَهُمَا كَانَ لَهُمَا الْأَخْذُ بِالشُّفْعَةِ، فَإِذَا عَلِمَا بَعْدَ الْبُلُوغِ فَتَرَكََا التَّرْكَ الَّذِي لَوْ أَحْدَثَ الْبَيْعُ فِي تِلْكَ الْحَالِ فَتَرَكََاهُ انْقَطَعَتْ شُفْعَتُهُمَا فَقَدْ انْقَطَعَتْ شُفْعَتُهُمَا، وَلَا شُفْعَةَ إِلَّا فِيمَا لَمْ يُقَسَمَ فَإِذَا وَقَعَتِ الْحُدُودُ فَلَا شُفْعَةَ.	(245[a]) SH ruling for <i>mas'ala</i> #1 and <i>mas'ala</i> #2; followed by subsidiary rulings ##1a-c/2a-c: [SH <i>'illa</i> implied; <i>i'tirād</i> of IAL <i>'illa</i> implied, and <i>i'tirād</i> of AH <i>'illa</i> implied: <i>tarjih al-ma'ānī</i> (indeterminate type)] (245[b]) SH rulings for <i>mas'ala</i> #3 [counter to AH rulings #3a-3c and Mashriqiyyūn]
(246) وَكَذَلِكَ لَوْ اقْتَسَمُوا الدَّارَ وَالْأَرْضَ وَتَرَكَوْا بَيْنَهُمْ طَرِيقًا أَوْ تَرَكَوْا بَيْنَهُمْ مَشْرَبًا لَمْ تَكُنْ شُفْعَةً، وَلَا تُوجِبُ الشُّفْعَةَ فِيمَا قُسِمَ بِشِرْكَ فِي طَرِيقٍ وَلَا مَاءٍ.	(246) SH subsidiary rulings for <i>mas'ala</i> #3: [#3a: counter to AH and Ahl al-Baṣra] [#3d: counter to Ahl al-Baṣra]
(247) وَقَدْ ذَهَبَ بَعْضُ أَهْلِ الْبَصْرَةِ إِلَى جُمْلَةِ قَوْلِنَا فَقَالُوا: لَا شُفْعَةَ إِلَّا فِيمَا بَيْنَ الْقَوْمِ الشُّرَكَاءِ، فَإِذَا بَقِيَتْ بَيْنَ الْقَوْمِ طَرِيقٌ مَمْلُوكَةٌ لَهُمْ أَوْ مَشْرَبٌ مَمْلُوكٌ لَهُمْ فَإِنْ كَانَتْ الدَّارُ وَالْأَرْضُ مَقْسُومَةً فِيهَا شُفْعَةٌ؛ لِأَنََّّهُمْ شُرَكَاءُ فِي شَيْءٍ مِنَ الْمِلْكِ وَرَوَوْا حَدِيثًا عَنْ عَبْدِ الْمَلِكِ بْنِ أَبِي سُلَيْمَانَ، عَنْ عَطَاءٍ، عَنْ جَابِرٍ،	(247) SH sets stage for “historical” dialectic by relating Ahl al-Baṣra adherence (for <i>mas'ala</i> #3) to <i>jumlati qawlinā</i> - SH relates Ahl al-Baṣra ruling for <i>mas'ala</i> #3a; [counter to SH ruling #3a; SH provides explanation of their reasoning; Ahl al-Baṣra <i>'illa</i> implied]

عَنْ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - شَبَّيْهَا بِهَذَا الْمَعْنَى أَحْسَبُهُ يَحْتَمِلُ شَبَّيْهَا بِهَذَا الْمَعْنَى وَيَحْتَمِلُ خِلَافَهُ؛ قَالَ: «الْحَارُّ أَحَقُّ بِسَقْبِهِ» إِذَا كَانَتْ الطَّرِيقُ وَاحِدَةً.	• SH relates Ahl al-Baṣra transmission “<i>shabīhan bi-hādhā al-ma‘nā</i>” [with <i>isnād</i>: ‘Abd al-Mālik b. Abī Sulaymān - ‘Aṭā’ - Jābir]: Prophetic <i>ḥadīth</i> [Ahl al-Baṣra <i>istidlāl bi’l-Sunna</i>] • SH objects: the <i>ḥadīth</i> may possibly bear (<i>yaḥtamilu</i>) either the <i>shabīh</i> of this <i>ma‘nā</i> or its <i>khilāf</i> [SH <i>i’tirāḍ</i>: <i>da‘wā al-ijmāl</i> (Shīr.II.C.3.2; Bāj.II.2.2.3.2)]
(248) وَإِنَّمَا مَنَعْنَا مِنَ الْقَوْلِ بِهَذَا أَنَّ أَبَا سَلَمَةَ وَأَبَا الرُّبَيْرِ سَمِعَا جَابِرًا، وَأَنَّ بَعْضَ حِجَازِيِّنَا يَرَوِي عَنْ عَطَاءٍ، عَنْ جَابِرٍ، عَنْ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - فِي الشُّفْعَةِ شَيْئًا لَيْسَ فِيهِ هَذَا وَفِيهِ خِلَافُهُ، وَكَانَ اثْنَانِ إِذَا اجْتَمَعَا عَلَى الرَّوَايَةِ عَنْ جَابِرٍ وَكَانَ الثَّلَاثُ يُوَافِقُهُمَا أَوْ لَى بِالتَّثَبُّتِ فِي الْحَدِيثِ إِذَا اخْتَلَفَ عَنْ الثَّلَاثِ، وَكَانَ الْمَعْنَى الَّذِي بِهِ مَنَعْنَا الشُّفْعَةَ فِيمَا قُسِمَ قَائِمًا فِي هَذَا الْمَقْسُومِ.	• (248) SH objection to Ahl al-Baṣra ruling for <i>mas’ala</i> #3a with formula: “<i>innamā mana‘nā min al-qawl bi-hādhā</i>” [SH <i>man’/mumāna’a</i> (see below)]: • 1) SH reports Abū Salama and Abū al-Zubayr also audited Jābir: (<i>ḥadīth</i> without Ahl al-Baṣra <i>ma‘nā</i> — but with its <i>khilāf</i>) [SH <i>mu‘āraḍa bi’l-nuṭq</i> (Shīr.II.C.8.1; Bāj.II.2.7.1)] • 2) SH reports “one of our Ḥijāzīs” on ‘Aṭā’ on Jābir: (<i>ḥadīth</i> without Ahl al-Baṣra <i>ma‘nā</i> — but with its <i>khilāf</i>) [SH <i>mu‘āraḍa bi’l-nuṭq</i> (Shīr.II.C.8.1; Bāj.II.2.7.1)] • 3) SH preponderates his <i>ḥadīths</i>: Two (Abū Salama and Abū al-Zubayr) concur on Jābir, and third (Ḥijāzī - ‘Aṭā’ - Jābir) agrees = <i>awlā bi’l-tathabbut fi’l-ḥadīth</i> than when third (‘Abd al-Mālik b. Abī Sulaymān - ‘Aṭā’ - Jābir) disagrees [SH <i>tarjīḥ</i> (with <i>awlā</i>) of counter-<i>ḥadīth</i> over Ahl al-Baṣra <i>ḥadīth</i> (Shīr.IX.1.5; Bāj.XVI.1.1.3)] • 4) SH objection: the <i>ma‘nā</i> by which we prevent (<i>mana‘nā</i>) [Ahl al-Baṣra ruling for <i>mas’ala</i> #3a] is <i>qā’im</i> in this <i>maqṣūm</i> [SH <i>man’/mumāna’a</i> of the <i>ḥukm</i> in the <i>aṣl</i> (Shīr.VII.3; Bāj.IX.B.5);³⁰ SH <i>mu‘āraḍa bi’l-‘illa</i> (Shīr.II.C.8.2.3; Bāj.II.2.7.2.3)]
(249) أَلَا تَرَى أَنَّ الْخَبَرَ عَنِ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ -	• (249) SH (in role of Q) initiates

³⁰ Notably, this objection — like all *man’/mumāna’a* objections — is confined to the domain of *istidlāl bi’l-qiyās* in the *jadāl*-theory texts. We will note this as an expanded application in proto-system *jadāl*.

وَسَلَّمَ-: «إِنَّ الشُّفْعَةَ فِيمَا لَمْ يُقَسِّمْ، فَإِذَا وَقَعَتْ الْحُدُودُ فَلَا شُفْعَةَ» وَلَا يَجِدُ أَحَدٌ قَالَ بِهَذَا الْقَوْلِ مَخْرَجًا مِنْ أَنْ يَكُونَ قَدْ جَعَلَ الشُّفْعَةَ فِيمَا وَقَعَتْ فِيهِ الْحُدُودُ.	“instructional” dialectic against SHAP of Ahl al-Baṣra: • SH dialectical question with <i>alā tarā</i> [SH pushes SHAP of Ahl al-Baṣra to concede SH <i>ḥadīth</i>] • SH objection: No proponent of Ahl al-Baṣra <i>qawl</i> has a <i>makhraj</i> from contradicting this <i>ḥadīth</i> [charge of <i>tanāquḍ</i> with no <i>makhraj</i> — i.e., no valid <i>jawāb</i> possible]
(250) فَإِنْ قَالَ: فَإِنِّي إِنَّمَا جَعَلْتُهَا فِيمَا وَقَعَتْ فِيهِ الْحُدُودُ؛ لِأَنَّهُ قَدْ بَقِيَ مِنَ الْمِلْكِ شَيْءٌ لَمْ تَقَعْ فِيهِ الْحُدُودُ.	• (250) SHAP of Ahl al-Baṣra <i>jawāb</i> (<i>fa-in qāla</i>): • [SHAP concedes <i>ma’nā</i> of SH <i>ḥadīth</i>, explains why he makes an exception]
(251) قِيلَ: فَيَحْتَمِلُ ذَلِكَ الْبَاقِي أَنْ يَجْعَلَ فِيهِ الشُّفْعَةَ. فَإِنْ احْتَمَلَ فَاجْعَلْهَا فِيهِ وَلَا تَجْعَلْهَا فِيمَا وَقَعَتْ فِيهِ الْحُدُودُ فَتَكُونُ قَدْ اتَّبَعْتَ الْخَبَرَ، وَإِنْ لَمْ يَحْتَمِلْ فَلَا تَجْعَلِ الشُّفْعَةَ فِي غَيْرِهِ.	• (251) SH objection (<i>qīla</i>): • SH formulates a critical distinction between <i>mas’ala</i> components • SH objection: SHAP should rule separately for each distinct component, and not extend one to the other — thus, he will be in consonance with the <i>khavar</i> • SH imperative objection: for what does not permit X, don’t bring about X in something else • [SH <i>elenchus</i>-charge of <i>tanāquḍ</i>, and correction of SHAP reasoning]
(252) وَقَالَ بَعْضُ الْمَشْرِقِيِّينَ: الشُّفْعَةُ لِلْجَارِ وَلِلشَّرِيكِ إِذَا كَانَ الْجَارُ مُلَاصِقًا، أَوْ كَانَتْ بَيْنَ الدَّارِ الْمَبِيعَةِ وَالدَّارِ الَّتِي لَهُ فِيهَا الشُّفْعَةُ رَحْبَةً مَا كَانَتْ إِذَا لَمْ يَكُنْ فِيهَا طَرِيقٌ نَافِذَةٌ، وَإِنْ كَانَ فِيهَا طَرِيقٌ نَافِذَةٌ وَإِنْ ضَاقَتْ فَلَا شُفْعَةَ لِلْجَارِ.	• (252) SH initiates “historical” dialectic by introducing <i>qawl</i> of Mashriqī SHAP for <i>mas’ala</i> #3a-b (<i>qāla ba’d al-Mashriqiyyīn</i>): • [Mashriqī SHAP ‘<i>illa</i> implied]
(253) قُلْنَا لِبَعْضٍ مَنْ يَقُولُ هَذَا الْقَوْلَ: عَلَى أَيِّ شَيْءٍ اعْتَمَدْتُمْ؟	• (253) SH assumes “historical” role of Q (<i>qulnā li-ba’d man yaqūlu hādihā al-qawl</i>): • [SH asks al-Bājī’s third question: <i>al-su’āl ‘an al-dalīl</i>]

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(254) قَالَ: عَلَى الْأَثَرِ؛ أَخْبَرَنَا سُفْيَانُ بْنُ عُيَيْنَةَ، عَنْ إِبْرَاهِيمَ بْنِ مَيْسَرَةَ، عَنْ عَمْرِو بْنِ الشَّرِيدِ، عَنْ أَبِي رَافِعٍ أَنَّ رَسُولَ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - قَالَ: «الْجَارُ أَحَقُّ بِسَقْبِهِ.»	• (254) SHAP <i>jawāb</i> (<i>qāla</i>): • “<i>athar</i>”³¹ [transmitted from Ibn ‘Uyaynā] of Prophetic <i>ḥadīth-qawl</i> [Mashriqī SHAP <i>istidlāl bi’l-Sunna</i>]
(255) فَقِيلَ لَهُ: فَهَذَا لَا يُخَالِفُ حَدِيثَنَا، وَلَكِنَّ هَذَا جُمْلَةٌ وَحَدِيثُنَا مُفَسَّرٌ.	• (255) SH objection (<i>qīla lahu</i>): • Your <i>ḥadīth</i> does not contradict our <i>ḥadīth</i> [quoted in §§249, 257], but yours is <i>jumla</i> and ours is <i>mufassir</i>³² [<i>i’tirād: da’wā al-ijmāl</i> (Shīr.II.C.3.2 [he claims <i>ijmāl</i> re: the <i>lughā</i>]; Bāj.II.2.2.3.2 [<i>al-munāza’a fi’l-‘āmm</i>: he claims <i>ijmāl</i> regarding it)]; foreshadowed: SH <i>mu’āraḍa bi’l-‘illa</i> (Shīr.II.C.8.2.3; Bāj.II.2.7.2.3)]
(256) قَالَ: وَكَيْفَ لَا يُخَالِفُ حَدِيثَكُمْ؟	• (256) SHAP becomes SHAQ — roles switch in response to SH <i>i’tirād</i> (<i>qāla</i>): • [SHAQ asks al-Bājī’s fourth question: <i>al-su’āl ‘an wajh al-dalīl</i>]
(257) قُلْنَا: الشَّرِيكُ الَّذِي لَمْ يُقَاسِمِ يُسَمَّى جَارًا وَيُسَمَّى الْمُقَاسِمَ، وَيُسَمَّى مَنْ بَيْنَكَ وَبَيْنَهُ أَرْبَعُونَ دَارًا، فَلَمْ يَجْزُ فِي هَذَا الْحَدِيثِ إِلَّا مَا قُلْنَا مِنْ أَنَّهُ عَلَى بَعْضِ الْجِيرَانِ دُونَ بَعْضٍ. فَإِذَا قُلْنَا لَمْ يَجْزُ ذَلِكَ لَنَا عَلَى غَيْرِنَا إِلَّا بِدَلَالَةٍ عَنْ رَسُولِ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - فَلَمَّا قَالَ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - : «الشُّفْعَةُ فِيمَا لَمْ يُقَسِّمْ، فَإِذَا وَقَعَتِ الْحُدُودُ فَلَا شُفْعَةَ» دَلَّ هَذَا عَلَى أَنَّ قَوْلَهُ فِي الْجُمْلَةِ: «الْجَارُ أَحَقُّ بِسَقْبِهِ» عَلَى بَعْضِ الْجِيرَانِ دُونَ بَعْضٍ وَأَنَّهُ الْجَارُ الَّذِي لَمْ يُقَاسِمِ.	• (257) SH (in role of P) <i>jawāb</i> (<i>qulnā</i>): • SH explains multiple applications of focal <i>lafz</i>; acknowledges need for Prophetic <i>dalīl</i> to back his usage [SH <i>tafsīr</i>; followed by SH statement of adherence to a legal-theoretical principle (<i>tafsīr</i>-argument must be supported by Sunnaic <i>dalīl</i>)] • SH explains: his <i>ḥadīth</i> (now quoted) is that very <i>dalīl</i> — it provides indicant for interpretation of <i>qawlihi fi’l-jumla</i> [SH <i>mu’āraḍa bi’l-‘illa</i> (Shīr.II.C.8.2.3; Bāj.II.2.7.2.3)]
(258) فَإِنْ قَالَ: وَتُسَمَّى الْعَرَبُ الشَّرِيكَ جَارًا؟	• (258) SHAQ (switch to “instructional” dialectic?) <i>i’tirād</i>-question (<i>fa-in qāla</i>): • [<i>muṭālaba</i> (Sānū def.)]

³¹ Note that, although for the sake of consistency I maintain different usages for “*athar*” (as reported *qawl/act* of Companions and Successors) and “*ḥadīth*” (as reported *qawl/act/iqrār* of the Prophet), the ancient practice was far more fluid and interchangeable. In §254, for instance, we have *athar* followed by *akhbaranā* and terminating in a *qawl* of the Prophet.

³² See our discussion below for an explanation as to why I prefer *mufassir* over *mufassar* (which latter we would expect, based on the *uṣūl* literature usage).

(259) قِيلَ: نَعَمْ، كُلُّ مَنْ قَارَبَ بَدْنَهُ بَدَنَ صَاحِبِهِ قِيلَ لَهُ: جَارٌ.	(259) SH <i>jawāb</i> (<i>qāla</i>): [SH provides relevant definition of focal <i>lafẓ</i>]
(260) قَالَ: فَادُلُّنِي عَلَى هَذَا.	(260) SHAQ (return to “historical” dialectic?) dialectical request for <i>dalīl</i> (<i>qāla</i>) [<i>muṭālaba</i> (Sānū def.); al-Bājī’s su’āl #3?]
(261) قِيلَ لَهُ: قَالَ حَمَلُ بْنُ مَالِكٍ بْنُ النَّبِيعَةِ: «كُنْتُ بَيْنَ جَارَتَيْنِ لِي فَضَرَبْتُ إِحْدَاهُمَا الْأُخْرَى بِمِسْطَحٍ، فَأَلْقَتْ جَنِينًا مَيِّتًا، فَقَضَى فِيهِ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - بَغْرَةً.»	(261) SH <i>jawāb</i> (<i>qāla lahu</i>): - SH <i>dalīl</i> #1: Prophetic <i>ḥadīth</i> (wherein focal <i>lafẓ</i> is illustrated)
(262) وَقَالَ الْأَعَشَى لِامْرَأَتِهِ: «أَجَارَتْنَا بَيْنِي فَإِنَّكَ طَالِقَةٌ.»	(262) SH <i>jawāb</i> (<i>qāla lahu</i>), cont.: - SH <i>dalīl</i> #2: <i>bayt</i> from short <i>qaṣīda</i> of al-A’shā (wherein focal <i>lafẓ</i> is illustrated)
(263) فَقِيلَ لَهُ: فَأَنْتَ إِذَا قُلْتَ: هُوَ خَاصٌّ عَلَى بَعْضِ الْجِيرَانِ دُونَ بَعْضٍ. لَمْ تَأْتِ فِيهِ بِدَلَالَةٍ عَلَى النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - وَلَمْ تَجْعَلْهُ عَلَى مَنْ لَزِمَهُ اسْمُ الْجَوَارِ، وَحَدِيثُ إِبْرَاهِيمَ بْنِ مَيْسَرَةَ لَا يَحْتَمِلُ إِلَّا أَحَدَ الْمَعْنَيْنِ وَقَدْ خَالَفْتُهُمَا مَعًا، ثُمَّ زَعَمْتَ أَنَّ الدَّارَ ثُبَاغٌ وَبَيْنَهَا وَبَيْنَ دَارِ الرَّجُلِ رَحْبَةٌ فِيهَا أَلْفُ ذِرَاعٍ فَأَكْثَرُ إِذَا لَمْ يَكُنْ فِيهَا طَرِيقٌ نَافِذَةٌ فَيَكُونُ فِيهَا الشُّفْعَةُ، وَإِنْ كَانَتْ بَيْنَهُمَا طَرِيقٌ نَافِذَةٌ عَرَضُهَا ذِرَاعٌ لَمْ تَجْعَلْ فِيهَا الشُّفْعَةَ، فَجَعَلْتَ الشُّفْعَةَ لِأَبْعَدِ الْجَارَيْنِ وَمَنْعَتْهَا أَقْرَبَهُمَا، وَزَعَمْتَ أَنَّ مَنْ أَوْصَى لِجِيرَانِهِ قَسَمْتَ وَصِيَّتَهُ عَلَى مَنْ كَانَ بَيْنَ دَارِهِ وَدَارِهِ أَرْبَعُونَ دَارًا، فَكَيْفَ لَمْ تَجْعَلِ الشُّفْعَةَ عَلَى مَا قَسَمْتَ عَلَيْهِ الْوَصِيَّةَ إِذَا خَالَفْتَ حَدِيثَنَا وَحَدِيثَ إِبْرَاهِيمَ بْنِ مَيْسَرَةَ الَّذِي احْتَجَجْتَ بِهِ؟	(263) SH launches multi-tiered <i>i’tirāḍ</i> against SHAQ position (<i>fa-qāla lahu</i>): 1) SH charges SHAQ for not bringing a <i>dalāla</i> about the <i>nabī</i> [i.e., SHAQ — unlike SH — brings no <i>dalīl</i> for his <i>takḥṣīṣ</i> of the focal <i>lafẓ</i>; SH charges SHAQ with not adhering to the principle SH states in §257] 2) SH charges SHAQ for not fixing the focal <i>lafẓ</i> upon whom it should be fixed 3) SH objection: <i>ḥadīth</i> of Ibn Maysara [in §254] permits only one of two <i>ma’nās</i> and SHAQ has contradicted them both [SH charge of <i>tanāquḍ</i>] 4) SH <i>reductio ad absurdum</i> in three parts: [<i>reductio ad absurdum</i> premise #1] [<i>reductio ad absurdum</i> premise #2] [<i>reductio ad absurdum</i> conclusion] 5) SH introduces <i>mas’alat al-naqd</i>, and charges SHAQ with inconsistency [SH

Part I: The Dialectical Forge
Chapter III: Analyses of “Overtly Dialectical” Presentations in the *Kitāb Ikhtilāf al-‘Irāqīyyīn*

	<i>i’tirād: al-naqḍ</i> (Shīr.VII.7; Bāj.IX.B.11.2.1)]³³ SH rhetorical <i>i’tirād</i> follow-up question (with <i>kayfa</i>) [SH <i>i’tirād: al-naqḍ</i> and 2x <i>tanāquḍ</i>]
(264) قَالَ: فَهَلْ قَالَ بِقَوْلِكُمْ أَحَدٌ مِنْ أَصْحَابِ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ؟	(264) SHAQ dialectical request for supporting <i>qawl</i> from the Companions (<i>qāla</i>) [<i>muṭālaba</i> for <i>tarjīḥ</i> based on supporting <i>qawl al-ṣaḥāba</i>]
(265) قُلْنَا: نَعَمْ. وَلَا يَضُرُّنَا بَعْدُ إِذْ ثَبَتَ عَنِ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - أَنْ لَا يَقُولَ بِهِ أَحَدٌ.	(265) SH <i>jawāb</i> (<i>qulnā</i>): [<i>uṣūl</i> principle at work: confirmed <i>ḥadīth</i> can stand alone without supporting <i>qawl</i> of Companion; SH rejection of a kind of <i>e silentio</i> argument]
(266) قَالَ: فَمَنْ قَالَ بِهِ؟	(266) SHAQ reiterates dialectical request (<i>qāla</i>): [<i>muṭālaba</i> for <i>tarjīḥ</i> based on supporting <i>qawl al-ṣaḥāba</i>]
(267) قِيلَ: عُمَرُ بْنُ الْخَطَّابِ رَضِيَ اللَّهُ تَعَالَى عَنْهُ - وَعُثْمَانُ رَضِيَ اللَّهُ تَعَالَى عَنْهُ. وَقَالَ بَعْضُ مِنَ التَّابِعِينَ؛ عُمَرُ بْنُ عَبْدِ الْعَزِيزِ رَحِمَهُ اللَّهُ تَعَالَى عَلَيْهِ - وَغَيْرُهُ.	(267) SH <i>jawāb</i> (<i>qāla</i>): - SH lists supporting Companions: ‘Umar I, ‘Uthmān; and some Successors: ‘Umar II and others
[(268-9) AH & AY vs. IAL regarding another <i>mas’ala</i>] [SH treats that <i>mas’ala</i> in §273]	
(270) أَخْبَرَنَا الْحَسَنُ بْنُ عُمَارَةَ، عَنْ الْحَكَمِ، عَنْ مُجَاهِدٍ، عَنْ ابْنِ عَبَّاسٍ، وَعَنْ الْحَكَمِ، عَنْ يَحْيَى، عَنْ عَلِيٍّ أَنَّهُمَا قَالَا: لَا شَفْعَةَ إِلَّا لِشَرِيكَ لَمْ يُقَاسِمِ.	(270) <i>āthār-qawls</i> of Ibn ‘Abbās and ‘Alī with <i>isnāds</i> and <i>matn</i> [AY/MIH “tacked on” <i>naql</i> for IAL ref. in §241]
(271) الْحَجَّاجُ بْنُ أَرْطَاةٍ؛ عَنْ عَمْرِو بْنِ شُعَيْبٍ، عَنْ عَمْرِو بْنِ الشَّرِيدِ، عَنْ أَبِيهِ قَالَ: قَالَ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «الْحَارُ أَحَقُّ بِسَقْبِهِ مَا كَانَ.»	(271) Prophetic <i>ḥadīth-qawl</i> with <i>isnād</i> and <i>matn</i> [AY/MIH “tacked on” <i>naql</i> supporting AH position in §239]
(272) أَبُو حَنِيفَةَ، عَنْ أَبِي أُمَيَّةَ، عَنْ الْمِسْوَرِ بْنِ مَخْرَمَةَ، أَوْ عَنْ سَعْدِ بْنِ مَالِكٍ قَالَ: قَالَ رَسُولُ اللَّهِ	(272) AH transmission of Prophetic <i>ḥadīth-qawl</i> with <i>isnād</i> and <i>matn</i> [AY/MIH “tacked on” <i>naql</i> supporting

³³ Again, we will note this as an expanded range of objection-application — *naqḍ* in the *jadāl*-theory texts is confined to *istidlāl bi’l-qiyās*, but we are in the domain of *istidlāl bi’l-Sunna*.

Discussion of Analysis:

A brief review of this set of related *masā'il* by presentation category shows a typical layout of AH, AY, and IAL rulings for *masā'il* #1-3 (the original Shaybānī Version material) in abridged F and G presentations (§§238-41), followed by a series of *adilla* and rulings of SH on the same *masā'il* (§§242-6; also F and G, if somewhat more detailed). These, however, are followed in turn by a rather extended dialectical sequence (category A) in two parts (§§247-51: SH vs. SHAP of the Ahl al-Baṣra; §§252-67: SH vs. SHAP/SHAQ of the Mashriqiyyūn), offering up a wealth of legal-theoretical and dialectical detail, and closing — though not before the introduction of a new *mas'ala* (§§268-9) — with three “tacked on” *akhbār* (§§270-2) provided by AY/MIH to support the AH and IAL rulings back in §§239 and 241.³⁴ Before treating the core dialectical material of these sections, we will, as before, attempt a brief conjectural analysis of the G category rulings and arguments which precede it.

In §236 a set of AH rulings are presented as regards the *yatīm* (who may or may not have a *waṣiyy*) and his right to *shufa* (*masā'il* #1-#1c); and the whole is extended to the parallel *mas'ala* (#2) of the *ghulām* with a living father (who, we are meant to assume, may or may not be guardian over the *ghulām*'s financial transactions). Although unstated as such, it is clear from the rulings — here, and in following sections — that AH is dealing with a set of properties and their effects, collectively and in isolation. These properties are: 1) he is a *yatīm/ghulām* with a *waṣiyy/living* father; 2) he is a *yatīm/ghulām* without a *waṣiyy/living* father; 3) he is a *ṣaghīr*; 4) the *waṣiyy/living* father did not make the demand; and 5) he reached the age of legal maturity (*adraka*).

It would appear, then, that AH considered the property of “*ṣaghīr*” as efficient in occasioning a right to demand *shufa* only when combined with the property of “*yatīm/ghulām* with a *waṣiyy/living* father,” upon whom the responsibility of making the demand could devolve. On the other hand, “*ṣaghīr*” in combination with “he is a *yatīm/ghulām* without a *waṣiyy/living* father” is no longer efficient in occasioning that right to *shufa* until such a time as “*ṣaghīr*” is replaced by “legal maturity.” Moreover, in such cases where the combined properties of “*ṣaghīr*” and “*waṣiyy/living* father did not make the demand” precede the replacement of “*ṣaghīr*” with “legal maturity,” we find

³⁴ §§268-72 thus mark a return to the Shaybānī Version material, with the final SH rulings and arguments (§273) closing the chapter. The *mas'ala* of §§268-9 and 273 will not be treated in the current analysis.

that the “legal maturity” property is no longer efficient in occasioning the right to *shufa*. For IAL, however, as we see in §238, the property of “*ṣaghīr*” is efficient over all these other properties in occasioning a *ḥukm* of no right to *shufa*. We are left to assume that IAL considered only “legal maturity” to be efficient in occasioning the right to *shufa* in these cases, and for this we find confirmation in al-Sarakhsī’s *Mabsūṭ* (30:145).³⁵

In essence, then, we are confronted with a conflict of properties — or, more properly: a conflict of conceptions as to which properties override which insofar as efficiency in producing a *ḥukm*. As we have seen with AH, both “*ṣaghīr*” and “legal maturity” may be cancelled out by other properties; but with IAL, they override all else. Moreover, once we consider SH’s rulings on these *masā’il* (from §245), we find not only another property added to the mix (the *shufa* is *ghibṭa*), but another cancellation (“legal maturity” trumps “*waṣiyy*/living father did not make the demand”). In other words, SH sides with AH (“*ṣaghīr*” + “*yatīm/ghulām* with a *waṣiyy*/living father” occasions right to *shufa*) only when these two properties are combined with “the *shufa* is *ghibṭa*”, i.e., felicitous. He sides with IAL, however, in regard to “legal maturity” which, against AH, overrides “*waṣiyy*/living father did not make the demand.”

Unfortunately, not one of the rulings for our jurists on *masā’il* ##1-2 are supported by reference to *adilla*; neither *naql* nor ‘*aql*’ is to be seen for any of them (i.e., they are all of presentation category G). Regardless, it is easy to see that in a hypothetical disputation between proponents of the AH, IAL, or SH positions — which we have every reason to believe would have occurred — the dialectical domain of concern is that of preponderating properties, singly or in combination, one over the other. In other words, the opponents would be arguing which property or properties are *awlā*; and specifically, in al-Shīrāzī’s parlance, this is a matter of *Tarjīḥ al-Ma’ānī*. Al-Shīrāzī, as we have seen in the previous chapter, dedicates a list of no less than sixteen *wujūh* to this dialectical domain (Shīr.X.1-16); while al-Bājī (*Bayān mā yaqa’u bihi al-Tarjīḥ fi’l-Ma’ānī*) lists twelve types and discusses three of the many others known to the Ahl al-Nazar (Bāj.XVI.2).³⁶ Without knowing the respective *adilla* for these *yatīm/ghulām* right to *shufa* rulings, however, this is as far as we can go insofar as identifying the relevant modes.

³⁵ “*lahu al-shufa idhā adraka*” is said to be the *qawl* of Muḥammad [b. al-Ḥasan], Zufar, and Ibn Abī Laylā (the complete reference in the *Mabsūṭ* is quoted without page-citation by al-Afghānī, 37, n.2).

³⁶ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 125-7; al-Bājī, *Minhāj*, Turkī ed., 234-40, §§533-48. Please see the appendices for a full translation of each type. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 21-5 for his discussion on *Tarjīḥ fi’l-‘Ilal*, and 26-7 for his *Masā’il al-Khilāf fi’l-‘Ilal*.

§§239-41 (with §§270-2) marks a shift in the original Shaybānī Version material to the core *mas’ala* of this particular set: precisely which relationship to the seller occasions the right to demand *shuf’a*. The provision of *adilla* in connection with the AH and IAL rulings (though not always in sequence) allows us to locate §§239-41 in presentation category F, and it is easy enough to discern that we are faced once again with a conflict of conceptions as to which properties are efficient in occasioning a *ḥukm* of right to *shuf’a*. For AH (§239), drawing *ḥujja* from the Prophetic *ḥadīth-qawls* of §§271-2 (and, most likely, the *ḥadīth-qawl* employed by the Ahl al-Baṣra in §247), it is evident that the following properties and combinations of properties are deemed efficient, in order of priority: 1) “*sharīk* of commixion;” 2) “*sharīk* who apportioned” + “only one *ṭarīq* separating;” and 3) “*jār mulāṣiq*.”

In an intriguing historical aside we are told by AY/MIH (§240) that IAL once also subscribed to this hierarchy of rulings but was commanded to alter his doctrine — by none other than the first ‘Abbāsīd Caliph: Abū al-‘Abbās (al-Saffāḥ) — to that of the Ḥijāzīs.³⁷ This Ḥijāzī counter-doctrine is supported by the *āthār-qawl* of ‘Alī and Ibn ‘Abbās, alluded to in §241, and appearing with quoted *matn* and *isnāds* in §270: “*lā shuf’ata illā li-sharīkin lam yuqāsim*.” In other words, the new conception to which IAL (as acting *qāḍī* of Kūfa) was compelled is one in which the property “*sharīk* of commixion” is alone efficient (against other relationship-properties) in occasioning the right to *shuf’a*. As we shall see, the same position was championed by SH against the Mashriqiyyūn, and *ikhtilāf* on this *mas’ala* indeed appears, in part, occasioned by regional adherences to different *adilla*.³⁸ Whatever the case, rather than engage in a conjectural recreation of an AH vs. (new) IAL position dialectic, we will rely instead upon an analysis of SH’s dialectic against the Ahl al-Baṣra and the Mashriqiyyūn. These partially recorded sequences, by virtue of the time and place of their compilation, provide by far the best window to whatever disputations on this *mas’ala* preceded them.

The voice of SH in this set of *masā’il* is first presented as transmitting three *āthār-qawls* (§§242-4) in which the same property-efficiency is manifest: the occurrence of *ḥudūd* is efficient in cancelling the right to *shuf’a*. Insofar as these oppose the Sunnaic *adilla* attached to AH’s solution, and recognizing the epistemic inferiority of the *aqwāl* of

³⁷ See my brief discussion of implications and precedents in the note attached to §240 in Part II.

³⁸ The rulings of AH and pre-compulsion IAL correspond to the position of SH’s Mashriqiyyūn (an appellation which appears synonymous with ‘Irāqīyyūn), and may be set over and against the position of SH and the Ahl al-Ḥijāz. See my note attached to §252 in Part II for a brief investigation into the meaning of Mashriqiyyūn.

Companions against an established *ḥadīth-qawl* of the Prophet, we may interpret them as preparing the way for a forthcoming *i’tirād* (rather than constituting a full *i’tirād* in and of themselves). As we shall see in the dialectical sequence of §§255ff., SH levels a *da‘wā al-ijmāl* (P’s *jumla* vs. Q’s *mufassir*) against the *istidlāl bi’l-Sunna* of the AH / Mashriqī position. Here in §§242-4, this forthcoming *i’tirād* — as yet unmentioned — is supported by three *āthār dalīls*.

In §245[a] SH proceeds to render judgments for the *yatīm/ghulām masā’il* ##1-2 (discussed above), and in §245[b] we hear his first pair of related rulings as regards the *mas’ala* at hand (#3): 1) there is *shufa* only for what is not apportioned (in consonance with the Ḥijāzī / “new” IAL position in §240); and 2) there is no *shufa* where *ḥudūd* occur (in consonance with his *āthār* transmissions of §§242-4). The property-efficiency considerations of these rulings have already been mentioned, and it is apparent that they constitute an objection to those which are implied in the AH rulings of §239 and supporting *adilla*. Finally in §246 we are presented with two SH subsidiary rulings: (#3a) there is no *shufa* regarding apportioned house/land separated by a *ṭarīq/mashrab*; and (#3d) no *shufa* is obliged for what is apportioned of a partnership in *ṭarīq/mā’*. These, taken together with the main rulings of §245[b], constitute the core positions for which SH achieves *elenchus* against proponents of the Ahl al-Baṣra and Mashriqiyyūn positions in the two ensuing sets of juridical disputation. To these we shall now turn.

SH begins the first dialectical sequence by relating the adherence of the Ahl al-Baṣra to *jumlati qawlinā* (as regards SH #3); that is to say, they profess the same general doctrine that *shufa* belongs only to *al-qawm al-shurakā’* (against the AH hierarchy of rulings which includes *jīrān*). Their *qawl* diverges, however, as regards *mas’ala* #3a, for they claim the right to *shufa* for apportioned house/land, separated by a *ṭarīq/mashrab* which is owned by the partners. This goes against SH ruling #3a, and he supplies their reasoning in two parts. First is an *‘aql* argument, introduced with “because” (*li-anna*)³⁹ and pinpointing an efficient property: “because they are *shurakā’* in something of the *milk*.” In other words, the fact that they are partners, too, in the separating *ṭarīq/mashrab* is itself efficient in occasioning one partner’s right to *shufa*. As a second part of the argument, SH relates the Prophetic *ḥadīth* which the Ahl al-Baṣra considered similar (*shabīhan*) to the *ma’nā* of their doctrine (*al-jār aḥaqq bi-saqabihi*), along with their *isnād* (‘Abd al-Mālīk b. Abī Sulaymān - ‘Aṭā’ - Jābir - Prophet). Thus we may classify

³⁹ “*li-anna*” is perhaps the most common marker for introducing an *‘aql* argument/explanation in the *K. Ikhtilāf al-‘Irāqīyyīn*; others include “*li-*”, “*min qibali*”, and “*fa-*”.

the base of their argument as *al-istidlāl bi'l-Sunna*, and it becomes clear that ensuing dialectical objections will belong to the corresponding genus of *i'tirādāt*.

Nor does SH leave off questioning “*shabīhan li-hādhā al-ma'nā*” before tackling other matters, for he promptly states his opinion (still in §247) that this *ḥadīth* is just as likely to bear the *khilāf* of the Ahl al-Baṣra's *ma'nā*, as it is to bear its *shabīh*. From the start, then, SH gives voice to an *i'tirād* which we may easily identify in later *jadāl* treatises as *da'wā al-ijmāl*. In al-Shīrāzī's listing of objections against *al-istidlāl bi'l-Sunna* (from the perspective of the *matn* as *qawl mubtada'*), we find it as the third *i'tirād*: “that he claim ambiguity (*an yudda'ī al-ijmāl*), either as regards the *Shar'*, or as regards the *lugha*” (Shīr.II.C.3).⁴⁰ As we shall see later, when SH revisits this *i'tirād* against a SHAP of the Mashriqiyyūn, it is a matter of *ijmāl* of the *lugha* (Shīr.II.C.3.2).⁴¹ Finally, and before proceeding further, we should note that §247 contains a number of terms and verbs which may be considered of some legal-theoretical import; among them are: *jumla* (in the sense of “general”), *ma'nā* (in the sense of [shared] efficient properties), *shabīh* (as a means of indicating that efficient properties may be shared — just as in *qiyās al-shabah*), *khilāf* (as contradictory, or opposite), *ḥasaba* (as conveying a considered opinion), and *iḥtamala* (as conveying a “fifty-fifty” possibility).

In §248 SH launches straight into another objection, and perhaps tellingly he employs a verb which has great currency in the *jadāl* treatises, saying: “The only thing that prevents us from professing this doctrine (*innamā mana'anā min al-qawl bi-hādhā*) is [X, Y, and Z].” The operative verb here is *mana'a*, and — as is made clear in Miller's dissertation — *man' / mumāna'a* is a staple objection of the *jadāl* literature. SH has, in effect, announced *man'* — that he is “prevented” from conceding to this *qawl* due to an objection which, as we shall see, stems in part from an epistemically-oriented theory of *ḥadīth* transmission. In brief, although much of his argument focuses upon respective *asānīd*, SH enacts a dialectical move of *mu'āraḍa*; he announces a Prophetic *ḥadīth* bearing the *khilāf* of the Ahl al-Baṣra's *ma'nā*, and then preponderates it over their *ḥadīth* on the basis of an epistemic principle of transmission. The argument takes a number of stages, as he mentions: 1) Abū Salama and Abū al-Zubayr (narrators of the SH counter-*ḥadīth*) also audited Jābir (the first narrator in the Ahl al-Baṣra *ḥadīth*); 2)

⁴⁰ al-Shīrāzī, *Ma'ūna*, al-ʿUmayrīnī ed., 59-60. Cf. Ibn ʿAqīl, *K. al-Jadal*, 34, §§179-80, who employs the same typology and example-*masā'il* as his teacher al-Shīrāzī.

⁴¹ al-Shīrāzī, op. cit. Al-Bāji's typology is somewhat more refined, and we find an *i'tirād* even closer to SH's objection to the Mashriqiyyūn: “*al-Munāza'a fi'l-'Umūm bi-da'wā al-ijmāl*” (Bāj.II.2.2.3.2; *Minhāj*, Turkī ed., 102, §198).

“one of our Ḥijāzīs” also transmitted the SH counter-*ḥadīth* from ‘Aṭā’ on Jābir (the first two narrators in the Ahl al-Baṣra *ḥadīth*); 3) the fact that two narrators (Abū Salama and Abū al-Zubayr) concur on Jābir, and a third (Ḥijāzī on ‘Aṭā’ on Jābir) agrees, is “superior in confirmation re: the [counter-] *ḥadīth* (*awlā bi’l-tathabbut fi’l-ḥadīth*)” than when a third (the Ahl al-Baṣra *ḥadīth* of ‘Abd al-Mālik b. Abī Sulaymān on ‘Aṭā’ on Jābir) disagrees (with Abū Salama and Abū al-Zubayr on Jābir); and 4) the *ma’nā* (from the counter-*ḥadīth*) by which he prevents (*mana’nā*) *shuf’a* for what is apportioned (the Ahl al-Baṣra ruling for *mas’ala* #3a) is existing (*qā’im*) in this *maqsūm* (i.e., in the house/land separated by a *ṭarīq/mashrab* owned by partners — the object of the *mas’ala*). In this fashion SH brings a counter-*ḥadīth*, explains why it is epistemically superior, and then establishes that the efficient property (*ma’nā*) of that *ḥadīth* — which occasions the *ḥukm* of no *shuf’a* — is “*qā’im*” in the *mas’ala* at hand. Although we are in the domain of *istidlāl bi’l-Sunna*, this constitutes a type of *man’/mumāna’a* of the *ḥukm* in the *aṣl* (Shīr.VII.3; Bāj.IX.B.5), as well as a *mu’āraḍa*.

This is an extraordinary argument from a number of perspectives, and there is again a wealth of legal-theoretical and dialectical concepts and terms put into practice. We find the verb *mana’a* twice employed in a similar sense as that conveyed in the *jadāl* literature (but not in the single domain it came to occupy); we find an instance of *mu’āraḍa* of Sunna by Sunna; we find an instance of *tarjīḥ* by which one *ḥadīth* is proven *awlā* over another by virtue of a legal-theoretical principle, and employing terms such as *ijṭama’a*, *wāfaqa*, and *tathabbut*; and, significantly, we find a reference to a *ma’nā* being *qā’im* in the *mas’ala* at hand — this constitutes a *mu’āraḍa* of the supposed *ma’nā* of the Ahl al-Baṣra *ḥadīth* (“because they are *shurakā’* in something of the *milk*” is overruled, as we shall see, by “*ḥudūd* occur in it”).

As for SH’s use of *mana’a*, the absence of *man’/mumāna’a* among the Sunna-related *i’tirāḍāt* of later *jadāl* works (it appears only among the *qiyās*-related *i’tirāḍāt*) does not necessarily take away from the significance of his usage here in a context of *al-istidlāl bi’l-Sunna*. Considering, as we do, that this early Islamic practice and teaching of juridical dialectic represents a “proto-system,” allows for the possibility that particular terms became restricted to particular domains over time. His introduction of a counter-*ḥadīth* to that of the Ahl al-Baṣra, however, would clearly be labelled a *mu’āraḍa* in later systems, and we may locate it easily in Shīrāzī’s *Ma’ūna*, in his treatment of “*al-i’tirāḍ against the Sunna from the perspective of the *matn* as *qawl mubtada*””: it is the first *ḍarb**

(*muʿāraḍa biʿl-nuṭq*) of the eighth *iʿtirāḍ* of *al-muʿāraḍa* (Shīr.II.C.8.1).⁴² Of note is the second *wajh* of al-Shīrāzī’s proposed *jawāb* to this species of *muʿāraḍa*: “that he preponderate (*an yurajjiḥa*) a *dalīl* over the *muʿāraḍa*, via what we will mention [in following chapters] of *wujūh al-tarjīḥāt*.”⁴³ As we see, SH pre-empts such a *jawāb* by doing his own *tarjīḥ* first.

Moreover, SH’s *tarjīḥ* also finds a precise match in al-Shīrāzī’s chapter on *Tarjīḥ al-Zawāhir*, as the fifth *wajh* of the first *mawḍiʿ* (re: the *isnād*), which is “specifically concerned with *akhbār al-āḥād*” (Shīr.IX.1.5). Al-Shīrāzī’s explanation is important here:

“[It is] that one of the two is more narrated (*akthar riwāyatan*), so it is *awlā*, because the thing among the *jamāʿa* is more widely remembered (*aḥfaz*) than it is among a small number; and due to this the Prophet said: «al-Shayṭān is with the one, but he is further from the two.» And among our *aṣḥāb* are those who say: It is not preponderated [in terms of numbers], like the *shahāda*. But the first [opinion] is *aṣaḥḥ*.”⁴⁴

Not only does this conform well with SH’s reasoning in §248 (that two supported by a third is *awlā* than when the third disagrees), but the very fact that al-Shīrāzī references *ikhtilāf* over this type of preponderating by number⁴⁵ drives home a core thesis of this dissertation. In short, we are witnessing a continued *ikhtilāf* over a *tarjīḥ* method dating back at least to the late second / early third century H, and which constitutes part of a staple chapter of *uṣūl al-fiqh* treatises: *taʿāruḍ al-adilla*. Moreover, this *tarjīḥ* method is just as plainly a dialectical tool of the SH vs. Ahl al-Baṣra dispute of §248ff., as it is an object of dispute in later *jadāl* literature. In other words, we have in both the *Umm* of al-Shāfiʿī and the *Maʿūna* of al-Shīrāzī a testimony to the forging of a critical *jadāl/uṣūl* method in dialectical venues. Dialectic as a major dynamic in the development of both Islamic legal theory and disputation theory is illustrated here in bold relief.

⁴² al-Shīrāzī, *Maʿūna*, al-ʿUmayrīnī ed., 67. Cf. Ibn ʿAqīl, *K. al-Jadal*, 36, §190, who once again employs the same typology and example-*masāʾil* as his teacher. Al-Bājī, however, has developed a more refined typology by which we can precisely identify SH’s *muʿāraḍa* when he employs it again — with a shift in tactic — against the Mashriqiyyūn in §§255ff. For now, we can locate his §248 *muʿāraḍa* more generally, under Bājī.II.2.7.1, or *al-iʿtirāḍ ʿalā al-istidlāl biʿl-Sunna min jihat al-muʿāraḍa bi-nuṭq* (*Minhāj*, Turkī ed., 119ff., §§233ff.)

⁴³ al-Shīrāzī, *Maʿūna*, al-ʿUmayrīnī ed., 67. The referenced treatments of *tarjīḥāt* begin on page 121.

⁴⁴ al-Shīrāzī, *Maʿūna*, al-ʿUmayrīnī ed., 121-2. Cf. Ibn ʿAqīl, *K. al-Jadal*, 24, §128; and al-Bājī, *Minhāj*, Turkī ed., 223-4, §508. Al-Bājī accompanies his discussion with a Mālikī vs. Ḥanafī example which parallels the above SH *tarjīḥ* in a number of ways.

⁴⁵ He discusses this *ikhtilāf* in more detail in his *Lumaʿ* (Mustū ed., 174), and in his *Tabṣira* (Hītū ed., 348). In the latter he mentions not only the above *ḥadīth* as *dalīl*, but a Qurʾānic indicant as well, in conjunction with the *shahāda* argument of opponents to this type of *tarjīḥ* and — significantly — the proper *jawāb* against it. It is evident throughout the *jadāl* literature that dialectical disputation was as much the forge for systems of *jadāl* as it was for systems of *uṣūl al-fiqh*. The *Kāfiya* of al-Juwaynī is particularly rich in expositions on *jadāl*-theory *ikhtilāf*.

Nor is this all that we might say, for al-Bājī opens his chapter on *Tarjīḥāt* with the following: “Know that *al-tarjīḥ* is a *ṭarīq* for the advancing of one of the two *dalīls* over the other; and the Qudamā’ used to make use of it in *al-naẓar*, and they did so frequently (*fa-aktharū minhu*); but I will point out [only] that which is most necessary, in abbreviated manner (*bi-wajh al-ikhtiṣār*).”⁴⁶ We are thus provided some support for another theory this dissertation proposes (if more tentatively); mainly, that the systematization of later *jadāl* theory was accomplished — in part — by research and analysis of the dialectical argument and method of earlier jurists. In other words, the later systems were partially determined via analysis of the “proto-systems.”⁴⁷

Returning to the last part of SH’s argument in §248, his establishing that the *ma’nā* of his *ḥadīth* is “*qā’im*” in the *mas’ala* at hand may be registered as an early expression connoting efficient properties shared between source-ruling and case-under-consideration — a relationship which would be expressed in later *uṣūl/jadāl* literature in terms of *awṣāf*, *‘ilal*, and *ta’tḥīr* as regards *aṣl* and *far’*. More importantly, it constitutes another species of *mu’āraḍa* on the part of SH. In effect, SH has overridden the efficiency of the supposed *ma’nā* of the Ahl al-Baṣra *ḥadīth* (they are *shurakā’* in something of the *milk*) by the efficiency of the *ma’nā* of his own *tarjīḥ*-superior *ḥadīth* (no *shuḥḥa* where *ḥudūd* occur), as pertains to the *mas’ala* at hand.⁴⁸ Taking into account SH’s *da’wā al-ijmāl* against the *ḥadīth* of the Ahl al-Baṣra, his subsequent *mu’āraḍa*, and his *tarjīḥ* of that counter-*ḥadīth*, we can see that SH is now taking the argument to its logical conclusion: consideration of the *ma’nā* which is supposedly derived from the ambiguous *ḥadīth* is to be replaced — here, in the *mas’ala* at hand — by consideration of the *ma’nā* of the unambiguous, *tarjīḥ*-superior *mu’āraḍa ḥadīth*. This subsidiary act of *mu’āraḍa* also finds its place in the *jadāl*-theory treatises. For al-Shīrāzī, it is the second *ḍarb* of *mu’āraḍa* against *istidlāl bi’l-Sunna* (from the perspective of the *matn*, as *qawl muḥtada’*) — whereas the first, as we have seen, was *mu’āraḍa bi’l-nuṭq*, the second is *mu’āraḍa bi’l-‘illa*. More specifically, it is that subspecies of *mu’āraḍa bi’l-‘illa* employed “when the Sunna [of P] is *‘umūm*, allowing the possibility of *takhṣīṣ*” (Shīr.II.C.8.2.3; Bāj.II.2.7.2.3).⁴⁹

⁴⁶ al-Bājī, *Minhāj*, Turkī ed., 221, §504.

⁴⁷ We will note that, insofar as this theory proves true, our current research and analysis parallels what may have been the efforts of fourth and fifth century H *jadāl*-theorists.

⁴⁸ That “no *shuḥḥa* where *ḥudūd* occur” is the *ma’nā* which SH refers to here is immediately made clear by his following dialectical question (§249), in which he pushes SHAP to concede to it.

⁴⁹ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 67-8, n.6 — [NB: this is reproduced from al-‘Umayrīnī’s MS of al-Shīrāzī’s *Mulakhkhaṣ fi’l-Jadāl*. The anticipated “*mu’āraḍa bi’l-‘illa*,” listed at the start of this [259]

In §249 the first dialectical sequence begins, with SH assuming an “instructional” role of Q against a SHAP of the Ahl al-Baṣra. He immediately launches an objection-question by way of *alā tarā* — that “staple” formula (along with *ara’ayta*) of early *jadāl* practice. It is a push for SHAP to concede acceptance of the counter-*ḥadīth* (preponderated in §248), which SH now quotes in his question: «the *shuf’a* is for what was not divided (*fīmā lam yuqṣam*), and when *ḥudūd* occur there is no *shuf’a*.»⁵⁰ Additionally, SH clearly sets the stage for another *reductio ad impossibile* terminating in a charge of *tanāquḍ*; he right away states that no proponent of the Ahl al-Baṣra *qawl* may find an evasion (*makhraj*) from having brought about *shuf’a* where *ḥudūd* occur. SH has made his strategy clear: 1) his *alā tarā* presents an *endoxon* ruling (straight from the Prophet) which SHAP is bound to concede; 2) SHAP will be shown to have ruled, in the *mas’ala* at hand, the opposite of the conceded *endoxon* ruling; thus 3) SHAP will be shown to have contradicted himself — a charge for which he has no real *makhraj*.⁵¹

SHAP’s concession to SH’s Prophetic *ḥadīth-qawl* is evident in §250; he is now forced to defend his apparent contradiction in its light, and — despite SH’s assurance of no *makhraj* — SHAP nevertheless attempts an explanation. The sequence continues, then, in “instructional mode,” with SHAP’s response (*fa-in qāla*): he brought about *shuf’a* where *ḥudūd* occur (a concession to the *endoxon* ruling) only because there remains of the (jointly-owned) *milk* something in which *ḥudūd* did not occur (i.e., the jointly-owned *ṭarīq/mashrab*). In other words, SHAP concedes to the *ma’nā* of SH’s *ḥadīth*, while simultaneously maintaining that it does not obtain in a part of the *mas’ala* at hand: part of the *milk* remains without *ḥudūd*. In effect, he is conceding that the greater part of the *milk* (the land/house) is apportioned or divided by something which may be described as *ḥudūd*; at the same time, he is maintaining that the *divider itself* is also jointly owned, and is not itself apportioned or divided by *ḥudūd*. Thus, the *mas’ala* as a whole remains — for SHAP — an exception to the expected *ḥukm* of no *shuf’a*.

chapter of the *Ma’ūna*, is missing from both *Ma’ūna* MSS. Turkī also notes this in his edition of the *Ma’ūna* (184, n.11), but he does not fill the lacuna from another source, as al-‘Umayrīnī does. Intriguingly, the *K. al-Jadal* of Ibn ‘Aqīl also indicates two *ḍarbs* of *mu’āraḍa* (36, §190), but proceeds only to name and treat one (*mu’āraḍa bi’l-nuṭq*). al-Bājī, however, provides a full treatment of *mu’āraḍa bi’l-‘illa*, using the same sub-categories as al-Shīrāzī (for when P’s *Sunnaic dalīl* is *naṣṣ*, *zāhir*, or *‘umūm*; see *Minhāj*, Turkī ed., 123-5, §§244-7).

⁵⁰ Cf. the *āthār-qawls* transmitted by SH in §§242-4, and the *āthār-qawl* “tacked on” by AY/MIH in §270, all of which contain components of this *ḥadīth-qawl*.

⁵¹ It is noteworthy that SH uses “*makhraj*” here in a sense similar to the “*jawāb*” of later *jadāl* systems — this latter constitutes a study of response-method: P’s means of overcoming Q’s *i’tirāḍ*. By claiming no *makhraj* SH assures that SHAP can have no real *jawāb* to the objection, and that *elenchus* will be sure to follow.

SH is quick to jump to *elenchus* at this point (§251); in effect he charges SHAP with ignoring the procedures requisite to his own distinction of *milk* with/without *ḥudūd*. First of all, if it is possible that the remaining *milk* (*al-bāqī*; i.e., the *ṭarīq/mashrab* of the *mas’ala*) be the object of *shuf’a*, then SHAP should rule the right to *shuf’a* for that *bāqī*, specifically (and not for the *milk* marked by *ḥudūd*). In other words, only the referenced *ṭarīq/mashrab* may be the locus of *shuf’a*, not the divided land/house; and thus, SH says: “You will have followed the *khavar*” (which embodies the conceded *endoxon* ruling). Secondly, if the *bāqī* may not be the object of *shuf’a*, SH declares (perhaps somewhat snappishly): “Don’t bring about the *shuf’a* in something else.”

In our final analysis, then, it is clear that SH has once again reduced the position of his opponent to an internal, logical inconsistency. In other words, and despite the absence of a direct charge of *qawl mutanāqīḍ* (as we saw in §102 above), SH is nevertheless accusing SHAP of *tanāquḍ*. Notably, notwithstanding the prefatory arguments of *mu’āraḍa* and *tarjīḥ* and *ma’nā*, both SH and SHAP are arguing from the same *dalīl* in §§249–51, and no question of *istidlāl* is at stake. Rather, the charge is that SHAP has: 1) conceded the *endoxon dalīl* and 2) contradicted it in his ruling for the *mas’ala* at hand. We may attempt to represent his *tanāquḍ* thus:⁵²

- SHAP concedes: $(x)[(Mx \ \& \ Hx) \rightarrow \neg Px]$ ⁵³
- SHAP rules: $(Ma \ \& \ Ha) \ \& \ (Mb \ \& \ \neg Hb) \vdash Pa \ \& \ Pb$ ⁵⁴
- SH correction: $(Ma \ \& \ Ha) \ \& \ (Mb \ \& \ \neg Hb) \vdash \neg Pa \ \& \ Pb$ ⁵⁵

(Universe: M = jointly-owned *milk*; H = *ḥudūd* occur in it; P = right to pre-emption obtains in it; a = part A of the *milk*; b = part B of the *milk*)

SHAP’s *tanāquḍ* lies in that he at once concedes $(x)[(Mx \ \& \ Hx) \rightarrow \neg Px]$, but rules $(Ma \ \& \ Ha) \vdash Pa$. SH underscores this *tanāquḍ* by showing what SHAP ought to have concluded had he remained consistent to the logic of his concession. Thus, once again,

⁵² For this analysis I will utilize a basic set of symbols for predicate logic, as employed by Rodes and Pospesel in *Premises and Conclusions: Symbolic Logic for Legal Analysis* (Upper Saddle River, NJ: Prentice Hall, 1997); especially at 113–206.

⁵³ Read: “For any x: if x is jointly-owned *milk*, and x is something in which *ḥudūd* occur; then x is something in which the right to *shuf’a* does not obtain.”

⁵⁴ Read: “Part A of the *milk* is jointly owned and *ḥudūd* occur in it; and part B of the *milk* is jointly owned but no *ḥudūd* occur in it; therefore the right to *shuf’a* obtains in part A of the *milk* and in part B of the *milk*.”

⁵⁵ Read: “Part A of the *milk* is jointly owned and *ḥudūd* occur in it; and part B of the *milk* is jointly owned but no *ḥudūd* occur in it; therefore the right to *shuf’a* does not obtain in part A of the *milk*, but the right to *shuf’a* does obtain in part B of the *milk*.”

we are faced with an *elenchus* which bears a much closer resemblance to the classical Aristotelian dialectical paradigm than to anything we find in the *jadāl*-theory texts of al-Shīrāzī, et al. Although we might find some similarity in this case to *al-naqd*, we must point out: 1) the hallmark move of bringing a parallel *endoxon* ruling in which the same ‘*illa* occasions a different *ḥukm* is missing; and 2) the above arguments unfold within the domain of *al-istidlāl bi’l-Sunna*, for which the *jadāl*-theory texts do not speak of *al-naqd* (it is confined to *al-istidlāl bi’l-qiyās*). Certainly SH sees the solution of this *mas’ala* as a simple matter of *al-istidlāl bi’l-Sunna*, and would have been content had SHAP restricted his *ḥukm* of *shufa* to that part of the *milk* (*ṭarīq/mashrab*) in which the efficient property of the *ḥadīth* obtains — he would have “followed the *khābar*.” What he objects to is that SHAP has extended his *ḥukm* for that specific part of the *milk* to another part of the *milk* (land/houses) where the efficient property of the *ḥadīth* does not obtain.⁵⁶

Having demonstrated how a disputant might achieve *elenchus* against a proponent of the Ahl al-Baṣra argument, SH immediately gets under way with a new — and quite protracted — dialectical sequence, extending from §252 to §267. This sequence has a decidedly “historical” tenor, opening with “*wa qāla ba’d al-Mashriqīyyīn: [X, Y, Z]*” (§252); followed by “*qulnā li-ba’d man yaqūlu hādihā al-qawl*” (§253); then “*qāla*” and “*fa-qīla lahu*” and so on. The sequence provides significant indication, in other words, that this is something like a transcript of a real debate between SH and “one of the Easterners.” Even so, its very location in a work of *ikhtilāf* testifies to its didactic value, as do other indicants such as a temporary lapse to “*fa-in qāla... qīla lahu...*” in §§258-9. At any rate, we may immediately recognize this SHAP of the Mashriqīyyūn as the proponent of a variant on the AH rulings in §239. Regarding these *masā’il* he rules the right of *shufa* for *sharīk* and for *jār*, when: 1) the *jār* is *mulāṣiq*, or 2) the considered houses are separated by a *raḥba* with no *ṭarīq nāfidha* in it. This latter he confirms by ruling no right to *shufa* for the *jār* when the *raḥba* has a *ṭarīq nāfidha* in it — even if narrow.

SH, in the role of Q, opens the debate with a dialectical question we may instantly identify as the *su’āl ‘an al-dalīl* of later *jadāl* systems (*su’āl* #3 of al-Bājī’s

⁵⁶ SH has divided the *mas’ala* into two: one part in which the ‘*illa* occasioning *shufa* obtains (and thus, SHAP’s *ḥukm* — if restricted to it — is correct), and one part in which it does not (and thus, SHAP’s *ḥukm* — extended to it — is wrong). SH’s solution thus requires two separate *ḥukms* when the dividing (but not divided) portion of the *milk* may itself be subject to *shufa*, whereas SHAP’s problematic solution has but one *ḥukm*.

question-schema): Upon which thing did you rely (*ʿalā ayyi shayʿin iʿtamadtum*)?”⁵⁷ Accordingly, the Mashriqī SHAP renders his *dalīl* in §254: an “*athar*,” transmitted from Ibn ʿUyaynā (a teacher of SH), which consists in fact of a Prophetic *ḥadīth-qawl*: «*al-jār aḥaqq bi-saqabihi*.» Of course, we recognize this as the same *ḥadīth-qawl* from which the Ahl al-Baṣra claimed to derive the *maʿnā* for their ruling above. SH now takes a different tack as regards this *ḥadīth*, however, saying in so many words (§255): Your *ḥadīth* does not conflict with ours; rather, yours is a *jumla*, while ours is a *mufassir*.⁵⁸ We cannot

⁵⁷ al-Bājī (*Minhāj*, Turkī ed., 34, 36, §§64 and 70) calls it “*al-suʿāl ʿan dalīl al-madhhab*” and “*al-suʿāl ʿan al-dalīl*,” the *sāʿil* asks: “*mā al-dalīl ʿalā dhālika*?” In his short section on the “*aqṣām al-suʿāl*,” Ibn ʿAqīl also refers to “*al-suʿāl ʿan al-dalīl*,” his *sāʿil* asks: “*mā dalīluka ʿalā hādihā al-madhhab*?” (*K. al-Jadal*, 42, §220).

⁵⁸ Joseph Lowry, in “The Legal Hermeneutics of al-Shāfiʿī and Ibn Qutayba” (*Islamic Law and Society* 11:1 [2004], 1-41) sheds considerable light on the terms here employed by SH. First (p.22), he points to a discussion in the *Risāla* (Shākir §§624-35) where SH utilizes a *jumla*/*mufassar* distinction, and he translates *jumal* as “non-specific.” Further on (36-7), he supplies a definition of *jumla* as understood in the *Risāla* (“a general rule the details of which are found elsewhere”), and he describes SH’s use of *jumla* vs. *naṣṣ*: “Passages in the Qurʾān labelled *jumla* contain a general but undefined obligation (e.g., *aqīmū al-ṣalāt*!) the details of which are supplied by *ḥadīths*. Passages that do not require to be supplemented by another text (that is, are hermeneutically self-sufficient), are labelled *naṣṣ*.” Finally, in a footnote (37, n.85), Lowry observes that *naṣṣ* and sometimes *mufassar* are opposed to *jumla*/*jumal*. To this we may add some additional notes. First, in the context of §255 it would seem that the active *mufassir* is more appropriate than the passive *mufassar*; this is borne out by the sense of the passage, and by a parallel distinction (in this case, *jumal*/*mufassira*) in the *Risāla* (Shākir §314). There, SH explains the role of the Sunna as an exemplification of the *naṣṣ*, and an interpreter of the *jumal* of the Qurʾān:

314 – And God explained for them that He only abrogated what he abrogated of the Kitāb by means of the Kitāb, and that the Sunna is not an <i>nāsikha</i> (abrogator) to the Kitāb; rather, it only followed the Kitāb, representing what was revealed as <i>naṣṣ</i> (univocal), and a <i>mufassira</i> (interpreter) of the <i>maʿnā</i> (meaning) of what God revealed of it as <i>jumal</i> (equivocal).	314 – وَأَبَانَ اللَّهُ لَهُمْ أَنَّهُ إِنَّمَا نَسَخَ مَا نَسَخَ مِنَ الْكِتَابِ بِالْكِتَابِ، وَأَنَّ السَّنَةَ لَا نَاسِخَةَ لِلْكِتَابِ، وَإِنَّمَا هِيَ تَبَعٌ لِلْكِتَابِ، يُمَثِّلُ مَا نَزَلَ نَصًّا، وَمُفَسِّرَةً مَعْنَى مَا أَنْزَلَ اللَّهُ مِنْهُ جُمَلًا.

The Sunna, we see, not only exemplifies (*yumaththilu*) what God sent down as univocal (*naṣṣan*), but is an [active] interpreter (*mufassira*) for the *maʿnā* of such as God revealed as ambiguous/equivocal (*jumalan*). And it is this same sense of “active interpreter/specifier” and “equivocal/non-specific” which appears to be at work in §255 above. Certainly, elsewhere in the *Risāla* (§§418 and 698) we find the passive *mufassar*, and precisely in the sense which Lowry so aptly describes as “hermeneutically self-sufficient.” These distinctions, of course, all fall within the hermeneutical purview of most later *uṣūl al-fiqh* works, and are discussed under the headings of *mufassar*/*mubayyan* (clear) vs. *mujmal* (ambiguous; note that *jumla* and *mujmal* are cognates). See Hallaq, *History of Islamic Legal Theories*, 43ff., and note that he cites relevant chapters from a number of important *uṣūl* works. Finally, we might add that al-Muzanī — expounding on the same *masʿala* of §255 above — confirms all of this in his *Mukhtaṣar* (Būlāq, iii.48 [margin]; Maṭraḥī, ix.130; Najjār, viii.119):

overstress that we have in §§255ff. an exemplary model of al-Shāfi‘ī’s hermeneutic at work; moreover, it is at work in a context of juridical dialectic born from *ikhtilāf* over the meaning of “*jār*” and the right to pre-emption. This is not to say, of course, that this particular *mas‘ala* of *ikhtilāf* and ensuing debates gave birth to the *mufassir/mujmal* distinction. There can nevertheless be little doubt that such dialectical settings as this prompted both its introduction and its refinement of formulation over time. Certainly, whatever the case as to its origins, we cannot deny that a *mufassar/mubayyan* vs. *mujmal* distinction is a fundamental component of most *uṣūl al-fiqh* works, and no stronger evidence of the dynamic role of juridical dialectic in the formation of Islamic legal theory can be found than what we have in §§255ff.

What is more, we can once again easily identify SH’s statement in §255 among the *i’tirāḍāt* of later *jadal* works — we have, in fact, already seen it in §247. It is a *da‘wā al-ijmāl*. More specifically (and this will be made clear in following sections), it is a claim that the *lughā* of the opponent’s *ḥadīth-qawl* is *mujmal* (Shīr.II.C.3.2; Bāj.II.2.2.3.2).⁵⁹ We will also note here that such a *da‘wā* entails – as indicated by SH in §255 — more than a mere claim and a linguistic explanation (which latter SH provides, at the behest of his opponent, in following sections), but it entails a kind of *mu‘āraḍa* — that is to say, the “*mufassir*” *ḥadīth* of SH is brought in to particularize the “*jumla*” *ḥadīth* of the Mashriqī SHAP. In so doing, the efficient properties which have been improperly drawn from the *jumla* are supplanted by those of the *mufassir* (see the end of §257).

Being that SH’s *da‘wā al-ijmāl* of §255 is accompanied by a kind of *mu‘āraḍa*, we are not surprised to see that hallmark of *mu‘āraḍa* much mentioned by Miller in his dissertation: the switching of roles of P and Q. Perhaps al-Bājī describes this phenomenon best, when he explains the nature of *mu‘āraḍa* as a dialectical question:

“That he [Q] opposes (*yuqābila*) his [R’s] indicant (*dalīl*) by its like, or by what is stronger than it; and R responds to him via all that Q puts forth against the *dalīl* of R [i.e., they switch roles] as pertains to *muṭālabāt* and

“And your *ḥadīth* does not contradict (*lā yukhālifu*) our *ḥadīth* — because it is *mujmal* (equivocal), and our *ḥadīth* is a *mufassir* (interpreter), and the *mufassir* clarifies (*yubayyinu*) the *mujmal*.”

وَحَدِيثُكَ لَا يُخَالِفُ حَدِيثَنَا — لِأَنَّهُ مُجْمَلٌ وَحَدِيثُنَا
مُفَسِّرٌ وَالْمُفَسِّرُ يُبَيِّنُ الْمُجْمَلَ.

⁵⁹ al-Shīrāzī, *Ma‘ūna*, al-‘Umayrīnī ed., 59-60; al-Bājī, *Minhāj*, Turkī ed., 102, §198; Ibn ‘Aqīl, *K. al-Jadal*, 34, §180. Intriguingly, both al-Shīrāzī and Ibn ‘Aqīl employ the same example of a *qawl mujmal*: the Prophet’s maxim “*al-rahn bimā fihi*.” This same maxim crops up in §378 of the *K. Ikhtilāf al-‘Irāqīyyīn*, and a number of other places in the *Umm* (see the note attached to §378 in Part II of this dissertation). Although occurring mostly in the midst of dialectical sequences, the issue at stake does not seem to be the *ijmāl* of this maxim, however.

i‘tirādāt, or he preponderates (*yurajjiḥu*) his statement of the *dalīl* over that by which it was opposed.”⁶⁰

This is precisely what happens in §256, as the Mashriqī SHAP becomes a SHAQ, and asks SH his first dialectical question of this sequence. With regard to his own *ḥadīth* (of §254), SHAQ asks: “*kayfa lā yukhālifu ḥadīthakum?*” The *mu‘āraḍa* of SH is now shown in bold relief, as his *mufassir ḥadīth* becomes the focus of attention. SHAQ is aware that SH supports his ruling via *istidlāl* from another Sunnaic *dalīl*, but he is not aware of the exact nature of this *dalīl* — especially with regard to its role as *mufassir* to his own *ḥadīth*. Accordingly, we may identify SHAQ’s request with al-Bājī’s fourth dialectical question: *al-su‘āl ‘an wajh al-dalīl*.⁶¹

SH’s *jawāb* in §257 consists of two parts. The first is a *tafsīr* of a particular *lafẓ*: *jār/jirān*. We will recall that the *ḥadīth-qawl* from which SHAQ derives his ruling for *mas’ala* #3a-b is: «*al-jār aḥaqq bi-saqabihi*.» SH now explains that *jār* may be used to designate a *sharīk* of commixion, or a partner who divides (*muqāsīm*), or even someone living forty houses away. The significance is that, necessarily, SHAQ’s *ḥadīth* must refer to some *jirān* and not others. Importantly, SH follows this *tafsīr* by indicating his endorsement and adherence to a principle which belongs as much to *jadal*-theory as it does to legal theory in general: “When we say as much, such is not granted us [as argument] against others except by means of an indicant (*dalāla*) on the authority of the Messenger of God....” This is clearly the statement of a restricting norm: a *da‘wā* of *ijmāl* regarding a *ḥadīth-qawl* followed by a purely linguistic analysis does not alone constitute *ḥujja* — it must be supported by an authoritative *dalāla*. We should pause to mark this as another instance of “proto” *jadal/uṣūl* theory played out in a purely dialectical venue. If, for example, we search for the forge-marks of later *mujmal/mufassar* theory, it is in contexts such as §257 that we should first look.

In accordance with this self-imposed principle, SH now quotes his *tafsīr-dalāla* in full; it is the now familiar *ḥadīth-qawl*: «*al-shuf’a fīmā lam yuqsam, fa-idhā waqa‘at al-ḥudūd fa-lā shuf’ata*.» We will note we are dealing with the same *ḥadīth* vs. counter-*ḥadīth* as were raised in the previous dialectic against a proponent of the Ahl al-Baṣra *qawl*. The difference here is a shift in approach. Against the Ahl al-Baṣra, SH brought his “commixion/*ḥudūd*” counter-*ḥadīth* by way of *mu‘āraḍa* against the *ma‘nā* which they attributed to their “*jār*” *ḥadīth* — it was a means of confirming the *khilāf* of their

⁶⁰ al-Bājī, *Minhāj*, Turkī ed., 41, §78.

⁶¹ al-Bājī, *Minhāj*, Turkī ed., 39-40, §76.

purported *ma’nā*. Now SH brings his *ḥadīth* — also by way of *mu’āraḍa* — as a *mufassir* to the *jumla ḥadīth* of the Mashriqiyyūn. Accordingly, he at last explains the *waḥ* of his *dalīl* (requested by SHAQ in §256) as *mufassir*: “This [SH *ḥadīth-qawl*] provides indicant (*dalla...* ‘*alā*) that his *qawl* in the *jumla*: [SHAQ *ḥadīth*] pertains to some of the *jīrān* and not others, and that he [the intended *jār*] is the *jār* who did not divide (*lam yuqāsīm*).” From this, it is immediately apparent what SH has done with his *dalīl*: he has particularized the general scope which SHAQ attributed to the efficient property of “he is a *jār*” for occasioning the *ḥukm* of right to *shuf’a* — in effect, the efficiency of a plurality of types of “*jār*” has been supplanted by the singular efficiency of “*jār* as *sharīk* of commixion.”

Once again, SH’s explanation corresponds to that type of *matn*-oriented *mu’āraḍa* implied at the end of §248 and foreshadowed in §255: *al-mu’āraḍa bi’l-‘illa* (Shīr.II.C.8.2.3; Bāj.II.2.7.2.3); SHAQ’s general ‘*illa* (*jār* as “neighbour”: *mulāṣiq*/separated by *raḥba*) has indeed been supplanted by SH’s particular ‘*illa* (*sharīk* of commixion), through the action of his *mufassir-ḥadīth*.⁶² For both al-Shīrāzī and al-Bājī, this subspecies is to be employed “when the Sunna is ‘*umūm*/‘*āmm yaḥtamilu al-takhṣīṣ*.” For both, as well, the recommended *jawāb* is that the one targeted by such a *mu’āraḍa* argue against the opponent’s *dalīl* in such a way as eliminates it, that he be allowed to persist in his *istidlāl* from the ‘*umūm*. This is precisely what SHAQ proceeds to do in §258, focusing upon SH’s *tafsīr* of “*jār*.”

We will note that SH presented his argument in two parts: 1) his polysemous *tafsīr* of *jār* as applying to several types of individual; and 2) his explanation that his *mu’āraḍa-ḥadīth* pinpoints exactly which individual is intended (*sharīk* of commixion). He has not, however, provided a *dalīl* supporting his initial *tafsīr* of *jār* in part one of the argument (part two merely assumes its polysemous nature). SHAQ very prudently does not accept this *tafsīr* without a further *dalīl*, and his next question may be read in the spirit of both objection and request: “And the Arabs designate the *sharīk* as *jār*?” This corresponds quite well with the general dialectical category of *muṭālaba*, which Sānū defines as “The *sā’il*’s (the *mu’tariḍ*’s) lack of acceptance of what the *mu’allil* (the *mustadill*) mentions of premises (*muqaddimāt*) — all of them, or some of them — without

⁶² al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 67-8, n.6 [NB: lacuna reproduced from *al-Mulakhkhaṣ fi’l-Jadal*; see above note]; al-Bājī, *Minhāj*, Turkī ed., 125, §§247).

establishing the *dalīl* for them.”⁶³ SHAQ’s question is of such a nature; he objects to the unsupported *tafsīr*, while simultaneously requesting proof from an authoritative domain: the *lughā* of the Arabs. We should pause to note that the manner of hermeneutic this represents constitutes one of the major domains of *uṣūl al-fiqh* — yet another illustration of *uṣūl* theory developing in an early dialectic.

We may note that throughout this exchange, SH is somewhat parsimonious in his replies, never rendering up his argument in full detail, but doling it out premise-by-premise only at SHAQ’s behest. This matches well with the comportment of the proponent as we have seen it described in the *jadal* works, as does SHAQ’s practice of halting SH at every step and digging deeper for supporting proofs. SH’s response in §259 continues in this spirit, providing only a definition of *jār* (*kullu man qāraba badanuhu badana ṣāhibihi*), but not a source. Accordingly, SHAQ cannot accept it without further support, so his next question (§260) is once again in the spirit of *muṭālaba*. He says: “Provide me an indicant for this (*fa-dlulnī ‘alā hādihā*).”⁶⁴ SH immediately replies with not one, but two such *dalīls*, citing: (§261) a Prophetic *ḥadīth* wherein the Prophet judges against one of the *jāratayn* of Ḥamal b. Malik b. al-Nābigha, and in which the context allows us to interpret *jāra* as wife (or, perhaps *jāriya* or *ama*); and (§262) a *bayt* from a short *qaṣīda* of Maymūn b. Qays al-A’shā (d. ca. 8/629) wherein *jāra* clearly means wife.⁶⁵

⁶³ Sānū, *Mu’jam*, s.v. “المطالبة.” The reference to “premises” doubtless marks this definition as emanating from a later source/sources. I have yet to find a more precise match in the early *jadal*-theory texts, although we might consider SHAQ’s *muṭālaba* as similar to al-Bājī’s *al-muṭālaba lahu bi-ithbāt al-waṣf fi’l-aṣl* (Bāj.IX.A.1.5; *Minhāj*, Turkī ed., 151, §312), if we consider SH’s *jār-sharik* of commixion correspondence as critical to establishing the efficient property of his *aṣl-ḥadīth*.

⁶⁴ Due to the wording of SHAQ’s demand, we might be tempted to identify this as *al-muṭālaba bi’l-dalīl*. It would seem, however, that this particular species of *muṭālaba* is restricted to the domain of *qiyās* — specifically for demanding the *dalīl* by which the *mu’allil* provides indicant for the *ḥukm* as being occasioned by a certain ‘illa (Sānū, *Mu’jam*, s.v. “المطالبة بالدليل”). Al-Bājī’s several *dalīl*-oriented *muṭālabāt* seems to bear this out (Bāj.IX.A.1.2-4; *Minhāj*, Turkī ed., 149-50, §312).

⁶⁵ Variants of this *bayt* appear in a number of *ḥadīth* commentaries, *fiqh* works, etc., usually for the purpose of interpreting *jār* in connection to pre-emption. Al-Muzanī, in a detailed discourse on *shufa* in his *Mukhtaṣar* (Būlāq, iii.48-9 [margin]; Maṭrajī, ix.130; Najjār, viii.119), reproduces a number of lines from the poem, prefaced by the following “historical” dialectical Q&A (bear in mind that al-Muzanī was purportedly praised as a master dialectician by al-Shāfi’ī):

Following this, SH launches (in §263) a multi-tiered *i’tirāḍ* against SHAQ’s rulings for *mas’ala* #3a-b whereby all of *tanāquḍ*, *reductio ad absurdum*, and the *i’tirāḍ* of *al-naqḍ* come into play, and by which we would expect SH’s *elenchus* to be sealed (SHAQ, however, as we shall see, is not yet ready to concede). First, SH charges SHAQ with not adhering to the very *jadal/uṣūl* principle which SH imposed upon himself back in §257: *tafsīr* of the *jumla* is not sufficient argument in and of itself, but must be supported by an authoritative *dalīl*. “You yourself,” SH charges, “when you say: ‘It [the *lafẓ* of *jār*] is specialized for some of the *jīrān* and not others,’ you do not bring for it a *dalāla* about the Prophet..., nor do you fix it [the *lafẓ* of *jār*] upon the one to whom adheres the *ism al-jiwār*.” In other words, inherent to the very rulings of the Mashriqī opponent for *mas’ala* #3a-b is a conception that the *jār* of «*al-jār aḥaqq bi-saqabihi*» applies to some *jīrān* and not others, but SHAQ has not backed this conception with another Prophetic *dalīl*, as SH has done for his opposing conception. There is something important in this charge which we ought not overlook. If we conceive of the development of a science of methodology (such being *uṣūl al-fiqh* and *jadal-theory*) as a “pursuit of *ḥujjiyya*” — i.e., a gradual winning-out of proven epistemically-superior methods over those less productive in disputation —, then we are witnessing here the very thing itself. SH is chiding his opponent for not adhering to a principle of method whose epistemic superiority (within the greater superset of theological and legal-theoretical first

He said: And does the ‘designation of proximity’ fall upon the *sharīk* (partner)?
I said: Yes — is your wife closer to you, or your *sharīk*?
He said: My wife, of course! Because she is my *ḍajīra* (bed-fellow).
I said: And so the Arabs say the wife of a man is his *jāra* (neighbor).
He said: But where?
I said: Al-A’shā said: O *jāra* of ours: part, and you are indeed divorced [etc.]

قَالَ: وَهَلْ يَقَعُ اسْمُ الْجَوَارِ عَلَى الشَّرِيكِ؟
قُلْتُ: نَعَمْ – امْرَأَتُكَ أَقْرَبُ إِلَيْكَ أَمْ شَرِيكَكَ؟
قَالَ: بَلْ امْرَأَتِي، لِأَنَّهَا ضَجِيعَتِي.
قُلْتُ: فَالْعَرَبُ تَقُولُ امْرَأَةُ الرَّجُلِ جَارَتُهُ.
قَالَ: وَآيْنَ؟
قُلْتُ: قَالَ الْأَعْشَى: أَجَارَتَنَا بَيْنِي فَإِنَّكَ طَالِفَةٌ... [إلخ]

Note that the “*ism al-jiwār*” of this discussion also occurs in §263 above, and that al-Muzanī’s dialectical sequence parallels that of the SH vs. Mashriqī SHAQ quite closely. We might thus consider this an example of a proto-system transmission of *jadal* teaching and practice, from SH to al-Muzanī. If al-Muzanī did in fact engage in the above dialectic, and if he learned its basic structure and premises from the *Umm*, then the didactic role of *Umm* dialectical sequences would be illustrated here in bold relief.

principles) cannot be ignored.⁶⁶ Moreover, it is a principle which SHAQ himself has pressed for by earlier demanding SH’s *dalīl*.⁶⁷

At any rate, SH’s charge contains a second component (SHAQ does not fix the *lafz* of *jār* upon whomever the *ism al-jiwār* adheres), and we may understand this as a setting of the stage for a charge of *tanāquḍ*. The meaning of this first step becomes clear in the second, when SH develops his argument thus: 1) the *ḥadīth* of Ibn Maysara (i.e., SHAQ’s *ḥadīth* in §254)⁶⁸ permits only one of the two *ma’nās* which SHAQ attributes to it — i.e., *jār* can only designate either an efficient property of a) “*sharīk* of commixion, or b) neighbour separated by a *raḥba* with no *ṭarīq nāfidha*; and 2) “You have contradicted them both, together (*qad khālaftahumā ma’an*).” Thus is the cause of SHAQ’s *tanāquḍ* exposed, he never bothered to fix the *ma’nā* of *jār* in his source *ḥadīth* with any precision and, as a result, he ended up contradicting both possible *ma’nās* by allowing them all to occasion the same ruling. Recalling that his source *ḥadīth* (*al-jār aḥaqq bi-saqabihi*) bequeaths “the most right” to the “*jār*,” we might represent SHAQ’s *tanāquḍ* thus:

- SHAQ source *ḥadīth*: $(x)(Jx \rightarrow Sx)$ ⁶⁹
 - SHAQ does not fix meaning of *jār*, thus rules: $Jp \vee Jn \vdash Sp \ \& \ Sn$ ⁷⁰
- (Universe: $J = jār$; $S =$ has most right to *shufa*; $p =$ Partner of commixion; $n =$ neighbour separated by *raḥba* with no *ṭarīq nāfidha*)

Clearly, according to SH’s argument, if the *lafz* of *jār* can only designate one of two possible types of individual, then “the most right to *shufa*” can be granted only to one, and not to the other. By granting it to both, SHAQ has contradicted both possible *ma’nās* of his own source *ḥadīth*. To a certain extent, this is similar to the *tanāquḍ* of §251, where SH shows how SHAP contradicted the *ma’nā* of the very *ḥadīth* which he conceded. Perhaps we might consider a family of *tanāquḍ*, then, in which an opponent’s

⁶⁶ One might claim, in fact, that SH’s *Risāla* represents a distillation of these epistemically-superior methods as developed over time in SH’s disputations, not to mention presented in a style of didactic dialectic. Here in §263 we find something in that spirit of the *Risāla*.

⁶⁷ In this sense, SH’s charge could be read as one of hypocrisy. This is verging upon something which we will encounter later, and have labelled “*method-naqd*.”

⁶⁸ Note that SH does not refer to it by its last narrator — his own teacher, Ibn ‘Uyayna — but prefers to label it by the next narrator in the *isnād*.

⁶⁹ Read: “For any x , if x is a *jār*, then x has the most right to *shufa*.”

⁷⁰ Read: “The partner of commixion is a *jār* OR the neighbour separated by a *raḥba* with no *ṭarīq nāfidha* is a *jār*; therefore, the partner of commixion has the most right to *shufa* AND the neighbour separated by a *raḥba* with no *ṭarīq nāfidha* has the most right to *shufa*.”

purported *istidlāl bi’l-Sunna* is shown to contradict the *ma’nā* of the very Sunnaic *dalīl* which is the source of his *istidlāl*.

Nor does SH stop here. Without hesitation, he now shifts to a different angle of attack, initiating a three-stage *reductio ad absurdum*. We may read SH’s argument as a set of premises (1-2) consequent to SHAQ’s rulings, followed by a conclusion (3) which, in combining premises 1-2, exposes an absurdity inherent to SHAQ’s reasoning: 1) SHAQ would concede the right to *shuf’a* for a house separated by a *raḥba* of 1,000 cubits and more, so long as there is no *ṭarīq nāfidha* in it; 2) SHAQ would *not* concede the right to *shuf’a* when the properties are separated by a *ṭarīq nāfidha* of only one cubit; 3) therefore, SHAQ would concede the right to *shuf’a* for the most distant of *jīrān*, while preventing it from the nearest. The absurdity lies, of course, in that this set of hypothetical rulings — consequent to those expressed by SHAQ in §252 for *mas’ala* #3b — defy the conception of *jār* as implied in his own source-*ḥadīth* by “due to his nearness (*bi-saqabihi*).” We might, therefore, also classify this SH argument as another charge of *tanāquḍ* (for SHAQ has once again contradicted the very *ḥadīth* from which he claims *istidlāl*), but the extremes of 1,000 cubits and 1 cubit seem to make *reductio ad absurdum* a more appropriate fit.

Still not satisfied with his critique, SH shifts to yet another tack, and we are finally exposed to what has seemed “missing” from previous charges of *tanāquḍ*, and which disallowed us from interpreting these past objections as *al-naqd*. SH raises, near the end of §263, a parallel ruling of SHAQ as regards another genus of substantive law, demonstrating clearly that — although the same purportedly efficient property obtains in this *mas’alat al-naqd* — SHAQ does not cause it to occasion the same ruling as he does in the *mas’ala* at hand. These are the two “hallmarks” of the *i’tirāḍ* of *al-naqd*: 1) the raising of a parallel *mas’ala* whose ruling is *endoxon*; and 2) that this *mas’alat al-naqd* exhibits, by the definition of the *jadal* works, “the presence of the occasioning factor with the absence of the norm (*wujūd al-‘illa ma’a ‘adam al-ḥukm*).”⁷¹ And these two hallmarks are evident in SH’s charge: “You claimed that the one who bequeaths (*awṣā*) to his *jīrān*, that you divide his bequest (*qassamta waṣīyyatahu*) for the one who, between

⁷¹ al-Bājī, *Minhāj*, Turkī ed., 14; and 185 (§142). Cf. al-Shīrāzī’s fuller definition: “the presence of the ‘illa, but not a *ḥukm*, according to the *qawl* of one who does not opine (*lā yarā*) *takhṣīs al-‘illa*” (*Ma’ūna*, al-‘Umayrīnī ed., 104). al-Baṣrī’s definition is also enlightening: “the presence of the ‘illa in a *mawḍi’* from which its *ḥukm* is absent” (*K. al-Qiyās al-Shar’ī*, Ḥamīd Allāh ed., 1041; Hallaq, “Treatise,” 218). The opening (§276) of Ibn ‘Aqīl’s *Bāb al-Naqd* begins: “*al-Naqd* is *wujūd al-‘illa ma’a ‘adam al-ḥukm*, and that is the opposite (*ḍidd*) of *al-ta’tḥīr*, because *al-ta’tḥīr* is *wujūd al-ḥukm bi-ghayr al-‘illa*. And that is a valid question according to the *qawl* of who does not profess *takhṣīs al-‘illa*, and such are our *aṣḥāb* [i.e., the Ḥanbalīs]” (*K. al-Jadal*, 56).

his house and his [the legator’s] house are forty houses (!)” This *waṣīyya* ruling is the *mas’alat al-naqḍ*, and we can clearly see that the same pair of efficient properties (i.e., “he is a *jār*” and “he is separated by forty houses”) as would occasion a *ḥukm* of “no right belongs to him” by SHAQ’s rulings on the *shufa mas’ala*, instead occasion the contrary *ḥukm* by SHAQ’s rulings on the *mas’alat al-naqḍ*. So not only are we witnessing an *i’tirāḍ* of *al-naqḍ* some two hundred years or more before our first extant works of juridical *jadāl* theory, but we are witnessing it in a most pristine form. Notably, however, we are also witnessing it in a domain (against *istidlāl bi’l-Sunna*) in which it does not appear in our *jadāl*-theory texts (being confined there only to the realm of *qiyās*).⁷²

Delving deeper for a more exact identification in the later *jadāl* theory, we find that al-Shīrāzī (Shīr.VII.7) does not break the category of *naqḍ* down into subcategories; rather, he proceeds directly from his definition to the treatment of several *wujūh* of *jawāb* — i.e., of valid methods of responding to the *i’tirāḍ* of *naqḍ*. Among these we find a *jawāb* (*wajh* 3) which has some relevance to SH’s *i’tirāḍ* above in that it describes a response-procedure which parallels the procedure undertaken by SH himself in his objection. Al-Shīrāzī prescribes: “That he repudiate (*an yadfa’a*) the *naqḍ* by way of the *ma’nā* of the *lafẓ*, and that is two things: the requirement (*muqtaḍā*) of the *lafẓ*, and the *tafsīr* of the *lafẓ*.”⁷³ As to this latter approach, he writes: “the *lafẓ* may possibly bear two *amrs* with a single likelihood (*iḥtimālān wāḥidan*), so he interprets (*yufassiru*) one of them in order to repudiate the *naqḍ*.”⁷⁴ Thus, in describing a counter to *naqḍ*, al-Shīrāzī comes quite close to describing the procedure by which SH initiated his set of arguments, closing with an attack of *naqḍ*.⁷⁵

Al-Bājī, on the other hand, subdivides *al-naqḍ* into two *ḍarbs* dependent upon the nature of the *‘illa* under debate — it is either: 1) “posited for the genus (*wuḍi’a li’l-jins*), and it is in the status of definition (*bi-manzilat al-ḥadd*);” or 2) “posited for the *ithbāt* of the *aḥkām* as regards individuals (*al-a’yān*).”⁷⁶ He explains the first *ḍarb*: “regarding it, *al-ṭard wa’l-‘aks* are taken into account; and if it is undone (*intaqaḍa*) in one

⁷² Once again, we will note this broader range for *naqḍ* as a feature of proto-system *jadāl*.

⁷³ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 105.

⁷⁴ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 106.

⁷⁵ Clearly, if the *lafẓ* may possibly bear two *amrs*, then Q may base his *i’tirāḍ* upon one and P his *jawāb* upon the other. The initial vehicle for both would be *tafsīr* of the *lafẓ*.

⁷⁶ al-Bājī, *Minhāj*, Turkī ed., 185, §412.

of the two ways, then it is undone in the other.”⁷⁷ We should quickly note this as another instance of crossover between two method-theory domains of *uṣūl al-fiqh* (*al-ṭard wa’l-‘aks* as a method for *ithbāt al-‘illa*) and *al-jadal al-fiqhī* (*ḍarb* #1 of the *i’tirād* of *al-naqḍ*). This provides potential evidence for another of the theories considered in this dissertation; namely, that the private deliberations of *ijtihād* may in part attempt to anticipate the public critique of dialectical disputation. Hence the science of *ijtihād* (*uṣūl al-fiqh*) is geared in part towards an *internal dialectic* — which is to say, in this case, that when the *mujtahid* employs the procedure of *al-ṭard wa’l-‘aks* privately, he is anticipating the *naqḍ* of his jurist-peers (who will “test” or critique his *ijtihād* through dialectic).

At any rate, the ‘*illa* of SH’s *mas’alat al-naqḍ* clearly does not stand up to the procedure of *al-ṭard wa’l-‘aks*;⁷⁸ we may thus identify his *naqḍ* as the second *ḍarb* of al-Bājī’s typology. This however, is again subdivided into two *ḍarbs*: 1) for the ‘*illa* posited for obligation (*mawḍū‘a li’l-wujūb*); and 2) for the ‘*illa* posited for permission (*li’l-jawāz*). Considering the *ḥukm* for our *mas’alat al-naqḍ*, we would classify its ‘*illa* by the first *ḍarb*, of which al-Bājī writes: “when it is found without the *ḥukm*, such constitutes *naqḍ*.” Thus, our final identification of SH’s objection at the end of §263 is: *i’tirād* by way of the *naqḍ* of an ‘*illa* which was posited for a *ḥukm* of obligation regarding an individual, not a genus (Bāj.IX.B.11.2.1).⁷⁹

Finally, we reach the end of §263, where SH drives home his charges of *naqḍ* and *tanāquḍ* with a rhetorical question which, normally, would mark the sealing of his *elenchus*: “So how is it you did not effect *shuḥḥa* on the [same] basis as you divided the *waṣīyya*, when you contradict (*khālafta*) our *ḥadīth* and the *ḥadīth* of Ibrāhīm b. Maysara from which you draw *ḥujja* (*iḥtajajta bihi*)?” SH has drawn together the threads of his objection into a singular confounding question, and we can see from the remaining

⁷⁷ al-Bājī, *Minhāj*, Turkī ed., 185, §413. Of particular import here is an evident correspondence between the requirements of definition (*jāmi‘* and *māni‘*) and of *jarayān* (*ṭard* and ‘*aks*). This is an idea worthy of further investigation, in light of al-Bājī’s twofold typology of the ‘*illa*, and that the first is “in the *manzila* of the *ḥadd*,” while the second is for “individuals (*‘ayān*).”

⁷⁸ The ‘*illa* of our *mas’alat al-naqḍ* is composed of two efficient properties (“he is a *jār*” and “he is separated by forty houses”); together, these occasion a *ḥukm* of “he has the right to a portion of the *waṣīyya*.” According to the procedure of *al-ṭard wa’l-‘aks*, the *ḥukm* must be present wherever the ‘*illa* is present, and absent wherever it is absent. Clearly, however, in the *mas’ala* of the *waṣīyya* who bequeaths to his *jārān*, the *ḥukm* of “he has the right to a portion of the *waṣīyya*” is not dependent solely upon the ‘*illa* “he is a *jār* separated by forty houses” — were he the *jār* next door he would have his portion.

⁷⁹ al-Bājī, *Minhāj*, Turkī ed., 185, §415. Cf. Ibn ‘Aqīl’s discussion on *al-naqḍ* (K. *al-Jadal*, 56ff., §§276ff.); he follows the same typology as al-Bājī, and from this we might surmise that al-Shīrāzī’s was the same (as the teacher of both), but that he did not treat *naqḍ* fully in his *Ma‘ūna* for some reason or another.

sections that SHAQ is understood to have afterwards conceded the overthrow of his *hujja*. Still, before committing to the “*sharīk* of commixion only” ruling of SH, he has one more test.

In §264, and once more in the spirit of *muṭālaba*, SHAQ asks: “Did any of the Companions of the Prophet... profess your *qawl*?” Although I have yet to find an exact match for this question in the later *jadal* literature, it is obvious that SHAQ’s request is related to theories of *naskh* and, perhaps, *ijmā‘ al-ṣaḥāba*. As for *naskh*, we find a relevant objection related to the *matn* of the Sunna (as *qawl muḥtada‘*) in al-Shīrāzī’s *Ma‘ūna*; his sixth *i‘tirāḍ* (*al-naskh*) is divided into several *wujūh*, the third of which is “*al-naskh bi-‘amal al-ṣaḥāba bi-khilāfihi*, which is that he conveys, on the authority of the Ṣaḥāba, the ‘*amal* of the *khilāf* of it [i.e., of the *khabar*], in order to provide indicant for its *naskh*” (Shīr.II.C.6.3).⁸⁰ Although this *i‘tirāḍ* is directed towards the ‘*amal* of the Companions, not their *qawl* (as with SHAQ), a parallel rationale may be discerned in SHAQ’s *muṭālaba*: if none of the Companions professed the same *qawl*, this may serve as an indicant that such a Prophetic *qawl* is *mansūkh*. On the other hand, if a significant number of Companions professed this *qawl*, without *khilāf*, then this might serve as indicant of *ijmā‘ al-ṣaḥāba*. Either way, it is evident that SHAQ’s *muṭālaba* represents a demand for a certain kind of *naql* which — in addition to SH’s ‘*aql* arguments — would elevate SH’s *mufasssir-ḥadīth* over all other possible *adilla*. As such, it is most related to a demand for *tarjīḥ*. Not surprisingly, the very first *wajh* of al-Shīrāzī’s *matn*-oriented *tarjīḥāt* (Shīr.IX.2.1) reads: “That one of the two *khabars* be *muwāfiq* to another *dalīl* from an *aṣl*, or *ma‘qūl aṣl*, so it is given precedence....”⁸¹ We might interpret SHAQ’s question, then, as a *muṭālaba* for *tarjīḥ* based on a supporting *qawl* from one or more Companions.

SH, as frugal as ever with his *jawāb*, responds in §265 not with the requested source(s), but with a simple confirmation (*na‘am*) followed by the profession of a principle of transmission-related legal epistemology. This latter is meant to pre-empt any further objections, simply by pointing out the irrelevance of SHAQ’s *muṭālaba*; SH asserts: “Nor would it harm us that no one professes it, since it is confirmed on the authority of the Prophet.” Once again, we are witnessing the assertion of a “proto-*uṣūl al-fiqh*” theory within a dialectical context: a confirmed Prophetic *ḥadīth* may stand alone as an *aṣl*, unharmed by the silence of Companions (or Successors). From another

⁸⁰ al-Shīrāzī, *Ma‘ūna*, al-‘Umayrīnī ed., 62, 63-4. Cf. Ibn ‘Aqīl (*K. al-Jadal*, 35, §185) and al-Bājī (Bāj.II.2.5.3; *Minhāj*, Turkī ed., 112, §219), both of whom employ the same definition as their teacher, and the same *mas‘ala* example.

⁸¹ al-Shīrāzī, *Ma‘ūna*, al-‘Umayrīnī ed., 123.

perspective, we may read this response as the quashing of an *e silentio* argument in the bud — i.e., SHAQ might intend to argue: “If the Prophet really professed it, then so would one or more of the Companions, but we have no such *naql* from them.” Either way, we have testimony here of a legal theory honed — gaining the edge of *hujjiya*, in fact — in the forge of dialectic. We also note that, however briefly, legal-theory itself has become the *subject* of dialectic. In other words, SH’s apparent dismissal of SHAQ’s grasping at the silence of the Companions is an instance of *uṣūl*-oriented *jadal*.

SHAQ is persistent, however, and will not concede without the final confirmation which a *qawl* from the Companions would lend to SH’s already extensive argument; he repeats his *muṭālaba* in §266, asking: “*fa-man qāla bihi?*” At last SH complies, and with an overwhelming response to boot. In §266 he lists not only ‘Umar b. al-Khaṭṭāb and ‘Uthmān, but “some of the Successors” including ‘Umar b. ‘Abd al-‘Azīz and others. And with that the dialectical sequence comes to a close, as did — or so we must assume — the Mashriqī SHAQ’s resistance.

[masā’il-set #3] §§274-88

Summary of Analysis:

(274) قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أُعْطِيَ الرَّجُلُ الرَّجُلَ أَرْضًا مُزَارَعَةً بِالنَّصْفِ أَوْ الثُّلُثِ أَوْ الرَّبْعِ، أَوْ أُعْطِيَ نَخْلًا أَوْ شَجَرًا مُعَامَلَةً بِالنَّصْفِ أَوْ أَقَلِّ مِنْ ذَلِكَ أَوْ أَكْثَرَ فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: هَذَا كُلُّهُ بَاطِلٌ؛ لِأَنَّهُ اسْتَأْجَرَهُ بِشَيْءٍ مَجْهُولٍ.	• (274) AH rulings for <i>masā’il</i> #1 and #2 • supported by ‘aql: “because” (efficient property indicated)
(275) يَقُولُ: أَرَأَيْتَ لَوْ لَمْ يَخْرُجْ مِنْ ذَلِكَ شَيْءٌ، أَلَيْسَ كَانَ عَمَلُهُ ذَلِكَ بِغَيْرِ أَجْرٍ؟	• (275) AH <i>ara’ayta</i> introduces hypothetical negative consequence of opposing opinion • [<i>reductio ad impossibile</i> (consequent ruling is non-endoxon) = AH <i>mu‘āraḍa bi-‘illa</i> of opposing <i>istidlāl bi’l-Sunna</i> (Shīr.II.E.8.2; Bāj.II.4.9.3.2); AH <i>istidlāl bi’l-qiyās</i> (<i>aṣl</i> and ‘<i>illa</i> reported by al-Ṭabarī)]
(276) وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: ذَلِكَ كُلُّهُ جَائِزٌ، بَلَّغْنَا عَنْ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – أَنَّهُ أُعْطِيَ خَيْبَرَ بِالنَّصْفِ، فَكَأَنَّهُ كَذَلِكَ حَتَّى قُبِضَ، وَخِلَافَةَ أَبِي بَكْرٍ رَضِيَ اللَّهُ تَعَالَى عَنْهُ وَعَامَّةَ خِلَافَةِ عُمَرَ. وَبِهِ يَأْخُذُ.	• (276) IAL rulings for <i>masā’il</i> #1 and #2 • IAL <i>naql</i>: Prophetic <i>fi’l</i> (at Khaybar) [<i>al-istidlāl bi’l-Sunna</i> (Prophet’s <i>fi’l</i>); IAL <i>i’tirād</i> implied: <i>al-mu‘āraḍa bi’l-nuṭq</i> (Shīr.VII.15.1; Bāj.IX.B.15.1)] • IAL <i>naql</i> (cont.): Tacit compliance of Abū Bakr and ‘Umar (Prophet’s <i>fi’l</i> at Khaybar observed) • [a mode of <i>tarjīḥ</i>: another <i>aṣl</i> supports the <i>khavar</i> (Shīr.IX.2.1)] • AY adherence to IAL rulings #1 and #2 stated
(277) وَإِنَّمَا قِيَاسُ هَذَا عِنْدَنَا مَعَ الْأَثَرِ. أَلَا تَرَى أَنَّ الرَّجُلَ يُعْطَى الرَّجُلَ مَالًا مُضَارَبَةً بِالنَّصْفِ وَلَا بِأَسْ بِذَلِكَ.	• (277) IAL/AY states “<i>wa innamā qiyās hādhā ma’a al-athar</i>,” IAL/AY <i>alā tarā</i> introduces <i>aṣl</i> for <i>qiyās</i> (<i>muḍārabā</i>) • [IAL/AY <i>istidlāl bi’l-qiyās</i>; <i>qiyās</i> supporting Sunna (a mode of <i>tarjīḥ</i>: [(Shīr.IX.2.1)]); ‘<i>illa</i> reported by al-Ṭabarī; thus IAL/AY <i>mu‘āraḍa bi-‘illat al-aṣl</i> (<i>al-farq bi-qiyās al-‘illa</i>; Shīr.VII.15.2.2.1; Bāj.IX.B.15.2.2.1.1)]

(278) وَقَدْ بَلَّغَنَا عَنْ عُمَرَ بْنِ الْخَطَّابِ رَضِيَ اللَّهُ تَعَالَى عَنْهُ وَعَنْ عَبْدِ اللَّهِ بْنِ مَسْعُودٍ وَعَنْ عُثْمَانَ بْنِ عَفَّانٍ رَضِيَ اللَّهُ تَعَالَى عَنْهُ أَنَّهُمْ أَعْطَوْا مَالًا مُضَارَبَةً.	• (278) IAL/AY <i>muḍāraba aṣl</i> supported by <i>āthār</i> of ʿUmar I, Ibn Masʿūd, and ʿUthmān • [support for <i>aṣl</i> of §277 <i>qiyās</i>]
(279) وَبَلَّغَنَا عَنْ سَعْدِ بْنِ أَبِي وَقَّاصٍ، وَعَنْ ابْنِ مَسْعُودٍ رَضِيَ اللَّهُ تَعَالَى عَنْهُمَا أَنَّهُمَا كَانَا يُعْطِيَانِ أَرْضَهُمَا بِالرُّبْعِ وَالثُّلُثِ.	• (279) IAL ruling for <i>masʿala</i> #1 supported by <i>āthār</i> of Saʿd b. Abī Waqqāṣ and Ibn Masʿūd • [support of <i>ḥukm</i> of <i>athar/qiyās</i>]
(280) قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا دَفَعَ الرَّجُلُ إِلَى الرَّجُلِ النَّخْلَ أَوْ الْعِنَبَ يَعْمَلُ فِيهِ عَلَى أَنَّ لِلْعَامِلِ نَصْفَ الثَّمَرَةِ أَوْ ثُلُثَهَا أَوْ مَا تَشَارَطَا عَلَيْهِ مِنْ جُزْءٍ مِنْهَا، فَهَذِهِ الْمُسَاقَاةُ الْحَلَالُ الَّتِي عَامَلَ عَلَيْهَا رَسُولُ اللَّهِ -صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ- أَهْلَ خَيْبَرَ.	• (280) SH ruling for <i>masʿala</i> #2 • [SH <i>istidlāl</i> by Prophetic <i>fiʿl</i> (Khaybar)]
(281) وَإِذَا دَفَعَ الرَّجُلُ إِلَى الرَّجُلِ أَرْضًا بَيْضَاءَ عَلَى أَنْ يَزْرَعَهَا الْمَدْفُوعَةُ إِلَيْهِ، فَمَا أَخْرَجَ اللَّهُ مِنْهَا مِنْ شَيْءٍ فَلَهُ مِنْهُ جُزْءٌ مِنَ الْأَجْزَاءِ؛ فَهَذِهِ الْمُحَاقَلَةُ وَالْمُخَابَرَةُ وَالْمُزَارَعَةُ الَّتِي نَهَى عَنْهَا رَسُولُ اللَّهِ -صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ-، فَاحْلَلْنَا الْمُعَامَلَةَ فِي النَّخْلِ خَيْرًا عَنْ رَسُولِ اللَّهِ -صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ-، وَحَرَّمْنَا الْمُعَامَلَةَ فِي الْأَرْضِ الْبَيْضَاءِ خَيْرًا عَنْ رَسُولِ اللَّهِ -صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ-.	• (281) SH ruling for <i>masʿala</i> #1 • [<i>istidlāl</i> by Prophetic proscription] • SH argument: ruling for <i>masʿala</i> #2: <i>ḥalāl</i> on basis of <i>khavar</i> on the Prophet (Khaybar); ruling for <i>masʿala</i> #1: <i>ḥarām</i> on basis of (another) <i>khavar</i> on the Prophet • [SH <i>iʿtirād</i> implied: <i>al-muʿāraḍa biʿl-nuṭq</i> (Shīr.VII.15.1; Bāj.IX.B.15.1); plus implied principle of legal theory]
(282) وَلَمْ يَكُنْ تَحْرِيمُ مَا حَرَّمْنَا بِأَوْجَبٍ عَلَيْنَا مِنْ إِحْلَالِ مَا أَحْلَلْنَا، وَلَمْ يَكُنْ لَنَا أَنْ نَطْرَحَ بِإِحْدَى سُنَّتَيْهِ الْأُخْرَى، وَلَا نُحَرِّمَ بِمَا حَرَّمَ مَا أَحَلَّ كَمَا لَا نُحِلُّ بِمَا أَحَلَّ مَا حَرَّمَ، وَلَمْ أَرِ بَعْضَ النَّاسِ سَلِمَ مِنْ خِلَافِ النَّبِيِّ -صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ- مِنْ وَاحِدٍ مِنَ الْأَمْرَيْنِ؛ لَا الَّذِي أَحْلَاهُمَا جَمِيعًا وَلَا الَّذِي حَرَّمَهُمَا جَمِيعًا.	• (282) SH argues principle of legal theory in three parts • [SH <i>iʿtirād</i>: proposed <i>farʿ</i> is not allowed to be a <i>farʿ</i>, an “appeal to legal theory”: <i>qiyās</i> cannot trump Prophetic Sunna] • SH “historical” objection: <i>lam arā baʿḍ al-nās salima min khilāf al-nabī</i> re: one of the two <i>amrs</i> – not the one who made both X and Y <i>ḥalāl</i> (i.e., IAL and AY), and not the one who made them both <i>ḥarām</i> (i.e., AH) • [SH <i>iʿtirād</i> against all of AH, AY, and IAL: charge of <i>tanāquḍ</i> and <i>muʿāraḍa</i> by way of Sunna (i.e., <i>biʿl-nuṭq</i>) against <i>qiyās</i> (Shīr.VII.15.1; Bāj.IX.B.15.1)]

(283) فَأَمَّا مَا رُوِيَ عَنْ سَعْدٍ وَابْنِ مَسْعُودٍ أَنَّهُمَا دَفَعَا أَرْضَهُمَا مُزَارَعَةً فَمَا لَا يُثْبِتُ هُوَ مِثْلُهُ وَلَا أَهْلُ الْحَدِيثِ، وَلَوْ ثَبَتَ مَا كَانَ فِي أَحَدٍ مَعَ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - حُجَّةٌ.	• (283) SH <i>i'tirād</i> against <i>istidlāl</i> (IAL in §279) from <i>āthār</i> of Sa'd and Ibn Mas'ūd: • 1) not confirmed by its like [SH <i>i'tirād</i>: “appeal to legal theory;” Bāj. “<i>qawl al-wāḥid min al-ṣaḥāba idhā lam yaẓhar</i> is not <i>ḥujja</i>”] • 2) not confirmed by the Ahl al-Ḥadīth [SH transmission-oriented <i>i'tirād</i>: (Shīr.II.B; Bāj.II.1)] • SH objection: if the contents of one of these were confirmed of the Prophet, it would be <i>ḥujja</i> • [SH <i>i'tirād</i>: “appeal to legal theory;” Bāj. “<i>qawl al-wāḥid min al-ṣaḥāba idhā lam yaẓhar</i> is not <i>ḥujja</i>”]
(284) وَأَمَّا قِيَاسُهُ وَمَا أَجَازَ مِنَ النَّخْلِ وَالْأَرْضِ عَلَى الْمُضَارَبَةِ فَعَهْدُنَا بِأَهْلِ الْفَقْهِ يَقِيسُونَ مَا جَاءَ عَمَّنْ دُونَ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - عَلَى مَا جَاءَ عَنِ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - وَأَمَّا أَنْ يُقَاسَ سُنَّةُ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - عَلَى خَبَرٍ وَاحِدٍ مِنَ الصَّحَابَةِ، كَأَنَّهُ يَلْتَمِسُ أَنْ يُثْبِتَهَا بِأَنْ تُوَافِقَ الْخَبَرَ عَنْ أَصْحَابِهِ فَهَذَا جَهْلٌ، إِنَّمَا جَعَلَ اللَّهُ عَزَّ وَجَلَّ لِلْخَلْقِ كُلِّهِمُ الْحَاجَةَ إِلَى النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - وَهُوَ أَيْضًا يَغْلُطُ فِي الْقِيَاسِ، إِنَّمَا أَحْزَنَّا نَحْنُ الْمُضَارِبَةَ وَقَدْ جَاءَتْ عَنْ عُمَرَ وَعُثْمَانَ أَنَّهَا كَانَتْ قِيَاسًا عَلَى الْمُعَامَلَةِ فِي النَّخْلِ، فَكَانَتْ تَبَعًا قِيَاسًا لَا مُتَّبِعَةً مَقِيسًا عَلَيْهَا.	• (284) SH <i>i'tirād</i> against IAL/AY <i>qiyās</i> in §277 • SH appeal to method-principle of the Ahl al-Fiqh • [<i>argumentum ad verecundiam</i>; appeal to <i>endoxon</i> principle; charge of “affirming the consequent”] • SH supporting appeal to theological principle [God only confirmed a need for the Prophet] • SH <i>i'tirād</i> against AY/IAL <i>qiyās</i> in §277: charge of fallacy (<i>yaghlatu</i>) in the <i>qiyās</i> — SH allowance of <i>muḍāraba</i> was <i>taba'an qiyāsan lā matbū'an maqīs 'alayhi</i> • [SH <i>i'tirād</i>: charge of mistaking <i>far'</i> as <i>aṣl</i> / inverting <i>far'</i> and <i>aṣl</i>; <i>petitio principii</i>; mistaken cause]
(285) فَإِنْ قَالَ قَائِلٌ: فَكَيْفَ تُشَبِّهُ الْمُضَارَبَةَ الْمُسَاقَاةَ؟	• (285) SH initiates “instructional” dialectic (<i>fa-in qāla qā'il</i>): • SHAQ dialectical question (How does X resemble [tushbihi] Y?) • [between <i>al-su'āl 'an wajh al-dalīl</i> and <i>muṭālaba bi-ithbāt al-waṣf fi'l-far'</i> (Bāj.IX.A.1.6) — a stage prior to planned <i>man' al-waṣf fi'l-far'</i> (Bāj.IX.B.6.1.2)] • [NB: SHAQ apparent <i>istidlāl bi-qiyās al-</i>

	shabah]
(286) قِيلَ: التَّخْلُ قَائِمَةٌ لِرَبِّ الْمَالِ؛ دَفَعَهَا عَلَى أَنْ يَعْمَلَ فِيهَا الْمُسَاقِفِي عَمَلًا يُرْجَى بِهِ صَلَاحُ ثَمَرِهَا عَلَى أَنَّ لَهُ بَعْضَهَا، فَلَمَّا كَانَ الْمَالُ الْمَدْفُوعُ قَائِمًا لِرَبِّ الْمَالِ فِي يَدَي مَنْ دَفَعَ إِلَيْهِ يَعْمَلُ فِيهِ عَمَلًا يُرْجَوُ بِهِ الْفَضْلُ جَازَ لَهُ أَنْ يَكُونَ لَهُ بَعْضُ ذَلِكَ الْفَضْلِ عَلَى مَا تَشَارَطَا عَلَيْهِ وَكَانَ فِي مِثْلِ مَعْنَى الْمُسَاقَاةِ.	• (286) SH jawāb (qīla): • SH establishes three <i>maʿānī</i> shared between X and Y; SH states: <i>wa kāna [X] fī mithli maʿnā [Y]</i>
(287) فَإِنْ قَالَ: فَلِمَ لَا يَكُونُ هَذَا فِي الْأَرْضِ؟	• (287) SHAQ dialectical question (Why does this not obtain as regards Z?) • [“<i>muṭālaba biʿl farq</i>” (unknown to <i>jadāl</i> literature); attempted charge of <i>naqd</i> (?); most likely: attempted <i>muʿāraḍa</i> of <i>qiyās</i> over Sunnaic <i>dalīl</i>]
(288) قِيلَ: الْأَرْضُ لَيْسَتْ بِالَّتِي تَصْلُحُ فَيُؤْخَذُ مِنْهُ الْفَضْلُ، إِنَّمَا يَصْلُحُ فِيهَا شَيْءٌ مِنْ غَيْرِهَا وَلَيْسَ بِشَيْءٍ قَائِمٍ يُبَاعُ وَيُؤْخَذُ فَضْلُهُ، كَالْمُضَارَبَةِ، وَلَا شَيْءٌ مُثْمِرٌ بَالِغٌ فَيُؤْخَذُ ثَمَرُهُ كَالْتَّخْلِ، وَإِنَّمَا هُوَ شَيْءٌ يَحْدُثُ فِيهَا، ثُمَّ بَتَصَرُّفٍ لَا فِي مَعْنَى وَاحِدٍ مِنْ هَذَيْنِ، فَلَا يَحُوزُ أَنْ يَكُونَ قِيَاسًا عَلَيْهَا وَهُوَ مُفَارِقٌ لَهَا فِي الْمُتَبَدِّلِ وَالْمُتَعَقِّبِ، وَلَوْ جَازَ أَنْ يَكُونَ قِيَاسًا مَا جَازَ أَنْ يُقَاسَ شَيْءٌ نَهَى عَنْهُ النَّبِيُّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - فَيَحِلُّ بِهِ شَيْءٌ حَرَّمَهُ؛ كَمَا جَعَلَ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - فِي الْمُفْسِدِ لِلصَّوْمِ بِالْجِمَاعِ رَقَبَةً، فَلَمْ يُقَسَّ عَلَيْهَا الْمُفْسِدُ لِلصَّلَاةِ بِالْجِمَاعِ، وَكُلُّ أَفْسَدَ فَرَضًا بِالْجِمَاعِ.	• (288) SH delineates four <i>furūq</i> (two with Y, one with X, and one with both) • SH conclusion #1: it is not allowed that it be a <i>qiyās</i> on the basis of Y, while it is <i>mufāriq lahā fiʿl-mubtadaʿ waʿl-mutaʿaqqab</i> • [SH <i>iʿtirāḍ</i>: <i>farq</i>; hypothetically a <i>farq bi-qiyās al-shabah</i> (Shīr.VII.15.2.2.3; Bāj.IX.B.15.2.2.4)] • SH conclusion #2: even if <i>qiyās</i> obtained, not allowed to do <i>qiyās</i> for what Prophet proscribed, not allowed to make <i>ḥalāl</i> by <i>qiyās</i> from what Prophet made <i>ḥarām</i> • [SH <i>iʿtirāḍ</i>: proposed <i>farʿ</i> is not allowed to be a <i>farʿ</i> (?), or <i>muʿāraḍa biʿl-nuṭq</i> (Shīr.VII.15.1; Bāj.IX.B.15.1) — see Bājī jawāb for §274] • SH illustrates <i>endoxon</i> method in a parallel <i>masʿala</i> • [SH <i>iʿtirāḍ</i>: <i>method-naqd</i>]

Discussion of Analysis:

The sections selected for analysis here constitute the whole of the *Bāb al-Muzāraʿa* of the *Kitāb Ikhtilāf al-ʿIrāqīyyīn*. Insofar as my presentation categories are concerned, we may outline the chapter as follows: §§274-5 (AH, category C); §§276-9 (IAL & AY, category C); §§280-1 (SH, category D); §§282-4 (SH, category C); §§285-8 (SH

vs. SHAQ, category A). It is noteworthy that both the presentations of AH and of IAL rulings incorporate indicants of past dialectic (hence, category C), in this case, the staple formulae of *araʿayta* and *alā tarā*. We may thus claim of the entire chapter that it bears overt signs of past, and recurring, dialectical disputation. We begin with §274, where the AH ruling for both *masʿala* #1 (*muzāraʿa* of land for half, third, or quarter) and *masʿala* #2 (*muʿāmala* of *nakhl*/trees for half, less, more) is presented: “This, all of it, is *bāṭil*.” This is followed by a brief *ʿaql* argument wherein “because (*li-anna*)” in effect indicates for us the efficient property which, according to AH, occasions this ruling: “it is a hire in exchange for something *majhūl*.” Immediately following this (§275), a rhetorical *araʿayta* is attributed to AH, which introduces a hypothetical negative consequence resultant of the contrary of his *bāṭil* ruling: maybe nothing will be produced, thus it will be work without an *qjr*. This we might term a hypothetical *reductio ad impossibile* — the potential consequence of an opposing ruling is patently non-*endoxon*, and the opponent cannot both maintain his ruling and its potential consequence. We thus gain insight into one of the major functions of the *araʿayta* formula as a vehicle for delivering *reductio* arguments.

Moreover, we can — with the help of later works such as al-Ṭabarī’s *Ikhtilāf al-Fuqahāʾ* — recognize that the non-*endoxon* consequence of AH’s *araʿayta* would indeed be deemed as such: “And the *ʿilla* of the one who professes the *qawl* of Abū Ḥanīfa as regards his distaste (*karāha*) for *al-muzāraʿa* and *al-musāqāt* is the consensus of all (*ijmāʿ al-kull*) that the *ujra* is not allowed except as *maʿlūma*. So when the *ʿāmil fiʾl-arḍ* is merely the *mustaʿjir al-arḍ* [for the *masʿala* conditions, and with the negative consequence of no produce] then it is *ijāra majhūla*, and it is *bāṭila* by way of *qiyās* with what they achieved consensus upon (*ajmaʿū ʿalayhi*).”⁸² This insight from al-Ṭabarī allows us to pinpoint the *aṣl* (*ijmāʿ* that *ijāra majhūla* is *bāṭila*) by which AH performs his *qiyās* to both *muzāraʿa* and *musāqāt*.

At a deeper level, and assuming that the *dalīl* for the opposing position is the Sunnaic example of the Prophet at Khaybar (see IAL in §276), we may understand AH’s *araʿayta* as delivering a specific species of *muʿāraḍa*. In short, his *araʿayta* serves to underscore the *ḥikma* (“what if nothing is produced?”) behind the *ʿilla* (“it is for something *majhūl*”) for the *masʿal* at hand (*muzāraʿa* and *musāqāt*), which *ʿilla* is also present in the *aṣl*-ruling (*ijāra majhūla* is *bāṭila*) made *endoxon* via *ijmāʿ al-kull*. The whole thus represents a trumping, by way of *qiyās*, of the *istidlāl biʾl-Sunna* upon which the

⁸² *Ikhtilāf al-Fuqahāʾ*, Kern ed., 147-8.

opposing ruling (*jā’iz*) relies. AH’s argument is a species of *mu’āraḍa*, by way of *qiyās*, against *al-istidlāl bi’l-Sunna*. We might guess at this point that SH would find this mode of reasoning problematic, and, as we will see, SH indeed takes proponents of the AH position to task.

Moreover, we may identify this type of *mu’āraḍa* with some precision in the later *jadāl* systems. First, we must recognize that the opposing opinion (IAL in §276) relies not only upon *istidlāl bi’l-Sunna*, but upon that species of *istidlāl bi’l-Sunna* which refers to the Prophet’s *af’āl* (specifically, his actions at Khaybar). Having thus located the corresponding domain of Sunnaic *af’āl*-oriented *i’tirāḍāt* (Shīr.II.E; Bāj.II.4), we may thus hone in to the *i’tirāḍ* of *mu’āraḍa* (Shīr.II.E.8; Bāj.II.4.9), and at last to *mu’āraḍa* by way of an *‘illa* (Shīr.II.E.8.2; Bāj.II.4.9.3).⁸³ Al-Bājī further subdivides this species according to the nature of the Prophet’s *fi’l* as either 1) *muḥtamal*, or 2) *ghayr muḥtamal* — i.e., P’s supporting Sunnaic *fi’l* can either incorporate the *‘illa* brought by Q, or it can’t. We can see that AH’s *mu’āraḍa bi-‘illa* falls under the latter (Bāj.II.4.9.3.2), and al-Bājī’s Mālikī (P) vs. Ḥanafī (Q) example is instructive; it shows Q attempting to overturn P’s *istidlāl* from Sunnaic *fi’l* by way of introducing an *‘illa-ḥukm* relationship established in another source (just as with AH above). Accordingly, al-Bājī suggests a *ṭarīq* for P’s *jawāb* to this *mu’āraḍa*, part of which includes “that it be said... *al-qiyās* may not be raised against (*lā yu’āraḍu*) *al-naṣṣ*, and if he desires to speak against the *qiyās* by that which instructs, so that he concede to him his *dalīl*, then such is his right.”⁸⁴ As we shall soon see, this *jawāb* is a fair description of SH’s counter-argument against the AH position.

We now proceed to IAL’s ruling (in §276) for *mas’ala* #1 and #2, which is the contrary⁸⁵ of AH: “That, all of it, is *jā’iz*.” This ruling is immediately supported by *naql* in two parts: 1) the Prophetic *fi’l* (Khaybar given over for half the produce); and 2) the tacit

⁸³ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 77; al-Bājī, *Minhāj*, Turkī ed., 134-5, §272ff. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 38, §200, who mentions this species but provides neither discussion nor example nor *jawāb*. Note that our “location” procedure above mimics the intention of that *istidlāl*-based organizing principle characteristic to the *jadāl*-manuals of al-Shīrāzī, Ibn ‘Aqīl, and al-Bājī. This is the logic of *topoi* at work — the same as is propounded in the *Topics*; a practiced disputant who has memorized the many argument types according to larger sets and subsets may quickly “locate” the largest set of counter-arguments relevant to the opponent’s argument, then proceed through subsets until locating the precise form of relevant counter-argument, then go about collecting — from the opponent — the premises by which that counter-argument will transform into *elenchus*.

⁸⁴ al-Bājī, *Minhāj*, Turkī ed., 135, §274.

⁸⁵ As we know with contraries, both may not be true, but both may be false. As it turns out, according to SH’s rulings, such is the case here. For AH rules “*al-muzāra’a* and *al-musāqāt* are *bāṭil*,” IAL rules the contrary “*al-muzāra’a* and *al-musāqāt* are *jā’iz*,” while SH rules “*al-muzāra’a* is *bāṭil* and *al-musāqāt* is *jā’iz*.”

compliance of Abū Bakr and ‘Umar, whereby the Prophet’s giving Khaybar over for half remained in place until near the end of ‘Umar’s reign. As for the first part, we may understand it simply as *istidlāl* by way of Sunnaic *fi’l*. In a dialectical context, however, and assuming the proponent of this IAL position to be in the role of Q, we might also read it as a type of *mu‘āraḍa* against the *qiyās* of the AH position — the very converse of the *mu‘āraḍa* suggested by AH’s *ara’ayta* in §275. Were such the case, we could easily identify this objection as the first species of *qiyās*-oriented *mu‘āraḍāt*, i.e., *al-mu‘āraḍa bi’l-nuṭq* (Shīr.VII.15.1; Bāj.IX.B.15.1). Al-Shīrāzī explains *nuṭq*: “*fa-huwa al-Kitāb, wa’l-Sunna, wa’l-Ijmā‘*,” while Ibn ‘Aqīl notes: “When the *qiyās* opposes (*‘āraḍa*) the *naṣṣ* of Kitāb or Sunna, the *ḥukm* of the *qiyās* is eliminated.”⁸⁶ As for the second part of IAL’s *naql* in §276 (the continued observance of the Prophet’s act through the reigns of Abū Bakr and ‘Umar), this is presented as support for the Sunnaic *fi’l*. In a sense, it is giving more weight to IAL’s *istidlāl bi’l-Sunna*, and interpreted thus constitutes a kind of *tarjīḥ*. In fact, we find an appropriate category of *tarjīḥ* among al-Shīrāzī’s *matn*-oriented *tarjīḥāt al-ṣawāḥir*, wherein the *khavar* “is *muwāfiq* to another *dalīl* from an *aṣl*, or *ma‘qūl aṣl*” (Shīr.IX.2.1).⁸⁷ In this case, the supporting *aṣl* is the tacit continuation of the Prophet’s Khaybar transaction under the reigns of Abū Bakr and ‘Umar.

Moving on, AY embraces the ruling of IAL over that of AH⁸⁸ and we may thus attribute the support for the IAL position rendered in §§277-9 as emanating from either IAL or AY, or both. In §277, a further argument is put forth: “And indeed the *qiyās* of this only corresponds with the *athar* [i.e., with the Sunnaic *fi’l* and its continuation under Abū Bakr and ‘Umar].” This added support also constitutes a type of *tarjīḥ*, and may be found under the same category whereby the *khavar* “is *muwāfiq* to another *dalīl* from an *aṣl*, or *ma‘qūl aṣl*” (Shīr.IX.2.1). This time, of course, the support is a *ma‘qūl aṣl* (*ma’nā al-khiṭāb*) rather than an *aṣl*. The *qiyās*-support of IAL/AY is then followed by a rhetorical *alā tarā* by which the *aṣl* of the proposed *athar*-supporting *qiyās* is introduced; in short, *muḍāraba* is contracted for half the profit, and “*la ba’sa bi-dhālika*.”⁸⁹ We will note this as a function of the *alā tarā* formula: the delivery of an *endoxon* ruling (indeed,

⁸⁶ al-Shīrāzī, *Ma’ūna*, Turkī ed., 262, §147 [there is a major lacuna in al-‘Umayrīnī’s MS, unnoticed by the editor, so this material is missing from his edition]; al-Bājī, *Minhāj*, Turkī ed., 201, §454; Ibn ‘Aqīl, *K. al-Jadal*, 70, §327.

⁸⁷ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 123.

⁸⁸ This is an act of frequent occurrence in this *khilāf* treatise, and a clear indicant of the spirit of “following the *ḥujja*” triumphing over perceived teacher/school “loyalty.”

⁸⁹ Cf. al-Ṭabarī (*Ikhtilāf al-Fuqahā*, Kern ed., 148): “And as for the *illa* of the one who professes the *qawl* of Abū Yūsuf and Muḥammad, it is the *qiyās* from the *ijmā‘ al-kull* for the allowance of *al-muqāraḍa* [which is synonymous with *al-muḍāraba*]; etc.”

one sanctioned by *ijmā‘ al-kull*)⁹⁰ which is to serve as *aṣl* for *qiyās* to the *mas‘ala* at hand. Moreover, this *qiyās* is then supported from two different directions: 1) the *aṣl* is supported by *āthār* of ‘Umar, Ibn Mas‘ūd, and ‘Uthmān (who gave *māl* for *muḍāraba*) in §278; and 2) the transferred *ḥukm* of permission is supported by *āthār* of Sa‘d b. Abī Waqqāṣ and Ibn Mas‘ūd (who contracted the giving of land for a third and a quarter) in §279. Taken in its totality, then, we can summarize IAL’s ruling (*mu‘āmala* of both land and trees for a portion of the produce is *jā‘iz*) as derived via: 1) *istidlāl bi’l-Sunna*; which is in turn preponderated by 2) *āthār* of Abū Bakr and ‘Umar; then by 3) a corresponding *qiyās* from the *endoxon*-sanctioned ruling on *muḍāraba*; which is in turn supported by 4) *āthār* for both *muḍāraba* and *mu‘āmala* of land.

Bearing in mind that the *aṣl* for IAL/AY’s supporting *qiyās* is delivered via rhetorical *alā tarā*, we may interpret the production of the *muḍāraba*-to-*mu‘āmala* *qiyās* as a dialectical move from past disputation. As such, we may identify it not only as *qiyās* supporting Sunna (which, as we shall see, is highly problematic for SH), but as a species of *mu‘āraḍa*. Moreover, and thanks once again to al-Ṭabarī’s discourse in his *Ikhtilāf al-Fuqahā’*, we may distinguish the ‘*illa*’ which was seen by Abū Yūsuf and Muḥammad to be efficient in both *muḍāraba* and *muzāra‘a/musāqāt*, and to have occasioned a *ḥukm* of *jā‘iz*: the labour is for something “which will come into existence, but is not in existence, and it is *majhūl* before its existence, *ma‘lūm* upon its existence.”⁹¹ Over and against this lies the ‘*illa*’ for AH’s *qiyās*, which occasioned the *ḥukm* of *bāṭil*: “it is for something *majhūl*.” In effect, the IAL/AY ‘*illa*’ claims the distinction of a *farq* between the ‘*illa*’ of the AH *aṣl* and the (real) ‘*illa*’ of the *furū‘* of *muzāra‘a/musāqāt*. Thus, a new *aṣl* (with a more appropriate ‘*illa*’) is made to supplant AH’s *aṣl*. Equipped with a knowledge of the *uṣūl* and ‘*ilal*’ of the opposing *qiyās*-sets, we can proceed to identify the most likely species of *qiyās*-oriented *mu‘āraḍa* which proponents of the AH vs. IAL/AY positions might have employed in dialectical debate. Assuming IAL/AY to be in the role of Q, we find the most precise identification in al-Bājī’s refined subdivisions. Bearing in mind that the *uṣūl* for both *qiyās*-sets are sanctioned by *ijmā‘*, it is: “*al-mu‘āraḍa bi-‘illat al-aṣl*, which is *al-farq*,” with the “*farq bi-‘illat al-ḥukm*,” when “the *ma‘nā* is *muttafaq ‘alayhi*” (Bāj.IX.B.15.2.2.1.1).⁹² Al-Shīrāzī’s hierarchy only extends to “*mu‘āraḍa* as regards the *aṣl*, which is *al-farq*” for “*al-farq bi-qiyās al-‘illa*” (Shīr.VII.15.2.2.1).⁹³

⁹⁰ See previous note.

⁹¹ al-Ṭabarī, *Ikhtilāf al-Fuqahā’*, Kern ed., 148.

⁹² al-Bājī, *Minhāj*, Turkī ed., 202-3, §459.

⁹³ al-Shīrāzī, *Ma‘ūna*, Turkī ed., 262-3, §149.

We proceed now to SH’s rulings and supporting arguments for *mas’ala* #1 and *mas’ala* #2. In §280 SH rules as regards the cultivation of vines/trees for a third, or whatever portion stipulated, that such is “*al-musāqāt al-ḥalāl*” — supporting this immediately by reference to the now familiar Sunnaic *fi’l* of the Prophet’s transaction with the Ahl al-Khaybar. In §281, however, he rules for the cultivation of “white land” for whatever portion stipulated, that such is “*al-muḥāqala wa’l-mukhābara wa’l-muzāra‘a allati nahā ‘anhā Rasūl Allāh*” — in other words, the *mu‘āmala* of land is proscribed by a different *istidlāl bi’l-Sunna*. SH then clarifies his reasoning in a succinct manner: *mu‘āmala* of the *nakhl* (*mas’ala* #2) has been made *ḥalāl* on the basis of a *khābar* on the Prophet; *mu‘āmala* of “white land” (*mas’ala* #1) has been made *ḥarām* on the basis of a *khābar* on the Prophet. Already we can see that AH and IAL/AY will be taken to task for their respective *qiyās*-based arguments made in full light of contrary, but established, Sunna. We may also measure this initial response as corresponding to that species of *mu‘āraḍa* — Sunna over *qiyās* — which we have already encountered in our analysis of IAL’s argument in §276. That is to say, the explanation of SH here implies a *mu‘āraḍa bi’l-nuṭq* (Shīr.VII.15.1; Bāj.IX.B.15.1).

As we discover in §282, however, there is more at stake from SH’s perspective; for, as we understand from his explanation, AH and IAL are both in violation of a fundamental legal-theoretical principle. Consequently, we are about to witness a most illuminating illustration of “proto-uṣūl” theory acquiring the edge of *ḥujjiya* in a dialectical context. SH asserts this principle in three stages, which — by way of an almost tedious repetition — are quite evidently designed to hammer the theory home. He says: 1) the *taḥrīm* of what we made *ḥarām* was no more obligatory for us than the *ihlāl* of what we made *ḥalāl*; 2) we have no right to discard one of two Sunnas on the basis of (i.e., as a result of *qiyās* with) the other; and 3) we have no right to make *ḥarām* what the Prophet made *ḥalāl* on the basis of (i.e., by way of *qiyās* with) what he made *ḥarām*, nor to make *ḥalāl* what he made *ḥarām* on the basis of what he made *ḥalāl*.

As an argument against the previously stated rulings and methods of AH and IAL, this is more than a mere statement of legal-theoretical principle, but itself constitutes a type of *i‘tirāḍ* — an “appeal to legal theory” — against problematic reasoning from *qiyās* when the result conflicts with established Sunna. Due to refinements in the legal-theoretical landscape over the ensuing two hundred years, however, we should perhaps not be surprised that such an “appeal to legal theory” is not to be found in the early *jadal*-theory texts. We do find hints here and there, however, that this particular

principle is well-understood. Certainly we have seen Ibn ʿAqīl say (while introducing *al-muʿāraḍa biʾl-nuṭq*): “When the *qiyās* opposes (*ʿāraḍa*) the *naṣṣ* of Kitāb or Sunna, the *ḥukm* of the *qiyās* is eliminated.”⁹⁴ Moreover, we earlier foreshadowed SH’s objection by quoting part of al-Bājī’s *jawāb* to a charge of *muʿāraḍa bi-ʿilla*: “that it be said... *al-qiyās* may not be raised against (*lā yuʿāraḍu*) *al-naṣṣ*.”⁹⁵ Finally, we will note that al-Bājī dedicates a set of *iʿtirāḍāt* (Bāj.IX.B.2-4) consisting of charges that P’s *aṣl* is not allowed to be an *aṣl* for *qiyās*, or his *illa* is not allowed to be an *illa*, or his *ḥukm* is not allowed to be a *ḥukm*.⁹⁶ Notably, the fourth component of *qiyās* (the *farʿ*) is not treated, and it is precisely the *farʿ* with which SH is concerned. In other words, SH’s objection consists, from a certain perspective, of a charge that P’s *farʿ* is not allowed to be a *farʿ* for *qiyās* (because it is already established by Sunna).⁹⁷

Returning to SH in §282, we now find that a more palpable dialectical element enters his argument. We might call it a “historical” objection made by SH, when he laments: “I have not seen/considered one of the community [of (Iraqi?) jurists] to escape from contradicting the Prophet (*lam ara baʿḍ al-nās salima min khilāf al-nabī*)”⁹⁸ with regard to one of the two *amrs* — neither the one who made both [types of *muʿāmala*, i.e., trees/vines and “white land”] *ḥalāl* [i.e., IAL & AY], nor the one who made them both *ḥarām* [i.e., AH].” Read in the spirit of dialectical objection — and if we assume all of AH, IAL, and AY to have been cognizant of the Sunnaic *adilla* referenced by SH, and to have conceded their *ithbāt* — we might see SH’s lament as a charge of *tanāquḍ*, reminiscent of those we have seen earlier. In other words, had AH, IAL, and AY all known of and conceded SH’s Sunnaic *adilla* (which, by his reckoning, are certainly *endoxa*), then they would have been shown by SH to contradict their own concessions by generating contrary rulings. Alternately, we might, again, consider his statement as an expression of *qiyās*-oriented *muʿāraḍa biʾl-nuṭq* (Shīr.VII.15.1; Bāj.IX.B.15.1).

SH rests from this particular “appeal to legal theory” for a moment, and turns to another in §283. Here, he launches a two-part *iʿtirāḍ* against the *istidlāl* of IAL/AY (in §279) from the *āthār* of Saʿd b. Abī Waqqāṣ and Ibn Masʿūd. First, he claims that their practice (*muzāraʿa* for a third and a quarter) is not confirmed by its like (*lā yuthbitu huwa mithluhu*); second, that it is not confirmed by the Ahl al-Ḥadīth. Again, we may read this

⁹⁴ Ibn ʿAqīl, *K. al-Jadal*, 70, §327.

⁹⁵ al-Bājī, *Minhāj*, Turkī ed., 135, §274.

⁹⁶ al-Bājī, *Minhāj*, Turkī ed., 155ff., §326ff.

⁹⁷ We may consider this as equivalent to *al-muʿāraḍa biʾl-nuṭq*.

⁹⁸ As al-Rabī elsewhere explains, “when he says *baʿḍ al-nās*, they are the Mashriqiyyūn” (see our note attached to §252 in Part II of this dissertation).

in the spirit of a “historical” objection — a dialectic with jurists of the past — and two distinct types of *i’tirāḍ* are at work. First, we must recognize that we have entered the *istidlāl*-domain of *qawl al-wāḥid min al-ṣaḥāba*, which was controversial from the start and only became more so over time. Importantly, SH closes his objection with a revealing hypothetical observation: had one of the above *athar* narrations been confirmed in accordance with the Prophetic Sunna, it would have been *ḥujja*. This statement guides us to certain insights: 1) SH indicates that *qawl al-wāḥid min al-ṣaḥāba* can, in fact, constitute *ḥujja* when certain conditions are met; 2) he sheds light on what he meant by “*lā yuthbitu huwa mithluhu*”: it is not, as I first expected, a call for additional supporting *āthār* (as a thrust towards *ijmā‘ al-ṣaḥāba*); rather, it is a call for Sunnaic consonance. The confirming “*mithluhu*,” in other words, must be found in the Prophet’s Sunna, as he later indicates.

It is the evidence of such statements which allow us to link the *K. Ikhtilāf al-‘Irāqīyyīn* (as Schacht and Ḥassūn have done before us) to SH’s “Old Doctrine.” Moreover, no better confirmation might be found than such as the *Ma‘ūna* provides. First among al-Shīrāzī’s objections to *istidlāl* from *qawl al-wāḥid min al-ṣaḥāba* (Shīr.IV.1) is: “That he [Q] say: *qawl al-wāḥid min al-ṣaḥāba*’ is not *ḥujja*.” The sole recorded *jawāb* to this, however, reads: “That he [P] say: ‘Verily, such according to me is *ḥujja*, in his Old Doctrine (*fī qawlihi al-qadīm*);’ and if he [Q] does not concede, you [P] provide indicant for it.”⁹⁹ Importantly, that “*qawl al-wāḥid min al-ṣaḥāba idhā lam yaẓhar* is not *ḥujja*” appears as the primary stance of al-Bājī (it is the *ẓāhir* of the Mālikī *madhhab*), as well as the first *i’tirāḍ* of al-Shīrāzī and Ibn ‘Aqīl.¹⁰⁰ That SH allows for the possibility that *qawl al-wāḥid min al-ṣaḥāba* may stand as *ḥujja* at all provides a strong link to his Old Doctrine, although we will note that he still insists that it be in consonance with the Prophet’s Sunna (as opposed to merely *qiyās*).

Most importantly, as concerns the objectives of this dissertation, we are once again provided insight as to how a legal-theoretical principle might be forged in a dialectical context. SH’s claim that the contents of these opposing *āthār* are not supported by their *mithl*, twinned with the critique that they are not consonant with

⁹⁹ al-Shīrāzī, *Ma‘ūna*, al-‘Umayrīnī ed., 82. Importantly, we may infer from this that both Q and P may belong to the Shāfi‘ī *madhhab*. This reminds us that juridical dialectic was far more than an inter-*madhhab* contest, but a critical venue for testing the *ijtihād* of jurist-peers within one’s own doctrinal *madhhab*.

¹⁰⁰ al-Bājī, *Minhāj*, Turkī ed., 134ff., §296; al-Shīrāzī, (op. cit.); Ibn ‘Aqīl, *K. al-Jadal*, 39, §207. Importantly, all these authors discuss means by which P might attempt to support his *qawl al-wāḥid min al-ṣaḥāba* as *ḥujja*.

Prophetic Sunna, constitutes another “appeal to legal theory.” This, as we have seen, most closely resembles al-Bājī’s objection to *qawl al-wāḥid min al-ṣaḥāba idhā lam yaẓhar*. Moreover, we have seen SH object via “appeal to the non-confirmation of the Ahl al-Ḥadīth,” which itself most closely resembles a transmission-oriented *i’tirāḍ*. This again confirms that he considered the possibility that *qawl al-wāḥid min al-ṣaḥāba* might constitute *ḥujja*, for our early *jadāl*-theory texts do not even treat transmission-oriented objections for this controversial domain of *istidlāl*. Any similarity to SH’s objection could only be found in the domain of *al-i’tirāḍ ‘alā al-istidlāl bi’l-Sunna min jihat al-isnād* (Shīr.II.B; Bāj.II.1).¹⁰¹

Nor is SH done with appealing to such principles, for in §284, expressly targeting the IAL/AY *qiyās* from *muḍāraba*, he makes a patently dialectical push towards the concession of yet another methodological norm. His formulation is important here, for it is as much an “appeal to the *endoxon*” as it is to principle: “our knowledge of the Ahl al-Fiqh is that they [follow method X, not your method, which is *jahl*].” We may, of course, read this as an *argumentum ad verecundiam*, but in this setting of juridical dialectic it is much more. In fact, it is a claim by SH that his argument-method is in perfect consonance with that specialized subset of *endoxa* which Aristotle labelled “the Wise, all of them.” By positioning his reasoning thus, he at once exiles contrary reasoning from the domain of the Ahl al-Fiqh — a powerful critique of the IAL/AY *qiyās*. As to the nature of this *endoxon* method: it is simply that *qiyās* is used to judge those who came after the Prophet, on the basis of what has been transmitted by the Prophet. As for the reverse, SH declares: “this is *jahl*.” Importantly, SH’s stating of this *endoxon* method may also be read as an objection to the fallacy inherent to the IAL/AY procedure. More specifically, we might locate this fallacy under “affirming the consequent” ($p \rightarrow q; q \vdash p$, where “p” is “Prophet ruled X for this *mas’ala*” and “q” is “Companions/Successors ruled X for this *mas’ala*”). And SH does not stop there, but supports his Ahl al-Fiqh method by yet another appeal, this time to a patently theological principle: God only confirmed the need, of all people, for the Prophet (i.e., not for the Companions, Successors, et al.) With all the preceding appeals to theory, method, and principle, SH’s arguments from §281-4 constitute by far one of the most shining examples of legal theory forged in dialectic which the *K. Ikhtilāf al-‘Irāqīyyīn* has to offer.

¹⁰¹ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 52ff.; al-Bājī, *Minhāj*, Turkī ed., 76ff., §147ff. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 30ff., §161ff.

These latter appeals all build to a final SH *i’tirād*, introduced in clearly dialectical language at the end of §284: “He [IAL/AY] also committed a fallacy (*yaghlaṭu*) in the *qiyās*.”¹⁰² As for SH, he only allows *muḍāraba* in the first place because it represents the *qiyās* of ‘Umar and ‘Uthmān from the *aṣl* of *mu‘āmala* of the *nakhl*. Thus, as he says, “it [*muḍāraba*] followed as *qiyās*, it was not followed as a basis for *qiyās* (*kānat taba‘an qiyāsan lā matbū‘an maqīs ‘alayhi*).” Although Schacht interpreted this as illustrating the principle “no further *qiyās* can be based on the result of a *qiyās*,”¹⁰³ there is something different happening here. In fact, it is a charge of *aṣl-far‘* inversion — the *mu‘āmala* of the *nakhl* served as the *aṣl* for two Companions’ *qiyās* to the *far‘* of *muḍāraba*. IAL/AY have mistakenly taken this prior *qiyās*-ruled *far‘* and made it the *aṣl* for a new *qiyās* which, astonishingly enough, purports to extend its *ḥukm* to nothing less than its own original *aṣl* (which IAL/AY have presumed a *far‘*). So far I have been unable to locate a parallel to this charge of *aṣl-far‘* inversion in the early *jadāl*-theory texts. We might even presume that inversions of this sort were of rare occurrence, and — with advancements in the sciences of *ḥadīth* and *uṣūl* — grew rarer yet as relevant theory-systems became more refined. Nevertheless, we may once again note that among the first of al-Bājī’s *qiyās*-oriented *i’tirādāt* may be a found a set of objections that P’s *aṣl* can’t be used as an *aṣl*, nor his *‘illa* as an *‘illa*, etc. (Bāj.IX.B.2-4).¹⁰⁴

Finally, we might note that SH’s charge against the IAL/AY *qiyās* indicates an implicit circularity. Were we to take SH’s usage of the verb *yaghlaṭu* in combination with his following explanation, we might then propose the possibility that his *i’tirād* consists, in fact, of a charge of *petitio principii*.¹⁰⁵ On the other hand, we might interpret his argument as a charge of mistaken cause.¹⁰⁶ If either of these readings were to prove accurate, and were then supported with stronger indicants of something more than a mere paralleling of the *Organon*, then we could indeed claim an Aristotelian “flavour” belonged to “proto-system” juridical dialectic.¹⁰⁷ Certainly there would be the appearance of terminological crossover with the early *jadāl* and *uṣūl* treatises, as the

¹⁰² Aristotle’s σοφισμα (*Top.* VIII.11, 106a16-17) was most often translated as *mughālīt* or *mughālāṭa*. See, ‘Abd al-Raḥmān Badawī, ed., *Mantiq Aristū* (3 Vols. Cairo: Maṭba‘at Dār al-Kutub al-Miṣriyya, 1948), iii.758; and A.M. Goichon, *Vocabulaires Comparés d’Aristote et d’Ibn Sīnā* [Paris: Desclée de Brouwer, 1939], 23.)

¹⁰³ Schacht, *Origins*, 124.

¹⁰⁴ al-Bājī, *Minhāj*, Turkī ed., 155ff., §326ff.

¹⁰⁵ See our discussion in the previous chapter.

¹⁰⁶ Again, see our discussion in the previous chapter. In this case, the “effect” (*muḍāraba* is *jā‘iz*) has been mistaken as the “cause” for what is, in fact, its own “cause” (*musāqāt* is *jā‘iz*).

¹⁰⁷ SH’s usage of the verb *yaghlaṭu* may be used as an indicant for such a claim.

translators of the *Soph. El.* rendered Aristotle’s $\pi\alpha\rho\alpha\ \tau\acute{o}\ \mu\eta\ \alpha\acute{\iota}\tau\iota\omicron\nu\ \acute{\omega}\varsigma\ \alpha\acute{\iota}\tau\iota\omicron\nu$ as: “*an yaḍa’a lā ka-‘illa ka-‘illa*,” and “*min waḍ’ mā laysa bi-‘illa ‘alā annahu ‘illa*,” and “*bi-ithbāt ‘illa lā ka-‘illa*.”¹⁰⁸ Notably, there is a striking resemblance between these translations and al-Bājī’s third *qiyās*-oriented objection: “*al-i’tirād... bi-an mā ja’alahu ‘illatan lā yajūzu an yuj’ala ‘illatan*” (Bāj.IX.B.3).¹⁰⁹

Whatever the case, we have now reached the start of that brief dialectical sequence which closes the *Bāb al-Muzāra’a*. In §285 SH (who will play the role of P) initiates an “instructional” dialectical sequence (with *fa-in qāla qā’il*); SHAQ opens with a dialectical question aimed at SH’s claim that the ruling for *muḍāraba* was derived via *qiyās* from *musāqāt* (and not the reverse): “How does the *muḍāraba* resemble the *musāqāt* (*kayfa tushbihu al-muḍāraba al-musāqāt*)? Being that the *aṣl* and *far’* components of SH’s “historical” *qiyās* are already known to SHAQ, we have mostly passed the point of information-gathering and may read this question as moving closer to an objection. SHAQ’s use of the verb *tushbihu* is the key element here, as it connotes the focus of his demand: the *ma’nā* purportedly shared by the *aṣl* and *far’* of this *qiyās*.¹¹⁰ Accordingly, we may locate SHAQ’s question somewhere between al-Bājī’s fourth dialectical question — *al-su’āl ‘an wajh al-dalīl*¹¹¹ — and the initial stage of al-Bājī’s sixth *ḍarb* of *qiyās*-oriented *muṭālabbāt/mumāna’āt*: *muṭālaba bi-ithbāt al-waṣf fi’l-far’* (Bāj.IX.A.1.6) or *man’ al-waṣf fi’l-far’* (Bāj.IX.B.6.1.2).¹¹² That is to say, SHAQ knows SH’s *aṣl* and *far’*, but the *awṣāf* which are supposed to connect them has not been made clear to him; of course, he cannot object to the *awṣāf* before he is absolutely certain as to how SH conceives of them.

Now, al-Bājī’s ordered hierarchy-outline of *muṭālaba*, *i’tirād*, and *mu’āraḍa* (Bāj.IX.A) is followed by the individual treatment of each individual objection in the same order (Bāj.IX.B). Being that he employs *muṭālaba* for Bāj.IX.A.1.6 and *mumāna’a/man’* for Bāj.IX.B.6.1-2, the overlapping of these terms is plain. This is true in other treatises as well, and confirmed by Sānū’s cross-referencing *muṭālaba* with *mumāna’a* (*Mu’jam*, s.v. “المطالبة”). Perhaps, therefore, we may think of *muṭālaba* and *mumāna’a/man’* not so much as synonymous, but as indicative of initial and subsequent stages of the same dialectical move. In other words, as concerns establishing the *waṣf* in

¹⁰⁸ Again, see our discussion of the *Sophistical Elenchi* at the end of Chapter II.

¹⁰⁹ al-Bājī, *Minhāj*, Turkī ed., 158ff., §335ff.

¹¹⁰ As we shall soon see quite plainly, the term *ma’nā* for SH denotes the *waṣf* or collective *awṣāf* which are efficient in occasioning the *ḥukm* in the *aṣl*, and which — in *qiyās* procedure — are claimed to be shared by the *far’*.

¹¹¹ al-Bājī, *Minhāj*, Turkī ed., 39f., §76.

¹¹² al-Bājī, *Minhāj*, Turkī ed., 150, §312; and 166-7, §359.

the *far‘*, Q initiates by requesting that P explain how the *far‘* shares the *waṣf/awṣāf* of the *aṣl* (this being *muṭālaba bi-ithbāt al-waṣf fi’l-far‘*); then, when he has done so, Q objects to some aspect of P’s explanation (this being *man‘ al-waṣf fi’l-far‘*). What we witness in SHAQ’s question of §285 is that request-stage (*muṭālaba*) immediately prior to a planned objection-stage (*mumāna‘a/man‘*).

Whatever the case, SH readily complies (in “instructional” mode, with *qīla*) to SHAQ’s *muṭālaba* in §286, rendering the shared properties of *aṣl* and *far‘* as follows:

- [Sunnaic *aṣl*]: *nakhl* for *musāqāt*
 - [waṣf]: the *nakhl* are *qā’ima bi-rabb al-māl*
 - [waṣf]: it is understood the work is to procure the *ṣalāḥ* of the fruit
 - [ḥukm]: it is [jā’iz] that some fruit belongs to the worker
- [far‘]: *māl* for *muḍāraba*
 - [waṣf]: the *māl* is *qā’im li-rabb al-māl*
 - [waṣf] it is understood the work is to procure *faḍl*
 - [ḥukm]: it is therefore jā’iz that that some of the *faḍl* belongs to the worker according to mutual stipulation

SH closes by plainly stating: “And it [*muḍāraba*] is in the like *ma’nā* (*fī mithli ma’nā*) of the *musāqāt*.” Thus, we not only receive a succinct, step by step account of his *qiyās* (and, purportedly, that of ‘Umar and ‘Uthmān), but we are afforded one of the best illustrations of what SH means by “*fī mithli ma’nā* X” as occurs in the *K. Ikhtilāf al-‘Irāqīyyīn*. “*Ma’nā*”, for SH, is equivalent to the potentially-efficient *waṣf* or *awṣāf* (i.e., the ‘*illa*) of later *uṣūl* and *jadāl* theorists; “*fī mithli ma’nā*,” for SH, is his formula for declaring that the case-at-hand shares the potentially-efficient *waṣf* or *awṣāf* of the authoritative source-ruling.

SHAQ’s following question in §287 is subsidiary to his *muṭālaba* of §285, and although SH, as we shall see, in fact never allows him to reach the stage of openly-stated objection, we can still perceive the connection between *muṭālaba* and *mumāna‘a/man‘*. SHAQ asks: “Why doesn’t this [*ma’nā*] exist in the land [i.e., in *muzāra‘a*] (*lima lā yakūn hādhā fi’l-arḍ*)?” Exactly how we identify this question, however, depends upon whether or not we perceive SHAQ as having conceded to SH’s *qiyās*. Such, unfortunately, is not entirely clear from the textual presentation. Nevertheless, and regardless of SHAQ’s intention, we can still produce a label for this dialectical question — if not one which is found in the *jadāl*-theory texts. In essence, SHAQ’s question is a “*muṭālaba bi’l-farq*,” clearly, SHAQ believes that — for consistency’s sake — SH should extend his *qiyās*-reasoning to the *mas’ala* of *muzāra‘a*. That SH does not do so indicates for SHAQ that SH must believe there is a *farq* between the *aṣl* of *musāqāt* and the *far‘* of

muzāra’a. This *farq* is what he requests, and it is exactly what SH delivers in §288. Still, we are uncertain as to SHAQ’s real objective, and may ponder two possibilities.

If we read SHAQ as rejecting SH’s *qiyās*, then his question in §287 may be understood as leading towards nothing less than a charge of *al-naqd*. For if there is no *farq* between *musāqāt* and *muzāra’a*, then clearly SH should extend the ruling from the former to the latter, but he does not. In other words, SHAQ is employing *muzāra’a* as the *mas’alat al-naqd*, arguing that SH’s *awṣāf* are present therein, but not his *ḥukm* — thus, his *musāqāt-muḍāraba qiyās* should be rendered void. Accordingly, SH may be read (in §288) as denying the presence of the *awṣāf* in the *mas’alat al-naqd*.

On the other hand, if we read SHAQ as having conceded to SH’s rendering of *qiyās* from *musāqāt* to *muḍāraba*, then he may be seen to have shifted tactics — abandoning the mistakenly inverted IAL/AY *qiyās* in an attempt to rescue the IAL/AY ruling for *muzāra’a*. He thus proceeds by pushing SH to concede that the *ma’nā* of *musāqāt* obtains as much in *muzāra’a* as it does in *muḍāraba*, and, thus, the IAL/AY ruling should be sound (by a new *qiyās*) regardless of having been improperly reasoned (by the inverted *qiyās*). If such is the case, then SHAQ’s question in §287 may be understood as leading towards that type of *mu’āraḍa* which is anathema to SH (and most later jurists), by which Q’s *qiyās* (in this case: a proposed *musāqāt-muzāra’a*) is made to supplant P’s Sunnaic *dalīl* (in this case: the Prophet’s *fi’l* at Khaybar). If we consider that the *jadal* theorists conceived of the charge of *farq* as a subset of *mu’āraḍat al-‘illa bi-‘illa*, then we can read the first part of SH’s response in §288 as a counter-*mu’āraḍa* (of subspecies *farq*) against SHAQ’s proposed *qiyās-over-Sunna mu’āraḍa*. In the end, as we shall see, this seems the most satisfactory assessment.

To be certain, SHAQ has requested a *farq* between *muzāra’a* and *musāqāt*, and SH more than delivers in §288. In fact, he delineates no less than four *furūq* (two with *musāqāt*, one with *muḍāraba*, and one with both), as follows: 1) land does not “grow healthily” so that *faḍl* be taken from it (like the *nakhl* of *musāqāt*) — rather, something else grows in it; 2) that thing [which grows in it] is not something *qā’im* which is sold so that *faḍl* be taken from it (like the *māl* of *muḍāraba*); 3) that thing [which grows in it] is not something *muthmir bāligh* so that fruit be taken from it (like the *nakhl* of *musāqāt*), it is only a thing which happens in the land; 4) the administering (*taṣarruf*) of that thing [which grows in the land] is not in the same *ma’nā* as the *taṣarruf* in *musāqāt* or *muḍāraba*. SH concludes by plainly stating his charge of *farq*: “So it is not allowed that it

[that which grows in the land] be determined via *qiyās* based upon it [*musāqāt*] while it is distinct from it from start to finish (*mufāriq lahā fi’l-mubtada’ wa’l-muta’aqqab*).”¹¹³

If we indeed consider SHAQ as having suggested a *mu’āraḍa* by which a *musāqāt-muzāra’a qiyās* would supplant SH’s Sunnaic *dalīl*, then this response would constitute SH’s counter-*mu’āraḍa* against the *awṣāf* of SHAQ’s proposed *aṣl* — bearing in mind that SH does not consider SHAQ’s *mu’āraḍa qiyās* to be valid in the first place, as it conflicts with the Sunna. Nevertheless, SH’s reply is suggestive of a hypothetical counter-*qiyās* from an unstated *aṣl*, inasmuch as the void left by his *farq* (and the subsequent invalidation of SHAQ’s *aṣl*) would normally be filled by a new *aṣl* brought by SH. We must also point out that, although the *awṣāf* of *musāqāt* and *muzāra’a* are quite clear now, the efficiency of any of them has not been determined. Indeed, it may well be that the ‘*illa* (as opposed to *waṣf/awṣāf*) of *musāqāt* and *muzāra’a* are known by neither SH nor SHAQ nor by anyone, and the language of SHAQ (*tushbiḥu* in §285) followed by SH’s rendering of shared *awṣāf* (in §286, with no demonstration of efficiency), suggests that both SH’s *musāqāt-muḍāraba qiyās* and SHAQ’s proposed *musāqāt-muzāra’a qiyās* are based upon resemblance (*shabah*). In other words, we are in the domain of *qiyās al-shabah* (where only shared properties are established), and not *qiyās al-‘illa* (where the ‘*illa* is demonstrably efficient, and firmly indicated by *naṣṣ*, *ijmā’*, *ẓāhir*, or *istinbāt*).¹¹⁴

Appropriately, we might propose SH’s counter-*mu’āraḍa* (suggested through his delineation of *furūq*) as the supplanting of SHAQ’s *qiyās al-shabah* with a hypothetical *qiyās al-shabah* (whose *aṣl* and *awṣāf* are never suggested, but which would fill the void left by the elimination of the IAL/AY *aṣl*). In other words: 1) it is clear that SH’s objection constitutes *farq*; 2) as a subspecies of *mu’āraḍa*, *farq* normally entails (in the *jadāl*-theory literature) the replacement of P’s *aṣl* by another (constituting a counter-*qiyās*); but 3) perhaps not seeing the need to support his Sunnaic proscription of *muzāra’a*, SH does not produce such a counter-*qiyās*; although 4) if he had, it would likely have been another *qiyās al-shabah* (being that only *awṣāf* not necessarily efficient in occasioning a *ḥukm* have been discussed). We would therefore locate this hypothetical counter-*qiyās* under al-Shīrāzī’s *al-farq bi-qiyās al-shabah* (Shīr.VII.15.2.2.3),

¹¹³ SH employs a similar expression in §1131: “*mukhālif... fi’l-bad’i wa’l-muta’aqqabi*.” It is obvious that these phrases are meant to convey a certain comprehensiveness of difference between two things which are claimed by an opponent to be similar. As to their translation, however, I am uncertain as to how they might best be rendered. Significantly, neither phrase occurs elsewhere in the *Umm*; nor, for that matter, in any of the nearly 6,000 diverse volumes of the *Maktaba al-Shāmīla* which I have searched electronically.

¹¹⁴ See al-Bājī’s typology of *qiyās al-‘illa*: *Minhāj*, Turkī ed., 26-7, §47; and our discussions in the previous chapter.

and al-Bājī’s *al-farq bi-dalālat al-ḥukm*, subclass four: “that he make distinction (*an yufarriqa*) by way of a *ḍarb* of *al-shabah* (Bāj.IX.B.15.2.2.2.4).¹¹⁵

All hypotheses aside, SH continues with his concluding explanation, allowing that even if SHAQ’s *qiyās* were valid, one is simply not allowed to do *qiyās* regarding what the Prophet proscribed, nor allowed to make *ḥalāl* by *qiyās* what the Prophet made *ḥarām*. Again we are reminded of al-Bājī’s proponent’s *jawāb* that “*al-qiyās* may not be raised against *al-naṣṣ*,” and may read SH’s critique as an *i’tirāḍ* that what has been proposed as a *far’* is not allowed to be a *far’*, or as a *mu’āraḍa bi’l-nuṭq*.

Finally, SH closes this dialectical sequence (and the *Bāb al-Muzāra’a*) with a fascinating illustration which ought to draw our attention in a number of ways. It is, in fact, a unique charge of *method-theory naqd* — a dialectical objection exposing SHAQ’s self-contradiction in ignoring, in the *mas’ala* at hand, a key method of “proto-*uṣūl*” legal theory — in two parts. SH asserts: 1) the Prophet fixed the *raqaba* for the one who invalidates his fast through sex (*al-muḥsid li’l-ṣawm bi’l-jimā*); but 2) we don’t do *qiyās* [i.e., we don’t transfer the *raqaba-ḥukm*] to the one who invalidates his *prayer* through sex (*al-muḥsid li’l-ṣalāt bi’l-jimā*); despite 3) a common property shared by both: invalidation of a *farḍ* through sex. This short argument alone speaks volumes for the nature of proto-system legal theory, juridical dialectic, and their dynamic symbiosis. From one perspective, we once again witness the fine-honing of a legal theory in the dialectical forge; from another, we are witnessing a new echelon of dialectic. The subject matter of previous dialectic, although necessarily utilizing tools of legal principle and theory in both *istidlāl* and *i’tirāḍ*, has nevertheless remained substantive law.¹¹⁶ In other words, the base-matter has remained *furū’*, as worked by the tools of “proto-*uṣūl al-fiqh*” in the dialectical forge. Now, however, the base-matter has become the tools themselves, and we may thus begin to speak in terms of an *uṣūl*-method-oriented dialectic as well as a *furū’*-oriented dialectic.¹¹⁷ Moreover, we recognize the same dialectical instrument of objection at work in both: *al-naqd*.

¹¹⁵ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 117-8; al-Bājī, *Minhāj*, Turkī ed., 203, §461; 205-6, §466 (using the same example-*mas’ala* as his teacher). Ibn ‘Aqīl does not appear to discuss *mu’āraḍa* by way of *qiyās al-shabah* in his *K. al-Jadal*.

¹¹⁶ This, we will note, is also the case with the early *jadal*-theory texts.

¹¹⁷ Ibn Khaldūn, as we have seen, speaks of two *ṭarīqas* of *jadal* known in his time: that of al-Bazdawī, and that of al-‘Amīdī. The distinction between them, however, does not correspond to “*fiqh*-oriented” dialectic vs. “*uṣūl al-fiqh*-oriented” dialectic. Rather, as his exposition makes clear, al-Bazdawī’s was a specialized *ṭarīqa* for juridical dialectic by way of *al-adilla al-shar’iyya*, while al-‘Amīdī’s *ṭarīqa* was more general, treating *adilla* from any ‘ilm, and with particular focus on *istidlāl* (*Muqaddima*, Shaḥāda ed., 579; Rosenthal trans., iii.33).

As we have seen, Miller speaks of two genres of juridical *jadāl* appearing in the 4th/10th c. H: 1) “works with the *jadāl* method devoted to *uṣūl al-fiqh*” (and which “usually had the word *jadāl* somewhere in their title”); and 2) “works devoted to the *furū*” (which “were generally called *ṭarīqa*”). Unfortunately, he supplies no citations for this claim, nor does he tell us for which genre his authors are writing (saying only “we shall discuss works written on juristic *jadāl*”).¹¹⁸ The distinction inherent to these two genres, however, is plainly apparent in the practice of SH some two centuries or more before their introduction to the domain of juridical literature. We are thus provided with another potentially supportive indicant for our theory that early *jadāl*-systems were conceived, in part, through an analysis of past *jadāl* practice and teaching. Whoever the authors of the “*jadāl* method devoted to *uṣūl al-fiqh*” may have been, they may well have developed a category of *naqḍ* drawn from a study of practices such as that of SH in §288.

Whatever the historical-developmental implications, we will celebrate the discovery of this unique application of a classical *i‘tirāḍ* by giving it a new appellation: *method-naqḍ*. Whereas *fiqh*-oriented *naqḍ* has consisted in bringing an *endoxon* ruling in which P’s *‘illa* is present but his *ḥukm* is not, SH’s *method-naqḍ* has instead brought an *endoxon* ruling in which P’s method consideration (shared efficient properties) is present, but his method procedure (*qiyās*) is not. One of the most lucid demonstrations of a dynamic “dialectic-proto-*uṣūl*” symbiosis in the *Umm* thus concludes with a particularly illuminating instance of method-oriented *i‘tirāḍ*.

¹¹⁸ Miller, *Disputation Theory*, 87.

[masā’il-set #4] §§634-667

Summary of Analysis:

634 – أَخْبَرَنَا الرَّبِيعُ قَالَ: قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا مَاتَ الرَّجُلُ وَتَرَكَ أَخَاهُ لِأَبِيهِ وَأُمِّهِ وَجَدَّ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: الْمَالُ كُلُّهُ لِلْجَدِّ، وَهُوَ بِمَنْزِلَةِ الْأَبِ فِي كُلِّ مِيرَاثٍ.	• (634) AH ruling for <i>mas’ala</i> #1 • AH ‘<i>aql</i> explanation: X is <i>bi-manzilat</i> Y <i>fī kull</i> Z [AH <i>manzila</i>-subsumption extends ruling for <i>mas’ala</i> #1 to entire genus Z]
635 – وَكَذَلِكَ بَلَّغْنَا عَنْ أَبِي بَكْرٍ الصِّدِّيقِ، وَعَنْ عَبْدِ اللَّهِ بْنِ عَبَّاسٍ، وَعَنْ عَائِشَةَ أُمِّ الْمُؤْمِنِينَ، وَعَنْ عَبْدِ اللَّهِ بْنِ الزُّبَيْرِ رَضِيَ اللَّهُ تَعَالَى عَنْهُمْ أَنَّهُمْ كَانُوا يَقُولُونَ: الْجَدُّ بِمَنْزِلَةِ الْأَبِ إِذَا لَمْ يَكُنْ لَهُ أَبٌ.	• (635) AH reference <i>naql</i> (for <i>taqlīd</i>): <i>āthār-qawls</i> of Abū Bakr, Ibn ‘Abbās, ‘Ā’isha, Ibn al-Zubayr • [AH <i>istidlāl bi-qawl al-wāḥid</i> (x4) <i>min al-Ṣaḥāba</i>; possible attempt at <i>istidlāl bi-ijmā’ al-Ṣaḥāba</i>; implied <i>i’tirādāt</i> against IAL <i>naql</i>: (1) against <i>istidlāl bi-qawl al-wāḥid min al-Ṣaḥāba</i>: <i>khilāf</i> of another Ṣaḥābī (Shīr.IV.3; Bāj.V.2); (2) against <i>istidlāl bi-ijmā’ al-Ṣaḥāba</i>: <i>muṭālaba bi-taṣḥīḥ al-ijmā’</i> (Shīr.III.2; Bāj.III.1.1) or <i>khilāf</i> of another Ṣaḥābī (Shīr.III.3; Bāj.III.1.2); (3) possible <i>i’tirād</i>: <i>tarjīḥ</i> of <i>athar-qawl</i> due to more narrators (Shīr.IX.1.5; Bāj.XVI.1.1.3)]
636 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ فِي الْجَدِّ بِقَوْلِ عَلِيِّ بْنِ أَبِي طَالِبٍ رَضِيَ اللَّهُ عَنْهُ: لِلْأَخِ النَّصْفُ وَلِلْجَدِّ النَّصْفُ.	• (636) IAL ruling for <i>mas’ala</i> #1 is <i>taqlīd</i> of counter-<i>naql</i>: <i>athar-qawl</i> of ‘Alī • [IAL <i>istidlāl bi-qawl al-wāḥid min al-Ṣaḥāba</i>; implied <i>i’tirād</i> of AH <i>naql</i>: (1) against <i>istidlāl bi-qawl al-wāḥid min al-Ṣaḥāba</i>: <i>khilāf</i> of another Ṣaḥābī (Shīr.IV.3; Bāj.V.2); (2) against <i>istidlāl bi-ijmā’ al-Ṣaḥāba</i>: <i>muṭālaba bi-taṣḥīḥ al-ijmā’</i> (Shīr.III.2; Bāj.III.1.1) or <i>khilāf</i> of another Ṣaḥābī (Shīr.III.3; Bāj.III.1.2)]
637 – وَكَذَلِكَ قَالَ زَيْدُ بْنُ ثَابِتٍ وَعَبْدُ اللَّهِ بْنُ مَسْعُودٍ فِي هَذِهِ الْمَنْزِلَةِ.	• (637) IAL counter-<i>naql</i> supported by reference to further <i>naql</i> “as regards this <i>manzila</i>”: <i>āthār-qawls</i> of Zayd b. Thābit and Ibn Mas‘ūd • [implied extension of <i>i’tirād</i>: <i>khilāf</i> of another Ṣaḥābī (Shīr.IV.3; Bāj.V.2; or Shīr.III.3; Bāj.III.1.2)]
638 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا هَلَكَ	• (638) SH ruling for <i>mas’ala</i> #1

الرَّجُلُ وَتَرَكَ جَدَّهُ وَأَخَاهُ لِأَيِّهِ وَأُمِّهِ، فَالْمَالُ بَيْنَهُمَا نَصْفَانِ.	
639 – وَهَكَذَا قَالَ زَيْدُ بْنُ ثَابِتٍ وَعَلِيٌّ وَعَبْدُ اللَّهِ بْنُ مَسْعُودٍ.	• (639) SH references supporting <i>naql</i> (for <i>taqlīd</i>): <i>āthār-qawls</i> of Zayd b. Thābit, ‘Alī, and Ibn Mas‘ūd • [SH <i>istidlāl bi-qawl al-wāhid min al-ṣaḥāba</i> (x3); implied <i>i’tirāḍ</i> of AH <i>naql</i>: (1) against <i>istidlāl bi-qawl al-wāhid min al-ṣaḥāba</i>: <i>khilāf</i> of another Ṣaḥābī (Shīr.IV.3; Bāj.V.2); (2) against <i>istidlāl bi-ijmā‘ al-ṣaḥāba</i>: <i>muṭālaba bi-taṣhīḥ al-ijmā‘</i> (Shīr.III.2; Bāj.III.1.1) or <i>khilāf</i> of another Ṣaḥābī (Shīr.III.3; Bāj.III.1.2)]
640 – وَرُوِيَ عَنْ عُثْمَانَ رَضِيَ اللَّهُ عَنْهُمْ؛ وَخَالَفَهُمْ أَبُو بَكْرٍ الصِّدِّيقُ رَضِيَ اللَّهُ عَنْهُ فَجَعَلَ الْمَالَ لِلْجَدِّ.	• (640) SH references additional supporting <i>naql</i>: <i>athar-qawl</i> ‘Uthmān • [NB: SH has raised the number of <i>āthār</i> to equal that of AH] • SH marks Abū Bakr’s ruling in disagreement with SH referenced Ṣaḥāba • [SH specifically points out <i>khilāf</i> al-Ṣaḥāba: this is <i>i’tirāḍ</i> of AH <i>naql</i>: <i>khilāf</i> of another Ṣaḥābī (Shīr.IV.3; Bāj.V.2)]
641 – وَقَالَتْهُ مَعَهُ عَائِشَةُ وَابْنُ عَبَّاسٍ وَابْنُ الزُّبَيْرِ وَعَبْدُ اللَّهِ بْنُ عُبَيْدَةَ رَضِيَ اللَّهُ عَنْهُمْ.	• (641) SH marks the “lineage” of <i>khilāf</i>, Abū Bakr followed by ‘Ā’isha, Ibn ‘Abbās, Ibn al-Zubayr, and ‘Abd Allāh b. ‘Utba • [NB: another support added to AH <i>naql</i>, SH has raised AH <i>āthār</i> to outnumber his own]¹¹⁹ • [overall it is established that <i>ikhtilāf</i> al-Ṣaḥāba is split down the middle (i.e. this is a matter of <i>tarjīḥ</i> for which another <i>dalīl</i> will be necessary)]
642 – وَهُوَ مَذْهَبُ أَهْلِ الْكَلَامِ فِي الْفَرَائِضِ، وَذَلِكَ أَنَّهُمْ يَتَوَهَّمُونَ أَنَّهُ الْقِيَاسُ، وَلَيْسَ وَاحِدٌ مِنَ الْقَوْلَيْنِ بِقِيَاسٍ غَيْرَ أَنَّ طَرَحَ الْأَخَ بِالْجَدِّ أَبْعَدُ مِنَ	• (642) SH sets stage for “historical” dialectic: AH/Abū Bakr ruling is also the <i>madhhab</i> <i>Ahl al-Kalām fi’l-farā’id</i> • SH charge: <i>Ahl al-Kalām</i> are deluded (<i>yatawahhamūna</i>) into thinking <i>qawl</i> of

¹¹⁹ We must note SH’s reporting of *āthār* contrary to his own *āthār*, and to his own opinion, as a mark of practicing “good” dialectic. In other words, the *āthār* in support of the AH position now outnumbers his own, the mentioning of which indicates his “truth-seeking” sincerity.

الْقِيَاسِ مِنْ إِبْطَاتِ الْأَخِ مَعَهُ.	Abū Bakr group is the <i>qiyās</i>, while: 1) neither <i>qawl</i> is by <i>qiyās</i>; 2) <i>qawl</i> of Abū Bakr group is further from the <i>qiyās</i> than <i>qawl</i> of ‘Alī group [SH <i>i’tirād</i> #1: this not <i>qiyās</i> (implied range of <i>muṭālabāt</i> and <i>mumāna‘āt</i>); SH <i>i’tirād</i> #2: Abū Bakr <i>qawl</i> is further from <i>qiyās</i> = reversal of apparent Ahl al-Kalām attempt at <i>tarjīh</i> (Shīr.IX.2.1) = <i>al-qalb</i> (SH is saying that the same <i>awṣāf</i> of <i>qiyās</i>, were it valid, should produce a <i>ḥukm</i> closer to his <i>qawl</i> than that of SHAP — see below)]
643 – وَقَدْ قَالَ بَعْضُ مَنْ يَذْهَبُ هَذَا الْمَذْهَبِ: إِنَّمَا طَرَحْنَا الْأَخَ بِالْجَدِّ لِفَلَاحِ خِصَالِ أَنْتُمْ مُجْتَمِعُونَ مَعَنَا عَلَيْهَا؛ إِنَّكُمْ تَحْجُبُونَ بِهِ بَنِي الْأُمِّ، وَكَذَلِكَ مَنَزَلَةُ الْأَبِ وَلَا تُنْقِصُونَهُ مِنَ السُّلُوسِ، وَكَذَلِكَ مَنَزَلَةُ الْأَبِ وَأَنْتُمْ تُسَمُّونَهُ أَبَا.	(643) SH initiates “historical” dialectic by introducing <i>qawl</i> of SHAP of the Ahl al-Kalām (<i>qad qāla ba‘ḍ man yadhhabu hādhā al-madhhab</i>): - SHAP rejects party X for party Y “due to three <i>khiṣāl</i> regarding which you yourselves are in consensus with us (<i>antum mujtami‘ūna ma‘anā ‘alayhā</i>) [SHAP patent appeal to <i>endoxa khiṣāl</i>: 1) <i>endoxon ḥukm A</i>; 2) <i>endoxon ḥukm B</i>; 3) <i>endoxon</i> “nominal” <i>waṣf</i>] [SHAP appeal to <i>endoxa khiṣāl</i> supporting <i>qiyās</i> from Z to Y: Type I <i>qiyās al-dalāla</i> (via <i>ḥukm A</i>, <i>ḥukm B</i>, and “nominal” <i>waṣf</i>)]
644 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: قُلْتُ: إِنَّمَا حَجَبْنَا بِهِ بَنِي الْأُمِّ خَبَرًا لَا قِيَاسًا عَلَى الْأَبِ.	(644) SH <i>i’tirād</i> vs. SHAP <i>ḥukm A</i> (<i>qultu</i>): We eclipse party W by party Y “<i>khabaran lā qiyāsan</i> [from party Z]” [SH <i>mu‘āraḍa bi’l-nuṭq</i> by way of <i>āthār</i> (Shīr.VII.15.1; Bāj.IX.15.1);¹²⁰ also an implicit <i>method-mu‘āraḍa</i>; roles change due to <i>mu‘āraḍa</i>]
645 – قَالَ: وَكَيْفَ ذَلِكَ؟	(645) SHAQ dialectical question (<i>qāla</i>): <i>wa kayfa dhālika?</i> [SHAQ <i>su‘āl ‘an wajh al-dalīl</i> (?) or new method-<i>su‘āl</i>: <i>su‘āl ‘an wajh al-i’tirād</i> (?) or <i>muṭālaba bi-wajh al-qadh</i> (?)]

¹²⁰ In our *jadal*-theory lens-texts, *mu‘āraḍa bi’l-nuṭq* is achieved only with Kitāb, Sunna, and Ijmā‘. We will note this example (*mu‘āraḍa* by way of *āthār*) as unique to proto-system *jadal*.

646 – قُلْتُ: نَحْنُ نَحْجُبُ بَنِي الْأُمِّ بَيِّنَاتِ ابْنِ ابْنِ مُتَسَفِّلَةٍ، وَهَذِهِ وَإِنْ وَافَقَتْ مَنْزِلَةَ الْأَبِ فِي هَذَا الْمَوْضِعِ فَلَمْ نَحْكَمْ لَهَا نَحْنُ وَأَنْتَ بِأَنْ تَكُونَ تَقُومَ مَقَامَ الْأَبِ فِي غَيْرِهِ.	• (646) SH initiates three-part <i>jawāb</i> (<i>qultu</i>): • SH objection to SHAQ <i>khaṣṣa</i> #1 via introduction of three <i>endoxa</i> premises • [SH <i>i’tirāḍ</i> against SHAQ <i>qiyās al-dalāla</i> by <i>ḥukm</i> A: either an early species of <i>qiyās al-dalāla</i>-oriented <i>naqḍ</i>, or <i>method-naqḍ</i>]
647 – وَإِذَا وَافَقَهُ فِي مَعْنَى وَإِنْ خَالَفَهُ فِي غَيْرِهِ، وَأَمَّا أَنْ لَا نَنْقُصَهُ مِنَ السُّدُسِ فَإِنَّا لَمْ نَنْقُصْهُ خَبَرًا، وَنَحْنُ لَا نَنْقُصُ الْجَدَّةَ مِنَ السُّدُسِ، أَفَرَأَيْتِنَا وَإِيَّاكَ أَقَمْنَاهَا مَقَامَ الْأَبِ أَنْ وَافَقْتُهُ فِي مَعْنَى، وَأَمَّا اسْمُ الْأُبُوَّةِ فَنَحْنُ وَأَنْتَ نُلْزِمُ مَنْ بَيَّنَّنَا وَبَيْنَ آدَمَ اسْمَ الْأُبُوَّةِ.	• (647) SH objection to SHAQ <i>khaṣṣa</i> #1 (conclusion): likewise Y corresponds to Z in one <i>ma’nā</i>, but differs in another • [<i>i’tirāḍ</i>: most suggestive of <i>method-naqḍ</i> (a general method principle is being argued: <i>khaṣṣa</i> shared by Y and Z in one case may not be shared in another, thus cannot be trusted as an indicant that Y is in the <i>manzila</i> of Z for whole genus of <i>masā’il</i>; i.e., you follow this principle elsewhere, why not here where it is just as relevant?)] • SH objection to SHAQ <i>khaṣṣa</i> #2 (two <i>endoxa</i> premises and rhetorical conclusion): • 1) <i>endoxon</i> premise #1 [SH <i>mu’āraḍa bi’l-nuṭq</i> by way of <i>āthār</i> (Shīr.VII.15.1; Bāj.IX.15.1)] • 2) <i>endoxon</i> premise #2 • 3) SH <i>ara’ayta</i>: Do you and I rule that party V stand in the <i>maqām</i> of party Z anywhere else because party V corresponds to party Z in a <i>ma’nā</i>? • [SH rhetorical <i>ara’ayta</i> pushes SHAQ to concede inconsistency; SH <i>i’tirāḍ</i>: either an early species of <i>qiyās al-dalāla</i>-oriented <i>naqḍ</i>, or <i>method-naqḍ</i>] • SH objection to SHAQ <i>khaṣṣa</i> #3 (<i>endoxon</i> premise re: <i>lafẓ</i> usage) • [SH appeal to (<i>endoxon</i>) ‘<i>urf al-lugha</i> (?)]
648 – وَإِذَا كَانَ ذَلِكَ وَدُونَ أَحَدِهِمْ أَبٌ أَقْرَبُ مِنْهُ لَمْ يَرِثْ.	• (648) SH objection to SHAQ <i>khaṣṣa</i> #3 (<i>endoxon</i> premise) • [SH appeal to general (<i>endoxon</i>) <i>ḥukm</i>]

649 – وَكَذَلِكَ لَوْ كَانَ كَافِرًا وَالْمُورُوثُ مُسْلِمًا، أَوْ قَاتِلًا وَالْمُورُوثُ مَقْتُولًا، أَوْ كَانَ الْمُورُوثُ حُرًّا وَالْأَبُ مَمْلُوكًا، فَلَوْ كَانَ إِنَّمَا وَرَثْنَا بِاسْمِ الْأَبَوَّةِ فَقَطْ وَرَثْنَا هَؤُلَاءِ الَّذِينَ حَرَمْنَاهُمْ كُلَّهُمْ، وَلَكِنَّا إِنَّمَا وَرَثْنَاهُمْ خَبَرًا لَا بِالْإِسْمِ.	• (649) SH objection to SHAQ <i>khaṣṣa</i> #3 (three <i>endoxa</i> premises) • [SH <i>i'tirād</i> (setup): introduction of three <i>endoxa masā'il al-naqd</i>] • SH <i>i'tirād</i> (conclusion): if we ruled on the basis of this “nominal” <i>waṣf</i>, we would have transferred to these we have forbidden. But we only transfer by <i>khavar</i>, not by <i>ism</i> • [SH <i>i'tirād</i>: <i>al-naqd</i> (the “nominal” <i>waṣf</i> is present in these three cases, but not the <i>ḥukm</i> of transfer; thus, the <i>waṣf</i> is not efficient); ALSO al-Baṣrī's objection to <i>al-ta'līl bi'l-ism</i>, <i>ḍarb</i> 1]
650 – قَالَ: فَأَيُّ الْقَوْلَيْنِ أَشْبَهُ بِالْقِيَاسِ؟	• (650) SHAQ dialectical question (<i>qāla</i>): <i>fa-ayy al-qawlayn ashbahu al-qiyās?</i> • [Concession to SH objections to the three <i>khiṣāl</i> implied; SHAQ <i>su'āl 'an wajh al-dalīl</i> (?) or initial stage of “<i>muṭālaba bi'l-qadh (bi'l-qalb)</i>” (?)]
651 – قُلْتُ: مَا فِيهِمَا قِيَاسٌ، وَالْقَوْلُ الَّذِي اخْتَرْتُ أَبْعَدُ مِنَ الْقِيَاسِ وَالْعَقْلِ.	• (651) SH <i>jawāb</i> in two parts (<i>qultu</i>): • 1) There is no <i>qiyās</i> in either <i>qawl</i> [SH <i>mu'araḍa bi'l-nuṭq</i> reiterated] • 2) SHAQ <i>qawl</i> is farther from <i>al-qiyās</i> and <i>al-'aql</i> than SH <i>qawl</i> [SH counter-<i>tarjīḥ</i> on the basis of two <i>uṣūl</i>; or initial charge of <i>al-qalb</i> (SH is saying that the same <i>awṣāf</i> of <i>qiyās</i>, were it valid, should produce a <i>ḥukm</i> closer to his <i>qawl</i> than that of SHAQ — see below)]
652 – قَالَ: فَأَيْنَ ذَلِكَ؟	• (652) SHAQ dialectical question (<i>qāla</i>): <i>fa-ayna dhālika?</i> • [SHAQ initial stage of <i>muṭālaba bi'l-qadh (bi'l-qalb)</i> (?)]
653 – قُلْتُ: أَرَأَيْتَ الْحَدَّ وَالْأَخَ إِذَا طَلَبَا مِيرَاثَ الْمَيِّتِ أَيْدِيلِيَانِ بِقَرَابَةِ أَنْفُسِهِمَا أَمْ بِقَرَابَةِ غَيْرِهِمَا؟	• (653) SH <i>jawāb</i> (<i>qultu</i>) initiates <i>i'tirād</i> of <i>al-qalb</i> in stages: • SH <i>qalb</i>-stage #1 (SH <i>ara'ayta</i> question) • [NB: role change — SH asserts himself as Q, pushes concession to critical premise]
654 – قَالَ: وَمَا ذَلِكَ؟	• (654) SHAQ [maintaining role as Q] dialectical question (<i>qāla</i>): <i>Wa mā dhālika?</i>

Part I: The Dialectical Forge
Chapter III: Analyses of “Overtly Dialectical” Presentations in the *Kitāb Ikhtilāf al-ʿIrāqīyyīn*

	[SHAQ dismisses SH question — charge of irrelevance (?)]
655 – قُلْتُ: أَلَيْسَ إِنَّمَا يَقُولُ الْجَدُّ: أَنَا أَبُو أَبِي الْمَيِّتِ. وَيَقُولُ الْأَخُّ: أَنَا ابْنُ أَبِي الْمَيِّتِ؟	(655) SH presses his <i>ara'ayta</i> question [as Q] (<i>qultu</i>) [SH presses concession of critical <i>bi-qarābati ghayrihimā</i> premise]
656 – قَالَ: بَلَى.	(656) SHAP [role change] concedes (<i>qāla</i>): <i>balā</i>. [SHAQ concedes to stage #1 of SH <i>qalb</i>]
657 – قُلْتُ: فَبِقَرَابَةِ أَبِي الْمَيِّتِ يُدْلِيَانِ مَعًا إِلَى الْمَيِّتِ.	(657) SH confirms conceded premise (axis of <i>qarāba</i>) by stating it [SHAP <i>taslīm</i> of stage #1 is confirmed]
658 – قُلْتُ: فَاجْعَلْ أَبَا الْمَيِّتِ هُوَ الْمَيِّتَ أَبَاهُمَا أَوْ لَى بِكَثْرَةِ مِيرَاثِهِ، ابْنُهُ أَوْ أَبُوهُ؟	(658) SH <i>qalb</i>-stage #2 (<i>qultu</i>): - SH dialectical question: Make relation Z to the <i>mawayyit</i> himself the <i>mawayyit</i> — which is <i>awlā</i> in quantity of <i>mīrāth</i>; son of Z [corresponding to X of the <i>mas'ala</i> at hand] or father of Z [corresponding to Y of the <i>mas'ala</i> at hand]? [SH introduces <i>mas'alat al-qalb</i>, with obvious <i>endoxon</i> ruling, pushes SHAP to concede <i>qalb</i>-premise]
659 – قَالَ: بَلِ ابْنُهُ؛ لِأَنَّ لَهُ خَمْسَةَ أَسْدَاسٍ وَلَا بِيَهُ السُّدُسُ.	(659) SHAP <i>jawāb</i> (<i>qāla</i>): “<i>bal</i> [son of Z]” [SHAP concedes SH <i>qalb</i>-premise]
660 – قُلْتُ: فَكَيْفَ حَجَبْتَ الْأَخَ بِالْجَدِّ، وَالْأَخَ إِذَا مَاتَ الْأَبُ أَوْ لَى بِكَثْرَةِ مِيرَاثِهِ مِنَ الْجَدِّ، لَوْ كُنْتُ حَاجِبًا أَحَدَهُمَا بِالْآخَرِ انْبَغَى أَنْ تَحْجُبَ الْجَدَّ بِالْأَخِ.	(660) SH launches <i>elenchus</i> (<i>qultu</i>): 1) How did you make Y eclipse X when [in <i>mas'alat al-qalb</i>] X is <i>awlā</i>? 2) If you must eclipse one by the other [i.e., if <i>qiyās</i> actually obtained here, which it does not], it should be X eclipsing Y [i.e. the reverse, hence: <i>qalb</i> (lit. “reversal”)] [SH <i>elenchus</i> via hypothetical <i>qalb</i>: either <i>qalb bi-ḥukm maqṣūd</i> (Shīr.VII.14.1) or <i>qalb bi-ba‘ḍ awṣāf al-illa</i> (Bāj. IX.B.9.2)]
661 – قَالَ: وَكَيْفَ يَكُونُ الْقِيَاسُ فِيهِ؟	(661) SHAQ [reverts to questioner] dialectical question (<i>qāla</i>): “So how should the <i>qiyās</i> be, regarding it?” [SHAQ <i>su‘āl ‘an wajh al-dalīl/ muṭālaba</i> aimed at undermining SH <i>qalb</i> — NB

	al-Bājī on <i>al-qalb bi-baʿd awṣāf al-ʿilla</i> as “<i>min bāb al-muʿāraḍa</i>” (§387) — this is how SHAQ is perceiving it, hence roles have changed, and he asks this <i>suʿāl ʿan wajh al-dalīl</i>, or <i>muṭālaba</i> to find footing for objection. Note that SH will respond by providing a hypothetical counter-<i>qiyās</i> which still opposes SHAQ position [<i>muʿāraḍa</i> of <i>qiyās</i> by hypothetical counter-<i>qiyās</i>]
662 – قُلْتُ: لَا مَعْنَى لِلْقِيَاسِ فِيهِمَا مَعًا يَجُوزُ. وَلَوْ كَانَ لَهُ مَعْنَى انْبَغَى أَنْ نَجْعَلَ لِلْأَخِ أَبَدًا حَيْثُ كَانَ مَعَ الْجَدِّ خَمْسَةَ أَسْدَاسٍ وَلِلْجَدِّ السُّدُسَ.	• (662) SH <i>jawāb</i> (<i>qultu</i>) in three parts: • 1) No <i>maʿnā</i> regarding <i>qiyās</i> of [the <i>masʿala</i> at hand] is allowed • [SH charges that this <i>masʿala</i> cannot be a <i>farʿ</i> (a form of <i>mumānaʿa</i>), because it shares no <i>maʿnā</i> with an <i>aṣl</i>] • 2) SH hypothetical: “if there belonged to it a <i>maʿnā</i> [thus initiating hypothetical <i>muʿāraḍa-qiyās</i> to SHAQ <i>qiyās</i> already discredited via hypothetical <i>qalb</i>], X will always be <i>awlā</i> than Y” • [SH confirms hypothetical <i>qalb</i>-conclusion: X is <i>awlā</i> than Y — also a result of his hypothetical <i>muʿāraḍa qiyās</i> which is forthcoming]
663 – وَقُلْتُ: أَرَأَيْتَ الْإِخْوَةَ أَمْثَلِي الْفَرَضِ فِي كِتَابِ اللَّهِ؟	• (663) SH <i>jawāb</i> continued (<i>wa qultu</i>): • 3) SH dialectical question (<i>araʿayta</i>) in three parts brings <i>elenchus</i> via hypothetical <i>muʿāraḍa qiyās</i> (final invalidation of SHAQ <i>qiyās</i>): • Premise #1: [<i>araʿayta</i> introduces <i>endoxon dalīl</i> (from Qurʾān) for SH hypothetical-<i>muʿāraḍa</i>, to which SHAP must concede]
664 – قَالَ: نَعَمْ.	• (664) SHAP [note role change] concedes (<i>qāla</i>): “<i>naʿam</i>” • [SH secures premise #1: <i>aṣl</i> for hypothetical-<i>muʿāraḍa qiyās</i>]
665 – قُلْتُ: فَهَلْ لِلْجَدِّ فِي كِتَابِ اللَّهِ فَرَضٌ؟	• (665) SH brings premise #2 (<i>qultu</i>): • [continuation of <i>araʿayta</i> introduces lack of alternate <i>endoxon dalīl</i> for SH hypothetical-<i>muʿāraḍa</i> (i.e., other than

	a singular, shaky <i>dalīl</i> from the Sunna, which he will introduce next), the lack of which SHAP must concede]
666 – قَالَ: لَا.	• (666) SHAP concedes (<i>qāla</i>): “<i>lā</i>” • [SH secures premise #2: no alternative <i>dalīl</i> for hypothetical-<i>mu‘āraḍa qiyās</i>]
667 – قُلْتُ: وَكَذَلِكَ السُّنَّةُ. هُمْ مُبْتَنُونَ فِيهَا وَلَا أَعْلَمُ لِلْجَدِّ فِي السُّنَّةِ فَرْضًا إِلَّا مِنْ وَجْهِ وَاحِدٍ لَا يُثَبِّتُهُ أَهْلُ الْحَدِيثِ كُلُّ الشَّيْبَةِ، فَلَا أَعْلَمُكَ إِلَّا طَرَحْتَ الْأَقْوَى مِنْ كُلِّ وَجْهِ بِالْأَضْعَفِ.	• (667) SH proceeds to <i>elenchus</i>: • 1) SH confirms same premises hold for the Sunna • 2) SH objects to possible exception <i>dalīl</i> from Sunna: it is <i>min wajhin wāḥidin lā yuthbituhu Ahl al-Ḥadīth kulla al-tathbīt</i> [SH transmission-oriented <i>i‘tirād</i>] • 3) SH <i>elenchus</i> statement [SH seals <i>elenchus</i> by comparing his hypothetical <i>mu‘āraḍa qiyās</i> (for which X is <i>awlā</i>, based upon the stronger <i>wujūh</i> of Kitāb and Sunna) to SHAP <i>qiyās</i> (for which Y is <i>awlā</i>, ignoring the stronger <i>wujūh</i>)]

Discussion of Analysis:

The extended dialectical sequence we will next examine is preceded by brief presentations of AH, IAL, and SH rulings for a single *mas‘ala* with supporting *naql*, and which — unusually — lack any mention of the adherence or revised ruling of AY (in both *Umm* and Shaybānī versions).¹²¹ In terms of presentation, the concerned sections are: §§634-5 (AH ruling and *naql*; category F); §§636-7 (IAL ruling and *naql*; category F); §§638-41 (SH ruling and *naql* [mostly the same as IAL, but followed by a “lineage” for the AH counter-*naql*]; category F); and §§642-67 (extended “historical” dialectic between SH and a SHAP/SHAQ of the Ahl al-Kalām; category A). As we shall see, this latter sequence of dialectic provides an exceedingly rich illustration of early hermeneutic, rational inference, and objection. Before delving into it, however, we will once again engage in the more conjectural task of drawing out the species of argument

¹²¹ In his edition of the Shaybānī Version, al-Afghānī informs us that both AY and MIH sided with IAL and his *naql* as regards the focus *mas‘ala* of *muqāsamat al-jadd* (84, n.2).

and objection which might have been employed by proponents of the AH and IAL positions (if not even by AH and IAL themselves).¹²²

For reasons which will soon become clear, the sole *mas’ala* treated in these sections was a highly contentious one, and concerns the apportioning of inheritance when the deceased is survived by only his grandfather and full-brother. In §634 we learn that AH ruled all of the *māl* to the grandfather. This plain statement is followed by a brief ‘*aql* explanation: “he [the grandfather] is in the status of the father as regards every inheritance (*huwa bi-manzilat al-ab fī kull mīrāth*).” Before proceeding further, we should note this as belonging to a general category of legal argument: due to a status consideration (usually expressed with *bi-manzila*) of an agent/object/action X of the *mas’ala*-at-hand, the entire set of rulings-in-question as pertains to that agent/object/action X is subsumed by the appropriate set of rulings already established for agent/object/action Y, for that entire genus of *masā’il*. In other words: X is in the *manzila* of Y for the whole of substantive genus A; thus, X will have the *ḥukm* of Y for the whole of substantive genus A. This particular mode of legal solution — which we might label “*manzila*-subsumption,” with its accompanying formula of “X is in the *manzila* of Y,” is of great frequency throughout our treatise and the *Umm* as a whole.¹²³ Nor would it appear that this formula of subsumption originated with AH, for his ruling is supported in §635 by *naql* of the *āthār-qawls* of Abū Bakr, Ibn ‘Abbās, ‘Ā’isha, and Ibn al-Zubayr, who are all reported to have said: “*al-jadd bi-manzilat al-ab idhā lam yakun lahu ab.*”

In §636-7, however, we learn that IAL’s ruling on this *mas’ala* stems from a counter-set of *āthār-qawls* belonging to ‘Alī, Zayd b. Thābit, and Ibn Mas‘ūd: the inheritance is to be equally distributed between the surviving grandfather and full-brother (*li’l-akh al-niṣf wa li’l-jadd al-niṣf*). Thus the background to the AH vs. IAL dispute becomes quite plain: our jurists adhere to opposing sets of *aqwāl al-Ṣaḥāba*, each with a separate “lineage,” and we may consider identifying the domain of *istidlāl* (or, perhaps more accurately, *taqlīd*) for both positions as *qawl al-wāḥid min al-Ṣaḥāba* (despite the fact that one position is backed by four, and the other by three). Additionally, we may wish to consider investigating the domain of *ijmā’ al-Ṣaḥāba*, insofar as the solution to

¹²² We are reminded that later historical and biographical authors narrate a number of face-to-face disagreements and disputes between them.

¹²³ Cf. instances of *manzila*-subsumption in §§202, 346, 391m, 474, 537, 752, 987, 1072, 1204, 1341, 1348, 1350-2, 1358-9. In the entirety of the *Umm* there are some 56 occurrences of the term “*bi-manzila*.”

this *mas’ala* appears split more-or-less evenly between two camps, and we might find relevant objection material therein. Finally, we may consider the domain of *tarjīh*, insofar as a numerical preponderating of *āthār* might be at work in the support of either position.

From the perspective of AH in the role of Q, and assuming a dialectical confrontation with a proponent of the IAL position, we can envisage three or four potential species of *i’tirāḍ* to be brought forth when the IAL proponent states the *āthār-qawls* which form the basis of his *istidlāl/taqlīd*. First, if the IAL proponent draws his *dalīl* via *qawl al-wāḥid min al-ṣaḥāba*, thrice, the AH questioner might object by conveying the *khilāf* of another *ṣaḥābī*, four times, “in order,” as we have seen al-Shīrāzī say, “to make of the *mas’ala* a *khilāf* between the *ṣaḥāba*” (Shīr.IV.3; Bāj.V.2).¹²⁴ Second, if the IAL proponent intends to establish his *dalīl* as *ijmā’ al-ṣaḥāba*, then the AH proponent — like the “*mukhālīf*” of al-Shīrāzī’s example *mas’ala* — might object by saying “this is the *qawl* of a group of *ṣaḥāba*, and it is not *ijmā’*.” This constitutes *muṭālaba bi-taṣḥīḥ al-ijmā’*, and is the second *ḍarb* of al-Shīrāzī’s *i’tirāḍāt* against *al-istidlāl bi-ijmā’* (Shīr.III.2; Bāj.III.1.1).¹²⁵ Alternately, he might once again simply “convey *al-khilāf* on the authority of one of them [i.e., of another *ṣaḥābī*]” in order to cancel any claim of *ijmā’* (Shīr.III.3; Bāj.III.1.2).¹²⁶ Third, if the IAL proponent implies that he will support his *naql* by way of a numerical *tarjīh* (with three narrated *āthār*), the AH questioner might pre-empt him by way of a counter-*tarjīh* (with four narrated *āthār*). We have earlier seen a preponderating of narrators as al-Shīrāzī’s, et al., *isnād*-oriented *Tarjīh al-Zawāhir* (Shīr.IX.1.5; Bāj.XVI.1.1.3).¹²⁷ The difference here is that both originator and transmitter of doctrine are of the *ṣaḥāba*. Finally, were we to reverse the roles of P and Q, we would expect the same *i’tirāḍāt* from an IAL questioner against the *istidlāl* of an AH proponent — except for the *isnād*-oriented *tarjīh*, as the IAL position boasts one less *athar* than the AH position.

¹²⁴ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 82f.; al-Bājī, *Minhāj*, Turkī ed., 144, §298. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 39f.

¹²⁵ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 80-1. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 39, §204, employing the same example *mas’ala*. Al-Bājī’s typology is somewhat more refined, and the AH position questioner would proceed according to one of the three *ḍarbs* of *al-muṭālaba bi-taṣḥīḥ al-ijmā’ wa zuḥūrihi* (*Minhāj*, Turkī ed., 139-40, §§281-4).

¹²⁶ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 81; al-Bājī, *Minhāj*, Turkī ed., 140, §285. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 39, §205.

¹²⁷ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 121-2; al-Bājī, *Minhāj*, Turkī ed., 223-4, §508. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 24, §128.

SH, as we see in §638, parallels the IAL position for this *mas’ala* (*al-māl baynahumā niṣfān*), and at first references the same *āthār-qawls* of Zayd b. Thābit, ‘Alī, and Ibn Mas‘ūd as supporting *naql*. We may thus — at first — hypothesize his objections to the AH position as the same as our IAL proponent above. In §640, however, SH references an additional supporting *naql*: the *athar-qawl* of ‘Uthmān — we may thus imagine that, were the *mas’ala* set in a venue of dialectical debate, and did the procedure of argument and defence devolve into a question of *tarjīḥ*— SH may well have stood ground against the AH position by demonstrating an equal number of Ṣaḥāba adherents and transmitters. Moreover, SH marks Abū Bakr’s ruling (*māl* only for the grandfather) as being in disagreement with his own referenced Ṣaḥāba; i.e., he not only raises the IAL supporting *āthār* (with the addition of ‘Uthmān) to a numerical equivalence with those of the opposing AH position, but he specifically points to this as an issue of *khilāf al-Ṣaḥāba*. Thus he conforms to the very definition of *i’tirāḍāt* against *istidlāl bi-ijmā’ al-Ṣaḥāba* (Shīr.III.2; Bāj.III.1.1) and *istidlāl bi-qawl al-wāḥid min al-Ṣaḥāba* (Shīr.IV.3; Bāj.V.2) by way of conveying the *khilāf* of others from this same group.

Moreover, and despite adding (in §641) another *athar-qawl* in support of the AH position (and thus upsetting the numerical balance in an AH proponent’s favour),¹²⁸ SH draws further attention to the underlying *khilāf* of the Ṣaḥāba by drawing a sort of “lineage” for the opposing *qawl*. He claims that all of ‘Ā’isha, Ibn ‘Abbās, Ibn al-Zubayr, and ‘Abd Allāh b. ‘Utba professed the opposing *qawl* along with Abū Bakr. Overall, then, we may say that SH has established this as a *mas’alat al-khilāf* split down the middle between two more-or-less equal groupings of important Ṣaḥāba. We may predict, too, that an additional *dalīl* might be sought after by an opponent to tip the evidence in favour of the AH *qawl*. This is precisely what happens in the ensuing dialectical sequence, and it is the method (*qiyās*) by which his opponent seeks to strengthen the *ḥujjiyya* of the AH *qawl* to which SH quite vehemently objects.¹²⁹

In §642, SH initiates a patently “historical” dialectic by informing his reader that the AH/Abū Bakr ruling (all *māl* to the grandfather) is also the *madhhab Ahl al-Kalām fi’l-farā’id*. Before proceeding, we should note that this is the only mention of the

¹²⁸ Again, we would consider this a clear sign of SH’s sincere dialectical ethic. Mentioning additional *adilla* for the opposing position is a mark of “good” dialectic.

¹²⁹ Cf. this same dialectical debate as it plays out in the *Risāla* (Shākir ed., 591ff., §§1773ff.) Khadduri translates the interlocutor’s initial assessment of this *mas’ala* as: “The narratives are equally divided on the subject and the evidence of analogy supports those who held that [the grandfather] is on an equal footing with the father and that the brothers are debarred” (*Risāla*, 2nd ed., 347, §792; brackets are Khadduri’s).

Ahl al-Kalām in the *Kitāb Ikhtilāf al-‘Irāqīyyīn*, and, as we shall see, it is accompanied with some spleen on the part of SH.¹³⁰ This selfsame debate, too, appears in a variant form in the *Risāla*, although the Ahl al-Kalām are nowhere mentioned — neither as regards this *mas’ala*, nor elsewhere in the treatise.¹³¹ Whether a specific reference to the Mu‘tazila or otherwise, SH accuses the Ahl al-Kalām as deluded (*yatawahhamūna*) into thinking the *qawl* of the AH/Abū Bakr group is also the *qiyās*. SH ardently denies that this could be so, saying: 1) neither *qawl* is by *qiyās*; and 2) the *qawl* of the AH/Abū Bakr group (*ṭarḥ al-akh bi’l-jadd*) is further from *qiyās* than the *qawl* of the IAL/SH/‘Alī group (*ithbāt al-akh ma’ahu*).¹³²

Although we have not reached the particulars of SH vs. Ahl al-Kalām arguments and objections just yet, we may, from the perspective of early *jadal*-theory (and based upon what follows in §§643ff.), interpret the overall projects of the opposing positions now. The project of the Ahl al-Kalām position (attempting *tarjīḥ* of opposing *āthār* via supporting *qiyās*) finds a match in al-Shīrāzī’s first *wajh* of *matn*-oriented *tarjīḥāt*: “That one of the two *khbars* be *muwāfiq* to another *dalīl* from an *aṣl*, or *ma’qūl aṣl*, so it is given precedence...” (Shīr.IX.2.1).¹³³ As for SH’s two projects (confirming: [1] neither *qawl* is by *qiyās*, and [2] the AH/Abū Bakr *qawl* is further from the *qiyās*), they may be interpreted as: 1) a range of *muṭālabāt* and *mumāna‘āt* against the components of the opposing position’s purported *qiyās*; and 2) the reversal of the Ahl al-Kalām attempt at *tarjīḥ*, which takes the form of a “hypothetical” *i’tirāḍ* of *al-qalb*. By this latter SH demonstrates that the same *awṣāf* of the purported *qiyās*, were *qiyās* at all valid here, should produce a *ḥukm* closer to his SH/IAL/‘Alī group *qawl* than to that of the Ahl al-Kalām/AH/Abū

¹³⁰ Including this instance, the Ahl al-Kalām are referenced eight times by SH in the *Umm*.

¹³¹ Khadduri (*Risāla*, 2nd ed., 347, n.30) claims: “It is the Ḥanafī’s opinion which the interlocutor supports.” As we see here, however, SH attributes this attempted *qiyās*-support to the Ahl al-Kalām. This appellation is commonly understood to reference the Mu‘tazila; see, e.g., Schacht, *Origins*, 128, where he references this very debate in our treatise under the heading “The Mu‘tazila,” observing: “Shāfi‘ī, in *Tr. I*, 122, reports their analogical reasoning on a question of law and refutes it. They reject traditions on account of *naẓar* and reason, and use *qiyās* as a basis for criticizing traditions.” In a footnote attached to this last sentence, he refers the reader to Ibn Qutayba’s *Ta’wīl Mukhtalif al-Ḥadīth*. I would question Schacht on two counts: 1) in our dialectical sequence above (his *Tr. I*, 122), the SHAP of the Ahl al-Kalām is attempting to use *qiyās* as a means of preponderating opposing sets of *āthār* — he is neither rejecting nor criticizing his own set, whatever Ibn Qutayba might accuse the Ahl al-Kalām of doing elsewhere; and 2) I see no objection to “Ahl al-Kalām” as applied in a broader sense, encompassing those who engage in dialectical theology, rather than a specific reference to the Mu‘tazila.

¹³² Schacht (*Origins*, 124) interprets: SH “recognizes its limits [i.e., the limits of *qiyās*], in opposition to the *ahl al-kalām*....”

¹³³ al-Shīrāzī, *Ma‘ūna*, al-‘Umayrīnī ed., 123. I have yet to locate an equivalent discussion by Ibn ‘Aqīl or al-Bājī.

Bakr group. It is a reversal of the purported *qiyās* — hence “*qalb*” — but it is done only for the sake of argument — hence “hypothetical.”

The dialectical sequence proper begins in §643, when SH introduces the *qawl* of a SHAP of the Ahl al-Kalām, saying: “And one of those who subscribe to this *madhhab* has said... (*qad qāla ba‘ḍ man yadhhabu hādhā al-madhhab*).” We now hear the voice of this “historical” SHAP, who has rejected brother for grandfather “due to three *khiṣāl* regarding which you yourselves are in consensus with us (*antum mujtami‘ūna ma‘anā ‘alayhā*):” 1) you make the grandfather eclipse the mother’s sons [i.e., the maternal half-brothers of the deceased] — likewise is the *manzila* of the father [we will label this *endoxon ḥukm A*]; 2) you don’t diminish the grandfather from the sixth [i.e., against full-brothers, the grandfather retains a minimum share of 1/6] — likewise is the *manzila* of the father [we will label this *endoxon ḥukm B*]; and 3) you call the grandfather “father” [we will label this an *endoxon* “nominal” *waṣf*].¹³⁴ This not only constitutes SHAP’s appeal to the *endoxa khiṣāl* supporting his *qiyās* from father to grandfather, but it provides indicants for the precise type of *qiyās* which he proposes: Type I *qiyās al-dalāla* (via shared *ḥukm A*, shared *ḥukm B*, and a shared “nominal” *waṣf*).¹³⁵ We may illustrate SHAP’s proposed *qiyās* as follows:

¹³⁴ There are a number of salient features in the summation of the opponent’s stance in §643 alone; among them are: 1) the term *madhhab* in the sense of doctrinal opinion; 2) the term *khiṣāl* (s. *khaṣla*) in the sense of “quality, property” — cf. al-Shīrāzī’s use of *khaṣīṣa* in discussing *qiyās al-dalāla*; 3) the acknowledgement of a doctrinal consensus as conveyed through the descriptor *mujtami‘ūna ma‘anā ‘alayhā*; 4) a technical usage of *manzila*; and 5) a “nominal” hermeneutic — i.e., the semantic connecting of the common denomination of a thing (“father”) to its legal status. A search for these elements and terms in early *kalām* works might help us to identify more precisely the theological affiliation of these Ahl al-Kalām — be they Mu‘tazila or otherwise. Of greater import, however, is the fact that al-Shāfi‘ī may here be engaged in disputation with a dialectical theologian on a point of law (as opposed to only a proponent of their *qiyās* for this *mas‘ala*). If such is the case here, it would serve to illustrate the superiority of Hallaq’s “many hats” paradigm over a “cross-germination between epistemic communities” paradigm. That is to say that dialectic marked the procedure — the form of disputation — whether an individual scholar was engaged in theological speculation, normative inference, or other projects. Certainly one might be a specialist in one field or another, but the origins of terms, concepts, and methods may not necessarily be attributable to one field over another (as with Miller’s juridical “take over” of the field of *jadal/munāẓara* from theologians). Rather, they are better tied to the individual projects of individual scholars across thematic domains. In other words, we need not interpret SH’s dialectic as an absolute convergence of prior *Kalām*-method and nascent legal theory/dialectic, as some might claim it to be. Both SH and the SHAP of the Ahl al-Kalām position appear to have worn more than one “hat.”

¹³⁵ al-Shīrāzī, *Ma‘ūna*, al-‘Umayrīnī ed., 36, 116-17; Turkī ed., 140, 263-4. al-Bājī, *Minhāj*, Turkī ed., 27, §48; 203f., §461f. Ibn ‘Aqīl, *K. al-Jadal*, 13, §62.

<i>Aṣl</i> Father		<i>Far‘</i> Grandfather
<i>Endoxon Ḥukm A</i> he eclipses maternal half- brothers	← SAME →	<i>Endoxon Ḥukm A</i> he eclipses maternal half- brothers
<i>Endoxon Ḥukm B</i> he retains minimum 1/6	← SAME →	<i>Endoxon Ḥukm B</i> he retains minimum 1/6
<i>Endoxon “Nominal” Waṣf</i> <i>ism al-ubuwwa</i>	← SAME →	<i>Endoxon “Nominal” Waṣf</i> <i>ism al-ubuwwa</i>
<i>Endoxon Ḥukm C</i> he eclipses full-brothers	← THEREFORE →	<i>Unknown Ḥukm C (?)</i> (Should be the same)

From this illustration it is easy to see how the legal argument we have labelled *manzila*-subsumption may be supported by Type I *qiyās al-dalāla*. Due to the shared (and *endoxa*) *aḥkām* A and B, along with the shared (also *endoxon*) *waṣf* of “he is called ‘father,’” one ought to be able to claim — according to SHAP — that when the father of the deceased does not inherit, the grandfather should be in his *manzila* across the whole genus of *mīrāth masā’il*.

SH, as we have seen, is entirely opposed to allowing a *qiyās* overruling of established *khābar* for the same *mas’ala*. In §644, attacking the first *khaṣla* of SHAP’s *qiyās* (our *endoxon ḥukm A*), he again makes this clear, saying: We eclipse the mother’s sons by the grandfather “only by way of *khābar*, not by *qiyās* with the father (*khabaran lā qiyāsan ‘alā al-ab*).” This objection constitutes — on one level — the now familiar *mu‘āraḍa bi’l-nuṭq* (Shīr.VII.15.1; Bāj.IX.15.1), although, significantly, it is by way of *āthār*.¹³⁶ On another level, and bearing in mind that SH’s starting point for this objection is a principle of legal theory, implicit to his objection is a charge belonging to the domain of method-oriented *jadāl*. In so many words, SH has claimed: “You have violated a fundamental principle by attempting *qiyās* where there is established *khābar*; therefore I am supplanting your *istidlāl bi’l-qiyās* with my *istidlāl bi’l-khābar*.” P’s problematic method is trumped by Q’s *endoxon* method. Previously, we encountered a method-oriented objection in the form of *al-naqd*, and thus proposed a new label: *method-naqd*. Now that we have encountered an implicit method-oriented objection in the form of *al-mu‘āraḍa*, we might suggest another new label: *method-mu‘āraḍa*. One thing is certain:

¹³⁶ We will mark this as peculiar to proto-system *jadāl*.

however we assess SH’s objection in §644, it is a form of *mu‘āraḍa*, and we might predict a consequent change in roles.

This is precisely what occurs in §645: SHAP becomes SHAQ, and launches his first dialectical question: *wa kayfa dhālika?* Again, we may interpret this on two levels, depending upon SHAQ’s understanding of SH’s intention. On the more substantive level, SHAQ’s question resembles al-Bājī’s *su‘āl ‘an wajh al-dalīl*: in precisely which mode is the *dalīl* of SH’s supplanting *khābar*? Based on SH’s ensuing multi-tiered *jawāb* in §§646–9, however, we might better qualify SHAQ’s question as a method-oriented *su‘āl* — something like a *su‘āl ‘an wajh al-‘tirād*, or, more specifically, a *su‘āl ‘an wajh al-mu‘āraḍa*. In essence, he appears to be asking: How is it that you supplant my *qiyās*? And he receives, in response, a very succinct and programmatic account. SH, in fact, proceeds step by step to *elenchus*. We will note that he does little to vindicate his own *istidlāl bi’l-khābar*; rather, he supplants SHAQ’s *qiyās* by destroying it.

In §646 SH initiates a three-part *jawāb* by objecting to SHAQ’s first *khaṣṣa* with an ordered set of *endoxa* premises: 1) we eclipse the mother’s sons [i.e., the maternal half-brothers of the deceased] by the daughter of the son of a son [i.e., the great-granddaughter of the deceased] *mutasaffila*; 2) therefore, she corresponds to the *manzilat al-ab* in this particular setting (*fī hādhā al-mawḍi‘*); and 3) neither we nor you would ever rule that she stand in the *maqām al-ab* anywhere else. This is a specific attack against SHAQ’s employment of *endoxon ḥukm A* in his proposed *qiyās al-dalāla*, and the dialectical move employed by SH is a now familiar one: it is a species of *al-naqḍ*. In effect, SH has shown that the same *khaṣṣa* (*endoxon ḥukm A*) is present in the great-granddaughter *mas’alat al-naqḍ*, but SHAQ would never extend it — by way of *qiyās al-dalāla* — to other *masā’il* in the genus of *mīrāth*. Nor would SHAQ ever claim “*wa hiya fī manzilat al-ab fī kull mīrāth*” simply because she is in the *manzila* of the father in a single instance.

As for identifying this species of *naqḍ* in the *jadāl*-theory literature, we are at first struck with a conundrum: *al-naqḍ*, as we have seen, is defined in terms of “the presence of the *‘illa*, and not the *ḥukm*.” In other words, the *naqḍ* of the *jadāl* texts is oriented specifically towards *qiyās al-‘illa* (Shīr.VII.7; Bāj.IX.B.11.1-2), whereas SH’s target is clearly *qiyās al-dalāla*. That his objection belongs to the genus of *al-naqḍ*, however, is self-evident: the hallmark of bringing a *mas’alat al-naqḍ* (the great-granddaughter case) is present; so, too, is the employing of that *mas’alat al-naqḍ* to show an opponent’s inconsistency.

We may suggest two possible explanations: 1) the proto-system objections which we would place under the *naqd*-genus of fully-systematized *jadāl* enjoyed a larger domain of application than existed in later times, when *qiyās*-procedure in general became more refined, and disputation centered more specifically upon *istidlāl bi-qiyās al-‘illa*; or 2) SH’s objection may be targeted more at SHAQ’s overall method, than upon his particular usage of *endoxon ḥukm A* in his *qiyās al-dalāla*. As for the first explanation, we might simply conclude that we are witnessing a species of *qiyās al-dalāla*-oriented *naqd* which was not discussed in the early *jadāl*-system literature for some reason or another. As to the second, we might understand SH’s objection as belonging to that higher echelon of method-oriented *i’tirāḍāt*, and thus label it, once again, *method-naqd*.

This latter explanation gains some support when we consider SH’s conclusion at the start of §647. Here SH draws to a close his objection against SHAQ’s employing of his first *khaṣṣa* in *qiyās*, asserting that the grandfather may thus correspond to the father in one *ma’nā*, but differ from him in another. There is very evidently a principle of legal theory implicit to this statement: whatever it is that allows the grandfather or great-granddaughter, in one instance, to stand in the *manzila* of father, is not necessarily transferable to other *mawāḍi’*. In other words, the *khaṣṣa* shared by X and Y in one case may not be shared in another, and thus the *khaṣṣa* itself cannot be trusted to indicate the *manzila*-subsumption “X is in the *manzila* of Y for the whole genus of *masā’il*.” This implication of a more general legal principle at work supports our interpretation of SH *method-naqd*; his objection is akin to saying: This is the principle you adhere to in the great-granddaughter *mas’ala*, why do you ignore it here in the grandfather *mas’ala*, where it is just as relevant?

We have mentioned that SH’s *jawāb* to SHAQ’s dialectical question in §645 is in three parts; SH now proceeds to attack SHAQ’s second *khaṣṣa* (*endoxon ḥukm B*). First, he once again asserts that the grandfather retains his minimum of one-sixth due to *khābar* (not *qiyās*). As before, we may classify this objection as *mu’āraḍa bi’l-nuṭq* by way of *āthār* (Shīr.VII.15.1; Bāj.IX.15.1). SH then proceeds to bring another *mas’alat al-naqd*: the *mas’ala* of the grandmother, who also retains a minimum of one-sixth. This time, however, he follows with a rhetorical *reductio* introduced by our familiar *ara’ayta* formula: “Would you hold that you and I should stand her in the *maqām* of the father, in that she corresponds to him in a *ma’nā*?” Thus does SH push SHAQ to concede, once more, to his own inconsistency. This objection, in most ways, is a mirror of SH’s objection to SHAQ’s first *khaṣṣa*, and we may interpret it in the same two ways: 1) as a

specifically *qiyās al-dalāla*-oriented *naqḍ*, by which SHAQ’s employing of *endoxon ḥukm* B has been shown to be inconsistent; and 2) as a *method-naqḍ*, whereby SHAQ’s procedure of *manzila*-subsumption has once again been exposed as inconsistent.

Finally, SH proceeds to attack SHAQ’s third *khaṣṣa* (the shared “nominal” *waṣf*), and he does so in a series of stages with a devastating finish. First, at the end of §647, he puts forth a single premise: “As for the *ism al-ubuwwa*, both you and I attach the *ism al-ubuwwa* to whosoever is between us and Ādam.” In short, this is something like an appeal to the (*endoxon*) ‘*urf al-lugha*.¹³⁷ Second, in §648, SH brings another premise in the form of an appeal to a general (and *endoxon*) *ḥukm* consequent to this *endoxon* usage of the *ism al-ubuwwa*: “When it is thus,” he says, “and below one of them is a ‘father’ nearer [to the deceased] than him, he does not inherit.” Third, in §649, SH introduces a series of three (*endoxa*) *masā’il al-naqḍ*, for the *ism al-ubuwwa* also obtains when: 1) the “father” is a *kāfir* and the *mawrūth* a Muslim; 2) the “father” is the *qātil* and the *mawrūth* the *maqtūl*; and 3) the “father” is *mamlūk* and the *mawrūth* is *ḥurr*.

The stage thus set, SH delivers a devastating *i’tirāḍ*. In short: if we transferred inheritance on the basis of the *ism al-ubuwwa* alone, we would have transferred in these [*masā’il al-naqḍ*] we have forbidden. However, he continues (at the end of §649), we have only transferred inheritance by *khavar*, not by *ism*. This objection corresponds well, once again, to the genus of *naqḍ*. In fact, it is a triple-*naqḍ*, for SH has shown SHAQ to be thrice inconsistent as regards his intention to employ the “nominal” *waṣf* for *qiyās* to the *mas’ala* at hand. Clearly, had this *waṣf* any efficiency whatsoever in the *far’* of the grandfather’s inheritance, it would have shown itself in these *masā’il al-naqḍ*, but it has failed to produce anything but the opposite *ḥukm* than SHAQ intends.

Moreover, this focus upon the *ism al-ubuwwa*, and the telltale objection “we have only transferred inheritance by *khavar*, not by *ism*,” point us towards yet another species of objection found in our oldest extant treatise on juridical *jadāl*: the *Kitāb al-Qiyās al-Shar’ī* of al-Baṣrī. Al-Baṣrī’s *faṣl* “On what Especially Marks (*yakhtaṣṣu*) the ‘*illa*, as pertains to its Modes of Invalidation (*al-wujūh al-muḥsida lahā*)” is initially divided into such as provides indicant for *fasād al-‘illa* by way of 1) *Qawl al-Umma*; and 2) *al-Istinbāt*. This latter, we are told, consists of *wujūh*, and the very first *wajh* is entitled *al-Ta’līl bi’l-Ism*. This in turn is subdivided into three *ḍarbs*, which may be summarized as follows:¹³⁸

¹³⁷ Cf. al-Shīrāzī’s example *jawāb* as regards the first *ḍarb* of the second *i’tirāḍ* against *al-istidlāl bi’l-Kitāb* (*Ma’ūna*, al-‘Umayrīnī ed., 42). The Ḥanafī P appeals to the ‘*urf* of the *lugha*, as “the *khiṭāb* [of the Qur’ān] is in the *lugha* of the Arabs.”

¹³⁸ al-Baṣrī, *K. al-Qiyās al-Shar’ī*, Ḥamīd Allāh ed., 1039; Hallaq, “Treatise,” 216-17.

- *Ḍarb* 1, example: the *mu‘allil* fixes the ‘*illa* for *taḥrīm al-khamr* on the fact that the Arabs called it *khamr* (*fāsid*, because the Arab designation has no *ta‘thīr*).
- *Ḍarb* 2: the ‘*illa* is established by genus (e.g., the ‘*illa* that it is of the genus of *khamr*, occasions the *ḥukm* of *taḥrīm* — this is *not fāsid*, as being of the genus may have *ta‘thīr*).
- Also allowed is *ta‘līl* by a *ṣifa* among *ṣifāt*, or a *ḥukm* among *aḥkām* (a *ḥukm shar‘ī* may be used as the ‘*illa* to establish another *ḥukm shar‘ī*) [NB: this corresponds to *qiyās al-shabah* and Type I & II *qiyās al-dalāla*].

SHAQ’s appeal to an *endoxon* usage of the *ism al-ubuwwa* fits quite well within this general category of *al-ta‘līl bi’l-ism*; and this is made all the more interesting when we consider that SHAQ was the proponent of an Ahl al-Kalām position, while al-Baṣrī himself represented that rare combination of Mu‘tazilī-Ḥanafī. If there is any significance at all to SHAQ’s utilization of *ta‘līl bi’l-ism* and al-Baṣrī’s inclusion of it as a domain of *qiyās*-oriented *i‘tirāḍāt* (we do not find it in al-Shīrāzī, et al.), it is not immediately clear to me. Pursuit of this question, however, is alone enough to motivate an independent research paper. What is clear, at any rate, is that we may place SH’s objection within this domain-set, and note that shades of his critique bear upon all three of al-Baṣrī’s *ḍarbs*.

We earlier suggested that SH’s strategy here was less concerned with defending his source *akhbār* than with utterly destroying SHAQ’s *qiyās*. It is quite evident that he has succeeded in this — SHAQ ceases to pursue validating his *qiyās al-dalāla*, and we may read his shifting to new ground as conceding the invalidity of his *qiyās* and moving on. In §650, SHAQ launches another dialectical challenge, and we are reminded of our first assessment of the overall Ahl al-Kalām project: *tarjīḥ* of their *āthār-qawl* set via the measure of *qiyās*. No doubt this was the motive which prompted SHAQ to propose a “perfect” *qiyās* in the first place; that is, his *qiyās al-dalāla* rendered forth the very same *ḥukm* as the AH/Abū Bakr group *qawl*. But now SHAQ has conceded to SH’s *khaṣla*-by *khaṣla* dismembering of his “perfect” *qiyās*, so he retreats to a less perfect vantage. Whereas before he could claim his *qawl* to be the *qiyās*, he now challenges SH: “Which of the two *qawls* most resembles the *qiyās* (*fa-ayy al-qawlayn ashbahu al-qiyās*)?” His project has been curtailed — from *āthār-qawl* in complete accordance with the *ma‘nā al-khiṭāb*, he has retreated to *āthār-qawl* “most resembling” the *ma‘nā al-khiṭāb*. His question must still be recognized as a challenge, however, and it contains a clever trap for SH. Were SH simply to pursue the question and argue his own set of *āthār-qawls* as closest to *qiyās*, he would have gone back on his afore-stated stance: “there is no *qiyās* regarding these two *qawls*.” Not surprisingly, the very first thing SH does in his *jawāb* (start of

\$651) is to reiterate his *mu‘āraḍa bi’l-nuṭq*, saying: “There is no *qiyās* in/regarding either *qawl*.”

We will note that it has become very difficult to classify SHAQ’s questions at this point in the dialectical sequence. The discussions we have found in the *jadāl*-theory texts as regards the defining and proper ordering of questions have been presented in an abstracted, and ideal, light. There we find a simple, logical ordering for Q, proceeding cautiously so as to never retract or accidentally concede. The reality of this particular dialectical sequence, however, has seen a number of twists whereby SHAP has become SHAQ, and wherein SHAQ cannot proceed to dismantle his opponent’s *istidlāl/taqlīd*, which is equal to his own, nor can he dismantle his *‘aql* arguments — for SH denies *qiyās*, and brings nothing to fill the void except his *āthār-qawl*. In short, even as questioner SHAQ is constantly on the defensive, as SH does nothing positive — i.e., he does not assert his *ḥukm* — but instead contents himself with dismantling whatever SHAQ brings forward. Thus, SHAQ’s questions continue in the vein of “*su’āl ‘an wajh al-i’tirād*,” or “*muṭālaba bi’l- taṣḥīḥ al-i’tirād*,” or some other such combination we do not find in the *jadāl*-theory texts.¹³⁹

One thing is clear: a number of the dialectical questions we have encountered thus far (including “which of the two *qawls* is closer to the *qiyās*?”) do not seem to “fit” the neatly-ordered question hierarchy of al-Bājī. The implications of this, however, are not at all clear. We might conjecture that over time, juridical *jadāl* in practice became more refined and strictly-ordered as *jadāl*-theory itself became more and more systematized. Thus, the first fully-systematized treatises saw no need to address questions which fell outside of al-Bājī’s (and others’) hierarchy — for they simply would never have been asked in the first place (or at least not in the same way). Still, a category of “*i’tirād*-oriented” questions/objections (e.g., “with what do you claim to supplant my *qiyās*?” or “on what basis do you claim your *khābar* is *awlā* than my *khābar*?”) seems like something we ought to find in the texts (in addition to the *jadāl*

¹³⁹ Of course, we find several relevant challenges among the *ajwiba*-responses suggested by our *jadāl* authors, but they do not receive a separate classification or typology. As such, it is a more difficult task to “name” these *i’tirād*-oriented questions/objections, except by combining formulaic elements from the classified categories of *istidlāl*-oriented questions/objections, as we have attempted here. An important disclaimer: our invention of such terms as “*su’āl ‘an wajh al-i’tirād*” are exactly that — our invention, and are not meant to suggest that *jadāl* practitioners or theorists ever entertained such monikers. We are merely attempting to describe, with appropriate Arabic terminology, what we perceive the questioner to intend with his questions. This is similar to our use of *endoxon*: unless otherwise stated, it is simply a handy descriptor, not a strict identification of the subject dialectician’s source or “unspoken” classification.

authors’ suggestions regarding appropriate *ajwiba*). I remain uncertain, however, as how to interpret its absence.¹⁴⁰

At any rate, SH reinforces his “no *qiyās* for either” stance in the first part of his *jawāb* in §651. Immediately thereafter, he — as before, parsimonious in response — supplies a short answer to SHAQ’s challenge, saying: “the *qawl* you have chosen is farther from *al-qiyās* and *al-‘aql*.” We must pause once again and examine this statement carefully, for it is heavy laden with significant implications. As we see time and again (with *al-ma‘qūl*, in §§402, 633, 929, 1056, 1061, and 1411),¹⁴¹ and repeatedly throughout the *Umm*, *al-‘aql* is here presented as a measuring-stick — similar to the sources and guiding principles of the later *adilla ‘aqliyya* and *uṣūl al-‘amaliyya* of Ithnā ‘Asharī Shī‘ī tradition. As we shall do for *ma‘qūl* in the following chapter, we may now do for *‘aql*, although a preliminary electronic search for the term is made more difficult due to the common appearance of *‘aql* as an object of various substantive concerns (e.g., when *compos mentis* is discussed), and due to its polysemous nature (e.g., *‘aql* as referring to *diya*). However, a simple pairing of *al-qiyās wa’l-‘aql*, as above in §651, uncovers two more illustrative usages, as follows.

First, from a discussion of “the non-Muslim combatant who converts to Islam in the Abode of War whilst there belongs to him property therein (*al-ḥarbiyyu yuslimu fī dār al-ḥarbi wa lahu bihā mālun*)” in the *Kitāb Siyar al-Awzā‘*.¹⁴²

593 – [...] This <i>qawl</i> is alien to <i>qiyās</i> , <i>‘aql</i> , and Sunna.	593 – [...] هَذَا الْقَوْلُ خَارِجٌ مِنَ الْقِيَاسِ وَالْعَقْلِ وَالسُّنَّةِ.

Second, from a discussion “regarding the *‘aql* [read: *diya*] of the woman (*fī ‘aqli al-mar’ati*),” in the *Kitāb al-Radd ‘alā Muḥammad b. al-Ḥasan*.¹⁴³

151 – [...] Nor is there in that of which Sa‘īd	151 – [...] وَلَا يَكُونُ فِيهَا قَالَ سَعِيدٌ: السُّنَّةُ. إِذَا

¹⁴⁰ It is quite likely, as has been suggested to me by an examiner of this dissertation, that even the most thorough of *jadāl*-theory treatises would not have accounted for all of the questions and objections which might occur in an actual dialectical exchange. What is important, however, is the great number of “unfamiliar” questions and objections (in terms of the later theory) we find in proto-system *jadāl*, and their formulaic nature; this strongly suggests that earlier manifestations of juridical *jadāl* were indeed quite different from later ones, and that the dialectic of our subject-text and lens-texts represent different phases in the evolution of a larger tradition.

¹⁴¹ We will encounter *al-ma‘qūl* when we analyze the dialectical sequences of §§1056, 1061, and 1411. A final interpretation will be offered in Chap. IV.2 as to precisely what SH means by *‘aql* and *ma‘qūl*.

¹⁴² Ḥassūn ed., vol. 10, pt.15, 346.

¹⁴³ Ḥassūn ed., vol. 10, pt.15, 162. Note that both of these *kutub* are *ikhtilāf* treatises, replete with shorter and extended dialectical sequences.

Part I: The Dialectical Forge
Chapter III: Analyses of “Overtly Dialectical” Presentations in the *Kitāb Ikhtilāf al-‘Irāqīyyīn*

says: Sunna — [not] when it conflicts with <i>qiyās</i> and ‘ <i>aql</i> , unless on the strength of ‘ <i>ilm</i> , according to what we opine. And God Most High knows best.	كَأَنَّ تَخَالَفَ الْقِيَاسِ وَالْعَقْلِ إِلَّا عَنْ عِلْمٍ أَتْبَاعَ فِيمَا نَرَى وَاللَّهُ تَعَالَى أَعْلَمُ.

Two details cannot be ignored here: 1) in both of these examples, *al-‘aql* appears ranked among “sources” — alongside Sunna and *qiyās*; and 2) both instances occur at the concluding section of an openly dialectical exchange.

Moreover, there is a very enlightening discussion in the *Kitāb Ibtāl al-Istiḥsān*,¹⁴⁴ which bears considerable import in terms of SH’s conception and usage of the term ‘*aql*. SH, near the middle of the treatise, reviews a few relevant Qur’ānic indicants, relates the famed *ḥadīth* of the Prophet’s discourse with Mu‘adh [b. Jabal], and then the equally famed *ḥadīth* by which the accurate *mujtahid* receives two rewards and the mistaken *mujtahid* receives one.¹⁴⁵ He then proceeds to an “instructional” dialectic, which I have translated in the appendices of Part II of this dissertation (see appendix II.§651), and which features the Ahl al-‘Uqūl wa’l-Adab.

The Ahl al-‘Uqūl appear once in the *Risāla*,¹⁴⁶ as well, and also during a refutation of *istiḥsān*:

1458 – And if the <i>ta‘ṭīl</i> (suspension/denial) of <i>qiyās</i> were permitted; it would be permitted to the Ahl al-‘Uqūl — without the Ahl al-‘Ilm — that they profess, regarding what has no <i>khavar</i> (report) concerning it, on the basis of what comes to them of <i>istiḥsān</i> (rationalized juristic preference).	1458 – ولو جاز تعطيل القياس جاز لأهل العقول من غير أهل العلم أن يقولوا فيما ليس فيه خبرٌ بما يحضُرهم من الاستحسان.

We should note that the ambiguity of *min ghayr* in this context makes it difficult to determine whether the Ahl al-‘Uqūl and the Ahl al-‘Ilm are exclusive to each other (one cannot belong to both sets), or otherwise. Remarkably, a search among a great many pre-modern sources of Shāfi‘ī *fiqh* has revealed no other occurrence of the Ahl al-‘Uqūl, while among *Uṣūl al-Fiqh* literature in general, we only find mention in 1) the *Iḥkām fī Uṣūl al-Aḥkām* of the Ṣāḥirī Ibn Ḥazm;¹⁴⁷ 2) a line of verse quoted by al-Khaṭīb al-Baghdādī in his *Al-Faqīh wa’l-Mutafaqqih*;¹⁴⁸ 3) the *Muwāfaqāt* of al-Shāṭibī,¹⁴⁹ and 4) the

¹⁴⁴ A treatise on legal theory which is every bit as important as the *Risāla*, but oft overlooked.

¹⁴⁵ §89-90, Ḥassūn ed., vol.10, pt.15, 125.

¹⁴⁶ §1458, Shākir ed., 505. An examiner of this dissertation has also pointed out to me the reference to an Ahl al-Murū‘a wa’l-‘Aql in §1304 (Shākir ed., 470).

¹⁴⁷ Shākir ed., 1:28; 5:146, 161; 8:96.

¹⁴⁸ Al-‘Azzāzī ed., 2:402.

¹⁴⁹ Āl Salmān ed., 2:41, 214.

Baḥr al-Muḥīṭ of al-Zarkashī.¹⁵⁰ We will leave off further investigation for the moment, and return to the question of what SH means by ‘*aql* and *ma‘qūl* in Chapter IV.2. For now, we will simply state our conclusion from the forthcoming discussion: by ‘*aql* and *ma‘qūl*, SH means something like “that which may be rationally inferred from the textual *dalīl* (from *Kitāb* and *Sunna*) when it is not directly stated therein.” In other words, ‘*aql* and *ma‘qūl* are used in practically the same way that al-Shīrāzī, al-Bājī, et al. conceive of *ma‘qūl aṣl* (i.e., *laḥn al-khiṭāb*, *faḥwā al-khiṭāb*, and *dalīl al-khiṭāb*) — with the exception of *qiyās*, which al-Shāfi‘ī always lists separately from ‘*aql* and *ma‘qūl*.

Returning to our dialectical sequence, we find that SHAQ’s question “which of the two *qawls* most resembles the *qiyās*” has again born no fruit — SH, again, avoids saying anything positive about his *akhbār*. He does not say “mine is closer to *qiyās* than yours;” rather, he simply says “yours is farther from the *qiyās* and the ‘*aql*.” The significance is that SHAQ must remain on the defensive, still, despite the fact that he has been in the role of Q for some time now, because SH has given him nothing positive to critique. All that SH has done, in fact, is to suggest his own objections in such a way that SHAQ is left with no option except to keep asking SH to reveal the particulars of his objection. Such is the case now, and SHAQ meekly asks (§652): “And where is that (*fa-ayna dhālika*)?”

We may attempt to identify SH’s *jawāb* and SHAQ’s follow-up question as follows: First of all, SH has — in pre-empting SHAQ’s *qiyās*-measure *tarjīḥ* project, brought his own “counter-*tarjīḥ*.” Moreover, the *qiyās*-measure has now been twinned with the measure of *al-‘aql*. Of course, SH would have to say something positive regarding his *āthār* in order to properly preponderate them over SHAQ’s *āthār* on the basis of closer proximity to *qiyās* and ‘*aql*. However, SH does no such thing. What is more, his true intention is revealed in following sections: he will, in fact, turn SHAQ’s proposed *qiyās* on its head — via an *i‘tirād* of *al-qalb*.¹⁵¹ Thus we might best understand SH’s second claim in §651 as a setting-the-stage for a “hypothetical” *qalb*. As for SHAQ’s “*fa-ayna dhālika*” in §652, it is once again of a genus we don’t find in the *jadāl*-theory literature — that genus of *i‘tirād*-oriented questions/objections. Here, he appears to be anticipating SH, and demands that he pinpoint the *locus* (hence: *ayna*?) of his own *qawl*’s failure to conform to *qiyās* and ‘*aql*. In other words, SHAQ’s dialectical question is

¹⁵⁰ Dār al-Kutubī ed., 6:493, and 8:96 — in paraphrase of the *Risāla* passage (§1458, above).

¹⁵¹ In so many words, SH will say that — were *qiyās* valid here — the same *awṣāf* should produce a *ḥukm* closer to the SH *qawl* than to the SHAP *qawl*.

something akin to a “*muṭālaba bi wajh al-man’ / wajh al-mu‘āraḍa / wajh al-qalb*,” etc. Again, SHAQ is left asking SH “how does your *i‘tirāḍ* work?”

In §§653ff., SH more than answers the question; he commandeers the role of Q, then pushes SHAP to concede a number of *endoxa* premises, then seals at last his *elenchus* via *qalb*. The first stage of the process may be outlined thus: 1) in §653 SH asserts himself as Q with an opening *ara’ayta* question: “do grandfather and brother claim kinship to the deceased *bi-qarābati anfusihimā*, or *bi-qarābati ghayrihimā*? (this latter being the first premise he wants SHAP to concede);¹⁵² 2) SHAP is uncertain as to the relevance and/or significance of this dichotomous choice thrust upon him, and is rightly hesitant to answer — his *jawāb* in §654 is thus itself a question seeking clarity/explanation: “What of it?” or “What are you asking me (*wa mā dhālika*)?”; 3) SH takes advantage of this request to fine-tune the premise he seeks, and to “feed” it to SHAP in just the formula he requires it to be conceded in: “Wouldn’t the grandfather say: *anā abū abī al-mayyit*, and the brother say: *anā ibnu abī al-mayyit*?” His objective, of course, is that SHAP (temporarily SHAQ) concede to a *locus* of *mīrāth*-claim in the *qarāba* with the father of the deceased. In §656, SHAP concedes (“*balā*”), and thus SH secures the first stage of his *qalb*. He then confirms SHAQ’s concession of the “axis of *qarāba*” by plainly stating it in §657.

In §658, SH proceeds to the next stage — introducing the *mas’alat al-qalb*: “Make the *abī al-mayyit* himself the *mayyit*,” he enjoins of SHAP. “Now which of the two is *awlā* in quantity of *mīrāth*; his son [corresponding to the brother of the *mas’ala* at hand] or his father [corresponding to the grandfather of the *mas’ala* at hand]?” For the sake of clarity, we may chart the *mas’ala* at hand and the *mas’alat al-qalb* as follows:

Mas’ala at Hand	Individual	Mas’alat al-Qalb
• Grandfather of deceased	← A →	• Father of deceased
• Father of deceased	← B →	• DECEASED
• DECEASED • Brother of Deceased	← C & D →	• Son of deceased • Son of deceased
• Son of deceased	← E →	• Grandson of deceased
NB: The boxed “A” and “D” are the same individuals in both <i>mas’alas</i> .		

¹⁵² NB: thus we witness yet another usage of the *ara’ayta* formula: presenting P with a dichotomous choice, in this case: “kinship via X, or kinship via not-X?”

SH, working from the conceded “axis of *qarāba* in the father of the deceased” premise, now pushes SHAP to concede the *endoxon* ruling for his *mas’alat al-qalb* — who is *awlā* in *mīrāth*, father or son? In §659, SHAP has no choice but to rule appropriately: the son is *awlā* (with five-sixths) than the father (with one-sixth). Thus, he concedes to what we might call the “*qalb*-premise.” And so, with both conceded premises in hand, SH (in §660) springs his *elenchus* via *qalb* in the form of a rhetorical question to which SHAP is not expected to have a reply: “Why did you make the grandfather eclipse the brother when — if the father dies [as in the *mas’alat al-qalb*] — he [the brother] is *awlā*?” SH now confirms *qalb* by stating his “reversal:” If you must eclipse one by the other [i.e., if *qiyās* actually obtained here, which it does not], it should be the brother eclipsing the grandfather [the “reverse” of the AH/Abū Bakr *āthār-qawl* — hence “*qalb*”].

We should pause briefly to acknowledge two significant points. First of all, §§651ff. is testimony to the use of *qalb*-reversal in juridical dialectic some two hundred years and more before our earliest extant *jadal*-theory treatises. Al-Baṣrī dedicates both the regular overview and a separate subsection to the move, treating some of its peculiarities and the *ikhtilāf* regarding it;¹⁵³ while al-Shīrāzī, al-Bājī, Ibn ‘Aqīl, et al., all treat *qalb* as a staple of *qiyās*-oriented *i’tirādāt*.¹⁵⁴ Second, and before placing SH’s species of *qalb* in the *jadal*-theory hierarchies, we must remind ourselves that SH is engaged in — has mostly been engaged in — a *hypothetical* enterprise. Simply put, he denies that *qiyās* obtains for either of the opposing *qawls*, and whether he dismantles SHAP’s arguments via *naqd*, *qalb*, *mu’āraḍa*, etc., he is doing so for the sake of argument.

This is important to recognize here, for *naqd*, *qalb*, *mu’āraḍa* and other *qiyās*-oriented objections entail the existence of, or potential for, a counter-*qiyās*. But SH, of course, refuses to entertain the notion. Thus, we are witness to something which is at once in close conformity with the early *jadal*-theory literature, and at once unique to SH. This is a style of argumentation he employs time and again — a powerful genre of *reductio* arguments which invariably open with: “I deny that what you say can be the case, but let us, for the sake of argument, assume that it could be the case; X, Y, and Z would result, none of which you yourself accept, and thus do you contradict yourself / prove inconsistent / etc.” It is for this reason — due to the “unreal” mode of SH’s argument style — that we must refer to his objections as “hypothetical.” For *qalb*, e.g., there has to be real *‘ilal* for Q to work with; but SH neither recognizes any *‘illa* on the

¹⁵³ *Kitāb al-Qiyās al-Shar‘ī*, al-Mays ed., 1040f., 1048ff.; Hallaq, “Treatise,” 217f., 224ff.

¹⁵⁴ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., [missing]; Turkī ed., 259-61; Ibn ‘Aqīl, *K. al-Jadal*, 62-3 §§295-301; al-Bājī, *Minhāj*, Turkī ed., 174ff., §385ff.; al-Juwaynī, *Kāfiya*, 217ff.

part of SHAP, nor introduces one of his own — he simply shows that SHAP’s own ruling for the *mas’alat al-qalb* should bring him to rule the reverse of what he rules for the *mas’ala* at hand. This is *qalb* in general, but not in particulars — a consequence of SH’s “unreal” argument style. It is important we bear this in mind while identifying SH’s *qalb* in the *jadāl* works, and it is important for what comes next in terms of his “unreal” *mu’āraḍa*.

Al-Shīrāzī’s first *ḍarb* of *qalb* (Shīr.VII.14.1) is called *qalb bi-ḥukm maqṣūd*. This is a fair description of SH’s argument, and al-Shīrāzī’s example *mas’ala* parallels it; for the focus here is upon SHAP’s “aimed-at *ḥukm*” which — without changing a single component of his reasoning — can be shown to be the *reverse* of what he should have concluded. P says: Due to components A-C, I rule that X is the case; Q objects: Due to components A-C, you *should* rule that X is *not* the case. The “aimed-at *ḥukm*” is reversed, hence: *qalb bi-ḥukm maqṣūd*.

Al-Bājī’s typology, on the other hand, devolves from a different ordering principle — thus, we find the closest match to SH’s “hypothetical” *qalb* to be “*qalb bi-ba’ḍ awṣāf al-‘illa*” (Bāj. IX.B.9.2). We are unaware, of course, as to the complete *‘illa* for the *mas’ala* at hand, but SH has shown us quite clearly that a part of it — the shared property of *qarāba* through the father — ought to be efficient in occasioning the reverse of SHAP’s ruling regarding the grandfather. Hence *qalb* as regards “some of the *awṣāf*.” Importantly, al-Bājī adds a note to this species of *qalb*, saying: “Indeed, it is of the *bāb al-mu’āraḍa* according to what our *shaykh* Abū Ishāq [al-Shīrāzī] stated, because there belongs to the *mustadill* the right to say: I only made the *‘illa* the collectivity of the *awṣāf*, so when you reversed some/one of them, you did not invalidate the *‘illa*; rather, you have only obliged another.”¹⁵⁵ Remarkably, although SHAQ (reverting to the role of questioner in §661) does not follow this formula directly, his next dialectical question shows precisely the same understanding of SH’s *qalb* as entailing a kind of *mu’āraḍa*: “So how,” SHAQ asks, “*should* the *qiyās* be as regards it?”

SHAQ has perceived SH’s *qalb* just as al-Shīrāzī (according to al-Bājī) said he ought to perceive it. We may thus read his question in §661 in the spirit of an *i’tirāḍ*-oriented objection — something like a “*su’āl ‘an wajh al-mu’āraḍa*,” or a species of *muṭālaba*. The gist of his question is: “You have knocked down my *qiyās*, but you have never replaced it with something better — so how *should* the *qiyās* be for this *mas’ala*?” In essence, he is demanding that SH produce a counter-*qiyās*; and, as we shall see, SH at

¹⁵⁵ al-Bājī, *Minhāj*, Turkī ed., 175-6, §387.

once obliges him and denies him full satisfaction, simply by sticking to his “unreal” style of argument. In other words, SH responds with a “hypothetical” counter-*qiyās* opposing the SHAQ position — what follows is an “unreal” *mu‘āraḍa* of *qiyās* by “hypothetical” counter-*qiyās*.

In §§662ff., SH develops his unique argument in three parts. He begins by reassuring us that he still finds true *qiyās* untenable, though he now formulates this message differently. He says: “No *ma’nā* is permitted for the *qiyās* as regards both of them, together.” In other words, when brother and grandfather are brought together as contenders for a portion of *mīrāth*, no *ma’nā* can be extracted from the *mas’ala* and announced as efficient. We have noted this before: SHAP’s attempted *qiyās* was not the sort for which an *illa* was known, and SH made short work of SHAP’s *qiyās al-dalāla*. If we were to attempt to identify this first objection on the part of SH, then we might call it a form of *mu’māna’a* by which the *far’* is prevented from being a *far’* due to some set of considerations (among them, in this case, the impossibility of extracting a *ma’nā* from the brother-grandfather *mas’ala*). That being said, SH makes the jump into “unreal” mode — he says: “If there belonged to it a *ma’nā*...” — and thus initiates the anticipated “hypothetical” *mu‘āraḍa qiyās* (which “hypothetically” supplants the SHAQ *qiyās* already discredited via a “hypothetical” *qalb*). The hypothetical *mu‘āraḍa qiyās* is first stated in terms of its *ḥukm* solution: “If there was a *ma’nā* [to this *qiyās*], it would have been right that we should always make there belong to the brother... five-sixths, while we make there belong to the grandfather one-sixth.” In other words, the result of this *mu‘āraḍa qiyās* confirms the hypothetical *qalb* conclusion: the brother is still *awlā* in terms of *mīrāth* than the grandfather.

But it is one thing to state the conclusion of one’s hypothetical *mu‘āraḍa qiyās*, and another to demonstrate the validity of one’s *qiyās*-reasoning which achieved that result. Accordingly, SH straight away sets about demonstrating his *mu‘āraḍa qiyās*, and, moreover, he does it in a properly dialectical fashion: by securing the premises requisite to his *mu‘āraḍa* from SHAQ himself. SH accomplishes this through a three-part *ara’ayta* question, starting in §663, whose sole purpose is to introduce the *endoxa adilla* requisite to his hypothetical *mu‘āraḍa*, and to which SHAP (now that SH has assumed the role of Q once again) cannot help but concede. First, the *ara’ayta* pushes SHAP to concede to the fact that brothers are confirmed a *farḍ*-share in the Qur’ān — SHAP indeed concedes with a simple “Yes” in §664. In §665, still governed by the *ara’ayta* of §663, SHAP is pushed to concede another premise: there does not belong to the

grandfather a *farḍ*-share in the Qur’ān. As he must, SHAP concedes in §666 with a simple “No.”

With two questions, governed by the same *ara’ayta* formula, SH has secured from SHAP the premises requisite to his hypothetical *mu’āraḍa*. Before proceeding to *elenchus*, however, he must make sure to have closed all doors to objection. Thus — and with firm assertion — he states that the same (confirmation of brother’s *farḍ*-share; non-confirmation for grandfather’s) is true of the Sunna — except for a single Sunnaic *dalīl* to which SH objects before it may even be raised as counter-*naql*.¹⁵⁶ His objection to the sole possible exception is stated in a patently transmission-oriented *i’tirāḍ*: the Sunnaic *dalīl* in question is “of a singular mode (*min wajhin wāḥidin*) whose like has not received full confirmation from the Ahl al-Ḥadīth (*lā yuthbituhu... kulla tathbīt*).” Finally, with all doors closed, SH announces his *elenchus* by way of a critique in which the superiority of his hypothetical *mu’āraḍa qiyās* is implied: “I don’t know except that you have discarded the stronger of each *wajh* for the weaker.” Implied here is that the conclusion of SH’s *mu’āraḍa-qiyās* (brother is *awlā* in *mīrāth*) is built upon — extended from — the epistemically stronger *wujūh* of Kitāb and Sunna; whereas the conclusion of SHAP’s *qiyās* (grandfather is *awlā*) ignores these stronger *wujūh*, and is built upon weaker stuff.

We must again reiterate that this is a “hypothetical” *mu’āraḍa* — SH does not believe that *qiyās* obtains in this *mas’ala*. We may still, however, identify his “hypothetical” *mu’āraḍa qiyās*: it is a Type I *qiyās al-dalāla* whereby known *aḥkām* provide indicant for the brother being *awlā* in *mīrāth* as regards the *mas’ala* at hand. To review, then, SH — all the while in “unreal” for-argument’s-sake-argumentation-mode — first reversed SHAP’s *qiyās* via the *i’tirāḍ* of *qalb*, which in turn implies a kind of *mu’āraḍa*, which SHAP induced SH to demonstrate, which SH then did, in the form of a counter-*qiyās al-dalāla* from *endoxa aḥkām* of Qur’ān and Sunna. This final stage we may easily identify in the *jadal*-system treatises: it is *al-farq bi-qiyās al-dalāla* (Shīr.VII.15.2.2.1; Bāj.IX.B.15.2.2.1), and conforms perfectly with al-Shīrāzī’s definition: “that it [the *far*] be severed/differentiated from [the *aṣl*] (*yufarraqa*) by a *ḥukm* of the *aḥkām al-shar‘*.”¹⁵⁷ Al-Bājī’s definition for the relevant subspecies of *farq bi-dalālat al-ḥukm* is also quite descriptive of SH’s “hypothetical” *mu’āraḍa*: “that he

¹⁵⁶ We will again note this demonstrates the spirit of “good” dialectic; SH leaves no opposing stone unturned, even when his opponent does not mention it himself.

¹⁵⁷ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 116-17; al-Bājī, *Minhāj*, Turkī ed., 203-4, §461-2.

sever/differentiate (*yufarriqa bayn*) the *far‘* and the *aṣl* by way of a *ḥukm* peculiar to the *far‘* which does not part from it (*lā yufāriquhu*).”

Once more, before closing this analysis, we must repeat that this hypothetical *mu‘āraḍa qiyās* does not represent SH’s solution to the *mas‘ala* at hand. We have already seen what that is: strict adherence (*taqlīd*) to the *āthār-qawl* whereby grandfather and brother are guaranteed equal shares — half and half. All of these hypothetical arguments are meant only to show that SHAP’s *qiyās* would be wrong, even if *qiyās* obtained for this *mas‘ala*. This is a powerful argument style in the hands of SH, and he appears — at least in the *K. Ikhtilāf al-‘Irāqīyyīn* — the unique master of it. Certainly, we do not find any SHAQ putting SH through the same motions of “suppose what you say is true...;” and I have yet to discover in the *jadāl*-theory texts discussions of the sort of extended “unreal” *i‘tirāḍāt* we have here.

[masā’il-set #5] §§686-704

Summary of Analysis:

686 – وَإِذَا تُوفِّيَ الرَّجُلُ وَتَرَكَ امْرَأَتَهُ وَتَرَكَ فِي بَيْتِهِ مَتَاعًا، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يُحَدِّثُ عَنْ حَمَّادٍ، عَنْ إِبْرَاهِيمَ أَنَّهُ قَالَ: مَا كَانَ لِلرَّجَالِ مِنَ الْمَتَاعِ فَهُوَ لِلرِّجَالِ، وَمَا كَانَ لِلنِّسَاءِ فَهُوَ لِلْمَرْأَةِ، وَمَا كَانَ لِلرِّجَالِ وَالنِّسَاءِ فَهُوَ لِلْبَاقِي مِنْهُمَا الْمَرْأَةُ كَانَتْ أَوْ الرَّجُلُ.	• (686) AH transmits <i>naql</i> for <i>mas’ala</i> #1: <i>athar-qawl</i> of Ibrāhīm • [AH <i>taqlīd</i> of <i>athar-qawl</i> of Ibrāhīm]
687 – وَكَذَلِكَ الزَّوْجُ إِذَا طَلَّقَ؛ وَالْبَاقِي الزَّوْجُ فِي الطَّلَاقِ، وَبِهِ كَانَ يَأْخُذُ أَبُو حَنِيفَةَ وَأَبُو يُوسُفَ.	• (687) Apparent continuation of <i>athar-qawl</i> of Ibrāhīm — ruling for <i>mas’ala</i> #1 extended to <i>mas’ala</i> #2; AH and AY adherence specifically stated • [AH & AY <i>taqlīd</i> of <i>athar-qawl</i> of Ibrāhīm; al-Sarakhsī’s <i>Mabsūṭ</i> supplies AH <i>isti’māl</i>-based reasoning]
688 – ثُمَّ قَالَ بَعْدَ ذَلِكَ: لَا يَكُونُ لِلْمَرْأَةِ إِلَّا مَا يُجَهِّزُ بِهِ مِثْلَهَا فِي ذَلِكَ كُلِّهِ؛ لِأَنَّهُ يَكُونُ رَجُلٌ تَاجِرٌ عِنْدَهُ مَتَاعُ النِّسَاءِ مِنْ تِجَارَتِهِ أَوْ صَانِعٌ أَوْ تَكُونُ رَهُونًا عِنْدَ رَجُلٍ.	• (688) AY recants, proposes different ruling for <i>masā’il</i> #1-2 • AY ‘<i>aql</i> argument with “because” problematizes gender-based assumptions by appealing to three potentially efficient <i>awṣāf</i> • [implied AY <i>i’tirāḍ</i> against the <i>athar-qawl</i> of Ibrāhīm: three-fold <i>naqḍ</i> or <i>kasr</i> (Shīr.VII.7 or Shīr.VII.8; Bāj.IX.B.11.1 or Bāj.IX.B.12.2.1)]
689 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: إِذَا مَاتَ الرَّجُلُ أَوْ طَلَّقَ فَمَتَاعُ الْبَيْتِ كُلُّهُ مَتَاعُ الرَّجُلِ إِلَّا الدَّرْعُ وَالْخِمَارَ وَشِبْهَهُ، إِلَّا أَنْ تَقُومَ لِأَحَدِهِمَا بَيْنَةٌ عَلَى دَعْوَاهُ.	• (689) IAL rulings for <i>masā’il</i> #1-2 • [IAL <i>i’tirāḍ</i> against the AH & AY rulings implied, but <i>aṣl/istidlāl</i> not indicated; “wife and her possessions are in the <i>yad</i> of the husband” argument (possibly maintained by IAL) provided by al-Sarakhsī]
690 – وَلَوْ طَلَّقَهَا فِي دَارِهَا كَانَ أَمْرُهُمَا عَلَى مَا وَصَفْتُ فِي قَوْلِهِمَا جَمِيعًا.	• (690) AY/MIH reports extension of AH vs. IAL rulings to <i>mas’ala</i> #3
691 – قَالَ الشَّافِعِيُّ: وَإِذَا اخْتَلَفَ الزَّوْجَانِ فِي مَتَاعِ الْبَيْتِ يَسْكُنَانِهِ قَبْلَ أَنْ يَتَفَرَّقَا أَوْ بَعْدَ مَا تَفَرَّقَا، كَانَ الْبَيْتُ لِلْمَرْأَةِ أَوْ الرَّجُلِ، أَوْ بَعْدَ مَا يَمُوتَانِ وَاخْتَلَفَتْ	• (691) SH reformulates <i>masā’il</i> in more detailed variants, then declares <i>taswiya</i> for all of them • [SH: <i>fa-sawā’un dhālika kulluhu</i> = SH

فِي ذَلِكَ وَرَثَتُهُمَا بَعْدَ مَوْتِهِمَا أَوْ وَرَثَةُ الْمَيِّتِ مِنْهُمَا وَالْبَاقِي، كَانَ الْبَاقِي الزَّوْجُ أَوْ الزَّوْجَةُ فَسَوَاءٌ ذَلِكَ كُلُّهُ. فَمَنْ أَقَامَ الْبَيِّنَةَ عَلَى شَيْءٍ مِنْ ذَلِكَ فَهُوَ لَهُ، وَمَنْ لَمْ يُقِمِ بَيِّنَةً فَالْقِيَاسُ الَّذِي لَا يُعْذَرُ أَحَدٌ عِنْدِي بِالْعَفْلَةِ عَنْهُ عَلَى الْإِجْمَاعِ أَنَّ هَذَا الْمَتَاعَ فِي أَيْدِيهِمَا مَعَ فَهُوَ بَيْنَهُمَا نَصْفَانِ، كَمَا يَخْتَلِفُ الرَّجُلَانِ فِي الْمَتَاعِ بِأَيْدِيهِمَا جَمِيعًا فَيَكُونُ بَيْنَهُمَا نَصْفَيْنِ بَعْدَ الْإِيمَانِ.	“taswiya-subsumption”] • SH rulings for combined <i>masā’il</i> dependent upon <i>bayyina</i> distinction and joint possession • SH <i>istidlāl bi’l-qiyās</i> from an <i>aṣl</i> which is sanctioned by <i>ijmā’</i>, stated in clear terms [<i>‘illa</i> (composed of two efficient properties) is implied] • [implied SH <i>i’tirāḍ</i> of AH, AY, and IAL positions; gender-based considerations denied efficiency — no <i>bayyina</i> + joint-possession = <i>‘illa</i>; this is <i>mu‘āraḍa</i> of <i>qiyās</i> by <i>qiyās</i> (al-Baṣrī), or <i>al-mu‘āraḍa bi-‘illa muḥtada’a</i> (Shīr.VII.15.2.1; Bāj.IX.B.15.2.1)]
692 – فَإِنْ قَالَ قَائِلٌ: فَكَيْفَ يَكُونُ لِلرَّجُلِ النَّصُوحُ وَالْخُلُوقُ وَالْدُّرُوعُ وَالْخُمْرُ، وَيَكُونُ لِلْمَرْأَةِ السَّيْفُ وَالرُّمْحُ وَالْدَّرْعُ؟	• (692) SH initiates “instructional” dialectic by introducing SHAQ dialectical question (<i>fa-in qāla qā’il</i>): • [SHAQ <i>i’tirāḍ</i>-oriented objection: <i>muṭālaba bi-wajh i’tirāḍ ‘adam al-ta’tḥīr</i> (?); first stage in charge of <i>naqd/kasr</i>/etc. (?); SHAQ is asserting gender-based <i>‘illa</i>]
693 – قِيلَ: قَدْ يَمْلِكُ الرَّجَالُ مَتَاعَ النِّسَاءِ وَالنِّسَاءُ مَتَاعَ الرَّجَالِ.	• (693) SH <i>jawāb</i> part 1 (<i>qāla</i>): assertion of part of <i>naqd</i> premise #1
694 – أَرَأَيْتَ لَوْ أَقَامَ الرَّجُلُ الْبَيِّنَةَ عَلَى مَتَاعِ النِّسَاءِ، وَالْمَرْأَةُ الْبَيِّنَةَ عَلَى مَتَاعِ الرَّجَالِ، أَلَيْسَ يُقْضَى لِكُلِّ بِنَا أَقَامَ عَلَيْهِ الْبَيِّنَةُ؟	• (694) SH assumes (usurps?) role of Q: <i>ara’ayta</i> question pushes SHAP to concede to <i>naqd</i> premise stated in §693 [<i>bayyina</i> over gender-assumption] • [SH pushes <i>endoxon</i> ruling to which SHAP must concede, delivered by <i>ara’ayta</i>]
695 – فَإِذَا قَالَ: بَلَى.	• (695) SHAP (<i>fa-idhā qāla</i>) concedes • [SH acquires <i>naqd</i> premise #1]
696 – قِيلَ: أَفَلَيْسَ قَدْ زَعَمْتَ وَزَعَمَ النَّاسُ أَنَّ كَيْنُونَةَ الشَّيْءِ فِي يَدَيِ الْمُتَنَازِعِينَ ثُبُتَ لِكُلِّ النَّصْفِ؟	• (696) SH dialectical question (<i>qāla</i>) • (stronger than <i>ara’ayta</i>): <i>a-fa-laysa qad za’amtā wa za’ama al-nāsu...</i> (points toward both <i>naqd</i> and violation of <i>ijmā’</i>) • [SHAQ pushes concession of <i>naqd</i> premise #2, which is doubly <i>endoxon</i>:

	1) SHAP professes it; 2) it is sanctioned by <i>ijmāʿ</i>]
697 – فَإِنْ قَالَ: بَلَى.	• (697) SHAP concedes (<i>fa-in qāla</i>) • [SH acquires <i>naqd</i> premise #2]
698 – قِيلَ: كَمَا تَثْبُتُ لَهُ الْبَيِّنَةُ.	• (698) SH dialectical question (<i>qīla</i>) pushes for concession of <i>naqd</i> premise #3
699 – فَإِنْ قَالَ: بَلَى.	• (699) SHAP concedes (<i>fa-in qāla</i>) • [SH acquires <i>naqd</i> premise #3]
700 – قِيلَ: فَلِمَ لَمْ تَجْعَلِ الزَّوْجَيْنِ هَكَذَا وَهِيَ فِي أَيْدِيهِمَا؟ فَإِنْ اسْتَعْمَلْتَ عَلَيْهِمُ الظُّنُونَ وَتَرَكْتَ الظَّاهِرَ قِيلَ لَكَ: فَمَا تَقُولُ فِي عَطَارٍ وَدَبَّاغٍ فِي أَيْدِيهِمَا عَطَرٌ وَمَتَاعُ الدَّبَّاغِ تَدَايَاهُ مَعًا.	• (700) SH springs first charge of <i>naqd</i> from conceded premises (<i>qīla</i>), then leaps to cover counter-objection • 1) <i>naqd</i>-conclusion flows naturally from the three conceded premises (Shīr.VII.7; Bāj.IX.B.11.1) • 2) SH sets up second <i>masʿalat al-naqd</i> (<i>qīla laka</i>), employing epistemological terms (<i>ẓann</i> and <i>ẓāhir</i>); nature of “joint-possession” ‘<i>illa</i> pinpointed as a “sensory status quo” • [SH pushes SHAP to abandon his “context-override”; SH is edging SHAP closer to a “<i>naqd</i>-dilemma” — if SHAP continues with his context-overrides and assumptions, SH will bring another <i>masʿalat al-naqd</i>, but if SHAP abandons his assumptions, he must rule as SH rules for the <i>masʿala</i> at hand]
701 – فَإِنْ زَعَمْتَ أَنَّكَ تُعْطِي الدَّبَّاغَ مَتَاعَ الدَّبَّاغِينَ وَالْعَطَارَ مَتَاعَ الْعَطَارِينَ.	• (701) SH leaps to pre-empt SHAP intransigence, himself answering — from SHAP perspective (<i>fa-in zaʿamta</i>) — the new <i>masʿalat al-naqd</i> from §700 • [SH builds <i>naqd</i>-dilemma: SHAP not allowed to respond until all exits are cut off, and he will be forced to contradict himself]
702 – قِيلَ: فَمَا تَقُولُ فِي رَجُلٍ غَيْرِ مُوسِرٍ وَرَجُلٍ مُوسِرٍ تَدَايَا يَأْقُوْنَا وَلَوْلُؤَا؟	• (702) SH introduces third <i>masʿalat al-naqd</i> (<i>qīla</i>) • [SH further problematizes the “context-disputed object” to make lack of efficiency more obvious; SHAP pushed to drop context-override, or

	contradict <i>ijmā’</i>]
703 – فَإِنْ زَعَمْتَ أَنَّكَ تَجْعَلُهُ لِلْمُوسِرِ وَهُوَ بِأَيْدِيهِمَا مَعًا خَالَفْتَ مَذْهَبَ الْعَامَّةِ.	(703) SH springs part 1 of <i>naqd</i>-dilemma (<i>fa-in za’amta</i>): “If you rule X, you contradict the <i>madhhab</i> of the ‘<i>amma</i>” [“<i>madhhab</i> of the ‘<i>amma</i>” refers back to §691, an obvious charge of violation of <i>ijmā’</i>; also overlapping that Aristotelian <i>endoxa</i>-set of “most of the people.” Thus, <i>naqd</i>-dilemma #1: violation of <i>ijmā’</i> and/or proposal of non-<i>endoxon</i> ruling (this is <i>mu‘āraḍa bi’l-nuṭq [ijmā’]</i>; Shīr.VII.15.1; Bāj.IX.B.15.1)]
704 – وَإِنْ زَعَمْتَ أَنَّكَ تَقْسِمُهُ بَيْنَهُمَا وَلَا تَسْتَعْمِلُ عَلَيْهِمَا الظَّنَّ، فَهَكَذَا يَنْبَغِي لَكَ أَنْ تَقُولَ فِي مَتَاعِ الرَّجُلِ وَالْمَرْأَةِ.	(704) SH springs part 2 of <i>naqd</i>-dilemma (<i>wa in za’amta</i>): “If you rule Y, you should do the same for the <i>mas’ala</i> at hand” [SH closes his <i>naqd</i>-dilemma; the only feasible SHAP response is concession to SH rulings for this set of <i>masā’il</i>]

Discussion of Analysis:

Our next *mas’ala*-set for analysis exhibits a number of unique features, although it is typical enough in terms of the order of presentation categories, which may be summarized thus: §§686-7 (AH, category F); §688 (AY, category F); §689 (IAL, category G); §690 (AH & IAL, category G); §§691 (SH, category D); §§692-704 (SH vs. SHAQ/SHAP, category A). In general, the *masā’il* of this set consider the question of how to distinguish the commodities (*matā’*) of the house as belonging to husband or wife, when they must be divided for purposes of *mīrāth* or divorce. The stance of AH is noteworthy, for rather than present his own ruling for *mas’ala* #1 (§686; wherein the husband is survived by the wife, leaving his *matā’* in the house), he simply transmits the *athar-qawl* of the famed Successor-jurist Ibrāhīm al-Nakhaṭī.¹⁵⁸ This latter ruled that the *matā’* of men belong to the husband; of women, to the wife; and of both, to whichever one is the *bāqī* (i.e., the survivor). We are left, then, to interpret AH’s position as the most direct form of *taqlīd*. This appears to carry over into §687 as well, where Ibrāhīm’s *qawl*

¹⁵⁸ Matters of *taqlīd* or *istidlāl* from a Successor-jurist do not seem to be discussed in our lens-texts; we will mark this as a potentially unique feature (and a frequent one, as we shall see) of proto-system juridical *jadāl*.

regarding *mas’ala* #1 is extended to *mas’ala* #2 (the husband unilaterally divorces the wife, and is the one remaining [also termed *al-bāqī*] in the house). The adherence of both AH and AY to this two-*mas’ala* ruling is then clearly stated at the end of §687. In a sense, we are thus blocked from gaining insight into the reasoning behind this position, although it is obvious that a gender-based assumption for disputed possessions has been given efficiency in occasioning the relevant *aḥkāṁ*.¹⁵⁹ We should also be reminded that Ibrāhīm al-Nakha’ī was famed as a proponent of *ra’y*, so long as it was twinned with reliable *riwāyāt*.¹⁶⁰

Significantly, and by no means of rare occurrence, we next learn (in §688) that AY recanted from this *qawl* and proposed a different ruling for *masā’il* ##1-2: the wife receives only “that which her like would appropriately be provided with (*mā yujāhazu bihi mithluhā*).”¹⁶¹ He supports this with an *‘aql* argument (initiated with “because”), whereby he problematizes gender-based assumptions of ownership by appealing to three *awṣāf* potentially born by the husband. These, it is evident, would be efficient in occasioning his ownership: 1) if he is a *tājir* of female-oriented *matā’*; 2) if he is a *ṣāni’* [of female-oriented *matā’*]; and 3) if there are [female-oriented] *ruhūn* in his keeping. Not only may we read these, collectively, as an objection to the *athar-qawl* of Ibrāhīm al-Nakha’ī, but they in fact constitute three separate *masā’il al-naqd/al-kasr* — each situation comprises a case wherein the *waṣf* of “*matā’ al-nisā’*” is overridden by another *waṣf*. The object-property efficiency of “it is the *matā’* of women” is cancelled by the party-property efficiency of “he is a *tājir* of *matā’ al-nisā’*” or “he is a *ṣāni’* of *matā’ al-nisā’*,” as well as by the object-property efficiency of “it is a *rahn* in his keeping.” In this manner, a singular reliance upon mere gender-relevancy is proven untrustworthy for occasioning a *ḥukm*, and we may classify AY’s latter ruling as embodying — in broadest

¹⁵⁹ Al-Afghānī [Shaybānī version] (87, n.1) cites al-Sarakhsī (*Mabsūṭ*, 5:213), who lists a host of opinions on *masā’il* ##1-3 from prominent early *fuqahā’*. Here, Abū Ḥanīfa’s reasoning is portrayed as based upon conceptions of *isti’māl* and the husband’s “possession” of the wife. When the object comes under dispute, he ruled on the benefit of assumption, saying: “The [considered] *qawl* is the *qawl* of the *musta’mil*, for the possession (*yad*) of the *musta’mil* here is *aqwā* as regards what is appropriate (*ṣāliḥ*) to one of the two; and as for regarding what is appropriate for them both, the side of the man is preponderated in *ṭalāq*, because he is the *ṣāḥib* of the house, and she had been among the *matā’* in his possession, etc.”

¹⁶⁰ See, among other sources, Lecomte’s short article on al-Nakha’ī in the *EF*², and Sezgin’s references culled from Abū Na’īm’s *Ḥilyat al-Awliyā’* (in *Tārīkh al-Turāth al-‘Arabī*, vol. 1, pt. 3, 18f.).

¹⁶¹ Again, we are offered indication that AY is “following the *ḥujja*,” i.e., practicing the “good” dialectic, not sophistically defending a regional or “school” doctrine.

terms — a three-fold *i’tirāḍ* of *al-naqḍ* or *al-kasr* (Shīr.VII.7 or VII.8; Bāj.IX.B.11.1 or Bāj.IX.B.12.2.1).¹⁶²

We next encounter IAL’s ruling for *masā’il* ##1-2 (§689; all *matā’* of the *bayt* are the *matā’* of the husband, except for obviously female-oriented *matā’* [blouse, veil, etc.]), although, notably, no *aṣl* is supplied in the presentation. IAL is careful to assert a proviso, however, whereby *bayyina* brought by the contender for ownership would override these general husband-favouring and gender-relevant assumptions. We may thus read his ruling as a more refined approach admitting of the usual strength of *bayyina*-backed claims, as well as an implied *i’tirāḍ* of both the AH and AY rulings. We are impeded by not knowing the precise manner of his *istidlāl*, but may see from the ruling itself that an hierarchy of efficient properties is implied: 1) “the claim of party X is backed by *bayyina*” (occasioning a *ḥukm* in favour of party X); followed by 2) “he is the *ṣāḥib* of the *bayt*” (occasioning a *ḥukm* in favour of the husband); and 3) “it is of the *matā’* of women” (occasioning a *ḥukm* in favour of the wife). We are still hindered from a specific identification, but it is evident that these *awṣāf*, ordered in terms of efficiency, were seen by IAL to override those of opposing rulings. Notably, al-Sarakhsī has neglected to mention the *bayyina* proviso in rendering IAL’s ruling. He does, however, provide the argument for those who opine that all of the *matā’* of the *bayt* belong to the husband — even if he resides in the wife’s *bayt* (which appears to be IAL’s position in §690, following): “because the wife is in the possession (*yad*) of the husband, and that which is in her *bayt* is also in the *yad* of the husband — don’t you see/opine (*alā tarā*) that he is the *ṣāḥib* of the *bayt*, and the house (*al-manzil*) is annexed to him (*yudāf ilayhi*)...?”¹⁶³ We may pause momentarily to note the persistence of that staple dialectical formula — *alā tarā* — either as employed by al-Sarakhsī himself, or as forwarded from “historical” disputation, or both.¹⁶⁴ Finally, and before moving on to SH, we will note that (in §690) either AY or MIH reports the extension of AH and IAL rulings to *mas’ala* #3 (wherein the husband unilaterally divorces his wife in *her* house — i.e., she is the *bāqī*). It is due to this we believe IAL to have maintained, as implicit to the

¹⁶² al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 104ff. and 107f.; al-Bājī, *Minhāj*, Turkī ed., 185, §413; and 192f., §436. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 56ff., §§276ff.; and 65f., §§305ff. Al-Bājī’s *kasr* 2.1 is especially apt: “That he eliminate a *waṣf* which is non-efficient in the *ḥukm* which is made conditional upon the ‘illa.”

¹⁶³ Al-Afghānī [Shaybānī version] (87, n.1), citing *Mabsūt*, 5:213.

¹⁶⁴ The “*alā tarā*” formula occurs, astonishingly, well over two thousand times in the *Mabsūt*, mostly employed by al-Sarakhsī himself, at other times in the arguments he relates from others. “*Ara’ayta*,” though far less frequent, still enjoys some 150 occurrences.

second in his hierarchy of efficient properties, the “wife and her possessions are in the *yad* of the husband” argument, as related by al-Sarakhsī.

§691 displays once again SH’s refined approach to dealing with ongoing *masā’il* of this sort, and his ruling and arguments unfold in stages. First, he reformulates *masā’il* ##1-3 into a finer subset, detailing them one by one, as follows:

- the spouses disagree regarding the *matā’* of their shared house
 - before separation
 - after separation
 - when the house belongs to the husband
 - when the house belongs to the wife
- both spouses die, and the heirs disagree as to who owned which of the *matā’*
- the husband/wife survives his/her spouse, and the heirs disagree with him/her regarding ownership of the *matā’*

Having thus detailed all variants of *masā’il* within the broader area of *ikhtilāf*, SH declares: “That, all of it, is one and the same (*fa-sawā’un dhālika kulluhu*).” We will tarry here in order to note a hallmark method of early legal argumentation: *masā’il* of *ikhtilāf*, ruled upon separately by other jurists, are — via the pinpointing of shared efficient properties, and the denial of efficiency for unshared properties — made to receive the same *ḥukm*. Right away we may note some similarity here with what we have termed “*manzila*-subsumption;” accordingly, we will term this species of argument “*taswiya*-subsumption.” Moreover, we will add that — just as *manzila*-subsumption is most often expressed with the formula “X is in the *manzila* of Y,” and variants — *taswiya*-subsumption is most often expressed with the formula “X, and Y, [and Z, etc.] are *sawā’un* [with regard to the *ḥukm*],” and variants. In other words, whenever we find such an expression employing *sawā’un*, we observe *taswiya*-subsumption at work. Finally, we may note that the various “*sawā’un*” formulae enjoy great currency in the *Kitāb Ikhtilāf al-‘Irāqīyyīn* alone (with some 26 occurrences), not to mention the *Umm* as a whole (with some 700 occurrences in addition to those just mentioned). Like *manzila*-subsumption, *taswiya*-subsumption was quite evidently a common feature of the landscape of early Islamic legal argumentation.

Continuing on, we learn that SH asserts a pair of rulings for these *masā’il* tied through *taswiya*-subsumption: 1) if the contender brings *bayyina* for a thing, then it belongs to him/her; 2) if neither contender has *bayyina*, the *matā’* are considered to be in joint possession, and are divided between them half and half. SH states his *istidlāl* for the latter ruling in no uncertain terms. In fact, it is as strong a statement of *istidlāl bi’l-qiyās* as we may find in the *K. Ikhtilāf al-‘Irāqīyyīn*: first, SH states “no one can be excused

for neglecting it;” second, he confirms that it is grounded upon *ijmā‘*; and third, he provides for us the *aṣl*. This latter is introduced by the marker “just like (*kamā*),” and from its presentation we discern the following components: 1) the *aṣl* itself, being two men in joint possession of *matā‘* who disagree regarding ownership; and 2) the *ḥukm*: the *matā‘* are divided between them half and half, after the *aymān*. Although never directly stated, the ‘*illa* is easy to detect, and might be formulated as the combination of two efficient properties: 1) relating to the parties, “neither brings *bayyina*,” and 2) relating to the object of contention, “it is in joint possession of the contending parties.” If we consider this to constitute the ‘*illa*, then we may identify SH’s *qiyās* as *qiyās al-‘illa* and portray it thus:

<i>Aṣl</i> two men disagree as to ownership of <i>matā‘</i>		<i>Far‘</i> two parties [in one of the <i>masā’il</i> of <i>taswiya</i> -subsumption] disagree as to ownership of <i>matā‘</i>
<i>‘Illa</i> neither brings <i>bayyina</i> ; the object is in their joint possession	← SAME →	<i>‘Illa</i> neither brings <i>bayyina</i> ; the object is considered in joint possession of husband and wife
<i>Ḥukm</i> the <i>matā‘</i> are divided between them half and half, after the <i>aymān</i>	ALSO ← SAME →	<i>Ḥukm</i> (?) [should be the same]

This is *qiyās al-‘illa* of the sturdiest construction, and carries the further *ḥujjiyya* of extension from an *aṣl* sanctioned by *ijmā‘*.¹⁶⁵ Moreover, and considering its direct opposition to the *athar-qawl* of Ibrāhīm followed by AH and AY, and to the reasoning of IAL, it most definitely constitutes a species of *i‘tirāḍ* against these positions. Once again, unfortunately, we are held back from a precise identification in the early *jadāl*-theory works due to our lack of knowledge concerning the *istidlāl* of either Ibrāhīm or IAL. What is clear, however, is that SH has completely neutralized any gender-relevancy considerations, and denied the efficiency of such *awṣāf* as “it is the *matā‘* of men/women,” or “the house belongs to the husband/wife,” etc. The only efficient *awṣāf* in all of these cases linked by *taswiya*-subsumption, according to SH, are: 1) neither has brought *bayyina*; and 2) it is jointly-possessed. These alone make up the ‘*illa* which in turn occasions the *ḥukm* of half and half division.

¹⁶⁵ This *ijmā‘*, as we shall see, is further alluded to as the claim of both SHAP and “*al-nās*” (§696), and the “*madhhab al-‘amma*” (§703). These terms, linked with *ijmā‘*, provide more data for SH’s disputed conception of consensus.

And so, although lacking the *istidlāl* of the opposing opinions, we still have some ideas as to which properties deemed efficient by their proponents have been supplanted. We might thus envisage the *qawls* of Ibrāhīm and IAL as emanating from an inferior sort of *qiyās*, and classify SH’s *i’tirāḍ* as either: 1) the *mu’āraḍa* of *qiyās* by way of *qiyās* of which al-Baṣrī spoke;¹⁶⁶ or 2) the *mu’āraḍa bi-‘illa mubtada’a* of al-Shīrāzī and al-Bājī (Shīr.VII.15.2.1; Bāj.IX.B.15.2.1).¹⁶⁷ As to this latter type of *mu’āraḍa*, SH’s *qiyās* conforms well to the pattern set by al-Bājī’s example *mas’ala* (al-Shīrāzī does not have one). Like SH in §691, al-Bājī’s Shāfi’ī Q disagrees with the Mālikī P’s interpretation of what constitutes the efficient property in the *far’* (saying nothing as regards the *aṣl*), and instead proposes a new *‘illa* in the *far’*, linking it back to a different *aṣl* with the same *‘illa*, and thus justifying his counter-*ḥukm*.¹⁶⁸ Al-Bājī’s Shāfi’ī Q, like SH himself in §691, brings a completely new *‘illa*, counter-*aṣl*, and counter-*ḥukm* — a completely new *qiyās al-‘illa* — and it is this, I surmise, which constitutes *mu’āraḍa bi-‘illa mubtada’a*.¹⁶⁹

Having thus set forth his own ruling and argument for the *masā’il* of this section, SH at last initiates an “instructional” dialectical sequence. In §692, he leaps right in with a dialectical question from an anonymous questioner (*fa-in qāla qā’il*). SHAQ challenges SH by asking: “How can there belong to a man [patently feminine objects A-D], and there belong to a woman [patently masculine objects X-Z]?” Thus is it evident from the start that SH’s *qiyās* may be interpreted, as we surmised, as implying the lack of efficiency of gender-based assumptions. Reading SH’s *qiyās* as the product of a *mu’āraḍa* of *qiyās* by way of *qiyās*, or *mu’āraḍa bi-‘illa mubtada’a*, SHAQ’s question may once again be construed in the spirit of an objection to an objection. With the efficiency of gender-based assumptions at stake, we might identify it as something in the manner of a *muṭālaba bi-wajh i’tirāḍ ‘adam al-ta’tḥīr*, or some such combination we do not find in the *jadal*-theory texts. On the other hand, we are reminded that — in cases of *mu’āraḍa* — roles reverse, and the proponent becomes the questioner, with the full array of *qiyās*-oriented *i’tirāḍāt* at his disposal. We may thus read SHAQ’s question — bearing in mind that, in the mode of “instructional” dialectic, SH is teaching his reader how to deal with a potential critique — as an opponent’s attempt to reassert a gender-based *‘illa*. This he might do by leading SH (or any proponent of his *qiyās*) to concede premises from which

¹⁶⁶ al-Baṣrī, K. *al-Qiyās al-Shar’ī*, Ḥamīd Allāh ed., 1044; Hallaq, “Treatise,” 221.

¹⁶⁷ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., [Missing]; Turkī ed., 262, §148; al-Bājī, *Minhāj*, Turkī ed., 201, §455. Cf. Ibn ‘Aqīl, K. *al-Jadal*, 71, §330.

¹⁶⁸ al-Bājī, op. cit.

¹⁶⁹ See my note regarding *mubtada’a* in the *mu’āraḍa* discussions of Chap. II.

he may reconstruct his argument; and, from this perspective, SHAQ’s question may simply constitute the first stage in an attempted charge of *naqd*, or *kasr*, etc.

SH, however, shows us how to halt this project in the bud. In his *jawāb* in §693, he first asserts a premise which, as we shall soon see, constitutes part of a larger strategy to place SHAQ in something of a “*naqd*-dilemma.” Flatly, he states: “Men might own the *matā’* of women, and women the *matā’* of men.” Then, surprisingly, he appears to usurp the role of questioner in §694, pushing his opponent (now SHAP) to concede to his premise with a dialectical question delivered through the familiar *ara’ayta* formula. From the perspective of later *jadāl*-theory, this appears, at first glance, a breaking of the rules. However, we may consider that SHAQ — by ostensibly reasserting his gender-based ‘*illa*, albeit in question form — may be interpreted by an opponent as having (re-) placed himself in the role of P.

Whatever the case, SH has commandeered the station of critique, and his *ara’ayta* of §694 pushes SHAQ to consider a hypothetical case whose *endoxon* solution must be conceded. SHAQ is asked: 1) if a man has *bayyina* for the *matā’* of women; and 2) a woman has *bayyina* for the *matā’* of men; then 3) wouldn’t you yourself judge favourably for the one who furnished *bayyina*? Thus SH pushes for the first premise (*bayyina* establishes ownership over gender-assumptions) of his forthcoming *naqd*-dilemma; and SHAP — still, we will note, in “instructional” mode, preceded by *fa-idhā qāla* — emphatically concedes in §695: “Of course (*balā*)!” SH has easily acquired his first *naqd* premise, and proceeds in §696 to a dialectical question phrased in an even stronger formulation than *ara’ayta*: “And have you not yourself claimed, and ‘the people’ claimed X (*a-fa-laysa qad za’amta wa za’ama al-nāsu X*)?” We will note the double strength of this formulation, for it points not only towards *naqd* (*qad za’amta*), but towards a violation of *ijmā’* (*za’ama al-nās*).¹⁷⁰ As for the “X” of our rendering, it is the — now asserted as doubly-*endoxon* — general ruling that “the existence (*kaynūna*) of the thing in the possession of two contenders confirms, for each of them, half.”¹⁷¹ This we may read as a second *naqd* premise, and, as before, SHAP emphatically concedes in §697, with: “*Balā!*”

In §698 SH now pushes for a final concession, drawing the first two conceded premises together in an effort to confirm the parity of efficiency between *bayyina*-

¹⁷⁰ This reference to *al-nās* clearly refers back to SH’s claim of an *ijmā’*-sanctioned *aṣl* in §691.

¹⁷¹ It is worth considering SH’s use of the term *kaynūna*, here. SH employs *kaynūna* some fourteen times in the *Umm*, and almost always — as in §696 — in combination with “possession” (*yad*). Thus, although *kaynūna* is cognate to the *kawn*, *kiyāna*, *kā’in*, etc. of theological and philosophical discussions, it appears to bear, in SH’s usage, little more than a technical association with possession, as in “the *kaynūna* of object X in the *yad* of party Y.”

backed claims and the status of an object in joint-possession. SHAP again concedes with “*balāl*” in §699, and SH has acquired his third *naqd* premise: joint-possession occasions half and half division between the two contending parties, just as *bayyina* occasions full ownership for the party furnishing it. All premises conceded, SH now springs his first charge of *naqd* in §700: “Then why don’t you treat the two spouses like that, when it is in their joint possession?” This is classic *naqd*: SHAP has conceded to ruling X and Y in general cases where the efficient properties of *bayyina*-backed claims (*naqd*-premise #1) and joint-possession (*naqd*-premise #2) are at work, and yet has ruled other than X and Y in the *masā’il* at hand, wherein one or the other of those same efficient properties must be at work.¹⁷² SH’s first *i’tirād* of *naqd* thus conforms quite well to the formulations of early *jadāl*-theory, whereby P’s conceded *‘illa* is present, but not his elsewhere-practiced *ḥukm* (Shīr.VII.7; Bāj.IX.B.11.1).¹⁷³

What is more, SH’s *naqd*-conclusion flows naturally from the three premises he has garnered from SHAP: 1) *bayyina* establishes ownership over gender-based considerations; 2) joint possession of a thing establishes half-ownership; and 3) joint possession is just as efficient in occasioning half-ownership as *bayyina* is in occasioning full-ownership. Thus, for the *masā’il* at hand (linked through *taswiya*-subsumption), SHAP ought to have ruled either: 1) full-ownership with *bayyina*; or 2) half-ownership without *bayyina*. A contending party, after all, either has *bayyina*, or it does not; and if it does not, the *matā’* are assumed to have been in joint possession. SH might be considered to have achieved *elenchus* at this point, but we are reminded that he has a larger plan in mind. What follows — straight through to the end of this dialectical sequence — is a concise series of pre-emptive strikes whereby SH demonstrates how to cut off any potential counter-objections before SHAP even has a chance to formulate them. Indeed, SHAP is swallowed up by a thoroughly constructed *naqd*-dilemma in which every exit is closed, and we never again hear his voice.

Still in §700, SH moves immediately to cover a potential counter-objection by setting up a second *mas’alat al-naqd* (if we consider the combined *bayyina* and joint-possession questions as constituting a single, first *mas’alat al-naqd*). This he does just in case SHAP prefers to “place doubts over them (*in ista’malta ‘alayhim al-ḡunūn*), and

¹⁷² As such, our “*naqd*-premises” ##1-2 constitute general *masā’il al-naqd*, but we have chosen to present them as premises for the convenience of showing how they link together with *naqd*-premise #3, resulting in a thoroughly confounding conclusion of SHAP’s inconsistency.

¹⁷³ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 104ff.; al-Bājī, *Minhāj*, Turkī ed., 185, §§412-13. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 56f., §§276-7; and al-Baṣrī, *K. al-Qiyās al-Shar’ī*, Ḥamīd Allāh ed., 1041ff.; Hallaq, “Treatise,” 218ff.

abandon the *ẓāhir*,” and we should pause here to note the entry of a patently epistemological set of terms into the argument.¹⁷⁴ It is evident that *ẓāhir* is employed here in the sense of a “sensory status quo:” so far as anyone can tell from external indicants and contexts, the situation is X, and only *bayyina* can shift judgment in favour of one party over the other. Thus, in a sense, SH distinguishes the nature of (or, perhaps, the *ḥikma* behind) the assumption inherent to the *ʿilla* of joint-possession: it is the “sensory status quo” to which any solution to the *masʿala* must revert in absence of *bayyina*.¹⁷⁵ Moreover, it is important to remember that the term *ẓann* is treated in the *uṣūl* literature (mostly in introductory discussions of epistemological first principles), in the sense of “probability.” Al-Juwaynī defines it thus in his *Waraqāt*: “The pairing of two matters, one of them being more evident than the other (*tajwīz amrayni aḥaduhumā aẓharu min al-ākhar*),”¹⁷⁶ and al-Bājī’s definition in his *Minhāj* is almost verbatim the same.¹⁷⁷ Note that *ẓann* and *ẓāhir* are linked by this definition, and so also do they both occur here in §700. It may not be too preposterous, then, should we hold out the possibility of a more technical translation for SH’s “*in istaʿmalta ʿalayhim al-ẓunūn*” as “if you make use of probabilities as concerns them.” Whatever the case, the “*ẓāhir*” is certainly a staple concern of *uṣūl al-fiqh* treatises, and its usage here in a venue of dialectic is noteworthy.

Returning to SH’s *masʿalat al-naqd*, preceded by this epistemological appeal, we find that SH is now pushing for SHAP to abandon what we might, in broader terms, designate as his “context-override.” That is to say, SHAP has already asserted a gender-based assumption which we may consider an appeal to gender-context, and SH is now introducing a *masʿalat al-naqd* exhibiting a trade-context, and — as we shall see — will soon introduce yet another *masʿalat al-naqd* exhibiting a solvency-context.¹⁷⁸ As with his gender-based assumptions, SHAP is expected to adhere to a principle of “overriding” the *endoxon bayyina*/joint-possession efficiency with a special property-efficiency

¹⁷⁴ Cf. SH’s use of *ẓāhir* in §685 (in a category D argument, directly preceding the *masʿal* of this dialectical sequence), which includes a reference to *milk*.

¹⁷⁵ Although *istiḥāb al-ḥāl* is conspicuously absent from SH’s legal theory, we might conjecture as to whether or not this argument may be subsumed by what was later to become known as *istiḥāb al-ḥāl al-ʿaql* — or even, considering that SH’s *aql* for *qiyās* enjoys the sanction of *ijmāʿ*, the highly-contented *istiḥāb al-ḥāl al-ijmāʿ*. We will revisit this briefly in Chapter IV.2.

¹⁷⁶ *Waraqāt* (in *Arbaʿa Mutūn fī Uṣūl al-Fiqh ʿalā al-Madhāhib al-Arbaʿa*), Qāsimī and Balkhī ed., 46.

¹⁷⁷ Turkī ed., 11, §14. “*tajwīz amrayni fa-zāʿidan, aḥaduhumā aẓharu min al-ākhar*.”

¹⁷⁸ Ultimately, as we shall see, SH plays these various contexts against each other in order to lay bare SHAP’s inconsistency and internal contradictions.

consideration derived from the *mas’ala* context. Thus, we will label his general property-efficiency arguments as “context-overrides.”

And so SH presents SHAP with a new *mas’alat al-naqd* wherein ‘aṭṭār and dabbāgh are in joint possession of the *matā’* of their individual trades, which they each claim against the other — SH (rhetorically) asks: “What do you say [about that]?” Quite obviously, SHAP is being pushed to abandon the sort of “context-override” by which he considered feminine-*matā’* as relevant to the wife, and masculine-*matā’* as relevant to the husband. Now, however, the *mas’ala* setting has changed, and, for consistency’s sake, we ought to expect he would override the joint-possession status of the *matā’* of contention by a trade-relevancy consideration. But SH does not pause for an answer, and his strategy becomes clear: if SHAP persists in overriding the joint-possession ‘illa with context-based assumptions, then SH will simply stick him with another *mas’alat al-naqd*. If, however, he abandons his “context-overrides” for this or other *masā’il*, then he must do the same for the *masā’il* at hand. In such a manner SH marches SHAP onwards to a larger *naqd*-dilemma.

In §701, SH leaps to pre-empt any intransigence on the part of SHAP, positing, from an insistence on context-override, that SHAP might rule for the dabbāgh the *matā’* of the dabbāgh, and for the ‘aṭṭār the *matā’* of the ‘aṭṭār (a context-override of trade-relevancy, as opposed to gender-relevancy). Thus SH builds the *naqd*-dilemma, for in case SHAP were to maintain this position, he leaps to yet another *mas’alat al-naqd* in §702. Here, SHAP is again (rhetorically) asked: “What do you say as regards (*fa mā taqūlu fi*)...,” and confronted with a case in which the *mūsir* and the *mu’sir* each claim against the other a ruby and pearl in their joint possession. We will pause here to note that this is more than a clever strategy on the part of SH — a closing off of all exits before SHAP has a chance to respond —, but it is an excellent device for this kind of “instructional” dialectic. SH is providing his student with a step-by-step elevating of *masā’il*: if P persists with his context-override, introduce the ‘aṭṭār vs. dabbāgh *mas’ala*; if still he persists, introduce the *mūsir* vs. *mu’sir mas’ala*.

Moreover, we may note that SH has introduced small changes into the relationship between context and object of dispute; for “*mūsir*” (solvent) as a descriptor does not incite the same sort of assumption for ownership of ruby or pearl as “dabbāgh” does for the implements and materials of tanning, or “‘aṭṭār” for perfumes, “*nisā*” for feminine commodities, and “*rijāl*” for masculine commodities. This only serves to underscore the inefficiency of context-based considerations. All of these contextual

descriptors are equally negligible in terms of epistemic value, but the solvency example brings this to the fore. Being male has as much to do with an assumed right to ownership of a disputed masculine commodity as being solvent has to do with a right to ownership of a disputed valuable object.

Having thus problematized SHAP’s position to the fullest extent possible, SH now springs his larger *naqd*-dilemma in that typical dichotomous form which allows us to label it “dilemma” in the first place. Two exits are shown to SHAP, and behind each lies a thorny patch he must balk to enter. Both are in reference to the *mūsir* vs. *mu’sir mas’ala*, which we may understand to represent all that precedes it by way of SH argument. In §703, SH flatly asserts that should SHAP claim to treat the ruby or pearl as belonging to the *mūsir*, despite its being in joint possession with the *mu’sir*, then he will have “contradicted the *madhhab al-‘amma*.” This, of course, is a charge of violation of the *ijmā’* which SH has twice claimed previously for the efficiency of joint possession in occasioning a *ḥukm* of half and half division. In terms of early *jadāl*-theory, SH is blocking SHAP from this exit with *mu’āraḍa bi’l-nuṭq* (Shīr.VII.15.1; Bāj.IX.B.15.1), where, in this case, the *nuṭq* is neither Kitāb nor Sunna, but *ijmā’*. That is to say, SHAP’s ‘illa-interpretation has been exposed as contrary to a doctrine enjoying the epistemic sanction of consensus, which fits perfectly the definitions of *mu’āraḍa bi’l-nuṭq*.¹⁷⁹

We will also tarry for a moment to consider that *ijmā’* in general, as a category of epistemic justification, provides one of the greatest areas of overlap in *uṣūl al-fiqh* with the Aristotelian conception of *endoxa* premises. This phrase of *madhhab al-‘amma* is a particularly shining illustration, and we are reminded of the “most of the people” *endoxa* set in Aristotle’s hierarchy of “all the people, or most of them, or the wise — either all of them, most of them, or famous individual sages.” It is difficult to tell whether SH’s references to *al-nās* (as in §696) or *al-‘amma* (as here in §703) refer to the *Umma* at large, or to the community of *fuqahā’*, or to some other subset. Either way, a conceptual overlap with Aristotle’s *endoxa* hierarchy is quite evident. And most certainly, SHAP cannot maintain such a stance against the (*endoxon*) *madhhab al-‘amma* without extraordinary justification. In other words, the first exit from SH’s *naqd* dilemma has been barred.

¹⁷⁹ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., [Missing]; Turkī ed., 262, §147; al-Bājī, *Minhāj*, Turkī ed., 201, §454. Cf. Ibn ‘Aqīl (*K. al-Jadal*, 70, §327) who, unlike al-Shīrāzī, mentions only *qiyās* in conflict with Kitāb and Sunna. As for al-Bājī, he directs us to earlier discussions, by which we assume he includes *ijmā’* along with Kitāb and Sunna as *nuṭq*.

Finally, SH proceeds to the second component of dilemma, asserting that SHAP, should he claim that he would divide the disputed ruby/pearl between the *mūsir* and *mu‘sir*, and not place doubt over them (*lā tasta‘milu ‘alayhimā al-ḡann*),¹⁸⁰ then he must do the same regarding the *matā‘* of husband and wife. Of course this is the only viable exit for SHAP, but it requires complete concession to the validity of SH’s ruling for the *masā’il* at hand and the invalidity of SHAP’s own position. In this manner is the strategy of SH’s *naqḍ*-dilemma made clear — it corresponds to the ultimate aim of classical dialectical encounter: to collect from one’s opponent the premises from which one’s own conclusion must naturally flow. We will close this analysis by noting that SH’s *naqḍ*-dilemma shows not only the marks of a master-dialectician (and teacher of juridical dialectic), but it remains — for the time being — in the domain of his unique style of argumentation. No hint of such a larger strategy appears in the *jadāl*-theory texts I have examined, and I have yet to uncover the like employed by another early jurist. That being said, there remains a mountain of research yet to be done, and there is every possibility that this sort of larger strategy was a common feature of proto-system *jadāl* teaching and practice. We are only at the very beginning of the road towards a complete picture of late second / early third century H juridical dialectic.

¹⁸⁰ Again, we might hold some possibility that *ḡann* here connotes a technical sense of “probability,” as though SHAP were entertaining — through his context-overrides — some slight epistemic advantage over the conventions of *bayyina* and joint-ownership efficiency.

[masā'il-set #6] §§744-773¹⁸¹

Summary of Analysis:

744 – قَالَ: وَلَوْ أَنَّ عَبْدًا بَيْنَ رَجُلَيْنِ أَعْتَقَ أَحَدُهُمَا نَصِيبَهُ وَهُوَ مُوسِرٌ، كَانَ الْخِيَارُ لِلْآخَرِ فِي قَوْلِ أَبِي حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ فَإِنْ شَاءَ أَعْتَقَ الْعَبْدَ كَمَا أَعْتَقَ صَاحِبُهُ، وَإِنْ شَاءَ اسْتَسْعَى الْعَبْدُ فِي نِصْفِ قِيمَتِهِ، فَيَكُونُ الْوَلَاءُ بَيْنَهُمَا، وَإِنْ شَاءَ ضَمَّنَ شَرِيكَهُ نِصْفَ قِيمَتِهِ وَيَرْجِعُ الشَّرِيكَ بِمَا ضَمَّنَ مِنْ ذَلِكَ عَلَى الْعَبْدِ، وَيَكُونُ الْوَلَاءُ لِلشَّرِيكَ كُلَّهُ، وَهُوَ عَبْدٌ مَا بَقِيَ عَلَيْهِ مِنَ السَّعَايَةِ شَيْءٌ.	• (744) AH rulings (x3) for <i>mas'ala</i> #1 (partner-manumitter is <i>mūsir</i>) • AH states underpinning substantive principle: [AH reliance upon general legal principle: partially-manumitted = still a slave in the eyes of the law]
745 – وَكَانَ ابْنُ أَبِي لَيْلَى رَحِمَهُ اللَّهُ تَعَالَى يَقُولُ: هُوَ حُرٌّ كُلُّهُ يَوْمَ أَعْتَقَهُ الْأَوَّلُ، وَالْأَوَّلُ ضَامِنٌ لِنِصْفِ الْقِيَمَةِ، وَلَا يَرْجِعُ بِهَا عَلَى الْعَبْدِ، وَلَهُ الْوَلَاءُ، وَلَا يُخَيَّرُ صَاحِبُهُ فِي أَنْ يُعْتِقَ الْعَبْدَ أَوْ يَسْتَسْعِيَهُ.	• (745) IAL counter-rulings (x3) for <i>mas'ala</i> #1: • IAL counter-principle implied: [IAL reliance upon general legal principle: partially-manumitted = entirely free in the eyes of the law]
746 – وَلَوْ كَانَ الَّذِي أَعْتَقَ الْعَبْدَ مُعْسِرًا، كَانَ الْخِيَارُ فِي قَوْلِ أَبِي حَنِيفَةَ لِلشَّرِيكَ الْآخَرِ؛ إِنْ شَاءَ ضَمَّنَ الْعَبْدَ نِصْفَ قِيمَتِهِ يَسْعَى فِيهَا وَالْوَلَاءُ بَيْنَهُمَا، وَإِنْ شَاءَ أَعْتَقَهُ كَمَا أَعْتَقَ صَاحِبُهُ، وَالْوَلَاءُ بَيْنَهُمَا.	• (746) AH rulings (x2) for <i>mas'ala</i> #2 (same conditions as <i>mas'ala</i> #1, but partner-manumitter is <i>mu'sir</i>)
747 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: إِذَا كَانَ مُعْسِرًا سَعَى الْعَبْدُ لِلشَّرِيكَ الَّذِي لَمْ يُعْتِقْ فِي نِصْفِ قِيمَتِهِ، وَيَرْجِعُ بِذَلِكَ الْعَبْدُ عَلَى الَّذِي أَعْتَقَهُ، وَالْوَلَاءُ كُلُّهُ لِلَّذِي أَعْتَقَهُ، وَلَيْسَ لِلْآخَرِ أَنْ يُعْتِقَ مِنْهُ شَيْئًا.	• (747) IAL counter-rulings (x3) for <i>mas'ala</i> #2
748 – وَكَانَ يَقُولُ: إِذَا أَعْتَقَ شِقْصًا فِي مَمْلُوكٍ فَقَدْ أَعْتَقَهُ كُلَّهُ، وَلَا يَتَبَعُ الْعَبْدُ فَيَكُونُ بَعْضُهُ رَقِيقًا وَبَعْضُهُ حُرًّا، وَبِهِ يَأْخُذُ. أَرَأَيْتَ مَا أَعْتَقَ مِنْهُ أَيْكُونُ رَقِيقًا؟	• (748) IAL counter-principle stated in full: [IAL reliance upon general legal principle: partially-manumitted = entirely free; slave is not divisible so as to allow part-free, part-slave] • AY adherence stated

¹⁸¹ From this point forward, we are prevented by space limitations from providing full prose discussions of our analyses. Instead, footnotes will be appended to the summary tables where appropriate, and the Arabic text will continue in parallel to our analysis for quick reference. Again, the reader is asked to refer to the translation of analyzed sections in Part II of this dissertation.

	• AY/MIH/IAL (not clear which) initiates rhetorical <i>ara’ayta</i> • 1) [<i>ara’ayta</i> question pushes concession to premise #1 of <i>reductio ad impossibile</i>]
749 – فَإِنْ كَانَ مَا أَعْتَقَ مِنْهُ يَكُونُ رَقِيقًا فَقَدْ عَتَقَ، فَكَيْفَ يَجْتَمِعُ فِي مُعْتَقٍ وَاحِدٍ عَتَقٌ وَرَقٌّ؟	• (749) AY/MIH/IAL <i>ara’ayta</i> (cont.): • 2) [still governed by <i>ara’ayta</i>, dialectical question pushes concession to premise #2 of <i>reductio ad impossibile</i>] • 3) [rhetorical <i>kayfa</i> question underscores contradiction, providing conclusion for <i>reductio ad impossibile</i>] • [AY/MIH/IAL objection to AH substantive principle: <i>reductio ad impossibile</i>; implied: ‘<i>itq</i> extends from portion to whole; predicates X and ¬X cannot obtain in the same individual at the same time (proof by contradiction in <i>reductio</i> form?)]¹⁸²
750 – أَلَا تَرَى أَنَّهُ لَا يَجْتَمِعُ فِي امْرَأَةٍ بَعْضُهَا طَالِقٌ وَبَعْضُهَا غَيْرُ طَالِقٍ وَبَعْضُهَا امْرَأَةٌ لِلزَّوْجِ عَلَى حَالِهَا.	• (750) AY/MIH/IAL <i>alā tarā</i>: vehicle for delivery of <i>endoxon</i> ruling as <i>mas’alat al-kasr</i> • <i>mas’alat al-kasr</i> shows a parallel ruling wherein predicates Y and ¬Y are not allowed to obtain in the same individual at the same time • [AY/MIH/IAL <i>i’tirāḍ</i> of <i>al-kasr</i> (Shīr.VII.8; Bāj.IX.B.12.1 [?])]¹⁸³
751 – وَكَذَلِكَ الرَّقِيقُ وَبِهَذَا يَأْخُذُ إِلَّا حَصْلَةً لَا يَرْجِعُ الْعَبْدُ بِمَا سَعَى فِيهِ عَلَى الَّذِي أَعْتَقَهُ.	• (751) AY/MIH/IAL: the <i>mas’alat al-kasr</i> is tied as analog to the <i>mas’ala</i> at hand • AY adherence restated, with exception of single <i>khaṣla</i> of this ruling¹⁸⁴ • [AY counter-ruling for IAL ruling #2 on <i>mas’ala</i> #2]
752 – وَقَالَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى: لَا يُعْتَقُ	• (752) AH sidesteps AY/MIH/IAL charge of contradictory states by re-

¹⁸² NB: this appears a pure ‘*aql*’ argument from the basic logical principle of non-contradiction.

¹⁸³ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 107-8; al-Bājī, *Minhāj*, Turkī ed., 191ff., §§432ff. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 65, §307.

¹⁸⁴ NB: from this, and earlier references to *khaṣla/khiṣāl* in §§643ff., it is evident that *khaṣla* is as likely to refer to a *ḥukm* re: an entity at hand, as it is to a property of that entity. In that sense, it is quite similar to the *khaṣṣa* of al-Shīrāzī in his *qiyās al-dalāla* discussion.

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بَعْضُهُ وَبَعْضُهُ رَقِيقٌ وَهَذَا كُلُّهُ بِمَنْزِلَةِ الْعَبْدِ مَا دَامَ مِنْهُ شَيْءٌ رَقِيقٌ أَوْ يَسْعَى فِي قِيَمَتِهِ.	asserting counter-principle (with <i>manzila</i>-subsumption) [AH <i>manzila</i>-subsumption: partially-enslaved = in the <i>manzila</i> of a full slave; implied ‘<i>aql: riqq</i> (not ‘<i>itq</i>) extends from portion to whole]
753 – أَرَأَيْتَ لَوْ أَنَّ الشَّرِيكَ قَالَ: نَصِيبُ شَرِيكِي مِنْهُ حُرٌّ وَأَمَّا نَصِيبِي فَلَا، هَلْ كَانَ يُعْتَقُ مِنْهُ مَا لَا يَمْلِكُ؟ وَإِذَا أَعْتَقَ مِنْهُ مَا يَمْلِكُ، فَكَيْفَ يُعْتَقُ مِنْهُ مَا لَا يَمْلِكُ؟ وَهَلْ يَقَعُ عِتْقُ فِيمَا لَا يَمْلِكُ الرَّجُلُ؟	(753) AH <i>ara’ayta</i> introduces triple <i>reductio</i> barrage against AY/MIH/IAL position - three rhetorical <i>reductio ad impossibile</i> arguments [AH three-part <i>reductio</i> pushes opponent to concede <i>endoxa</i> premises vital to AH counter-argument]¹⁸⁵
754 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا كَانَ الْعَبْدُ بَيْنَ الرَّجُلَيْنِ فَأَعْتَقَ أَحَدُهُمَا نَصِيبَهُ مِنْهُ، فَإِنْ كَانَ مُوسِرًا بَأَنْ يُؤَدِّيَ نَصْفَ قِيَمَتِهِ فَالْعَبْدُ حُرٌّ كُلُّهُ، وَالْوَلَاءُ لِلْمُعْتَقِ الْأَوَّلِ وَلَا خِيَارَ لِسَيِّدِ الْعَبْدِ الْآخَرِ. وَإِنْ كَانَ مُعْسِرًا فَالنَّصْفُ الْأَوَّلُ حُرٌّ وَالنَّصْفُ الثَّانِي لِمَالِكِهِ وَلَا سَعَايَةَ عَلَيْهِ. وَهَذَا مَكْتُوبٌ فِي كِتَابِ الْعِتْقِ بِحُجَجِهِ إِلَّا أَنَّا وَحَدَّثْنَا فِي هَذَا الْكِتَابِ زِيَادَةَ حَرْفٍ لَمْ نَسْمَعْ بِهِ فِي حُجَجِهِمْ.	(754) SH rulings (x2) for <i>mas’ala</i> #1, and rulings (x2) for <i>mas’ala</i> #2 - SH editorial note directs us to a <i>Kitāb al-‘Itq</i> for full SH rulings and <i>hujja</i> for these <i>masā’il</i>,¹⁸⁶ then he notes that here, in this treatise (a reference to the Shaybānī Version) he found an additional argument he had not heard of before (apparently referring back to the <i>kasr</i> objection of §§750-1)
755 – كَانَ مِمَّا احْتَجُّوا بِهِ فِي هَذَا الْكِتَابِ أَنْ قَالَ قَائِلُهُمْ: كَيْفَ تَكُونُ نَفْسٌ وَاحِدَةٌ بَعْضُهَا حُرٌّ وَبَعْضُهَا مَمْلُوكٌ لَا يَكُونُ، كَمَا لَا تَكُونُ الْمَرْأَةُ بَعْضُهَا طَالِقٌ	(755) SH sets the stage for an “instructional” dialectic against the <i>kasr</i>-argument (§§750-1) he has just now discovered¹⁸⁷

¹⁸⁵ NB: For the whole series of rulings and arguments in §§744-53 there is no *naql*, nor is there — with the exception of what is implied by the attempted *kasr* of §§750-1 — any *istidlāl*. This *ikhtilāf* depends entirely upon logical consistency, definition, and substantive principle. Note also that all rulings from all positions are subsidiary to a set of conflicting general principles: 1) if any portion remains enslaved, then the whole individual is in the *manzila* of the slave — i.e., his *ahkām* are the *ahkām* of the slave (AH); and 2) If any portion is manumitted, then the whole individual is in the *manzila* of the manumitted — i.e., his *ahkām* are the *ahkām* of the manumitted (AY/MIH/IAL). In essence, then, this *ikhtilāf* is due to conflicting notions of efficiency in occasioning *manzila*-subsumption. For AH, the portion enslaved occasions *manzila*-subsumption under the genus of slave; for AY/MIH/IAL the portion freed occasions *manzila*-subsumption under the genus of freed.

¹⁸⁶ The reader is referred to appendix II. §755 of part II of this dissertation, where I have attempted to translate the sections most likely referenced here by SH.

¹⁸⁷ NB: This offers a fascinating window on proto-system *jadāl* teaching and practice: SH initiates an “instructional” dialectic, against a (recently re-discovered) thesis from a “historical” dialectic, in order to prepare the student for an encounter with a proponent of the “historical” thesis.

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وَبَعْضُهَا غَيْرُ طَالِقٍ؟	- SH reformulates SHAP argument (<i>kāna mimmā iḥtajju bihi fī hādhā al-kitāb an qāla qā'iluhum X</i>) into dialectical <i>kayfa</i>-question: “How can [individual A cannot be both X and ¬X] not be just like [individual B cannot be both Y and ¬Y]?” [SH reformulates <i>kasr</i>-objection of §§750-1]¹⁸⁸
756 – فَإِنْ زَعَمَ أَنَّ الْعَبْدَ يَكُونُ فِيهِ الرِّقُّ وَالْحُرِّيَّةُ قِيَاسًا عَلَى الْمَرْأَةِ. قِيلَ لَهُ: أَيْجُوزُ لِلرَّجُلِ أَنْ يَنْكِحَ بَعْضَ امْرَأَةٍ؟	(756) SH initiates “instructional” dialectic by relating the proper dialectical questions for debating SHAP claim (<i>in za'ama X; qīla lahu Y</i>) - SHAP <i>mas'alat al-kasr</i> in §§750-1 is presented as claimed basis for <i>qiyās</i> - SH dialectical question #1 introduces first <i>mas'alat al-farq</i> (partial ownership vs. partial marriage) [SH pushes SHAP to concede premise #1 for <i>farq</i> #1]
757 – فَإِنْ قَالَ: لَا. لَا تَكُونُ إِلَّا مَنكُوحَةً كُلِّهَا أَوْ غَيْرَ مَنكُوحَةٍ.	(757) SHAP <i>jawāb (fa-in qāla)</i> concedes: (x)[Wx → (Mx v ¬Mx)]¹⁸⁹ [SHAP concedes premise #1 (re: partial marriage) of <i>farq</i> #1]
758 – قِيلَ لَهُ: أَفَيَجُوزُ أَنْ يُشْتَرَى بَعْضُ عَبْدٍ؟	(758) SH dialectical question #2 (<i>qīla lahu</i>) [SH pushes SHAP to concede premise #2 for <i>farq</i> #1]
759 – فَإِنْ قَالَ: نَعَمْ.	(759) SHAP <i>jawāb (fa-in qāla)</i> [SHAP concedes premise #2 (re: partial ownership) of <i>farq</i> #1]
760 – قِيلَ لَهُ: فَأَيْنَ الْعَبْدُ مِنَ الْمَرْأَةِ؟	(760) SH dialectical question #3 (<i>qīla lahu</i>): “<i>fa-ayna X min Y?</i>” [SH announces <i>farq</i> #1 in rhetorical fashion (SHAP never replies, so

¹⁸⁸ It is evident from SH rulings for *mas'ala* #2 that he is going to object to the *mas'alat al-kasr*. Note he has maintained the *kasr*-objection in the form of a question (although it is an *alā tarā* in §750), and it is obvious he recognizes it as an objection to the AH principle. He will now *object to the objection* – again, we are entering a domain of objection-oriented *i'tirādāt*. Not surprisingly, we will see that his critique is mirrored by the *jawāb* suggested by al-Bājī for the proponent defending against a charge of *kasr* (*Minhāj*, Turkī ed., 191, §433) – especially with regard to *farq*. SH will expose a number of *furūq* between the *mas'alat al-kasr* and the *mas'ala* at hand.

¹⁸⁹ Read: “For any x, if x is a woman, then x is either entirely *mankūha*, or entirely not *mankūha*.”

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	concession to <i>farq</i> #1 is assured)] ¹⁹⁰
761 – وَقِيلَ لَهُ: أَيْجُوزُ لَهُ أَنْ يُكَاتِبَ الْمَرْأَةَ عَلَى الطَّلَاقِ وَيَكُونَ مَمْنُوعًا حَتَّى تُؤَدِّيَ الْكِتَابَةَ أَوْ تَعْجَزَ؟	(761) SH dialectical question #4 (<i>wa qīla lahu</i>) introduces second <i>masʿalat al-farq</i> (<i>kitāba</i> for divorce vs. <i>kitāba</i> for manumission) [SH pushes SHAP to concede premise #1 for <i>farq</i> #2]
762 – فَإِنْ قَالَ: لَا.	(762) SHAP <i>jawāb</i> (<i>fa-in qāla</i>) [SHAP concedes premise#1 (re: <i>kitāba</i> for divorce) of <i>farq</i> #2]
763 – قِيلَ: أَيْجُوزُ هَذَا لَهُ فِي الْعَبْدِ؟	(763) SH dialectical question #5 (<i>qīla</i>) [SH pushes SHAP to concede premise #2 for <i>farq</i> #2]
764 – فَإِنْ قَالَ: نَعَمْ.	(764) SHAP <i>jawāb</i> (<i>fa-in qāla</i>) [SHAP concedes premise#2 (re: <i>kitāba</i> for manumission) of <i>farq</i> #2]
765 – قِيلَ: فَلِمَ تَجْمَعُ بَيْنَهُمَا؟	(765) SH dialectical question #6 (<i>qīla</i>): “<i>fa-lima tajmaʿu baynahumā?</i>”¹⁹¹ [SH announces <i>farq</i> #2 in what appears rhetorical fashion, but SHAP actually replies and delivers his concession)]
766 – فَإِنْ قَالَ: لَا يَجْتَمِعَانِ.	(766) SHAP <i>jawāb</i> (<i>fa-in qāla</i>): “<i>lā yajtamiʿāni</i>” [SHAP concedes to not linking slave and wife for this second <i>masʿalat al-farq</i>; this is a concession not only to the <i>farq</i>, but to <i>method-naqd</i> (SHAP has conceded that he does not do <i>qiyās</i> between woman and slave in this <i>masʿalat al-farq</i>, but he does in the <i>masʿala</i> at hand)]
767 – قِيلَ: وَكَذَلِكَ لَا يَجْتَمِعَانِ حَيْثُ جُمِعَتْ بَيْنَهُمَا.	(767) SH announces <i>elenchus</i> #1 (<i>qīla</i>): “Likewise, they are not linked where [in the <i>masʿala</i> at hand] you have linked them together.” [SH ties conceded <i>masāʿil al-farq</i> ##1-2 to the <i>masʿala</i> at hand, and charges SHAP with <i>method-naqd</i> (You do not do <i>qiyās</i> in the <i>masāʿil al-farq</i>, nor should

¹⁹⁰ NB: SH has shown that, in this purportedly parallel domain of ownership/marriage, there is a critical *farq* when it comes to the particular question of *partial* ownership/marriage.

¹⁹¹ Again, SH has shown that, in the purportedly parallel domain of freedom/divorce, there is a critical *farq* when it comes to the contracting of future freedom/divorce (*kitāba*).

	you do it here where the same <i>furūq</i> prevent it)]
768 – وَيُقَالُ لَهُ أَيضًا: أَتَكُونُ الْمَرْأَةُ لِأَنْتَيْنِ، كَمَا يَكُونُ الْعَبْدُ مَمْلُوكًا لِأَنْتَيْنِ وَيَكُونُ لِرَوْحِ الْمَرْأَةِ أَنْ يَهَبَهَا لِلرَّجُلِ فَتَكُونُ زَوْجَةً لَهُ، كَمَا يَكُونُ الْعَبْدُ إِذَا وَهَبَهُ صَارَ عَبْدًا لِمَنْ وَهَبَهُ لَهُ؟	• (768) SH proceeds to another set of <i>masā'il al-furūq</i> (#3 and #4; <i>wa qīla lahu ayḍan</i>) • SH dialectical question #7, in two parts: • 1) SH introduces <i>mas'alat al-farq</i> #3 (joint-ownership of wife vs. joint-ownership of slave) • 2) SH introduces <i>mas'alat al-farq</i> #4 (gifting of wife vs. gifting of slave) • [SH pushes SHAP to concede all premises for <i>farq</i> #3 and <i>farq</i> #4]
769 – فَإِنْ قَالَ: لَا.	• (769) SHAP <i>jawāb</i> (<i>fa-in qāla</i>) • [SHAP concedes all premises for <i>farq</i> #3 and <i>farq</i> #4]
770 – قِيلَ: فَمَا بَالُ الْمَرْأَةِ تُقَاسُ عَلَى الْمَمْلُوكِ؟	• (770) SH dialectical question #8 (<i>qīla</i>): “<i>fa-mā bālu al-mar'ati tuqāsu 'alā al-mamlūk?</i>” • [SH is not only confirming <i>farq</i> #3 and <i>farq</i> #4 in rhetorical fashion, but this is primarily a statement of <i>elenchus</i> (#2) due to method-<i>naqd</i> (you have no right, in view of these <i>furūq</i>, to do <i>qiyās</i> between these, as you have done for the <i>mas'ala</i> at hand)
771 – وَيُقَالُ لَهُ: أَرَأَيْتَ الْعَبْدَ إِذَا عَتَقَ مَرَّةً أَيْكُونُ لِسَيِّدِهِ أَنْ يَسْتَرْفِقَهُ، كَمَا يَكُونُ لَهُ إِذَا طَلَّقَ الْمَرْأَةَ مَرَّةً أَنْ يَكُونُ لَهُ رَجَعْتُهَا؟	• (771) SH proceeds to yet another <i>mas'alat al-farq</i> (#5; <i>wa yuqālu lahu</i>) • SH dialectical question #9: <i>ara'ayta</i> is used as a vehicle for introducing a final <i>mas'alat al-farq</i> (master re-enslaving slave vs. husband re-marrying wife) • [SH pushes SHAP to concede all premises for <i>farq</i> #5]
772 – فَإِنْ قَالَ: لَا.	• (772) SHAP <i>jawāb</i> (<i>fa-in qāla</i>) • [SHAP concedes all premises for <i>farq</i> #5]
773 – قِيلَ: فَمَا نَعْلَمُ شَيْئًا أَبْعَدَ مِمَّا قَاسَهُ بِهِ مِنْهُ.	• (773) SH seals his final <i>elenchus</i> with sweeping statement: “<i>fa-mā na'lamu shay'an ab'ada mimma qāsahu bihi minhu</i>”

	[SH has gained concession to five <i>furūq</i>, SHAP slave/manumission-wife/divorce <i>qiyās</i> (the basis of the charge of <i>kasr</i> in §§750-1) is destroyed]¹⁹²

¹⁹² NB: This entire dialectical sequence may be summed up in two parts. First, the original *i‘tirāḍ* (*kasr*) is discussed: 1) AY/MIH/IAL object to the combination of freedom and slavery in a single individual at the same time, and they bring the *mas’alat al-kasr* of divorce; and 2) a SHAP of this AY/MIH/IAL *kasr* is introduced in order that SH may instruct the reader how to debate this point. Second, the *i‘tirāḍ (farq)* of the *i‘tirāḍ (kasr)* is developed in dialectic: 1) SH takes the role of Q, and leads SHAP to concede all premises for five *furūq* between the *mas’alat al-kasr* and the *mas’ala* at hand; and 2) SH proceeds to *elenchus*, destroying the *qiyās* upon which the *kasr* is based, and, as a result, showing that the combination of freedom and slavery in a single individual has not been harmed (a necessary condition for his rulings for *mas’ala* #2). Throughout this process, SHAP is reminded that he observes these *furūq* elsewhere — but has ignored them in the *mas’ala* at hand, and is thus inconsistent. Thus, the whole also constitutes a charge of *method-naqd*.

[masā’il-set #7] §§1051-1061

Summary of Analysis:

1051 – وَسُئِلَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى عَنْ الْمُحْرَمِ يُصِيبُ الصَّيْدَ، فَيُحْكَمُ عَلَيْهِ فِيهِ عَنَاقٌ أَوْ جَفْرَةٌ أَوْ شِبْهُ ذَلِكَ. فَقَالَ: لَا يُجْزَى فِي هَذِي الصَّيْدِ إِلَّا مَا يُجْزَى فِي هَذِي الْمُتَعَةِ؛ الْحَدَّ عَنِ الضَّأْنِ إِذَا كَانَ عَظِيمًا أَوْ الثَّيِّبِ مِنَ الْمَعَزِ وَالْبَقَرِ وَالْإِبِلِ، فَمَا فَوْقَ ذَلِكَ لَا يُجْزَى مَا دُونَ ذَلِكَ.	• (1051) AY reports “historical” dialectic: AH “was asked about (su’ila... ‘an)” <i>mas’ala</i> #1 • AH ruling #1a: (<i>hady al-ṣayd</i> = <i>hady al-mut’a</i> = large <i>jadha’</i> or <i>thaniyy</i>) [<i>manzila</i>-subsumption (made clear in <i>Mabsūt</i> of al-Sarakhsī), but without <i>sawā’un</i> formula] • AH ruling #1b (general): “<i>mā fawqa dhālika lā yujzi’u mā dūna dhālika</i>”
1052 – أَلَا تَرَى إِلَى قَوْلِ اللَّهِ عَزَّ وَجَلَّ فِي كِتَابِهِ فِي جَزَاءِ الصَّيْدِ: «هَدْيًا بَالِغَ الْكَعْبَةِ» [المائدة: 95].	• (1052) AH <i>alā tarā ilā</i> introduces <i>endoxon dalīl</i> Q.5:95 • [implied AH <i>i’tirāḍ</i> against <i>istidlāl bi-qawl al-wāḥid min al-Ṣaḥāba</i>: “<i>an yu’arīḍahu bi’l-naṣṣ Kitāb aw Sunna</i>” (Shīr.IV.2);¹⁹³ also implied: AH <i>istidlāl bi’l-naṣṣ al-Kitāb</i>]
1053 – وَسَأَلْتُ ابْنَ أَبِي لَيْلَى عَنْ ذَلِكَ فَقَالَ: يُبْعَثُ بِهِ، وَإِنْ كَانَ عَنَاقًا أَوْ حَمَلًا.	• (1053) AY continues “historical” dialectic: “<i>wa sa’altu Ibn Abī Laylā ‘an dhālika, fa-qāla:</i>” • IAL ruling #1b (even ‘<i>anāq</i> and <i>ḥamal</i> can be <i>hady al-ṣayd</i>)
1054 – قَالَ أَبُو يُوسُفَ رَحِمَهُ اللَّهُ: أَخَذَ بِالْأَثَرِ فِي الْعَنَاقِ وَالْجَفْرَةِ.	• (1054) AY reports IAL <i>taqlīd</i> of (<i>akhadha bi-</i>) the <i>athar</i> re: ‘<i>anāq</i> and <i>jafra</i> • [IAL/AY/MIH reasoning explained in <i>Mabsūt</i> (4:93): <i>istiḥsān</i> based on 1) <i>naql</i>: <i>āthār</i> of <i>Ṣaḥāba</i>; 2) ‘<i>aql</i>: a <i>fortiori</i> reasoning; 3) <i>i’tirāḍ</i>: AH’s <i>qiyās</i> = <i>qiyās al-manṣūṣ bi’l-manṣūṣ</i>; and 4) ‘<i>aql</i>: <i>hady</i> can be ‘<i>anāq</i>, or <i>faṣīl</i>, or <i>jady</i>.] • [overall, the <i>taqlīd</i> of an <i>athar</i>, and the four reasons behind the reported <i>istiḥsān</i>, singularly or collectively, constitute an <i>i’tirāḍ</i> against the AH position which does not find a parallel in the early <i>jadāl</i>-theory texts]

¹⁹³ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 82. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 39, §208.

1055 – وَقَالَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ: فِي ذَلِكَ كُلِّهِ قِيمَتُهُ. وَبِهِ يَأْخُذُ.	• (1055) AH ruling #1b (specific): (<i>qīma</i> for below what is equivalent to ‘<i>anāq</i> and <i>ḥamal</i>) • AY adherence [incongruent with <i>Mabsūt</i>]
1056 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَصَابَ الرَّجُلُ صَيْدًا صَغِيرًا فَدَاهُ بِشَاةٍ صَغِيرَةٍ؛ لِأَنَّ اللَّهَ عَزَّ وَجَلَّ يَقُولُ «مِثْلُ» [المائدة: 95] وَالْمِثْلُ مِثْلُ الَّذِي يُفْدَى. فَإِذَا كَانَ كَبِيرًا كَانَ كَبِيرًا. وَإِذَا كَانَ الَّذِي يُفْدَى صَغِيرًا كَانَ صَغِيرًا، وَلَا أَعْلَمُ مَنْ قَالَ: لَا يَجُوزُ أَنْ يُفْدَى الصَّيْدُ الصَّغِيرُ بِصَغِيرٍ مِثْلِهِ مِنَ الْعَنَمِ إِلَّا خَالَفَ الْقُرْآنَ وَالْأَثَارَ وَالْقِيَاسَ وَالْمَعْقُولَ.	• (1056) SH ruling for <i>mas’ala</i> #1 (small <i>ṣayd</i>, small <i>hady</i>; large <i>ṣayd</i>, large <i>hady</i>) • SH <i>istidlāl</i>: God’s <i>qawl</i> in Q.5:95, and SH <i>tafsīr</i> of «<i>mithlu</i>» • SH sets stage for “historical-instructional” dialectic: <i>i’tirād</i> against SHAP of AH position stated: “<i>wa lā a’lamu man qāla X, illā khālafa</i> [1] <i>al-Qur’ān</i>, [2] <i>al-āthār</i>, [3] <i>al-qiyās</i>, [4] <i>al-ma’qūl</i>”¹⁹⁴ • [SH <i>istidlāl</i> focuses upon a different component of AH <i>dalīl</i> Q.5:95; thus his <i>i’tirād</i> = <i>al-mushāraka fi’l-dalīl (min jihat al-zāhir</i>; Shīr.I.4[.1]; Bāj.I.3.1.2 — matching al-Bājī exactly, and al-Bājī uses this very <i>mas’ala</i> for his example)¹⁹⁵ supported by <i>āthār</i>, <i>qiyās</i>, and <i>ma’qūl</i>]
1057 – وَإِذَا كَانَ يَزْعُمُ أَنَّ الصَّيْدَ مُحَرَّمٌ كُلُّهُ فَرَعَمَ أَنَّهُ تُفْدَى الْجَرَادَةُ بِتَمْرَةٍ أَوْ أَقْلٍ مِنْ تَمْرَةٍ؛ لِصِغَرِهَا وَقَلَّةِ قِيمَتِهَا. وَتُفْدَى بَقَرَةُ الْوَحْشِ بِبَقَرَةٍ لِكِبَرِهَا، فَكَيْفَ لَمْ يَزْعُمْ أَنَّهُ يُفْدَى الصَّغِيرُ بِالصَّغِيرِ وَقَدْ فَدَى الصَّغِيرُ بِصَغِيرٍ وَالْكَبِيرُ بِكَبِيرٍ. وَقَدْ قَالَ اللَّهُ عَزَّ وَجَلَّ:	• (1057) SH continues setting stage for “historical-instructional” dialectic: • SH introduces a pair of SHAP rulings (as <i>masā’il al-naqd</i>), and follows with dialectical question: “<i>idhā kāna yaz’umu X, Y, and Z; fa-kayfa lam yaz’um</i> [small for small, large for large], while

¹⁹⁴ Again, a reference to *ma’qūl*, and this time with every appearance of a “source” (or at least a guiding principle), along with *Qur’ān*, *āthār*, and *qiyās* (compare with §§402, 633, 929, 1061, and 1411). This continues to be an intriguing question: What does SH mean by *al-ma’qūl*, and is he using it in a technical sense? We will take this up in Chapter IV.2.

¹⁹⁵ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 44.; al-Bājī, *Minhāj*, Turkī ed., 59f., §114. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 28, §148. Al-Bājī’s more refined typology not only hits the mark exactly, but his example *mas’ala* is the very *mas’ala* under consideration in §1051-61. First he defines this subtype of *Kitāb*-oriented *i’tirād*: “Each one of them [P&Q] makes [the *ḥukm*] dependent upon the *āya* by way of a different *lafẓ* from which the other makes it dependent, and he promotes (*yata’awwalu*) his *lafẓ*.” Then, he presents his example *mas’ala*; in brief: 1) the Mālikī P draws upon Q.5:95 [*lafẓ* #1] to support his opinion re: the *kaffāra* of the *qātīl al-ṣayd* (feeding the poor); and 2) the Shāfi‘ī Q objects, saying he draws upon the same *āya* [but *lafẓ* #2] for *ḥujja* for his opinion (the *hady* is the *jazā’* for the *ṣayd*, not a *kaffāra*). This convergence of *masā’il* provides strong evidence for a theory promoted by this dissertation: early *jadal*-theory consists in part of a study and analysis of past dialectic.

«فَجَزَاءٌ مِّثْلُ مَا قَتَلَ مِنَ النَّعَمِ» [المائدة: 95] وَأِنَّمَا رَفَعَ وَخَفَضَ بِالمِثْلِ عِنْدَهُ فَكَيْفَ يَفْدِي بِتَمْرَةٍ وَلَا يَفْدِي بِعَنَاقٍ وَمَا لِلضَّحَايَا وَهَذِي الْمُتَنَعَةِ وَجَزَاءُ الصَّيْدِ، هَلْ رَأَى قِيَاسَ جَزَاءِ الصَّيْدِ حِينَ أَصَابَ المُحْرِمُ البَقْرَةَ بِأَنْ قَالَ: يَكْفِيهِ شَاةٌ كَمَا يَكْفِي المُتَمَتِّعُ أَوْ الْمُضْحِي. أَوْ قَاسَهُ حِينَ أَصَابَ المُحْرِمُ جَرَادَةً بِأَنْ قَالَ: لَا يُجْزِي المُحْرِمُ إِلَّا شَاةٌ كَمَا لَا يُجْزِي المُضْحِي وَالمُتَمَتِّعُ إِلَّا شَاةٌ.	he has ruled [small for small, large for large], and God said [Q.5:95 restated in full]?” • [SH rhetorical charge of method-<i>naqd</i> (SHAP method applies Qur’ānic principle “by the <i>mithl</i>” elsewhere, but then denies it generally [the <i>mas’ala</i> at hand])] • SH pinpoints SHAP inconsistency with a series of dialectical questions: • 1) SH states SHAP principle: he “raised and lowered by the <i>mithl</i>,” then objection: “why not ‘<i>anāq</i> [when it is the <i>mithl</i>]?” • [again, SH <i>i’tirāḍ</i> of method-<i>naqd</i>: denial of self-practiced Qur’ānic principle] • 2) SH states SHAP <i>uṣūl</i> for <i>qiyās</i> (<i>al-ḍahāyā</i>, <i>hady al-mut’a</i>) and <i>far’</i> (<i>jazā’ al-ṣayd</i>); then SH initiates “historical-instructional” dialectic with dialectical questions: • 1) “<i>hal ra’āhu qiyās jazā’ al-ṣayd</i>” when he rules sheep for cow, as sheep suffices <i>mutamatti’</i> and <i>muḍaḥḥī</i>? • 2) “<i>aw qāsahu</i>” when he rules sheep for locust, as only sheep suffices <i>mutamatti’</i> and <i>muḍaḥḥī</i>? • [SH pushes for method-<i>naqd</i> premise #1 by asking (2x) al-Bājī’s third question <i>al-su’āl ‘an dalīl al-madhhab</i>: is it <i>qiyās</i>?; this is also SH <i>i’tirāḍ</i> via <i>reductio ad absurdum</i> (x2), as sheep is obviously too small for cow, and too large for locust]
1058 – فَإِنْ قَالَ: لَا.	• (1058) SHAP <i>jawāb</i> (<i>fa-in qāla</i>) • [SHAP concedes SH method-<i>naqd</i> premise #1, denying that it is <i>qiyās</i>]
1059 – قِيلَ: أَلَا أَنَّ جَزَاءَ الصَّيْدِ كَمَا قَالَ اللَّهُ تَبَارَكَ وَتَعَالَى: «مِثْلُ» وَإِنَّمَا المِثْلُ صَغِيرًا أَوْ كَبِيرًا عَلَى قَدْرِ المِصَابِ.	• (1059) SH dialectical question (<i>qīla</i>): Is it [SHAP reasoning] because of [<i>mithl</i> principle in Q.5:95], and [<i>tafsīr</i>: <i>mithl</i> = small or large ‘<i>alā qadr al-muṣāb</i>’]?] • [SH pushes for method-<i>naqd</i> premise

	#2 by asking al-Bājī’s <i>su’āl ‘an al-dalīl</i> : is it <i>istidlāl</i> from Q.5:95’s <i>lafẓ</i> of «mithl»?]
1060 – فَإِنْ قَالَ: نَعَمْ.	(1060) SHAP <i>jawāb (fa-in qāla)</i> [SHAP concedes SH method-<i>naqd</i> premise #2, admitting that it is <i>istidlāl</i> from Q.5:95’s <i>lafẓ</i> of «mithl»]
1061 – قِيلَ: فَمَا أَضَلَّكَ عَنِ الْجَفَرَةِ إِذَا كَانَتْ مِثْلَ مَا أُصِيبَ. وَإِنْ كُنْتَ تُقَلِّدُ عُمَرَ بْنَ الْخَطَّابِ رَضِيَ اللَّهُ تَعَالَى عَنْهُ وَحَدَّهُ فِي أَقْضِيَّةٍ لَا حُجَّةَ لَكَ فِي شَيْءٍ مِنْهَا إِلَّا تَقْلِيدَهُ فَكَيْفَ خَالَفْتَهُ وَمَعَهُ الْقُرْآنُ وَالْقِيَاسُ وَالْمَعْقُولُ وَغَيْرُهُ مِنْ أَصْحَابِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ؟ وَقَدْ قَضَى عُمَرُ رَضِيَ اللَّهُ عَنْهُ فِي الْأَرْتَبِ بَعْنَاقٍ، وَفِي الْيَرْبُوعِ بِجَفَرَةٍ، وَقَضَى فِي الضَّبِّ بِجَدْيٍ قَدْ جَمَعَ الْمَاءَ وَالشَّجَرَ. وَقَضَى ابْنُ مَسْعُودٍ رَضِيَ اللَّهُ عَنْهُ فِي الْيَرْبُوعِ بِجَفَرَةٍ أَوْ جَفَرٍ. وَقَضَى عُثْمَانُ رَضِيَ اللَّهُ عَنْهُ فِي أُمِّ حَبِيبٍ بِحُلَانٍ مِنَ الْغَنَمِ، يَعْنِي حَمَلًا.	(1061) SH seals method-<i>naqd elenchus</i> with series of rhetorical questions and supporting counter-<i>naql</i> 1) SH dialectical question (<i>qīla</i>): “Why don’t you apply [<i>istidlāl</i> from Q.5:95’s <i>lafẓ</i> of «mithl»] re: the <i>jafra</i>, when it is <i>mithl mā uṣība</i>?” [SH concludes his charge of method-<i>naqd</i> with dialectical question pushing SHAP to concede inconsistent method-application]¹⁹⁶ 2) SH leaps to pre-empt SHAP counter-objection (<i>taqlīd</i> of ‘Umar b. al-Khaṭṭāb) 1) SH implies it is <i>qawl al-wāḥid min al-ṣaḥāba</i> (with descriptor <i>waḥdahu</i>), and that SHAP has no other <i>hujja</i> 2) SH dialectical question (<i>kayfa khālaftahu, wa ma’ahu</i> [1] al-Qur’ān, [2] <i>al-qiyās</i>, [3] <i>al-ma’qūl</i>,¹⁹⁷ and [4] other <i>Aṣḥāb al-Nabī</i>?) - SH counter-<i>naql</i>: <i>āthār</i>-rulings of ‘Umar (x3) - SH counter-<i>naql</i>: <i>athar</i>-ruling of Ibn Mas‘ūd - SH counter-<i>naql</i>: <i>athar</i>-ruling of ‘Uthmān [SH closing <i>elenchus</i>: SHAP has contradicted all relevant <i>uṣūl</i>; equivalent to multiple <i>i’tirāḍāt</i>, including: 1) against <i>qawl al-wāḥid min</i>

¹⁹⁶ NB: Once again, SH’s *naqd*-procedure conforms perfectly to the Aristotelian dialectical program of Q’s gathering from P such premises as naturally lead to: 1) exposure of P’s self-contradiction/inconsistency; and 2) a conclusion equivalent to Q’s own thesis.

¹⁹⁷ Again, *ma’qūl* appears in a list of “sources,” this time Qur’ān, *qiyās*, and *āthār* (compare with §§402, 633, 929, 1056, and 1411).

	<i>al-Ṣaḥāba: mu‘āraḍa bi-naṣṣ al-Kitāb</i> (Shīr.IV.2),¹⁹⁸ and conveyance of <i>khilāf</i> from another of the Ṣaḥāba (x2; Shīr.IV.3; Bāj.V.2),¹⁹⁹ and advancing <i>qiyās</i> over <i>qawl al-wāḥid min al-Ṣaḥāba</i> (Bāj.V.1);²⁰⁰ 2) against SHAP’s <i>istidlāl bi’l-Kitāb: al-mushāraka fi’l-dalīl (min jihat al-zāhir</i>; Shīr.I.4[.1]; Bāj.I.3.1.2),²⁰¹ and 3) against SHAP’s faux-<i>qiyās</i>: <i>mu‘āraḍa</i> of <i>qiyās</i> by <i>qiyās</i> (al-Baṣrī),²⁰² or <i>al-mu‘āraḍa bi-‘illa mubtada’a</i> (Shīr.VII.15.2.1; Bāj.IX.B.15.2.1)²⁰³]

¹⁹⁸ al-Shīrāzī, *Ma‘ūna*, al-‘Umayrīnī ed., 82. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 39, §208.

¹⁹⁹ al-Shīrāzī, *Ma‘ūna*, al-‘Umayrīnī ed., 82; al-Bājī, *Minhāj*, Turkī ed., 144, §298. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 39, §209.

²⁰⁰ al-Bājī, *Minhāj*, Turkī ed., 144, §297.

²⁰¹ al-Shīrāzī, *Ma‘ūna*, al-‘Umayrīnī ed., 44.; al-Bājī, *Minhāj*, Turkī ed., 59f., §114. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 28, §148. See previous note re: Al-Bājī’s illustration by way of this very *mas’ala*.

²⁰² al-Baṣrī, *K. al-Qiyās al-Shar‘ī*, Ḥamīd Allāh ed., 1044; Hallaq, “Treatise,” 221.

²⁰³ al-Shīrāzī, *Ma‘ūna*, al-‘Umayrīnī ed., [Missing]; Turkī ed., 262, §148; al-Bājī, *Minhāj*, Turkī ed., 201, §455. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 71, §330.

[masā’il-set #8] §§1067-1080

Summary of Analysis:

1067 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا قَتَلَ الرَّجُلُ الرَّجُلَ عَمْدًا وَلِلْمَقْتُولِ وَرَثَةٌ صِغَارٌ وَكِبَارٌ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لِلْكِبَارِ أَنْ يَقْتُلُوا صَاحِبَهُمْ إِنْ شَاءُوا.	• (1067) AH ruling for <i>mas’ala</i> #1 • [AH <i>naql</i> provided by AY in §§1069-70; AH <i>istidlāl</i> (<i>bi-qawl al-wāhid min al-ṣahāba</i>) provided by al-Sarakhsī (<i>Mabsūt</i> 26:174)²⁰⁴] • [General <i>ḥukm</i> implied: majors don’t wait for minors to mature and speak their right; non-efficiency of “all <i>wulāt al-dam</i> agree to killing” implied = <i>i’tirāḍ</i> of IAL efficiency of this property]
1068 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَيْسَ لَهُمْ أَنْ يَقْتُلُوا حَتَّى يَكْبُرَ الْأَصَاغُرُ. وَبِهِ يَأْخُذُ.	• (1068) IAL counter-ruling for <i>mas’ala</i> #1 • [no IAL <i>istidlāl</i>/argument provided] • [General <i>ḥukm</i> implied: majors must wait for minors to mature and speak their right; efficiency of “all <i>wulāt al-dam</i> agree to killing” implied = <i>i’tirāḍ</i> of AH non-efficiency of this property]²⁰⁵ • AY adherence stated
1069 – حَدَّثَنَا أَبُو يُوسُفَ عَنْ رَجُلٍ، عَنْ أَبِي جَعْفَرٍ، أَنَّ الْحَسَنَ بْنَ عَلِيٍّ – رَضِيَ اللَّهُ عَنْهُمَا – قَتَلَ ابْنَ مُلْجَمٍ بَعْلِيٍّ.	• (1069) AY transmits <i>naql</i> (<i>istidlāl</i> basis for AH ruling): <i>athar-fi’l</i> of Ḥasan b. ‘Alī [this is also <i>athar-qawl</i> of ‘Alī, as his dying decree to Ḥasan (shown in <i>Mabsūt</i>)]
1070 – وَقَالَ أَبُو يُوسُفَ: وَكَانَ لِعَلِيِّ رَضِيَ اللَّهُ عَنْهُ أَوْلَادٌ صِغَارٌ.	• (1070) AY explains premise of AH <i>istidlāl</i> from ‘Alī to <i>mas’ala</i> at hand (‘Alī had minor children, i.e., Ḥasan did not wait for them to mature)²⁰⁶
1071 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا قَتَلَ الرَّجُلُ الرَّجُلَ عَمْدًا وَلَهُ وَرَثَةٌ؛ صِغَارٌ وَكِبَارٌ أَوْ كِبَارٌ	• (1071) SH expands <i>mas’ala</i> #1 to include absent majors; SH ruling 1a (no right to kill until minors mature), and 1b (no right to kill until absent

²⁰⁴ Al-Afghānī (143-4, n.2) quotes a portion of the relevant material from al-Sarakhsī’s *Mabsūt* in full.

²⁰⁵ Compare these rulings with the AH and IAL rulings of §§236-8, which we have discussed earlier in *mas’ala*-set #2.

²⁰⁶ We will mark this as another example of AY “following the *ḥujja*” in “good” dialectic; here, he has supplied material to help explain the opposing position.

غَيْبٌ، فَلَيْسَ لِأَحَدٍ مِنْهُمْ أَنْ يَقْتُلَ حَتَّى تَبْلُغَ الصَّغَارُ وَتَحْضُرَ الْغَيْبُ وَيَجْتَمِعَ مَنْ لَهُ سَهْمٌ فِي مِيرَاثِهِ؛ مِنْ زَوْجَةٍ أَوْ أُمٍّ أَوْ جَدَّةٍ عَلَى الْقَتْلِ، فَإِذَا اجْتَمَعُوا كَانَ لَهُمْ أَنْ يَقْتُلُوا. فَإِذَا لَمْ يَجْتَمِعُوا لَمْ يَكُنْ لَهُمْ أَنْ يَقْتُلُوا. وَإِذَا كَانَ هَذَا هَكَذَا فَلَا يَهُمُ شَاءَ مِنَ الْبَالِغِينَ الْحُضُورِ أَنْ يَأْخُذَ حِصَّتَهُ مِنَ الدِّيَةِ مِنْ مَالِ الْجَانِي بِقَدْرِ مِيرَاثِهِ مِنَ الْمَقْتُولِ، وَإِذَا فَعَلَ كَانَ لِأَوْلِيَاءِ الْغَيْبِ وَعَلَى أَوْلِيَاءِ الصَّغَارِ أَنْ يَأْخُذُوا لَهُمْ حِصَصَهُمْ مِنَ الدِّيَةِ؛ لِأَنَّ الْقَتْلَ قَدْ حَالَ وَصَارَ مَالًا، فَلَا يَكُونُ لَوْلِيِّ الصَّغِيرِ أَنْ يَدَعُهُ وَقَدْ أَمَكَّنَهُ أَخْذُهُ.	majors present) • efficiency of SH ‘illa (all who have share in <i>mīrāth</i> agree to killing) is firmly asserted as concomitant (when they all agree, they can kill; when they don’t all agree, they can’t kill) • SH subsidiary rulings; ‘aql for final subsidiary ruling (“because” efficient property: “taking of <i>māl</i> is possible”)
1072 – فَإِنْ قَالَ قَائِلٌ: كَيْفَ ذَهَبَتْ إِلَى هَذَا دُونَ غَيْرِهِ مِنَ الْأَقَاوِيلِ وَقَدْ قَالَ بَعْضُ أَهْلِ الْعِلْمِ: أَيُّ وُلَاةِ الدَّمِ قَامَ بِهِ قَتْلٌ وَإِنْ عَفَا الْآخَرُونَ. فَأَنْزَلَهُ بِمَنْزِلَةِ الْحَدِّ.	• (1072) SH initiates “instructional” dialectic by introducing SHAQ dialectical question #1 (<i>fa-in qāla qā’il</i>) [al-Bājī’s third question: <i>al-su’āl ‘an dalīl al-madhhab</i>]: “<i>kayfa dhahabta ilā hādhā...</i>” incorporating three counter-opinions: “...<i>dūna ghayrihi min al-aqāwīl...</i>” beginning with #1 from the Ahl al-‘Ilm: “...<i>wa qad qāla ba’d Ahl al-‘Ilm: X is the case</i>”: • 1) Ahl al-‘Ilm contrary <i>qawl</i> #1: <i>manzila</i>-subsumption (<i>qīṣāṣ</i> is in the <i>manzila</i> of the <i>ḥadd</i>, thus any of <i>wulāt al-dam</i> can kill, even if another pardons)
1073 – وَقَالَ غَيْرُهُ مِنْ أَهْلِ الْعِلْمِ: يَقْتُلُ الْبَالِغُونَ وَلَا يَنْتَظِرُونَ الصَّغَارَ.	• (1073) SHAQ <i>su’āl ‘an dalīl al-madhhab</i> with contrary opinions (cont.): “<i>wa qāla ghayruhu min Ahl al-‘Ilm: Y is the case</i>”: • 2) Ahl al-‘Ilm contrary <i>qawl</i> #2: (same as AH in §1067)
1074 – وَقَالَ غَيْرُهُ: يَقْتُلُ الْوَلَدُ وَلَا يَنْتَظِرُونَ الزَّوْجَةَ؟	• (1074) SHAQ <i>su’āl ‘an dalīl al-madhhab</i> with contrary opinions (cont.): “<i>wa qāla ghayruhu: Z is the case</i>”: • 3) Ahl al-‘Ilm contrary <i>qawl</i> #3: (child kills, does not wait for wife)
1075 – قِيلَ: ذَهَبْنَا إِلَيْهِ أَنَّهُ السُّنَّةُ الَّتِي لَا يَنْبَغِي أَنْ تُخَالَفَ أَوْ فِي مِثْلِ مَعْنَى السُّنَّةِ وَالْقِيَاسِ عَلَى	• (1075) SH <i>jawāb (qīla)</i>: • SH declares his ruling is based upon (<i>dhahabnā ilayhi</i>): 1) <i>al-Sunna allatī lā</i>

الإجماع.	yanbaghī an tukhālafa; or 2) <i>fī mithl ma‘nā al-Sunna</i>; and 3) <i>al-qiyās ‘alā al-ijmā‘</i> [SH answers SHAQ su‘āl ‘an <i>dalīl al-madhhab</i> with three species of <i>istidlāl</i>: 1) <i>istidlāl bi’l-Sunna</i>; or 2) <i>istidlāl</i> from “<i>mithl ma‘nā al-Sunna</i> [the Sunnaic <i>qawl</i> is a disjunction, implying either all choose killing, or all must take share of <i>diya</i> (?)]”;²⁰⁷ and 3) <i>istidlāl bi-qiyās al-‘illa</i> (of al-Bājī’s <i>jalī</i> type [4.1.1.2, ‘<i>illa</i> is known by <i>ijmā‘</i>])²⁰⁸
1076 – فَإِنْ قَالَ: فَأَيُّنَ السُّنَّةُ فِيهِ؟	(1076) SHAQ dialectical question #2 (<i>fa-in qāla</i>): “<i>fa-ayna al-Sunna fihī?</i>” [likely the first stage of an intended SHAQ <i>muṭālaba bi-taṣhīḥ al-akhbār</i> (among the <i>muṭālabāt</i> subsumed by the first <i>ḍarb</i> of al-Bājī’s fifth question)²⁰⁹]
1077 – قِيلَ: قَالَ رَسُولُ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «مَنْ قُتِلَ لَهُ قَتِيلٌ فَأَهْلُهُ بَيْنَ خَيْرَتَيْنِ: إِنْ أَحْبَبُوا أَخَذُوا الْقِصَاصَ، وَإِنْ أَحْبَبُوا فَالدِّيَّةُ» فَلَمَّا كَانَ مِنْ حُكْمِ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – أَنَّ لَوْلَاةَ الدِّمِ أَنْ يَقْتُلُوا وَلَهُمْ أَنْ يَأْخُذُوا الْمَالَ، وَكَانَ إِجْمَاعُ الْمُسْلِمِينَ أَنَّ الدِّيَّةَ مَوْزُونَةٌ لَمْ يَحِلَّ لَوَارِثٍ أَنْ يَمْنَعَ الْمِيرَاثَ مَنْ وَرِثَ مَعَهُ حَتَّى يَكُونَ الْوَارِثُ يَمْنَعُ نَفْسَهُ مِنَ الْمِيرَاثِ، وَهَذَا مَعْنَى الْقُرْآنِ فِي قَوْلِ اللَّهِ عَزَّ وَجَلَّ: «فَمَنْ عَفِيَ لَهُ مِنْ أَخِيهِ شَيْءٌ فَاتَّبَاعُ بِالْمَعْرُوفِ وَأَدَاءٌ إِلَيْهِ بِإِحْسَانٍ» [البقرة: 178]. وَهَذَا مَكْتُوبٌ فِي كِتَابِ الدِّيَاتِ.	(1077) SH <i>jawāb (qīla)</i>: 1) SH recites Prophetic <i>ḥadīth</i>-ruling: [“If <i>mas’ala</i> X occurs, parties have two choices: if they prefer, A; if they prefer, B”] 2) SH combines the disjunctive Sunnaic ruling with <i>ijmā‘</i> on two rulings of <i>mīrāth</i>: 1) <i>diya</i> is inherited; 2) no heir can block another’s inheritance, even his own 3) SH asserts this [his ruling] is the <i>ma‘nā</i> of Q.2:178 - SH ref. to another <i>kitāb</i> [SH <i>istidlāl</i> combines disjunctive Sunnaic <i>qawl</i> with <i>ijmā‘</i> re: <i>mīrāth</i>, the whole conforming to <i>ma‘nā</i> of Q.2:178]

²⁰⁷ NB: SH’s *istidlāl* here most resembles al-Shīrāzī’s *dalīl al-khiṭāb*, especially that sort promoted by Ibn Surayj which depends upon the *lafẓ al-sharṭ* (*al-Luma‘*, Mustū ed., 106). As we will see in §1077, SH’s Sunnaic *qawl* – in the form of a disjunction – thrice incorporates a *lafẓ al-sharṭ* (the *mas’ala* is initiated with “*man*,” and the disjunction of rulings twice incorporates “*in*”). We would hesitate to label SH’s *istidlāl* as *dalīl al-khiṭāb*, however, since the Sunnaic *qawl* itself internally suggests “either X or –X” (i.e., it does not require an additional hermeneutic). It therefore remains uncertain as to exactly how we might identify SH’s reference to *fī mithl ma‘nā al-Sunna* in this instance.

²⁰⁸ al-Bājī, *Minhāj*, Turkī ed., 26, §47.

²⁰⁹ al-Bājī, *Minhāj*, Turkī ed., 40, §78.

1078 – وَوَجَدْنَا مَا خَالَفَهُ مِنَ الْأَقَاوِيلِ لَا حُجَّةَ فِيهِ لِمَا وَصَفْتُ مِنَ السُّنَّةِ بِخِلَافِهِمْ.	(1078) SH turns to <i>i'tirād</i> of opposing positions: there is no <i>ḥujja</i> in the opposing <i>aqāwīl</i>, due to the <i>khilāf</i> of his <i>istidlāl bi'l-Sunna</i> [this constitutes: 1) <i>mu'āraḍa bi'l-nuṭq</i> against Ahl al-‘Ilm <i>qawl</i> #1 — <i>manzila</i>-subsumption supplanted by <i>naṣṣ</i> of Sunna (Shīr.VII.15.1; Bāj.IX.B.15.1);²¹⁰ 2) “<i>an yu'arīḍahu bi'l-naṣṣ Kitāb aw Sunna</i>” against Ahl al-‘Ilm <i>qawl</i> #2 — <i>taqlīd</i> of <i>athar</i> supplanted by <i>naṣṣ</i> of Sunna (Shīr.IV.2);²¹¹ and 3) unidentifiable <i>i'tirād</i> (reasoning behind Ahl al-‘Ilm <i>qawl</i> #3 unknown)]
1079 – وَوَجَدْتُ مَعَ ذَلِكَ قَوْلَهُمْ مُتَنَاقِضًا إِذْ زَعَمُوا أَنَّهُمْ امْتَنَعُوا مِنْ أَنْ يَأْخُذُوا الدِّيَّةَ مِنَ الْقَاتِلِ؛ لِأَنَّهُ إِنَّمَا عَلَيْهِ دَمٌ لَا مَالٌ. فَلَوْ زَعَمُوا أَنَّ وَاحِدًا مِنَ الْوَرِثَةِ لَوْ عَفَا حَالَ الدَّمِ مَالًا، مَا لَزِمُوا قَوْلَهُمْ وَلَقَدْ نَقَضُوهُ.	(1079) SH charge of <i>tanāquḍ</i>: “<i>wajadtu... qawlahum mutanāqīḍ</i>” 1) “they claim (<i>za'amū</i>)” [<i>naqīḍ</i>-premise #1]; 2) “so if they claim (<i>fa-law za'amū</i>)” [<i>naqīḍ</i>-premise #2]; then 3) “they do not adhere to their <i>qawl</i>, but have contradicted it (<i>mā lazimū qawlahum wa laqad naqaḍūhu</i>)” [SH <i>i'tirād</i> of <i>tanāquḍ</i>; pure logical contradiction]²¹²
1080 – فَأَمَّا الَّذِينَ قَالُوا: هُوَ كَالْحَدِّ يَقُومُ بِهِ أَيُّ	(1080) SH charge of double-<i>naqḍ</i> “<i>fa-ammā alladhīna qālū</i> [Ahl al-‘Ilm

²¹⁰ al-Shīrāzī, *Ma'ūna*, al-‘Umayrīnī ed., [Missing]; Turkī ed., 262, §147; al-Bājī, *Minhāj*, Turkī ed., 201, §454. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 70, §327.

²¹¹ al-Shīrāzī, *Ma'ūna*, al-‘Umayrīnī ed., 82. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 39, §208.

²¹² This marks the third and final charge of *tanāquḍ*, openly employing the term *mutanāqīḍ*, which appears in the *K. Ikhtilāf al-‘Irāqīyyīn* (cf. §§102 and 469). This particular charge is of some import, especially considering the use of the verb *naqaḍa* at the close of the section, SH’s usage of *khālafa* and *khilāf* in the previous section, and his use of *khālafa* in the following section. This is suggestive of a more precise or even technical application of these terms, whereby, for example, *mutanāqīḍ* and *naqaḍa* are reserved for internal, logical contradictions (as in self-contradicting arguments), while *khilāf* and *khālafa* are reserved for such claims as contradict presumed *endoxa* sources or opinions. A comparison of the usage of *naqaḍūhu* (X’s claim A vs. his own *qawl* –A) in §1079, with *khālafahu* (the *aqāwīl* of group X vs. the *ijtihād*-sources of SH) and *khilāf* (Sunna vs. the *aqāwīl* of group X) in §1078, and *khālafū baynahu* (*mas'ala* X) *wa bayna* (legal category Y) in §1080, goes some way towards bearing this out. It may even be that *mutanāqīḍ* and *naqaḍa* convey a sense of “being contradictory to,” while *khilāf* and *khālafa* convey “being contrary to.” Any confirmation or denial of this assertion, however, will require a great deal more of searching and comparison throughout the *Umm* and other works. For now, we may note that all but two of the 28 occurrences of *mutanāqīḍ* in the *Umm* are employed as descriptors of a *qawl*, as in the basic formula: “*wa qulta fī hādhihā qawlan mutanāqīḍan*.” Interestingly, the term does not appear in the *Risāla*, and so may have escaped the notice of previous *Risāla*-centered studies of SH’s legal theory.

الْوَرْتَةُ شَاءَ، وَإِنْ عَفَا غَيْرُهُ فَقَدْ خَالَفُوا بَيْنَهُ وَبَيْنَ الْحَدِّ، مِنْ أَجْلِ أَنَّهُمْ يَزْعُمُونَ أَنَّ لِلْوَرْتَةِ الْعَفْوَ عَنِ الْقَتْلِ، وَيَزْعُمُونَ أَنَّهُ لَا عَفْوَ لَهُمْ عَنِ الْحَدِّ، وَيَزْعُمُونَ أَنَّهُمْ لَوْ اصْطَلَحُوا فِي الْقَتْلِ عَلَى الدِّيَةِ جَازَ ذَلِكَ، وَيَزْعُمُونَ أَنَّهُمْ لَوْ اصْطَلَحُوا عَلَى مَالٍ فِي الْحَدِّ لَمْ يَحْزِرْ.	<i>qawl #1</i>]; <i>faqad khālafū baynahu wa bayna al-ḥadd</i>” [i.e., they have been inconsistent as regards the components of their own <i>manzila</i>-subsumption] • SH <i>naqd</i> #1: they claim <i>ḥukm</i> A for the <i>mas’ala</i> at hand (<i>qatl</i>), but <i>ḥukm</i> –A for the subsuming legal category (<i>ḥadd</i>) • SH <i>naqd</i> #2: they claim <i>ḥukm</i> B for the <i>mas’ala</i> at hand (<i>qatl</i>), but <i>ḥukm</i> –B for the subsuming legal category (<i>ḥadd</i>) • [SH <i>i’tirāḍ</i> of <i>naqd</i> (x2); (Shīr.VII.7; Bāj.IX.B.11.1)²¹³]

²¹³ al-Shīrāzī, *Ma’ūna*, al-ʿUmayrīnī ed., 104ff.; al-Bājī, *Minhāj*, Turkī ed., 185, §§412–13. Cf. Ibn ʿAqīl, *K. al-Jadal*, 56ff., §§276ff. Both of SH’s *naqd* charges correspond to al-Bājī’s first *ḍarb* of *naqd*, which — by sheer coincidence — is defined in terms which (although conveying a different sense entirely) resemble terms employed in the *naqd* components at hand in our dialectical sequence. That is to say, the charges made in §1080 conform well to that *ḍarb* of *al-naqd* against an *ʿilla* which is “*wuḍʿa li’l-jins* [in our case, the legal category of *ḥudūd*], *fa-huwa bi-manzilat al-ḥadd* [meaning: ‘definition’].”

[*masā’il*-set #9] §§1125-1131

Summary of Analysis:

1125 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَقَرَّ الرَّجُلُ بِالسَّرِقَةِ مَرَّةً وَاحِدَةً، وَالسَّرِقَةُ تُسَاوِي عَشْرَةَ دَرَاهِمَ فَصَاعِدًا، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: أَقْطَعُهُ. وَيَقُولُ: إِنْ لَمْ أَقْطَعْهُ جَعَلْتُهُ عَلَيْهِ دَيْنًا وَلَا قَطَعَ فِي الدِّينِ.	• (1125) AH rulings for <i>mas’ala</i> #1, and subsidiary ruling • [implied ‘<i>ilal</i>: combination of <i>niṣāb</i> + single <i>iqrār</i> occasions <i>ḥukm</i> of cutting; <i>māl</i> = <i>dayn</i> after first <i>iqrār</i> (<i>dayn</i> does not occasion cutting)] • [Supplied by the <i>Mabsūt</i>: 1) AH <i>istidlāl</i>: Sunnaic <i>fi’l</i>; 2) AH <i>qiyās/manzila</i>-subsumption argument: it is of the ‘<i>uqūbāt</i>, so its witness/confession procedure bears the same relationship as in <i>qīṣāṣ</i> (two witnesses are confirmed by a singular confession); 3) <i>i’tirād</i> (likely al-Sarakhsī’s, not necessarily that of AH) of IAL/old AY <i>qiyās/manzila</i>-subsumption: <i>zinā</i> is <i>makhṣūṣ</i> among its <i>naẓā’ir</i>; 4) AH ‘<i>ilal</i>: <i>māl</i> = <i>dayn</i> after first <i>iqrār</i> (<i>dayn</i> does not occasion cutting); undiminished <i>māl</i> is returned after first <i>iqrār</i> (returned <i>māl</i> does not occasion cutting); 5) AH/Sarakhsī <i>alā tarā</i> introduces <i>mas’alat al-naqd</i> (two witnesses + <i>māl</i> returned occasions no cutting — <i>mas’ala</i> at hand [<i>iqrār</i>] is <i>awlā</i>) • [<i>i’tirādāt</i> against IAL/old AY position implied by AH ruling, reported <i>istidlāl</i>, and objection-arguments include: 1) against <i>istidlāl bi-qawl al-wāḥid min al-ṣaḥāba</i>: “<i>an yu’ārīḍahu bi’l-naṣṣ Kitāb aw Sunna</i>” (Shīr.IV.2);²¹⁴ 2) against <i>istidlāl bi-qiyās al-‘illa</i>: <i>mu’āraḍa</i> of <i>qiyās</i> by <i>qiyās</i> (al-Baṣrī), or <i>al-mu’āraḍa bi-‘illa mubtada’a</i> (Shīr.VII.15.2.1; Bāj.IX.B.15.2.1);²¹⁵ and 3) against <i>istidlāl</i>

²¹⁴ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 82. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 39, §208.

²¹⁵ al-Baṣrī, *K. al-Qiyās al-Shar’ī*, Ḥamīd Allāh ed., 1044; Hallaq, “Treatise,” 221; al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., [Missing]; Turkī ed., 262, §148; al-Bājī, *Minhāj*, Turkī ed., 201, §455. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 71, §330.

	<i>bi-qiyās al-‘illa: al-naqd</i> (Shīr.VII.7; Bāj.IX.B.11.1) ²¹⁶]
1126 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا أَقْطَعُهُ حَتَّى يُقَرَّ مَرَّتَيْنِ. وَبِهَذَا يَأْخُذُ. ثُمَّ رَجَعَ إِلَى قَوْلِ أَبِي حَنِيفَةَ.	• (1126) IAL counter-ruling for <i>mas’ala</i> #1 • [implied counter-‘illa: only combination of <i>niṣāb</i> + double <i>iqrār</i> occasions <i>ḥukm</i> of cutting; <i>aṣl</i> implied in §1128 by SHAP: when there are two witnesses to <i>sariqa</i>]²¹⁷ • previous AY adherence stated; then AY reversion to AH <i>qawl</i> stated • [Supplied by the <i>Mabsūt</i>: 1) IAL/old AY <i>ḥujja: athar-fi’l</i> of ‘Alī; 2) counter-<i>qiyās/manzila</i>-subsumption argument: it is a <i>ḥadd</i>, so its witness/confession procedure bears the same relationship as in <i>zinā</i> (number of witnesses required = number of confessions required)] • [<i>i’tirāḍāt</i> against AH position implied by IAL/old AY ruling and reported <i>istidlāl</i> include: 1) against <i>istidlāl bi’l-Sunna</i>: either <i>al-naskh bi-‘amal al-ṣaḥāba bi-khilāfihi</i> (Shīr.II.C.6.3; Bāj.II.2.5.3)²¹⁸ or <i>mu‘āraḍat</i> [al-Sunna] <i>bi’l-‘illa</i> (Shīr.II.C.8.2; Bāj.II.2.7.2);²¹⁹ 2) against <i>istidlāl bi-qiyās al-‘illa: mu‘āraḍa</i> of <i>qiyās</i> by <i>qiyās</i> (al-Baṣrī), or <i>al-mu‘āraḍa bi-‘illa muḥtada’a</i> (Shīr.VII.15.2.1; Bāj.IX.B.15.2.1)²²⁰]
1127 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَقَرَّ الرَّجُلُ بِالسَّرِقَةِ مَرَّةً وَاحِدَةً وَتَبَتَ عَلَى الْإِقْرَارِ وَكَانَتْ مِمَّا تُقْطَعُ فِيهِ الْيَدُ قُطِعَ، وَسَوَاءٌ إِقْرَارُهُ مَرَّةً أَوْ أَكْثَرَ.	• (1127) SH ruling for <i>mas’ala</i> #1 • [SH <i>taswiya</i>-subsumption: cutting for single and multiple confessions]

²¹⁶ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 104ff.; al-Bājī, *Minhāj*, Turkī ed., 185, §§412-13. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 56ff., §§276ff. This al-Bājī’s first *ḍarb* of *naqd*, against an ‘illa which is “*wuḍ‘a li’l-jins* [IAL/AY *manzila*-subsumption under the witness/confession requirements of *ḥudūd*], *fa-huwa bi-manzilat al-ḥadd*.”

²¹⁷ The SHAP position in §1128 is that of IAL in §1126. He cuts only for two confessions, by *qiyās* on the basis of the *aṣl* of cutting only for two witnesses. This is why the SHAP *qawl* in §1128 begins with *kamā*.

²¹⁸ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 63f.; al-Bājī, *Minhāj*, Turkī ed., 112f., §219. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 35, §185.

²¹⁹ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 67f., n.6; al-Bājī, *Minhāj*, Turkī ed., 123ff., §§244ff.

²²⁰ See note for §1125.

1128 – فَإِنْ قَالَ قَائِلٌ: كَمَا لَا أَقْطَعُهُ إِلَّا بِشَاهِدَيْنِ.	• (1128) SH initiates “instructional” dialectic with SHAP counter-<i>qawl</i> #1 (<i>fa-in qāla qā’ilun: kamā X</i>) • [SHAP reasoning: <i>qiyās</i> from <i>aṣl</i> of cutting only for two witnesses (cf. IAL ruling in §1126)]
1129 – فَهُوَ إِذَا شَهِدَ عَلَيْهِ شَاهِدَانِ قَطَعَهُ وَلَمْ يَلْتَفِتْ إِلَى رُجُوعِهِ لَوْ كَانَ أَقَرَّ، وَهُوَ لَوْ أَقَرَّ عِنْدَهُ مِائَةً مَرَّةً ثُمَّ رَجَعَ لَمْ يَقْطَعْهُ.	• (1129) First SH objection to SHAP <i>qiyās</i> flatly stated to reader (without “<i>qāla lahu</i>”) • 1) SH introduces critique-<i>mas’ala</i> #1 (two witnesses, SHAP pays no heed to recanting of <i>iqrār</i> – it does not occasion <i>ḥadd</i>-aversion [implied: neither <i>iqrār</i> nor <i>rujū’</i> have efficiency, thus number of <i>iqrār</i> is irrelevant]) • 2) SH introduces critique-<i>mas’ala</i> #2 (one-hundred confessions, SHAP grants recanting of <i>iqrār</i> total efficiency to occasion <i>ḥadd</i>-aversion [implied: <i>iqrār</i> efficiency cancelled by <i>rujū’</i>, thus original number of <i>iqrār</i> is irrelevant]) • [SH <i>i’tirād</i> against SHAP <i>qiyās</i> most resembles ‘<i>adam al-ta’tḥīr</i> (x2): SHAP’s <i>waṣf</i> (two/twice) shown to have no relevance to efficiency of the ‘<i>illa</i> (Shīr.VII.6.2; Bāj.IX.B.14.2)²²¹]
1130 – فَإِنْ قَالَ قَائِلٌ: فَهَكَذَا لَوْ رَجَعَتِ الشُّهُودُ لَمْ تَقْطَعْهُ.	• (1130) SH continues “instructional” dialectic with SHAP counter-<i>qawl</i> #2 (<i>fa-in qāla qā’ilun: fa-hākadhā X</i>) • [SHAP reasoning: <i>qiyās</i> from <i>aṣl</i> of not cutting when witnesses recant]
1131 – قِيلَ: لَوْ رَجَعَ الشُّهُودُ عَنِ الشَّهَادَةِ عَلَيْهِ ثُمَّ	• (1131) SH <i>i’tirād</i> of <i>farq</i> (<i>qāla</i>):

²²¹ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 102f. (“‘*adam al-ta’tḥīr* regarding that for which the ‘*illa* is not destroyed by its elimination”); al-Bājī, *Minhāj*, Turkī ed., 200, §452 (“regarding a *waṣf* for which the ‘*illa* is not destroyed by its elimination; this *waṣf* being called a ‘stuffing’ [*ḥashw*]”). Cf. Ibn ‘Aqīl, *K. al-Jadal*, 70, §274 (“when he mentions, regarding the ‘*illa*, a *waṣf* of which the *ḥukm* stands independent, without it”). The descriptors supplied by our *jadāl*-theory authors correspond quite closely to our interpretation of SH’s objection-project in §1129. Notably, the ‘*illa* of *iqrār* (accepted as efficient by all jurists in this *mas’ala*-set) is not harmed by SH’s critique. Rather, he denies that attaching a number to the *iqrār* bears any relevance to the efficiency of *iqrār*; i.e., the number-*waṣf* is a mere “stuffing” on the part of SHAP. Al-Shīrāzī’s second *wajh* of *jawāb* to this *i’tirād* (*Ma’ūna*, al-‘Umayrīnī ed., 102) is of some interest, for it shows us a good strategy by which SHAP might have benefited, and the example *mas’ala* belongs to a similar domain of our *mas’ala* set above.

عَادُوا فَشَهِدُوا عَلَيْهِ بِمَا رَجَعُوا عَنْهُ لَمْ تُقْبَلْ شَهَادَتُهُمْ، وَلَوْ أَقَرُّ ثُمَّ رَجَعَ ثُمَّ أَقَرَّ قَبْلَ مِنْهُ، فَالِإِقْرَارُ مُخَالَفٌ لِلشَّهَادَاتِ فِي الْبَدءِ وَالْمَتَعَقَّبِ.	• SH introduces <i>mas’alat al-farq</i>: when recanting witnesses return to testify again, their testimony is not accepted; not so when recanting confessor confesses again • SH seals destruction of SHAP’s <i>qiyās</i>: <i>iqrār</i> is <i>mukhālif</i> to the <i>shahādāt</i> “<i>fi’l-bad’i wa’l-muta’aqqaḇi</i>”²²² • [SH <i>i’tirād</i> of <i>farq</i> between SHAP’s <i>aṣl</i> and <i>far’</i> (not identifiable in the <i>jadāl</i>-theory texts — SH’s overall objection is <i>mu’āraḍa bi’l-nuṭq</i>, not <i>mu’āraḍa bi-‘illa</i>)]²²³

²²² Cf. an earlier SH charge of *farq* we have seen (§288), which is sealed by a similar formula.

²²³ Ultimately, we will note that SH’s sole concern in §§1129 and 1131 is the destruction of SHAP’s *qiyās* from two witnesses to two confessions — it is a destructive, not constructive, critique. That is to say, he does not bring a counter-*qiyās*, nor — as we have seen earlier (§§288; 622ff.) — does he argue by way of a “hypothetical” *mu’āraḍa-qiyās*. We do not, in fact, even learn the *aṣl* of SH’s own *istidlāl*, although we might presume it to be the same Sunnaic *dalīl* upon which AH is said (by al-Sarakhsī) to have depended. Thus, from a larger perspective, we may envisage the conflict between the SH and SHAP opinions as an SH *mu’āraḍa bi’l-nuṭq*, whereby SHAP’s *qiyās* is simply to be supplanted by SH’s Sunnaic *dalīl*. SH, however, has undertaken the additional task of laying bare the inconsistencies (lack of efficiency of any number attached to the ‘illa of *iqrār*; and *farq* between the *aṣl* of *shahāda* and the *far’* of *iqrār*) inherent to SHAP’s *qiyās*. As his larger objection may be categorized as *mu’āraḍa bi’l-nuṭq* (not *mu’āraḍa bi-‘illa*, beneath which we find the varieties of *farq*-objection in the *jadāl*-theory texts), we will have to treat his *farq*-objection as unique — either to proto-system *jadāl*, or to his own argument style.

[*masā’il*-set #10] §§1217-1232

Summary of Analysis:

1217 – وَإِذَا زَوَّجَ الرَّجُلُ ابْنَتَهُ وَهِيَ صَغِيرَةٌ ابْنُ أَخِيهِ وَهُوَ صَغِيرٌ يَتِيمٌ فِي حَجَرِهِ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: النِّكَاحُ جَائِزٌ وَلَهُ الْخِيَارُ إِذَا أَدْرَكَ. وَبِهِ يَأْخُذُ.	• (1217) AH rulings for <i>mas’ala</i> #1 (<i>walī</i> of orphaned nephew marries him to his daughter while both are minors): 1a) <i>jā’iz</i>; 1b) with <i>khiyār</i> upon maturity • previous AY adherence stated (AY changes to variant in 1218b) • [<i>istidlāl</i> and arguments provided by <i>Mabsūṭ</i> 4:214f.] • [multiple <i>i’tirāḍāt</i> may be inferred against IAL position]
1218 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا يَحْجُوزُ ذَلِكَ عَلَيْهِ حَتَّى يُدْرِكَ. ثُمَّ رَجَعَ أَبُو يُوسُفَ وَقَالَ: إِذَا زَوَّجَ الْوَلِيُّ فَلَا خِيَارَ وَهُوَ مِثْلُ الْأَبِ.	• (1218[a]) IAL counter-ruling for <i>mas’ala</i> #1 (<i>walī</i> cannot marry him off until he attains maturity) • [multiple <i>i’tirāḍāt</i> may be inferred against AH position] • (1218[b]) New AY ruling (he recants from AH in §1217): 1b (no <i>khiyār</i> upon maturity) • [<i>istidlāl</i> and arguments provided by <i>Mabsūṭ</i> 4:215; <i>taqlīd</i> of ‘Urwa b. al-Zubayr’s <i>qiyās al-‘illa</i> (<i>manzila</i>-subsumption: the minor married of by the <i>walī</i> is in the <i>manzila</i> of the minor married of by the father)] • [implied <i>i’tirāḍ</i> against AH ruling 1b: <i>mu‘āraḍat al-‘illa bi’l-‘illa</i> (subtype difficult to determine; Shīr.VII.15.2; Bāj.IX.B.15.2)²²⁴]
1219 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَلَا يَحْجُوزُ نِكَاحُ الصَّغَارِ مِنَ الرِّجَالِ، وَلَا مِنَ النِّسَاءِ إِلَّا أَنْ يُزَوِّجَهُنَّ الْآبَاءُ وَالْأَجْدَادُ إِذَا لَمْ يَكُنْ لَهُنَّ آبَاءٌ، فَإِنَّهُمْ آبَاءٌ، وَإِذَا زَوَّجَهُنَّ أَحَدٌ سِوَاهُمَا فَالنِّكَاحُ مَفْسُوخٌ وَلَا يَتَوَارَثَانِ فِيهِ، وَإِنْ كَبُرَا، فَإِنْ دَخَلَ عَلَيْهَا فَأَصَابَهَا فَلَهَا الْمَهْرُ، وَيُفَرَّقُ بَيْنَهُمَا، وَلَوْ طَلَّقَهَا قَبْلَ أَنْ يَفْسَخَ	• (1219) SH ruling for <i>mas’ala</i> #1; detailed subsidiary rulings (all showing marriage of minors is <i>mafsūkh</i> from the start, if anyone but fathers marry them off) • [implied <i>i’tirāḍ</i> against AH/AY ruling 1a: <i>mu‘āraḍat al-‘illa bi’l-nuṭq</i> (see §1225); <i>farq</i> (§§1228ff.)]

²²⁴ al-Shīrāzī, *Ma‘ūna*, al-‘Umayrīnī ed., [Missing]; Turkī ed., 262ff., §§148ff.; al-Bājī, *Minhāj*, Turkī ed., 201ff., §§455ff. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 71, §330.

النِّكَاحُ لَمْ يَقَعْ طَلَاقُهُ وَلَا ظَهْرُهُ وَلَا إِيلَافُهُ؛ لِأَنَّهَا لَمْ تَكُنْ زَوْجَةً قَطُّ.	
[(1220-23) AH (& AY), IAL, and SH rulings and arguments for another <i>mas’ala</i> (can a man combine in marriage a woman and her step-mother?)]	
1224 – قَالَ الشَّافِعِيُّ: فَإِنْ قَالَ قَائِلٌ: لِمَ زَعَمْتَ أَنَّ الْآبَاءَ يُزَوِّجُونَ الصِّغَارَ؟	• (1224) SH initiates “instructional” dialectic (<i>fa-in qāla qā’ilun</i>): “<i>lima za’amta X?</i>” (X = fathers can marry off minors) • [SHAQ asks al-Bājī’s third question: <i>al-su’āl ‘an dalīl al-madhhab</i> — an obvious first stage in pushing concession of his <i>qiyās</i> (Type I <i>qiyās al-dalāla</i>, as we shall see) linking <i>awliyā’</i> with fathers (see SHAQ in §1227), by securing SH’s acceptance of his <i>aṣl</i>]
1225 – قِيلَ: زَوَّجَ أَبُو بَكْرٍ رَسُولَ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – عَائِشَةَ وَهِيَ بِنْتُ سَيْتٍ أَوْ سَعٍ وَبَنَى بِهَا النَّبِيُّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – وَهِيَ بِنْتُ تِسْعٍ فَالْحَالَانِ اللَّذَانِ كَانَ فِيهِمَا النِّكَاحُ وَالِدُخُولُ كَانَا وَعَائِشَةُ صَغِيرَةً مِمَّنْ لَا أَمْرَ لَهَا فِي نَفْسِهَا.	• (1225) SH <i>jawāb</i> (<i>qīla</i>): • SH <i>istidlāl bi’l-Sunna</i> (Sunnaic <i>fi’l</i> of Prophet and Abū Bakr re: ‘Ā’isha) • SH <i>tafsīr</i>: 1) both <i>nikāḥ</i> and <i>dukhūl</i> while she was a minor; 2) <i>hāl</i> of minor defined: “<i>lā amra lahā nafsihā</i>” • [SH names his <i>dalīl</i>-source, confirming what SHAQ intends to push as the <i>aṣl</i> of his Type I <i>qiyās al-dalāla</i>]
1226 – وَزَوَّجَ غَيْرُ وَاحِدٍ مِنْ أَصْحَابِ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – ابْنَتَهُ صَغِيرَةً.	• (1226) SH <i>jawāb</i> (cont.): • allusion to <i>āthār</i> of other Companions (as fathers marrying off minor daughters) • [SH confirms his <i>dalīl</i>-source with supporting <i>āthār</i> = a kind of <i>tarjīḥ</i> (Shīr.IX.2.1)]
1227 – فَإِنْ قَالَ قَائِلٌ: فَإِذَا أَجَزْتَ هَذَا لِلْآبَاءِ، وَلَمْ تَلْتَفِتْ إِلَى الْقِيَاسِ فِي أَنَّهُ لَا يَجُوزُ أَنْ يُعْقَدَ عَلَى حُرَّةٍ صَغِيرَةٍ نِكَاحٌ ثُمَّ يَكُونَ لَهَا الْخِيَارُ؛ لِأَنَّ أَصْلَ النِّكَاحِ لَا يَجُوزُ أَنْ يَكُونَ فِيهِ خِيَارٌ إِلَّا فِي الْإِمَاءِ إِذَا تَحَوَّلَتْ حَالُهُنَّ، وَالْحَرَائِرُ لَا تُحَوَّلُ حَالُهُنَّ، وَلَا يَجُوزُ أَنْ يُعْقَدَ عَلَيْهِنَّ مَا لَهُنَّ مِنْهُ بُدٌّ، ثُمَّ يُلْزِمُهُنَّ	• (1227) SH continues “instructional” dialectic (<i>fa-in qāla qā’ilun</i>), with multi-premise SHAQ <i>i’tirād</i>: • 1) you allow this (compulsion) to the fathers, but ignore the <i>qiyās</i> (re: <i>khiyār</i>, from the <i>aṣl</i> of the <i>imā’</i>): • [SHAQ recounts an objection of <i>farq</i> — either pre-conceded or earlier

فَكَيْفَ لَمْ تَجْعَلِ الْأَوْلِيَاءَ قِيَاسًا عَلَى الْآبَاءِ؟	advanced by SH — to this <i>qiyās al-‘illa</i> from the <i>ama</i> compelled to marriage]²²⁵ • 2) “<i>fa-kayfa lam taj‘al al-awliyā’ qiyāsan ‘alā al-ābā’?</i>” • [i.e., “you have thus conceded that X and Y are alike as regards <i>ḥukm</i> A, how do you deny <i>qiyās</i> [<i>al-dalāla</i>] from X to Y?” SHAQ attempts <i>elenchus</i> with <i>i’tirād</i>: objection-oriented dialectical question (not in the <i>jadāl</i>-theory texts), something like a <i>muṭālaba bi’l-farq</i>]²²⁶ • [NB: what SHAQ is attempting here is nothing less than a charge of <i>method-naqd</i>. He is accusing SH of being inconsistent in his <i>qiyās</i>-method.]
1228 – قِيلَ: لِإِفْتِرَاقِ الْآبَاءِ وَالْأَوْلِيَاءِ وَأَنَّ الْأَبَ يَمْلِكُ مِنَ الْعَقْدِ عَلَى وَلَدِهِ مَا لَا يَمْلِكُهُ مِنْهُ غَيْرُهُ.	• (1228) SH <i>jawāb</i> (<i>qīla</i>): • 1) due to the <i>iftirāq</i> of X and Y • 2) <i>ḥukm</i> A is unique only to X • [SH <i>i’tirād</i> of <i>farq</i>, with implied <i>mu‘āraḍa bi’l-nuṭq</i> (<i>jadāl</i>-theory texts do not treat this combination)]²²⁷

²²⁵ In abbreviated fashion, SHAQ incorporates into his question the elements of an *i’tirād* — conceded, or perhaps earlier advanced, by SH — against the allowance of *khiyār* upon majority for the minor compelled to marriage, from the *aṣl* of the *ama* compelled to marriage (who has *khiyār* upon the transformation of her status from enslaved to manumitted). Incredibly, all the elements of a previous dispute have been crammed into SHAQ’s dialectical question by way of stating a single, pre-conceded premise. Broken down into components, the previously attempted *qiyās* must have been composed of: 1) *aṣl*: the *ama* compelled to marriage by her master; 2) *far’*: the minor compelled to marriage by her father; 3) purported *‘illa*: her *ḥāl* transforms; and 4) *ḥukm*: she gains the right to *khiyār* upon transformation of *ḥāl*. SH, it would seem, has previously objected to this *qiyās*, due to the following reasons: 1) the *aṣl al-nikāḥ* does not allow *khiyār*; 2) the exception is the *ama*, when her *ḥāl* transforms; 3) the *ḥāl* of the freeborn (minor) does not change; 4) one cannot, at the same time, a) contract (over the freeborn) something which allows them an escape (from the contract), and b) impose that contract upon them. As for the third component of objection, perhaps we are meant to understand that the transformations of *ḥāl* (in *aṣl*: from slave to free; in *far’*: from minor to major) are not analogous — they do not constitute the same *‘illa*. This would constitute an objection of *farq* between *aṣl* and *far’*, destroying the attempted *qiyās al-‘illa*. Whatever the case, all of this past argument appears to have been inserted into SHAQ’s question for the sake of highlighting a single shared *ḥukm* which SHAQ believes should serve as an element of *qiyās* from fathers to *awliyā’*: whether married off by father or *walī*, there belongs no *khiyār* after the *nikāḥ* is concluded.

²²⁶ NB: the *qiyās* for which SHAQ is proponent appears to be a Type I *qiyās al-dalāla*: his *aṣl* (father) and *far’* (other *awliyā’*) share a common *ḥukm* (no *khiyār* allowed in *nikāḥ* for which they serve as *walī*). Thus, it is deemed by SHAQ that they should also share the *ḥukm* under consideration (the right to compulsion of the minor).

²²⁷ We might expect SH to be setting the stage for a *mu‘āraḍa* by way of Type II *qiyās al-dalāla* (certain *aḥkām* of the *far’* are the opposite of those for the (*naẓīr*) *aṣl*, therefore, we should expect the *ḥukm* under consideration also to be the opposite — i.e., no right to compulsion of the minor). Once again, however, we find SH’s concern is not so much promoting his *istidlāl* as

1229 – أَلَا تَرَى أَنَّهُ يَعْقِدُ عَلَى الْبَكْرِ بِالْعَا وَلَا يُرَدُّ عَنْهَا وَإِنْ كَرِهَتْ، وَلَا يَكُونُ ذَلِكَ لِلْعَمِّ وَلَا لِلْأَخِ وَلَا وَلِيِّ غَيْرِهِ.	• (1229) SH <i>alā tarā</i> introduces <i>mas’alat al-naqd</i> (father unique re: <i>ḥukm</i> of compulsion of virgin major), in an attempt to portray SHAQ as elsewhere paying heed to the <i>farq</i> of §1228 • [SH attempts rhetorical <i>i’tirād</i> of <i>naqd</i> (SHAQ’s ‘illa must be present in <i>mas’alat al-naqd</i>, but his <i>ḥukm</i> is presumed not to be, thus showing that he honours the <i>farq</i>; Shīr.VII.7; Bāj.IX.B.11.2.1)²²⁸
1230 – فَإِنْ قَالَ قَائِلٌ: فَإِنَّا لَا نُجِيزُ لِلْأَبِ أَنْ يَعْقِدَ عَلَى الْبَكْرِ بِالْعَا، وَنَجْعَلُهُ فِيهَا وَفِي الثَّيْبِ مِثْلَ غَيْرِهِ مِنَ الْأَوْلِيَاءِ.	• (1230) SHAP (note role reversal) <i>jawāb</i> (<i>fa-in qāla qā’il</i>): • SHAP rejects the <i>mas’alat al-naqd</i> — it does not create contradiction because SHAQ rules the opposite of SH for that <i>mas’ala</i>; SH’s <i>farq</i> is implicitly denied, and SHAQ’s Type I <i>qiyās al-dalāla</i> is strengthened by another shared <i>ḥukm</i> (no compulsion of virgin major) • [this is al-Shīrāzī’s first <i>wajh</i> of <i>jawāb</i> against a charge of <i>naqd</i>: “that he does not concede to the <i>mas’alat al-naqd</i>,” and al-Bājī’s first <i>ṭarīq</i> against the relevant <i>naqd</i> subtype (11.2.1): “that he prevents (<i>an yamna’a</i>) the <i>mas’alat al-naqd</i>”]²²⁹

destroying SHAQ’s *qiyās* — his exposing *furūq* is a destructive, not constructive, critique. Moreover, as we have seen previously in §§1129ff., he brings neither counter-*qiyās* nor “hypothetical” *mu’araḍa-qiyās* (nor will he in this sequence). We have, however, already encountered the *aṣl* of SH’s *istidlāl* (Sunnaic *fi’l* and supporting *āthār*), and, with more conviction, may identify the conflict of opinions (from SH’s vantage) as a *mu’araḍa bi’l-nuṭq* (SHAQ’s *qiyās* to be supplanted by SH’s Sunnaic *dalīl*). As far as identifying his charges of *farq*, however, we are in the same position as we were previously; i.e., the varieties of *farq*-objection fall under the heading of *mu’araḍat al-‘illa bi’l-‘illa* in the *jadāl*-theory texts. Here, however, SH brings no counter-*‘illa*, only *nuṭq*. We will therefore, as before, treat his *farq*-objection as unique.

²²⁸ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 104ff.; al-Bājī, *Minhāj*, Turkī ed., 185, §§415. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 57, §§278. Here, this is al-Bājī’s second *darb* of *naqd*, against an ‘illa which is “*wuḍi’a li-ithbāt al-aḥkām fi’l-a’yān*.” SHAQ’s ‘illa — merely indicated by his *dalāla* — is not “in the *manzila* of the *ḥadd*.” We may further narrow the identification of this *naqd* to that subtype (11.2.1) against an ‘illa “*mawḍū’a li’l-wujūb*.”

²²⁹ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 104; al-Bājī, *Minhāj*, Turkī ed., 185, §415; 186, §419 (this *jawāb* is further subdivided depending upon whether or not P actually has a *madhhab* regarding the *mas’alat al-naqd*; see §§420-2). Bearing in mind this is an “instructional” dialectic, we can see that SH is “covering all the bases” which his pupil might encounter in course of a disputation on this *mas’ala*. This charge of *naqd* would have been sufficient had SHAQ professed the same *ḥukm* as SH for the *mas’alat al-naqd*. As we see, however, SH confronts his pupil with a SHAP who rules

1231 – قِيلَ: فَأَنْتَ تَجْعَلُ قَبْضَهُ لِمَهْرِ الْبِكْرِ قَبْضًا وَلَا تَجْعَلُ ذَلِكَ لَوْلِيٍّ غَيْرِهِ إِلَّا وَصِيًّا بِمَالٍ، وَتَجْعَلُ عَقْدَهُ عَلَيْهَا صَغِيرَةً حَائِزًا لَا خِيَارَ لَهَا فِيهِ، وَتَجْعَلُ لَهَا الْخِيَارَ إِنْ عَقَدَ عَلَيْهَا وَلِيٌّ غَيْرُهُ.	• (1231) SH <i>elenchus</i> (<i>qīla</i>) via introduction of two additional <i>masā'il al-naqd</i>: • 1) <i>naqd</i> #1: (you rule A for father and –A for other <i>awliyā'</i> [except the <i>waṣī</i> of <i>māl</i>]) • 2) <i>naqd</i> #2: (you rule B for minor married off by father and –B for minor married off by other <i>awliyā'</i>)²³⁰ • [SH double-charge of <i>naqd</i> (Shīr.VII.7; Bāj.IX.B.11.2.1)²³¹]
1232 – وَلَوْ كَانَ مِثْلُ سَائِرِ الْأَوْلِيَاءِ مَا كُنْتُ قَدْ فَرَّقْتُ بَيْنَهُ وَبَيْنَ الْأَوْلِيَاءِ. وَهَذَا مَكْتُوبٌ فِي كِتَابِ النِّكَاحِ.	• (1232) SH seals his <i>elenchus</i>: • (snappish?) assertion: “If X were like Y, I would not have made distinction between X and Y.” • [SH reasserts <i>farq</i> as general: father different from other <i>awliyā'</i> across all relevant <i>masā'il</i>]²³² • SH ref. to (presumably complete argument in) another <i>kitāb</i>

the opposite; according to SHAP, the father does not receive SH's *ḥukm*, and thus there is no *farq* between him and other *awliyā'*.

²³⁰ NB: SHAP is thus shown to be a proponent of the AY position as regards rulings 1a and 1b (cf. §§1217 and 1218b).

²³¹ al-Shīrāzī, *Ma'ūna*, al-‘Umayrīnī ed., 104ff.; al-Bājī, *Minhāj*, Turkī ed., 185, §§415. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 57, §§278.

²³² We will note here that a charge of *farq* (as an objection to *qiyās*) is a potent tool against claims of *manzila*-subsumption. Although neither AY nor SHAQ/SHAP ever claim that other *awliyā'* are in the *manzila* of the father, their reasoning appears to be pushing in this direction (note especially how AY formulates his recanting in §1218). This concern expressed by SH that a *farq* should be generally observed, across legal genera, is something we will refer to later as “*farq*-extension” (see note attached to §78, below).

[masāʾil-set #11] §§1310-1326

Summary of Analysis:

1310 – وَإِذَا ارْتَدَّ الزَّوْجُ عَنِ الْإِسْلَامِ وَكَفَرَ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: بَأْتَتْ مِنْهُ امْرَأَتُهُ إِذَا ارْتَدَّ، لَا تَكُونُ مُسْلِمَةً تَحْتَ كَافِرٍ. وَبِهِ يَأْخُذُ.	• (1310) AH ruling for <i>masʾala</i> #1 • AY adherence stated • [AH reasoning supplied in <i>Mabsūt</i> (5:49): 1) objection to <i>ridda</i> is a <i>mūjib</i> for separation (i.e., it is an <i>ʿilla</i>); 2) this is like the <i>maḥramiyya</i> (i.e., this is an <i>aṣl</i> for <i>qiyās</i>); thus AH <i>istidlāl</i> is <i>qiyās al-ʿilla</i>] • [AH <i>iʿtirāḍ</i> against IAL <i>qiyās al-ʿilla</i> is strongly indicated: <i>al-farq bi-qiyās al-ʿilla</i> (Shīr.VII.15.2.2.1); and <i>al-farq bi-ʿillat al-ḥukm</i> (Bāj.IX.B.15.2.2.1.1)]²³³
1311 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هِيَ امْرَأَتُهُ عَلَى حَالِهَا حَتَّى يُسْتَتَابَ. فَإِنْ تَابَ فَهِيَ امْرَأَتُهُ، وَإِنْ أَبَى قُتِلَ وَكَانَ لَهَا مِيرَاثُهَا مِنْهُ.	• (1311) IAL counter-ruling for <i>masʾala</i> #1 with subsidiary rulings • [IAL reasoning supplied in <i>Mabsūt</i> (5:49): <i>istidlāl bi-l-qiyās</i> (<i>aṣl</i>: non-Muslim spouse converts to Islam)] • [IAL <i>iʿtirāḍ</i> against the AH ruling would consist of the same type as AH’s against his own]
1312 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا ارْتَدَّ الرَّجُلُ عَنِ الْإِسْلَامِ فَنِكَاحُ امْرَأَتِهِ مَوْقُوفٌ؛ فَإِنْ رَجَعَ إِلَى الْإِسْلَامِ قَبْلَ أَنْ تَنْقَضِيَ عِدَّتُهَا فَهِيَ عَلَى النِّكَاحِ الْأَوَّلِ، وَإِنْ انْقَضَتْ عِدَّتُهَا قَبْلَ رُجُوعِهِ إِلَى الْإِسْلَامِ فَقَدْ بَأَتْ مِنْهُ، وَالْبَيِّنَةُ فَسْخٌ بِلا طَلَاقٍ. وَإِنْ رَجَعَ إِلَى الْإِسْلَامِ فَخَطَبَهَا لَمْ يَكُنْ هَذَا طَلَاقًا. وَهَذَا	• (1312) SH ruling for <i>masʾala</i> #1 with more detailed subsidiary rulings • SH ref. to another <i>kitāb</i> • [SH reasoning supplied in <i>Mabsūt</i> (5:49), but difficult to reconcile with his ruling here.]

²³³ al-Shīrāzī, *Maʾūna*, al-ʿUmayrīnī ed., [initial section missing, remainder on 116]; Turkī ed., 262-3 §§149; al-Bājī, *Minhāj*, Turkī ed., 202f. §§459f. As we read in the *Mabsūt*, the objection to the IAL position rests upon a *farq* between his *aṣl* (wherein *ikhtilāf al-dīn* is not itself an immediate *mūjib* for *furqa*) and the *farʿ* (wherein objection to *ridda* is itself a *mūjib* for *furqa*). The Ḥanafī position thus brings another *aṣl* (the *maḥramiyya*), wherein the same *ʿilla* (i.e., “it is an obstacle to *nikāḥ*” [a property of forbidden degrees in the *aṣl*, and of *ridda* in the *farʿ*]) is found. Thus the same *ḥukm* of immediate separation may be transferred to the *farʿ* (i.e., to the *masʾala* at hand). This corresponds perfectly to al-Shīrāzī’s objection of *al-farq bi-qiyās al-ʿilla* and al-Bājī’s *al-farq bi-ʿillat al-ḥukm*. [Note that al-Bājī provides a finer subdivision, according to whether the *maʾnā* (of the *aṣl*) is agreed or disagreed upon (by P and Q). We can see that in the AH *iʿtirāḍ* of the IAL position (as culled from statements in the *Mabsūt*), there is agreement as to the *maʾnā* of IAL’s *aṣl* — the disagreement lies in the *maʾnā* of the *farʿ*; thus we may make a very precise identification (Bāj.IX.B.15.2.2.1.1).]

مَكْتُوبٌ فِي كِتَابِ الْمُرْتَدِّ.	
1313 – قَالَ: وَإِذَا رَجَعَتِ الْمَرْأَةُ مِنْ أَهْلِ الْإِسْلَامِ إِلَى الشَّرْكِ كَانَ هَذَا وَالْبَابُ الْأَوَّلُ سَوَاءً فِي قَوْلِهِمَا جَمِيعًا، غَيْرَ أَنَّ أَبَا حَنِيفَةَ كَانَ يَقُولُ: يُعْرَضُ عَلَى الْمَرْأَةِ الْإِسْلَامُ؛ فَإِنْ أَسْلَمَتْ خُلِّيَ سَبِيلُهَا. وَإِنْ أَبَتْ حُبِسَتْ فِي السِّجْنِ حَتَّى تُتُوبَ وَلَا تُقْتَلَ. بَلَّغْنَا ذَلِكَ عَنْ ابْنِ عَبَّاسٍ رَضِيَ اللَّهُ عَنْهُمَا.	• (1313[a]) AH and IAL rulings for <i>mas’ala</i> #2 • [taswiya-subsumption: they maintain their positions, extended from §§1310-11] • (1313[b]) AH subsidiary rulings for <i>mas’ala</i> #2 (2a: if she repents, she is left alone; 2b: if not, she is imprisoned until she repents — she is not killed) • AH rulings 2a-b are supported by <i>naql: athar</i> of Ibn ‘Abbās • [AH <i>istidlāl bi-qawl al-wāḥid min al-Ṣaḥāba</i>]
1314 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: إِنْ لَمْ تُتُوبَ قُتِلَتْ. وَبِهِ يَأْخُذُ.	• (1314) IAL counter-ruling to AH 2b: (if she does not repent, she is killed) • previous AY adherence stated (he recants to AH in §1315)
1315 – ثُمَّ رَجَعَ إِلَى قَوْلِ أَبِي حَنِيفَةَ.	• (1315) AY reverts to <i>qawl</i> of AH (ruling 2b)
1316 – وَكَيْفَ تُقْتَلُ وَقَدْ نَهَى رَسُولُ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – عَنْ قَتْلِ النِّسَاءِ فِي الْحُرُوبِ مِنْ أَهْلِ الشَّرْكِ، فَهَذِهِ مِثْلُهُمْ.	• (1316) AY/MIH rhetorical <i>i’tirād</i>: “<i>kayfa</i> [IAL ruling for 2b], when the Prophet [<i>aṣl</i>: killing <i>mushrikāt</i> in war; <i>ḥukm</i>: forbidden], and she [the <i>murtadda</i> of the <i>mas’ala</i> at hand] is like them [i.e., shares the ‘<i>illa</i> occasioning no killing]?” • [AY/MIH <i>istidlāl bi’l-qiyās</i> (indeterminate type); <i>aṣl</i> is Sunnaic prohibition] • [AY/MIH rhetorical objection introduces <i>mu’āraḍa-qiyās</i> against AH <i>istidlāl bi-qawl al-wāḥid min al-Ṣaḥāba</i> (Bāj.V.1);²³⁴ implied here is an <i>i’tirād</i> against IAL of <i>fasād al-i’tibār</i> known by way of the <i>uṣūl</i> (Shīr.VII.12.2.2; Bāj.IX.B.10.2.2)²³⁵]

²³⁴ The rhetorical objection of AY/MIH conforms well to al-Bājī’s first *wajh* of *i’tirād* against this domain of *istidlāl*: “That he says: ‘Verily this is a *qawl* of *wāḥid min al-Ṣaḥāba*, and *al-qiyās* is advanced over it” (*Minhāj*, Turkī ed., 144, §§296f.)

²³⁵ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 114f.; al-Bājī, *Minhāj*, Turkī ed., 181f., §§402ff — especially at §405. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 64, §303. Remarkably, we find the very *mas’ala* at hand presented by al-Shīrāzī and al-Bājī (and alluded to by Ibn ‘Aqīl) as one of the examples for this broad genus

1317 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا ارْتَدَّتِ الْمَرْأَةُ عَنِ الْإِسْلَامِ فَلَا فَرْقَ بَيْنَهَا وَبَيْنَ الرَّجُلِ، تُسْتَتَابُ، فَإِنْ تَابَتْ، وَإِلَّا قُتِلَتْ كَمَا يُصْنَعُ بِالرَّجُلِ.	• (1317) SH rulings 2a (if she repents, [she is left alone]) and 2b (if she does not repent, she is killed) • SH argument = <i>taswiya</i>-subsumption (<i>lā farqa bayn X and Y</i>) • [this is the <i>jawāb</i> we find for the same example-<i>mas’ala</i> employed by al-Bājī]²³⁶ • [implied SH <i>i’tirāḍ</i> against AH/AY ruling 2b: non-observance of <i>farq</i>; denial of AH/AY reasoning (as we shall see in the ensuing dialectical sequence, this crystallizes into a charge of <i>method-naqd</i>, whereby SHAP is accused of ignoring a previously observed <i>farq</i> for the <i>mas’ala</i> at hand, and his <i>faḥwā al-khiṭāb</i> or <i>qiyās al-jalī</i> is thus destroyed)]
1318 – فَخَالَفْنَا فِي هَذَا بَعْضُ النَّاسِ فَقَالَ: يُقْتَلُ	• (1318) SH sets the stage for a “historical” dialectic (<i>fa-khālafanā fī</i>

of objection (indeed, al-Bājī, in the middle of §405, claims: “*wa hādhā al-bāb min awsa’ abwāb al-i’tirādāt*”). In brief, both al-Shīrāzī and al-Bājī divide *fasād al-i’tibār* into that which is known by way of the *naṣṣ* (i.e., the objection to P’s *istidlāl* is apparent in the same *naṣṣ* upon which P relies), and that which is known by the *uṣūl* (wherein P’s *fasād al-i’tibār* is made apparent through other *endoxa* rulings). As we can see, AY/MIH has implied an objection of the latter type by bringing the Prophet’s prohibition re: killing *mushrikāt* in the *dār al-ḥarb*. This species of *fasād al-i’tibār* is further subdivided, however, by both our authors, and we find the most relevant subdivision (2.2) to be that wherein P “considers a *far’* on the basis of an *aṣl*, while they differ with regard to a *naẓīr* of the *ḥukm*.” Here al-Shīrāzī’s second example-*mas’ala* is one and the same with al-Bājī’s third (at §405), and with our *mas’ala* at hand. P has considered women on the basis of men with regard to *ridda*-killing; Q (a Ḥanafī in al-Bājī’s example) then objects, saying (al-Bājī, op. cit.): “This is an *i’tibār fāsīd*, because the *uṣūl* made distinction between them (*farraqat baynahumā*); don’t you see/opine (*alā tarā*) that, as regards *al-kufr al-aṣlī*, the man is killed but the woman is not killed?” This is remarkably similar to the objection of AY/MIH in §1316, right down to the dialectical question (although AY/MIH employs a *kayfa* question while al-Bājī’s Ḥanafī employs *alā tarā*). This is important to our dissertation for a number of reasons, but here we will only mark what this suggests in support of our theory that early *jadāl*-theory was in part elaborated from an analysis of proto-system *jadāl* teaching and practice. We will see that SH’s *jawāb* to his questioner in the ensuing dialectic (SH having taken up IAL’s position) is also found in our *jadāl*-theory texts, but will pursue this below.

²³⁶ al-Bājī, *Minhāj*, Turkī ed., 182, §405. “And the *jawāb* is that for *al-kufr al-aṣlī* the woman is safeguarded against it [i.e., against being killed] while the man is not safeguarded against it; and, as regards our *mas’ala*, which is *kufr al-ridda*, neither the man nor the woman is safeguarded against it. And they are equal (*istawayā*) as regards the obligation of killing for it, like *zinā* and homicide (*al-qatl*).” We must pause to note that not only does al-Bājī’s *jawāb* to the Ḥanafī Q’s charge of *fasād al-i’tibār* mirror SH’s *taswiya*-subsumption (employing *istawayā*), but the examples used to confirm their *taswiya* (*zinā* and *qatl*) are precisely the two which SH employs, to the same end, in §1326. Again, we find remarkable convergence here, and support for our theory of later *jadāl* theory as resultant, in part, of a study of earlier disputation.

الرَّجُلُ إِذَا ارْتَدَّ وَلَا تُقْتَلُ الْمَرْأَةُ. وَاحْتَجَّ بِشَيْءٍ رَوَاهُ عَنِ ابْنِ عَبَّاسٍ لَا يُثْبِتُ أَهْلُ الْحَدِيثِ مِثْلَهُ.	<i>hādhā ba‘ḍ al-nās fa-qāla...</i>:²³⁷ • SHAP ruling 2b stated: (<i>murtadd</i>-husband is killed, but not <i>murtadda</i>-wife) • SHAP <i>hujja</i> stated (same <i>athar</i> of Ibn ‘Abbās employed by AH in §1313[b])²³⁸ • SH transmission-oriented <i>i‘tirāḍ</i>: “<i>lā yuthbitu Ahl al-Ḥadīth mithlahu</i>” • [SH <i>i‘tirāḍ</i> against <i>qawl al-wāḥid min al-Ṣaḥāba</i>, but oriented towards <i>isnād</i> (a combination not found in our <i>jadal</i>-theory texts)]
1319 – وَقَدْ رُوِيَ شَبِيهُ ذَلِكَ الْإِسْنَادَ عَنْ أَبِي بَكْرٍ الصَّدِّيقِ رضي الله عنه أَنَّهُ قَتَلَ نِسْوَةً ارْتَدَدْنَ عَنِ الْإِسْلَامِ، فَلَمْ نَرَأْ أَنْ نَحْتَجَّ بِهِ إِذَا كَانَ إِسْنَادُهُ مِمَّا لَا يُثْبِتُهُ أَهْلُ الْحَدِيثِ.	• (1319) SH <i>i‘tirāḍ</i>: “the <i>shabīh</i> of that <i>isnād</i> has been narrated on Abū Bakr [that he did the opposite of the <i>athar</i> of Ibn ‘Abbās], <i>fa-lam nara an naḥtājja bihi idhā kāna isnāduhu mimmā lā yuthbituhu Ahl al-Ḥadīth</i>” • [unique SH “hypothetical” <i>i‘tirāḍ</i> against <i>qawl al-wāḥid min al-Ṣaḥāba</i>: conveyance of <i>khilāf</i> from another of the <i>Ṣaḥāba</i> (Shīr.IV.3; Bāj.V.2)²³⁹ while maintaining principle of <i>isnād</i>-critique]²⁴⁰

²³⁷ This is a common formula throughout the *Umm* (a preliminary search shows some 130 instances of *khālafanā... fa-qāla...*) for introducing a “historical” dialectic; the disputation we are about to read appears actually to have occurred. SH persists in “historical” mode, as we shall see, employing past tenses (*qīla*, *qāla*, *qultu*) — to this, we may contrast the “instructional” dialectic, which employs conditionals (*fa-in qāla..., qīla...*). Note that SH never names his opponent, but we may assume he is a proto-Ḥanafī since he draws upon the same *naql* and proposes the same rulings as AH and AY in previous sections.

²³⁸ Note that SHAP is arguing the same ruling from the same *athar* as AH in §1313b. In §1320, we will see him employ the same Sunnaic *dalīl* as AY/MIH use in their *i‘tirāḍ* of §1316.

²³⁹ al-Shīrāzī, *Ma‘ūna*, al-‘Umayrīnī ed., 82f.; al-Bājī, *Minhāj*, Turkī ed., 144, §298. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 39f.

²⁴⁰ Once again, as with SH’s previous raising of a “hypothetical” *mu‘āraḍa-qiyās* (in §§288; 622ff.) — while maintaining, on principle, that *qiyās* does not obtain for the *mas’ala* at hand — we now witness him raising a “hypothetical” *athar*-of-*khilāf* — while maintaining, on principle, that it cannot be used as an *aṣl* for the same reason (problematic *isnād*) that his opponent’s *athar* cannot be used. In other words, we are now at a point where we can claim this argument style of “hypothetical *i‘tirāḍ*” to be a *common* strategy of SH, as well as one for which we do not find discussions in our early *jadal*-theory texts. At any rate, SH’s strategy here is worthy of further note. In so many words, he asserts: “We could have produced *hujja* of the same strength as yours, but with an opposite conclusion, had we deigned to do so. We will not rely — as you do — upon *isnāds* the *ḥadīth* scientists cannot verify.” This is more than merely a unique strategy: it constitutes, once again, the fine-honing of legal theory in a dialectical venue. The essence of SH’s objection may be read thus: “Not only is your evidence of an inferior epistemic grade, but we can produce evidence for the opposite conclusion, of the same inferior epistemic grade.”

1320 – وَاحْتَجَّ مَنْ خَالَفَنَا بِأَنَّ النَّبِيَّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – نَهَى عَنْ قَتْلِ النِّسَاءِ فِي دَارِ الْحَرْبِ، وَقَالَ: إِذَا نُهِيَ عَنْ قَتْلِ الْمُشْرِكَاتِ اللَّاتِي لَمْ يُؤْمِنَنَّ، فَالْمُؤْمِنَةُ الَّتِي ارْتَدَّتْ عَنِ الْإِسْلَامِ أَوْلَى أَنْ لَا تُقْتَلَ.	• (1320) SH continues setting the stage for “historical” dialectic: • additional SHAP <i>ḥujja</i> stated: (same Sunnaic prohibition employed by AY/MIH in <i>muʿāraḍa-qiyās / iʿtirāḍ of fasād al-iʿtibār</i> of §1316) • SHAP <i>istidlāl bi-faḥwā al-khiṭāb/qiyās al-jalī</i> stated (<i>qāla</i>): • 1) <i>mushrikāt</i> (who never believed) are not to be killed • 2) therefore, the <i>muʿmina</i> who apostatized from Islam is <i>awlā re</i>: the <i>ḥukm</i> of not being killed • [SHAP <i>istidlāl bi-faḥwā al-khiṭāb/qiyās al-jalī</i>,²⁴¹ implied <i>iʿtirāḍ of fasād al-iʿtibār</i> known by way of the <i>uṣūl</i> (Shīr.VII.12.2.2; Bāj.IX.B.10.2.2)]²⁴²
1321 – قِيلَ لِبَعْضٍ مَنْ يَقُولُ هَذَا الْقَوْلَ: قَدْ رَوَيْتَ أَنَّ النَّبِيَّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – نَهَى عَنْ قَتْلِ الْكَبِيرِ الْفَانِي، وَعَنْ قَتْلِ الْأَجِيرِ، وَرَوَيْتَ أَنَّ أَبَا بَكْرٍ الصَّدِّيقَ نَهَى عَنْ قَتْلِ الرُّهْبَانِ. أَفَرَأَيْتَ إِنْ ارْتَدَّ شَيْخٌ فَإِنْ أَوْ أَجِيرٌ أَتَدْعُ قَتْلَهُمَا؟ أَوْ ارْتَدَّ رَجُلٌ رَاهِبٌ أَتَدْعُ قَتْلَهُ؟	• (1321) SH initiates “historical” dialectical sequence (<i>qīla li-baʿḍ man yaqūlu hādhā al-qawl</i>), by setting the stage for a charge of <i>method-naqd</i>: • 1) SH lists SHAP <i>khavar</i> for certain <i>masāʾil al-naqd</i>: • Sunnaic prohibition (killing elderly and labourers) • <i>athar</i>-prohibition of Abū Bakr (killing monks) • 2) SH two-part <i>araʾayta</i> elicits SHAP ruling for these <i>masāʾil al-naqd</i> • would you not kill the elderly- or labourer-<i>murtadd</i>? • would you not kill the ascetic-

Thus, your evidence is not evidence at all, from two perspectives.” Here we find a basic principle of *isnād*-theory inseparably intertwined with a species of dialectical objection; proto-system legal theory acquiring the edge of *ḥujjiyya* in proto-system juridical *jadāl*.

²⁴¹ Here we have encountered our first instance of that genus of a *fortiori* inference which al-Shīrāzī and al-Bājī refer to as *faḥwā al-khiṭāb* (al-Shīrāzī, *Maʿūna*, al-ʿUmayrīnī ed., 35; al-Bājī, *Minhāj*, Turkī ed., 24, §45. Cf. Ibn ʿAqīl, *K. al-Jadal*, 11-12, §§53-6 [*al-qiyās al-jalī*]). In particular, this is of the *a minore ad maius* variety, or, in al-Bājī’s formula: “That he cite (*an yanuṣṣa*) the lesser (*al-adnā*), so that there be indicated by means of it (*fa-yunabbahu bihi*) the greater (*al-aʿlā*)” [al-Shīrāzī’s definition is practically identical]. The phrase *awlā min/an* is ubiquitous throughout the *Umm*, and conveying this species of inference is one of its major functions.

²⁴² See our previous note attached to the *iʿtirāḍ* of AY/MIH in §1316, above. SHAP’s position is one and the same, with the same implied *iʿtirāḍ*.

	<i>murtadd?</i> [SH pushes SHAP to concede <i>method-naqd</i>-premise #1: ruling differently for these <i>masā’il al-naqd</i>]²⁴³
1322 – قَالَ: لَا.	(1322) SHAP <i>jawāb</i> (<i>qāla</i>): [SHAP rules in the negative, and SH acquires <i>method-naqd</i>-premise #1]
1323 – قِيلَ: وَلِمَ؟ أَلَا أَنَّ حُكْمَ الْقَتْلِ عَلَى الرَّدَّةِ حُكْمُ قَتْلِ حَدٍّ لَا يَسَعُ الْوَالِي تَعْطِيلَهُ مُخَالَفَ الْحُكْمِ قَتْلِ الْمُشْرِكِينَ فِي دَارِ الْحَرْبِ؟	(1323) SH dialectical question (<i>qīla</i>): “<i>wa lima?</i>” - SH formulates SHAP’s expected reasoning as he would like it to be delivered: “Is it because: [1] the <i>ḥukm</i> of killing for <i>ridda</i> is a <i>ḥukm</i> of killing for a <i>ḥadd</i>, which the <i>wālī</i> cannot obstruct... ... different from (<i>mukhālifun li-</i>) [2] the <i>ḥukm</i> of killing <i>mushrikīn</i> in the <i>dār al-ḥarb</i>?” [SH asks al-Bājī’s third question: <i>al-su’āl ‘an dalīl al-madhhab</i>, pushing SHAP to concede <i>method-naqd</i>-premise #2: SHAP’s previous observation of the <i>farq</i> between his <i>aṣl</i> and his <i>far</i>]
1324 – قَالَ: نَعَمْ.	(1324) SHAP <i>jawāb</i> (<i>qāla</i>): [SHAP concedes to previous recognition of the <i>farq</i>, and SH acquires <i>method-naqd</i>-premise #2]
1325 – قُلْتُ: فَكَيْفَ احْتَجَجْتَ بِحُكْمِ دَارِ الْحَرْبِ فِي قَتْلِ الْمَرْأَةِ وَلَمْ تَرَهُ حُجَّةً فِي قَتْلِ الْكَبِيرِ الْفَانِي وَالْأَجِيرِ وَالرَّاهِبِ.	(1325) SH drives home his charge of <i>method-naqd</i> (<i>qultu</i>), with a rhetorical <i>kayfa</i> question attacking his current <i>istidlāl bi-faḥwā al-khiṭāb/al-qiyās al-jalī</i>: “How have you drawn <i>ḥujja</i> from [the <i>dār al-ḥarb aṣl</i>] for [the <i>mas’ala</i> at hand], but did not opine it (<i>lam tarahu</i>) <i>ḥujja</i> for [the <i>masā’il al-naqd</i>]?” [SH rhetorical charge of <i>method-naqd</i>: inconsistent observance of the <i>farq</i>

²⁴³ We are now witnessing SH build his case for the *farq* between *ḥarb*-killing and *ridda*-killing, which is mirrored by the *jawāb* against *fasād al-i’tibār* in al-Bājī’s third *mas’ala* example. There, the distinction between *al-kufr al-aṣlī* and *kufr al-ridda* is underscored (see our note attached to §1317, above).

	between <i>dār al-ḥarb</i> killing and <i>ridda</i> killing] ²⁴⁴
1326 – ثُمَّ قُلْتُ: لَنَا أَنْ نَدَعَ أَهْلَ الْحَرْبِ بَعْدَ الْقُدْرَةِ عَلَيْهِمْ وَلَا نَقْتُلَهُمْ، وَلَيْسَ لَنَا أَنْ نَدَعَ مُرْتَدًّا، فَكَيْفَ ذَهَبَ عَلَيْكَ افْتِرَاقُهُمَا فِي الْمَرْأَةِ؟ فَإِنَّ الْمَرْأَةَ تُقْتَلُ حَيْثُ يُقْتَلُ الرَّجُلُ فِي الزَّنا وَالْقَتْلِ.	• (1326) SH seals <i>elenchus</i> with a second charge of <i>method-naqd</i> (<i>thumma qulta</i>): • “You said: [1] we have the right not to kill Ahl al-Ḥarb after mastering them... • ... and [2] we do not have the right not to kill the <i>murtadd</i>... • ... so [3] how has their <i>iftirāq</i> [i.e., the <i>farq</i> between <i>ḥarb</i>-killing and <i>ridda</i>-killing] escaped you for the <i>murtadda</i>-wife?” • SH confirms <i>taswiya</i>-subsumption of woman and man for all capital infractions (naming <i>zinā</i> and <i>qatl</i>)²⁴⁵ • [SH second charge of <i>method-naqd</i> (inconsistent observance of the same <i>farq</i> for a related <i>masʿalat al-naqd</i>) by rhetorically bringing forth all premises as though pre-conceded by SHAP]²⁴⁶

²⁴⁴ SH’s charge of *method-naqd* is unique thus far in our analyses, as it depends upon SHAP’s previous observance of a critical *farq*. It may be summarized as follows: 1) having established SHAP’s *istidlāl* in the previous section (*faḥwā al-khiṭāb* or *al-qiyās al-jalī* from a Sunnaic prohibition, of the species *a minore ad maius*), he re-opens that same *istidlāl* (from another Sunnaic prohibition and an *athar*-prohibition) to include elderly men, labourers, and ascetics; 2) he asks whether these latter three classes ought also to escape killing for apostasy, to which he procures SHAP’s denial; 3) he isolates SHAP’s own distinction in the case of these three classes: there is a *farq* between *ḥadd*-killing and *ḥarb*-killing (*ridda* being considered a *ḥadd*); and 4) he underscores SHAP’s methodological inconsistency: ignoring that *farq* for the *ridda*-wife (drawing *ḥujja* from the *ḥarb*-killing prohibition), but not for elderly men, labourers, and ascetics. In essence, SH has asked: “Why did you observe the *farq* for the *masʿil al-naqd*, but not observe it for the *masʿala* at hand?” It is an attack upon SHAP’s methodology: he ought either to employ *faḥwā al-khiṭāb* in the *masʿil al-naqd*, or to not employ it here; hence, we label this *method-naqd*.

²⁴⁵ Note that these are the same two domains used by al-Bājī to confirm the same *taswiya* of women and men for *ḥadd*-killing in his *jawāb* (see our note attached to §1317, above).

²⁴⁶ Note that SH introduces, as his first *method-naqd* premise, an *aṣl* (not killing Ahl al-Ḥarb after mastery) which we have not seen SHAP wholly concede to (although it is implied in §1323). Either way, with its different approach to the *farq* between *ḥarb*-killing and *ḥadd*-killing, we may consider it a separate charge of *method-naqd*. Overall, we may assess SH’s final *elenchus* as a successful *jawāb* to SHAP’s implied charge of *fasād al-iʿtibār*. Both the charge of SHAP and SH’s *jawāb* are employed, as we have noted, as an example *masʿala* in the texts of al-Shīrāzī and al-Bājī. The same is alluded to by Ibn ʿAqīl (*K. al-Jadal*, 64, §303), when he lists (among other examples belonging to this genus of objection): “That the *muʿtarid* say... you have considered a *ḥaqq Allāh* on the basis of a *ḥaqq al-Ādamī*.” Taken all together, the persistence of this *masʿala* of *ikhtilāf* from the time of SH, and its appearance as an example in the early *jadāl*-theory texts some three hundred years later, speaks volumes regarding the continuity of proto-system *jadāl* teaching and practice through to the early systematic literature. It is evident that persistent *ikhtilāf*, with persistent methods of objection and response, contributed analytical categories for

[masā’il-set #12] §§1402-1412

Summary of Analysis:

1402 – وَإِذَا طَلَّقَ الرَّجُلُ امْرَأَتَهُ وَاحِدَةً فَانْقَضَتْ عِدَّتُهَا، فَتَزَوَّجَتْ زَوْجًا وَدَخَلَ بِهَا ثُمَّ طَلَّقَهَا، ثُمَّ تَزَوَّجَهَا الْأَوَّلُ، فَإِنَّ أَبَا حَنِيفَةَ قَالَ: هِيَ عَلَى الطَّلَاقِ كُلِّهِ. وَبِهِ يَأْخُذُ.	• (1402) AH ruling for <i>mas’ala</i> #1: (<i>hiya ‘alā al-ṭalāq kullihī</i>) • AY adherence stated • [AH ‘illa-interpretation implied: consummation with H2 eliminates 1, 2, or 3 previous <i>ṭalāqs</i>] • [AH supporting <i>naql</i> supplied in <i>Mabsūt</i> (6:95): <i>āthār-qawls</i> of Ibn ‘Abbās, Ibn ‘Umar, Ibrāhīm, and the <i>aṣḥāb</i> of ‘Abd Allāh b. Mas‘ūd; detailed AH reasoning also supplied] • [cf. our discussion re: §§635ff. AH <i>istidlāl bi-qawl al-wāḥid</i> (x4 plus) <i>min al-ṣaḥāba</i> [and Successors] may also be a possible attempt at <i>istidlāl bi-ijmā‘ al-ṣaḥāba</i> [and Successors]; implied <i>i’tirāḍ</i> of SH <i>naql</i>: (1) against <i>istidlāl bi-qawl al-wāḥid min al-ṣaḥāba</i>: <i>khilāf</i> of another <i>Ṣaḥābī</i> (Shīr.IV.3; Bāj.V.2); (2) against <i>istidlāl bi-ijmā‘ al-ṣaḥāba</i>: <i>muṭālaba bi-taṣḥīḥ al-ijmā‘</i> (Shīr.III.2; Bāj.III.1.1) or <i>khilāf</i> of another <i>Ṣaḥābī</i> (Shīr.III.3; Bāj.III.1.2); (3) possible <i>i’tirāḍ</i>: <i>tarjīḥ</i> of <i>athar-qawl</i> due to more narrators (Shīr.IX.1.5; Bāj.XVI.1.1.3)]
1403 – وَقَالَ ابْنُ أَبِي لَيْلَى: هِيَ عَلَى مَا بَقِيَ.	• (1403) IAL counter-ruling for <i>mas’ala</i> #1: (<i>hiya ‘alā mā baqiya</i>) • [IAL ‘illa-interpretation implied: consummation with H2 does not eliminate 1 or 2 previous <i>ṭalāqs</i>] • [IAL <i>i’tirāḍ</i> against AH/AY position difficult to infer without knowing his <i>istidlāl</i>]
1404 – قَالَ الشَّافِعِيُّ: وَإِذَا طَلَّقَ الرَّجُلُ امْرَأَتَهُ وَاحِدَةً أَوْ اثْنَتَيْنِ، فَانْقَضَتْ عِدَّتُهَا وَنَكَحَتْ زَوْجًا غَيْرَهُ، ثُمَّ أَصَابَهَا، ثُمَّ طَلَّقَهَا أَوْ مَاتَ عَنْهَا، فَانْقَضَتْ	• (1404) SH ruling for <i>mas’ala</i> #1: (<i>hiya ‘indahū</i> [H1] <i>‘alā mā baqiya min al-ṭalāq</i>) • SH ‘illa-interpretation stated: consummation with [H2] eliminates 3,

later theorists. Our *masā’il*-set of §§1310-26 offers as prime an illustration of this phenomenon as may be hoped for.

عِدَّتْهَا فَنَكَحَتْ الزَّوْجَ الْأَوَّلَ، فَهِيَ عِنْدَهُ عَلَى مَا بَقِيَ مِنَ الطَّلَاقِ، يَهْدِمُ الزَّوْجَ الثَّانِي الثَّلَاثَ وَلَا يَهْدِمُ الْوَاحِدَةَ وَلَا الثَّنِيَّتَيْنِ.	but does not eliminate 1 or 2 previous <i>ṭalāqs</i> • [Jurists in agreement with SH supplied in <i>Mabsūt</i> (6:95): MIH and Zufar; detailed MIH reasoning also supplied (similar to that of SH below)] • [SH supporting <i>naql</i> supplied in <i>Mabsūt</i> (6:95): <i>āthār-qawls</i> of ‘Umar, ‘Alī, Ubayy b. Ka‘b, ‘Imrān b. al-Ḥuṣayn, and Abī Hurayra]²⁴⁷ • [cf. our discussion re: §§639ff. SH <i>istidlāl bi-qawl al-wāhid min al-Ṣaḥāba</i> (x5); implied <i>i’tirāḍ</i> of AH <i>naql</i>: (1) against <i>istidlāl bi-qawl al-wāhid min al-Ṣaḥāba</i>: <i>khilāf</i> of another Ṣaḥābī (Shīr.IV.3; Bāj.V.2); (2) against <i>istidlāl bi-ijmā‘ al-Ṣaḥāba</i>: <i>muṭālaba bi-taṣḥīḥ al-ijmā‘</i> (Shīr.III.2; Bāj.III.1.1) or <i>khilāf</i> of another Ṣaḥābī (Shīr.III.3; Bāj.III.1.2); (3) possible <i>i’tirāḍ</i>: <i>tarjīḥ</i> of <i>athar-qawl</i> due to more narrators (Shīr.IX.1.5; Bāj.XVI.1.1.3)]
1405 – وَقَوْلُنَا هَذَا قَوْلُ عُمَرَ بْنِ الْخَطَّابِ رَضِيَ اللَّهُ تَعَالَى عَنْهُ وَعَدَدٌ مِنْ كِبَارِ أَصْحَابِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ.	• (1405) SH declares <i>naql</i>: • SH <i>qawl</i> = <i>athar-qawl</i> of ‘Umar, and other <i>kibār Aṣḥāb al-Nabī</i> • [SH ref. to <i>kibār Aṣḥāb al-Nabī</i> may be a push towards epistemic advantage via an <i>endoxon</i> sub-set of those closer to the Prophet (cf. Shīr.IX.1.3 and 1.6)]²⁴⁸

²⁴⁷ NB: al-Sarakhsī’s report of SH’s opinion corresponds with his opinion in §1404, and his *naql* in §1405.

²⁴⁸ Importantly, al-Sarakhsī (*Mabsūt* 6:95) notes, as regards the *naql*-adherence of the opposing AH/AY vs. MIH/SH positions: “So the younger set of the jurists (*al-shubbān min al-fuqahā*) [MIH, SH, Zufar] adhered to the *qawl* of the elder set of the Companions (*al-mashā’ikh min al-Ṣaḥāba*) [‘Umar, ‘Alī, et al.]... and the elder set of jurists [AH, AY] adhered to the *qawl* of the younger set of Companions [Ibn ‘Abbās, Ibn ‘Umar, et al.]” SH’s reference to “other *kibār* of the *Aṣḥāb al-Nabī*” corresponds with this observation, and gives weight to the possibility that this “*shubbān* vs. *mashā’ikh* of the Companions” distinction may have played a role in argument. Of course, whether or not this is a question of design on the part of our jurists is still difficult to confirm. It is possible, however, that when two opposing opinions were backed by comparable (in terms of number) sets of Companion *āthār-qawls*, a further epistemic consideration was put into effect for purposes of *tarjīḥ*. Those jurists adhering to the *qawl* of the elder set of Companions might claim greater authority due to their having been closer to the Prophet. This finds a parallel in a different domain: the *isnād*-related *tarjīḥāt* of al-Shīrāzī. His third *wajh* is: “That one of the two is closer to the Messenger of God... so he is advanced over him, because he is more perceptive/remembering (*aw‘ā*)” (Shīr.IX.1.3). Even more relevant is his sixth *wajh*: “That one of

1406 – وَقَدْ خَالَفْنَا فِي بَعْضِ هَذَا بَعْضُ النَّاسِ فَقَالَ: إِذَا هَدَمَ الزَّوْجُ ثَلَاثًا هَدَمَ وَاحِدَةً وَأُثْنَتَيْنِ. وَاحْتَجَّ بِقَوْلِ ابْنِ عُمَرَ وَابْنِ عَبَّاسٍ رَضِيَ اللَّهُ عَنْهُمَا.	• (1406) SH sets the stage for a “historical” dialectic (<i>qad khālafanā fī baʿḍ hādha baʿḍ al-nāsi fa-qāla</i>): • SHAQ <i>ʿilla</i>-interpretation stated: if H2 eliminates three <i>ṭalāqs</i>, then he eliminates one and two²⁴⁹ • SHAQ <i>hujja</i> stated: <i>āthār-qawls</i> of Ibn ʿUmar and Ibn ʿAbbās²⁵⁰ • [SHAQ <i>iʿtirāḍ</i> implied: <i>muʿāraḍa biʿl-qiyās</i> (the <i>qiyās</i> having been performed by the “younger set” of Ṣaḥāba)]
1407 – وَسَأَلْنَا فَقَالَ: مِنْ أَيْنَ زَعَمْتُمْ أَنَّ الزَّوْجَ يَهْدِمُ الثَّلَاثَ وَلَا يَهْدِمُ مَا هُوَ أَقَلُّ مِنْهَا؟	• (1407) SH initiates “historical” dialectic by relating SHAQ dialectical question (<i>wa saʿalnā fa-qāla</i>): • SHAQ asks al-Bājī’s third or fourth question (or combination thereof): <i>al-suʿāl ʿan dalīl al-madhhab / wajh al-dalīl</i>: “<i>min ayna zaʿamtum X?</i>” [X = SH <i>ʿilla</i>-interpretation] • [SHAQ seeks to problematize SH’s <i>istidlāl</i>, and to gain concession of premises leading to his own conclusion]
1408 – قُلْنَا: زَعَمْنَاهُ بِالْأَمْرِ الَّذِي لَا يَنْبَغِي لِأَحَدٍ أَنْ يَدْفَعَهُ.	• (1408) SH <i>jawāb</i> (<i>qulnā</i>): • “We claim X based on the <i>amr</i> which none may rightly reject” • [SH asserts his <i>adilla</i> are <i>endoxa</i>]²⁵¹
1409 – قَالَ: وَمَا هُوَ؟	• (1409) SHAQ dialectical question (<i>qāla</i>): • SHAQ narrows his question to the <i>dalīl</i>: “<i>wa mā huwa?</i>”

the two is greater in terms of *ṣuḥba*, so he is given precedence, because he is more knowing (*aʿraf*) of what persists of the *sunan*” (Shīr.IX.1.6). See the *Maʿūna*, al-ʿUmayrīnī ed., 121-2.

²⁴⁹ Again we encounter that formula which introduces a “historical” dialectic (cf. §§1318 and 1377). Note that SHAQ’s opinion conforms with AH and AY in §1402. This confirms RB’s comment I have conveyed in a note attached to §252 in the translation: the formula “*baʿḍ al-nās*” refers to the Mashriqīyyūn.

²⁵⁰ NB: SHAQ’s *naql* also conforms to what al-Sarakhsī has reported of AH/AY *naql* for §1402. Thus both his ruling and his *naql* match AH/AY, and we may conclude with certainty that he is a proponent of their position.

²⁵¹ SH is once again parsimonious with his *jawāb*. Still, though ambiguous, it is a plain assertion that his basis for *ʿilla*-interpretation is *endoxon*. In fact, SH’s statement stands as the very definition of one sense of *endoxon* in the normative realm: “the *amr* which none may rightly reject.”

1410 – قُلْنَا: حَرَّمَهَا اللَّهُ بَعْدَ الثَّلَاثِ حَتَّى تَنْكِحَ زَوْجًا غَيْرَهُ. وَبَيَّنَ رَسُولُ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – عَنْ اللَّهِ عَزَّ وَجَلَّ أَنَّ النِّكَاحَ الَّذِي أَحَلَّهَا اللَّهُ بِهِ بَعْدَ الثَّلَاثِ إِصَابَةُ الزَّوْجِ، وَكَانَتْ مُحَرَّمَةً قَبْلَ الزَّوْجِ لَا تَحِلُّ بِحَالٍ إِلَّا بِالزَّوْجِ، فَكَانَ لِلزَّوْجِ حُكْمُ هَدْمِ الثَّلَاثِ لِهَذَا الْمَعْنَى، وَكَانَتْ فِي الْوَاحِدَةِ وَالثَّانِيَةِ حَالًا، فَلَمْ يَكُنْ لِلزَّوْجِ هَاهُنَا حُكْمٌ، فَزَعَمْنَا أَنَّهُ يَهْدِمُ حَيْثُ كَانَتْ لَا تَحِلُّ لَهُ إِلَّا بِهِ، وَكَانَ حُكْمُهُ قَائِمًا، وَلَا يَهْدِمُ حَيْثُ لَا حُكْمَ لَهُ وَحَيْثُ كَانَتْ حَالًا بِغَيْرِهِ.	• (1410) SH <i>jawāb</i> (<i>qulnā</i>) in stages leading to <i>elenchus</i> (we do not hear from SHAQ again): • 1) SH <i>istidlāl bi'l-Kitāb</i>= “God made her <i>ḥarām</i> [to H1] after the three [<i>ṭalāqs</i>] «<i>hattā tankihū zawjan ghayrahu</i> [i.e., H2]»” [Q.2:230] • 2) SH <i>istidlāl bi'l-Sunna</i> (as <i>mufassir</i> to Qur’ān) = Prophet clarifies (<i>bayyana</i>) God’s <i>qawl</i>: <i>nikāḥ</i> means the licit sexual intercourse of H2 (<i>iṣābat al-zawj</i>)²⁵² • [SH appeal to legal-theory principle: Sunnaic hermeneutic brought to bear upon a <i>lafẓ</i> of the Qur’ān] • 3) SH ‘<i>aql</i> argument presented as distinct premises: • a) she is <i>muḥarrama</i> to H1 before [<i>nikāḥ</i> with] H2 • b) she is <i>only</i> made lawful by [<i>nikāḥ</i> with] H2 • c) “due to this <i>ma’nā</i>.” H2 has <i>ḥukm</i> of eliminating three [i.e., <i>nikāḥ</i> with him occasions <i>hadm</i> of three <i>ṭalāqs</i>] • d) she was <i>ḥalāl</i> [to H1] with one and two <i>ṭalāqs</i> • e) therefore, no <i>ḥukm</i> (of <i>hadm</i> of one or two <i>ṭalāqs</i>) was attached to H2 • 4) SH summarizes the conclusions of his ‘<i>aql</i> argument (<i>fa-za’amnā</i>): • a) H2 eliminates when she was not lawful to H1 <i>except by way of that ḥukm</i> [<i>hadm</i> of three <i>ṭalāqs</i>], which was <i>qā’im</i> • b) H2 does not eliminate when that <i>ḥukm</i> is not attached to him – <i>when she is ḥalāl to another</i> [meaning H1] • [overall SH argument may be classified as <i>istidlāl</i> by way of Type II <i>qiyās al-dalāla</i> (the <i>aṣl</i> [three <i>ṭalāqs</i>] and

²⁵² Once again we encounter SH’s conception of how Sunna may act as *mufassir* to Qur’ān (see my reference to Joseph Lowry, SH’s *Risāla*, and other observations in our analysis of §255 above). As before in §255 (where Sunna is *mufassir* to Sunna), we must stress that we are witnessing the assertion of a legal-theoretical principle in an early dialectical sequence: SH’s *mufassir*-theory is gaining the edge of *hujjiyya* in the dialectical forge.

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	the <i>farʿ</i> [one or two <i>ṭalāqs</i>] are <i>naẓāʿir</i>), from an <i>aṣl</i> clarified by a <i>mufasssir</i> -hermeneutic combining <i>istidlāl biʿl-Kitāb</i> with <i>istidlāl biʿl-Sunna</i>] ²⁵³
1411 – وَكَانَ أَصْلُ الْمَعْقُولِ أَنَّ أَحَدًا لَا يَحِلُّ لَهُ بِفِعْلِ غَيْرِهِ شَيْءٌ، فَلَمَّا أَحَلَّ اللَّهُ لَهُ بِفِعْلِ غَيْرِهِ أَحَلَّلْنَا لَهُ حَيْثُ أَحَلَّ اللَّهُ لَهُ، وَلَمْ يَحْزَنْ أَنْ نَقِيسَ عَلَيْهِ مَا خَالَفَهُ لَوْ كَانَ الْأَصْلُ لِلْمَعْقُولِ فِيهِ.	• (1411) SH justifies his argument in broader terms of legal-theory: • 1) “the <i>aṣl</i> of the <i>maʿqūl</i> is that nothing is made <i>ḥalāl</i> for party X by the <i>fiʿl</i> of party Y”²⁵⁴ • 2) God [Q.2:230] made <i>ḥalāl</i> for him [H1] by the <i>fiʿl</i> of another [H2] – [in other words, Q.2:230 is an exception to “the <i>aṣl</i> of the <i>maʿqūl</i>”] • 3) Therefore, we made <i>ḥalāl</i> for him [H1] only where God made <i>ḥalāl</i> for him – [in other words, we do not

²⁵³ The whole of SH’s argument may be summarized as follows. Regarding the wife unilaterally divorced by three *ṭalāqs*: she is *ḥarām* to H1; thus the *ḥukm* of *ḥadm* of three *ṭalāqs* is attached to H2. Regarding the wife unilaterally divorced by one or two *ṭalāqs*: she is *ḥalāl* to H1; thus the no *ḥukm* of *ḥadm* of one or two *ṭalāqs* is attached to H2. As such, SH’s argument conforms perfectly to al-Shīrāzī’s Type II *qiyās al-dalāla*, and we may represent it as follows:

<u>Aṣl</u> woman divorced by three <i>ṭalāqs</i> <u>Hukm A</u> she is <i>ḥarām</i> to H1 ⌋ <i>Naẓāʿir</i> ⌋ <u>Hukm B</u> H2 has <i>ḥukm</i> of <i>ḥadm</i>	← Opposite → ← Therefore, also Opposite →	<u>Farʿ</u> woman divorced by one/two <i>ṭalāqs</i> <u>Hukm →A</u> she is <i>ḥalāl</i> to H1 ⌋ <i>Naẓāʿir</i> ⌋ <u>Hukm →B</u> H2 has no <i>ḥukm</i> of <i>ḥadm</i>

²⁵⁴ SH’s phrase: “the *aṣl* of the *maʿqūl*” is of obvious import, although our interpretation of it must await further confirmation if such can be found. From all outward appearances, however, he is using the phrase to convey the same sense as the *qāʿida* of later legal theory – a usage of *aṣl* which corresponds well with such conceptions as we see in the *Uṣūl* of al-Karkhī and elsewhere. It is as though SH is (inductively) drawing, from the Sharʿa as a whole, the *aṣl* that “nothing is made *ḥalāl* for party X by the *fiʿl* of party Y.” He then shows us that God (in Q.2:230) has made an exception to this inductively-derived principle – this “*aṣl* of the *maʿqūl*,” while maintaining that – *qua* exception – it cannot serve as the basis for *qiyās* (read: *qiyās al-ʿilla*). What is strange is that SH’s argument may be portrayed as Type II *qiyās al-dalāla* from that very same exception-decree of Q.2:330. We may raise a number of possible explanations, among them: 1) SH is claiming that God’s exceptions to the *aṣl al-maʿqūl* are only inappropriate as *uṣūl* for *qiyās al-ʿilla* (and not for other types of *qiyās*); 2) *qiyās*-theory was not as fully systematized in SH’s time as it was later, and so SH’s understanding of *qiyās* did not include the type of argument which he has here employed; 3) our *qiyās* illustration of SH’s reasoning in §1410 is simply not how SH conceived of his own argument (see following note), or 4) SH’s general justification in §1411 is inconsistent with his own argument in §1410.

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	extend God’s exception to “the <i>aṣl</i> of the <i>maʿqūl</i>” beyond Q.2:230] • 4) It is not allowed that we do <i>qiyās</i> [<i>al-ʿilla</i>] from it [Q.2:230] to what differs from it (<i>mā khālafahu</i>) [which is what the AH/AY/SHAQ position does] “if the <i>aṣl</i> belongs to the <i>maʿqūl fīhi</i>”²⁵⁵
1412 – وَقَدْ رَجَعَ إِلَى هَذَا الْقَوْلِ مُحَمَّدٌ بْنُ الْحَسَنِ بَعْدَمَا كَانَ يَقُولُ بِقَوْلِ أَبِي حَنِيفَةَ، وَاللَّهُ أَعْلَمُ.	• (1412) SH/RB seals SH <i>elenchus</i>: • MIH reversion to this <i>qawl</i> after prior adherence to the AH <i>qawl</i> is stated²⁵⁶ • “<i>wa Allāhu aʿlam</i>”²⁵⁷

²⁵⁵ The importance of this section simply cannot be overstated. Among other things, this is perhaps as detailed an indication of what SH means by *maʿqūl* as appears in the *K. Ikhtilāf al-ʿIrāqīyyīn* (cf. §§402, 633, 651, 929, and 1056). Of particular note is that this is the only instance of the phrase *aṣl al-maʿqūl* in all of the *Umm* and the *Risāla*, and, for that matter, all the *fiqh* works of the Shāfiʿī, Ḥanafī, and Mālikī *madhāhib* which I have been able to search electronically. Moreover, the *aṣl al-maʿqūl* which SH mentions (nothing is made *ḥalāl* to someone by way of the *fiʿl* of another) has every appearance, as we have mentioned, of a *qāʿida* derived inductively from the Sharīʿa as a whole. If such is indeed the case, we are witnessing in §1411 both: 1) a proto-system *qāʿida* raised in a dialectical sequence; and 2) a legal theory (we may not use God’s exception to the *qawāʿid* as a basis for *qiyās*), also raised in a dialectical sequence. What is more, we might gain a refined sense of the meaning of *maʿqūl* when listed elsewhere by SH among other sources — as referring to all such general principles as may be derived inductively from the Sharīʿa as a whole. Whatever the case with *aṣl al-maʿqūl*, SH’s justification certainly lays bare a critical principle of *qiyās* in his overall legal theory; mainly, when God goes against what appears to us as *al-maʿqūl*, we must follow Him in that — but not build upon it with *qiyās*. In other words, we don’t do *qiyās* with anything that is not consonant with the *maʿqūl*. I will tentatively conclude, therefore, that SH’s argument is that *qiyās al-ʿilla* cannot be done from the *aṣl* of Q.2:230 because this particular *aṣl* constitutes the singular exception to a broader, inductively-corroborated *aṣl*. In order to explain his apparent Type II *qiyās al-dalāla* from Q.2:230, I must simply conclude that SH did not conceive of his argument as any type of *qiyās*. Rather, SH saw the *masʿala* at hand (the woman divorced by one or two *ṭalāqs*) as being fully under the governance of the *aṣl al-maʿqūl* — the wife, after all, is *ḥalāl* to H1 through no action on the part of H2. Therefore, according to SH, it would be wrong to claim that the *ḥukm* of *ḥadm* be attached to H2 in the *masʿala* at hand, because: 1) H2 had nothing whatsoever to do with her being *ḥalāl* to H1; and 2) whenever H2 does have something to do with her being *ḥalāl* to H1, it is God’s singular exception, not the rule (i.e., not the *maʿqūl*). All of these hypotheses regarding *ʿaql*, *maʿqūl*, and *aṣl maʿqūl* will be revisited in Chapter IV.2, where I will provide my final assessment as to what SH means by these terms.

²⁵⁶ As we note in our translation, this statement of MIH *qawl*-reversion is of potential import in three respects: 1) what it supports of the “traditional” account of authorship and compilation for both Shaybānī and *Umm* versions; 2) what it illustrates of a jurist “following the *ḥujja*” over “school loyalty;” and 3) what it suggests of the possibility that SH — through dialectical disputation — may have in fact influenced his own teacher to change opinions. Indeed, it remains possible that the “*baʿḍ al-nās*” of this “historical” dialectical sequence is none other than MIH himself. Whatever the case, this comment is another clear indicant that, like AY and SH, MIH was “following the *ḥujja*” — a practitioner of the “good” dialectic.

²⁵⁷ We are provided indicant by such pious expressions that our jurists were engaged in the “good” dialectic (as opposed to sophistry), following the *ḥujja* and refining rational theories through dialectic in a sincere attempt to “discover” God’s Sharīʿa.

Summary Analyses of Short Dialectical Sequences

There is a total of ten short dialectical sequences (presentation category B) in the *Umm* Version of the *K. Ikhtilāf al-‘Irāqīyyīn*.²⁵⁸ Unlike my analyses for the preceding twelve extended dialectical sequences, I will not treat these as *masā’il*-sets (i.e., I will not include the statements of opinion and argument which precede them). Instead, the following are treated in isolation, although the reader may be assured that analyses were undertaken with full consideration to the relevant *masā’il*-set as a whole. Furthermore, and again due to space limitations, the whole of category B short sequences will only be presented in summary table format, without accompanying prose discussions. As with the preceding analyses, the reader is enjoined first to read the relevant translated sections in Part II of this dissertation before perusing the summaries.

As the category designation suggests, the following short sequences are — as regards content and, perhaps, authorial intent — somewhere between the full didactic and justificatory purposes of the longer “instructional” or “historical” sequences we have analyzed, and the more abbreviated nature of the arguments which we find in categories C through E. Of particular note is that all of the short dialectical sequences in this category are of the “instructional” (*fa-in qāla*) variety between SH and an anonymous opponent. A didactic intention is thus made evident by the language of SH, even while these short sequences continue their justificatory role of illustrating key elements of his preceding arguments.

§§35-37: SH vs. SHAQ

35 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اشْتَرَى الرَّجُلُ الْجَارِيَةَ فَوَطَّئَهَا، ثُمَّ اسْتَحَقَّهَا رَجُلٌ أَخَذَهَا وَمَهْرَ مِثْلِهَا مِنَ الْوَاطِئِ وَلَا وَقْتَ لِمَهْرٍ مِثْلِهَا إِلَّا مَا يُنْكِحُ بِهِ مِثْلَهَا، وَيَرْجِعُ الْمُشْتَرِي عَلَى الْبَائِعِ بِشَمَنِ الْجَارِيَةِ الَّذِي قَبِضَ مِنْهُ، وَلَا يَرْجِعُ بِالْمَهْرِ الَّذِي أَخَذَهُ رَبُّ الْجَارِيَةِ مِنْهُ؛ لِأَنَّهُ كَشَيْءٍ اسْتَهْلَكَهُ هُوَ.	• (35) SH rulings for <i>mas’ala</i> #1 • Supported with ‘<i>aql</i> (“because it is like X”); efficient property indicated in the <i>mas’ala</i> at hand (<i>ka-shay’in istahlakahu huwa</i>) • [SH ‘<i>aql</i> indicates <i>aṣl</i> and ‘<i>illa</i> for <i>qiyās</i>, mirroring MIH(?) “interruption” of preceding category C argument (§§33-34); thus, SH <i>istidlāl bi-qiyās al-‘illa</i>]
36 – فَإِنْ قَالَ قَائِلٌ: مِنْ أَيْنَ قُلْتَ هَذَا؟	• (36) SH initiates “instructional” dialectic (<i>fa-in qāla qā’il</i>): • “<i>min ayna qulta hādhā?</i>”

²⁵⁸ They are: 1) §§35-7; 2) §§50-3; 3) §§62-5; 4) §§78-80; 5) §§155-7; 6) §§534-6; 7) §§540-4; 8) §§737-43; 9) §§785-8; 10) §§1115-19.

	[SHAQ asks al-Bājī’s third question: <i>al-su’āl ‘an dalīl al-madhhab</i>]
37 – قِيلَ لَهُ: لَمَّا قَضَى رَسُولُ اللَّهِ -صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ- فِي الْمَرْأَةِ نِكَاحَ بَعْضِ إِذْنِ وَلِيِّهَا أَنْ نِكَاحَهَا بَاطِلٌ، وَأَنَّ لَهَا إِنْ أُصِيبَتِ الْمَهْرُ، كَانَتْ الْإِصَابَةُ بِشِبْهِةِ ثَوْبِ الْمَهْرِ، وَلَا يَكُونُ لِلْمُصِيبِ الرَّجُوعُ عَلَى مَنْ غَرَّهَ؛ لِأَنَّهُ هُوَ الْآخِذُ لِلْإِصَابَةِ، وَلَوْ كَانَ يَرْجِعُ بِهِ عَلَى مَنْ غَرَّهَ لَمْ يَكُنْ لِلْمَرْأَةِ عَلَيْهِ مَهْرٌ؛ لِأَنَّهَا قَدْ تَكُونُ غَارَةً لَهُ فَلَا يَجِبُ لَهَا مَا يَرْجِعُ بِهِ عَلَيْهَا.	(37) SH <i>jawāb</i> (<i>qīla lahu</i>): - SH <i>istidlāl</i> by way of Sunnaic judgment (<i>qaḍā Rasūl Allāh...</i>) - SH <i>tafsīr</i> of Sunnaic judgment provides additional efficient properties shared by the <i>mas’ala</i> at hand (<i>shubha</i> + the <i>muṣīb</i> initiated the <i>iṣāba</i>) [SH <i>i’tirād</i>: <i>mu’āraḍa bi’l-nuṭq</i> (Shīr.VII.15.1; Bāj.IX.B.15.1)]²⁵⁹ - additional ‘<i>aql</i> support: “because” introduces <i>reductio ad impossibile</i>²⁶⁰

§§50-53: SH vs. SHAQ

50 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اشْتَرَى الرَّجُلُ الدَّابَّةَ أَوْ الثَّوْبَ أَوْ أَيَّ بَيْعٍ مَا كَانَ، فَوَجَدَ الْمُشْتَرِيَ بِهِ عَيْبًا فَاخْتَلَفَ الْمُشْتَرِي وَالْبَائِعُ، فَقَالَ الْبَائِعُ: حَدَّثَ عِنْدَكَ. وَقَالَ الْمُشْتَرِي: بَلْ عِنْدَكَ. فَإِنْ كَانَ عَيْبًا يَحْدُثُ مِثْلَهُ بِحَالٍ فَالْقَوْلُ قَوْلُ الْبَائِعِ مَعَ يَمِينِهِ عَلَى الْبَيْتِ بِاللَّهِ لَقَدْ بَاعَهُ وَمَا هَذَا الْعَيْبُ بِهِ، إِلَّا أَنْ يَأْتِيَ الْمُشْتَرِيَ عَلَى دَعْوَاهُ بَيِّنَةٌ، فَتَكُونُ الْبَيِّنَةُ أَوَّلَى مِنَ الْيَمِينِ، وَإِنْ نَكَلَ الْبَائِعُ رَدَدْنَا الْيَمِينِ عَلَى الْمُشْتَرِي، أَتَمَمْنَاهُ أَوْ لَمْ نَتَمِّمْهُ فَإِنْ حَلَفَ رَدَدْنَا عَلَيْهِ السَّلْعَةَ بِالْعَيْبِ، وَإِنْ نَكَلَ عَنْ الْيَمِينِ لَمْ نَرُدِّدْهَا عَلَيْهِ وَلَمْ نُعْطِهِ بِنُكُولٍ صَاحِبِهِ فَقَطْ، إِنَّمَا نُعْطِيهِ بِالنُّكُولِ إِذَا كَانَ مَعَ النُّكُولِ يَمِينُهُ.	(50) SH ruling for “benefit of assumption” <i>mas’ala</i> #1 (S <i>qawl</i> + S <i>yamīn</i>, or B <i>qawl</i> with B <i>bayyina</i>)²⁶¹ - SH ‘<i>aql</i> explanation (evidentiary-<i>tarjīh</i>: <i>bayyina</i> is <i>awlā</i> than <i>yamīn</i>) [implied ‘<i>ilal</i>: 1) no B <i>bayyina</i> + S <i>yamīn</i> occasions <i>ḥukm</i> in favour of S; 2) B <i>bayyina</i> overrides S <i>yamīn</i>, occasioning <i>ḥukm</i> in favour of B] - SH subsidiary rulings (re: <i>nukūl</i> of <i>yamīn</i>) [“reward” principle (<i>ḥikma?</i> <i>sabab?</i>) implicit to SH ‘<i>illa</i>: S <i>nukūl</i> alone does not occasion <i>ḥukm</i> in favour of B; ‘<i>illa</i> must consist of S <i>nukūl</i> + B <i>yamīn</i>]

²⁵⁹ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., [Missing]; Turkī ed., 262, §147; al-Bājī, *Minhāj*, Turkī ed., 201, §454. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 70, §327.

²⁶⁰ SH’s closing argument pinpoints — as we have now seen a number of times — a purely logical inconsistency which might result from the opposing opinion (which we may infer to be that of IAL in §33). We might render it thus: “If X owes *mahr* to Y, and Y might also be a “deceiver,” then X should also claim *mahr* from Y (according to IAL’s [and, presumably, SHAQ’s] opinion, wherein X claims *mahr* from the seller due to his deception). But how can X both owe and claim *mahr* from Y?” SH’s *elenchus* may thus be categorized as a combination of *mu’āraḍa bi’l-nuṭq* (supplanting IAL’s “deceiver” ‘*illa* with efficient properties drawn from a Sunnaic judgment) and *reductio ad impossibile* (exposing an impossible result consequent to the application of IAL’s ruling).

²⁶¹ S = “seller;” B = “buyer”

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51 – فَإِنْ قَالَ قَائِلٌ: مَا دَلٌّ عَلَى مَا ذَكَرْتُ؟	(51) SH initiates “instructional” dialectic (<i>fa-in qāla qā’il</i>): - SHAQ demands <i>dalīl</i> for SH subsidiary rulings and argument: “<i>mā dalla ‘alā mā dhakarta?</i>” [SHAQ asks al-Bājī’s third question: <i>al-su’āl ‘an dalīl al-madhhab</i>]
52 – قِيلَ: قَضَى رَسُولُ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – لِلْأَنْصَارِيِّينَ بِالْأَيْمَانِ يَسْتَحِقُّونَ بِهَا دَمَ صَاحِبِهِمْ فَتَكَلُّوا وَرَدَّ الْأَيْمَانَ عَلَى يَهُودَ يَبْرَعُونَ بِهَا، ثُمَّ رَأَى عُمَرُ بْنُ الْخَطَّابِ رَضِيَ اللَّهُ تَعَالَى عَنْهُ الْأَيْمَانَ عَلَى الْمُدْعَى عَلَيْهِمُ الدَّمُ يَبْرَعُونَ بِهَا فَتَكَلُّوا، فَرَدَّهَا عَلَى الْمُدْعِينَ وَلَمْ يُعْطِهِمْ بِالتُّكُولِ شَيْئًا حَتَّى رَدَّ الْأَيْمَانَ، وَسُئِلَ رَسُولُ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – النَّصُّ الْمُفَسَّرَةُ تَدُلُّ عَلَى سُنَّتِهِ الْجُمْلَةَ.	(52) SH <i>jawāb</i> (<i>qīla</i>): 1) <i>istidlāl</i> from Sunnaic judgment (“<i>qaḍā Rasūl Allāh...</i>” between the Anṣāriyyūn and the Jews) [SH ‘illa evident in Sunnaic <i>dalīl</i>] 2) <i>istidlāl</i> from <i>athar</i>-judgment of ‘Umar [SH <i>tafsīr</i> shows his ‘illa (and <i>sabab/hikma</i>) at work in his <i>athar dalīl</i>] 3) SH asserts hermeneutic: Sunna is <i>al-naṣṣ al-mufasssira</i> providing indicant for (<i>tadullu ‘alā</i>) <i>jumla</i> Sunna²⁶²
53 – وَكَذَلِكَ قَوْلُ عُمَرَ بْنِ الْخَطَّابِ رَضِيَ اللَّهُ تَعَالَى عَنْهُ وَقَوْلُ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «الْبَيِّنَةُ عَلَى الْمُدْعَى، وَالْيَمِينُ عَلَى الْمُدْعَى عَلَيْهِ» ثُمَّ قَوْلُ عُمَرَ بْنِ الْخَطَّابِ رَضِيَ اللَّهُ تَعَالَى عَنْهُ ذَلِكَ جُمْلَةً دَلَّ عَلَيْهَا نَصُّ حُكْمِ كُلِّ وَاحِدَةٍ مِنْهُمَا، وَالَّذِي قَالَ: لَا	(53) SH <i>jawāb</i> (cont.): 4) SH explains hermeneutic at work: <i>athar-qawl</i> and Sunnaic <i>qawl</i> (<i>al-bayyina ‘alā al-mudda’ī, wa’l-yamīn ‘alā al-mudda’ā ‘alayhi</i>) are <i>jumla</i>; while the <i>athar</i> and Sunnaic <i>aḥkām</i> (in §52) provide indicant²⁶³

²⁶² Cf. our earlier discussion of *mufasssir/mujmal*/etc. (note attached to §255). We cannot overstress the importance of SH incorporating an explicit reference to his legal theory within this dialectical sequence. Nor is this principle unfamiliar: in his *Risāla*, the terms *naṣṣ*, *mufasssir*, and *jumla* coincide when he explains the relationship between *Kitāb* and *Sunna*. God has clarified (*abāna*) “that the *Sunna* is not an abrogator (*nāsikha*) to the *Kitāb*, rather it is subordinate (*taba^{un}*) to the *Kitāb*, relating to the like of what was revealed as *naṣṣ* (*bi-mithli mā nazala naṣṣ^{an}*), and an interpreter (*mufasssirat^{un}*) of the *ma’nā* of what God revealed of it [the *Kitāb*] in non-specific form (*jumal^{an}*)” (Shākir ed., §314, p.106; for lucid discussions of SH’s hermeneutic of *naṣṣ*, *mufasssir*, and *jumla*, see, once again: Joseph Lowry’s “Legal Hermeneutics of al-Shāfi’ī and Ibn Qutayba,” *passim*). As regards *jumla*, Lowry notes: “*Jumla* is found in the *Risāla*, but in a very precise sense, meaning a ‘general rule the details of which are found elsewhere’” (op. cit., 36-7). We may note that a similar discussion occurs in SH’s *Kitāb Bayān Farā’id Allāh* (Ḥassūn, vol. 10, pt. 15, 90, §56). Here in §52, however, al-Shāfi’ī explains that what is univocal (*naṣṣ*) in the *Sunna* serves to interpret what is non-specific (*jumla*) in the *Sunna*; and the particular manner in which this precept obtains in the *mas’ala* at hand will be described in §53. We are again witness to the fine-tuning of legal theory in a dialectical venue; and, of course, we need not mention that the hermeneutics of *naṣṣ*, *mujmal*, *mubayyan*, etc. receive full-chapter treatment in later, fully-systematized *uṣūl* works.

²⁶³ SH here explains how the *mufasssir*-to-*jumla* precept he references in §52 determines the appropriate hermeneutic for the case at hand. The *aḥkām* of the Prophet and ‘Umar in §52 serve to provide indicant for their *jumla qawl* related in §53. Furthermore this very *jumla qawl* and a

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يَعْدُو بِالْيَمِينِ الْمُدَّعَى عَلَيْهِمْ. يُخَالِفُ هَذَا فَيَكْثُرُ وَيَحْمَلُ الْحَدِيثَ مَا لَيْسَ فِيهِ. وَقَدْ وَضَعْنَا هَذَا فِي كِتَابِ الْأَفْضِيَّةِ وَالْيَمِينِ بَيْنَ الْمُتَبَايَعِينَ عَلَى الْبَتِّ فِيمَا تَبَايَعَا فِيهِ.	• 5) SH objection to opposing ruling (wa <i>alladhī qāla</i> [opposing opinion] <i>yukhālifu</i> [SH <i>adilla</i> and <i>mufassir</i> hermeneutic]), and charge of misinterpretation • 6) SH reference to full counter-argument in another <i>kitāb</i> • [SH <i>i’tirād</i>: <i>da’wā al-ijmāl</i> re: the <i>Shar‘</i> (Shīr.II.C.3.1; Bāj.II.2.2.3.2); and “hermeneutic-objection” ²⁶⁴] • 7) SH closes with subsidiary ruling (<i>yamīn</i> for S and B is ‘<i>alā al-batti</i>)

§§62-65: SH vs. SHAQ

62 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اشْتَرَى الرَّجُلُ الْعَبْدَ أَوْ أَيْ سِلْعَةً مَا اشْتَرَى عَلَى أَنَّ الْبَائِعَ بِالْخِيَارِ أَوْ الْمُشْتَرِيَ أَوْ هُمَا مَعًا إِلَى مُدَّةٍ يَصِفَانَهَا ؛ فَإِنْ كَانَتْ الْمُدَّةُ ثَلَاثًا أَوْ أَقَلَّ فَلْيَبِيعْ حَائِزٌ ، وَإِنْ كَانَتْ أَكْثَرَ مِنْ ذَلِكَ بِطَرَفَةِ عَيْنٍ فَأَكْثَرُ فَلْيَبِيعْ مُتَّفَقٌ.	• (62) SH ruling for <i>mas’ala</i> #1 • [SH listing of contractual conditions implies a full complement of efficient properties, the focus of which, for the <i>mas’ala</i> at hand, is: “the <i>khiyār</i> is stipulated for three days or less.” This, together with other properties, occasions the <i>ḥukm</i> of <i>jā’iz</i>.]
63 – فَإِنْ قَالَ قَائِلٌ: وَكَيْفَ جَارَ الْخِيَارُ ثَلَاثًا وَلَمْ يَجْزِ أَكْثَرَ مِنْ ثَلَاثٍ؟	• (63) SH initiates “instructional” dialectic (<i>fa-in qāla qā’il</i>): • SHAQ: “<i>Kayfa jāza X</i>, and not more than <i>X</i>?” • [SHAQ asks al-Bājī’s fourth question:

variant — «*al-bayyina ‘alā al-mudda’i*, wa’l-*yamīn ‘alā man ankara*» — are prominent among the *qawā’id fiḥiyya* (and examples of *ijmā’*) in later works of *uṣūl* and its subgenres. SH’s hermeneutic regarding the *mas’ala* at hand thus stands as a striking illustration, from two perspectives, of how an element of the later sciences of legal theory gained the edge of *hujjiyya* in proto-system dialectical disputation.

²⁶⁴ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 59; al-Bājī, *Minhāj*, Turkī ed., 102, §198. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 34, §179. Although SH’s overall objection here most resembles this species of *i’tirād* — especially considering his claim that the Sunnaic «*al-bayyina ‘alā al-mudda’i*» is *jumla* — we may also consider his other objection; mainly, that the opposing position has “augmented and burdened the *ḥadīth* with what is not in it.” I have not been able to find a match for this objection in our *jadal*-theory works, but we may note that it concerns an interpretation as to the full extent of the *ḥukm* which may be inferred from this Sunnaic *dalīl*. For the opposing position, the *yamīn* must be extracted from S should B fail to bring *bayyina*, or the *ḥukm* will be in favour of B. As for SH, however, this is reading more into the *ḥadīth* than what was intended, and he brings his Sunnaic and *athar aḥkām* by way of a *dalīl* for that. It is as much a charge of misinterpretation due to not following SH’s *mufassir*-to-*jumla* principle, as it is to “over-burdening” the *ḥadīth*. Lacking a more specific identification, we will simply place it under a larger genus of “hermeneutic-objection.”

	<i>al-suʿāl ʿan wajh al-dalīl; or a species of muṭālaba</i>] ²⁶⁵
64 – قِيلَ لَوْلَا الْخَبْرُ عَنْ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – مَا جَازَ أَنْ يَكُونَ الْخِيَارُ بَعْدَ تَفَرُّقِ الْمُتَبَايَعِينَ سَاعَةً؛ لِأَنَّ رَسُولَ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – إِنَّمَا جَعَلَ لَهُمَا الْخِيَارَ إِلَى أَنْ يَتَفَرَّقَا؛ وَذَلِكَ أَنَّ رَجُلًا لَا يَحُوزُ أَنْ يَدْفَعَ مَالَهُ إِلَى الْبَائِعِ وَيَدْفَعَ الْبَائِعُ حَارِيتَهُ لِلْمُسْتَشْتَرِي فَلَا يَكُونُ لِلْبَائِعِ الْإِنْتِفَاعُ بِثَمَنِ سِلْعَتِهِ وَلَا لِلْمُسْتَشْتَرِي أَنْ يَنْتَفِعَ بِحَارِيَّتِهِ، وَلَوْ زَعَمْنَا أَنَّ لَهُمَا أَنْ يَنْتَفِعَا زَعَمْنَا أَنَّ عَلَيْهِمَا إِنْ شَاءَ أَحَدُهُمَا أَنْ يَرُدَّ رَدًّا، فَإِذَا كَانَ مِنْ أَصْلٍ مَذْهَبِنَا أَنَّهُ لَا يَحُوزُ أَنْ أُبَيِّعَ الْجَارِيَةَ عَلَى أَنْ لَا يَبِيعَهَا صَاحِبُهَا لِأَنِّي إِذَا شَرَطْتُ عَلَيْهِ هَذَا فَقَدْ نَقَضْتُهُ مِنَ الْمِلْكِ شَيْئًا، وَلَا يَصْلُحُ أَنْ أُمْلِكُهُ بِعَوَضٍ آخِذُهُ مِنْهُ إِلَّا مَا مِلْكُهُ عَلَيْهِ تَامَ فَقَدْ نَقَضْتُهُ بِشَرْطِ الْخِيَارِ كُلِّ الْمِلْكِ حَتَّى حَظَرْتُهُ عَلَيْهِ، وَأَصْلُ الْبَيْعِ عَلَى الْخِيَارِ لَوْلَا الْخَبْرُ كَانَ يَنْبَغِي أَنْ يَكُونَ فَاسِدًا لِأَنَّا نَفْسِدُ الْبَيْعَ بِأَقَلِّ مِنْهُ مِمَّا ذَكَرْتُ، فَلَمَّا شَرَطَ رَسُولُ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ –: «فِي	• (64) SH <i>jawāb (qīla)</i>: • 1) SH explains his <i>istidlāl bi'l-Sunna</i> • [a particular <i>khābar</i> makes an exception to the general Sunnaic rule] • 2) SH underscores resultant contradiction of SHAQ position (claim of full <i>intifāʿ</i> and claim of full responsibility to return are incompatible) • [SH <i>reductio ad impossibile</i>] • 2) SH “<i>aṣl</i> of our <i>madhhab</i>” argument shows what the basis of <i>qiyās</i> would be if not for the exception-<i>khābar</i>]²⁶⁶ • [SH <i>iʿtirāḍ</i>: “hypothetical” <i>farq bi-qiyās al-ʿilla</i>, or <i>bi-ʿillat al-ḥukm</i> (Shīr.VII.15.2.2.1; Bāj.IX.B.15.2.2.1.1)]²⁶⁷ • 3) SH “hypothetical” <i>a fortiori</i> argument (the <i>aṣl madhhabinā</i> forbids partial diminishment of <i>milk</i>; all the more so should the full diminishment of <i>milk</i> be forbidden in the <i>masʿala</i> at hand [if not for the exception-<i>khābar</i>])

²⁶⁵ We might characterize SHAQ’s demand as more in the spirit of an objection than information-seeking; it is evident that he shares SH’s Sunnaic *dalīl* (by which three days is permitted), but will not concede to SH’s restriction to *only* three days without further evidence and argument. For this reason, we might identify his question as belonging to the genus of *muṭālaba*t (i.e., among al-Bājī’s first *darb* of *iʿtirāḍāt*; see *Minhāj*, Turkī ed., 40-1, §78.

²⁶⁶ Importantly, we recognize a parallel function here between “the *aṣl* of our *madhhab*” from §64 and “the *aṣl* of the *maʿqūl*” from §1411 (see above analysis and attached notes). Both phrases introduce a general rule which *ought* to be the *aṣl* for *qiyās*, if SH at all believed that *qiyās* obtains for the *masʿala* at hand. Both phrases, in other words, belong to an argument from SH’s cardinal tenet (as noted by Schacht) that exceptions to general rules cannot serve as the basis for *qiyās*.

Perhaps the difference between these two phrases is that the “*aṣl madhhabinā*” references a general rule belonging to a transmitted body of doctrine, while “*aṣl al-maʿqūl*” references a general rule inductively derived from the Sharʿa as a whole. Either way, we are once again witnessing the term *aṣl* in the sense of a *qāʿida*, the very meaning we find in the *Uṣūl al-Karkhī*.

²⁶⁷ al-Shīrāzī, *Maʿūna*, al-ʿUmayrīnī ed., [initial section missing, remainder on 116]; Turkī ed., 262-3 §§149; al-Bājī, *Minhāj*, Turkī ed., 202f. §§459f. We will remember that this *farq*-objection is actually a species of *muʿāraḍa*, and will note that SH’s “hypothetical” *muʿāraḍa* is here plain. In short, he is claiming that – were it not for the exception-*khābar* – he would supplant his opponent’s *ʿilla* with that derived from “the *aṣl* of our *madhhab*” (i.e., diminishment of *milk* occasions *ḥukm* of *fāsid*). This is akin to problematizing the *ʿilla* of the opponent’s *aṣl* with regard to the *farʿ* (hence *farq*), but we recognize, in this case, that SH has problematized the opposing *aṣl* from a different perspective (it is an exception to the general rule). Once again, we find SH employing a “hypothetical” objection.

المُصَرَّاةِ خِيَارَ ثَلَاثٍ بَعْدَ الْبَيْعِ. 65 - وَرَوِيَ عَنْهُ عَلَيْهِ الصَّلَاةُ وَالسَّلَامُ أَنَّهُ جَعَلَ لِحَبَّانَ بْنِ مُنْقِذٍ خِيَارَ ثَلَاثٍ فِيمَا ابْتِاعَ، انْتَهَيْنَا إِلَى مَا أَمَرَ بِهِ رَسُولُ اللَّهِ -صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ- مِنَ الْخِيَارِ وَلَمْ يُجَاوِزْهُ إِذْ لَمْ يُجَاوِزْهُ رَسُولُ اللَّهِ -صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ- وَلَكَ أَنَّ أَمْرَهُ بِهِ يُشْبِهُ أَنْ يَكُونَ كَالْحَدِّ لِعَاقِبَتِهِ مِنْ قَبْلِ أَنْ الْمُصَرَّاةُ قَدْ تُعْرِفُ تَصَرُّفَهَا بَعْدَ أَوَّلِ حَلْبَةٍ فِي يَوْمٍ وَلَيْلَةٍ وَفِي يَوْمَيْنِ حَتَّى لَا يَشْكُ فِيهَا، فَلَوْ كَانَ الْخِيَارُ إِنَّمَا هُوَ لَيَعْلَمَ اسْتِثْنَاءَ عَيْبِ التَّصَرُّفِ أَشْبَهَ أَنْ يُقَالَ: لَهُ الْخِيَارُ حَتَّى يَعْلَمَ أَنَّهَا مُصَرَّاةٌ طَالَ ذَلِكَ أَوْ قَصُرَ، كَمَا يَكُونُ لَهُ الْخِيَارُ فِي الْعَيْبِ إِذَا عَلِمَهُ بِأَنَّ وَقْتُ طَالَ ذَلِكَ أَوْ قَصُرَ، وَلَوْ كَانَ خِيَارُ حَبَّانَ إِنَّمَا كَانَ لَاسْتِثْنَاءَ غَيْرِهِ أَمْكَنَهُ أَنْ يَسْتَشِيرَهُ فِي مَقَامِهِ وَبَعْدَهُ بِسَاعَةٍ، وَأَمْكَنَ فِيهِ أَنْ يَدَعَ الْإِسْتِثْنَاءَ دَهْرًا،	4) SH quotes the exception-<i>khavar</i>²⁶⁸ (65) SH <i>jawāb</i> (cont.): 5) SH continues with a second Sunnaic judgment (for Ḥabbān b. Munqidh) in support of his three-day restriction²⁶⁹ 6) SH asserts consonance of his ruling with Prophet’s Sunna (he did not exceed three, so neither do we) 7) SH <i>tafsīr</i> of his <i>adilla</i>: they represent the utmost time-limit for <i>khiyār</i>-stipulation 8) additional <i>tafsīr</i> establishes these <i>adilla</i> as proof that <i>khiyār</i> of three days is “the utmost limit,” and stipulation beyond that renders the <i>bayʿ</i> <i>fāsid</i> [SH <i>istidlāl biʾl-Sunna</i> is firmly tied to the <i>masʿala</i> at hand; overall, this constitutes an <i>iʿtirāḍ</i> of <i>muʿāraḍa biʾl-nuṭq</i> (Shīr.VII.15.1; Bāj.IX.B.15.1)²⁷⁰ —

²⁶⁸ SH’s *tafsīr* and accompanying argument up to this point may be summarized as follows: 1) three days is an exception (indicated by a *khavar*) to a general rule (also derived from the Sunna) that there is no *khiyār* after separation of B and S; 2) it is not permitted that both B and S exchange *māl* and *jāriya* without having immediate *intifāʿ* of *jāriya* and *māl*; 3) if we claim they both have full *intifāʿ*, we would be claiming [following SHAQ’s opinion] that they must both return when one of them desires it [which is self-contradictory]; 4) if the “*aṣl* of our *madhhab*” [i.e., the *aṣl* which would serve for *qiyās*] is that S cannot sell a *jāriya* to B with the *sharṭ* that B not resell her (because S partly diminishes the full *milk* of B, and S cannot take compensation except for a full transfer of *milk* to B); 5) then this *sharṭ* of *khiyār* [in the *masʿala* at hand] would strip B of all *milk* [i.e., it would be worse]; and 6) the *aṣl* of *bayʿ ʿalā al-khiyār* would be *fāsid* if not for the exception-*khavar*, because (ordinarily) we invalidate the *bayʿ* for less than that.

²⁶⁹ At the end of §64, SH relates the exception-*khavar* (re: the *muṣarrāt*). It is unclear as to why Ḥassūn chose to break off and begin a new section here, as SH’s sentence appears to continue on into §65 with another supporting Sunnaic *dalīl*, and, ultimately, with the assertion that these two represent the sum-total of the Prophet’s restrictions on *khiyār*.

²⁷⁰ al-Shīrāzī, *Maʿūna*, al-ʿUmayrīnī ed., [Missing]; Turkī ed., 262, §147; al-Bājī, *Minhāj*, Turkī ed., 201, §454. Cf. Ibn ʿAqīl, K. *al-Jadal*, 70, §327. Schacht devotes a considerable amount of attention to this section of the treatise (see notes attached to §62ff. in Part II of this dissertation). His main concern is that this, and two other sections, illustrate what he rightly observes to be a cardinal tenet of SH: that “exceptions cannot be extended by analogy” (*Origins*, 123-4). To this we might add another observation of great import to our dissertation; mainly, the three examples cited by Schacht all occur as arguments within a dialectical sequence. The first is in the category B sequence we are now concluding, and the other two belong to the extended dialectical sequences which we have previously analyzed in *masāʾil*-sets #10 (§§1217-32) and #12 (§§1402-12). The significance is plain: at this stage in proto-system legal theory, SH’s particular tenet of *qiyās*-extension had not yet gained a more general recognition. He therefore may be found promoting it, and critiquing opponents for not observing it, in no less than three separate instances within our treatise. No finer illustration of a legal-theory principle gaining the edge of *hujjiyya* in the dialectical forge may be hoped for than this.

Part I: The Dialectical Forge
Chapter III: Analyses of “Overtly Dialectical” Presentations in the *Kitāb Ikhtilāf al-ʿIrāqīyyīn*

فَكَانَ الْحَبْرُ دَلَّ عَلَى أَنَّ حَيَارَ ثَلَاثٍ أَقْصَى غَايَةِ الْخِيَارِ، فَلَمْ يَجْزُ لَنَا أَنْ نُجَاوِزَهُ وَمَنْ جَاوَزَهُ كَانَ عِنْدَنَا مُشْتَرِطًا بَيْعًا فَاسِدًا.	SHAQ’s attempted <i>qiyās</i> from the exception-<i>khābar</i> is blocked by <i>tafsīr</i> and argument from Sunnaic <i>adilla</i>]

§§78-80: SH vs. SHAQ

78 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا بَاعَ الرَّجُلُ الرَّجُلَ الْعَبْدَ عَلَى أَنْ لَا يَبِيعَهُ مِنْ فُلَانٍ، أَوْ عَلَى أَنْ لَا يَسْتَحْدِمَهُ، أَوْ عَلَى أَنْ يُنْفِقَ عَلَيْهِ كَذَا، أَوْ عَلَى أَنْ يُخَارِجَهُ، فَالْبَيْعُ فِيهِ كُلُّهُ فَاسِدٌ؛ لِأَنَّ هَذَا كُلُّهُ غَيْرُ تَمَامٍ مِلْكٍ، وَلَا يَجُوزُ الشَّرْطُ فِي هَذَا إِلَّا فِي مَوْضِعٍ وَاحِدٍ؛ وَهُوَ الْعَتَقُ اتِّبَاعًا لِلسُّنَّةِ وَلِفِرَاقِ الْعَتَقِ لِمَا سِوَاهُ فَنَقُولُ: إِنْ اشْتَرَاهُ مِنْهُ عَلَى أَنْ يُعْتَقَهُ فَأَعْتَقَهُ فَالْبَيْعُ جَائِزٌ.	• (78) SH ruling (<i>fāsid</i>) is the same for related <i>masā’il</i> ##1-4 (which all involve stipulation of what the buyer must or must not do with the slave) • 1) ‘<i>aql</i> argument: “because” of common ‘<i>illa</i> (impediment to full ownership occasions a <i>ḥukm</i> of “the bay’ is <i>fāsid</i>”)²⁷¹ • 2) SH <i>bayān</i> of ‘<i>itq</i>-exception, which is due to: a) Sunnaic <i>dalīl</i>; and b) <i>firāq</i> of ‘<i>itq</i> from all other transactions • [SH “<i>farq</i>-extension;” implied <i>i’tirād</i>: <i>fasād al-i’tibār</i> known by way of the <i>uṣūl</i> (see analysis for §80)] • 3) SH states ‘<i>itq</i>-exception ruling (stipulation that buyer must manumit is <i>jā’iz</i>)²⁷²

²⁷¹ This is the same ‘*illa* we have just seen at work in the category B sequence of §§62-5. We may now note the relationship between what we have termed “*taswīya*-subsumption” and *qiyās*. To claim that “this, all of it, is one and the same” is to imply that the *masā’il* proposed for *taswīya*-subsumption share the same efficient properties necessary to constitute an ‘*illa* occasioning the same *ḥukm* for each *mas’ala* in that set of *masā’il*.

²⁷² It is evident that the ensuing debate will center upon SH’s insistence that the *firāq* of ‘*itq* from all other transactions be observed here. This is not the first time we have encountered this conception: it played a critical role in SH’s argument against *qiyās* from marriage/divorce to ownership/manumission in §§755ff. In effect, we are witnessing a concern that a critical *farq* be observed across substantive domains for the sake, or so we assume, of maintaining doctrinal consistency (and avoiding the charge of *naqd*). Nor has ‘*itq* been the only focus of this sort of concern; we have encountered something quite similar in §§1321ff. with SH’s insistence that a *farq* be maintained between *ḥarb*-killing and *ḥadd*-killing. Importantly, we will note that his opponent’s non-observance of the *farq* in the *mas’ala* then at hand, and his observance of it elsewhere, is what led SH to charge him with *method-naqd*. With these, and our current *mas’ala*, in mind, we may propose a new label for this type of concern: “*farq*-extension.” In a manner similar to the way that “*manzila*-subsumption” describes a jurist’s concern that X receive the *ḥukm* of Y across all relevant *masā’il* within a substantive legal domain, and “*taswīya*-subsumption” describes a jurist’s concern that *masā’il* sharing the same efficient properties receive the same *ḥukm* (unless, of course, Kitāb and Sunna decree an exception), so too will we employ “*farq*-extension” to describe a jurist’s concern that a critical difference between certain legal activities (ownership vs. marriage, ‘*itq* vs. divorce, *ḥarb*-killing vs. *ḥadd*-killing, ‘*itq* vs. all other bay’ stipulations) be observed across all *masā’il* within relevant domains. Nor would it be going too far to posit that a main motive behind each of these similar concerns with consistency

79 – فَإِنْ قَالَ رَجُلٌ: مَا فَرَقَ بَيْنَ الْعَتَقِ وَغَيْرِهِ؟	• (79) SH initiates “instructional” dialectic (<i>fa-in qāla rajul</i>): • SHAQ: “<i>mā farraqa bayna al-ʿitq wa ghayrihi?</i>” • [SHAQ objection-oriented dialectical question: “<i>suʿāl ʿan wajh al-iʿtirād</i>” (?); or “<i>muṭālaba biʿl-farq</i>” (?)²⁷³]
80 – قِيلَ: قَدْ يَكُونُ لِي نَصْفُ الْعَبْدِ فَأَهْبُهُ وَأَبِيعُهُ وَأَصْنَعُ فِيهِ مَا شِئْتُ غَيْرَ الْعَتَقِ فَلَا يَلْزِمُنِي ضَمَانُ نَصِيبِ شَرِيكِي فِيهِ، وَلَا يَخْرُجُ نَصِيبُ شَرِيكِي مِنْ يَدِهِ، لِأَنَّ كُلًّا مَالِكٌ لِمَا مَلَكَ فَإِنْ أَعْتَقْتُهُ وَأَنَا مُوسِرٌ عَتَقَ عَلَيَّ نَصِيبُ شَرِيكِي الَّذِي لَا أَمْلِكُ وَلَمْ أَعْتَقْ وَضَمِنْتُ قِيَمَتَهُ، وَخَرَجَ مِنْ يَدَيَّ شَرِيكِي بغيرِ أَمْرِهِ وَأُعْتِقَ الْحَمْلُ قَتْلُهُ لِأَقْلَ [مِنْ] سِتَّةِ أَشْهُرٍ فَيَقَعُ عَلَيْهِ الْعَتَقُ وَلَوْ بَعْتُهُ لَمْ يَجْزِ الْبَيْعُ مَعَ خِلَافِهِ لغيرِهِ فِي هَذَا وَفِي أُمِّ الْوَلَدِ وَالْمُكَاتَبِ وَمَا سِوَاهُمَا.	• (80) SH <i>jawāb</i> (<i>qāla</i>) introduces a number of <i>masāʿil</i> of <i>furūq</i>: • 1) ‘<i>itq</i> of <i>mūsir</i> A’s share impinges upon B’s share (which is manumitted and leaves his possession), unlike gifting, sale, etc. of A’s share • 2) ‘<i>itq</i> of the foetus of the <i>umm walad</i> (its sale is not <i>jāʿiz</i>) • 3) reference to additional <i>khilāf</i> between ‘<i>itq</i>, the <i>umm walad</i>, the <i>mukātab</i>, and their like, and other legal arrangements • [SH principle <i>iʿtirād</i>: charge that SHAQ’s <i>aṣl</i> may not serve as an <i>aṣl</i> due to general <i>farq</i> = charge of <i>fasād al-iʿtibār</i> known by way of the <i>uṣūl</i> (Shīr.VII.12.2.2; Bāj.IX.B.10.2.2),²⁷⁴ implied <i>iʿtirād</i>: <i>method-naqq</i>]²⁷⁵

is the avoidance of being charged with *naqq*. That is to say, these juridical pre-occupations we have noticed, and the formulae employed by jurists to convey them, all bear the forge-marks of dialectical disputation. Proto-system legal theory was directed by consistency-concerns such as these, and these, in turn, were driven by the avoidance of a singular genus of *iʿtirād*: *al-naqq*.

²⁷³ We must assume that SHAQ entertains the viability of *qiyās* from the basis of ‘*itq*-stipulations in the sale of a slave to the four *masāʿil* treated by SH in §78. In this sense, we read SH’s *farq*-extension as an *iʿtirād* of *farq* against such a *qiyās*, and SHAQ’s dialectical question — challenging SH to justify this *farq* — as an objection-oriented species of *suʿāl* or *muṭālaba*.

²⁷⁴ al-Shīrāzī, *Maʿūna*, al-ʿUmayrīnī ed., 114f.; al-Bājī, *Minhāj*, Turkī ed., 181f., §§402ff. Cf. Ibn ʿAqīl, *K. al-Jadal*, 64, §§302-4. Of note here is the utility of *farq* as a tool for critique. We know, of course, that it is identified in the *jadāl*-theory texts with the *muʿāraḍa* of P’s *illa* by way of *qiyās al-illa* and *qiyās al-dalāla*. We have also seen SH employ *farq* in his *jawāb* against an implied charge of *fasād al-iʿtibār* in the dialectical sequence of §§1320ff. Now, however, we find SH employing *farq* (in much the same manner as his opponent did in §§1320ff.) in order to press his own charge of *fasād al-iʿtibār*. Even as his opponent earlier pushed him to accept the evidence of the *uṣūl* in establishing a *farq* between men and women (re: *ḥarb*-killing, to which SH responded with his own *farq* between *ḥarb*-killing and *ḥadd*-killing), now we find that SH has pushed SHAQ to concede the *farq* between ‘*itq* and other transactions, based upon the evidence of the *uṣūl* (his *masāʿil* of *furūq* in §80). This is the essence, and meaning, of *fasād al-iʿtibār*: the *muʿtarid* pushes the *muʿallil* to concede that his *qiyās* is built upon an “invalid consideration.”

²⁷⁵ Although not noted by Schacht in his *Origins*, this short dialectical sequence once again provides an example of SH’s adherence to that *qiyās*-theorem by which an exception to general

§§155-157: SH vs. SHAQ

155 – قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ تَعَالَى عَنْهُ: وَإِذَا ابْتَاعَ الرَّجُلُ مِنَ الرَّجُلِ ثَوْبًا مُرَابَحَةً فَبَاعَهُ، ثُمَّ وَجَدَ الْبَائِعَ الْأَوَّلَ الَّذِي بَاعَهُ مُرَابَحَةً قَدْ خَانَهُ فِي الثَّمَنِ فَقَدْ قِيلَ: تُحْطُ عَنْهُ الْخِيَانَةُ بِحَصَّتِهَا مِنَ الرَّبْحِ وَيَرْجِعُ عَلَيْهِ بِهِ، وَلَوْ كَانَ الثَّوْبُ فَائِئًا لَمْ يَكُنْ لَهُ أَنْ يَرُدَّهُ. وَإِنَّمَا مَنَعْنَا مِنَ إِفْسَادِ الْبَيْعِ وَأَنْ يَرُدَّهُ إِذَا كَانَ قَائِمًا، وَيَجْعَلُهُ بِالْقِيمَةِ إِذَا كَانَ فَائِئًا أَنْ الْبَيْعَ لَمْ يَنْعَقِدْ عَلَى مُحَرَّمٍ عَلَيْهِمَا مَعًا وَإِنَّمَا انْعَقَدَ عَلَى مُحَرَّمٍ عَلَى الْخَائِنِ مِنْهُمَا.	• (155) SH rulings for <i>masā'il</i> #1a (B has sold the <i>thawb</i>) and #1b (B still has the <i>thawb</i>) • 1) SH relates (<i>fā-qad qīla</i>) the IAL/AY ruling for #1b in §154 (B returns <i>thawb</i>, and reclaims the price minus the <i>khiyāna</i> of A) • 2) SH ruling for #1b (B has no right to return <i>thawb</i> to A) • [SH counter-ruling to AH, IAL, and AY] • SH explanation: “<i>innamā mana'anā min</i>” • 1) we are prevented from the <i>ifsād</i> of the <i>bay'</i> and that B return the <i>thawb</i> to A when it is <i>qā'im</i> [counter to AH, IAL, AY rulings for #1b, which entail the <i>bay'</i> is <i>fāsīd</i>]... • 2) and [we are prevented from] that he lay claim to the value of the <i>thawb</i> when it is <i>fā'it</i> [in consonance with AH, IAL, and AY rulings for #1a, for which the <i>bay'</i> is <i>jā'iz</i>]... • 3) because the <i>bay'</i> was not contracted for a <i>muḥarram</i> to them both, but only

transactional rules cannot serve as the basis for *qiyās*. We may thus qualify SH's argument in three ways: 1) an appeal to this principle; 2) an *i'tirād* of *fasād al-i'tibār* known by way of the *uṣūl*; and 3) an *i'tirād* of *method-naqd*. As for the first, it is equivalent to SH claiming that SHAQ's *aṣl* may not be used as an *aṣl*, and this links it to the charge of *fasād al-i'tibār*. In fact, we may now claim that Schacht's observation of this principle tenet of SH — no *qiyās*-extension from an exception to a general rule — is nothing less, once converted into objection-form, than a species of *fasād al-i'tibār* known by way of the *uṣūl*. For SH, the Sharī'a as a whole supplies evidence that the ruling which his opponent employs as an *aṣl* is an exception — i.e., it is critically different from others within the same domain of legal acts — and this *farq* must therefore be extended and observed across the *masā'il* of that domain. His opponent's *qiyās* does not recognize this *farq*-extension, and is built upon an exception — i.e., upon an “invalid consideration” — and this is the meaning of *fasād al-i'tibār*. It is the resultant inconsistency of the opponent's doctrine which allows SH to charge him with what we have termed *method-naqd*: the opponent observes these *furūq* elsewhere, but not in the four *masā'il* at hand.

	for a muḥarrām to the khā'in [SH i'tirād against AH, IAL, AY ruling for #1b: <i>man' al-waṣf fi'l-far'</i> Shīr.VII.4; Bāj.IX.6.1.1)]²⁷⁶ [SH i'tirād against AH, IAL, AY ruling for #1b: <i>mu'āraḍa</i> of <i>qiyās</i> by <i>qiyās</i> (al-Baṣrī), or <i>al-mu'āraḍa bi-'illa muḥtada'a</i> (Shīr.VII.15.2.1; Bāj.IX.B.15.2.1)]²⁷⁷
156 – فَإِنْ قَالَ قَائِلٌ: مَا يُشَبِّهُ هَذَا مِمَّا يَجُوزُ فِيهِ الْبَيْعُ بِحَالٍ وَالْبَائِعُ فِيهِ غَارٌّ؟	(156) SH initiates “instructional” dialectic (<i>fa-in qāla qā'il</i>): - SHAQ: “<i>mā yushbiḥu hādhā, of permitted bay', when the seller is a ghārr?</i>” [SHAQ objection-question challenges SH to produce a parallel among permitted <i>bay'</i> contracts; not among al-Bājī's questions; something like a <i>muṭālaba</i> for <i>qiyās al-shabah</i> (?)]
157 – قِيلَ: يُدَلِّسُ الرَّجُلُ لِلرَّجُلِ الْعَيْبَ فَيَكُونُ التَّدْلِيسُ مُحَرَّمًا عَلَيْهِ وَمَا أَخَذَ مِنْ ثَمَنِهِ مُحَرَّمًا. كَمَا كَانَ مَا أَخَذَ مِنَ الْخِيَانَةِ مُحَرَّمًا، وَلَا يَكُونُ الْبَيْعُ فَاسِدًا فِيهِ، وَلَا يَكُونُ لِلْبَائِعِ الْخِيَارُ فِي رَدِّهِ، وَقِيلَ: لِلْمُسْتَشْتَرِي الْخِيَارُ فِي أَخْذِهِ بِالثَّمَنِ الَّذِي سُمِّيَ لَهُ أَوْ فَسَخَ الْبَيْعَ؛ لِأَنَّهُ لَمْ يَنْعَقِدْ إِلَّا بِثَمَنِ مُسَمًّى، فَإِذَا وَجَدَ غَيْرَهُ فَلَمْ يَرْضَ بِهِ الْمُسْتَشْتَرِي فَسَدَ الْبَيْعُ؛ لِأَنَّهُ يَرُدُّ إِلَى	(157) SH <i>jawāb</i> (<i>qīla</i>): - SH produces parallel (<i>tadlīs-bay'</i>), certain properties are the same for <i>khiyāna-bay'</i>, thus <i>ḥukm A</i> and <i>ḥukm B</i> for <i>tadlīs-bay'</i> must be the same for <i>khiyāna-bay'</i> [SH <i>istidlāl bi-qiyās al-shabah</i>; having reinterpreted the efficient <i>waṣf</i> in the <i>far'</i>, this constitutes SH's <i>mu'āraḍa-qiyās</i>]²⁷⁸

²⁷⁶ Note that by objecting to the *waṣf*-interpretation inherent to the opposing opinion, SH will have to bring a new *aṣl* which matches his new interpretation of the efficient *waṣf* in the *far'*. This is precisely what he proceeds to do, after being prompted by SHAQ in the following section.

²⁷⁷ al-Baṣrī, *K. al-Qiyās al-Shar'i*, Ḥamīd Allāh ed., 1044; Hallaq, “Treatise,” 221; al-Shīrāzī, *Ma'ūna*, al-'Umayrīnī ed., [Missing]; Turkī ed., 262, §148; al-Bājī, *Minhāj*, Turkī ed., 201, §455. Cf. Ibn 'Aqīl, *K. al-Jadal*, 71, §330. If we reference what appears to be SH's explanation of AH, IAL, and AY reasoning for ruling the *bay'* as *fāsid* (at the end of §157), then it becomes apparent here in §155 that SH is opposing their conception of efficient properties with a wholly new *qiyās* — i.e., with a new *'illa*, *aṣl* and *ḥukm*. Such is *mu'āraḍa bi-'illa muḥtada'a*.

²⁷⁸ We may represent SH's *qiyās al-shabah* (elicited by SHAQ) as follows:

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ثَمَّنَ مَجْهُولٌ عِنْدَ الْمُشْتَرِي لَمْ يَرْضَ بِهِ الْبَائِعُ.	- SH relates (<i>wa qīla</i>) opposing opinion and reasoning (for AH, IAL, and AY?) which conflicts with his <i>qiyās al-shabah</i> [possible SH <i>i‘tirāḍ</i> of <i>naqd</i>: if AH et al. rule as SH does for <i>tadlīs-bay‘</i>, then they should do the same for <i>khiyāna-bay‘</i>, but do not — the ‘illa is the same, but not the <i>ḥukm</i> (Shīr.VII.7; Bāj.IX.B.11.2)²⁷⁹]

§§534-536: SH vs. SHAP

534 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا شَهِدَ الرَّجُلُ وَهُوَ بَصِيرٌ ثُمَّ أَدَّى الشَّهَادَةَ وَهُوَ أَعْمَى جَازَتْ شَهَادَتُهُ؛ مِنْ قَبْلِ أَنْ أَكْثَرَ مَا فِي الشَّهَادَةِ السَّمْعُ وَالْبَصَرُ وَكِلَاهُمَا كَانَ فِيهِ يَوْمٌ شَهِدَ.	(534) SH ruling for <i>mas’ala</i> #1 - SH explanation indicates his ‘illa with “because” (hearing and sight functioning at time event was witnessed)
535 – فَإِنْ قَالَ قَائِلٌ: لَيْسَ فِيهِ يَوْمٌ يَشْهَدُ.	(535) SH initiates “instructional” dialectic (<i>fa-in qāla qā’il</i>): - SHAP suggests a property potentially efficient in overriding SH ‘illa to produce the opposite <i>ḥukm</i> (neither functioning at time of testimony)
536 – قِيلَ: إِنَّمَا احْتَجْنَا إِلَى الشَّهَادَةِ يَوْمَ كَانَتْ، فَأَمَّا يَوْمٌ ثَقَامُ فَإِنَّمَا هِيَ تَعَادُ بِحُكْمِ شَيْءٍ قَدْ أُبَيِّنَتْهُ	(536) SH <i>jawāb</i> (<i>qīla</i>): 1) ‘aql argument: the day of testimony only refers back to the day of

<i>Asl</i> bay‘ where seller does <i>tadlīs</i> <i>Wasf</i> <i>tadlīs</i> is a <i>muḥarram</i> to the seller <i>Wasf</i> the price is a <i>muḥarram</i> to the seller <i>Ḥukm A</i> the bay‘ is not <i>fāsid</i> <i>Ḥukm B</i> the seller has not right to <i>khiyār</i> re: its return	← SAME → ← SAME → ALSO ← SAME → ALSO ← SAME →	<i>Far‘</i> bay‘ of <i>murābaḥa</i>, where seller does <i>khiyāna</i> <i>Wasf</i> <i>khiyāna</i> is a <i>muḥarram</i> to the seller <i>Wasf</i> the price is a <i>muḥarram</i> to the seller <i>Ḥukm A</i> (should be same as for <i>tadlīs-bay‘</i>) <i>Ḥukm B</i> (should be same as for <i>tadlīs-bay‘</i>)

²⁷⁹ al-Shīrāzī, *Ma‘ūna*, al-‘Umayrīnī ed., 104ff.; al-Bājī, *Minhāj*, Turkī ed., 185ff., §§414ff. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 57, §278.

بَصِيرًا، وَلَوْ رَدَدْنَاهَا إِذَا لَمْ يَكُنْ بَصِيرًا؛ لِأَنَّهُ لَا يَرَى الْمَشْهُودَ عَلَيْهِ حِينَ يَشْهَدُ، لَزَمْنَا أَنْ لَا نُجِيزَ شَهَادَةَ بَصِيرٍ عَلَى مَيِّتٍ وَلَا عَلَى غَائِبٍ؛ لِأَنَّ الشَّاهِدَ لَا يَرَى الْمَيِّتَ وَلَا الْغَائِبَ وَالَّذِي يَزْعُمُ أَنَّهُ لَا يُجِيزُ شَهَادَتَهُ بَعْدَ الْعَمَى وَقَدْ أَثْبَتَهَا بَصِيرًا يُجِيزُ شَهَادَةَ الْبَصِيرِ عَلَى الْمَيِّتِ وَالْغَائِبِ.	witnessing the event; and if not seeing at the time of testimony obliges not permitting the testimony, then... • 2) <i>mas’alat al-naqd</i> #1 (sighted witness does not see deceased, so testimony re: deceased party should not be allowed) • 3) <i>mas’alat al-naqd</i> #2 (sighted witness does not see the absent, so testimony re: absent party should not be allowed) • SH <i>elenchus</i>: SHAP’s ‘illa (witness cannot “see” at time of testimony) is present in the <i>masā’il al-naqd</i>, but he rules the opposite (testimony re: the deceased and the absent permitted) • [SH double <i>i’tirād</i> of <i>naqd</i> (Shīr.VII.7; Bāj.IX.B.11.2)²⁸⁰]

§§540-544: SH vs. SHAP

540 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَقَرَّ الرَّجُلُ بِالزَّنا وَوَصَفَهُ الصِّفَّةَ الَّتِي تُوجِبُ الْحَدَّ فِي مَجْلِسٍ أَرْبَعِ مَرَّاتٍ، فَسَوَاءٌ هُوَ وَالَّذِي أَقَرَّ بِهِ فِي مَجَالِسٍ مُتَفَرِّقَةٍ، إِنْ كُنَّا إِنَّمَا احْتَجْنَا إِلَى أَنْ يُقَرَّ أَرْبَعَ مَرَّاتٍ قِيَاسًا عَلَى أَرْبَعَةِ شُهُودٍ، فَالَّذِي لَمْ يُقَمِّ عَلَيْهِ فِي أَرْبَعِ مَرَّاتٍ فِي مَقَامٍ وَاحِدٍ وَأَقَامَهَا عَلَيْهِ فِي أَرْبَعِ مَرَّاتٍ فِي مَقَامَاتٍ مُخْتَلِفَةٍ تَرَكَ أَصْلَ قَوْلِهِ؛ لِأَنَّهُ يَزْعُمُ	• (540) SH ruling for <i>mas’ala</i> #1 (single session) and <i>mas’ala</i> #2 (separate sessions): “<i>fa-sawā’un</i> X and Y” • [SH <i>taswiya</i>-subsumption] • If SHAP relies only upon <i>qiyās</i> from four witnesses, then SHAP has abandoned his <i>aṣl</i> — he should rule that <i>only</i> single session be accepted²⁸¹ • [SH <i>i’tirād</i> of <i>method-naqd</i> vs. opposing opinion, via hypothetical Type I <i>qiyās al-dalāla</i>]²⁸²

²⁸⁰ al-Shīrāzī, *Ma’ūna*, al-‘Umayrīnī ed., 104ff.; al-Bājī, *Minhāj*, Turkī ed., 185ff., §§414ff. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 57, §278.

²⁸¹ We must bear in mind that the opposing opinion of SHAP is: (efficient properties) four sessions with four confessions in each occasions (*ḥukm*) the infliction of the *ḥadd*-punishment, while SH’s opinion is: (efficient properties) one session with four confessions occasions (*ḥukm*) the infliction of the *ḥadd*-punishment.

²⁸² The implication is that, if SHAP relies only upon *qiyās* for the *mas’ala* at hand, then he must maintain that an original *qiyās* (re: number of confessions required) confirms a shared ‘illa between *aṣl* (witnesses) and *far’* (confessions). This *aṣl* ought therefore also be used for *qiyās* to the *mas’ala* at hand (number of sessions), but SHAP does not do this, or he would rule that *only* a single session of four confessions be accepted. This is a charge of what we have chosen to call *method-naqd*, for SHAP — relying only upon *qiyās* — will have been inconsistent in his *qiyās*-method for related *masā’il*. SH clearly asserts this by stating: “he has abandoned the *aṣl* of his *qawl*.” The manner in which SH demonstrates SHAP’s inconsistency takes the form of a

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أَنَّ الشُّهُودَ الْأَرْبَعَةَ لَا يُقْبَلُونَ إِلَّا فِي مَقَامٍ وَاحِدٍ.	
541 – قَالَ: وَلَوْ تَفَرَّقُوا حَدَّهْمُ.	(541) SH presents SHAP objection (<i>qāla</i>): [difficult to identify]²⁸³
542 – فَكَانَ يَنْبَغِي لَهُ أَنْ يَقُولَ: الْإِقْرَارُ أَرْبَعَ مَرَّاتٍ فِي مَقَامٍ أَثْبَتَ مِنْهُ فِي أَرْبَعَةِ مَقَامَاتٍ.	(542) SH counter-objection²⁸⁴
543 – فَإِنْ قَالَ: إِنَّمَا أَخَذْتُ بِحَدِيثِ مَا عِزٍّ.	(543) SH initiates “instructional” dialectic (<i>fa-in qāla qā’il</i>): - SHAP claims <i>istidlāl</i> only by <i>ḥadīth</i> re: Mā’iz [SHAP <i>istidlāl bi’l-Sunna</i>; implied SHAP claim: this <i>ḥadīth</i> contains the efficient properties of four sessions with four confessions each]
544 – فَلَيْسَ حَدِيثُ مَا عِزٍّ كَمَا وَصَفَ، وَلَوْ كَانَ كَمَا وَصَفَ أَنَّ مَا عِزًّا أَقَرَّ فِي أَرْبَعَةِ أَمَكِنَةٍ مُتَفَرِّقَةٍ أَرْبَعَ مَرَّاتٍ مَا كَانَ قَبُولُ إِقْرَارِهِ فِي مَجْلِسٍ أَرْبَعَ مَرَّاتٍ	(544) SH objections and <i>elenchus</i>: 1) <i>ḥadīth</i> re: Mā’iz is not as SHAP describes 2) even if it was, then Mā’iz’s four sessions with four confessions each

“hypothetical” Type I *qiyās al-dalāla* (“hypothetical,” because SH does not himself rely upon it), which we may render as follows:

<i>Asl</i> witnesses to <i>zinā</i>		<i>Far’</i> confessions to <i>zinā</i>
<i>Hukm A</i> must be four	SHAP claims: ← SAME →	<i>Hukm A</i> must be four
<i>Hukm B</i> must be in a single <i>maqām</i>	SHAP should also claim: ← SAME →	<i>Hukm B</i> (also) must be in a single <i>maqām</i>

There are further implications of this style of argument with regard to another theory proposed by this dissertation; mainly, that the dynamic symbiosis of *uṣūl* and *jadāl* theory may be partly explained as the *mujtahid*’s *anticipation* of dialectical disputation during the course of his private *ijtihād*. In this case, the hypothetical *qiyās al-dalāla* employed by SH in critiquing the opposing view at the start of a short dialectical sequence may also have played a role in his private *ijtihād*. He certainly makes it clear that he does not rely upon this *qiyās al-dalāla* (or he could not have ruled *taswīya*-subsumption for single and multiple sessions), but he has obviously considered it to bolster his eventual *ijtihād*ic solution.

²⁸³ Due to the abbreviated nature of this objection, and its unfamiliar grammar (Form V *tafarraqa* usually conveys, so far as I have been able to determine, a passive voice, but *ḥaddahum* is in the accusative, not nominative), I am unable to determine the precise sense of the sentence. It may be that the illicit activity constituting the *ḥadd* was “spread out” in a number of instances; or that the confessor’s descriptions of his wrong vary or diverge with repeated telling; or, perhaps, something else.

²⁸⁴ Likewise, I am unable to identify SH’s counter-objection, or determine its significance, being uncertain as to the sense of SHAP’s objection in §541.

خِلَافًا لِهَذَا؛ لَأَنَّا لَمْ نَنْظُرْ إِلَى الْمَجَالِسِ إِنَّمَا نَنْظُرُنَا إِلَى الْلَفْظِ، وَلَيْسَ الْأَمْرُ كَمَا قَالَا جَمِيعًا، وَإِقْرَارُهُ مَرَّةً عِنْدَ الْحَاكِمِ يُوجِبُ الْحَدَّ إِذَا ثَبَتَ عَلَيْهِ حَتَّى يُرْجَمَ. أَلَا تَرَى إِلَى قَوْلِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ –: «أَعْدُ يَا أُتَيْسُ إِلَى امْرَأَةٍ هَذَا، فَإِنْ اعْتَرَفَتْ فَارْجُمُهَا» وَحَدِيثُ مَا عَزَّ يَذُلُّ حِينَ سَأَلَ أَبِي جُنَّةٍ؟ أَنَّهُ رَدَّهُ أَرْبَعَ مَرَّاتٍ لِإِنْكَارِ عَقْلِهِ.	would not constitute <i>khilāf</i> with SH ruling • 3) because <i>lafẓ</i> [of Prophet] is focus of examination, not session²⁸⁵ • [SH hypothetical <i>i'tirād</i> against SHAP <i>istidlāl bi'l-Sunna: al-mushāraka fi'l-dalīl</i> (Shīr.II.E.4; Bāj.II.4.5)²⁸⁶] • 4) SH objects to common property (fourfold confession) of AH and IAL rulings (§§537-9), because single <i>iqrār</i> before a <i>ḥākim</i> occasions <i>ḥadd</i> when confirmed • 5) <i>alā tarā</i> introduces <i>mu'āraḍa-ḥadīth</i> re: Unays • [SH <i>i'tirād: mu'āraḍa bi'l-nuṭq</i> (Shīr.II.C.8.1; Bāj.II.2.7.1);²⁸⁷ also: <i>method-naqd</i>²⁸⁸]

²⁸⁵ Essentially, SH has claimed that this should not be so much *istidlāl* by way of Sunnaic *fi'l*, as *istidlāl* by way of Sunnaic *qawl*. The focus, as we will see, should be what the Prophet said, especially with regard to his asking if Mā'iz was *non compos mentis*. This is why we have placed SH's first *i'tirād* (*al-mushāraka fi'l-dalīl*) in the domain of Sunnaic *fi'l*, but will place his second (*mu'āraḍa bi'l-nuṭq*) and third (*al-mushāraka fi'l-dalīl*) in the domain of Sunnaic *qawl*.

²⁸⁶ al-Shīrāzī, *Ma'ūna*, al-'Umayrīnī ed., 74; al-Bājī, *Minhāj*, Turkī ed., 131, §263. Al-Bājī's larger genus of *al-mushāraka fi'l-istidlāl bi'l-Sunna* once again contains the most detailed subtypes. We find a precise identification under that *ḍarb* wherein both P and Q make their *ḥukm* conditional upon the *zāhir*, and under that *qism* wherein P and Q each focus upon a different *lafẓ* of the *khbar* than the other (105, §205; re: Sunnaic *qawl*). This is clearly what SH is suggesting when he claims that SHAP's *istidlāl*, if it were accurate, would not be the *khilāf* of SH's, "because we do not examine the sessions [like SHAP], we examine only the *lafẓ* (of the confessor)." In other words, both SHAP and SH would be drawing indicant from the same *ḥadīth*, but focusing upon different *alfāz* of that "shared" *dalīl*. We have labelled SH's *i'tirād* of *al-mushāraka fi'l-dalīl* "hypothetical" because SH does not in fact concede that the concerned *ḥadīth* bears what SHAP has claimed of it (i.e., four sessions of four confessions each).

²⁸⁷ al-Shīrāzī, *Ma'ūna*, al-'Umayrīnī ed., 67; al-Bājī, *Minhāj*, Turkī ed., 119ff., §§233ff. Cf. Ibn 'Aqīl, *K. al-Jadal*, 36, §190. Note that we are within the domain of *istidlāl bi'l-Sunna*, so SH's *mu'āraḍa* constitutes the supplanting of AH, IAL, and SHAP *istidlāl* from the *ḥadīth* re: Mā'iz (i.e., their interpretation of the *dalīl* it provides) with the *nuṭq* of the *ḥadīth* re: Unays. This dovetails nicely with SH's following and final *i'tirād*, as we shall see. Note also that al-Bājī once again lists a more refined series of subtypes to this objection, based upon whether Q's *dalīl* is *ma'lūm* or *maznūn*, and whether it is more general, more specific, or alike re: either, in comparison to P's *dalīl-khbar*.

²⁸⁸ We consider SH's objection also to constitute a species of *method-naqd*, because his rhetorical *alā tarā* implies that all of AH, IAL, and SHAP concede the epistemic authority of the *ḥadīth* re: Unays. This is akin to saying: "You acknowledge this *ḥadīth* elsewhere, but ignore it for the *mas'ala* at hand even though it is relevant. You have been inconsistent in your *ḥadīth*-application method." SH's *alā tarā* may thus be considered to have a rather biting edge, for what it suggests of — to use the contemporary term — "cherry picking." That is, SH's rhetorical charge may insinuate that AH, IAL, and SHAP have been knowingly selective in reviewing the Sunnaic evidence, choosing only such *adilla* as supported their pre-determined solution.

	• 6) SH final objection seals his <i>elenchus</i>: • a <i>lafẓ</i> of the <i>ḥadīth</i> Mā‘iz indicates a case-specific efficient property (sanity of confessor is suspect), which has been ignored by the opposing position • [SH <i>i’tirād</i>: <i>al-mushāraka fi’l-dalīl</i> (Shīr.II.C.4; Bāj.II.2.3.1.2)²⁸⁹]

§§737-743: SH vs. SHAP

737 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَشَرَكَةُ الْمُفَاوَضَةِ بَاطِلَةٌ وَلَا أَعْرِفُ شَيْئًا مِنَ الدُّنْيَا يَكُونُ بَاطِلًا إِنْ لَمْ تَكُنْ شَرَكَةُ الْمُفَاوَضَةِ بَاطِلَةً، إِلَّا أَنْ يَكُونَا شَرِيكَيْنِ يُعَدَّانِ الْمُفَاوَضَةَ خَلَطَ الْمَالِ بِالْمَالِ وَالْعَمَلُ فِيهِ وَاقْتِسَامُ الرَّبْحِ فَهَذَا لَا بَأْسَ بِهِ، وَهَذِهِ الشَّرَكَةُ الَّتِي يَقُولُ بَعْضُ الْمَشْرِقِيِّينَ لَهَا: شَرَكَةُ عِنَانٍ.	• (737) SH initiates discussion of his rulings for <i>sharikat mufāwada</i> in stages: • 1) virulent denunciation of <i>mufāwada</i> as <i>bāṭil</i> • 2) SH exception: specific definition of <i>mufāwada</i>²⁹⁰ • [efficient properties detailed: two partners + <i>khalṭ al-māl bi’l-māl</i> + (<i>khalṭ</i>) <i>al-‘amal fihi</i> + <i>iqtisām al-ribḥ</i> together occasion <i>ḥukm</i> of <i>lā ba’sa bihi</i>]²⁹¹ • 3) SH equates his <i>mubāḥ</i> formulation of <i>mufāwada</i> to what some of the Mashriqiyyūn call <i>sharikat ‘inān</i>²⁹²

²⁸⁹ al-Shīrāzī, *Ma‘ūna*, al-‘Umayrīnī ed., 60f.; al-Bājī, *Minhāj*, Turkī ed., 105, §205. Cf. Ibn ‘Aqīl, *K. al-Jadal*, 34, §181. Again, SH employs the same *ḥadīth* as *dalīl*, but focuses upon a different *lafẓ*. Whereas AH, IAL, and SHAP appear to have considered only the overall number of confessions made by Mā‘iz, SH considers that *lafẓ* (“a-bihi junna?”) which provides an indicant for the *reason* behind the Prophet’s aversion of the *ḥadd* before four confessions (sanity is suspect). The pinpointing of this efficient property thus removes the *ḥadīth* from consideration as an *aṣl* except for cases wherein this same property is found. As this sort of restriction seems in no way intended by the opposing opinion, SH’s final *i’tirād* may be considered the seal of his *elenchus*.

²⁹⁰ Of note is that the components of SH’s definition of the *mubāḥ* form of *mufāwada* also serve as the efficient properties which occasion that *ḥukm* formulated as “*lā ba’sa bihi*.” Elsewhere, we have referenced one of al-Bājī’s divisions of *‘ilal* (for purposes of *naqd*), as that type which is “*wuḍi’a li’l-jins*, and it is in the *manzila* of the *ḥadd*.” SH’s definition-*‘illa* fits nicely within with this category. As we shall see, his *elenchus* in this short dialectical sequence is also a (multiple) charge of *naqd*; thus his defining of efficient properties here dovetails with his final refutation of the opposing opinion.

²⁹¹ We will note here that the formula “*lā ba’sa bi-/an*” enjoys great currency among the jurists of our treatise (with some eighteen occurrences, and well over 300 in the *Umm* overall). This formula is obviously of the language of normative assessment in general, and in particular conveys that norm which was to be more systematically labelled *mubāḥ* in later *uṣūl* literature. As such, it may be compared over and against the formulae of “*aḥabba ilayya*” and variants (conveying the later *mustaḥabb/mandūb*), and *akrahu/yakrahu* X *lahu* and variants (conveying the later *makrūh*, which we also find in our treatise and plentifully throughout the *Umm*).

²⁹² This assertion of SH is important for a number of reasons. First, it provides a window onto an era wherein contract typologies were more inchoate than in later times. There is testimony here to yet another dynamic of dialectic at work: the refinement and fixing of categories and

738 – فَإِذَا اشْتَرَكَا مَفَاوِضَةً وَتَشَارَطَا أَنَّ الْمَفَاوِضَةَ عِنْدَهُمَا هَذَا الْمَعْنَى فَالشَّرِكَةُ صَحِيحَةٌ، وَمَا رُزِقَ أَحَدُهُمَا مِنْ غَيْرِ هَذَا الْمَالِ الَّذِي اشْتَرَكَا فِيهِ مَعَ مَا مِنْ تِجَارَةٍ أَوْ إِجَارَةٍ أَوْ كَنْزٍ أَوْ هَبَةٍ أَوْ غَيْرِ ذَلِكَ فَهُوَ لَهُ دُونَ صَاحِبِهِ.	• (738) SH ruling for valid <i>sharikat mufāwaḍa</i>: • 4) mutual stipulation of <i>mufāwaḍa</i> in this <i>ma’nā</i> (the ‘<i>inān</i> of <i>baḍ al-Mashriqiyyūn</i>) is <i>ṣaḥīḥ</i> • 5) subsidiary ruling: income generated outside of contracted <i>māl</i> belongs only to its <i>ṣāḥib</i>, not his partner • [SH pinpoints <i>waṣf</i> of contention: “it is <i>māl</i> generated from contracted <i>māl</i>” vs. “it is <i>māl</i> generated outside of contracted <i>māl</i>”]
739 – وَإِنْ زَعَمَا بَأَنَّ الْمَفَاوِضَةَ عِنْدَهُمَا بَأَنَّ يَكُونَا شَرِيكَيْنِ فِي كُلِّ مَا أَفَادَا بَوَاحٍ مِنَ الْوُجُوهِ بِسَبَبِ الْمَالِ وَغَيْرِهِ، فَالشَّرِكَةُ فِيهِ فَاسِدَةٌ، وَلَا أَعْرِفُ الْقِمَارَ إِلَّا فِي هَذَا أَوْ أَقَلِّ مِنْهُ؛ أَنْ يَشْتَرِكَ الرَّجُلَانِ بِمَائَتِي دِرْهَمٍ فَيَجِدُ أَحَدُهُمَا كَنْزًا فَيَكُونُ بَيْنَهُمَا.	• (739) SH ruling for invalid <i>sharikat mufāwaḍa</i>: • 6) mutual stipulation of <i>mufāwaḍa</i> with sharing of all income generated (including outside contracted <i>māl</i>) is <i>fāsid</i> • 7) SH sets the stage for “instructional” dialectic (and charge of <i>naqḍ</i>) with objection to invalid <i>mufāwaḍa</i>: it is <i>qimār</i> • [SH provides <i>aṣl</i> for invalidation] • 8) SH introduces <i>mas’alat al-naqḍ</i> (<i>khalt al-māl</i> of 200 dirhams; one partner divides self-discovered treasure between them) • [<i>mas’alat al-naqḍ</i> contains efficient properties (see §741) linking it to <i>qimār</i>]

technical terms within venues of disputation. In this very section, we are witnessing the “ironing out” of a technical definition for a specific contract type; and, significantly, it is recorded in a book of *ikhtilāf*, at the head of a short dialectical sequence. Second, we again encounter a reference to the “Easterners” (cf. our analysis of §252, above; and our note attached to §252 in Part II of this dissertation); and, in this case, SH’s report of their distinct usage of *sharikat ‘inān* is telling. Insofar as we have already inferred — with the help of RB (see the note in Part II) — that the Mashriqiyyūn include AH, but exclude Mālik, we may suggest — on the basis of the ‘*inān* distinction — that this group comprised, for SH, the jurists of a nascent Ḥanafism (in ‘Irāq and perhaps further east as well). We claim this on the basis of the unique Ḥanafī treatment of *mufāwaḍa*, as distinct in most ways from the other three surviving Sunnī schools (see Hallaq, *Sharī’a*, 252-3). We may also note a complete Ithnā ‘Asharī rejection of *mufāwaḍa*. In future research one might consider comparing Shī‘ī sources with §§737-9, to see if *mufāwaḍa* is defined and critiqued in the same manner. Finally, one might conjecture as to the extent which variant contract typologies reflect the separate evolution of pre- and early Islamic regional variants, later disputed in a more systematized juridical-dialectical setting.

740 – أَرَأَيْتَ لَوْ تَشَارَطَا عَلَى هَذَا مِنْ غَيْرِ أَنْ يَتَخَالَطَا بِمَالٍ كَانَ يَجُوزُ.	• (740) SH initiates “instructional” dialectic (in the role of Q): • SH <i>araʿayta</i> pushes SHAP to rule on the <i>masʿalat al-naqd</i> minus a property of <i>mufāwāḍa</i> (no <i>khalṭ al-māl</i>, but mutual stipulation for division of <i>kanz</i> if found)
741 – فَإِنْ قَالَ: لَا يَجُوزُ؛ لِأَنَّهُ عَطِيَّةٌ مَا لَمْ يَكُنْ لِلْمُعْطِي وَلَا لِلْمُعْطَى وَمَا لَمْ يَعْلَمْهُ وَاحِدٌ مِنْهُمَا، أَفَتُجِزُهُ عَلَى مَائَتَيْ دِرْهَمٍ اشْتَرَكَا بِهِمَا؟	• (741a) SHAP <i>jawāb</i> (<i>fa-in qāla</i>): • SHAP rules “<i>lā yajūzu</i>” • SHAP “because” explanation pinpoints two properties of <i>kanz</i>-only <i>masʿala</i> efficient in occasioning his disallowance (the giving of that which neither owned [at the time of contract]; the giving of that which neither knew [at the time of contract]) • (741b) SH dialectical question: • SH restores the <i>khalṭ al-māl</i> property to the <i>masʿalat al-naqd</i>, and pushes SHAP: “<i>a-fa-tujīzuhu?</i>” (SHAP is silenced) • [SH rhetorical <i>iʿtirāḍ</i> of <i>naqd</i> (Shīr.VII.7; Bāj.IX.B.11.1);²⁹³ the same properties which occasioned SHAP’s disallowance in the <i>kanz</i>-only <i>masʿala</i> are present in the <i>masʿalat al-naqd</i> (and thus in the invalid <i>mufāwāḍa</i>), but SHAP’s <i>aḥkāṃ</i> are contradictory]²⁹⁴
742 – فَإِنْ عَدُّهُ بَيْعًا فَبَيْعٌ مَا لَمْ يَكُنْ لَا يَجُوزُ.	• (742) SH leaps to close another door (if the partners reconsider the contract as <i>bayʿ</i>) by pointing out another property in the <i>masʿalat al-naqd</i> (it [the

²⁹³ al-Shīrāzī, *Maʿūna*, al-ʿUmayrīnī ed., 104ff.; al-Bājī, *Minhāj*, Turkī ed., 185, §§412-13. Cf. Ibn ʿAqīl, *K. al-Jadal*, 56ff., §§276ff. As foreshadowed by SH’s definition-*illa* in §737, his *naqd* corresponds to al-Bājī’s first *darb* of *naqd*; i.e., for an *illa* which is “*wuḍiʿa liʾl-jins* [the contract category of *mufāwāḍa*], *fa-huwa bi-manzilat al-hadd*.”

²⁹⁴ This is a unique argument strategy we have not yet encountered, and worthy of review. SH has: 1) taken a *masʿala* the ruling for which, in SHAP’s opinion, ought to be *jāʿiz*; 2) removed a property linking it to the *masʿala* at hand; 3) asked SHAP to rule on it (which he does, pronouncing it “not *jāʿiz*” while stating the efficient properties himself); 4) replaced the property linking the *masʿalat al-naqd* to the *masʿala* at hand; and 5) rhetorically asked SHAP to rule on it again, forcing either his self-contradiction or silence. The particular genius of this strategy is that — in conformity with the classical aims of dialectic — SHAP has himself provided the efficient properties which occasion (by linking invalid *mufāwāḍa* to *qimār*) SH’s own ruling. SHAP has provided the premises by which SH at once refutes him and vindicates his own thesis.

	<i>kanz</i>] is not in existence at the time of contract) which occasions the <i>ḥukm</i> of “<i>lā yajūzu</i>” (SHAP remains silent)
743 – أَرَأَيْتَ رَجُلًا وَهَبَ لَهُ هَبَةً أَوْ أَجَرَ نَفْسَهُ فِي عَمَلٍ فَأَفَادَ مَالًا مِنْ عَمَلٍ أَوْ هَبَةٍ، أَيْكُونُ الْآخَرُ فِيهَا شَرِيكًا؟ لَقَدْ أَنْكَرُوا أَقَلَّ مِنْ هَذَا.	• (743) SH seals his <i>elenchus</i>: • SH rhetorical <i>ara’ayta</i> introduces two more <i>masā’il al-naqd</i> (<i>mufāwāḍa</i> partner receives gift, or earns outside wage) • [SH double <i>i’tirād</i> of <i>naqd</i> (Shīr.VII.7; Bāj.IX.B.11.1)²⁹⁵] • SH concludes with an <i>a fortiori</i> punch “<i>laqad ankarū aqall min hādhā</i>” (i.e., SH’s opponents have rejected less invalid contracts, all the more so should they reject invalid <i>mufāwāḍa</i>)²⁹⁶

§§785-788: SH vs. SHAP

785 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَ الْعَبْدُ بَيْنَ رَجُلَيْنِ فَدَبَّرَهُ أَحَدُهُمَا فَلَا خَرَ بَيْعُ نَصِيْبِهِ؛ لِأَنَّ التَّدْبِيرَ عِنْدِي وَصِيَّةٌ. وَكَذَلِكَ لِلَّذِي دَبَّرَهُ أَنْ يَبِيعَهُ. وَهَذَا مَكْتُوبٌ فِي كِتَابِ الْمُدَبِّرِ.	• (785) SH ruling for <i>mas’ala</i> #1 (partner can sell his share of <i>mudabbbar</i>) • supported by ‘<i>aql: tadbīr</i> equated with <i>waṣīyya</i> • [SH <i>taswiya</i>-subsumption = <i>istidlāl bi-qiyās</i> (type indeterminate from presentation)]²⁹⁷ • SH ruling for <i>mas’ala</i> #2 (<i>mudabbir</i> can sell his share of <i>mudabbbar</i>) • SH ref. to full argument in another <i>kitāb</i>
786 – وَمَنْ زَعَمَ أَنَّهُ لَيْسَ لِلْمُدَبِّرِ أَنْ يَبِيعَ الْمُدَبَّرَ لَزِمَهُ أَنْ يَزْعُمَ أَنَّ عَلَى السَّيِّدِ الْمُدَبِّرِ نَصْفَ الْقِيَمَةِ لِشَرِيكِهِ إِنْ كَانَ مُوسِرًا وَيَكُونُ مُدَبِّرًا كُلُّهُ، كَمَا يَلْزِمُهُ هَذَا فِي الْعَتَقِ إِذَا جَعَلَ هَذَا عِتْقًا يَكُونُ لَهُ بِكُلِّ	• (786) SH initiates “instructional” dialectic (<i>wa man za’ama X</i>): • SHAP claims opposite of SH <i>ḥukm</i> for <i>mas’ala</i> #2 • SH objection in stages: • 1) assertion that SHAP counter-claim

²⁹⁵ See note attached to §741b.

²⁹⁶ This argument is of the species *a minore ad maius* and, although taking place within a larger framework of *naqd*, it finds no specific reference or example under *naqd* in our *jadāl*-theory texts. We will consider it, therefore, as belonging either to SH’s unique style of argumentation, or to that of the jurists of his day, or to have been neglected mention by later theorists in their *naqd* discussions.

²⁹⁷ Although we may assume the efficient property linking valid *tadbīr* to valid *waṣīyya* is something like: “it is a transfer of ownership which is effected upon the death of the legator,” we learn neither the ‘*illa* nor its indicants (shared *awṣāf* or *aḥkām*) from the abbreviated presentation of §785, and so hesitate to identify the type of SH’s *qiyās*.

حَالٍ.	entails non-<i>endoxon</i> subsidiary ruling for <i>mas’ala</i> #2: “<i>‘lazimahu an yaz’uma:</i>” (<i>mudabbir</i> pays half-value to <i>sharīk</i>, slave is wholly <i>mudabbbar</i>) • 2) SHAP <i>aṣl</i> is implied (<i>kamā yalzamuhu hādhā fī Y</i>) • [SHAP <i>aṣl</i>: ‘<i>itq</i>; SH <i>aṣl</i>: <i>waṣīyya</i>] • 3) “if [SHAP] treats X as Y, X belongs to Y <i>bi-kulli ḥālīn</i>” • [SH charge of <i>method-naqd</i>: SHAP does not consistently observe <i>taswiya</i>-subsumption (X under Y), thus his rulings are inconsistent]²⁹⁸
787 – فَإِنْ قَالَ: فَالْعَتَقُ الَّذِي الرَّمْتَةُ فِيهِ نَصْفُ الْقِيَمَةِ عَتَقٌ وَاقِعٌ مَكَانَهُ.	• (787) SHAP <i>jawāb</i> (<i>fa-in qāla</i>): • full <i>taswiya</i>-subsumption would transform <i>tadbīr</i> into “on the spot” ‘<i>itq</i>; it would no longer be <i>tadbīr</i> • [SHAP attempts to parry charge of <i>method-naqd</i>: justification for <i>takhṣīṣ al-‘illa</i> (?)]²⁹⁹

²⁹⁸ SH’s argument may be rephrased as follows: 1) If you do *qiyās* from *aṣl* Y (‘*itq*) to *far’* X (*tadbīr*) for the *mas’ala* at hand; then 2) you must consistently apply this *qiyās* re: all subsidiary rulings (i.e., you must observe *taswiya*-subsumption); but 3) [implied] you do not apply this *qiyās* for subsidiary rulings; thus 4) your method is inconsistent. As the consistent observance of *qiyās* across relevant domains is a matter of consistent method, we may identify SH’s argument as a species of *method-naqd*.

²⁹⁹ SHAP’s rejoinder resembles nothing so much as a justification for *takhṣīṣ al-‘illa*, which Sānū (*Mu’jam*, s.v. “تخصيص العلة”) defines as: “the absence (*takhalluf*) of the *ḥukm* from the *waṣf* which is claimed an ‘*illa* in certain forms/modes (*fī ba’d al-suwar*), due to the presence of an impediment (*mānī*), and it is called *naqd*” (see also Hallaq, *History*, 110-11, for an overview and detailed presentation of al-Sarakhsī’s argument against *takhṣīṣ al-‘illa*; and Zysow, “Economy of Certainty,” 403ff. for a detailed historical and analytical overview). Of course, we know that *naqd* is indeed a charge of *takhṣīṣ al-‘illa*, but only against those who do not subscribe to the theory that such a “specialization” of the ‘*illa* is allowable. Our *jadāl*-theory texts make this plain; al-Shīrāzī, for example (*Ma’ūna*, al-‘Umayrīnī ed., 104), defines *naqd* as: “the presence of the ‘*illa*, and not a *ḥukm*, according to the *qawl* of one who does not opine (*lā yarā*) *takhṣīṣ al-‘illa*.” It is not right, then, to say that *takhṣīṣ al-‘illa* is called *naqd*, because the former is a theory, while the latter is a charge of practicing (knowingly or otherwise) that theory while simultaneously disclaiming it. At any rate, SHAP’s argument in §787 may be rephrased as follows: 1) You say I must apply my *qiyās* for the primary ruling (*mudabbir* cannot sell his portion of the *mudabbbar*) to the subsidiary ruling (*mudabbir* pays half-value to *sharīk*, *mudabbbar* is wholly free); but 2) if I do so, then this is no longer *tadbīr* at all, because the ‘*itq* happens immediately, not after the death of the *mudabbir*; and 3) this transformation constitutes an impediment [*mānī*] to full *qiyās*-extension; thus 4) I am justified in applying my *qiyās* to the primary ruling, but not the subsidiary ruling (i.e., I am not guilty of inconsistency). If such an argument can be considered a justification for *takhṣīṣ al-‘illa* re: the *mas’ala* at hand — and I cannot be certain it does, as we have not learned what the ‘*illa* is — then this short dialectical sequence of §§785-8 would acquire a new dimension of importance for the purposes of this dissertation. Not only would it provide

788 – قِيلَ: فَأَنْتَ تَزْعُمُ فِي الْجَارِيَةِ بَيْنَ الرَّجُلَيْنِ يَطُوهَا أَحَدُهُمَا فَتَلِدُ أَنَّهَا أُمٌّ وَلَدٍ وَعَلَيْهِ نَصْفُ الْقِيَمَةِ، وَهَذَا عِنْتُ لَيْسَ بِوَاقِعٍ مَكَانَهُ، إِنَّمَا هُوَ وَاقِعٌ بَعْدَ مُدَّةٍ كَعِنْتِ الْمُدَبِّرِ يَقَعُ بَعْدَ مُدَّةٍ.	• (788) SH <i>elenchus</i> (<i>qīla</i>): “And you yourself claim (<i>fa-anta taz‘umu</i>):” • SH introduces a <i>mas’alat al-naqd</i> (jointly owned <i>jāriya</i> becomes <i>umm walad</i>), wherein SHAP’s supposed impediment to <i>taswiya</i>-subsumption (§787) should also be present, but SHAP rules payment of half-value regardless • SH points out that <i>umm walad</i> and <i>tadbīr</i> are both species of delayed ‘<i>itq</i>’³⁰⁰ • [SH vindicates his original charge of <i>method-naqd</i> by exposing SHAP’s inconsistent claim of impediment in a <i>mas’alat al-naqd</i>]³⁰¹

testimony that *takhṣīṣ al-‘illa* — in substance, if not name — was being debated in the late second century H, but it reveals what we have labelled *taswiya*-subsumption to be the *antidote* for *takhṣīṣ al-‘illa*. That is to say, if a jurist was not practicing *taswiya*-subsumption (as SH enjoins), then he was doing *takhṣīṣ al-‘illa* (knowingly or otherwise), and might be charged with *naqd* by someone like SH. On the other hand, if he usually practices *taswiya*-subsumption (in avoidance of *naqd*, and a distaste for what would be known as the theory of *takhṣīṣ al-‘illa*), and it can be shown that he has practiced it elsewhere but not in the *mas’ala* at hand, then he might be charged with *method-naqd*.

³⁰⁰ SH’s finishing stroke may be rephrased thus: 1) You claim that observing full *taswiya*-subsumption in the *mas’ala* at hand is impossible, because it would transform *tadbīr* into immediate ‘*itq*’; but 2) in the case of the jointly-owned *jāriya* who becomes an *umm walad*, where you should be blocked by the same impediment, you do not claim an impediment, and exercise full *taswiya*-subsumption; thus 3) my original charge of *method-naqd* stands: you ought to have done full *taswiya*-subsumption in the *mas’ala* at hand because there is no real impediment to your doing so, just as there was no impediment when you applied full *taswiya*-subsumption to the *jāriya*-become-*umm-walad*.

³⁰¹ Overall, this is an extraordinary argument, and unlike any we have yet analyzed. For consistency’s sake I ought to have applied the descriptor “hypothetical” to the bulk of SH’s objections, but I felt this would confuse matters. Of primary consideration is that SH himself does not subscribe to *qiyās* from ‘*itq*’ to *tadbīr* — he has already told us that he considers *tadbīr* to be a *waṣiyya*, and thus suggested his own *aṣl* of *taswiya*-subsumption. When he appears to be arguing for ‘*itq*’ as an *aṣl* for *taswiya*-subsumption, he is only doing so in order to show SHAP *what he should have done*, if he meant to claim consistency. Thus, SH’s argument style here is more “destructive” than “constructive;” that is to say, he is focused entirely upon obliterating SHAP’s claims, not in acquiring concession to the premises from which his own thesis (*tadbīr*-as-*waṣiyya*) is constructed. The stages of the argument are as follows, and, as we noted, quite unique: §786: SH claims SHAP *should* have extended his *qiyās* (though SH does not concede to it) to the subsidiary ruling, but has not (*method-naqd*); §787: SHAP implies that he could not do so, due to an impediment (and so is justified in something like *takhṣīṣ al-‘illa*); §788: SH shows SHAP that his ‘*itq*’-*qiyās* was in no way impeded in another case, where the same supposed impediment ought also to have been claimed by SHAP (*method-naqd*). In so many words, SH has said: “the *aṣl* is not ‘*itq*’, it is *waṣiyya*, but even if it were ‘*itq*’, you have completely mishandled your *qiyās*.” For that reason, we would be tempted to add the additional descriptor of “hypothetical” to the bulk of his objections.

§§1115-1119: SH vs. SHAP

1115 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: يَضْمَنُ قَائِدُ الدَّابَّةِ وَسَائِقُهَا وَرَاكِبُهَا مَا أَصَابَتْ يَدُهُ أَوْ فَمُ أَوْ رِجْلُهُ أَوْ ذَنْبُهُ، وَلَا يَحْجُوزُ إِلَّا هَذَا، وَلَا يَضْمَنُ شَيْئًا إِلَّا أَنْ يَحْمِلَهَا عَلَى أَنْ تَطَأَ شَيْئًا فَيَضْمَنُ؛ لِأَنَّ وَطْأَهَا مِنْ فِعْلِهِ فَتَكُونُ حِينَئِذٍ كَأَدَاةٍ مِنْ أَدَاتِهِ حَتَّى بِهَا.	• (1115) SH ruling for set of <i>masā'il</i> (<i>qā'id</i>, <i>sā'iq</i>, <i>rākib</i> are all liable) • SH indicates efficient property (inducement to trample) occasioning the <i>ḥukm</i> • SH explanation (“because”) states the reason (<i>sabab</i>/<i>ḥikma</i>?) behind the efficient property’s efficiency (<i>qā'id</i>, et al. = agent of harm; <i>dābba</i> = implement)
1116 – فَأَمَّا أَنْ نَقُولَ: يَضْمَنُ عَنْ يَدِهَا وَلَا يَضْمَنُ عَنْ رِجْلِهَا فَهَذَا تَحَكُّمٌ.	• (1116) SH initiates “instructional” dialectic (<i>fa-amma an naqūl</i>): • SH objects to an opposing ruling (liable for foreleg, not back leg): “this is arbitrariness (<i>fa-hādhā taḥakkum</i>)!” • [SH <i>i'tirād</i>: <i>taḥakkum</i>]³⁰²
1117 – فَإِنْ قَالَ: لَا يَرَى رِجْلَهَا.	• (1117) SHAP <i>jawāb</i> (<i>fa-in qāla</i>): • [SHAP produces a property (the <i>qā'id</i>, et al., does not see the back leg) which he deems efficient in occasioning the <i>ḥukm</i> of not liable]
1118 – فَهُوَ إِذَا كَانَ سَائِقًا لَا يَرَى يَدَهَا، فَيَنْبَغِي أَنْ يَقُولَ فِي السَّائِقِ: يَضْمَنُ عَنِ الرَّجْلِ، وَلَا يَضْمَنُ عَنِ الْيَدِ. وَلَيْسَ هَكَذَا بِقَوْلٍ.	• (1118) SH <i>elenchus</i>: SH introduces <i>mas'alat al-naqḍ</i> (the <i>sā'iq</i>, who does not see the foreleg), wherein the same <i>ḥukm</i> should be occasioned • SH exposes lack of <i>ḥukm</i>: “But there is

³⁰² We will allow *taḥakkum* to stand as a species of objection peculiar to proto-system *jadāl*. It seems to be absent — I have not yet encountered the term — in our *jadāl*-theory texts, although it occurs a number of times in the *Umm* (in both verbal and *maṣḍar* forms), always as a charge — as in §1116 — of arbitrariness. As for the nature of this arbitrariness, one would assume that it stemmed from an opponent’s lack of *dalīl*; i.e., the opponent stands accused of maintaining a position without having engaged in any accepted form of *istidlāl* whatsoever. We are confirmed in this by the example of a passage from the *Bāb Mā Jā'a fi'l-Jihād* of the *Kitāb Ikhtilāf Mālik wa'l-Shāfi'i* (Hassūn, vol. 9, pt. 14, 467, §741): “... and as for the *mutaḥakkim* who proceeds arbitrarily (*yataḥakkama*), and claims of the two *qawls* of the Prophet... that one of them is a *ḥukm*, and the other *ijtihād*, without an indicant (*bi-lā dalālatin*); if this is allowed, the *sunan* will have departed from the hands of the people (*kharajat... min aydī al-nās*).” The key phrase here, of course, is *bi-lā dalāla*, and we would submit this as the very kernel of *taḥakkum*: it is reasoning rendered arbitrary via lack of *dalāla*. Finally, the apparent lack of the term in the discussions of the *jadāl*-theorists may be easily explained should we assume that, by the time these full-system treatises were composed, substantive rulings with no basis in accepted forms of *istidlāl* had long since ceased to occur in private *ijtihād* and public *jadāl*. That is to say, if we are correct, the natural pursuit of *ḥujjiyya*, fired by the dynamic of juridical *jadāl*, meant that no jurists of later times presumed to propose solutions without first grounding their arguments in accepted modes of *istidlāl*. The age in which charges of *taḥakkum* could be made had passed.

Part I: The Dialectical Forge
Chapter III: Analyses of “Overtly Dialectical” Presentations in the *Kitāb Ikhtilāf al-ʿIrāqīyyīn*

	no <i>qawl</i> like this” • [SH <i>iʿtirād</i>: <i>naqd</i> via <i>e silentio</i>]³⁰³
1119 – فَأَمَّا مَا رُوِيَ عَنْ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – مِنْ أَنَّ الرَّجُلَ جُبَارٌ، فَهُوَ – وَاللَّهُ تَعَالَى أَعْلَمُ – غَلَطٌ؛ لِأَنَّ الْحُقُوظَ لَمْ يَحْفَظُوا هَكَذَا.	• (1119) SH seals <i>elenchus</i>: • SH objects to the Sunnaic-<i>qawl</i> submitted in support of AH’s ruling (no <i>ḍamān</i>, as with SHAP) in §1113: it is <i>ghalaṭ</i>, because the Ḥuffāz preserve nothing of the like • “<i>Allāhu Taʿālā Aʿlam</i>”³⁰⁴ • [SH transmission-oriented <i>iʿtirād</i>]³⁰⁵

³⁰³ To some degree, this is the usual charge of *naqd* we have encountered many times before; specifically it is that sub-species (Bāj.IX.B.11.2.1) which al-Bājī reserves for such *ʿilal* of a type *wuḍiʿa li-ithbāt al-aḥkām fiʾl-ʿayān*, and which are *mawḍūʿa liʾl-wujūb* (*Minhāj*, Turkī ed., 185ff., §§415ff.) In this particular instance, however, there is a unique twist: rather than assert that SHAP’s *ʿilla* is present in the *masʿalat al-naqd* but he has ruled differently, SH states: “*wa laysa hākadhā bi-qawlin*.” No one at all, in other words, has ever proposed such a *qawl* as the *masʿalat al-naqd* would entail should we extend SHAP’s reasoning to it. Now, from one perspective, we might read this as the ultimate charge that SHAP’s reasoning for the *masʿala* at hand is non-*endoxon*. From another, however, it reads as an *e silentio* argument. SH argues: “You hold X to be the case. But if X is the case; then you should also have claimed that Y is the case. But no one at all has claimed that Y is the case.” This is not a complete argument if read in this fashion — it rests upon an *e silentio* assumption. SHAP, after all, might very well simply state “Y is also the case” right there and then, and thank SH for leading him to fill the long-standing omission. This is a unique sub-species of *naqd*, then, for SH has not so much pointed out an inconsistency as shown us an empty space in the opposing position’s doctrine.

³⁰⁴ SH appears to mitigate what is again, in essence, an *e silentio* assumption, by acknowledging that God alone knows if the Prophet actually said what AH claims he did re: the *jubār*. We are reminded by this and other pious formulae throughout our treatise, and in the literature of *fiqh* in general, that jurists in the main were attempting to operate within the greater normative controls of the “good *jadāl*.” That is, such formulae provide indicants for us that a sincere, truth-seeking *jadāl* ethic was recognized; we must consider it, therefore, as occupying the *status quo* of normative practice. Upon those who would claim that juridical *jadāl* was a sophistical enterprise lies the burden of proof; and appeals to “human nature” are insufficient in light of the very demonstrable ethical dynamic of pre-modern Islamic scholarship (and societies). An exposition on this dynamic is to be found in Wael Hallaq’s forthcoming *The Impossible State: Islam, Politics and Modernity’s Moral Predicament*, especially in Chapter V, section 2: “The Moral Technologies of the Self.” Here we find an overview of the moral substrate presupposed, depended upon, and promoted by pre-modern *Sharīʿa*. And, with specific regard to our claim that modern appeals to “human nature” are insufficient as arguments for pre-modern juristic sophistry (made, as they are, from a modern perspective at great remove from the *Sharīʿi* moral dynamic highlighted by Hallaq), we may hold, in contradistinction to such modern conceptions, Hallaq’s rendering of al-Ghazālī’s “theory of human nature,” explained in this same section (pp. 159ff.) Summarized by al-Ghazālī’s theory is a moral essence which fits hand-in-glove with the truth-seeking ethic of pre-modern juridical dialectic.

³⁰⁵ As is usual with these general transmission-oriented objections of SH, we cannot make a precise identification through the lens of the *jadāl*-theory texts. There, such *iʿtirādāt* as are directed against the opponent’s *istidlāl biʾl Sunna* “*min jihat al-isnād*” are all quite specific. Any number of them might be implied by SH’s general critique. All the same, we might consider this particular charge to be unique in comparison to others we have seen SH make. These usually take the form of “the Ahl al-Ḥadīth have not confirmed its like.” Here, however, the charge is that the Ḥuffāz — which we assume to designate such transmitters as SH considers trustworthy — have not preserved any such *matn* or its like whatsoever. Notably, Schacht cites this *masʿala*-

set (*Tr. I*, §194 by his system, §§1113-18 in Ḥassūn’s) as a case illustrating SH’s “cautious” recognition of *ḥadīth* criticism in the *Risāla*. He translates the relevant passage (p.55 of the Būlāq ed.) thus: “In most cases the truthfulness or lack of truthfulness of a tradition can only be known through the truthfulness or lack of truthfulness of the transmitter, except in a few special cases when he relates what cannot possibly be the case, or what is contradicted by better authenticated information” (Schacht, *Origins*, 37-8 and n.1). Precisely how SH’s charge above in §1119 (“*al-Ḥuffāz lam yahfazū hākadhā*”) illustrates this, however, is not made clear.

Dialectical Formulae (Indicative of Past or Recurrent Disputation) Appearing in Arguments Outside of Dialectical Sequences

There are a great many arguments in the *K. Ikhtilāf al-‘Irāqīyyīn* which employ the dialectical formulae we have encountered in Q&A sequences, but which are not situated within a dialectical sequence — such are the parameters of my presentation category C. A number of these arguments have already been analyzed, as they belong to the *masā’il*-sets concluding in category A sequences, and to the short dialectical sequences of category B. Unlike the preceding presentation categories A and B, however, such sections from the *Umm* Version as I have placed in category C are not a part of sequential Q&A exchanges between SH and SHAP/SHAQ. Rather, they either: 1) contain the familiar dialectical question/objection-formulae which we have seen employed elsewhere in Q&A sequences (mostly *ara’ayta* and *alā tarā*); 2) provide some hint as to a “historical” dialectic (e.g., *wa qāla ba’d al-nās X*), or a recurrent debate (e.g., *wa-alladhī yaz’umu X*); or 3) they incorporate some other phrase which strongly indicates the *mas’ala* at hand was the subject of past or ongoing face-to-face (or literary) disputation. As such, category C arguments may emanate from any one of the featured jurists of the *Umm* Version — *ara’ayta*, for example, issues not only from the mouths of AH and IAL, but from Shurayḥ (§11), and even from the Prophet himself (§108).

Due to the large number of category C presentations, I will not be able to present full analyses here, but will instead review the roles played by various formulae within different jurist’s arguments. Our basic assumption is that — in the abbreviated presentations of the bulk of material in our treatise — these arguments incorporating *ara’ayta*, etc., represent either the actual or presumed *elenchus* questions/statements from past or ongoing disputation. In other words, if an AY argument closes with a rhetorical *alā tarā* question introducing a *mas’alat al-naqd*, it will be assumed that AY either: 1) stifled his opponent with it in the past; 2) presumes to stifle, by means of it, contemporary proponents of the opposing position; or 3) wishes to convey to his student that key *topos* of opposing position X, upon which one should focus in debate. Of course, all three intentions may be at work at the same time. In the main, the following review of formulae is meant to show that patently dialectical material need not be presented in Q&A sequential format, but may be buried within non-sequence arguments. The distinguishing feature of category C is that the formulation of the presenter removes our need to hypothesize (as in categories D through G) that such

arguments unfolded, or were meant to unfold, in a dialectical venue. Rather, the stamp of dialectic is plainly upon them.

Ara’ayta?

We have already encountered a number of instances of *ara’ayta* questions in previous analyses, mostly, of course, within the extended and short dialectical sequences which have been our focus up to this point. A brief review of how this formula has been employed will reveal a startling variety of functions, although all appear to relate to *reductio* arguments. As for our first encounter with *ara’ayta*, it was within a larger argument driving towards a charge of *tanāquḍ*. In this instance, SH employed *ara’ayta* (§96) in order to push concession to such premises from which he might construct his charge. At the time, we noted that this constituted a unique charge of internal, logical inconsistency. It differed from a charge of *naqḍ* in that no *mas’alat al-naqḍ* was brought forward to expose a larger, doctrinal inconsistency as regards the efficiency of properties in occasioning the same *ḥukm (naqḍ)*, or as regards the observance of principle or the practice of *istidlāl (method-naqḍ)*. Still, the similarity of *tanāquḍ* and *naqḍ* is evident, and not surprisingly the most common usages of *ara’ayta* we have encountered lie within the domain of *naqḍ*.

Within this domain of *naqḍ*, then, we have seen *ara’ayta* exhibit the following functions, all through the capable handling of SH: 1) in §694, to push concession to a premise he required for his charge of *naqḍ*; 2) in §743, to introduce a pair of *masā’il al-naqḍ*; 3) in §740, to push his opponent to rule on a *mas’alat al-naqḍ* from which a property of the *mas’ala* at hand had been removed (for an eventual charge of *naqḍ*); 4) in §1321, to push his opponent to rule on a *mas’alat al-naqḍ* (this time, for an eventual charge of *method-naqḍ*); and 5) in §647, to push his opponent’s concession to inconsistency, for a final charge of *method-naqḍ*. Even within the larger domain of *naqḍ*, then, *ara’ayta* has been used by SH for five distinct purposes. *Naqḍ* and *tanāquḍ* are not the only objection-domains in which SH employed *ara’ayta*, however. We have also seen him make use of it within the larger domains of: 1) *mu’āraḍa*: in §663, to introduce an *endoxon dalīl* (from the Qur’ān) for his “hypothetical” *mu’āraḍa*; 2) *kasr* and *farq*: in §771, to push his opponent to rule on a *mas’alat al-farq*, which tied back to an original charge of *kasr*; and 3) *qalb*: in §653, to frame a disjunction of premises, one of which — expected to be conceded by his opponent — was to form a component of SH’s charge of *qalb*.

All of the above instances of SH *ara’ayta* occurred within extended or short dialectical sequences. Not only, therefore, is the real usage of *ara’ayta* in real dialectical

disputation thus confirmed beyond any doubt, but we have been able — thanks to a less-abbreviated presentation — to make more precise identifications of the objection-domains within which it was employed. This is not the case with category C. Although we have already analyzed a few *ara’ayta* instances from this category as well (as constituting part of the *masā’il*-sets concluding with extended dialectical sequences), the restraints placed upon our identifications will now be made obvious. In fact, we were forced upwards to a far more general objection-domain, that of the *reductio ad impossibile*.³⁰⁶ In §275 and §753, we found AH employing *ara’ayta* in order to introduce hypothetical cases (three, in §753) with either negative or impossible consequences. In other words, *ara’ayta* was the vehicle for delivering a rhetorical *reductio ad impossibile*. In §748, either IAL, AY, or MIH employed *ara’ayta* to push concession to a premise which, again, was necessary for a rhetorical *reductio ad impossibile*.

The restrictions imposed by category C upon our ability to identify with more precision are thus manifest, and they will continue to tie our hands as we proceed to instances of *ara’ayta* not yet treated. In fact, we are again forced upwards for the majority of examples to the more general domain of *reductio ad impossibile*. Drawing upon the fact that most *ara’ayta* usage in categories A and B fell within the domain of *naqd*, it seems probable that many of these rhetorical *reductios* of category C also belong to that species of *i’tirād*. Abbreviated presentation, lack of knowledge of opposing *istidlāl*, and lack of opponent’s response, however, prevent us from positive claims. Rather, we will simply note that most category C *ara’aytas* serve to introduce, as we have seen earlier, hypothetical cases with either negative or impossible consequences. Of course, these might be *masā’il al-naqd*, or of *kasr*, or of other objections marked by the bringing of a parallel case, but we can’t be sure which. Examples include: §108 (within a larger category D argument, and issuing from the mouth of the Prophet himself); §221 (AH, introducing two impossible consequences, one framed as a disjunction); §320 (AH); §554 (AH); §817 (AH); §818 (AH, introducing two impossible consequences); and §1143 (AH).

³⁰⁶ This retreat to a larger category, however, also allows us to realize the relationship between larger and smaller objection-domains. Certainly it becomes evident that some of the more distinct species of objection we have encountered with *ara’ayta* in categories A and B — *tanāquḍ*, *naqd*, and *kasr*, specifically — all belong to the greater domain of *reductio ad impossibile*. The restrictions placed upon us by abbreviated presentation in categories C through G, however, assures that we are rarely able to descend from such larger domains in order to make more specific identifications.

In other instances, we are more tempted to make a tentative identification of *naqd*, thanks to certain indicants within the argument presentation. Several *ara’aytas* are employed in introducing probable *masā’il al-naqd*, concluding with a rhetorical charge of *naqd*; which is to say, more cautiously, it seems likely from the phrasing or circumstance that the charge is *naqd*, though we are still prevented from making a positive identification. Such is §11 (within a larger category D argument), where none other than the famed Successor-jurist Shurayḥ implies a defendant’s *naqd* with his rhetorical *ara’ayta*. That is to say, Shurayḥ confronts his objecting defendant with a case wherein it was the complainant who was afflicted with fire rather than himself (the *mas’alat al-naqd*), then asks him whether he’d relinquish his fees (expecting a “no”, and thus the defendant’s *naqd*). Elsewhere, in §148 and §149, IAL’s *ara’aytas* introduce apparent *masā’il al-naqd*, then he offers for each a pair of potential rulings framed as disjunctions. Being that the untenable of the two rulings mirrors that of the opposing position, while the obvious choices mirror IAL’s positions (and moreover, being that IAL subsequently pushes the “obvious choices” with *alā tarā* questions), we may read this as a likely attempt at *naqd*. In §150, IAL even answers his own *ara’ayta* (which introduces an apparent *mas’alat al-naqd*) in such a manner as suggests his intention was, indeed, a charge of *naqd*. Examples similar to these may be found in §34 (MIH?) and §809 (AH).

Lastly we’ll note one other use to which *ara’ayta* has been put in category C presentations: introducing a parallel *mas’ala* whose known *ḥukm* is presumably *endoxon*, in order to support the arguing jurist’s ruling for the *mas’ala* at hand. We find either AH or AY employing *ara’ayta* to this end in §836 (where the *ara’ayta*-raised *mas’ala* and ruling are nearly the same as the *mas’ala* at hand with AH/AY’s ruling); while SH delivers the support of two *endoxa* rulings via *ara’ayta* in §1195. Again, this appears to indicate an intended charge of *naqd*, for it is akin to saying: “Haven’t you considered case X, where you would follow the *endoxon* ruling as I do? Why, then, don’t you rule as I do in the *mas’ala* at hand (where the same properties are at work)?” The main point of difference with this final function of *ara’ayta* is that here it delivers parallel *masā’il* with *endoxa* rulings, whereas elsewhere it mostly delivers parallel *masā’il* with negative or impossible consequences.

Alā tarā?

Again, we have already encountered a number of instances of this formula in our previous analyses. A brief review, however, will begin to reveal what appears the general difference between the functions of *alā tarā* and *ara’ayta* within juridical argumentation schemes. Previous analyses have shown *alā tarā* employed as follows: 1) to push concession to an *endoxon dalīl* from Kitāb or Sunna, with SH in §249 (a Prophetic *ḥadīth*) and AH in §1052 (Q.5:95); 2) to push the arguing jurist’s *aṣl* for *qiyās*, with IAL or AY in §277 (in which case the *qiyās* supports an *athar*); 3) to introduce a *mu’āraḍa-ḥadīth*, with SH in §544; 4) to introduce an *endoxon* ruling as a *mas’alat al-kasr*, with AY, MIH, or IAL in §750; and 5) to introduce a *mas’alat al-naqd*, with SH in §1229 (portraying his opponent as elsewhere paying heed to a *farq*). These are but a few instances, however, and the greater bulk of *alā tarās* — appearing in category C presentations we have not yet explored — illustrate an even wider variety of functions. Moreover, and unlike *ara’ayta*, we are hardly impeded by the more abbreviated presentations of category C in understanding the jurist’s intention in delivering material via *alā tarā*. As we shall see, this is chiefly a result of the different *primary functions* of *ara’ayta* and *alā tarā*.

By far the most common end to which *alā tarā* is employed may be described thus: to introduce a parallel *mas’ala* — sharing elements with the *mas’ala* at hand — whose ruling is *endoxon*, all of which supports the arguing jurist’s ruling for the *mas’ala* at hand. This may in turn be interpreted as implying an *aṣl* for *qiyās*, and/or a charge of *naqd* against the opposing opinion. In short, it is akin to asking: “Don’t you rule as I do for this parallel *mas’ala*? [being the function of the *alā tarā* question, which in turn implies:] Then why don’t you rule as I do for the *mas’ala* at hand, when it contains the same elements?” If the implication is more hypothetical on our part, the primary intent — justifying the arguing jurist’s ruling via introduction of an *endoxon* parallel — is quite clear in the following examples: §§103 (AH), 235 (SH, in part 2 of his *alā tarā*), 363 (AH), 394 (SH), 460 (AH), 826 (AH), 834 (AH), 835 (AH), and 995 (AY). Alternately, we find *alā tarā* introducing a hypothetical configuration of the *mas’ala* at hand (as opposed to a parallel *mas’ala*), whereby the arguing jurist’s ruling is justified or shown to be *endoxon*. Examples include: §151 (SH, with two hypothetical configurations) and §1193 (also SH). Similar to this is when *alā tarā* introduces a hypothetical configuration of *events subsequent* to those of the *mas’ala* at hand, whereby the arguing jurist’s ruling is again justified or shown to be *endoxon*. Examples include: §1243 (AH) and 1289 (AH).

Also quite common is *alā tarā* as a vehicle for pushing assertions regarding efficient properties. We find it employed in pressing concession to the *presence*, in the *mas’ala* at hand, of an efficient property occasioning the arguing jurist’s *ḥukm* in all of §319 (AH), 458 (AH), 817 (AH), and 831 (AH). In a more particular manner, SH uses *alā tarā* to push concession to the efficiency of a property by showing its co-absence (*‘aks*) with the *ḥukm* (§235, in part 1 of his *alā tarā*).³⁰⁷ Related to these are instances in which *alā tarā* is used to push concession to the arguing jurist’s reasoning (*sabab/ḥikma?*) behind what he proposes as that property efficient in occasioning his *ḥukm*. Examples include §876 (AH), and §1303 (AH). Similarly, AH uses *alā tarā* to present what may be called an “argument to inclusion” in §54 (whereby general absolution from a defect includes all instances of defect, named or otherwise), and an “appeal to future possibility of status change” in §126 (“Don’t you see/opine that a man might become insolvent today, and obtain *māl* tomorrow?”) Again related to assertion of efficient properties and supporting arguments is when AH pushes concession to the subsumption of the *mas’ala* at hand under a more general legal category, whose *ḥukm* regarding the *mas’ala* at hand it thus ought to share (in §723, arguing that *zakāt* be treated like every other *farīḍa* insofar as minors are concerned). To bring this general category to conclusion, we will note that *alā tarā* has also been used to push concession to the arguing jurist’s *ḥukm* for the *mas’ala* at hand *after* a justification (by argument or *dalīl*) of the efficient properties which occasion it. Examples include: §397 (SH), and §833 (AH).

Finally, two more functions of *alā tarā* may be discerned from the examples found in our treatise. In §74 RB uses it to introduce a pair of *masā’il* (*naḥā’ir*, in fact) by which a *farq* is demonstrated; and in §148 IAL uses it to push the “obvious choice” of rulings for a previously introduced *mas’alat al-naqd*, wherein a pair of potential rulings had been framed as a disjunction. This last example in particular provides a fine illustration of how *ara’ayta* and *alā tarā* may be employed in potent combination. Rephrased in a more abstract form, IAL first asks in §148: “*Ara’ayta* [such and such a parallel *mas’ala*]? Is it the case that [ruling 1], or is it the case that [ruling 2]?” Then IAL asks: “*Alā tarā* that [ruling 1] is the case?” This latter ruling (1) of course, helps justify IAL’s ruling in the *mas’ala* at hand. In this combination, we find Q’s *ara’ayta* introducing a parallel *mas’ala* and its dichotomy of potential solutions, while Q’s *alā tarā* pushes

³⁰⁷ Al-Bājī defines *al-‘aks* as: “absence of the *ḥukm* due to absence of the ‘illa;” its counterpart, of course, is *al-ṭard*: “presence of the *ḥukm* due to presence of the ‘illa” (*Minhāj*, Turkī ed., 14).

concession to the “obvious choice” ruling, which in turn justifies Q’s solution for the *mas’ala* at hand.

Ara’ayta* vs. *Alā Tarā

Comparisons of the instances and perceived functions of *ara’ayta* and *alā tarā* reviewed above reveal certain areas of overlap. Both, for example, have been employed to introduce *adilla* which the opponent is considered bound to accept — e.g., the Qur’ānic indicants from §663 (with *ara’ayta*) and §1052 (with *alā tarā*). Both, too, have been used to introduce *masā’il al-naqd*, and both have introduced parallel *endoxa* rulings in support of the arguing jurist’s position. On the whole, however, a general difference has become manifest, and we may begin to speak in terms of the *primary functions* of these “staple” dialectical formulae. As for *ara’ayta*, it is primarily the herald of objection and refutation; that is to say, it appears more closely tied to the advancing of objections and the declaration of *elenchi*. *Alā tarā*, on the other hand, is primarily the herald of *endoxon* justification; which is to say it appears more closely tied to the delivery of arguments or parallel rulings in support of the arguing jurist’s position, and to which an opponent is expected to concede. Put differently, we might say that *ara’ayta* is more often the vehicle by which P’s thesis is problematized and refuted, while *alā tarā* is more often the vehicle by which Q’s thesis is supported and justified. Notably, these constitute the two main objectives of the questioner in the Aristotelian scheme of dialectic.

Other Formulae Indicative of Past or Recurrent Dialectic

Our purpose in examining the *ara’ayta* and *alā tarā* questions of our treatise has not only been to establish patterns as to their usage. We were also intent upon showing that — just as these formulae appear in extended and short dialectical sequences (and are thus confirmed as “dialectical” formulae in real dialectic) —, they also appear in arguments *outside* of dialectical sequences (and are thus indicants of prior or recurrent dialectic). The point is that we do not always require the presentation of arguments in sequential Q&A format in order to make a strong claim that such arguments featured in, or were intended to feature in, real dialectical disputation. Such abbreviated presentations which employ these formulae (category C) very likely incorporate real dialectical arguments, even when the voice of an opponent is not heard. Nor are *ara’ayta* and *alā tarā* our only indicants; there are a host of other formulae which are every bit as revealing, and we will briefly review them here.

Primary among these are “*kayfa... wa...?*” or “*kayfa... idhā...?*” or other questions formulated with *kayfa*. The uses to which we have seen such questions put in previous analyses are many and various, and — being that only the most general pattern seems to emerge — we would simply refer the reader to our prior summaries so as to gain a picture of the multiple functions of *kayfa* in dialectical sequences. Examples we have already encountered are: §§63 (SHAQ), 263 (SH), 660 (SH), 749 (AY/MIH/IAL), 753 (AH), 1057 (SH, x2), 1061 (SH), 1072 (SHAQ), 1227 (SHAQ), 1316 (AY/MIH), 1325 (SH), and 1326 (SH). All of these serve to problematize the opposing position in some manner or another, and the *kayfa* question is thus revealed as a tool for Q’s advancing of objection and refutation against P’s thesis (like the primary function of *ara’ayta*), as opposed to Q’s justification of his own thesis (as with the primary function of *alā tarā*). Additional instances of *kayfa* questions in category C presentations, outside of the *masā’il*-sets we have analyzed, include: §§33 (MIH?), 221 (AH), 291 (AH), 387 (AH), 420 (AH), 1194 (SH), 1243 (AH), 1289 (AH), 1341 (AH), 1363 (AH), and 1367 (AH). All of these instances of *kayfa* exhibit the same general function as those which have preceded them in our analyses: P’s position is problematized, and Q’s objection or refutation is advanced. Lastly, we may note that all of these examples illustrate precisely how an objection (which is a kind of assertion) may be phrased as a question; for Q’s *kayfa* question problematizes P’s thesis in such a manner as either strongly implies Q’s objection (which need not be asserted thereafter — this is a “rhetorical” *kayfa*), or in such a manner as sets the stage for Q’s objection (which he thereafter asserts).

Such assertions of objection often employ the verb *za’ama/yaz’umu*, as when Q objects: “You have claimed X elsewhere, how is it that you now claim -X?” We have already encountered numerous instances of *za’ama* in contexts of objection in our analyses of dialectical sequences. Again, the presence of such formulae as “*man / alladhī za’ama / yaz’umu* [opposing position X]” in non-sequence arguments provide obvious indicants of prior or ongoing dialectical disputation. Examples of these latter include: §§467 (SH, relating three claims), 567-71 (SH, relating numerous claims), 729 (SH), 792 (SH), 824 (SH), and 1050 (SH).

In addition to *kayfa* questions and *za’ama* assertions, there are a number of other formulae in our treatise which provide strong indicant for past and recurrent dialectic. In §10, for example, SH initiates his objection to an opposing opinion with: “*wa qad yadkhulu ‘alā qā’il hādhā an yuqāla lahu....*” Very similar expressions incorporating *dakhala* or *adkhala* may be found in: §§33 (MIH?), 1032 (SH), and 1370

(SH). More obvious yet are the familiar references to “historical” dialectic we have encountered before, although, of course, they are not followed in category C presentations by transcript-like sequences of Q&A. SH begins his objection to an opposing position in §729 with “*wa qāla ba‘ḍ al-nās [X]... wa ihtajja bi- [Y]....*” In §§1377-83, SH raises a series of opposing opinions, then refutes them one after another. He begins by relating: “*wa qad khālafanā fī hādhā ba‘ḍ al-nās bi-aqāwīl;*” and then proceeds with “*fa-qāla aḥaduhum [X],*” and “*wa qāla ghayruhu [Y],*” and “*wa qāla ghayruhu [Z].*” In §1417, on the other hand, SH concludes a justification of his ruling by noting: “*wa qad khālafā hādhā ba‘ḍ al-nās, wa hādhā maktūb fī Kitāb al-Ḥudūd bi-ḥujajihī.*” Certainly no stronger indicants of past dialectical disputation may be found than these. Nor do such formulations as the following leave much to doubt: “*wa bi-dhālika taraknā qawl man qāla X*” (SH, in §1026); “*idhā kānū yaqūlūna*” (SH, in §1102); and, in most vigorous and thorough fashion, “*wa mā a‘rifu aṣlan wa lā far‘an li-qawl man qāla X*” (SH, in §1084).

Finally, we will close this discussion by noting that we need not always rely upon such obvious formulae as the above for indicants of past or recurrent dialectical disputation. Sometimes even the most abbreviated presentations, in conjunction with their following on the heels of an opposing opinion, may indicate the past occurrence of an argument in real disputation. Such is the case with AH in §562, who, following IAL’s ruling, is related as saying: “*lā yanbaghī li’l-qāḍī an yaf‘ala dhālika, li-annahu....*,” and, again following IAL’s ruling [X is the case], in §958: “*Bal, [Y is the case].*” Our treatise is, after all, a work of *ikhtilāf*, and every *mas’ala* within it had formed — and continued to form — a focus for disputation. We have only chosen to narrow our attention to presentation categories A, B, and C due to the greater ease with which their “overtly dialectical” features may be distilled and identified.

Presentations which are Not “Overtly Dialectical” (Categories D, E, F and G):

Open Doors for Further Research

Although these presentation categories cannot be adequately treated in this dissertation, the reader will be reminded that we have already dealt with a number of arguments belonging to them (with the exception of category E). These include: §§91-4, 280-1, and 691 (category D); §§239-41, 242-6, 634-41, 686-8, 1067, 1069-70, 1219, 1313b, 1317, and 1404-5 (category F); and §§89-90, 236-8, 689-90, 744-5, 1068, 1125-6, 1217-18, 1310-13a, and 1402-3 (category G). The reader is directed to our previous summary tables in order to review the elements we have been able to distil from these more abbreviated presentations. Of course, a great deal more can be learned — especially from analyses of D and E arguments, but we have been held back by limitations of time and space. Even so, a number of pertinent elements have manifested themselves through what we might call our cursory “analysis-overview” which was corollary to the process of dividing up the text of our treatise by presentation category. The results of this “surface” analysis will be treated briefly in Chapter IV.1.

As we have already seen, a great deal can be gleaned from analyses of categories F and G as well — especially with the help of later *fiqh* and *ikhtilāf* works wherein the purported reasoning of the arguing jurist is explained. Of course, the nature of these categories (as with D and E) is such as they do not contain any “overtly dialectical” formulae or Q&A sequences. Our argument-identifications for categories F and G in particular have thus been a far more hypothetical enterprise than for other categories; we have imagined the opposing opinions in a dialectical venue and then inferred as best we could the types of *ītirādāt* most likely to have been employed. Nevertheless, in addition to what fruits we might garner through this conjectural activity, there are many and obvious elements of additional interest in the form of technical terms, consistent formulae, modes of *istidlāl*, etc. — all of which contribute significantly to that small window on proto-system legal theory and juridical dialectic which our treatise provides.

In the end — and although categories D through G form, by far, the greater bulk of presentations in the *K. Ikhtilāf al-‘Irāqīyyīn*³⁰⁸ — we must postpone further analyses of

³⁰⁸ We are speaking, of course, of the *Umm* Version only. As for the Shaybānī Version, its very nature as the “source-text” for the *Umm* Version precludes the presence of category A and B

these categories, excepting such instances as have occurred in our fully-treated *masā’il*-sets. On the other hand, as has been mentioned, our cursory “analysis-overview” during the process of category division revealed a great many pertinent elements for all of categories D through G, and these will be reviewed in Chapter IV.1. Our purpose now is to stress that all of these categories await a deeper analysis, and that there is even more yet to be learned regarding the arguments of the *K. Ikhtilāf al-‘Irāqīyyīn* than this dissertation contains.³⁰⁹

dialectical sequences, which occur only between SH and SHAP/SHAQ. That is to say, the Shaybānī source-text only contains presentation categories C through G.

³⁰⁹ A complete analysis constitutes but one of several “open doors” for further research; these, too, will be discussed in more detail in following sections.

Chapter IV.1: Proto-System Dialectic in the *Kitāb Ikhtilāf al-‘Irāqīyyīn*

Introduction

In this first half of Chapter IV we will review the elements unearthed by our analyses in the previous chapter and arrange them as follows: First, by what seems to have fallen easily, or relatively easily, into the categories of our *jadāl*-theory lens-texts; Second, by what has not been easy to identify by way of our lens-texts, and may possibly (but not necessarily) represent dialectical phenomena unique to proto-system juridical *jadāl*.¹ Following this, we will: 3) present a number of additional elements from presentation categories C through G;² 4) present a number of elements incidental to our dissertation objectives, but of import to the study of early Islamic legal history; and 5) proffer a few summary remarks. Only then will we proceed to our larger conclusions in the second half of this chapter.

The reader should bear in mind that the first part of what follows refers only to our analyses in the previous chapter. As regards presentation category C, we have so far reviewed only the functions of the dialectical formulae employed therein. The bulk of arguments in this category, then, along with all the arguments of categories D through F, and the bare substantive rulings of category G, remain an open door to further (if more difficult) analyses.

As an additional note, it is important to bear in mind that our lens-text identifications are not to be understood as assertions that jurists who engaged in proto-system *jadāl* would have recognized all the terms by which we have categorized their arguments (though they certainly would in many instances). We have peered at early material through a lens of *jadāl*-theory fashioned at least two centuries later; we have doubtless employed a more refined set of categories and definitions than existed during

¹ We must allow that certain elements of juridical dialectical *practice* in the era of our early *jadāl*-theory treatises were not discussed in these early attempts at full systematization. A ready example is the use of the *alā tarā* formula by all of our *jadāl*-theory authors at various points in their texts, often while defending particular positions of *jadāl*-theory itself. We do not find, however, any systematic treatment regarding where and to what purpose the *alā tarā* formula is to be employed.

² Excepting, of course, what we have already learned from category C with regard to the usage of dialectical formulae *ara’ayta*, *alā tarā*, etc.

the proto-system era.³ Again, ours has not been an anachronistic back-projection of system and term; rather, we have endeavoured to *discover and categorize* the theory and practice of an earlier time. The key message to be read from our following presentation is therefore quite simple: Although full-system *theory* was absent to a considerable extent (though certainly not entirely) from proto-system juridical dialectic, an extraordinary number of its elements existed in *practice* nonetheless. This obtains with regard to *uṣūl al-fiqh* and *jadāl*-theory both.

What follows should therefore impress upon the reader that remarkable continuity one may observe from proto-system *jadāl* teaching and practice to full-system *jadāl*-theory treatises. At the same time, one will recognize the extraordinary elaborations and refinements — the true, comprehensive *system* — which our fourth and fifth century H *jadāl* theorists achieved. It is they who were the true Aristotles of Islamic juridical disputation praxis and legal theory. Their systems, however, were not created *ex nihilo*, nor were they “taken over” from systems elaborated by other epistemic communities. Rather, they represent the analytical distillation of a continuous tradition of juridical *jadāl* teaching and practice which grew increasingly refined over preceding centuries, and was already marked by a high level of sophistication by the time of al-Shāfi‘ī.

Proto-System Dialectical Questions Within the Categories of the *Jadāl*-Theory Texts

We should not be at all surprised by the total absence of Al-Bājī’s questions #1 and #2 from the dialectical sequences of the *Ikhtilāf al-‘Irāqīyyīn*. This may easily be explained as the result of our subject-treatise’s abbreviated nature; i.e., for each instance in which a dialectical sequence occurs, the *mas’ala* of contention has already

³ The important work of Zafar Ishaq Ansari, in his “Islamic Juristic Terminology Before al-Shāfi‘ī,” should here be referenced — indeed, many of the findings of this dissertation are fully consonant with his seminal study. Besides the valuable light he sheds upon early (2nd century H) usages of the terms *ḥadīth*, *sunna*, *ijmā’*, *ra’y*, *qiyās*, etc., he reaches a number of important and relevant general conclusions (299-300). Among them are the following: 1) “there was a marked lag between the conceptual and terminological aspects of the development of *fiqh*,” and “some of the fundamental concepts... are anterior to the period when they acquired standard technical terms for their expression;” 2) “if there is positive evidence about the existence of a concept as embodied by the term in use, we can confidently make an affirmative statement,” but “if, on the contrary, positive terminological evidence is lacking in regard to some concept, this does not necessarily signify the non-existence of that concept;” 3) overall, there was a “trend towards an increasingly precise definition of terms... a more vivid *uṣūl*-consciousness reflected in the growing recognition of distinctions between the various sources of positive doctrines, and its corollary, an increasing formalism and finesse in technical legal thought;” and 4) “even though there was a semantic lag, yet the formulation of technical terms with accurate connotations was well on its way [by al-Shāfi‘ī’s time] and considerable progress seems to have been made in that respect.”

been determined, and opposing solutions are already known. All that remained for al-Shāfi‘ī, therefore, was to present such portions of the “transcript” wherein one’s *dalīl* was, or ought to be, elicited (*su’āl* #3); wherein the mode of the *dalīl*, if not clear, was, or ought to be, elicited (*su’āl* #4); and wherein the questioner proceeded, or ought to proceed, to critique (*su’āl* #5).⁴ Of course, any assessment in terms of “absences” would only hold true if we understood al-Shāfi‘ī and other proto-system jurists to have adhered to an ordered question-schema like that proffered by al-Bājī; there are, however, more than a few indications that they did not.

What follows, therefore, is only a list of questions we have encountered which most easily correspond to al-Bājī’s schema (if not always an exact fit). Even then, identifications were often quite difficult to make: many of our questions appeared to combine information-seeking and refutational intentions. Many more questions were directed at an opponent’s objection rather than his *istidlāl*, and yet others simply found no easy classification in our lens-texts. For the most part, these latter will be treated in following sections as potentially unique to proto-system *jadal*.

***Su’āl* #3: The Question about the *Dalīl* [of the *Madhhab*]**

- ‘*alā ayyi shay’in i’tamadtum?*
 - §253 (SH)
- *fa-dlulnī ‘alā hādhā* (in the spirit of a *muṭālaba*)
 - §260 (SHAQ)
- *kayfa dhahabta ilā hādhā dūna ghayrihi min al-aqāwīl...*
 - §1072 (SHAQ; following up with three counter-*qawls*)
- *lima za‘amta X?*
 - §1224 (SHAQ; as first stage in pushing concession to his Type I *qiyās al-dalāla* [see SHAQ in §1227])
- *min ayna za‘amtum X?*
 - §1407, 1409 (SHAQ; [X = SH ‘*illa*-interpretation]; possibly *su’āl* #4; in §1409 he repeats his request for the *dalīl*: “*wa mā huwa?*”)
- *min ayna qulta hādhā?*
 - §36 (SHAQ)
- *mā dalla ‘alā mā dhakarta?*
 - §51 (SHAQ)
- *Su’āl* #3 as the means of eliciting premises for a charge of *method-naqd*
 - [in the way of a rhetorical *reductio ad absurdum*]
 - Q states *uṣūl* and *far’* for P’s *qiyās*, then asks: Is X (which is absurd) the *qiyās*; or Y (which is absurd) the *qiyās*?
 - §1057 (SH)
 - Q asks: Did you rule as you did because of *dalīl* X? (*dalīl* X being that *dalīl*)

⁴ Our repetition of “was elicited” vs. “ought to be elicited,” and “proceeded” vs. “ought to proceed,” is meant to reflect the two main species of dialectical “transcripts” we have encountered: the “historical” vs. the “instructional.”

which P has not consistently applied, and which is also Q’s *dalīl*)

- §1059 (SH)
- Q asks: Why did you rule in the negative, is it because X is different from Y? (this difference being the *farq* that P has not consistently observed)
- §1323 (SH)

Su’āl #4: The Question about the Wajh of the Dalīl

- *kayfa* [my *dalīl*] *lā yukhālifu* [your *dalīl*]?
- §256 (SHAQ)
- How does X resemble (*kayfa tushbihu*) Y?
- §285 (SHAQ; in the spirit of *muṭālaba bi-ithbāt al-waṣf fi’l-far’*)
- *wa kayfa dhālika*?
- §645 (SHAQ; in the spirit of a “*muṭālaba bi-wajh al-qadh*”)⁵
- *fa-ayy al-qawlayn ashbahu al-qiyās?*
- §651 (SHAQ; an initial stage of “*muṭālaba bi’l-qadh [bi’l-qalb]*”?)
- *wa kayfa yakūnu al-qiyās fīhi?*
- §661 (SHAQ; in the spirit of objection to SH’s hypothetical *qalb*)
- *kayfa jāza* X, and not more than X?
- §63 (SHAQ; more in the spirit of a *muṭālaba*)

Su’āl #5: The Question according to the Wajh al-Qadh

Muṭālabāt (as setting the stage for *Mumāna’āt*)

- Indeterminate Type
- §§63 (SHAQ); 258 (SHAQ); 260 (SHAQ; in the form of *su’āl #3*, but in the spirit of a critical demand for a *dalīl*)
- *muṭālaba bi-ithbāt al-waṣf fi’l-far’*
- (Bāj.IX.A.1.6)
- §285 (SHAQ; setting stage for *man’ al-waṣf fi’l-far’*)
- *muṭālaba bi-taṣḥīḥ al-akhbār*
- §1076 (SHAQ: “*fa-ayna al-Sunna fīhi?*” likely the first stage of an intended [but never realized] *muṭālaba*)

[Corresponding *I’tirāḍāt* and *Mu’āraḍāt* will be treated below in detail]

It should be apparent from this listing (and our forthcoming discussions of more unique forms) that not many of the questions we encountered fit easily into al-Bājī’s schema. Even such obvious candidates as “*fa-dlulnī ‘alā hādhā*” for *su’āl #3* were often uttered with a patently refutational design. We will note this, then, as an overall characteristic of our window on proto-system *jadāl*: its dialectical questions do not conform well to the structured categories of later theory — at least, that is, with regard

⁵ Such *muṭālabāt* as appear in quotes are not actual categories in the *jadāl* texts. See our discussion below of question types which appear unique to proto-system *jadāl*.

to those (#1-4, and the *muṭālabāt* of #5) which comprise the initial information-seeking stage of disputation. As for *i‘tirāḍāt* and *mu‘āraḍāt*, however, there is a remarkable correspondence between proto-system practice and full-system theory. It is to these we shall now turn, arranging our identifications according to the organizing principle of our lens-texts.

Proto-System *Istidlālāt* and *I‘tirāḍāt* Within the *Adilla* Domains of the *Jadal*-Theory Texts

We will recall that our early *jadal* theorists organized the domains of *istidlāl* and objection according to three supersets: *aṣl*, *ma‘qūl aṣl*, and *istiṣhāb ḥāl*. We will endeavour to follow this arrangement in presenting such *istidlālāt* and *i‘tirāḍāt* we have encountered in the *Ikhtilāf al-‘Irāqīyyīn* which conform to the categories of later theory. The immediate impression is that a remarkable amount of the arguments and dialectical moves of our subject-text would have been recognized and easily explained by later theorists. It is our thesis, of course, that this is no coincidence. Indeed, it would appear that the system of al-Shīrāzī, for example, was not only formulated from the practice and pedagogy of his more immediate teachers (e.g., Abū al-Ṭayyib al-Ṭabarī [d.450/1058]) and teachers’ teachers (in the line of Ibn Surayj and students), but by an analysis and structuring of the practice and teaching of such jurist-dialecticians as Abū Ḥanīfa, Abū Yūsuf, Muḥammad b. al-Ḥasan, and al-Shāfi‘ī.

Bearing this in mind, we may proceed to review instances of argument from our subject-text which match well the categories of our lens-texts, with an important caveat or two. First of all, we will remember that the abbreviated presentations of the *Ikhtilāf al-‘Irāqīyyīn* — particularly in such categories as were not “overtly dialectical” — sometimes brought us to propose identifications of a more hypothetical nature. The juxtaposition of opposing rulings and arguments guided us in surmising the forms of objection they would represent in a venue of face-to-face dialectical debate. Of course, as a work of *ikhtilāf*, the contents of our subject-text were invariably the object of real-time dialectic at some point or another; however, they were rarely “transcribed” as such. As we have done in the previous chapter, we will therefore continue to do now, marking all such objections as may be inferred through the contrast of opinions as “implied.”

We will also recall that abbreviated presentations — particularly for Abū Ḥanīfa, Ibn Abī Laylā, and Abū Yūsuf — often caused us to seek out reports of background reasoning in later works. These will also be labelled in what follows, as emanating either from the reports of al-Ṭabarī or al-Sarakhsī. As for all arguments and

objections which do not bear the markers of “implied” or “reported,” they may be considered as clearly indicated in our subject-text itself. Since we are dealing at present only with “overtly dialectical” material, this applies to the great majority of dialectical moves which follow.

A final important caveat, and one which applies to the whole of our analytical venture, and all of the discussions straight through to the end of this chapter: our analyses have been conducted with regard to portions of a single, early treatise of *ikhtilāf*, which itself constitutes less than a twentieth of the volume of the *Kitāb al-Umm*. Nor is the *Umm* the only early compendium in which patently dialectical material may be found in abundance. Our window onto proto-system *jadāl* is thus a fraction of a fraction, and I am understandably reluctant to extend the picture we are provided beyond its borders to the whole of proto-system *jadāl*. In avoidance of tedious repetition of this caveat, therefore, I would ask the reader to bear this in mind as we proceed to assess this sliver of light cast onto the early juridical dialectical scene. Unless stated otherwise, my observations apply to our jurist-dialecticians only insofar as the *masā’il* of our subject text is concerned — they are not (necessarily) to be extended to their overall (and mostly unexamined) practice, and certainly not to the practice of their unnamed predecessors and peers. That being said, we will begin, now, by reviewing the superset of *aṣl*, and its subsets of *Kitāb*, *Sunna*, *Ijmā’*, and *Qawl al-Wāḥid min al-Ṣaḥāba*.

Kitāb

Istidlālāt

- §§1052 (AH; Q.5:95; implied [Qur’ānic *dalīl* is introduced by *alā tarā ilā...* i.e., presented by way of *mu‘ārāḍa*]); 1056 (SH; God’s *qawl* in Q.5:95; accompanied with SH *tafsīr* of «*mithlu*»); 1077 (SH; he claims his *istidlāl* from Sunna and *ijmā’* is “in the *ma’nā* of” Q.2:178); 1410 (SH; Q.2:230; followed by *mufassir* Sunna)

I’tirāḍāt

- *al-mushāraka fi’l-dalīl (min jihat al-zāhir)*
 - (Shīr.I.4[.1]; Bāj.I.3.1.2)
 - §§1056 (SH; SH *istidlāl* focuses upon a different component of AH *dalīl* Q.5:95; supported by *āthār*, *qiyās*, and *ma’qūl*);⁶ 1061 (SH)

Although one might at first be tempted to think this a rather small representation of argument from the Qur’ān, we will see that this is not true of our

⁶ SH’s *i’tirāḍ* matches al-Bājī exactly, and al-Bājī uses this very *mas’ala* for his example (al-Bājī, *Minhāj*, Turkī ed., 59f., §114). The implications of this will be discussed in concluding sections of this chapter.

subject-treatise as a whole, with some dozen additional Qur’ānic justifications occurring outside of our subject-treatise’s “overtly dialectical” material.⁷ On the other hand, we might also propose that — with the Qur’ān occupying the uppermost rank of epistemic authority as it does — *masā’il of ikhtilāf* occurred more frequently in other domains of *istidlāl* enjoying less in the way of consistency and consensual interpretation in the proto-system era: particularly, the increasingly-important corpus of *sunan*.⁸ The nascent science of the Ahl al-Ḥadīth (and its material), after all, was newer to the Islamic intellectual landscape than that of the *mufasssirūn*. Finally, we must bear in mind that we have examined but a single treatise of the *Kitāb al-Umm*; the whole of this compendium is replete with many hundreds of arguments from the Qur’ān.

As it is, the sole *i’tirād* from overtly dialectical presentations we have identified in this domain is *al-mushāraka fi’l-dalīl*. This might suggest that the relation of the *aḥkāma al-Qur’ān* to various genera of the evolving *fiqh* of proto-Sunnism had already been well-argued and more-or-less delineated by the time of al-Shāfi‘ī, but no positive confirmation can be made without a great deal more research. We may certainly observe, however, that the arguments of al-Shāfi‘ī incorporate the complementary Qur’ān-Sunna relationship central to what Joseph Lowry has aptly labelled al-Shāfi‘ī’s “concept of the *Bayān*,” as formulated in his *Risāla*.⁹ The role of Prophetic Sunna is indeed a large one in our dialectical sequences, and not only in the hands of al-Shāfi‘ī, as we have seen. It is to this domain we shall now turn.

Sunna

Istidlālāt

- Prophetic Qawl
 - §§37 (SH; *qaḍā* Rasūl Allāh...; SH *tafsīr* links efficient properties to the *mas’ala* at hand); 52 (SH; *qaḍā* Rasūl Allāh...); 239 (AH); 247 (Ahl al-Baṣra); 254 (SHAP of Mashriqiyyūn); 1075 (SH); 1077 (SH; combined with *ijmā’* and [ambiguous] *ma’nā* of Q.2:178)
- Prophetic Fi’l
 - §§64-5 (SH; 3x; accompanied by *tafsīr* of his hermeneutic); 261 (SH; *ḥadīth* is used incidentally as supporting *dalīl* to illustrate usage of *lafẓ* contended by SHAQ); 276 (IAL); 543 (SHAP); 1125 (AH; reported by al-Sarakhsī); 1225 (SH; accompanied by SH *tafsīr*)

⁷ See our section on “Select Additional Elements from Presentation Categories C through G,” below.

⁸ Of course, although the normative materials of the Qur’ān are impressive in size and scope (not only by way of direct application to subsumable ritual and transaction, but as base-*uṣūl* for extension, and sources of general principles), its overall substantive corpus is dwarfed by that of the *sunan*. This difference in substantive contribution may also have bearing on the relative infrequency of *istidlālāt* and *i’tirādāt* in the domain of *Kitāb* within our subject-text.

⁹ *Early Islamic Legal Theory*, 23ff. and *passim*.

- undetermined type
 - §§78 (SH; general appeal to Sunna as witness to *farq* between ‘*itq* and all other transactions); 1410 (SH; as *mufassir* to Q.2:230)

I’tirādāt

From the Perspective of the *Isnād*

- Indeterminate: it is *min wajhin wāḥidin lā yuthbituhu Ahl al-Ḥadīth kulla al-tathbīt*
 - §667 (SH; dismissing possible exception to his hypothetical *mu‘āraḍa*)
- Indeterminate: it is *ghalaṭ*, because “*al-Ḥuffāz lam yahfazū hākadhā*”
 - §1119 (SH)

From the Perspective of the *Matn*: *Qawl Muḥtada’*

- *da‘wā al-ijmāl*
 - *da‘wā al-ijmāl* re: the *Shar‘*
 - (Shīr.II.C.3.1; Bāj.II.2.2.3.2)
 - §53 (SH)
 - he claims *ijmāl* re: the *lughā*; *al-munāza‘a fi’l-‘āmm*: he claims *ijmāl* for it
 - (Shīr.II.C.3.2; Bāj.II.2.2.3.2)
 - §247 (SH)
 - P’s *ḥadīth* is *jumla*; Q’s is *mufassir*: §255 (SH; supported by *adilla*: *āthār-qawls* of ‘Umar, Abān b. ‘Uthmān, and al-Ḥakam, and later by other *āthār*)
- *al-mushāraka fi’l-dalīl*
 - (Shīr.II.C.4; Bāj.II.2.3.1.2)
 - §544 (SH employs the same *ḥadīth* as *dalīl*, but focuses upon a different *lafẓ*)
- *al-naskh bi-‘amal al-Ṣaḥāba bi-khilāfihi*
 - (Shīr.II.C.6.3; Bāj.II.2.5.3)
 - §1126 (IAL/[old] AY; implied by al-Sarakhsī’s report)
- *mu‘āraḍa bi’l-nuṭq*
 - (Shīr.II.C.8.1; Bāj.II.2.7.1)
 - §§248 (SH; x2); §544 (SH; counter-*ḥadīth* introduced by *alā tarā*)
- *mu‘āraḍa bi’l-‘illa*
 - general
 - (Shīr.II.C.8.2; Bāj.II.2.7.2)
 - §1126 (IAL/[old] AY; implied)
 - when the Sunna is ‘*umūm*, allowing the possibility of *takhṣīṣ*
 - (Shīr.II.C.8.2.3; Bāj.II.2.7.2.3)
 - §248 (SH); §257 (SH)
 - *Jawāb*: Shīr. and Bāj. recommend arguing against the Q’s *dalīl* so as to eliminate it, then persist in his *istidlāl* from the ‘*umūm*
 - §258 (SHAP)

From the Perspective of the *Matn*: *Fī’l*

- *al-mushāraka fi’l-dalīl*
 - (Shīr.II.E.4; Bāj.II.4.5)
 - §544 (SH; hypothetical; SH does not in fact concede that the concerned *ḥadīth* bears what SHAP has claimed of it, but if it did...)
- *al-mu‘āraḍa*
 - by way of ‘*illa*

- (Shīr.II.E.8.2; Bāj.II.4.9.3.2)
 - §274 (AH)

Tarjihāt

- *Isnād*-Oriented
 - one of the two is more narrated, so it is *awlā*
 - (Shīr.IX.1.5; Bāj.XVI.1.1.3)
 - §248 (SH)
- *Matn*-Oriented
 - the *khābar* is *muwāfiq* to another *dalīl* from an *aṣl*, or *ma‘qūl aṣl*
 - (Shīr.IX.2.1)
 - §§276 (IAL; continuation of Prophet’s transaction at Khaybar under the reigns of Abū Bakr and ‘Umar); 276 (IAL; “*innamā qiyās hādihā ma‘a al-athar*”); 1226 (SH; supports his *istidlāl* by way of Sunnaic *fi’l* with allusion to unnamed Ṣaḥāba)

Considering we are working from a single treatise, and confined as we are at present to mostly “overtly dialectical” material, there are a surprising number of arguments which fall into the categories of later *jadal*-theory in the domain of Sunna. In fact, with regard to larger subcategories, we are only missing representatives of *istidlāl* and *i‘tirāḍāt* with regard to the Prophet’s *iqrār*, and *i‘tirāḍāt* oriented to the Prophet’s *qawl khārij ‘alā al-sabab* (al-Bājī’s *Sunna wārida ‘alā al-sabab*).¹⁰ Of particular note with regard to our samples of proto-system *istidlāl bi’l-Sunna* are the following: 1) al-Shāfi‘ī’s *tafsīr* not only of the contents of a particular *khābar*, but of his own hermeneutic; 2) the support of his Sunna-interpretation via elements from other *uṣūl* (Qur’ān and *Ijmā‘*); and 3) his employing Sunna as *mufassir* to Qur’ān, and as an incidental *dalīl* for *lafz*-interpretation with regard to another Sunnaic *aṣl*. These are legal theoretical elements which go beyond the mere claim of Sunnaic consonance for one’s solution to the *mas’ala* at hand, and have all been brought forth in a dialectical venue.

As far as *i‘tirāḍāt* and *tarjihāt* in this domain, we are also offered a number of insights with regard to proto-system practice. First of all, we will note the vague form which al-Shāfi‘ī’s transmission-oriented objections often take; and this assessment applies to the greater part of our subject-treatise. This is certainly not to say that al-

¹⁰ This is not to say, of course, that such did not occur in the abbreviated *ikhtilāf* of our text, or elsewhere in the *Umm*. Also, as one examiner of this dissertation has pointed out, perhaps we need not be surprised by the amount of Sunnaic *istidlālāt* and *i‘tirāḍāt* at all, considering: 1) its superior substantive contribution; 2) its doctrinal diversity; 3) its plurality of sites for *ikhtilāf*, as a domain of *istidlāl* (with a number of textual and transmission considerations); and 4) the contestation, by a number of contemporaries, of the epistemological and hermeneutical authority granted to it by al-Shāfi‘ī.

Shāfi‘ī was not a master of (and contributor to) the transmission-theory of his time — we will discuss incidences where elements of his theory arise in the course of objection in the latter half of Chapter IV. In the main, however, his objections are formulated as “the Ahl al-Ḥadīth do not confirm its like.” Significantly, the other jurists of our treatise are quite silent with regard to transmission-oriented objections, although we must not assume that such did not play a role in the much abbreviated accounts of their arguments, or elsewhere in their dialectical encounters.

With regard to *matn*-oriented dialectical moves, we may highlight a number of features, as follows: 1) a concern with *ijmā‘*, and the appearance of al-Shāfi‘ī’s *jumla-mufassir* distinction in a Sunna-to-Sunna encounter; 2) the repeated practice of critiquing an opponent’s interpretation of a particular *lafẓ*; 3) the preponderating of one’s Sunnaic *dalīl* by way of supporting *adilla* of a weaker epistemic value; 4) the *mu‘āraḍa* of *ḥadīth* by *ḥadīth*; and 5) the supplanting of an opponent’s conception of an efficient property with one’s own conception (*al-mu‘āraḍa bi’l-‘illa*). Once again, all of these features depend upon legal-theoretical methods which go beyond a mere claim that one’s ruling is more in consonance with the Prophet’s Sunna. There is a developed hermeneutic in place, and the fine-honing of epistemic justification through dialectical encounter is plain to see.

Ijmā‘

Istidlālāt

- §1077 (SH; *ijmā‘* on two substantive rulings is combined with a Sunnaic *qawl* and claimed to be “in the *ma’nā* of” Q.2:178)
- [*ijmā‘* as *aṣl* for *qiyās*]¹¹
 - §§274-5 (AH; *ijmā‘* re: *aṣl* reported by al-Ṭabarī); 277 (IAL/AY; *ijmā‘* re: *aṣl* reported by al-Ṭabarī); 691 (SH; *ijmā‘* re: *aṣl* stated clearly); 1075 (SH; *al-qiyās ‘alā al-ijmā‘*)
- [Q’s general charge: P’s violation of [*mā*] *za‘ama al-nās*; and of the *madhhab al-‘amma*]¹²
 - §§696 (SH; twinned with *naqḍ* as component of “*naqḍ dilemma*”); 703 (SH; “If you rule X, you contradict the *madhhab* of the ‘*amma*,” violation of *ijmā‘* is first option of “*naqḍ-dilemma*”)

I’tirāḍāt

- against *istidlāl bi-ijmā‘ al-Ṣaḥāba: muṭālaba bi-taṣḥīḥ al-ijmā‘*

¹¹ Properly speaking, this is *istidlāl bi’l-qiyās*, not *istidlāl bi’l-ijmā‘*; I have included *ijmā‘* as the *aṣl* of *qiyās* in this domain simply to underscore that *ijmā‘* appears to have been employed by our jurists as an *aṣl* with some frequency.

¹² Again, these instances properly belong to another domain — as components of a “*naqḍ dilemma*” (a unique argument strategy of al-Shāfi‘ī’s we will explore shortly). I have included it here, however, as the *ijmā‘* which the opponent will appear to violate is also the *ijmā‘* forming the basis of the questioner’s *istidlāl*.

- (Shīr.III.2; Bāj.III.1.1)
 - §§635 (AH; implied); 636 (IAL; implied); 639 (SH; implied); 1402 (AH; implied by al-Sarakhsī’s report); 1405 (SH; implied; *āthār-qawls* of five of the Ṣaḥāba)
- against *istidlāl bi-ijmā‘ al-Ṣaḥāba*: *khilāf* of another Ṣaḥābī
 - (Shīr.III.3; Bāj.III.1.2)
 - §§635 (AH; implied); 636 (IAL; implied); 637 (IAL; implied; *āthār* increased from one to three); 639 (SH; implied; *khilāf* of three *āthār-qawls* [same as IAL]); 640-1 (SH; raise own *āthār* to four, AH *āthār* to five; then clearly indicates *khilāf* of Ṣaḥāba); 1402 (AH; implied by al-Sarakhsī’s report); 1405 (SH; implied; *āthār-qawls* of five of the Ṣaḥāba)

Although our samples of *ijmā‘*-oriented *i‘tirāḍāt* are entirely of the “implied” sort, we should note that our *istidlālāt* are either reported by al-Ṭabarī or clearly stated in our subject-text. Moreover, there are a number of incidents awaiting further investigation from other presentation categories. That being acknowledged, we may highlight the following features with regard to this small set of early *ijmā‘*-oriented dialectical moves: 1) al-Shāfi‘ī’s skilful blending of *ijmā‘* with Sunna and Qur’ān for the accretion of epistemic justification; 2) a common role for *ijmā‘* in sanctioning an *aṣl* for *qiyās* with all key jurists of our subject-text; 3) al-Shāfi‘ī’s formulae of “[*mā*] *za‘ama al-nās*,” and “*madhhab al-‘amma*” (both of which harmonize with Aristotle’s *endoxa*-set); 4) the absence — so far as we can immediately discern — of reference to subcategories of *ijmā‘*; and 5) the absence of demands for *taṣḥīḥ* of one’s claim of *ijmā‘* (beyond the domain of *ijmā‘ al-Ṣaḥāba*).¹³

As for the two objections against *ijmā‘ al-Ṣaḥāba* we have listed, these are mostly the result of our conjecture as to how our jurists might have employed their collections of supporting *āthār* when confronted with an opposing set. On the whole, and hesitant as ever to generalize, our subject-text provides little indication that *ijmā‘* was conceived of in anything like the more sophisticated manner of later *uṣūl* and *jadāl*-theory systems. On the other hand, what little we have encountered in the way of *ijmā‘*ic formulae and application corresponds well with the dialectic of Aristotle’s *Topics*, from two perspectives: 1) appeals to *ijmā‘*, to “[*mā*] *za‘ama al-nās*,” and to the *madhhab al-‘amma*

¹³ Of course, this may indicate nothing more than that such demands were unnecessary with regard to the limited *masā’il* of *ikhtilāf* with which our treatise is concerned.

(paralleling subsets within Aristotle’s larger *endoxa* set); and 2) the employing of *ijmā’*-sanctioned rulings as *uṣūl* for *qiyās* (paralleling Aristotle’s use of *endoxa* premises).¹⁴

¹⁴ Twinned with the hierarchy of epistemic authority inherent to our jurists’ Islamic argument episteme (God, Sunna, *ijmā’*, *qiyās*, etc.), this latter parallel (the use of *endoxa* premises) may be said to extend to the full gamut of epistemic justifications in Islamic legal theory. Moreover, we may observe that it was juridical disputation that largely determined what these *endoxa* premises themselves would be. Thus, juridical *jadāl* at once depended upon, and determined, what was *endoxon* for the Muslim jurist. We will revisit this notion in Chapter IV.2.

Qawl al-wāḥid min al-ṣaḥāba

Istidlālāt

- One Companion
 - §§52 (SH; *athar*-judgment of ‘Umar, in support of Sunnaic judgment; SH *tafsīr* shows his ‘illa (and *sabab/ḥikma*) at work in this *athar dalīl*); 89 (AH; *athar-qawl* of Ibn ‘Abbās; reported by al-Sarakhsī); 90[a] (IAL; *athar* of ‘Ā’isha; reported by al-Sarakhsī); 92-3 (RB relating SH; *athar-qawl* of Ibn ‘Abbās); 636 (IAL; *athar-qawl* of ‘Alī); 1061 (SHAP; *taqlīd* of ‘Umar b. al-Khaṭṭāb); 1067, 1069-70 (AH; *athar-fi’l* of Ḥasan b. ‘Alī; al-Sarakhsī reports this was also ‘Alī’s dying wish — i.e., it is also an *athar-qawl* of ‘Alī);¹⁵ 1126 (IAL/[old] AY; reported by al-Sarakhsī; *athar-fi’l* of ‘Alī); 1313[b] (AH; *athar* of Ibn ‘Abbās); 1318 (SHAP; same *athar* of Ibn ‘Abbās employed by AH in §1313[b])
- Two Companions
 - §§241 (IAL; enforced Caliphal decree is *qawl* of Ḥijāzīs = *āthār-qawls* of ‘Alī and Ibn ‘Abbās); 279 (IAL/AY; *āthār-af’āl* Sa’d b. Abī Waqqāṣ and Ibn Mas‘ūd; used to support *ḥukm* extended by *qiyās*); 1406 (SHAQ; *āthār-qawls* of Ibn ‘Umar and Ibn ‘Abbās)
- Multiple Companions (in the attempt to preponderate another *aṣl*, or show *ijmā’ al-ṣaḥāba*, or simply by way of *taqlīd*)
 - §§242-4 (SH; *āthār-qawls* of ‘Umar, Abān b. ‘Uthmān, and al-Ḥakam; used as *adilla* for *i’tirāḍ* against *istidlāl bi’l-Sunna*); 267 (SH; ‘Umar I, ‘Uthmān; and some Successors: ‘Umar II and others; used incidentally to support SH *ḥadīth* interpretation); 278 (IAL/AY; *āthār-af’āl* of ‘Umar, Ibn Mas‘ūd, and ‘Uthmān; used to support *aṣl* for *qiyās*); 635 (AH; *āthār-qawls* of Abū Bakr, Ibn ‘Abbās, ‘Ā’isha, Ibn al-Zubayr); 637 (IAL; *āthār* increased by addition of *āthār-qawls* of Zayd b. Thābit and Ibn Mas‘ūd); 639 (SH; *āthār-qawls* of Zayd b. Thābit, ‘Alī, and Ibn Mas‘ūd [same as IAL]); 640 (SH; *āthār* increased by addition of *athar-qawl* of ‘Uthmān)
- Unstated Number of Companions
 - §§1054 (IAL; *taqlīd* of the *athar* re: ‘*anāq* and *jaḥra*; confirmed by al-Sarakhsī, with a host of other supports, all of which constitute *istiḥsān*); 1226 (SH; as support for his *istidlāl* by way of Sunnaic *fi’l*); 1405 (SH; *athar-qawl* of ‘Umar, and other *kibār Aṣḥāb al-Nabī*; al-Sarakhsī reports: *āthār-qawls* of ‘Umar, ‘Alī, Ubayy b. Ka’b, ‘Imrān b. al-Ḥuṣayn, and Abī Hurayra)
- Mixed: Two Companions and Several Successors (in attempt to show *ijmā’*, or to preponderate the *athar-qawl* of a Companion, or simply by way of *taqlīd*)
 - §1402 (AH; reported by al-Sarakhsī: *āthār-qawls* of Ibn ‘Abbās, Ibn ‘Umar, Ibrāhīm, and the *aṣḥāb* of ‘Abd Allāh b. Mas‘ūd)

I’tirāḍāt

- *qawl al-wāḥid min al-ṣaḥāba idhā lam yaḥzar* is not *ḥujja* (al-Bājī)
 - §§283 (SH; *matn* of opposing *āthār* is “not confirmed by its like”); 1061 (SH claims that SHAP’s *dalīl* is a *qawl al-wāḥid min al-ṣaḥāba* [using the descriptor *waḥdahu*], and that he has no other *ḥujja*)
- advancing *qiyās* over *qawl al-wāḥid min al-ṣaḥāba*
 - (Bāj.V.1)
 - §§1061 (SH); 1316 (AY/MIH)

¹⁵ We will note that our lens-texts do not treat the *af’āl* of Ṣaḥāba as a category for *istidlāl*.

- conveyance of *khilāf* from one of the Ṣaḥāba
 - (Shīr.IV.3; Bāj.V.2)
 - §§89 (AH; implied by al-Sarakhsī’s report); 90[a] (IAL; implied by al-Sarakhsī’s report); 635 (AH; *khilāf* of four Ṣaḥāba against IAL *athar*); 636 (IAL; *khilāf* of one); 637 (IAL; *āthār* increased from one to three); 639 (SH; *khilāf* of three *āthār-qawls* [same as IAL]); 640 (SH; *āthār* increased from three to four); 1061 (SH; 2x); 1319 (SH; unique “hypothetical” *i’tirāḍ*; he maintains the same principle of *isnād*-critique against the *khilāf-athar* he brings, as he does against the *athar* he opposes); 1402 (AH; implied by al-Sarakhsī’s report: *āthār-qawls* of Ibn al-‘Abbās and several Successors); 1405 (SH; implied; *āthār-qawls* of five of the Ṣaḥāba)
- *an yu’arīḍahu bi’l-naṣṣ Kitāb aw Sunna*
 - (Shīr.IV.2)
 - §§1052 (AH; the *nuṭq* is Q.5:95; introduced by *alā tarā ilā*); 1061 (SH; the *nuṭq* is Q.5:95); 1078 (SH; the *nuṭq* is a Sunnaic *qawl*); 1125 (AH; reported by al-Sarakhsī; the *nuṭq* is a Sunnaic *fi’l*)

As should now be quite evident, by far the most numerous subset of *aṣl* (as opposed to *ma’qūl aṣl*, which is also abundant) employed for both *istidlāl* and *i’tirāḍ* in the *Ikhtilāf al-‘Irāqīyyīn* is *āthār* of the Ṣaḥāba. Adding to the important role of *āthār* in our window on proto-system *jadal*, we will note that transmission-oriented objections with regard to them (not treated here, but see below) enjoy a significant presence in our subject-text. Moreover, objections of this kind consist of the same arguments employed against faulty transmissions of Prophetic Sunna (although such a transmission-oriented mode of *i’tirāḍ* does not seem to have been treated by our lens-texts with specific regard to *āthār*).

With regard to *istidlālāt* from *āthār*, we should note first of all that our lens-texts are concerned only with *qawls* of singular Companions which bear no indicant of wide-spread adherence. The convention of categorizing by one, two, or multiple Ṣaḥāba is my own, and has been prompted by two considerations. First, I thought it quite likely that, just as the *khabar al-wāḥid* may have more than one transmitter at any, or all stages of transmission, requiring only a falling-short of the conditions for *tawātur* to be labelled *wāḥid*; so too might the matching *aqwāl* of two, or even three Ṣaḥāba still be considered in the domain of *qawl al-wāḥid min al-Ṣaḥāba*, requiring only a falling-short of the conditions of *ijmā’ al-Ṣaḥāba* to be labelled as *wāḥid*. Any positive claims as to this supposition on my regard must await a great deal more of research and comparison, however.

A second consideration triggering my convention was to see if, by isolating references to one or two Companions from references to multiple Companions, some sort of pattern would emerge. To a certain extent, we may say that one has, and may be described in the following terms. The singular *athar* of a Companion constituted a kind of lower-epistemic-grade glass weight which, in the absence of stronger *adilla*, could tip the scale in favour of a particular solution to the *mas’ala* at hand. As a source for *taqlīd*, of course, it could stand on its own, but would immediately be outweighed by a stronger *dalīl* from Kitāb, Sunna, or even *qiyās* (see, e.g., §§1052, 1061, 1125, and 1316). In consonance with another *dalīl*, however, the *qawl* of a Companion would only add to that *dalīl*’s utility for epistemic justification (witness, among others, §§52; 92; 278-9; 1054). Moreover, in sufficient numbers, matching *aqwāl* of Companions might provide indicant for the reinterpretation (§§242-4) or even *naskh* (implied in §1126) of Prophetic Sunna itself.

Not surprisingly, we find *āthār* of Companions playing a number of roles in *i’tirāḍāt* outside the domain of *qawl al-wāḥid min al-Ṣaḥāba* (i.e., besides against each other, as above in the numerous instances of “conveyance of *khilāf* from one of the *Ṣaḥāba*”). Within this domain, however, a few more points are worthy of highlighting: 1) al-Shāfi’ī’s epistemic devaluation of opposing *āthār* because it is “not confirmed by its like,” or it is “*waḥdahu*” — unaccompanied by another *dalīl*; 2) the apparent advancing of *qiyās* over *āthār* by both Ibn Abī Laylā and al-Shāfi’ī; 3) the balancing of *āthār*-set against *āthār*-set we witness in §§635ff., resulting in al-Shāfi’ī’s observation that *khilāf* was split down the middle between opposing Companion-sets; and 4) al-Shāfi’ī’s “hypothetical” *i’tirāḍ*, whereby he critiques his opponent’s *athar* by showing he can bring one of equally problematic transmission but conveying the opposite *ḥukm*. Once again, arguments such as these go beyond mere claims that one’s ruling is consonant with the *qawl* of a *Ṣaḥābī*; they draw deeper into argument axioms of preponderance, epistemology of *qiyās*, and epistemic valuation of conveyance-modes. This is proto-system legal theory wrought in the dialectical forge, and we will revisit some of these incidents later in Chapter IV.2. As for now, we will turn to the second superset of *adillat Shar‘iyya*, the *ma’qūl aṣl* and its subsets of *faḥwā al-khiṭāb*, *dalīl al-khiṭāb*, *ma’nā al-khiṭāb*, etc.

Laḥn al-Khiṭāb, Faḥwā al-Khiṭāb, Dalīl al-Khiṭāb, and al-Ḥaṣr

We may note first off that no incidences corresponding to *laḥn al-khiṭāb* or *al-ḥaṣr* were encountered in the course of our analyses. This indicates nothing more than

the absence of *adilla* with contended features relevant to these categories in the relatively few *masā’il* of *ikhtilāf* we have fully explored in this dissertation. Nor are the merely singular occurrences of *faḥwā al-khiṭāb* and *dalīl al-khiṭāb* — and those only in the domain of *istidlāl* — particularly indicative of anything by their low representation.¹⁶ As for the former, we will recall that al-Shāfi‘ī’s opponent was reported as arguing, from Sunnaic basis, that if *mushrikāt* who never believed are not to be killed, then the apostatizing *mu’mīna* should be *awlā* with regard to not being killed (§1320). This is *faḥwā al-khiṭāb* of the species *a minore ad maius*, where the *khiṭāb* is the Prophet’s, and he “cites the *adnā*, so that the *a’lā* be indicated by it.” And as for the latter, we have seen al-Shāfi‘ī himself infer from the *naṣṣ* of Q.2:282 — whereby God allows *dayn ilā ajal musamman* — that God does not allow *dayn ilā ajal ghayr musamman* (§91).¹⁷ This is *dalīl al-khiṭāb*, and, as we recall, it bore the additional stamp of conforming to Ibn Surayj’s stipulation that God’s *khiṭāb* be expressed via *lafẓ al-sharṭ*.

Ma’nā al-Khiṭāb (al-Qiyās)

Istidlālāt

- *qiyās al-‘illa*
 - *Jalī*
 - §§274-5 (AH; efficient property indicated; al-Ṭabarī reports *aṣl* and *‘illa* and that *aṣl* enjoys sanction of *ijmā’ al-kull*); 691 (SH; *‘illa* of two efficient properties; *aṣl* is *ijmā’*); 1075 (SH; *al-qiyās ‘alā al-ijmā’*)
 - undetermined subtype
 - §§35 (SH; *‘illa* and *aṣl* clearly indicated); 1310 (AH; *‘illa* and *aṣl* reported by al-Sarakhsī); 1311 (IAL; *aṣl* reported by al-Sarakhsī)
- Type I *qiyās al-dalāla*
 - §§540 (SH; hypothetical; in context of *method-naqḍ*, showing what SHAP should have done to be consistent in his *qiyās-method*); 643 (SHAP of Ahl al-Kalām; via three *endoxa khiṣāl*: *ḥukm A*, *ḥukm B*, and “nominal” *waṣf*);¹⁸ 1227 (SHAQ; by way of objection: “*aṣl X* and *far’ Y* share a common *ḥukm A*; how is it you deny they also share *ḥukm B*?”)
- Type II *qiyās al-dalāla*
 - §1410 (SH; *aṣl* and the *far’* are *naẓā’ir*, *aṣl* is clarified by a *mufasssir-hermeneutic* combining *istidlāl bi’l-Kitāb* with *istidlāl bi’l-Sunna*)

¹⁶ We have also uncovered further occurrences of each of these latter in other presentation categories, see our “additional elements” section below.

¹⁷ Of note, too, is that SH further supported his argument with *tafsīr* via *dalāla* from other āyas: Q.2:189, 22:28, 2:233.

¹⁸ Note the similarity between SHAP’s usage of *khaṣla/khiṣāl* and al-Shīrāzī’s usage of *khaṣīṣa*.

- Type III *qiyās al-dalāla*: *qiyās al-shabah*
 - §§157 (SH); 277 (IAL/AY; *aṣl* introduced via *alā tarā*; *aṣl* and *aḥkām* supported by *āthār*; al-Ṭabarī reports *aṣl* and ‘*illa* and that *aṣl* enjoys sanction of *ijmā‘ al-kull*);¹⁹ 285 (SHAQ; same as IAL/AY in §277)
- Indeterminate Type of *Qiyās*
 - §§785 (SH); 1125 (AH; reported by al-Sarakhsī); 1126 (IAL/[old] AY; reported by al-Sarakhsī); 1128 (SHAP); 1130 (SHAP); 1316 (AY/MIH; *aṣl* is Sunnaic prohibition)

I‘tirādāt

- against *al-ta‘līl bi’l-ism*, *ḍarb 1* (al-Baṣrī)
 - §649 (SH; note that his opponent, who is doing *qiyās* based on the *ism al-ubuwwa*, is of the Ahl al-Kalām)
- *man‘ al-waṣf fi’l-far‘*:
 - (Shīr.VII.4; Bāj.IX.6.1.1)
 - §§89 (AH; implied); 90[a] (IAL; implied); 155 (SH); 662 (SH; this *mas‘ala* cannot be a *far‘*, because it shares no *ma‘nā* with an *aṣl*)
 - *Jawāb*: *tafsīr* and *dalāla*
 - §89 (AH; implied by al-Sarakhsī’s report)
- *al-qawl bi-mūjib al-‘illa*:
 - (Shīr.VII.9.2; Bāj.IX.8)
 - §90[a] (IAL; implied by al-Sarakhsī’s report)
- *al-naqḍ* (Shīr.VII.7)
 - against an ‘*illa* which is “*wuḍi‘a li’l-jins, fa-huwa bi-manzilat al-ḥadd*”
 - (Bāj.IX.B.11.1)
 - §§693-700 (SH); 700-703 (SH); 702 (SH) [sequence = components of “*naqḍ-dilemma*” which is sprung in §§703-4]; 740-1 (SH; rhetorical *elenchus* in §741; SHAP is silenced); 743 (SH; double *naqḍ*; *masā’il al-naqḍ* delivered by *ara’ayta*); 1125 (AH and/or al-Sarakhsī; *alā tarā* introduces *mas’alat al-naqḍ*)
 - against an ‘*illa* which is “*wuḍi‘a li-ithbāt al-aḥkām fi’l-a’yān*”
 - (Bāj.IX.B.11.2.1)
 - §§536 (SH; double charge of *naqḍ*); 1229 (SH; *alā tarā* introduces *mas’alat al-naqḍ*); 1231 (SH; double charge of *naqḍ*)
 - *Jawāb*: “he prevents / does not concede to the *mas’alat al-naqḍ*”
 - §1230 (SHAP)
- *al-qalb*
 - (Shīr.VII.14.1) or (Bāj. IX.B.9.2)
 - *qalb bi-ḥukm maqṣūd* or *qalb bi-ba‘ḍ awṣāf al-‘illa*
 - §651 (SH); 653 (SH; *ara’ayta*); 655-60 (SH; hypothetical *qalb* in stages)

¹⁹ Even though al-Ṭabarī provides an ‘*illa*, we will include this under *qiyās al-shabah* because the efficiency of the disputed *awṣāf* is not addressed in our dialectical sequence, and the language employed is suggestive of *qiyās al-shabah*. It may be that these details had not been worked out at this time — indeed, were in the very process of being determined — and al-Ṭabarī’s ‘*illa* was confirmed at a later date.

- *‘adam al-ta’tthīr*
 - regarding a *waṣf* for which the *‘illa* is not destroyed by its elimination
 - (Shīr.VII.6.2; Bāj.IX.B.14.2)
 - §1129 (SH; SHAP’s *waṣf* shown to have no relevance to efficiency of the *‘illa*)
- *fasād al-i’tibār*
 - known by way of the *uṣūl*
 - (Shīr.VII.12.2.2; Bāj.IX.B.10.2.2)
 - §§78 (SH; foreshadowed); 80 (SH; *aṣl* may not serve as an *aṣl* due to general *farq* demonstrated in a number of *masā’il al-furūq*); 1316 (AY/MIH; NB: this is the very example we find in the *jadāl*-theory texts); 1320 (SHAP; implied)
 - *Jawāb*: confirmation of *taswīya* between *aṣl* and *far’*
 - §1326 (SH; NB: this is the very *jawāb* we find in al-Bājī)
 - *al-mu‘āraḍa*
 - *mu‘āraḍa bi’l-nuṭq*
 - (Shīr.VII.15.1; Bāj.IX.B.15.1)
 - §§37 (SH; the *nuṭq* is Sunnaic judgment); 64-5 (SH; opponent’s attempted *qiyās* from an exception-*khābar* is blocked by *tafsīr* and argument from Sunnaic *adilla*); 276 (IAL; implied; the *nuṭq* is Sunnaic *fi’l*); 282 (SH; the *nuṭq* [x2] is Sunnaic proscription and *fi’l*); 288 (SH; the *nuṭq* is Sunnaic proscription); 703 (SH; the *nuṭq* is *ijmā’*); 1219 (SH; implied); §1225 (SH; the *nuṭq* is Sunnaic *fi’l*)
 - *mu‘āraḍa of qiyās by qiyās (al-Baṣrī)*; or *mu‘āraḍa bi-‘illa muḥtada’a*
 - (Shīr.VII.15.2.1; Bāj.IX.B.15.2.1)
 - §§155 and 157 (SH); 691 (SH; implied); 1061 (SH); 1125 (AH and/or al-Sarakhsī); 1126 (IAL/[old] AY; implied)
 - *mu‘āraḍa bi-‘illat al-aṣl (al-farq bi-qiyās al-‘illa; bi-‘illat al-ḥukm)*
 - (Shīr.VII.15.2.2.1; Bāj.IX.B.15.2.2.1.1)
 - §§64 (SH; hypothetical; were it not for the exception-*khābar*, SH would supplant opponent’s *‘illa* with that derived from “the *aṣl* of our *madhhab*”); 277 (IAL/AY; *‘illa* reported by al-Ṭabarī); 1310 (AH; strongly indicated by al-Sarakhsī’s report); 1311 (IAL; suggested by al-Sarakhsī’s report)
 - *mu‘āraḍa bi-‘illat al-aṣl (al-farq bi-qiyās al-dalāla)*
 - (Shīr.VII.15.2.2.2.1; Bāj.IX.B.15.2.2.2.1)
 - §§662-7 (SH; hypothetical)
 - *mu‘āraḍa bi-‘illat al-aṣl (al-farq bi-qiyās al-shabāh)*
 - (Shīr.VII.15.2.2.3; Bāj.IX.B.15.2.2.2.4)
 - §288 (SH; hypothetical [he does not actually believe *qiyās* obtains here])
 - Indeterminate subtype of *mu‘āraḍat al-‘illa bi’l-‘illa*
 - (Shīr.VII.15.2; Bāj.IX.B.15.2)
 - §§1218[b] (AY); 1406 (SHAQ; his *qiyās* having been performed by the “younger set” of Ṣaḥāba)
 - Indeterminate type of *farq*
 - §§1125 (AH and/or al-Sarakhsī; *zinā* is *makhṣūṣ* among its *naẓā’ir*); 1131 (SH; *farq* between SHAP’s *aṣl* and *far’*; but SH’s overall objection

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appears to be *muʿāraḍa biʿl-nuṭq*); 1219 (SH; implied); 1228ff. (SH; *farq* against SHAQ’s *qiyās al-dalāla*; but SH’s overall objection appears to be *muʿāraḍa biʿl-nuṭq*)

Tarjīḥāt

- Indeterminate *tarjīḥ al-maʿānī*:
 - §§236 (AH; implied); 238 (IAL; implied); 245[a] (SH; implied)

This remarkable array of *qiyās*-oriented *istidlālāt* and *iʿtirāḍāt* should impress upon the reader a number of important points, not least of which is a confirmation of Hallaq’s observation: “*Qiyās*, the primary method of legal reasoning in Islamic law, is indeed the focal point of dialectic.”²⁰ From what we see in the *Ikhtilāf al-ʿIrāqīyyīn*, this was just as true in the second century H as it was in al-Baṣrī’s day, and after. Even in the limited number of *masāʾil* we have analyzed, the full gamut of al-Shīrāzī’s *qiyās* typology is represented, along with a remarkable number (seven from fifteen) of *qiyās*-oriented *iʿtirāḍāt*, including the full range of *muʿāraḍāt*. Such a showing is of tremendous import to our window on proto-system *jadāl*, and a thorough examination of *qiyās*-oriented *istidlāl* and *iʿtirāḍ* in the *ikhtilāf* treatises of the *Umm* would deserve a dissertation all its own. For the time being we must limit ourselves to a few general remarks.

Most important is the following: Although expressed in a different language of *maʿānī*, or indirectly through markers such as “*liʿannahū* X,” and “*kamā* Y,” etc., with the terms *ʿilla* and *wasf* entirely absent,²¹ and *ṣifa* occurring only in a non-technical sense, and none of the language of *ṭard* and *ʿaks*, *jarayān* and *taʿthīr*; despite this, all of it, the proto-system method of *qiyās* revealed in our subject-text was very nearly as complex *in practice* as the full-system methods which theorists would formulate centuries later. What we may observe in the table above is thus ample evidence to support a primary premise prompting the research and writing of this dissertation: Philological studies of legal-theoretical terms, and the comparison of these terms between earlier and later periods, are — though important procedures in a larger study — insufficient, by themselves, for revealing the real nature of proto-system legal theory and disputation. We must also analyze, to the depth that we are able, the *argumentation* of early jurists, in order to understand the relative sophistication of their methods. And nowhere is this more urgent than in the domain of *qiyās*-oriented *istidlāl* and *iʿtirāḍ*.

²⁰ “Treatise,” 200.

²¹ *ʿIlla* in fact does occur in §1045, but in the sense of “sickness” (*marāḍihim wa ʿillatihim*). We will note, however, that is not entirely absent from the *Umm* in a technical, legal-theoretical sense, and would direct the reader to our translation in appendix II. §1417 of Part II of this dissertation.

That being noted, we will briefly highlight a number of features before moving on. As for *al-istidlāl bi-ma‘nā al-khiṭāb*, observe: 1) al-Shāfi‘ī’s frequent resort to “hypothetical” *istidlāl*, wherein he in fact does not believe *qiyās* to obtain in the *mas’ala* at hand, but nevertheless pursues a *qiyās*-method “for argument’s sake” in order to problematize his opponent’s reasoning; 2) a SHAP of the Ahl al-Kalām employs the term *khaṣṣa/khiṣāl* in much the same way that al-Shīrāzī employs the term *khaṣṣa/khaṣā‘is*, both in the domain of *qiyās al-dalāla*; 3) al-Shāfi‘ī’s once again skilful blending of *adilla*, clarifying his *aṣl* for Type II *qiyās al-dalāla* via a Kitāb-Sunna *mufasssir*-hermeneutic; and 4) again, the relevant frequency with which *uṣūl* for *qiyās* are sanctioned by *ijmā‘*.

As for *i‘tirāḍāt*, we will first note that a SHAP of the Ahl al-Kalām performs *qiyās* based, in part, on the *ism al-ubuwwa*, and that al-Shāfi‘ī refutes him in a manner later suggested by al-Baṣrī. Now, being that 1) al-Baṣrī is the only *jadāl*-theorist to treat *al-ta‘līl bi’l-ism* as a domain for *i‘tirāḍ*; and 2) he was also a significant figure in the history of the Mu‘tazila; we might ask: was *al-ta‘līl bi’l-ism* a technique particularly employed by dialectical theologians from the second century through to al-Baṣrī’s day? Though we must leave this question as yet another open door, we will nevertheless mark *al-ta‘līl bi’l-ism* as a site for potential (and early) cross-germination between speculative and normative epistemic projects.

Returning to the above *i‘tirāḍāt*, we will only further note the astonishing frequency of charges of *naqq*, *qalb*, *fasād al-waḍ‘*, and *farq*, along with the numerous arguments by which *‘illa* and *qiyās* are supplanted by way of *mu‘āraḍa*. Many of these instances are accompanied by our familiar dialectical formulae, and we have every reason to believe that the frequent occurrences of *ara‘ayta* and *alā tarā* among the earlier jurists (AH, IAL, et al.) provides indication that these same sorts of *i‘tirāḍ* may be uncovered through further examination of their arguments. For now, however, we must consign most of their early arguments to the larger set of *reductio ad impossibile*, as the necessary details provided us via extended dialectical sequences are at hand only with regard to al-Shāfi‘ī and his anonymous opponents.

Istiṣhāb al-Hāl

We should not be surprised to have encountered so little which may be claimed (and with great hesitancy) by this domain of *istidlāl* and *i‘tirāḍ*. It has been asserted, in the main, that the principle of *istiṣhāb* is absent from the legal theory of al-Shāfi‘ī.²² In

²² See Y. Linant de Bellefonds in the *Et*² (s.v. “*Istiṣhāb*”), who observes: “The *Shāfi‘īs* gave *istiṣhāb* a much weightier significance than did the *Ḥanafīs*, which explains why this method of juridical

addition to this, a number of secondary works concerned with early legal theory do not appear to treat *istiṣḥāb* at all,²³ while more comprehensive histories do not treat of its origins, but only later manifestations.²⁴ Muṣṭafā al-Khinn, on the other hand, provides no less than five *masāʾil* — claiming there are many more — in which the practice of *istiṣḥāb* by early *mujtahids* is supposedly made clear. Moreover, most of his examples begin with an argument by al-Shāfiʿī.²⁵ We will quickly reference them here, while noting that — with a singular exception — I have not found al-Khinn’s examples to be very supportive of this claim for early practice of the *istiṣḥāb* principle.

al-Khinn’s *masāʾil* (purportedly) illustrating al-Shāfiʿī’s adherence to *Istiṣḥāb*

- *al-ṣulḥ ʿalā al-inkār* (Khinn, *Athar al-Ikhtilāf*, 543f.)
 - The ref. is to Būlāq, iii.196. We find, however, the same *masʾala* in §292-3 of our own subject-treatise, where SH justifies his ruling via *qiyās* from the *bayʿ* contract. I would disagree, therefore, that al-Khinn’s example is *istiṣḥāb*; rather, it is *istidlāl biʾl-qiyās*.
- *al-ḥukm ʿalā al-muddaʾā ʿalayhi bi-nukūlihi ʿan al-yamīn* (Khinn, *Athar al-Ikhtilāf*, 545)
 - The ref. is to Būlāq, vii.34. Again, we find this *masʾala* in our own subject-treatise: see §53; §613; and §1097. And again, I would disagree that this is *istiṣḥāb*; rather, it is *istidlāl biʾl-Sunna* throughout.
- *irth al-mafqūd* (Khinn, *Athar al-Ikhtilāf*, 546f.)
 - The ref. is to Būlāq, iv.4. This indeed provides an example of SH adhering to an *istiṣḥāb*-like principle, and is followed by an illuminating dialectical sequence. Furthermore, the *masʾala* serves as one of the more common illustrations for *istiṣḥāb*.²⁶
- *ʿadam muṭālabat al-shaftiʿ biʾl-bayyina ʿalā thubūt al-milk* (Khinn, *Athar al-Ikhtilāf*, 547)
 - Al-Khinn provides no quotations from al-Shāfiʿī, nor Shāfiʿī opinions, only Ḥanafī opinions, and from late sources.

reasoning has been generally, though erroneously, associated with Shāfiʿī teaching. The word *istiṣḥāb* does not even appear in the *Umm* of the Imām al-Shāfiʿī and he had recourse to the concept on one occasion only, without naming it (Schacht, *Origins*, 126).” Following this reference to Schacht’s *Origins*, we read: “Shāfiʿī applies this principle in *Umm*, iv. 170 without, however, using the term *istiṣḥāb*; he obviously regards it as part of *qiyās* and ‘reason’ (*maʾqūl*).” After following this reference in the Būlāq edition of the *Umm*, I find it difficult indeed to reconcile Schacht’s claims with the material therein. Whichever *masʾala* he is referring to, al-Shāfiʿī’s *istidlāl* throughout the cited passage is from Sunna and Qurʾān — *qiyās* and *maʾqūl* are not mentioned, and I am uncertain where this unnamed *istiṣḥāb* is thought to have occurred. On the other hand, if we refer back to al-Bājī’s discussion of *Istiṣḥāb al-Ḥāl*, we will recall that it included a short section on related but erroneous modes of *istidlāl*. The third of these was attributed to al-Shāfiʿī himself: “*istidlāl* — by way of the absence of a *dalīl* for a thing — for the negation of that thing.” Al-Bājī concludes that what al-Shāfiʿī is doing in such cases is actually *istiṣḥāb al-ḥāl fī barāʾat al-dhimma*.

²³ E.g., Hallaq, *Origins*; Hasan, *Early Development*; Lowry, *Early Islamic Legal History*; Vishanoff, *Formation* (a single reference to *istiṣḥāb*, and only in a Zāhirī context).

²⁴ E.g., Schacht, *Introduction* (21; claiming only that it is “derived from Jewish law”); Coulson, *History*; Hallaq, *History*; Kamali, *Principles*.

²⁵ *Athar al-Ikhtilāf*, 543-9.

²⁶ See, among others, Coulson, *History*, 92-3; and Kamali, *Principles*, 389. This latter treats the *mafqūd masʾala* under the category of *istiṣḥāb al-wasf*.

- *istis‘ā’ al-‘abd idhā a‘taqa mu‘sir naṣībahu minhu* (Khinn, *Athar al-Ikhtilāf*, 548f.)
 - The ref. is to Būlāq, vii.183; and again we find this *mas‘ala* treated in our own subject-treatise (see §744ff.) Al-Khinn provides no real explanation as to how this constitutes *istiṣhāb*, however, and I am at a loss to do so myself.

Returning to our subject-treatise’s dialectical material, the only instance of something like *istiṣhāb* I have noticed is the following: In §700, al-Shāfi‘ī employs the term *ẓāhir* in the sense of a “sensory status quo.” That is, in the absence of *bayyina*, we must assume the original state of an object to be “jointly-possessed” between husband and wife. Now, although this might represent something like an early consideration of *istiṣhāb al-ḥāl*, we will also note that the incident occurs in a *qiyās*-oriented debate. Moreover, al-Shāfi‘ī’s own *qiyās* (stated in §691) is from an *aṣl* sanctioned by *ijmā‘*. I would be quite hesitant, despite the *istiṣhāb*-like qualities of al-Shāfi‘ī’s “*ẓāhir*” in this case, to say that his reasoning lay outside the domain of *istidlāl bi’l-qiyās*. In conclusion, I believe that *istiṣhāb* has its real theoretical origins sometime in the century or two following al-Shāfi‘ī. Moreover, it is quite likely that it evolved from an analysis of *masā’il* of *ikhtilāf* such as the third mentioned by al-Khinn above, and which forever-after remained a key illustrative example. Whatever the case may be, this remains an exciting area for further research; the early history of *istiṣhāb* in legal theory, it would seem, has yet to be writ.

Proto-System *Istidlālāt* and *I’tirādāt* Expanded to Other Domains

Before proceeding to dialectical features which may be unique to proto-system juridical *jadāl*, we should also note that certain objections appear to have enjoyed a broader range of application in proto-system *jadāl* than in the discussions of our *jadāl*-theory texts (while yet remaining within one of their *adilla* domains). For example, we have seen *naqd* and *man‘* applied in the domain of *istidlāl bi’l-Sunna*, whereas they are both confined to the domain of *qiyās* in our lens-texts. We have also seen transmission-oriented objections employed against *istidlāl* from the *āthār* of Companions, whereas we do not find them within this domain of the *jadāl*-theory works — there, they are restricted to the domain of *istidlāl bi’l-Sunna*. We will list these “expanded-range” objections here, along with modes of *istidlāl* which appear — as components of objection — outside of where we find them in our lens texts.

Naqḍ* in domains besides *qiyās al-‘illa

- Against *al-istidlāl bi’l-Sunna*
 - (Shīr.VII.7; Bāj.IX.B.11.2.1)²⁷
 - §263 (SH)
- Against Type I *qiyās al-dalāla*
 - §646-7 (SH; more likely a *method-naqḍ*; inconsistency pushed in §647 with *ara’ayta*)
- Against Type III *qiyās al-dalāla*
 - §649 (SH; 3x; the “nominal” *waṣf* is present in three *masā’il al-naqḍ*, but not the *ḥukm* of transfer; thus, the *waṣf* is not efficient)

Man’* in the domain of *istidlāl bi’l-Sunna

- *man’ al-ḥukm fi’l-aṣl; mumāna’a fi ḥukm al-aṣl*
 - (Shīr.VII.3; Bāj.IX.B.5)
 - §248 (SH)

Transmission-Oriented Objections in the domain of *Qawl al-Wāḥid min al-Ṣaḥāba*

- its like is not confirmed by the Ahl al-Ḥadīth
 - (indeterminate, but could be among: Shīr.II.B; Bāj.II.1 [against *isnād* for Sunna])
 - §§283 (SH); §1318 (SH)

Tarjīḥ* in the domain of *Qawl al-Wāḥid min al-Ṣaḥāba

- *tarjīḥ* of *athar-qawl* due to [Ṣaḥāba] being closer to the Messenger of God
 - (Shīr.IX.1.3)
 - §1405 (SH; implied)
- *tarjīḥ* of *athar-qawl* due to more narrators
 - (Shīr.IX.1.5; Bāj.XVI.1.1.3)
 - §§635 (AH; implied); 1402 (AH; implied by al-Sarakhsī’s report); 1405 (SH; implied; *āthār-qawls* of five of the Ṣaḥāba)
- *tarjīḥ* of *athar-qawl* due to [Ṣaḥāba] being greater in terms of *ṣuḥba*
 - (Shīr.IX.1.6)
 - §1405 (SH; implied)
- *tarjīḥ* of *āthār-qawls* by showing they are the *qiyās*
 - (Shīr.IX.2.1)
 - §§642 (Ahl al-Kalām); 651 (SH; hypothetically shows that if *qiyās* obtained [it doesn’t], then the same *awṣāf* of *qiyās* should produce a *ḥukm* closer to his own, *āthār*-derived, *qawl* than that of SHAP]

²⁷ In the *jadāl*-theory texts, *naqḍ* is confined to objections against *istidlāl bi’l-qiyās*. All of the Shīrāzī and Bājī numbers we employ in the following samples are drawn from their “proper” *jadāl*-theory domains. The reader is asked to bear this in mind, so as not to confuse my identifications with a claim that our theorists treated, e.g., *tarjīḥāt* in the domain of *qawl al-wāḥid min al-ṣaḥāba*. Such expansions of argument types are not to be found in our lens-texts.

Āthār of the Ṣaḥāba employed for Mu‘āraḍa bi’l-Nuṭq (rather than Kitāb, Sunna, or Ijmā’)

- “we only ruled Y *khābarān lā qiyāsan ‘alā X*”
 - (Shīr.VII.15.1; Bāj.IX.15.1)
 - §§644, 647, reiterated in §651 (SH; the “*khābar*” consists of *āthār* of Ṣaḥāba, not Prophetic Sunna)

There are a number of potential explanations for this apparent expanded range of certain categories. Among them is simply the possibility that they were just as expanded in the practice of our early *jadāl* theorists and their teachers, but for some reason it was not customary to treat, e.g., *naqḍ* outside the domain of *qiyās* in theoretical discourse. When we consider the systematic thoroughness of our authors, however, this explanation seems less likely than another we might offer: With far less choate and/or consensually-established legal-theoretical and dialectical bases to draw upon, it seems likely that our jurists of the proto-system era encountered *ikhtilāf* due to a greater variety of epistemic differences than did the jurists of later times. In other words, it is not inconceivable that, as legal-theory grew more refined in dialectical debates, a role for *naqḍ* in the domain of Sunna more or less disappeared. Similarly, a change in the theory and epistemic valuation of what was to become known as *qiyās al-dalāla* might have contributed to the disappearance of *naqḍ* charges directed at that category. And as for the use of *āthār* of the Ṣaḥāba in general, and the necessity for *tarjīḥ* and transmission-oriented objections regarding them, we can easily discern a decline of the whole domain of Companion-reports over time. Indeed, the role of *āthār* in full-system *jadāl* and *uṣūl* theory is nowhere near as important as the extensive role they quite openly played in the *Ikhtilāf al-‘Irāqīyyīn*.

Whatever the case may be with regard to these expanded roles, one thing appears certain: the practice of proto-system *jadāl* in our subject treatise — though quite sophisticated — is less choate and in many ways dissimilar from the refined systems posited by our early theorists. This becomes most evident once we gather together the question types, *istidlālāt*, and *i‘tirāḍāt* for which we have found no match in our lens-texts, and it is to this task we shall now turn.

Proto-System Question Strategies Outside the Categories of our *Jadāl*-Theory Texts

We have already mentioned that it was no easy task to match the question types and strategies of the *Ikhtilāf al-‘Irāqīyyīn* to the more rigid procedural orderings of our lens-texts. Of particular note in this regard are the two areas in which we have

grouped our samples below. We will first review them before offering a few observations.

Objection-Oriented (as opposed to *istidlāl*-oriented) *As’ila* and *Muṭālabāt*²⁸

- “*muṭālaba bi’l farq*”
 - §§79 (SHAQ; “*mā farraqa bayna al-‘itq wa ghayrihi?*”); 287 (SHAQ); 1227 (SHAQ; “*aṣl X and far’ Y share a common ḥukm A; how is it you deny they also share ḥukm B?*”)
- “*muṭālaba bi’l-tarjīh*” (Q’s demand for a *qawl al-Ṣaḥāba* supporting P’s *ḥadīth* interpretation: specifically, a demand for Shīr.IX.2.1)
 - §§264, 266 (SHAQ)
- “*su’āl ‘an wajh al-i’tirād / muṭālaba bi-wajh al-qadh*”
 - §§645 (SHAQ; eliciting the manner of SH’s *i’tirād* [which is a kind of *mu’āraḍa*]); 651-2 (SHAQ; initial stages of *muṭālaba* [with SH’s critique being *qalb*]); 692 (SHAQ; *muṭālaba* [with SH’s critique being ‘*adam al-ta’tīr*’];” possibly the first stage in charge of *naqd/kasr*/etc.; i.e., SHAQ is asserting his ‘*illa*)
- “*muṭālaba for [qiyās] al-shabah*” (Q’s response to the rejection of his *aṣl*, consequent to a reinterpretation of the efficient property in the *far’*)
 - §156 (SHAQ challenges SH to produce a parallel among permitted *bay’* contracts)

Q Procures Premise After Premise from P for *Elenchus* (in the manner of the Topics)

- *elenchus* is via *tanāquḍ* (classic *reductio ad impossibile*):
 - sequence: §§96 (SH; *ara’ayta*); 98 (SH; disjunctive question, one option absurd); 100 (SH)
 - sequence: §§249 (SH; *alā tarā* introduces *ḥadīth*)
 - *Jawāb*
 - §250 (SHAP offers explanation: this is not contradiction)
- *elenchus* is via *naqd*
 - sequence: §§693-702 (SH, 3x *naqd*; he subsequently springs “*naqd-dilemma*” in §§703-4; (NB: §694 pushes premise with *ara’ayta*; §696 pushes premise with *a-fa-laysa qad za’amta wa za’ama al-nāsu*)
 - sequence: §§740 (SH *ara’ayta* pushes SHAP to rule on the *mas’alat al-naqd* minus a property of the *mas’ala* at hand); 741 (SH restores the property, rhetorically asks SHAP to rule again; *elenchus: naqd*); 742-3 (SH closes other exits with additional charges of *naqd*)
- *elenchus* is via hypothetical *qalb* (*qiyās* does not obtain here, but if it did...)
 - sequence: §§653 (SH; *ara’ayta*); 655ff. (SH vs. SHAP); 658 (SH introduces *mas’alat al-qalb*); 660 (SH; *elenchus* via hypothetical *qalb*)
- *elenchus* is via hypothetical *mu’āraḍa* (*qiyās* does not obtain here, but if it did...)
 - sequence: §§662ff. (SH); 663 (SH; *ara’ayta* introduces Qur’ānic *aṣl*); 665 (SH; premise #2); 667 (SH; *elenchus* via hypothetical *mu’āraḍa*)
- *elenchus* is via *farq*
 - via *farq* and *method-naqd*

²⁸ NB: The terms within categories encased by quotation marks do not appear in such combinations in the *jadal*-theory texts. In order to describe proto-system phenomena I have had to generate new categories from the elements of later theory.

- sequence: §§756-60 (SH; *farq* #1); §§761-7 (SH; *farq* #2 [NB: §§765-7 has additional charge of *method-naqd*]); §§768-70 (SH; *farq* #3 and *farq* #4; rhetorical *elenchus* via *farq* and *method-naqd*); §§771-3 (SH; *farq* #5; final SH *elenchus* via *furūq* and *method-naqd*)
- *elenchus* is via *method-naqd*
 - sequence: §§1057 (SH; *method-naqd* premise #1); 1059 (SH; *method-naqd* premise #2); 1061 (SH seals *method-naqd elenchus* with series of rhetorical questions and supporting counter-*naql*)
 - sequence: §§1321 (SH; *method-naqd*-premise #1 elicited by *ara’ayta*); 1323 (SH; *method-naqd*-premise #2 elicited by al-Bājī’s *su’āl* #3); 1325 (SH; rhetorical charge of *method-naqd*: inconsistent observance of the *farq*); 1326 (SH; second charge of *method-naqd* [for a related *mas’alat al-naqd*] by rhetorically bringing forth all premises as though pre-conceded by SHAP)
- attempted *elenchus* is via *method-naqd* (but P succeeds in demonstrating *farq*)
 - sequence: §1224 (SHAQ; *method-naqd* premise #1); §1227 (SHAQ; multiple premises, then attempted *elenchus*: “you have conceded that X and Y are alike as regards *ḥukm* A, how do you deny *qiyās* [*al-dalāla*] from X to Y?”); §§1228ff. (SH succeeds in demonstrating *farq* between X and Y; then counters with his own charge of *naqd*)

As for the objection-oriented *as’ila* and *muṭālabāt*, we do not find such categories in the lens-texts, and I have indeed been required to invent the above categories myself. Certainly, the occurrence of this genre of question or demand would be natural to any dialectical engagement, and I am at a loss to suggest why they do not enjoy independent treatment by our theorists. One possible explanation, however, is that al-Shīrāzī et al. considered their thorough expositions on the *qjwiba* appropriate to each type of *i’tirād* quite sufficient, without having to elaborate a separate schema of counter-questions. Certainly, one can see that the systematic elaboration of objection-oriented questions would further complicate an already complex (but highly practical) ordering principle.

I would conclude in the end that this genre of question and demand is a likely candidate for that sort of dialectical feature which indeed existed in the *practice* of our theorists and their peers, but was not included in their systematizing discourse. Nevertheless, we must mark it for the time being as unique to proto-system *jadāl*. Perhaps, after all, as schemas like al-Bājī’s were developed and became more and more enforced in real-time dialectical encounters, this older style of questioning the objection *qua* objection fell out of use. Once the roles of P and Q reversed (due to *mu’āraḍa*) in later eras, the new questioner would simply proceed through the same, orderly schema that his opponent had followed, testing his *mu’āraḍa* as a new, counter *istidlāl*.

With regard to Q’s *Topics*-like acquisition of premise after premise from P, and then brandishing these premises as a well-constructed *elenchus*; this is a feature we might expect to see in the copious example-*masā’il* provided by our *jadāl*-theorists, but do not. Again, we might suspect this to be as much a feature of the *practice* of later *jadāl* as of earlier, and simply omitted from the theory discourse.²⁹ Its absence from the example-*masā’il*, however, is quite difficult to explain. Moreover, as a procedural style it is, of course, in full consonance with Aristotle’s dialectical method. After some consideration, therefore, and having attempted to picture what a dialectical disputation following al-Bājī’s procedure (as derived from question schema and example-*masā’il*) might actually look like in “transcript” form, I have come to the following conclusion: Both the procedure and intent of proto-system vs. full-system Q&A disputation represent — at times, but not always — *distinctly different dialectical styles*.

In other words, the comportment of Q in questioning P, in terms of both intention and procedure, was conspicuously different in al-Shāfi‘ī’s day than it was (with assumed consistency between theory and practice) some two and a half centuries later. With regard to intent, we have already noted a particular proto-system concern with “internal,” logical contradiction — *tanāquḍ* — which simply does not figure into the theory and categories of our lens-texts.³⁰ This, however, in combination with the premise-gathering approach, is in perfect conformity with the dialectical aims and methods of the *Topics*. With the systems of al-Shīrāzī and al-Bājī we witness something slightly different at work. Rather than occupying himself with fashioning an *elenchus* constructed from P’s conceded premises, Q sets about problematizing P’s *istidlāl* wherever a weakness may be discerned and, should P’s *istidlāl* collapse, supplanting it via *mu‘āraḍa*. But then again, we also may observe this intention and approach in the dialectical sequences of the *Ikhtilāf al-‘Irāqīyyīn*, with plentiful examples of *mu‘āraḍa* (among other features) as witness.

If this may seem confusing at first, it may be stated more clearly as follows: The proto-system *jadāl* of our subject-text at once incorporated both a *Topics* and a *Minhāj*

²⁹ Compare, for example, the dialectical formula of *alā tarā*; it enjoys frequent usage by our theorists in their own *jadāl*-theory-oriented debates, but no mention (much less independent treatment) in their theoretical expositions.

³⁰ Of course, we have found discussions of *tanāquḍ* and “*an yanquḍa X*” among the *aqṣām al-inqītā’* of al-Khaṭīb al-Baghdādī, al-Juwaynī, and Ibn Ḥazm (incorrectly labelled “*munāqaḍa*” by Miller; see our discussion of Miller’s “signs of defeat” in Chapter II.) The point here is that *tanāquḍ* does not appear to receive any theoretical elaboration in these texts; certainly it finds no place (or even mention) in the core treatises of our *jadāl*-theory lens.

style of dialectical method, whereas the full-system *jadāl* of our lens-texts consisted only of the latter. Proto-system *jadāl* was, in this respect, *broader* with regard to dialectical method, and the significance of this as pertains to our evolutionary thesis is indeed quite clear. If we call to mind the developmental model of “common origins, parallel development, and cross-germination” I proposed near the end of Chapter II, and if we anticipate the more abstract “evolution of Islamic argument epistemes” model I will propose in the second half of the current chapter, then we might attempt here an explanation of the “broader scope” features we have thus far observed in our subject-text.

In brief, the “common origins” of Chapter II’s developmental model consisted of a number of argumentation epistemes common to the pre-Islamic intellectual landscape of the Near East, among them such as were patently Aristotelian. With the rise of an Islamic intelligentsia, a host of new Islamic axioms infused various of these pre-existing epistemes, and new Islamic argumentation epistemes began to develop across a number of different intellectual projects. What we may observe in the dialectic of the *Ikhtilāf al-‘Irāqīyyīn* is simply an earlier stage in the development of those argumentation epistemes which were eventually to become peculiar to *uṣūl al-fiqh* and juridical *jadāl* theory. The “broader scope” features — the additional question types, strategies, objection-domains, and distinctive argument categories — provide a snapshot of our “proto-system” as a *wider* collection of (evolving) prior and Islamic argumentation axioms. This wider collection was, through the working of the dialectical forge itself, to become more refined, more precise, and consequently *narrower* in terms of both accepted and practiced axioms. Thus, although far more refined, ordered, defined, and thorough, the full-system *jadāl* of al-Shīrāzī, al-Bāḡī, et al. was yet more restricted in terms of procedures and argument content. Among other things (and we will see many more below), the premise-by-premise construction of *elenchi* via *tanāquḍ* appears to have fallen away. Such is the evolution of *ḥujjiyya*, the gradual and “natural” fine-tuning of epistemic justifications within an Islamic argumentation episteme.

Proto-System *Istidlālāt* and *I’tirāḍāt* Outside the *Adilla* Domains of the *Jadāl*-Theory Texts

As the following dialectical moves and argument strategies potentially unique to proto-system juridical *jadāl* are quite numerous, we shall have to proceed in the hope that my headers and abbreviated comments provide sufficient explanation of the samples within each category. Bearing in mind the theses I have proposed in this and

earlier chapters, I will further limit myself to only the most general comments following upon this rather extensive listing.

Reported *Istiḥsān*

- §1054 (al-Sarakhsī reports IAL/AY/MIH reasoning = *istiḥsān* based on 1) *naql*: āthār of Ṣaḥāba; 2) ‘*aql*: a *fortiori* reasoning; 3) *i’tirād*: AH’s *qiyās* = *qiyās al-manṣūṣ bi’l-manṣūṣ*; and 4) ‘*aql*: *hady* can be ‘*anāq*, or *faṣīl*, or *jady*)³¹

Istidlāl / Taqlīd of the Qawl of a Successor

- §§686-7 (AH & [old] AY; *athar-qawl* of Ibrāhīm); 1218[b] (AY; *taqlīd* of ‘Urwa b. al-Zubayr’s *qiyās al-‘illa / manzila*-subsumption; reported by al-Sarakhsī)

Objections against *Istidlāl / Taqlīd of the Qawl of a Successor*

- *Naqd*
 - (Shīr.VII.7; Bāj.IX.B.11.1)³²
 - §688 (AY [new]; implied; 3x *naqd* [may be *kasr*] against AH *athar-qawl* of Ibrāhīm)
- *Kasr*
 - (Shīr.VII.8; Bāj.IX.B.12.2.1)
 - §688 (AY [new]; implied; 3x *kasr* [may be *naqd*] against AH *athar-qawl* of Ibrāhīm)
- *Mu‘āraḍa*
 - By way of ‘*illa mubtada’a*
 - (Shīr.VII.15.2.1; Bāj.IX.B.15.2.1)
 - §691 (SH; implied; likely this is directed against the *qiyās* of Ibrāhīm and IAL, and thus may be considered consonant with our *jadāl*-lens *qiyās*-to-*qiyās mu‘āraḍa*)

Charges of *Method-Naqd*

- *endoxon qiyās*-method shown in parallel *mas’ala*, but P does not to practice it in *mas’ala* at hand; P is inconsistent with his *qiyās*-method
 - §§288 (SH); 540 (SH shows what SHAP should have done via hypothetical Type I *qiyās al-dalāla*); 1227 (SHAQ; “you acknowledge that *aṣl* X and *far’* Y share a common *ḥukm* A; how is it you deny they also share *ḥukm* B?”)
- against P’s *manzila*-subsumption (same status consideration shown in parallel *mas’ala*, but P does not practice *manzila*-subsumption there)
 - §646-7 (SH; potentially a *qiyās al-dalāla*-oriented *naqd*; inconsistency pushed in §647 with *ara’ayta*)
- against P’s *taswiya*-subsumption (P does not consistently observe *taswiya*-subsumption (X under Y), thus his rulings are inconsistent)
 - §§786-8 (SH; if [SHAP] treats X as Y, X belongs to Y *bi-kulli ḥālīn*)

³¹ *Mabsūṭ*, 4:93; al-Afghānī (141, n.1).

³² Again, the Shīrāzī and Bājī numbers in this and following categories refer to discussions of objection types which do not appear, in our lens texts, in the domains here listed. In this sense, they not only represent expansions of certain *i’tirādāt* to other domains, but to domains which are not at all treated by our *jadāl* theorists.

- *Jawāb*: §787 (SHAP appears to attempt a justification of *takhṣīṣ al-‘illa*)
- against P’s inconsistent observance of *farq*
 - §§80 (SH; the opponent observes the demonstrated *furūq* elsewhere, but not in the four *masā’il* at hand); 761-7 (SH; along with *farq* #2, §§765-7 has additional charge of *method-naqd*; final SHAP concession is to both *farq* and *method-naqd*); 768-70 (SH; along with *farq* #3 and *farq* #4; rhetorical *elenchus* via *farq* and *method-naqd*); 771-3 (SH; *farq* #5; final SH *elenchus* via *furūq* and *method-naqd*); 1317ff. (SH; SHAP is accused of ignoring a previously observed *farq* for the *mas’ala* at hand, and his *faḥwā al-khiṭāb* is thus destroyed; SHAP’s methodology is attacked: he ought either to employ *faḥwā al-khiṭāb* in the *masā’il al-naqd*, or to not employ it in the *mas’ala* at hand); 1321-5 (SH gathers premises and delivers rhetorical charge of *method-naqd*); 1326 (SH; rhetorically states premises as though pre-conceded by SHAP, for second charge of *method-naqd*)
- P applies Qur’ānic principle elsewhere, but then ignores it for the *mas’ala* at hand
 - §§1057 (SH; multiple charges); 1057-61 (SH; collects *method-naqd* premises from SHAP; seals *elenchus* with rhetorical questions and counter-*naql*)
- P acknowledges *ḥadīth* elsewhere, but ignores it for the *mas’ala* at hand
 - §544 (SH; delivered via *alā tarā*)

“*Naqd* Dilemma” [Q blocks all exits with multiple charges; P faced with *naqd* wherever he turns]

- §§693-700 (SH; first charge of *naqd* from conceded premises); 700-703 (SH; second charge of *naqd* without P’s response); 702 (SH; third charge of *naqd* without P’s response); 703-4 (SH; “*naqd*-dilemma”: if you rule X, you violate *ijmā’*; if you rule Y, you must do the same for the *mas’ala* at hand)

Method-*Mu‘ārada*

- P violates a fundamental principle (by attempting *qiyās* where there is established *khābar*); Q supplants P’s *istidlāl bi’l-qiyās* with Q’s *istidlāl bi’l-khābar*
 - §644 (SH)

Linguistic Appeals

- Drawing *dalīl* for usage of *lafẓ* from Prophetic Era Poetry
 - §262 (SH)
- Apparent argument to ‘urf *al-lughā* (*endoxon* usage which P and Q share)
 - §647 (SH)

Besides these numerous and partly-unique modes of *istidlāl*, *i’tirād*, and multi-stage objection strategies, we have also encountered a family of legal arguments and formulaic statements which evince a marked concern for doctrinal consistency (and which I have termed *manzila*-subsumption, *taswiya*-subsumption, etc.) Although sharing many elements of the *qiyās*-oriented *istidlālāt* and *i’tirādāt* of our lens-texts, the relative

uniformity with which these arguments were formulated, coupled with an absence of independent treatment by our theorists, has prompted me to consider them as elements unique to proto-system *jadal*. As a family of arguments with similar concerns, we might subsume them beneath the label of “Consistent Generalizing of the ‘*Ilā*,” and after a listing of subcategories and samples, I will proceed to my final assessment of the entire set.

General Argument to *manzila*-subsumption

- §§634 (AH); 643 (SHAP); 752 (AH); 1072 (SHAQ reporting *qawl* of one of the Ahl al-‘ilm); 1051 (AH; clarified by report of al-Sarakhsī); 1125 (AH; reported by al-Sarakhsī); 1126 (IAL/[old] AY; reported by al-Sarakhsī); 1218 (AY; implied)

General Objection to *manzila*-subsumption

- via *mu‘āraḍa bi’l-nuṭq*
 - (Shīr.VII.15.1; Bāj.IX.B.15.1)
 - §1078 (SH; the *nuṭq* is a Sunnaic *qawl*)
- via *naqḍ*
 - (Shīr.VII.7; Bāj.IX.B.11.1)
 - §1080 (SH; “double-*naqḍ*”)
 - SH *naqḍ* #1: they claim *ḥukm* A for the *mas’ala* at hand, but *ḥukm* ¬A for the subsuming legal category
 - SH *naqḍ* #2: they claim *ḥukm* B for the *mas’ala* at hand, but *ḥukm* ¬B for the subsuming legal category
- via *farq*
 - §1125 (AH and/or al-Sarakhsī; *zinā* is *makhṣūṣ* among its *naṣā’ir*)

Argument for the efficiency of a quality for *manzila*-subsumption (i.e., argument from a substantive legal principle)

- Principles of Legal Status
 - §§744, 746 (AH; principle: partial manumission = slave in the eyes of the law)
 - §§745, 747ff. (IAL/AY/MH; principle: partial-manumission = entirely free in the eyes of the law)

Objection to the efficiency of a quality for *manzila*-subsumption (i.e., against a substantive legal principle)

- Against a conception of a Principle of Legal Status
 - via *reductio ad impossibile*
 - §§748-9 (IAL/AY/MH; see below)
 - via *Kasr*
 - (Shīr.VII.8; Bāj.IX.B.12.1 [?])
 - §§750-1 (AY/MIH/IAL; *alā tarā* delivers *mas’alat al-kasr* which shows that the *impossible* of §§748-9 is elsewhere recognized)

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- *Jawāb*: Objection to *Kasr*-Objection
 - §§755ff. (SH; *farq* employed;³³ *method-naqd* employed)

Argument to *Taswiya*-Subsumption

- §§540 (SH); 691 (SH); 1127 (SH); 1313[a] (AH & IAL, reported by AY/MIH); 1317 (SH); 1326 (SH)

Argument to *Farq*-Extension

- §§78ff. (SH; *firāq* of *‘itq* from all other transactions); 755ff. (SH); 1232 (SH; implied); 1321ff. (SH)

On the Modes of “Consistent Generalizing of the ‘*illa*”

As my final assessment regarding *manzila*-subsumption, *taswiya*-subsumption, and *farq*-extension, I would state the following: All of these categories constitute a sort of “super-*qiyās*” whereby the efficient properties relevant to the *mas’ala* at hand are brought into relationship with a larger genus of *masā’il*, or a “*bāb*” of substantive rulings. For *manzila*-subsumption, to say that X is in the *manzila* of Y for all Z is to say that X and Y share the relevant efficient properties occasioning the same *ḥukm* throughout the *bāb* of Z. For *taswiya*-subsumption, to say that that “*hādhā kulluhu sawā’un*,” is to claim that the stated set of *masā’il* share the same efficient properties necessary to constitute an ‘*illa*’ occasioning the same *ḥukm* for each *mas’ala* in that set. And as for *farq*-extension, to demand that the *farq* between two types of legal entity be observed across relevant genera of substantive rulings is to simultaneously extend two sets of opposing ‘*ilal*’ occasioning opposing *ḥukms* across those genera. All three categories are marked by a concern with consistency and an aversion to doctrinal contradiction; and we might claim that all three are prompted, in the end, by an anticipation of *naqd* and its avoidance.³⁴

Objections to Objections

We have already taken note of objection-oriented *as’ila* and *muṭālabāt* as a special feature of the dialectic of the *Ikhtilāf al-‘Irāqīyyīn*. Here we will note a similar category of objections to objections, for which we have identified two species. The samples for both belong to al-Shāfi‘ī, and may be summarized thus:

³³ As al-Bājī suggests one might do (*Minhāj*, Turkī ed., 191, §433), SH employs *farq* a number of times in his attack of the opponent’s *mas’alat al-kasr*.

³⁴ The dynamic role of anticipation of dialectical objections in the private enterprise of *ijtihād* will be revisited in the latter half of Chapter IV.

- Objection to *Kasr*-Objection Against Substantive Principle of *Manzila*-Subsumption
 - via *Farq* between *mas’alat al-kasr* (now treated as opponent’s *aṣl* for *qiyās*) and *mas’ala* at hand³⁵
 - §§756-60 (SH; *farq* #1 [partial ownership vs. partial marriage] in stages, with rhetorical *elenchus*); 761-7 (SH; *farq* #2 [*kitāba* for divorce vs. *kitāba* for manumission] in stages, §§765-7 has additional charge of *method-naqd*; with final SHAP concession to *elenchus* via *farq* and *method-naqd*); 768-70 (SH; *farq* #3 [joint-ownership of wife vs. joint-ownership of slave] and *farq* #4 [gifting of wife vs. gifting of slave]; rhetorical *elenchus* via *farq* and *method-naqd*); 771-3 (SH; *farq* #5 [master re-enslaving slave vs. husband re-marrying wife; introduced by *ara’ayta*]; final SH statement seals *elenchus* via *furūq* and *method-naqd*: “*fa-mā na’lamu shay’an ab’ada mimmā qāsahu bihi minhu*”)
- Objection to charge of *Fasād al-I’tibār* Against *Qiyās*
 - via *method-naqd* (opponent who charged *fasād al-i’tibār* is accused of inconsistent observance of a *farq*)
 - §§1321ff. (SH)

We may now proceed to the arguments and features of our subject-text which appear the most unique of all. As for the following listing, it is hoped that my headers and abbreviated comments, along with all that we have discussed up to this point in Chapters II-IV.1, will suffice in underscoring the “ancient” tenor of these arguments, and in drawing them closer to the prior argumentation epistemes, infused with Islamic axioms, which lay at the root of the long developmental history of Islamic juridical *jadāl*. Whatever their origin, if such could ever be traced, one thing is certain: the categories which follow receive no theoretical treatment by our *jadāl*-theorists, even in part — nor may any trace of them be detected in the example-*masā’il* our lens-texts provide.

Tanāquḍ³⁶

- Purely internal logical contradiction [P’s *qawl* asserts both X and ¬X]
 - *fa qawluka mutanāqid*:
 - §102 (SH; with demonstration of the *tanāquḍ*)
 - *wajadtu ma’a dhālika qawlahum mutanāqid*:
 - §1079 (SH; he clearly shows the two *naqīd* premises of opposing *qawl*, then announces the consequence: “they do not adhere to their *qawl*, but have contradicted it [*mā lazimū qawlahum wa laqad*”

³⁵ Although this response to *kasr* by way of showing a *farq* re: the *mas’alat al-kasr* is recommended by al-Bājī (see two notes previous), we have included SH’s objection-to-objection here in the more unique proto-system categories, since the original *kasr* was against a principle for *manzila*-subsumption. See the above category of “Objection to the efficiency of a quality for *manzila*-subsumption.”

³⁶ Again, we have seen *tanāquḍ* mentioned by al-Juwaynī and Ibn Ḥazm, but only as a “sign of defeat;” to my knowledge, *tanāquḍ* and “*qawl mutanāqid*” receive no theoretical treatment.

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naqaḍūhu]”)

- P’s *istidlāl* from a *dalīl* contradicts the *ma’nā* of that *dalīl* [He derives –X from X]
 - *wa lā yajidu aḥadun qāla bi-hādhā al-qawl makhrajan min* [self-contradiction]
 - §§249, 251 (SH)
 - *dalīl* X can only have two *ma’nās*, and you have contradicted them both (while simultaneously claiming *dalīl* X)
 - §263 (SH; 2x)
- P’s *istidlāl* contradicts *endoxa adilla* (which we assume P to have pre-conceded)
 - *lam arā ba’d al-nās salima min khilāf al-nabī* re: one of the two *amrs* — not the one who made both X and Y *ḥalāl*, and not the one who made them both *ḥarām* [because the Prophet made X *ḥalāl* and Y *ḥarām*]
 - §282 (SH)

Reductio ad absurdum

- §263 (SH; two consequence of opponent’s solution combine to produce absurdity); §1057 (SH; two consequences of opponent’s *qiyās* are absurd)

Reductio ad impossibile

- §§37 (SH; impossible result consequent to the application of IAL’s ruling); 64 (SH; impossible result consequent to the application of SHAP’s ruling); 275 (AH; delivered by *ara’ayta*; hypothetical); 748-9 (IAL/AY/MH; premises delivered with *ara’ayta*; conclusion with *kayfa*; rhetorical);³⁷ 753 (AH; *ara’ayta* introduces triple *reductio* barrage; rhetorical)

***Argumentum ad Verecundiam* (paralleling appeals to Aristotle’s *endoxa* set of “the Wise”)**

- Appeals to the Ahl al-Ḥadīth
 - SH, numerous times
- Appeals to the method of the Ahl al-Fiqh
 - §284 (SH)

Q’s Objection to P’s Affirming the Consequent (Aristotle’s Fallacy of Consequent)

- §284 (SH; opponent implies that Companions’ ruling X confirms that the Prophet ruled X)

Q’s Objection to P’s Petitio Principii or Mistaken Cause

- §284 (SH; using the verb *yaghlaṭu*, claims opponent has reversed *aṣl* X and *far’* Y, making Y the *aṣl* for X)

***a fortiori* argument (outside the domain of *fahwā al-khiṭāb*)**

- §64 (SH; hypothetical; the *aṣl madhhabinā* forbids partial X; all the more so should

³⁷ NB: this is the logical axiom of non-contradiction extended into a question of legal status: status X and status –X cannot combine in a single individual. Does this constitute a “proof by contradiction” in legal argument?

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- full X be forbidden in the *mas’ala* at hand [if not for the exception-*khabar*])
- §743 (SH; sealing a triple-charge of *naqd* with an “*a fortiori* punch”: “*laqad ankarū aqall min hādhā*” (i.e., SH’s opponents have rejected less invalid contracts, all the more so should they reject invalid *mufāwaḍa*)

The Charge of *Taḥakkum*: P’s Reasoning Rendered Arbitrary via Lack of *Dalāla*

- §1116 (SH; “*fa-amma an naqūl* [opposing opinion], *fa-hādhā taḥakkum!*”)
- Associated with this is a unique form of *naqd* via *e silentio*:**
- §1118 (SH introduces *mas’alat al-naqd* wherein the same *ḥukm* should be occasioned, then says: “*wa laysa hākadhā bi-qawlin*”)

Empirical Inductive Argument

- §91 (SH; with *lā narā*; ‘*aṭā*’ never comes but early or late)

Finally, with regard to the extended and short dialectical sequences we have analyzed in full, and in addition to all the many categories of questions, *istidlālāt*, and *i’tirādāt* we have identified both within and without the domains of our lens-texts, there are three additional argument-categories worthy of note. The first is one that has every appearance of an ancient category of *adillat al-Shar’* all on its own, and has thus far remained something of a mystery (although I will proffer my final assessment in the concluding half of Chapter IV). I am speaking of the *ma’qūl* and the ‘*aql*, a combined source-category which, with all of its examples, seems to belong to al-Shāfi’ī alone. The second is what I have termed “open appeals to legal theory,” all of which constitute a genus of dialectical argument, and all examples of which, once again, belong to al-Shāfi’ī. The third feature is not so much an argument as a force of compulsion, but must be included here as an element of proto-system *jadal* insofar as it constitutes a powerful persuasion-method by which a *mujtahid* and *qāḍī* was brought to change both opinion and practice. I am speaking, of course, of that decree of the first ‘Abbāsīd caliph which brought the unfortunate Ibn Abī Laylā from a position of *ittifāq* with Abū Ḥanīfa, to one of *ikhtilāf*. These three categories, then, are as follows:

Argument to *al-Ma’qūl* and *al-‘Aql*

- Statement that the opponent has violated the ‘*aql* (among other sources)
 - §651 (SH)
- Statement that the opponent has violated the *ma’qūl* (among other sources)
 - §1056 (SH)
- “the *aql* of the *ma’qūl* was that nothing is made *ḥalāl* for party X by the *fi’l* of party Y”
 - §1411 (SH)
- It is not allowed that we do *qiyās* from [God’s exception] to what differs from it “if

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the *aṣl* belongs to the *ma‘qūl fīhi*”
○ §1411 (SH)

Open Appeals to Legal Theory

- §52-3 (SH asserts hermeneutic: Sunna is *al-naṣṣ al-mufasssira* providing indicant for (*tadullu ‘alā*) *jumla* Sunna; he then explains this hermeneutic at work re: the *mas‘ala* at hand)
- §248 (SH; two narrators, when a third agrees, is *awlā* than two when a third disagrees)
- §257 (SH explains multiple applications of a focal *lafz*; then acknowledges the need for a Prophetic *dalīl* to back his usage)
- §263 (SH criticizes SHAQ for not bringing a *dalāla* about the *Nabī* [i.e., SHAQ — unlike SH — brings no *dalīl* for his *takḥṣīṣ* of the focal *lafz*])
- §265: (SH asserts: “Nor would it harm us that no one [among the *Ṣaḥāba*] professes it, since it is confirmed on the authority of the Prophet.” The principle is that an established *ḥadīth* can stand alone; this is also a refutation of an *e silentio* argument.)
- §283 (SH; “if the contents of one of these [*āthār*] were confirmed of the Prophet, it would be *ḥujja*,” but they are not “confirmed by their like”)
- §284 (SH; *qiyās* is done to those who come *after* the Prophet, on the basis of what the Prophet did; not the reverse [i.e., we cannot presume to know the Prophet’s commands based only upon *āthār* of the Companions])
- §§1410ff. (SH *istidlāl bi’l-Sunna* [as *mufasssir* to Qur’ān] = Prophet clarifies [*bayyana*] God’s *qawl*: *nikāḥ* means the licit sexual intercourse of husband #2 [*iṣābat al-zawj*])
- §1411 (SH; It is not allowed that we do *qiyās* from [God’s exception] to what differs from it “if the *aṣl* belongs to the *ma‘qūl fīhi*”)

Caliphal Decree Alters *Mujtahid*’s Doctrine and/or Practice as *Qāḍī*

- §240 (IAL; forced to adhere to the *qawl* of the *Ḥijāzīs* by al-Saffāḥ)

Having thus reviewed all the genera and species of dialectical argument encountered during our full analyses of dialectical sequences, we may quickly note one last outstanding feature before closing this section and moving on. Already with regard to several of the categories above — and indeed throughout the whole of our subject-treatise — we may note a remarkable *formulaic consistency*. As for the presentation of Q&A sequences, the presentation (and extension) of prior substantive rulings, and AY adherences to one *qawl* or another; these all require little in the way of comment — they speak for themselves, and provide great insight to the nascent proto-system of the *‘ilm al-khilāf*.

The point now, however, is that several families of argument also enjoy a considerable consistency of presentation, and thus provide insight as to the underlying *systematic* nature of what is, after all, our proto-system of *jadal* teaching and practice.

That is to say, though far removed from the refinements of full-system *jadāl*, our proto-system was a system nonetheless, with its own transmitted conventions. Nowhere does this become more apparent than in recurrent argument formulae. Now, perhaps the most significant examples are the *ara’ayta* and *alā tarā* formulae we have already discussed at some length; for these the reader is kindly asked to refer back to our discussion at the end of Chapter III. At present, we will review a select set of additional formulae we have encountered in our analyses, divided into two sets, as follows.

A. The Formulae of Subsumption and Extension in Proto-System Juridical Dialectic

***Manzila*-Subsumption**

- X is *bi-manzilat* Y *fi* kull Z: §634 (AH)
- X is in the *manzila* of Y *idhā* Z: §635 (in the *aqwāl* of several Companions)
- *wa kadhālika qāla* so-and-so *fi hādhā al-manzila*: §637 (IAL)
- You rule A for party X, *wa kadhālika manzilat* party Y: §643 (SHAP; x2)
- Even if X corresponds to *manzilat* Y in this *mawḍi‘*, neither you nor I rule Z: §646 (SH)
- X, all of it, is in the *manzila* of Y: §752 (AH)
- *fa-anzala* X *bi-manzilat* Y: §1072 (SHAQ reporting *qawl* of one of the Ahl al-‘ilm)

***Taswiya*-Subsumption**

- *fa-sawā’un dhālika kulluhu*: §691 (SH)
- *wa sawā’un* X and Y: §§540 (SH); 1127 (SH)
- *kāna hādhā wa’l-bāb al-awwal sawā’an fi qawlihimā jamī’an*: §1313[a] (AH & IAL, reported by AY/MIH)
- *lā farqa bayn* X and Y: §1317 (SH)
- for indeed A happens wherever B happens, with regard to substantive legal genera X and Y: §1326 (SH)

Extension of *ḥukm* to relevant genus of substantive law

- *fi qawlihimā jamī’an*: §1313[a] (AH & IAL *taswiya*-subsumption reported by AY/MIH); and numerous other examples
- *kadhālika qawluhumā fi* kull X: §90[b] (AY reporting AH vs. IAL)
- *wa kadhālika* X: §687 (AH & [old] AY)
- and in case Y, the *ḥukm* is ‘*alā mā waṣaftu fi qawlihimā* [re: case X] *jamī’an*: §690 (re: AH & IAL)
- “Every X with ‘*illa* Y has *ḥukm* Z”: §94 (SH)

***Ma’nā*-Sharing**

- X is *fi mithli ma’nā* Y: §§286 (SH); 1075 (SH; *fi mithli ma’nā al-Sunna*)
- X is in the *ma’nā* of Y: §1077 (SH; he claims his *istidlāl* from Sunna and *ijmā’* to be “in the *ma’nā* of” Q.2:178)

B. The Formulae of Objection / Refutation in Proto-System Juridical Dialectic³⁸

Formulae with *Mana’a*

- *innamā mana’anā min (al-qawl bi- [P’s thesis/proof])*
 - setting stage for *mu’āraḍa* of *qiyās* by *qiyās*, or *al-mu’āraḍa bi-‘illa mubtada’a*
 - §155 (SH)
 - setting stage for *mu’āraḍa bi’l-nuṭq* against *istidlāl bi’l-Sunna*
 - §248 (SH)
- *al-ma’nā alladhī mana’nā bihi [ḥukm of P’s ḥadīth] qā’iman fī [Q’s ḥadīth]*
 - setting stage for *mu’āraḍa bi’l-‘illa* against *istidlāl bi’l-Sunna*
 - §248 (SH)

Broad, Multiple Objection Formulae

- “the *qawl* you have chosen is farther from *al-qiyās* and *al-‘aql*”
 - §651 (SH)
- “*wa lā a’lamu man qāla X, illā khālafa* [1] *al-Qur’ān*, [2] *al-āthār*, [3] *al-qiyās*, [4] *al-ma’qūl*”
 - §1056 (SH)
- “*kayfa khālaftahu* [an *athar dalīl*], *wa ma’ahu* [1] *al-Qur’ān*, [2] *al-qiyās*, [3] *al-ma’qūl*, and [4] other *Aṣḥāb al-Nabī*?”
 - §1061 (SH)

Emphatic Expression of *Farq*

- it is not allowed that X be a *qiyās* on the basis of Y, while it is “*mufāriq lahā fi’l-mubtada’ wa’l-muta’aqqaḅ*”
 - §288 (SH)
- X is *mukhālif* to Y “*fi’l-bad’i wa’l-muta’aqqaḅ*”
 - §1131 (SH)

Our analyses of twelve *masā’il*-sets concluding in category A extended dialectical sequences, and of ten category B short dialectical sequences — a mere fraction of the contents of the *Kitāb Ikhtilāf al-‘Irāqīyyīn*, itself less than a twentieth of the pages of the *Umm* — have thus uncovered an astounding array of dialectical arguments and features both consonant with, and diverging from, the contents of early full-system *jadāl* treatises. We will shortly proceed to the larger implications of what we have found. Before doing so, however, we must quickly list the most salient arguments and features which manifested themselves during my “surface analysis” of material outside overtly-dialectical presentation categories. Only then will our window onto proto-system juridical *jadāl* be as complete as we can make it at this time.

³⁸ Again, we would refer the reader to our discussion of *ara’ayta*, *alā tarā*, and other formulae at the end of Chapter III for the main categories belonging to this set.

Additional Elements from Presentation Categories C through G

We must here acknowledge that what follows is far from a complete listing of features, and further yet from a thorough analysis. It is only meant to show what has become evident through a “surface analysis,” and to hint at the great treasure of argument awaiting examination in the remaining presentation categories. For material familiar to our lens-texts, I will only employ general categories — combined *istidlālāt* and *iʿtirāḍāt* for the familiar domains of *istidlāl* — with large groupings of examples. After this will follow an inventory of more unique arguments and features culled from lists drawn at an earlier stage of research. In particular, the arguments of categories C through E are wide open for more exploration and identification — as are the *ʿaql*-explanations of category F (largely absent from the below listings); while much may yet be distilled from the plain substantive statements of category G.³⁹ Much of what follows will be familiar, although a number of new categories will also surface. In the main, it is hoped that the reader will be impressed by how much more our subject treatise may have to teach us about proto-system juridical argumentation and legal theory, and yet remain satisfied by the amount and variety of “overtly dialectical” material we have analyzed to this point.

***Istidlālāt* and *Iʿtirāḍāt* Within the *Adilla* Domains of our Lens-Texts**

Kitāb

- §§565 (SH; Q.65:2; Q.2:282); 581 (AH & AY; Q.65:2); 583 (SH; support by interpretation of *sharʿ* of God in *āyas* of §§565ff.); 1102 (SH); 604-5 (SH; Q.2:282 plus *athar* Ibn ʿAbbās); 677 (SH; with *tafsīr*, as *aṣl* for *qiyās*); 913-14 (AH; Q.4:102 [and *āthār* Ibn ʿAbbās and Ibrāhīm]); 955-6 (RB preponderates contrary SH *qawl* over previous SH *qawl* via Qurʾānic *dalīl*); 1035 (SH; Q.5:96 and *tafsīr* of one of the Ahl al-ʿIlm); 1238 (SH; Q.4:23); 1257 (SH; Qurʾānic indicant for interpretation of Sunna); 1280 (SH; Q.66:1-2 as component of *aṣl* for *qiyās*); 1296 (AH; Q.65:6; *lima, wa qad qāla Allāhu X? = muṭālaba biʿl-dalīl* plus *muʿaraḍa biʿl-nuṭq*)

Sunna

- §§31 (SH uses Sunnaic *Qāʿida* [*al-kharāj biʿl-damān*] as basis for *Fahwā al-Khiṭāb*); 42-3 (AH & AY); 48 (AH & AY); 60 (AH); 107-8 (SH; Prophet uses *araʿayta*); 110-11 (AH & AY); 271-2 (AH & AY; x2); 378 (AH & AY; *Qāʿida* [*al-rahn bimā fihi*]); 537-8 (AH & AY); 547 (SH); 609 (AH; *Qāʿida* [*al-bayyina ʿalā al-muddaʿī*]); 612 (SH; Sunnaic *Qāʿida* [*al-bayyina ʿalā al-muddaʿī*]; *muʿaraḍa biʿl-nuṭq* of opposing *qawl*); 705; 707-9 (AH & AY; Sunna supported by *āthār* ʿUmar, Ibn Masʿūd, and al-Shaʿbī); 710-12 (SH; *tafsīr* of two *maʿnās*); 796 (SH; *wa hādhā maʿnā al-Sunnati naṣṣan*); 820 (SH); 901 (AH & AY; Sunna followed by comparison with multiple *āthār*); 911 (SH reasons from Prophet’s Sunna and objects to a claim of *naskh*); 916 (IAL); 919 (SH; Prophet’s Sunna was “in this *maʿnā*”); 922 (SH; with *tafsīr*); 928 (*khbar* of Prophet supports SH *taswiya*-

³⁹ Via the intermediary, that is, of later works of *ikhtilāf* and *fiqh*, with the arguments they attribute to our respective proto-system jurists.

subsumption); 981-2 (IAL & AY; with *tafsīr*); 991 (AY); 1010 (AY supplies AH *naql*: “something of that sort on the Prophet”); 1024 (SH); 1032 (SHAP & SH); 1039 (SH; with *tafsīr* including definition of a key *lafẓ*); 1084 (SH *muʿāraḍa biʿl-nuṭq*; Sunna is the *khilāf* of opposing *qawl*); 1109 (AH & AY); 1111-12 (SH); 1113 (AH & AY); 1135 (AH); 1135-41 (SH *muʿāraḍa* of Sunna and *āthār* with better Sunna and *āthār*); 1147 (AH & AY; AY/MIH claims that AH confirmed *ḥadīth* as *marfūʿ*); 1199 (AH); 1213-16 (AH/AY/SH vs. IAL debate focused upon interpretation of single Sunnaic *lafẓ*: “*nisāʾuhā*”; each position is an *iʿtirād* of the other); 1247 (SH); 1255 (AH & AY; application of principle via interpretation of *lafẓ* [“consulted”]); 1257 (SH; Sunna interpreted by *tafsīr*, more Sunna, and Qurʾān); 1262-8 (AH vs. IAL & SH; *mushāraka fiʿl-dalīl* [they interpret the *ḥadīth* Barīra differently]); 1269-73 (AH vs. IAL & AY & SH; *mushāraka fiʿl-dalīl* [they interpret the Sunnaic *Qāʿida (al-walad liʿl-firāsh...*) differently]); 1280 (SH; with Q.66:1-2; as *aṣl* for *qiyās*); 1415 (IAL; along with *āthār*); 1417 (SH; along with *āthār*); 1420 (IAL & AY); 1422 (AH & AY)

Ijmāʿ

- §§566-7 (SH reported by RB; *ijmāʿ* re: *maʿnā* of Q.65:2 / Q.2:282); 1383 (SH supports his ruling by fourfold citing of *ijmāʿ*)

***Ijmāʿ al-Ṣaḥāba* or *Tarjīḥ* by Accumulation of *Ṣaḥāba* (?)**

- §§330-1 (SH *taswīya*-subsumption supported by four Companions); 912 (SH; four Companions; *tafsīr* for ʿUthmān’s practice); 1049 (SH supports ruling as “following upon” four Companions, four Successors, “and others”); 1417 (SH; four Companions plus Sunna)

Qawl al-Wāḥid min al-Ṣaḥāba

- §§3-4 (AH; ʿAlī); 24-6 (AH & AY; ʿAlī); 75-6 (AH & AY; ʿUmar); 120-2 (AH & AY; Ibn Masʿūd and ʿUmar [and Ibrāhīm]); 207-9 (AH & AY; ʿUmar, ʿUthmān, and Ibn Masʿūd); 212 (AH & AY; Ibn Masʿūd); 215 (SH; Ibn ʿAbbās); 340 (AH; Abū Bakr); 355 (AH; Ibn ʿAbbās); 454-5 (SH; ʿAlī and other Companions); 468 (SH reported by RB; ʿUmar); 496 (AH & AY; ʿAlī; *muʿāraḍa* of IAL *āthār* of Successors in §497); 506 (AH & AY; ʿUmar); 531-2 (AH; ʿAlī); 604-5 (SH; Ibn ʿAbbās; in support of *istidlāl* from Q.2:282); 620 (AH & AY; ʿUmar [and Shurayḥ]); 627 (AH & AY; Ibn Masʿūd [and Shurayḥ]); 705, 707-9 (AH & AY; ʿUmar, Ibn Masʿūd, and al-Shaʿbī [supporting Sunna]); 724 (SH; ʿUmar); 725 (SH; ʿĀʾisha); 727 (SH; ʿUmar); 798 (AH & AY; Abd Allāh b. ʿUmar); 804-5 (SH; Ibn ʿUmar [and Shurayḥ]); 832 (AH; ʿAlī); 839 (AH; Ibn Masʿūd); 909 (IAL; ʿUmar [via Ibn ʿAbbās] and ʿAlī); 913-14 (AH; Ibn ʿAbbās [supporting Q.4:102; and supported by *athar* Ibrāhīm]); 941 (SH; Ibn ʿUmar); 947 (IAL & AY; Ibn ʿAbbās); 959 (AH/AY; ʿAlī); 990 (AH; ʿUmar); 996 (AH/AY; ʿUmar); 1016 (IAL; Ibn ʿAbbās; *muʿāraḍa* of AH *athar* Ibrāhīm); 1027 (SHAP; ʿUmar); 1028 (SHAP; Ibn ʿUmar); 1032 (SHAP & SH); 1041 (IAL/AY; Ibn ʿAbbās and Ibn ʿUmar); 1062-4 (IAL/AY; Ibn Masʿūd [and ʿĀmir (b. Abd Allāh b. Masʿūd?) and ʿAṭāʾ b. Abī Rabāḥ]); 1099 (AH & AY; Ibrāhīm); 1135 (AH; ʿAlī and Ibn Masʿūd); 1140 (SH; Abū Bakr); 1141 (SH; ʿĀʾisha); 1181 (AH; Ibn ʿAbbās); 1234-5 (AH; two *āthār* of ʿUmar [supported by *athar* Ibrāhīm]); 1238 (SH; support of Q.4:23 with ʿAbd Allāh b. Jaʿfar and ʿAbd Allāh b. Ṣafwān); 1244 (AH; ʿAlī); 1275 (AY; Ibn Masʿūd); 1288 (AH; ʿUmar, ʿAlī, Ibn Masʿūd, Zayd b. Thābit); 1297 (AH; ʿUmar supporting Q.65:6); 1300 (AH & AY; Ibn ʿAbbās); 1392 (SH; Abd al-Raḥmān [b. Awf]); 1393 (IAL; Ibn Masʿūd); 1413 (AH; ʿAlī); 1415 (IAL; Abū Bakr and ʿAlī; along with Sunna)

Faḥwā al-Khiṭāb

- §§30-1 (SH; *a maiore ad minus* from Sunnaic *Qāʿida: al-kharāj biʿl-ḍamān*)

Dalīl al-Khiṭāb

- §§734 (SH; “when we command X, we do not permit the reverse of X” [*aṣl* not mentioned]); 1241 (SH; “God only made *ḥarām* through *ḥalāl*; and the *ḥarām* is the opposite of the *ḥalāl*”)

Maʿnā al-Khiṭāb (Qiyās)

- §§8-9 (SHAP); 10 (SH; *farq* and *naqḍ*); 14 (SHAP); 19 (SH); 135-6 (SH); 167 (SH; *maʿnā* of the *ʿilla* in the *farʿ*); 184 (SH; *farq*); 212 (AH & AY; reported by al-Sarakhsī); 292 (SH); 322 (SH ruling supported by *qiyās* [x3] = *muʿāraḍa* of AH *ʿilla*); 329 (SH ruling = *muʿāraḍa* of AH *ʿilla*); 337-8 (SH); 344-5 (SH; *qiyās* correlation between genera is underscored); 388 (SH; *qiyās* correlation between two genera of contracts is underscored); 389 (AH & AY; *qiyās* with another genus of contract); 391 (AY extends IAL ruling to related *masʿala* by way of *qiyās*); 417 (SH); 460 (AH/AY); 509 (SH; *aṣl* is from *Kitāb*); 556 (SH supports parallel to AH §554 with *qiyās*); 633 (SH); 671-2 (SH; 2x *qiyās al-ʿilla*, with full explanation of efficient properties); 677 (SH; from Qurʾān; supported by *tafsīr*, and *athar* ‘Aṭā’); 726 (SH; *farq*); 729 (SH vs. SHAP); 960 (SH); 968 (SH); 987 (IAL; *muʿāraḍa* by *qiyās* with another genus of *zakāt*); 992 (*muʿāraḍa* of AH position via *a fortiori qiyās* and another *qiyās*); 997 (SH; *muʿāraḍa-qiyās* of AH & AY *ʿilla*); 1012 (SH); 1017-20 (SH *qiyās a maiore ad minus*; as X is in the *maʿnā* of Y, or *akhaffu minhu*); 1032 (SH); 1066 (SH; 2x *qiyās*); 1097 (SH); 1101 (SH); 1149 (SH; *aṣl* is Sunna); 1161 (AH & [new] AY; implied); 1195 (SH); 1233-5 (AH & AY; *muʿāraḍa* of IAL *ʿilla*, supported by *āthār*); 1243 (AH); 1280 (SH; *aṣl* consists of: Prophetic Sunna, Q.66:1-2); 1283 (SH); 1309 (SH); 1370 (SH; *naqḍ*); 1427-30 (AH/AY/SH vs. IAL; *ʿilal* of each implies *ʿtirāḍ* of the other’s)

Tarjihāt

- §§7ff. (SH; *qiyās* vs. *qiyās* via supporting *āthār*); 607 (SH; Ibn ʿAbbās vs. Ibn al-Zubayr; Ibn ʿAbbās closer to Qurʾān and *qiyās*); 796 (SH preponderates a *maʿnā* as more appropriate [Schacht: “*a potiori*” *qiyās*], supports with *ʿaql*: hypothetical situation in which one causes less harm)

Istidlālāt and ʿtirāḍāt Outside the Adilla Domains/Categories of the Jadal-Theory Texts

General Appeal’s to God’s Decrees (without mention of specific *adilla*); *shahādat al-uṣūl*?

- §308 (SH; re: testimony and procedure)

“Reasoning from the Silence of the *Uṣūl*”

- §931 (SH claims no Prophetic report has been preserved — *min wajhin yathbutu mithluhu* — contrary to his ruling; an anticipation of attempted *muʿāraḍa biʿl-nuṭq?*)

Argument from “Rights of God” vs. “Rights of People” Distinction

- §§509-10 (SH & RB); 1149-50 (SH; *qiyās* extended to “every *ḥadd* of God;” ruling for all *ḥuqūq al-ādamiyyīn* shows clear distinction of rights and consequences; subsidiary ruling combines both domains for *sariqa*)

Tarjih-Oriented (?) Laying Out and Comparison of *Āthār*

- §§900-8 (AH & AY; comparison of Prophetic Sunna and *āthār* of Abū Bakr, Ibn Mas‘ūd, ‘Umar, Ibn ‘Abbās, Ibn ‘Umar [with *tafsīr* of his *qawl*], ‘Alī, and Mu‘āwīya [with explanation of Kūfan vs. Syrian practices stemming from these latter two])

Transmission-Oriented Objections re: *Athar* of Companion / Successor

- §§15-16 (SHAP; ‘Alī; SH claims as weak); 17 (SHAP; ‘Umar; SH claims as weak); 18 (SHAP; ‘Alī; SH claims as weak); 31 (SH against *athar* ‘Umar; al-Bayhaqī reports: because it is *mursal*; and against *athar* ‘Alī); 1139 (SH); 1379 (SH)

Use of *Āthār* of Successors and Famed Jurists in Arguments

- §§11-12 (SHAP; Shurayḥ); 19 (SH; ‘Aṭā’ b. Abī Rabāḥ); 120-2 (AH & AY; Ibrāhīm [supporting Ibn Mas‘ūd and ‘Umar]); 123-4 (IAL; ‘Umar II); 307 (SH; Shurayḥ); 340 (AH; Ibrāhīm); 356 (AH; Ibrāhīm); 374-6 (AH & AY; Ibrāhīm [x2], Abū Ja‘far, ‘Aṭā’); 465-6 (IAL & AY; Shurayḥ); 497 (IAL; Shurayḥ and Ibrāhīm; *mu‘āraḍa* of AH/AY *athar* ‘Alī in §496); 528 (AH & AY; Shurayḥ); 566 (SH reported by RB; Mujāhid; used for *tafsīr* of Qur’ānic *dalīl*); 571 (SH/RB; Shurayḥ); 585 (AH; Shurayḥ); 620 (AH & AY; Shurayḥ [supporting *athar* ‘Umar]); 627 (AH & AY; Shurayḥ [and Ibn Mas‘ūd]); 677 (SH; ‘Aṭā’; supporting *qiyās* from Qur’ān); 714 (AH & [old] AY; Ibrāhīm); 720 (AH; Ibrāhīm); 804-5 (SH; Shurayḥ [supporting Ibn ‘Umar]); 810 (AY/MIH; Ibrāhīm in support of AH ruling); 846[a] (IAL; Shurayḥ); 893-4 (IAL & AY; Ibrāhīm and ‘Āmir [b. ‘Abd Allāh b. Mas‘ūd?]); 898 (AH & AY; Ibrāhīm); 913-14 (AH; Ibrāhīm [supporting Q.4:102 and Ibn ‘Abbās]); 938 (IAL; Ibrāhīm); 939 (AH & AY; Ibrāhīm; *mu‘āraḍa*: contrary *naql* from same Successor); 942 (IAL; Ibrāhīm); 948 (AH; Ibrāhīm); 971 (AH; Ibrāhīm); 979 (AH; Ibrāhīm; AY believes this to be AH’s *naql*); 1014 (AH; Ibrāhīm); 1042 (AY; ‘Alī b. ‘Abd Allāh b. ‘Abbās; transmitted by anonymous *shaykh*); 1045 (SH; long, fully-quoted *athar* of ‘Abd al-A‘lā b. ‘Abd Allāh b. ‘Āmir and his mother); 1048 (IAL/AY; ‘Aṭā’ b. Abī Rabāḥ); 1062-4 (IAL/AY; ‘Āmir [b. ‘Abd Allāh b. Mas‘ūd?] and ‘Aṭā’ b. Abī Rabāḥ [supporting Ibn Mas‘ūd]); 1233 (AH; Ibrāhīm [supporting two *āthār* of ‘Umar]); 1250-1 (IAL; ‘Āmir [b. ‘Abd Allāh b. Mas‘ūd?], Shurayḥ, and Ibrāhīm); 1286 (SH supports ruling with *qawl* of Abū Bakr b. ‘Abd al-Raḥmān b. al-Ḥārith b. Hishām);⁴⁰ 1379 (SHAP; ‘Umar [II?]); 1381 (SH; Ibn al-Zubayr); 1396 (AH/AY; Ibrāhīm); 1399-1400[a] (AH; Ibrāhīm and ‘Aṭā’ b. Abī Rabāḥ)

Appeals to One, or Some, of the Ahl al-‘Ilm (Aristotle’s *endoxa*-set of “the Wise”?)

- §§1035 (SH supports ruling with Q.5:96 and *tafsīr* of one of the Ahl al-‘Ilm); 1046 (SH supports ruling with *qawl* of “more than one of the Ahl al-‘Ilm”)⁴¹

Unique “Role-Reversal” *Qiyās*

- §1222 (IAL; cf. SH’s strategy in §658)

“Limited *Qiyās*”

- §1261 (SH brings a parallel genus of contract, underscoring first the efficient property in the parallel which does not apply to the current *mas‘ala*, then he details the shared efficient property common to both contracts)

⁴⁰ NB: this Abū Bakr is one of the *Fuqahā’ al-Madīna al-Sab‘a* (d.94/712).

⁴¹ Questionably, Schacht (*Origins*, 89) references this as an example of consensus according to the ancient school usage. Note, however, that SH merely says “more than one of the Ahl al-‘Ilm.”

Qiyās Based upon Another Qiyās (?)

- §9 (SHAP)

Athar to be Preferred Over Qiyās

- §793 (SH attributes SHAP position to the Ahl al-Qiyās; [as we see from the main SH argument elsewhere in the *Umm* (from *naql: athar ‘Ā’isha*), this is an accusatory charge for those who would prefer *qiyās* over an *athar*])

Argument to *al-ma‘qūl*

- §§402 (SH; the *ma‘qūl* of a contract type: *hawāla*); 633 (SH; the *ma‘qūl* of a contract type: *waṣiyya*); 929 (SH; reasoning from a *ma‘qūl* in a *khbar* of the Prophet: Prophet aimed at showing *farq*)

Argument to Custom or Convention

- §§481 (IAL; because it is ‘urf *ẓāhir* among the people);⁴² 875 (SH efficient property occasioning *ḥukm* is “*idhā fa‘ala dhālika al-fi’l alladhī yuf‘alu bi-mithlihi fi dhālika al-waqt*” — i.e., the ‘illa is “his action was consonant with sea-faring convention”)

Claimed / Reported *Istiḥsān*

- §§478 (IAL);⁴³ 484 (IAL);⁴⁴ 730 (AH);⁴⁵ 799 (IAL);⁴⁶ 801 (IAL);⁴⁷ 811 (AH);⁴⁸ 874 (IAL);⁴⁹ 1021 (AH)⁵⁰

***Iḥtiyāt* as a Guiding Principle**

- §§1018 (SH; *aḥabba ilayya* ruling linked with *iḥtiyāt*)

Unique Argument Types of a more “ancient” tenor

Charges of *tanāquḍ* / *qawl mutanāqid*

- §469 (SH)

Reductio ad Impossibile

- §§13 (SH); 407 (IAL); 1194 (SH); 1289 (AH; *alā tarā*)

⁴² Considered *istiḥsān* by al-Sarakhsī (*Mabsūṭ* 30:150); al-Afghānī (64, n.1). Noted as *istiḥsān* by Schacht (*Origins*, 112).

⁴³ *Mabsūṭ* 7:164; 30:150. Noted by Schacht (*Origins*, 112, and 273, n.4).

⁴⁴ Noted by Schacht (*Origins*, 112).

⁴⁵ *Mabsūṭ* 28:34. Noted by Schacht (*Origins*, 112).

⁴⁶ *Mabsūṭ* 7:207. Noted by Schacht (*Origins*, 111-12).

⁴⁷ *Mabsūṭ* 7:207. Noted by Schacht (*Origins*, 111-12).

⁴⁸ Schacht (*Origins*, 112) claims: “Abū Ḥanīfa is systematically consistent, but still makes a very slight concession....”

⁴⁹ Schacht (*Origins*, 112) claims: “he [IAL] makes an inconsistent exception on account of *vis maior*, out of regard for material justice.” After a comparison with SH’s ruling (based upon seafaring convention) in §875, I believe it is questionable to interpret IAL’s exception as *istiḥsān*.

⁵⁰ As claimed by Schacht (*Origins*, 112), from his interpretation of al-Ṭaḥāwī’s description of AH’s decision as *ra’y*, recorded in the *Mabsūṭ* (4:138). Notably, however, the *Mabsūṭ* - replete with references to *istiḥsān* — does not appear to employ the term with reference to AH’s particular opinion on this *mas’ala*. I think it unlikely that al-Ṭaḥāwī or al-Sarakhsī viewed it as such, and would conclude that this identification belongs to Schacht alone.

A Fortiori Arguments (Outside the domain of *Faḥwā al-Khiṭāb*)

- §§215 (SH; *a maiore ad minus*); 992 (SH; *qiyās; a minore ad maius*); 1017-20 (SH *qiyās a maiore ad minus*; as X is in the *ma’nā* of Y, or *akhaḥfu minhu*); 1084 (SH; *a minore ad maius*); 1102 (SH; *a maiore ad minus*); 1241 (SH overrides ‘illa concerns of previous sections by upgrading the *mas’ala* to full-blown *zinā* — an “*a fortiori* strategy”)⁵¹

Argument via Restrictive Disjunction

- §1395 (AH/AY; unlawful sex act must incur either *ṣadāq* or *ḥadd* — if not one, then it must be the other)

Schacht’s “*a potiori*” *qiyās*:⁵²

- §796 (SH preponderates a *ma’nā* as more appropriate (*aḥrā*), supports with ‘aql: hypothetical situation in which one causes less harm)

Ra’y, according to Schacht:

- §975 (AY; *lā arā X*);⁵³ §1044 (SH; *wa lā arā — wa Allāhu Ta’ālā a’lam* — that X is *jā’iz*)⁵⁴

Other Argument Categories / Elements

Open Appeals to Legal Theory

- §§56 (SH; several legal theoretical principles); 293 (SH; lack of *āthār* justifies use of *qiyās*); 609 (AH; “The *yamīn* is not transferred from the locus [*mawḍi’*] upon which the Prophet... placed it [*waḍa’ahā*]”); 1139 (SH; “*laysat fī aḥādīn ma’a al-nabī... ḥujjatan*”)
- [proto-system “normative law of contradiction”?]: §734 (SH; “when we command X, we do not permit the reverse of X” [*aṣl* not mentioned])

Appeal to Theological Principle

- §1425 (SH; *ḥukm Allāhi wāḥidun lā yakhtalifu*)

Practice of *Iḥtiyāt*

- §503 (SH; in the context of “*Qāḍī* Instruction”)

Apparent *Maṣlaḥa* in *Āthār* of Companions

- §15 (‘Alī)

Apparent *Maṣlaḥa* in Reasoning/Practice?: SH conceals his real solution, out of fear of negative societal consequence

- §§20 (SH, reported by RB: fear of iniquitous artisans); 309 (SH, reported by RB: fear of iniquitous *qāḍīs*); 1179 (SH, reported by RB: fear of iniquitous *qāḍīs*)

⁵¹ §1241 is a terse presentation of a complex argument from another *kitāb*. See my translation of it in the appendices in Part II of this dissertation.

⁵² *Origins*, 124 and n.2: “A particular kind of *qiyās* is represented by conclusions *a potiori*...” A closer examination of SH in §796, however, shows something more like the *Tarjīḥ al-Ma’ānī* of our *jadāl*-theory texts.

⁵³ Schacht, *Origins*, 105: “an example of his [Abū Yūsuf’s] explicit use of *ra’y*...”

⁵⁴ Schacht, *Origins*, 120 and n.1: “Shāfi’ expresses his own *ra’y*.” At the top of 120, Schacht reiterates that he considers our subject-treatise from SH’s “earliest period,” in which SH uses *ra’y* “in the same loose way as the ancient schools.”

Rulings Rendered According to Social Categories

- §590 (SH; *ahl al-masjid* vs. *ahl al-qabila* vs. *sūqī*)

Presumptions or Hypothetical Possibilities of Parties’ Strategizing as Premises in Argument

- §§198 (SH); 273 (SH); 348-50 (SH); 590-1 (SH); 1175 (SH)

Dialectical Formulae appear in Sunna / Āthār of Successors

- §§11 (Shurayḥ uses *ara’ayta*); 107-8 (SH; Prophet uses *ara’ayta*)

MIH supplies Later Qawl of AY

- §§514 (*wa ḥifẓī ‘an Abī Yūsuf annahu qāla ba’dū: X*); 588 (*wa qāla Abū Yūsuf ba’dā dhālika: X*)

RB supplies additional (more clear/correct) qawl of SH; or Alternate SH Ruling

- §§199; 350; 439 (*ḥifẓī ‘an al-Shāfi’ī... annahu yaqḍī X*); 510; 843 (SH ruling lacking, so RB — in apparent reference to *qawl* of AH & IAL — says: *li’l-Shāfi’ī... hāhunā jawābun*); 955-6 (RB presents SH *qawl* contrary to that presented by SH previously; preponderates the new *qawl* with ‘*aql* and Qur’ānic *dalīl*’); 1004 (RB supplies a contrary SH ruling he found “in another *mawḍi’*,” supports with argument)

RB Tafsīr of SH Ruling

- §499

Legal Theory Concepts and Terminology in Arguments⁵⁵

naṣṣ in the sense of “univocal”

- §796 (SH; *wa hādhā ma’nā al-Sunnati naṣṣan*)

‘amm/khāṣṣ distinction

- §74 (RB uses *alā tarā* to show the distinction); 510 (RB; *khāṣṣ* distinction)

Qur’ānic and Sunnaic / Āthāric Hermeneutic, and Complementary Interplay

- §§566 (SH reported by RB; *athar* Mujāhid supports *tafsīr* of Qur’ānic *dalīl*); 570-1 (SH/RB; *athar* Shurayḥ conflicts with Qur’ān); 1213-16 (debate is focused upon interpretation of single *lafẓ*: “*nisā’uhā*”); 1257 (SH; Sunna interpreted by *tafsīr*, more Sunna, and Qur’ān); 1425 (SH; Prophetic Sunna “is in the *ma’nā* of” Q.5:42 and Q.5:49)

Consistent Generalizing of the ‘illa (“super-qiyaṣ”)

Manzila-Subsumption

- §§201 (AH & AY); 202 (IAL); 346 (AH & AY); 391m (AH & AY); 474 (IAL); 537 (AH & AY); 987 (IAL); 1204 (IAL); 1341 (AH); 1348 (AH); 1350-2 (AH, AY, IAL); 1358-9 (AH, IAL)
 - §§1343-53: extensive *ikhtilāf* (AH & SH [and AY in §1350 (!)] vs. IAL & AY) re: the *manzila* of a partially manumitted ‘*abd*

⁵⁵ This is not a complete listing, more will be discussed in the second half of this chapter. Also see additional epistemological terms under “Epistemology of Evidentiary Procedure” below.

- §§1354-60: extensive *ikhtilāf* (AH & SH vs. IAL & AY) re: the *manzila* of a partially manumitted *ama*

Taswiya-Subsumption

- §§7 (SH); 38 (SH); 69 (SH); 210 (SH); 329 (SH); 336 (AY); 380 (SH); 383 (SH); 461 (IAL); 462 (SH); 495 (SH); 525 (AY); 669 (AH & IAL); 928-9 (SH; *lā takhtalifu* X and Y, because each is *mawṣūla*); 970 (AH); 1097 (SH); 1110 (AH & IAL); 1149 (SH); 1163 (SH); 1178 (2x, SH); 1189 (AY); 1192 (SH); 1246 (AY); 1328 (AH & IAL); 1398 (AH)

Extension of *Hukm* to Relevant Genus / Genera (of transaction, parties, objects, etc.)

- §§332 (SH); 559 (SH); 671 (SH); 856 (SH); 891 (AH); 1000 (SH); 1149 (SH; *qiyās* extended to “every *ḥadd* of God”); 1277-8 (AH/AY)

Formulaic Modes of Objection

innamā mana’nā

- §§68-9 (SH; x2); 394 (SH)

Elements of Additional Interest

We have now provided almost as complete a picture of the dialectic and argumentation of our subject-treatise as we may at this time. What follows is a listing of elements, mentions, etc. which, although incidental to our current project, ought still to be of great interest to the legal historian of early Islam. Of course, the *Ikhtilāf al-‘Irāqīyyīn* is a treasure-trove of rulings and arguments relevant to the study of the legal status of women in the second century H; the legal status of slaves (and the institution of slavery in general); the laws of contract and commerce; etc. Features relevant to these domains would be far too numerous to list, so we will confine ourselves to narrower topics and refer the reader to our translation in Part II for broader concerns. Finally, we must again acknowledge that what follows is only a sampling, and not intended to represent a thorough survey.

Of Legal-Historical Import

- Reference to *Taqlīd*
 - §1061 (of ‘Umar)
- Caliphal Decree Alters *Mujtahid*’s Doctrine and/or Practice as *Qāḍī*
 - §240 (AY/MIH re: IAL)
- Mention of Iniquitous *Qāḍīs*
 - §§309 (SH, reported by RB); 1179 (SH, reported by RB)
- Reference to Community of Jurists (by Region)
 - Ahl al-Baṣra: §§247ff.
 - Mashriqīyyūn: §§252ff.; 737
 - Ahl al-Ḥijāz: §240
- Reference to Epistemic Community (by Project/Specialization)
 - Ahl al-Fiqh: §§284; 1429 (as excluded from exemption from *ḥadd* for not

- knowing)
 - Ahl al-Ḥadīth: §§283; 667; 929; 1318-19; 1379 (Ahl al-‘Ilm bi’l-Ḥadīth)
 - Ahl al-Kalām: §§642ff.
 - Ahl al-Qiyās: §793 (with apparent accusation of preferring *qiyās* over an *athar* ‘Ā’isha)
 - Ahl al-‘Ilm: §1046; 1072 (three separate doctrines mentioned)
 - The Huffāz: §1119
- Different Rulings for Different Social Categories
 - Sūqī vs. ‘Arab: §584
 - Ahl al-Masjid vs. Ahl al-Qabīla vs. Sūqī: §590
- Reference to Testimonial Subgroups, Evidentiary Specialists, and Court Functionaries
 - *dhawā ‘adlin*: §32
 - Ahl al-Ma’rifa al-Bāṭina: §§502-3
 - the *qā’if*: §680
 - Ahl al-Khibra bi’l-Mashhūd ‘alayhi: §685
 - the *jilwāz*: §1428 (in context of real Kūfan practice)
- Rulings re: Written Instruments
 - *kitāb al-qāḍī ilā al-qāḍī*: §§554ff.; 577ff.; 1161ff.
 - *dhikr ḥaqq*: §§477-86
 - *‘uhda*: §§232-3
- Rulings re: the Qāḍī’s memory and the Epistemic Value of what is Registered in his *Dīwān*
 - §§1156ff.; 1176ff.
- Step-by-Step “Qāḍī Instruction” re: Procedural Concerns
 - §§129; 227; 437-8 (including what to write in the *qāḍā’*); 502-4; 1162-3 (re: verifying *kitāb al-qāḍī ilā al-qāḍī*)
- Examples of a *Mujtahid-Qāḍī* Putting his Rulings into Practice
 - §§446 (AY, as reported [apparently] by MIH); 539 (IAL); 555 (IAL); 595 (IAL); 597 (IAL); 706 (IAL); 1165 (IAL); 1166 (AY); 1190 (IAL; x2); 1198 (IAL; x4); 1423 (IAL; firmly asserted by AY/MIH comment: *wa qad fa’ala dhālika*); 1428 (IAL, as witnessed by AY)
- Regional Variations for Appellation of Contract
 - §202 (old Iraqi *mu’āmala* for Ḥijāzī *musāqāt*)
- Jurists Indicate Regional Variations of Practice Resultant of Different Practices of Different Companions
 - §§900-8 (AH/AY/MIH listing of *naql* and explanation shows, among other things, Kūfans taking up practice of ‘Alī and Syrians taking up practice of Mu’āwiya)

Of Other Historical Import

- References to (and Clarifications of) Weights and Measures
 - §§973-6 (ṣā’, wasq, raṭl, mudd, makhtūm by the Ḥajjājī standard, makhtūm by the Greater Hāshimī standard, the ṣā’ of the Prophet); 985ff. (*mithqāl*, *dirham*, *dīnār*)

- Re: Canonization of the Qur’ān
 - §909 (IAL mentions ‘Umar as reading two “*sūras*” for *qunūt* [NB: these same *sūras* are found only in the non-canonical codex of Ubayy b. Ka‘b];⁵⁶ AY explains IAL transmitted (*yuḥaddithu*) this from Ibn ‘Abbās)
- Rulings with regard to the Khawārij
 - §§176-8

Finally, before closing this section, we must present one last area of interest from our subject-text, as it bears upon a tentative hypothesis we will present in the concluding half of this chapter: the possible interplay between the epistemology of evidentiary procedure, the procedure of dialectical disputation, and the epistemology of *ijtihād*. Disputation between litigants in the *qāḍī’s majlis*, after all, shares certain features in common with disputation between jurist-dialecticians in a *majlis* of juridical *jadal*; and the argumentation epistemes of this latter enterprise, as we soon hope to make plain, constitute a formative dynamic for the argumentation epistemes of private *ijtihād*.

Arguments and Rulings Bearing upon the Epistemology of Evidentiary Procedure

- Appeals to Sunnaic *Qā’ida*: «*al-bayyina ‘alā al-mudda’ī...*»
 - §§610-13
- Rulings regarding “the Benefit of Assumption”
 - §§1-2; 50; 133-4; 196-9; 359-61; 860-4; 1276-80
- “Evidentiary *Tarjih*”
 - *jarḥ* is *awlā* than *ta’dīl*: §564
 - *qāḍī’s ‘ilm* is *awlā* than witness testimony: §305
 - *iqrār* is *awlā* than *shuhūd*: §479; 482
 - *iqrār* is *awlā* than *bayyina*: §477
 - Testimony and Oaths ‘*alā ‘ilm* vs. *al-battata*:
 - §§504 (*al-shahāda ‘alā al-batti tu’awwalu ilā al-‘ilm*); 614-19; 685 (*ma’nā al-batt ma’nā al-‘ilm, wa ma’nā al-‘ilm ma’nā al-batt*)
- on the impossibility of determining which witnesses are lying/truthful: §590ff.
- Rulings re: the *Qāḍī’s* knowledge of prior litigation
 - §§304-8 (epistemological concerns/terms include: *‘ilm, ṣāḥir, shakk, yaqīn*)
 - §§1156ff., 1176ff. (*Qāḍī’s* memory and the epistemic value of his *dīwān*)
- “*Qāḍī* Instruction” guided by Epistemological Concerns
 - §§502-4 (epistemological concerns/terms include: *iḥtiyāt, ma’rifā, iḥāṭa, ‘ilm, al-batt*); 682ff.; 1168-71 (epistemological concerns/terms include: *ṣāḥir*)

⁵⁶ See our note attached to §909 in Part II of this dissertation.

The *Ikhtilāf al-‘Irāqīyyīn*:

Our Window on Proto-System Juridical *Jadal* Teaching and Practice

And so we draw our examination of the *Ikhtilāf al-‘Irāqīyyīn* to a close, and ought by now to be thoroughly impressed by the wealth of information this relatively short treatise is capable of providing, even to the limited extent we have analyzed it. Yet, with all things considered, our small window opens upon a vista which ought *not* to surprise us in the least: a blending of prior Near Eastern argumentation epistemes (of which we have only pointed out such axioms as appear most “Aristotelian”) with early Islamic argumentation epistemes, the whole of which — though seemingly broader in procedural and argumentative content, and in every way sophisticated — is not nearly as *refined* as its descendant-systems were to become in the following three centuries.

As examples of the infusion of prior epistemes with Islamic axioms in the constitution of a new, and distinct, argumentation episteme, we may cite the evident differences between: 1) the Aristotelian *endoxa* set vs. the early Islamic *endoxa* hierarchy; and 2) the organizing principle of the *Topics* vs. that of our *jadal*-theory texts. As for the first example, we observe in our proto-system *jadal* an Islamic hierarchy of epistemic authority at a relatively advanced stage, along with plenty of evidence that the ranking of *uṣūl* was still being wrought in the dialectical forge. Still, parallels with the Aristotelian “everyone” (*ijmā‘ al-Umma*) and “the wise” (*ijmā‘* of the *Ṣaḥāba*, or *‘ulamā’*) and “the famous of the wise” (the Sunna of the Prophet, *qawl al-wāḥid min al-Ṣaḥāba*, *taqlīd* of a venerated exemplar *mujtahid*) are quite evident, and may be witnessed in the full heat of dialectically-motivated hierarchical formulation with regard to epistemic valuation. By the era of our *jadal*-theory texts, much more appears to have been resolved with regard to the hierarchy of epistemic authority (at least within the nascent Sunnism to which all our texts belong), and again through the venue of dialectical encounter. Contention yet remained in a number of areas, however, as all of our *jadal*-theorists report.

And as for the example of organizing principles, we will note that Aristotle’s *topoi* of predicables are not at all easy to distinguish in our *jadal*-theory texts. Although the general aims and procedures of “good” dialectic are evident, our lens-text organizing principles are in accordance with the axioms of Islamic epistemic valuation (the hierarchy of *uṣūl*). In our proto-system *Ikhtilāf al-‘Irāqīyyīn*, we also see these features at a relatively advanced stage in practice, although elements which appear quite “Aristotelian” (especially premise-gathering for reduction to *tanāquḍ*, absurdity,

etc.) are far more evident than in any of the *jadāl*-theory texts, if not in fact entirely particular to our proto-system.

Indeed, all of our observations combine to justify our referring to the *jadāl* teaching and practice of the *Ikhtilāf al-‘Irāqīyyīn* as part of a “proto-system” in the first place. It is “proto” in the sense that it is a less-refined precursor to such as evolved over the following centuries; and it is a “system” with respect to all of the transmitted conventions we have noted, especially with regard to the formulae of question, objection, justification, statement of substantive ruling, etc. To this we may add a remarkable consistency of both substantive and legal-theoretical technical terms, though this latter set in particular would continue to evolve (e.g., from *ma‘nā* to *waṣf* and *‘illa*, from *qiyās* to *qiyās al-ṭard*, *qiyās al-‘aks*, *al-‘illa*, *al-dalāla*, etc.)

What is more, we may also observe a consistency in approach to the *mas‘ala* at hand, especially in the practice of al-Shāfi‘ī. Witness, for example, his common procedure of: 1) reporting or reformulating the *mas‘ala* as two contradictory *qawls*; 2) weighing these *qawls* against each other; and — although certainly not always — 3) choosing the one of greatest epistemic backing. By way of example, we may cite the following: §§7-20; 304-8 (SH preference clear); 312-14; 365-6 (preference not clear); 475-6 (*qawl* #1 of *ba‘ḍ aṣḥābinā*; *qawl* #2 of *ghayruhum*; no preference indicated); 1007-8 (*qad qīla* X; *wa qīla* -X; preference not clear); and 348-50 (RB clarifies SH *ma‘nā*).

Our window onto the proto-system of Islamic juridical *jadāl* is thus as complete as we can make it at this stage of research. I would reiterate an earlier caveat, and stress that our analyses, categories, and assessments belong only to our subject-treatise, and to the comportment of its dialectician-jurists only insofar as its *masā’il* of *ikhtilāf* are concerned. Nevertheless, although at a very early stage of exploration, and understandably hesitant to abstract our findings into broader strokes of the legal-historian’s brush, we may yet distil certain dynamics from our findings and incorporate them into larger themes of legal-historical development. Indeed, we may even propose that such dynamics play a role in intellectual-historical evolution on the grander scale. It is to this final, “theory-building” task we shall now turn.

Chapter IV.2: Evolutionary Paradigms, the Dialectical Forge, Broader Implications

Introduction

In this concluding half of Chapter IV, I will draw our study to a close by exploring some of the implications of what we have surveyed, analyzed, and concluded in preceding chapters. In so doing, we will proceed from more particular observations and their implications to the more general and abstract. First (in sections A and B), we will address the differences between proto-system and full-system legal theory and *jadal*-theory, review select instances of elements from both theories “gaining the edge of *ḥujjiyya*” in the dialectical forge, compare our model of dialectical dynamics with select current evolutionary paradigms for *uṣūl al-fiqh*, and, finally, develop our model — component by component — into a more fully-contoured “Unified Dialectical Forge Theory.” Following this (in section C), I will attempt to sketch — in the broadest of strokes — a “background narrative” for the early evolution of Islamic dialectical and legal theories, as well as a provisional “motive” model for the bequeathing of dialectical axioms to logical and legal-theoretical argumentation epistemes. Finally (in section D), after briefly introducing more open doors for future research, I will proceed to a few closing statements.

A. On Proto-System *Jadal* and the Evolution of the ‘*ilm Uṣūl al-Fiqh*

A.1. Differences between Proto-System Legal Theory and Fully-Systematized *Uṣūl al-Fiqh*

Throughout previous chapters we have encountered a number of elements pertaining to the proto-system legal theory (al-Shāfi‘ī’s, in the main) which manifests itself with some frequency in the *Ikhtilāf al-‘Irāqīyyīn*. Occasionally, I have noted differences between this manifest theory and the more refined, fully-systematized theories we find in the works of early *uṣūl*ists (among them, the *uṣūl* treatises of our *jadal*-theory authors, and their *jadal* works as well). It is to this topic we now return, with the objective of exploring further implications. Before proceeding, however, I must remind the reader that due to the very content and arrangement of the *jadal*-theory treatises comprising our lens-texts, our survey of dialectical elements in the *Ikhtilāf al-‘Irāqīyyīn* was as much legal-theoretical as it was dialectical. The entire focus of our lens-texts remains, after all, the justification and critique of *istidlāl* — and the language and method of *istidlāl* is propounded in terms of the ‘*ilm uṣūl al-fiqh*. Thus we may claim that differences between proto-system and full-system legal theory have

manifested themselves in two ways: 1) via elements from our subject-text which did not “match” what we find in our lens-texts; and 2) via elements from our lens-texts which we would have expected to find in relevant discussions of our subject-text, but were absent.

Among the many examples we may cite is the comparatively less refined manner in which the *qiyās*-method of our subject-text is expressed. Although the term *qiyās* occurs some two dozen times in the *Ikhtilāf al-‘Irāqīyyīn*, along with a half dozen or more incidents of the verb *qāsa/yaqīsu*, nowhere is the *mode* of *qiyās* technically expressed, and invariably we encounter such phrases as “*qiyāsan ‘alā*” and “*qāsahu ‘alā*.” Entirely absent, in other words, are technical references to *qiyās al-ṭard*, *qiyās al-‘aks*, *qiyās al-‘illa* (with *jalī*, *wāḍiḥ*, and *khafī* subtypes), *qiyās al-dalāla*, and *qiyās al-shabah*; although we have seen that many such species of *qiyās* were there in practice. Moreover, although some of the discussions of *qiyās*-relationship in our lens-texts are conducted in terms of *ma‘nā/ma‘ānī*, the technical language of *waṣf* and *‘illa* dominates full-system *jadal* theory. The *qiyās*-relationships of the *Ikhtilāf al-‘Irāqīyyīn*, on the other hand, are conducted entirely in terms of *ma‘ānī* (with the notable exception of a reported claim of the Ahl al-Kalām, which employs *khiṣāl*). So not only are the terms *‘illa* and *waṣf* entirely absent from our subject-text, but so too are any technical references to *ṭard*, *‘aks*, *jarayān*, and *ta’tḥīr*.

In a similar fashion, al-Shāfi‘ī’s *ḥadīth* justifications and transmission-oriented objections appear only in the vaguest terms in our subject-text; the latter are invariably some version of: “its like is not confirmed by the Ahl al-Ḥadīth,” and absent are any technical references to *āḥād* and *mutawātir*, *mursal* and *musnad*, etc. We have seen that there are, however, indications of the less refined *ḥadīth* science then in place (perhaps we may consider this yet another proto-system). As for the domain of hermeneutic, other differences are manifest. Certainly we have seen the hermeneutics of *bayān*, *jumla/mufasssir*, and *‘amm/khāṣṣ* (among others) at work; but absent from our subject-text — and indeed, from the *Umm* and the *Risāla* as a whole — are the technical hermeneutics of *muṭlaq* vs. *muqayyad*, and *ḥaqīqa* vs. *majāz*.

Nor is this all that we might note, for there are differences with regard to the presence and absence of entire categories of *istidlāl*. The term *khiṭāb*, for example, appears nowhere at all in either *Umm* or *Risāla*, much less *laḥn al-khiṭāb*, *faḥwā al-khiṭāb*, *dalīl al-khiṭāb*, and *ma‘nā al-khiṭāb*. Although we have found, in our subject-text alone, nearly the full gamut of *istidlāl* and *i’tirāḍ* in the domain of *ma‘nā al-khiṭāb* in practice,

and a few instances of *faḥwā al-khiṭāb* and *dalīl al-khiṭāb* in practice, technical references to these and other categories of *ma'qūl aql* are simply missing from al-Shāfi'ī's legal theory as a whole. So, too, is any acknowledgement of *istiṣhāb*; the term and its cognates are absent from both *Umm* and *Risāla*. On the other hand, we find indicants of guiding principles at work in proto-system legal theory — and not just al-Shāfi'ī's — which simply receive no theoretical treatment in our *jadāl* theory texts. Among these are: 1) a concern with internal, logical consistency (manifest in charges of *tanāquḍ*); 2) concerns which mirror the principle of *maṣlaḥa* (surprisingly absent from al-Bājī); 3) demonstrated concerns with *iḥtiyāt*, accompanied by the term itself; and 4) reports of *istiḥsān*.¹

This brings us to that most interesting “source” in al-Shāfi'ī's legal theory which we have come across several times, and whose equivalent we have yet to discover in the early *jadāl* theory texts. I am speaking, of course, of his arguments to the *'aql* and the *ma'qūl*, and we will pause now to make a final assessment as to what al-Shāfi'ī might have intended by these terms. Notably, references to the *ma'qūl* occur some seventy times throughout the *Umm*, and we have encountered seven of these in the *K. Ikhtilāf al-ʿIrāqiyīn*: §§402, 633, 929, 1056, 1061, and 1411 (2x); we have also encountered al-Shāfi'ī's argument to the *'aql* in §651. Before proceeding to our own assessment, however, we should note that Schacht has had something to say on the topic:²

“Shāfi'ī often refers to *'aql* ‘reason’ or *ma'qūl* ‘what is reasonable’, sometimes as a synonym of *qiyās* [citing *Tr. I*, 160, wherein we find Ḥassūn's §929], and in the numerous cases where he speaks of *qiyās* and *'aql* or *qiyās* and *ma'qūl*, sometimes in a broader meaning, implying that a doctrine is consistent and stands to reason [citing *Tr. I*, 73, wherein we find Ḥassūn's §402].³ So *ma'qūl* can be opposed to *qiyās* proper [citing *Tr. I*, 121, wherein we find Ḥassūn's §633], or be used to show that there is no place for *qiyās* [citing *Tr. I*, 253, wherein we find Ḥassūn's §1411].”⁴

¹ *Istiḥsān*, of course, was a hotly debated principle in proto-system legal theory, and thus itself the object of proto-system juridical dialectic. Witness, for example, al-Shāfi'ī's *Kitāb Ibṭāl al-Istiḥsān*. Although we should not be surprised that our lens-texts do not treat *istiḥsān* in any category of *istidlāl* (being that none of our chosen *jadāl*-theorists are Ḥanafīs), we should yet be surprised that it does not appear to be treated among the categories of *i'tirād*. The opponents in example-*masā'il* of all our treatises are often Ḥanafīs, and the absence of specifically *istiḥsān*-oriented objections is noteworthy.

² *Origins*, 126.

³ Here, Schacht also cites numerous other instances from treatises of the *Umm*, the *Risāla*, and the *Ikhtilāf al-Ḥadīth*.

⁴ Schacht continues: “*Ijtihād* must be exercised by *'aql*...; Allah has endowed mankind with *'aql* and guides them either by an explicit text or by indications on which to base their *ijtihad*...;” twice citing the *Risāla* (*Origins*, 126).

As for §402, we find that al-Shāfiʿī argues from the *maʿqūl* in a contract type (*hawāla*); he does so again in §633, with reference to the *maʿqūl* in *waṣiyya*, using the term in a consistent fashion in both cases. Schacht, as we see, interprets the first as *maʿqūl* “in a broader meaning, implying that a doctrine is consistent and stands to reason,” and the second as “*maʿqūl*... opposed to *qiyās* proper.” In §929, however, we find that al-Shāfiʿī argues from the *maʿqūl* in a *khābar* of the Prophet, specifically asserting that the Prophet “aimed at (*arāda*) the *farq* between the *farīda* and the *nāfila*.” Surprisingly, Schacht now interprets this, as we have seen, “as a synonym of *qiyās*.”⁵ Now, I find it unlikely that al-Shāfiʿī, remarkably consistent in all respects, would employ *maʿqūl* both as a “synonym for *qiyās*” and as “opposed to *qiyās* proper.”⁵

Moreover, in all of §§651, 1056 and 1061 (none of which are referenced by Schacht), we find that al-Shāfiʿī lists *ʿaql* and *maʿqūl* as a distinct “source” among “sources” — as though it were an *aṣl* among *uṣūl*:

- §651: “the *qawl* you have chosen is farther from *al-qiyās* and *al-ʿaql*”
- §1056: “*wa lā aʿlamu man qāla X, illā khālaḥa* [1] *al-Qurʾān*, [2] *al-āthār*, [3] *al-qiyās*, [4] *al-maʿqūl*”
- §1061: “*kayfa khālaḥahu* [an *athar dalīl*], *wa maʿahu* [1] *al-Qurʾān*, [2] *al-qiyās*, [3] *al-maʿqūl*, and [4] other *Aṣḥāb al-Nabī*?”

Not only may we observe the hallmarks of consistent usage in the above examples, but three characteristics of *ʿaql* / *maʿqūl* make themselves plain here: 1) they are listed separately from *qiyās* — i.e., they are *distinct* from *qiyās*; 2) they may be paired with other *adilla* as a sort of super-authoritative epistemic conglomeration; and 3) they are something that an opponent can violate through faulty reasoning.

Finally, we come to the very intriguing “*aṣl al-maʿqūl*” of §1411. Here we find al-Shāfiʿī arguing the following:

- “the *aṣl al-maʿqūl* was that nothing is made *ḥalāl* for party X by the *fiʿl* of party Y”
- It is not allowed that we do *qiyās* from [God’s exception] to what differs from it “if the *aṣl* belongs to the *maʿqūl fīhi*”

Now, Schacht has interpreted these two instances as *maʿqūl* being “used to show that there is no place for *qiyās*.” Although I would agree that he is most correct in judging the context to be one in which “there is no place for *qiyās*,” I would argue that it is in fact the term *aṣl* which is “used to show” it, not the term *maʿqūl*. *Aṣl* in §1411, though

⁵ An examiner of this dissertation has suggested that what Schacht actually meant by “opposed to *qiyās* proper” was such as would indicate al-Shāfiʿī’s *maʿqūl* is *broader* than just *qiyās* proper; in this case, and in consonance with the *maʿqūl* of the *jadāl*-theorists, Schacht would be right.

qualified by *al-ma'qūl* and *li'l-ma'qūl fīhi*, seems to refer to God's "original" ruling(s) with regard to the key quality (*ḥalāl* for party X via *fī'l* of party Y) inherent to the *mas'ala* at hand. In other words, it is God's *aṣl*-principle that this arrangement should never be the case, and this *aṣl*-principle bears the further epistemic advantage of "belonging to the *ma'qūl fīhi*." God's explicit ruling in the *mas'ala* at hand (wherein he in fact enjoins this arrangement) is therefore God's own exception to God's *aṣl*-principle (which is for us, in hermeneutical terms, *ma'qūl fīhi*); thus, according to al-Shāfi'ī's legal-theoretical teaching, it must never be allowed to serve as the basis of *qiyās* when the end-solution would contradict God's "original" *aṣl*-principle.

Now, before my final assessment as to what al-Shāfi'ī means by *'aql* and *ma'qūl* — which terms appears to me very consistent in his usage —, I would remind the reader that the second subset of the *adillat al-Shar'* according to al-Shīrāzī, al-Bājī, et al., is *ma'qūl aṣl*. More specifically, I would draw attention to the fact that — although one might suspect *ma'qūl aṣl* to mean something like "rational *aṣl*" — we must take into consideration the following fact: every form of *ma'qūl aṣl* in the *jadāl*-theory literature *still depends upon a textual dalīl*. That is to say, no form of *ma'qūl aṣl* (such as *faḥwā al-khiṭāb*, or *ma'nā al-khiṭāb*, etc.) exists in isolation from Kitāb or Sunna (i.e., they are all derivations from the *khiṭāb*). This is the source of the epistemic strength of the modes of reasoning grouped together in this subset, and the reason for their superiority over *istiṣhāb* (and other principles operating in the absence of more comprehensive textual *adilla*).

Moreover, all of the categories of *ma'qūl aṣl* may be described in the following manner: they are modes of discovering or bringing to the surface God's fuller intensions with regard to His *aḥkām*, when such fuller intentions are not plainly stated in the textual *dalīl*. This applies to all of *laḥn al-khiṭāb*, *faḥwā al-khiṭāb*, *dalīl al-khiṭāb*, and *ma'nā al-khiṭāb* — by way of each of these modes, a solution for the *mas'ala* at hand is subsumed beneath what is *understood* to be God's fuller normative intention. I have italicized "understood" in the previous sentence because I believe this to be the crux of the matter: *ma'qūl* is synonymous with *mafhūm*, but with the added implication of *mafhūm* via varying degrees of rational effort. This varying degrees of effort also explains the hierarchical ranking of these modes of *istidlāl* in our *jadāl*-theory texts, with *laḥn al-khiṭāb* requiring the least rational effort, and *ma'nā al-khiṭāb* requiring the most. And the lesser the degree to which humankind must exercise its rational faculty in comprehending the full range of God's command, the lesser the degree to which

human error can creep in, and the greater the epistemic authority of the command thus comprehended.

At last we may return to al-Shāfiʿī, and make our final assessment regarding his intention with *maʿqūl* and *ʿaql*, taking all of the above into account. Importantly, none of the instances in which al-Shāfiʿī employs these terms prevent us from defining the *maʿqūl* as “that which is *mafḥūm* of God’s command via rational effort (to lesser or greater degrees), when it is not plainly stated in a textual *dalīl*.” In other words, al-Shāfiʿī’s intention with *maʿqūl* and *ʿaql* is in consonance with the intention of al-Shīrāzī, et al., with *maʿqūl aṣl*, despite two obvious differences: 1) al-Shāfiʿī never once makes technical reference to *khiṭāb* throughout his legal theory (i.e., he formulates no typology for *maʿqūl aṣl*); and 2) al-Shāfiʿī consistently references *ʿaql* and *maʿqūl* independently of *qiyās*. As for this latter, it is not to suggest he did not see a relationship between *maʿqūl* and *qiyās*, but only that he did not subsume *qiyās* beneath *maʿqūl* as our *jadāl*-theorists subsumed it beneath *maʿqūl aṣl*.

My final assessment, then, is that when al-Shāfiʿī argues to the *maʿqūl*, he is arguing to that “rational understanding” which would later be expressed in terms of *laḥn al-khiṭāb*, *faḥwā al-khiṭāb*, and *dalīl al-khiṭāb* (but not *maʿnā al-khiṭāb*, which he expounds separately in terms of *qiyās*). If this is correct, then there are two very important implications for this dissertation, each of which may again be expressed in terms of difference and similarity with full-system *jadāl* and *uṣūl* theory. First, al-Shāfiʿī’s *maʿqūl* and *ʿaql* are different in that he developed no refined typology of subtypes as later theorists did for *maʿqūl aṣl* (even if he in fact practiced modes of reasoning which may be qualified in terms of these subtypes). Thus, once again, proto-system legal theory appears just as we would expect: less choate, less refined, less comprehensive. As with other areas, some of the base material is there, but without the categories and refined definitions it would receive with our *jadāl* and *uṣūl* theorists. Second, the very fact that we find a parallel consideration sharing the technical term *maʿqūl* speaks volumes with regard to the continuity and perpetual development and refinement of certain proto-system concepts. *Uṣūl al-Fiqh* did not emerge in the fourth century from a vacuum, but neither was al-Shāfiʿī the Aristotle of this science. He was indeed an eminent contributor to proto-system legal theory; but he was not alone in making early contributions, and the real systematizing Aristotles came later.

These latter statements, in fact, are supported by all the parallels and divergences we have noted between the proto-system legal theory of the *Ikhtilāf al-*

‘*Irāqīyyīn* and the full-system theory of fourth and fifth century H *uṣūlists*. Certain core elements of later *uṣūl al-fiqh* are present, but in reduced number and with less refinement. Certain elements are missing entirely, and apparently fashioned at a later date. Technical terms are generally scarce, and of broader scope, though consistently applied; and certain of those terms in vogue in proto-system theory would eventually take on different nuances and gain additional subcategories. Most importantly of all, and as both our subject-text and lens-texts stand witness, all of these elaborations and refinements were resultant of continual epistemic pressures brought to bear in venues of juridical disputation. *Uṣūl al-Fiqh* as we know it was born and refined in the dialectical forge.

Returning to al-Shāfi‘ī’s intentions with appeals to ‘*aql* and *ma‘qūl*, we must finally note Joseph Lowry’s extensive discussion on the topic in his *Early Islamic Legal Theory*. Unfortunately, I had overlooked this account until after spending a great deal of time trying to fathom al-Shāfi‘ī’s intention on my own, and eventually reaching my final assessment as above; I would have benefited greatly from his insights. Luckily, however, my final assessment finds a great deal of support in Lowry’s, which I may briefly summarize as follows. First, he notes that al-Shāfi‘ī refers to ‘*aql* in three different ways in his *Risāla*: 1) with seeming disapproval, in reference to the Ahl al-‘Uqūl; 2) positively, as “a tool furnished by God so that His servants can do what is most important: perform legal reasoning;”⁶ and 3) by referring to *mas’ala* solutions as *ma‘qūl*.⁷ With regard to the specific sense of *ma‘qūl* in two examples, Lowry describes the term: 1) as corresponding to “the most obvious implication of the [Qur’ānic] passages in question (*ashbahuhumā bi’l-ma‘qūl al-ẓāhir*),” and as bearing a similarity to “the identification of the *ma’nā* in *ma’nā*-based *qiyās*,” and 2) as corresponding to “simply a sensible [solution], apparently unanchored in a revealed text.” As for Lowry’s final

⁶ Importantly with regard to the cited passages in which al-Shāfi‘ī refers to ‘*aql* in this sense, Lowry observes: “Shāfi‘ī seems less overtly hostile to ‘*aql*, but also unwilling to let it operate unconstrained by revelation” (*Early Islamic Legal Theory*, 314).

⁷ Ibid., 313-14. Importantly, Lowry’s discussion of ‘*aql* and *ma‘qūl* is taking place within a larger chapter entitled: “Internal Evidence for the *Risāla*’s Polemical Content.” In other words, he is well-aware of the *Risāla*’s dialectical features. More specifically in this section he is exploring “The *Risāla* as Theological Polemic,” and has preceded his examination of “The Role of Reason (‘*Aql*)” with discussions of: 1) “God’s Attributes;” 2) “God’s Foreknowledge and Foreordainment of Events;” and 3) “The Idea of Justice (‘*Adl*).”

analysis: “it can be said that Shāfiʿī disapproves of reason as a substitute for revelation but recognizes the necessity of using reason as a tool for interpreting revelation.”⁸

⁸ Ibid., 315-17. As an addendum to this addendum, I have — since initial submission of this dissertation — come across a confirming reference in Éric Chaumont’s *El*² entry on al-Shāfiʿī. Under section (2) “Doctrine,” subsection (b), “*uṣūl al-fiqh*,” Chaumont explains, with regard to al-Shāfiʿī’s modes of derivation of *aḥkām*:

This legal statute is either presented as such in the scriptural sources (the Qurʾān and the Sunna), which al-Shāfiʿī calls “the foundation” (*al-aṣl*), or is it possible, by means of analogical reasoning (*qiyās* [q.v.]) to infer it from the *aṣl*, the latter being the bearer of a latent “rationally deducible content”, the *maʿkūl al-aṣl*? All the efforts of al-Shāfiʿī—and herein lies his originality in comparison with his predecessors—were subsequently to be applied to defining with precision, establishing critically and ranking in order of priority these different sources (*aṣl* and *maʿkūl al-aṣl*) and to determining the modalities of their usage.

Chaumont’s translation of *maʿqūl al-aṣl* as “rationally deducible content” is in perfect consonance with not only the *ʿaql* and *maʿqūl* we have found in the *Umm*, but with the arch-category of *maʿqūl aṣl* as we find it in our *jadāl*-theory texts.

A.2. Legal Theory in the Dialectical Forge

We will again remind the reader that our *jadāl*-theory lens for analyzing the *Ikhtilāf al-ʿIrāqīyyīn* was also an *uṣūl*-theory lens, and that most of the material we analyzed was “overtly dialectical” in that it appeared in transcript-like Q&A sequences replete with argument and counter-argument; thus, it is not an exaggeration to say that so long as these arguments depend upon *istidlāl* within one of the domains listed by our *jadāl*-theorists, they constitute examples of legal-theoretical axioms (be they epistemological, hermeneutical, or rational-inferential) gaining, sustaining, or losing the edge of *ḥujjiyya* in the dialectical forge. Certain examples, however, were more obviously of a legal-theoretical bent, and we have pointed them out as we progressed through chapters III and IV.1. Primary among these are what we termed “open appeals to legal theory” — once in our review of category A-B material (nine examples), and again for the C-G material (five examples).⁹

In addition to these were many other instances wherein it was quite clear that a legal-theoretical axiom was being employed, sometimes accompanied by a recognizably technical vocabulary. In avoidance of repeating previous observations, I will simply list a number of instances here according to certain general legal-theoretical domains as I understand them. This should not be considered a complete listing.

Epistemology (having to do with ʿilm, certainty, doubt, etc.)

- §§700 (with *ẓann* and *ẓāhir*);¹⁰ 504, 614-19, 685 (ʿalā ʿilm vs. *al-battata*); 304-8 (with ʿilm, *ẓāhir*, *shakk*, *yaqīn*); 502-4 (*iḥtiyāt*, *maʿrifa*, *iḥāṭa*, ʿilm, *al-batt*); 1168-71 (with *ẓāhir*); 1273 (with *ẓāhir*)
- [also, all examples listed as “Arguments and Rulings Bearing upon the Epistemology of Evidentiary Procedure” near the end of Chap. IV.1]

Transmission Theory (having to do with *isnāds*, conveyance of *akhbār*)

- §§248 (with *awlā*, *ijtimaʿa*, *wāfaqa*, and *tathabbut*); 283; 667 (critique: it is *min wajhin wāḥidin lā yuthbituhu Ahl al-Ḥadīth kulla al-tathbīt*); 1138 (critique: *laysat min wajh yathbutu mithluhu law infarada*); 1139 (critique: *laysat fī aḥadin maʿa al-nabī... ḥujjatan*; and *lā aʿlamuhu thābitan ʿan wāḥidin minhumā*); 1147 (with *marfūʿ*)

Hermeneutical Theory (having to do with *alfāz*, ʿamm, *khāṣṣ*, *mujmal*, *mufassar*, etc.)

- §§52 (Sunna is *al-naṣṣ al-mufasssira* providing indicant for [*tadullu ʿalā*] *jumla* Sunna); 64-5; 87-8 (with *mawḍūʿ* and *waḍʿ*); 247 (with *jumla*, *maʿnā*,¹¹ *shabīh*, *khilāf*, and

⁹ To avoid repetition, I will ask the reader to refer back to these two listings in Chap. IV.1; and, with regard to the forthcoming table, to see the relevant notes in Chaps. III-IV.1.

¹⁰ An examiner of this dissertation has pointed out that *ẓann* as relating to a concept of probability appears to be absent from both *Umm* and *Risāla*. And indeed, in the case of §700, the term reads best if we translate it as “doubt.”

iḥtamala); 255 (SH *ḥadīth* is *mufassir* to SHAP's *jumla ḥadīth*); 257ff. (with *sammā*, *dalāla*, and *jumla*); 263 (with *khāṣṣ*, *dalāla*, *ism*, *yaḥṭamilu*, *ma'nā*, *khālafa*); 265; 1056ff.; 1077; 1255; 1271; 1410ff.

Primary Rational-Inferential Theory (having to do with *qiyās*-theory)

- [every instance where *ma'nā* is evoked (e.g., §248, where SH claims the *ma'nā* of his *ḥadīth* is present [*qā'im*] in the *ma's'ala* at hand)]¹²
- §§282ff. (*qiyās* cannot trump established Sunna); 284; 293 (lack of *āthār* justifies use of *qiyās*); 787 (*takhṣiṣ al-'illa?*); 1071 (concomitance?); 1261; 1411

Secondary Rational-Inferential Theory (having to do with *iḥtiyāt*, *maṣlaḥa*, *adilla* 'aqliyya, etc.)

- [all arguments to '*aql* and *ma'qūl*'; all instances of reported *istiḥsān*; and all instances of apparent appeals to '*urf*, *iḥtiyāt*, *maṣlaḥa*]

There are, of course, other cases where a legal-theoretical principle is brought to the fore, such as: §984, where al-Shāfi'ī appears to allude to the *ḥikma* behind the '*illa* of a ruling; and §§1023-8, wherein al-Shāfi'ī explains clearly why he abandons the *athar* of a Companion for a Prophetic *ḥadīth*. And to all of the above, we might add a host of substantive legal definitional concerns:

- §§301 (the *ma'nā* of *ikrāh*); 735ff. (definition of *sharikat mufāwada*); 864 (definition/properties of *mafsūkh*); 1299-1306 (definitions of *ilā'*); 1307-9 (definitions of *zihār*); 1124 (the *ma'ānī* of slaves [*amwāl* or *nufūs*? SH discussion is framed by a *ma'nā* being *mufāriq* from one genus (*amwāl*), and *mujāmi'* with another genus (*nufūs*)]¹³

What is more, we have noted a number of examples wherein legal theory and method were the objects of dialectical critique itself — an *uṣūl al-fiqh* oriented genus of objections. Although treatises such as al-Shāfi'ī's *Kitāb Ibtāl al-Istiḥsān* make it abundantly clear that legal theory was often the object of proto-system *jadāl*, we are fortunate to have encountered several examples of this happening within the dialectical sequences of our own subject-text. Primary among these are the many

¹¹ On the *Ma'nā* of *Ma'nā*: §§710-12 of our subject-text provide an excellent illustration of what al-Shāfi'ī intends by *ma'nā*. Combining what we observe here with what we have seen elsewhere (such as in §§247-8), we might suggest the following technical definitions relating to *ma'nā*, as employed by al-Shāfi'ī in different technical contexts: 1) *ma'nā* (as regards an *aṣl*): a property which is purported to be efficient in the *ḥukm* of that *aṣl*. 2) "X (*far'*) is in the *ma'nā* of Y (*aṣl*)": the case under consideration is purported to share a property which itself is purported to be efficient in the *ḥukm* of the *aṣl*.

¹² Note that al-Shāfi'ī employs *qā'im*, and not some cognate of *ithbāt* as we usually find in the later *uṣūl* literature.

¹³ This of course resembles the Aristotelian definitional hermeneutic of genus plus differentia.

instances of what I have termed *method-naqd*.¹⁴ Other examples, all belonging to al-Shāfiʿī, include:

- §§263 (SHAQ critiqued for not bringing a *dalāla* about the *nabī* for his *takhṣīṣ* of the focal *lafz*, as SH has done); 265: (“Nor would it harm us that no one [among the Ṣaḥāba] professes it, since it is confirmed on the authority of the Prophet”); 283 (*āthār* do not constitute *ḥujja* when not confirmed by their like; but if they are consonant with established Sunna, they are *ḥujja*); 284 (appeal to a method-principle of the Ahl al-Fiqh: *qiyās* is done to those who come after the Prophet, on the basis of the what the Prophet did; not the reverse [i.e., we cannot assume the Prophet’s commands based upon *āthār*] — as further supported by a theological principle [God only confirmed a need for the Prophet]); 288 (apparent rejection of *qiyās al-shabah*, in general)

My objective in compiling all of the above examples is simply to impress upon the reader one of the largest theses of this dissertation: juridical dialectic was a major — if not *the* major — dynamic in the formation, refinement, and epistemic advancement of Islamic legal-theoretical principles. It was a sifting of good argument from bad, sound method from problematic, irrefutable from refutable; all according to the pressures of juridical *jadal*’s continually evolving argumentation episteme. This is the very meaning of what we have come to call the Dialectical Forge, and I will take a step further now by asserting the following: Until this all-important dynamic in the formation and refinement of legal theory is recognized and accounted for, until the full extent of its implications is explored, no legal-historical paradigm for the origins and evolution of *uṣūl al-fiqh* will be complete. This brings us to our next task.

A.3. The Dialectical Forge and Current Paradigms for the Evolution of *Uṣūl al-Fiqh*¹⁵

My objective in this section is not to supplant current paradigms — all of which offer interpretations important in their own right, and several of which are replete with accurate observations and insightful assessments of various stages in the development of *uṣūl al-fiqh*. The fact is, however, that no paradigm I have yet encountered stresses the role of juridical dialectic to the extent that I believe it needs to be stressed (if indeed dialectic is mentioned at all). The present aim, therefore, is to determine which of these paradigms is consonant with the Dialectical Forge theory as we have developed it thus far, and which is not; that is to say: which paradigm for the

¹⁴ See our listings in the first half of this chapter.

¹⁵ Disclaimer: what follows, due to the constraints of space, is an inevitably reductive enterprise; many of the paradigms of concern are quite complex, but will here be abbreviated to outline form. It is sincerely hoped that no problematic distortions result from this process; nevertheless, the reader is reminded that a full grasp of the trajectories and historical models which follow — with all their important details and implications — may only be gained through consulting their authors’ full expositions.

evolution of *uṣūl al-fiqh* allows the integration of our dialectical model with minimal conflict, and which does not. We will begin with the most comprehensive evolutionary paradigms of which I am aware, and will proceed through successively less comprehensive paradigms. Along the way, our model of the Dialectical Forge will be enhanced by a number of important observations by leading scholars.¹⁶

Wael Hallaq

Hallaq, as we have seen, is one of the few contributors to the modern study of juridical dialectic, and we will revisit his historical observations regarding *jadal* (as we saw them in Chap. II.2) in following sections. With regard to the legal history of Islam as a whole he is a seminal scholar, and has advanced several legal-historical trajectories of particular concern to our current project. These are elaborated in detail in a number of books and articles; fortunately for us, these are now gathered together and summarized in a recent publication. Here we may observe how particular trajectories integrate to form a larger, comprehensive paradigm for the “formative period” of Islamic legal conceptions, doctrinal schools, and institutions.¹⁷ The following outlines, though necessarily abbreviated to an uncomfortable extent, still hope to capture the essence of certain decisive trends and evolutionary stages as Hallaq presents them. We will begin with the earliest trends of concern (corresponding to our proto-system of legal theory

¹⁶ Disclaimer: There are without doubt a great many more historical overviews of the evolution of *uṣūl al-fiqh* in current secondary literature, introductions to edited texts, etc., than I will present here. What follows represents only that with which I am most familiar, which is relatively comprehensive, or which does not repeat material found in other secondary sources. Mohammad Hashim Kamali’s brief historical discussion (pages 4-6 of his important *Principles of Islamic Jurisprudence*), for example, does not appear in the following simply because he does not appear to pursue the history of *uṣūl* after al-Shāfi‘ī, and his comments are drawn, in the main, from Muḥammad Abū Zahra’s *Uṣūl al-Fiqh* (whose historical trajectory we shall treat in some detail). The same applies to the trajectory of Muḥammad al-Khūḍarī in his *Uṣūl al-Fiqh*; the greater part of his observations find their parallels in Abū Zahra’s text. So too, do those of Aḥmad Badr al-Dīn Ḥassūn (whose edition of the *Kitāb al-Umm* we have relied upon for our translation; see in particular the overview of al-Shāfi‘ī’s contributions at i.151ff. of his lengthy introduction). Finally, the important contributions of Éric Chaumont are not being neglected here; his discussions regarding the evolution of *uṣūl al-fiqh*, however, are in the main subsumed by those of Hallaq, Calder, and Muḥammad Abū Zahra (see the introduction to his translation of al-Shīrāzī’s *Kitāb al-Luma’*, esp. at 3-16). And as for any major lacunae on my part with regard to the *status quaestionis* of *uṣūl al-fiqh* evolution: it may be attributed to the significant increase in relevant literature over the past decades, and my own relatively recent immersion in the field.

¹⁷ We will concern ourselves only with those trajectories which bear most upon our conception of the dialectical forge, and which have indeed proven essential to my understanding of developments from proto-system to full-system legal theory. Our approach, in this regard, is therefore doubly-reductive; for we will have to set aside certain important trajectories and paradigms (e.g., the evolution from proto-*qāḍī* to full-fledged judiciary, the formation of doctrinal *madhāhib*, the creation of “axes of authority,” etc.) which integrate into Hallaq’s larger paradigm for our concerned period, as well as reduce such trajectories as we do address to outline form.

through to the age of al-Shāfiʿī), and then proceed to subsequent trends (roughly from al-Shāfiʿī's time through to the first full-system treatments of *uṣūl al-fiqh*).

Hallaq on the rise of “legal specialists”¹⁸

- 1) 80-120 H: private scholars studying law for pious reasons contribute *sunan*-based, positive opinions and Qurʾānic interpretations; some became judges
- 2) *Ḥalaqas* form in important cities and regions (Medina, Mecca, Kūfa, Baṣra, Damascus, Fuṣṭāṭ, Yemen, Khurāsān; mostly in the Ḥijāz and Iraq): some are exclusively juridical; specializations evolve in Qurʾānic inheritance law, ritual law, *sunan*, etc.
- 3) “The activities of the legal specialists initiated what was to become a fundamental principle of Islamic law, namely, that legal knowledge as an *epistemic* quality was to be the final arbiter in law-making;” “...those men in possession of a greater store of knowledge grew more influential than others less learned, gaining in the process — by sheer virtuousness of their knowledge — exclusive authority as legists. [...] This epistemic and moral authority became a defining feature of Islamic law.”

The early tradition of scholarly *ḥalaqāt* is of key importance here, for as certainly as these were venues for dialectical disputation in the latter half of the second century H, they undoubtedly were in the first half. Hallaq's observation (#3 above) with regard to legal knowledge and “epistemic and moral authority” is of even greater import, for these critical elements were gaining weight through a discourse which had started even earlier — at least by the time of the Tābiʿūn, several of whom — such as Ibrāhīm al-Nakhaʿī (d. ca. 96/717) — survived into this period.¹⁹ The discourse of this generation, and of those prior, was replete with novel and problematic cases requiring carefully considered solutions; these in turn required a mode or modes of epistemic justification, and early epistemic justifications took the form of references to Qurʾān and *sunan*, coupled with the exercise of *raʾy*. In these former two “sources” we find not only authoritative rulings, but the new argumentation axioms of early Islam.²⁰ In the

¹⁸ Hallaq, *Sharīʿa*, 43-5. For a more detailed rendering, see Hallaq, *Origins*, 63-6.

¹⁹ Our subject-text is filled with references to Ibrāhīm in particular, and we will note that he was (like Ibn Abī Laylā, Abū Ḥanīfa, and Abū Yūsuf after him) a Kūfan. What is more, he was famed for his cautious recourse to *raʾy* in conjunction with *sunan* (see Lecomte's *El²* entry, s.v. “al-Nakhaʿī”).

²⁰ Besides the conception of epistemic authority residing in the Qurʾān and the *sunan*, there are the argumentation axioms expressed in these sources themselves. With regard to the Qurʾān, see pp.93-209 of Heinrich's edition of al-Ṭūfī's *ʿAlam al-Jadhal fī ʿIlm al-Jadal*, where the author presents an analysis of the *jadal* of the Qurʾān, *sūra* by *sūra*. Although somewhat late in the game, we should note here that the *araʾayta* formula occurs in the Qurʾān some twenty times (most often as *araʾaytum*), and with the very same syntax (interrogative alif with conditional) as we find in our subject-text (see, e.g., Q.6:40-1, 46-7; 10:50, 59; etc.) *Alā tarā* also enjoys at least one occurrence (Q.12:59; as *alā tarawn*), and so far as I have investigated these they appear to exhibit the same rhetorical function as when employed by Abū Ḥanīfa and the other jurists of the *Ikhtilāf al-ʿIrāqīyyīn*. Also with regard to the argumentation of the Qurʾān, see Gwynne's

latter, *ra'y*, we would undoubtedly find the axioms of prior Near Eastern argumentation epistemes (if indeed they are not also to be found in the Qur'ān and *sunan*). As we have suggested earlier, it was the infusion of Islamic axioms into prior epistemes that forms the stem from which both theological and juridical *jadal* flourished; and, most importantly, it was in such venues as were provided by early *ḥalaqāt* that the early development of distinctively Islamic argumentation epistemes took place. The Dialectical Forge, in other words, was lit from the earliest times, and we have our first example of how our model may integrate well with current legal-historical trajectories.²¹

Hallaq on the evolution of Sunnaic epistemic authority: from a larger pool of exemplary *sunan* to the primacy of Prophetic Sunna²²

- 1) The pre-Islamic Arabian concept of *sunna* as an exemplary conduct: “a normative practice to be emulated”
- 2) The Prophet's *sīra* overlapped with *sunna* from the beginning; his Sunna was thus most important (but not primary) immediately after his death; still, the Prophet's Sunna was one among many *sunan*
- 3) Early transmission: *qāḍīs* and others begin transmitting Prophetic *ḥadīth*; there are new and more strident epistemic and pedagogical pressures; Prophetic Sunna is recognized to play a special role in Qur'ānic hermeneutic; still, reference to non-Prophetic *sunan* continues on the same level
- 4) Post-Prophetic *sunan* are projected back onto the Prophet; this was a natural phenomenon, as the *sunan* and *ra'y* of Companions were regarded an extension of the Prophet's (i.e., they were understood to have been emulating him)
- 5) The proliferation of *ḥadīth* (including many fabrications); *ḥadīth* began to compete and conflict with practice-based *sunan*: in the Ḥijāz, “The literary narrative of *ḥadīth* acquired validity only to the extent that it was supported by this local usage;” also in Iraq, “living tradition” was the measure; this is “*ḥadīth* vs. *sunnaic* practice”
- 6) Due to the efforts of “a mobile class of traditionists,” the literary *ḥadīth* eventually overtook *sunnaic* practice in terms of epistemic authority
- 7) Al-Shāfi'ī asserts that only formal *ḥadīth* can determine Prophetic Sunna; still, this principle did not catch on immediately

Again, all of these stages and trends integrate well with a backdrop dynamic of proto-system juridical *jadal*. Indeed, we can see some of the above trends in the heat of

important *Logic, Rhetoric, and Legal Reasoning in the Qur'ān*. Yet another open door for future research thus manifests itself: analyzing the arguments of our subject-text through the argumentation methods of the Qur'ān. Finally, with regard to the argument axioms of the *sunan*, we have encountered in our analyses references to the *qiyās* of the Ṣaḥāba, and we will see a relevant observation of Hallaq's in the following paradigm (on the evolution of Sunnaic epistemic authority).

²¹ As we shall see, this is more or less the case with all of Hallaq's paradigms, and I would chalk this up to his thoroughness of research, highlighting of the epistemic, moral, and pious dynamics of the juristic enterprise, and conversance with (not to mention contributions to) the study of juridical dialectic.

²² Hallaq, *Sharī'a*, 40-8. In more detail: Hallaq, *Origins*, 69-78, 102-109, 117-120.

transformation in the dialectical sequences of the *Ikhtilāf al-ʿIrāqīyyīn*. Among other things, the considerable presence of non-Prophetic *sunan* is plain to see, although the *āthār* of Companions (and Successors) already appear most useful either in the absence of more authoritative *adilla*, or as glass weights adding epistemic mass to *istidlāl* from another *dalīl*. Regarding #4, we have seen references to *āthār* of the Companions as continuations of the Prophet’s *aqwāl* and transactions, just as we have seen references to the *qiyās* of the Ṣaḥāba. Moreover, we have seen al-Shāfiʿī problematize his opponent’s attempt to assume the Prophet’s ruling on the basis of *āthār* (cf. #7 above). As Prophetic Sunna proliferated and/or was back-projected, the jurist-dialectician had an ever-growing store of more epistemically-authoritative *dalīls* with which to justify his *ijtihād* and critique his opponent’s. In fact, no finer presentation of a source for *istidlāl* and *iʿtirāḍ* gaining primacy of *ḥujjiyya* in the Dialectical Forge — no finer example of the advancement of a distinctly Islamic-juridical argumentation episteme — can be provided than what we find in Hallaq’s *sunan*-to-Sunna evolutionary paradigm.

Hallaq on the evolution of authoritative rational-inferential method: from a less choate *raʿy* to al-Shāfiʿī’s more refined conception of *qiyās*²³

- 1) From early on *raʿy* was closely associated with *sunna* and consensus, as exemplified by the method of the “people of *raʿy*,” a large range of types of reasoning were subsumed by *raʿy*: from the more informal to the “strictly logical”
- 2) A new generation of scholars (latter half of second century H) participate in a juridical landscape marked by an increased authority for Prophetic *ḥadīth*, and a shrinking arena for “discretionary opinion;” *raʿy* begins to acquire a “negative connotation”; “Non-textual *raʿy* obviously was no match for the Sunna”
- 3) There is a gradual process of terminological refinement into three categories: 1) *ijtihād*; 2) *qiyās*; 3) *istiḥsān*
- 4) Al-Shāfiʿī rejects “arbitrary” *raʿy* and *istiḥsān*, and incorporates *qiyās*/*ijtihād* into his legal theory; eventually *qiyās* “was to become the basis of all later legal theories, elaborated under the rubric of *uṣūl al-fiqh*”

We are again privileged to have seen these trends playing out in our subject-text. Indeed the rational-inferential methods revealed through our analyses extended far beyond the refined (and more “disciplined”)²⁴ typology of *maʿqūl aṣl* expounded in later theory; perhaps these argument types and strategies which we have marked as potentially unique to proto-system *jadal* — including many of al-Shāfiʿī himself — may be subsumed beneath the later “negative” rubric of *raʿy*. If such is the case, then a contribution of this dissertation has been to reveal something of just what *raʿy* was — which arguments, specifically, were employed by early proponents of *raʿy* and did not

²³ Hallaq, *Sharīʿa*, 48-51. In more detail: Hallaq, *Origins*, 113-21.

²⁴ I have borrowed this apt descriptor from Hallaq; see #6 in the following paradigm of the “Great Synthesis.”

make the epistemic grade established by later generations of theorists.²⁵ Moreover, we may even suggest that several of the argument axioms of al-Shāfiʿī's (early) legal theory episteme — despite his (later) rejection of *ra'y* and *istiḥsān* — would themselves have been identified as *ra'y* by later theorists (and even by himself, in the “new doctrine” legal theory of the *Risāla*).²⁶

Whatever the case may be, the most important contribution we hope to have made is to show that this gradual refinement of *endoxon* argumentation-method came about in dialectical contexts, and we will pause here to propose what the wider implications of this might be. In short: Just as natural selection — dictated by environmental change — is the ultimate determinant for the extinction or survival (and, ultimately, evolution) of species, so too is the heat of dialectical encounter — regulated by an ever-advancing argumentation episteme — a determinant for the extinction, survival, and evolution of species of argument.²⁷ Perhaps the most critical “environmental” element of all in this respect was the gradually crystallizing Islamic hierarchy of epistemic authority; such prior species of argument as could adapt to this determining element were to survive in enhanced forms (e.g., the more technically advanced species of *qiyās*, and the reformulated species of *istiḥsān*), while those which could not adapt disappeared gradually from the juridical dialectical landscape. Such is the evolution of legal theory's rational-inferential methodology as we see it described in the above paradigm. The *Ikhtilāf al-ʿIrāqīyyīn* provides a snapshot of something like a middle stage in our proto-system's evolution, with the final steps towards full-system legal theory to be taken in the following century (as Hallaq's next paradigm will show).

²⁵ I have avoided speaking of *ra'y* throughout my analyses and reviews, with the explicit intention of moving beyond this nebulous category, and getting at the true substance of proto-system argumentation outside of later “canon” domains of *istidlāl*. Perhaps now that we have seen which argument types lay outside of this later canon, and which lay within, we might consider subsuming the former set under the later “negative connotation” of *ra'y*.

²⁶ Pursuit of this question constitutes a very intriguing open door for future inquiry.

²⁷ Note that this “ever-advancing argumentation episteme” itself had a determinant: the generally pious, “truth-seeking” comportment of jurist-dialecticians as we have seen it time and again. This is an important point, for argumentation epistemes in a more sophisticated environment may not be seen to advance in the same manner as those in an environment of “good” truth-seeking dialectic. An example may be discerned in the relatively inchoate argumentation systems of modern legal pedagogy.

Hallaq on “The great rationalist-traditionalist synthesis” (as the true cradle of *uṣūl al-fiqh*)²⁸

- 1) After the end of the second century H there was a clear distinction between “rationalist” and “traditionalist” approaches to law (“exclusive affiliation to one or the other camp became the general rule”)
- 2) The *Miḥna* (218-34 H) marks a “climax” in the rationalist (Caliphs, Mu‘tazila, many Ḥanafīs) vs. traditionalist (proto-Ḥanbalīs) conflict
- 3) The third century H sees a growth in traditionists and traditionalists, a mostly unidirectional “migration” or “conversion” from the rationalist to the traditionalist “camp,” and before the end of the century six law-oriented “canonical” *ḥadīth* collections had been compiled
- 4) Re: *ḥadīth* as “a textual entity”: “A universally transmitted *ḥadīth*... proved more appealing as a material and textual source of law than the living, *sunnaic* practice as defined by a specific city or legal community, since the latter had developed their own judicial and juristic peculiarities in keeping with their own particular environment.”
- 5) But by the end of the third century “most jurists are reported to have combined the two [rationalist and traditionalist approaches] in some way;” this is the “Great Synthesis,” as recorded by the historians and biographers; “It was the midpoint between the two movements that constituted the normative position of the majority; and it was from this centrist position that Sunnism... was to emerge.”
- 6) “...it was not the defeat of rationalism or the absolute victory of traditionalism that underpinned the emergence of *uṣūl al-fiqh*, but rather a redefinition and methodical disciplining of the former and the rise and dramatic increase of the latter.”
- 7) “The Ḥanafites had to accommodate this new genre no later than in the third/ninth century...”
- 8) “Ibn Ḥanbal’s jurisprudence — restrictive in its ways of reasoning — was soon abandoned by his immediate and later followers,” the latter eventually accepted not only *qiyās* (abhorred by Ibn Ḥanbal), but even *istiḥsān* (abhorred by al-Shāfi‘ī)
- 9) The Great Synthesis and *uṣūl al-fiqh*: “It was with this development that *uṣūl al-fiqh*... was at last defined. [...] legal theory emerged as a result of this Synthesis, which itself embodied, and was reflected by, this theory.”

One real effect of that drastic turn of events known as the *Miḥna*, insofar as I understand it, was the admixture of political dynamics — if but temporarily — into the evolving Islamic argumentation episteme. In short, a new argument axiom was introduced into the set: the unfortunate *argumentum ad baculum*. Although disputational *majālīs* held before Caliphs prior to this period may have been tainted by a looming threat to the “loser,” we have in the *Miḥna* something else entirely: a real and oft-administered threat to the opponent of certain positions whose potentially *endoxic* qualities were overshadowed by the political sanction they enjoyed. *Ḥujjiyya*, in other words, and *endoxa* methods of epistemic justification, appear temporarily to have taken a back seat. As Hallaq notes, however, the *Miḥna* merely marks the “climax” of a

²⁸ Hallaq, *Sharī‘a*, 55-9. In more detail: Hallaq, *Origins*, 122-7.

disputational trend which had been ongoing for some time prior, and was to resolve itself sometime afterward in the “Great Synthesis.”

Again, the whole of the evolutionary process leading to the “Great Synthesis” may be understood as unfolding within the Dialectical Forge (in both speculative and normative projects). In fact, we may even begin to speak in terms of Hegelian dialectic, where *thesis* (the theories and methods of the “rationalist camp”) meets *antithesis* (the theories and methods of the “traditionalist camp”), and the axioms of both resolve into a new theoretical and methodological episteme of *synthesis*. As Hallaq’s paradigm portrays, the epistemic quality of Sunnaic practice confirmed via *endoxic* methods simply could not be ignored by practitioners of an argumentation episteme infused with Islamic axioms of hierarchical authority. Hence the “migration” to the traditionalist camp. On the other hand, the undeniable necessity for human rational assessment in the testing and confirmation of the conveyance of potential *adilla* (i.e., transmission-oriented concerns), and the interpretation of established *adilla* (i.e., hermeneutical concerns), and the derivation and extension of norms from established *adilla* (i.e., rational-inferential concerns) also could not be ignored. Hence the “disciplining” of proto-system legal theory’s hermeneutical and rational-inferential modes, and the eventual extinction, as Hallaq shows us, of such argumentation epistemes which did not adopt these modes in their enhanced forms.²⁹

Again, with the exception of the *Mihna* interlude, we are witness to a “rationally” evolving legal theory, dictated not so much by politics and factional loyalties as by the exigencies of dialectical exchange. Hallaq has shown us the Hegelian dialectical process of rationalist thesis conflicting with traditionalist antithesis and resolving in a “Great Synthesis,” which in turn “embodied, and was reflected by” *uṣūl al-fiqh*. I would only add that this more abstract process could only have unfurled through the medium of real, face-to-face (and literary) venues of “good” truth-seeking juridical *jadal*, whose participants were morally committed to “following the *ḥujja*.” In other words, to claim that *uṣūl al-fiqh* was born from the Great Synthesis is equivalent, in my opinion, to claiming that it was born in the Dialectical Forge. This is precisely what this dissertation has proposed, and again we witness how our model may integrate with this most important of current developmental paradigms.

²⁹ Besides the transformation of proto-Ḥanbalism (#8 in the above outline), Hallaq points to the eventual extinction of *Ẓāhirism* due to its strict stance against rational-inferential methods which had become *endoxa* within the remainder of the Sunni sphere (*Sharīʿa*, 59).

Hallaq on the early systematization of *uṣūl al-fiqh*³⁰

- 1) “One of the first groups to begin propounding legal theory in its organic and comprehensive form was a circle of Baghdadian Shāfi‘ites, headed by the distinguished jurist Ibn Surayj (d. 306/918).”
- 2) “This group was to contextualize legal theory as a synthesis between rationality and the textual tradition...”
- 3) “...the first and foremost Shāfi‘ite authors to write works on *uṣūl al-fiqh* (as a full-fledged methodology) were [Ibn Surayj’s] students, such as Abū Bakr al-Fārisī (fl. c. 350/960), Ibn al-Qāṣṣ (d. 335/946), Abū Bakr al-Ṣayrafi (d. 330/942) and al-Qaffāl al-Shāshī (d. 336/947).”
- 4) “However, it must be emphasized that the legal theory produced by this circle of scholars was not the product of an ongoing process of elaboration based on an established tradition, as later theory came to be. Instead, it was largely the product of the specific historical process that had begun a century or so earlier, and that had culminated under the influence of the Synthesis formed at the close of the third/ninth century and the first half of the fourth/tenth. Their theory can thus be characterized as the child of its environment, and it owed little more to al-Shāfi‘ī than partial or nominal affiliation. The Ḥanafites, for instance, did not lag far behind in elaborating their own theory of law.”
- 5) “In fact, Shāfi‘ī had little to do with the elaboration of *uṣūl al-fiqh*, since he advocated the synthesis in a rudimentary and incomplete form. And there were others, during the decades after his death, who discoursed on certain aspects of legal methodology and reasoning, usually advocating or refuting one specific position or another. Thus Shāfi‘ī’s theory was not accepted as standard by the community of third/ninth century jurists....”
- 6) “By the middle of the fourth/tenth century, therefore, an elaborate and comprehensive theory of *uṣūl* had emerged. The next century and a half witnessed a phase in the history of this theory that produced the standard works on which later expositions so heavily depended, but the essential developments had already occurred by 350/960 or thereabouts.”

And so, with the Great Synthesis we arrive at the beginning of the full-system *‘ilm uṣūl al-fiqh*. With regard to its *literary* beginnings we should not be surprised that, with a few important exceptions, legal theory itself had not been the focus of systematic efforts up to this point; it was only in the course of the preceding three-quarters of a century that: 1) as Hallaḡ has shown us, the Great Synthesis was achieved; and 2) legal theory itself had become a *singular object* of dialectic to such a critical frequency and pitch — indeed, theory-oriented dialectic reached a boiling point.

Whatever the reason, full expositions on a comprehensive and systematic science for *ijtihād* had become a necessity, and it would appear that Ibn Surayj was

³⁰ Hallaḡ, *Sharī‘a*, 59–60. In more detail: Hallaḡ, *Origins*, 127–8; Hallaḡ, *History*, 30–5. The most thorough rendering of themes in the above outline may be found in Hallaḡ’s original article: “Was al-Shāfi‘ī the Master Architect of Islamic Jurisprudence?”

among the first to provide one.³¹ In addition to the Baghdādian Shāfiʿī affiliation of Ibn Surayj and his prolific students, Hallaq also notes they embodied the by-then-normative combination of traditionalist, jurist, and speculative theologian.³² And to this we will add another area of expertise: *dialectician* (also noted by Hallaq).³³ Ibn Surayj was famed as the vindicator of the Shāfiʿī *madhhab*, with numerous *munāẓarāt* against famed opponent contemporaries (such as Abū Bakr Muḥammad b. Dāwūd [al-Zāhirī]).³⁴ Among his many compositions several argumentative treatises against opponent-jurists, past and present, are listed, and his name has even been attached to a famed puzzle of juridical dialectic: the *masʾala al-Surayjiyya*, or *dawr al-ṭalāq*.³⁵ Abū Bakr [Muḥammad b. ʿAbd Allāh] al-Ṣayrafī was also an author on *uṣūl al-fiqh*, and noted for his *munāẓara* with none other than the prominent *mutakallim* Abū al-Ḥasan al-Ashʿarī (d.324/935-6).³⁶ And of course, Abū Bakr al-Qaffāl al-Shāshī, as we have seen, was “the first among *fuqahāʾ* to compose [a treatise on] *al-jadal al-ḥasan*” — the “good” dialectic — not to mention a *Kitāb fī Uṣūl al-Fiqh* and a *sharḥ* of al-Shāfiʿī’s *Risāla*.³⁷

Although we will continue to claim that — beginning with this period — *uṣūl al-fiqh* and *jadal*-theory were to know many systematizing Aristotles, we should pause to reflect upon the important combination of elements embodied by Abū Bakr al-Qaffāl al-Shāshī in particular. United in this scholar are a number of indicants providing support for certain claims of this dissertation. Regarding the “dynamic symbiosis” of juridical *jadal* and *uṣūl al-fiqh*, and the simultaneous development and literary fluorescence of both as comprehensive systems (themes which we will shortly elaborate in more detail),³⁸ we have in our purported first author of a systematized *jadal*-theory treatise a scholar who was also among the very first authors of systematized *uṣūl al-fiqh*. These full genre treatises emerged, in other words, not only simultaneously, but frequently by

³¹ It is possible that he even composed one (or several) in literary form, as he is credited with some 400 works (al-Shīrāzī, *Ṭabaqāt*, al-Mays ed., 118).

³² *Sharīʿa*, 59.

³³ “Was al-Shāfiʿī the Master Architect;” 596: “...Qaffal was the author of both a commentary on the *Risāla* and a treatise on legal theory, as well as the first to have written on juridical dialectic [citing Ibn Khallikān’s *Wafayāt*]. That both [al-Ṣayrafī and Qaffāl] were distinguished *uṣūlīs*, *muḥaddiths*, speculative theologians, and dialecticians betrays their debt to Ibn Surayj who mastered all these sciences and placed them in the service of the law.”

³⁴ al-Shīrāzī, *Ṭabaqāt*, al-Mays ed., 118.

³⁵ See Schacht’s *El*² entry on Ibn Surayj for a complete rendering of the *masʾala*.

³⁶ al-Shīrāzī, *Ṭabaqāt*, al-Mays ed., 118; Ibn Qāḍī Shuhba, *Ṭabaqāt*, ʿAbd al-ʿAlīm Khān ed., i.113, 116-7.

³⁷ al-Shīrāzī, *Ṭabaqāt*, al-Mays ed., 118; see our earlier discussion (Chap. II) when, in exploring who the author of the *Uṣūl al-Shāshī* might be, we briefly introduce Abū Bakr al-Qaffāl al-Shāshī.

³⁸ See section C, below, on “Unified Dialectical Forge Theory.”

the same hand (as proven also by our later lens-text authors), and they did so from the start.³⁹

And with regard to what I have asserted as a marked continuity from proto-system *jadāl* teaching and practice through to full-system *jadāl* theory, we will note al-Qaffāl al-Shāshī's commentary on the *Risāla*. Although what I perceive of continuity has most to do with the significant overlap of al-Shāfi'ī's dialectical practice with the modes of *istidlāl* and *i'tirāḍ* found in the treatises of al-Shīrāzī and al-Bājī, I find al-Qaffāl al-Shāshī's looking back to al-Shāfi'ī's proto-system legal theory treatise to be indicative of a singular aspect of overall continuity I have more tentatively proposed; mainly, that the formulation of full-system theory depended, in part, upon an analysis of the teaching and practice of proto-system *mujtahids*. Among other things, we will note that the *Risāla*, like the *Umm*, is replete with dialectical sequences — although, significantly, they are of a much more Socratic-pedagogical type (Q&A between teacher and student), than they are of an Aristotelian-disputational type (Q&A between proponents of opposing positions).⁴⁰ Still, al-Qaffāl al-Shāshī's conversance with the *Risāla* suggests his conversance with the *Umm*, and it is quite possible that he was just as interested in al-Shāfi'ī's dialectical practice as he was with his more “rudimentary and incomplete” legal theory.⁴¹

Nevertheless, this assertion of “continuity” on my part may appear to be at odds with Hallaq's quoted statements in #4 and #5 of the above outline. On close inspection, however, it is not. Hallaq's clear intention is to show that the first formulators of comprehensive *uṣūl al-fiqh* were not elaborating upon “an established tradition” founded by al-Shāfi'ī. Al-Shāfi'ī was no founder in the real sense of the word (our analyses and observations in Chapters III and IV.1 confirm this), and the relationship between the students of Ibn Surayj and al-Shāfi'ī's legal theory was clearly not the same as the relationship between al-Shīrāzī, al-Bājī, al-Juwaynī, et al. with the legal theory of Ibn Surayj and students. It is indeed the dialectical trends which played

³⁹ That is to say, singular authors produced treatises for both systems from the start of the full-system era through to the era of our lens-text authors, and beyond.

⁴⁰ A comparison of dialectical styles between *Risāla* and *Umm* constitutes yet another open door for future research.

⁴¹ In reviewing this dissertation, Dr. Wael Hallaq has drawn my attention to an important point. In short, we must bear in mind that al-Qaffāl al-Shāshī would have approached both *Umm* and *Risāla* at a significant developmental remove from the era of their authorship. That is to say, the nascent sciences of *uṣūl* and *jadāl* (of which al-Shāshī would be among the first, if not *the* first, to systematize in comprehensive fashion) had developed significant refinements in the intervening century. Among other things, he would have read these texts from a perspective of more advanced hermeneutics.

out in the four or five generations after al-Shāfiʿī's death which inspired the full systematization of the *ʿilm uṣūl al-fiqh*; and indeed this newly-systematized *ʿilm* “owed little more to al-Shāfiʿī than partial or nominal affiliation.” The only additions to these observations entailed by my assertion of “continuity” from proto-system to full-system may be summed up in the following statement: There are a number of elements (though less refined, and far less numerous than those of full-system theory) which were practiced and (sometimes) expounded by al-Shāfiʿī, many — if not all — of which preceded him (i.e., he did not “found” them), and which continued to be refined in the Dialectical Forge after his death through to the Great Synthesis and the first comprehensive formulations of *uṣūl al-fiqh* (and juridical *jadāl*). These include “rudimentary” hermeneutical conceptions of *ʿāmm* and *khāṣṣ*, *jumla* and *mufasssir*, etc., and the less-developed modes of *istidlāl* as we have seen them in our analyses.

Al-Shāfiʿī, in other words, was merely a participant — albeit a significant one — in a continually-evolving argumentation episteme which did not culminate into full systematization until a century or more after his death; his *Risāla* may perhaps be best described as the distillation and organizing of principles from a “rudimentary and incomplete” proto-system somewhere in its middle stage (its third-century latter stage merging with the first stage of full-system *uṣūl al-fiqh*, somewhere at the heart of the Great Synthesis). If anything, then, my assertion of proto-system to full-system continuity — for dialectical and legal-theoretical elements shared by both — supports, rather than conflicts with, Hallaq’s claims as quoted above.

At any rate, Hallaq also states: “The next century and a half [after the treatises of Ibn Surayj’s students] witnessed a phase in the history of this theory [*uṣūl al-fiqh*] that produced the standard works on which later expositions so heavily depended....” I would only draw the reader’s attention to the fact that some of the most important of these “standard works” of *uṣūl* were composed by the very authors of our *jadāl*-theory lens-texts;⁴² and, just as Hallaq observes, they constitute a continuation and elaboration upon the full-system theory of Ibn Surayj’s circle.

⁴² They are the *Lumaʿ*, *Sharḥ al-Lumaʿ*, and *Tabṣira* of al-Shīrāzī; the *Iḥkām al-Fuṣūl fī Aḥkām al-Uṣūl* and *Kitāb al-Ishāra fī Maʿrifat al-Uṣūl wa-l-Wajāza fī Maʿnā al-Dalīl* of al-Bājī; the *Kitāb al-Wāḍiḥ fī Uṣūl al-Fiqh*; and the *Waraqāt* of al-Juwaynī. As for al-Juwaynī’s *Burhān fī Uṣūl al-Fiqh*, Tāj al-Dīn al-Subkī (d.771/1369) apparently found it so difficult to work with that he gave it the appellation “*Laghz al-Umma*” (“Riddle of the *Umma*,” see the entry on al-Juwaynī in the *IE*). If this renowned Shāfiʿī scholar found the *Burhān* inaccessible, than my own difficulties in navigating al-Juwaynī’s *Kāfiya fī l-Jadal* may be thrown into a new light; Miller, too, appears to have concentrated his efforts in just a few of the more clearly organized pages of the *Kāfiya*. All in all, I would consider myself in very good company indeed.

Muḥammad Abū Zahra

In the following tables I have attempted an outline of the prolific Muḥammad Abū Zahra's "formation (*nash'at*) of the 'ilm uṣūl al-fiqh" from the opening pages of his introductory volume entitled, simply, *Uṣūl al-Fiqh*. Overall, we may say that he makes quite a number of significant points underscoring various elements of our model of the Dialectical Forge — especially with regard to al-Shāfi'ī's legal theory and *jadal*; we may claim that the Dialectical Forge integrates well with his overall trajectory. An added bonus of citing Abū Zahra on such matters is that we benefit from his full immersion in the relevant pre-modern literature; his overview, as one examiner of this dissertation so aptly put it, is a "rationalized compendium of traditional sources."

Abū Zahra on Uṣūl al-Fiqh Before al-Shāfi'ī⁴³

- 1) "The 'ilm uṣūl al-fiqh was conceived along with the 'ilm al-fiqh, even if the *fiqh* had been set down in writing before it."
- 2) **In the era of the Ṣaḥāba:** The rational inference (*istinbāt*) of *fiqh* began immediately after the passing of the Prophet. Abū Zahra supplies examples of *istinbāt*, *istidlāl*, and *manāḥij* (procedures) for legal solutions, as reported of 'Alī (a kind of primitive *qiyās* and 'closing the way [to wrongdoing/harm; ' *sadd al-dharā'i'*]), and 'Abd Allāh b. Mas'ūd (who observed *naskh*) — "Thus we must acknowledge that the Ṣaḥāba in their *ijtihād* adhered to *manāḥij*, even if they did not announce them in every circumstance."
- 3) **In the era of the Tābi'ūn:** "*al-istinbāt* broadens due to the multiplication of novel cases (*ḥawādith*) and the concern of a group of the Tābi'ūn with the [issuance of] the *fatwā*...."⁴⁴ Such were in possession of Kitāb, Sunna, and the *fatāwā* of the Ṣaḥāba, "and among them were such as pursued the *manāḥij* of *maṣlaḥa* (public welfare considerations) if there was no *naṣṣ* ([univocal] text)... and of *qiyās*; and the *tafrī'āt* (derivations) deduced by Ibrāhīm al-Nakha'ī and others of the *fuqahā'* of Iraq were directed towards the extraction (*istikhrāj*) of occasioning factors for *qiyās* ('*ilal al-aqyisa*), and their regulation (*ḍabtihā*), and the derivation [of new rulings] from them by the application of those '*ilal* to various *furū'*."
 - a. "Here we find that the *manāḥij* became clearer than before, and whenever the 'legal schools' (*madāris fiqhiyya*) differed (*ikhtalafat*) the *ikhtilāf* was a cause for the distinction of the *manāḥij* of *istinbāt* for each *madrasa*."
- 4) **In the era of the A'immat al-Mujtahidīn:** "we find that the *manāḥij* were even more clear in form, and with the distinction of *manāḥij* the 'laws' (*qawānīn*) of *istinbāt* were clarified, and their teaching spread, and manifested on the tongues of the *a'imma* in unambiguous expressions, clear and refined..."
 - a. **Abū Ḥanīfa:** "defines the foundational *manāḥij* of his *istinbāt* by way of Kitāb, then Sunna, then *Fatāwā al-Ṣaḥāba* — taking up what they formed consensus upon, and choosing from among their opinions with regard to what they disagreed upon, and not going beyond them; but he did not take up the *ra'y* of the Tābi'ūn because they were men like him. And one finds that he pursued *qiyās* and *istiḥsān* according to a clear program (*minhāj*), to

⁴³ Abū Zahra, *Uṣūl al-Fiqh*, 13-14.

⁴⁴ He names Sa'īd b. al-Musayyab in Medina, and 'Alqama and Ibrāhīm al-Nakha'ī in Iraq.

the point that his pupil Muḥammad b. al-Ḥasan al-Shaybānī said of him: His *aṣḥāb* used to dispute with him (*yunāzi'ūnahu*) with regard to his *qiyās*, and when he said: *astahsinu*, no one pursued/adhered to him (*lam yalḥaq bihi aḥadun*).”

- b. **Mālik:** “used to pursue clear *uṣūl*ist *manāḥij* in his argumentation (*iḥtijāj*) by way of the ‘Aml Ahl al-Madīna, and his declaration of such in his books and epistles/treatises, and in his stipulation of such with regard to the narration of *ḥadīth*. And in his critique (*naqḍi*) of the *ahādīth* he criticized with all adroitness, and in his rejection of some of the *āthār* attributed to the Prophet due to their contradicting what is *naṣṣ* in the Qur’ān, or the well-known and acknowledged of the general principles of religion (*qawā’id al-dīn*)...”
- c. **Abū Yūsuf:** “And like this, too, was Abū Yūsuf in the *Kitāb al-Kharāj*, and in his *Radd ‘alā Siyar al-Awzā’ī*; he pursued a clear and unambiguous *minhāj*: the *minhāj* of his *ijtihād*.”

I have consciously avoided employing the term *uṣūl al-fiqh* with regard to legal theory predating the full-system era of Ibn Surayj’s circle and afterwards (i.e., before the fourth century H); for the proto-system I have preferred the more general “legal theory,” simply due to the conception of a less choate and less refined body of principles which the ambiguity of the term allows. If we read Abū Zahra’s *uṣūl al-fiqh* in the above quotations and paraphrases in the same spirit — and I believe he makes it quite plain that we may do so in following discussions — then there is nothing at all which prevents an easy integration of our Dialectical Forge model into Abū Zahra’s pre-Shāfi’ī history of what we would call proto-system legal theory. In fact, all of his assertions harmonize with claims that we have made with regard to the proto-system.

Importantly, Abū Zahra acknowledges that legal theory was not invented by al-Shāfi’ī, but that it was an ongoing process from the dawn of Islam and had reached a level of sophistication by al-Shāfi’ī’s time. This corresponds well with our placement of al-Shāfi’ī somewhere in the middle of our proto-system’s trajectory; certainly the likes of the *manāḥij* Abū Zahra attributes to Abū Ḥanīfa, Mālik, and Abū Yūsuf are plentifully indicated by the arguments of our subject-text alone (and thoroughly vindicated by the other treatises and arguments in the *Umm* and other early compendia). Of even greater significance, however is his statement to the ends that “whenever the *madāris fiqhiyya* differed, the *ikhtilāf* was a cause for the distinction of the *manāḥij al-istinbāt* for each *madrasa*.”⁴⁵ In so many words, Abū Zahra has laid his finger on the Dialectical Forge

⁴⁵ Note also that in the following descriptions of *manāḥij* for Abū Ḥanīfa, Mālik, and Abū Yūsuf, all three are discretely tied to juridical disputation, whether in the form of contentious students (an illustration of the *ḥalaqa* as a site for *jadāl*), or published critical rejections of *ḥadīth*, or in disputational treatises and epistles.

itself; for the venue in which *ikhtilāf* between opposing positions sought resolution was that of juridical *jadāl* (as our subject-text stands witness), and a consequence was indeed the formation (not to mention refinement) of distinctive legal theoretical and dialectical “toolboxes” for various juristic “schools.” In this manner we can speak of projects within a greater project, as distinctive sets of argument axioms were employed by distinct groupings of jurists in the early proto-system of legal theory: variant argumentation epistemes within a larger, constantly evolving episteme — and all of this before al-Shāfiʿī arrived on the scene.

Abū Zahra: “Al-Shāfiʿī Sets Down in Writing the ‘*ilm Uṣūl al-Fiqh*’”⁴⁶

- 1) “Al-Shāfiʿī came along and found the wealth of *fiqh* which had been transmitted from the Ṣaḥāba and the Tābiʿūn and the Aʿimmat al-Fiqh who had preceded him, and he found the *jadāl* between the *aṣḥāb* of various positions, and he found the current *munāẓarāt* between the *fiqh* of Madīna and the *fiqh* of Iraq...;” in short, al-Shāfiʿī’s genius, coupled with his knowledge of Medinan *fiqh* learned from Mālik, and Iraqi *fiqh* learned from Muḥammad b. al-Ḥasan, and of the *fiqh* of Mecca allowed him to posit “scales by which the wrong might be distinguished from right; and these scales are the *uṣūl al-fiqh*.”
- 2) “And it is not at all strange that research (*baḥth*) into the substantive elaborations (*furū*) of *fiqh* and its putting down in writing (*tadwīn*) should precede the *tadwīn* of *uṣūl al-fiqh*; because when the ‘*ilm uṣūl al-fiqh* consists of scales for the regulation (*ḍabt*) of *al-istinbāt* and the knowledge (*maʿrifa*) of wrong from right, then it is a regulating ‘*ilm* — and the material (*mādda*): it is *fiqh*. And such is the nature of all the regulating ‘*ulūm*; for grammar (*al-naḥw*) arrived subsequent to classical literary form (*al-nuṭq biʿl-fuṣḥā*), and the poets used to utter poetry in meter (*mawzūnan*) before Khalīl b. Aḥmad set down the rules of prosody (*ḍawābiṭ al-ʿarūd*) in writing, and the people used to debate each other (*yatajādalūn*) and speculate before Aristotle set down in writing the science of logic (‘*ilm al-mantiq*).”
- 3) Al-Shāfiʿī was especially suited to the task of setting down in writing the rules of rational inference (*ḍawābiṭ al-istinbāt*), due to his scholarly accomplishments and wide scope of experience in: 1) language (*al-lughā*); 2) *al-ḥadīth*; 3) the *fiqh* of his era; and 4) the *ikhtilāf* of the Ṣaḥāba and current scholars; “And he spared no effort to come to know the causes of *khilāf*, and the various positions proffered in the theories of the disputants (*anzār al-mukhtalifīn*).”
- 4) Al-Shāfiʿī’s special training in the Qurʾānic science of Ibn ʿAbbās, and his vast knowledge of Sunna, allowed him to assess “the station (*maqām*) of Sunna with regard to the Qurʾān, and its status (*ḥāl*) in case of the opposition (*muʿāraḍa*) of some its apparent meanings (*ẓawāhir*) to the *ẓawāhir* of the Qurʾān. And his study of the *fiqh* of raʾy and the transmitted *āraʾ* from the Ṣaḥāba was a foundation for what he posited of regulations (*ḍawābiṭ*) for *qiyās*.”
- 5) “And thus did al-Shāfiʿī set down in writing the *qawāʾid* for *istinbāt*; nor were they, on the whole, an innovation of his manufacture. Rather, they are a detailed noting down of what the *fuqahāʾ* who were guided by them followed, from among the *manāḥij* for their *istinbāt* which they did not set down in writing. For he did not originate the *minḥāj* of *istinbāt*, but he has precedence insofar as he gathered together the various threads of these *manāḥij* which he selected, and set them down

⁴⁶ Abū Zahra, *Uṣūl al-Fiqh*, 13-18.

- in writing in an *‘ilm* of interconnected parts; and his like in that is the example of Aristotle in his putting down in writing (*tadwīn*) for the logic (*manṭiq*) of the Peripatetics — for he [Aristotle] made no innovation with regard to the *aṣl* of the *minhāj*; rather, his innovation was in the regulating (*dabt*) of the *minhāj*. This is the opinion of the majority (*jumhūr*) of the *fuqahā’* in their prior assessment of al-Shāfi’ī with regard to the *tadwīn* of that *‘ilm*, and not one of them disagrees about that.”⁴⁷
- 6) “And we do not say that al-Shāfi’ī brought the *‘ilm* in a complete state, according to all its modes/facets (*wujūh*), so that nothing remained for the efforts of those who followed him; rather, they came after him those who elaborated and augmented, and revised numerous *masā’il* with regard to this *‘ilm*, just as those who came after Aristotle did in the East and West, as relates to the *‘ilm al-manṭiq*. For they revised it and augmented it, even if the *aṣl* with regard to its being treated as an established *‘ilm* of well-ordered parts goes back to Aristotle.”
- 7) Al-Shāfi’ī’s *‘ilm al-uṣūl* may be found in his *Risāla*, *K. Jimā’ al-‘Ilm*, and *K. Ibṭāl al-Istiḥsān*; Abū Zahra sees al-Shāfi’ī as considering his *‘ilm* as universal laws and guiding principles for *istinbāṭ* of the *aḥkāim* across the ages; and that he employed this *minhāj* in debating (*munāqasha*) the *ārā’* of current *fuqahā’*, and of Mālik, the *‘Irāqīyyīn*, Abū Yūsuf and al-Awzā’ī (mentioning the *ikhtilāf* treatises in the *Umm*). In short, he did not much depart from this *minhāj* which he had regulated. Al-Shāfi’ī’s *uṣūl al-fiqh* was thus not only theoretical, but practical.

From the start (#1 above) Abū Zahra makes it plain that al-Shāfi’ī entered into a dialectical world; indeed it was the *jadal* of his predecessors and peers that prompted his own early attempt at systematization (and we see some reference to his own *jadal* in #7 – the application of his *minhāj* in *munāqasha*). Equally important is Abū Zahra’s nod towards a natural explanation of *fiqh* preceding *uṣūl al-fiqh*: a regulating science indeed must be preceded by the subject material whose elaboration it seeks to regulate, and a similar notion will come into play in our forthcoming expansion upon the Dialectical Forge theory. His assessment of the role of al-Shāfi’ī, however, also marks a minor point of conflict with our model: I have related on more than one occasion that the true Aristotles of *uṣūl al-fiqh* came a century and more after the death of al-Shāfi’ī, and that al-Shāfi’ī, indeed, was no Aristotle.

Hallaq’s past research is enough to vindicate my continued adherence to this statement, and for additional support all one need do is make a set of comparisons. First, between: 1) the limited scope of the contents of al-Shāfi’ī’s *Risāla*, *Jimā’ al-‘Ilm*, *Ibṭāl al-Istiḥsān*, along with whatever might be gleaned (as we have attempted) from his other treatises; and 2) the far-more comprehensive, detailed, and refined treatments of

⁴⁷ After this point, Abū Zahra gently debates an Imāmī Shī’ī claim that the Imām Muḥammad al-Bāqir was the first to set down in writing the *‘ilm uṣūl al-fiqh* and to regulate it. In brief, he reiterates the claim that al-Shāfi’ī’s precedence arises only from his *taṣnīf* and *tanzīm*; it is acknowledged that his predecessors possessed and elaborated *manāhij* of their own and transmitted them, but not that they produced written systematizations (*Uṣūl*, 16-18).

even the earliest extant *uṣūl al-fiqh* treatises (i.e., the *Fuṣūl* of al-Jaṣṣāṣ and the *Mu'tamad* of al-Baṣrī). This is more than sufficient; and we are further confirmed in our conclusion by the eminent Shāfi'ī-analyst Joseph Lowry, in the concluding chapter of his *Early Islamic Legal History* entitled: "The *Risāla* and its Relationship to Mature *Uṣūl al-Fiqh*."⁴⁸

Second, one might compare both of the above sets with the *Organon*. By criteria of: 1) systematic categorization, 2) refinement of definition, and 3) comprehensiveness of scope, al-Shāfi'ī's collected expressions of legal theory barely attain the level of Aristotle's *Categories* and *De Interpretatione*, much less the sophisticated contributions of the *Prior* and *Posterior Analytics*, *Topics*, etc. Later *uṣūl*ist polymaths, on the other hand, have in fact gone further in terms of comprehensive systematizing than Aristotle himself ever did for logic. And if al-Shāfi'ī falls far short, while later *uṣūl*ists exceed, then we might expect the "Aristotle of *uṣūl al-fiqh*" to fall somewhere in between.⁴⁹ Of course, *uṣūl al-fiqh* in truth had many systematizing Aristotles; but if we must choose a first set, that honour would most probably go to the circle of Ibn Surayj: his students, and their students. Lacking copies of their works, we would perforce extend the honour to al-Jaṣṣāṣ and al-Baṣrī; and, with greater enthusiasm, to al-Shīrāzī, his students, and his peers.

At the same time, we must never neglect the fact that al-Shāfi'ī's *Risāla* and other treatises are indeed expressions of a *system*, and that he was a genius and *systematizer* in his own right. This is well-expressed in Abū Zahra's quotations above, and if we interpose our Dialectical Forge among them, we would read that al-Shāfi'ī's legal theory, in both earlier and later stages, was a distillation of his observations, analyses, selections, and refinements as fermented throughout a long career of

⁴⁸ In a brief but comprehensive review, Lowry narrows the loci of major differences (and markers of elaboration and advancement) from al-Shāfi'ī's legal theory to that of full-system *uṣūl al-fiqh* tradition: 1) the relationship between *uṣūl* and *furū'*; 2) "the capacity for abstraction;" 3) epistemological tools; 4) linguistic argument; and 5) theoretical vs. functional aims (*Early Legal Theory*, 359-68).

⁴⁹ I recognize that this appears something of a dubious pursuit; but an "apples and oranges" comparison of logic and legal theory is not the intention here. Rather, the focus is the three criteria mentioned previously (systematic categorization, refinement of definition, and comprehensiveness of scope), with regard to all that we know of Aristotle's and al-Shāfi'ī's respective systematization projects. From what surviving sources for al-Shāfi'ī's project show us, its achievements — though crucial and thoroughly impressive in their own right — fall far short, in a quantitative sense, of Aristotle's. Nor, we might add, did al-Shāfi'ī's *Risāla* and other treatises ever play in subsequent centuries of *ilm uṣūl al-fiqh* anything like the role which Aristotle's *Organon* played in the subsequent millennium and more of logic studies. Contributions on a par with Aristotle in terms of our three criteria and subsequent influence belong to later systematizers of *uṣūl al-fiqh*, and not likely to a single individual at that.

dialectical interaction with teachers and peers in a number of scholarly centers. In short, it is a refined formulation of select Islamic legal theories as had demonstrated the greatest temper of epistemic justification in the Dialectical Forge by the middle stage of proto-system developments; but it is not a foundation, and it is far from a full science.

Abū Zahra on *Uṣūl al-Fiqh* After al-Shāfiʿī⁵⁰

- 1) Following generations of *fuqahāʾ* turned to commenting upon and refining his system, others accepted it in broad outline but disagreed on the greater part of details and added *uṣūl* (many of which al-Shāfiʿī had disagreed with):
 - a. Ḥanafīs: added *istiḥsān* and *ʿurf*
 - b. Mālikīs: added *ijmāʿ* *Ahl al-Madīna*, *istiḥsān*, *maṣlaḥa al-mursala*, *bāb al-dharāʾiʿ*
- 2) Such additions constitute the only real sites of *khilāf*; the four *uṣūl* of Kitāb, Sunna, *ijmāʿ*, and *qiyās* are subject to consensus (*majmaʿ ʿalayhā*)
- 3) Though many closed the gates of *ijtihād* on themselves, *uṣūl al-fiqh* (which remained very much alive) did not lose its value in the age of *taqlīd*, and was further elaborated without threatening the boundaries of the *madhhab* doctrine as it had been developed: its new role was as a tool in the *jadāl* and *munāzara* with regard to the *ikhtilāf* of the age.
- 4) After doctrinal-*madhāhib* were established, *uṣūl* studies splits into two branches:⁵¹
 - a. a) The *Uṣūl al-Shāfiʿiyya* or *Ṭarīqat al-Mutakallimīn*: remains purely theoretical, unattached to the substantive elaborations (*furūʿ*) of any particular *madhhab*; not concerned with doctrinal justification, only with the most certain methods⁵²
 - b.) The *Uṣūl al-Ḥanafīyya*: turns towards justifying the doctrine of a particular *madhhab* and establishing the correctness of its *ijtihād*, past and present, as well as the general principles (*qawāʾid*) that support their *madhhab*; this style of *uṣūl* fixes the particular methods of the *madhhab*, and allows for ‘derivation of rules in the manner of eponymic *mujtahids*’ (*takhrīj*) – thus it develops and expands the *madhhab*⁵³

⁵⁰ Ibid., 18-25.

⁵¹ As Abū Zahra makes plain, despite the Shāfiʿī / Ḥanafī appellations, scholars from all *madhāhib* engaged and wrote *uṣūl* works in both trends.

⁵² Abū Zahra delves into the Shāfiʿī *ṭarīqa* in much greater detail in pages 20-2 of his *Uṣūl al-Fiqh*. He stresses, among other things, the prescriptive role of this branch of the *ʿilm al-uṣūl*: it is *ḥākima ʿalā al-furūʿ*. He names the three greatest works of the Shāfiʿī / Mutakallimūn *ṭarīqa* as follows: 1) the *Muʿtamad* of al-Baṣrī; 2) the *Burhān* of al-Juwaynī; and 3) the *Mustaṣfā* of al-Ghazālī. These spawned many commentaries, abridgments, and glosses. The *Maḥṣūl* of Fakhr al-Dīn al-Rāzī and the *Iḥkām* of al-Āmidī both built upon these great works, and were in turn the objects of abridgement and commentary.

⁵³ Abū Zahra turns to a more detailed discussion of the Ḥanafī *ṭarīqa* in pages 22-5. He stresses how their method measured *furūʿ* against the *qawāʾid al-uṣūl*, and how their *istinbāt* was thus verified, and that by means of it they were equipped for undertaking *jadāl* and *munāzara*. Whereas the *uṣūl al-Shāfiʿiyya* were a *minhāj liʾl-istinbāt* and *ḥākima ʿalayhi*, the Ḥanafī *ṭarīqa* was not *ḥākima ʿalā al-furūʿ* after they had been set down in writing; i.e., they derived the *qawāʾid* that aided their *madhhab*, and they defended them — they are *maqāyīs muqarrira*, not *maqāyīs ḥākima* (cf. Hallaq vs. Calder with regard to the prescriptive vs. descriptive function of *uṣūl al-fiqh*). Several contributions of this *ṭarīqa* to jurisprudence in general are mentioned, and then Abū Zahra begins to list the most important works, as follows: 1) the *Uṣūl* of al-Karkhī (being the oldest *kitāb* of this type); 2) the *uṣūl* work of al-Jaṣṣāṣ (“broader and more detailed” than al-Karkhī’s); 3) the *Taʾsīs al-Nazar* of al-Dabbūsī; 4) the *Uṣūl* of al-Bazdawī (the clearest and most straightforward work of the Ḥanafī *ṭarīqa*); and 5) the *uṣūl* work of al-Sarakhsī (like al-Bazdawī’s,

- 5) Finally, scholars came along attempting to reunite the two tendencies: a) developing abstract *uṣūl*; b) applying them, beyond even the Ḥanafī method⁵⁴

With regard to ##1 and 2 above, there is again a point of conflict with our model (and with Hallaq's overall narrative); for it does not appear that jurists in the main referred back to and built upon al-Shāfi'ī's particular distillation of proto-system legal theories in the ensuing century. I believe, rather, that latter stages in the development of proto-system legal theory may best be described as follows: the *ijtihād*ic and dialectical principles and methods which had been debated in al-Shāfi'ī's day (and before) continued to be debated in increasingly refined terms (with tighter definitions, the expansion of categories, and the recognition of subtypes within categories) while the seminal intellectual-historical events of Hallaq's narrative (crystallization of "camps," subsequent "migrations" and "disciplining," and eventual synthesis) unfolded. What we have in al-Shāfi'ī's *Risāla* and other treatises was not a foundation upon which later jurists built; rather, it is something more of a snapshot of select mid-proto-system developments provided by one legal theorist's and master dialectician's *minhāj* (not to mention his critique of other *manāhij*).

And as for the hierarchy of Kitāb, Sunna, *ijmā'*, and *qiyās* being common to subsequent systems we may note the following: 1) as Abū Zahra himself avows, this was not an invention of al-Shāfi'ī's, nor was it even his objective, as is certainly confirmed by the meticulous research of Joseph Lowry;⁵⁵ 2) this was *not* common to all subsequent systems within proto-Sunnism (witness the Zāhirīs and proto-Ḥanbalīs); and 3) the precise modes of confirming epistemic authority (in matters of conveyance, *naskh*, interpretation, etc.) and preponderating *adilla* continued to be debated well into al-Shīrāzī's day and beyond. In short, the "four source" hierarchy was not *majma'* *'alayhi* — neither generally, nor with regard to subsidiary concerns —, and elaborations of *istiḥsān*, *maṣlaḥa*, etc. do not constitute mere additions to an established hierarchy.

With regard to #3 above, it is certainly true that *uṣūl al-fiqh* played a role in *jadāl* and *munāẓara* in the age(s) of established doctrinal *madhāhib*. We would greatly expand upon this conception, of course, and will do so shortly by developing a "unified

but broader and more detailed). These spawned commentaries, etc., and works in the *ṭarīqa* by authors of other *madhāhib* are mentioned, with reference even to the Imāmī Shī'a and Zaydīs.

⁵⁴ Abū Zahra first mentions the *Badī' al-Nizām* of al-Sā'ātī (combining the works of al-Bazdawī and al-Āmidī), then proceeds to list other important works from this synthetic genre.

⁵⁵ See his "Does Shāfi'ī Have a Theory of 'Four Sources' of Law?," and pp.11f. of his *Early Islamic Legal Theory* — indeed, the whole of Lowry's *Risāla* research constitutes a thorough antidote to previous "four sources" hierarchy readings of the *Risāla*, and provides comprehensive exposition as to its true theoretical thrust: *Bayān* theory.

dialectical forge theory;” for now, however, suffice it to say that legal theory played a role in juridical *jadāl* throughout the evolutionary history of both (i.e., from long before doctrinal *madhāhib*) — this is but one side of what we have termed their “dynamic symbiosis.”

Finally, with regard to ##4 and 5, these oft-referenced legal-literary trends — potentially originating with the intellectual-historical analysis of Ibn Khaldūn (see below) — offer yet another point for integration of the Dialectical Forge model of *jadāl-uṣūl* dynamics. In short, the notable development of distinctly “pure-theoretical” vs. “*furūʿ*-oriented” *ṭarīqas* may be attributed to “natural” sub-projects developing within the co-evolving argumentation epistemes of *jadāl* and *uṣūl al-fiqh*. In other words, and as we have seen to already have been a feature of proto-system *jadāl*, legal theory itself was often the *object* of dialectical disputation — i.e., in distinction to the object of justification and critique of substantive rulings. There seems always to have been, in this sense, 1) a *fiqh*-oriented *jadāl*; and 2) an *uṣūl al-fiqh*-oriented *jadāl*.

In subsequent eras dominated by *madhhabic* affiliation (itself partly the end-product of distinct methodological “toolboxes” forged and refined in dialectical disputation — the *uṣūl al-madhāhib*), it is only natural that these prior *jadāl* orientations would morph into *ṭarīqas* which 1) distil the methodology of past *mujtahids* associated with the *madhhab*, and by which distillation the doctrinal “core” of that *madhhab* may continue to be justified and expanded upon (the Ḥanafī *ṭarīqa*); and 2) continue to pursue an ideal, “universal” answer to the question: “What are the most epistemically sound theoretical principles and practical methods by which we might ‘discover’ God’s *Sharīʿa*?”

We cannot overstress that these *ṭarīqas* of *uṣūl al-fiqh* literature constitute permutations of “natural” dialectical agendas (*furūʿ*-oriented vs. *uṣūl*-oriented; justificatory vs. exploratory; “descriptive” vs. “prescriptive”) already noticeable in proto-system *jadāl*. What is more, the synthetic project of combining *uṣūl al-fiqh ṭarīqas* beginning with Ibn al-Sāʿātī (al-Baʿlabakī al-Baghdādī; d.694/1294) coincides chronologically with another synthetic project — this time in the realm of *jadāl*-theory. I am speaking, of course, of the first formulation of the *Ādāb al-Baḥth* at the hands of Shams al-Dīn Muḥammad al-Samarqandī (fl. 675/1276).⁵⁶

⁵⁶ See Miller, *Disputation Theory*, 196ff. There may be more than a chronological coincidence between synthetic projects, of course, and this constitutes yet another open door for further exploration.

Between Hallaq and Abū Zahra, then, we have already acquired a relatively thorough outline of key developments in the evolution of *uṣūl al-fiqh*. The differences between these and other narratives, as far as I have encountered them, are usually the result of variant *interpretations* of otherwise agreed-upon developments (e.g., the status of al-Shāfiʿī's contribution, the earlier and later functions of *uṣūl al-fiqh*, etc.), and we shall detect something of a variant interpretation in what follows. Most importantly, however, we have been able so far to highlight the threads of dialectic running through these narratives, and to weave our conception of the Dialectical Forge among them with considerable ease. The fact that our model — whereby formative primacy in the evolution of *uṣūl al-fiqh* is given to juridical *jadal* and its co-evolving axioms of argumentation — has found no real conflict with current legal-historical narratives is significant indeed. In fact, I believe we have already seen sufficient evidence that it is a workable model; the remaining trajectories / paradigms will thus be presented with little discussion, and only new confirmations or obvious points of conflict with the Dialectical Forge theory will be highlighted.

Norman Calder

Perhaps the best source from which we can distil Calder's historical trajectory for legal theory is his entry on *uṣūl al-fiqh* in the *EI*². Despite certain conceptions with which I disagree (and only some of which will be addressed in following notes), this is an informative article consisting of a combination of observations, chronological considerations, and the author's theses. Notably, much of Calder's account depends upon Ibn Khaldūn and al-Ghazālī, but his overall assessment — especially with regard to the origins and function of *uṣūl al-fiqh* — exhibits a decidedly Ḥanafī *ṭarīqa* “defence of the *madhhab*” orientation.⁵⁷

Calder on the Origins and Evolution of *Uṣūl al-Fiqh*

- 1) Ibn Khaldūn regarding “the relatively late development of *uṣūl al-fiqh* as a comprehensive science:” His reasoning was that “for the earliest generations, the relevant skills were intuitive and innate (in respect of language and its use) or based on personal experience (in respect of assessing transmitters of *ḥadīth*, etc.)”⁵⁸

⁵⁷ The same caveats with regard to reduction through outlining as we have mentioned earlier apply here. In addition, due to the structure of Calder's article, a number of his observations and theses will not appear in the same order; I have attempted as chronological an arrangement here as possible. The reader is reminded that a more complete conception of Calder's view on *uṣūl al-fiqh* — its literature, origins, development, nature, and function — may only be obtained through referencing the *EI*² article and works such as his *Studies*.

⁵⁸ Calder, “*Uṣūl al-Fiqh*,” *EI*², ¶6.

- 2) Ibn Khaldūn considered the *Risāla* to be the first work of *uṣūl al-fiqh*;⁵⁹ but the influence and early date of al-Shāfiʿī's *Risāla* has been questioned by modern scholars.⁶⁰
- 3) As a literary genre, *uṣūl al-fiqh* enjoys an unbroken span from its apparent origins in the 4th/10th c. to the 13th/19th c.⁶¹
- 4) The early *uṣūl al-fiqh* literature is already quite “developed;” Calder suggests “there was a prior tradition of teaching and study, a gradually emerging system for the classification and presentation of problems, and, at least, informal notebooks.”⁶²
- 5) Notable representations of *uṣūl al-fiqh* — at its birth as a literary genre — are the works of the Ḥanafī scholars Aḥmad b. Muḥammad al-Shāshī (d.344/955) and Aḥmad b. ʿAlī Abū Bakr al-Jaṣṣāṣ (d.370/980).⁶³
- 6) Ibn Khaldūn's “famous distinction” between: 1) “the *uṣūl* of the theologians;” and 2) “that of the jurists.”⁶⁴
- 7) Ibn Khaldūn on the “early landmarks of the theologians’ tradition;” this *ṭarīqa* begins with Muʿtazilīs, is first developed by Shafīʿī-Ashʿarīs, and later developed (in summary and commentary) by scholars of the other three surviving Sunni schools.⁶⁵
- 8) Ibn Khaldūn's representatives of the Ḥanafī *ṭarīqa*: 1) ʿAbd Allāh b. ʿUmar al-Dabbūsī (d.430/1038), who was seen to be the “most important early writer in this tradition;” 2) ʿAlī b. Muḥammad al-Bazdawī (d.484/1089), who continued al-Dabbūsī's work, and that of other early figures.⁶⁶
- 9) Ibn Khaldūn's mention of the *K. al-Badīʿ* of Ibn al-Sāʿātī (d.694/1295), which “combined... the Ḥanafī (jurists’) tradition with the tradition derived from al-Āmidī,

⁵⁹ Ibid.

⁶⁰ Ibid., ¶1. Citing Hallaq, “Was al-Shāfiʿī the Master Architect;” and his own *Studies* (chap. 9).

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid. NB: Calder does not once mention the Shāfiʿī predecessors Ibn Surayj (d.306/918) and his students. As we have seen, it is this circle of scholars which Hallaq observes to be “the first and foremost Shāfiʿīte authors who [wrote] on *uṣūl al-fiqh*” (*History*, 33). Referencing Hallaq's “Was al-Shāfiʿī the Master Architect,” but bypassing these earliest of contributors (who take up two full pages [595-6] of Hallaq's article) — marks, in my opinion, something of a Ḥanafī-method bias on Calder's part (Hallaq, at least, mentions that “The Ḥanafites... did not lag far behind in elaborating their own theory of law” [*Sharīʿa*, 59]). Other indicants of a Ḥanafī bias will arise in what follows.

⁶⁴ Calder, “Uṣūl al-Fiqh,” *EF*, ¶7. The distinguishing factor is named as *tajrīd* (abstraction), though following this Calder says only “the theologians abstracted the principles and the rules of the science from their normative exemplification.” How this differentiates them exactly from the Ḥanafī / Jurists’ tradition (with its backwards-looking, justificatory approach) is not made clear. Bear in mind, however, that Calder maintains a strict priority for the “descriptive” over the “prescriptive” function of *uṣūl al-fiqh*. Such is not only evident in this article, but particularly underscored in his “*Al-Nawawī's Typology of Muftīs*.”

⁶⁵ Calder, “Uṣūl al-Fiqh,” *EF*, ¶7. The following authors and works are listed: 1) Qāḍī ʿAbd al-Jabbār (Muʿtazilī, d.415/1025): *K. al-ʿUmad*; 2) the commentary on this by Abū al-Ḥusayn al-Baṣrī (d.436/1044): *al-Muʿtamad*; 3) Imām al-Ḥaramayn al-Juwaynī (Shāfiʿī, d.478/1085): *K. al-Burhān*; 4) al-Ghazālī (Shāfiʿī, d.505/1111): *al-Mustasfā*; 5) Fakhr al-Dīn al-Rāzī (Shāfiʿī, d.606/1209): *al-Maḥṣūl*; 6) Sayf al-Dīn al-Āmidī (Shāfiʿī, d.631/1233): *al-Iḥkām*. Then Calder names the “two standard textbooks of Ibn Khaldūn's time”: 1) Ibn Ḥājib (Mālikī, d.646/1249): *al-Mukhtaṣar*; 2) al-Bayḍāwī (Shāfiʿī, d. 685/1286 or 692/1293): *al-Minhāj*.

⁶⁶ Ibid., ¶8.

thereby ensuring considerable convergence of the two traditions in the subsequent period.”⁶⁷

The most important contributions thus far to our interwoven Forge-narrative are Calder’s above assertions in ##4 and 8. As for the first, it confirms that *uṣūl al-fiqh* did not emerge from an intellectual vacuum, and that indeed there was a “prior tradition of teaching and study.” This, of course, is our proto-system of legal theories, throughout its pre-Shāfiʿī, middle, and final stages, continually shaped and honed by the relentless pressure of *ḥujjiyya* in the dialectical forge. And as for the second, it is important that Calder marks al-Dabbūsī as the “most important writer in [the Ḥanafī] tradition;” we have examined his *Taʾsīs al-Naẓr* at some length in Chapter II, and its dialectical agenda has been made plain. In this we are provided further indication that the *ṭarīqas* of post-*madhhab* legal theory originated in nothing more than natural concerns of variant dialectical projects whose threads may be discerned throughout the full gamut of *jadāl-uṣūl* co-evolution.

Calder on the Shāfiʿī / Mutakallimūn vs. Ḥanafī / Fuqahāʾ Ṭarīqas; and the (Primary) Function of Uṣūl al-Fiqh as Preservation and Defence of the Madhhab

- 1) Calder begins to address the Shāfiʿī vs. Ḥanafī approaches⁶⁸ by suggesting that an ideal *uṣūl al-fiqh* may be seen as “a pure science presented in radical abstraction from normative detail.”⁶⁹
- 2) Al-Ghazālī (in his *Mustaṣfā*): 1) *uṣūl al-fiqh* is set apart from *ʿilm al-khilāf*, since only *khilāf* works “dealt with specific examples of norms and their relationship to revealed texts;” 2) the function of *uṣūl al-fiqh* is “to identify the sources of the law and the general hermeneutical principles which permitted extrapolation of norms from texts.”⁷⁰
- 3) Calder: the Shāfiʿī tradition of *uṣūl al-fiqh* “owed much to the Muʿtazila and to the Mālikī Abū Bakr al-Bāqillānī (d. 403/1014).”⁷¹
- 4) Calder, re: the early Ḥanafīs: their work was “much less purist” and “more focused on the defence of acknowledged norms.” He suggests, however, that over time the Ḥanafī approach was influenced by “the more abstract tradition” and came into closer conformity with it.⁷²
- 5) Calder on the Ḥanafī *ṭarīqa*: “This tradition should be seen as prior to and productive of the theologians’ tradition. It is more focused on the rules of the law and the discovery of principles that justify the rules than on the abstract analysis of

⁶⁷ Ibid. Quite rightly, Calder describes Ibn Khaldūn’s “survey” of *uṣūl al-fiqh* tradition as representing only “his assessment of highlights” (Ibid., ¶9)

⁶⁸ As Calder notes: “Ibn Khaldūn identified these tendencies as that of the theologians and that of the jurists respectively” (Ibid., ¶2).

⁶⁹ Ibid.

⁷⁰ Ibid. Note that Calder sees the *Mustaṣfā* as exemplary of: 1) the standard contents of an *uṣūl al-fiqh* book; 2) a high point in the Shāfiʿī tradition (“a peak of organisation and expression”). He claims it was of much influence on later works. (Ibid., ¶4)

⁷¹ He cites Chaumont’s *Bāqillānī*, and Ibn Khaldūn (Ibid., ¶4).

⁷² Ibid.

- hermeneutical principles. This is probably how the discipline developed, emerging out of polemical defence of known rules.”⁷³
- 6) Calder on the nature and function of *uṣūl al-fiqh*:⁷⁴
- a. some modern scholars (mainly Hallaq), and some pre-modern “indigenous” scholars (e.g., al-Ghazālī) have misrepresented *uṣūl al-fiqh* “as an ongoing method for the discovery and the development of rules, implying that it points to a capacity for change and evolution in the juristic tradition”
 - b. the “historical reality” (in both “broad terms” and “details”): “the norms of the law were known prior to and independent of the tradition of *uṣūl*,” and most Muslims (“by virtue of family or geography”) adhered to one of the *madhāhib* “by a loyalty that was ultimately acknowledged and termed *taqlīd*”⁷⁵
 - c. “Chaumont (*Ijtihād et histoire*) has shown that the theory of *ijtihād* is not developmental: it is concerned with the discovery of the law as an eternal and enduring truth”⁷⁶
 - d. Ibn Khaldūn’s “illuminating comment on the real situation” in his discussion of *jadāl* (“which he perceived as a sub-genre within the science of *uṣūl*”): 1) *uṣūl al-fiqh* was only “deductive (*li’l-istinbāt*)” for the *mujtahids* (Calder claims Ibn Khaldūn means only the *madhhab* founders), 2) “Later jurists used the hermeneutical skills and arguments of *uṣūl* in order to *preserve and defend* norms that had already been deduced and were accepted through *taqlīd*” [italics are Calder’s]
 - e. “Re-creation, re-discovery, re-experience: it is concern with repetition and defence of the known law, not concern with development, that most characterises—and most reveals the profound religious and cultural values of the legal sciences of Islam, both *furūʿ* and *uṣūl*.”⁷⁷

As for #1 above, it may be that Calder’s conception of the Shāfiʿī/Mutakallimūn *ṭarīqa* is drawn mostly from al-Ghazālī, as his citations would suggest. Certainly, it is hard to reconcile his “presented in radical abstraction from normative detail” descriptor with the works of such as al-Baṣrī which, like those of our other *jadāl* authors, are replete with examples from the full range of *adilla* and *masāʾil al-ikhtilāf*. In particular, one wonders to which *ṭarīqa* the *uṣūl* works of al-Shīrāzī, al-Bājī, al-Juwaynī, and Ibn ʿAqīl ought to be assigned, considering the very obvious interconnectedness between the principles of *uṣūl al-fiqh* and “normative detail” demonstrated by the many

⁷³ Ibid., ¶8. This being “more focused on the rules of the law and the discovery of principles that justify the rules” is reminiscent of Abū Zahra’s description of the Ḥanafī *ṭarīqa*, as we see. In short, he describes it as concerned with establishing the correctness of a particular *madhhab*’s *ijtihād* and of their *qawāʾid*, thus fixing the particular methods of that *madhhab* and allowing for *takhrīj*.

⁷⁴ All of the following assertions belong to ibid., ¶11.

⁷⁵ Calder rightly notes that “caveats” surround use of the term.

⁷⁶ I find this reference ambiguous, and do not understand how it is meant to support claims of a “defence of the *madhhab*” primary orientation for *uṣūl al-fiqh*. Moreover, Hallaq has shown quite plainly how the machinery of development and change was built into the very structure of the Islamic jurisprudential enterprise, largely through the activities of *muftīs* and *muṣannifīs* (see his *Authority, Continuity and Change*, especially chapters 5 and 6).

⁷⁷ Calder, “*Uṣūl al-Fiqh*,” *EP*, ¶12.

hundreds of example-*masā'il* in their *jadal* texts. Either way, it seems a dangerous proposition to assume a strict dichotomy between the two *ṭarīqas* on the basis of derivation from / justification of *furū'* vs. "abstraction" from *furū'*. This ambiguity of nature and function seems further confirmed by Calder's observation in #4.

As for #5, I am uncertain as to why Calder draws the conclusion that the Ḥanafī *ṭarīqa* must precede the Shāfi'ī, and of course our stance is that both evolved as sub-projects from a pair of co-evolving orientations within a larger dialectical episteme. It is also here in #5, however, that Calder provides a most telling allusion to the dialectal forge: "This is probably how the discipline developed, emerging out of polemical defence of known rules." The key term, of course, is "polemical," and the proof is written large in compendia such as the *K. al-Umm*. My amendments to this statement would be to substitute "dialectical" for "polemical," to change "defence" to "justification and critique," and "known rules" to "*ijtihād*ic solutions;" I would also broaden the scope somewhat. In other words: "This is probably how the discipline [of *uṣūl al-fiqh*, as a whole] developed, emerging out of dialectical justification and critique of *ijtihād*ic solutions." Although falling far short of the Dialectical Forge thesis I hope this dissertation adequately supports, Calder's allusion is nevertheless a sign that we are on the right track.⁷⁸

⁷⁸ With regard to references to juridical *jadal* in secondary works dedicated to legal theory, I may mention two other examples (besides Hallaq's discussion in his *History*, which we have referenced in Chapter I.2). First of all, Lowry dedicates an entire chapter of his *Early Islamic Legal Theory* to "Internal Evidence for the *Risāla*'s Polemical Contexts" (chap. vi, pp. 275-318). Among many other things, he explores the various epistemic groups mentioned by al-Shāfi'ī in appeals and critiques (the Ahl al-'Ilm / Fiqh / Ḥadīth / etc.), and the largely overlooked reading of "The *Risāla* as a Theological Polemic" (including the insightful discussion of al-Shāfi'ī's *'aql* and *ma'qūl* we have noted earlier). Again, the significance of *jadal* as a formative dynamic in legal theory is hinted at by Lowry's detailed discourse. We hope that the findings of this dissertation may augment the considerations he has raised with regard to the overall character and intent of al-Shāfi'ī's *Risāla*. As for the second reference which comes to mind, Bernard Weiss provides, in his monumental *Search for God's Law*, a number of useful notes with regard to juridical dialectic. He cites Miller's dissertation, and firmly grounds al-Āmidī's *Iḥkām* in its juridical dialectical contexts. Among other things, he notes the following of import to the themes of our current project: 1) "A scholar could adhere to an opinion only so long as he was confident that it could be shown, in the context of debate, to be at least as worthy as that of other scholars, if not superior" (an acknowledgement of the scholarly ethic of "good" dialectic); 2) "One often gets the feeling in reading [al-Āmidī's] works that they constitute, at least in part, records of debates in which he himself participated, memoirs of a master dialectician" (a fair reminder of the style we find in the *Umm*, and the marker of a long-standing contextual continuity); and 3) "Āmidī clearly wrote largely to meet the practical needs of scholars... who wished to prove their mettle in scholarly debate" and "his shorter works... were probably intended as manuals to be used by students in memorizing the essentials of arguments that could be useful in debate" (clear echoes of the didactic intent plainly visible in al-Shāfi'ī's "instructional" dialectical sequences). Weiss also provides: 1) a very useful discourse on the nature of the *mas'ala*, including such

Finally, with regard to Calder's insistence that the true nature and primary function of *uṣūl al-fiqh* is descriptive and unconcerned with development, we have already suggested something of a Ḥanafī *ṭarīqa* bias in his developmental narrative. In addition to this, Hallaq has recently dealt admirably with the "descriptive" vs. "prescriptive" dichotomy by showing, *inter alia*, how the former "meshes into" the latter.⁷⁹ As to Chaumont's "non-developmental" assertion, this is also adequately dealt with in Hallaq's chapter just referenced, and, in exquisite detail, in the latter chapters of his *Authority, Continuity and Change*.⁸⁰

On the whole, the only addition I might add from our Dialectical Forge theory is to suggest that "descriptive" and "prescriptive" functions were never so much on the minds of jurists engaged in dialectical disputation; the objective remained the testing of *ijtihād*ic solutions and the refinement of *ijtihād*ic method, no matter whether the *mas'ala* at hand was completely novel, or a long-standing *mas'ala* of *ikhtilāf*. Perhaps these twin concerns (*furū'*-oriented and *uṣūl*-oriented *jadal*) may best account for perceived "descriptive" vs. "prescriptive" functions for *uṣūl al-fiqh*. Then again, we might place the whole dichotomy at Ibn Khaldūn's doorstep, and attribute modern championing of the "descriptive" function to an over-reliance on his somewhat reductive narratives for *uṣūl*- and *jadal*-theory development.

Khalīl al-Mays

In the introduction to his edition of the *Uṣūl al-Shāshī* (pp. 8-11), al-Mays sets forth a brief historical trajectory of *uṣūl al-fiqh*, paying much more attention to variant traditions than Nadwī does in the introduction to his edition.⁸¹ This manifests itself

observations as (with regard to *uṣūl al-fiqh* in general): "its entire range of issues is determined by a long history of debate;" 2) an enlightening discussion of al-Āmidī's dialectical presentation of material (with statement of the *mas'ala*, various *aqwāl*, invalid arguments, objections, etc.); and 3) a useful overview of the interplay between objection and counter-argument (Weiss, *Search*, 46-50; see also his "Medieval Islamic legal education as reflected in the works of Sayf al-Dīn al-Āmidī," *passim*).

⁷⁹ *Sharī'a*, 72ff.; on "The function of legal theory."

⁸⁰ I might add that it is difficult to reconcile a non-developmental legal theory with a legal system which flourished *in practice* across Islamicate societies from Andalusia to Indonesia for a millennium and more, unless one were to suggest that these societies themselves were utterly static. Novel situations demand novel legal solutions, and legal specialists provided them within a larger *uṣūl*ist episteme, as the *fatwā* literature clearly demonstrates. As to how *fatwā* were cycled into a *madhhab*'s doctrinal corpus, thus promoting development *within madhāhib*, see Hallaq's *Authority, Continuity and Change*.

⁸¹ I have not treated Nadwī's narrative here for a number of reasons. Besides offering no additions to the narratives included thus far, it is both reductive and linear to a problematic extent. In short, Nadwī paints a larger overview, whereby al-Shāfi'ī's *Risāla* (as our first extant *uṣūl* work) is followed by 'ulamā' writing on this *fann*, until al-Shātibī wrote his *Muwaffaqāt*, which "rose above all [works] ancient and modern, as regards the *bayān* of the *maqāṣid al-Sharī'a* and its

under the subheading *Manāhij al-Mu'allifin*. As is the norm, al-Mays begins with al-Shāfi'ī, but tells us that, among the 'ulamā' who followed him, "the *manāhij* [of *ta'lif*] multiplied, and their *ṭarīqa* diverged (*ikhtalafat*) into three: 1) the *Ṭarīqat al-Mutakallimīn*, or *Uṣūl al-Shāfi'iyya*; 2) the *Ṭarīqat al-Aḥnāf*; and 3) the *Ṭarīqat al-Muta'akhhirīn*."⁸² He then proceeds to briefly describe each *ṭarīqa*, and then to list the more notable works for each. As we have already covered the developmental areas mentioned in his quick synopsis, I will simply summarize his account of the major characteristics of the three *ṭarīqas*, in parallel with their major works, in the following table:

<i>Ṭarīqat al-Mutakallimīn</i>	
Writings distinguished by: • precise-determining (<i>taḥqīq</i>) of <i>masā'il</i>; establishing (<i>taqrīr</i>) of general principles (<i>qawā'id</i>); rectification/testing (<i>tamhīṣ</i>) of contended solutions (<i>khilāfāt</i>) with rational drawing of indicants (<i>al-istidlāl al-'aqlī</i>) and an increase in <i>jadal</i> regarding them • like the 'Ulamā' al-Kalām • a purely theoretical orientation • almost in isolation from building and testing of substantive legal elaborations (<i>furū'</i>), little concern for application • a program (<i>minhāj</i>) for <i>istinbāt</i>, prescriptive/governing the <i>furū'</i> (<i>hākima 'alayhi</i>)	Most important works: • The pillars (<i>arkān</i>) of this <i>technē</i> (<i>fann</i>) and its general principles (<i>qawā'id</i>): ◦ <i>al-'Umda</i> of Ibn 'Abd al-Jabbār (Mu'tazilī, d.415) ◦ (its <i>sharḥ</i>) <i>al-Mu'tamad</i> of Abū Ḥusayn al-Baṣrī (Mu'tazilī, d.473?!)) ◦ <i>K. al-Burhān</i> of al-Juwaynī (d.478) ◦ <i>al-Mustaṣfā</i> of al-Ghazālī (d.505) • Most important work of the later tradition: ◦ <i>al-Iḥkām</i> of al-Āmidī
<i>Ṭarīqat al-Aḥnāf</i>	
Writings characterized by: • establishing (<i>taqrīr</i>) of general legal-theoretical principles (<i>al-qawā'id al-uṣūliyya</i>) according to the requirements conveyed from their imāms	Most important works: • Oldest: ◦ the <i>Uṣūl</i> of al-Karkhī (d.340) • Broader and more detailed: ◦ the <i>Uṣūl</i> of al-Jaṣṣāṣ (d.370)

qawā'id al-kulliyya." He then narrows focus to Ḥanafī scholars, citing the most famed works on the subject to be: 1) the *Uṣūl* of al-Karkhī; 2) the *Ta'sīs al-Nazar* of Abū Zayd al-Dabbūsī; and 3) the *Uṣūl* of al-Bazdawī. Then, in the same breath, he presents the *Uṣūl al-Shāshī* as "one of the most important *Mukhtaṣars* belonging to the Ḥanafī's for this noble *fann*," it being much studied, relied upon, commented upon, etc., all over the Islamic world. We must allow, of course, the possibility that it was never his intention to provide a comprehensive overview (Nadwī ed., *Uṣūl al-Shāshī*, 5-6).

⁸² *Uṣūl al-Shāshī*, al-Mays ed., 8.

Part I: The Dialectical Forge
Chapter IV.2: Evolutionary Paradigms, the Dialectical Forge, Broader Implications

- the verification (<i>taḥqīq</i>) of the <i>furūʿ</i> and their application (<i>taṭbīq</i>) according to those <i>qawāʿid</i>, and taking the <i>aḥkām</i> from the <i>qawāʿid al-uṣūliyya</i>; they derived their <i>uṣūl al-fiqh</i> from the <i>furūʿ</i> and <i>masāʾil fiqhiyya</i> on the authority of the Ḥanafī imāms - not prescriptive/governing the <i>furūʿ</i> after they were put down	- Between these two works: - the <i>Khamsīn</i> of Abū ʿAlī al-Shāshī (d.344)⁸³ - After writing continued to progress: - the <i>Taʾsīs al-Nazar</i> of al-Dabbūsī (d.430) - the <i>Uṣūl</i> of al-Bazdawī (d.483); the most lucid of the books of the early <i>madhhab</i> - Writings continue to this day
Ṭarīqat al-Mutaʾakhhirīn	
Writings characterized by: - combining the two <i>ṭarīqas</i> - verification (<i>taḥqīq</i>) of the <i>qawāʿid uṣūliyya</i>, and furnishing proof (<i>burhān</i>) for them - application (<i>taṭbīq</i>) and connection (<i>rabṭ</i>) of these <i>qawāʿid</i> to the <i>furūʿ al-fiqhiyya</i>	Most important works: - the <i>Badīʾ al-Nizām</i> of Ibn al-Sāʾātī (d.694); combines the Ḥanafī <i>Uṣūl al-Bazdawī</i> and the Shāfiʿī <i>Iḥkām</i> of al-Āmidī - The <i>Tanqīḥ al-Uṣūl</i> and its <i>sharḥ</i>, of al-Bukhārī al-Ḥanafī (d.747); still used in al-Azhar and elsewhere - The combination of both ways progressed: - the <i>Jamʿ al-Jawāmiʿ</i> of al-Subkī (Shāfiʿī, d.771) - the <i>Taḥrīr</i> of Ibn al-Himām al-Ḥanafī (d.861) - Among the last, and most detailed: - the <i>Musallam al-Thubūt</i> of Ibn ʿAbd al-Shakūr (d.1119)

Again, the listing of al-Karkhī's *Uṣūl* and al-Dabbūsī's *Taʾsīs* among the early works of the Ḥanafī *ṭarīqa* is important for what it suggests of the interrelated literary projects of the *ʿilm al-khilāf*, *ʿilm al-jadal*, and *ʿilm uṣūl al-fiqh*. The great difference in contents and agenda with regard to these two works and, e.g., the *uṣūl* works of al-Jaṣṣāṣ or (the still mysterious) al-Shāshī, however, continues to cast ambiguity over the *ṭarīqa* distinction in the first place. Between the listing of works and the salient characteristics noted by al-Mays we hear echoes of Abū Zahra's and Calder's accounts; I wonder if, after all, all three do not derive ultimately from Ibn Khaldūn's reductive narrative.

A.4 The Dialectical Forge and *Uṣūl al-Fiqh*: Developing the Model

As we have seen, except for the few brief allusions noted above, the role of dialectic in the evolution of *uṣūl al-fiqh* has not received much in the way of focused

⁸³ See our discussion in Chapter II re: the *Uṣūl al-Shāshī*; it seems quite unlikely that this attribution is correct, due to the anachronistic references pointed out by Nadwī.

study up to this point. More than likely this is due to the fact, overall, and as Dr. Robert Wisnovsky has reminded his students on more than one occasion: “dialectic is a grossly understudied genre in Islamic thought.”⁸⁴ Of course, a particular aim of this dissertation has been to bring juridical *jadāl* to the forefront of attention in *uṣūl al-fiqh* studies, and indeed to claim that it constitutes the most important dynamic in the evolution of legal theory. Before proceeding to review a few important aspects of our Dialectical Forge, however, we must note an exception to this relative rule of neglect, and expand upon its assertions.

Hallaq, in charting the course of his introduction to al-Baṣrī’s *K. al-Qiyās al-Shar‘ī*, mentions he will take up “[*jadāl*’s] relationship to legal theory which provided the premises and points of departure for dialectic.”⁸⁵ In a subsequent section he expands upon this relationship between juridical dialectic and the concerns of *uṣūl al-fiqh*.⁸⁶ Taken all together, this discussion provides one of the more important starting points regarding our Dialectical Forge theory which I have yet come across in the secondary literature. Such being the case, I will reproduce the most relevant section in full:

“Dialectic, whose aim it is to reach the truth about a judgment of a case of law, presupposes the existence of the case and at least one *ẓannī* judgment. The process by which a judgment is derived belongs to the realm of legal theory. But establishing the validity of the material evidence for the judgment and the particular methods by which the judgment was reached is the task of dialectic. Thus, logically as well as procedurally the role of legal theory precedes that of dialectic. The latter comes to confirm or refute a conclusion reached by a legal theoretician (*uṣūlī*). Following the Aristotelian tradition, Muslim jurists held that dialectic takes its start from views or opinions rather than from textual premises. *Uṣūl al-fiqh*, on the other hand, departs from such premises to yield a conclusion which, being only inferred, in turn becomes the premise for the arguments of dialectic. But Muslim jurists went slightly beyond the Aristotelian conception to give

⁸⁴ Class Lecture. “Islamic Logic.” 08 January 2007. McGill University, Institute of Islamic Studies. With regard to the vital relationship between juridical dialectic and *uṣūl al-fiqh* in particular, this trend seems unfortunately to have continued. The latest publication on *uṣūl al-fiqh* I am aware of is David Vishanoff’s *Formation of Islamic Hermeneutics*. This is an exceedingly thorough work in terms of both the secondary literature on *uṣūl al-fiqh* and its primary sources. However, and despite a significant treatment of al-Shāfi‘ī, and frequent reference to *uṣūlī*s who were famed dialecticians and/or authors of *jadāl*-treatises, not a mention of dialectical concerns is to be found from cover to cover. Of course, the author’s core focus remains upon the evolution of *uṣūl al-fiqh*’s linguistic-hermeneutical domain, and this may provide a partial explanation. As we have seen in our subject-text, however, linguistic-hermeneutical concerns played a significant role in juridical *jadāl* from the earliest times, and its salient elements and categories may be found throughout most of the domains of our *jadāl*-theory texts. In the end, I must conclude that the absence of reference to dialectic by so thorough a scholar is simply a by-product of its unaccountably low visibility in legal-theoretical (and indeed, historical-intellectual) studies.

⁸⁵ “Treatise,” 197. Italics are mine.

⁸⁶ *Ibid.*, 199-200.

dialectic a more important and expanded role. Juridical dialectic, though unequipped to provide new cases with legal solutions, could reconsider the premises and methods the ‘uṣūlists’ employ in reaching these solutions, and could thus declare them either valid or void.”

If I am reading the above correctly, then Hallaq has already indicated one of the theses I hope this dissertation supports, and I will now attempt an explanation.

First, we will note that the bulk of materials in a typical *uṣūl al-fiqh* text in fact represent theoretical and methodological *propositions*. As such, they may — and do — constitute the building blocks of argument (i.e., *premises*). In some cases they are apodeictic (generally, or within specific contexts of the Islamic argumentation episteme), in others they are assertoric, and in others they are markedly dialectical (i.e., *endoxa*: either generally, or within a *madhhab*’s theoretical teachings). And, of course, such propositions as are most directly concerned with *istidlāl* (i.e., methodological propositions) are also *normative*; for they are statements of “how one *ought to* [analyze the textual *dalīl*, or establish the ‘*illa* in the *aṣl*, or establish *jarayān*, or preponderate conflicting *adilla*, etc.]”

This having been considered, a key argument of this dissertation may be presented in simplest terms as a “three-stage cycle”: 1) *uṣūl al-fiqh* premises are forged and refined in dialectical encounter; 2) thus confirmed, these same premises are employed in *ijtihād*; and 3) when this *ijtihād* is tested in dialectical disputation, these same premises (and others, also forged in previous dialectic) may be brought to bear in both the justification of the proponent’s *istidlāl*, and in the questioner’s critique. Thus, *jadāl* employs premises of *uṣūl al-fiqh* which were themselves produced by *jadāl*. With regard to the evolution of *systems* for both *uṣūl al-fiqh* and *jadāl*, the augmented effect of this three-stage cycle is what we have previously spoken of in terms of “co-evolution” and “dynamic symbiosis;” for, ultimately, as *uṣūl* premises are refined, so too is *jadāl* refined, and the effect is cumulative up to whatever point the unconstrained intellect may reach with regard to refined networks of categories and subtypes.

Importantly, there is another perspective, or facet, with regard to this cycle: The premises of *uṣūl al-fiqh* are in fact distillations from larger categories of principle and method hammered out in venues of juridical dialectic, from the very beginning of the proto-system through to the full-system era and beyond. Thus, it may be claimed that they are *impregnated with the axioms inherent to any dialectical encounter*. In other words, we may read in the premises of *uṣūl al-fiqh* certain dialectical “*givens*” (non-contradiction, consistency, adherence to the *endoxa*) and “*motives*” (avoidance and

detection of self-contradiction, avoidance of the non-*endoxa*, or avoidance of amphiboly, circularity, accident, mistaken cause, and a whole host of other fallacies).⁸⁷ This is the phenomenon we have earlier suggested in terms of the bequeathing of axioms from the argumentation episteme of juridical *jadal* to the argumentation episteme of *uṣūl al-fiqh*.

To sum up, there are three components to Dialectical Forge theory as we have developed it thus far: 1) the “three-stage cycle,” whereby *uṣūl* premises are forged in dialectic, then used in *ijtihād*, and then employed in the dialectical testing of that *ijtihād* (in both P’s justification of *istidlāl*, and in Q’s *i’tirāḍ*); 2) a consequence of this cycle is the impregnation of the *uṣūl al-fiqh* argumentation episteme with the axioms (both “givens” and “motives”) of the *jadal* argumentation episteme; and 3) the augmented effect of the three-stage cycle is the dynamic symbiosis and co-evolution of *jadal* and *uṣūl al-fiqh* systems towards greater and greater degrees of refinement. If the Dialectical Forge is at all a workable model with regard to the real historical evolution of these systems, then indeed we may claim: 1) legal theory and dialectic are inseparable; and 2) they have been from the start of the greater Islamic jurisprudential project and through all subsequent phases of development.

Now, we have already suggested a reason as to why this seemingly all-important dynamic has been, for the most part, neglected: the relatively small amount of study which has been dedicated to juridical *jadal* as opposed to a much larger amount for *uṣūl al-fiqh*. And, after all, the role of *uṣūl* propositions as *premises in argument* may not be immediately perceptible in their contexts of *ijtihād* (a private process whose premises may remain unspoken, unrecorded, or in other ways inaccessible to the researcher). Obviously, this is not the case with *jadal*, where: 1) legal theoretical propositions are indeed spoken as premises of an argument (as we see a number of times in our subject-text); 2) they receive much more obvious attention as argument premises in *jadal*-theory texts than they do in *uṣūl* texts (with the exception, of course, of *uṣūl*-text chapters on *i’tirāḍāt*, *tarjīḥāt*, etc.);⁸⁸ and 3) their use as argument is thrown into bold relief by *masā’il* of *ikhtilāf*. Whatever the cause, it is sincerely hoped that our preliminary attempts at a working Dialectical Forge model (as flawed as it is bound to be) may be a platform for further debate. Here, in other words, is a theory I would hope

⁸⁷ See our first attempt at a table of “dialectical motives” in part C, below.

⁸⁸ As Weiss shows, detailed works such as al-Āmidī’s *Iḥkām* are also exceptions; the place of dialectic as a formative dynamic is made quite plain by the author’s treatment of each legal theoretical premise.

to see refined (and hopefully not discarded) in contemporary venues of scholarly dialectic.

Nor is this all that we may propose with regard to the Dialectical Forge at this point; in particular, a pair of what we might call “subsidiary theories,” introduced in earlier discussions, may now be revisited. The first of these is what we might label “*ijtihād*ic anticipation of *jadāl*,” the second concerns an Aristotelian parallel which may be observed with regard to the role of “scientific” premises in dialectic.

On the “Three-Stage Cycle” and “*ijtihād*ic Anticipation”

The three-stage cycle, as we have formulated it, is related to another theory which we have suggested; mainly, that the public procedure of *jadāl* may be said to intrude into the private procedure of *ijtihād* insofar as we assume the *mujtahid* to anticipate the publication and subsequent debate (whether face-to-face, or via the intermediary of a literary medium) of his *ijtihād*ic solution. The anticipated directives of *jadāl*, in this fashion, may be said to influence the jurist *qua mujtahid*, not only as *qua mustadill/mujīb*.⁸⁹ If indeed this is a viable assumption, and I believe it is, then the importance of pointing it out is simply this: we see in this “*ijtihād*ic anticipation” of *jadāl* yet another crossing of currents between the argumentation epistemes of *jadāl* and *uṣūl al-fiqh* — another entry point for the argument axioms of dialectic. And, once again, these axioms would consist of the “givens” — and particularly the “motives” — of dialectic. The *mujtahid*, in other words, during the course of *ijtihād*, might anticipate charges of inconsistency, non-*endoxic istidlāl*, mistaken cause, etc.; and this anticipation of dialectical charges would influence his/her current course of private *ijtihād*.⁹⁰

⁸⁹ I must here acknowledge that, to a certain extent (and in a different sense of the word), this theory of *ijtihād*ic anticipation has itself been “anticipated” by Hallaq (*History*, 94f.) During an important discourse on the role of dialectic in testing a jurist’s *ijtihād*, he notes, among other things, that: “to safeguard the *ratio legis* against the critique of the opponent, the jurisconsult must take into account a number of considerations....” These he proceeds to list, and they are five in number: 1) that the *ḥukm* at which the proponent aims has not already been plainly revealed in an authoritative text (for, “He would be an easy prey if the opponent could produce a revealed text in which the rule for the case in question is explicitly stated”); 2) that the source-text for *qiyās* is not abrogated, is unambiguous, not subject to *ikhtilāf*, and that its *ḥukm* is transferable; 3) the proponent must be able to prove *ta’tihir*; 4) the proponent must avoid *naqd* and *takhsīs al-‘illa*; and 5) he must be certain that his *‘illa* cannot occasion a different *ḥukm*.

⁹⁰ Anticipation of this sort may perhaps best be considered as a “natural” consequence of pre-knowledge of a forthcoming debate. In the more rhetorical realm of political debate, the politician preparing for a scheduled debate will attempt to anticipate the justifications and objections of his/her opponent (and audience). In the presumably “good” dialectical realm of academia, the graduate student will attempt to anticipate the constructive criticism of mentors and peers in the presentation of research and the construction of supporting arguments and proofs.

On the Parallel of “Scientific” Premises and Aristotelian Dialectic

If we return to Hallaq’s summation above, we would consider his statement that “logically as well as procedurally the role of legal theory precedes that of dialectic” to be a departure point for this dissertation; for, in combination with what we have observed of the formative role of dialectic in premise-forging, it is the impetus for what we have formulated as a “three-stage cycle.” And indeed we have a striking — if not entirely unexpected — parallel for this in the perceived role of Aristotelian dialectic with regard to the demonstrative sciences. In short, as indicated by Aristotle in the *Topics*, it is through dialectic that the *archai* — the self-evident “first principles” upon which any syllogistic argument must ultimately depend within a demonstrative system — are discussed and (re-)defined:

“Further, it [dialectic] is useful in connexion with the ultimate bases of each science; for it is impossible to discuss them at all on the basis of the principles peculiar to the science in question, since the principles are primary in relation to everything else, and it is necessary to deal with them through the generally accepted opinions on each point. This process belongs peculiarly, or most appropriately to dialectic; for, being of the nature of an investigation, it lies along the path to the principles of all methods of inquiry.”⁹¹

As Aristotelian dialectic is to the demonstrative sciences, so might we discern a parallel relationship between *jadāl* and the *‘ilm uṣūl al-fiqh*. And it is in this very direction which Hallaq appears to point when he observes the “expanded role” for dialectic among Muslim jurists, whereby they “reconsider the premises and methods the ‘uṣūlists’ employ in reaching these solutions, and could thus declare them either valid or void.” A major thrust of this dissertation is merely to expand upon this model, and to argue that the premises and methods of *uṣūl al-fiqh* were *originally* considered and *first* developed in the venue of dialectic, as well as *re-considered* (and subsequently refined) time and again throughout the long course of evolution.

With regard to *uṣūl al-fiqh*, our Dialectical Forge model is as complete as we can make it up to this point. We will now turn to another set of considerations; mainly, the formative dynamic of juridical dialectic as pertains to its own theory: the *‘ilm al-jadal*.

⁹¹ *Top.* I.2, 101a36-101b4.; trans. Forster. See also the variant views on the role of dialectic as regards *archai* and the demonstrative sciences set forth by G.E.L. Owen, “*Tithenai ta phainomena*,” in Nussbaum, ed., *Logic, Science and Dialectic* [Ithaca, NY: 1986], 239-51; Robin Smith, “Dialectic and Method in Aristotle,” in Sim, ed., *From Puzzles to Principles? Essays on Aristotle’s Dialectic* [Lanham, MD: 1999], 39-55; and Robert Bolton, “The Epistemological Basis of Aristotelian Dialectic,” in Sim, ed., *Puzzles to Principles*, 57-105.

B. On Proto-System *Jadal* and the Evolution of the *‘ilm al-Jadal*

B.1. Differences between Proto-System *Jadal* Teaching and Practice and Fully-Systematized *Jadal*-Theory

Throughout the course of our analyses of the *Ikhtilāf al-‘Irāqīyyīn* in Chapter III, and subsequent review and categorization of elements in Chapter IV.1, we encountered quite a multitude of argument types, formulations, and strategies — in short, dialectical moves — which did not quite “fit” into the schemata and categories of our *jadal*-theory lens-texts. It is not my intention to review them all at this point, but we will recall that I identified a few larger categories for which the dialectic of our subject-text differed from the material of our lens-texts. With regard to what we called “expanded range” objections, for example, we discussed certain implications for *jadal*-system evolution. In sum, we concluded they present a picture of proto-system *jadal* in its middle stage, before the refining processes of the latter stage led to a more narrowed field of operation for certain modes of *istidlāl* and *i’tirāḍ*. Combining this with our more developed model of the Dialectical Forge, I might now suggest that the processes of dynamic symbiosis and co-evolution led to such refinements in both *jadal* and *uṣūl* that the need for — or appropriateness of — these objections outside of certain domains simply fell away over time.

In fact, we might suggest the same for the other categories of difference: the question strategies, *istidlālāt*, and *i’tirāḍāt* outside the categories of our *jadal*-theory texts might all be understood as having fallen away over time due to the relentless workings of the dialectical forge. Primary examples of concerns which might have lessened and disappeared over time as a result of continual refinements in legal theory include: 1) *istidlāl* by way of the *qawl* of a Successor (and objections to it); 2) such arguments as we have subsumed beneath the heading: “Consistent Generalizing of the *‘illa*” or “super-*qiyās*,” and 3) certain species of objection-oriented *muṭālabāt*, “strategies” such as *naqḍ*-dilemma, and objections to objections. Each of these might have disappeared due to refinements — and restrictions — in respective areas of: 1) the epistemic “weight” and ranking of *adilla*; 2) accepted *qiyās*-method; and 3) the order and typology of acceptable questions — i.e., the tightening of Q&A procedure.

So, too, might arguments to *‘aql* and *ma‘qūl* have fallen away over time, as a continually-refined legal theory developed specific categories of *laḥn al-khiṭāb*, *faḥwā al-khiṭāb*, *dalīl al-khiṭāb*, etc. (the domain of *ma‘qūl aṣl*). Charges of *taḥakkum*, we argued, might simply have been no longer necessary; there were no longer jurists in the latter

stages of the Great Synthesis whose *ijtihād* was not grounded to some extent or another in accepted *adilla* — even the reformulated *istiḥsān* was eventually cleansed of all traces of “arbitrariness.” In the end, all of these “disappearances” may be explained, or potentially so, as the workings of our dialectical forge, with specific regard to the factors of dynamic symbiosis and co-evolution of *jadāl* and legal theory systems. More important for our present concern, however, is that they provide examples of *jadāl shaping itself*; i.e., these proto-system elements, absent from full-system *jadāl*, serve as indicants that the dialectical forge was just as important a dynamic in the shaping of *jadāl*-theory as it appears to have been for the shaping of *uṣūl al-fiqh*. Such is the primary thesis with which we will be concerned in this section.

Returning to what marks the proto-system dialectic of our subject-text as “different,” there were other types of arguments which captured our attention. These not only lay outside later *jadāl*-theory discourse, but they had certain characteristics that allowed us to describe them as more “ancient” in tenor. Besides (or, perhaps, included among) what might, retrospectively, be labelled as *ra’y*, there were a number of elements to which we sometimes attached the descriptor “Aristotelian,” or which we rendered in the names accorded them by Latin scholasticism. These included: 1) Q’s procuring premise-after-premise for *elenchus*, in the manner of the *Topics*; 2) charges of *tanāquḍ*; 3) arguments *ad absurdum*, *ad impossibile*, *ad verecundiam*, *a fortiori* (without a textual *dalīl*), and *a potiori*; and 4) apparent objections to sophistical *elenchi*, such as affirming the consequent, *petitio principii*, or mistaken cause.

The importance of these arguments lies not only in their apparent falling away or transformation via the workings of the dialectical forge, but in the picture they provide for us of the “prior argument epistemes” which featured in the early Islamic dialectical landscape. These, as we have suggested, were infused by the new axioms of Islam, and a new episteme of distinctly Islamic argumentation continued to evolve and transform. An ideal illustration of this process may be found in the fusion of a prior argument axiom (the assumption that the *a fortiori* argument is epistemically sound) with a new Islamic axiom (the assumption that argument must be grounded in an authoritative textual *dalīl* to be considered sound) to produce a feature of the more evolved *jadāl* / *uṣūl al-fiqh* argumentation episteme (*fahwā al-khiṭāb*). The fact that we find *a fortiori* arguments which are *not* based in textual *adilla*, — as well as those which are — in the dialectic of the *Ikhtilāf al-‘Irāqīyyīn*; coupled with the fact that we do not find the former receiving theoretical treatment in our *jadāl*-theory texts; is just that

sort of indicant which allows us to consider al-Shāfiʿī's era as somewhere in the middle of proto-system development.

The presence of these more “ancient” argument axioms alongside distinctly Islamic axioms also encourages us to ponder how best to qualify the “ancient” set; in short, we are tempted to ask: “Just how ‘Aristotelian’ is the dialectic of the *Ikhtilāf al-ʿIrāqiyyīn*?” I have put forward numerous caveats with regard to genetic projects of this sort, and will stand by them here.⁹² However, we certainly will not shy away from the presence of a distinctly Aristotelian episteme in the early Islamic landscape — even before the Translation Movement — as there is every reason to believe it was there. Before turning to the question of how ‘Aristotelian’ the prior axioms we may have found in our subject-text appear to be, however, we will pause to examine that particular candidate, and most interesting feature, we have discovered: al-Shāfiʿī's charges of *tanāquḍ*.

Arguments to *Tanāquḍ* and the meaning of *Mutanāqid*

One means of pursuing this question further would be to: 1) search for instances of *mutanāqid*, *naqaḍa*, *khilāf*, etc. throughout the whole of the *Kitāb al-Umm* and *Risāla*; and 2) compare the contexts in which all such terms are employed. A larger undertaking of this sort must await future projects, but a preliminary search for *mutanāqid* has revealed some 28 instances in the *Umm* — yet none whatsoever in the *Risāla* (of course, this does not preclude the existence of cognates and verbal forms).⁹³

⁹² Primary among these is that parallels alone do not indicate probability of genetic relation, but only possibility; and possibilities do not accumulate to produce probability. That is to say, even if we have gathered as many parallels as we seem to have done, this does not make it probable that our early jurists were reading Aristotle; only some other indicant of a greater epistemic weight (e.g., direct in-text references to the *Organon*, or confirmed accounts of a jurist's studying Aristotle, etc.) can shift our parallels into the realm of probability or certainty. Nor does the cynical stance that a pathetic monolith of “Islamic Tradition” conspired to hide or disguise traces of “Greek logic” in its earlier history constitute any sort of argument at all; the burden of proof lies with the claimant, and one who makes such a claim as this must bring strong evidence of conspiratorial erasure and/or camouflage. Incidentally, it may be considered an added benefit of the Dialectical Forge model — with regard to the gradual disappearance of prior axioms from various evolving Islamic epistemes — that it offers an alternative explanation to claims of a “denaturalized Hellenism.”

⁹³ Should the term and cognates prove entirely absent from the *Risāla*, then such might provide indicant for a conclusion which certain scholars (e.g., Ḥassūn and Schacht) have reached with regard to our subject-text; namely, that its contents are representative of al-Shāfiʿī's “old doctrine,” whereas the *Risāla* is representative of his “new.” The implications are interesting in two ways: 1) our analyses might not only have uncovered a picture of proto-system *jadāl*, but a very specific snapshot of al-Shāfiʿī's “old doctrine” legal theory and method; and 2) the processes of the Dialectical Forge, as we have described them, may be seen as unfolding not only within the general argumentation episteme of the community of jurists, but within a single jurist throughout his career. This latter, of course, should not be seen as surprising at all. It is

Of particular note is this: of the 28 instances in the *Umm*, all but two are expressly employed as descriptors of a *qawl* in a dialectical context — as with the basic formula: *wa qulta [fī hādhā] qawlan mutanāqidan*, and variants such as: *kunta mutanāqida al-qawli fīhi*.⁹⁴ A search for the term *tanāquḍ* in the *Umm* yields nearly a dozen more instances, most of which are also descriptively tied to a *qawl*. A particularly illuminating example of *qawl mutanāqid* may be found at the end of §11635 of the *Bāb Man Qāla Lā Yūrathu Aḥadun ḥattā Yamūta*:⁹⁵

And he professes, regarding it, a <i>qawl mutanāqid</i> (contradictory doctrine) outside the pale, all of it, of the <i>aqāwīl al-nās</i> (doctrines of the people), and the <i>qiyās</i> , and the <i>ma'qūl</i> .	فَيَقُولُ فِيهِ قَوْلًا مُتَنَاقِضًا خَارِجًا كُلُّهُ مِنْ أَقَاوِيلِ النَّاسِ وَالْقِيَاسِ وَالْمَعْقُولِ.

Incidentally, I could not think of a more effective description of what is non-*endoxic* than: *khārij^{an}*, *kullahu*, *min aqawīli al-nāsi*.⁹⁶ Also, we may note yet another instance wherein *al-ma'qūl* is listed among “sources.”

Another fine example combining these elements is in §1331 of the *Bāb fī Bay' al-Ḥayawān* of the *Kitāb Ikhtilāf Mālik wa'l-Shāfi'ī*:⁹⁷

And you [pl.] profess, regarding it, a <i>qawl mutanāqid</i> (contradictory doctrine) outside the pale of the Sunna, and the <i>āthār</i> , and the <i>qiyās</i> , and the <i>ma'qūl</i> .	وَقُلْتُمْ فِيهِ قَوْلًا مُتَنَاقِضًا خَارِجًا مِنَ السُّنَّةِ وَالْأَثَارِ وَالْقِيَاسِ وَالْمَعْقُولِ.

Certainly, when reading through the 28 instances of *mutanāqid* in the *Umm*, a remarkable formulaic consistency may be observed; this is the mark of an established dialectical art, as practiced by a master dialectician, and speaks volumes about the level of sophistication of proto-system *jadāl*. But perhaps what we gain most from these two examples above is that a *qawl mutanāqid* is “outside the pale” of *endoxa* premises; that is to say, al-Shāfi'ī's legal theory at this stage in his career incorporated specific *endoxa* sets which he may easily list when he perceives his opponent's *qawl* to fall outside of

already documented as a recognition of al-Shāfi'ī's evolution from old to new doctrines in the legal literature, biographies, etc. Importantly, however, it provides yet another example of a jurist “following the *ḥujja*” as a “good” dialectician should.

⁹⁴ The two instances which appear in the *K. Jimā' al-'Ilm* call for particular scrutiny; there is much yet to be learned here.

⁹⁵ *Umm*, Ḥassūn ed., vol.4, pt.8, 195.

⁹⁶ In his review of this dissertation, Dr. Wael Hallaq has pointed out that *al-nās*, in juridical contexts, most certainly indicates something akin to “the community of scholars/jurists.” I would also draw attention to al-Rabī's explanation: “When he [al-Shāfi'ī] says: *ba'd al-nās*; they are the Mashriqiyyūn,” most likely meaning the Iraqi jurists (see my note attached to §252 in Part II of this dissertation).

⁹⁷ *Umm*, Ḥassūn ed., vol.9, pt.14, 575.

them. They are, at least in the above examples: the *aqāwīl al-nās*; *qiyās*; *ma'qūl*; Sunna; and *āthār*.⁹⁸ Whatever we determine *mutanāqid* to mean, we may be certain of this much: it is subsumed by the non-*endoxa*.

And yet, there is another way to interpret these passages; mainly: “not only is *qawl X mutanāqid*, but it is *khārijan min endoxa* sets A, B, and C.” There may not be much of a difference either way, but my point here is to remind the reader that the key meaning of *mutanāqid*, as our analyses have shown (and the term itself implies), has to do with contradiction. In this sense, then, *mutanāqid* is a particular non-*endoxic* quality of the opponent’s *qawl* (“it is contradictory”), among other non-*endoxic* qualities (“it is *khārijan min* A, B, C”); that is to say: *mutanāqid* does not simply mean “non-*endoxic*,” although it certainly is non-*endoxic*.

My final analysis, then, having examined the instances we encountered in our subject-text, is this: *tanāquḍ* refers to either 1) “internal,” or 2) “wider-doctrine,” logical contradictions. That is to say: Q accuses P of *tanāquḍ* when P claims “X is the case” and “¬X is the case,” either 1) within the same argument (as closely juxtaposed premises), or 2) between arguments made in different instances of his wider doctrine. As for this latter manifestation — i.e., when P argues “X is the case” regarding the same sort of *mas’ala* for which he elsewhere argues “¬X is the case,” this is remarkably similar to *naqḍ* (and of course, *tanāquḍ* and *naqḍ* are cognates).⁹⁹ Either way, P might be brought to concede a past claim that “X is the case” during the course of investigating his current claim that “¬X is the case.” Thus, the *tanāquḍ* would be made “immediate” through the dialectical process (i.e., Q may cause P to juxtapose the *naqīḍayn* in such a way as the contradiction becomes “internal” as opposed to “wider doctrine”). Again, there is an ambiguous overlapping of *tanāquḍ* with the *naqḍ* of our *jadāl*-theory texts, but this should not surprise us at all. Indeed, the cognate relationship of the terms, against the backdrop of our dialectical forge, may provide indicant for a certain continuity from proto-system *jadāl* teaching and practice to full-system treatises. Certainly, we have seen plentiful indicants elsewhere, and it may not be too much of a stretch to suggest that *tanāquḍ* is, in one way or another, precursor to the eventual full-system category of *naqḍ*. Should such be the case, we have yet another example of *jadāl*-theory shaped in its own dialectical forge.

⁹⁸ NB: my listing is not meant to represent an hierarchy.

⁹⁹ The difference is that, to qualify as *naqḍ*, the opponent must have caused the same ‘*illa* to occasion a different *ḥukm* in a parallel *mas’ala*. In “wider-doctrine *tanāquḍ*” the contradiction may manifest itself outside this strictly ‘*illa-ḥukm* relational concern.

Now, before moving on to our next concern, we should return to the question of how ‘Aristotelian’ arguments to *tanāquḍ*, and other apparently prior axioms, may be said to be. Rather than review the materials from the *Topics* and *Sophistical Elenchi* which we presented at the end of Chapter II, much of which suggests that a number of the arguments we have isolated in the *Ikhtilāf al-‘Irāqīyyīn* certainly appear ‘Aristotelian,’ we will turn instead to al-Fārābī’s definition of *jadāl*. The benefit is this: we may see in this definition an overall account of what Aristotelian dialectic is, as expressed in Arabic terms by a renowned Baghdadian contemporary of the students of Ibn Surayj.¹⁰⁰ In fact, we would be hard put to find a better measure for determining how “Aristotelian dialectical” a particular disputational style might be. Of major concern, as we shall see, are al-Fārābī’s (and Aristotle’s) emphases on destroying/defending theses with universal subjects, and on exposing/avoiding contradiction. Here is my translation, preserving key terms in transliteration:¹⁰¹

The <i>ṣinā‘a</i> (<i>technē</i>) of <i>jadāl</i> is the <i>ṣinā‘a</i> by means of which there is obtained by the human being [1] the capability to fashion — from <i>endoxa</i> premises — a <i>qiyās</i> (syllogism) for the nullification of every <i>waḍ‘</i> (lit. “position,” meaning “thesis-proposition”) whose subject is universal, which [waḍ‘] he obtains-as-concession, by way of question, from a Respondent [R] who is responsible for its [the waḍ‘’s] preservation — whichever of the two parts of the <i>naqīḍ</i> (contradictory) which occurs/agrees. And [2] [the capability to] preserve every <i>waḍ‘</i> whose subject is universal, which he explains / holds	صناعة الجدال هي الصناعة التي بها يحصل للإنسان القوة على أن يعمل من مقدمات مشهورة، قياساً في إبطال [كل] ¹⁰² وضع موضوعه كلي يتسلمه بالسؤال عن مجيب يتضمن حفظه، أي جزء من جزئي النقيض اتفق، وعلى حفظ كل وضع موضوعه كلي يعرضه لسائل يتضمن إبطاله، أي جزئين من جزئي النقيض اتفق ذلك.

¹⁰⁰ Al-Fārābī (d.339/950) spent most of his life in Baghdād, and did not leave for Syria until 330/942.

¹⁰¹ I have preferred my own translation, but we should note that Miller (*Disputation Theory*, 54-5 and n.10) also translates the first part of this same definition, as follows: “The art (*ṣinā‘a*) of dialectic is the art through which a man acquires the capacity to (1) fashion from commonly accepted premises a syllogism that destroys a thesis whose subject is universal, and that he obtains through questioning a respondent who was entrusted with defending either part of a contradictory alternation, whatever that happens to be; and (2) to defend any proposition with a universal premise by opposing himself to a questioner entrusted with destroying either part of a contradictory alternation, whatever that happens to be” (Miller cites a typescript of a MS, but we find this passage in al-Fārābī, *Al-Manṭiq ‘inda al-Fārābī: al-Juz’ al-Thālith: Kitāb al-Jadal*, ed. Rafīq al-‘Ajam (Beirut: Dār al-Mashriq, 1986), 13, which apparently relies upon the same MS, as the folio numbers in the margins coincide perfectly). Compare this with DiPasquale’s translation in *Alfarabi and the Starting Point of Islamic Philosophy: A Study of the Kitāb al-Jadal (Book of Dialectic)*, (Ph.D. Dissertation: Harvard University, 2002) Appendix 1.

¹⁰² The editor finds this “kull” in one of his MSS, but has not included it in his transcription (al-‘Ajam ed., 13, n.2).

opposite to the Questioner [Q] who is entrusted with its [the <i>wadʿ</i>’s] nullification — whichever of the two parts of the <i>naqīd</i> that may be.	
And Aristotle treats/fixes this <i>ṣināʿa</i>, according to his definition of it, that it is a <i>ṭarīq</i> (method); and he says: “It is a <i>ṭarīq</i> by means of which we are prepared to fashion — from <i>endoxa</i> premises — a <i>qiyās</i> for every <i>masʿala</i> (<i>problēma</i>) considered, and that, when we respond with a <i>jawāb</i> (response), we bring not forth in it something <i>muḍādd</i> (opposite/contrary).” And his saying “<i>muḍādd</i>,” he employs it in the place of <i>al-muqābil</i> (the opposite), and by means of it he indicates <i>al-munāqīd</i> (the contradictory). And our saying “we bring not forth in it something <i>munāqīd</i>,” we mean: “we do not concede to anything by which we are bound to the <i>naqīd</i> of the <i>wadʿ</i> for the preservation of which we are responsible.” And his saying “for every <i>masʿala</i> considered,” he means: “regarding every <i>wadʿ</i> which is obtained-as-concession by means of the question,” and he intends by it “whichever occurs/agrees of the two parts of the <i>naqīd</i>, that Q obtain it [the part, as concession] from R.”	وأرسطوطاليس يجعل هذا الصناعة عند تحديده لها أنّها طريق، ويقول إنّها طريق، يتهيأ لنا بها أن نعمل من مقدمات مشهورة قياساً في كلّ مسألة تُقصد، وأن يكون إذا أجبنا جواباً لم نأت فيه بشيء مضاد. فقولاه مضاد استعمله مكان المقابل وأشار به الى المناقض. وقولنا، لم نأت فيه بشيء مناقض يعني لم نسلّم شيئاً يلزمنا عنه نقيض الوضع الذي تضمّننا حفظه. وقوله في كلّ مسألة تُقصد، يعني في كلّ وضع تسلّم بالسؤال وأراد به أي جزء اتفق من جزئي النقيض أن يتسلّمه السائل عن الجيب.

Now, to understand the *juzʿ min juzʿay al-naqīd*, it may help to reference Sānū’s definition of *al-naqīdān*, wherein we learn that it refers specifically to the two properties which cannot be combined in a single thing at the same time and place (like life and death); nor can they both be eliminated from a single thing at the same time and place.¹⁰³ Perhaps what is meant is this: if Q can get R to concede to that “part” which, if uttered by R in conjunction with his thesis-proposition, would result in an obvious contradiction (*naqīd*), then he can trap R into a *reductio ad impossibile*. Further light may be shed from the description of “indirect reduction” — *reductio per impossibile* — found in Parry and Hacker’s *Aristotelian Logic*, 277f. Here we note that the standard examples are in propositional form, indeed: “these forms [of simple indirect reduction] are especially appropriate if syllogisms (and syllogistic forms) take the form of conditionals rather than arguments (or argument forms)” (278). At any rate, if we think of the two “parts” of the *naqīd* as two propositions which, together, create a

¹⁰³ Sānū, *Muʿjam*, s.v. “النقيضان.”

contradiction, perhaps we can understand al-Fārābī as saying: “whichever of the two propositions necessary to form the contradiction which R concedes to Q.”¹⁰⁴

Returning to our original question, and taking account of al-Fārābī’s definition of Aristotelian dialectic and the terms he employs, we may say this much: with regard to certain argument types (*tanāquḍ* and *reductio*s especially), and certain question strategies (especially the premise-gathering for *elenchus* by *tanāquḍ*), the dialectic employed by al-Shāfiʿī in the *Ikhtilāf al-ʿIrāqīyyīn* appears very Aristotelian indeed. In fact, his use of the terms *mutanāqiḍ*, *tanāquḍ*, *naqaḍa*, etc., coupled with the formulaic consistency with which he uses them, may even provide the sort of indicant we need to shift the ‘Aristotelian’ claim from possibility to probability. At the same time, however, and this is important: we must note the *differences* of al-Shāfiʿī’s formulae. He says *mutanāqiḍ*, not *munāqiḍ*. Moreover, the term *naqiḍ* or *naqiḍān/naqiḍayn* does not appear anywhere in the whole of the *Umm* or the *Risāla* (and neither, for that matter, does *munāqiḍ*). Nor does the term *muqaddimāt* appear anywhere in *Umm* or *Risāla*, while *muqaddima* only occurs in other meanings besides “premise.” And completely absent from al-Shāfiʿī’s works, too, are both *muḍādd* and *muqābil*.¹⁰⁵ If certain of al-Shāfiʿī’s argument strategies ultimately derive from an Aristotelian teaching, that teaching appears not to have been expressed in the same Arabic terms by which Aristotelian dialectic was rendered in al-Fārābī’s time (or in his particular tradition).

Already the question is growing more difficult, and this difficulty is significantly compounded by the following: *munāqiḍ*, as employed by al-Fārābī, is the active participle of the third form *nāqaḍa*, whose *maṣdar* is *munāqaḍa*; and *munāqaḍa*, as we have seen it employed by al-Juwaynī, is synonymous with *naqḍ*. Nor is this all. If we search for the terms of root *n-q-ḍ* with which we have been most concerned to this

¹⁰⁴ In an earlier draft, I had suggested we might also understand this passage simply as saying: the theses of R and Q each represent the *naqiḍ* of the other. An examiner of this dissertation, however, has clarified the following point: in Aristotle’s dialectic, Q *does not bring a counter-thesis*, he only undermines P’s thesis. This is a major point of departure with juridical *jadāl* which, as we have seen, incorporates “constructive” as well as “destructive” dialectical moves. *Muʿāraḍa*, of course, is the primary example of a “constructive” dialectical move — not only does Q deconstruct P’s *istidlāl*, but he supplants it with his own (purportedly) superior *istidlāl*. It is a very notable difference indeed that *muʿāraḍa* does not seem to be discussed at all in works of philosophical *jadāl*, and that it appears to describe a significantly different dialectical move in theological *jadāl*.

¹⁰⁵ On the other hand, the term *muḍādd* occurs at least once in the *Fuṣūl* of al-Jaṣṣāṣ, twice in the *Muʿtamad* of al-Baṣrī, and twice in the *Burhān* of al-Juwaynī; while the term *muḍādda(t)* is found six times in the *Uṣūl* of al-Sarakhsī, and eight times in the *Burhān* of al-Juwaynī. As for the terms *muqābil* and *muqābala*, they enjoy great frequency in all of these texts; *muqābala* may also be found four or five times in the *Tabṣira* of al-Shīrāzī.

Part I: The Dialectical Forge
Chapter IV.2: Evolutionary Paradigms, the Dialectical Forge, Broader Implications

point, then we will find the following occurrences in some of our earliest full-system *uṣūl al-fiqh* treatises:¹⁰⁶

Source	<i>tanāquḍ</i> / <i>mutanāqiḍ</i>	<i>munāqiḍ</i>	<i>munāqaḍa</i>	<i>naqīḍ</i>
The <i>Fuṣūl</i> of al-Jaṣṣāṣ	20	7	9	1
The <i>Mu'tamad</i> of al-Baṣrī	24	1	23	64
The <i>Tabṣīra</i> of al-Shīrāzī	10	0	7	1
The <i>Luma'</i> of al-Shīrāzī	0	0	0	2
The <i>Burhān</i> of al-Juwaynī	35	21	34	44
The <i>Uṣūl</i> of al-Sarakhsī	14	3	13	0

Insofar as I can tell from a brief review of the above, wherever the terms *tanāquḍ* or *mutanāqiḍ* occur, they do so with the same meanings and in the same contexts as we find in the *Ikhtilāf al-'Irāqīyyīn* (although, significantly, not in the same formulaic patterns). On the other hand, *munāqiḍ* and *naqīḍ* occur in the same way that al-Fārābī employs them, and *munāqaḍa* appears to maintain its synonymy with *naqḍ*. Yet these latter terms appear nowhere in the *Umm* or *Risāla*.

Again, we don't have the space to pursue this further; in the main, my objective has been to demonstrate how complicated the tracing of terms can quickly become.¹⁰⁷ Of course, my objective was also to further problematize any assumptions one might draw from al-Shāfi'ī's usage of *tanāquḍ* and *mutanāqiḍ* in dialectical contexts. Accordingly, my own final assumptions, here stated, will be left in rather vague terms: 1) there are a number of reasons to believe that *certain elements* of al-Shāfi'ī's dialectic derive, ultimately, from Aristotelian tradition(s); 2) it will be a difficult, if not impossible, task to pinpoint the core transmitted doctrine of the "source" tradition(s), the path of transmission, and the chronology of that transmission; and 3) it will be just as difficult to trace these (and other) prior argument axioms *after* al-Shāfi'ī's era (bearing in mind that we do not assume "post-Shāfi'ī" to mean "derived from al-Shāfi'ī").

One thing is certain, however. Despite the fact that *tanāquḍ* and *mutanāqiḍ* appear in the arguments of early full-system *uṣūl al-fiqh* works, and they seem to bear the same sense (if not formulaic presentation) by which al-Shāfi'ī employs them; "al-

¹⁰⁶ All of the numerals in our table (excepting zero, of course) should be qualified by the descriptor "at least;" e.g., there are at least 64 occurrences of the term *naqīḍ* in the *Mu'tamad* of al-Baṣrī.

¹⁰⁷ And I am certainly not implying this is not a worthwhile pursuit — there is a great deal to be learned yet from a terminological comparison between our earliest legal theoretical and dialectical texts. These are complex undertakings, however, and demand a far more careful study than we can append to this dissertation.

tanāquḍ” and “*qawl mutanāqid*” do not constitute distinct categories of analysis in our earliest *jadāl*-theory texts.¹⁰⁸ On the other hand, “*al-naqḍ* / *al-munāqqaḍa*” do constitute distinct categories of analysis; yet these latter terms are absent from the dialectic of both *Umm* and *Risāla*.¹⁰⁹ Although we may never untangle the web of terminological relationships and associated paths of transmission, these differences between the dialectic of al-Shāfiʿī and that of full-system treatises still provide indicant for a complex reworking of dialectical tools in the dialectical forge. *Jadāl*, as confirmed by the still-debated application and objection-value of *naqḍ* reported in our lens-texts, continued to be a dynamic in the shaping of *jadāl*-theory.

Before closing this section and moving on, there is one last area of difference we have noted between al-Shāfiʿī’s argument strategies and the discussions we find in full-system *jadāl*-theory treatises; namely: 1) his many “hypothetical” objections (wherein, e.g., he states that *qiyās* does not obtain, then demonstrates that even if it did his opponent’s *qiyās*-method is faulty); 2) his *naqḍ*-dilemma strategy (§§693-704); and 3) his unique “remove then replace a property” strategy (§§740-1). Such strategies (and there are doubtless others we have missed, and yet more to be found in other parts of the *Umm*) raise a number of important questions; among them: Where and from whom did al-Shāfiʿī learn to argue in this fashion? Or are these his own innovations, a unique contribution to dialectical strategy? And if learned through teachers or peers, to what prior argumentation epistemes do they belong? These questions are intriguing ones, and deserve scholarly papers all their own.¹¹⁰ We must leave them as open doors; but for now, we can say this much: discussions of dialectical strategies, *per se*, do not occur in the early theoretical literature of juridical *jadāl*. Why this is so remains something of a mystery; but it is my suspicion that — as a corollary development in *jadāl*’s evolving

¹⁰⁸ In a similar fashion, we may note that the formula *alā tarā* — a staple of proto-system dialectic — also enjoys great currency in these same *uṣūl* texts we have treated (at least 180 occurrences in the *Fuṣūl* of al-Jaṣṣāṣ, 170 in the *Muʿtamad* of al-Baṣrī, 120 in the *Tabṣira* of al-Shīrāzī and 17 in his *Lumaʿ*, and 190 in the *Uṣūl* of al-Sarakhsī; incredibly enough, it is entirely absent from al-Juwaynī’s *Burhān*). At the same time, this formula receives no independent treatment in our *jadāl*-theory texts; at the very least, we might expect to find it as a distinct question-category, or fully treated in connection to certain objection types. This reminds us of the possibility that certain elements of proto-system *jadāl* may indeed have continued *in practice* in subsequent eras, and yet found no place for discussion in the theory-texts.

¹⁰⁹ As noted earlier, *naqḍ* — though absent from the *Risāla* — occurs plentifully in the *Umm*; however, it appears — so far as I have seen — only in substantive contexts (relating mostly to the termination of contractual agreements). In other words, “*naqḍ*” in any relation to a dialectical move does not occur.

¹¹⁰ In particular, one might begin by scouring the arguments of works attributed to Muḥammad b. al-Ḥasan, and any arguments attributed to him in later sources. How similar was al-Shaybānī’s dialectical method to al-Shāfiʿī’s? This would make an excellent thesis question.

argumentation episteme — a gradually expanding discourse on the “good” dialectical ethic (wherein such strategies may have been deemed detrimental to the “truth seeking” enterprise) led to a corresponding decrease in the practice of certain strategies.¹¹¹

B.2. *Jadal*-Theory in the Dialectical Forge

As we have stated above, any one of the features which seem to have “disappeared” between proto-system *jadal* teaching and practice and our full-system treatises may be considered candidate examples for the following notion: dialectical theory was itself shaped through dialectical exchange. In the main, the strongest evidence we have for this phenomenon is written quite plainly in our fifth century H *jadal*-theory texts. Our authors quite frequently draw attention to persistent areas of *ikhtilāf* with regard to the validity of procedures, dialectical question types, and various objections and responses. In particular, we might draw attention to al-Juwaynī’s discourse on the number and types of dialectical questions, with frequent reference to variant opinions: *wa minhum man qāla*: X; *wa minhum man qāla*: Y; etc.; interspersed with his own arguments as to what is valid and what is not.¹¹² In fact, this is a salient procedure of al-Juwaynī’s throughout the entirety of his *Kāfiya*, and it is not infrequent that he employs the familiar *alā tarā* formula in his justifications, and/or fully-transcribed “instructional” dialectical sequences.¹¹³

On further consideration, one realizes that the earliest extant treatises upon which we have relied are as much *examples* of *jadal* as they are attempts at systematization. Witness al-Bājī’s *Minhāj*, where practically every other category of *i’tirād* and *jawāb*, throughout the whole gamut of *adillat al-Shar‘*, is followed by a thorough discussion (and refutation) of “*mā yulḥaqu bi*-[objection-type X] *wa laysa minhu*.”¹¹⁴ Al-Shīrāzī, too, is quite fond of appending “Additional modes of the Aṣḥāb Abī Ḥanīfa” to his ordered lists of *i’tirādāt*, and, upon occasion, debating them.¹¹⁵ Indeed,

¹¹¹ This is not to suggest, of course, that al-Shāfi‘ī did not pursue the “good” dialectical ethic. As we have seen, there is plentiful evidence that he did, not the least of which is the very existence of an “old” and “new” doctrine. Rather, we are merely pointing out that — as with so many other elements of proto-system dialectic — certain strategies may have fallen away due to more stringent (not to mention formally systematized) standards of later generations.

¹¹² *Kāfiya*, Maḥmūd ed., 77ff., §§190ff.

¹¹³ See, for example, *ibid.*, 3ff., §§10ff. Other examples of dialectical sequences may be found throughout.

¹¹⁴ *Minhāj*, Turkī ed., *passim*.

¹¹⁵ More typically, he simply illustrates them with examples. Plainly, he is attempting to ensure that the dialectician-in-training is prepared to face modes of justification and critique which he himself does not advocate.

when our authors composed their treatises, they were quite consciously promoting their received, reformulated, or innovative *minhāj* of acceptable *jadāl* procedure and moves — over and against other *manāhij*. This is precisely the picture of dialectical theory shaped through dialectical exchange which I believe we should consider an important feature of the Dialectical Forge model.

Again, it is almost too obvious to need mentioning with regard to full-system theoretical developments, and we have suggested that the disappearance of proto-system elements provides another indicant of *jadāl* shaped through *jadāl*. But what of specific instances in our subject-text; can we, after all, witness the shaping of *jadāl*-theory in the act? To a certain extent, we may claim a potential site for *jadāl*-shaping-*jadāl*; namely, those questions and arguments we have labelled “objection-oriented,” and “objections to objections.” Here, the focus of debate has shifted from *istidlāl* to *i’tirād*, and in a very real sense that *i’tirād* is under pressure of scrutiny just as much as Q’s (potentially invalid) usage of it. In particular, such examples as we have subsumed under the category “*su’āl ‘an wajh al-i’tirād / muṭālaba bi-wajh al-qadh*” provide a locus for this phenomenon: by way of challenging Q to clarify and support his objection, P is in fact preparing to measure Q’s *i’tirād* against his own standard of what constitutes a valid *i’tirād*. It is in specific points of conflict such as this where I believe we may locate *jadāl*-shaping-*jadāl* “in the act.”

More in the line of the “disappearance” indicant, we may also consider those examples we mentioned of “expanded range” objections. §248, in which *mana’a* is twice employed in a sense similar to that conveyed in the *jadāl* literature, but outside its typical *jadāl*-theory domain, stands as an example. More intriguingly, however, al-Shāfi’ī employs — in this same section — a species of *tarjīḥ al-ẓawāhir* for which al-Shīrāzī references *ikhṭilāf* in his day.¹¹⁶ Doubtless there are other examples of this sort which may be found in our subject-text, and certainly they will be found when the whole of the *Umm*’s dialectical sequences have been explored (the work, I imagine, of a decade or more.) And on the topic of open doors, I might suggest a project with intriguing possibilities; mainly, that all “benefit of assumption” rulings (*fa’l-qawlu qawlu X*), as well as rulings and arguments in the evidentiary domain of oath-taking and *bayyina*, should be explored. There is an obvious overlap between certain

¹¹⁶ *Ma’ūna*, al-‘Umayrīnī ed., 121-2: “And among our *aṣḥāb* are those who say: It [the *ḥadīth*] is not preponderated [in terms of numbers of transmitters], like the *shahāda*. But the first [opinion, which allows this] is *aṣaḥḥ*.” In other words, al-Shīrāzī sanctions a *tarjīḥ*-method which we find al-Shāfi’ī employing in §248 nearly three hundred years earlier.

epistemological concerns of evidentiary procedure and of *jadal*-theory, and every possibility that a thorough examination of dialectical sequences in surviving juridical and theological literature will uncover a formative dynamic between “court” disputation-procedure and that of *jadal* sessions.

A final note with regard to *jadal*-shaping-*jadal* in the Dialectical Forge: although engendering no specific indications of the Dialectical Forge *per se*, Miller’s quite thorough examination of variant opinions among *jadal*-theorists (across all projects theological, philosophical, juridical, and synthetic), with regard to accepted procedure, question types, and objections, constitutes an excellent secondary source for the study of dialectical theory being shaped through dialectical debate. In fact, it is the supposed “expansions” and revisions of juridical dialectic with regard to the older and outstanding problems raised by theological *jadal* upon which Miller hinges many of his “juridical take over” claims.

As for this latter narrative, it is hoped that throughout the course of our analyses and discussions we have demonstrated sufficient proofs to lay the take over paradigm to rest. The dialectical sequences of the *Umm* are eloquent enough on their own in this regard, and we will not measure our Dialectical Forge theory against Miller’s narrative here (or against any of the others introduced in Chapter I.2). Instead, we will expand our model somewhat, and then present a final narrative of our own. It is left to the reader to determine which of the exceedingly few current narratives for juridical *jadal* evolution are consonant with ours, and which are not.¹¹⁷

B.3. Towards a “Unified Dialectical Forge Theory”

In section A.4, above, I developed the Dialectical Forge model with regard to the evolution of legal theory by highlighting three critical components: 1) the three-stage cycle; 2) dynamic symbiosis and co-evolution; and 3) the bequeathing of dialectical axioms, of both the given and motive varieties, to legal theory. Subsequent to this, I appended two further “subsidiary” theories: 1) *ijtihād*ic anticipation of *jadal*; and 2) the “first-principles parallel,” whereby *jadal* plays a role in *uṣūl al-fiqh* similar to that played by Aristotelian dialectic in the demonstrative sciences (the [re-]defining of first principles). Now, and considering what we have discussed in B.2, I would like to expand the Dialectical Forge model yet further by incorporating that component of “*jadal*-shapes-*jadal*,” i.e., the forging of dialectical theory via the medium of dialectical

¹¹⁷ See our presentation of *jadal* evolution narratives in Chapter I.2 for a comparison with what follows in section C of the current chapter.

exchange. This additional component, of course, is intertwined with co-evolution and dynamic symbiosis, but is unique in that *jadal*-theory itself becomes the object of *jadal*. So, too, does this component come with its own pair of subsidiary theories; we will now turn to these so that our model may expand to its fullest contours. I have chosen to call the fully-expanded model “Unified Dialectical Forge Theory,” as it will include all of our dynamics for the evolution of both *jadal* and *uṣūl* systems.

On the Role of Dialectic in Determining What is *Endoxon*

This theory is corollary to the “first principles parallel” we developed with regard to *jadal* and *uṣūl al-fiqh*. To explain, we must first return to an earlier discussion in the first half of this chapter. The topic was *ijmāʿ* and Aristotle’s dialectical premises (i.e., such as are to be found within the greater *endoxa*-set), and we noted certain parallels between the two conceptions. What is important at present is that we also noted the following: thanks to the hierarchy of epistemic authority which gradually developed in the juridical argumentation epistemes of proto-Sunnism (God, then Sunna, then *ijmāʿ*, *qiyās*, etc.), the parallel of Aristotle’s dialectical premises might be said to stretch across the full gamut of epistemic justifications in Islamic legal theory (i.e., not just *ijmāʿ*). In other words, the premises employed in juridical *jadal* were not delimited by: 1) what everyone believes; or 2) what most of the people believe; or 3) what most of the wise believe; etc. Rather, the Proto-Sunnī juridical *endoxa*-set became: 1) what God said; then 2) what God’s Messenger said / did / acknowledged; then 3) *ijmāʿ*; then etc. In other words, it became an *endoxa*-set of *hierarchical epistemic authority*, not a sets-within-the-superset model of Aristotelian dialectic (even though this model has great consonance with *ijmāʿ* theory).

Of course, we also observed that it was juridical disputation that determined what this hierarchical — and distinctly Islamic — *endoxa*-set would be. Juridical *jadal*, we concluded, at once depended upon and determined what was *endoxon* for the Muslim jurist. It is this theory of “dialectic defining the *endoxon*” which we would now like to incorporate into our near-complete “Unified Dialectical Forge” model; and, like the “first principles” theory we discussed earlier (which demonstrates an obviously correspondent concern for [re-]defining *archai*), this “defining the *endoxon*” theory also finds its parallel in the *Topics*. Near the end of his introduction to dialectical propositions, and before turning to dialectical problems, Aristotle says the following:¹¹⁸

¹¹⁸ *Top.* I.10, 104a34ff. (trans. Forster).

“It is also obvious that all opinions which accord with the arts are dialectical propositions; for one would accept the opinions of those who have examined the subjects in question. For example, on questions of medicine one would think as the doctor thinks and in matters of geometry as the geometrician thinks, and so too with the other arts.”

Now, we have already seen the role which dialectic may play in (re-)defining the first principles (*archai*) of the demonstrative sciences.¹¹⁹ Here, Aristotle confirms for us (as common sense would also dictate), that the “opinions” (*doxai*) of the demonstrative sciences are obviously within the larger *endoxa*-set of dialectical propositions (presumably concentrated in the subset of “the wise”). Of course these *doxai* of the demonstrative sciences ultimately depend upon *archai* which are themselves indemonstrable (but may be [re-]defined via dialectic). Thus we begin to see the parallel roles of Aristotelian dialectic (in both defining the *archai* of the demonstrative sciences, and depending upon their *doxai*) and juridical *jadal* (in both defining the premises of *uṣūl al-fiqh*, and depending upon them): in the end, both species of dialectic play a role in determining what is *endoxon*. Juridical *jadal*, I would claim, has determined what is *endoxon* for the Muslim jurist (i.e., hierarchies of epistemic authority and all of their subsidiary theories and methods: the very premises of *uṣūl al-fiqh*) throughout the many stages of its development as a system.

And perhaps, after all, this is the greatest advantage we have in being able to study Islamic juridical *ikhtilāf* and *jadal* in such detail, in so many sources, across so many genres, geographical regions, and eras: we are afforded by this wealth of material an illustration of what may be a far more universal paradigm for intellectual-historical evolution. Dialectic, in a very palpable manner, both expands and refines the premises of the *endoxa*-set. As a result, all of the theory-systems born and developed in the larger dialectical forge of human discourse — including theory-systems of dialectic itself — grow increasingly complex and sophisticated over time (if sometimes narrower in *endoxic* method). Indeed, they are limited only by the rational capabilities of theorists and studied practitioners, and by whatever constraints with which state, society, or historical accident may bind them.

¹¹⁹ Notably, Geometry was one of Aristotle’s favourite examples of a demonstrative science. See the *Cambridge Companion to Aristotle*, 25f., 47.

On the *ʿilm al-jadal* as Derived (in Part) from the Transmission and Study of Past *Jadal*

In previous discussions, we have also encountered indicants suggesting two additional processes were at work in the development of *jadal*-theory. The first we described in terms of the transmission of often quite particular (even *masʿala*-specific) dialectical methods from teacher to student. The second, and clearly related process, was *jadal* theorists looking back to the past and incorporating analyses of the *jadal*-practice of venerated exemplar *mujtahids* into their discussions. We would now like to briefly revisit these processes, and append them as final components of a more comprehensive “Unified Dialectical Forge Theory.”

Now, certainly it is hoped that we have impressed, during the course of our analyses, the fact that the *Ikhtilāf al-ʿIrāqīyyīn* was a treatise compiled, transmitted, and commented upon with a patently didactic intent; in short, our subject-treatise constitutes a *manual* of argument and strategy for the practicing jurist-dialectician, just as much as it constitutes a storehouse of past and recurrent *masāʾil* of *ikhtilāf*. The import here lies in the continuity at which such pedagogical features appear to aim, and we may hypothesize as to this aim and its fruition — the eventual culmination of teachings in comprehensive systems — by way of certain indicants we have come across. Primary among these is the very nature and intension of both “historical” and “instructional” dialectical sequences in the *Ikhtilāf al-ʿIrāqīyyīn*. With regard to the “instructional,” the didactic intent of “*fa-in qāla qāʾil... qāla lahu...*” is so plain as to have earned this label from the start. But the “historical” sequence, though equally important in the didactic project, provides proof of another important phenomenon; namely, the transmission of past *jadal* sequences as a base template for current and future *jadal*. Al-Shāfiʿī evoked “historical” sequences from past encounters in order to prepare his auditor/reader for future dialectical exchanges over continuing *masāʾil* of *ikhtilāf*.

This is important for what it shows of a marked and intentional *continuity* between generations of middle proto-system jurists (i.e., from the jurists of Abū Ḥanīfa’s era to those of al-Rabīʿs). Of course, the transmission of the *Ikhtilāf al-ʿIrāqīyyīn* itself (IAL & AH → AY → MIH → SH → RB), and the accretions of variant opinion and argument it gained along the way, are an eloquent testimony to this. Perhaps the most startling example by which continuity is brought into sharp focus, however, is what we witnessed in §§755ff. There, we will recall, al-Shāfiʿī discovers “in this book” (i.e., in the Shaybānī Version of our subject-text) an opposing argument from the past which he

had not personally encountered in his own dialectical exchanges, and then proceeds to refute it in “instructional” format in order to prepare his auditor/reader for any future encounter with a proponent of this “historical” argument. In a very real way, then, he *revived* a past argument for the sake of maintaining the comprehensiveness of an ongoing (and *mas’ala*-specific) set of counter-arguments. Nor is this all that we saw of continuity within the middle proto-system; for we found that al-Muzanī, in his own dialectical sequence in the *Mukhtaṣar*, imitates al-Shāfi’ī’s dialectic from §262.¹²⁰ Not only do we have indicants for the *intention* of didactic continuity, then, but we have evidence of its *success*.

With regard to this sort of *jadāl*-specific continuity from middle to late proto-system and onwards into the eras of full-system *jadāl* theory, we have moved beyond the scope of this dissertation’s analyses. In terms of providing a more complete picture for the evolution of juridical *jadāl* theory, the extant textual material from the third and early fourth centuries H remains a very significant open door — there is a great deal which will be learned from this material once it has been subjected to the kind of analysis we have attempted for the *Ikhtilāf al-‘Irāqīyyīn*.¹²¹ All the same, we still have plentiful indications that a marked continuity (and, of course, elaboration and refinement) of past *jadāl* teaching and practice will be revealed. The dialectical formulae of *ara’ayta* and *alā tarā* with their associated functions are a clear marker of a certain level of continuity throughout the long evolution of juridical *jadāl* — we have pointed out their frequency of usage in both roots and branches of the developmental tree. More important yet are certain indicants of “analyses of the past” which we found in our lens-texts, and it is to these we shall now turn our discussion.

Plainly evident in the earlier extant theory-works of juridical *jadāl* is that the authors of these texts looked back to the arguments and methods of venerated exemplar *mujtahids* (eponymic founders and *aṣḥāb*). We noted, for example, that al-Bājī opens his chapter on *Tarjīḥāt* with: “Know that *al-tarjīḥ* is a *ṭarīq* for the advancing of one of the two *dalīls* over the other; and the Qudamā’ used to make use of it in *al-naẓar*, and they did so frequently....”¹²² So, too, did they look back for paradigms of *uṣūl* and *furū’* oriented arguments. While attempting to identify al-Shāfi’ī’s *Kitāb*-oriented *i’tirād* in §1056, we discovered that al-Bājī not only appeared to describe the very same

¹²⁰ Būlāq, iii.48-9 [margin]; Maṭrajī, ix.130; Najjār, viii.119.

¹²¹ And, as we have seen, even such condensed collections of abstracted substantive rulings as al-Muzanī’s *Mukhtaṣar* may yield the occasional dialectical sequence for analysis.

¹²² *Minhāj*, Turkī ed., 221, §504.

dialectical move, but that his example *mas'ala* consisted of the very same *mas'ala* under consideration in §1051-61, with the same Qur'ānic *dalīl* and variant *lafẓ* interpretations.

And again, we found the dialectical move of Abū Yūsuf and/or Muḥammad b. al-Ḥasan in §1316 exactly described in our lens-texts (as a species of *fasād al-i'tibār*), then illustrated by the very same *mas'ala* of *ikhtilāf*, with the very same supporting *dalīl* (introduced, no less, by *alā tarā*).¹²³ What is more, with regard to the ensuing dialectic of §§1321ff., we also discovered a description matching al-Shāfi'ī's *jawāb* to a charge of *fasād al-i'tibār* (in §1326, having himself taken up Ibn Abī Laylā's position) — again, not only in relation to the very same *mas'ala*, but responding by the very *taswiya*-subsumption (al-Bājī employs *istawayā*) advanced by al-Shāfi'ī, and with the very same confirmatory rulings (re: *zinā* and *qatl*).¹²⁴ Thus both the charge of al-Shāfi'ī's opponent, and al-Shāfi'ī's *jawāb*, are echoed in the prescriptions and example *mas'ala* of al-Bājī some two hundred and fifty years later. Moreover, the *mas'alat al-ikhtilāf* precedes al-Shāfi'ī by at least another fifty years; thus, the full span of continuity (from Abū Ḥanīfa and Ibn Abī Laylā to al-Bājī) is more in the line of three hundred years.¹²⁵

¹²³ al-Shīrāzī, *Ma'ūna*, al-ʿUmayrīnī ed., 114f.; al-Bājī, *Minhāj*, Turkī ed., 181f., §§402ff — especially at §405. Cf. Ibn ʿAqīl, *K. al-Jadal*, 64, §303.

¹²⁴ al-Bājī, *Minhāj*, Turkī ed., 182, §405.

¹²⁵ Nor are these the only indicants of continuity and analysis of past *jadal*. All instances in which al-Shāfi'ī makes his opponent's method the object of critique (e.g., his apparent general rejection of *qiyās al-shabah* in §288), show that method-oriented dialectic in practice precedes any distinction between *fiqh*-oriented and *uṣūl al-fiqh*-oriented juridical dialectic. Such examples illustrating the sub-projects of proto-system *jadal* are what allows us to seek the roots of "Ḥanafī vs. Shāfi'ī" *ṭarīqas* long before the full systematization of *uṣūl al-fiqh*. These projects are the continuity and elaboration upon older tendencies, and both derived many a principle from proto-system *jadal* practice.

B.4. Unified Dialectical Forge Theory

Our intention now is to combine these last two theories of continuity which we believe to find support in our subject-text and lens texts; their relationship is self-evident, and may perhaps best be captured through the descriptor “transmission and analysis of past *jadal*.” This is the last component I would append to a “Unified Dialectical Forge Theory,” which is now as complete a formulation as I am capable of at this stage of research. Our theoretical model, with all of its components, would thus appear as follows:

Unified Dialectical Forge Theory	
Dialectic and Legal Theory	Dialectic and <i>Jadal</i> Theory
• the three-stage cycle • dynamic symbiosis and co-evolution • the bequeathing of dialectical axioms • <i>ijtihād</i>ic anticipation of <i>jadal</i> • the first principles parallel	• <i>jadal</i> exchange shapes <i>jadal</i> theory • dialectic defining the <i>endoxon</i> • transmission and analysis of past <i>jadal</i>

With our model as complete as can be for the time being, we will engage in one last project. In short, and pulling together various threads of analyses and narratives, past and present, we will attempt a working “background narrative” for the dialectical dynamics at work during the early course of *jadal* and *uṣūl* evolution.¹²⁶

¹²⁶ As will be most obvious to the reader at this point, our entire project has been one of intellectual-history as approached through the analysis of juridical texts; i.e., an approach through the examination of relevant social-historical backgrounds and contexts — as vital as that may be — has been largely, if not entirely, left alone. This is an intentional omission; in my estimation, such an approach would constitute a dissertation all its own, and I believe it necessary that we first come to understand the categories and argumentative *material* of proto-system and full-system juridical dialectic before searching out potential social-historical causes for the phenomena we witness. Moreover, it is my belief that such contexts and causes would remain secondary to the dynamics of the Dialectical Forge; the exigencies of dialectical debate, coupled with a true “follow the *hujja*” ethic, appear to have allowed for a set of intellectual systems to evolve largely according to rational dictates. Formal and informal logical considerations — largely (though certainly not entirely) unhampered by social or political pressures — truly appear to have shaped, over time, the dialectical practices and theories we have examined. Nevertheless, a social-historical analysis with regard to our jurist-dialecticians and their times is a vital project. Fortunately, a number of scholars have applied themselves to such work. Perhaps most relevant to our current study is Ahmed El-Shamsy’s 2009 Ph.D. dissertation for Harvard University: *From Tradition to Law: The Origins and Early Development of the Shāfi’ī School of Law in Ninth-Century Egypt*.

C. The Dynamics of “Unified Dialectical Forge Theory:” A Background Narrative for the Early Evolution of Juridical Dialectic and Legal Theory

If, by this stage, our Dialectical Forge theory has assumed a rather startling dimension, I would remind the reader of the following: 1) a sophisticated juridical dialectic has played a role in Islamic legal evolution since the earliest times, as our subject-text, the whole of the *Umm*, and other early compendia stand witness; 2) with regard to proto-system legal theory, the role of juridical dialectic was indeed a *formative* one, as I hope our analyses and discussions to have adequately demonstrated; 3) with regard to *jadal*-theory (proto- and full-system both), the role of juridical dialectic was also formative — the system itself devolved from *jadal*-axioms debated, dialectically, in venues practicing that system —, as both our subject-text and lens-texts bear witness; and 4) the Dialectical Forge theory integrates well with current paradigms for the evolution of Islamic legal theory, throughout all stages. My goal, in the end, has been to raise juridical dialectic to the uppermost ranks of Islamic legal-historical considerations; and my claim, in the end, is that dialectic and its progressively self-refining argumentation axioms constituted the major dynamic (within the greater set of cultural norms) powering the evolution of both *uṣūl* and *jadal* theory.

Upon this basis, I would now like to take the first steps towards an abstracted early narrative — incorporating and in all ways highlighting the complex dynamics of “Unified Dialectical Forge Theory” as we have developed it — which may serve as a background layer to developmental narratives, current and future, for *uṣūl al-fiqh* and *jadal* theory. Again, this Dialectical Forge narrative is intended neither to supplant current evolutionary paradigms (with certain obvious exceptions), nor to disown future contributions to our understanding of the developmental stages of these critical legal sciences. Rather, my project here is a first attempt at charting the outlines of what I believe to be the most important intellectual dynamic of all. Moreover, I believe this dynamic provided the impetus for many of the developments portrayed by current specialists in various trajectories we have examined. And most importantly of all, I hope this dynamic may be recognized and incorporated into the background of future contributions from specialists and peers, whether of the more comprehensive meta-historical variety, or era/region-specific micro-intellectual-histories. Lastly, it is hoped that our theory and background narrative, both, may gain from the insights (critiques and/or expansions) of current scholars in the field.

On the Confluence of “Argumentation Epistemes” and the Early Development of Epistemic Justification in Islamic Law

Even from the most general overview of early Islamic intellectual projects, developments, and debates in the domains of philosophy, theology, and law; considered along with the backdrop and continuity of pre-Islamic intellectual-historical developments in the lands which now formed the nucleus of early Islamicate civilization; it is a relatively safe matter to propose that numerous sets, or bodies, of “argumentation epistemes”¹²⁷ blanketed the early Islamic intellectual landscape. As for delineating these bodies of argumentation epistemes — marking out where one begins, and another ends, and which may have incorporated parts of another —, that is another matter entirely, and one which we have purposefully abandoned in this dissertation. Nevertheless, when we narrow our focus especially to the teaching and practice of proto-system *jadal* in Islam, we may posit the existence of certain argumentation epistemes, and hypothesize as to their interaction, confluence of axioms, and overall generative role in the evolution of juridical dialectic.¹²⁸

With regard to the question of what was “on the scene” during various stages in the evolution of *jadal* and *uṣūl* systems, we may posit quite a large number of argumentation epistemes in the early Islamicate intellectual landscape, of larger and smaller sets. The difficulty of attributing “origins” and “influences” is plain from the outset, even with the addition of a rough (and, in many ways arbitrary) pre-Islamic vs. early Islamic chronological divide. Beginning from the pre-Islamic, for example, and from a cultural and/or ethnic perspective, we may posit argumentation epistemes which may be more Persianate (axioms of which might be culled from Persian wisdom literature); or more Mesopotamian (axioms of which may, again, be culled from wisdom literature); or more Hellenic (culled from the philosophical traditions, and from the texts of Aristotelian and Stoic logic); or more Indic (culled from the *Nyāya Sūtras*, and other texts of Hindu philosophy); or more Aramaic (again, from the wisdom literature);

¹²⁷ With regard to definitions for “argumentation episteme” and “argumentation axiom,” see our discussion in the introductory chapter of this dissertation (I.1).

¹²⁸ Again, ours has not been a project of “origins.” Rather, our wish has simply been to explore the following: 1) what argumentation epistemes were “on the scene” during the evolution of juridical dialectical and legal-theoretical systems; 2) what the argumentation episteme(s) of proto-system juridical dialectic “looked like” (a primary objective in our analysis of the *Ikhtilāf al-ʿIrāqīyyīn*); and 3) what the argumentation episteme(s) of a more fully-systematized juridical dialectic became (as we see them in our *jadal*-theory treatises).

or more Arabian (from accounts of pre-Islamic disputes and arbitration, and from the argument style of the Qur'ān itself).

Then again, from the perspective of religious communities, we may draw axioms of argumentation from a vast body of Zoroastrian, Judaic, Hindu, Buddhist, Sabaeen, Christian, and other “confessional community” literatures — each in turn comprising different sets of argumentation epistemes (with regional and theological variants). Moreover, and shifting to a legal perspective, what host of argumentation epistemes might we derive from an examination of the vast legal records of ancient Mesopotamia, from Syro-Roman law books, Byzantine manuals, Sasānid Zoroastrian law books, the Palestinian and Babylonian Talmuds, and countless other legal sources?¹²⁹

The argumentation epistemes of the pre-Islamic Near East are numerous indeed, even when broken down into these reductive categories (which are also incomplete in number, and problematic in terms of overlap). And as far as tracing “origins” and “influence” between one episteme and the next, we are faced with incredible difficulties; for parallels in argument or substance are hardly proofs of influence to begin with, and even if they were, an absolute priority would be impossible to ascertain in the great majority of instances. We can say with certainty, however, that a great many argumentation epistemes were “on the scene” at the dawning of Islam, and that they continued into early Islam, whatever their relationship to each other, and whatever their relationship to the nascent argumentation epistemes of early Islamic intellectual traditions.

As for the argumentation epistemes of the first two centuries of Islam, we have an imposing body of literature to examine in the realms of theology and law alone. That being said, we may identify with certainty the appearance of a new, distinctly Islamic argumentation episteme from the outset — the era of the Prophet himself¹³⁰ —, and expanding through various projects into a wide variety of intellectual proto-systems and schools, each with variant argumentation epistemes, but all with patently *Islamic* axioms. The religio-political and legal events of the first century contributed this basic set of Islamic axioms (primary among them: the epistemic authority of God's Qur'ān,

¹²⁹ See my MA thesis, “Stoning and Hand-Amputation: the pre-Islamic origins of the *ḥadd* penalties for *zinā* and *sariqa*” (McGill University, 2005), for a (topic-specific) survey of several of these, and other, pre-Islamic legal sources.

¹³⁰ As evidenced, primarily, by the argumentation of the Qur'ān; and, secondarily, by the argumentation in such units of Prophetic Sunna which the researcher does not find problematic of historical attribution.

and His arguments and decrees recorded therein; and the epistemic authority of the *sunan* of the Prophet and his Companions and/or Family members and/or community, and their recorded arguments and decrees) to a thereafter distinctly Islamic set of argumentation epistemes across legal, theological, and philosophical domains.

Such Muslim scholars as engaged in speculative and normative projects were building, from the start, upon foundational epistemes incorporating Islamic axioms, along with whatever axioms may have been inherited from pre-Islamic times, whatever axioms new generations of scholars brought with them, and whatever axioms were spontaneously generated, reinvented, formulated afresh, or refined. In short, the intellectual landscape within which Islamic juridical dialectic first evolved was populated with numerous argumentation epistemes, old and new, overlapping and mutually influencing; and the primacy of one episteme over another — in terms of chronology or influence — is almost impossible to divine. It is here, however, that we may begin to consider in earnest the working of the Dialectical Forge in its specifically Islamicate context.

We will recall a developmental model I proposed in Chapter II, whereby it was deemed best to think of the evolutionary stages of theological and juridical *jadāl* in terms of “common origins, parallel development, and cross-germination.” We are at the base of that model now — the “common origins” of which we then spoke are the complicated web-works of epistemes and axioms we have just described. But it is important to recognize that the different aims and agendas of speculative (theological) and normative (juridical) projects are the real and immediate causes behind the “branching” and distinctive evolutionary trajectories of theological and juridical argumentation epistemes. Even though a great many, perhaps a majority, of scholars throughout the full range of developmental history were polymaths engaged in both these projects (and others),¹³¹ the natures of the projects themselves were *essentially* different, and the accompanying axioms of argumentation evolved accordingly (and, of course, in dialectical venues).¹³² In a sense, there is no real “branching” in terms of the

¹³¹ I believe this crucial consideration has been overlooked by much of modern scholarship. All too often we hear of “theologians” and “jurists” in terms which suggest a somehow exclusive membership, and we even hear suggestions of an enmity or rivalry between disciplines (see, e.g., van Ess, *The Flowering of Muslim Theology*, 4-5, 31ff.) Perhaps the best antidote to this may be found in the teaching of Dr. Wael Hallaq, who has reminded his students on many occasions that pre-modern Muslim scholars often “wore many hats.”

¹³² Witness, for example, the *istidlāl bi'l-shāhid 'alā al-ghā'ib* of theological discourse over and against the various modes of *istidlāl* we find in proto-system juridical *jadāl* and legal theory. Note, too, the *qiyās* of philosophical (and theological) discourse over and against the *qiyās* of

projects themselves, for their directives were always different. What I attempted to show in the model of Chapter II, however, was a branching of distinctly Islamic argumentation epistemes associated with these projects, for the argument axioms of both projects were all initially drawn from a common pool. Once these projects began in earnest, however, be it in the era of Successors, Companions, or even the Prophet himself, the transformative dynamic of the dialectical forge was immediately at work. And as for the spark which lit the forge: it is *ikhṭilāf*, and we may date the true beginnings of Islamic theological and juridical projects, along with their evolving sets of argumentation epistemes, from the very first instances of speculative and normative *ikhṭilāf*, and the epistemic justifications which were put forward to justify variant opinions.

With special regard to the evolution of legal theory and dialectic, I would suggest that the Unified Dialectical Forge theory, with most of its components, would provide a sufficient explanatory model for background intellectual dynamics from the very beginning — that is to say, from the first juridically-themed disputations onwards. As for the details of these disputations and their participants, they are to be culled from the earliest extant legal materials we possess; and — although so much more is yet to be done for the earliest periods — I believe that our model will mesh well with more detailed narratives as they emerge, as it already appears to do with the more general narratives of current scholarship.

Progressing to the era of venerated exemplar *mujtahids* like Abū Ḥanīfa, Ibn Abī Laylā, Abū Yūsuf, Mālik, al-Awzāʿī, Muḥammad b. al-Ḥasan, al-Shāfiʿī, et al., there is every reason to believe that further analyses of argument and dialectical sequences in the *Umm* and *Mudawwana* and other sources will not only widen our window on proto-system *jadāl*, but contribute to the expansion and refinement of our Unified Dialectical Forge model. As for the dialectic of the *Ikḥṭilāf al-ʿIrāqīyyīn* — that small window which we have opened onto the proto-system dialectical landscape — it was in part the inspiration of this model, and the majority of our theoretical components may thus be applied in the attempt to explain its dialectical phenomena. It is not untoward to suggest, at this point, that the Dialectical Forge model will also be of utility in the

juridical discourse. The similarities between these modes of reasoning is not the result of one discipline borrowing from another; it is the result of a common pot of argumentation epistemes at the shared base of the evolutionary tree of Islamic intellectual endeavours. The differences between these modes may be explained by divergent but parallel development, as driven by variant speculative vs. normative aims, in differently-evolving dialectical venues.

examination of other *Umm* treatises, and explaining such new phenomena as should emerge from a thorough analysis.

As we move past the middle of our proto-system into the latter half of the third century H, we must acknowledge there is even more work to be done in terms of argument analysis in extant texts. Still, we are assured by the relative consonance of our model with the narratives so far put forward by eminent legal-historians. And, finally, as we reach the fourth and fifth centuries, where so much recent scholarship has been done (though so much more awaits exploration and analysis), narratives of legal-historical development are, on the whole, in full consonance with the components of Unified Dialectical Forge theory. The culmination of dynamics which our theory hopes to account for is plainly writ in the earliest extant, full-system, comprehensive treatises of juridical *jadāl* and *uṣūl al-fiqh*. Perhaps one of the more important challenges with regard to the evolution of these systems still remains, however: the backwards tracing of dialectical styles and *uṣūl*ist premises to the first half of the fourth century H, and a careful reconstruction of the systems formulated by the first Aristotles of juridical dialectic and legal theory (presuming, of course, that manuscripts of these first formulations do not surface).

On the Bequeathing of Dialectical Axioms to Legal Theory: Towards a “Motive” Model

Of all the components of Unified Dialectical Forge theory, perhaps the most important is that which we have made the subheading for this section; for if there is a base metal which has been hammered into the premises of *uṣūl al-fiqh* through countless dialectical exchanges, strengthening their *ḥujjiyya* and allowing them to hold their edge; then this base metal is surely composed of dialectical axioms. The *mujtahid*-dialectician, of course, is the blacksmith at the anvil, and we have seen two activities wherein he is prompted to harden the steel of legal theoretical and methodological premises. The first is his private *ijtihād*, where anticipation of dialectical objection prompts a careful search for the most sound, most epistemically-superior base materials, a careful analysis and interpretation of the same, and a thorough tightening of rational inference to the *mas’ala* at hand. The second is in the fire of dialectical disputation itself, where the *ijtihād*ic solution is put to the test, and carefully forged premises — if at all tenable — may be reworked and refined to the necessary extent.

Our focus here is the “first forging” which occurs through *ijtihād*ic anticipation, and in a first attempt to illustrate how the anticipation of dialectical encounter might contribute dialectical axioms to the formation of argumentation epistemes, I have

composed the following (provisional) table.¹³³ The particular axioms under consideration are those of the species we have labelled “motive;” and what follows is meant to suggest how, in anticipation of dialectic, the transference of dialectical “motive” axioms might contribute to the formation of systematic subprojects within larger argumentation epistemes. For each “motive” we have suggested in the following table, recipient subprojects will be listed for: 1) prior argumentation epistemes;¹³⁴ 2) proto-system legal theory; and 3) full-system *uṣūl al-fiqh*.

Dialectical Motive: Avoiding Charges of Epistemic Insufficiency in Premises and Signs	
• Prior Argument Epistemes (Aristotelian) ○ epistemic authority of demonstrative premises (theory of <i>archai</i>) ○ epistemic authority of dialectical premises (theory of <i>endoxa</i>) • Proto-System Legal Theory ○ gradually evolving hierarchical epistemic authority: God, Prophet, [Companions / Imāms / Successors], <i>ijmāʿ</i>, <i>qiyās</i> / <i>al-maʿqūl</i> ▪ theories of abrogation: <i>naskh</i> (preponderating epistemic value within Qurʾān and Sunna) ▪ theories of transmission: early <i>ḥadīth</i> theory (preponderating epistemic value for modes of transmission) ▪ proto-system practices of <i>tarjīḥ</i> • Full-System Legal Theory ○ development and refinement of epistemically authoritative ranks: <i>Kitāb</i>, <i>Sunna</i>, <i>Ijmāʿ</i>, <i>Qawl al-Wāḥid min al-Ṣaḥāba</i>, <i>faḥwā al-khiṭāb</i>, <i>dalīl al-khiṭāb</i>, <i>maʿnā al-khiṭāb</i>, etc. ▪ refined categories within epistemically authoritative ranks (e.g., <i>Kitāb</i>: <i>naṣṣ</i>, then <i>ẓāhir</i> and <i>ʿamm</i>, then <i>mujmal</i>) ▪ refined conceptions of <i>nāsikh</i> and <i>mansūkh</i> ▪ refined conceptions of <i>tawātur</i>, <i>āḥād</i>, <i>mursal</i>, <i>musnad</i>, etc. ▪ further development of principles in the absence of textual <i>adilla</i> (e.g., <i>istiṣḥāb</i>, <i>maṣlaḥa</i>) ○ refined conceptions of <i>ʿilm</i>, <i>istidlāl</i>, <i>ẓann</i>, <i>shakk</i>, etc.	
Dialectical Motive: Avoiding Charges of Intentional¹³⁵ and Semantic Misinterpretation	
• Prior Argument Epistemes (Aristotelian) ○ Theory of “Categories” and Typologies of Predicables ○ Theory of Definitions and Other Hermeneutical Theories	

¹³³ This is only a first attempt, and my objective is mainly to suggest a way in which we may begin to think about and categorize these critical processes. The reader will note that the “recipient” subprojects are hardly comprehensive, and further reflection will doubtless turn up many more. Also, as we have mentioned in a previous note, a listing of dialectical motives influencing a jurist’s *ijtihād* may be culled from Hallaq’s discussion in *History*, 94f.

¹³⁴ As it is the only prior argumentation episteme we have explored to any extent in this dissertation, the Aristotelian will be our main representative here. This is not a wilful setting aside of other prior argumentation epistemes; we simply have not had the time, or the space, to explore them.

¹³⁵ “Intentional” is here meant in the hermeneutical sense; that is, an interpretive attempt to understand the intended meaning of a textual voice.

- Proto-System Legal Theory
 - Proto-System Hermeneutic: *‘āmm* and *khāṣṣ* distinctions, *jumla* and *mufasss* distinctions, *naṣṣ* and *zāhir* distinctions, etc.
- Full-System Legal Theory
 - Refinements in categories of *amr* and *nahy*, *‘āmm* and *khāṣṣ*, *mujmal* and *mubayyan*, *muṭlaq* and *muqayyad*, *naṣṣ* and *zāhir*, etc.

Dialectical Motive: Avoiding Charges of Invalid Inference and Internal / Doctrinal Inconsistency

- Prior Argument Epistemes (Aristotelian/Stoic)
 - development of Formal Syllogistic Axioms
 - Valid and Invalid Moods of Categorical Syllogistic
 - “Indemonstrables” of Hypothetical Conditional Syllogistic
 - Strategies for Dialectical Method
 - Guidelines for Fallacy Identification
- Proto-System Legal Theory
 - development of proto-system *qiyās* [*al-ṭard*]
 - *ma’nā* theory
 - *manzila*-subsumption
 - *taswiya*-subsumption
 - *farq*-extension
 - debate over *istiḥsān*
- Full-System Legal Theory
 - refined categories of *qiyās al-ṭard* and *qiyās al-‘aks*
 - refined tripartite typologies for *qiyās al-‘illa* and *qiyās al-dalāla*
 - refinements in definition: *waṣf* vs. *‘illa*
 - refined relational conceptions: *ta’tḥīr*, *jarayān*, *ṭard*, *‘aks*, etc.
 - refined categories of *tarjīḥ al-ma’ānī*
 - debate over *takhṣīṣ al-‘illa*

Though reductive to an extreme, such a model allows us to conceive, at least in broad strokes, the manner by which dialectical epistemes may produce and/or shape logical and legal-theoretical sub-projects and their axioms. And this leads me to perhaps the most general theory this dissertation will put forward. In short, I would claim that the major dynamic behind the systematization of argument epistemes is the practice of argumentative dialogue; i.e., it is dialectical disputation which forges and hones theories of epistemology, of hermeneutics, of rational inference, and of dialectic itself — ultimately prompting the structuring of refined categories and elements into a *system*. It was the dialectical disputation practiced in Aristotle’s day — be it the “good” Socratic and Platonic dialectic of the Academy, or the “bad” dialectic of the Sophists — which prompted him to his extraordinary systematization of syllogistic logic and its *technēs*. In a similar fashion, it was prior and current dialectical disputation which prompted al-Shāfi’ī’s first “rudimentary” system; and — most important of all — it was

prior and current dialectical disputation which, eventually, prompted the comprehensive systematization of *uṣūl al-fiqh* by Islamic legal theory's first real Aristotles.

D. Open Doors and Closing Statements

The more modest objectives of this dissertation are most apparent in Chapters II through IV.1, and it is hoped that I have succeeded to some extent in opening a small window onto the vista of proto-system juridical dialectic as we find it in the *Ikhtilāf al-ʿIrāqīyyīn*. Overall, I would wish that the reader be as impressed as I am by the sophistication of juridical *jadāl*, even at this early stage. It is also hoped that our exploration of the contents and organizing principles of the full-system treatises we chose for our analytical lens may be considered a contribution, and that the reader be also impressed by the detail, sophistication, high-level organization, and comprehensive scope of these texts. Finally, I would hope that my investigatory procedure in analyzing the *Ikhtilāf al-ʿIrāqīyyīn* through the lens of full-system *jadāl* theory be deemed not only acceptable, but a model which — with correction and refinement — might again be put to use in the analysis of early dialectical material.

As for the grander objectives which become most apparent here in our concluding chapter, I would wish they be deemed grand only in terms of thematic scope and potential for application; as much effort as I have put into them, these are still fledgling theories and models — preliminary attempts which will require much in the way of correction and refinement (that is, of course, if they survive the modern Dialectical Forge of Islamic legal studies). Nevertheless, it is hoped that even in this provisional stage, they may be of some utility, and counted as a contribution.

Whatever the final assessment, this much is certain: for any window this dissertation *may* have opened onto the realms of proto-system juridical *jadāl* and the formative dynamics of dialectical disputation, it has *certainly* opened a hundred more doors to unexplored territory. At first distressed by the enormous amount of material to be analyzed — in the *Ikhtilāf al-ʿIrāqīyyīn* alone, much less the whole of the *Umm*, and even less the considerable body of legal literature which has survived from the second and third centuries H — I am now comforted by the thought that decades of research and analysis are open to myself and other inquisitive scholars, junior and senior alike. Too many “open doors for further research,” in fact, were mentioned throughout the course of this dissertation to review them all now. There are others however, which I have not mentioned, and — incredibly — were originally counted among the objectives of the current project. Lest I be considered lax for not having at least considered them, I will list them here. These as-yet-unrealized objectives consisted, in the main, of examining the material in our subject-text (and eventually the whole of the *Umm* and

other early materials) through lenses other than the one we have fashioned for our current study. In the following list, lenses for analysis will be followed by the authors of works from which they would be fashioned; they include:

- The Lens of Qur’ānic Argumentation (al-Ṭūfī, Rosalind Gwynne)
- The Lens of Stoic Logic/Dialectic (Diogenes Laertius, Sextus Empiricus, Galen)
- The Lens of Arabic Aristotelian Logical Tradition, as fashioned from the earliest extant translations and commentaries (Ibn al-Muqaffā’, al-Kindī, Yaḥyā b. ‘Adī, al-Fārābī, et al.)
- The Lens of Early *Uṣūl al-Fiqh*, as fashioned from the earliest extant full-system treatises (al-Jaṣṣāṣ, al-Baṣrī, al-Shīrāzī, et al.)
- The Lens of Early Arabic Grammar Tradition, as fashioned from the earliest extant works (Sībawayhi, al-Mubarrad, Ibn al-Sarrāj, et al.)
- The Lens of Modern Symbolic Logic (Irving Copi, Rodes and Pospesel)
- The Lens of Modern Informal Logic / Critical Argumentation Theory (Douglas Walton [several titles])
- The Lens of Modern Legal Argumentation Theory (Robert Alexy, Douglas Walton, Rodes and Pospesel)

Having just scratched the surface of the *Ikhtilāf al-‘Irāqīyyīn* with our *jadāl*-theory lens, the treasure of features remaining to be discovered through these additional lenses can hardly be imagined. From such a perspective, it seems that a lifetime of investigation remains for this single text alone, much less the other treatises of the *Umm*, and what survives from the early Islamic legal corpus as a whole.

Closing Statement

There is one ardent wish that I have yet to mention. Those scholars who have immersed themselves in the field and developed an expertise in Islamic legal theory know well what an extraordinary achievement the totality of traditions represents. They are also well aware — thanks to the preservation of hundreds of volumes composed by venerable polymaths of the (remarkably introspective and self-knowing) Islamic legal sciences over such great stretches of time and space — that we have an unparalleled opportunity to explore and examine the full evolutionary scope of a great and long-lived intellectual-historical event.¹³⁶

¹³⁶ My comment in parentheses is meant to underscore the fact the we modern scholars are not “discoverers” of uninhabited territories. The scholars of the Islamic legal sciences were engaged in a constant examination and re-examination of their own traditions, guided — as ever — by the moral directives of understanding, truth-seeking, and “following the *ḥujja*.” Although I myself have indulged in a fair amount of coining terms and developing theories which do not (to my limited knowledge) find parallel discussions in the texts of our legal scientists, I yet firmly maintain that we must pay due consideration to what the pre-modern intelligentsia had to say with regard to the traditions in which they were more fully-immersed than we can ever conceive of being.

This last and most zealous wish, then, is that the many accomplishments of Islam's legal scientists be brought into the full light of a more universal intellectual history. Besides the obvious contributions which a wider recognition of the "event" of Islamic Dialectic and Legal Theory would bring to such fields as the History of Ideas and Evolutionary Epistemology, there lies in these traditions an enormous and almost entirely untapped wealth of contributions to the disciplines of Legal Argumentation, Deontic Logic, and Normative Ethics in particular, and Critical Argumentation at large. In short, the potential benefits of our all-too-obscure area of specialization far exceed the mere elaboration of a legal-tradition's historical stages and philosophy; and I am much comforted to know that I am not alone in promoting the study of its theoretical, methodological, and dialectical achievements across the boundaries of academic disciplines.

Appendix I: al-Baṣrī's Modes of Qiyās-Oriented Dialectic ¹

Faṣl: On the Definition (*ḥadd*) of Qiyās²

Faṣl: On the *Kalām* as regards the *Ḥukm*³

- 1) The *ḥukm*'s relation to (*ta'alluq bi*-) the *aṣl*
 - Is the *ḥukm* present or not?⁴
 - If present, is it present for the whole (*jamī'*) of the *aṣl*, or not?⁵
 - Is the *ḥukm* established in the *aṣl* via *qiyās* on the basis of another *aṣl*, or not?⁶
- 2) The *ḥukm*'s relation to (*ta'alluq bi*-) the *far'*, only
 - Is the presence of the *ḥukm* possible in the *far'*, or not?⁷
 - Is it possible to establish the *ḥukm* in the *far'* via *qiyās*, or not?⁸
 - If established, is the *ḥukm* present in the whole *far'*, or only part of it?⁹
- 3) The *ḥukm*'s relation to (*ta'alluq bi*-) both *aṣl* and *far'*, together
 - Is it possible that the *ḥukm* of that *far'* be derived from that *aṣl*, or not?¹⁰
 - This is *ikhtilāf mawḍū' al-aṣl wa'l-far'*¹¹
- 4) The *ḥukm* in isolation from *aṣl* and *far'*
 - Is it possible for you yourself [*as sā'il*] to profess the *ḥukm* which the *qā'*is made conditional upon the '*illa*?¹²

¹ As compiled from al-Baṣrī, *K. al-Qiyās al-Shar'ī*, Ḥamīd Allāh ed., 1032-50; Hallaq, "Treatise," 207-28. Most of al-Baṣrī's explanations, variant views, possible responses of the *mujīb*, etc., have been omitted.

² al-Baṣrī, *K. al-Qiyās al-Shar'ī*, Ḥamīd Allāh ed., 1032-3; Hallaq, "Treatise," 207-9. Here al-Baṣrī provides definitions for *qiyās al-tard* and *qiyās al-aks*; with further discussions of components, variant conceptions, and examples. We also learn that *al-kalām fi'l-qiyās* regards either [A] the *ḥukm* (either [1] the *ḥukm* itself; [2] its relation to (*ta'alluq bi*-) the *aṣl*; [3] its relation to the *far'*; or [4] its relation to both); or [B] the '*illa* (either [1] its presence/absence [in *aṣl* and *far'*]; or [2] its validity/invalidity).

³ al-Baṣrī, *K. al-Qiyās al-Shar'ī*, Ḥamīd Allāh ed., 1033-5; Hallaq, "Treatise," 209-12. What follows is a methodical sequence for examination of one's own *qiyās*, or one's opponent's *qiyās*.

⁴ The reasoning behind the question: there may be consensus the *aṣl* cannot be used for *qiyās*. One might disagree re: the presence of the *ḥukm*, and as *sā'il* prevent (*tamna'u*) the *qā'*is from his *qiyās*, or as *mas'ul* transfer *kalām* to the *aṣl*

⁵ One might critique the *qā'*is if he attempts *qiyās* on the basis of the whole, but the *ḥukm* is present only in the part.

⁶ Perhaps the *qā'*is referred the *far'* to the *aṣl* by a certain '*illa*; but the *ḥukm* of that other *aṣl* is occasioned by another '*illa*.

⁷ The reasoning behind the question: there may be *naṣṣ* or *ijmā'* which prevents [*mana'a*] its presence in the *far'*.

⁸ The reasoning behind the question: the *ḥukm* may be of the types where *qiyās* is not allowed, such as for *kaffāra*, *ḥadd*, *taqdīr*, or a *ḥukm makhṣūṣ min jumlat al-qiyās*. If Q subscribes to one of these no-*qiyās* views, he can halt the dispute.

⁹ One might critique the *qā'*is if he attempts *qiyās* to the whole of the *far'*, while the *ḥukm* may be present only in the part.

¹⁰ The reasoning behind the question: perhaps the *mawḍū'* of the *aṣl* is for *taghlīz*, and the *mawḍū'* of the *far'* is for *takhfīf*, and the *ḥukm* is *takhfīf*. One may object (*tamna'a*): this *ikhtilāf* is an *amāra* clarifying that the *ḥukm* of one is distinct from the other.

¹¹ Cf. the *qiyās*-oriented objections in the *i'tirād* tables for al-Shīrāzī and al-Bājī: this is *fasād al-waḍ'* (Shīr.VII.11; Bāj.IX.B.10).

- This is *al-qawl bi-mūjib al-'illa*¹³

Faṣl: On the Kalām as regards the 'illa¹⁴

- 1) The 'illa's presence in the *aṣl*:
 - Is it present in the whole of the *aṣl*, or part of it?¹⁵
- 2) The 'illa's presence in the *far'*:
 - Is the 'illa present in the *far'*, according to you?
 - If so, is it present in the whole of the *far'*, or part of it?¹⁶

Faṣl: On what Provides Indicant for the Validity (*ṣiḥḥa*) of the 'illa¹⁷

- There provides indicant for the *ṣiḥḥa* of the 'illa either:
 - 1) *al-Naṣṣ*¹⁸
 - 2) *al-Istinbāt*¹⁹
 - 3) [A *qawm*'s drawing indicant by other *wujūh* for *ṣiḥḥat al-'illa*]²⁰

Faṣl: On what Especially Marks (*yakhtaṣṣu*) the 'illa, as pertains to its Modes of Invalidation (*al-wujūh al-muṣṣida lahā*)²¹

- [Either *Qawl al-Umma*; or *al-Istinbāt*, of which latter there are *wujūh*]:

¹² The reasoning behind the question: maybe it is a *mujmal ḥukm* he [P] has made conditional upon his 'illa, and it is possible that you [Q] also profess it. If Q can also claim it, then the *qā'is* has failed to provide indicant of the *mawḍi' al-khilāf*; Q can insist on the *ḥukm*, according to a *ma'nā*, if the *qā'is* has not yet distinguished a *ma'nā*.

¹³ Cf. Bāj.IX.B.8.

¹⁴ al-Baṣrī, K. *al-Qiyās al-Shar'ī*, Ḥamīd Allāh ed., 1035; Hallaq, "Treatise," 212-13. What follows is a methodical sequence for examination of the opponent's 'illa.

¹⁵ The reasoning behind the question: 1) the *mu'allil* might refer the *far'* to the whole of the *aṣl*, when the 'illa is only in part of the *aṣl* — this nullifies his *qiyās*; and 2) if he refers the *far'* to the *mawḍi'* in which you yourself [Q] find the 'illa of the *aṣl*; you must examine: Is it permissible that part of the *aṣl* be *mu'allil* without [another] part? If so, you [Q] permit what he did. If you don't accept that part of the *aṣl* may have an 'illa, or that the 'illa be allowed unless it is for the whole *aṣl*, [P's] *qiyās* is nullified.

¹⁶ The *qā'is* might ascribe a *ṣifa* to the *far'* not permitted according to his *khaṣm*; or there might be consensus that the *ḥukm* for that *far'* cannot be confirmed except by a single 'illa (this nullifies *ta'līl* of a single 'illa which is not in the whole of the *far'*).

¹⁷ al-Baṣrī, K. *al-Qiyās al-Shar'ī*, Ḥamīd Allāh ed., 1036-8; Hallaq, "Treatise," 213-16.

¹⁸ Al-Baṣrī explains that *al-naṣṣ* provides indicant for *ṣiḥḥa* of the 'illa either: 1) by *ṣarīḥ*; or 2) by a *ḍarb* of *al-tanbīh*.

¹⁹ Al-Baṣrī explains that *al-istinbāt* provides indicant for the *ṣiḥḥa* of the 'illa by different *wujūh*: 1) the *qā'isūn* agree on a limited number of properties in the *aṣl*, there is no allowance for *ziyāda*, and all but one 'illa is invalidated, so we know it is the 'illa (it must be, or the agreed-upon premise of limited number of properties is wrong); 2) co-presence and co-absence of the 'illa and *ḥukm* in the *aṣl*, with no allowance for another efficient property in the 'illa of the *aṣl* (this establishes probability for the efficiency of the 'illa); and 3) the 'illa must have *ta'thīr* in both genus (*jins*) and species (*qabīl*) — so it is probable that this 'illa is *awlā* than others.

²⁰ Al-Baṣrī argues against each one of these: 1) the 'illa is *ṣaḥīḥ* if it is safeguarded from invalidating factors; 2) if the *khaṣm* fails to invalidate the 'illa, this provides indicant for its validity; and 3) the occurrence of the effect (*jarayān*) of the 'illa in the *ma'lūl* provides indicant for its validity.

²¹ al-Baṣrī, K. *al-Qiyās al-Shar'ī*, Ḥamīd Allāh ed., 1039-45; Hallaq, "Treatise," 216-23. Al-Baṣrī begins by observing: There provides indicant for the *fasād* of the 'illa: 1) *Qawl al-Umma*; and 2) *al-Istinbāt*, which latter consists of *wujūh*. He proceeds to list these *wujūh* of *istinbāt*-derived objections, and as we shall see, each finds its match in the *qiyās*-oriented *i'tirāḍāt* of al-Shīrāzī and al-Bājī.

- **Wajh 1: *al-Ta'līl bi'l-Ism***²²
 - *Ḍarb* 1: [no definition]²³
 - *Ḍarb* 2: the 'illa is established by genus²⁴
- **Wajh 2: *Ikhtilāf al-Waḍ'***: [no definition]²⁵
- **Wajh 3: *'Adam al-Ta'thīr***²⁶
 - [Definition]: the *mu'allil* mentions, among the collective of properties of the 'illa, such a property as which, if it is absent in the *aṣl*, the *ḥukm* yet remains²⁷
- **Wajh 4: *Qalb al-Qiyās***²⁸
 - [Definition]: the *naqīḍ* [Hallaq trans. "converse"] of the *ḥukm* mentioned in the *qiyās* [of P] is made conditional upon the 'illa, and the *far'* is referred, by means of that 'illa, to the *aṣl* to which the *far'* of the *qiyās* [of P] is referred.²⁹
 - *Ḍarb* 1: one of the two *ḥukms* made conditional on the 'illa is general (*mujmal*) and the other particular (*mufaṣṣal*)³⁰
 - *Ḍarb* 2: *Qalb al-Taswiya* — the *qālib* says: "It must be that such-and-such is equal to such-and-such," when their equality re: the *ḥukm* is confirmed. While one of them is prohibited (*maḥzūr*), the other must be like it (prohibited).³¹
- **Wajh 5: *al-Naqḍ***³²
 - [Definition]: the presence of the 'illa in a *mawḍi'* from which its *ḥukm* is

²² I have been so far unable to locate an equivalent for this category among the *qiyās*-oriented *i'tirāḍāt* of al-Shīrāzī and al-Bājī.

²³ In al-Baṣrī's example *mas'ala*, the *mu'allil* fixes the 'illa for *tahrīm al-khamr* on the fact that the Arabs called it *khamr*. This is *fāsid*, because the Arab designation has no *ta'thīr*.

²⁴ In al-Baṣrī's example *mas'ala*, the 'illa that the beverage is of the genus of *khamr* occasions the *ḥukm* of *tahrīm*. This is not *fāsid*; "being of the genus" may have *ta'thīr*. He proceeds to explain that also allowed are: 1) *ta'līl* by a *ṣifa* among *ṣifāt*; or 2) *ta'līl* by a *ḥukm* among *aḥkām* (i.e., a *ḥukm shar'ī* may be used to establish another *ḥukm shar'ī*). NB: the first corresponds to the *qiyās al-shabah* of al-Shīrāzī, and the second corresponds to his Type I and II *qiyās al-dalāla*.

²⁵ As we have indicated earlier, this is the *fasād al-waḍ'* of al-Shīrāzī and al-Bājī (Shīr.VII.11; Bāj.IX.B.10). Al-Baṣrī's example: the *ta'līl* from a clearly *taghlīz*-oriented *ḥukm* to a clearly *takhfīf*-oriented *ḥukm*; this *ikhtilāf* may constitute an *amāra* that you can't do *qiyās*. It may, however, be done if a *dalīl* provides indicant for it, or if the combination of *aḥkām* comprises an 'illa *madlūl 'alā ṣiḥḥatihā*. If, however, the *khaṣm* says no to this, the dispute shifts to *dalāla* of the 'illa's validity.

²⁶ This species of objection finds its match in al-Shīrāzī and al-Bājī (Shīr.VII.6; Bāj.IX.B.14).

²⁷ Al-Baṣrī explains: If we allow this to be, then we must allow any of an infinite number of [non co-present] properties to be attached to the 'illa, so we know that the 'illa can't be that collective, as we must reject that one property; and the *intiḳāḍ* of that property provides indicant for the *fasād* of the 'illa. He proceeds to warn against possibly trickery of the part of an opponent: It is not allowed to attach a *waṣf* to an 'illa [merely] to save it from *naqḍ* — we must know first that the *ḥukm* of the *aṣl* is conditional upon it (*yu'alliqu bihā*). If the *waṣf* is not effective in the *ḥukm*, it cannot be allowed to be part of the 'illa. If, after that property is removed, the remaining properties are *muntaqaḍ*, we know the *fasād* of the 'illa.

²⁸ Cf. Shīr.VII.14; Bāj.IX.B.9.

²⁹ In other words, Q counters with the same *qiyās* as R, except with the *naqīḍ* of R's *ḥukm*.

³⁰ Al-Baṣrī explains: This does not invalidate the 'illa, because it may induce a particular *ḥukm* while still having attached to it a general *ḥukm*; general does not contradict particular — and only incompatible *ḥukms* invalidate the same 'illa. Contradictory particular *ḥukms* invalidate; as one must be true, the other false.

³¹ Cf. Shīr.VII.14.2; Bāj.IX.B.9.3.

³² Cf. Shīr.VII.7; Bāj.IX.B.11.

absent³³

- **Wajh 6: al-Kasr**³⁴
 - [Definition]: *naqđ* of the 'illa on account of its *ma'nā*, not its *lafẓ* [Hallaq trans. "form"]³⁵
- **Wajh 7: al-Mu'āraḍa bi-'illa**³⁶
 - *Ḍarb* 1: the *mu'āraḍa* falls upon the 'illa of the *aṣl*, in that the *mu'tarid* establishes another 'illa for the *aṣl*³⁷
 - *Ḍarb* 2: the *qiyās* is opposed by another *qiyās*³⁸

Faṣl: On the Tarjīḥ of the 'illa of the Aṣl over another 'illa, and Tarjīḥ of a Qiyās over a Qiyās³⁹

- [1] *tarjīḥ* of one 'illa over the other, when *mu'āraḍa* occurs to the 'illa of the *aṣl*, and the two 'illas are equal
 - *Wajh* 1: [the *tarjīḥ*] refers back to the strength of the *ṭarīq* of the *ṣiḥḥat al-'illa*
 - [1.1] one 'illa is subject to consensus, and the other is not
 - [1.2] one is *manṣūṣ 'alayhā*, and the other is known by *mafhūm al-naṣṣ*
 - [1.3] the *ṭarīq* of one is *mafhūm al-naṣṣ*, and of the other *istinbāt*
 - *Wajh* 2: [the *tarjīḥ* refers back] to the *ta'addī* [Hallaq trans. "transitiveness"] of the 'illa
 - [2.1] one 'illa is *muta'addiya*, but not the other
 - [2.2] one 'illa has more *furū'* than the other⁴⁰

³³ Al-Baṣrī explains: When the *mu'allil* establishes his 'illa for the *jumla*, then it is "contradicted" by the *tafṣīl*; it is not *naqđ*, because the *ḥukm* of the 'illa itself is the *jumla*, and this is not absent from the *mawḍi'* in which the 'illa is found. Rather, only the *ḥukm mufaṣṣal* is absent, and the *ḥukm mufaṣṣal* is not its [the 'illa's] *ḥukm*, which is made conditional upon it. He then concludes: If the *mu'allil* establishes his 'illa for the *tafṣīl*, then he is contradicted by the *jumla*; this is a *naqđ ṣaḥīḥ*.

³⁴ Cf. Shīr.VII.8; Bāj.IX.B.12.

³⁵ As al-Baṣrī explains: Q rejects one of the properties of the 'illa because he does not consider it to be efficient, and allows that the *ḥukm* be made conditional upon another property, then replaces the rejected property with a more general one, then eliminates all but that one property. If the *mu'allil* objects to the *kasr*, he must prove the discarded property has *ta'thīr* re: the *ḥukm*, so that it must be included. NB: Q has "broken" apart the properties of R's proposed 'illa [hence: *kasr*], discarded one, replaced it, then eliminated all others. Note that this differs somewhat from the definitions and explanations of al-Shīrāzī and al-Bājī. Al-Baṣrī also notes that *al-kasr* has been called '*aks*' (Hallaq trans. "coexclusiveness"), but that this '*aks*' is different to the '*aks al-'illa*' which is opposite to (*muqābil*) *al-ṭard* (Hallaq trans. "coextensiveness"). He then proceeds to a detailed discussion of this. We should note here a crossover with the discussions of the *ṭard wa 'aks* process of *ithbāt al-'illa* as described in *uṣūl al-fiqh* texts.

³⁶ Cf. Shīr.VII.15.2; Bāj.IX.B.15.2.

³⁷ Al-Baṣrī explains: If the *qā'is* is not of those who professes "two 'illas" [i.e., *takḥṣīs al-'illa*]; he cannot profess them both [i.e., both his and the opponent's 'illa]. He continues: If, however, *al-qawl bi'l-'illatayn* is of his *madhhab*; he still cannot profess them both in this *mawḍi'* except after he validates his 'illa. Because the *mu'arid* did not concede to him — rather, he is contending with him as regards it [the 'illa of the *qā'is*], and he said to him: The 'illa in the *aṣl* is not what you have stated, rather, it is what I myself have stated.

³⁸ Al-Baṣrī claims: If it is [like] this, then the *kalām* for it has preceded. I have been unable to locate, however, just where such a discussion has taken place in the *K. al-Qiyās al-Shar'ī*. Nevertheless, I believe, that this category corresponds to the *mu'āraḍa* by way of 'illa *mubtada'a* of al-Shīrāzī and al-Bājī (Shīr.VII.15.2.1; Bāj.IX.B.15.2.1).

³⁹ al-Baṣrī, *K. al-Qiyās al-Shar'ī*, Ḥamīd Allāh ed., 1046; Hallaq, "Treatise," 223. The second type of *tarjīḥ* (*qiyās* over *qiyās*), though mentioned here, is discussed in the following *faṣl*.

[Faṣl: On the Tarjīḥ of Qiyās over Qiyās]⁴¹

- [2] when they [P's *qiyās* and Q's counter-*qiyās*] are equal, then one of them is preponderated over the other⁴²
 - [Wajh 1]: by what refers back to its *aṣl*
 - [1.1] the *ṭarīq* of confirming the *ḥukm* in one of the two is stronger than the *ṭarīq* of its confirmation in the other
 - [1.2] the *ṭarīq* of the *ta'līl* of one of the two *aṣls* is stronger than the *ṭarīq* of *ta'līl* of the other
 - [1.3] when the *ḥukm* of the *aṣl* from which the *ḥukm* of the *far'* is derived is stronger in one of the two, then one of the two *qiyāses* must be stronger; likewise when the *ṭarīq* of the *ṣiḥḥa* of the '*illa* of one of them is stronger.
 - [Wajh 2]: by what refers back to its *ḥukm*
 - [2.1] one of the two *ḥukms* is more *aḥwaṭ* [Hallaq trans. "comprehensive"]⁴³
 - [2.2] we have recommended the *isqāṭ* of one of the two *ḥukms* due to *shubḥa*⁴⁴
 - [Wajh 3]: by what refers back to its '*illa*⁴⁵

[Additional Tarjīḥ-related Discussion]⁴⁶

- the '*illa* might be preponderated in that it is supported by a *zāhir* — that necessitates that it is *awlā* than one which is not
- *Tarjīḥ* and *Iḥsād* of the '*illa* do not go outside of the categories we have discussed; because undermining the '*illa* itself must either be by way of a mode separated from it [the '*illa*] or by a mode which refers back to it⁴⁷

⁴⁰ Al-Baṣrī concludes: The majority *qawl* is that the '*illa* is not invalidated if it is not *muta'addiya*.

⁴¹ al-Baṣrī, *K. al-Qiyās al-Sharī*, Ḥamīd Allāh ed., 1046; Hallaq, "Treatise," 223-4.

⁴² Before this, al-Baṣrī notes: When the *qiyās* is opposed by a *qiyās*, its '*illa* is referred to the *kalām* with regard to its validity or invalidity, as has preceded.

⁴³ Al-Baṣrī's examples: Like when one of them is *wujūb*, and the other *nadb*; or one is *ḥaẓr* and the other *mubāḥ*.

⁴⁴ Al-Baṣrī's example: Like the *ḥudūd* — *ba'd al-nās* hold to the opinion of *tarjīḥ* by means of that, while some don't.

⁴⁵ Al-Baṣrī explains: We have already discussed this; except: *tarjīḥ* by *al-ta'addī* is not possible here — it is a *qiyās*, so *ta'addī* must already have been proven.

⁴⁶ al-Baṣrī, *K. al-Qiyās al-Sharī*, Ḥamīd Allāh ed., 1047; Hallaq, "Treatise," 224.

⁴⁷ Intriguingly, al-Baṣrī here engages in what we might call a "meta-logical" concern; he systematically outlines the relationship between categories of objection earlier discussed (*naqd*, *kasr*, etc.) and the domain of *tarjīḥāt*. He first defines two categories of undermining the '*illa*: [I] by a mode separated from the '*illa*; and [II] by a mode which connects to the '*illa*. To the first category [I] belongs *mu'araḍa* of the '*illa* by way of an '*illa*. To the second category [II] belongs a list of dialectical moves, separated into two further sub-categories: *Ḍarb* 1 [II.1], in which there belongs to the mode a conditional dependence (*ta'alluq*) on something else besides the '*illa*; and *Ḍarb* 2 [II.2], in which there does not belong to the mode a conditional dependence (*ta'alluq*) on something else besides the '*illa*. To this second *ḍarb* [II.2] belongs al-Baṣrī's *ta'līl bi'l-ism* (the equivalent to which I have not located in al-Shīrāzī and al-Bājī). As for the first *ḍarb* [II.1], it is further subdivided into two more divisions: [II.1.1] in which the "something else" [of II.1] is the *makān* of the '*illa*'s *wujūd* (i.e., there does not belong to it a *far'* to which it is extended); and [II.1.2] in which the "something else" is the '*illa*'s *ḥukm*. Finally, this latter division [II.1.2] is further divided into: [II.1.2.1] in which the mode undermining the '*illa* upon which the *ḥukm* is conditionally dependent refers to the *jumla* of the '*illa*; and [II.1.2.2] in which the mode

A Supplement (*ḍamīma*) Regarding *al-Qalb*⁴⁸

- Definition of *qalb al-qiyās*: the *qālib* for the *qiyās* makes dependent, from the 'illa, the *naqīd* of the *ḥukm* stated in the *qiyās*, and he refers the *far'* to that exact *aṣl*. Insofar as being dependent from the 'illa, one of the two *ḥukms* is not *awlā* than the other's being dependent from it, nor is it valid that they both, together, be dependent from it due to their mutual contradiction (*tanāfihimā*).
- [Three objections to *qalb*; followed by al-Baṣrī's refutation of all three]
- [Conclusion]: So it is clarified that there belongs an existence to *qalb* as pertains to three *wujūh*:
 - *Wajh* 1: that one of the two *ḥukms* be *mujmal* [Hallaq trans. "general"], without a mention of *taswiya*, and the other *mufaṣṣal* [Hallaq trans. "particular"]
 - *Wajh* 2: that the two *ḥukms* be both *mufaṣṣal*, without being mutually contradictory, in that the *ḥukm* in the *far'* has two orientations (*jihatayn*), and each of *qālib* and *qā'* aims at one of the *jihatayn*, and they don't mutually contradict in the *aṣl*, but they mutually contradict in the *far'* due to *ijmā'*
 - *Wajh* 3: that one of the two *ḥukms* be *mufaṣṣal* and the other *mujmal*, and its *ijmāl* is from the *jihat al-taswiya*

undermining the 'illa upon which the *ḥukm* is conditionally dependent refers to a *juz'* of its [the 'illa's] *ajzā'*. In the former subcategory [II.1.2.1], we are told that there belongs to it such as is conditionally dependent upon its [the 'illa's] *dalāla* for the *ḥukm*; herein are located all of *ikhtilāf al-waḍ'* (the 'illa is not fit to provide indicant for the *ḥukm*); *al-qawl bi-mūjib al-'illa* (allowed by the *ḥukm* being not explicit in the *dalāla*); *al-qalb* (the 'illa provides indicant for the *ḥukm* and for its *naqīd*); *al-naqḍ* (the *ḥukm*'s 'illa provides indicant in a *mawḍi'*, but not in another *mawḍi'*, yet is still to be found in it); and *al-kasr* (also comprising 'adam, *ta'thīr*, and *naqḍ*). As for the latter subcategory [II.1.2.2], it is here we find that case wherein a *waṣf* of the 'illa's *awṣāf* does not have efficiency in the *ḥukm*; this we understand to correspond to al-Baṣrī's definition of 'adam *al-ta'thīr*.

⁴⁸ al-Baṣrī, K. *al-Qiyās al-Sharī*, Ḥamīd Allāh ed., 1048-50; Hallaq, "Treatise," 224-8.

Appendix II: al-Shīrāzī's Modes of *I'tirāḍ* for all Domains of *Istidlāl* ¹

I. <i>Wujūh al-Kalām 'alā al-Istidlāl bi'l-Kitāb</i> ²
• <i>I'tirāḍ</i> 1: “That you, yourself, do not profess/ advocate it” (<i>annaka lā taqūlu bihi</i>) ○ <i>Wajh</i> 1: P draws indicant from the <i>Kitāb</i> by a method (<i>ṭarīq</i>) of <i>uṣūl</i> which he does not advocate ○ <i>Wajh</i> 2: P does not profess it [his current <i>ḥukm</i>] in the <i>mawḍi'</i> which he [currently] treats/discusses (<i>tanāwalahu</i>) • <i>I'tirāḍ</i> 2: That he [Q] profess its [the <i>āya</i>'s] effective cause (<i>an yaqūla bi-mūjibihā</i>) ○ <i>Ḍarb</i> 1: P draws <i>ḥujja</i> from (<i>yaḥtajju min</i>) the <i>āya</i> by one of the two <i>waḍ'</i>s; and Q professes his <i>mūjib</i> as corresponding to the other <i>waḍ'</i> ○ <i>Ḍarb</i> 2: P professes his <i>mūjib</i> in the <i>mawḍi'</i> by which he [Q] draws <i>ḥujja</i> • <i>I'tirāḍ</i> 3: That the <i>ijmāl</i> of the <i>āya</i> be claimed, either as regards the <i>shar'</i> or the <i>lughā</i> ○ [1] Regarding the <i>shar'</i> ○ [2] Regarding the <i>lughā</i> • <i>I'tirāḍ</i> 4: Sharing the <i>dalīl</i> (<i>al-mushāraka fi'l-dalīl</i>)³ • <i>I'tirāḍ</i> 5: Variant Reading [of the Qur'ān] (<i>ikhtilāf al-qirā'a</i>) • <i>I'tirāḍ</i> 6: <i>al-Naskh</i> ○ <i>Wajh</i> 1: That the <i>naskh</i> be clarified unambiguously (<i>ṣarīḥan</i>) ○ <i>Wajh</i> 2: That he [Q] claim its [the <i>āya</i>'s] <i>naskh</i> by a later <i>āya</i> ○ <i>Wajh</i> 3: That he [Q] claim its [the <i>āya</i>'s] <i>naskh</i> because such is <i>shar' man qablanā</i> • <i>I'tirāḍ</i> 7: <i>al-Ta'wīl</i> ○ <i>Ḍarb</i> 1: <i>Ta'wīl al-zāhir</i>⁴ ○ <i>Ḍarb</i> 2: <i>Takhṣīṣ al-'umūm</i> • <i>I'tirāḍ</i> 8: <i>al-Mu'āraḍa</i> ○ <i>Ḍarb</i> 1: <i>Mu'āraḍa bi'l-Nuṭq</i> ○ <i>Ḍarb</i> 2: <i>Mu'āraḍa bi'l-'Illa</i>
II. <i>al-Kalām 'alā al-Istidlāl bi'l-Sunna</i> ⁵
• (A) <i>al-I'tirāḍ</i> against the Sunna from the Perspective of Rejection (<i>al-Radd</i>) [on the basis of an <i>uṣūlī</i> principle] ○ <i>Wajh</i> 1: The <i>radd</i> of the Rāfiḍa [against the use of <i>akhbār āḥād</i>] ○ <i>Wajh</i> 2: The <i>radd</i> of the Aṣḥāb of Abū Ḥanīfa re: what becomes a general necessity (<i>ya'ummu bihi al-balwā</i>) ○ <i>Wajh</i> 3: The <i>radd</i> of the Aṣḥāb of Mālik re: what diverges from (<i>khālafa</i>) the <i>qiyās</i>

¹ Examples and responses have been omitted.

² *Ma'ūna*, al-'Umayrīnī ed., 48-78.

³ Al-'Umayrīnī provides al-Shīrāzī's explanation from his *al-Mulakhkhaṣ*: “He treats that by which the Mustadill draws indicant as a *dalīl* in the *mas'ala*.... *Ḍarb* 1: each of them draws indicant by the *dalīl* from the perspective of its most apparent meaning (*min jihat al-zāhir*), and there is no distinctive priority (*mīza*) for one over the other as regards what he claims of the *zāhir*. *Ḍarb* 2: each of them draws indicant by the *dalīl* from the perspective of generality (*min jihat al-'umūm*), there being no *mīza* for one over the other” (*Ma'ūna*, 44, n.1).

⁴ al-'Umayrīnī provides more from al-Shīrāzī's *al-Mulakhkhaṣ*, wherein the *ta'wīl al-zāhir* is further subdivided into: *Ḍarb* 1 (*ta'wīl* of the *lafẓ* according to the frequently used *ma'nā*); and *Ḍarb* 2 (*ta'wīl* of the *lafẓ* according to the *ma'nā* which is not frequently used).

⁵ *Ma'ūna*, al-'Umayrīnī ed., 40-8.

- *Wajh* 4: The *radd* of the Aṣḥāb of Abū Ḥanīfa re: what diverges from *qiyās al-uṣūl*
- *Wajh* 5:⁶ The *radd* of the Aṣḥāb of Abū Ḥanīfa re: that which necessitates *ziyāda* in the *naṣṣ* of the Qur'ān, and that such constitutes *naskh*
- (B) *al-I'tirāḍ* against the Sunna from the Perspective of *Isnād*
 - *Wajh* 1: *al-Muṭālabā bi-ithbātihi*; re: *akhbār* which are not consistent with the *sunan*, and are not heard except by the *mukhālifīn*
 - *Wajh* 2: *al-Qaḍḥ fi'l-isnād*
 - *Wajh* 1: he states re: the *rāwī* a cause (*sabab*) which obliges rejection (*al-radd*); saying: “he [the *rāwī*] is a liar, or innovator (*mubtadi*), or negligent/careless”
 - *Wajh* 2: he states [re: the *rāwī*] that he is unknown (*majhūl*)
 - *Wajh* 3: he states that it [the *isnād*] is *mursal*⁷
 - (3) Other *wujūh* of the Aṣḥāb Abī Ḥanīfa:
 - (3.1) *Wajh*: The Salaf rejected it⁸
 - (3.2) *Wajh*: The *rāwī* [himself] denies the *ḥadīth*⁹
 - (3.3) *Wajh*: Its *rāwī* did not act upon it¹⁰
 - (3.4) *Wajh*: This is a *ziyāda* not conveyed (*lam tunqal*) by the *naql* of the *aṣl*¹¹
- (C) *al-I'tirāḍ* against the Sunna from the Perspective of the *Matn* [as *qawl: mubtada'*]:¹²
 - *I'tirāḍ* 1: He draws indicant by that which he does not profess
 - *Wajh* 1: he draws indicant by a *ḥadīth* the sort of which he himself does not accept¹³
 - *Wajh* 2: he [Ḥanafī] draws indicant from it [the *khābar*] by a method (*ṭarīq*) he does not profess¹⁴
 - *Wajh* 3: he doesn't profess it in the *mawḍi'* in which it is found/mentioned

⁶ This *mas'ala* of *taghrīb* is debated in full dialectic in the *Umm*, but without reference to *naskh* of the Qur'ān: see §1417 [*Ikhtilāf al-ʿIrāqīyyīn*] and appendix II. §1417 (in Part II).

⁷ Its *isnād* does not entirely reach back to the Prophet: whether one or more *rāwīs* are missing, or that *rāwī* is missing from beginning, middle, or end; considered one of the types of *ḍa'if ḥadīths* by the *ʿamma* of the Ahl al-ʿIlm; (Sānū, *Muʿjam*, s.v. “المُرْسَل”).

⁸ “like re: the *ḥadīth al-qasāma*: ‘Amr b. Shuʿayb said: By God, the *ḥadīth* is not as Sahl transmitted”

⁹ “like they say re: the Prophet's saying [...] — transmitted by al-Zuhrī, and he had said: I don't know it”

¹⁰ “like re: the *ḥadīth* of the *ghasl* — seven times — from the licking of a dog, that its *rāwī* is Abū Hurayra, but he had given *fatwā* that it is three times”

¹¹ “like the Prophet's saying: “[...], when it attains five *awsaq*” — they say: this *ḥadīth* was transmitted by a group, and they mentioned nothing but a [single] *wasq*, which gives indicant that it is not an *aṣl* for them”

¹² al-Shīrāzī explains: “As for *matn*, there are three [types]: *qawl*, *fi'l*, and *iqrār*. And as for *qawl*, it is of two *ḍarbs*: *mubtada'* and *khārij ʿalā al-sabab*. And the *mubtada'* is like the Kitāb — there is directed to it [in terms of approach] that which is directed to the Kitāb. And we have explained it [in the section re: the Kitāb, above], but I will repeat the *qawl* as regards the Sunna, because it is more clear in terms of example, and maybe there will occur a *ziyāda* regarding it which was not mentioned as regards the Kitāb” (*Maʿūna*, 55-6; the same is repeated, nearly verbatim, by Ibn ʿAqīl, *K. al-Jadal*, 32). First, al-Shīrāzī deals with the *i'tirāḍāt* of the *qawl* as *mubtada'* (56-67), then the *qawl* as *khārij ʿalā al-sabab* (68-70), then with the *fi'l* (71-7), then with the *iqrār* (78).

¹³ “like their [the Ḥanafī's] *istidlāl* by a *khābar al-wāḥid* re: what becomes a general necessity, or [the Mālikī's] re: what contradicts the *qiyās*, and the like of which they do not profess by a *khābar al-wāḥid*”

¹⁴ “like he draws indicant by *dalīl al-khiṭāb* while he doesn't advocate it”

- *I'tirād* 2: He professes its effective cause (*yaqūlu bi-mūjibihi*)
 - *Wajh* 1: The *Mustadill* draws *ḥujja* (*yaḥtajju*) by one of the two *waḍ'*s; and the *sā'il* professes his *mūjib* by linking it with the other *waḍ'*
 - *Ḍarb* [sic] 2: He [P] professes his *mūjib* in the *mawḍi'* by which he [Q] draws *ḥujja* (*iḥtajja bihi*)
- *I'tirād* 3: He [Q] claims *ijmāl*, either re: the *shar'*, or the *lugha*
 - (1) Re: the *Shar'*
 - (2) *al-Mujmal fi'l-Lugha*¹⁵
- *I'tirād* 4: *al-Mushāraka fi'l-dalīl*
- *I'tirād* 5: [*I'tirād* of] *ikhtilāf al-riwāya*
- *I'tirād* 6: *al-Naskh*
 - *Wajh* 1: *al-naskh bi-taṣrīḥ*; He [the Prophet] conveys its [the *khābar*'s] *naskh* unambiguously (*yanqulu naskhahu ṣarīḥan*)
 - *Wajh* 2: *al-naskh bi-naql al-muta'akhhir*; He conveys what precludes/contradicts it (*yunāfihi*) as coming later, and claims its *naskh* by means of it
 - *Wajh* 3: *al-naskh bi-'amal al-Ṣaḥāba bi-khilāfihi*; He conveys, on the authority of the *Ṣaḥāba*, the *'aml* in *khilāf* of it, in order to provide indicant for its *naskh*
 - *Wajh* 4: *al-naskh bi-annah shar' man qablanā*; He claims its *naskh*, in that it is *shar' man qablanā*, and that its *naskh* is our *shar'*
 - Another *wajh* of the *Aṣḥāb Abī Ḥanīfa*: *al-naskh bi-zawāl al-'illa*
- *I'tirād* 7: *al-Ta'wīl*
 - *Ḍarb* 1:¹⁶ *Ta'wīl al-zāhir*
 - *Ḍarb* 2: *Takhṣiṣ al-'umūm*
- *I'tirād* 8: *al-Mu'āraḍa*
 - *Ḍarb* 1: *Mu'āraḍa bi'l-Nuṭq*
 - *Ḍarb* 2:¹⁷ *Mu'āraḍat [al-Sunna] bi'l-'illa* [cannot be divorced from the *ḥāl* of the *Sunna*]
 - (1) When the *Sunna* is *naṣṣ*, not allowing the possibility of *ta'wīl*
 - (2) When the *Sunna* is *zāhir*, allowing the possibility of *ta'wīl*
 - (3) When the *Sunna* is *'umūm*, allowing the possibility of *takhṣiṣ*
- (D) *al-I'tirād* about the *Sunna* from the Perspective of the *Matn* [as *qawl*: *khārij 'alā sabab*]:¹⁸

¹⁵ Al-Shīrāzī's example *mas'ala* and its maxim (*al-rahn bimā fihi*) crops up in a number of places in the *K. al-Umm*. See §378 of the *Ikhtilāf al-'Irāqiyyīn*, and attached note, and related references in appendix ii of Part II.

¹⁶ Al-'Umayrīnī (66, n.2) adds a note from al-Shīrāzī's *Mulakhkhaṣ* (35/B): "*Ta'wīl al-zāhir* is of two *ḍarbs*: 1) he does *ta'wīl* to the *lafẓ* about an *amr* in the like of which the *lafẓ* is employed frequently; 2) he does *ta'wīl* to it about a *ma'nā* in the like of which the *lafẓ* is employed rarely."

¹⁷ *Mu'āraḍa bi'l-'illa*, though we anticipate it from al-Shīrāzī's typology for the 8th *i'tirād* on p.66, is missing from both the *Ma'ūna* and the *K. al-Jadal*. Noting this, al-'Umayrīnī supplies the discussion from his MS of al-Shīrāzī's *Mulakhkhaṣ fi'l-Jadal*, in n.6, starting on p.67 and continuing to 68. The above is compiled from this footnote. This material is also missing from the *Turkī* ed., but he does not replace it with anything.

¹⁸ This refers back to al-Shīrāzī's typology on pp.55-6; the *matn* of the *Sunna* has three categories (*qawl*, *fi'l*, and *iqrār*), and *qawl* is further subdivided into *mubtada'* and *khārij 'alā sabab*. All that has preceded this section is of the former type of *qawl* (hence its relation to dialectical moves re: *istidlāl bi'l-Kitāb*), and we now proceed to the latter type.

- *Ḍarb* 1: The *lafẓ* is independent, in itself (*bi-nafsihi*), without the *sabab*, and the argument against it (*al-kalām 'alayhi*) is like the arguing against *al-Sunna al-mubtada'a*
- [1.2] Additional *i'tirād* of the Aṣḥāb Mālik against it [*al-mubtada'a?*]: This has indeed been revealed (*warada*) for a *sabab*, and it must be delimited/restricted by it (*yaqtaṣira 'alayhi*)
- *Ḍarb* 2: What is not independent, in itself, without the *sabab*; and what distinguishes it from the *i'tirād* is a claim of ambiguity (*da'wā al-ijmāl*)
- (E) *al-I'tirād* about the Sunna from the Perspective of the *Matn* [as *fi'l*]:¹⁹
 - *I'tirād* 1: The Mustadill does not profess/advocate it (*lā yaqūlu bihi*)
 - *I'tirād* 2: He disputes with him (*yunāzi'u*) as regards his/its requirement (*muqtaḍāhu*)
 - *Ṭarīq* 1: He contends with him as regards what he [the Prophet] did
 - *Ṭarīq* 2: [He concedes to] what he did, but he contends with him as regards the requirement (*muqtaḍā*) of his *fi'l*
 - *I'tirād* 3: *Da'wā al-ijmāl*
 - *I'tirād* 4: *al-Mushāraka fi'l-dalīl*
 - *I'tirād* 5: *Ikhtilāf al-riwāya*
 - *I'tirād* 6: *Da'wā al-naskh*
 - *I'tirād* 7: *al-Ta'wīl*
 - *I'tirād* 8: *al-Mu'āraḍa*
 - [1] By *zāhir*
 - [2] By *'illa*
- (F) *al-I'tirād* about the Sunna from the Perspective of the *Matn* [as *iqrār*]:
 - *Ḍarb* 1: *Iqrār 'alā al-qawl*; it is like his [the Prophet's] *qawl*, re: the *i'tirād* and the *jawāb*.
 - *Ḍarb* 2: *Iqrār 'alā al-fi'l*; it is like his [the Prophet's] *qawl*, re: the *i'tirād* and the *jawāb*, and we have explained the lot.

III. *al-I'tirād 'alā al-Istidlāl bi'l-Ijmā'*²⁰

- *I'tirād* 1: *Min Jihat al-Radd*
 - *Wajh* 1: *Radd al-Rāfiḍa*; for indeed, according to them, *al-ijmā'* is not a *ḥujja* as regards anything pertaining to the *aḥkām*
 - *Wajh* 2: *Radd* Ahl al-Zāhir to the *ijmā'* of other than the Ṣaḥāba
 - *Wajh* 3: *Radd* Ahl al-Zāhir, also, re: that for which the *qawl* of some/one of them [the Ṣaḥāba] appears, but the rest are silent. For indeed, according to them, that is not a *ḥujja*.²¹
- *I'tirād* 2: *al-Muṭālaba bi-taṣḥīḥ al-ijmā'*
- *I'tirād* 3: he [Q] conveys the *khilāf* on the authority of one of them
- *I'tirād* 4: He [Q] speaks about it as with the *matn* of the Sunna [see above]

¹⁹ Al-Shīrāzī says: "As for the *fi'l*, there is directed to it that which is directed to the *qawl*, as pertains to the *i'tirād*" (*Ma'ūna*, 71). In other words, we may now observe that there are eight larger categories of *i'tirādāt* as pertain to: 1) *istidlāl* by the Kitāb; 2) *istidlāl* by the *matn* of the Sunna, as *qawl*; and 3) *istidlāl* by the *matn* of the Sunna, as *fi'l*.

²⁰ *Ma'ūna*, al-'Umayrīnī ed., 79-81.

²¹ Cf. Ibn 'Aqīl, *K. al-Jadal*, 38. Ibn 'Aqīl's description of the anti-Zāhirī stance is more detailed; he says: "The other *i'tirād* is *man'* of the *sukūt al-Ṣaḥāba*, due to the *qawl* of some of them that it is *ijmā'*. And he provides indicant for it by that the *qawm*, if they opposed, they would have spoken up (*law khālafū, la-naṭaqū*), and if they had spoken up, it would have been conveyed (*law naṭaqū, la-nuqila*). [...] And their *ittifāq* is confirmed via their *sukūt*." This constitutes, of course, an *argumentum ex silentio*.

IV. *al-Kalām 'alā Qawl al-Wāḥid min al-Ṣaḥāba*²²

- *I'tirāḍ* 1: He says: *qawl al-wāḥid min al-Ṣaḥāba* is not a *ḥujja*
- *I'tirāḍ* 2: He counter-objects (*yu'arīḍuhu*) by the *naṣṣ* of Kitāb or Sunna
- *I'tirāḍ* 3: He conveys *al-khilāf* on the authority of another one of the *Ṣaḥāba*, in order to make of the *mas'ala* a *khilāf* between the *Ṣaḥāba*

V. *al-Kalām 'alā Faḥwā al-Khiṭāb*²³

- *I'tirāḍ* 1: He demands from him (*yuṭālibahu bi-*) *taṣḥīḥ* of the *ma'nā* which necessitates the confirmation (*ta'kīd*) of the [correlation of] the *far'* [with] the *aṣl*.
- *I'tirāḍ* 2: He professes the effective cause of confirmation (*yaqūla bi-mūjib al-ta'kīd*).
- *I'tirāḍ* 3: *al-lbṭāl*
- *I'tirāḍ* 4: He demands from him (*yuṭālibahu bi-*) the *ḥukm al-ta'kīd*
- *I'tirāḍ* 5: He deems the *ta'kīd* a *ḥujja* against him
- *I'tirāḍ* 6: He confronts/compares (*yuqābila*) the *ta'kīd* with what eliminates/overturns it (*bimā yusqīṭuhu*)²⁴

VI. *al-Kalām 'alā Dalīl al-Khiṭāb*²⁵

- *I'tirāḍ* 1: *al-Radd* [of the inferential method itself]²⁶
- *I'tirāḍ* 2: That he counter-object (*yu'arīḍuhu*) by *nuṭq* or by *faḥwā al-nuṭq*, which is *al-tanbīh*, or *al-qiyās*
 - *al-Kalām 'alayhi*: He speaks about these *mu'araḍāt* by what eliminates/overturns them (*bimā yusqīṭuhā*), so that there remain for him the *dalīl*.
- *I'tirāḍ* 3: That he²⁷ speaks about it by *al-ta'wīl*, in that he clarify the *fā'idat al-takḥṣīs*
 - In that he says: This *ḥāl* is only particularized (*khuṣṣa*) by the *dhikr*, because it is a *mawḍi'* of ambiguity (*ishkāl*)
 - Or: It is particularized by the *dhikr*, because the *ghālib* is that it does not occur except for this *ṣifa*

VII. *al-Kalām 'alā Ma'nā al-Khiṭāb wa huwa «al-Qiyās»*²⁸

I'tirāḍ 1: *Min jihat al-Radd*

- *Wajh* 1: From the perspective of the worthlessness (*nafāt*) of *al-qiyās* for the entirety of the *aḥkām*
- *Wajh* 2: From the perspective of the *Muthbitī al-Qiyās* — and they are the *Aṣḥāb Abī*

²² *Ma'ūna*, al-ʿUmayrīnī ed., 82-3.

²³ *Ma'ūna*, al-ʿUmayrīnī ed., 84-6.

²⁴ Al-Shīrāzī's example refers back to the *mas'ala* of *i'tirāḍ* 5; it is the *mukhālīf*'s second attempt against the same *faḥwā al-khiṭāb*.

²⁵ *Ma'ūna*, al-ʿUmayrīnī ed., 87-9.

²⁶ Regarding al-Shīrāzī's example *mas'ala*, cf. *Ikhtilāf al-ʿIrāqīyyīn*, §§110-13.

²⁷ Al-ʿUmayrīnī has "*an natakal lama*," which appears to be a typo.

²⁸ *Ma'ūna*, al-ʿUmayrīnī ed., 90-118; Turkī ed., 225-65. There are two major problems with al-ʿUmayrīnī's edition with regard to this chapter. First, two pages of printed material, which ought to have appeared between pp.91-2, have somehow been transposed to pp.94-5. This has been confirmed via comparison with the Princeton MS, and seems to be a printer's error. Second, there is a large lacuna in the Gotha MS upon which al-ʿUmayrīnī singularly relied for his edition. This went unnoticed by the editor, and as a consequence there are several pages of material missing from his edition (the point of the lacuna is at the bottom of p.115). The Princeton MS does not suffer this lacuna, however, and thus al-Turkī's edition contains the missing material along with the editor's notes marking the start and end of the Gotha MS lacuna (256 [and n.10] - 63 [and n.1]). For such material as is missing from al-ʿUmayrīnī's edition, I have therefore relied upon Turkī's edition.

Part I: The Dialectical Forge
Appendix II: al-Shīrāzī's Modes of *I'tirāḍ* for all Domains of *Istidlāl*

Ḥanīfa — for they forbid <i>al-qiyās</i> in <i>mawāḍi'</i>, among them:²⁹ ○ [1] <i>fi ithbāt al-lughāt</i> ○ [2] <i>fi ithbāt al-abdāl</i> ○ [3] <i>fi ithbāt al-maḡdarāt</i> ○ [4] <i>fi ithbāt al-ḡudūd</i>³⁰ ○ [5] <i>fi ithbāt al-kaffārāt</i>³¹ ○ [6] <i>fi ithbāt al-ziyāda fi naṣṣ al-Qur'ān</i>³² ○ [7] <i>fi ithbāt al-jumal</i>³³
<i>I'tirāḍ</i> 2: That he says: You don't profess/advocate <i>qiyās</i> re: this <i>ḡukm</i> ³⁴
<i>I'tirāḍ</i> 3: <i>Man'</i> of the <i>ḡukm</i> in the <i>aṣl</i> • [1] [responses with examples] • [2] Additional from the Aṣḡāb Abī Ḥanīfa: <i>Man' al-aṣl min jihat al-qiyās</i>
<i>I'tirāḍ</i> 4: <i>Man'</i> of the <i>waṣf</i> in the <i>aṣl</i>, or in the <i>far'</i>, or in them both • [1] Against the <i>aṣl</i> of the Mu'allil • [2] Against the <i>aṣl</i> of the Sā'il
<i>I'tirāḍ</i> 5: <i>al-Muṡālaba bi-taṣḡih al-'illa</i>³⁵ • [response with <i>ṡuruq</i>] ○ <i>al-ṡarīq fi taṣḡihihā</i> 1: <i>Siyāq al-alfāz</i> ▪ <i>Dalālatuhā min wajh al-naṣṣ</i> ▪ <i>Dalālatuhā min wajh al-zāhir</i> • The <i>zāhir</i> is <i>nuṡq</i> • The <i>zāhir</i> is a <i>sabab</i> conveyed with the <i>ḡukm</i> ○ <i>al-ṡarīq fi taṣḡihihā</i> 2: <i>al-Istinbāt</i> ▪ <i>Ḍarb</i> 1: <i>al-Ta'thīr</i>³⁶ ▪ <i>Ḍarb</i> 2: <i>Shahādat al-Uṡūl</i>³⁷

²⁹ Al-Shīrāzī first lists these *mawāḍi'*, here, before detailing related dialectical moves. The *mawāḍi'* he lists are: 1) *fi ithbāt al-asāmī wa'l-lughāt*; 2) *fi ithbāt al-abdāl*; 3) *fi ithbāt al-maḡdarāt*; 4) *fi ṡāb al-ḡudūd*; 5) *fi ṡāb al-kaffārāt*; 6) *fi ithbāt al-ziyāda fi'l-Qur'ān*; and 7) *fi ithbāt al-jumal*. A fair amount of the material pertaining to this list has been misplaced in al-'Umayrīnī's edition, transposed by a printer's error to pp.94-5. Pagination is continuous from 91-92, but the text is broken, and the intervening material appears on 94-5.

³⁰ Transposed in al-'Umayrīnī's edition to page 94.

³¹ Transposed in al-'Umayrīnī's edition to pages 94-5.

³² Transposed in al-'Umayrīnī's edition to page 95.

³³ Transposed in al-'Umayrīnī's edition to page 95.

³⁴ Partially transposed to 95; the remainder is on 92.

³⁵ Cf. Ibn 'Aqīl, *K. al-Jadal*, 50-1. Ibn 'Aqīl's approach is quite different. He breaks down *taṣḡih al-'illa* according to the *dalīl* upon which the Mu'allil relies as *nuṡq*, *faḡwā al-nuṡq*, and *istinbāt*. He then treats each of these separately.

³⁶ Al-'Umayrīnī provides (99, n.3) additional explanation from al-Shīrāzī: "*al-Ta'thīr* is that the *ḡukm* is present with the existence of a *ma'nā*, and it becomes most probable that it is due to it [this *ma'nā*] that it [the *ḡukm*] is established; and that it [the *ma'nā*] is an '*illa* re: that *ḡukm*. And it is distinguished by *taṣḡih* of the '*ilal* upon which the *ḡukm* depends in the *shar'*. And that is of two aspects (*wajḡayn*): 1) *al-Salb wa'l-Wujūd*: And it is that the *ḡukm* is present with the existence of a *ma'nā*, and it is removed by its removal in some/one of the *uṡūl*; 2) *al-Muḡābala wa'l-Taḡsīm*: And it is that he mention [a number of] *ma'ānī* in the *aṣl*, and all but one of them are nullified, so we know that the valid one (*al-ṡaḡih*) is it, and what is not it is *bāṡil*." [Note that this latter is the *sabr wa'l-taḡsīm* of later *uṡūl* works].

³⁷ Al-'Umayrīnī (99, n.4) provides explanation from al-Shīrāzī in his *Sharḡ al-Luma'* (fol. 207b.): "*Shahādat al-Uṡūl* is what distinguishes *qiyās al-dalāla*; it is that the '*illa* is testified to by the *uṡūl* in that *bāb*, *ṡardan wa 'aksan*."

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<i>I'tirāḍ</i> 6: 'Adam al-ta'thīr, which is the presence of the <i>ḥukm</i> with the absence of the 'illa³⁸ • <i>Ḍarb</i> 1:³⁹ 'Adam al-ta'thīr re: a <i>waṣf</i>, when it is removed from the 'illa, the 'illa is destroyed • <i>Ḍarb</i> 2: 'Adam al-ta'thīr re: that for which the 'illa is not destroyed by its removal⁴⁰
<i>I'tirāḍ</i> 7: al-Naqḍ; which is the presence of the 'illa, and not a <i>ḥukm</i>, according to the <i>qawl</i> of one who does not opine (<i>lā yarā</i>) <i>takhṣiṣ</i> al-'illa⁴¹
<i>I'tirāḍ</i> 8: al-Kasr; which is the presence of a <i>ma'nā</i> of the 'illa, and not a <i>ḥukm</i>⁴²
<i>I'tirāḍ</i> 9: al-Qawl bi-mūjib al-'illa • <i>Ḍarb</i> 1: For an 'illa by which he provides indicant for the nullification of the <i>sabab</i> of the <i>ḥukm</i> • <i>Ḍarb</i> 2: It is: That by which indicant is provided for the same <i>ḥukm</i>
<i>I'tirāḍ</i> 10: That the 'illa does not oblige its <i>aḥkām</i>; which is that the 'illa obliges two <i>ḥukms</i>, and he makes one of them conditional upon it, without the other
<i>I'tirāḍ</i> 11: <i>Fasād al-waḍ'</i>; which is that he makes conditional upon the 'illa the opposite (<i>ḍidd</i>) of what it requires • [1] what is known <i>min jihat al-Rasūl</i> • [2] what is known <i>min jihat al-uṣūl</i>
<i>I'tirāḍ</i> 12: <i>Fasād al-i'tibār</i> • [1] Regarding what is known by the <i>naṣṣ</i>; which is that he consider a <i>ḥukm</i> on the basis of a <i>ḥukm</i>, while the <i>naṣṣ</i> has revealed the <i>tafriqa</i> between them ◦ [1.2] Additional [<i>i'tirāḍ</i>] of the Aṣḥāb Abī Ḥanīfa: Linking the <i>muṭlaq</i> to the <i>muqayyad</i> • [2] Regarding what is known by the <i>uṣūl</i> ◦ <i>Wajh</i> 1: He considers a <i>ḥukm</i> on the basis of a <i>ḥukm</i>, but... ▪ one of them is founded upon expansion (<i>al-tawṣī'a</i>), while the other is [founded] upon restriction (<i>al-taḍyīq</i>) ▪ He considers <i>al-ibtidā'</i> on the basis of <i>al-istidāma</i> ▪ He considers <i>al-riqq</i> on the basis of <i>al-'itq</i>, or <i>al-'itq</i> on the basis of <i>al-bay'</i>, and the foundation of one of them is upon <i>al-ḍu'f</i>, while the foundation of the other is upon <i>al-quwwa</i>; and it is not permitted the <i>i'tibār</i> of one of them on the basis of the other

³⁸ Ibn 'Aqīl devotes a number of detailed and enlightening discussions to this type of *i'tirāḍ* in his *Bāb al-I'tirāḍ bi-'Adam al-Ta'thīr* (K. al-Jadal, 54-6).

³⁹ As al-'Umayrīnī (100, n.2) notes: "al-Shīrāzī divided, in the *Mulakhkhaṣ* (fol. 58b.), this *wajh* into two *ḍarbs*: 1) That there belong to the *waṣf* a *ta'thīr* upon/according to the *madhhab* of the Mu'allil [al-'Umayrīnī has *madhhab al-'ilal*, which appears to be a typo], and the *ḥukm* is dependent upon it according to him, but no *ta'thīr* belongs to it in the *uṣūl*; and 2) There belongs to it no *ta'thīr* upon/according to the *madhhab* of the Mu'allil, nor in anything of the *uṣūl*."

⁴⁰ As originally listed on p.100 of al-'Umayrīnī's edition of the *Ma'ūna*, this category is: "'Adam al-ta'thīr re: a *waṣf*, when it is removed from the 'illa, the 'illa is not destroyed."

⁴¹ The opening (*faṣl* 276) of Ibn 'Aqīl's *Bāb al-Naqḍ* begins: "*al-Naqḍ* is *wujūd al-'illa ma'a 'adam al-ḥukm*, and that is the opposite (*ḍidd*) of *al-ta'thīr*, because *al-ta'thīr* is *wujūd al-ḥukm bi-ghayr al-'illa*. And that is a valid question according to the *qawl* of one who does not profess *takhṣiṣ al-'illa*, and they are our *aṣḥāb*" (K. al-Jadal, 56).

⁴² Al-'Umayrīnī explains (107, n.4): "*al-Kasr* is a valid question for the *ifsād* of the 'illa when it is found in its *shurūṭ*. And most of the Ahl al-'Ilm have agreed as to its validity and the *ifsād* of the 'illa by means of it. And they call it *al-Naqḍ min Ṭarīq al-Ma'nā*, and *al-Ilzām min Ṭarīq al-Fiqh*. But some of the Uṣūlīs hold the opinion that *al-Kasr* is not a question which objects to the 'illa, and does not oblige a *jawāb*." He cites his MSS of *Sharḥ al-Luma'* and *al-Mulakhkhaṣ*, and Ibn 'Aqīl, K. al-Jadal, 65. As to this last, Ibn 'Aqīl begins his *Bāb fi'l-Kasr* by saying that it is accepted by most, in disagreement with some of the Shāfi'iyya.

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○ <i>Wajh</i> 2: He considers a <i>far'</i> on the basis of an <i>aṣl</i>, but... ▪ They are divergent (<i>mukhtalifān</i>) as regards parallels (<i>naẓā'ir</i>) to the <i>ḥukm</i> ○ [3.1] Additional <i>wajh</i> of the Aṣḥāb Abī Ḥanīfa 1: ▪ They say: The <i>i'tibār</i> of the <i>mutaqaddim</i> is not permitted on the basis of the <i>muta'akhhir</i> ○ [3.2] Additional <i>wajh</i> of the Aṣḥāb Abī Ḥanīfa 2: ▪ They also said: It is not permitted that he draw indicant by <i>naḥw al-ṭalāq</i> as regards <i>al-nikāḥ</i> (***)⁴³ <i>al-mawqūf 'alā buṭlānihi</i>, because <i>al-ṭalāq</i> is a <i>tābi' ghayr maqṣūd</i>, and he is not allowed to draw indicant by way of it for <i>buṭlān al-'aql</i>. ○ [3.3] Additional <i>wajh</i> of the Aṣḥāb Abī Ḥanīfa 3: ▪ They also said: "It is not allowed that he make the <i>ḥukm</i> dependent upon some imaginary <i>ma'nā</i>"
<i>I'tirāḍ</i> 13: "That he object to (<i>ya'tarīḍa</i>) the 'illa insofar as its <i>aṣl</i> is concerned" • <i>Wajh</i> 1: That he eliminates its [the 'illa's] <i>aṣl</i> • <i>Wajh</i> 2: That he particularizes (<i>yukhaṣṣa</i>) its [the 'illa's] <i>aṣl</i>
<i>I'tirāḍ</i> 14: <i>al-Qalb</i> • <i>Ḍarb</i> 1: <i>Qalb bi-Ḥukm Maqṣūd</i> • <i>Ḍarb</i> 2: <i>Qalb al-Taswiya</i> • <i>Ḍarb</i> 3: He makes the <i>ma'lūl</i> an 'illa, and the 'illa a <i>ma'lūl</i>
<i>I'tirāḍ</i> 15: <i>al-Mu'āraḍa</i> • (1) <i>al-Mu'āraḍa</i> by way of the <i>Nuṭq</i> ○ [by way of] <i>al-Kitāb</i>, <i>al-Sunna</i>, and <i>al-Ijmā'</i> • (2) <i>al-Mu'āraḍa</i> by way of the 'illa ○ <i>Ḍarb</i> 1: <i>Mu'āraḍa</i> by way of 'illa <i>Mubtada'a</i> ○ <i>Ḍarb</i> 2: <i>Mu'āraḍa</i> as regards the <i>Aṣl</i>, which is <i>al-Farq</i> ▪ [1] <i>al-Farq bi-Qiyās al-'illa</i> (***)⁴⁴ ▪ [2] <i>al-Farq bi-Qiyās al-Dalāla</i> • <i>Ḍarb</i> 1: That it be distinguished (<i>yufarraqa</i>) by a <i>ḥukm</i> of the <i>aḥkām al-shar'</i> • <i>Ḍarb</i> 2: It is distinguished (<i>yufarraqa</i>) by a <i>naẓīr</i> of the <i>naẓā'ir al-ḥukm</i> ▪ [3] <i>al-Farq bi-Qiyās al-Shabah</i>⁴⁵
VIII. <i>al-Kalām 'alā Istiṣhāb al-Ḥāl</i>⁴⁶
• (A) <i>Istiṣhāb Ḥāl al-'Aql fī Barā'at al-Dhimma</i> ○ <i>al-Kalām 'alayhi</i>, <i>Wajh</i> 1: <i>al-Mu'āraḍa bi-mithlihā</i> ○ <i>al-Kalām 'alayhi</i>, <i>Wajh</i> 2: That he convey it on the authority of the <i>aṣl</i>, by a

⁴³ A major lacuna occurs in al-'Umayrīnī's base MS, unnoticed by the editor (*Ma'ūna*, al-'Umayrīnī ed., 115, line -3), who forges on unaware. I will here supply this missing material from al-Turkī's edition, which takes account of that lacuna, and is collated from a number of other MSS (*Ma'ūna*, Turkī ed., 256 [and n.10] – 263 [and n.1]). I have marked where al-'Umayrīnī's lacuna begins and ends in the text, with the symbol (***)

⁴⁴ (*Ma'ūna*, Turkī ed., 262-3, §149). It is in this section that al-'Umayrīnī resumes in his edition, unaware of the preceding lacuna (bottom of p.115).

⁴⁵ Al-'Umayrīnī (117, n.3) explains: "Re: the validity of *qiyās al-shabah*, *wajhān*; and according to the *qawl* of those who do not permit *qiyās al-shabah*, it is not permitted that he distinguish (*yufarraqa*) by means of that."

⁴⁶ *Ma'ūna*, al-'Umayrīnī ed., 119-20.

dalīl

- (B) *Istiṣhāb Ḥāl al-‘Ijmā’*⁴⁷

IX. *Tarjih al-Zawāhir*⁴⁸

Mawḍi‘ 1: As Regards the *Isnād*; specifically concerned are the *akhbār al-āḥād*

- *Wajh* 1: That one of the two *rāwīs* is *kabīr*, and the other *ṣaghīr*, and the *riwāya* of the *kabīr* is advanced (*taqaddama*), because he is more accurate/exact (*aḍbaṭ*).
- *Wajh* 2: That one of the two is more knowledgeable (*a‘lam*), so his *riwāya* is advanced, because he is more knowledgeable of what he narrates.
- *Wajh* 3: That one of the two is closer (*aqrab*) to the Messenger of God, so he is given precedence over him (*yuqaddimu ‘alayhi*) [i.e., over the opposing *rāwī*], because he is more perceptive/attentive/remembering (*aw‘ā*).
- *Wajh* 4: That one of the two is one who had direct contact with / is a propagator of the story (*mubāshiran li’l-qisṣa*), and the *qisṣa* is dependent upon him, so he is given precedence, because he is more knowing (*a‘raf*).
- *Wajh* 5: That one of the two [*khabars*] is more narrated (*akthar riwāyatan*), so it is *awlā*, because the thing among the *jama‘a* is more remembered (*aḥfaz*) than it is among a small number; and due to this the Prophet said: “al-Shayṭān is with the one, but he is further from the two.”
 - And among our *aṣḥāb* are those who say: It is not preponderated [in terms of numbers], like the *shahāda*. But the first [opinion] is *aṣaḥḥ*.
- *Wajh* 6: That one of the two is greater in terms of *ṣuḥba*, so he is given precedence, because he is more knowing (*a‘raf*) of what persists of the *sunan*.
- *Wajh* 7: That one of the two is better of sequence/succession/context (*aḥsan siyāqan*) for the *ḥadīth*, so he is given precedence due to the excellence of his solicitude/care/interest (*ḥasan ‘ināyatihi*).
- *Wajh* 8: That one of the two is later, so he is given precedence, because he narrated the last of the two *riwāyas*.
- *Wajh* 9: That one of the two did not turn away from his *lafẓ* (*lam yuḍrib lafẓahu*), and the other turned away (*aḍraba*), so the one who did not turn away is given precedence, because he is more accurate/exact (*aḍbaṭ*).
- *Wajh* 10: That one of the two is more pious (*awra‘*) or more confirmed of prudence (*athbata iḥtiyāṭan*) regarding the *ḥadīth*, so he is given precedence, because he is more trustworthy (*awthaq*).
- *Wajh* 11: That one of the two is of the narrators of the Ahl al-Ḥaramayn, so it is given precedence over the *riwāya* of others, because they [the Ahl al-Ḥaramayn] are more knowing (*a‘raf*) of what persists of the *sunan*. Zayd b. Thābit said: “If you find the Ahl al-Madīna for something, then it is *sunna*.”
- *Wajh* 12: That for one of the two, the *riwāya* does not diverge from him (*lam takhtalif ‘anhu*), but the other, the *riwāya* diverges from him; regarding it, *wajhān*:
 - Among our *aṣḥāb* are those who say: The two *riwāyas* are opposed to each other (*tata‘ārīḍu*), and they eliminate/abrogate (*tusqitān*), and there remains the *riwāya* of the one from whom the *riwāya* did not diverge.

⁴⁷ This type of *istiṣhāb*, as listed on page 119, reads: “*Istiṣhāb Ḥāl al-‘Ijmā’ fīmā Ḥuḍiẓa ‘alayhi al-Ikhtilāf*.” Here (120, n.2) al-‘Umayrīnī explains: “The ‘*ulamā*’ have disagreed as to the validity of conditionality on *istiṣhāb ḥāl al-ijmā’*; and among them are those who say: It is *ṣaḥīḥ* — and it is the *madhhab* of Abū Bakr al-Ṣayraḥī, and al-Muzanī and Abū Thawr chose it, and it is the *madhhab* of Dāwūd; and among them are those who say: It is *bāṭil*, and al-Shīrāzī preponderated it (*rajjahahu*).”

⁴⁸ *Ma‘ūna*, al-‘Umayrīnī ed., 121-4.

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- And among our *aṣḥāb* are those who say: One of the two *riwāyas* from whom the *riwāya* diverges is preponderated over the other *riwāya*, by the *mu'āraḍa* of the one from whom the *riwāya* did not diverge.

Mawḍi' 2: As Regards the Matn

- *Wajh 1:* That one of the two *khabars* be *muwāfiq* to another *dalīl* from an *aṣl*, or *ma'qūl aṣl*, so it is given precedence, because with it, is that which brings it closer to it.
- *Wajh 2:* That one of the two [*khabars*] is practiced by the '*ulamā*', so it is *awlā*, because it is the latest of what came concerning him as pertains to the *sunan*.
- *Wajh 3:* That one of the two is a *nuṭq*, and the other a *dalīl*; the *nuṭq* is *awlā*, because it is *majma' 'alayhi*, and the *dalīl* is *mukhtalaf fīhi*.
- *Wajh 4:* That one of the two is a *qawl*, and the other a *fī'l*; regarding it there are three *awjah*:
 - 1) that they are both equal
 - 2) the *fī'l* is *awlā*
 - 3) the *qawl* is *awlā*, because there belongs to it a *ṣīgha* which it surpasses (*yata'addā*) by means of its *lafz*.
- *Wajh 5:* That in one of the two the *ḥukm* is aimed at (*quṣida bihi al-ḥukm*); it is *awlā* than that in which the *ḥukm* is not aimed at, because it is farther reaching (*ablaḡh*) as regards the *maqṣūd*.
- *Wajh 6:* That one of the two is more apparent (*aẓhar*) as regards the *dalāla 'alā al-ḥukm*; it is given precedence, because it is stronger (*aqwā*).
- *Wajh 7:* That there be, with one of the two, the *tafsīr* of the *rāwī*, because the *rāwī* is more knowledgeable (*a'raf*) of the *murād*.
- *Wajh 8:* That one of the two is cited without a *sabab*; it is *awlā* than that which is cited with a *sabab*, because that which is cited with a *sabab* is *mukhtalaf* as regards its '*umūm*, and that which is cited without a *sabab* is *majma'* for its '*umūm*.
- *Wajh 9:* That one of the two is a *nāqil*; it is *awlā*, because it informs/reports of a *ḥukm shar'ī*.
- *Wajh 10:* That one of the two is an *ithbāt*, and the other a *naḑī*; the *ithbāt* is *awlā*, because with the *muthbit* is *ziyādat 'ilm*.
- *Wajh 11:* That one of the two *khabars* is *muta'akhkhar*; it is *awlā*, because it is the latter of the two *amrs*, and Ibn 'Abbās has said: "We used to take down, as pertains to the *awāmīr* of the Messenger of God, by the most recent, and then by the [even] more recent (*bi'l-aḥdath fa'l-aḥdath*)."
- *Wajh 12:* That one of the two be more prudent (*aḥwat*); it is *awlā*.
- *Wajh 13:* That one of the two is a *ḥāẓir*, and the other a *mubīḥ*; regarding it there are *wajhān*:
 - Among our *aṣḥāb* are those who say: They are both equal.
 - And among them are those who say: The *ḥāẓir* is *awlā*, because it is more prudent (*aḥwat*).⁴⁹

X. *Tarjīḥ al-Ma'ānī*⁵⁰

- *Wajh 1:* That the *aṣl* of one of the two [*ma'nās*] is *manṣūṣ 'alayhi*; it is *awlā*, because it is stronger (*aqwā*).
- *Wajh 2:* That the *aṣl* of one of the two is confirmed by a *dalīl* which is *maqṭū' bihi*; it is

⁴⁹ Al-'Umayrīnī explains (124, n.3): "This last the *muṣannif* preponderated (*rajjahahu*) in *Sharḥ al-Luma'* and in *al-Luma'*.

⁵⁰ *Ma'ūna*, al-'Umayrīnī ed., 125-7.

- given precedence over that which is confirmed by a *dalīl* which is not *maqṭū' bihi*.
- *Wajh* 3: That there belong, to one of the two, *uṣūl*; it is *awlā*, because it is stronger in probability (*aqwā fi'l-ẓann*).
 - *Wajh* 4: That one of the two is a product of *qiyās* (*maqīs*) from an *aṣl* which provides *naṣṣ* for the *qiyās* from it; it is *awlā*, because it is *qiyās al-shar'*.
 - *Wajh* 5: That one of them [pl.] is a product of *qiyās* (*maqīs*) from its genus; it is *awlā*, because it is closer (*aqrab*) to it.
 - *Wajh* 6: That one of the two *'illas* is *manṣūṣ 'alayhā*;⁵¹ it [f.] is *awlā*, because it [m.] is stronger (*aqwā*).
 - *Wajh* 7: That the *waṣf* of one is a *maḥsūs*; and the *waṣf* of the other a *ḥukm*; regarding it, *wajhān*:
 - Among our *aṣḥāb* are those who say: The *maḥsūs* is *awlā*, because it is more firmly established (*athbat*).
 - And among them are those who say: The *ḥukm* is *awlā*, because the *ḥukm*, for the *ḥukm*, is of greater indicative power (*adall*).
 - *Wajh* 8: That one of the two is an *ithbāt*, and the other a *naḥī*; the *ithbāt* is *awlā*, because it is *majma' 'alā jawāzihi*, while the *naḥī* is *mukhtalaf fihi*.
 - *Wajh* 9: That the *waṣf* of one of the two is an *ism*, and the *waṣf* of the other a *ṣifa*; the *ṣifa* is *awlā*, because it is *majma' 'alayhā*, while the *ism* is *mukhtalaf fi jawāzihi*.
 - *Wajh* 10: That one has less properties (*aqalla awṣāfan*); regarding it, *wajhān*:
 - 1) The little of properties (*al-qalīla al-awṣāf*) is *awlā*.
 - 2) The much of properties (*al-kathīra al-awṣāf*) is *awlā*, because it is stronger of attachment (*aqwā tashabbuthan*) of the *far'* to the *aṣl*.
 - *Wajh* 11: That one of the two be determined by *al-ṭard wa'l-'aks*, and the other by *ṭard*, but not by *'aks*; the one determined by *ṭard* and *'aks* is *awlā*, because its validity is indicated by the *'aks* (*madlūl 'alā ṣiḥḥatihi bi'l-'aks*).
 - *Wajh* 12: That one of the two obliges *iḥtiyāt*; it is *awlā*, because it safer (*aslam*).
 - *Wajh* 13: That one of the two obliges *al-ḥaẓr*; and the other obliges *al-ibāḥa*; regarding it, *wajhān*, the same as we have mentioned as regards the *akhbār*.
 - *Wajh* 14: That one of the two is a *nāqila*, and the other a *mubqiya*; the *nāqila* is *awlā*.
 - *Wajh* 15: That one eliminates (*tusqīṭu*) the *ḥadd*, while the other obliges it; or: one eliminates (*tusqīṭu*) the *jizya*, while the other obliges it; regarding it, *wajhān*:
 - Among our *aṣḥāb* are those who say: They are equal.
 - And among them are those who say: That which eliminates/overturns (*yusqīṭu*) the *ḥadd*, and obliges the *jizya*, is *awlā*.
 - *Wajh* 16: That one [f.] of the two is in accordance with (*tuwāfiqu*) another *dalīl*, from an *aṣl*, or a *ma'qūl aṣl*; it [m.] is *awlā*, because it [f.] is stronger (*aqwā*).

⁵¹ Al-'Umayrīnī (125, n.3) has changed this sentence considerably, deeming the original to be a blatant error. Whereas the original was [ان يكون المعنيين منصوباً عليهما]; al-'Umayrīnī renders [ان تكون احدى العلتين منصوباً عليها]. This, he tells us, is what he finds in his MS (fol. 75b) of the *Mulakhkhaṣ*. Still, he offers no other explanation as to why the *Ma'ūna* MS is wrong.

Appendix III: al-Bājī's Modes of *i'tirāḍ* for all Domains of *Istidlāl*¹

I. Bayān Wujūh al-<i>i'tirāḍ</i> 'alā al-Istidlāl bi'l-Kitāb²
• 1) <i>al-i'tirāḍ 'alā al-istidlāl bi'l-Kitāb bi-an al-mustadill lā yaqūlu bihi</i> ○ 1.1) re: an <i>aṣl</i> of the <i>uṣūl</i> ○ 1.2) re: a <i>far'</i> of the <i>furū'</i> ○ 1.3) [related, but problematic, objections] • 2) <i>al-qawl bi-mūjib al-dalīl min al-Kitāb wa'l-munāza'a fī muqtaḍāhi [fī muqtaḍā al-lafz]</i> ○ 2.1) <i>al-munāza'a fī'l-naṣṣ</i> ▪ 2.1.1) by way of <i>da'wā al-ijmāl</i> ▪ 2.1.2) by way of <i>da'wā al-iḥtimāl</i> ○ 2.2) <i>al-munāza'a fī'l-zāhir</i> ▪ 2.2.1) re: <i>zāhir bi'l-waḍ'</i> • 2.2.1.1) <i>al-ḥaml 'alā 'urf</i> [two <i>amrs</i>] • 2.2.1.2) the <i>sā'il</i> links to another <i>ma'nā</i> than the <i>mas'ul</i> links it to, <i>fī'l-lughā</i> [three <i>ḍarbs</i>] ▪ 2.2.2) re: <i>zāhir bi'l-'urf</i> • 2.2.2.1) <i>zāhir bi-'urf al-lughā</i> [two <i>amrs</i>] • 2.2.2.1) <i>zāhir bi-'urf al-shar'</i> ▪ 2.2.3) re: <i>zāhir bi'l-dalāla</i> [two <i>ḍarbs</i>] ○ 2.3) <i>al-munāza'a fī'l-āmm</i> ▪ 2.3.1) by way of <i>da'wā al-ijmāl</i> ▪ 2.3.2) he concedes its being <i>āmm</i>, but objects to its treating the <i>mawḍi' al-khilāf</i> ○ 2.4) <i>al-munāza'a fī'l-mujmal</i>; the <i>lafz</i> is <i>mujmal</i>; P combines <i>āya</i> and <i>Sunna</i> ▪ 2.4.1) he objects to <i>ijmāl al-āya</i> ▪ 2.4.2) he objects to the <i>khābar</i> being a <i>bayān</i> for the <i>āya</i> • 3) <i>al-i'tirāḍ 'alā al-istidlāl bi'l-Kitāb bi-da'wā al-mushāraka fīhi [fī'l-istidlāl]</i> ○ 3.1) <i>min jihat al-zāhir</i>; neither one of the two outweighs the other ▪ 3.1.1) [P&Q focus upon the same <i>lafz</i> in the <i>āya</i>] ▪ 3.1.2) [P&Q focus upon two different <i>alfāz</i> in the <i>āya</i>] ○ 3.2) <i>min jihat al-'umūm</i>; neither one of the two outweighs the other ○ 3.3) [related, but problematic, objections] • 4) <i>al-i'tirāḍ 'alā al-istidlāl bi'l-Kitāb bi-ikhtilāf al-qirā'āt</i> ○ 4.1) the <i>mustadill</i> draws indicant by a <i>qirā'a</i>, and the <i>sā'il</i> opposes him by another <i>qirā'a</i>, in order to extend the <i>mustadill's qirā'a</i> ○ 4.2) the <i>mustadill</i> draws indicant by a <i>qirā'a</i>, and the <i>sā'il</i> opposes him by another <i>qirā'a</i>, in order to halt his <i>istidlāl</i> by that <i>qirā'a</i> ○ 4.3) [related, but problematic, objections] • 5) <i>al-i'tirāḍ 'alā al-istidlāl bi'l-Kitāb bi-da'wā al-naskh</i> ○ 5.1) he conveys a <i>naql ṣarīḥ</i> of <i>naskh</i> of an <i>āya</i> by an <i>āya</i> ○ 5.2) he claims <i>naskh</i> of an earlier <i>āya</i> by a later <i>āya</i> ○ 5.3) he claims its <i>naskh</i> in that such is <i>shar' man qablanā</i> ○ 5.4) he claims <i>naskh</i> of all the <i>aḥkām</i> of the <i>āya</i> by <i>naskh</i> of a <i>ḥukm</i> of the

¹ Examples and responses have been omitted. We have encountered the majority of terms here employed by al-Bājī in our previous outline of al-Shīrāzī's domains of *i'tirāḍāt*. Most of the current outline, therefore, will appear only in transliteration.

² *Minhāj*, Turkī ed., 42ff.

aḥkām

- 6) *al-i'tirāḍ 'alā al-istidlāl bi'l-Kitāb min jihat al-ta'wīl*
 - 6.1) *ta'wīl al-zāhir*
 - 6.1.1) he uses the *lafẓ* in its most common usage
 - 6.1.2) he prioritizes (*yata'awwala*) the *lafẓ*, and links it to what is not most common usage
 - 6.1.3) [related, but problematic, objections]
 - 6.2) *takhṣiṣ al-'umūm*
- 7) *al-i'tirāḍ 'alā al-istidlāl bi'l-Kitāb bi'l-mu'āraḍa*
 - 7.1) *bi-nuṭq*
 - 7.1.1) *akhaṣṣ*
 - 7.1.2) *a'amm*
 - 7.1.3) *mithlahu fi'l-'umūm*
 - 7.1.3.1) both are *'amm*
 - 7.1.3.2) both are *khāṣṣ*
 - 7.1.3.3) both are *khāṣṣ min wajh*, *'amm min wajh*
 - 7.2) *bi-'illa*
 - 7.2.1) P's *āya* is *naṣṣ*, does not bear *ta'wīl*
 - 7.2.2) P's *āya* is *zāhir*, bears *ta'wīl*
 - 7.2.3) P's *āya* is *'umūm*, bears *takhṣiṣ*
- 8) [related, but problematic, objections]

II. *al-I'tirāḍ 'alā al-Istidlāl bi'l-Sunna*³

- 1) *al-i'tirāḍ 'alā al-istidlāl bi'l-Sunna min jihat al-isnād*
 - 1.1) it is said: “this is *akhbār āḥād* and we don't profess by it”
 - 1.2) *min jihat al-muṭālaba wa'l-taṣḥīḥ* [two *ḍarbs*]
 - 1.3) *min jihat al-qadh wa'l-tajrīḥ* [two *wajhs*; and a number of problematic objections]
- 2) *wujūh al-i'tirāḍ 'alā matn al-Sunna*
 - 2.1) *bi-an al-mustadill lā yaqūlu bihi*
 - 2.1.1) re: an *aṣl* of the *uṣūl*
 - 2.1.2) re: a *far'* of the *furū'*
 - 2.1.3) [related, but problematic, objections]
 - 2.2) *bi'l-munāza'a fī muqtaḍāhi; al-munāza'a fī muqtaḍā lafẓ al-Sunna wa'l-qawl bi-mūjibihā*
 - 2.2.1) *al-munāza'a fī'l-naṣṣ*
 - 2.2.1.1) he claims its *ijmāl*
 - 2.2.1.2) he claims its *iḥtimāl* of a *ma'nā* other than that from which the *mustadill* draws indicant
 - 2.2.2) *al-munāza'a fī'l-zāhir*
 - 2.2.2.1) re: *zāhir bi'l-waḍ'*
 - 2.2.2.1.1) *al-ḥaml 'alā 'urf* [two *ḍarbs*]
 - 2.2.2.1.2) the *sā'il* links [the *lafẓ*] to another *ma'nā* than the *mas'ul* links it to, *fi'l-lugha* [three *ḍarbs*]
 - 2.2.2.2) re: *zāhir bi'l-'urf*
 - 2.2.2.2.1) *zāhir bi-'urf al-shar'*
 - 2.2.2.2.1) *zāhir bi-'urf al-lugha* [two *amrs*]
 - 2.2.2.3) re: *zāhir bi'l-dalāla* [two *ḍarbs*]

³ *Minhāj*, Turkī ed., 86ff.

- 2.2.3) *al-munāza'a fi'l-'āmm*
 - 2.2.3.1) he concedes its being *'āmm*, but objects to its treating the *mawḍi' al-khilāf*
 - 2.2.3.2) he claims *ijmāl* regarding it
 - 2.2.3.3) [related, but problematic, objections]
- 2.2.4) *al-munāza'a fi'l-mujmal*; the *lafẓ* is *mujmal*
- 2.3) *bi'l-mushāraka fi'l-dalīl; al-mushāraka fi'l-istidlāl bi'l-Sunna*
 - 2.3.1) *min jihat al-zāhir*
 - 2.3.1.1) both P and Q make conditional upon the same *lafẓ*
 - 2.3.1.2) each of them makes conditional upon a different *lafẓ* of the same *khavar*
 - 2.3.2) *min jihat al-'umūm*
 - 2.3.3) [related, but problematic, objections]
- 2.4) *bi-ikhtilāf al-riwāya*
 - 2.4.1) substituting *lafẓ* in place of *lafẓ* [two *ḍarbs*]
 - 2.4.2) substituting *ḥaraka* in place of *ḥaraka*
 - 2.4.3) [related, but problematic, objections]
- 2.5) *bi-da'wā al-naskh*
 - 2.5.1) he conveys *al-naskh ṣarīḥan*
 - 2.5.2) he conveys a later *khavar* concerning the Prophet, which contradicts the *khavar* of the *mustadill*
 - 2.5.3) he conveys *'amal* concerning the *Ṣaḥāba* which conflicts with it, and such provides indicant for its *naskh*
 - 2.5.4) [several related, but problematic, objections]
- 2.6) *min jihat al-ta'wīl*
 - 2.6.1) *ta'wīl al-zāhir*
 - 2.6.1.1) he links the *lafẓ* to its most common usage
 - 2.6.1.2) he links it to a *wajh* which is not used except *nādiran* and *majāzan*
 - 2.6.1.3) [related, but problematic, objections]
 - 2.6.2) *takḥṣīs al-'āmm*
- 2.7) *min jihat al-mu'āraḍa*
 - 2.7.1) *bi-nuṭq*
 - 2.7.1.1) the *nuṭq* is *ma'lūm, min jihat al-Qur'ān aw khavar al-tawātur*
 - 2.7.1.1.1) the *nuṭq* is *a'amm* than the *dalīl*
 - 2.7.1.1.2) the *nuṭq* is *akḥaṣṣ* than the *dalīl*
 - 2.7.1.1.3) the *nuṭq* is *mithlahu fi'l-'umūm wa'l-khuṣūṣ*
 - 2.7.1.2) the *nuṭq* is *maznūn, ka-khavar al-āḥād*
 - 2.7.1.2.1) the *nuṭq* is *a'amm* than the *dalīl*
 - 2.7.1.2.2) the *nuṭq* is *akḥaṣṣ* than the *dalīl*
 - 2.7.1.2.3) the *nuṭq* is *mithlahu fi'l-'umūm wa'l-khuṣūṣ*
 - 2.7.1.2.3.1) both are *'āmm*
 - 2.7.1.2.3.2) both are *khāṣṣ*
 - 2.7.1.2.3.3) both are *khāṣṣ min wajh, 'āmm min wajh*
 - 2.7.2) *bi-'illa*
 - 2.7.2.1) P's Sunna is *naṣṣ*, does not bear *ta'wīl*
 - 2.7.2.2) P's Sunna is *zāhir*, bears *ta'wīl*

- 2.7.2.3) P's Sunna is 'umūm, bears *takhṣiṣ*
- 3) *al-ī'tirāḍ 'alā al-istidlāl bi'l-Sunna al-wārida 'alā al-sabab*
 - 3.1) Sunna *wārida fī ghayr mu'ayyan* (already treated)
 - 3.2) Sunna *wārida fī mu'ayyan; yunqal ḥukm al-Nabī fī 'ayn*
 - 3.2.1) no *sabab* is conveyed with the *ḥukm*
 - He says: "This is a *qaḍiyya* of an 'ayn regarding an 'ayn while the *ḥāl* is probable, and it is not valid to make the *ḥukm* dependent on some of the *aḥwāl* without some other except by a *dalīl*"; this will be discussed later
 - 3.2.2) a *sabab* is conveyed with the *ḥukm* [several *wujūh*]
- 4) *al-ī'tirāḍ 'alā al-istidlāl bi-af'āl al-Nabī*
 - 4.1) that he objects to *al-istidlāl bihā; bi'l-man' min al-iḥtijāj bihi*
 - 4.2) that the *mustadill* does not profess it
 - 4.3) *bi'l-munāza'a fī muqtaḍāhi*
 - 4.3.1) he contends with him re: what he [the Prophet] did
 - 4.3.2) he contends with him re: the *muqtaḍā* of the *fi'l*
 - 4.4) *da'wā al-ijmāl*
 - 4.4.1) [related, but problematic, objection]
 - 4.5) *al-mushāraka fī'l-dalīl*
 - 4.6) *ikhtilāf al-riwāya*
 - 4.7) *da'wā al-naskh*
 - 4.8) *al-ta'wīl*
 - 4.8.1) about the *lafz* by which the *fi'l* is told
 - 4.8.2) about the *ḥāl* in which the *fi'l* occurred
 - 4.9) *al-mu'āraḍa*
 - 4.9.1) the *mu'āraḍa* is by a *fi'l*
 - 4.9.2) the *mu'āraḍa* is by a *qawl*
 - 4.9.3) the *mu'āraḍa* is by an 'illa
 - 4.9.3.1) the *fi'l* is *muḥtamal*
 - 4.9.3.2) the *fi'l* is not *muḥtamal*
 - 4.10) [related problematic objections]
- 5) *al-ī'tirāḍ 'alā al-istidlāl bi'l-iqrār*
 - 5.1) he [the Prophet] saw an *amr* and acknowledged it
 - 5.2) that it was done in his time in such a manner as could not be hidden from him

III. Bayān Wujūh al-ī'tirāḍ 'alā al-Istidlāl bi'l-Ijmā' ⁴

- 1) *al-istidlāl 'alā al-ijmā'* of a type which is known *bi'l-ittifāq*
 - 1.1) *al-muṭālaba bi-taṣḥīḥ al-ijmā' wa zuḥūrihi* [three *ḍarbs*]
 - 1.2) *naql al-khilāf*
 - 1.2.1) [related, but problematic, objection]
 - 1.3) that he discusses what is conveyed as pertains to *qawl* and *fi'l* and *iqrār*
 - 1.4) [related objection]
- 2) *al-istidlāl 'alā al-ijmā'* of a type which is known *bi'l-ikhtilāf* [*ikhtilāf* is split evenly into two camps, but P raises a third opinion]
- 3) [related, but problematic, objections]

⁴ *Minhāj*, Turkī ed., 138ff.

IV. <i>al-I'tirāḍ 'alā al-Istidlāl bi-Ijmā' Ahl al-Madīna</i>⁵
• [al-Bājī points out that the <i>ṭarīq</i> of <i>ijmā' Ahl al-Madīna</i> is by <i>naql</i>; indeed it is <i>iḥtijāj</i> by <i>khābar</i>] • 1) that it attains the <i>ḥadd</i> of <i>al-tawātur</i> ◦ this does not permit of <i>i'tirāḍ</i>, because <i>'ilm ḍarūrī</i> occurs by way of it • 2) it falls short of <i>tawātur</i> • 3) [additional discussion re: what enjoys consensus <i>min jihat al-ra'y wa'l-qiyās</i>]
V. <i>al-I'tirāḍ 'alā al-Istidlāl bi-Qawl al-Wāḥid min al-Ṣaḥāba idhā lam yaẓhar</i>⁶
• [al-Bājī reiterates an earlier stance that such does not constitute <i>ḥujja</i>; such is the <i>ẓāhir</i> of the <i>Mālikī madhhab</i>] • 1) He says: “This is <i>qawl wāḥid min al-Ṣaḥāba</i>, and <i>al-qiyās</i> is advanced over it.” • 2) He conveys <i>khilāf</i> as regards the <i>mas'ala</i> • 3) He discusses the <i>manqūl</i> by what brings understanding
VI. <i>al-Kalām 'alā Ma'qūl al-Aṣl: al-I'tirāḍ 'alā al-Istidlāl bi-Laḥn al-Khiṭāb</i>⁷
• [al-Bājī explains: <i>Laḥn al-khiṭāb: al-istidlāl</i> by means of it is not aimed at; rather, it anticipates (<i>yuqaddiru</i>) the <i>kalām</i>, in order that the <i>istidlāl</i> by means of it be completed.] • 1) the <i>laḥn al-khiṭāb</i> is added to the <i>kalām</i> in order that the <i>kalām</i> be completed by it; for the <i>tatmīm al-kalām</i> • 2) the <i>laḥn al-khiṭāb</i> is added in order that the <i>ta'wīl</i> by it be validated
VII. <i>al-Kalām 'alā Ma'qūl al-Aṣl: al-I'tirāḍ 'alā al-Istidlāl bi-Faḥwā al-Khiṭāb</i>⁸
• 1) The <i>faḥwā al-khiṭāb</i> is <i>jalī</i>: it is in the <i>ma'nā</i> of the <i>manṣūṣ 'alayhi</i> • 2) The <i>faḥwā al-khiṭāb</i> is <i>khafī</i> ◦ 2.1) that he objects to the <i>mushāraka</i> of the <i>mukhtalaf fihi</i> with the <i>muttafaq 'alayhi</i> in the <i>'illa</i> of the <i>ḥukm</i>

⁵ *Minhāj*, Turkī ed., 142f.

⁶ *Minhāj*, Turkī ed., 143f.

⁷ *Minhāj*, Turkī ed., 145f. al-Bājī defines *laḥn al-khiṭāb* in his introductory glossary (12) as: “[1] What is understood of the *qaṣd* of the *mutakallim* which his *lafẓ* does not posit; [2] and it is said: The restriction (*qaṣr*) of the *ḥukm* of the *manṭūq bihi* to some of what it treats of, and the *ḥukm* for the *maskūt 'anhu* by what is contrary to it (*khālafahu*); [3] and it is said: It is the *ḍamīr* except by means of which the *kalām* is not completed.” The second definition is close to al-Shīrāzī's definition for *dalīl al-khiṭāb*, except al-Bājī defines *dalīl al-khiṭāb* as: “The *ta'līq* of the *ḥukm* by way of a *ma'nā* in some of the *jins*, whether *ism* or *ṣifa*” (op. cit.) We will note, however, that al-Bājī does not treat *al-i'tirāḍ 'alā dalīl al-khiṭāb*, as al-Shīrāzī does (*Ma'ūna*, al-'Umayrīnī ed., 87ff.) In the *Luma'*, however (Mustū ed., 104f.), we find that al-Shīrāzī includes *laḥn al-khiṭāb* under the category of *mafhūm al-khiṭāb*, between *faḥwā al-khiṭāb* and *dalīl al-khiṭāb*, and he defines it first as we see in al-Bājī's third definition, then as “cancellation (*ḥadhḥ*) of the *muḍāf*, and standing in its place the *muḍāf ilayhi*” (which definition he accompanies with a Qur'ānic paradigm: «*wa is' al-qarya*», by which God means “*ahl al-qarya*”). This same definition and Qur'ānic paradigm may be found in the first example al-Bājī provides (*Minhāj*, Turkī ed., 146) for *laḥn al-khiṭāb*. Al-Shīrāzī accompanies his first definition with a Qur'ānic paradigm as well, and both definitions, with the same Qur'ānic paradigms, may be found — verbatim — in al-Khaṭīb al-Baghdādī's *al-Faqīh wa'l-Muttafaqih* (al-'Azzāzī ed., i.233).

⁸ *Minhāj*, Turkī ed., 146f.

- 2.2) that he suspends the *ḥukm* from an 'illa besides the one the *mustadill* suspended it from

VIII. *al-Kalām 'alā Ma'qūl al-Aṣl:*
***al-I'tirāḍ 'alā al-Istidlāl bi'l-Ḥaṣr*⁹**

- 1) [No heading, but in the example, a Ḥanafī accuses a Mālikī of using *dalīl al-khiṭāb*, which he — as a Mālikī — does not profess by; but the Mālikī says: This is not *dalīl al-khiṭāb*, rather, it is only *istidlāl bi'l-ḥaṣr*. This would explain why al-Bājī does not have a section treating *dalīl al-khiṭāb*, as al-Shīrāzī does.]
- 2) *Mu'āraḍa* of his *dalīl* by way of *al-nuṭq*

IX. *al-Kalām 'alā Ma'qūl al-Aṣl:*
***al-I'tirāḍ 'alā al-Istidlāl bi-Ma'nā al-Khiṭāb, wa huwa al-Qiyās*¹⁰**

- A) Tripartite *Tartīb*: [the logical sequence of objections; al-Bājī explains why for each step]
 - 1st) *Muṭālaba*
 - 1.1) That he request of the *mustadill* *taṣḥīḥ* of the *ithbāt* of the like of this *ḥukm* by way of *qiyās*
 - 1.2) The *muṭālaba* of the *mustadill* for the *dalīl* that what he made an *aṣl* is allowed to be an *aṣl*
 - 1.3) The *muṭālaba* for his *dalīl* that what he made a *ḥukm* is allowed to be a *ḥukm*
 - 1.4) The *muṭālaba* of him for the *dalīl* that what he made an 'illa is allowed to be an 'illa
 - 1.5) The *muṭālaba* of him for *ithbāt al-waṣf fi'l-aṣl*
 - 1.6) The *muṭālaba* of him for *ithbāt al-waṣf fi'l-far'*
 - 1.7) The *muṭālaba* of him for *taṣḥīḥ al-'illa*
 - 2nd) *I'tirāḍ*
 - 2.1) *al-qawl bi-mūjib al-'illa*
 - 2.2) *qalb al-'illa*
 - 2.3) *al-i'tirāḍ bi-fasād al-waḍ'*
 - 2.4) *al-naqḍ*
 - 2.5) *al-kasr*
 - 2.6) *al-muṭālaba bi-an al-'illa lā tajrī fi ma'lūlātihā*
 - 2.7) *al-muṭālaba bi-'adam al-ta'thūr*
 - 3rd) *Mu'āraḍa*
- B) Fifteen *Wujūh*: *mā ya'tarīḍu bihi 'alā al-qiyās*
 - 1) *al-i'tirāḍ bi-an al-mukhtalaf fihi lā yajūzu ithbātihī bi'l-qiyās*
 - 1.1) *min jihat nafāt al-qiyās*
 - 1.2) *min jihat muthbit al-qiyās* [eight sub-types]
 - 2) *al-i'tirāḍ bi-an mā qāsa 'alayhi lā yajūzu an yuj'ala aṣlan*
 - 2.1) the *sā'il* claims that the *aṣl* of the *mustadill* is *mansūkh*
 - 2.2) he claims that it is not valid that the 'illa of the *aṣl* be learned
 - 2.3) [five related, but problematic, objections]
 - 3) *al-i'tirāḍ bi-an mā ja'alahu 'illatan lā yajūzu an yuj'ala 'illatan*
 - 3.1) he objects that he makes *al-ittifāq* an 'illa
 - 3.2) he objects that he makes *al-ikhtilāf* an 'illa

⁹ *Minhāj*, Turkī ed., 147f.

¹⁰ *Minhāj*, Turkī ed., 148ff.

- 3.3) [five related, but problematic, objections]
- 4) *al-ī'tirād bi-an mā ja'alahu hukman lā yajūzu an yakūna hukman*
 - 4.1) He says, regarding the *hukm* of the 'illa: "And it resembles such and such;" and he does not explain (*lā yubayyinu*) the disagreed upon *hukm*
 - 4.2) [*al-ta'līl li'l-taswiya*] He says: "And such and such is equal to it;" and he does not make explicit the *hukm* for which the two are equal
- 5) *al-ī'tirād bi'l-mumāna'a fī hukm al-aṣl; al-kalām fī man' al-aṣl*
 - 5.1) there belongs to his opponent [Q] a *madhhab manṣūṣ* regarding the *man'* which does not disagree
 - 5.2) his [Q's] *qawl* disagrees; the opponent [Q] has a different *madhhab*
 - 5.3) there is not known to him [Q] a *qawl* regarding it, generally
 - 5.4) [two related, but problematic, objections]
- 6) *al-ī'tirād bi'l-mumāna'a fī l-waṣf*
 - 6.1) against the *aṣl* of the *sā'il*
 - 6.1.1) *man' al-waṣf fī l-aṣl*
 - 6.1.2) *man' al-waṣf fī l-far'*
 - 6.1.3) *man' al-waṣf* in both of them
 - 6.2) against the *aṣl* of the *mas'ul*
- 7) *al-muṭālaba bi-taṣhīḥ al-'illa*
 - 7.1) the *sā'il* begins by objecting to the 'illa of the *mustadill*
 - 7.2) the *sā'il* begins by requesting of him its *taṣhīḥ*
- 8) *al-ī'tirād 'alā al-'illa 'alā al-qawl bi-mūjibihā*
 - 8.1) *wuḍi'a li'l-wujūb*
 - 8.2) *wuḍi'a li'l-jawāz*
- 9) *al-ī'tirād 'alā al-'illa bi'l-qalb*
 - 9.1) *qalb bi-jamī' awṣāf al-'illa*
 - 9.2) *qalb bi-ba'd awṣāf al-'illa*
 - 9.3) *qalb al-sawiyya*
 - 9.4) [three related, but problematic, objections]
- 10) *al-ī'tirād 'alā al-'illa bi-fasād al-waḍ'*
 - 10.1) he makes conditional upon the 'illa the opposite of its *muqtaḍā*
 - 10.1.1) sometimes it is known by the *nuṭq*
 - 10.1.2) sometimes it is known by the *uṣūl*
 - 10.1.3) [related objection]
 - 10.2) *fasād al-ī'tibār*
 - 10.2.1) it is known by the *naṣṣ*
 - 10.2.2) it is known by the *uṣūl*
 - 10.2.3) [several related objections]
- 11) *al-ī'tirād 'alā al-'illa bi'l-naqḍ*
 - 11.1) what is *wuḍi'a li'l-jins*; and it is in the *manzila* of *al-ḥadd*
 - 11.2) what is *wuḍi'a li-ithbāt al-aḥkām fī l-a'yān*
 - 11.2.1) 'illa *mawḍū'a li'l-wujūb*
 - 11.2.2) 'illa *mawḍū'a li'l-jawāz*
 - 11.2.3) [several related, but problematic, objections]
- 12) *al-ī'tirād 'alā al-qiyās bi'l-kasr; al-naqḍ min jihat al-ma'nā*
 - 12.1) he replaces a *waṣf* of the *awṣāf* of the 'illa by what is in its *ma'nā*
 - 12.1.1) [related, but problematic, objection]

- 12.2) he eliminates a *waṣf* of the *awṣāf* of the *'illa*
 - 12.2.1) he eliminates an inefficient *waṣf* re: the *ḥukm* which was made dependent upon the *'illa*
 - 12.2.2) he eliminates an efficient *waṣf*
- 13) *al-i'tirāḍ 'alā al-'illa bi-annahā lā tajrī fī ma'lūlātiḥā; al-muṭālaba bi-ijrā' al-'illa fī ma'lūlātiḥā*
 - 13.1) [related, but problematic, objection]
- 14) *al-i'tirāḍ 'alā al-'illa bi-'adam al-ta'thīr*
 - 14.1) re: a *waṣf* which, when eliminated, the *'illa* is undone (*intaqaḍat*)
 - 14.1.1) to the *waṣf* belongs a *ta'thīr* on the *madhhab* of the *mu'allil*, and the *ḥukm* is dependent upon it according to him, however it has no *ta'thīr* in the *uṣūl*
 - 14.1.2) no *ta'thīr* belongs to it on the *madhhab* of the *mu'allil*, nor as regards anything of the *uṣūl*
 - 14.2) re: a *waṣf* for which the *'illa* is not undone by its elimination; called *al-ḥashw*
 - 14.2.1) [related, but problematic, objection]
- 15) *al-i'tirāḍ 'alā al-'illa bi'l-mu'āraḍa*
 - 15.1) *mu'āraḍat al-'illa bi'l-nuṭq* [already treated]
 - 15.2) *mu'āraḍat al-'illa bi'l-'illa*
 - 15.2.1) *al-mu'āraḍa bi-'illa mubtada'a*
 - 15.2.2) *al-mu'āraḍa bi-'illat al-aṣl*; which is *al-farq*
 - 15.2.2.1) *farq bi-'illat al-ḥukm*
 - 15.2.2.1.1) the *ma'nā* is *muttafaq 'alayhi*
 - 15.2.2.1.2) the *ma'nā* is *mukhtalaf 'alayhi*
 - 15.2.2.2) *farq bi-dalālat al-ḥukm*
 - 15.2.2.2.1) he makes distinction between the *far'* and the *aṣl* by way of a *ḥukm* peculiar to the *far'* which does not part from it (*lā yufāriquhu*)
 - 15.2.2.2.2) he makes distinction by way of the same *ḥukm*, in other than the *mawāḍi' al-khilāf*
 - 15.2.2.2.3) he makes distinction by way of *ḥukm* which resembles (*yushākilu*) the *ḥukm al-mukhtalaf fīhi*
 - 15.2.2.2.4) he makes distinction by way of a *ḍarb* of *al-shabah*

X. *al-Kalām 'alā al-Istidlāl bi'l-Awlā*¹¹

- 1) *al-istidlāl bi'l-awlā*: That he link the *far'* to the *aṣl* by way of a *ma'nā* which obliges the *jam'* between them, then he clarifies regarding the *far'* a *ziyāda* which obliges the *ta'kid* of the *ḥukm* of the *far'* upon the *aṣl*.
 - 1.1) *i'tirāḍ* by way of *al-muṭālaba* for *taṣḥīḥ* of the *ma'nā* which necessitates *ta'kid* of the *ḥukm* of the *far'* upon the *ḥukm* of the *aṣl*
 - 1.2) *i'tirāḍ* by way of *al-naqd*
 - 1.3) *i'tirāḍ* by way of *al-kasr*
 - 1.4) *i'tirāḍ* by way of making the *ta'kid* a *ḥujja* against the *mustadill*

¹¹ *Minhāj*, Turkī ed., 207ff. Cf. al-Bājī's definition for this manner of *istidlāl* (27).

Part I: The Dialectical Forge
Appendix III: al-Bājī's Modes of *i'tirāḍ* for all Domains of *Istidlāl*

○ 1.5) <i>i'tirāḍ</i> by way of <i>muqābala</i> of the <i>ta'kid</i> of the <i>far'</i> by a <i>ma'nā</i> which eliminates it ○ 1.6) <i>i'tirāḍ</i> by way of <i>al-farq</i>
XI. <i>al-Kalām 'alā al-Istidlāl bi'l-Taqsīm</i>¹²
• 1) <i>Istidlāl bi'l-taqsīm</i> 1: He states the <i>aqsām</i> upon which it is allowed that the <i>jawāb</i> of the <i>khaṣm</i> be made dependent (<i>yata'allaqa bihā</i>), and he nullifies all of them. ○ 1.1) <i>i'tirāḍ</i> by way of <i>al-naqd</i> ○ 1.2) <i>i'tirāḍ</i> by way of <i>al-kasr</i> ○ 1.3) <i>i'tirāḍ</i> by way of clarifying another <i>qism</i> which the <i>mustadill</i> abandons (<i>akhalla bihi</i>), and he makes the <i>ḥukm</i> dependent upon it ○ 1.4) <i>i'tirāḍ</i> by way of claiming the <i>ta'līq</i> of the <i>ḥukm</i> upon one of the <i>wujūh</i> of which the <i>mustadill</i> provides indicant for their <i>ibtāl</i>, and he validates it • 2) <i>Istidlāl bi'l-taqsīm</i> 2: He states the <i>aqsām</i> upon which it is allowed that the <i>ḥukm</i> be made dependent, and he nullifies all but one, then makes the <i>ḥukm</i> dependent upon it.
XII. <i>al-Kalām 'alā al-Istidlāl bi'l-'Aks</i>¹³
• 1) <i>i'tirāḍ</i> by way of <i>al-naqd</i> • 2) <i>i'tirāḍ</i> by way of <i>al-kasr</i> • 3) <i>i'tirāḍ</i> by way of <i>al-farq</i>
XIII. <i>al-Kalām 'alā al-Istidlāl bi-Bayān al-'Illa</i>¹⁴
• 1) <i>Istidlāl bi-bayān al-'illa</i> 1: He explains the <i>'illa</i> of the <i>ḥukm</i> so that the <i>ḥukm</i> be present due to its [the <i>'illa</i>'s] presence, in the <i>mawḍi'</i> of <i>khilāf</i> ○ 1.1) If he has begun the <i>istidlāl</i>, <i>i'tirāḍ</i> by way of <i>al-man'</i> ▪ 1.1.1) He objects to that which he stated as <i>'illa</i> for the <i>ḥukm</i>, or as <i>waṣf mu'aththir fihi</i>. ▪ 1.1.2) He objects to what he [opponent] mentioned as being <i>jamī' al-'illa</i>. ○ 1.2) If he has begun the <i>istidlāl</i>, <i>i'tirāḍ</i> by way of <i>al-naqd</i> ▪ 1.2.1) that the <i>'illa</i> is present with the absence of the <i>ḥukm</i> ▪ 1.2.2) that the <i>ḥukm</i> is present with the absence of the <i>'illa</i> • 2) <i>Istidlāl bi-bayān al-'illa</i> 2: He explains the <i>'illa</i> of the <i>ḥukm</i> so that the <i>ḥukm</i> be absent due to its [the <i>'illa</i>'s] absence, in the <i>mawḍi'</i> of <i>khilāf</i> ○ 2.1) [same as 1.1 above] ○ 2.2) [same as 1.2 above]
XIV. <i>al-Kalām 'alā al-Istidlāl bi-(Shahādat) al-Uṣūl</i>¹⁵
• 1) <i>i'tirāḍ</i> by way of <i>al-naqd</i>: he [Q] explains to him in the <i>uṣūl</i> the <i>khilāf</i> of what he [P] claims, and that such [a <i>khilāf</i>] is the <i>ma'nā</i> for what he [Q] claims as pertains to the <i>uṣūl</i>, and the <i>naqd</i> of what he [P] proposes as pertains to the <i>dalīl</i> • 2) <i>i'tirāḍ</i> by way of <i>al-farq</i>: he [Q] explains that this <i>mawḍi'</i> is a <i>mukhālif</i> to the rest of the <i>uṣūl</i>, <i>min jihat al-ma'nā</i>, and, due to this, it differs from them as regards the <i>ḥukm</i>
XV. <i>al-Kalām 'alā Istiṣhāb al-Ḥāl</i>¹⁶
• 1) For <i>Istidlāl bi-istiṣhāb al-ḥāl</i>

¹² *Minhāj*, Turkī ed., 210ff. Cf. al-Bājī's def. for this manner of *istidlāl* and its two types (27-8).

¹³ *Minhāj*, Turkī ed., 212ff. See al-Bājī's introductory example for this manner of *istidlāl* (29).

¹⁴ *Minhāj*, Turkī ed., 214ff. Cf. al-Bājī's def. for this manner of *istidlāl* and its two types (28-9).

¹⁵ *Minhāj*, Turkī ed., 217f. See al-Bājī's introductory example for this manner of *istidlāl* (29).

¹⁶ *Minhāj*, Turkī ed., 219f.

- 1.1) He opposes it (*yu'ārīḍahu*) by its like
- 1.2) He conveys it away from the *ḥāl* by way of a *dalīl*, saying: "Indeed, the *aṣl* is *barā'at al-dhimma bi'l-'aql*, except that the *shar'* has provided indicant for the *ishtighāl* of his *dhimma*"
- 2) For [the problematic] *Istidlāl bi-istiṣhāb al-ijmā'*
 - 2.1) He objects to this type of *istidlāl*, generally
 - 2.2) *i'tirāḍ* by way of *al-mu'āraḍa* [as above in 1.1]
 - 2.3) *i'tirāḍ* by way of *al-naql bi-dalīl* [similar to 1.2 above]

XVI. *al-Kalām 'alā al-Tarjihāt*¹⁷

- 1) *Tarjih* occurring in the *ẓawāhir*
 - 1.1) *fi mawḍi' al-isnād*
 - 1.1.1) One of the two *ḵabars* is narrated regarding a *qiṣṣa mashhūra mutadāwala ma'rūfa* 'inda *Ahl al-Naql*, while the opposing one transgresses/goes beyond that (*mu'ārīḍuhu muta'addiyan 'an dhālika*)
 - 1.1.2) The *rāwī* of one of the two *ḵabars* is *aḍbaṭ* and *aḥfaz*, while the *rāwī* of the one that opposes (*alladhī yu'ārīḍuhu*) is less than/without that
 - 1.1.3) The *ruwāt* of one of the two *ḵabars* are more than the *ruwāt* of the other
 - 1.1.4) One of the *rāwīs* says: "I audited the Messenger of God...", and the other says: "The Messenger of God... wrote to me with this" — the one who audited is *awlā*
 - 1.1.5) One of the two *ḵabars* is *muttafaḡan 'alā ṣiḥḥatihi*, ascribed to (*rafa'ahu ilā*) the Messenger of God, while the other is *mukhtalif fihi*.¹⁸
 - One of them says: This is *mawqūf 'alā al-Ṣaḥābī*
 - One of them says: It is *musnad*.
 - 1.1.6) One of the two *ḵabars* is *mansūban* to the Messenger of God by *naṣṣ* or *fi'l*, while the other is [*mansūban*] by *istidlāl*
 - 1.1.7) Re: his *rāwī* on the Prophet, the *ruwāt* from him have differed about him; among them are those who narrate from him that he narrated *ithbāt al-ḥukm*; and among them are those who narrate from him that he narrated *naḥī*
 - 1.1.8) The *rāwī* of one of the two *ḵabars* is *ṣāḥib al-qiṣṣa wa'l-mutalabbis bihā*, and the other is not thus; so the *ḵabar* of the *mubāshir* is *awlā*
 - 1.1.9) The *iṭbāq* of the *Ahl al-Madīna 'alā al-'amal bi-mūjib* of one of the two *ḵabars*; it is *awlā* than the *ḵabar* which contradicts the *'amal* of the *Ahl al-Madīna*
 - 1.1.10) One of the two *rāwīs* is more thorough of investigation (*ashadda taqasṣiyan*) for the *ḥadīth*, and better ordered (*aḥsana nasaḡan*) for it than the other; so his *ḥadīth* is advanced over his
 - 1.1.11) One of the two *isnāds* is sound from *al-iḍṭirāb*, while the other is *muḍṭaraban*; the *sālim min al-iḍṭirāb* is *awlā*
 - 1.1.12) [Problematic *tarjih* of the *Aṣḥāb Abī Ḥanīfa*]: The *rāwī* of one

¹⁷ *Minhāj*, Turkī ed., 221ff.

¹⁸ Al-Bājī's opening glossary section treats terms from the domain of *ḵabar* (Turkī ed., 13, §17). Among them we find his short definitions for 1) *al-mursal*: "whose *isnād* is severed (*inqaṭa'a*);" 2) *al-mawqūf*: "what terminates (*waqafa*) at a *Ṣaḥābī* or *Tābi'i*, and does not reach by it [i.e., by the *isnād*] the Messenger;" and 3) *al-musnad*: "whose *isnād* arrives (*ittaṣala*) [to the Prophet]."

of the two *khabs* is specialized in (*yakhtaṣṣu bi-*) the *ḥukm*, while the *rāwī* of its opposite (*ḍiddahu*) is not specialized in it [al-Bājī argues against this]

- 1.2) *fī mawḍi' al-matn*
 - 1.2.1) The *salāmat* of the *matn* of the *ḥadīth* for one of the two *ḥadīths* from *al-ikhtilāf* and *al-idṭirāb*, and the *ḥuṣūl* of that in the other; the one whose *lafẓ* agrees, and whose *ḥifẓ* from the *muḍṭarib* is certain, is advanced [over the other]
 - 1.2.2) That what one of the two *khabs* contains as pertains to the *ḥukm* is *manṭūqan bihi*, while what the other contains is *muḥtamalan*; that which is *nuṭīqa bi-ḥukmihi* is advanced [over the other]
 - 1.2.3) One of the two is *mustaqillan bi-naḥsihi*, *mustaghniyan 'an al-ḍamīr fīhi*, while the other is *muftaqar ilayhi*; the former is *awlā*
 - 1.2.4) The two *khabs* are employed in a *mawḍi' al-khilāf*; it is *awlā* than the *isti'māl* of one of the two and the *iṭṭirāḥ* of the other
 - 1.2.5) One of the two *'umūms* is *mutanāza'an* as regards its *takhṣīṣ*, while the other is *muttafaqan* for its *takhṣīṣ*; the *ta'alluq bi-'umūm mā lam yajma' 'alā takhṣīsihi* is *awlā*
 - 1.2.6) One of the two *khabs* is aimed at *bayān al-ḥukm*, while the other is not aimed at that; taking up the one which is aimed at *bayān al-ḥukm* is *awlā*
 - 1.2.7) One of the *khabs* is *mutawātir fī l-ḥukm*, while the other is *ghayr mutawātir*; the *mutawātir* is *awlā*
 - 1.2.8) One of them is *warada 'alā sabab*, while the other is *warada 'alā ghayr sabab*; the *wārid fī ghayr sabab* is advanced over the *khbar al-wārid fī sabab* as regards other than what it is made conditional from (*yata'allaqu minhu*) by way of the *sabab alladhī warada fīhi*
 - 1.2.9) One of the two *khabs* has made something requisite over the other (*qad qaḍā bihi 'alā al-ākhar*) in a *mawḍi'* of the *mawāḍi'*; it is *awlā* than it in the majority of the *mawāḍi'*
 - 1.2.10) One of the two *khabs* is *manqūl bi-alfāz mutaghāyira* and *ṭuruq mukhtalifa* [but *muttafiqa al-ma'nā*]; it is *awlā*
 - 1.2.11) One of the two *khabs* “eliminates the shortcoming” from (*yanfī al-naqṣ 'an*) the *Aṣḥāb* of the Messenger of God, while the second attributes it to them; the former is *awlā*
 - 1.2.12) [Problematic *tarjīḥ*] One of the two *khabs* is *muthbitan li-ḥukm*, while the other is *nāfiyan lahu*
 - al-Ḥasan b. al-Qaṣṣār, and Shaykhunā Abū Ishāq [al-Shīrāzī]: the *muthbit* is *awlā* than the *nāfi*
 - al-Qāḍī Abū Bakr [al-Bāqillānī], and Qāḍīnā Abū Ja'far: *humā sawā'un* [al-Bājī says: *wa huwa al-ṣaḥīḥ*]
 - One of them is confirming and the other a *mustaṣḥiban li-ḥukm al-'aql* by some possible mode, and the *nāfi* is not *kādhiban*; it advances the *muthbit* in this case
 - 1.2.13) [Problematic *tarjīḥ*] One of the two *khabs* is *ḥāziran* and the other *mubīḥan*
 - Ibn al-Qaṣṣār, and Shaykhunā Abū Ishāq: *dhahaba... ilā taqdīm al-ḥazr 'alā al-ibāḥa*
 - al-Qāḍī Abū Bakr, and al-Qāḍī Abū Ja'far: *humā sawā'un* [this is the *ṣaḥīḥ* according to al-Bājī]

- 2) *Tarjih* occurring in the *ma'ānī*
 - 2.1) One of the two 'illas is *manšūsan 'alayhā*, while the other is *ghayr manšūṣ 'alayhā*; [the *manšūṣ 'alayhā* is *awlā*]
 - 2.2) One of the two 'illas does not entail *takhṣīṣ* for its *aṣl*, while the second entails *takhṣīṣ* for its *aṣl*; the one which does not entail *takhṣīṣ* for its *aṣl* is *awlā* and *ahrā*
 - 2.3) One of the two is *muwāfiqa li-lafẓ al-aṣl*, while the other is *ghayr muwāfiqa*; the *muwāfiqa* is advanced [over the other]
 - 2.4) One of the two 'illas is *muṭarrada mun'akisa*, while the other is *muṭarrada ghayr mun'akisa*; the *mun'akisa* is preponderated
 - 2.5) One of two 'illas receives testimony from many *uṣūl*, while the other receives testimony from only one; the former is *awlā*
 - 2.6) One of the two *qā'isīn* refers the *far'* to an *aṣl* of its genus, while the other refers the *far'* to an *aṣl* which is not of its genus; the *qiyās* of the one who refers the *far'* to its genus is *awlā*
 - 2.7) One of the two 'illas is *wāqifa*, while the other is *muta'addiya*; the *muta'addiya* is *awlā* than the *wāqifa*
 - 2.8) One of the two does not generally encompass (*lā ta'ummu*) its *furū'*, while the other generally encompasses its *furū'*; the *'amma* is *awlā*
 - 2.9) One of the two 'illas is *'amma* and the other is *khāṣṣa*; the *'amma* is *awlā*
 - 2.10) One of the two 'illas is drawn from (*muntaza'atan min*) an *aṣl manšūṣ 'alayhi*, while the other is drawn from an *aṣl* which is not univocally fixed (*lam yunaṣṣ 'alayhi*); the *muntaza'a min aṣl manšūṣ 'alayhi* is *awlā*
 - 2.11) One of the two 'illas is *aqall awṣāfan*, while the other is *kathīrat al-awṣāf*; the *qalīlat al-awṣāf* is advanced [over the other]
 - This is the *qawl* of Abū Ishāq al-Shīrāzī
 - Some Aṣḥāb al-Shāfi'ī say: *humā sawā'un*
 - Some Aṣḥāb al-Shāfi'ī say: the *kathīrat al-awṣāf* is *awlā*
 - Ibn al-Qaṣṣār has wavered as regards it (*qad idṭaraba fī dhālika*)
 - 2.12) One of the two 'illas is *nāqila*, while the other is *mubqiya 'alā ḥukm al-aṣl*; the *mubqiya* is *awlā*
 - Shaykhunā Abū Ishāq, *tā'ifa min* Ahl al-Uṣūl like Ibn al-Qaṣṣār and others: the *nāqila* is *awlā*
 - 2.13) [Common and recurrent *wajh* of the Ahl al-Nazar]: One of the two 'illas is *ḥāzira*, while the other is *mubṭḥa*; they are equal (*humā sawā'un*)
 - Ibn al-Qaṣṣār, Abū Ishāq [al-Shīrāzī], Abū al-Ḥasan al-Karkhī: *al-ḥāzr* is advanced over *al-ibāḥa*
 - 2.14) [Common and recurrent *wajh* of the Ahl al-Nazar]: One of the two 'illas obliges the *ḥadd*, while the other eliminates it; they are equal (*humā sawā'un*)
 - This is the *qawl* of Abū Ishāq al-Shīrāzī
 - Some Aṣḥāb al-Shāfi'ī say: *al-musqīṭu al-ḥadd* is *awlā*
 - 2.15) [Common and recurrent *wajh* of the Ahl al-Nazar]: One of the two 'illas is *mūjiba li'l-'itq*, while the other is *ghayr mūjiba lahu*; they are equal (*humā sawā'un*)
 - This is the *qawl* of Abū Ishāq al-Shīrāzī
 - Some of the Mutakallimīn say: the *mūjiba li'l-'itq* is advanced [over the non-*mūjiba li'l-'itq*]

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The Dialectical Forge, Part II:
An Annotated Translation of the *Kitāb Ikhtilāf al-‘Irāqīyyīn*

by

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Part II of a thesis submitted to McGill University
in partial fulfilment of the requirements
of the degree of Doctor of Philosophy.

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كتاب اختلاف العراقيين

وهو كتاب اختلاف أبي حنيفة وابن أبي ليلى عن أبي يوسف

كما نقل إلينا في كتاب الأمّ

مع حجج محمد بن إدريس الشافعي ومناظراته

The Book of Ikhtilāf of the Iraqis

Being the Book of *Ikhtilāf* of Abū Ḥanīfa and Ibn Abī Laylā,

on the Authority of Abū Yūsuf,

as Transmitted in the *Kitāb al-Umm*

with the Arguments and Dialectic of Muḥammad b. Idrīs al-Shāfiʿī

An Annotated, Parallel Translation

by

Walter Edward Young

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Forward

I. Materials for the Arabic Text

With regard to the Arabic text of this parallel translation, I have, in the main, followed the *Kitāb Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā* as prepared by Dr. Aḥmad Badr al-Dīn Ḥassūn, in his scholarly edition of the *Kitāb al-Umm*.¹ In particular, his system of dividing the text into numbered sections (being the first edition to do so) has proven of enormous utility; I have followed him “to the number,” incorporating (but carefully noting) sequence-errors as they occur.² What is more, Ḥassūn’s edition of the *Umm* is the first I have come across which provides a near-complete vowelling of the text. This, too, was of enormous utility. I have, however, preferred my own rendition on more than one occasion, and have attempted to maintain a *full* vowelling of the text from start to finish. A number of times, I have also preferred transcriptions of the Arabic as found in other scholarly editions; such choices of mine, variant vowellings, etc., are all marked in the footnotes as they occur.³ In sum, we may say that the Arabic text appearing in our translation is closest to Ḥassūn’s edition, though with a number of significant variants of transcription and vowelling.

Of course, I have also made frequent reference to what I have chosen to call the “Shaybānī Version” (as opposed to the “*Umm* Version”) of the text.⁴ Abū al-Wafā’ al-

¹ *Mawsūʿat al-Imām al-Shāfiʿī: al-Kitāb al-Umm*, 16 Pts. in 10 Vols., 2nd Edition (Beirut: Dār Qutayba, 2003), vol. 9, pt. 14, 7-235. Ḥassūn’s is a praiseworthy edition, and a great contribution to the field. For descriptions of the MSS and fragments he employed, and his methods of collation, etc., see *ibid.*, vol. 1 (Intro.), 116-21; 125-6.

² Schacht’s system (by which he made references to this, and other treatises from the *Umm*, in his *Origins*), unfortunately, had no great utility for our project; the numbered sections by which he refers to our subject-treatise are more in the way of thematic groupings, and incorporate large swathes of text. Ḥassūn, on the other hand, has managed to apportion the text into much smaller, discrete units; although, unfortunately, there is an error or two in the sequence (e.g., §§880-889 — just the numbers, not any text — have been skipped). Rather than add a third numbering system to the mix, however, I decided to follow Ḥassūn’s — errors and all. Thus will our translation be forever linked to this particular edition (assuming that the numbering errors are corrected in future editions).

³ In particular, I have relied upon: 1) the “*Ṭabʿa Muṣawwara ʿan Ṭabʿat Būlāq* 1321 H,” produced at Cairo by the *Hayʾa al-Miṣriyya al-ʿĀmma liʾl-Kitāb* (*al-Umm*, 7 Pts. in 3 Vols., 1407/1987); 2) Maḥmūd Maṭrajī’s edition (*al-Umm*, 9 Vols.; Beirut: Dār al-Kutub al-ʿIlmiyya, 1993); and 3) Muḥammad Zuhri al-Najjār’s edition (*al-Umm*, 8 Vols.; Cairo: Maktabat al-Kulliyāt al-Azhariyya, 1961). Ḥassūn points out numerous problems he encountered with the original Būlāq edition, which he refers to by name of the Amīriyya press (*Mawsūʿat al-Imām al-Shāfiʿī*, vol. 1 (Intro.), 123-4).

⁴ We have noted the key differences between the Shaybānī and *Umm* versions in Part I of this dissertation, and I have attempted to account for conventional/formulaic differences in my notes to the translation.

Afghānī’s edition, with its frequent quotations from al-Sarakhsī’s *Mabsūṭ*, has proven invaluable for solving some of the more difficult problems our subject-text has posed.⁵ I have also taken direct recourse to the *Mabsūṭ* myself, employing the same edition upon which al-Afghānī relied.⁶ In terms of elucidating difficult problems posed by the text, additional references upon which I have relied may be found in the “List of Sources and Abbreviations” following the appendices; Schacht deserves a special mention here, however, as he made frequent reference to our subject-text, and translated the occasional passage.⁷ In the main, however, we must lament that there remains no readily accessible comprehensive study or commentary for our subject-text, or for the *Kitāb al-Umm* as a whole.⁸

As a final note: I have found the *al-Maktaba al-Shāmila* searchable, electronic version of the *Kitāb al-Umm* (which, in turn, represents a Beirut edition [Dār al-Ma‘rifa, 1990]) to be of tremendous service in locating key terms throughout the larger *Umm* compendium.⁹ Of course, this version also suffers many of the problems which seem all too common to electronic libraries of this sort (occasional omissions, incorrect transcriptions, errors in vowelings, etc.) However, cautiously employed as instant-indexing machines and textual databases, with results compared over and against printed editions of the text, it is impossible to conceive of a more convenient or thorough search-tool than what the *al-Maktaba al-Shāmila* provides. The electronic library, for all its potential failings, is yet a magnificent concordance.

II. On Conventions Employed in the Translation

The reader may ask: “Why a parallel translation?” And there are a number of reasons I have chosen this format. First of all, there is no question that translation is a hermeneutical exercise; the real question is to which degree. Now, when the subject-text was authored by one or more “multiple-Others,” separated from the translator by

⁵ *Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā* (Cairo: Maṭba‘at al-Wafā’, 1357/1939).

⁶ al-Sarakhsī, *Kitāb al-Mabsūṭ*, Ed. Muḥammad Rāḍī, et al., 30 Vols. (Cairo: Maṭba‘at al-Sa‘ada, 1324-1331/1906-1913).

⁷ *The Origins of Muhammadan Jurisprudence* (Oxford; London: Oxford University Press, 1979).

⁸ To my knowledge, there is only one extant *sharḥ* for the *Kitāb al-Umm*, and it is a modern and incomplete *tartīb ‘alā abwāb al-fiqh* still in manuscript form at the Dār al-Kutub al-Miṣriyya (Aḥmad Bek b. Yūsuf b. Aḥmad al-Ḥusaynī al-Muḥāmī [d.1332/1913], *Murshid al-Imām li-Birr Umm al-Imām*, 24 vols. [Dār al-Kutub al-Miṣriyya: ##1521-2]). At 24 vols., the author had only dealt with the first books of *‘ibādāt* before his passing; I am uncertain as to whether he incorporated material from the *K. Ikhtilāf al-‘Irāqīyyīn*. See: ‘Abd Allāh Muḥammad Ḥibshī, *Jāmi‘ al-Shurūḥ wa’l-Ḥawāshī: Mu‘jam Shāmil li-Asmā’ al-Kutub al-Mashrūḥa fi’l-Turāth al-Islāmī wa-Bayān Shurūḥihā* (Abū Dhabī: al-Majma‘ al-Thaqāfi, 2004) i:270-1.

⁹ Details regarding the program may be obtained from <<http://shamela.ws/index.php/main>>.

manifold removes of time, space, social contexts, religious conviction, etc. — as well as language —, that degree of interpretation must be assumed to be all the greater. There is no reason, however, that a general level of “accuracy” may not be attained, with proper attention paid to context, cross references to other texts, and referrals to the more learned scholars who have immersed themselves in the subject-text (and subject matter) to a degree which the translator may never be able to attain. Nevertheless, I consider parallel translation imperative to this particular project; the presentation of the text in its target redaction alongside the attempted translation provides an invaluable tool to both reader and author alike.

For the reader, there lies a handy opportunity to assess the translation in light of his/her own interpretation, especially with concern to passages which might be deemed problematic. Nothing is more frustrating than being confronted with a straight translation and trying to determine an original term (with all its nuances) from even a simple word like “owner” (is it *rabb*, or *ṣāḥib*, or *mālik*?) And as for the translator, the benefits are at least twofold: 1) parallel columns provide an easy layout for constant revision; that is, more refined translations of terms may be culled from the further contexts in which they later appear, and one may easily go back and make revisions; and 2) the translator, having presented a mentor or peer with a parallel Arabic “original,” may benefit from comments with regard to all sections deemed problematic.

Additionally, I have insisted upon as *literal* a rendering as possible, in order to preserve — as close as may be — the nuances of the Arabic text: its word order, terminology, terseness, etc. Much of my translation, therefore, cannot be considered “good English” by any means; the end product is *unidiomatic*, and intentionally so. Still, I have also attempted, where necessary, to provide helpful markers and references, and to explain in brackets what I believe the textual voice intends. My aim, in the end, is not to produce a pleasing work of literature in English, but to “reproduce” (so far as I am capable) the form, content, and style of the subject-text as I have come to understand it. Ultimately, this is a project of immersion: putting the reader into the text, bringing the reader to acquire the semantics and syntax of the Arabic employed by our jurist authors — *not* consuming an easily digestible (and all-too easily misleading) idiomatic English.¹⁰

¹⁰ For more in this regard, please see my “Addendum: A Note on ‘Translations’” in Part I of this dissertation.

With regard to technical terms: for the most part I will favour the Arabic alone in transliteration, after that transliteration has been accompanied by a translation once or twice.¹¹ As for such terms which have (more or less) precise English counterparts — such as “depository” for *mustawdaʿ*, or “debt” for *dayn* — I will alternate between the English and transliterated Arabic as is most convenient. And as for non-technical terms which have variable meanings in English (like *ṣāhib*), I will routinely prefer the Arabic transliteration. The reader is left to infer the most relevant nuance from the context. Although this results in the rather unconventional presentation of plain transliterations employed in parallel to *urtext*, I would prefer the reader encounter — for *معنى* and *قياس* — the terms “*maʿnā*” and “*qiyās*” (pregnant with all the nuances they may have acquired in the reader’s experience), rather than “meaning” and “analogy” (which do no justice to what the Arabic terms comprise, and have great potential to mislead).

Moreover, the reader will note I have exceeded this unconventional procedure with another; namely, I quite frequently include entire phrases in transliteration, in parentheses, following upon the translated phrase. For example, from §52: “the *Sunna* of the Messenger of God, may God bless and save him, is the unequivocal interpreting text (*al-naṣṣu al-mufasssirat*) providing indicants for his non-specific *Sunna* (*tadullu ʿalā sunnatihi al-jumlatu*).” Although a number of readers have, understandably, marked this as superfluous (why transliterate when the Arabic *urtext* is right alongside?), I have not committed myself to this extra labour without reason. In fact, there are two motives: 1) to underscore the words and phrases which I deem important to this current study (in the example of §52: *naṣṣ*, *mufasssir*, *tadullu ʿalā*, and *jumla*); and 2) to impress these Arabic terms upon the reader in immediate juxtaposition with their translation, as precisely-paired units (rather than expecting the reader to hunt down the terms in the *urtext*). The result, I hope, is that the reader acquires, all at once: *urtext*, translation, and transliteration of noteworthy passages.¹²

I have also made many attempts to avoid ambiguities in the English text through the insertion, in [brackets], of what is made plain (semantically or

¹¹ E.g., *شفعة* might appear as “right of pre-emption (*shufa*)” once or twice, then simply “*shufa*” thereafter.

¹² If I may offer a final justification for these peculiarities, it would simply be that these procedures represent how I myself, as reader, would most wish a highly technical early Islamic legal text to be presented. I can only ask for the patience of readers who would prefer a flowing and idiomatic English (such as, e.g., Khadduri provides in his translation of the *Risāla*); and I would also ask that they take into account my motives and intentions, here rendered.

syntactically) by the Arabic text; so too, though more sparingly, I have employed bracket-insertions for the sake of allowing the English text to flow somewhat more smoothly. Finally, the footnotes may include some lighter legal-theoretical and dialectical analyses, but their main purpose here is to elucidate the translation, and to highlight material of import to the “Authenticity Questions” we will shortly discuss. Real analyses and assessments of legal-theoretical and dialectical material in the text — the very focus of this dissertation — are entirely the domain of Part I.

Now, this is a terse and difficult text at points; it was compiled by accomplished scholars of substantive law — not to mention master dialecticians — for well-initiated jurists deeply immersed in these traditions. The language requires, at times, a more thorough grasp of obscure grammatical usages and juridical jargon than the translator may currently possess. It is highly likely, therefore, that the more experienced reviewer will discover segments of the translation which he/she finds problematic, or even plainly erroneous. Again, this was a major impetus for my insistence on a parallel translation: the reader may immediately access the Arabic text whenever he/she discerns a problem. In a spirit of scholarly cooperation, the reader is invited to offer suggestions and/or corrections for incorporation into a more accurate draft.

Authenticity Questions

My General Approach Regarding the Authenticity of the Text

My position with regard to questions of “authenticity” — whether pertaining to the authorship of the *Umm* as a whole, or of the *Ikhtilāf al-ʿIrāqīyyīn* in particular; or to the transmission and redaction of the entire *Umm* compendium, or merely of our subject-text — may be stated in very plain terms: Whosoever would question the “traditional status quo” of how and by whom these texts were composed, compiled, and transmitted bears the onus of proof. And, to be blunt, I have yet to see creditable proof brought forward by anyone that would cause me to question that the *Umm* and its treatises are anything other than what they — by their very structure, internal consistency, and intra-*kitāb* references — claim themselves to be.¹

In other words, I believe the texts argue most eloquently on their own behalf with regard to authenticity, even without the supporting narratives from *madhhab* historians and bio-bibliographers which they enjoy; and, in the end, I will let our subject-text speak for itself (if not on behalf of the entire *Umm*). The reader will find my notes drawing attention to editorial clues and intra-*kitāb* references throughout the translation from beginning to end.

On the whole, I have attempted to maintain a neutral stance, allowing for the possibility that the authorship and transmission of our texts is not as traditional narratives (the “status quo”) would have us believe. But when all is said and done, I find the indicants of authenticity in our subject-text far outweigh the more arbitrary “proofs” for re-ascription and post-dating that I have, so far, encountered. In short, the more conspiratorial of theses appear to stand on shaky legs indeed. That being said, we will first turn our attention to traditional narratives of authorship and transmission, and then to the arguments of scholars who have questioned them. As for the rest, there is the text of the *Ikhtilāf al-ʿIrāqīyyīn*, and all that it says — directly and indirectly — with regard to itself and the other *kutub* of the *Umm* compendium.

¹ We will turn to the “traditional status quo” with regard to authorship and transmission, and to the current (and ancient) scholars who have challenged it, shortly.

The “Traditional Status Quo” for the Shaybānī Version of our Subject-Text

In order to acquire a sense of the “Traditional” narrative regarding the authorship and early transmission of the *Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā* (the Shaybānī Version), we need only turn to the editor of our first critical edition: Abū al-Wafā' al-Afghānī. I have summarized his remarks from the introduction to his edition in the table below, and we will consider this an overview of the “traditional status quo” for the Shaybānī Version.

- Abū Yūsuf [d.182/798] was a student of both Abū Ḥanīfa [d.150/767] and Ibn Abī Laylā [d.148/765]. In this book, Abū Yūsuf gathers together what they, specifically, disagreed about, and pays no attention to the *ikhtilāf* of others (like Sufyān al-Thawrī, Ḥasan b. Šālīḥ, Sharīk b. 'Abd Allāh, Ibn Shubruma, et al.), “because he took *fiqh* from the two (*tafaqqaha 'alayhimā*), and his desire was to compile what he derived from them, from what they disagreed upon, to make clear his *qawl* with [regard to] them, agreeing with this one and differing with that one at one time, and the opposite another time, and so that it be a treasure-store and remembrance for those who came after him.”²
- Muḥammad b. al-Ḥasan [al-Shaybānī; d.189/804] transmitted the *K. Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā* on the authority of Abū Yūsuf.³
- After this, “al-Ḥākim Abū al-Faḍl Muḥammad b. Muḥammad b. Aḥmad al-Marwazī al-Shahīd [d.334/945] abridged it along with all that he abridged of his [al-Shaybānī's] books;⁴ and al-Sarakhsī [d.483/1090] provided commentary upon it in his *Mabsūṭ*, with the rest of [al-Shaybānī's] books.”⁵
- Al-Afghānī determines from al-Sarakhsī's account that the *K. Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā* was originally among the parts of al-Shaybānī's *Aṣl* (else why would al-Ḥākim have abridged it?) Yet it does not seem to appear as an integral volume, as it does here; and at least in one MS, parts of it appear in related chapters of the *Aṣl*, preceded by headings such as *Bāb Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā fi'l-Waḍ'ā*. Al-Afghānī hypothesizes that it may appear piece-meal in other copies.⁶

² Afghānī, 3-4. Al-Afghānī praises the book, its rarity and qualities, and its *ḥujja* on the basis of *aḥādīth* and *āthār*, be they *marfū'a*, *mawqūfa*, *musannada*, or *munqata'a*. When the *Lajna* [i.e., the *Lajnat Iḥyā' al-Ma'ārif al-Nu'māniyya* in Hyderabad] desired to produce an edition, however, they found only one copy in all of India. Al-Afghānī then describes his procedure with regard to *takhrīj* and *tawḍīḥ* and *tarājim*, etc. (ibid., 5-6).

³ Ibid., 4.

⁴ The well-famed abridgment of al-Ḥākim al-Shahīd is his *Kāfī fi'l-Fiqh*.

⁵ Ibid. Al-Sarakhsī, in his *Mabsūṭ*, says that Abū Yūsuf “desired to compile the *masā'il* in which there was *ikhtilāf* from his two professors, so he gathered up this *taṣnīf*; and Muḥammad, may God have mercy on him, learned it from him, and transmitted it on his authority. Except for that he added a little of what he heard from others, the *aṣl* of the *taṣnīf* belongs to Abū Yūsuf, and the *ta'līf* belongs to Muḥammad, God's mercy on them both; and such is considered as the *taṣnīf* of Muḥammad. And due to this al-Ḥākim, may God have mercy upon him, mentioned him in the *Mukhtaṣar*.” (*Mabsūṭ* 30:129; quoted in Afghānī, 5).

⁶ Afghānī, 5.

The “Traditional Status Quo” for the *Umm* Version of our Subject-Text

As for the *Umm* Version of the *Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā*, we may again turn to an editor for his overview of the “traditional status quo” of composition and transmission. Ḥassūn provides brief overviews for all the treatises of the *Umm*, among them our subject-treatise; we find, however, that his narrative under the heading “*Kitāb Ikhtilāf al-‘Irāqīyyīn*, or *Kitāb Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā*” is largely a near verbatim repeat of al-Afghānī’s, which we have summarized above.⁷ I would conclude that Ḥassūn, like al-Afghānī, derived his narrative from al-Sarakhsī’s *Mabsūṭ*, or borrowed it wholesale from al-Afghānī’s edition of the Shaybānī Version.⁸ At any rate, what little we may add from Ḥassūn at this point is in the table below, and the rest which is of relevance to the authorship and transmission of the *Umm* Version will be treated in our discussions and summaries of the *Umm* compendium as a whole.

- “it contains the notes (*mulāḥazāt*) of al-Imām al-Shāfi‘ī on the book of Abū Yūsuf: the *Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā*...”⁹
- “... al-Shāfi‘ī came along and [re]stated what Abū Ḥanīfa and Ibn Abī Laylā disagreed about according to Abū Yūsuf, and added to it his notes, supported by *aḥādīth* and *āthār*.”¹⁰

The “Traditional Status Quo” for the *Kitāb al-Umm*

As for the authorship and transmission of the *Umm* compendium as a whole, Ḥassūn provides a far more detailed narrative. This terminates in a lengthy argument against a certain scholar who has attempted to attribute authorship of the entire *Umm* corpus to one of al-Shāfi‘ī’s famed students, al-Buwayṭī (d.231/846). Before turning to this, however, we will summarize Ḥassūn’s narrative as representative of a “traditional status quo:”

- The *K. al-Ḥujja* (al-Shāfi‘ī’s “old doctrine” compendium of *fiqh* and *furū‘*, transmitted on his authority by his Baghdādī *aṣḥāb*) is the *vorlage* (*aṣl*) of the *K. al-Umm*; the most well-known transmitters of the *Ḥujja* are al-Za‘farānī [d.260/874] and al-Karābīsī [d.245/859 or 248/862], and it was a massive tome.¹¹
- “Al-Buwayṭī said: al-Shāfi‘ī said: The *Aṣḥāb al-Ḥadīth* met with me and requested

⁷ Ḥassūn, vol. 1 (Intro.), 93-4.

⁸ The only citation he provides is the same that al-Afghānī provides for a passage from the *Mabsūṭ* [30:128].

⁹ Ḥassūn, vol. 1 (Intro.), 93.

¹⁰ Ibid., 94. As we have seen, this is a vast understatement of al-Shāfi‘ī’s (and al-Rabī’s) contribution to our subject-text; Ḥassūn has more than made up for this, however, in his descriptions of the overall *jadali* nature of the *Umm* compendium which we related near the end of Chapter I in Part I of this dissertation.

¹¹ Ḥassūn, vol. 1 (Intro.), 79.

that I compose something on (*an aḍʿa ʿalā*) the book of Abū Ḥanīfa, so I said: I won't know their doctrine (*qawlahum*) until I research their books. Then I issued an order, and the books of Muḥammad b. al-Ḥasan were written for me, and I perused them for a year until I committed them to memory, then I composed *al-Kitāb al-Baghdādī*. Al-Buwayṭī said: He means *al-Ḥujja*.¹² Other sources mention the “old doctrine” contents of the *Ḥujja*, and its composition in Iraq.¹³

- Ḥassūn quotes the following passage from the *Fihrist* of al-Nadīm [d. ca. 385/995]: “There belonged to [al-Shāfiʿī] of books (*kutub*): a *Kitāb al-Mabsūṭ fi'l-Fiqh*, transmitted on his authority by al-Rabī b. Sulaymān [d.270/883] and al-Zaʿfarānī; and this book (*kitāb*) contained a *Kitāb al-Taḥāra*, *Kitāb al-Ṣalāt*, *Kitāb al-Zakāt*, *Kitāb al-Ṣiyām*, *Kitāb al-Ḥajj*, *Kitāb al-Iʿtikāf*, *Kitāb al-...* [i.e., all the *abwāb* of *fiqh*]¹⁴
- Ḥassūn posits the probability there wasn't much *ikhtilāf* between the *Mabsūṭ*, the *Ḥujja*, and the *Umm*; except for time, place, and [argumentative] power; additions and subtractions. The new *madhhab*, he says, was an extension of the old — a natural development, not entirely different from the old, except that al-Shāfiʿī recanted (*rajaʿa ʿan*) some of the doctrines he stated in Iraq.¹⁵
- Ḥassūn speculates with regard to these different titles: “Why is it that al-Rabī is famed for transmitting the *K. al-Umm* from al-Shāfiʿī, may God be pleased with him, and al-Zaʿfarānī for transmitting the *K. al-Ḥujja* from al-Shāfiʿī...; then Ibn al-Nadīm claims that the *Mabsūṭ* transmitted by al-Zaʿfarānī was arranged like the *Mabsūṭ* transmitted by al-Rabī, with slight discrepancies, and that the people don't practice al-Zaʿfarānī's *Mabsūṭ*, but only practice the *K. al-Ḥujja* and the *K. al-Umm*; unless the *Mabsūṭ* of al-Zaʿfarānī, which is the *Ḥujja*, is the *Mabsūṭ* of al-Rabī? That indicates that the *K. al-Mabsūṭ* does not differ much from the *K. al-Ḥujja*, which itself is the *aṣl* of the *K. al-Umm*; even though the *Mabsūṭ* of al-Zaʿfarānī which is the *Ḥujja* originated in Baghdad before the coming of al-Shāfiʿī to Egypt, and the *Mabsūṭ* of al-Rabī which is the *Umm* originated in Egypt, and it is the more powerful, and the one that is practiced, indeed, as it represents al-Shāfiʿī's new *madhhab*.¹⁶

¹² Citing Ibn Ḥajar al-ʿAsqalānī's *Tawālī al-Taʿsīs*; Ḥassūn, vol. 1 (Intro.), 79 and n.1.

¹³ Ḥassūn cites the *Tawālī al-Taʿsīs* and the *Kashf al-Ẓunūn*. Ḥassūn interprets this to mean that al-Shāfiʿī's old doctrine in Baghdad was, for the most part, a response (*radd*) to the *madhhab* of the Ahl al-Ra'y, and that it was close to the *madhhab* of the Ahl al-Ḥadīth.

¹⁴ Ḥassūn, vol. 1 (Intro.), 79-80. Ḥassūn continues to quote al-Nadīm with regard to the slight discrepancies in al-Zaʿfarānī's transmission; the *fuqahā* don't request, and don't practice, the recension of al-Zaʿfarānī, only that of al-Rabī. He then turns to al-Subkī [*Ṭabaqāt al-Shāfiʿiyya al-Kubrā*, al-Ḥusayniyya ed., 275], who mentions that the famed *Mukhtaṣar* of al-Buwayṭī was, according to Abū ʿĀṣim, systematically arranged according to the chapters of this *Mabsūṭ* (Ḥassūn, vol. 1 (Intro.), 80). Elsewhere, Ḥassūn notes a (relatively) early reference to the *Umm* and its many *kutub*: “Al-Bayhaqī [fl. ca. 402/1011; some 20 years after the death of al-Nadīm] mentioned *al-Kitāb al-Umm* [in his *Manāqib*], and that it was a *muṣannaf fi'l-furūʿ*, and that its *kutub* amounted to 128 books” (ibid., 93).

¹⁵ Ibid. (We have marked this, of course, as an indicant of the sincere dialectician “following the *ḥujja*” according to the truth-seeking ethic of dialectic.) Ḥassūn says: The foundation of al-Shāfiʿī's old *madhhab* was the *K. al-Ḥujja*; so, too, is it the foundation of the new *madhhab*, after a few improvements, and the changing of its name from *al-Ḥujja* to *al-Umm* (ibid.)

¹⁶ Ibid., 80-1. He continues in this vein, noting that it is probable that al-Shāfiʿī did not label his “old” or “new” books with a specific name, but was satisfied to mention the “Baghdādī” if he meant the old. Some of his *aṣḥāb* called his old book *al-Ḥujja*, as he composed it as a *ḥujja* against the Ahl al-Ra'y, and some of them called it the *Mabsūṭ*; and his new book was called *al-Umm* because it is a collection of al-Shāfiʿī's *fiqh* works, but some of them called it the *Mabsūṭ*; and the *K. al-Umm* was also known as the *Kitāb al-Rabī* (he cites the *Ṭabaqāt* of al-Nawawī, as quoted in

- The *K. al-Umm* is among the most important and comprehensive of the books of al-Shāfiʿī. It was transmitted on his authority, his new *madhhab* regarding the *abwāb* of *fiqh*, by four of his students: al-Muzanī [d.264/877], al-Buwayṭī [d.231/846], al-Rabīʿ al-Jīzī [d.256/870 or 257/871], and al-Rabīʿ b. Sulaymān al-Murādī [d.270/883].¹⁷

Perhaps the most eloquent of Ḥassūn's narratives for the composition and transmission of the *Umm*, however, are to be found some pages after his refutation of the re-ascription claims to which we will shortly turn. Because Ḥassūn presents a detailed picture with regard to stages of authorship, compilation, and editing; and because we will see so many signs of these stages — just as Ḥassūn describes them — in our own subject-treatise; I will here quote passages from Ḥassūn's discussion in full. Among them:

- “Al-Shāfiʿī composed many books, some of which he wrote by himself and recited to the people, or they recited to him, and some of them he delivered as dictations; and many of his books have been lost. That is to say that he composed in Mecca, and composed in Baghdad, and composed in Egypt; and what he composed in Mecca and Baghdad have been lost, and what remains in the hands of the ‘*ulamāʾ*’ of his books, now, are what he composed in Egypt. And it is this book, *al-Umm*, in which al-Rabīʿ gathered together (*jamaʿa fīhi*) some of the books of al-Shāfiʿī, and called it by this name, after having audited these books from him. And what eluded his audition, he makes clear; and what he found in al-Shāfiʿī's script, but didn't audit from him, he also makes clear. Just as the Ahl al-ʿIlm from among those who recite this *K. al-Umm* know.¹⁸ And [the same goes for] the *K. Ikhtilāf al-Ḥadīth*, and the *K. al-Risāla*, they are

the *Tamhīd li-Tārīkh al-Falsafa al-Islāmiyya* of Professor Mustafā ʿAbd al-Razzāq). Ḥassūn then quotes Aḥmad Muḥammad Shākir's introduction to his edition of the *Risāla*, to the effect that it was al-Rabīʿ who called the new book *al-Umm*, having gathered in it some of the books of al-Shāfiʿī (ibid., 82; cf. Shākir, 9).

¹⁷ Ḥassūn, vol. 1 (Intro.), 82. Ḥassūn notes that the *fatwā* is to be based on what is in the new [doctrine], excluding the old, as al-Shāfiʿī had recanted it, and said: “I make no allowance for he who transmits it from me (*lā aḡʾalu fī ḥillin man rawāhu ʿannī*);” except with regard to uncomplicated *masāʾil*, like the ‘seventeen’ — one bases *fatwās* for them on the old doctrine, except when the *qadīm* is supported by a *ḥadīth ṣaḥīḥ* having no *muʿārid*. For if it is supported by a *dalīl*, then it is the *madhhab* of al-Shāfiʿī — it is true that he said: ‘If the *ḥadīth* is *ṣaḥīḥ*, then it is my *madhhab*; don't give a hoot about my *qawl*’” (ibid., 82, and again on 88, almost verbatim). Again, we may mark this as an indicant of the strong truth-seeking dialectical ethic. Stronger indicants yet are provided by Ḥassūn, who later says that in the *Umm* we have the greatest legacy (*athar*) of al-Shāfiʿī, “and within it we find *akhbār* of al-Shāfiʿī's renunciation of some of his opinions, and sections on *uṣūl al-fiqh*.” We are reminded that his doctrine is split into old (Iraqi) and new (Egyptian), and: “that is to say that when he came to Egypt he renounced some of his *aqwāl* he used, before, to affirm; and the reason is that he mixed with the scholars of Egypt, and he heard what was *ṣaḥīḥ* of their *ḥadīth*, and he heard the pupils of al-Layth b. Saʿd [d.175/791] transmit his opinions and his *fiqh*, and he saw that some of the social conditions in Egypt differed from those he had seen in the Ḥijāz and in Iraq. And so the *fiqh* of al-Shāfiʿī, to the extent of some of his *aqwāl*, was changed, and it was called *al-madhhab al-jadīd*” (ibid., 88).

¹⁸ Cf. my “final word on the authorship question,” below. In a footnote attached to his refutation of re-ascription claims, Ḥassūn quotes from Abū Zahra's biography. Here we find further details with regard to al-Rabīʿ's caution in detailing sources, and whether he heard it from al-Shāfiʿī, or merely knows that al-Shāfiʿī said it, etc.; correcting and explaining errors of transmission, and

- among what al-Rabī transmitted on the authority of al-Shāfi‘ī separately, and didn’t enter into the *K. al-Umm*.”¹⁹
- “From a thorough examination (*istiqrā’*) of the books of al-Shāfi‘ī, it is made clear that he renewed the compilation of his books in Egypt from his memory, and his books were not all with him. Observe him as he says, in the *Risāla*, §1184: And every *ḥadīth* I wrote is interrupted (*munqaṭi‘an*), for I had heard it uninterrupted (*muttaṣilan*), or widespread (*mashhūran*) on the authority of the one from whom it was transmitted, by collective conveyance (*bi-naqli ‘āmmatin*) from the Ahl al-‘Ilm, who know it from a collectivity (*min ‘āmmatin*). But I disliked putting down a *ḥadīth* I had not mastered by memory (*lā utqinuhu ḥifẓan*), and some of my books were absent from me. So I verified, by means of what the Ahl al-‘Ilm knew of what I had memorized. Then I abbreviated, fearing lengthy writing, and arrived at what is sufficient for some of it, without a thorough examination (*taqaṣṣī*) of the ‘ilm regarding every issue.”²⁰
 - “It is most apparent that he renewed the compilation of the *Risāla* after compiling most of the books in the *Umm*, because he points often in the *Risāla* to subjects which are written therein, and he says, for example [§1173]: ‘I have explained (*qad fassartu*) this *ḥadīth* before this passage (*mawḍi‘*). And this is an allusion to what is in the *Umm* [6:77 of the Amīriyya edition].”²¹

Scholars Questioning the Authorship and Transmission of the *Kitāb al-Umm*

Before turning to Norman Calder’s attempt to post-date the composition and compilation of the *Umm* corpus past the era of al-Rabī b. Sulaymān, we will quickly review another modern scholar’s attempt at re-ascription; more accurately, I will present the arguments of Ḥassūn and Shākir against this re-ascription attempt. These two scholars are doubtless far more learned on the topic than I could hope to be.

In brief, the well-known Egyptian academic Dr. Zakī Mubārak (d.1952),²² apparently expanding upon a claim by the fourth century Ṣūfī *shaykh* Abū Ṭālib al-Makkī (d.386/996), then echoed by the famed Abū Ḥamid Muḥammad al-Ghazālī (d.505/1111) in his *Iḥyā’ ‘Ulūm al-Dīn*, put forward an argument that it was al-Shāfi‘ī’s

changes in al-Shāfi‘ī’s sayings; i.e., “He also used to say such-and-such...” (Ḥassūn, vol. 1 (Intro.), 91). We will note more than one instance of the same editorial caution in our subject-text.

¹⁹ Ḥassūn, vol. 1 (Intro.), 121-2.

²⁰ Ibid., 122. It is difficult to conceive of a finer show of truth-seeking sincerity and scholarly caution than this explanation provides. Another is provided in a subsequent quote: “And he [al-Shāfi‘ī] says in the *K. Ikhtilāf al-Ḥadīth*: A *thiqa* had related to me (*ḥaddathani*) that al-Ḥasan used to insert between him and ‘Ubāda: Ḥiṭṭān al-Raqqāshī. And I don’t know whether or not ‘Abd al-Wahhāb inserted him between them, then it vanished from my book when I transferred it from the *aṣl*. And the *aṣl*, on the day this book was written, was absent from me” (ibid.)

²¹ Ibid., 122-3. A key feature of our subject-text, which we will explore in numerous footnotes and an appendix, is the frequency with which al-Shāfi‘ī says, e.g., “and we have set this down in the *Kitāb al-Aqḍiya*” (§53); or “and this is written in the *Kitāb al-Rahn*” (§388); or “and the *aṣl* of this is written in the *Kitāb al-Itq*” (§681); etc. There are well over twenty such “intra-*Umm* / *Hujja* / *Mabsūṭ*” references in our subject-text alone.

²² Presumably in his *Iṣlāḥ Ashna’ Khaṭa’ fī Tārīkh al-Tashrī‘ al-Islāmī: Kitāb al-Umm : lam Yu’allifhu al-Shāfi‘ī wa-innamā Allafahu al-Būwayṭī wa-Taṣarrafa fīhi al-Rabī b. Sulaymān*.

student al-Buwayṭī — *not* al-Shāfi'ī himself — who authored the *Umm*, and that al-Rabī', in effect, plagiarized it from him. This argument extends to the *Risāla* as well, and we will review Shākir's refutation of Mubārak²³ after Ḥassūn's. As for this latter, his counter-argument (mostly against al-Makkī and al-Ghazālī) may be found in a massive footnote — which in turn spawns its own footnotes — extending for more than four pages of the introduction to his *Umm* edition.²⁴ He first presents an overview of the claims, then launches into his own argument. I have attempted a summary in the following table:

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| <ul style="list-style-type: none"> • there is <i>ijmā'</i> of the '<i>ulamā'</i>' that the <i>Umm</i> is, all of it, “composed by (<i>min taṣnīf</i>) al-Shāfi'ī,” and transmitted by al-Rabī' al-Murādī • there was no claim to the contrary until the end of the fourth century H; this claim was that it was not the composition (<i>taṣnīf</i>) of al-Shāfi'ī, but the compilation (<i>ta'līf</i>) of al-Buwayṭī, taken by al-Rabī', who added to it, then promoted it, and that this is what the people audited • this claim first appeared in the <i>K. Quwwat al-Qulūb</i> of Abū Ṭālib al-Makkī, a Ṣūfī; and it was repeated, almost verbatim, by al-Ghazālī in his <i>Ihyā'</i>²⁵ • the claim was then taken up by Dr. Zakī Mubārak (with no convincing support or cogent argument), who asserts that there are words in the <i>Umm</i> which indicate it could not have been written by al-Shāfi'ī • Ḥassūn next reproduces the relevant text from the referenced works of both al-Makkī and al-Ghazālī; then he makes his case, as follows: <ul style="list-style-type: none"> ○ 1) there was <i>ijmā'</i> that the <i>Umm</i> was the compilation (<i>ta'līf</i>) of al-Shāfi'ī for a century and a half — al-Makkī's claim flew in the face of it, and was neither considered, nor discussed ○ 2) if he [al-Makkī] meant <i>ta'līf</i> when he said <i>taṣnīf</i>, then there is more than enough in the <i>Umm</i> to refute his claim. But if he meant by <i>taṣnīf</i>: assembling (<i>al-tajmī'</i>) and arranging (<i>al-tartīb</i>), which is indicated by his saying “indeed it is merely the assemblage of al-Buwayṭī (<i>wa innamā huwa jam'u al-Buwayṭī</i>);” then, Ḥassūn claims, the <i>Umm</i> is merely a continuation of the <i>K. al-Hujja</i>. Their arrangement (<i>tartīb</i>), in other words, was the same; the only difference is that al-Shāfi'ī recanted some of his earlier doctrines.²⁶ ○ 3) all of this indicates that the <i>Umm</i> was the <i>ta'līf</i>, <i>jam'</i>, and <i>tartīb</i> of al-Shāfi'ī, that his role with regard to the <i>Umm</i> was the same as his role regarding the <i>K. al-Hujja</i>, and that his <i>aṣḥāb</i> were nothing but transmitters from him. The claim that al-Buwayṭī composed it is annulled. • Ḥassūn then proceeds to a set of interlinked arguments which, not surprisingly, show more than a little bit of the “hypothetical” argument style of al-Shāfi'ī himself <ul style="list-style-type: none"> ○ Suppose, for the sake of argument, that the <i>Umm</i> was indeed first compiled by al-Buwayṭī. This means either: |
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²³ Shākir, (Intro.) 9-10.

²⁴ Ḥassūn, vol. 1 (Intro.), 88 (n.1) – 92 (with 15 additional footnotes along the way).

²⁵ Ḥassūn cites Muḥammad Abū Zahra's biography of al-Shāfi'ī, and the introduction to Shākir's edition of the *Risāla*.

²⁶ Here, Ḥassūn reiterates most of his earlier discussion regarding the *Hujja*, *Mabsūṭ*, and *Umm*, as we have summarized in the previous table.

- a) al-Rabī propagated the *Umm* with the permission of al-Buwayṭī, and ought to be praised, not belittled; or...
- b) al-Rabī misappropriated it — a dangerous accusation against one of the great scholars for whom there is consensus upon his trustworthiness
- Ḥassūn then brings certain pre-modern criticisms of al-Makkī, which claim that he mixed up his words, and that people lost faith in him and abandoned him; i.e., that he was in no position to claim untrustworthiness, and not one of the *Ahl al-Jarḥ wa'l-Ta'dīl*. Al-Makkī's book has also been criticized for employing faulty *ḥadīth*.
- Based on all of this, al-Makkī's *tajrīḥ* and accusation against al-Rabī must be rejected. Al-Ghazālī's repeating of it is therefore rendered meaningless, as he provides no additional evidence in its support.
- And again, Ḥassūn brings a "hypothetical" argument in the style of al-Shāfi'ī
 - Suppose, for the sake of argument, that al-Rabī took the *Umm* from the *jam'* of al-Buwayṭī...
 - Why would he need to do so, when he is famed for transmitting it in its entirety straight from al-Shāfi'ī (like all the other greats of his *aṣḥāb*), and praised specifically by al-Shāfi'ī for just that?
 - There is no need whatsoever for him to take from al-Buwayṭī, even if al-Buwayṭī was more knowledgeable in *fiqh* (*afqah*). This is a matter of transmission (*naql*) and narration (*riwāya*), not superiority in *fiqh*.
- Finally, Ḥassūn turns to Dr. Zakī Mubārak by reproducing Shākir's refutation of his claims (see our summary in the following table)

Shākir's refutation of Mubārak, like Ḥassūn's after him, stresses that certain of his claims lead to consequences which are quite difficult to account for. More importantly, he indicates that the writings attributed to al-Shāfi'ī are themselves replete with proofs of authenticity. This, in my opinion, is the strongest of arguments which may be levelled against claims of re-ascription; Mubārak, it would seem, like Calder after him, made no mention nor took any account of the multitudinous indicants for authenticity within the larger corpus (the consistency of editorial remarks, the frequency of "intra-references" to other *kutub* in the corpus, etc.) These scholars, instead, have hinged their arguments upon a handful of "proofs" which are, in the end, only "proofs" by way of a very particular and, dare we say, *aprioristic* interpretation. In any event, Shākir's refutation may be summarized thus:

- Dr. Zakī Mubārak claims that the *Umm* was not authored by al-Shāfi'ī, but is the *ta'līf* of al-Buwayṭī, and was taken from him after his death by al-Rabī, who then attributed it to himself. He rests his claim on that of al-Makkī, and al-Ghazālī's transmission of it.
- With regard to Mubārak's "little book," Shākir says "the best of what is in it, is that it was written by the pen of an eloquent author; but the proofs (*ḥujaj*) for the refutation of his writing are plentiful throughout the books of al-Shāfi'ī themselves."

- Shākir then points out the following:
 - Mubārak’s claim entails questioning the whole community of ‘ulamā’ and their methods, by whom ‘ilm and Sunna have come down to us
 - al-Rabī was highly regarded for his transmission-trustworthiness (*thiqa*)
 - the charge that al-Rabī stole it from al-Buwayṭī and claimed it for his own entails that al-Rabī *lies every time* he attributes something to al-Shāfiʿī in the text
- Shākir reproduces later claims that refute this misattribution, then relates how al-Buwayṭī used to say: “al-Rabī is more firmly established (*athbat*) in al-Shāfiʿī than I am,” and that Abū Zurʿa al-Rāzī audited all of the books of al-Shāfiʿī from al-Rabī four years before the death of al-Buwayṭī²⁷
- In defense of being so critical of Mubārak’s claims, Shākir admits that he has no choice — even though Mubārak is a respected friend; for the consequences of such claims left unrefuted are enormous, and must lead to absurdities. Shākir then details one of those claims, as follows:
 - the expression “he reported to us (*akhbaranā*)” does not indicate the auditing of a narration (*riwāya*), but ‘report’ (*ikhbār*) sometimes means transmission and rationalized opinion (*al-naql waʿl-raʾy*); Mubārak gives the example of where al-Shāfiʿī said “*akhbaranā Hashīm*,” yet could never have met Hashīm, who died before al-Shāfiʿī came to Baghdad
 - Shākir, however, protests that nowhere does al-Shāfiʿī say “*akhbaranā Hashīm*,” only “*Hashīm*” — Mubārak, moreover, excludes the explanation of al-Bulqīnī for all of this, although Bulqīnī is his source; and he is guilty of adding the word “*akhbaranā*” where it never existed, in order to further his argument²⁸

And with this we will turn at last to Calder — who, to my knowledge, nowhere references Mubārak’s re-ascription claim. Instead, Calder pursues a course of literary analysis — “an emphatically secular exercise in historical reconstruction” — on the model of, among others, John Wansbrough and Jacob Neusner.²⁹ Unfortunately, I have found Calder’s arguments to be baffling in the extreme. On the whole, his conclusions are based upon unexplained assumptions of what must belong to what era, and what portion of his textual sample is more or less sophisticated than another portion. Moreover, this is compounded by his selection of — and restriction to — less than two

²⁷ Shākir, 9-10; quoted in full in Ḥassūn, vol. 1 (Intro.), 91-2.

²⁸ Shākir, 10; quoted in full in Ḥassūn, vol. 1 (Intro.), 92. To this we might add the following question: Supposing that the text actually did say “*akhbaranā Hashīm*,” how would this provide indicant that the work was authored *after* the death of al-Shāfiʿī? Whatever the reasoning, such an indicant would better serve one claiming the text was authored *before* al-Shāfiʿī. Of course, my point is simply that “proofs” of this sort (even when genuinely found in the text) can go either way.

²⁹ Calder, *Studies*, ix-x.

pages of text from a single chapter from the entire *Umm* compendium which, as we have seen it described, is a collection of some 120 and more different *kutub*.³⁰

In short, I have been unable to fathom Calder's reasoning throughout his treatment of the *Umm*; I read only unsupported assumptions and misrepresentations, and do not deem it the reader's duty to second guess the often unexpressed logic which may lie behind them. Nevertheless, I will here present a portion from his discussion, followed by my own objections:

- “The attribution of two items (Paras. 3 and 4) to Rabīʿ would seem to imply that these are late additions interpolated into a text which is otherwise fully attributed to Shāfiʿī. This conclusion, however, presents problems. Paragraph 3 gives expression to a number of juristic rules regarding the sweat of humans and animals, and the *suʿr* of animals, all of which are formally related on the authority of Rabīʿ. But the sweat of animals is explicitly also the subject matter of Paragraph 6 (anonymous, but read as from Shāfiʿī), and is raised again at Paragraph 15.2. The *suʿr* of animals is the subject-matter of 5.2 (to be understood as from Shāfiʿī) and remains the main subject-matter from Paragraph 9 to the end of the passage. The problem is this: if Rabīʿ had before him a text including all the material that is now before us, why should he have introduced his own opinion—with miserably rudimentary arguments—into a passage by Shāfiʿī in which the questions he, Rabīʿ, raised were more circumstantially dealt with by his acknowledged master? The answer I would propose is that there was no such text by Shāfiʿī, not even in the time of Rabīʿ.”³¹

Now, the paragraphs 3 and 4 referenced by Calder, by his own translation, read as follows:

- 3. 1. Rabīʿ said: The sweat of a Christian woman, of a ritually impure [woman], and of a menstruating woman is pure (*ṭāhir*).
- 3.2. Likewise the Magian [person].
- 3.3. The sweat of all animals (*dābba*) is pure.
- 3.4. The *suʿr* of animals (*dābba*) and predatory animals (*sibāʿ*), all of them, is pure; except the dog and the pig.
- 4. Rabīʿ said: That is Shāfiʿī's view.³²

So far as I can tell, Calder's “problem” simply vanishes upon closer inspection, as follows: First of all, if we read 3 and 4 as they appear in the text, then al-Rabīʿ has *not* “introduced his own opinion—with miserably rudimentary arguments.” Rather, he has

³⁰ My point being that whatever one “discovers” in one *kitāb* insofar as post-dating indicants are concerned, need not necessarily apply outside that *kitāb*. If Calder's “analyses” prove anything at all, they do so only for that section of text he selected, not for the rest of the *kutub* and treatises in the *Umm*. I cannot conceive of a single site where similar “analyses” could apply to the *Ikhtilāf al-ʿIrāqīyyīn*, for example.

³¹ Calder, *Studies*, 74.

³² *Ibid.*, 70.

listed a series of plain substantive rulings, *with no arguments*, and attributed them to al-Shāfiʿī. This is a simple function of commentary, not an argumentative intrusion.

Second, if I understand Calder’s gist, another part of the “problem” is that this listing of rulings repeats what al-Shāfiʿī argues in subsequent paragraphs. And yet, in the whole of Calder’s sample, nowhere does al-Shāfiʿī mention the sweat of a Christian woman, a ritually impure woman, a menstruating woman, or a Magian (3.1-2). Each of these, quite obviously, is a specific *masʾala* which either has been, or might be, raised in a debate.³³ Moreover, this is something that Calder appears to recognize in a subsequent and largely tangential discussion.³⁴ The worst textual “problem” thus far, however, is that al-Rabī has introduced four *masāʾil* of *ikhtilāf* which might be subsumed by al-Shāfiʿī’s more general ruling in paragraph 6.³⁵ As we see, however, this is not Calder’s interpretation.³⁶

Finally, with regard to 3.3 and 3.4, we see that the sweat of the *dābba*, and *suʾr* of *dābba* and *sibāʿ*, are indeed addressed directly by al-Shāfiʿī (in 6 and 5.2, respectively); and that in both (al-Rabī’s) 3.4 and (al-Shāfiʿī’s) 5.2, dog and pig are exceptions. We will note, however, that al-Rabī merely states that sweat and *suʾr* are *ṭāhir*; while al-Shāfiʿī discusses them in the context of sweat dripping into water, and saliva mixing with water. Al-Rabī’s statements, in other words, are more general. Still, the worst “problem” which paragraphs 3 and 4 pose, so far as I can tell, is that al-Rabī initiates a transmission of al-Shāfiʿī’s arguments and “instructional” dialectical sequences (of which we noted there are three) by listing some of al-Shāfiʿī’s rulings relating to the *masāʾil* at hand — some more specific, and some more general; some dealt with by al-Shāfiʿī in subsequent sections, and some not. Not only is the “problem” still ambiguous from a straight reading of the text, I am at a complete loss as to how this might constitute, in any way, a proof that “there was no such text by Shāfiʿī, not even in the time of Rabī.”

³³ We will note that Calder’s sample text contains no less than three short dialectical Q&A sequences of the type we have labelled “instructional” (*fa-in qāla qāʾil...* etc.) Calder mentions nothing of dialectic, however, nor of the obvious didactic intent of these sequences (and of all the dialectic in the *Umm*, for that matter).

³⁴ *Ibid.*, 74-5.

³⁵ “the sweat of men and animals (*ʿaraq al-insān wa-l-dābba*) is not impure, no matter where the sweat comes from...” (*ibid.*, 74)

³⁶ He sees it as a “gradual expansion” of the passage, one *masʾala* at a time — an “organic growth.” This is supported by such assumptions as that the placement of a gender-specific *al-naṣrāniyya* next to a gender-neutral *al-majūsī* is “illogical” (*Studies*, 75).

Calder, however, interprets all of paragraphs 3 and 4 as *pre*-dating 5.2, 6, 9ff., and 15.2. Thus, if I understand correctly, “rudimentary” and repetitive are markers of “older,” while: “Longer passages incorporating a coherent and consistent rational argument, as at Paragraphs 7 and 8, or a lengthy, subtle, and nuanced exegetical argument, as at Paragraphs 9-15, are probably to be understood as later developments.”³⁷ Not surprisingly, we then hear that “this is consistent with the supposition that these materials were added to the ‘Rabī said’ passage rather than that the Rabī material was interpolated into a previously existent text by Shāfiʿī.”³⁸ And then, that “the content of the Rabī passage (unnecessarily repeating material also presented, and in a superior manner, under a *qāla al-Shāfiʿī* rubric) and the form (rudimentary in argument, and archaic and incoherent in its formal development) suggest that the material attributed to Rabī here is older than the material attributed to Shāfiʿī.”³⁹

In the end, unexplained assertions fuse with assumptions, and a circle becomes complete: 1) al-Rabī’s list of substantive rulings is deemed an argument; 2) this in turn is deemed rudimentary, archaic, and incoherent; 3) one of the reasons stated for this is that it is “unnecessarily repeating material also presented, and in a superior manner, under a *qāla al-Shāfiʿī* rubric;” and 4) somehow, this material it repeats, in inferior manner, *post-dates* it. Paragraphs 3 and 4 are older because they are cruder; cruder, in part, by their repetition of what is more sophisticated; while what is more sophisticated is more recent; all of which hinges on an original, and unexplained, assessment of a simple listing of substantive rulings as rudimentary, archaic, and incoherent. Assumptions are built upon complementary assumptions; *circulus in probando*.

We could go on in this vein, but will leave the reader to judge both Calder and myself. To be certain, Calder’s arguments continue past the point I have left them for a number of pages; I have found them all to be of the same quality, however. Addressing the entire chapter will require a paper all its own: another open door. For the time being, critiquing Calder’s argument from the basis of “al-Rabī said” vs. “al-Shāfiʿī said” material is more than sufficient. The reader is invited to compare Calder’s selected

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid. Parentheses are Calder’s. We have already noted that al-Rabī’s listing of substantive rulings in no way constitutes an argument. Now, however, this listing is not only again referred to as “rudimentary in argument,” but as “archaic and incoherent in its formal development.” If the reader returns to paragraphs 3 and 4, I am certain that he/she will be as perplexed as I am as to how any of these descriptors apply. They have been asserted, certainly, but not explained.

paragraphs 3-4 above with the following sections of our subject-text: §§20, 74, 199, 309, 350, 439, 499, 510, 843, 955-6, 1004, 1154, 1179, and 1329. All of these sections feature al-Rabī's arguments or editorial comments, stated in such a way which simply defies Calder's assessment that the Rabī layer is the oldest. These sections of our subject-text, and those presentations featuring al-Rabī's voice in our appendices, are more than sufficient to problematize Calder's assertions past the point of recovery.

In further defence of my critique, I will only add that I am not alone in finding Calder's post-dating attempts problematic. Ahmad al-Shamsy has provided solid support for the authentic ascription of both *Umm* and *Risāla* to al-Shāfiʿī;⁴⁰ Joseph Lowry has problematized Calder's post-dating of the *Risāla*;⁴¹ and Wael Hallaq has refuted Calder's post-dating of Mālik's *Muwatṭaʿ* and Saḥnūn's *Mudawwana*.⁴² In the end, Calder's assessment of the *Umm* is surprisingly inconclusive in formulation. After having pinned further arguments upon yet another unproven assumption ("hermeneutic material [is] clearly secondary to established law");⁴³ he concludes:

"Providing a date for this kind of material is almost pointless. Conceding a (surely limited) impetus from Rabī himself, the growth of the text can be placed in the second half of the third century, with most of the material and all of the most sophisticated argument entering the text towards the end of that period. Stabilization of the text was slow, and, as in the case of the *Aṣl*, scarcely achieved in medieval times. There are obvious (and probably minor) interpolations from much later than the third century and no evidence of any major redaction achieved before the decisive intervention of Sirāj al-Dīn Bulqīnī (d. 805 [H])."⁴⁴

After translating and analyzing our subject-text, it is clear to me that the above narrative finds no application or relevance whatsoever to the *Umm* Version of the *Ikhtilāf al-ʿIrāqīyyīn*. Not only do we find "sophisticated" arguments attributed to al-Rabī (as well as the plain commentary material), the numerous intra-*kitāb* references and other indicants all point towards authenticity. If our analyses in

⁴⁰ See his: "The First Shāfiʿī: The Traditionalist Legal Thought of Abū Yaʿqūb Al-Buwayṭī (D. 231/846)," and his PhD dissertation: *From Tradition to Law: The Origins and Early Development of the Shāfiʿī School of Law in Ninth-Century Egypt*.

⁴¹ See his: "The Legal Hermeneutics of Al-Shāfiʿī and Ibn Qutayba: A Reconsideration."

⁴² See his: "On Dating Mālik's *Muwatṭaʿ*."

⁴³ Calder, *Studies*, 82. See our discussion of Calder's evolutionary narrative for *uṣūl al-fiqh* in Chapter IV.2 of Part I of this dissertation. This is a common theme, linked to the supposed primary function of *uṣūl al-fiqh* as "descriptive."

⁴⁴ *Ibid.*, 83.

Part I have neglected to highlight other marks of authenticity, our subject-text will speak on its own behalf in Part II.⁴⁵

A Final Word on the Authorship Question

The reader will recall that in Part I of this dissertation, I abandoned the so-called *Uṣūl al-Shāshī* as a source for fourth century *uṣūl al-fiqh* theory — despite its ascription by Khalīl al-Mays to Abū ‘Alī al-Shāshī (d.344/955) — because, as al-Nadwī pointed out, there are twice cited in the text scholars who died a century after the death of Abū ‘Alī. It is this type of *unambiguous* anachronism — that is to say, it cannot be interpreted as anything *other* than an anachronism — which, in my opinion, constitutes a proper indicant for re-ascription. Even so, it may in fact only provide indicant for the occasional editorial intrusion, allowing that the vast bulk of the text may still “authentically” belong to whom al-Mays ascribed it. (I myself did not wish to dedicate a detailed exposition on the *Uṣūl al-Shāshī* hinged upon that possibility).

My point is simple. Mubārak and Calder, too, are dealing with indicants of anachronism, but with one very significant difference: The “anachronism” depends entirely upon their *interpretation* of certain features which may in fact provide “indicant” in either direction; they are not, as with the references to al-Dabbūsī (d.430) and Ibn al-Ṣabbāgh (d.477) in the *Uṣūl al-Shāshī*, anachronisms *inherent* to the feature itself. Mubārak and Calder, in other words, first presumed the anachronism, then sought support from the text of the *Umm* by exploring only one direction of features which could go either way; whereas the *Uṣūl al-Shāshī* supplied its own, unambiguous “unidirectional” anachronisms — missed by al-Mays, but caught by al-Nadwī. Had Mubārak and Calder drawn upon anachronisms of the sort pointed out by al-Nadwī in the *Uṣūl al-Shāshī*, then we would consider their claims far more seriously. But they did not; and, as far as I can tell, they *could* not. The text of the *Umm* appears to be free of self-evident anachronisms, which ought to be indicant enough of authenticity, considering the complex jumble of treatises this enormous compendium contains.

This brings us to an important point: There is a certain privilege belonging to editors such as Ḥassūn and Shākir which ought not to be ignored; namely, *complete*

⁴⁵ Addendum: An examiner of this dissertation has drawn my attention to the admirable work of Mohyiddin Yahia, in his *Ṣāfi’ī et les deux sources de la loi islamique*. Not surprisingly in so thorough and comprehensive an overview as we find in this text, an entire section is dedicated to refuting Calder on this very question of the authorship of the *Umm* (pp.170ff; « Réfutation de la thèse de N. Calder »). Yahia’s discussion introduces many factors I have myself overlooked, and in fact constitutes a more-than-adequate refutation on its own.

immersion in the text, in its entirety, in all of its surviving redactions, and with all of its internal evidences and contexts revealed through the critical processes of collation and transcription. This is a most privileged position from which to argue the authenticity of a text, and had never been so apparent to me until after my own humble attempt — with its minor episodes of collating printed editions, and pursuing intra-*kitāb* references in the subject-text — at translating the *Ikhtilāf al-ʿIrāqīyyīn*.

With regard to those who have attempted to ascribe the authorship and compilation of the *Umm* to later generations of scholars, a certain analogue thus comes to mind: Why is it, that of those few North American scientists who deny the “common descent” theory of evolution, practically none of them are biologists, much less geneticists? The answer, in my opinion, is simple: The biologist, and in particular the geneticist, is fully immersed in the signs which support the “common descent” theory as the best model for explaining the manifold but inter-related phenomena of living organisms. The indicants provided by DNA (in conjunction with the fossil record, etc.) are overwhelming; “natural selection,” in fact, is *witnessed* on a daily basis by bio-chemists in their struggle against HIV. From this vantage, evolution has moved from theory to fact; in much the same fashion as elliptical-orbit heliocentrism. But those who stand at a distance from all of this find it easy to reduce “common descent” theory to the same level as counter-theories which do not enjoy anything close to the same preponderance of indicants. Put simply, the deniers of “common descent” theory are hardly in a position to preponderate counter-theories by way of *tarjīh*.

And, although quite obviously to a far, far, lesser extent, we may say the same with regard to the re-ascription and post-dating theories of Mubārak and Calder, over and against the “status quo” authorship theory of the *Umm* and *Risāla* editors (who are conversant with both “genes” and “fossil record” of the text). To point out a few features which might — and only after a highly questionable interpretation — provide indicant for re-ascription or post-dating, is not to overturn the manifold (and unmentioned) textual indicants supporting the “traditional status quo.”⁴⁶

⁴⁶ The fact that the plentiful textual indicants which point towards the authenticity of *Umm* and *Risāla* authorship and transmission do not receive mention in re-ascription and post-dating attempts is itself an indicant of aprioristic agendas. See Fischer’s discussions on “the fallacy of the possible proof” and “fallacies of statistical sampling” (*Historians’ Fallacies*, 53ff., and 104ff.), and Kahane & Cavender on “Suppressed (Overlooked) Evidence” (*Logic and Contemporary Rhetoric*, 62ff.)

As mentioned earlier, I will draw attention to all such textual indicants as provide insight into the “life” of the text, as it gathered accretions of commentary, *naql*, *ʿaql*, and — most important of all — “transcripts” of dialectical sequences, in the hands of Abū Yūsuf, Muḥammad b. al-Ḥasan, al-Shāfiʿī, and al-Rabīʿ. Above all, it is hoped that the reader will be as fascinated with the *Umm* Version of the *Ikhtilāf al-ʿIrāqīyyīn* as the translator has been; while bearing in mind, at the same time, this is but one small window onto the complex vista of proto-system juridical *jadāl*. The *Kitāb al-Umm* is a treasure-store of such windows, and many years of discovery lie ahead.

[Opening Chapter]

This is the book of that upon which Abū Ḥanīfa and Ibn Abī Laylā disagreed (<i>ikhtalafa fihi</i>), on the authority of Abū Yūsuf, may God Most High have mercy upon them.¹	هَذَا كِتَابُ مَا اخْتَلَفَ فِيهِ أَبُو حَنِيفَةَ وَابْنُ أَبِي لَيْلَى عَنْ أَبِي يُوسُفَ رَحِمَهُمُ اللَّهُ تَعَالَى.
1 - He said:² When a man delivers a <i>thawb</i> to the tailor, and he sews from it a <i>qabā'</i>, and the owner (<i>rabb</i>) of the <i>thawb</i> says: I ordered from you a <i>qamīṣ</i>, but the tailor says: You ordered from me a <i>qabā'</i>;³ then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: the [accepted] <i>qawl</i>⁴ is the <i>qawl</i> of the owner of the <i>thawb</i>, and the tailor is liable (<i>yaḍmanu</i>) for the value (<i>qīma</i>) of the <i>thawb</i>. And he embraces it (<i>wa bihi ya'khudhu</i>) — meaning: Abū Yūsuf [i.e., Abū Yūsuf embraces this doctrine of Abū Ḥanīfa's].⁵	1 - قَالَ: إِذَا أَسْلَمَ الرَّجُلُ إِلَى الْخِيَّاطِ ثَوْبًا فَخَاطَهُ قَبَاءً فَقَالَ رَبُّ الثَّوْبِ: أَمَرْتُكَ بِقَمِيصٍ. وَقَالَ الْخِيَّاطُ: أَمَرْتَنِي بِقَبَاءٍ. فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: الْقَوْلُ قَوْلُ رَبِّ الثَّوْبِ، وَيَضْمَنُ الْخِيَّاطُ قِيَمَةَ الثَّوْبِ، وَبِهِ يَأْخُذُ يَعْنِي أَبَا يُوسُفَ.

¹ (Ḥassūn, vol.9, pt.14, 7-10; Schacht: *Tr. I*, 1-2). This opening section receives no proper chapter heading, as such, in the manuscripts and editions. As al-Afghānī notes, however, in regard to his Shaybānī Version manuscript: "These are *masā'il* of *ijāra*, from the chapter of the *ḍamān* of the shared labourer (*al-ajir al-mushtarak*).” He notes further that al-Ḥākim (i.e., al-Ḥākim al-Shahīd, Abū al-Faḍl Muḥammad b. Muḥammad b. Aḥmad al-Marwazī, d.334/945) does not cover these *masā'il* in his abridgement (presumably the *Kāfi*) as regards this book, but al-Sarakhsī mentions them in several places of his book (the *Mabsūṭ*, a commentary on the *Kāfi*) (Afghānī, 9, n.1).

² This opening offers an opportunity to make a few points regarding the transmission of the core textual material as found in the *Umm* Version of the *Kitāb Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā*. If we accept that the core material was authored by Abū Yūsuf, who transmitted his book to al-Shaybānī, who (perhaps with some additions) transmitted it to al-Shāfi'ī, who then transmitted it along with his own comments and conclusions to al-Rabī'; then the initial "He" of "He said" (*qāla*) might in fact refer to any one of these esteemed jurists. The Shaybānī Version, however, as found in the manuscript edited by al-Afghānī, is far less ambiguous, and opens with "Muḥammad b. al-Ḥasan said, on the authority of Abū Yūsuf..." (Afghānī, 9).

³ Terms for various types of cloth and clothing have been left in Arabic transliteration, as they are polysemes, and may not be concisely rendered in English. Briefly: a *thawb* may be a man's garment cut from a single piece (or very few pieces) of cloth, or a piece of cloth for wearing, or a gown, or a woman's garment similar to a shift; a *qamīṣ* may be a shirt, or a shift, or a two-sleeved sewn garment; while a *qabā'* may be a tunic, or cloak, or a sewn outer garment with two sleeves (see Lane, under the relevant headings).

⁴ The term *qawl* will be rendered in transliteration throughout, due to its polysemous nature. In its most general sense, *qawl* refers simply to a speech act. In more particular instances, however, it may carry the connotations of a declarative statement, or of a rendered account, or of a doctrine, or even of court testimony. Here in §1 we may understand *qawl* in the sense of account, or testimony. Most frequently, however, we will encounter *qawl* in connection with jurists and their opinions and teachings, or authoritative figures (including God) and their judgments and decrees.

⁵ The explanatory phrase: *ya'nī Abū Yūsuf* thus assures us that, throughout the work, we may understand that the statement: *wa bihi ya'khudhu* (and the variant: *wa bi-hādhā ya'khudhu*) refers to Abū Yūsuf. These formulae serve as a handy means of informing us which opinion (*qawl*) (i.e., Abū Ḥanīfa's or Ibn Abī Laylā's) that the author of the core material himself embraced.

2 - But Ibn Abī Laylā used to say: the [accepted] <i>qawl</i> is the <i>qawl</i> of the tailor regarding that. ⁶	2 - وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الْقَوْلُ قَوْلُ الْخِيَّاطِ فِي ذَلِكَ.
3 - And if the <i>thawb</i> perishes (<i>dāʿa</i>) while in the keeping of the tailor, and the owner of the <i>thawb</i> and the tailor do not disagree regarding his work; then indeed Abū Ḥanīfa said: There is no liability (<i>ḍamān</i>) upon him, nor upon the fuller, nor the dyer, nor the like of any such worker — except as regards what is criminally incurred by their own hands (<i>illa fīmā janat aydihim</i>).	3 - وَلَوْ أَنَّ الثَّوبَ ضَاعَ مِنْ عِنْدِ الْخِيَّاطِ وَلَمْ يَخْتَلِفْ رَبُّ الثَّوبِ وَالْخِيَّاطُ فِي عَمَلِهِ فَإِنَّ أَبَا حَنِيفَةَ قَالَ: لَا ضَمَانَ عَلَيْهِ وَلَا عَلَى الْقَصَّارِ وَالصَّبَّاحِ وَمَا أَشَبَّهُ ذَلِكَ مِنَ الْعُمَّالِ إِلَّا فِيمَا جَنَّتْ أَيْدِيهِمْ.
4 - It has reached us concerning ʿAlī b. Abī Ṭālib, may God Most High be pleased with him, that he said: There is no <i>ḍamān</i> upon them.	4 - وَبَلَغَنَا عَنْ عَلِيِّ بْنِ أَبِي طَالِبٍ رَضِيَ اللَّهُ تَعَالَى عَنْهُ أَنَّهُ قَالَ: لَا ضَمَانَ عَلَيْهِمْ.
5 - But Ibn Abī Laylā used to say: They are liable (<i>dāminūna</i>) for what perished in their keeping, even if they had no wrongful hand in it.	5 - وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هُمْ ضَامُونَ لِمَا هَلَكَ عِنْدَهُمْ وَإِنْ لَمْ تَجُنْ أَيْدِيهِمْ فِيهِ.
6 - Abū Yūsuf said: they are liable, unless subjected to some overwhelming factor (<i>illa an yajīʿa shayʿun ghālibun</i>). ⁷	6 - قَالَ أَبُو يُوسُفَ: هُمْ ضَامُونَ إِلَّا أَنْ يَجِيءَ شَيْءٌ غَالِبٌ.
7 - Al-Shāfiʿī, may God Most High have mercy upon him, said: When the <i>thawb</i> perishes in the keeping of the tailor, or the laundryman, or the dyer, or the hired-worker (<i>ajir</i>) ordered to sell it, or the porter hired to deliver it while its <i>ṣāhib</i> is with him, or to deliver it while its <i>ṣāhib</i> is not with him; from sinking, or burning, or theft; and none of the hirelings has committed any criminal act in regard to it — or from another among the modes of loss; that, all of it, is one and the same (<i>fā-</i>	7 - قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: إِذَا ضَاعَ الثَّوبُ عِنْدَ الْخِيَّاطِ أَوْ الْعَسَّالِ أَوْ الصَّبَّاحِ أَوْ أَحِيرٍ أُمِرَ بَيْعِهِ أَوْ حَمَالٍ أُسْتُؤِجِرَ عَلَى تَبْلِيغِهِ وَصَاحِبُهُ مَعَهُ أَوْ تَبْلِيغِهِ وَلَيْسَ صَاحِبُهُ مَعَهُ مِنْ غَرَقٍ أَوْ حَرَقٍ أَوْ سَرَقٍ وَلَمْ يَجُنْ فِيهِ وَاحِدٌ مِنَ الْأَجْرَاءِ شَيْئًا أَوْ غَيْرِ ذَلِكَ مِنْ وُجُوهِ

Additionally, in this case (and most others) al-Afghānī comments that this is also the *qawl* of Muḥammad [b. al-Ḥasan al-Shaybānī] (Afghānī, 9, n.2). In fact, in the Shaybānī Version of al-Afghānī's edition, the aforementioned formulae are consistently rendered as *wa bihi na'khudhu* and *wa bi-hādhā na'khudhu* (i.e., “And we embrace it,” and “And we embrace this [doctrine]”). We may understand this as al-Shaybānī's indication that not only he, but Abū Yūsuf and others of the *aṣḥāb* of Abū Ḥanīfa embraced the *qawl* preceding. It is clear from the comments of al-Afghānī throughout his edition that it is most often the case, in fact, that al-Shaybānī follows the *qawl* of Abū Yūsuf. In the main, we will not continue to reproduce al-Afghānī's mention of the *qawl* of Muḥammad, unless it is variant, or more expansive, or proves significant in some other way.

⁶ The concern here is establishing “benefit of assumption.” See note attached to §359 for a list of other instances.

⁷ See Schacht, *Origins*, 112. A supposed example of *istiḥsān* [Mabsūṭ 15:103] for *vis maior*.

sawā ^{un} dhālika kulluhu) — there cannot be permitted regarding it other than one of two qawls. One of them is that whosoever took a wage for a thing guaranteed it (ḍaminahu). ⁸	الضَّيْعَةُ فَسَوَاءُ ذَلِكَ كُلُّهُ، فَلَا يَجُوزُ فِيهِ إِلَّا وَاحِدٌ مِنْ قَوْلَيْنِ: أَحَدِهِمَا: أَنْ مَنْ أَخَذَ أَجْرًا عَلَى شَيْءٍ ضَمِنَهُ.
8 - And who said this based it on qiyās (qāsahu) with the contract of loan of non-fungibles (al-‘āriyya) being guaranteed (tuḍmanu). ⁹	8 - وَمَنْ قَالَ هَذَا قَاسَهُ عَلَى الْعَارِيَّةِ تُضْمَنُ.
9 - And he said: The ‘āriyya is guaranteed (ḍaminat) due only to a benefit (manfa‘a) in it for the borrower, and he is liable for it until he returns it soundly intact; it is like the [free, noninterest-bearing] salaf-loan.	9 - وَقَالَ: إِنَّمَا ضُمِنَتِ الْعَارِيَّةُ لِمَنْفَعَةٍ فِيهَا لِلْمُسْتَعِيرِ فَهُوَ ضَامِنٌ لَهَا حَتَّى يُؤَدِّيَهَا بِالسَّلَامَةِ، وَهِيَ كَالسَّلَفِ.
10 - But it might be interposed upon one professing this (qā’il hādhā), that it be said to him: Verily the ‘āriyya is permitted to you for the usufruct (intifā‘) of it, without compensation (iwaḍ) which the lender (al-mu‘īru) takes from you; and it is like the salaf-loan. But this, all of it, is not permitted to you for the usufruct (intifā‘) of it – your benefit is only in something you do regarding it; and this does not resemble the borrowed thing, while I have come across you being given a mount for rent, and enjoying its usufruct by means of compensation taken from you, yet you are not made liable if it perishes (‘aṭibat) in your hands.	10 - وَقَدْ يَدْخُلُ عَلَى قَائِلِ هَذَا أَنْ يُقَالَ لَهُ: إِنَّ الْعَارِيَّةَ مَأْذُونٌ لَكَ فِي الْإِنْتِفَاعِ بِهَا بِلَا عَوَضٍ أَخَذَهُ مِنْكَ الْمُعِيرُ وَهِيَ كَالسَّلَفِ، وَهَذَا كُلُّهُ غَيْرُ مَأْذُونٍ لَكَ فِي الْإِنْتِفَاعِ بِهِ وَإِنَّمَا مَنْفَعَتُكَ فِي شَيْءٍ تَعْمَلُهُ فِيهِ، فَلَا يُشَبِّهُ هَذَا الْعَارِيَّةَ وَقَدْ وَجَدْتُكَ تُعْطِي الدَّابَّةَ بِكَرَاءٍ فَتَنْتَفِعُ مِنْهَا بِعَوَضٍ يُؤْخَذُ مِنْكَ، فَلَا تُضْمَنُ إِنْ عَطِبَتْ فِي يَدَيْكَ.
11 - And Shurayḥ had held to (qad dhahaba ilā) the making liable (taḍmīn) of the fuller, for he made liable a fuller whose house had burned down; and he said: You make me liable, and my house has burned down? So Shurayḥ said: Have you considered [what you would do] (ara’ayta), if his house had burned down; would you have relinquished your fee to him? ¹⁰	11 - وَقَدْ ذَهَبَ إِلَى تَضْمِينِ الْقَصَّارِ شُرَيْحٌ فَضَمَّنَ قَصَّارًا احْتَرَقَ بَيْتُهُ فَقَالَ: تُضْمِنُنِي وَقَدْ احْتَرَقَ بَيْتِي؟ فَقَالَ شُرَيْحٌ: أَرَأَيْتَ لَوْ احْتَرَقَ بَيْتُهُ كُنْتَ تَتْرُكُ لَهُ أَجْرَتَكَ؟

⁸ Cf. §§304-9; 312-14 for al-Shāfi‘ī’s reduction to two contradictory qawls.

⁹ Maṭrajī (vii.161, n.1) directs us to the Bāb al-‘Āriyya. This corresponds to §§10681-10706 of Part VII of Ḥassūn’s edition (pp.329ff.) Here we find al-Shāfi‘ī’s full argument as to why the non-fungible loan must be considered maḍmūn, and the borrower ḍāmin. The argument appears in dialectical Q&A format, and serves as an excellent example for future analysis.

¹⁰ Maṭrajī (vii.161, n.2) directs us here, and again (vii.162, nn.1-2) in §§16 and 17, to the Bāb Mas’alat al-Ujarā’. This corresponds to §§11241-11245 of Part VIII of Ḥassūn’s edition (pp.96ff.) Note that Schacht claims that this, and all references to Shurayḥ, are spurious (Origins, 229, n.4).

12 - Al-Shāfi'ī, may God Most High have mercy upon him, said: Ibn 'Uyayna related this to us concerning him.	12 - قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: أَخْبَرَنَا عَنْهُ ابْنُ عُيَيْنَةَ بِهَذَا.
13 - Al-Shāfi'ī, may God Most High have mercy upon him, said: And it is not permitted, when the artisans (<i>al-ṣunnā'u</i>) are made liable, other than this; and that all who take a wage for a thing become liable; and that for which he takes a wage must be <i>maḍmūn</i> , and the <i>maḍmūn</i> a <i>ḍāmīn</i> in every circumstance. ¹¹	13 - قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَلَا يَجُوزُ إِذَا ضَمِنَ الصَّنَاعُ إِلَّا هَذَا، وَأَنْ يَضْمَنَ كُلُّ مَنْ أَخَذَ عَلَى شَيْءٍ أَجْرًا، وَلَا يَخْلُو مَا أَخَذَ عَلَيْهِ الْأَجْرَ مِنْ أَنْ يَكُونَ مَضْمُونًا وَالْمَضْمُونُ ضَامِنٌ بِكُلِّ حَالٍ.
14 - The other <i>qawl</i> is that it is not <i>maḍmūn</i> , and so is not guaranteed in any circumstance (<i>bi-ḥālⁱⁿ</i>), just as a deposit (<i>wadī'a</i>) is not guaranteed in any circumstance.	14 - وَالْقَوْلُ الْآخَرُ؛ أَنْ لَا يَكُونَ مَضْمُونًا فَلَا يَضْمَنُ بِحَالٍ كَمَا لَا تُضْمَنُ الْوَدِيعَةُ بِحَالٍ.
15 - And it may be narrated, in a manner whose like the <i>Ahl al-Ḥadīth</i> do not confirm as authentic (<i>min wajhⁱⁿ lā yuthbitu... mithlahu</i>), that 'Alī b. Abī Ṭālib, may God Most High be pleased with him, made liable the laundryman and the dyer, and said: Nothing but that would promote the welfare (<i>yusliḥu</i>) of the people. ¹²	15 - وَقَدْ يُرَوَّى مِنْ وَجْهِ لَا يُثْبِتُ أَهْلُ الْحَدِيثِ مِثْلَهُ أَنَّ عَلِيَّ بْنَ أَبِي طَالِبٍ رَضِيَ اللَّهُ تَعَالَى عَنْهُ ضَمَّنَ الْعَسَّالَ وَالصَّبَّاحَ وَقَالَ: لَا يُصْلِحُ النَّاسَ إِلَّا ذَلِكَ.
16 - Ibn 'Uyayna related that to us on the authority of Ja'far b. Muḥammad, on his father, that 'Alī, may God Most High be pleased with him, said that.	16 - أَخْبَرَنَا بِذَلِكَ إِبْرَاهِيمُ بْنُ أَبِي يَحْيَى، عَنْ جَعْفَرِ بْنِ مُحَمَّدٍ عَنْ أَبِيهِ أَنَّ عَلِيًّا رَضِيَ اللَّهُ تَعَالَى عَنْهُ قَالَ ذَلِكَ.
17 - And the holding liable (<i>taḍmīn</i>) of some/one of the artisans is narrated concerning 'Umar, in a manner weaker (<i>aḍ'afa</i>) than this. And we didn't know either one of the two to be confirmed.	17 - وَيُرَوَّى عَنْ عُمَرَ تَضْمِينَ بَعْضِ الصَّنَاعِ مِنْ وَجْهِ أَوْضَعُ مِنْ هَذَا. وَلَمْ نَعْلَمْ وَاحِدًا مِنْهُمَا يُثْبِتُ.
18 - And it has been narrated concerning 'Alī b. Abī Ṭālib that he used not to make liable any one of the wage-workers (<i>al-uḥjarā'</i>), in a manner whose like is not confirmed as authentic.	18 - وَقَدْ رُوِيَ عَنْ عَلِيٍّ بْنِ أَبِي طَالِبٍ أَنَّهُ كَانَ لَا يَضْمَنُ أَحَدًا مِنَ الْأَجْرَاءِ مِنْ وَجْهِ لَا يُثْبِتُ مِثْلَهُ.

¹¹ The point, as I understand it, is one of contradiction. The artisan was liable for the material in his possession, while at the same time, the wage-payer was liable for the wage.

¹² This constitutes nothing less than an early appeal to *maṣlaḥa*, within the formula of an *athar*.

19 - Al-Shāfi'ī, may God Most High have mercy upon him, said: But it is authenticated (<i>thābit^{un}</i>) concerning 'Aṭā' b. Abī Rabāḥ, that he said: There is no <i>ḍamān</i> upon the artisan, nor upon the wage-worker. And as for what the hands of wage-workers and artisans have criminally incurred, there is no <i>mas'ala</i> regarding it, and they are liable just as the depository (<i>al-mustawda'</i>) is liable for what his hand criminally incurs — and crime is nullified for no one (<i>al-jināyatu lā tabṭulu 'an aḥadⁱⁿ</i>). And thus if they transgress, they become liable (<i>law ta'addū ḍaminū</i>).	19 - قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَثَابِتٌ عَنْ عَطَاءِ بْنِ أَبِي رَبَاحٍ أَنَّهُ قَالَ: لَا ضَمَانَ عَلَى صَانِعٍ وَلَا عَلَى أَجِيرٍ، فَأَمَّا مَا جَنَّتْ أَيْدِي الْأَجْرَاءِ وَالصُّنَّاعِ فَلَا مَسْأَلَةَ فِيهِ وَهُمْ ضَامِنُونَ كَمَا يَضْمَنُ الْمُسْتَوْدَعُ مَا جَنَّتْ يَدُهُ وَالْجَنَائَةُ لَا تَبْطُلُ عَنْ أَحَدٍ، وَكَذَلِكَ لَوْ تَعَدَّوْا ضَمِنُوا.
20 - Al-Rabī' said: That to which al-Shāfi'ī holds (<i>yadhabu ilayhi</i>), according to what I have seen, is that there is no <i>ḍamān</i> upon the artisans (<i>al-ṣunnā'i</i>) except for that which their hands criminally incur; but he used never to disclose that, out of fear of the artisans.¹³	20 - قَالَ الرَّبِيعُ: الَّذِي يَذْهَبُ إِلَيْهِ الشَّافِعِيُّ فِيمَا رَأَيْتُهُ أَنَّهُ لَا ضَمَانَ عَلَى الصُّنَّاعِ إِلَّا مَا جَنَّتْ أَيْدِيهِمْ وَلَمْ يَكُنْ يُبَوِّحُ بِذَلِكَ؛ خَوْفًا مِنَ الصُّنَّاعِ.

¹³ Cf. §§309 and 1179, where al-Shāfi'ī withholds other opinions out of fear of negative social/political consequences.

Bāb al-Ghaṣb

Chapter on Usurpation (<i>Ghaṣb</i>) ¹	بَابُ الْعَصَبِ
21 - Al-Shāfiʿī, may God Most High have mercy upon him, said:² And when a man usurps possession of [i.e., abducts] (<i>ighṭaṣaba</i>) a female slave (<i>jāriya</i>),³ then sells her, and the buyer manumits her (<i>aʿṭaqahā</i>), then indeed Abū Ḥanīfa, may God Most High be pleased with him used to say: The sale, and manumission, regarding her is null and void (<i>bāṭil</i>), not permitted; because he sold what he does not own, and he manumitted what he does not own. And it is this [doctrine] he [Abū Yūsuf] embraces.⁴	21 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اغْتَصَبَ الرَّجُلُ الْجَارِيَةَ فَبَاعَهَا وَأَعْتَقَهَا الْمُشْتَرِي فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: الْبَيْعُ وَالْعِتْقُ فِيهَا بَاطِلٌ لَا يَجُوزُ؛ لِأَنَّهُ بَاعَ مَا لَا يَمْلِكُ وَأَعْتَقَ مَا لَا يَمْلِكُ. وَبِهَذَا يَأْخُذُ.
22 - But Ibn Abī Laylā used to say: His manumission is lawful <i>jāʿiz</i>, and the usurper owes the value (<i>al-ghāṣibi al-qīmatu</i>).	22 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: عِتْقُهُ جَائِزٌ وَعَلَى الْغَاصِبِ الْقِيَمَةُ.

¹ (Ḥassūn, vol.9, pt.14, 11-16; Schacht: *Tr. I*, 3-8).

² Again, we note that al-Afghānī's Shaybānī Version begins this section with *قال أبو يوسف*, followed by the account of Abū Ḥanīfa's *ḥukm*. It is possible that the differences between the *Umm* Version and the Shaybānī Version as far as these attributions are concerned is simply a characteristic of a commentary tradition; the original text-for-analysis becomes attributed to the commentator (al-Shāfiʿī) — or, rather, the chain of transmission (ending at the commentator) is assumed to be known to the reader/reciter. This would allow the possibility that al-Afghānī's Shaybānī Version MS is representative of an archaic, pre-*Umm* transmission: the original text (or something very much like it) as learned, and commented upon, by al-Shāfiʿī. If such is the case, and there seems no reason that it cannot be, then the core Shaybānī Version material of the *Kitāb Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā* has shown a remarkable consistency of transmission across at least two distinct redactional conduits. There is another possibility which cannot be ruled out, however; mainly, that al-Afghānī's Shaybānī Version MS derives ultimately from material extracted from al-Shāfiʿī's *Umm*, and edited to remove al-Shāfiʿī's comments. It may, in fact, constitute an attempted reconstruction of Abū Yūsuf's original text by a post-*Umm* scholar, who, among other things, altered (or returned) such features as “*wa bi-hādhā ya'khudh*” to “*wa bi-hādhā na'khudh*.” Of course, there may be more complicated histories yet to these texts. However, there being — so far as I am aware — no firm evidence to the contrary, we might accept at this stage the *status quo* of appearances; i.e., that the Shaybānī Version of al-Afghānī's MS is representative of the original version studied, and expanded upon, by al-Shāfiʿī. At the same time we may recognize that the relationship between the two texts remains a very interesting area for scholarly inquiry.

³ As summarized in the *MF* (s.v. “جارية”), the term *jāriya* (as employed by the *fuqahāʾ*) may connote either 1) a young girl (*al-fatāt al-ṣaghīra*); 2) a young woman or teenage girl (*al-shābbā*); or 3) a female slave (*al-ama*). In this latter sense, *jāriya* was applied to female slaves whether young or old, and cannot necessarily be considered as an indicant of youth.

⁴ In addition to noting that this was also the *qawl* of Muḥammad (as stated in the *Mabsūt*), al-Afghānī informs us that al-Ḥākim's account of the *K. Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā* begins with this *masʾala* Afghānī, 11, n.1).

23 - Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man usurps possession of a <i>jāriya</i>, then manumits her, or sells her to one who manumits her, or buys her (<i>ishtarāhā</i>) via an invalid purchase (<i>shirā^{um} fāsid^{an}</i>), then manumits her, or sells her to one who manumits her; the sale is <i>bāṭil</i>; and when the sale is made <i>bāṭil</i>, the manumission of the buyer is not lawfully permitted, because he is not a [rightful] owner (<i>mālik</i>), and she is the owned-slave (<i>mamlūka</i>) of the first owner: the seller via invalid sale. And even if there pass her, one to the other, thirty buyers, or more, and whichever of them who wishes it manumits her, when the first seller has not manumitted her; the sale, all of it, is <i>bāṭil</i> and they rescind (<i>yatarāddūna</i>). [This is] because, when the sale of the first owner — whose ownership was <i>ṣaḥīḥ</i> — is <i>fāsid</i>, and he who does not own her then sells her; his sale regarding her is not lawfully permitted in any circumstance (<i>bi-ḥālⁱⁿ</i>), nor is the sale of he who sells on the basis of ownership from him (<i>bi'l-milki 'anhu</i>); and the <i>bay'</i>, when it is <i>fāsid</i>: he is not put into [lawful] ownership by means of it; and he who manumits what he does not own: his manumission is not lawfully permitted.	23 - قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اغْتَصَبَ الرَّجُلُ الْجَارِيَةَ فَأَعْتَقَهَا أَوْ بَاعَهَا مِمَّنْ أَعْتَقَهَا أَوْ اشْتَرَاهَا شِرَاءً فَاسِدًا فَأَعْتَقَهَا أَوْ بَاعَهَا مِمَّنْ أَعْتَقَهَا فَالْبَيْعُ بَاطِلٌ، وَإِذَا بَطَلَ الْبَيْعُ لَمْ يَجْزِ عِتْقُ الْمُتَبَاعِ؛ لِأَنَّهُ غَيْرُ مَالِكٍ، وَهِيَ مَمْلُوكَةٌ لِلْمَالِكِ الْأَوَّلِ الْبَائِعِ يَبِيعُهَا فَاسِدًا، وَلَوْ تَنَاسَخَهَا ثَلَاثُونَ مُشْتَرِيًا فَكَثُرَ وَأَعْتَقَهَا أَيُّهُمْ شَاءَ إِذَا لَمْ يُعْتَقِهَا الْبَائِعُ الْأَوَّلُ فَالْبَيْعُ كُلُّهُ بَاطِلٌ وَيَتَرَادُّونَ؛ لِأَنَّهُ إِذَا كَانَ يَبِيعُ الْمَالِكِ الْأَوَّلِ الصَّحِيحِ الْمِلْكِ فَاسِدًا فَبَاعَهَا الَّذِي لَا يَمْلِكُهَا فَلَا يَجُوزُ بَيْعُهُ فِيهَا بِحَالٍ وَلَا يَبِيعُ مَنْ بَاعَ بِالْمِلْكِ عَنْهُ، وَالْبَيْعُ إِذَا كَانَ فَاسِدًا لَمْ يُمْلِكْ بِهِ، وَمَنْ أَعْتَقَ مَا لَا يَمْلِكُ لَمْ يَجْزِ عِتْقُهُ.
24 - And when a man buys a <i>jāriya</i> and has sexual intercourse with her, then the buyer discovers a defect (<i>'ayb</i>) which is in her, and which the seller had hidden from him; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: There does not belong to him the right to return her after the sexual intercourse (<i>ba'da al-waṭ'i</i>).	24 - وَإِذَا اشْتَرَى الرَّجُلُ الْجَارِيَةَ فَوَطَّئَهَا ثُمَّ أَطْلَعَ الْمُشْتَرِيَّ عَلَى عَيْبٍ كَانَ بِهَا دَلَّسَهُ الْبَائِعُ لَهُ فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: لَيْسَ لَهُ أَنْ يَرُدَّهَا بَعْدَ الْوَطْءِ.
25 - And thus has it reached us concerning 'Alī b. Abī Ṭālib, may God be pleased with him.	25 - وَكَذَلِكَ بَلَّغْنَا عَنْ عَلِيِّ بْنِ أَبِي طَالِبٍ رَضِيَ اللَّهُ عَنْهُ.
26 - Abū Yūsuf, may God Most High have mercy on him, said: However, he [Abū Ḥanīfa?] says: He lays claims from him (<i>yarji'u 'alayhi</i>) to the remainder (<i>faḍl</i>) of what would lie between soundness (<i>al-ṣiḥḥa</i>) and defect so far as price. And he [Abū Yūsuf] embraces it.	26 - قَالَ أَبُو يُوسُفَ رَحِمَهُ اللَّهُ تَعَالَى: وَلَكِنَّهُ يَقُولُ: يَرْجِعُ عَلَيْهِ بِفَضْلِ مَا بَيْنَ الصَّحَّةِ وَالْعَيْبِ مِنَ الثَّمَنِ. وَبِهِ يَأْخُذُ.

27 – But Ibn Abī Laylā used to say: He returns her, and returns along with her a dowry appropriate to her (<i>mahra mithliḥā</i>); and the <i>mahr</i> according to his <i>qawl</i>: he takes the tenth of her value, and half of the tenth, and makes the <i>mahr</i> half of that.	27 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: يَرُدُّهَا وَيُرُدُّ مَعَهَا مَهْرَ مِثْلِهَا، وَالْمَهْرُ فِي قَوْلِهِ يَأْخُذُ الْعَشْرَ مِنْ قِيمَتِهَا وَنِصْفَ الْعَشْرِ، فَيَجْعَلُ الْمَهْرَ نِصْفَ ذَلِكَ.
28 – And if the buyer does not have sexual intercourse with the <i>jāriya</i>, but a defect occurs in her while in his keeping, he has no right to return her according to the <i>qawl</i> of Abū Ḥanīfa; however, he claims the remainder of what lies between defect and soundness [so far as price], and his <i>ṣāhib</i> [i.e., Abū Yūsuf] embraces it.	28 – وَلَوْ أَنَّ الْمُشْتَرِيَ لَمْ يَطَأَ الْجَارِيَةَ وَلَكِنَّهُ حَدَّثَ بِهَا عَيْبٌ عِنْدَهُ لَمْ يَكُنْ لَهُ أَنْ يَرُدَّهَا فِي قَوْلِ أَبِي حَنِيفَةَ، وَلَكِنَّهُ يَرْجِعُ بِفَضْلِ مَا بَيْنَ الْعَيْبِ وَالصَّحَّةِ، وَبِهِ يَأْخُذُ صَاحِبُهُ.
29 – But Ibn Abī Layl used to say: He returns her, and he returns what the defect – which occurred in his keeping – diminished of her [in value].	29 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: يَرُدُّهَا وَيُرُدُّ مَا تَقْصَصَهَا الْعَيْبُ الَّذِي حَدَّثَ عِنْدَهُ.
30 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man buys a non-virgin (<i>thayyib</i>) <i>jāriya</i>, and has sexual intercourse with her (<i>aṣābahā</i>), then discovers in her a defect which existed while in the seller’s keeping; he has the right to return her, because the sexual intercourse does not diminish her by anything [in value], and he is merely returning her in the condition (<i>al-ḥāl</i>) in which he took her; and when the Messenger of God, may God bless and save him, decrees <i>al-kharāj bi’l-ḍamān</i> [i.e., an asset’s yield/benefit belongs to whomever holds liability for that asset],⁵ and we opine (<i>raʾaynā</i>) the service (<i>al-khidma</i>) to be thus, sexual intercourse is of less damage to her (<i>aqalla ḍarar^{an} ‘alayhā</i>) than service (<i>khidma</i>) or yield (<i>kharāj</i>), had she rendered it [the <i>waṭʾ</i>] with liability (<i>addat-hu bi’l-ḍamān</i>).⁶	30 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اشْتَرَى الرَّجُلُ الْجَارِيَةَ ثَيِّبًا فَأَصَابَهَا ثُمَّ ظَهَرَ مِنْهَا عَلَى عَيْبٍ كَانَ عِنْدَ الْبَائِعِ كَانَ لَهُ رَدُّهَا؛ لِأَنَّ الْوَطْءَ لَا يُنْقِصُهَا شَيْئًا، وَإِنَّمَا رَدَّهَا بِمِثْلِ الْحَالِ الَّتِي أَخَذَهَا بِهَا، وَإِذَا قَضَى رَسُولُ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – بِالْخَرَاجِ بِالضَّمَانِ وَرَأَيْنَا الْخِدْمَةَ كَذَلِكَ، كَانَ الْوَطْءُ أَقْلَ ضَرَرًا عَلَيْهَا مِنْ خِدْمَةٍ أَوْ خَرَاجٍ لَوْ أَدَّتهُ بِالضَّمَانِ.

⁵ *Al-kharāj bi’l-ḍamān*, as its mnemonic formulation may suggest, is indeed a legal maxim (*qāʿida*, pl. *qawāʿid*); its use here by al-Shāfiʿī is of the utmost import. The *MF* (s.v. "ضمان") lists it as the seventh among the *qawāʿid* of *ḍamān*, explaining its *maʿnā* as: “That the benefits of the thing (*manāfiʾa al-shayʾi*) be merited by whomever is bound by its *ḍamān* if it is destroyed; and that the *manfaʾa* be in recompense for the bearing of the loss of its destruction (*fī muqābilī taḥammuli khasāratī halākīhi*); and what does not enter into its *ḍamān* does not merit its *manāfiʾ*.” Schacht translates *al-kharāj bi’l-ḍamān* as “profit follows responsibility” (*Origins*, 123, 181, 270).

⁶ In other words, the seller to whom the *thayyib jāriya* is returned has no right to claim compensation for the benefit (sexual intercourse) which the returning buyer enjoyed while she was under his (the buyer’s) ownership, and thus also under his *ḍamān*. This parallels the illustrating example of *al-kharāj bi’l-ḍamān* as found in a modern glossary: “if a person buys a

31 – And if she is a virgin (<i>bikr</i>), and he has sexual intercourse with her (<i>aṣābahā</i>) elsewhere than her vulva (<i>farj</i>), and does not deflower her (<i>lam yaftadḍahā</i>), then likewise [i.e., as in §30]. But if he deflowers her; he has no right to return her, due to the fact that (<i>min qibali</i>) he has diminished her [in value] by loss of virginity (<i>bi-dhahābi al-'udhrati</i>), and it is not permitted for him to return her in diminished state (<i>nāqīṣat^m</i>). Likewise it would not be permitted for him that he take her in diminished state and claim what the defect – which was hidden from him – had diminished her from the <i>aṣl</i> of the price which he gave for her, unless the seller wishes to take her in diminished state. For that is his [the seller's] right unless the buyer wishes to retain her in defective state (<i>an yaḥbisahā ma'ibat^m</i>), and not claim anything pertaining to the defect; and we don't know it authenticated as concerns 'Umar, nor 'Alī, nor their <i>khilāf</i>, that he said the contrary (<i>khilāf</i>) of this <i>qawl</i>.⁷	31 – وَإِنْ كَانَتْ بَكْرًا فَأَصَابَهَا فِيمَا دُونَ الْفَرْجِ وَلَمْ يَفْتَضَّهَا فَكَذَلِكَ، وَإِنْ افْتَضَّهَا لَمْ يَكُنْ لَهُ رَدُّهَا؛ مِنْ قِبَلِ أَنَّهُ قَدْ نَقَصَهَا بِذَهَابِ الْعُدْرَةِ فَلَا يَجُوزُ لَهُ أَنْ يَرُدَّهَا نَاقِصَةً، كَمَا لَمْ يَكُنْ يَجُوزُ عَلَيْهِ أَنْ يَأْخُذَهَا نَاقِصَةً وَيَرْجِعَ بِمَا نَقَصَهَا الْعَيْبُ الَّذِي دَلَّسَ لَهُ مِنْ أَصْلِ الثَّمَنِ الَّذِي أُعْطِيَ فِيهَا إِلَّا أَنْ يَشَاءَ الْبَائِعُ أَنْ يَأْخُذَهَا نَاقِصَةً، فَيَكُونُ ذَلِكَ لَهُ إِلَّا أَنْ يَشَاءَ الْمُشْتَرِي أَنْ يَحْبِسَهَا مَعِيبَةً وَلَا يَرْجِعَ بِشَيْءٍ مِنَ الْعَيْبِ، وَلَا نَعْلَمُهُ ثَبَتَ عَنْ عُمَرَ وَلَا عَلِيٍّ وَلَا خِلَافِهِمَا أَنَّهُ قَالَ خِلَافَ هَذَا الْقَوْلِ.
32 – And when he buys a <i>jāriya</i> and has sexual intercourse with her, and [another] man has a claim to her, and the <i>qāḍī</i> rules in favour of his right to her (<i>fa-qaḍā lahu bihā al-qāḍī</i>); then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: Upon the one who had sex with her (<i>al-wāṭi</i>) is [enjoined] a dowry appropriate to her like (<i>mahr mithlihā</i>), according to the equivalent for which a man would marry her like, ruled upon (<i>yaḥkumu bihi</i>) by just folk (<i>dhawā 'adl^m</i>), and he lays claim to the price from whomever sold to him, but does not claim the <i>mahr</i>. And he [Abū Yūsuf]	32 – وَإِذَا اشْتَرَى الْجَارِيَةَ فَوَطَّئَهَا فَاسْتَحَقَّهَا رَجُلٌ فَقَضَى لَهُ بِهَا الْقَاضِي، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: عَلَى الْوَاطِئِ مَهْرٌ مِثْلُهَا عَلَى مِثْلِ مَا يَتَزَوَّجُ بِهِ الرَّجُلُ مِثْلُهَا يَحْكُمُ بِهِ ذَوَا عَدْلٍ، وَيَرْجِعُ بِالثَّمَنِ عَلَى الَّذِي بَاعَهُ وَلَا يَرْجِعُ بِالمَهْرِ. وَبِهِ يَأْخُذُ.

house and then rents it out, but subsequently notices a defect in the house and returns the house to the seller, the seller has no claim on the rent during the period the house remained with the buyer” (Muhammad Akram Khan, *Islamic Economics and Finance: A Glossary*, 2nd Ed. (New York: Routledge, 2003): 110.) Note also that the latter part of the argument is of the species a *maiore ad minus*; if the seller is not owed compensation for *khidma/kharāj*, all the less so should he be owed compensation for sexual intercourse.

⁷ This refers back to §25. Maṭrajī (vii.163, n.2) informs us that al-Bayhaqī, in the *K. al-Buyā'*, transmits the relevant report concerning 'Umar (“If she is a *thayyib*, he returns along with her half the *'ushr*; and if she is a *bikr*, he returns the *'ushr*.”) Al-Bayhaqī then explains why al-Shāfi'ī does not trust it: it is *mursal*, because the first transmitter ('Āmir) did not know 'Umar. He goes on to say, however, that the report concerning 'Alī (“He cannot return her, but he lays claim to the loss from defect [*nuqṣān al-'ayb*]”) is related by reliable transmitters.

embraces it.	
33 – But Ibn Abī Laylā used to say: the <i>wāṭiʿ</i> owes the <i>mahr</i> , in accordance with what I have mentioned to you of his <i>qawl</i> [§27 above], but he lays claim to the price and the <i>mahr</i> from the seller, because he had deceived him as regards her (<i>qad gharrahu minhā</i>). Then one of them interrupted him [i.e., interrupted Abū Yūsuf] (<i>adkhala ʿalayhi</i>), and said: And how is it he lays claim on him, according to the <i>qawl</i> of Ibn Abī Laylā, for what was brought about, while he is the one who committed the sex-act? ⁸	33 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: عَلَى الْوَاطِئِ الْمَهْرُ، عَلَى مَا ذَكَرْتُ لَكَ مِنْ قَوْلِهِ، وَيَرْجِعُ عَلَى الْبَائِعِ بِالثَّمَنِ وَالْمَهْرِ، لِأَنَّهُ قَدْ غَرَّرَهُ مِنْهَا. فَأَدْخَلَ عَلَيْهِ بَعْضُهُمْ فَقَالَ: وَكَيْفَ يَرْجِعُ عَلَيْهِ فِي قَوْلِ ابْنِ أَبِي لَيْلَى بِمَا أَحْدَثَ وَهُوَ الَّذِي وَطِئَ؟
34 – Have you considered [what would happen] (<i>araʿayta</i>), if he sells him a <i>thawb</i> , and he tears it, or destroys it, and [another] man has claim to it, and he is made liable for the value; would he not lay claim on the seller only to the price, even if the value was more than it?	34 – أَرَأَيْتَ لَوْ بَاعَهُ ثَوْبًا فَخَرَقَهُ أَوْ أَهْلَكَهُ فَاسْتَحَقَّهُ رَجُلٌ وَضَمِنَهُ بِالْقِيَمَةِ؛ أَلَيْسَ إِنَّمَا يَرْجِعُ عَلَى الْبَائِعِ بِالثَّمَنِ وَإِنْ كَانَتْ الْقِيَمَةُ أَكْثَرَ مِنْهُ؟
35 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man buys a <i>jāriya</i> and has sexual intercourse with her, then another man lays rightful claim to her; he takes her and the dowry appropriate to her like (<i>mahra mithlihā</i>) from the <i>wāṭiʿ</i> ; and there belongs no time-condition [i.e., for surrender of deferred dowry] (<i>wa lā waqta</i>) to the <i>mahr</i> appropriate to her kind, except for such as by which her kind would marry; ⁹ and the buyer lays claim on the seller to the price of the <i>jāriya</i> which [price] he took from	35 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اشْتَرَى الرَّجُلُ الْجَارِيَةَ فَوَطِئَهَا، ثُمَّ اسْتَحَقَّهَا رَجُلٌ أَخَذَهَا وَمَهْرَ مِثْلِهَا مِنَ الْوَاطِئِ وَلَا وَقْتَ لِمَهْرِ مِثْلِهَا إِلَّا مَا يُنْكِحُ بِهِ مِثْلَهَا، وَيَرْجِعُ الْمُشْتَرِي عَلَى الْبَائِعِ بِثَمَنِ الْجَارِيَةِ الَّذِي قَبِضَ مِنْهُ، وَلَا يَرْجِعُ بِالْمَهْرِ الَّذِي أَخَذَهُ رَبُّ

⁸ This is a fascinating interruption; it provides another indicant that this text not only grew out of, but incorporated, its ongoing dialectical setting. The Shaybānī Version edited by al-Afghānī begins the interruption, not with “*fa-adkhala ʿalayhi baʿduhum fa-qāla*,” but with “*qāla Muḥammad*.” This again raises a number of possibilities regarding the relationship between the *Umm* Version and the Shaybānī Version; perhaps: 1) the Shaybānī Version which al-Shāfiʿī recited and commented upon was appropriately modified to one remove beyond Muḥammad (i.e., al-Shāfiʿī, on Muḥammad, on Abū Yūsuf) — but here the previous commentator (al-Shaybānī) is not named; or 2) al-Afghānī’s MS, if derived from material extracted from the *Umm* at a later date, was thoughtfully re-worded to reflect an appropriate order of narration (Muḥammad, on Abū Yūsuf). These two scenarios entail that either: 1) Muḥammad was the interposer, but not mentioned, or forgotten, by the compiler of the *Umm*; or 2) the interposer was someone else, and whoever reconstituted al-Afghānī’s text assumed it to be Muḥammad. Whatever the case as regards this intriguing interruption, it bears witness not only to the continuity of debate regarding the *masāʾil* of the *K. Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā*, but that later objections of this kind might actually form accretions to the older text.

⁹ See the *MF*, s.v. “مهر” (22 تعجيل المهر وتأجيله).

him, and he does not lay claim to the <i>mahr</i> which the [real] owner of the <i>jāriya</i> took from him, because it is like something that he himself consumed.	الْجَارِيَةِ مِنْهُ؛ لِأَنَّهُ كَشَيْءٍ اسْتَهْلَكَهُ هُوَ.
36 – And if one were to say (<i>fa-in qāla qā'il^{un}</i>): From where do you say this?	36 – فَإِنْ قَالَ قَائِلٌ: مِنْ أَيْنَ قُلْتَ هَذَا؟
37 – It is said to him: When the Messenger of God, may God bless and save him, pronounced judgment regarding the woman who was married off without the permission of her legal guardian, that her <i>nikāḥ</i> was <i>bāṭil</i> , and that, if she had been subjected to / engaged in sexual intercourse (<i>uṣṭab</i>), to her belonged the <i>mahr</i> – the sexual intercourse (<i>al-iṣāba</i>) was in an obscure circumstance (<i>bi-shubhatⁱⁿ</i>) obliging the <i>mahr</i> , and the one who engaged in sexual intercourse (<i>al-muṣṭib</i>) has no right to make claim on who deceived him; because it was he who initiated the <i>iṣāba</i> . And if he were to lay claim to it from the one who deceived him, there would belong no <i>mahr</i> to the woman from him, because she might have been misleading to him (<i>ghārrat^{un} lahu</i>), and there is not enjoined for her that which he lays claim to from her.	37 – قِيلَ لَهُ: لَمَّا قَضَى رَسُولُ اللَّهِ -صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ- فِي الْمَرْأَةِ تَزْوِجَ بِغَيْرِ إِذْنٍ وَلَيْهَا أَنْ نِكَاحَهَا بَاطِلٌ، وَأَنَّ لَهَا إِنْ أُصِيبَتْ الْمَهْرُ، كَانَتْ الْإِصَابَةُ بِشُبْهَةٍ تُوجِبُ الْمَهْرَ، وَلَا يَكُونُ لِلْمُصِيبِ الرَّجُوعُ عَلَى مَنْ غَرَّهُ؛ لِأَنَّهُ هُوَ الْآخِذُ لِلْإِصَابَةِ، وَلَوْ كَانَ يَرْجِعُ بِهِ عَلَى مَنْ غَرَّهُ لَمْ يَكُنْ لِلْمَرْأَةِ عَلَيْهِ مَهْرٌ؛ لِأَنَّهَا قَدْ تَكُونُ غَارَةً لَهُ فَلَا يَجِبُ لَهَا مَا يَرْجِعُ بِهِ عَلَيْهَا.
38 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man buys a <i>jāriya</i> of whom a defect in her had been hidden from him, which the seller knows, or does not know; it is all the same in the <i>ḥukm</i> (<i>fa-sawā^{un} fi'l-ḥukm</i>), and the seller is a sinner (<i>āthim</i>) in the cover-up (<i>al-tadlīs</i>) if he is knowing; and if a defect occurs in her in the keeping of the buyer, then he discovers the defect which has been hidden from him; he has no right to return her, even if the defect which occurs in her in his keeping is the least of the defects of the slave (<i>aqalla 'uyūb al-raqīq</i>); and when he is buyer, he has the right to return her for the slightest of defects, because the contract of sale (<i>al-bay'</i>) does not bind him in something defective (<i>ma'ṭbⁱⁿ</i>) unless he so wishes – and thus he owes to the seller the like of what the seller would have owed him; and he has no right to return upon the seller after the defect which occurred in his ownership,	38 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اشْتَرَى الرَّجُلُ الْجَارِيَةَ قَدْ دُلَّسَ لَهُ فِيهَا عَيْبٌ عِلْمُهُ الْبَائِعِ أَوْ لَمْ يَعْلَمْهُ فَسَوَاءٌ فِي الْحُكْمِ، وَالْبَائِعُ آثِمٌ فِي التَّدْلِيلِ إِنْ كَانَ عَالِمًا، فَإِنْ حَدَّثَ بِهَا عِنْدَ الْمُشْتَرِي عَيْبٌ ثُمَّ أَطْلَعَ عَلَى الْعَيْبِ الَّذِي دُلَّسَ لَهُ لَمْ يَكُنْ لَهُ رُدُّهَا، وَإِنْ كَانَ الْعَيْبُ الَّذِي حَدَّثَ بِهَا عِنْدَهُ أَقْلَ عَيُوبِ الرَّقِيقِ، وَإِذَا كَانَ مُشْتَرِيًا فَكَانَ لَهُ أَنْ يَرُدَّهَا بِأَقْلَ الْعَيُوبِ؛ لِأَنَّ الْبَيْعَ لَا يُلْزِمُهُ فِي مَعِيبٍ إِلَّا أَنْ يَشَاءَ، فَكَذَلِكَ عَلَيْهِ لِلْبَائِعِ مِثْلُ مَا كَانَ لَهُ عَلَى الْبَائِعِ، وَلَا يَكُونُ لَهُ أَنْ يَرُدَّ عَلَى الْبَائِعِ بَعْدَ الْعَيْبِ الَّذِي حَدَّثَ فِي مِلْكِهِ كَمَا لَمْ يَكُنْ

just as the seller has no right to bind him to the contract of sale while there is in it a defect which was in his ownership. And this is the <i>ma'nā</i> of the <i>Sunna</i> of the Messenger of God, may God bless and save him, in that he ruled that the slave be returned by reason of defect, and to the buyer — when the defect occurs in his keeping — belongs the right to lay claim to what the defect — which the seller hid from him — diminished of her [in value]; and his claim to it is just as I will describe to you: that the <i>jāriya</i> be assessed as though free from defect (<i>sālimatⁱⁿ min al-'ayb</i>), so that it be said: Her value is a hundred. Then she is assessed with the defect in her, and it is said: Her value is ninety. And her value is on the day the buyer took possession of her from the seller, because it was on that day the contract of sale was completed. Then it is said to him: Lay claim to a tenth of her price from the seller, whatever it may be — be it lesser, or be it greater. And if he buys her for two hundred, he lays claim to twenty, and if he had bought her for fifty, he lays claim to five, unless the seller wishes to take her in a state of defect (<i>ma'ibat^m</i>), without anything being taken from the buyer; and it is said to the buyer: Surrender her if you wish, and if you wish keep her, but make no claim to anything.	لِلْبَائِعِ أَنْ يُلْزِمَهُ الْبَيْعُ وَفِيهِ عَيْبٌ كَانَ فِي مِلْكِهِ. وَهَذَا مَعْنَى سُنَّةِ رَسُولِ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - فِي أَنَّهُ قَضَى أَنْ يُرَدَّ الْعَبْدُ بِالْعَيْبِ وَلِلْمُشْتَرِي إِذَا حَدَّثَ الْعَيْبُ عِنْدَهُ أَنْ يَرْجِعَ بِمَا نَقَصَهَا الْعَيْبُ الَّذِي دَلَّسَ لَهُ الْبَائِعُ، وَرُجُوعُهُ بِهِ كَمَا أَصِفُ لَكَ أَنْ تُقَوِّمَ الْجَارِيَةَ سَالِمَةً مِنَ الْعَيْبِ فَيُقَالُ: قِيمَتُهَا مِائَةٌ. ثُمَّ تُقَوِّمَ وَبِهَا الْعَيْبُ فَيُقَالُ: قِيمَتُهَا تِسْعُونَ. وَقِيمَتُهَا يَوْمَ قَبْضِهَا الْمُشْتَرِي مِنَ الْبَائِعِ؛ لِأَنَّهُ يَوْمَئِذٍ تَمَّ الْبَيْعُ، ثُمَّ يُقَالُ لَهُ: ارْجِعْ بِعُشْرِ ثَمَنِهَا عَلَى الْبَائِعِ كَأَنَّا مَا كَانَ قَلَّ أَوْ كَثُرَ. فَإِنْ اشْتَرَاهَا بِمِائَتَيْنِ رَجَعَ بِعُشْرَيْنِ، وَإِنْ كَانَ اشْتَرَاهَا بِخَمْسِينَ رَجَعَ بِخَمْسَةِ إِلَّا أَنْ يَشَاءَ الْبَائِعُ أَنْ يَأْخُذَهَا مَعِيَّةً بِلَا شَيْءٍ يَأْخُذُهُ مِنَ الْمُشْتَرِي فَيُقَالُ لِلْمُشْتَرِي: سَلِّمَهَا إِنْ شِئْتَ وَإِنْ شِئْتَ فَأَمْسِكْهَا وَلَا تَرْجِعْ بِشَيْءٍ.
39 – And when two men buy a <i>jāriya</i>, and they find a defect in her, and one of them is content with the defect, but the other is not content; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: Neither one has the right to return unless they, together, reach consensus (<i>yajtami'ā</i>) as to the return.	39 – وَإِذَا اشْتَرَى الرَّجُلَانِ جَارِيَةً فَوَجَدَا بِهَا عَيْبًا فَرَضِي أَحَدُهُمَا بِالْعَيْبِ وَلَمْ يَرْضَ الْآخَرُ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: لَيْسَ لِوَاحِدٍ مِنْهُمَا أَنْ يُرَدَّ حَتَّى يَجْتَمِعَا عَلَى الرَّدِّ جَمِيعًا.
40 – But Ibn Abī Laylā used to say: To one of them belongs the right to return his share (<i>ḥiṣṣatahu</i>), even if the other is content with the defect. And he [Abū Yūsuf] embraces it.	40 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لِأَحَدِهِمَا أَنْ يُرَدَّ حِصَّتُهُ وَإِنْ رَضِيَ الْآخَرُ بِالْعَيْبِ. وَبِهِ يَأْخُذُ.

41 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And when two men buy the <i>jāriya</i> as a single transaction (<i>ṣafqat^{un} wāḥidat^{un}</i>) from a man, then they find in her a defect, and one of them wants to return, and the other to keep; then to whomever wants to return belongs the right to return, and to whomever wants to keep belongs the right to keep, because there exists in the contract of sale of the two (<i>bay‘ al-ithnayn</i>) that he sell to each one of them half, and the half belonging to each one is like the whole if he sells it; just as if he sold to one of them half of her and to the other half of her, then they found in her a defect – there belongs to each one of them [the right] of return of the half and of claiming the price which was taken from him; and there belongs to each one of them [the right] to keep – even if his <i>ṣāhib</i> returns.	41 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اشْتَرَى الرَّجُلَانِ الْجَارِيَةَ صَفْقَةً وَاحِدَةً مِنْ رَجُلٍ فَوْجَدًا بِهَا عَيْبًا، فَأَرَادَ أَحَدُهُمَا الرَّدَّ وَالْآخَرُ التَّمَسُّكَ فَلِلَّذِي أَرَادَ الرَّدَّ الرَّدُّ وَلِلَّذِي أَرَادَ التَّمَسُّكَ التَّمَسُّكُ لِأَنَّ مَوْجُودًا فِي بَيْعِ الْإِثْنَيْنِ أَنَّهُ بَاعَ كُلُّ وَاحِدٍ مِنْهُمَا النِّصْفَ، فَالنِّصْفُ لِكُلِّ وَاحِدٍ كَالْكُلِّ لَوْ بَاعَهُ، كَمَا لَوْ بَاعَ لِأَحَدِهِمَا نِصْفَهَا وَلِلْآخَرِ نِصْفَهَا، ثُمَّ وَجَدَا بِهَا عَيْبًا كَانَ لِكُلِّ وَاحِدٍ مِنْهُمَا رَدُّ النِّصْفِ وَالرُّجُوعُ بِالثَّمَنِ الَّذِي أُخِذَ مِنْهُ، وَكَانَ لِكُلِّ وَاحِدٍ مِنْهُمَا أَنْ يُمْسِكَ وَإِنْ رَدَّ صَاحِبُهُ.
42 – And when a man buys land in which there is a date-palm (<i>nakhl^{un}</i>), and there is fruit in it, but he did not stipulate anything; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: The fruit belongs to the seller, unless the buyer stipulated that.	42 – وَإِذَا اشْتَرَى الرَّجُلُ أَرْضًا فِيهَا نَخْلٌ وَفِيهِ ثَمَرٌ وَلَمْ يَشْتَرِ شَيْئًا فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: الثَّمَرُ لِلْبَائِعِ إِلَّا أَنْ يَشْتَرِ ذَلِكَ الْمُشْتَرِي.
43 – And thus it has reached us concerning the Messenger of God, may God bless and save him, that he used to say: «Whosoever buys a date-palm which has pollinated fruit (<i>thamar^{un} mu‘abbar^{un}</i>); its fruit belongs to the seller, unless the buyer stipulated that; and whosoever buys a slave and there belongs property to him; his property belongs to the seller, unless the buyer stipulates that.» And he [Abū Yūsuf] embraces it.¹⁰	43 – وَكَذَلِكَ بَلَّغْنَا عَنْ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – أَنَّهُ كَانَ يَقُولُ: «مَنْ اشْتَرَى نَخْلًا لَهُ ثَمَرٌ مُؤَبَّرٌ فَثَمَرُهُ لِلْبَائِعِ، إِلَّا أَنْ يَشْتَرِ ذَلِكَ الْمُشْتَرِي، وَمَنْ اشْتَرَى عَبْدًا وَلَهُ مَالٌ فَمَالُهُ لِلْبَائِعِ، إِلَّا أَنْ يَشْتَرِ ذَلِكَ الْمُشْتَرِي.»

¹⁰ Al-Afghānī (14, n.2) supplies an extensive paraphrase-quotation from the *Mabsūt* (30:31), which finishes with a narrative of no small import to our analysis of this text – so far as indicants of its dialectical contexts are concerned. Al-Afghānī reveals to us that al-Sarakhsī reports a certain *amālī* session with Abū Yūsuf: “And he relates that Abū Yūsuf, may God have mercy upon him, was dictating (*kān amlā*) this *mas‘ala* to his *aṣḥāb*, while Muḥammad was present in the *majlis*; and when he mentioned this *qawl*, Muḥammad, may God have mercy on him, said to himself: The matter is not as he says. Then the one taking dictation (*al-mustamlī*) accosted him: Here is one who opposes you (*yukhālīfuka*), may God have mercy on you! And he [Abū Yūsuf] said: Who is he? He said: Muḥammad b. al-Ḥasan. Then Abū Yūsuf said: What do we

	وَبِهِ يَأْخُذُ.
44 – But Ibn Abī Laylā used to say: The fruit belongs to the buyer even if he did not stipulate, because the fruit of the date-palm is of the date-palm.	44 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الثَّمَرَةُ لِلْمُشْتَرِي وَإِنْ لَمْ يَشْتَرِطْ؛ لِأَنَّ ثَمَرَةَ النَّخْلِ مِنَ النَّخْلِ.
45 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man buys from a man a date-palm which has been pollinated; its fruit belongs to the seller unless the purchaser (<i>al-mubtāʿ</i>) stipulates that; and if it has not been pollinated, then its fruit belongs to the buyer (<i>al-mushtarī</i>) because its fruit is not manifest (<i>ghayru munkashif^m</i>), except in the time of pollination (<i>waqti al-ibārī</i>), and the <i>ibār</i> is when the <i>inkishāf</i> begins; and that of fruit in which the <i>inkishāf</i> does not appear; it is like the foetus (<i>al-janīn</i>) in the womb of its mother — he owns it who owns its mother; and when there begins, pertaining to it, the <i>inkishāf</i> ; it is like the foetus which has left its mother. And this, all of it, is in the <i>maʿnā</i> of the <i>Sunna</i> .	45 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اشْتَرَى الرَّجُلُ مِنَ الرَّجُلِ النَّخْلَ قَدْ أُبْرِتَ فَثَمَرُهَا لِلْبَّائِعِ إِلَّا أَنْ يَشْتَرِطَ ذَلِكَ الْمُبْتَاعُ، وَإِنْ كَانَتْ لَمْ تُؤَبَّرْ فَثَمَرُهَا لِلْمُشْتَرِي لِأَنَّ ثَمَرَهَا غَيْرُ مُنْكَشِفٍ إِلَّا فِي وَقْتِ الْإِبَارِ، وَالْإِبَارُ حِينَ يَبْدُو الْإِنْكَشَافُ وَمَا لَمْ يَبْدُ الْإِنْكَشَافُ فِي الثَّمَرِ فَهُوَ كَالْجَنِينِ فِي بَطْنِ أُمِّهِ يَمْلِكُهُ مَنْ مَلَكَ أُمَّهُ، وَإِذَا بَدَأَ مِنْهُ الْإِنْكَشَافُ كَانَ كَالْجَنِينِ قَدْ زَايَلَ أُمَّهُ. وَهَذَا كُلُّهُ فِي مَعْنَى السُّنَّةِ.
46 – And if he buys grapes or figs or fruit of whatever variety, after it sprouts forth, whether small or large; the fruit belongs to the seller, which is to say it is manifest (<i>munkashifat^{un}</i>), there being no impediment before it (<i>lā ḥāʾila dūnahā</i>) as regards the like <i>maʿnā</i> of the pollinated date-palm.	46 – فَإِنْ اشْتَرَى عِنَبًا أَوْ تِينًا أَوْ ثَمَرًا أَيَّ ثَمَرٍ مَا كَانَ بَعْدَمَا يَطْلُعُ، صَغِيرًا كَانَ أَوْ كَبِيرًا، فَالْثَّمَرَةُ لِلْبَّائِعِ وَذَلِكَ أَنَّهَا مُنْكَشِفَةٌ لَا حَائِلَ دُونِهَا فِي مِثْلِ مَعْنَى النَّخْلِ الْمُؤَبَّرِ.
47 – And likewise, when he sells a slave to whom belongs <i>māl</i> ; the <i>māl</i> belongs to the seller, unless the purchaser stipulates. And this, all of it, is like the <i>Sunna</i> , as far as univocal text (<i>naṣṣan</i>); or resembling its <i>maʿnā</i> (<i>shabīh^{un} bi-maʿnāhā</i>), not opposing it (<i>lā yukhālifu</i>).	47 – وَهَكَذَا إِذَا بَاعَ عَبْدًا لَهُ مَالٌ فَمَالُهُ لِلْبَّائِعِ، إِلَّا أَنْ يَشْتَرِطَ الْمُبْتَاعُ. وَهَذَا كُلُّهُ مِثْلُ السُّنَّةِ نَصًّا أَوْ شَبِيهًا بِمَعْنَاهَا لَا يُخَالِفُهُ.

make of the *qawl* of a man who renounces *ʿilm*! That is, leave the *ikhtilāf* to us. So Muḥammad kept silent, and didn't answer back out of respect for him. I [al-Afghānī] said: But he [Muḥammad] did not mention this detail here in the text (*al-matn*), for perhaps he chose it [the *qawl* of Abū Yūsuf] (*ikhtārāhu*) after the composition of this book, and God knows best." Previous to this narrative, al-Sarakhsī indeed informs us that this was also the *qawl* of Muḥammad.

Bāb al-Ikhtilāf fi'l-'Ayb

Chapter on Disagreement Regarding Defect (al-Ikhtilāf fi'l-'Ayb) ¹	بَابُ الْاِخْتِلَافِ فِي الْعَيْبِ
48 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man buys from a man a <i>jāriya</i>, or a riding-mount (<i>al-dābba</i>), or a <i>thawb</i>, or other than that, and the buyer finds in it a defect, and he says: You sold it to me, while it had this defect in it, and the seller denies that; the evidence is [enjoined] upon the buyer (<i>fā-'alā al-mushtarī al-bayyīn</i>).² And if he has no <i>bayyina</i>, then upon the seller is [enjoined] the taking of the oath (<i>al-yamīn</i>), by God, that he had sold it without this defect in it. And if the seller says: I turn the [responsibility of] the <i>yamīn</i> back onto him; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: I don't turn the [responsibility of] the <i>yamīn</i> back onto him [i.e., onto the buyer], nor does he divert it [the <i>yamīn</i>] from the locus (<i>al-mawḍiʿ</i>) in which the Messenger of God, may God bless and save him, fixed it.³ And he [Abū Yūsuf] embraces it.	48 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اشْتَرَى الرَّجُلُ مِنَ الرَّجُلِ الْحَارِيَّةَ أَوْ الدَّابَّةَ أَوْ الثَّوْبَ أَوْ غَيْرَ ذَلِكَ، فَوَجَدَ الْمُشْتَرِي بِهِ عَيْبًا وَقَالَ: بَعْتَنِي وَهَذَا الْعَيْبُ بِهِ. فَأَنْكَرَ ذَلِكَ الْبَائِعُ، فَعَلَى الْمُشْتَرِي الْبَيِّنَةُ. فَإِنْ لَمْ تَكُنْ لَهُ بَيِّنَةٌ فَعَلَى الْبَائِعِ الْيَمِينَ بِاللَّهِ لَقَدْ بَاعَهُ وَمَا هَذَا الْعَيْبُ بِهِ. فَإِنْ قَالَ الْبَائِعُ: أَنَا أَرُدُّ الْيَمِينَ عَلَيْهِ. فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: لَا أَرُدُّ الْيَمِينَ عَلَيْهِ وَلَا يُحَوَّلُهَا عَنْ الْمَوْضِعِ الَّذِي وَضَعَهَا رَسُولُ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ. وَبِهِ يَأْخُذُ.
49 – And Ibn Abī Laylā used to profess something like the <i>qawl</i> of Abū Ḥanīfa, may God Most High have mercy upon him, except that, when he suspects (<i>attahama</i>) the claimant, he turns the [responsibility of] the <i>yamīn</i> back onto him, and it is said: Swear, and turn it back (<i>iḥlif wa ruddahā</i>)! And if he refuses to swear, he [Ibn Abī Laylā] does not accept from him (<i>lam yaqbal minhu</i>) and judges against him.	49 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ مِثْلَ قَوْلِ أَبِي حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى إِلَّا أَنَّهُ إِذَا اتَّهَمَ الْمُدْعِيَ رَدَّ الْيَمِينَ عَلَيْهِ، فَيَقَالُ: احْلِفْ وَرُدَّهَا. فَإِنْ أَبَى أَنْ يَحْلِفَ لَمْ يَقْبَلْ مِنْهُ وَقَضَى عَلَيْهِ.

¹ (Ḥassūn, vol.9, pt.14, 17-27; Schacht: Tr. I, 9-39).

² As summarized by Hallaq (*Sharīʿa*, 348): “The strong association of *shahāda* [oral testimony] with *bayyina* has rendered these two terms nearly interchangeable, although *bayyina* includes other types of evidence, such as the oath (*yamīn*), confession/acknowledgment (*iqrār*) and circumstantial indicants (*qarāʾin al-aḥwāl*).” As with other technical terms, I shall prefer to keep them in transliteration throughout. As for *bayyina* specifically: it must be born in mind that the term subsumes the categories of evidence listed by Hallaq, and that, as he indicates, the relevant juridical discourses on evidence exhibit a marked preference for oral-testimonial *bayyina*.

³ Al-Afghānī (14, n.1) explains: “His *qawl*: Nor does he divert it, etc.: i.e., he does not change the allotment of the Prophet, may God bless and save him, when he made the *bayyina* the responsibility of the claimant (*al-muddaʿī*), and the *yamīn* the responsibility of the accused (*al-muddaʿā ʿalayh*).”

50 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man buys a <i>dābba</i>, or a <i>thawb</i>, or whatever [object of] sale might be, and the buyer finds in it a defect, and the buyer and the seller disagree, and the seller says: It occurred in your keeping, and the buyer says: Nay, in your keeping; if it is a defect whose like occurs in any circumstance (<i>'ayb^{am} yaḥduthu mithluhu bi-hāl^m</i>), then the [considered] <i>qawl</i> is the <i>qawl</i> of the seller along with his <i>yamīn</i>, with absolute certainty (<i>'alā al-batti</i>), by God, that he had sold it without this defect in it; unless the buyer provides <i>bayyina</i> of his claim, for the <i>bayyina</i> is more principal [in rank] than (<i>awlā min</i>) the <i>yamīn</i>; and if the seller abstains (<i>nakala</i>) [from taking the <i>yamīn</i>], we turn the [responsibility of] the <i>yamīn</i> back upon the buyer, whether we suspect him or not; and if he swears, we send back for him the commodity (<i>al-sil'ata</i>) with defect; but if he abstains from the <i>yamīn</i>, we don't send it back for him, and we don't reward him due only to his <i>ṣāhib</i>'s refusal to swear, rather we reward him due to the refusal to swear when there is, along with the refusal to swear, his <i>yamīn</i>.⁴	50 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اشْتَرَى الرَّجُلُ الدَّابَّةَ أَوْ الثَّوبَ أَوْ أَيَّ بَيْعٍ مَا كَانَ، فَوَجَدَ الْمُشْتَرِي بِهِ عَيْبًا فَاخْتَلَفَ الْمُشْتَرِي وَالْبَائِعُ، فَقَالَ الْبَائِعُ: حَدَثَ عِنْدَكَ. وَقَالَ الْمُشْتَرِي: بَلْ عِنْدَكَ. فَإِنْ كَانَ عَيْبًا يَحْدُثُ مِثْلُهُ بِحَالٍ فَالْقَوْلُ قَوْلُ الْبَائِعِ مَعَ يَمِينِهِ عَلَى الْبَيْتِ بِاللَّهِ لَقَدْ بَاعَهُ وَمَا هَذَا الْعَيْبُ بِهِ، إِلَّا أَنْ يَأْتِيَ الْمُشْتَرِي عَلَى دَعْوَاهُ بَيِّنَةٍ، فَتَكُونَ الْبَيِّنَةُ أَوْلَى مِنَ الْيَمِينِ، وَإِنْ نَكَلَ الْبَائِعُ رَدَدْنَا الْيَمِينَ عَلَى الْمُشْتَرِي، أَتَهَمَّنَاهُ أَوْ لَمْ تَتَهَمَّهُ فَإِنْ حَلَفَ رَدَدْنَا عَلَيْهِ السَّلْعَةَ بِالْعَيْبِ، وَإِنْ نَكَلَ عَنِ الْيَمِينِ لَمْ نَرُدِّهَا عَلَيْهِ وَلَمْ نُعْطِهِ بِنُكُولِ صَاحِبِهِ فَقَطْ، إِنَّمَا نُعْطِيهِ بِالنُّكُولِ إِذَا كَانَ مَعَ النُّكُولِ يَمِينُهُ.
51 – And if one should say (<i>fa-in qāla qā'il</i>): What provides a <i>dalīl</i> (<i>mā dalla</i>) for what you have stated?	51 – فَإِنْ قَالَ قَائِلٌ: مَا دَلٌّ عَلَى مَا ذَكَرْتَ؟
52 – It is said: The Messenger of God, may God bless and save him, decreed oaths (<i>qaḍā... bi'l-aymān</i>) for the <i>Anṣāriyyūn</i>, by which they might merit retaliation for their companion (<i>yastaḥiqqūna bihā dama ṣāhibihim</i>),⁵ and they abstained, and he turned [the responsibility of] the <i>aymān</i> onto the Jews by which they were cleared; then 'Umar b. al-Khaṭṭāb, may God be pleased with him, saw fit (<i>ra'ā</i>) [to impose] the <i>aymān</i> upon those accused of blood by which they might exculpate themselves (<i>yabra'ūna bihā</i>) and they abstained (<i>fa-nakalū</i>), so he turned them [the <i>aymān</i>] back upon the claimants, and did not	52 – قِيلَ: قَضَى رَسُولُ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – لِلْأَنْصَارِيِّينَ بِالْأَيْمَانِ يَسْتَحِقُّونَ بِهَا دَمَ صَاحِبِهِمْ فَتَنَكَّلُوا وَرَدَّ الْأَيْمَانَ عَلَى يَهُودَ يَبْرَعُونَ بِهَا، ثُمَّ رَأَى عُمَرُ بْنُ الْخَطَّابِ رَضِيَ اللَّهُ تَعَالَى عَنْهُ الْأَيْمَانَ عَلَى الْمُدَّعَى عَلَيْهِمُ الدَّمَ يَبْرَعُونَ بِهَا فَتَنَكَّلُوا، فَرَدَّهَا عَلَى الْمُدَّعِينَ وَلَمْ يُعْطِهِمْ بِالنُّكُولِ شَيْئًا حَتَّى رَدَّ الْأَيْمَانَ، وَسُنَّةُ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ

⁴ The *mas'ala* at hand concerns establishing “benefit of assumption” (see note attached to §359 for a list of all occurrences in this treatise).

⁵ See the MF (s.v. “دم”), where *mustaḥiqq al-dam* is equated with *walī al-qīṣāṣ*.

reward them anything on the basis of the [defendants'] refusal to swear (<i>bi'l-nukūli</i>), until he turned back the <i>aymān</i>. And the <i>Sunna</i> of the Messenger of God, may God bless and save him, is the unequivocal interpreting text (<i>al-naṣṣu al-mufasssirat</i>) providing indicants for his non-specific <i>Sunna</i> (<i>tadullu 'alā sunnatihi al-jumlatu</i>).	وَسَلَّمَ - النَّصُّ الْمُفَسَّرَةُ تَدُلُّ عَلَى سُنَّتِهِ الْجُمْلَةِ.
53 – And thus the <i>qawl</i> of 'Umar b. al-Khaṭṭāb, may God Most High be pleased with him, and the <i>qawl</i> of the Prophet, may God bless and save him: “The evidence is [enjoined] upon the claimant, and the oath is [enjoined] upon the accused (<i>al-bayyinatu 'alā al-mudda'ī, wa'l-yamīnu 'alā al-mudda'ā 'alayhi</i>);” then the <i>qawl</i> of 'Umar b. al-Khaṭṭāb, may God Most High be pleased with him; that is a non-specific sense (<i>jumlat^{um}</i>) for which the <i>naṣṣ</i> of the <i>ḥukm</i> of each one of the two provides indicant (<i>dalla 'alayhā</i>); and whosoever said he does not exempt the <i>mudda'ā 'alayhim</i> from the <i>yamīn</i> contradicts (<i>yukhālifu</i>) this, and he augments and burdens the <i>ḥadīth</i> with what is not in it. And we have set this down in the <i>Kitāb al-Aqḍiya</i>, and the <i>yamīn</i> is between those concluding a contract of sale (<i>al-mutabāyi'ayni</i>), with absolute certainty, regarding what they have concluded sales-terms about (<i>tabāya'ā fīhi</i>).⁶	53 – وَكَذَلِكَ قَوْلُ عُمَرَ بْنِ الْخَطَّابِ رَضِيَ اللَّهُ تَعَالَى عَنْهُ وَقَوْلُ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «الْبَيِّنَةُ عَلَى الْمُدَّعِي، وَالْيَمِينُ عَلَى الْمُدَّعَى عَلَيْهِ» ثُمَّ قَوْلُ عُمَرَ بْنِ الْخَطَّابِ رَضِيَ اللَّهُ تَعَالَى عَنْهُ ذَلِكَ جُمْلَةٌ دَلَّ عَلَيْهَا نَصُّ حُكْمِ كُلِّ وَاحِدَةٍ مِنْهُمَا، وَالَّذِي قَالَ: لَا يَعْدُو بِالْيَمِينِ الْمُدَّعَى عَلَيْهِمْ. يُخَالِفُ هَذَا فَيَكْثُرُ وَيَحْمِلُ الْحَدِيثَ مَا لَيْسَ فِيهِ. وَقَدْ وَضَعْنَا هَذَا فِي كِتَابِ الْأَقْضِيَةِ وَالْيَمِينِ بَيْنَ الْمُتَبَايِعِينَ عَلَى الْبَتِّ فِيمَا تَبَايَعَا فِيهِ.
54 – And when a man contracts a sale [of a slave, or animal (see §56), with himself as seller], and he is absolved (<i>bari'a</i>) from [responsibility for] any defect; then indeed	54 – وَإِذَا بَاعَ الرَّجُلُ بَيْعًا فَبَرِيَ مِنْ كُلِّ عَيْبٍ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ

⁶ There is a *Kitāb al-Aqḍiya* in the *Umm* corresponding to Ḥassūn, vol. 8, pt. 13, 7ff, §§24360ff. In the opening (§24360) of this chapter, however, we find a brief discourse on the *zāhir* and *bāṭin* of the *ḥukm*, which concludes with: “And its *tafsīr* is in the *Kitāb al-Aqḍiya*, which is the *Kitāb al-Shāhid wa'l-Yamīn*.” In other words, there appears to have been another text called *Kitāb al-Aqḍiya*, which also bore an alternate title. Intriguingly, though we do not find a chapter of the *Umm* with the exact alternate title of *Kitāb al-Shāhid wa'l-Yamīn*, we do find references to such a *Kitāb* in other sources. Among them is the *manāqib* work of Ibn Ḥajar al-'Asqalānī (d.852), the *Tawālī al-Ta'sīs*, which purports to relate what is, for our concerns, a highly relevant anecdote from one of al-Shāfi'i's early (“Old Doctrine”) students: “And al-Ābarī extracted [a report] (*akhraja*) from the *ṭarīq* of al-Za'farānī [d.260]; he said: We were attending the *majlis* of Bishr al-Marīsī [d.218; prominent Murji'i and follower of Abū Yūsuf], but we were not capable of overcoming him in dialectical disputation (*kunnā lā naqḍaru 'alā munāzaratihi*); then al-Shāfi'i arrived and gave us the *Kitāb al-Shāhid wa'l-Yamīn*, and I studied it in two nights, then I headed over to the *ḥalaqa* of Bishr, engaged him in dialectical debate, and decisively refuted him (*nāzartuhu fa-qāṭa' tuhu*). And he said: This is no cleverness of yours (*laysa ḥādhā min kaysika*); this is from the *kalām* of a man I saw in Mecca [i.e., al-Shāfi'i] — and with him half the 'aql of the people of the world!” (*Tawālī*, 91, §41).

Abū Ḥanīfa, may God Most High be pleased with him, used to say: The absolution (<i>al-barā'a</i>) from all of that is legally permitted (<i>jā'iza</i>), and the buyer cannot return it due to a defect, whatever it may be. Don't you see/opine (<i>a-lā tarā</i>), that he, if he absolved himself (<i>abra'ahu</i>) from skull-fractures (<i>al-shijāj</i>), he is absolved from every fracture, and if he absolved himself from wounds/sores (<i>al-qurūh</i>), he is absolved from every wound/sore? And he [Abū Yūsuf] embraces this [doctrine].	يَقُولُ: الْبَرَاءَةُ مِنْ كُلِّ ذَلِكَ جَائِزَةٌ وَلَا يَسْتَطِيعُ الْمُشْتَرِي أَنْ يَرُدَّهُ بِعَيْبٍ كَانَتْ مَا كَانَ، أَلَا تَرَى أَنَّهُ لَوْ أَبْرَأَهُ مِنَ الشَّحَاجِ بَرِيءٌ مِنْ كُلِّ شَجَّةٍ، وَلَوْ أَبْرَأَهُ مِنَ الْقُرُوحِ بَرِيءٌ مِنْ كُلِّ قَرْحَةٍ. وَبِهَذَا يَأْخُذُ.
55 – But Ibn Abī Laylā used to say: He is not absolved from that until he designates the defects, all of them, by their names; and he [Ibn Abī Laylā] did not state that he [the buyer] take possession of them (<i>yada'a yadahu</i> 'alayhā).⁷	55 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا يَبْرَأُ مِنْ ذَلِكَ حَتَّى يُسَمِّيَ الْعُيُوبَ كُلَّهَا بِأَسْمَائِهَا وَلَمْ يَذْكُرْ أَنْ يَضَعَ يَدَهُ عَلَيْهَا.
56 – Al-Shāfi'ī, may God Most High be pleased with him, said: And when a man sells a slave, or some sort of animal, in exemption of defects (<i>bi'l-barā'ati min al-uyūb</i>); the doctrine to which we hold (<i>fa-alladhī nadhhabu ilayhi</i>), and God Most High knows best, is the judgment (<i>qaḍā'</i>) of 'Uthmān b. 'Affān, may God Most High be pleased with him, that he [the seller] is absolved from every defect about which he did not know, and is not absolved from a defect which the seller knew of and did not name, and [did not] call his attention to (<i>lam yusammihi al-bā'i wa yaqifhu</i> 'alayhi). And we held to this doctrine only in the manner of <i>taqlīd</i>, and [due to the fact] that within it is a <i>ma'nā</i> of the <i>ma'ānī</i> within which the animal (<i>ḥayawān</i>) separates itself from everything else; which is to say that such as had life in it, and was furnished with health, and sickness, and its natures were transformed but rarely (<i>taḥūlu tabā'i'uhu qallamā</i>) — he is absolved from a defect, be it hidden or apparent; and when it is hidden from the seller, it absolves him due to his innocence of it (<i>ubri'uhu bi-bur'ih</i>	56 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا بَاعَ الرَّجُلُ الْعَبْدَ أَوْ شَيْئًا مِنَ الْحَيَوَانِ بِالْبَرَاءَةِ مِنَ الْعُيُوبِ، فَالَّذِي نَذْهَبُ إِلَيْهِ – وَاللَّهُ تَعَالَى أَعْلَمُ – قَضَاءُ عُثْمَانَ بْنِ عَفَّانَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ أَنَّهُ بَرِيءٌ مِنْ كُلِّ عَيْبٍ لَمْ يَعْلَمْهُ، وَلَمْ يَبْرَأْ مِنْ عَيْبٍ عَلِمَهُ وَلَمْ يُسَمِّهِ الْبَائِعُ وَيَقِفْهُ عَلَيْهِ. وَإِنَّمَا ذَهَبْنَا إِلَى هَذَا تَقْلِيدًا وَأَنَّ فِيهِ مَعْنَى مِنَ الْمَعَانِي يُفَارِقُ فِيهِ الْحَيَوَانُ مَا سِوَاهُ؛ وَذَلِكَ أَنَّ مَا كَانَتْ فِيهِ الْحَيَاةُ فَكَانَ يَتَعَذَّى بِالصَّحَّةِ وَالسَّقَمِ وَتَحُولُ طَبَائِعُهُ قَلَمًا يَبْرَأُ مِنْ عَيْبٍ يَخْفَى أَوْ يَظْهَرُ، فَإِذَا خَفِيَ عَلَى الْبَائِعِ أُبْرِئُهُ بِبُرْئِهِ مِنْهُ، فَإِذَا لَمْ يَخْفَ عَلَيْهِ فَقَدْ وَقَعَ اسْمُ الْعُيُوبِ عَلَى مَا نَقَصَهُ، يَقِلُّ وَيَكْثُرُ وَيَصْغُرُ

⁷ Al-Afghānī (15-16, n.4) provides us with an anecdote which is, once again, highly relevant to this dissertation: “And the *aṣḥāb* of the *manāqib* narrated — regarding a *munāzara* which was held between him [Ibn Abī Laylā] and the Imām [Abū Ḥanīfa] under sponsorship of the Caliph Maṣṣūr — that it was his *madhhab* [Ibn Abī Laylā's] that he [the seller] was not absolved until he [the buyer] took possession of the defective object (*al-ma'ib*). And al-Imām Abū Yūsuf rejected this by means of his *qawl*: ‘*wa lam yadhkur... etc.*’” Al-Afghānī does not indicate his sources.

<i>minhu</i>); and when it is not unknown to him, and the name of the defects has alighted upon what diminishes it [in value]: it is less, and it is more, and it is younger, and it is older — and the designation (<i>al-tasmiyya</i>) falls upon that; then it does not absolve him from it, unless he calls his [the buyer's] attention to it. And had it been more <i>ṣaḥīḥ</i> in the <i>qiyās</i> — if not for the <i>taqlīd</i>, and what we described of the separation (<i>tafriq</i>) of the animal from other than it — then he would not be absolved from a defect which was in it, which its <i>ṣaḥīb</i> did not see; but the <i>taqlīd</i> and what we have described is more principal [in rank] (<i>awlā</i>) due to what we have described.	وَيَكْبُرُ وَتَقَعُ التَّسْمِيَةُ عَلَى ذَلِكَ فَلَا يُبْرِئُهُ مِنْهُ إِلَّا أَنْ يَقِفَهُ عَلَيْهِ. وَإِنْ أَصَحَّ فِي الْقِيَاسِ لَوْلَا التَّقْلِيدُ وَمَا وَصَفْنَا مِنْ تَفْرِيقِ الْحَيَوَانِ غَيْرَهُ لَأَنَّ لَا يُبْرَأُ مِنْ عَيْبٍ كَانَ بِهِ لَمْ يَرَهُ صَاحِبُهُ وَلَكِنَّ التَّقْلِيدَ وَمَا وَصَفْنَا أَوْلَى بِمَا وَصَفْنَاهُ.
57 – And when a man buys a <i>dābba</i>, or a man-servant (<i>khādim</i>^m), or a house, or a <i>thawb</i>, or other than that, and a man advances a claim regarding it, and there belongs to the claimant no <i>bayyina</i> for his claim, and he wishes to engage the buyer, in whose hands is that commodity, in a mutual oath-taking on his claim; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: the <i>yamīn</i> is [enjoined] upon him [the buyer], with absolute certainty (<i>al-battata</i>), by God: To this one, regarding it, there belongs no right (<i>mā li-hādhā fīhi ḥaqq</i>^m). And he [Abū Yūsuf] embraces this [doctrine].	57 – وَإِذَا اشْتَرَى الرَّجُلُ دَابَّةً أَوْ خَادِمًا أَوْ دَارًا أَوْ ثَوْبًا أَوْ غَيْرَ ذَلِكَ، فَادَّعَى فِيهِ رَجُلٌ دَعْوَى وَلَمْ يَكُنْ لِلْمُدَّعِي عَلَى دَعْوَاهُ بَيِّنَةٌ، فَأَرَادَ أَنْ يَسْتَحْلِفَ الْمُشْتَرِيَ الَّذِي فِي يَدَيْهِ ذَلِكَ الْمَتَاعُ عَلَى دَعْوَاهُ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: الْيَمِينُ عَلَيْهِ الْبَتَّةُ بِاللَّهِ مَا لِهَذَا فِيهِ حَقٌّ. وَبِهَذَا يَأْخُذُ.
58 – But Ibn Abī Laylā used to say: Upon him is [enjoined] that he swear by God he does not know (<i>mā ya'lamu</i>) that to this one, regarding it, there belongs a <i>ḥaqq</i>.	58 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: عَلَيْهِ أَنْ يَحْلِفَ بِاللَّهِ مَا يَعْلَمُ أَنَّ لِهَذَا فِيهِ حَقًّا.
59 – Al-Shāfi'ī, may God Most High have mercy upon him, said: The oath is [enjoined] upon him, upon absolute certainty (<i>al-yamīnu 'alayhi bi'l-batti</i>): To this one, regarding it, there belongs no right; and that suffices for him when he hadn't known that there belongs to this one a right regarding it. And so it is with the general lot of <i>aymān</i> and testimonies (<i>shahādāt</i>).⁸	59 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: الْيَمِينُ عَلَيْهِ بِالْبَتِّ مَا لِهَذَا فِيهِ حَقٌّ وَيَسَعُهُ ذَلِكَ إِذَا لَمْ يَكُنْ يَعْلَمُ لِهَذَا فِيهِ حَقًّا. وَهَكَذَا عَامَّةُ الْأَيْمَانِ وَالشَّهَادَاتِ.

⁸ The distinction here is between the epistemic value (and responsibility) engendered by a claim of “I know with certainty he has no right” vs. “I do not know that he has a right,” and “This one has no right” vs. “I do not know of a right belonging to this one.”

60 – And when the buyer contracts a sale (<i>ishtarā al-mushtarī bay^{an}</i>)⁹ with the understanding that the seller has the option of choice (<i>al-bā'i bi'l-khiyār</i>) for a month, or that the buyer has <i>khiyār</i> for a month; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: The contract of sale is invalid (<i>al-bay'u fāsīd^{un}</i>), and the <i>khiyār</i> is not to be above three days. It has reached us concerning the Messenger of God, may God bless and save him, that he used to say: «Whosoever buys a sheep which has not been milked for some time (<i>shāt^{an} muḥaffalat^{an}</i>), he enjoys two options (<i>fa-huwa bi-khayr al-naẓarayn</i>) over three days; if he wishes, he returns it, and along with it a <i>ṣā'</i> of dates, or a <i>ṣā'</i> of wheat.»¹⁰ And he [Abū Ḥanīfa] treated <i>khiyār</i>, all of it, on the basis of the <i>qawl</i> of the Messenger of God, may God bless and save him.¹¹	60 – وَإِذَا اشْتَرَى الْمُشْتَرِي بَيْعًا عَلَى أَنْ الْبَائِعَ بِالْخِيَارِ شَهْرًا أَوْ عَلَى أَنْ الْمُشْتَرِي بِالْخِيَارِ شَهْرًا ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: الْبَيْعُ فَاسِدٌ وَلَا يَكُونُ الْخِيَارُ فَوْقَ ثَلَاثَةِ أَيَّامٍ ؛ بَلَّغْنَا عَنْ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – أَنَّهُ كَانَ يَقُولُ: «مَنْ اشْتَرَى شَاةً مُحَفَّلَةً فَهُوَ بِخَيْرِ النَّظَرَيْنِ ثَلَاثَةَ أَيَّامٍ ؛ إِنْ شَاءَ رَدَّهَا وَرَدَّ مَعَهَا صَاعًا مِنْ تَمْرٍ ، أَوْ صَاعًا مِنْ شَعِيرٍ» فَجَعَلَ الْخِيَارَ كُلَّهُ عَلَى قَوْلِ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ .
61 – But Ibn Abī Laylā used to say: The <i>khiyār</i> is <i>jā'iz</i>, be it a month, or a year. And he [Abū Yūsuf] embraces it.¹²	61 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الْخِيَارُ جَائِزٌ شَهْرًا كَانَ أَوْ سَنَةً . وَبِهِ يَأْخُذُ .

⁹ Al-Afghānī (16, n.2) suggests this formula might be a slip of the pen (*taṣḥīf*) in the *aṣl*. However, it is consistent throughout all of the versions I have referenced. Moreover, we have already seen (in §54) the formula: *wa idhā bā'a al-rajulu bay^{an}* (which I have rendered: “when a man contracts a sale [with himself as seller]”). We might, therefore, consider *bay'* not only as “sale,” but as the “contract of sale” itself; the opening to §60 may thus be rendered, if somewhat redundantly: “when the buyer contracts a sale [with himself as buyer].” Alternatively, it may be that *bay'* actually connotes the “object of sale;” §54 might thus be rendered: “When a man sells something [i.e., some object of sale];” and §60: “When the buyer buys something [i.e., some object of sale].” To this, we may add the further complication alluded to in the MF (s.v. “بيع”); mainly, that “*al-bay'* is from among the [category of] words which also mean their opposite (*al-aḍḍād*), like *al-shirā'* — one of the two might be pronounced whilst the other is meant by it.” In light of all this, I have found that rendering “*bay'*” in the sense of “contract of sale” has consistently proven the most effective, with *bā'a bay^{an}* as “contracts a sale [as seller],” and *ishtarā bay^{an}* as “contracts a sale [as buyer].”

¹⁰ Regarding this *ḥadīth*, Ḥassūn (ix.19, n.2) notes that *muḥaffala* applied to sheep means that its owner did not milk it for some days; the milk thus collects in its udder, deceiving the buyer.

¹¹ Regarding Abū Ḥanīfa's approach to this *mas'ala*, al-Afghānī quotes al-Sarakhsī (*Mabsūt*, 13:38): “And in this is a *dalīl* of the permissibility of stipulating *khiyār* in a contract of sale. What is meant is *khiyār al-shart*, and for this he restricted it to three days, and he mentioned the *taḥfīl* as a *bay'ān* for the motivating cause (*al-sabab al-dā'i*) for *shart al-khiyār*.”

¹² Al-Afghānī remarks this is also the *qawl* of Muḥammad, as told by al-Sarakhsī (*Mabsūt*, 13:41). Once again, we observe “the two companions” disagreeing with their master, and in full accordance with Ibn Abī Laylā. This provides yet another indicant that the “truth-seeking” spirit of dialectic was at work in their debates. We will see many more such instances in the following sections.

62 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man buys a slave, or any commodity whatsoever he buys, with the understanding that the seller has stipulated <i>khiyār</i>, or the buyer, or both of them together, for a period they both described, and if the period is three [days] or less; the <i>bay'</i> is <i>jā'iz</i>. But if it exceeds that by a mere instant or more, then the <i>bay'</i> is undone (<i>muntaqaḍ^{un}</i>).¹³	62 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اشْتَرَى الرَّجُلُ الْعَبْدَ أَوْ أَيَّ سِلْعَةٍ مَا اشْتَرَى عَلَى أَنَّ الْبَائِعَ بِالْخِيَارِ أَوْ الْمُشْتَرِيَ أَوْ هُمَا مَعًا إِلَى مُدَّةٍ يَصِفَانَهَا ؛ فَإِنْ كَانَتْ الْمُدَّةُ ثَلَاثًا أَوْ أَقَلَّ فَلِالْبَيْعِ جَائِزٌ ، وَإِنْ كَانَتْ أَكْثَرَ مِنْ ذَلِكَ بِطَرْفَةٍ عَيْنٍ فَأَكْثَرَ فَلِالْبَيْعِ مُنْتَقَضٌ.
63 – And if one should say (<i>fā-in qāla qā'il</i>): How is it that the <i>khiyār</i> is permitted for three, but not permitted for more than three [days]?	63 – فَإِنْ قَالَ قَائِلٌ: وَكَيْفَ جَازَ الْخِيَارُ ثَلَاثًا وَلَمْ يَجْزُ أَكْثَرَ مِنْ ثَلَاثٍ؟
64 – It is said (<i>qāla</i>): If not for the <i>khabar</i> on the authority of the Messenger of God, may God bless and save him, it would not be permissible that there be <i>khiyār</i> after the separation of the two parties to the contract of sale for an <i>hour</i>; because the Messenger of God, may God bless and save him, only made for them the right of <i>khiyār</i> up to the point that they part; which is to say a man is not permitted to pay over his <i>māl</i> to the seller, and the seller pay over his <i>jāriya</i> to the buyer, and there not belong to the seller the usufruct (<i>intifā'</i>) of the price of his commodity, nor to the buyer that he enjoy the usufruct of his <i>jāriya</i>; and if we claim that they both have the right to enjoy the usufruct, we would be claiming [if we follow the opposing opinion] that upon both lies the responsibility to return, if one of them wishes to return. And when it is from the <i>aṣl</i> of our <i>madhhab</i> that it is not permitted that I sell a <i>jāriya</i> with the understanding that her <i>ṣāhib</i> does not sell her — because, when I stipulate this upon him, I have diminished him to some extent in the ownership, and it is not right (<i>wa lā yaṣluḥu</i>) that I put him in ownership by means of compensation I take from him, except for that over which his ownership is complete — then I will have diminished him, by means of the <i>sharṭ al-khiyār</i>, of all	64 – قِيلَ لَوْلَا الْخَبَرُ عَنْ رَسُولِ اللَّهِ -صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ- مَا جَازَ أَنْ يَكُونَ الْخِيَارُ بَعْدَ تَفَرُّقِ الْمُتَبَاعِيَيْنِ سَاعَةً؛ لِأَنَّ رَسُولَ اللَّهِ -صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ- إِنَّمَا جَعَلَ لَهُمَا الْخِيَارَ إِلَى أَنْ يَتَفَرَّقَا؛ وَذَلِكَ أَنَّ رَجُلًا لَا يَجُوزُ أَنْ يَدْفَعَ مَالَهُ إِلَى الْبَائِعِ وَيَدْفَعَ الْبَائِعُ جَارِيَتَهُ لِلْمُشْتَرِيَ فَلَا يَكُونُ لِلْبَائِعِ الْإِنْتِفَاعُ بِثَمَنِ سِلْعَتِهِ وَلَا لِلْمُشْتَرِيَ أَنْ يَنْتَفِعَ بِجَارِيَتِهِ، وَلَوْ زَعَمْنَا أَنَّ لَهُمَا أَنْ يَنْتَفِعَا زَعَمْنَا أَنَّ عَلَيْهِمَا إِنْ شَاءَ أَحَدُهُمَا أَنْ يَرُدَّ رَدًّا، فَإِذَا كَانَ مِنْ أَصْلِ مَذْهَبِنَا أَنَّهُ لَا يَجُوزُ أَنْ أُبَيْعَ الْجَارِيَةُ عَلَى أَنْ لَا يَبِيعَهَا صَاحِبُهَا لِأَنِّي إِذَا شَرَطْتُ عَلَيْهِ هَذَا فَقَدْ نَقَصْتُهُ مِنَ الْمِلْكِ شَيْئًا، وَلَا يَصْلُحُ أَنْ أُمْلِكُهُ بِعَوَضٍ أَخَذَهُ مِنْهُ إِلَّا مَا مِلْكُهُ عَلَيْهِ تَامٌ فَقَدْ نَقَصْتُهُ بِشَرْطِ الْخِيَارِ كُلِّ الْمِلْكِ حَتَّى حَظَرْتُهُ عَلَيْهِ، وَأَصْلُ الْبَيْعِ عَلَى الْخِيَارِ لَوْلَا

¹³ The *mas'ala* treated in §§60ff. (restriction of *khiyār al-sharṭ* to three days) is explained at great length in the MF (s.v. “خيار الشرط,” 15, 16). Also, from §62 to the end of §65 has been translated by Schacht (*Origins*, 326-7).

ownership, to the extent that I have prohibited him from it (<i>ḥazartuhu 'alayhi</i>). And the <i>aṣl</i> of <i>al-bay' 'alā al-khiyār</i>; if not for the <i>khābar</i>, it would have been requisite that it should be invalid (<i>fāsid^{an}</i>), because we invalidate the <i>bay'</i> due to less than what I have mentioned. And, since the Messenger of God, may God bless and save him, stipulated: «As regards the milking-beast whose milk has been held back in her udders (<i>al-muṣarrā</i>), there is <i>khiyār</i> of three [days] after the sale»...	الْخَبَرُ كَانَ يَنْبَغِي أَنْ يَكُونَ فَاسِدًا لِأَنَّ نَفْسَهُ الْبَيْعَ بِأَقْلٍ مِنْهُ مِمَّا ذَكَرْتُ، فَلَمَّا شَرَطَ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - : «فِي الْمَصْرَاةِ خِيَارٌ ثَلَاثَ بَعْدَ الْبَيْعِ».
65 - ... and it was transmitted concerning him, upon him be blessings and peace, that he made for Ḥabbān b. Munqidh the right to <i>khiyār</i> of three [days] regarding what he purchased; we arrive ultimately (<i>intahaynā</i>) to what the Messenger of God, may God bless and save him, commanded of the <i>khiyār</i>. And we didn't exceed it, since the Messenger of God, may God bless and save him, did not exceed it. And you are correct that his commanding it looks as though it might be like the delimiting boundary for its [the period for <i>khiyār</i>-stipulation's] utmost extent (<i>ka'l-ḥaddi li-ghāyatihi</i>), due to the fact that the udder-binding (<i>taṣriya</i>) of the <i>muṣarrā</i> might be known after the first milking in a day and a night and in two days, so that he [the buyer] does not doubt it in her; and if the <i>khiyār</i> was merely so that he might know clarification (<i>istibāna</i>) of the defect of the <i>taṣriya</i>, it is similar to (<i>ashbaha</i>) that it be said: He has the right of <i>khiyār</i> until he knows that it is a <i>muṣarrā</i> — should that take a while, or a short time —, just as he has the right to <i>khiyār</i> regarding the defect when he knows it without a stipulated period of time (<i>bilā waqt^{an}</i>) — should that take a while, or a short time.¹⁴ And even if the <i>khiyār</i> of Ḥabbān was merely due to the consultation of another (<i>li-istishārati ghayrihi</i>), it is possible that he consulted him at once (<i>fi maqāmihi</i>), and after it by an hour — and it is possible, regarding it, that he left off the	65 - وَرُويَ عَنْهُ عَلَيْهِ الصَّلَاةُ وَالسَّلَامُ أَنَّهُ جَعَلَ لِحَبَّانَ بْنِ مُنْقِذٍ خِيَارَ ثَلَاثٍ فِيْمَا ابْتِاعَ، انْتَهَيْنَا إِلَى مَا أَمَرَ بِهِ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - مِنَ الْخِيَارِ وَلَمْ نُجَاوِزْهُ إِذْ لَمْ يُجَاوِزْهُ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - وَلَكَّ أَنَّ أَمْرَهُ بِهِ يُشَبِّهُ أَنْ يَكُونَ كَالْحَدِّ لِغَايَتِهِ مِنْ قَبْلِ أَنْ الْمَصْرَاةَ قَدْ تُعْرَفُ تَصَرُّفَتِهَا بَعْدَ أَوَّلِ حَلْبَةٍ فِي يَوْمٍ وَلَيْلَةٍ وَفِي يَوْمَيْنِ حَتَّى لَا يَشُكَّ فِيهَا، فَلَوْ كَانَ الْخِيَارُ إِنَّمَا هُوَ لَيَعْلَمَ اسْتِبَانَةَ عَيْبِ التَّصْرِيفَةِ أَشَبَّهَ أَنْ يُقَالَ: لَهُ الْخِيَارُ حَتَّى يَعْلَمَ أَنَّهَا مُصْرَاةٌ طَالَ ذَلِكَ أَوْ قَصُرَ، كَمَا يَكُونُ لَهُ الْخِيَارُ فِي الْعَيْبِ إِذَا عَلِمَهُ بِلَا وَقْتٍ طَالَ ذَلِكَ أَوْ قَصُرَ، وَلَوْ كَانَ خِيَارُ حَبَّانَ إِنَّمَا كَانَ لِاسْتِشَارَةٍ غَيْرِهِ أَمْكَنَهُ أَنْ يَسْتَشِيرَهُ فِي مَقَامِهِ وَبَعْدَهُ بِسَاعَةٍ، وَأَمْكَنَ فِيهِ أَنْ يَدْعَ الْإِسْتِشَارَةَ دَهْرًا، فَكَانَ الْخَبَرُ دَلٌّ عَلَى أَنَّ خِيَارَ ثَلَاثٍ أَقْصَى غَايَةِ الْخِيَارِ، فَلَمْ يَجْزَ لَنَا أَنْ نُجَاوِزْهُ وَمَنْ جَاوَزْهُ كَانَ عِنْدَنَا

¹⁴ The reader should be reminded that there is a difference between the natural right to *khiyār* (upon discovery of a defect), and the *stipulation* of the right to *khiyār* tied to a time period. Among the implications of the latter is that the seller or buyer actually loses that right after the specified time elapses.

consultation forever (<i>dahr^{an}</i>). So the <i>khbar</i> was indicating (<i>dalla 'alā</i>) the fact that the <i>khiyār</i> of three [days] is the utmost limit of the <i>khiyār</i> , and we were not permitted to exceed it; and whoso exceeds it is, according to us, a stipulator of an invalid contract of sale (<i>mushtari^{an} bay^{an} fāsid^{an}</i>). ¹⁵	مُشْتَرِطًا بَيْعًا فَاسِدًا.
66 – He said: And when a man contracts a sale [with himself as buyer] ¹⁶ with the understanding that the seller has <i>khiyār</i> of a day, and the buyer takes possession of it [the object of sale], and it is destroyed in his keeping; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: the buyer is liable (<i>dāmin^{un}</i>) for the value, because he deprived him of a <i>bay'</i> . And he [Abū Yūsuf] embraces it. ¹⁷	66 – قَالَ: وَإِذَا اشْتَرَى الرَّجُلُ بَيْعًا عَلَى أَنَّ الْبَائِعَ بِالْخِيَارِ يَوْمًا وَقَبَضَهُ الْمُشْتَرِي فَهَلَكَ عِنْدَهُ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: الْمُشْتَرِي ضَامِنٌ بِالْقِيَمَةِ؛ لِأَنَّهُ أَخَذَهُ عَلَى بَيْعٍ، وَبِهِ يَأْخُذُ.
67 – But Ibn Abī Laylā used to say: He is a custodian/guardian (<i>amīn</i>) regarding that — he owes nothing as regards it; but if indeed the right of <i>khiyār</i> belonged to the buyer, and it [the object] was destroyed in his keeping, then he owes its price, [the one] which he bought it for; according to both their <i>qawls</i> [i.e., Abū Ḥanīfa's and Ibn Abī Laylā's].	67 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هُوَ أَمِينٌ فِي ذَلِكَ لَا شَيْءَ عَلَيْهِ فِيهِ، وَلَوْ أَنَّ الْخِيَارَ كَانَ لِلْمُشْتَرِي فَهَلَكَ عِنْدَهُ فَهُوَ عَلَيْهِ بِثَمَنِ الَّذِي اشْتَرَاهُ بِهِ فِي قَوْلِهِمَا.
68 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man contracts the sale of (<i>bā'a</i>) a slave, with <i>khiyār</i> of three [days] or less, and he [the buyer] takes possession of him, and the slave dies in the hands of the buyer; he is liable (<i>dāmin^{un}</i>) for his value. And we only objected (<i>mana'nā</i>) that we make him liable for his price (<i>thamanahu</i>) due to the fact that the sale has not been completed as	68 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا بَاعَ الرَّجُلُ الْعَبْدَ بِالْخِيَارِ ثَلَاثًا أَوْ أَقَلَّ وَقَبَضَهُ، فَمَاتَ الْعَبْدُ فِي يَدَيِ الْمُشْتَرِي فَهُوَ ضَامِنٌ لِقِيَمَتِهِ. وَإِنَّمَا مَنَعْنَا أَنْ نُضَمِّنَهُ ثَمَنَهُ أَنَّ الْبَيْعَ لَمْ يَتِمَّ فِيهِ وَمَنَعْنَا أَنْ نَطْرَحَ الضَّمَانَ عَنْهُ أَنَّهُ لَمْ

¹⁵ The entirety of this short dialectical sequence and argument has also been translated by Schacht (*Origins*, 327-7). Elsewhere (pp.123-4), Schacht assesses this argument as an illustration of al-Shāfi'ī's "most important methodical rule regarding the use of *qiyās*... that a *qiyās* cannot be based on a special case which constitutes an exception from a general rule; in other words, that exceptions cannot be extended by analogy." He cites (124, n.1) not only the above as example but also (by his numbering system) §216 and 253 (indicating, I believe, the dialectical sequences ending in Ḥassūn §1232 and §1412, respectively). He also cites relevant discussions in the *Risāla*.

¹⁶ Regarding this formula (*ishtarā al-rajulu bay^{an}*), Al-Afghānī (17, n.3) repeats his "slip of the pen" remark (as in §60 above). At this point, however, and based on the consistency of the formula throughout all versions, it seems certain that one of the interpretations we discussed regarding §60 must be intended. In fact, though I have attempted to maintain the sense of "contract of sale," treating *bay'* as "object of sale" makes even more sense here.

¹⁷ Note that Schacht has translated §§66-9 (*Origins*, 270). His translation is different from ours on a number of points, and we will note that he appears to have combined the *Umm* and Shaybānī versions (translating "we," e.g., for Abū Yūsuf, but also including the arguments of al-Shāfi'ī).

regards it; and we objected (<i>mana'nā</i>) that we discard the liability from him due to the fact that he did not deprive him [the seller?] except of a sale by which he would take compensation from the buyer;¹⁸ and we don't make <i>bay'</i> other than guaranteed (<i>maḍmūn^{an}</i>); and there is no way (<i>wayh</i>) that he be an <i>amīn</i> regarding him [the slave] — a man is only an <i>amīn</i> regarding what he does not own, and what he does not enjoy the usufruct of (<i>lā yantifi'u bihi</i>), as immediate benefit or deferred (<i>manfa't^{an} 'ājilat^{an} wa lā 'ājilat^{an}</i>); rather, he merely takes hold of him [the slave] for the <i>manfa'a</i> of its owner (<i>rabbīhi</i>), not for the <i>manfa'a</i> of his own self.	يَأْخُذُهُ إِلَّا عَلَى بَيْعٍ يَأْخُذُ مِنَ الْمُشْتَرِي بِهِ عَوْضًا فَلَا نَجْعَلُ الْبَيْعَ إِلَّا مَضْمُونًا، وَلَا وَجْهَ لَأَنْ يَكُونَ أَمِينًا فِيهِ إِنَّمَا يَكُونُ الرَّجُلُ أَمِينًا فِيمَا لَا يَمْلِكُ وَلَا يَنْتَفِعُ بِهِ مِنْفَعَةً عَاجِلَةً وَلَا آجِلَةً، وَإِنَّمَا يُمَسِّكُهُ لِمَنْفَعَةِ رَبِّهِ لَا لِمَنْفَعَةِ نَفْسِهِ.
69 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And it makes no difference, as regards that (<i>wa sawā^{un} fi dhālika</i>), whether the <i>khiyār</i> belonged to the seller or the buyer, because the <i>bay'</i> was not concluded regarding him until he died.	69 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَسَوَاءٌ فِي ذَلِكَ كَانَ الْخِيَارُ لِلْبَائِعِ أَوْ لِلْمُشْتَرِي؛ لِأَنَّ الْبَيْعَ لَمْ يَتِمَّ فِيهِ حَتَّى مَاتَ.
70 – And when a man buys a <i>jāriya</i>, then sells half of her and does not sell the other half, then he finds a defect in her which the seller had hidden from him (<i>dallasahu lahu</i>); then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: He cannot return what remains [to him] of her, nor can he lay claim to what the defect has devalued of her; and he used to say: Return the <i>jāriya</i>, all of her, just as you took her, and if not, then you may claim no right (<i>fa-lā ḥaqqā laka</i>). And he [Abū Yūsuf] embraces it.	70 – وَإِذَا اشْتَرَى الرَّجُلُ الْجَارِيَةَ فَبَاعَ نِصْفَهَا وَلَمْ يَبِعِ النِّصْفَ الْآخَرَ، ثُمَّ وَجَدَ بِهَا عَيْبًا قَدْ كَانَ الْبَائِعُ دَلَّسَهُ لَهُ، فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: لَا يَسْتَطِيعُ أَنْ يَرُدَّ مَا بَقِيَ مِنْهَا وَلَا يَرْجِعَ بِمَا نَقَصَهَا الْعَيْبُ، وَيَقُولُ: رُدَّ الْجَارِيَةَ كُلَّهَا كَمَا أَخَذْتُهَا، وَإِلَّا فَلَا حَقَّ لَكَ. وَبِهِ يَأْخُذُ.
71 – But Ibn Abī Laylā, may God Most High have mercy upon him, used to say: He returns what he possesses of her to the seller, to the measure of her price. And so too, both of their doctrines (<i>qawluhumā</i>) [i.e., of Abū Ḥanīfa and Ibn Abī Laylā] regarding clothing, and regarding every <i>bay'</i>.¹⁹	71 – وَكَانَ ابْنُ أَبِي لَيْلَى رَحِمَهُ اللَّهُ تَعَالَى يَقُولُ: يَرُدُّ مَا فِي يَدِهِ مِنْهَا عَلَى الْبَائِعِ بِقَدْرِ ثَمَنِهَا. وَكَذَلِكَ قَوْلُهُمَا فِي الثِّيَابِ وَفِي كُلِّ بَيْعٍ.

¹⁸ Of note is al-Shāfi'ī's use of *man'* ("objection") — a dialectical move which receives extensive treatment in the *jadāl/munāẓara* literature.

¹⁹ That is to say, Abū Ḥanīfa and Ibn Abī Laylā maintain their separate positions across the whole genus of objects of *bay'*.

72 – Al-Shāfi'ī, may God Most High be pleased with him, said: And when a man [B] buys from a man [A] a <i>jāriya</i>, or a <i>thawb</i>, or a commodity, and he sells half of her/it to a man (<i>bā'a nisfahā min rajulⁱⁿ</i>), then there appears in her a defect which the seller [A] had covered up; he [B] has no right to return the half for his share of the price to the seller [A], nor to lay claim upon him for anything of loss from defect from the <i>aṣl</i> of the price; and it is said to him [B]: Return her as she is, or retain (<i>iḥbis</i>). And he only has the right to lay claim to loss from defect when the <i>jāriya</i> dies, or if she is manumitted, and becomes unreturnable in any circumstance (<i>bi-hālⁱⁿ</i>), or a defect occurs in her in his keeping so that he [B] becomes without the right to return her to him [A] in any circumstance.	72 – قَالَ الشَّافِعِيُّ: رَضِيَ اللَّهُ تَعَالَى عَنْهُ: وَإِذَا اشْتَرَى الرَّجُلُ مِنَ الرَّجُلِ الْجَارِيَةَ أَوْ الثَّوبَ أَوْ السَّلْعَةَ فَبَاعَ نِصْفَهَا مِنْ رَجُلٍ ثُمَّ ظَهَرَ مِنْهَا عَلَى عَيْبٍ دَلَّسَهُ الْبَائِعُ لَمْ يَكُنْ لَهُ أَنْ يَرُدَّ النَّصْفَ بِحِصَّتِهِ مِنَ الثَّمَنِ عَلَى الْبَائِعِ وَلَا يَرْجِعَ عَلَيْهِ بِشَيْءٍ مِنْ نَقْصِ الْعَيْبِ مِنْ أَصْلِ الثَّمَنِ، وَيُقَالُ لَهُ: رُدَّهَا كَمَا هِيَ أَوْ احْبِسْ. وَإِنَّمَا يَكُونُ لَهُ أَنْ يَرْجِعَ بِنَقْصِ الْعَيْبِ إِذَا مَاتَتِ الْجَارِيَةُ أَوْ أُعْتِقَتْ فَصَارَتْ لَا تُرَدُّ بِحَالٍ، أَوْ حَدَثَ بِهَا عِنْدَهُ عَيْبٌ فَصَارَ لَيْسَ لَهُ أَنْ يَرُدَّهَا عَلَيْهِ بِحَالٍ.
73 – And as for when he [B] sells her, or sells some of her, then it might be possible that he return her [completely, or his share of her, to A]; and when it is possible that he return her, then such would oblige that the seller [B] have no right to return her <i>while</i> laying claim to the loss from defect, just as he has no right to keep her in his possession while laying claim to loss from defect.	73 – فَأَمَّا إِذَا بَاعَهَا أَوْ بَاعَ بَعْضَهَا فَقَدْ يُمَكِّنُ أَنْ يَرُدَّهَا، وَإِذَا أَمَكَّنَ أَنْ يَرُدَّهَا فَيَلْزِمُ ذَلِكَ الْبَائِعَ لَمْ يَكُنْ لَهُ أَنْ يَرُدَّهَا، وَيَرْجِعَ بِنَقْصِ الْعَيْبِ، كَمَا لَا يَكُونُ لَهُ أَنْ يُمَسِّكَهَا بِيَدِهِ وَيَرْجِعَ بِنَقْصِ الْعَيْبِ.
74 – Al-Rabī said:²⁰ When I sell you a slave (<i>abd</i>) with the understanding that you not sell him, or something of the sort; or I stipulate for you a condition, as regards him, which does not bind you as regards your slave except that you wish it; the sale regarding him is null and void (<i>bāṭil^{un}</i>), due to the fact that I, when I come into ownership [to your debit] of the compensation (<i>al-iwad</i>) pertaining to him, then you have the right to own him just as I myself was his owner; and when I sell to	74 – قَالَ الرَّبِيعُ: إِذَا بَعْتُكَ عَبْدًا عَلَى أَنْ لَا تَبِيعَهُ أَوْ شَيْئًا سِوَاهُ، أَوْ شَرَطْتُ عَلَيْكَ فِيهِ شَرْطًا لَيْسَ يَلْزِمُكَ فِي عَبْدِكَ إِلَّا أَنْ تَشَاءَ، فَالْبَيْعُ فِيهِ بَاطِلٌ مِنْ قَبْلِ أَنِّي إِذَا مَلَكَتُ عَلَيْكَ الْعَوَضَ مِنْهُ فَلَكَ أَنْ تَمْلِكَهُ كَمَا كُنْتُ أَنَا مَالِكُهُ، فَإِذَا بَعْتُكَ عَلَى أَنْ لَا تَبِيعَهُ فَقَدْ

²⁰ Ḥassūn provides no indication of this, but §74 is not found in all the copies; it appears in both Būlāq (vii.92, n.1) and Maṭrajī (vii.167, n.1) in precisely the same footnote. The note begins with: "In some/one of the copies, here, there is more; this is its *naṣṣ*:..." followed by what Ḥassūn has included as §74. The placement followed by Ḥassūn, and indicated in the Būlāq and Maṭrajī footnotes, is interesting insofar as al-Rabī is explaining the next *mas'ala* before it appears. The absence of §74 in other copies, along with its odd placement, are further indicants for consideration in reconstructing the redactional history of the text.

you with the understanding that you not sell him,²¹ then I have diminished for you from what I was owning of him, because there had belonged to me the right to sell and do with him as I pleased; and when I diminish for you from what I owned regarding him, then you do not own him in the way of full ownership (<i>milk^{an} tamm^{an}</i>), as I myself was owner, except for manumission (<i>al-'itq</i>) alone, due to a <i>ḥadīth</i> of Barīra [a <i>mawlāt</i> of 'Ā'isha]; for indeed this is a particular removed from the general (<i>khāṣṣ^{un} mustakhrāḡ^{un} min al-'āmmi</i>).²² Don't you see/opine (<i>alā tarā</i>) that I, if I gifted to you half a slave, I have no responsibility to you to gift you the other half? But when I manumit half a slave belonging to me, the manumission of the remainder is assessed to my debit (<i>quwwima 'alayya</i>) when I am solvent (<i>mūsir^{an}</i>), for manumission is the <i>khilāf</i> of other than it, as pertains to all things.	نَقَصْتُكَ مِمَّا كُنْتُ أَمْلِكُهُ؛ لِأَنَّهُ كَانَ لِي أَنْ أُبِيعَ وَأَصْنَعَ بِهِ مَا شِئْتُ، وَإِذَا نَقَصْتُكَ مِمَّا كُنْتُ أَنَا أَمْلِكُ فِيهِ فَلَمْ تَمْلِكْهُ مَلَكًا تَامًّا كَمَا كُنْتُ أَنَا مَالِكًا إِلَّا الْعَتَقُ وَحْدَهُ بِحَدِيثِ بَرِيرَةَ، فَإِنَّ هَذَا خَاصٌّ مُسْتَخْرَجٌ مِنَ الْعَامِّ، أَلَا تَرَى أَنِّي لَوْ وَهَبْتُ لَكَ نَصْفَ عَبْدٍ لَمْ يَكُنْ عَلَيَّ لَكَ أَنْ أَهَبَ لَكَ النِّصْفَ الْآخَرَ، وَإِذَا أَعْتَقْتُ نَصْفَ عَبْدٍ لِي قَوْمَ عَلَيٍّ عَتَقْتُ الْبَاقِي إِذَا كُنْتُ مُوسِرًا، فَالْعَتَقُ خِلَافٌ غَيْرُهُ مِنْ جَمِيعِ الْأَشْيَاءِ.
75 – He [Abū Yūsuf] said: And when a man buys a slave and there is stipulated (<i>ushturīṭa</i>) as regards him a condition (<i>sharṭ</i>) that he sell him to so-and-so, or gift him to so-and-so, or that he manumit him; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: The <i>bay'</i> regarding this is <i>fāsid</i>. And he [Abū Yūsuf] embraces it.	75 – قَالَ: وَإِذَا اشْتَرَى الرَّجُلُ عَبْدًا وَاشْتَرَطَ فِيهِ شَرْطًا أَنْ يَبِيعَهُ مِنْ فُلَانٍ أَوْ يَهَبَهُ لِفُلَانٍ، أَوْ عَلَى أَنْ يُعْتَقَهُ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: الْبَيْعُ فِي هَذَا فَاسِدٌ. وَبِهِ يَأْخُذُ.
76 – And the like of that has reached us concerning 'Umar b. al-Khaṭṭāb, may God Most High be pleased with him.	76 – وَقَدْ بَلَغَنَا عَنْ عُمَرَ بْنِ الْخَطَّابِ رَضِيَ اللَّهُ تَعَالَى عَنْهُ نَحْوُ مِنْ ذَلِكَ.
77 – But Ibn Abī Laylā used to say: The sale is <i>jā'iz</i>, but the condition (<i>al-sharṭ</i>) is <i>bāṭil</i>.	77 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الْبَيْعُ حَائِزٌ وَالشَّرْطُ بَاطِلٌ.

²¹ Ḥassūn has *lā yabī'ahu*, as opposed to Būlāq and Maṭrajī, which have *lā tabī'ahu*. I have followed the latter, as it appears to make more sense.

²² Al-Rabī's explanation employs the *khāṣṣ/āmm* distinction which al-Shāfi'ī elaborates upon in a number of discussions, and which eventually boasts specially-dedicated chapters throughout the *uṣūl* literature. Here, we are made to understand the *ḥadīth* Barīra is an exception, removed from the general rule, which makes cases of manumission (*'itq*) different from all others.

78 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man sells a man a slave, with the understanding that he not contract the sale of him from so-and-so, or that he not engage his services, or that he provide such-and-such maintenance for him, or that he empower him [the slave] to work on his own whilst taking a portion of his earnings (<i>an yukhārijahu</i>); then the sale by such is, all of it, <i>fāsid</i>, because this, all of it, is other than full ownership (<i>ghayru tamāmi milk^m</i>), and stipulation regarding this is not permitted except in a single place — and that is manumission (<i>al-'itq</i>) in conformity to the Sunna, and due to the dissimilarity (<i>firāq</i>) of <i>al-'itq</i> from everything else, for we say: If he bought him from him with the understanding that he manumit him, and he manumits him, then the <i>bay'</i> is <i>jā'iz</i>.	78 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا بَاعَ الرَّجُلُ الرَّجُلَ الْعَبْدَ عَلَى أَنْ لَا يَبِيعَهُ مِنْ فُلَانٍ، أَوْ عَلَى أَنْ لَا يَسْتَحْدِمَهُ، أَوْ عَلَى أَنْ يُنْفِقَ عَلَيْهِ كَذَا، أَوْ عَلَى أَنْ يُخَارِجَهُ، فَالْبَيْعُ فِيهِ كُلُّهُ فَاسِدٌ؛ لِأَنَّ هَذَا كُلُّهُ غَيْرُ تَمَامٍ مِلْكٍ، وَلَا يَحُوزُ الشَّرْطُ فِي هَذَا إِلَّا فِي مَوْضِعٍ وَاحِدٍ؛ وَهُوَ الْعِتْقُ اتِّبَاعًا لِلسُّنَّةِ وَلِفِرَاقِ الْعِتْقِ لِمَا سِوَاهُ فَتَقُولُ: إِنْ اشْتَرَاهُ مِنْهُ عَلَى أَنْ يُعْتِقَهُ فَأَعْتَقَهُ فَالْبَيْعُ جَائِزٌ.
79 – And if a man should say (<i>fa-in qāla rajul^{um}</i>): What occasions the <i>farq</i> (<i>mā farraqa</i>) between manumission (<i>al-'itq</i>) and other things?	79 – فَإِنْ قَالَ رَجُلٌ: مَا فَرَّقَ بَيْنَ الْعِتْقِ وَغَيْرِهِ؟
80 – It is said: There may belong to me half of a slave, and I gift it, and sell it, and do with it as I wish — besides <i>al-'itq</i> —; the <i>ḍamān</i> of my partner's share (<i>naṣīb sharīkī</i>) in him is not incumbent upon me while my partner's share does not leave his possession, because each is an owner (<i>mālik</i>) for what he owns; then if I manumit him while I am solvent (<i>mūsir^{am}</i>), my partner's share — which I do not own and I did not manumit — is manumitted to my debit, and I become liable (<i>ḍamintu</i>) for his value, and he leaves the possession of my partner without his instruction (<i>bi-ghayri amrihi</i>); and the foetus (<i>al-ḥaml</i>) is manumitted (<i>u'tīqa</i>), then she bears him for less than six months, and the manumission falls upon him; and if I sold him, the <i>bay'</i> is not legally permissible; along with its [manumission's] dissonance (<i>khilāfihi</i>) with other things regarding this; and regarding the <i>umm al-walad</i>, and the <i>mukātab</i>, and the like of these two.	80 – قِيلَ: قَدْ يَكُونُ لِي نِصْفُ الْعَبْدِ فَأَهْبُهُ وَأَبِيعُهُ وَأَصْنَعُ فِيهِ مَا شِئْتُ غَيْرَ الْعِتْقِ فَلَا يَلْزَمُنِي ضَمَانُ نَصِيبِ شَرِيكِي فِيهِ، وَلَا يَخْرُجُ نَصِيبُ شَرِيكِي مِنْ يَدِي، لِأَنَّ كُلَّ مَالِكٍ لِمَا مَلَكَ فَإِنْ أَعْتَقْتُهُ وَأَنَا مُوسِرٌ عَتَقَ عَلَيَّ نَصِيبُ شَرِيكِي الَّذِي لَا أَمْلِكُ وَلَمْ أَعْتِقْ وَضَمِنْتُ قِيَمَتَهُ، وَخَرَجَ مِنْ يَدِي شَرِيكِي بِغَيْرِ أَمْرِهِ وَأَعْتِقْتُ الْحَمْلَ فَتِلْدُهُ لِأَقْلٍ [مِنْ] 23 سِتَّةَ أَشْهُرٍ فَيَقَعُ عَلَيْهِ الْعِتْقُ وَلَوْ بَعْتُهُ لَمْ يَجْزِ الْبَيْعُ مَعَ خِلَافِهِ لِغَيْرِهِ فِي هَذَا وَفِي أُمِّ الْوَلَدِ وَالْمُكَاتَبِ وَمَا سِوَاهُمَا.

²³ Missing from Ḥassūn, but present in Būlāq and Maṭrajī.

81 – He said: And when a man owes a man <i>māl</i> from a sale, and the <i>māl</i> becomes due (<i>fa-halla al-māl</i>) and he [the creditor] defers it from him [the debtor] (<i>akhkharahu</i> 'anhu) to another appointed time (<i>ajal</i>); then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: His [the creditor's] deferment (<i>ta'khīruhu</i>) is <i>jā'iz</i>, and it is [deferred] to the other <i>ajal</i>, to which he postponed it for him. And he [Abū Yūsuf] embraces it.	81 – قَالَ: وَإِذَا كَانَ لِرَجُلٍ عَلَى رَجُلٍ مَالٌ مِنْ بَيْعٍ، فَحَلَّ الْمَالُ فَأَخَّرَهُ عَنْهُ إِلَى أَجَلٍ آخَرَ، فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: تَأْخِيرُهُ جَائِزٌ وَهُوَ إِلَى الْأَجَلِ الْآخَرِ الَّذِي أَخَّرَهُ عَنْهُ. وَبِهِ يَأْخُذُ.
82 – But Ibn Abī Laylā used to say: He [the creditor] has the right to retract as regards that, unless such is in the manner of settlement from both of them (<i>'alā wajhi al-ṣulḥi minhumā</i>).	82 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَهُ أَنْ يَرْجِعَ فِي ذَلِكَ إِلَّا أَنْ يَكُونَ ذَلِكَ عَلَى وَجْهِ الصُّلْحِ مِنْهُمَا.
83 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man owes a man <i>māl</i> which has come due (<i>māl^{um} ḥāl^{um}</i>), from a <i>salaf</i>-contract, or sale-contract, or whatever form may be, and the <i>ṣāhib</i> of the <i>māl</i> grants him a delay of the <i>māl</i> (<i>anẓarahu... bi'l-māl</i>) for some period of time; he has the right to retract regarding the grant of delay (<i>al-naẓira</i>) whenever he wishes; which is to say it [the <i>naẓira</i>] is not the removal (<i>ikhrāj</i>) of something from his ownership to him upon whom is the debt, nor something by means of which he takes compensation (<i>iwaḍ</i>) from him, so that we compel him to the <i>iwaḍ</i> which he takes from him, or we invalidate it (<i>nufsiduhu</i>) and he returns the compensation; and there is no difference (<i>wa lā farqa</i>) between the <i>salaf</i> and the <i>bay'</i>, except that they both mutually rescind (<i>yatafāsakhā</i>) regarding the <i>bay'</i> while the <i>mabī'</i> is in existence (<i>qā'im^{um}</i>), and they both treat it as a <i>bay'</i> of something else by grant of delay, or they raise against each other a claim as regards it (<i>yataḍā'ayāni fīhi da'wā</i>), and they both make it into a renewed/appealed contract of sale to a term (<i>bay'^{an} musta'na^{an} ilā ajalⁱⁿ</i>), and the <i>bay'</i> which they occasioned binds them both.	83 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَ لِلرَّجُلِ عَلَى الرَّجُلِ مَالٌ حَالٌّ مِنْ سَلَفٍ أَوْ مِنْ بَيْعٍ أَوْ أَيْ وَجْهِ كَانَ، فَأَنْظَرَهُ صَاحِبُ الْمَالِ بِالْمَالِ إِلَى مُدَّةٍ مِنَ الْمُدَدِ، كَانَ لَهُ أَنْ يَرْجِعَ فِي النَّظَرَةِ مَتَى شَاءَ وَذَلِكَ أَنَّهَا لَيْسَتْ بِإِخْرَاجِ شَيْءٍ مِنْ مِلْكِهِ إِلَى الَّذِي عَلَيْهِ الدَّيْنُ وَلَا شَيْئًا أَخَذَ مِنْهُ بِهِ عَوَضًا فَنَلَزَمَهُ إِيَّاهُ لِلْعَوَضِ الَّذِي يَأْخُذُهُ مِنْهُ أَوْ تُفْسِدُهُ وَيَرُدُّ الْعَوَضَ، وَلَا فَرْقَ بَيْنَ السَّلَفِ وَبَيْنَ الْبَيْعِ إِلَّا أَنْ يَتَفَاسَخَا فِي الْبَيْعِ وَالْمَبِيعِ قَائِمٌ فَيَجْعَلَانِهِ بَيْعًا غَيْرَهُ بِنَظَرَةٍ، أَوْ يَتَدَاْعِيَانِ فِيهِ دَعْوَى فَيُصَيِّرَانِهِ بَيْعًا مُسْتَأْنَفًا إِلَى أَجَلٍ فَيَلْزَمُهُمَا الْبَيْعُ الَّذِي أَحْدَنَاهُ.

84 – And if a man is owed <i>māl</i> by a man, and the debtor (<i>al-maṭlūb</i>) absents himself from him so that he [the creditor] lowers from [his debt] some of that <i>māl</i>, with the understanding that he will give him some of it, then he appears to him afterward; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: What he lowers from [his debt] from that <i>māl</i>: it is <i>jā'iz</i>.²⁴	84 – وَلَوْ أَنَّ رَجُلًا كَانَ لَهُ عَلَى رَجُلٍ مَالٌ فَتَغَيَّبَ عَنْهُ الْمَطْلُوبُ حَتَّى حَطَّ عَنْهُ بَعْضُ ذَلِكَ الْمَالِ عَلَى أَنْ يُعْطِيَهُ بَعْضَهُ، ثُمَّ ظَهَرَ لَهُ بَعْدُ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: مَا حَطَّ عَنْهُ مِنْ ذَلِكَ الْمَالِ فَهُوَ جَائِزٌ.
85 – But Ibn Abī Laylā used to say: He has the right to retract regarding what he lowered from [his debt], because he absented himself from him. And he [Abū Yūsuf] embraces it.	85 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَهُ أَنْ يَرْجِعَ فِيمَا حَطَّ عَنْهُ؛ لِأَنَّهُ تَغَيَّبَ عَنْهُ. وَبِهِ يَأْخُذُ.
86 – But if the claimant-creditor (<i>al-tālib</i>) says: If he appears to me, then to him [belongs] such-and-such from what he owes. This, his <i>qawl</i> does not oblige him to anything, according to their <i>qawls</i> [i.e., Abū Ḥanīfa's, Ibn Abī Laylā's, and Abū Yūsuf's], together.	86 – وَلَوْ أَنَّ الطَّالِبَ قَالَ: إِنْ ظَهَرَ لِي فَلَهُ مِمَّا عَلَيْهِ كَذَا وَكَذَا. لَمْ يَكُنْ قَوْلُهُ هَذَا يُوجِبُ عَلَيْهِ شَيْئًا فِي قَوْلِهِمْ جَمِيعًا.
87 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the man who owes the debt absents himself, so he [the creditor] lowers it – while he is absent – by some [amount] and he [the creditor] takes from him the remainder, then says: I only lowered it due to [his] absence (<i>al-taghayyub</i>); he has no right to retract regarding what he lowered of it, and this is not from among the <i>ma'ānī</i> of compulsion (<i>ikrāh</i>) which we apply to such as who are compelled;²⁵ because <i>ikrāh</i> is posited (<i>mawḍū'um</i>) on the 'abd, as regards what is between him and God, and as regards the <i>ḥukm</i>, and this [case] is not <i>ikrāh</i>; he had appeared to him after the absence, and had transgressed against him regarding the absence, and he had assumed he was absent from him, but he wasn't absent.	87 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا تَغَيَّبَ الرَّجُلُ عَلَيْهِ الدَّيْنُ مِنَ الرَّجُلِ فَحَطَّ عَنْهُ – وَهُوَ مُتَغَيَّبٌ – شَيْئًا وَأَخَذَ مِنْهُ الْبَقِيَّةَ ثُمَّ قَالَ: إِنَّمَا حَطَّطْتُ عَنْهُ لِلتَّغَيَّبِ. فَلَيْسَ لَهُ أَنْ يَرْجِعَ فِيمَا حَطَّ عَنْهُ، وَلَا يَكُونُ هَذَا مِنْ مَعَانِي الْإِكْرَاهِ الَّتِي نَطْرَحُهَا عَمَّنْ أُكْرِهَ عَلَيْهَا؛ لِأَنَّ الْإِكْرَاهَ مَوْضُوعٌ عَنِ الْعَبْدِ فِيمَا بَيْنَهُ وَبَيْنَ اللَّهِ وَفِي الْحُكْمِ وَلَيْسَ هَذَا إِكْرَاهًا؛ قَدْ كَانَ يَظْهَرُ لَهُ بَعْدَ التَّغَيَّبِ وَيُعَدِّي عَلَيْهِ فِي التَّغَيَّبِ وَيَظُنُّ أَنَّهُ غَابَ عَنْهُ وَلَمْ يَغِبْ.

²⁴ The MF (s.v. “إبراء”) discusses the creditor's reduction or forgiveness of debt (*al-ḥaṭṭu*).

²⁵ This is an objection to Ibn Abī Laylā's (unwritten) reasoning, as revealed in the *Mabsūt*. Al-Afghānī notes: “And in a copy of the *Mabsūt*: Because he was compelled (*muḍṭar'um*) as regards this reduction” (19, n.5); and also: “Al-Sarakhsī does not mention any *khilāf* regarding this *mas'ala*” (19, n.6).

88 – And if the <i>ṭālīb</i> says: If he appears to me, then there belongs to him such-and-such a reduction (<i>fa-lahu waḍ‘u kadhā</i>), then he appears to him; there belongs to him no <i>waḍ‘</i> – because it is a gift of risk/hazard (<i>‘aṭīyyatu mukhāṭarat</i>)²⁶	88 – وَلَوْ قَالَ الطَّالِبُ: إِنْ ظَهَرَ لِي فَلَهُ وَضْعُ كَذَا. فَظَهَرَ لَهُ لَمْ يَكُنْ لَهُ وَضْعٌ؛ لِأَنَّهُ عَطِيَّةٌ مُخَاطَرَةٌ.
89 – And when a man contracts a sale with a man [tied] to the ‘<i>aṭā</i>’ [i.e., concerning his portion of the ‘<i>aṭā</i>’, whenever distributed to him];²⁷ then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say regarding that: the <i>bay‘</i> is <i>fāsid</i>.²⁸	89 – وَإِذَا بَاعَ الرَّجُلُ الرَّجُلَ بَيْعًا إِلَى الْعَطَاءِ فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ فِي ذَلِكَ: الْبَيْعُ فَاسِدٌ.
90 – But Ibn Abī Laylā used to say: the <i>bay‘</i> is <i>jā‘iz</i>, and the <i>māl</i> [from the to-be-distributed ‘<i>aṭā</i>’] is [considered as] presently due (<i>ḥāl</i>) [as opposed to after a term].²⁹ And so too their doctrines (<i>qawluhumā</i>) [i.e., Abū Ḥanīfa’s and Ibn Abī Laylā’s] regarding every thing sold (<i>mabī‘</i>) [tied] to a term unknown (<i>ilā ajal</i>ⁱⁿ <i>lā yu‘rafu</i>);³⁰ and if the buyer consumes it, then upon him is [enjoined] the value, according to the <i>qawl</i> of Abū Ḥanīfa; and if a defect occurs in it, he returns it and returns what the defect devalued of it; and if it is of fixed substance (<i>qā‘im bi-‘aynihi</i>) [i.e., non-consumable and non-productive],³¹ and the buyer says: I don’t	90 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الْبَيْعُ جَائِزٌ وَالْمَالُ حَالٌ. وَكَذَلِكَ قَوْلُهُمَا فِي كُلِّ مَبِيعٍ إِلَى أَجَلٍ لَا يُعْرَفُ؛ فَإِنْ اسْتَهْلَكَهُ الْمُشْتَرِي فَعَلَيْهِ الْقِيَمَةُ فِي قَوْلِ أَبِي حَنِيفَةَ، وَإِنْ حَدَثَ بِهِ عَيْبٌ رَدَّهُ وَرَدَّ مَا نَقَصَهُ الْعَيْبُ، وَإِنْ كَانَ قَائِمًا بَعَيْنِهِ فَقَالَ الْمُشْتَرِي: لَا أُرِيدُ الْأَجَلَ وَأَنَا أَتَقَدُّ لَكَ الْمَالُ. جَازَ ذَلِكَ لَهُ فِي هَذَا كُلِّهِ فِي قَوْلِ أَبِي حَنِيفَةَ. وَبِهِ يَأْخُذُ.

²⁶ In other words, it is a *mukhāṭara* contract, whose element of chance produces an unacceptable amount of risk (see, among other places, the MF, s.v. “خطر”).

²⁷ See the *El*², s.v. “‘Aṭā’,” for details regarding this historical pension/soldiers’ pay. See also the MF, s.v. “عطاء,” for a full treatment of different categories and associated substantive rulings.

²⁸ For §§89-90, see *Mabsūt* 13:26-7. The reasoning and *naql* for both AH and IAL positions are explained.

²⁹ See Lane, i.622, s.v. “دين حال”: “A debt of which the appointed term, or period, is ended...; a debt falling due...; contr. of مُؤَجَّل...”

³⁰ I.e., Abū Ḥanīfa and Ibn Abī Laylā maintain their separate opinions regarding these other cases.

³¹ The use of the term ‘*ayn* in the sense of “substance” — if this is a correct interpretation — offers a tantalizing glimpse at the cross-fertilization of technical terms among disciplines. In the *El*², s.v. “‘Ayn,” Van den Bergh notes that ‘*ayn* “can also denote the effect of the function of sight, the aspect, the thing viewed, and especially in the plural, *a‘yān*, the particular things that are perceived in the exterior world. It is therefore not astonishing when we read in Kh̲w̲ārizmī’s *Mafātīḥ al-‘Ulūm*... that in an old translation of Aristotle’s *Categories* which he ascribes to ‘Abd Allāh b. al-Mukaffā’, the first category, οὐσία, substance, which signifies a particular concrete individual, e.g. a particular horse or a particular man, was rendered by ‘*ayn*. However, in a later translation of the *Categories* by Ishāk b. Ḥunayn the word ‘*ayn* is replaced by the Persian word *ḍjawhar* and this word becomes the technical term in all later philosophy for all the meanings of οὐσία, substance.” We learn also of Ibn Sīnā that, in discussing the opening to Aristotle’s *Hermeneutics*, “he uses for the things in the exterior world (in Greek τὰ πράγματα) the term

want the <i>qjal</i>, and I will pay to you in cash the <i>māl</i> (<i>anqudu laka al-māl</i>); such is permitted him as regards this, all of it, according to the <i>qawl</i> of Abū Ḥanīfa. And he [Abū Yūsuf] embraces it.	
91 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man contracts a sale with a man [tied] to the 'aṭā'; the bay' is <i>fāsīd</i>, due to the fact that God, to Him belong might and majesty, gave His permission for debt (<i>dayn</i>) [tied] to a designated term (<i>ilā qjalⁱⁿ musamm^{am}</i>),³² and the designated (<i>al-musammā</i>) is the appointed time (<i>al-muwaqqat</i>) by the new moons (<i>al-ahilla</i>) which God, to Him belong might and majesty, designated; for indeed He says: «They ask you about the new moons. Say: They are time-markers (<i>mawāqīt</i>) for the people, and for the <i>hajj</i>» [Q.2:189]. And the new moons are well-known time-markers, and what there is in their <i>ma'nā</i> is of fixed [numbers of] days; for verily He says: «On fixed days (<i>fī ayyāmⁱⁿ ma'lūmātⁱⁿ</i>)» [Q.22:28]; and of years, for indeed He says: «Two entire years (<i>ḥawalayni kāmīlayni</i>)» [Q.2:233]; and all of this is such as does not come early, or come late; but the 'aṭā' is never so, according to what I have known, and we can't see/opine (<i>lā narā</i>) that it will ever be other than coming early and coming late, and even if the <i>imām</i> exercises <i>ijtihād</i> to the greatest extent of his labouring, coming early or late would still enter into it.	91 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا بَاعَ الرَّجُلُ الرَّجُلَ بَيْعًا إِلَى الْعَطَاءِ فَلَبَيْعٌ فَاسِدٌ مِنْ قَبْلِ أَنْ اللَّهُ عَزَّ وَجَلَّ أَذِنَ بِالذَّيْنِ إِلَى أَجَلٍ مُسَمًّى، وَالْمُسَمًّى الْمَوْقُوتُ بِالْأَهْلَةِ الَّتِي سَمَّى اللَّهُ عَزَّ وَجَلَّ فَإِنَّهُ يَقُولُ: «يَسْأَلُونَكَ عَنِ الْأَهْلَةِ قُلْ هِيَ مَوْقُوتٌ لِلنَّاسِ وَالْحَجِّ» [البقرة: 189]. وَالْأَهْلَةُ مَعْرُوفَةُ الْمَوَاقِيتِ وَمَا كَانَ فِي مَعْنَاهَا مِنَ الْأَيَّامِ الْمَعْلُومَاتِ فَإِنَّهُ يَقُولُ: «فِي أَيَّامٍ مَّعْلُومَاتٍ» [الحج: 28]. وَالسَّنِينَ فَإِنَّهُ يَقُولُ: «حَوْلَيْنِ كَامِلَيْنِ» [البقرة: 233]. وَكُلُّ هَذَا الَّذِي لَا يَتَقَدَّمُ وَلَا يَتَأَخَّرُ، وَالْعَطَاءُ لَمْ يَكُنْ قَطُّ فِيمَا عَلِمْتُ وَلَا نَرَى أَنْ يَكُونَ أَبَدًا إِلَّا يَتَقَدَّمُ وَيَتَأَخَّرُ، وَلَوْ اجْتَهِدَ الْإِمَامُ غَايَةَ جَهْدِهِ لَدَخَلَهُ التَّقَدُّمُ وَالتَّأَخُّرُ.
92 – Al-Rabī related to us: al-Shāfi'ī related to us, he said: Sufyān b. 'Uyayna related to us, on the authority of 'Abd al-Karīm, on 'Ikrima, on Ibn 'Abbās, he said: Don't contract sales to the 'aṭā', nor to the threshing (<i>andar</i>), nor to the pressing (<i>al-aṣīr</i>).	92 – أَخْبَرَنَا الرَّبِيعُ: أَخْبَرَنَا الشَّافِعِيُّ قَالَ: أَخْبَرَنَا سُفْيَانُ بْنُ عُيَيْنَةَ عَنْ عَبْدِ الْكَرِيمِ عَنْ عِكْرِمَةَ عَنْ ابْنِ عَبَّاسٍ قَالَ: لَا تُبَايَعُوا إِلَى الْعَطَاءِ وَلَا إِلَى الْأُنْدَرِ وَلَا إِلَى الْعَصِيرِ.
93 – Al-Shāfi'ī said: And this, all of it, is just as he said, because this comes early or comes late.	93 – قَالَ الشَّافِعِيُّ: وَهَذَا كُلُّهُ كَمَا قَالَ؛

a'yān." Al-Khwārizmī's observation is confirmed by referencing an edition of Ibn al-Muqaffa's *Al-Mantiq*, published some decades ago in Tehran (*al-Mantiq li-Ibn al-Muqaffa* and *Hudūd al-Mantiq li-Ibn Bihriz*, ed. Muḥammad Taqī Dānish'pazhūh, Tehran: Anjuman-i Shāhanshāhī-i Falsafah-i Irān, 1357/1978; pp.7ff., passim).

³² See Q.2:282.

	لَأَنَّ هَذَا يَتَقَدَّمُ وَيَتَأَخَّرُ.
94 – And every bay' [tied] to an unknown <i>ajal</i> – the bay' regarding it is <i>fāsid</i> . ³³	94 – وَكُلُّ بَيْعٍ إِلَى أَجَلٍ غَيْرِ مَعْلُومٍ فَالْبَيْعُ فِيهِ فَاسِدٌ.
95 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And if the commodity which was contracted for sale to an unknown term is destroyed (<i>halakat</i>) in the possession of the buyer; he returns the value; and if it is devalued in his hands due to a defect, he returns it and what the defect devalued; and if the buyer says: I am content with the commodity by a presently-due price (<i>bi-thamanⁱⁿ ḥāl^{im}</i>), and I nullify the condition (<i>shart</i>) of <i>ajal</i> – he has no right to do such; when the sale was invalidly contracted, neither one of them has the right to rectify it (<i>yuṣliḥahu</i>) without the other.	95 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: فَإِنْ هَلَكَتِ السَّلْعَةُ الَّتِي أُتْبِعَتْ إِلَى أَجَلٍ غَيْرِ مَعْلُومٍ فِي يَدَيِ الْمُشْتَرِي رَدَّ الْقِيَمَةَ، وَإِنْ نَقَصَتْ فِي يَدَيْهِ بَعِيبٍ رَدَّهَا وَمَا نَقَصَهَا الْعَيْبُ، فَإِنْ قَالَ الْمُشْتَرِي: أَنَا أَرْضَى السَّلْعَةَ بِثَمَنِ حَالٍ وَأَبْطَلُ الشَّرْطَ بِالْأَجَلِ، لَمْ يَكُنْ ذَلِكَ لَهُ إِذَا انْعَقَدَ الْبَيْعُ فَاسِدًا لَمْ يَكُنْ لِأَحَدِهِمَا أَنْ يُصْلِحَهُ دُونَ الْآخَرِ.
96 – And it is said to whom professes the doctrine of Abū Ḥanīfa (<i>wa yuqālu li-man qāla qawla Abī Ḥanīfata</i>) [as at the end of §90, and rejected by al-Shāfi'ī in §95]: Have you considered [what would happen] (<i>ara'ayta</i>), when you claim that the bay' is <i>fāsid</i> ; when would it be rectified (<i>fa-matā ṣalaha</i>)?	96 – وَيُقَالُ لِمَنْ قَالَ قَوْلَ أَبِي حَنِيفَةَ: أَرَأَيْتَ إِذَا زَعَمْتَ أَنَّ الْبَيْعَ فَاسِدًا فَمَتَى صَلَحَ؟
97 – And if he says: It would be rectified by this one's nullification (<i>ibtāl</i>) of his condition (<i>shart</i>).	97 – فَإِنْ قَالَ: صَلَحَ بِإِبْطَالِ هَذَا شَرْطِهِ.
98 – It is said to him: And to this one belongs the right to be [both] seller [and] buyer, or is this one merely buyer, and the owner of the commodity (<i>rabbu al-sil'ati</i>) seller?	98 – قِيلَ لَهُ: فَلِهَذَا أَنْ يَكُونَ بَائِعًا مُشْتَرٍ، أَوْ إِنَّمَا هَذَا مُشْتَرٍ وَرَبُّ السَّلْعَةِ بَائِعٌ؟
99 – And if he says: Nay, the owner of the commodity is the seller.	99 – فَإِنْ قَالَ: بَلْ رَبُّ السَّلْعَةِ بَائِعٌ.
100 – It is said to him: And does the owner of the commodity occasion a sale besides the first contract of sale?	100 – قِيلَ لَهُ: فَهَلْ أَحْدَثَ رَبُّ السَّلْعَةِ بَيْعًا غَيْرَ الْبَيْعِ الْأَوَّلِ؟
101 – And if he says: No.	101 – فَإِنْ قَالَ: لَا.

³³ The MF (s.v. “البيع الفاسد”, esp. at §10) summarizes the main points of this *mas'ala*, in much the same terms, under the heading: “causes of invalidity (*asbāb al-fasād*; §§7-10).”

102 – It is said: Then your *qawl* is contradictory (*fa-qawluḥu mutanāqid^{un}*); you claim that an invalid sale (*bay^{an} fāsid^{an}*) whose *ḥukm* is like one in which no sale occurs becomes a *bayʿ* without its owner (*mālikuhu*) contracting *bayʿ*.

102 – قِيلَ: فَقَوْلُكَ مُتَنَاقِضٌ تَزْعُمُ أَنَّ بَيْعًا
فَاسِدًا حُكْمُهُ كَمَا لَمْ يَصِرْ فِيهِ بَيْعٌ يَصِيرُ بَيْعًا
مِنْ غَيْرِ أَنْ يَبِيعَهُ مَالِكُهُ.

Bāb Bay' al-Thimār qabla an Yabdū Ṣalāḥuhā

Chapter on the Sale of Fruit before its Wholesomeness (Ṣalāḥuhā) is Manifest ¹	بَابُ بَيْعِ الثَّمَرِ قَبْلَ أَنْ يَبْدُوَ صَلَاحُهَا
103 – Al-Rabī related to us, he said: al-Shāfi'ī said: And when a man buys fruit before it ripens, from all the categories (aṣnāf) of crops; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, said: When he does not stipulate the leaving of that fruit to such a time as it ripens, then indeed the bay' is jā'iz. Don't you see/opine (alā tarā), that he, if he buys green wheat/barley (qaṣīl ^{an}), giving it as fodder to his animals (dawābbihi) before it ripens; such is permissible?	103 – أَخْبَرَنَا الرَّبِيعُ قَالَ: قَالَ الشَّافِعِيُّ: وَإِذَا اشْتَرَى الرَّجُلُ ثَمَرًا قَبْلَ أَنْ يَبْلُغَ مِنْ أَصْنَافِ الْعَلَةِ كُلِّهَا فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى قَالَ: إِذَا لَمْ يَشْتَرِ تَرْكَ ذَلِكَ الثَّمَرِ إِلَى أَنْ يَبْلُغَ فَإِنَّ الْبَيْعَ جَائِزٌ، أَلَا تَرَى أَنَّهُ لَوْ اشْتَرَى قَصِيلاً يَقْصِلُهُ عَلَى دَوَابِّهِ قَبْلَ أَنْ يَبْلُغَ كَانَ ذَلِكَ جَائِزًا؟
104 – He [Abū Ḥanīfa?] said: And if he buys something from the spadix [of the palm tree] (al-ṭal'i) when it emerges, and he cuts it, it is jā'iz; and when he buys it, and does not stipulate its leaving [until it ripens]; then [enjoined] upon him is that he cut it; and when he requests permission of his ṣāhib regarding leaving it [until it ripens], and he permits him such; there is no harm in that (fa-lā ba'sa bi-dhālika). And he [Abū Yūsuf] embraces it.	104 – قَالَ: وَلَوْ اشْتَرَى شَيْئًا مِنَ الطَّلْعِ حِينَ يَخْرُجُ فَقَطَعَهُ كَانَ جَائِزًا، وَإِذَا اشْتَرَاهُ وَلَمْ يَشْتَرِ تَرْكَهُ فَعَلَيْهِ أَنْ يَقْطَعَهُ فَإِذَا اسْتَأْذَنَ صَاحِبَهُ فِي تَرْكِهِ فَأُذِنَ لَهُ فِي ذَلِكَ فَلَا بَأْسَ بِذَلِكَ. وَبِهِ يَأْخُذُ.
105 – But Ibn Abī Laylā ² used to say: There is no good (lā khayra) in the bay' of something of that sort until it ripens. And there is no harm (lā ba'sa), when he buys something of that sort which has ripened, that he stipulate upon the seller its leaving for a given term (tarkahu ilā ajal ⁱⁿ).	105 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا خَيْرَ فِي بَيْعِ شَيْءٍ مِنْ ذَلِكَ حَتَّى يَبْلُغَ، وَلَا بَأْسَ إِذَا اشْتَرَى شَيْئًا مِنْ ذَلِكَ قَدْ بَلَغَ أَنْ يَشْتَرِ عَلَى الْبَائِعِ تَرْكَهُ إِلَى أَجَلٍ.
106 – But Abū Ḥanīfa, may God Most High be pleased with him, used to say: There is no good in this stipulation (shart).	106 – وَكَانَ أَبُو حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ يَقُولُ: لَا خَيْرَ فِي هَذَا الشَّرْطِ.

¹ (Ḥassūn, vol.9, pt.14, 18-43; Schacht: Tr. I, 9-18).

² Al-Afghānī's Shaybānī Version (21) follows the name of Ibn Abī Laylā with raḥimahu Allāh.

107 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man buys kinds (<i>aṣnāf</i>) of fruit before their wholesomeness (<i>ṣalāḥuhā</i>) is apparent; the <i>bay'</i> is <i>fāsid</i>, because the Prophet, may God bless and save him, proscribed (<i>nahā'an</i>) the <i>bay'</i> of fruit until its wholesomeness is apparent; and if he buys it and does not name its cutting [in the contract], nor its leaving [until it ripened], before its wholesomeness is apparent; the <i>bay'</i> regarding it is <i>fāsid</i>, because he only buys, then leaves until its period (<i>ibbānahu</i>) is attained — and its <i>bay'</i> is not <i>ḥalāl</i> (<i>lā yaḥillu</i>) piece-by-piece (<i>munfarid^{an}</i>) until its wholesomeness is made manifest, unless he buys of it something he sees with his own eye, with the understanding that he cut on the spot (<i>makānahu</i>); and there is no harm in it, just as there is no harm in it when it is fallen down (<i>mawḍū^{an}</i>) on the ground; and this is not of the <i>ma'nā</i> which the Prophet, may God bless and save him, proscribed (<i>nahā... 'anhu</i>) — the Prophet, may God bless and save him, only proscribed that fruit be sold up until its wholesomeness is apparent.	107 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اشْتَرَى الرَّجُلُ أَصْنَافًا مِنَ الثَّمَارِ قَبْلَ أَنْ يَبْدُوَ صَالِحُهَا فَالْبَيْعُ فَاسِدٌ؛ لِأَنَّ النَّبِيَّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - نَهَى عَنْ بَيْعِ الثَّمَارِ حَتَّى يَبْدُوَ صَالِحُهَا، وَلَوْ اشْتَرَاهُ وَلَمْ يُسَمِّ قِطْعَهُ وَلَا تَرْكَهُ قَبْلَ أَنْ يَبْدُوَ صَالِحُهُ كَانَ الْبَيْعُ فِيهِ فَاسِدًا؛ لِأَنَّهُ إِنَّمَا يَشْتَرِي ثُمَّ يَتْرُكُ إِلَى أَنْ يَبْلُغَ إِبَانَهُ وَلَا يَحِلُّ بَيْعُهُ مُتَفَرِّدًا حَتَّى يَبْدُوَ صَالِحُهُ إِلَّا أَنْ يَشْتَرِيَ مِنْهُ شَيْئًا يَرَاهُ بَعَيْنِهِ عَلَى أَنْ يَقْطَعَ مَكَانَهُ، فَلَا يَكُونُ بِهِ بَأْسٌ كَمَا لَا يَكُونُ بِهِ بَأْسٌ إِذَا كَانَ مَوْضُوعًا بِالْأَرْضِ، فَلَيْسَ هَذَا مِنَ الْمَعْنَى الَّتِي نَهَى النَّبِيُّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - عَنْهُ، إِنَّمَا نَهَى النَّبِيُّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - عَنْ الثَّمَرَةِ أَنْ تُبَاعَ حَتَّى يَبْدُوَ صَالِحُهَا.
108 – And he [the Prophet] said: «Have you considered [what would happen] (<i>ara'ayta</i>) if God holds back (<i>mana'a</i>) the fruit; then for what would one of you take the <i>māl</i> [i.e., compensation] of his brother?»³ And the Prophet, may God bless and save him, has forbidden the <i>bay'</i> of fruit until it is safe from blight (<i>ḥattā tanjū min al-'āhati</i>); and there is only held back/prevented (<i>yumna'u</i>) [by God], of fruit, that which is left for a period of time, short of which occurs the prevention (<i>al-man'u</i>).	108 – وَقَالَ: «أَرَأَيْتَ إِنْ مَنَعَ اللَّهُ الثَّمَرَةَ، فِمَ يَأْخُذُ أَحَدُكُمْ مَالَ أَخِيهِ؟» وَقَدْ نَهَى النَّبِيُّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - عَنْ بَيْعِ الثَّمَرَةِ حَتَّى تَنْجُوَ مِنَ الْعَاهَةِ، وَإِنَّمَا يُمْنَعُ مِنَ الثَّمَرَةِ مَا يُتْرَكُ إِلَى مُدَّةٍ يَكُونُ الْمَنْعُ دُونَهَا.
109 – And, likewise, the blight only comes upon what is left for a period of time short of which the blight occurs; and as for what is cut on the spot: it is like the [sort] fallen upon the ground (<i>ka'l-mawḍū'i bi'l-ardī</i>).	109 – وَكَذَلِكَ إِنَّمَا تَأْتِي الْعَاهَةُ عَلَى مَا يُتْرَكُ إِلَى مُدَّةٍ تَكُونُ الْعَاهَةُ دُونَهَا، فَأَمَّا مَا يَقْطَعُ مَكَانَهُ فَهُوَ كَالْمَوْضُوعِ بِالْأَرْضِ.

³ Schacht (*Origins*, 104) considers this an instance of back-projecting; i.e., the *ara'ayta* is “put into the mouth of the Prophet.” He neglects to mention, however, that *ara'ayta* is a Qur'ānic rhetorical device occurring some 23 times in precisely the same manner the Prophet employs it here (see, e.g., Q.6:40-1, 46-7; 10:50, 59; etc.)

110 – And when a man buys land in which there is a date-palm in which there is fruit (<i>ḥaml^{un}</i>), and he does not state [in the contract] the palm, nor the fruit; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: The palm belongs to the buyer, following on the land (<i>taba^{an} li'l-ardī</i>); and the fruit belongs to the seller, unless the buyer makes stipulation.	110 – وَإِذَا اشْتَرَى الرَّجُلُ أَرْضًا فِيهَا نَخْلٌ فِيهَا حَمْلٌ فَلَمْ يَذْكُرِ النَّخْلَ وَلَا الْحَمْلَ فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: النَّخْلُ لِلْمُشْتَرِي تَبَعًا لِلأَرْضِ، وَالثَّمَرَةُ لِلْبَائِعِ إِلَّا أَنْ يَشْتَرِطَ الْمُشْتَرِي.
111 – It has reached us concerning the Messenger of God, may God bless and save him, that he said: «Who buys a pollinated palm tree; its fruit belongs to the seller, unless the buyer stipulates otherwise (<i>yastathniyahu</i>).» And he [Abū Yūsuf] embraces it.	111 – بَلَّغْنَا عَنْ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – أَنَّهُ قَالَ: «مَنْ اشْتَرَى نَخْلًا مُؤَبَّرًا فَثَمَرَتُهُ لِلْبَائِعِ إِلَّا أَنْ يَسْتَثْنِيَهُ الْمُشْتَرِي». وَبِهِ يَأْخُذُ.
112 – But Ibn Abī Laylā used to say: The fruit belongs to the buyer. ⁴	112 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الثَّمَرَةُ لِلْمُشْتَرِي.
113 – Al-Shāfiʿī, may God Most High be pleased with him, said: And when a man buys land in which there is a palm tree, and in the palm tree there is fruit; the fruit belongs to the seller when it has been pollinated; and if it wasn't pollinated: it belongs to the buyer; and the land with the palm belongs to the buyer.	113 – قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ تَعَالَى عَنْهُ: وَإِذَا اشْتَرَى الرَّجُلُ أَرْضًا فِيهَا نَخْلٌ وَفِي النَّخْلِ ثَمَرَةٌ، فَالثَّمَرَةُ لِلْبَائِعِ إِذَا كَانَ قَدْ أُبِّرَ وَإِنْ لَمْ يُؤَبَّرْ فَهُوَ لِلْمُشْتَرِي، وَالْأَرْضُ بِالنَّخْلِ لِلْمُشْتَرِي.
114 – He [Abū Yūsuf] said: And when a man buys a hundred “broken” cubits (<i>dhirāⁱⁿ mukassarat^{am}</i>) ⁵ of an un-apportioned house (<i>dārⁱⁿ ghayri maqsumatⁱⁿ</i>), or ten arable plots (<i>ajriba</i>) of un-apportioned land; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say regarding that, all of it: The bay' is <i>bāṭil</i> , and not permitted, because he does not know what he bought – how much of the house is it?	114 – قَالَ: وَإِذَا اشْتَرَى الرَّجُلُ مِائَةَ ذِرَاعٍ مُكَسَّرَةٍ مِنْ دَارٍ غَيْرِ مَقْسُومَةٍ، أَوْ عَشْرَةَ أَجْرِيَةٍ مِنْ أَرْضٍ غَيْرِ مَقْسُومَةٍ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ فِي ذَلِكَ كُلِّهِ: الْبَيْعُ بَاطِلٌ وَلَا يَجُوزُ؛ لِأَنَّهُ لَا يَعْلَمُ مَا اشْتَرَى كَمْ

⁴ §§110-112: Al-Afghānī (21, n.4) notices that this *mas'ala* is a repeat, differing only from its earlier appearance [§§42-6] by a few expressions.

⁵ A clue as to the history of this measure might be found in the *Et*², s.v. “*Dhirā*”: 1) “In the 17th century [in Persia], there was a “royal” cubit (*gaz-i shāhī*) of 95 cm. in Iran; the “shortened” cubit (*gaz-i mukassar*) of 68 cm. was used for measuring cloth; this was probably the cloth cubit of Aleppo”; 2) and as for the cloth cubit of Aleppo: “The Egyptian cloth cubit (*dhirā' al-bazz*, also called *al-dhirā' al-baladiyya*, identical with the late-mediaeval *dhirā' al-ḥadīd*, or “iron” cubit, which seems to have been originally the same as the “black” cubit) measured 58.15 cm., the cloth cubit of Damascus 63 cm., the widely accepted cloth-cubit of Aleppo 67.7 cm., that of Baghdād 82.9 cm., and that of Istanbul 68.6 cm.”

And how much of the land is it? And where is its location (<i>mawḍi'uhu</i>) as pertains to the house, and as pertains to the land?	هُوَ مِنَ الدَّارِ؟ وَكَمْ هُوَ مِنَ الْأَرْضِ؟ وَأَيْنَ مَوْضِعُهُ مِنَ الدَّارِ وَالْأَرْضِ؟
115 – But Ibn Abī Laylā, may God Most High have mercy upon him, used to say: It is <i>jā'iz</i> in the <i>bay'</i> . And he [Abū Yūsuf] embraces it. And [even] if the house isn't a hundred cubits; the buyer has option (<i>al-mushtarī bi'l-khiyār</i>): if he wishes, he returns it; and if he wishes, he lays claim upon the seller to what has been devalued of the house, according to the <i>qawl</i> of Ibn Abī Laylā.	115 – وَكَانَ ابْنُ أَبِي لَيْلَى رَحِمَهُ اللَّهُ تَعَالَى يَقُولُ: هُوَ جَائِزٌ فِي الْبَيْعِ. وَبِهِ يَأْخُذُ. وَإِنْ كَانَتْ الدَّارُ لَا تَكُونُ مِائَةَ ذِرَاعٍ فَالْمُشْتَرِي بِالْخِيَارِ إِنْ شَاءَ رَدَّهَا وَإِنْ شَاءَ رَجَعَ بِمَا نَقَصَتِ الدَّارُ عَلَى الْبَائِعِ فِي قَوْلِ ابْنِ أَبِي لَيْلَى.
116 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man buys from a house a third, or a quarter, or ten out of a total of one hundred shares; the <i>bay'</i> is <i>jā'iz</i> , and he is a partner (<i>sharīk^{un}</i>) regarding them, according to the measure of what he bought.	116 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اشْتَرَى الرَّجُلُ مِنَ الدَّارِ ثُلَاثًا أَوْ رُبْعًا أَوْ عَشْرَةَ أَصْهُمٍ مِنْ مِائَةِ سَهْمٍ مِنْ جَمِيعِهَا فَالْبَيْعُ جَائِزٌ، وَهُوَ شَرِيكٌ فِيهَا بِقَدَرِ مَا اشْتَرَى.
117 – Al-Shāfi'ī said: And likewise, if he bought half of a slave, or half a <i>thawb</i> , or half of a piece of lumber.	117 – قَالَ الشَّافِعِيُّ: وَهَكَذَا لَوْ اشْتَرَى نِصْفَ عَبْدٍ أَوْ نِصْفَ ثَوْبٍ أَوْ نِصْفَ خَشَبَةٍ.
118 – But if he buys a hundred cubits from a house of determined proportion (<i>dārⁱⁿ maḥdūdātⁱⁿ</i>), and he does not designate [in the contract] the cubits of the house; the <i>bay'</i> is <i>bāṭil</i> , due to the fact that the hundred might be half, or a third, or a quarter, or less, and he will have bought something of undetermined proportion, unmeasured — its measure unknown as pertains to the house, and we will have permitted him. And if he designates the cubits of the whole house [in the contract], then he buys of them a hundred cubits; it is <i>jā'iz</i> , due to the fact that this is a known portion (<i>sahm^{un} ma'lūm^{un}</i>) of its collective entirety, and this is like his buying a share from among its shares.	118 – وَلَوْ اشْتَرَى مِائَةَ ذِرَاعٍ مِنْ دَارٍ مَحْدُودَةٍ وَلَمْ يُسَمِّ أَذْرُعَ الدَّارِ فَالْبَيْعُ بَاطِلٌ مِنْ قَبْلِ أَنْ الْمِائَةُ قَدْ تَكُونُ نِصْفًا أَوْ ثُلَاثًا أَوْ رُبْعًا أَوْ أَقَلَّ، فَيَكُونُ قَدْ اشْتَرَى شَيْئًا غَيْرَ مَحْدُودٍ وَلَا مَحْسُوبٍ مَعْرُوفٍ كَمْ قَدَرُهُ مِنَ الدَّارِ فَجُزِئَهُ. وَلَوْ سَمَّى ذِرْعَ جَمِيعِ الدَّارِ ثُمَّ اشْتَرَى مِنْهَا مِائَةَ ذِرَاعٍ كَانَ جَائِزًا؛ مِنْ قَبْلِ أَنْ هَذَا مِنْهَا سَهْمٌ مَعْلُومٌ مِنْ جَمِيعِهَا، وَهَذَا مِثْلُ شِرَائِهِ سَهْمًا مِنْ أَصْهُمٍ مِنْهَا.
119 – And if he says: I buy from you one hundred cubits, taking them from any house I wish; the <i>bay'</i> is <i>fāsid</i> .	119 – وَلَوْ قَالَ: أَشْتَرِي مِنْكَ مِائَةَ ذِرَاعٍ آخِذَهَا مِنْ أَيِّ الدَّارِ شِئْتُ. كَانَ الْبَيْعُ فَاسِدًا.

120 – And if the inter-tangled trees/bushes (<i>al-ājām</i>) are a barrier (<i>maḥṣūrat^{an}</i>), and a fish has become trapped (<i>ḥuṣira</i>) in them, and a man buys it; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: Such is not permitted. ⁶	120 – وَإِنْ كَانَتْ الْأَجَامُ مَحْظُورَةً وَقَدْ حُطِرَ فِيهَا سَمَكٌ فَاشْتَرَاهُ رَجُلٌ، فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: لَا يَحُوزُ ذَلِكَ.
121 – It has come down to us on the authority of Ibn Mas‘ūd, may God Most High be pleased with him, that he said: «Don’t buy a fish in the water, for it is a risk (<i>gharar^{um}</i>).»	121 – بَلَّغَنَا عَنْ ابْنِ مَسْعُودٍ رَضِيَ اللَّهُ تَعَالَى عَنْهُ أَنَّهُ قَالَ: «لَا تَشْتَرُوا السَّمَكَ فِي الْمَاءِ فَإِنَّهُ غَرَرٌ.»
122 – And so, too, it has reached us concerning ‘Umar b. al-Khaṭṭāb, may God Most High be pleased with him, and Ibrāhīm al-Nakha‘ī. And he [Abū Yūsuf] embraces it.	122 – وَكَذَلِكَ بَلَّغَنَا عَنْ عُمَرَ بْنِ الْخَطَّابِ رَضِيَ اللَّهُ تَعَالَى عَنْهُ وَإِبْرَاهِيمَ النَّخَعِيِّ. وَبِهِ يَأْخُذُ.
123 – But Ibn Abī Laylā used to say regarding this: His buying is <i>jā’iz</i> ; there is no harm in it (<i>lā ba’sa bihi</i>).	123 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ فِي هَذَا: شِرَاؤُهُ جَائِزٌ لَا بَأْسَ بِهِ.
124 – And so, too, it has reached us concerning ‘Umar b. ‘Abd al-‘Azīz.	124 – وَكَذَلِكَ بَلَّغَنَا عَنْ عُمَرَ بْنِ عَبْدِ الْعَزِيزِ.
125 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And when the fish is in a well, or a cistern (<i>mājilⁱⁿ</i>), or a barricading tangle of trees/bushes, and the seller and the buyer have both seen it, and its owner sells it, or something from it he beheld with his own eye, but it is not taken until fished out (<i>yuṣāda</i>); the sale of it is <i>bātil</i> , due to the fact that it is neither a sale of inclusive description (<i>bay‘i ṣifati maḍmūnatⁱⁿ</i>), nor a sale of an object under control (<i>bay‘i ‘aynⁱⁿ maqdūrⁱⁿ ‘alayhā</i>) when sold and paid for, and it might possibly die and putrefy (<i>yantina</i>) before being taken, and there is, for who buys it in its death, a hazard (<i>mukhāṭara</i>) in the taking of it. However, if it was in a spring of water, not trapped in it, and taken by hand on the spot (<i>makānahu</i>), its <i>bay’</i> is permitted, just	125 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَ السَّمَكَ فِي بَيْتٍ، أَوْ مَاجِلٍ أَوْ أَجْمَةٍ مَحْظُورَةٍ، وَكَانَ الْبَائِعُ وَالْمُشْتَرِي يَرَيَانِهِ، فَبَاعَهُ مَالِكُهُ أَوْ شَيْئًا مِنْهُ يَرَاهُ بَعِينَهُ وَهُوَ لَا يُؤْخَذُ حَتَّى يُصَادَ، فَالْبَيْعُ فِيهِ بَاطِلٌ؛ مِنْ قَبْلِ أَنَّهُ لَيْسَ بِبَيْعِ صِفَةٍ مَضْمُونَةٍ وَلَا بِبَيْعِ عَيْنٍ مَقْدُورٍ عَلَيْهَا حِينَ تُبَاعُ فَيُدْفَعُ، وَقَدْ يُمَكِّنُ أَنْ يَمُوتَ فَيَنْتِنَ قَبْلَ أَنْ يُقْبَضَ فَيَكُونَ عَلَى مُشْتَرِيهِ فِي مَوْتِهِ الْمُخَاطَرَةُ فِي قَبْضِهِ، وَلَكِنَّهُ لَوْ كَانَ فِي عَيْنِ مَاءٍ لَا يَمْتَنِعُ فِيهِ وَيُؤْخَذُ بِالْيَدِ

⁶ Al-Afghānī, drawing upon other references, explains the meaning of *qjma*, and adds: “their saying: The sale of fish in the *qjma*; they mean the stagnant water of the *wādī-bed* (*al-baṭīḥa*), which is the planting-spot for cane (*qaṣab*) or reeds (*yarā*) [....]” (22 n.3).

as it is permitted when it is removed and placed on the ground (<i>wuḍi'a 'alā al-arḍi</i>). ⁷	مَكَانَهُ حَازَ بَيْعُهُ، كَمَا يَجُوزُ إِذَا أُخْرِجَ فَوُضِعَ عَلَى الْأَرْضِ.
126 - And when a man is detained (<i>ḥubisa</i>) regarding debt, and the <i>qāḍī</i> declares him insolvent (<i>fallasahu</i>), but he sells, and buys, and manumits in prison, or makes a charitable donation (<i>taṣaddaqa bi-ṣadaqatⁱⁿ</i>), or proffers a gift (<i>wahaba hibat^{an}</i>); then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: This, all of it, is <i>jā'iz</i> , and nothing is sold of his <i>māl</i> regarding the debt, and the declaration of insolvency is not to be counted as anything (<i>wa laysa yu'addu al-taflīsu shay^{un}</i>) [al-Afghānī's "corrected" rendering]. ⁸ Don't you see/opine (<i>alā tarā</i>) that a man might become insolvent today, and obtain <i>māl</i> tomorrow?	126 - وَإِذَا حُبِسَ الرَّجُلُ فِي الدَّيْنِ وَفَلَّسَهُ الْقَاضِي، فَبَاعَ فِي السِّجْنِ وَاشْتَرَى وَأَعْتَقَ أَوْ تَصَدَّقَ بِصَدَقَةٍ أَوْ وَهَبَ هِبَةً، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: هَذَا كُلُّهُ جَائِزٌ، وَلَا يَبَاعُ شَيْءٌ مِنْ مَالِهِ فِي الدَّيْنِ وَلَيْسَ يُعَدُّ التَّفْلِيسُ شَيْئًا، أَلَا تَرَى أَنَّ الرَّجُلَ قَدْ يُفْلِسُ الْيَوْمَ وَيُصِيبُ غَدًا مَالًا.
127 - But Ibn Abī Laylā used to say: His <i>bay'</i> is not permitted, nor is his buying, manumitting, gifting, nor charitable donating, after declaration of insolvency, ⁹ and he sells his <i>māl</i> , and makes it up (<i>yaqḍīhi</i>) to the creditors.	127 - وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا يَجُوزُ بَيْعُهُ وَلَا شِرَاؤُهُ وَلَا عِتْقُهُ وَلَا هِبَتُهُ وَلَا صَدَقَتُهُ بَعْدَ التَّفْلِيسِ فَيَبِيعُ مَالَهُ وَيَقْضِيهِ الْغُرَمَاءَ.
128 - And Abū Yūsuf, may God Most High have mercy upon him, professed something like the <i>qawl</i> of Ibn Abī Laylā, except for the manumission (<i>al-'atāqa</i>) in detention, and not by way of declaration of insolvency. And we do not permit anything	128 - وَقَالَ أَبُو يُوسُفَ رَحِمَهُ اللَّهُ تَعَالَى مِثْلَ قَوْلِ ابْنِ أَبِي لَيْلَى مَا خَلَا الْعَتَاقَةَ فِي الْحَجَرِ وَلَيْسَ مِنْ قِبَلِ التَّفْلِيسِ. وَلَا نُجِيزُ

⁷ Note the final sentence here mirrors the conclusions in §§107 and 109; the analogical relationship is clear, and hinges upon the idea that *gharar* obtains in an object of sale whose position is insecure. So long as it is cut from the tree or captured by hand *makānahu* (on the spot) — i.e., during the *bay'*-session — it is permissible.

⁸ This last phrase represents something of a conundrum. Ḥassūn (ix.32), Būlāq (vii.94), and Maṭraḥī (vii.170) have rendered وَلَيْسَ بَعْدَ التَّفْلِيسِ شَيْءٌ. Al-Afghānī (23-24) renders the same in his main text, but we find that he changes the phrase via his corrigenda (٣), the last printed page of the edition) to وَلَيْسَ يُعَدُّ التَّفْلِيسُ شَيْئًا (he has "corrected" بعد to يعد , and شيء to شيئاً). We might infer from all of this that the former rendering is consistent throughout all of the MSS referenced, including al-Afghānī's Shaybānī Version. As the editions referenced do not draw attention to this phrase, we are left to wonder: 1) what precisely might be understood by "*wa laysa ba'da al-taflīsi shay^{un}*," and 2) upon what basis al-Afghānī made his changes, which, after all, appear to make more sense — was he assuming scribal error for both *ba'da*/*yu'addu* and *shay^{un}*/*shay^{un}*? Whatever the case, I have been compelled to follow al-Afghānī here, even though consistency seems to be showing us that "*wa laysa ba'da al-taflīsi shay^{un}*" is the intended reading. At this point, however, I simply cannot make sense of it.

⁹ Here, *ba'da al-taflīsi* appears in all editions, and makes sense in the context of *ikhtilāf*.

except manumission from that, ever, until he discharges his debt.¹⁰	شَيْئًا سِوَى الْعَتَاقَةِ مِنْ ذَلِكَ أَبَدًا حَتَّى يَقْضِيَ دَيْنَهُ.
129 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And the bay' of the man is permitted, and the entirety of what he originates in his māl, whether a possessor of debt (<i>dhā daynⁱⁿ</i>) or otherwise; possessor of discharge of debt (<i>dhā wafāⁱⁿ</i>) or otherwise; until he is appealed against regarding the debt; for when he is appealed against, and something is confirmed against him, or he admits to something of it, it is incumbent upon the qāḍī that he detain him on the spot, and that he say: I have detained him until I settle his debt, and I have declared him insolvent (<i>fallastuhu</i>).¹¹ Then he calculates his māl, and he orders him to strive in bargaining (<i>al-tasawwum</i>), and he orders who will bargain with him, then the qāḍī executes the bay' regarding it, at the most expensive [price] he is capable of, and he settles his debt; and when no debt remains over him, he is brought forth, and freed of detention, and he returns to [a state in which] all that he did regarding his māl is permitted him, until such a time as he is appealed against regarding another debt [i.e., besides the one he was just cleared of]; and what was consumed of his māl during the time in which he was detained, by sale, or gift, or charitable donation, or other than that; it is returned (<i>fa-huwa mardūd^{un}</i>).	129 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَيَجُوزُ بَيْعُ الرَّجُلِ وَجَمِيعُ مَا أَحْدَثَ فِي مَالِهِ كَانَ ذَا دَيْنٍ أَوْ غَيْرِ ذِي دَيْنٍ، وَذَا وَفَاءٍ أَوْ غَيْرِ ذِي وَفَاءٍ حَتَّى يُسْتَعْدَى عَلَيْهِ فِي الدَّيْنِ، فَإِذَا اسْتَعْدِيَ عَلَيْهِ فَتَبَّتْ عَلَيْهِ شَيْءٌ أَوْ أَفَرَّ مِنْهُ بِشَيْءٍ، انْبَغَى لِلْقَاضِي أَنْ يَحْجَرَ عَلَيْهِ مَكَانَهُ وَيَقُولَ: قَدْ حَجَرْتُ عَلَيْهِ حَتَّى أَقْضِيَ دَيْنَهُ وَفَلَسْتُهُ. ثُمَّ يُحْصِي مَالَهُ وَيَأْمُرُهُ بِأَنْ يَجْتَهِدَ فِي التَّسَوُّمِ وَيَأْمُرُ مَنْ يَتَسَوَّمُ بِهِ ثُمَّ يَنْفِذُ الْقَاضِي فِيهِ الْبَيْعَ بِأَعْلَى مَا يَقْدِرُ عَلَيْهِ فَيَقْضِيَ دَيْنَهُ فَإِذَا لَمْ يَبْقَ عَلَيْهِ دَيْنٌ أَحْضَرَهُ فَأَطْلَقَ الْحَجَرَ عَنْهُ، وَعَادَ إِلَى أَنْ يَجُوزَ لَهُ فِي مَالِهِ كُلُّ مَا صَنَعَ إِلَى أَنْ يُسْتَعْدَى عَلَيْهِ فِي دَيْنٍ غَيْرِهِ، وَمَا اسْتَهْلَكَ مِنْ مَالِهِ فِي الْحَالَةِ الَّتِي حُجِرَ فِيهَا عَلَيْهِ بِبَيْعٍ أَوْ هِبَةٍ أَوْ صَدَقَةٍ أَوْ غَيْرِ ذَلِكَ فَهُوَ مَرْدُودٌ.
130 – And when a man gives a man a commodity (<i>matā^{am}</i>) for him to sell, and he does not designate payment cash down (<i>bi'l-naqdi</i>) or delayed (<i>bi'l-nasī'ati</i>), and he [the commissioned] sells it by delayed payment; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: It is <i>jā'iz</i>. And he [Abū Yūsuf] embraces it.	130 – وَإِذَا أَعْطَى الرَّجُلُ الرَّجُلَ مَتَاعًا يَبِيعُهُ وَلَمْ يُسَمِّ بِالْثَقَدِ وَلَا بِالنَّسِيئَةِ فَبَاعَهُ بِالنَّسِيئَةِ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: هُوَ جَائِزٌ. وَبِهِ يَأْخُذُ.

¹⁰ This last comment appears to belong to Muḥammad b. al-Ḥasan. Al-Afghānī's text (24) is precisely the same.

¹¹ Ḥassūn has فَلَاسْتُهُ, I have chosen فَلَاسْتُهُ, as I can't make sense of Ḥassūn's rendering.

131 – But Ibn Abī Laylā used to say: The sale is <i>jā'iz</i>, but the one commissioned [to make the sale] (<i>al-ma'mūr</i>) is liable (<i>dāmin^{un}</i>) for the value of the commodity until he turns it over (<i>yadfa'ahu</i>) to the owner (<i>rabb</i>) of the commodity; and when the “price” (<i>al-thaman</i>) leaves the keeping of the buyer, and it is in excess of the value, then indeed he [the commissioned] yields (<i>yaruddu...</i> <i>'alā</i>) that excess to the owner of the commodity; and if it is less than the value, he is not made liable for other than the past value, and the seller lays no claim to anything from the owner of the commodity. And God Most High knows best.	131 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الْبَيْعُ حَائِزٌ وَالْمَأْمُورُ ضَامِنٌ لِقِيَمَةِ الْمَتَاعِ حَتَّى يَدْفَعَهُ لِرَبِّ الْمَتَاعِ، فَإِذَا خَرَجَ الثَّمَنُ مِنْ عِنْدِ الْمُشْتَرِي وَفِيهِ فَضْلٌ عَنْ الْقِيَمَةِ فَإِنَّهُ يَرُدُّ ذَلِكَ الْفَضْلَ عَلَى رَبِّ الْمَتَاعِ، وَإِنْ كَانَ أَقَلَّ مِنَ الْقِيَمَةِ لَمْ يَضْمَنْ غَيْرَ الْقِيَمَةِ الْمَاضِيَةِ، وَلَمْ يَرْجِعِ الْبَائِعُ عَلَى رَبِّ الْمَتَاعِ بِشَيْءٍ. وَاللَّهُ تَعَالَى أَعْلَمُ.
132 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man turns over a commodity (<i>sil'at^{un}</i>) to a man, and says: Sell it. But he does not say: By payment cash down, or: By delayed payment, or: By whatever you think best (<i>ra'ayta</i>) of cash down or delayed; the <i>bay'</i> is [understood to be] for payment cash down; and if he [the commissioned] sells it by delayed payment, he [the owner of the commodity] has the right to reversal of the sale (<i>naqḍ al-bay'</i>) after he swears an oath by God (<i>yahlifu bi-Allāhi</i>) that he did not authorize [him] to sell other than by payment cash down; and if it [the commodity] has passed out of existence (<i>fātat</i>) [i.e., is no longer <i>qā'im</i>], the seller is liable for its value. And if he [the owner of the commodity] wishes to make the buyer liable, he makes him liable; and if he [the owner of the commodity] makes the seller liable, the seller lays no claim on the buyer; but if he makes the buyer liable, the buyer lays claim upon the seller to the excess (<i>faḍl</i>) pertaining to what the owner (<i>rabb</i>) of the commodity took from [him], from what he [the buyer] purchased it for; because there was not taken from him except for what was incumbent upon him from the value of the commodity which he destroyed, when the <i>bay'</i> of it had not been concluded.	132 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا دَفَعَ الرَّجُلُ إِلَى الرَّجُلِ سِلْعَةً فَقَالَ: بَعْهَا. وَلَمْ يَقُلْ بِنَقْدٍ وَلَا بِنَسِيئَةٍ وَلَا بِمَا رَأَيْتَ مِنْ نَقْدٍ أَوْ نَسِيئَةٍ، فَالْبَيْعُ عَلَى النَّقْدِ فَإِنْ بَاعَهَا بِنَسِيئَةٍ كَانَ لَهُ نَقْضُ الْبَيْعِ بَعْدَ أَنْ يَحْلِفَ بِاللَّهِ مَا وَكَّلَ أَنْ يَبِيعَ إِلَّا بِنَقْدٍ، فَإِنْ فَاتَتْ فَالْبَائِعُ ضَامِنٌ لِقِيَمَتِهَا؛ فَإِنْ شَاءَ أَنْ يَضْمَنَ الْمُشْتَرِي ضَمَنَهُ فَإِنْ ضَمَّنَ الْبَائِعُ لَمْ يَرْجِعِ الْبَائِعُ عَلَى الْمُشْتَرِي وَإِنْ ضَمَّنَ الْمُشْتَرِي رَجَعَ الْمُشْتَرِي عَلَى الْبَائِعِ بِالْفَضْلِ مِمَّا أَخَذَ رَبُّ السِّلْعَةِ عَمَّا ابْتَاعَهَا بِهِ؛ لِأَنَّهُ لَمْ يُؤْخَذْ مِنْهُ إِلَّا مَا لَزِمَهُ مِنْ قِيَمَةِ السِّلْعَةِ الَّتِي أَتْلَفَهَا إِذَا كَانَ الْبَيْعُ فِيهَا لَمْ يَتِمَّ.
133 – He [Abū Yūsuf] said: And when the two parties to a contract of sale disagree	133 – قَالَ: وَإِذَا اخْتَلَفَ الْبَيْعَانِ فَقَالَ الْبَائِعُ:

(ikhtalafa al-bayyi'āni), and the seller says: I sold to you while I had khiyār. But the buyer says: You sold to me while having no right to khiyār. Then indeed Abū Ḥanīfa, may God be pleased with him, used to say: The [accepted] qawl is the qawl of the seller, with his oath (ma'a yamīnihi). ¹²	بِعْتِكَ وَأَنَا بِالْخِيَارِ. وَقَالَ الْمُشْتَرِي: بَعْتَنِي وَلَمْ يَكُنْ لَكَ خِيَارٌ. فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: الْقَوْلُ قَوْلُ الْبَائِعِ مَعَ يَمِينِهِ.
134 – But Ibn Abī Laylā used to say: The [accepted] qawl is the qawl of the buyer. And he [Abū Yūsuf] embraces it.	134 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الْقَوْلُ قَوْلُ الْمُشْتَرِي. وَبِهِ يَأْخُذُ.
135 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when two men conclude the sale (tabāya'a) of a slave, and they separate (tafarraqā) after the bay', then they disagree (ikhtalafā), and the seller says: I contracted bay' with you (bi'tuka) with the understanding that I had khiyār for three [days]; but the buyer says: You contracted bay' with me, but you did not stipulate khiyār; they both swear (taḥālafa) and the buyer has khiyār regarding unilateral annulment of the sale (faskhi al-bay'i), or the seller will have the right to khiyār [if the buyer does not unilaterally annul the bay']; and this — and God Most High knows best — is like their ikhtilāf regarding the price: we, ourselves, revoke (nanquḍu) the bay' due to their ikhtilāf regarding the price; and we revoke it [bay'] due to the claim of this one that he has the right to khiyār, and that he did not acknowledge the sale except with khiyār.	135 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا تَبَايَعَ الرَّجُلَانِ عَبْدًا وَتَفَرَّقَا بَعْدَ الْبَيْعِ ثُمَّ اخْتَلَفَا فَقَالَ الْبَائِعُ: بَعْتُكَ عَلَيَّ أَنِّي بِالْخِيَارِ ثَلَاثًا. وَقَالَ الْمُشْتَرِي: بَعْتَنِي وَلَمْ تَشْتَرِطْ خِيَارًا. تَحَالَفَا وَكَانَ الْمُشْتَرِي بِالْخِيَارِ فِي فسخِ الْبَيْعِ أَوْ يَكُونُ لِلْبَائِعِ الْخِيَارُ، وَهَذَا – وَاللَّهُ تَعَالَى أَعْلَمُ – كَاخْتِلَافِهِمَا فِي الثَّمَنِ؛ نَحْنُ نَنْقُضُ الْبَيْعَ بِاخْتِلَافِهِمَا فِي الثَّمَنِ، وَنَنْقُضُهُ بِادِّعَاءِ هَذَا أَنْ يَكُونَ لَهُ الْخِيَارُ وَأَنَّهُ لَمْ يُقَرَّرْ بِالْبَيْعِ إِلَّا بِخِيَارٍ.
136 – And likewise, if the buyer claims khiyār, the qawl regarding it would be thus.	136 – وَكَذَلِكَ لَوْ ادَّعَى الْمُشْتَرِي الْخِيَارَ، كَانَ الْقَوْلُ فِيهِ هَكَذَا.
137 – He [Abū Yūsuf] said: And when a man sells [barters] a jāriya for a jāriya, and each one of them [i.e., of the two parties to the bay'] takes possession, then one of them finds a defect ('ayb) in the jāriya he took possession of; then indeed Abū Ḥanīfa, may	137 – قَالَ: وَإِذَا بَاعَ الرَّجُلُ جَارِيَةً بِجَارِيَةٍ وَقَبِضَ كُلُّ وَاحِدٍ مِنْهُمَا، ثُمَّ وَجَدَ أَحَدُهُمَا بِالْجَارِيَةِ الَّتِي قَبِضَ عَيْبًا، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ

¹² Al-Afghānī (24-5, n.4) points out a discrepancy in the *Mabsūt*: “Here it is like this, but in the *Bāb al-Khiyār fi'l-Bay'* of the *Mabsūt* there is *khilāf* re: this *mas'ala*. He said: ‘And when the seller and the buyer disagree regarding the stipulation of khiyār, the qawl is that of the one who denies it of them both.’ And the denier here is the seller, not the buyer; and this *mas'ala* is not mentioned in the *K. al-Ikhtilāf* of the *Mabsūt*, and God knows best.” Also note that Schacht discusses this *mas'ala* (what he calls “rules on presumption”) to some extent (*Origins*, 271). See my note attached to §359 for other instances of establishing “benefit of assumption.”

God Most High have mercy upon him, used to say: He returns her and he takes [back] his <i>jāriya</i> , because the sale has been annulled (<i>qad intaqada</i>). And he [Abū Yūsuf] embraces it.	اللَّهُ تَعَالَى كَانَ يَقُولُ: يَرُدُّهَا وَيَأْخُذُ جَارِيَّتَهُ؛ لَأَنَّ الْبَيْعَ قَدْ انْتَقَضَ. وَبِهِ يَأْخُذُ.
138 – But Ibn Abī Laylā used to say: He returns her and he takes her value [as though she were] sound (<i>ṣaḥīḥat^{an}</i>) [i.e., her full, no-defect, value].	138 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: يَرُدُّهَا وَيَأْخُذُ قِيمَتَهَا صَحِيحَةً.
139 – And likewise, both their <i>qawls</i> [i.e., Abū Ḥanīfa’s and Ibn Abī Laylā’s] regarding all slaves, and animals, and [non-gold, non-silver] movables used as price (<i>al-‘urūd</i>).	139 – وَكَذَلِكَ قَوْلُهُمَا فِي جَمِيعِ الرِّقَيقِ وَالْحَيَوَانِ وَالْعُرُوضِ.
140 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And when a man completes a commutative contract (<i>bāya’a</i>) with a man: a <i>jāriya</i> for a <i>jāriya</i> , and they both take possession, then one of them finds a defect in the <i>jāriya</i> he took; he returns her, and takes [back] the <i>jāriya</i> he sold her for, and the <i>bay’</i> between them is annulled (<i>intaqada</i>).	140 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا بَايَعَ الرَّجُلُ الرَّجُلَ جَارِيَةً بِجَارِيَةٍ وَتَقَابَضَا، ثُمَّ وَجَدَ أَحَدُهُمَا بِالْجَارِيَةِ الَّتِي قَبَضَ عَيْبًا، رَدَّهَا وَأَخَذَ الْجَارِيَةَ الَّتِي بَاعَ بِهَا، وَانْتَقَضَ الْبَيْعُ بَيْنَهُمَا.
141 – And likewise the entirety of animals and ‘ <i>urūd</i> .	141 – وَهَكَذَا جَمِيعُ الْحَيَوَانِ وَالْعُرُوضِ.
142 – And likewise if one of them [i.e., of the two parties] had dirhams, or a movable (<i>‘araḍ^{um}</i>) of the ‘ <i>urūd</i> .	142 – وَهَكَذَا إِنْ كَانَتْ مَعَ أَحَدَاهُمَا دَرَاهِمٌ أَوْ عَرَضٌ مِنَ الْعُرُوضِ.
143 – And if the <i>jāriya</i> dies in the possession of one of the two men, and the other finds a defect in the living <i>jāriya</i> ; he returns her and takes the value of the dead <i>jāriya</i> , because she herself was the price which he paid; just as he returns her and takes the price which he paid [if it were something else].	143 – وَإِنْ مَاتَتِ الْجَارِيَةُ فِي يَدَي أَحَدِ الرَّجُلَيْنِ فَوَجَدَ الْآخَرُ عَيْبًا بِالْجَارِيَةِ الْحَيَّةِ، رَدَّهَا وَأَخَذَ قِيمَةَ الْجَارِيَةِ الْمَيِّتَةِ؛ لِأَنَّهَا هِيَ الثَّمَنُ الَّذِي دَفَعَ كَمَا يَرُدُّهَا وَيَأْخُذُ الثَّمَنَ الَّذِي دَفَعَ.
144 – And when a man contracts a sale [with himself as buyer] on behalf of another, under his order, and he finds a defect in it [the object of <i>bay’</i>]; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: The buyer litigates (<i>yukhāsimu</i>), and we don’t care [about the question]: Does the commissioning-principal (<i>al-āmir</i>) attend [the litigation] or not? Nor do we charge (<i>nukallifu</i>) the buyer with fetching the <i>āmir</i> ; nor do we opine that upon the buyer is [enjoined] an oath (<i>yamīn</i>) if the seller says: The <i>āmir</i> was	144 – وَإِذَا اشْتَرَى الرَّجُلُ بَيْعًا لِعَیْرِهِ بِأَمْرِهِ فَوَجَدَ بِهِ عَيْبًا، فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: يُخَاصِمُ الْمُشْتَرِي، وَلَا نُبَالِي أَحْضَرَ الْأَمْرُ أَمْ لَا، وَلَا نُكَلِّفُ الْمُشْتَرِي أَنْ يُحْضِرَ الْأَمْرَ، وَلَا نَرَى عَلَى الْمُشْتَرِي يَمِينًا إِنْ قَالَ الْبَائِعُ: الْأَمْرُ قَدْ رَضِيَ بِالْعَيْبِ. وَبِهِ يَأْخُذُ.

content with the defect. ¹³ And he [Abū Yūsuf] embraces it. ¹⁴	
145 – But Ibn Abī Laylā used to say: The buyer cannot return the commodity which has the defect in it until he fetches the <i>āmīr</i> , and he [the <i>āmīr</i>] swears that he was not content with the defect; even if he is absent in some other <i>balad</i> .	145 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا يَسْتَطِيعُ الْمُشْتَرِي أَنْ يَرُدَّ السَّلْعَةَ الَّتِي بِهَا الْعَيْبُ حَتَّى يُحْضِرَ الْأَمِيرَ فَيَحْلِفُ مَا رَضِيَ بِالْعَيْبِ وَلَوْ كَانَ غَائِبًا بَعِيرَ ذَلِكَ الْبَلَدِ.
146 – And likewise the man possessing <i>māl</i> for the purpose of <i>muḍāraba</i> , who came to some <i>bilād</i> to trade in them by means of that <i>māl</i> ; for indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: For what he bought of that and found in it defect; he has the right to return it, and he is not made to swear regarding the contentment (<i>riḍā</i>) of the principal with the defect.	146 – وَكَذَلِكَ الرَّجُلُ مَعَهُ مَالٌ مُضَارَبَةً أَتَى بِلَادًا يَتَجَرُّ فِيهَا بِذَلِكَ الْمَالِ فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: مَا اشْتَرَى مِنْ ذَلِكَ فَوَجَدَ بِهِ عَيْبًا، فَلَهُ أَنْ يَرُدَّهُ وَلَا يُسْتَحْلِفَ عَلَى رِضَا الْأَمِيرِ بِالْعَيْبِ.
147 – But Ibn Abī Laylā used to say: The buyer in a <i>muḍāraba</i> -contract (<i>al-mushtarī al-muḍārib</i>) cannot return anything of that until he fetches the principal (<i>rabb al-māl</i>), and he swears by God that he was not content with the defect, even if he hasn't seen the commodity, and even if he is absent.	147 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا يَسْتَطِيعُ الْمُشْتَرِي الْمُضَارِبُ أَنْ يَرُدَّ شَيْئًا مِنْ ذَلِكَ حَتَّى يُحْضِرَ رَبَّ الْمَالِ فَيَحْلِفَ بِاللَّهِ مَا رَضِيَ بِالْعَيْبِ وَإِنْ لَمْ يَرَ الْمَتَاعَ، وَإِنْ كَانَ غَائِبًا.
148 – Have you considered [what would be the case with] (<i>ara'ayta</i>) a man who commissions (<i>amara</i>) a man, and he sells for him a commodity or an article of merchandise, and the buyer finds in it a defect; does the seller litigate in that case, or do we charge him with fetching the commissioning-principal (<i>al-āmīr</i>), the owner of the commodity [that he sells]? Don't you opine (<i>alā tarā</i>) that his [the buyer's] opponent in this is the seller, and that we don't charge him with fetching the <i>āmīr</i> while there is no quarrel (<i>lā</i>	148 – أَرَأَيْتَ رَجُلًا أَمَرَ رَجُلًا فَبَاعَ لَهُ مَتَاعًا أَوْ سِلْعَةً فَوَجَدَ الْمُشْتَرِي بِهِ عَيْبًا، أَيَخَاصِمُ الْبَائِعُ فِي ذَلِكَ، أَوْ تُكَلِّفُهُ أَنْ يُحْضِرَ الْأَمِيرَ رَبَّ الْمَتَاعِ، أَلَا تَرَى أَنَّ خَصْمَهُ فِي هَذَا الْبَائِعِ، وَلَا تُكَلِّفُهُ أَنْ يُحْضِرَ الْأَمِيرَ وَلَا خُصُومَةَ بَيْنَهُ وَبَيْنَهُ.

¹³ Interestingly, Al-Afghānī (25, n.3) renders: [إِنْ قَالَ الْبَائِعُ: [إِنَّ الْأَمِيرَ قَدْ رَضِيَ بِالْعَيْبِ] , which addition he finds in the *Mabsūṭ*. Of course there may be several explanations for this, but we ought to note as regards this (admittedly minor) detail that al-Afghānī's text seems closer to the Shāfi'ī Version than the Shaybānī Version referenced by al-Sarakhsī.

¹⁴ Note that Schacht briefly assesses the *mas'ala* at hand (*Origins*, 271).

<i>khuṣūmata</i>) between them [i.e., between buyer and principal]?¹⁵	
149 – And likewise, when he commissions him, and he buys [rather than sells] for him — such is like his commissioning (<i>amrihi</i>) for sale. Have you considered [what would be the case] (<i>ara'ayta</i>) if he buys a commodity and doesn't [first] behold it; does the buyer have the right of <i>khiyār</i> when he sees it, or does he not have the right of <i>khiyār</i> until he fetches the <i>āmir</i>?	149 – فَكَذَلِكَ إِذَا أَمَرَهُ فَاشْتَرَى لَهُ فَهُوَ مِثْلُ أَمْرِهِ بِالْبَيْعِ، أَرَأَيْتَ لَوْ اشْتَرَى مَتَاعًا وَلَمْ يَرَهُ، أَكَانَ لِلْمُشْتَرِي الْخِيَارُ إِذَا رَأَاهُ، أَمْ لَا يَكُونُ لَهُ خِيَارٌ حَتَّى يُحْضِرَ الْأَمِيرَ؟
150 – Have you considered [what would be the case] (<i>ara'ayta</i>) if he contracts the purchase of a slave, and finds him to be blind before taking possession of him, and he says: I have no need for him (<i>lā ḥājata lī fihi</i>); has he no right to return him, due to this, until he fetches the <i>āmir</i>? Of course not (<i>balā</i>). He has the right to return him, without fetching the <i>āmir</i>.	150 – أَرَأَيْتَ لَوْ اشْتَرَى عَبْدًا فَوَجَدَهُ أَعْمَى قَبْلَ أَنْ يَقْبِضَهُ فَقَالَ: لَا حَاجَةَ لِي فِيهِ. أَمَا كَانَ لَهُ أَنْ يَرُدَّهُ بِهَذَا حَتَّى يُحْضِرَ الْأَمِيرَ؟ بَلَى لَهُ أَنْ يَرُدَّهُ وَلَا يُحْضِرَ الْأَمِيرَ.
151 – Al-Shāfi'ī, may God Most High be pleased with him, said: And when a man authorizes a man as agent (<i>wakkala</i>) to buy a specific article of merchandise, or described article (<i>sil'at^{an} bi-'ayniḥā aw mawṣūfat^{an}</i>), or he turns over to him <i>māl</i> by way of <i>qirād</i>¹⁶ and he buys merchandise with it and finds in it a defect; he has the right to return that without the <i>rabb al-māl</i>, because he is the buyer, and it is not incumbent upon him that he swear by God the owner of the <i>rabb al-māl</i> is not content; which is to say that he stands in the place of the owner regarding what he bought for the <i>rabb al-māl</i>. Don't you see/opine (<i>alā tarā</i>) that the <i>rabb al-māl</i>, if he says: I am	151 – قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ تَعَالَى عَنْهُ: وَإِذَا وَكَّلَ الرَّجُلُ الرَّجُلَ أَنْ يَشْتَرِيَ سِلْعَةً بَعَيْنِهَا أَوْ مَوْصُوفَةً، أَوْ دَفَعَ إِلَيْهِ مَالًا قِرَاضًا فَاشْتَرَى بِهِ تِجَارَةً فَوَجَدَ بِهَا عَيْبًا، كَانَ لَهُ أَنْ يَرُدَّ ذَلِكَ دُونَ رَبِّ الْمَالِ؛ لِأَنَّهُ الْمُشْتَرِي وَلَيْسَ عَلَيْهِ أَنْ يَحْلِفَ بِاللَّهِ مَا رَضِيَ رَبُّ الْمَالِ؛ وَذَلِكَ أَنَّهُ يَقُومُ مَقَامَ الْمَالِكِ فِيمَا اشْتَرَى لِرَبِّ الْمَالِ، أَلَا تَرَى أَنَّ رَبَّ الْمَالِ لَوْ

¹⁵ In this, the first of a triple-barrage of *reductio*s aimed at Ibn Abī Laylā's *ḥukm*, either Abū Yūsuf, Muḥammad, or Abū Ḥanīfa himself argues the absurdity of raising a suit between to parties that have no quarrel. An interesting comment is provided by al-Afghānī (26, n.1), who remarks: "This *ḥujaj* is the *ḥujaj* of the Imām Abū Ḥanīfa, reiterated against Ibn Abī Laylā either by Abū Yūsuf or Muḥammad; and there was omitted — and God knows best — from the book, before his saying: *ara'ayta*, something along the lines of: Muḥammad said: And how does Ibn Abī Laylā say: The buyer cannot return the article of merchandise? Have you considered (*ara'ayta*)..., etc. And if the like of this expression have strength [i.e., if it is at all likely], then the context of the expression [in §148] is straightforward. Nay, maybe the rendition of that *ḥujaj* is from the Imām Abū Ḥanīfa himself, as there will come a parallel of such [below]. And God knows best." In other words, either this and following sections represent the response to a pupil's/transmitter's interjection, as we see in §§33-4, only without the cue-phrase ("And so-and-so asked: How can he possibly say X?"); or they represent the original dialectical triple-elenchus of Abū Ḥanīfa himself.

¹⁶ Note al-Shāfi'ī's preference for *qirād* over *muḍāraba*, though essentially the same partnership is meant.

not content with what he bought; he has no right to <i>khiyār</i> regarding what he [the agent] purchased, and the <i>bay'</i> binds him? And if he [the agent] buys something and shows partiality [to the merchant] regarding it; the <i>bay'</i> is not revoked, and [right of] chastisement (<i>al-tibā'a</i>) belongs to the <i>rabb al-māl</i> against the agent, not against the one from whom [the object] was bought.	قَالَ: لَا أَرْضَى بِمَا اشْتَرَى. لَمْ يَكُنْ لَهُ خِيَارٌ فِيمَا ابْتَاعَ، وَلَزِمَهُ الْبَيْعُ، وَلَوْ اشْتَرَى شَيْئًا فَحَابَى فِيهِ لَمْ يُنْتَقِضِ الْبَيْعُ وَكَانَتْ التَّبَاعَةُ لِرَبِّ الْمَالِ عَلَى الْوَكِيلِ لَا عَلَى الْمُشْتَرَى مِنْهُ.
152 – And likewise the [right of] chastisement belongs to the buyer against the seller without the <i>rabb al-māl</i>, and if the seller claims, against the buyer, the <i>riḍā</i> of the <i>rabb al-māl</i>,¹⁷ he swears upon his knowledge ('<i>alā 'ilmihi</i>), not upon absolute certainty (<i>lā 'alā al-batti</i>).¹⁸	152 – وَكَذَلِكَ تَكُونُ التَّبَاعَةُ لِلْمُشْتَرِي عَلَى الْبَائِعِ دُونَ رَبِّ الْمَالِ، فَإِنْ ادَّعَى الْبَائِعُ عَلَى الْمُشْتَرِي رِضَا رَبِّ الْمَالِ حَلَفَ عَلَى عِلْمِهِ لَا عَلَى الْبَتِّ.
153 – And when a man [A] sells a <i>thawb</i> by way of <i>murābaḥa</i> for something designated, and the buyer [B] sells the <i>thawb</i> then finds that the seller [A] had cheated him (<i>qad khānahu</i>) in the <i>murābaḥa</i>, and exceeded [overcharged] him in the <i>murābaḥa</i>; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: The <i>bay'</i> [between A and B] is <i>jā'iz</i>, because he [B] has sold the <i>thawb</i>. But if the <i>thawb</i> is [still] in his keeping he has the right to return it [to A] and take [back] what he paid (<i>naqada</i>) if he wishes, and not subtract anything from it [i.e., from the price he paid to A].	153 – وَإِذَا بَاعَ الرَّجُلُ ثَوْبًا مُرَابَحَةً عَلَى شَيْءٍ مُسَمًّى، فَبَاعَ الْمُشْتَرِي الثَّوْبَ ثُمَّ وَجَدَ الْبَائِعَ قَدْ خَانَهُ فِي الْمُرَابَحَةِ وَزَادَ عَلَيْهِ فِي الْمُرَابَحَةِ، فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: الْبَيْعُ جَائِزٌ؛ لِأَنَّهُ قَدْ بَاعَ الثَّوْبَ وَلَوْ كَانَ عِنْدَهُ الثَّوْبُ كَانَ لَهُ أَنْ يَرُدَّهُ وَيَأْخُذَ مَا تَقَدَّ إِنْ شَاءَ وَلَا يَحْطُطُهُ شَيْئًا.
154 – But Ibn Abī Laylā used to say: That deception (<i>khiyāna</i>) [i.e., the excess in mark up] and its portion of the profit (<i>ḥiṣṣatuhā min al-ribḥi</i>) is subtracted from it [the price B paid to A, and now reclaims]. And he [Abū Yūsuf] embraces it.	154 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: تُحْطُ عَنْهُ تِلْكَ الْخِيَانَةُ وَحِصَّتْهَا مِنَ الرَّبْحِ. وَبِهِ يَأْخُذُ.

¹⁷ Ḥassūn has رِضَا رَبِّ instead of رَبِّ الْمَالِ, which the Būlāq (and other) editions have, and makes no note of it. It therefore appears to be a typo.

¹⁸ Cf. §§57-59, where the distinction between swearing '*alā 'ilmihi* and swearing '*alā al-batti* is made clear.

155 – Al-Shāfi'ī, may God Most High be pleased with him, said: And when a man [B] purchases (<i>ibtā'a</i>) from a man [A] a <i>thawb</i> by way of <i>murābaḥa</i>, then sells it, then he finds that the first seller [A] who sold it to him by way of <i>murābaḥa</i> had cheated him regarding the price; it has been said: The <i>khiyāna</i> [i.e., the excess in mark up] is subtracted from it [the price reclaimed by B] by its portion from the profit, and he [B] lays claim to it from him [A]. But if the <i>thawb</i> is in existence (<i>qā'im^{an}</i>) [i.e., still in the keeping of B], he does not have the right to return it. And there only prevents us from (<i>innamā mana'anā min</i>) the invalidation (<i>ifsād</i>) of the <i>bay'</i>, and that he [B] return it [the <i>thawb</i>] when it is in existence (<i>qā'im^{an}</i>), or that he lay claim to the value [of the <i>thawb</i>] when it is non-existent (<i>fā'it^{an}</i>),¹⁹ [the fact] that the <i>bay'</i> was not contracted for a thing forbidden (<i>muḥarramⁱⁿ</i>) to them both, together. Rather, it was contracted for a thing forbidden only to the deceiver (<i>al-khā'in</i>) from among them.	155 – قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ تَعَالَى عَنْهُ: وَإِذَا ابْتَعَ الرَّجُلُ مِنَ الرَّجُلِ ثَوْبًا مُرَابَحَةً فَبَاعَهُ، ثُمَّ وَجَدَ الْبَائِعَ الْأَوَّلَ الَّذِي بَاعَهُ مُرَابَحَةً قَدْ خَانَهُ فِي الثَّمَنِ فَقَدْ قِيلَ: تُحْطُ عَنْهُ الْخِيَانَةُ بِحَصَّتِهَا مِنَ الرَّبْحِ وَيَرْجِعُ عَلَيْهِ بِهِ، وَلَوْ كَانَ الثَّوْبُ قَائِمًا لَمْ يَكُنْ لَهُ أَنْ يَرُدَّهُ. وَإِنَّمَا مَنَعَنَا مِنْ إِفْسَادِ الْبَيْعِ وَأَنْ يَرُدَّهُ إِذَا كَانَ قَائِمًا، وَيَجْعَلُهُ بِالْقِيَمَةِ إِذَا كَانَ فَائِتًا أَنْ الْبَيْعَ لَمْ يَنْعَقِدْ عَلَى مُحَرَّمٍ عَلَيْهِمَا مَعًا وَإِنَّمَا انْعَقَدَ عَلَى مُحَرَّمٍ عَلَى الْخَائِنِ مِنْهُمَا.
156 – And if one should say (<i>fa-in qāla qā'il</i>): What, of such things for which <i>bay'</i> is permitted in any circumstance (<i>bi-ḥālⁱⁿ</i>), resembles this, when the seller in it [the <i>bay'</i> contract] is deceptive (<i>ghārr^{um}</i>)?	156 – فَإِنْ قَالَ قَائِلٌ: مَا يُشَبِّهُ هَذَا مِمَّا يَجُوزُ فِيهِ الْبَيْعُ بِحَالٍ وَالْبَائِعُ فِيهِ غَارٌّ؟
157 – It is said: A man conceals (<i>yudallisu</i>) from a man a defect, and the <i>tadlīs</i> is a thing forbidden (<i>muḥarram^{an}</i>) for him, and what he took as pertains to its price is a <i>muḥarram</i>. Just as what he took from the <i>khiyāna</i> was a <i>muḥarram</i>. But the <i>bay'</i> is not <i>fāsid</i> for it [i.e., with the <i>tadlīs</i>], and the seller has no <i>khiyār</i> regarding its return. But it was said: To the buyer belongs the <i>khiyār</i> regarding his taking for the price which was designated for it, or unilateral annulment (<i>faskh</i>) of the <i>bay'</i>, because it was not contracted except for a designated price; and when he finds it was otherwise [i.e., the seller's mark up does not reflect the claimed percentage of the seller's purchase price], and the buyer did not	157 – قِيلَ: يُدَلِّسُ الرَّجُلُ لِلرَّجُلِ الْعَيْبَ فَيَكُونُ التَّدْلِيسُ مُحَرَّمًا عَلَيْهِ وَمَا أَخَذَ مِنْ ثَمَنِهِ مُحَرَّمًا. كَمَا كَانَ مَا أَخَذَ مِنَ الْخِيَانَةِ مُحَرَّمًا، وَلَا يَكُونُ الْبَيْعُ فَاسِدًا فِيهِ، وَلَا يَكُونُ لِلْبَائِعِ الْخِيَارُ فِي رَدِّهِ، وَقِيلَ: لِلْمُشْتَرِي الْخِيَارُ فِي أَخْذِهِ بِالثَّمَنِ الَّذِي سُمِّيَ لَهُ أَوْ فُسَخِ الْبَيْعُ؛ لَأَنَّهُ لَمْ يَنْعَقِدْ إِلَّا بِثَمَنِ مُسَمًّى، فَإِذَا وَجَدَ غَيْرَهُ فَلَمْ يَرْضَ بِهِ الْمُشْتَرِي فَسَدَ الْبَيْعُ؛ لَأَنَّهُ يُرَدُّ إِلَى ثَمَنِ مَجْهُولٍ عِنْدَ الْمُشْتَرِي لَمْ يَرْضَ

¹⁹ Note that *qā'im^{an}* seems to be expressed over-and-against *fā'it^{an}*, which usage may help us to fix a sense of “in existence” vs. “having passed out of existence.”

consent to it, the <i>bay'</i> is corrupted (<i>fasada</i>), because it is returned to a price unknown (<i>thamanⁱⁿ majhūlⁱⁿ</i>) to the buyer, to which the seller did not consent.	بِهِ الْبَائِعُ.
158 – And when a man buys for a man an article of merchandise, and a defect appears in it before he pays the [cash] price; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: He has the right to return it if he furnishes <i>bayyina</i> for the defect. And he [Abū Yūsuf] embraces it. ²⁰	158 – وَإِذَا اشْتَرَى الرَّجُلُ لِلرَّجُلِ سِلْعَةً، فَظَهَرَ فِيهَا عَيْبٌ قَبْلَ أَنْ يَنْقُدَ الثَّمَنَ فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: لَهُ أَنْ يَرُدَّهَا إِنْ أَقَامَ الْبَيِّنَةَ عَلَى الْعَيْبِ. وَبِهِ يَأْخُذُ.
159 – But Ibn Abī Laylā, may God Most High have mercy upon him, used to say: I don't accept witnesses for the defect until he pays the price (<i>hattā yanquda al-thamana</i>).	159 – وَكَانَ ابْنُ أَبِي لَيْلَى رَحِمَهُ اللَّهُ تَعَالَى يَقُولُ: لَا أَقْبَلُ شُهُودًا عَلَى الْعَيْبِ حَتَّى يَنْقُدَ الثَّمَنَ.
160 – Al-Shāfi'ī said: And when a man buys an article of merchandise and takes possession of it, and pays its price, or does not pay it, until there appears, as pertains to it, a defect which the seller acknowledges, or [which] is seen, or is given testimony of (<i>yushhidu 'alayhi</i>); he has the right to return [it] before the payment (<i>qabla al-naqdi</i>), just as he has the right to return [it] after the payment.	160 – قَالَ الشَّافِعِيُّ: وَإِذَا اشْتَرَى الرَّجُلُ السِّلْعَةَ وَقَبَضَهَا، وَنَقَدَ ثَمَنَهَا أَوْ لَمْ يَنْقُدْهُ حَتَّى ظَهَرَ مِنْهَا عَلَى عَيْبٍ يُقَرُّ بِهِ الْبَائِعُ أَوْ يُرَى، أَوْ يُشْهِدُ عَلَيْهِ فَلَهُ الرَّدُّ قَبْلَ النَّقْدِ كَمَا لَهُ الرَّدُّ بَعْدَ النَّقْدِ.
161 – And when a man sells against the interest of his son, he being a major (<i>kabīr^{um}</i>), a house, or a commodity, with neither exigency nor excuse (<i>min ghayri ḥājatiⁱⁿ wa lā 'udhrⁱⁿ</i>); ²¹ then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: That is not permitted against the interest of his son. And he [Abū Yūsuf] embraces it.	161 – وَإِذَا بَاعَ الرَّجُلُ عَلَى ابْنِهِ وَهُوَ كَبِيرٌ دَارًا أَوْ مَتَاعًا مِنْ غَيْرِ حَاجَةٍ وَلَا عُذْرٍ فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا يَجُوزُ ذَلِكَ عَلَى ابْنِهِ. وَبِهِ يَأْخُذُ.
162 – But Ibn Abī Laylā used to say: His <i>bay'</i> against his interest is <i>jā'iz</i> .	162 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: بَيْعُهُ عَلَيْهِ جَائِزٌ.

²⁰ Al-Sarakhsī adds this is also the opinion of Muḥammad (Al-Afghānī, 27, n.1). Moreover, and adding yet another piece to the puzzle regarding the source of al-Afghānī's text, we find: "And in a copy of the *Mabsūt*: *fa-ṭa'ana fihā bi-'ayb^{um}*" (26 n.2) – this, instead of *fa-ṣahara fihā 'ayb^{um}*, which all of al-Afghānī, Ḥassūn, Būlāq, etc. have rendered; and, further along: "And in a copy of the *Mabsūt*: *lā taqbal shahādata shuhūd*" [for §159] (27, n.2). Might it be that al-Sarakhsī was referencing a slightly different version than what has survived to grow into these texts before us? Is it of any significance, the fact that al-Afghānī's text matches the *K. al-Umm*, rather than the *Mabsūt*?

²¹ NB: this suggests that, in other circumstances, an appeal to *hāja* and *'udhr* might be considered.

163 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man has been administering his own <i>māl</i>, and his father sells something of his <i>māl</i> against his interest, for several times more than it equals, or for other than what is equal, in non-exigency (<i>fī ghayri ḥājat^{an}</i>), or [with] exigency descending upon his father; the <i>bay'</i> is <i>bāṭil</i>, and he [the father] is as an alien party (<i>al-ajnaḇī</i>) regarding the <i>bay'</i> against his interest, and he [the father] has no <i>ḥaqq</i> regarding his <i>māl</i>, unless he [the son] stands in need (<i>yaḥtāja</i>), and he provides for him with conventional equity (<i>yunfiqa 'alayhi bi'l-ma'rūf</i>).²²	163 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَ الرَّجُلُ يَلِي مَالَ نَفْسِهِ فَبَاعَ أَبُوهُ عَلَيْهِ شَيْئًا مِنْ مَالِهِ بِأَكْثَرِ مِمَّا يَسْوَى أَوْ بِغَيْرِ مَا يَسْوَى فِي غَيْرِ حَاجَةٍ أَوْ حَاجَةٍ نَزَلَتْ بِأَبِيهِ، فَالْبَيْعُ بَاطِلٌ، وَهُوَ كَالْأَجْنَبِيِّ فِي الْبَيْعِ عَلَيْهِ وَلَا حَقَّ لَهُ فِي مَالِهِ إِلَّا أَنْ يَحْتَاجَ فَيَنْفِقَ عَلَيْهِ بِالْمَعْرُوفِ.
164 – And likewise [regarding] what he consumes of his <i>māl</i>.	164 – وَكَذَلِكَ مَا اسْتَهْلَكَ مِنْ مَالِهِ.
165 – And when a man sells a commodity for a man, and the man is present, silent; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: That is not permitted against his interest, and his silence is not an acknowledgement of the <i>bay'</i>. And he [Abū Yūsuf] embraces it.	165 – وَإِذَا بَاعَ الرَّجُلُ مَتَاعًا لِرَجُلٍ وَالرَّجُلُ حَاضِرٌ سَاكِتٌ فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: لَا يَجُوزُ ذَلِكَ عَلَيْهِ، وَلَيْسَ سُكُوتُهُ إِقْرَارًا بِالْبَيْعِ. وَبِهِ يَأْخُذُ.
166 – But Ibn Abī Laylā used to say: His silence is an acknowledgement of the <i>bay'</i>.	166 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: سُكُوتُهُ إِقْرَارٌ بِالْبَيْعِ.
167 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man sells a <i>ṥawb</i> for a man, or he sells for him a manservant, and the man whose <i>ṥawb</i> or manservant is the object of sale, and who is present at the <i>bay'</i>, does not authorize (<i>lam yuwakkil</i>) the seller, but does not forbid him from the <i>bay'</i>, or concede to it; he has the right to refuse the <i>bay'</i>, and his silence is not [to be construed as] <i>riḍā</i> with the <i>bay'</i>. Silence (<i>al-ṣamt</i>) is only [to be construed as] <i>riḍā</i> of the virgin (<i>al-bikr</i>); as for the man: no.	167 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا بَاعَ الرَّجُلُ ثَوْبًا لِرَجُلٍ أَوْ خَادِمًا وَالرَّجُلُ الْمَبِيعُ ثَوْبَهُ أَوْ خَادِمَهُ حَاضِرٌ الْبَيْعَ لَمْ يُوَكَّلِ الْبَائِعَ وَلَمْ يَنْهَهُ عَنِ الْبَيْعِ وَلَمْ يُسَلِّمْهُ، فَلَهُ رَدُّ الْبَيْعِ وَلَا يَكُونُ صَمْتُهُ رِضًا بِالْبَيْعِ إِنَّمَا يَكُونُ الصَّمْتُ رِضًا بِالْبِكْرِ وَأَمَّا الرَّجُلُ فَلَا.
168 – He said: And when a man sells a portion (<i>naṣīb^{an}</i>) from his house, and does not designate a third or a quarter or the like, or such-and-such [a number of] shares; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to	168 – قَالَ: وَإِذَا بَاعَ الرَّجُلُ نَصِيبًا مِنْ دَارِهِ وَلَمْ يُسَمِّ ثُلثًا أَوْ رُبْعًا أَوْ نَحْوَ ذَلِكَ، أَوْ كَذَا وَكَذَا سَهْمًا، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى

²² Again, the presence of *ḥāja* plays a determining role. Cf. later conceptions of *al-ḍarūra* in the *uṣūl* literature.

say: The bay' is not permitted in this fashion ('alā hādhā al-wajhi).	كَانَ يَقُولُ: لَا يَجُوزُ الْبَيْعُ عَلَى هَذَا الْوَجْهِ.
169 – And Abū Yūsuf, may God Most High have mercy upon him, said: He has the right of khiyār when he comes to know – if he wishes, he takes, and if he wishes, he leaves.	169 – وَقَالَ أَبُو يُوسُفَ رَحِمَهُ اللَّهُ تَعَالَى: لَهُ الْخِيَارُ إِذَا عَلِمَ؛ إِنْ شَاءَ أَخَذَ وَإِنْ شَاءَ تَرَكَ.
170 – But Ibn Abī Laylā, may God Most High have mercy upon him, used to say: When the house is [apportioned] between two or three, I permit the sale of the portion (al-naṣīb) even if it is not designated. But if it is many shares, it is no permissible until it is designated.	170 – وَكَانَ ابْنُ أَبِي لَيْلَى رَحِمَهُ اللَّهُ تَعَالَى يَقُولُ: إِذَا كَانَتْ الدَّارُ بَيْنَ اثْنَيْنِ أَوْ ثَلَاثَةٍ أَجَزْتُ بَيْعَ النَّصِيبِ وَإِنْ لَمْ يُسَمَّ، وَإِنْ كَانَتْ أَسْهُمًا كَثِيرَةً لَمْ يَجْزْ حَتَّى يُسَمَّى.
171 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the house is [apportioned] between three, and one of them says to a man: I sell you a portion from this house, and he doesn't say: My portion; the bay' is bāṭil, due to the fact that the naṣīb from it might be a single share from among a thousand shares, and less, and it might be most of the house. So it is not permissible until it is known well (ma'lūm ^{an}) to [both] the seller and the buyer.	171 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَتْ الدَّارُ بَيْنَ ثَلَاثَةٍ فَقَالَ أَحَدُهُمْ لِرَجُلٍ: بَعْتُكَ نَصِيبًا مِنْ هَذِهِ الدَّارِ. وَلَمْ يَقُلْ: نَصِيبِي. فَالْبَيْعُ بَاطِلٌ؛ مِنْ قَبْلِ أَنْ النَّصِيبَ مِنْهَا قَدْ يَكُونُ سَهْمًا مِنْ أَلْفِ سَهْمٍ وَأَقَلَّ، وَيَكُونُ أَكْثَرَ الدَّارِ فَلَا يَجُوزُ حَتَّى يَكُونَ مَعْلُومًا عِنْدَ الْبَائِعِ وَالْمُشْتَرِي.
172 – And if he says: I sell you my naṣīb; it is not permitted until they mutually assent (yataṣādaqā) that they both knew his naṣīb before the contracting of the sale ('aqd al-bay').	172 – وَلَوْ قَالَ: بَعْتُكَ نَصِيبِي. لَمْ يَجْزْ حَتَّى يَتَصَادَقَا بِأَنَّهُمَا قَدْ عَرَفَا نَصِيبَهُ قَبْلَ عَقْدِ الْبَيْعِ.
173 – And when a man presses his seal over a [document of] purchase (khatama... 'alā shirā ^m); then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: That is not assent (taslīm) to the bay' until he says: I assent (sallamtu). And he [Abū Yūsuf] embraces it.	173 – وَإِذَا خَتَمَ الرَّجُلُ عَلَى شِرَاءٍ فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: لَيْسَ ذَلِكَ بِتَسْلِيمٍ لِلْبَيْعِ حَتَّى يَقُولَ: سَلَّمْتُ. وَبِهِ يَأْخُذُ.
174 – But Ibn Abī Laylā, may God Most High have mercy upon him, used to say: That is taslīm to the bay'.	174 – وَكَانَ ابْنُ أَبِي لَيْلَى رَحِمَهُ اللَّهُ تَعَالَى يَقُولُ: ذَلِكَ تَسْلِيمٌ لِلْبَيْعِ.

175 – Al-Shāfi'ī, may God Most High be pleased with him, said: And when a man brings a writing (<i>kitāb</i>) in which there is a purchase in his name, and he presses his seal over it, but does not speak, and does not bear witness [orally], and does not write; the sealing is not an acknowledgement – acknowledgement is only by means of spoken words (<i>innamā yakūnu al-iqrāru b'il-kalāmi</i>).	175 – قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ تَعَالَى عَنْهُ: وَإِذَا أَتَى الرَّجُلُ بِكِتَابٍ فِيهِ شِرَاءٌ بِاسْمِهِ وَخَتَمَ عَلَيْهِ وَلَمْ يَتَكَلَّمْ وَلَمْ يُشْهَدْ وَلَمْ يَكْتُبْ، فَالْخَتَمُ لَيْسَ بِإِقْرَارٍ، إِنَّمَا يَكُونُ الْإِقْرَارُ بِالْكَلَامِ.
176 – And when the slaves and the commodities are sold in the army [camp] of the Khawārij, and they are commodities from among the commodities of the Muslims, or slaves from among their slaves, which they [the Khawārij] seized from them; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: It is not permitted, and it is yielded up to its people (<i>yuraddu 'alā ahlihi</i>). And he [Abū Yūsuf] embraces it.	176 – وَإِذَا بَاعَ الرَّقِيقُ وَالْمَتَاعُ فِي عَسْكَرِ الْخَوَارِجِ وَهُوَ مَتَاعٌ مِنْ مَتَاعِ الْمُسْلِمِينَ أَوْ رَقِيقٌ مِنْ رَقِيقِهِمْ قَدْ غَلَبُوهُمْ عَلَيْهِ فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: لَا يَجُوزُ وَيُرَدُّ عَلَى أَهْلِهِ. وَبِهِ يَأْخُذُ.
177 – But Ibn Abī Laylā used to say: It is <i>jā'iz</i>. But if the commodity is of fixed substance (<i>qā'im^{an} bi-'aynihi</i>) [i.e., no legal preventative to return has occurred in it], and the slave is of fixed substance (<i>qā'im^{an} bi-'aynihi</i>),²³ and the Khawārij are killed before they sell him/it, he/it is yielded up to his/its <i>ahl</i>, according to their <i>qawls</i> [i.e., Abū Ḥanīfa's, Ibn Abī Laylā's, and Abū Yūsuf's], together.	177 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هُوَ جَائِزٌ. وَإِنْ كَانَ الْمَتَاعُ قَائِمًا بَعَيْنِهِ وَالرَّقِيقُ قَائِمًا بَعَيْنِهِ وَقُتِلَ الْخَوَارِجُ قَبْلَ أَنْ يَبِيعُوهُ، رُدَّ عَلَى أَهْلِهِ فِي قَوْلِهِمْ جَمِيعًا.
178 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the Khawārij conquer a people, and take their possessions as though they were lawful (<i>mustaḥillīn</i>), and sell them, then the [rightful] Imām overwhelms whomever they [the looted and sold possessions] are in the possession of; he removes them from his possession, and he annuls (<i>fasakha</i>) the <i>bay'</i>, and he yields it up, for the price, to whomever buys from him.	178 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا ظَهَرَ الْخَوَارِجُ عَلَى قَوْمٍ فَأَخَذُوا أَمْوَالَهُمْ مُسْتَحِلِّينَ فَبَاعُوهَا، ثُمَّ ظَهَرَ الْإِمَامُ عَلَى مَنْ هِيَ فِي يَدَيْهِ، أَخْرَجَهَا مِنْ يَدَيْهِ وَفَسَخَ الْبَيْعَ وَرَدَّهَ بِالثَّمَنِ عَلَى مَنْ اشْتَرَى مِنْهُ.

²³ Cf. §90 (“being of fixed substance [i.e., non-consumable and non-productive]”) – I am still uncertain as how to best render this phrase. The MF (s.v. هبة, 36.iii) juxtaposes (قَائِمًا بَعَيْنِهِ) with the descriptor (لَمْ يَهْلِكْ وَلَمْ يَزْدَدْ خَيْرًا وَلَمْ يَحْدُثْ فِيهِ مَا يَمْنَعُ الرَّجُوعَ) in such a way that we might suppose the latter to define the former.

179 - And when a Muslim man contracts bay' with (bā'a... min) a Christian (naṣrānī), of a dābba, and another Christian raises claim to it (adda'āhā) ²⁴ and furnishes bayyina for it from among the Christians [i.e., in the form of their testimony]; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: Their testimony is not permitted, due to the fact that he lays claim to that against a Muslim.	179 - وَإِذَا بَاعَ الرَّجُلُ الْمُسْلِمُ الدَّابَّةَ مِنَ النَّصْرَانِيَّ، فَادَّعَاهَا نَصْرَانِيٌّ آخَرُ وَأَقَامَ عَلَيْهَا بَيِّنَةً مِنَ النَّصْرَارِ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: لَا تَجُوزُ شَهَادَتُهُمْ؛ مِنْ قَبْلِ أَنَّهُ يَرْجِعُ بِذَلِكَ عَلَى الْمُسْلِمِ.
180 - But Ibn Abī Laylā used to say: Their testimony is permissible against the Christian, while he does not lay claim to anything against the Muslim. And he [Abū Yūsuf] embraces it. ²⁵	180 - وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: شَهَادَتُهُمْ جَائِزَةٌ عَلَى النَّصْرَانِيَّ، وَلَا يَرْجِعُ عَلَى الْمُسْلِمِ بَشْيْءٌ. وَبِهِ يَأْخُذُ.
181 - Al-Shāfi'ī, may God Most High have mercy upon him, said: The testimony of one who opposes (khālaḥa) Islam is not permitted, nor is testimony permitted until the two witnesses both combine [the qualities of] being free, Muslims, of the age of majority, of just character (hurrayni muslimayni bālighayni 'adlayni), not suspected ²⁶ as regards what they bear witness to among the polytheists, nor among the Muslims, nor [are they suspected of being] for anyone, nor against anyone.	181 - قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَلَا تَجُوزُ شَهَادَةُ أَحَدٍ خَالَفَ الْإِسْلَامَ، وَلَا تَجُوزُ الشَّهَادَةُ حَتَّى يَجْمَعَ الشَّاهِدَانِ أَنْ يَكُونَا حُرَّيْنِ مُسْلِمَيْنِ بَالِغَيْنِ عَدْلَيْنِ غَيْرِ ظَنِينَيْنِ فِيمَا يَشْهَدَانِ فِيهِ بَيْنَ الْمُشْرِكِينَ وَلَا الْمُسْلِمِينَ وَلَا لِأَحَدٍ وَلَا عَلَى أَحَدٍ.
182 - And when a man contracts bay' [of something] from some/one of his heirs while he is ill; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: His bay' of such is not permitted when he dies from his illness.	182 - وَإِذَا بَاعَ الرَّجُلُ بَيْعًا مِنْ بَعْضِ وَرَثَتِهِ وَهُوَ مَرِيضٌ فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا يَجُوزُ بَيْعُهُ ذَلِكَ إِذَا مَاتَ مِنْ مَرَضِهِ.
183 - But Ibn Abī Laylā used to say: His bay' is jā'iz, by the value. And he [Abū Yūsuf]	183 - وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: بَيْعُهُ جَائِزٌ

²⁴ Al-Afghānī (28, n.5) seems at first to be pointing out a variant in his copy of the *Mabsūt*:

وفي نسخة المبسوط : فاستحقها نصراني من يد المشتري بيينة من النصارى

The only occurrence of this phrase I was able to locate (*Mabsūt* 30:143), however, is found in this context:

ثُمَّ ذَكَرَ مَسْأَلَةَ الشَّهَادَاتِ إِذَا بَاعَ مُسْلِمٌ دَابَّةً مِنْ نَصْرَانِيٍّ فَاسْتَحَقَّهَا نَصْرَانِيٌّ مِنْ يَدِ الْمُشْتَرِي بَيِّنَةً مِنَ النَّصْرَارِ وَقَدْ بَيَّنَّا خِلَافَ أَبِي يُوسُفَ فِي هَذِهِ الْمَسْأَلَةِ فِي كِتَابِ الشَّهَادَاتِ وَقَوْلُ ابْنِ أَبِي لَيْلَى كَقَوْلِ أَبِي يُوسُفَ.

Rather than variant text, then, this appears to be al-Sarakhsī's paraphrase.

²⁵ Schacht (*Origins*, 210) summarizes the *mas'ala* at hand; he mistakes Abū Yūsuf as siding with Abū Ḥanīfa, however, and not with Ibn Abī Laylā.

²⁶ Ḥassūn (ix.41 and n.1) renders *ghayra ḡinnayn* (not suspect of religion), rather than *ghayra ḡanīnayn*. I have preferred the latter, however, uncertain of how to make sense of the former.

embraces it.	بِالْقِيمَةِ. وَبِهِ يَأْخُذُ.
184 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when an ailing man contracts the bay' of something from some/one of his heirs for [a price] the like of its value (<i>bi-mithli qīmatihī</i>), or for what the people dupe him into (<i>yataghābanu al-nāsu bihi</i>), ²⁷ then he dies; the bay' is jā'iz; the bay' – not a gift (<i>hibat^{um}</i>) nor a bequest (<i>waṣīyat^{um}</i>), for such is returned (<i>fa-yuraddu</i>).	184 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا بَاعَ الرَّجُلُ الْمَرِيضُ بَيْعًا مِنْ بَعْضِ وَرَثَتِهِ بِمِثْلِ قِيمَتِهِ أَوْ بِمَا يَتَغَابَنُ النَّاسُ بِهِ، ثُمَّ مَاتَ، فَالْبَيْعُ جَائِزٌ وَالْبَيْعُ لَا هَبَةً وَلَا وَصِيَّةً فَيَرُدُّ.
185 – And when a man consumes <i>māl</i> belonging to his son, while his son is a major and the man himself wealthy; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: It is a debt (<i>dayn^{um}</i>) upon the father. And he [Abū Yūsuf] embraces it.	185 – وَإِذَا اسْتَهْلَكَ الرَّجُلُ مَالًا لَوْلَدِهِ، وَوَلَدُهُ كَبِيرٌ وَالرَّجُلُ غَنِيٌّ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: هُوَ دَيْنٌ عَلَى الْأَبِ. وَبِهِ يَأْخُذُ.
186 – But Ibn Abī Laylā used to say: There belongs to him no <i>dayn</i> [imposed] upon his father; and as for what his father consumes of something belonging to his son, there is no liability (<i>ḍamān</i>) upon him concerning it.	186 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا يَكُونُ لَهُ دَيْنٌ عَلَى أَبِيهِ، وَمَا اسْتَهْلَكَ أَبُوهُ مِنْ شَيْءٍ لِابْنِهِ فَلَا ضَمَانَ عَلَيْهِ فِيهِ.
187 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man consumes <i>māl</i> belonging to his son, whatever it may be, without pressing need (<i>hājatⁱⁿ</i>) ²⁸ on the part of the father; the son lays claim against him ²⁹ just as he lays claim against the alien party (<i>al-ajṇabī</i>). ³⁰	187 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اسْتَهْلَكَ الرَّجُلُ لِابْنِهِ مَالًا مَا كَانَ، مِنْ غَيْرِ حَاجَةٍ مِنَ الْأَبِ رَجَعَ عَلَيْهِ الْإِبْنُ كَمَا يَرْجِعُ عَلَى الْأَجْنَبِيِّ.
188 – And if he manumits for him a slave; his manumission is not permitted. Manumitting (<i>al-itqu</i>) is not a [form of] consumption, so there is not permitted in any circumstance (<i>bi-ḥālⁱⁿ</i>) the manumitting of other than the owner (<i>al-mālik</i>).	188 – وَلَوْ أَعْتَقَ لَهُ عَبْدًا لَمْ يَجْزُ عِتْقُهُ، وَالْعِتْقُ غَيْرُ اسْتِهْلَاكِ فَلَا يَجُوزُ بِحَالٍ عِتْقُ غَيْرِ الْمَالِكِ.

²⁷ NB the reference to *ghabn* (see Hallaq, *Sharī'a*, 250).

²⁸ Again, as in §§161-3, we encounter the possibility of appeal to exigency (*hāja*).

²⁹ Ḥassūn has رَجَعَ عَلَيْهِ الْإِبْنُ instead of رَجَعَ الْإِبْنُ (ix.42). This is likely only a typo.

³⁰ Cf. §163.

189 – And when a man buys [barter] a <i>jāriya</i> for [the “price” of] a slave, and he adds [in the contract] along with her a hundred dirhams, then he finds in the slave a defect, but the <i>jāriya</i> has died in the keeping of the buyer; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: He returns the slave, and he takes from him a hundred dirhams and the value of the <i>jāriya</i> [as though she were] in sound state (<i>qīmata al-jāriyati ṣaḥīḥat^{an}</i>).³¹	189 – وَإِذَا اشْتَرَى رَجُلٌ جَارِيَةً بَعْدَ وَزَادَ مَعَهَا مِائَةَ دِرْهَمٍ، ثُمَّ وَجَدَ بِالْعَبْدِ عَيْبًا وَقَدْ مَاتَتِ الْجَارِيَةُ عِنْدَ الْمُشْتَرِي، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: يَرُدُّ الْعَبْدَ وَيَأْخُذُ مِنْهُ مِائَةَ دِرْهَمٍ وَقِيَمَةَ الْجَارِيَةِ صَحِيحَةً.
190 – And if it is the <i>jāriya</i> herself in whom he finds the defect, and the slave who has died; he returns the <i>jāriya</i>³² and he divides (<i>qassama</i>) the value of the slave against (<i>‘alā</i>) the one hundred dirhams, and against the value of the <i>jāriya</i>, and there belongs to him whatever attains (<i>aṣāba</i>) the one hundred dirhams, and he returns whatever the slave attains of the value of the <i>jāriya</i>.³³ And he [Abū Yūsuf] embraces it.	190 – فَإِنْ كَانَتِ الْجَارِيَةُ هِيَ الَّتِي وَجَدَ بِهَا الْعَيْبَ وَقَدْ مَاتَ الْعَبْدُ، رَدَّ الْجَارِيَةَ وَقَسَّمَ قِيَمَةَ الْعَبْدِ عَلَى الْمِائَةِ الدَّرْهَمِ وَعَلَى قِيَمَةِ الْجَارِيَةِ فَيَكُونُ لَهُ مَا أَصَابَ الْمِائَةَ الدَّرْهَمِ وَيَرُدُّ مَا أَصَابَ الْعَبْدَ مِنْ قِيَمَةِ الْجَارِيَةِ. وَبِهِ يَأْخُذُ.
191 – But Ibn Abī Laylā used to say regarding this: If he finds a defect in the slave; he returns him and takes his value [as though he were] in sound state (<i>qīmatahu ṣaḥīḥ^{an}</i>); and likewise the dirhams which are in his possession.³⁴	191 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ فِي هَذَا: إِنْ وَجَدَ بِالْعَبْدِ عَيْبًا رَدَّهُ وَأَخَذَ قِيَمَتَهُ صَحِيحًا، وَكَذَلِكَ الدَّرَاهِمُ الَّتِي هِيَ فِي يَدَيْهِ.
192 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And when a man buys [barter] a <i>jāriya</i> for [the “price” of] a slave, and he adds along with the <i>jāriya</i> a hundred dirhams, and they both take possession, then the <i>jāriya</i> dies and he finds in the slave a defect; to him belongs the right to return the slave and to take possession of [both] the hundred dirhams which he turned over, and the value of the <i>jāriya</i> which he turned over.	192 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اشْتَرَى الرَّجُلُ جَارِيَةً بَعْدَ وَزَادَ مَعَ الْجَارِيَةِ مِائَةَ دِرْهَمٍ فَتَقَابَضَا، ثُمَّ مَاتَتِ الْجَارِيَةُ فَوَجَدَ بِالْعَبْدِ عَيْبًا، فَلَهُ رَدُّ الْعَبْدِ وَقَبْضُ الْمِائَةِ الدَّرْهَمِ الَّتِي دَفَعَ وَقِيَمَةَ الْجَارِيَةِ الَّتِي دَفَعَ.

³¹ Schacht (*Origins*, 271) briefly assesses the *mas’ala* at hand.

³² NB: al-Afghānī’s text has رُدَّتِ الْجَارِيَةُ instead of رَدَّ الْجَارِيَةَ (29). Another clue re: the history of the texts?

³³ Ḥassūn offers, re: the last line (مَا أَصَابَ الْعَبْدَ مِنْ قِيَمَةِ الْجَارِيَةِ), “Perhaps it is: الْعَبْدُ مِنْ قِيَمَةِ الْجَارِيَةِ (ix.42 n.1). Remarkably, al-Afghānī’s Shaybānī version is rendered thus: “وَيَرُدُّ مَا أَصَابَ قِيَمَةَ الْجَارِيَةِ مِنْ قِيَمَةِ الْعَبْدِ” (29).

³⁴ Al-Afghānī notes (29, n.2): “وكانت الدراهم للذي في يديه.”

193 – And we only made her value incumbent upon the one who took possession [of her] (<i>al-qābiḍ</i>) due to the fact that, had she remained in existence (<i>law kānat qā'imat^{an}</i>), we would return her herself (<i>bi-'aynihā</i>), because she is the “price” (<i>thaman</i>) of the slave — she and the hundred dirhams.	193 – وَإِنَّمَا جَعَلْنَا قِيمَتَهَا عَلَى الْقَابِضِ، مِنْ قَبْلِ أَنَّهَا لَوْ كَانَتْ قَائِمَةً رَدَدْنَاهَا بَعَيْنِهَا؛ لِأَنَّهَا ثَمَنُ الْعَبْدِ هِيَ وَالْمِائَةُ الدَّرْهَمَ.
194 – And likewise, if the slave dies and he finds in the <i>jāriya</i> a defect; he returns her and the hundred dirhams and takes his [the slave's] value, because had he remained in existence (<i>law kāna qā'im^{an}</i>), he would have taken him — and when he passes out of existence (<i>fāta</i>), his value stands in his stead (<i>taqūmu maqāmahu</i>).	194 – وَكَذَلِكَ إِنْ مَاتَ الْعَبْدُ وَوَجَدَ بِالْجَارِيَةِ الْعَيْبَ، رَدَّهَا وَالْمِائَةَ الدَّرْهَمَ وَأَخَذَ قِيمَتَهُ؛ لِأَنَّهُ لَوْ كَانَ قَائِمًا لَأَخَذَهُ، فَإِذَا فَاتَ فَقِيمَتُهُ تَقُومُ مَقَامَهُ.
195 – And all who contract a sale [as purchaser] (<i>ibtā'a bay^{an}</i>), but obtain a defect (<i>fa-aṣāba 'ayb^{an}</i>); he returns it and lays claim to whatever he gave for its price.	195 – وَكُلُّ مَنْ ابْتِاعَ بَيْعًا فَأَصَابَ عَيْبًا رَدَّهُ وَرَجَعَ بِمَا أُعْطِيَ فِي ثَمَنِهِ.
196 – And when a man buys two <i>thawbs</i> from a man, and takes possession of them both, and one of them is destroyed while he finds in the other <i>thawb</i> a defect and wants to return it, and they disagree (<i>ikhtalafā</i>) regarding the value of the destroyed [<i>thawb</i>]; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, says: ³⁵ The [accepted] <i>qawl</i> is the <i>qawl</i> of the seller, with his oath. And he [Abū Yūsuf] embraces it. ³⁶	196 – وَإِذَا اشْتَرَى الرَّجُلُ ثَوْبَيْنِ مِنْ رَجُلٍ وَقَبِضَهُمَا، فَهَلَكَ وَاحِدٌ وَوَجَدَ بِالثَّوْبِ الْآخَرَ عَيْبًا فَأَرَادَ رَدَّهُ، فَاخْتَلَفَا فِي قِيمَةِ الْهَالِكِ فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى يَقُولُ: الْقَوْلُ قَوْلُ الْبَائِعِ مَعَ يَمِينِهِ. وَبِهِ يَأْخُذُ.
197 – But Ibn Abī Laylā used to say: The <i>qawl</i> is the <i>qawl</i> of the buyer.	197 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الْقَوْلُ قَوْلُ الْمُشْتَرِي.
198 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man buys two <i>thawbs</i> in a single session (<i>ṣafqat^{an} wāḥidat^{an}</i>), and one of them is destroyed in his possession, while he finds in the other a defect, and they disagree regarding the price of the <i>thawb</i> , and the seller says: Its value is ten. But the buyer says: Its value is five. The <i>qawl</i> is the <i>qawl</i> of the seller, due to the fact that the price, all of it, has been made incumbent upon the buyer; and the buyer, if he wants to return the <i>thawb</i> , he will return it for the greatest price (<i>bi-</i>	198 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اشْتَرَى الرَّجُلُ ثَوْبَيْنِ صَفْقَةً وَاحِدَةً فَهَلَكَ أَحَدُهُمَا فِي يَدِهِ وَوَجَدَ بِالْآخَرِ عَيْبًا، فَاخْتَلَفَا فِي ثَمَنِ الثَّوْبِ فَقَالَ الْبَائِعُ: قِيمَتُهُ عَشْرَةٌ. وَقَالَ الْمُشْتَرِي: قِيمَتُهُ خَمْسَةٌ. فَالْقَوْلُ قَوْلُ الْبَائِعِ؛ مِنْ قَبْلِ أَنْ الثَّمَنُ كُلُّهُ قَدْ لَزِمَ

³⁵ Note the slight departure here from *kāna yaqūlū* to just *yaqūlu*.

³⁶ See §359 for other instances of establishing “benefit of assumption.”

<i>akthari al-thamani</i>), or [if] he wants to lay claim to [compensation for] the defect, he lays claim to it based on the greater price; so we don't award him extra (<i>al-ziyādata</i>) on the basis of his <i>qawl</i>.³⁷	الْمُشْتَرِي، وَالْمُشْتَرِي إِنْ أَرَادَ رَدَّ الثَّوْبِ رَدَّهُ بِأَكْثَرِ الثَّمَنِ، أَوْ أَرَادَ الرُّجُوعَ بِالْعَيْبِ رَجَعَ بِهِ بِأَكْثَرِ الثَّمَنِ، فَلَا تُعْطِيهِ بِقَوْلِهِ الزِّيَادَةَ.
199 – Al-Rabī said: And regarding it there is another <i>qawl</i> belonging to al-Shāfiʿī: That the <i>qawl</i> is the <i>qawl</i> of the buyer, due to the fact that he is the one from whom the price is taken. And it is the more correct of the two doctrines [of al-Shāfiʿī] (<i>wa huwa aṣaḥḥu al-qawlayni</i>).³⁸	199 – قَالَ الرَّبِيعُ: وَفِيهِ قَوْلٌ آخَرٌ لِلشَّافِعِيِّ: أَنَّ الْقَوْلَ قَوْلُ الْمُشْتَرِي؛ مِنْ قَبْلِ أَنَّهُ الْمَأْخُذُ مِنْهُ الثَّمَنُ. وَهُوَ أَصَحُّ الْقَوْلَيْنِ.
200 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when he buys two <i>thawbs</i>, or two things, in a single session, and one of them is destroyed, and he finds in the other a defect; there is no way open to return (<i>laysa ilā al-raddi sabīl^{am}</i>), and he lays claim to the value of the defect, because he bought them both in a single session (<i>ṣafqat^{am} wāḥidat^{am}</i>), and he has no right to revoke it [the <i>ṣafqa</i>].³⁹	200 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اشْتَرَى ثَوْبَيْنِ أَوْ شَيْئَيْنِ فِي صَفَقَةٍ وَاحِدَةٍ، فَهَلَكَ أَحَدُهُمَا وَوَجَدَ بِالْآخَرِ عَيْبًا، فَلَيْسَ إِلَى الرَّدِّ سَبِيلٌ وَيَرْجِعُ بِقِيَمَةِ الْعَيْبِ؛ لِأَنَّهُ اشْتَرَاهُمَا صَفَقَةً وَاحِدَةً فَلَيْسَ لَهُ أَنْ يَنْقُضَهَا.

³⁷ Here al-Shāfiʿī appears to base his argument upon the customary strategies of a typical buyer; there seems a presupposition of intent to illicit gain on the part of the buyer — that no matter what the actual price was, the buyer will claim the greatest possible, so that the refund/compensation for defect will be greater.

³⁸ This may present yet another important clue as to the compilation of the text: is it possible this *kitāb* was compiled first during al-Shāfiʿī's "old doctrine" phase in Baghdad, and al-Rabī is merely updating it to the "new doctrine?"

³⁹ Since one *thawb* has been destroyed, he can't return them both; had one not been destroyed, he would have had to return them both — even if only *one* had a defect — because he bought them both in a single *ṣafqa*. The two *thawbs* form, in other words, a single object of sale.

Bāb al-Muḍāraba

Chapter on Muḍāraba ¹	بَابُ الْمُضَارَبَةِ
201 – Al-Shāfi'ī, may God Most High have mercy upon him, said:² And when a man gives a man a <i>thawb</i> that he sell it, with the understanding that what there is in it of profit, they divide half-and-half between them; or he gives him a house [i.e., supplies the land], that he build it, and rent it out,³ with the understanding that its rent (<i>ujratiḥā</i>) be split between them half-and-half; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say regarding that, all of it: <i>Fāsid</i>. And he who sells [i.e., does the work of selling] has the right to an appropriate wage (<i>ajru mithlihi</i>) at the expense of the owner (<i>rabb</i>) of the <i>thawb</i>, and to the builder of the house belongs the right to an appropriate wage, at the expense of the owner of the house. And he [Abū Yūsuf] embraces it.⁴	201 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَعْطَى الرَّجُلُ الرَّجُلَ ثَوْبًا يَبِيعُهُ عَلَى أَنْ مَا كَانَ فِيهِ مِنْ رِبْحٍ فَبَيْنَهُمَا نَصْفَانِ، أَوْ أَعْطَاهُ دَارًا يَبْنِيهَا وَيُؤْجِرُهَا عَلَى أَنْ أُجْرَتَهَا بَيْنَهُمَا نَصْفَانِ، فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ فِي ذَلِكَ كُلِّهِ: فَاسِدٌ، وَلِلَّذِي بَاعَ أَجْرٌ مِثْلُهُ عَلَى رَبِّ الثَّوْبِ، وَلِلْبَانِي الدَّارِ أَجْرٌ مِثْلُهُ عَلَى رَبِّ الدَّارِ. وَبِهِ يَأْخُذُ.
202 – But Ibn Abī Laylā used to say: It is <i>jā'iz</i>, and the rent and the profit (<i>al-ajru wa'l-ribḥu</i>) are split half-and-half between them. And Ibn Abī Laylā used to treat this in the domain of land for sharecropping (<i>yaj'alu hādhā bi-manzilati al-arḍ li'l-muzāra'ati</i>) and palms for cultivation (<i>al-nakhli li'l-mu'āmalati</i>) [i.e., under the rubric of <i>muzāra'a</i> and <i>musāqāt</i>].⁵	202 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هُوَ جَائِزٌ، وَالْأَجْرُ وَالرِّبْحُ بَيْنَهُمَا نَصْفَانِ، وَكَانَ ابْنُ أَبِي لَيْلَى يَجْعَلُ هَذَا بِمَنْزِلَةِ الْأَرْضِ لِلْمُزَارَعَةِ وَالتَّخْلِ لِلْمُعَامَلَةِ.

¹ (Ḥassūn, vol.9, pt.14, 44-5; Schacht: *Tr. I*, 40-41).

² Again, and this appears to be a pattern when starting a new section, al-Afghānī's Shaybānī Version begins with *qāla* Abū Yūsuf (30), whereas the *Umm* Version begins *qāla* al-Shāfi'ī. It was likely understood that al-Shāfi'ī was reciting the book as it has passed through Abū Yūsuf and Muḥammad b. al-Ḥasan, but the absence of a chain of transmission may be of significance. As to what it signifies, however, I am uncertain.

³ Quite possibly a typo, Ḥassūn has *وَيُؤْجِرُهَا* instead of *وَيُؤْجِرُهَا*, which is how it appears in Būlāq and elsewhere, and which latter form I have favoured here. Ḥassūn's form IV, however, appears to be of more common use than the form III of our other texts.

⁴ Al-Afghānī, besides noting that such was “also the *qawl* of Mūḥammad,” points out that this “is a *mas'ala* of the *Bāb al-Muḍāraba bi'l-'Urūd*, whose parallel is in 22:35 of the *Mabsūt*” (30, n.1).

⁵ Lane observes that *al-mu'āmala* is, in the old Iraqi dialect, what the Hijāzīs called *al-musāqāt* (v.2158). That this is a reference to *al-musāqāt* is also confirmed by Ḥassūn, who then defines the latter (ix.44 n.3). We might take the example of this *mas'ala* to underscore a point no doubt well-known to readers of early juridical texts; mainly, that there is a wealth of genetic-linguistic (and socio-linguistic) material to be combed from such pages as these, which, among other things, preserve regional variants which might transform or disappear in later texts.

203 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man turns over a <i>thawb</i> to a man,⁶ or an article of merchandise (<i>silʿat^m</i>), that he sell it for such-and-such, and whatever increases [beyond the base-price] be divided between them half-and-half; or [he turns over] a plot of earth (<i>buqʿa</i>) that he build upon it, with the understanding that he rent it out (<i>yukriyahā</i>) and the rent (<i>al-kirāʿu</i>) be divided between them half-and-half; this is <i>fāsid</i>, and if it is found out (<i>udrika</i>) before the <i>bayʿ</i> and the building, it is revoked/nullified (<i>nuqida</i>), and if it is not found out until there are <i>bayʿ</i> and building, then there belongs to the seller and the builder their appropriate wage (<i>ajru mithlihi</i>); while the price of the <i>thawb</i>, all of it, belongs to the owner (<i>rabb</i>) of the <i>thawb</i>, and the house to the owner of the house.	203 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا دَفَعَ الرَّجُلُ إِلَى الرَّجُلِ ثَوْبًا أَوْ سِلْعَةً يَبِيعُهَا بِكَذَا فَمَا زَادَ فَهُوَ بَيْنَهُمَا نَصْفَانِ، أَوْ بُعْعَةً يَبْنِيهَا عَلَى أَنْ يُكْرِيهَا وَالْكَرَاءُ بَيْنَهُمَا نَصْفَانِ، فَهَذَا فَاسِدٌ، فَإِنْ أُدْرِكَ قَبْلَ الْبَيْعِ وَالْبِنَاءِ نُقِضَ، وَإِنْ لَمْ يُدْرِكَ حَتَّى يَكُونَ الْبَيْعُ وَالْبِنَاءُ كَانَ لِلْبَائِعِ وَالْبَانِي أَجْرٌ مِثْلُهُ، وَكَانَ ثَمَنُ الثَّوْبِ كُلُّهُ لِرَبِّ الثَّوْبِ وَالِدَّارُ لِرَبِّ الدَّارِ.
204 – And when a man has <i>māl</i> as <i>muḍāraba</i>, and he sells it on credit (<i>fa-adānahu</i>), and the owner <i>rabb al-māl</i> [i.e., the principal] neither orders him to do so, nor forbids him – i.e., by his <i>qawl</i> – and he sells it on credit to the purchaser, and sells for delayed payment (<i>bi-nasīʿat^m</i>) – not loaning it to him [as <i>qarḍ</i>], or, if he loans it, becoming liable (<i>wa law aqraḍahu ḍamina</i>); then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: There is no <i>ḍamān</i> [enjoined] upon the <i>muḍārib</i>, and what he sold of that on credit, it is <i>jāʿiz</i>. And he [Abū Yūsuf] embraces it.⁷	204 – وَإِذَا كَانَ مَعَ الرَّجُلِ مَالٌ مُضَارَبَةً فَأَدَانَهُ وَلَمْ يَأْمُرْهُ بِذَلِكَ رَبُّ الْمَالِ وَلَمْ يَنْهَهُ – يَعْنِي بِقَوْلِهِ – فَأَدَانَهُ الْمُشْتَرِي بِهِ وَبَاعَ بِنَسِيعَةٍ وَلَمْ يَقْرِضْهُ وَلَوْ أَقْرَضَهُ ضَمِنَ، فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: لَا ضَمَانَ عَلَى الْمُضَارِبِ وَمَا أَدَانَ مِنْ ذَلِكَ فَهُوَ جَائِزٌ. وَبِهِ يَأْخُذُ.
205 – But Ibn Abī Laylā used to say: The <i>muḍārib</i> is liable (<i>ḍāmin^m</i>), unless he brings <i>bayyina</i> that the <i>rabb al-māl</i> gave permission to him as regards the delayed payment (<i>al-nasīʿa</i>).	205 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الْمُضَارِبُ ضَامِنٌ إِلَّا أَنْ يَأْتِيَ بِالْبَيِّنَةِ أَنَّ رَبَّ الْمَالِ أَذِنَ لَهُ فِي النَّسِيعَةِ.
206 – And if he made a <i>qarḍ</i>-loan of it (<i>aqraḍahu qarḍ^m</i>), he is liable (<i>ḍamina</i>) according to both their <i>qawls</i> [i.e., Abū Ḥanīfa’s and Ibn Abī Laylā’s], together, because the <i>qarḍ</i>-loan is not of the	206 – وَلَوْ أَقْرَضَهُ قَرْضًا ضَمِنَ فِي قَوْلِهِمَا جَمِيعًا؛ لِأَنَّ الْقَرْضَ لَيْسَ مِنَ الْمُضَارَبَةِ.

⁶ Again most likely an omission, Ḥassūn has دَفَعَ الرَّجُلُ ثَوْبًا instead of دَفَعَ الرَّجُلُ إِلَى الرَّجُلِ ثَوْبًا, as have the other editions consulted.

⁷ Al-Afghānī (30, n.2) notes this is also Muḥammad’s opinion; and, additionally, “it is the *mas’ala* of the Chapter on what is permitted for the *muḍārib* in the *muḍāraba*, from the *Mabsūt* [22:31-9].”

muḍāraba-contract.	
207 – Abū Ḥanīfa, on the authority of Ḥumayd b. ‘Abd Allāh b. ‘Ubayd al-Anṣārī, ⁸ on his father, on his grandfather, [reported] that ‘Umar b. al-Khaṭṭāb, may God Most High be pleased with him, gave the <i>māl</i> of an orphan as <i>muḍāraba</i> , and he used to put it to work in ‘Irāq, and he would not know how he [the <i>muḍārib</i> -agent] fixed it in terms of profit (<i>kayfa qāṭa’ahu ‘alā al-ribḥi</i>). ⁹	207 – أَبُو حَنِيفَةَ عَنْ حُمَيْدِ بْنِ عَبْدِ اللَّهِ بْنِ عُبَيْدِ الْأَنْصَارِيِّ، عَنْ أَبِيهِ، عَنْ جَدِّهِ أَنَّ عُمَرَ بْنَ الْخَطَّابِ رَضِيَ اللَّهُ تَعَالَى عَنْهُ أَعْطَى مَالَ يَتِيمٍ مُضَارَبَةً فَكَانَ يَعْمَلُ بِهِ فِي الْعِرَاقِ وَلَا يَدْرِي كَيْفَ قَاطَعَهُ عَلَى الرَّبْحِ.
208 – Abū Ḥanīfa, may God Most High have mercy upon him, on the authority of ‘Abd Allāh b. ‘Alī, on al-‘Alā’ b. ‘Abd al-Raḥmān b. Ya‘qūb, on his father, [reported] that ‘Uthmān b. ‘Affān, may God Most High be pleased with him, gave <i>māl</i> as <i>muqārada</i> — meaning: as <i>muḍāraba</i> .	208 – أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى عَنْ عَبْدِ اللَّهِ بْنِ عَلِيٍّ، عَنِ الْعَلَاءِ بْنِ عَبْدِ الرَّحْمَنِ بْنِ يَعْقُوبَ، عَنْ أَبِيهِ أَنَّ عُثْمَانَ بْنَ عَفَّانَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ أَعْطَى مَالًا مُقَارَضَةً. يَعْنِي مُضَارَبَةً.
209 – Abū Ḥanīfa, on the authority of Ḥammād, on Ibrāhīm, [reported] that ‘Abd Allāh b. Mas‘ūd, may God Most High be pleased with him, gave Zayd b. Khulayda <i>māl</i> as <i>muqārada</i> .	209 – أَبُو حَنِيفَةَ عَنْ حَمَّادٍ، عَنْ إِبْرَاهِيمَ، أَنَّ عَبْدَ اللَّهِ بْنَ مَسْعُودٍ رَضِيَ اللَّهُ تَعَالَى عَنْهُ أَعْطَى زَيْدَ بْنَ خُلَيْدَةَ مَالًا مُقَارَضَةً.
210 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And when a man turns over to a man <i>māl</i> for <i>muḍāraba</i> , and neither orders him to, nor prohibits him from, <i>al-dayn</i> , and he sells on credit (<i>adāna</i>) in a <i>bay‘</i> , or purchase (<i>shirā’</i>), or a <i>salaf</i> ; all that is one and the same (<i>fa-sawā^{un} dhālika kulluhu</i>) — he is liable (<i>ḍāmin^{un}</i>), unless the <i>rabb al-māl</i> confirms him in this (<i>yuqirra lahu</i>), or <i>bayyina</i> is furnished that he permitted him to do that. ¹⁰	210 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا دَفَعَ الرَّجُلُ إِلَى الرَّجُلِ مَالًا مُضَارَبَةً وَلَمْ يَأْمُرْهُ وَلَمْ يَنْهَهُ عَنِ الدَّيْنِ فَأَدَّانَ فِي بَيْعٍ أَوْ شِرَاءٍ أَوْ سَلَفٍ فَسَوَاءُ ذَلِكَ كُلُّهُ؛ هُوَ ضَامِنٌ إِلَّا أَنْ يُقَرَّرَ لَهُ رَبُّ الْمَالِ أَوْ تَقُومَ عَلَيْهِ بَيِّنَةٌ أَنَّهُ أَذِنَ لَهُ فِي ذَلِكَ.

⁸ Al-Afghānī (30-1, n.3) finds a problem with the attribution of this and related *āthār*, offering his opinion at the end of a lengthy discussion, along with a slightly different version in which ‘Umar’s agent reaps a profit which ‘Umar divides up. Additionally, he notes: “And in the *riwāya* of the *K. al-Muḍāraba* he adds: And he [used to] put it to work for him in Iraq, and he [used to] come to the Hījāz, and ‘Umar used to divide up the profit” (31, n.1).

⁹ Note this seems to support §204 (as do §§208-9).

¹⁰ Note that al-Shāfi‘ī does not supply an argument in support of his conclusion, which is, we may note, more-or-less the opinion of Ibn Abī Laylā.

Bāb al-Salam

Chapter on Salam ¹	بَابُ السَّلَامِ
211 – Al-Shāfiʿī, may God Most High have mercy upon him, said: ² And when a man is owed wheat (<i>ṭaʿām</i>) by a man via a <i>salam</i> arrangement (<i>aslama ilayhi fihi</i>), then he takes some of his wheat, and some of his capital (<i>raʿsi mālihi</i>); then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: It is <i>jāʿiz</i> .	211 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَ لِرَجُلٍ عَلَى رَجُلٍ طَعَامٌ أَسْلَمَ إِلَيْهِ فِيهِ، فَأَخَذَ بَعْضَ طَعَامِهِ وَبَعْضَ رَأْسِ مَالِهِ فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: هُوَ جَائِزٌ.
212 – It has reached us on the authority of ʿAbd Allāh b. ʿAbbās, may God Most High be pleased with them both, that he said: That is the well-known and accepted, the good, the fine [practice] (<i>dhālīka al-maʿrūf al-ḥasan al-jamīl</i>). ³ And he [Abū Yūsuf] embraces it.	212 – بَلَغَنَا عَنْ عَبْدِ اللَّهِ بْنِ عَبَّاسٍ رَضِيَ اللَّهُ تَعَالَى عَنْهُمَا أَنَّهُ قَالَ: ذَلِكَ الْمَعْرُوفُ الْحَسَنُ الْجَمِيلُ. وَبِهِ يَأْخُذُ.
213 – But Ibn Abī Laylā used to say: When he takes some of his capital, the <i>salam</i> contract has been invalidated (<i>fa-qad fasada al-salamu</i>); [so] he takes his capital, all of it. ⁴	213 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: إِذَا أَخَذَ بَعْضَ رَأْسِ مَالِهِ فَقَدْ فَسَدَ السَّلَامُ وَيَأْخُذُ رَأْسَ مَالِهِ كُلَّهُ.
214 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man offers advanced payment (<i>aslafa</i>) to a man for one hundred dinars for a measure of wheat (<i>mikyalati ṭaʿāmⁱⁿ</i>), well-described and for a known term (<i>mawṣūfⁱⁿ ilā ajalⁱⁿ maʿlūmⁱⁿ</i>), and the term has come due	214 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَسْلَفَ الرَّجُلُ الرَّجُلَ مِائَةَ دِينَارٍ فِي مِكْيَلَةٍ طَعَامٍ مَوْصُوفٍ إِلَى أَجَلٍ مَعْلُومٍ، فَحَلَّ الْأَجَلُ فَتَرَاصِيًا أَنْ يَتَفَاسَخَا الْبَيْعُ كُلُّهُ كَانَ جَائِزًا.

¹ (Ḥassūn, vol.9, pt.14, 46-7; Schacht: *Tr. I*, 42-43). Ḥassūn, whose edition is collated from no less than ten different manuscripts, notes that MS “*kāp*” entitles this chapter *Bāb al-Salaf*; he then points out that *salam* and *salaf* (*sallama*, *aslama*; *sallaḥa*, *aslafa*) are of one and the same meaning (ix.46, n.1).

² Again (and the reader may assume, hereafter, at the head of each new chapter), al-Afghānī’s Shaybānī Version (32) begins: “*Qāla Abū Yūsuf*.”

³ Al-Afghānī tells us this is Muḥammad’s opinion as well, then adds this helpful note from the *Mabsūṭ* [12:130], which supplies the *aṣl* for *qiyās*: “Al-Imām al-Sarakhsī said: Our *ḥujja* regarding this is that he takes the capital as mutual agreement to rescind the contract (*iqālat^{an}*), and if it is mutually rescinded in full, it is permitted, and so, too, when it is mutually rescinded in part it is permitted as well, just as in *bayʿ al-ʿayn*” (33, n.4).

⁴ Al-Afghānī reveals the *ḥujja* of Ibn Abī Laylā; al-Sarakhsī mentions this to be the *qawl* of Ibn ʿUmar, and his *dalīl* was the *ḥadīth*: “Don’t take except for [either] your [object of] *salam*, or your capital;” al-Sarakhsī adds “the *taʿwīl* of the *ḥadīth* is that the *nahī* is upon taking other than what amounts to the capital (*raʿs al-māl*) and what was offered in *salam* (*al-musallam fihi*), and that is only at the time of exchange (*inda al-istibdāl*) (33-4, n.5).

(ḥalla), and they mutually consent (tarādayā) to mutually annul (tafāsakhā) the bay‘; all of this is jā‘iz.	
215 – And if this is jā‘iz, then it is permitted that they mutually annul half of the bay‘ and mutually affirm half of it. Ibn ‘Abbās was asked about this, and he saw no harm in it (fa-lam yara bihi ba’s ^{am}), and said: This is the well-known and accepted, the good, the fine [practice]. And the qawl of Ibn ‘Abbās is [also] the qiyās, but others opposed him (khālafahu) in this. ⁶	215 – وَإِذَا كَانَ هَذَا جَائِزًا جَازَ أَنْ يَتَفَاسَخَا نَصْفَ الْبَيْعِ وَيُثَبَّتَا نَصْفَهُ، وَقَدْ سُئِلَ عَنْ هَذَا ابْنُ عَبَّاسٍ فَلَمْ يَرِ بِهِ بَأْسًا وَقَالَ: هَذَا الْمَعْرُوفُ الْحَسَنُ الْحَمِيلُ. وَقَوْلُ ابْنِ عَبَّاسٍ الْقِيَاسُ، وَخَالَفَهُ فِيهِ غَيْرُهُ.
216 – He [Abū Yūsuf] said: And when a man procures a salam contract regarding meat (al-laḥm); then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: There is no good in it (lā khayra fihi), because it is not well-known and accepted (ghayru ma‘rūf ^{an}). And he [Abū Yūsuf] embraces it.	216 – قَالَ: وَإِذَا أَسْلَمَ الرَّجُلُ فِي اللَّحْمِ فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: لَا خَيْرَ فِيهِ؛ لِأَنَّهُ غَيْرُ مَعْرُوفٍ. وَبِهِ يَأْخُذُ.
217 – But Ibn Abī Laylā used to say: There is no harm in it (lā ba’sa bihi). Then, Abū Yūsuf, may God Most High have mercy upon him, reverted to the qawl of Ibn Abī Laylā, and said: When he makes clear (bayyana) the loci (mawāḍi‘a) of the meat, and he says: Thighs, and sides [ribs?] (janūb ^{um}), and the like; it is jā‘iz. ⁷	217 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا بَأْسَ بِهِ. ثُمَّ رَجَعَ أَبُو يُوسُفَ رَحِمَهُ اللَّهُ تَعَالَى إِلَى قَوْلِ ابْنِ أَبِي لَيْلَى وَقَالَ: إِذَا بَيَّنَّ مَوَاضِعَ اللَّحْمِ فَقَالَ: أَفْخَاذٌ وَجُنُوبٌ وَنَحْوُ هَذَا. فَهُوَ جَائِزٌ.
218 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And when a man procures a salaf contract (aslafa) regarding meat, by weight (bi-wazn ⁱⁿ), and quality (ṣifat ⁱⁿ), and locus (mawḍi‘ ⁱⁿ), and of a known age (min sinn ⁱⁿ ma‘lūm ⁱⁿ), and he designates (sammā) that thing; the salaf is jā‘iz.	218 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَسْلَفَ الرَّجُلُ الرَّجُلَ فِي لَحْمٍ بِوَزْنٍ وَصِفَةٍ وَمَوْضِعٍ وَمِنْ سِنٍّ مَعْلُومٍ وَسَمَّى ذَلِكَ الشَّيْءَ، فَالْسَّلَفُ جَائِزٌ.

⁵ I have followed Būlāq (vii.98) with نصفه; whereas Ḥassūn (ix.46) has نصفًا, and Maṭrajī (vii.175) has نصف.

⁶ NB: Al-Shāfi‘ī confirms the ḥujja of Abū Ḥanīfa (i.e., the qawl of Ibn ‘Abbās). Then he presents the corresponding qiyās as a conditional. Note that it appears to be of the *a maiore ad minus* type (“If [complete transaction] is jā‘iz, then all the more so should [half transaction] be jā‘iz.”)

⁷ Yet another mark of dialectical sincerity on the part of Abū Yūsuf. Having turned towards the opinion of Abū Ḥanīfa, he then turns back to that of Ibn Abī Laylā, with a proviso. Rather than blind loyalty, we see that it is refined argument that guides doctrinal adherence. As for §§216-17: Al-Afghānī (34-5, n.1) cites a long, rich discussion by al-Sarakhsī [Mabsūṭ 12:137] on this matter, and the ikhtilāf within the Ḥanafī school on the subject, and their arguments.

Bāb al-Shufa

Chapter on Right of Pre-Emption (<i>al-Shufa</i>) ¹	بَابُ الشُّفْعَةِ
219 – Al-Shāfiʿī, may God Most High have mercy upon him, said: When a woman marries for a portion (<i>shiqṣ</i>) ² of a house [i.e., as dowry]; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: There is no right of pre-emption (<i>shufa</i>) regarding that to anyone. And he [Abū Yūsuf] embraces it.	219 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: إِذَا تَزَوَّجَتْ امْرَأَةٌ عَلَى شِقْصٍ مِنْ دَارٍ فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا شُفْعَةَ فِي ذَلِكَ لِأَحَدٍ. وَبِهِ يَأْخُذُ.
220 – But Ibn Abī Laylā used to say: To the pre-emptor (<i>al-shafī</i>) belongs the <i>shufa</i> , based on the value, and the woman takes the value of that from him.	220 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لِلشَّفِيعِ الشُّفْعَةُ بِالْقِيَمَةِ، وَتَأْخُذُ الْمَرْأَةُ قِيَمَةَ ذَلِكَ مِنْهُ.
221 – But Abū Ḥanīfa, may God Most High be pleased with him, said: How can that be (<i>kayfa yakūnu dhālika</i>), while this is not a purchase (<i>shirā</i>) in which there is <i>shufa</i> ? This is merely <i>nikāḥ</i> . Have you considered [what would happen] if he unilaterally divorced her (<i>ṭallaqahā</i>) before consummating the marriage (<i>yadkhula bihā</i>); how much belongs to the <i>shafī</i> from her? And what would he take, the value [of the portion], or the dowry (<i>mahr</i>) [i.e., the portion itself]? ³	221 – وَقَالَ أَبُو حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ: كَيْفَ يَكُونُ ذَلِكَ وَلَيْسَ هَذَا شِرَاءً يَكُونُ فِيهِ شُفْعَةٌ، إِنَّمَا هَذَا نِكَاحٌ. أَرَأَيْتَ لَوْ طَلَّقَهَا قَبْلَ أَنْ يَدْخُلَ بِهَا كَمْ لِلشَّفِيعِ مِنْهَا؟ وَبِمَ يَأْخُذُ، بِالْقِيَمَةِ أَوْ بِالمَهْرِ؟
222 – And likewise, when she is bilaterally divorced (<i>ikhtalaʿat</i>) for a portion of a house, according to both their <i>qawls</i> [i.e., Abū Ḥanīfa's and Ibn Abī Laylā's], together. ⁴	222 – وَكَذَلِكَ إِذَا اخْتَلَعَتْ بِشِقْصٍ مِنْ دَارٍ فِي قَوْلِهِمَا جَمِيعًا.

¹ (Hassūn, vol.9, pt.14, 47-56; Schacht: *Tr. I*, 44-50).

² Hassūn (ix.48, n.1) defines *shiqṣ* as “a portion (*tāʿifa*) of a thing;” then he proposes that what al-Shāfiʿī means by it here is “the known, undetached portion (*al-naṣīb al-maʿlūm al-ghayr mafrūz*).”

³ This is a superb instance of dialectical disputation; beginning with a “How can this be?” followed by *araʿayta* introducing a pair of *reductio* arguments. Of import is that this Question is attributed to Abū Ḥanīfa himself; here he appears as the *sāʿil* preparing to launch his *elenchus* against the *mujīb* (Ibn Abī Laylā). The difficulty upon which this *elenchus* is based may be made plain upon consideration of the Qurʾānic substantive norms of divorce before consummation (Q.2:236-7). For discussions, see, among others, O. Spies in the *El*² (s.v. “*mahr*”): “Even if the man divorces the wife before he has cohabited with her, he must leave half the *mahr* with her...;” and, again: “if the man pronounces a divorce, the *mahr* must be paid in every case if cohabitation has taken place; but the bridegroom may withdraw from the marriage before it is consummated; in this case he is bound to give the woman half the *mahr*.”

⁴ As regards §§219-22, al-Afghānī (35, n.1) observes: “And it is also the *qawl* of Muḥammad. And the *masʿala* is in the *Bāb al-Mahr* from the *K. al-Nikāḥ* of the *Mabsūṭ* of al-Sarakhsī [5:78]. He said: And according to us, the obligation of *al-shufa* is particularized to / peculiar to (*yakhtaṣṣu bi-*) exchange (*muʿāwada*) of *māl* with *māl muṭlaq*, and the *buḍʿ* is not *māl muṭlaq*, and the thing owned

223 – Al-Shāfiʿī said: And when a man marries a woman for a share (<i>naṣīb</i>) from a house which is not apportioned [into shares] (<i>ghayri maqṣūmat^m</i>), and the partner (<i>sharīk</i>) of the married one (<i>al-mutazawwij</i>) wants the <i>shufa</i>; he takes it for the value of her appropriate dowry (<i>mahri mithlihā</i>). And if he [the husband] unilaterally divorces her before consummating the marriage, the <i>shufa</i> is complete (<i>tāmmat^{an}</i>), and there belongs to the husband the right to lay claim to half the price (<i>thaman</i>) of the <i>shufa</i> [from the divorced wife].	223 – قَالَ الشَّافِعِيُّ: وَإِذَا تَزَوَّجَ الرَّجُلُ الْمَرْأَةَ بِنَصِيبٍ مِنْ دَارٍ غَيْرِ مَقْسُومَةٍ، فَأَرَادَ شَرِيكَ الْمُتَزَوِّجِ الشُّفْعَةَ أَخَذَهَا بِقِيَمَةِ مَهْرٍ مِثْلِهَا، وَلَوْ طَلَّقَهَا قَبْلَ أَنْ يَدْخُلَ بِهَا كَانَتْ الشُّفْعَةُ تَامَّةً وَكَانَ لِلزَّوْجِ الرَّجُوعُ بِنَصْفِ ثَمَنِ الشُّفْعَةِ.
224 – And likewise if she is bilaterally divorced for a portion (<i>shiqṣ</i>) from a house – and he is not permitted to marry her for a portion unless it is known, calculated (<i>maʿlūm^{an} maḥsūb^{an}</i>), for he marries her for what she had known of the dowry (<i>al-ṣadāq</i>);⁵ if he marries her for a portion uncalculated and unknown, to her belongs the right to her appropriate dowry (<i>ṣadāqu mithlihā</i>); and there is no <i>shufa</i> regarding it, because it is an unknown dowry (<i>mahr^{un} majhūl^{un}</i>), and the <i>nikāḥ</i> is confirmed, but the <i>mahr</i> is dissolved (<i>yanfasikhu</i>) and returned to its owner (<i>rabbihī</i>), and to her	224 – وَكَذَلِكَ لَوْ اخْتَلَعَتْ بِشِقْصٍ مِنْ دَارٍ وَلَا يَحُوزُ أَنْ يَتَزَوَّجَهَا بِشِقْصٍ إِلَّا أَنْ يَكُونَ مَعْلُومًا مَحْسُوبًا فَيَتَزَوَّجَهَا بِمَا قَدْ عَلِمَتْ مِنَ الصَّدَاقِ، فَإِنْ تَزَوَّجَهَا عَلَى شِقْصٍ غَيْرِ مَحْسُوبٍ وَلَا مَعْلُومٍ كَانَ لَهَا صَدَاقٌ مِثْلِهَا وَلَمْ يَكُنْ فِيهِ شُفْعَةٌ؛ لِأَنَّهُ مَهْرٌ مَجْهُولٌ فَيُثَبَّتُ النِّكَاحُ وَيَنْفَسَخُ الْمَهْرُ وَيُرَدُّ إِلَى رَبِّهِ، وَيَكُونُ

as *ṣadāq* is in the status (*bi-manzilati*) of the thing gifted (*al-mawhūb*), so regarding it no *shufa* is obliged. [We will note this as a dialectical move of *farq*.] And this is because the pre-emptor takes possession only by the like cause by which the buyer takes possession, and indeed the *sharʿ* puts the pre-emptor before the buyer regarding the confirmation of his right to take by that cause, not regarding the establishment of some other cause, and due to this, *shufa* regarding the *mawhūb* is not obliged, because if he takes it, he takes it by compensation (*bi-ʿiwaḍin*), and it is another cause, not the cause by which the rightful taker of possession takes in possession. And so, too, here the woman acquired the house by *nikāḥ* as a gift given voluntarily (*ṣadāq^{an}*), and if the pre-emptor takes it, it is a purchase (*shirāʿ^{an}*) [as opposed to *ṣadāq^{an}*], and is another cause, in contradiction to the case of when he buys it for a slave, then indeed the pre-emptor takes it for the like of that cause, because purchase by the value of the slave is in the status of purchase by the substance itself of the slave (*bi-ʿayni al-ʿabd*), in that it is *shirāʿ^{un} muṭlaq^{un}*.⁵

⁵ O. Spies (*El²*, s.v. “*mahr*”) defines *mahr* as: “synonymous with *ṣadāq* which properly means “friendship”, then “present”, a gift given voluntarily and not as a result of a contract, is in Muslim law the gift which the bridegroom has to give the bride when the contract of marriage is made and which becomes the property of the wife.” As regards the usage of *ṣadāq* vs. *mahr*, *naṣīb* vs. *shiqṣ*, perhaps we are seeing al-Shāfiʿī in the role of commentator as well as in the role of *mujtahid*. That is to say, al-Shāfiʿī often chooses synonyms, or employs a different vocabulary set from Abū Ḥanīfa. Is this partly by way of offering definitions, clarity, to his students? Or is it the result of regional variants? Or both? Or perhaps it is a sign of something else entirely? Another key feature we may note is the fact that, generally speaking, the expressions or formulations of his “when/if P, then Q” cases are more abstracted, and seemingly more open to universal application.

belongs the right to her appropriate dowry (<i>ṣaḍāqu mithlihā</i>). ⁶	لَهَا صَدَاقٌ مِثْلُهَا.
225 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man buys a house, and builds in it a structure (<i>binā</i>), then the <i>shafi</i> comes demanding it [the house] on the basis of <i>shufa</i> ; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: The <i>shafi</i> takes the house, and the <i>ṣāhib</i> of the structure takes [up] the demolition (<i>al-naqd</i>). And he [Abū Yūsuf] embraces it.	225 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اشْتَرَى الرَّجُلُ دَارًا وَبَنَى فِيهَا بِنَاءً ثُمَّ جَاءَ الشَّفِيعُ يَطْلُبُهَا بِالشُّفْعَةِ فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: يَأْخُذُ الشَّفِيعُ الدَّارَ وَيَأْخُذُ صَاحِبُ الْبِنَاءِ النَّقْضَ. وَبِهِ يَأْخُذُ.
226 – But Ibn Abī Laylā used to make the house and structure belong to the <i>shafi</i> , and make [incumbent] upon him the value of the structure, and the price of the house for which the <i>ṣāhib</i> of the structure bought it; and if not, then no <i>shufa</i> belongs to him. ⁷	226 – وَكَانَ ابْنُ أَبِي لَيْلَى يَجْعَلُ الدَّارَ وَالْبِنَاءَ لِلشَّفِيعِ وَيَجْعَلُ عَلَيْهِ قِيمَةَ الْبِنَاءِ وَثَمَنَ الدَّارِ الَّذِي اشْتَرَاهَا بِهِ صَاحِبُ الْبِنَاءِ، وَإِلَّا فَلَا شُفْعَةَ لَهُ.
227 – Al-Shāfiʿī, may God Most High be pleased with him, said: And when a man buys a share (<i>naṣīb</i>) from a house, then he subdivides it (<i>qāsama fihi</i>) and builds, then the <i>shafi</i> demands it [the share] from him on the basis of <i>shufa</i> , it is said to him: If you wish, produce the price for which he bought it, and the value of the structure, today; and if you wish, claim [i.e., litigate for] (<i>daʿi</i>) the <i>shufa</i> . He has no right to other than this, because he built without transgression (<i>ghayra mutaʿaddin</i>), and there	227 – قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ تَعَالَى عَنْهُ: وَإِذَا اشْتَرَى الرَّجُلُ نَصِيبًا مِنْ دَارٍ ثُمَّ قَاسَمَ فِيهِ وَبَنَى، ثُمَّ طَلَبَهُ الشَّفِيعُ بِالشُّفْعَةِ قِيلَ لَهُ: إِنْ شِئْتَ فَادِّ الثَّمَنَ الَّذِي اشْتَرَاهُ بِهِ وَقِيمَةَ الْبِنَاءِ الْيَوْمَ، وَإِنْ شِئْتَ فَدَعْ الشُّفْعَةَ. لَا يَكُونُ لَهُ إِلَّا هَذَا؛ لِأَنَّهُ بَنَى غَيْرَ مُتَعَدٍّ فَلَا يَكُونُ عَلَيْهِ هَدْمٌ

⁶ §§219-24: Abū Ḥanīfa has attempted, as we have seen, a *reductio* argument based on an assumption that — as a transaction has occurred between the pre-emptor and the bride — further transactions (re: her keeping half the *mahr*) must unfold between them if she is unilaterally divorced. Why he owns this to be problematic is not clarified in this passage (but argued by al-Sarakhsī in his *Mabsūt* — see al-Afghānī's note above). Al-Shāfiʿī (§223) seems not only to take Ibn Abī Laylā's position, but to elaborate it in such a way as would silence the *reductio* of Abū Ḥanīfa. Schacht (*Origins*, 271), on the other hand, has this to say as regards the *mas'ala* (§44, according to his numbering system): "Ibn Abī Laylā is crudely systematic in applying the rules of pre-emption even to property given as *donatio propter nuptias*, but his solution of the problem is clumsy and inconsistent. Abū Ḥanīfa, followed by Abū Yūsuf, gives systematic reasoning against it. Shāfiʿī accepts pre-emption in the case in question, and makes this doctrine juridically acceptable for the first time. But the argument which Sarakhsī, v. 78, puts into the mouth of Shaibānī in favour of the doctrine of Abū Ḥanīfa and Abū Yūsuf is easily superior even to Shāfiʿī's reasoning; it develops Abū Ḥanīfa's argument in a masterly way and introduces a judicious distinction; this seems to be an argument that Shaibānī really did use."

⁷ Al-Afghānī (36, n.2) observes: "And in the *Mabsūt*: And by the *qawl* of Ibn Abī Laylā, the pre-emptor takes the house and the structure and gives the price and the value of the structure if he wishes. And it is a *riwāya* on the authority of Abū Yūsuf."

will not be [incumbent] upon him the demolition of what he built. ⁸	مَا بَنَى .
228 – And when a man buys land or a house; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: To the <i>ṣāhib</i> of the <i>shufa</i> belongs the <i>shufa</i> when he finds out, and if he demands the <i>shufa</i> [he gets it], ⁹ and if not, then no right to <i>shufa</i> belongs to him. And he [Abū Yūsuf] embraces it. ¹⁰	228 – وَإِذَا اشْتَرَى الرَّجُلُ أَرْضًا أَوْ دَارًا فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لِصَاحِبِ الشُّفْعَةِ الشُّفْعَةُ حِينَ عَلِمَ، فَإِنْ طَلَبَ الشُّفْعَةَ وَإِلَّا فَلَا شُّفْعَةَ لَهُ. وَبِهِ يَأْخُذُ.
229 – But Ibn Abī Laylā used to say: He has <i>khiyār</i> of three days after his finding out (<i>huwa bi'l-khiyāri thalāthata ayyāmⁱⁿ ba'da 'ilmihī</i>).	229 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هُوَ بِالْخِيَارِ ثَلَاثَةَ أَيَّامٍ بَعْدَ عِلْمِهِ.
230 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a portion (<i>shiqṣ</i>) is sold of a house, and the <i>shafī</i> is present, knowing (<i>ḥādīr^{un} ʿālim^{un}</i>), and he makes his demand on the spot (<i>ṭalaba makānahu</i>), then to him belongs the <i>shufa</i> . And if he delays (<i>akhkhara</i>) the demand, then states an excuse (<i>ʿudhr^{an}</i>) — of illness, or of some complication with respect to arrival before the <i>sultān</i> (<i>imtināⁱⁿ min wuṣūlⁱⁿ ilā al-sultāni</i>), or of detention (<i>ḥabs</i>) of a <i>sultān</i> , or the like sort of excuse — he is still in possession of his <i>shufa</i> (<i>kāna ʿalā shufatihi</i>). But there is no time (<i>waqt</i>) regarding that [i.e., no period of <i>khiyār</i>] unless he firmly establishes it [by excuse]; and [enjoined] upon him is the <i>yamīn</i> [that] he did not abandon that [right], neither consenting to a surrendering (<i>taslīm</i>) of the <i>shufa</i> , nor forsaking his right to it.	230 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا بَاعَ شِقْصٌ مِنَ الدَّارِ وَالشَّفِيعُ حَاضِرٌ عَالِمٌ فَطَلَبَ مَكَانَهُ فَلَهُ الشُّفْعَةُ، وَإِنْ أَخَّرَ الطَّلَبَ فَذَكَرَ عُذْرًا مِنْ مَرَضٍ أَوْ امْتِنَاعٍ مِنْ وُصُولٍ إِلَى السُّلْطَانِ أَوْ حَبْسِ سُلْطَانٍ أَوْ مَا أَشْبَهَهُ مِنَ الْعُذْرِ كَانَ عَلَى شُفْعَتِهِ، وَلَا وَقْتٌ فِي ذَلِكَ إِلَّا أَنْ يُمَكِّنَهُ، وَعَلَيْهِ الْيَمِينَ مَا تَرَكَ ذَلِكَ رِضًى بِالتَّسْلِيمِ لِلشُّفْعَةِ وَلَا تَرْكًا لِحَقِّهِ فِيهِ.

⁸ NB: not only does this solution have the practical quality of instruction to a *qāḍī*, but it bears the mark of that quintessential duty of the *qāḍī* to settle disputes before they take on the formal requirements of a *daʿwā*. See Hallaq on the proto-*qāḍī* as *ḥakam* (*Sharīʿa*, 36; *Origins*, 35f.), and his relevant observations regarding mediation and arbitration (*Sharīʿa*, 160ff.)

⁹ We will note here the use of the “unfinished conditional;” this style of presentation enjoys some frequency throughout the *Umm*.

¹⁰ Al-Afghānī (36, n.3), notes this to be the *qawl* of Muḥammad as well, then reproduces a section from the *K. al-Shufa* of the *Mabsūṭ* [14:116-7], wherein the Ḥanafī *ʿulamāʾ* are said to draw their indicants from *aḥādīth* from the Prophet. Such *aḥādīth* indicate that *shufa* is granted only to the *shafī* who acts immediately upon his right. “And in this *lafẓ* is a guide [pointing out] that the demand of pre-emption is fixed in time to the *majlis* in which the *shafī* found out; and such is the *ikhtiyār* of al-Karkhī.” Then other opinions are cited based on the *nawādir* of Abū Ḥanīfa (allowing varying lengths of silence, different forms of expression of demand/interest, etc.) Finally, opinions of Ibn Abī Laylā, Sufyān, and Sharīk are cited.

231 – And if he is absent, then the <i>qawl</i> regarding him is as though he were in the <i>ma'nā</i> of one present (<i>al-ḥāḍir</i>) – if leaving is possible to him, or the authorizing of a proxy (<i>al-tawkīl</i>), and he has no detainer (<i>ḥābis</i>). If he forsakes that [<i>khurūj</i> or <i>tawkīl</i>], his <i>shufa</i> is terminated.¹¹	231 – فَإِنْ كَانَ غَائِبًا فَالْقَوْلُ فِيهِ كَهَوِّ فِي مَعْنَى الْحَاضِرِ إِذَا أَمَكَّنَهُ الْخُرُوجُ أَوْ التَّوَكُّيلُ وَلَمْ يَكُنْ لَهُ حَابِسٌ، فَإِنْ تَرَكَ ذَلِكَ انْقَطَعَتْ شُفَعَتُهُ.
232 – And when a man takes a house by right of <i>shufa</i> from the buyer, and pays him the price in ready money (<i>naqadahu al-thamana</i>); then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: The [written] promise of fulfillment of contractual obligation (<i>al-uhda</i>) is [incumbent] upon the buyer who takes the <i>māl</i> [from the <i>shafī</i>]. And he [Abū Yūsuf] embraces it.¹²	232 – وَإِذَا أَخَذَ الرَّجُلُ الدَّارَ بِالشُّفْعَةِ مِنَ الْمُشْتَرِي وَنَقَدَهُ الثَّمَنَ فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: الْعَهْدَةُ عَلَى الْمُشْتَرِي الَّذِي أَخَذَ الْمَالَ. وَبِهِ يَأْخُذُ.
233 – But Ibn Abī Laylā used to say: The <i>uhda</i> is [incumbent] upon the seller, because the <i>shufa</i> occurred on the day the buyer made purchase for [i.e., in place of] the <i>shafī</i>.	233 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الْعَهْدَةُ عَلَى الْبَائِعِ؛ لِأَنَّ الشُّفْعَةَ وَقَعَتْ يَوْمَ اشْتَرَى الْمُشْتَرِي لِلشَّفِيعِ.

¹¹ §§230-1: Al-Muzanī clarifies this in his *Mukhtaṣar* (Maṭrajī, ix.131; Najjār, viii.120): “If he finds out, and demands [*shufa*] on the spot, then it belongs to him; but if he is capable of it, and does not demand, his *shufa* is nullified. And if he finds out, then delays the demand: if he has an excuse pertaining to detention (*ḥabs*) or something else, then his *shufa* yet belongs to him; and if not, no *shufa* belongs to him. And the length of his absence does not terminate it [the *shufa*]; rather, only that he knows then abandons [his right] terminates it.”

¹² Ḥassūn (ix.50, n.1) defines *uhda* as “*ḍamān* of a defect which existed while in the care of the seller, or the falling due/demand of a right (*istiḥqāq*), obliged by *bayyina* established for the one meriting it, and the surrendering of the *sil'a* to him.” It is important, however, to recognize that the *uhda* is most likely a written instrument, and we find in the MF (s.v. عهدة 1) a number of common definitions, among them: “the document and authoritative reference for redress (*al-wathīqa wa'l-marjī' li'l-iṣlāh*)... and the document of the two parties contracting *bay'* (*wathīqatu al-mutabāy'i ayni*)... because it is referenced in case of confusion (*'inda al-iltibās*).” But it would seem that, in the domain of *shufa*, the term gains a more specialized, technical sense, and the MF proceeds to relate definitions of specific schools and jurists. For the Ḥanafī's: “*ḍamān* for the price in the event of claim/falling due (*'inda al-istiḥqāq*);” while the Mālikī al-Abī Al-Azhārī defines it as “*ḍamān* for the price of the share (*ḥiṣṣa*) of he who is present, after his absence, if there appears in it (the *ḥiṣṣa*) a defect, or it is claimed/falls due (*ustuḥiqqat*).” Al-Dardīr, on the other hand, defines it thus: “the attachment of *ḍamān* for the object of *bay'* to the seller (*ta'alluqu ḍamāni al-mabī'i bi'l-bā'i'i*) for a specific period of time (*fī zamanin mu'ayyanin*), and it is of two types: *uhda* of a year, and *uhda* of three [days].” Perhaps the clearest and most relevant definition is that of the Ḥanbalī al-Buhūtī, who observes: “What is meant by *uhda* here (i.e., in the *bāb al-shufa*) is the claim of he to whom the ownership (*milk*) was transferred — being *shafī*, or buyer —, against he from whom the *milk* was transferred — being seller or buyer —, for the price (*al-thaman*) or the indemnity (*al-arsh*), in the event of the claiming/falling due (*'inda istiḥqāq*) of the portion (*shiḡs*), or its defect.”

234 – Al-Shāfiʿī, may God Most High be pleased with him, said: And when a man takes a portion (<i>shiqṣ</i>) by right of <i>shuʿfa</i> from the buyer; his <i>uhda</i> is [incumbent] upon the buyer who took [<i>māl</i>] from him; and the <i>uhda</i> of the buyer is [incumbent] upon the one who sold to him — the <i>uhda</i> is only [incumbent] upon whomever took possession of (<i>qabaḍa</i>) the <i>māl</i>, and from whom the sold thing (<i>al-mabīʿ</i>) was taken.	234 – قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ تَعَالَى عَنْهُ: فَإِذَا أَخَذَ الرَّجُلُ الشَّقْصَ بِالشُّفْعَةِ مِنْ الْمُشْتَرِي فَعَهْدُهُ عَلَى الْمُشْتَرِي الَّذِي أَخَذَ مِنْهُ وَعَهْدُهُ الْمُشْتَرِي عَلَى بَائِعِهِ، إِنَّمَا تَكُونُ الْعَهْدَةُ عَلَى مَنْ قَبِضَ الْمَالَ وَقَبِضَ مِنْهُ الْمَبِيعَ.
235 – Don't you see/opine (<i>alā tarā</i>) that the first seller is not an owner (<i>mālik</i>), and if he clears (<i>abra'a</i>) the one who takes by right of <i>shuʿfa</i> from the price, he is not cleared (<i>lam yabra'</i>)? And if he [the seller] has cleared himself (<i>tabarra'a</i>) to the one buying from him, of a defect which the one seeking pre-emption (<i>al-mustashfi'u</i>) does not know of, then — if the <i>mustashfi'u</i> finds out after his taking by right of <i>shuʿfa</i> — he has the right to return it?¹³	235 – أَلَا تَرَى أَنَّ الْبَائِعَ الْأَوَّلَ لَيْسَ بِمَالِكٍ، وَلَوْ أَتْبَرَأَ الْآخِذَ بِالشُّفْعَةِ مِنَ الثَّمَنِ لَمْ يَبْرَأْ وَلَوْ كَانَ تَبَرَأَ إِلَى الْمُشْتَرِي مِنْهُ مِنْ عَيْبٍ لَمْ يَعْلَمْ بِهِ الْمُسْتَشْفِعُ فَإِنْ عَلِمَ الْمُسْتَشْفِعُ بَعْدَ أَخْذِهِ بِالشُّفْعَةِ كَانَ لَهُ رَدُّهُ.
236 – And when the <i>shuʿfa</i> belongs to an orphan (<i>yatīm</i>),¹⁴ then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: The <i>shuʿfa</i> belongs to him, and if he has a legal guardian (<i>waṣiyy</i>), he takes it [the <i>shuʿfa</i>] by right of <i>shuʿfa</i>. And if he doesn't have a <i>waṣiyy</i>, he is in possession of his <i>shuʿfa</i> when he attains legal maturity (<i>idhā adraka</i>). And if the <i>waṣiyy</i> does not demand the right to <i>shuʿfa</i> after his finding	236 – وَإِذَا كَانَتِ الشُّفْعَةُ لِلْيَتِيمِ فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَهُ الشُّفْعَةُ فَإِنْ كَانَ لَهُ وَصِيٌّ أَخَذَهَا بِالشُّفْعَةِ. وَإِنْ لَمْ يَكُنْ لَهُ وَصِيٌّ كَانَ عَلَى شُفْعَتِهِ إِذَا أَدْرَكَ، فَإِنْ لَمْ يَطْلُبِ الْوَصِيُّ الشُّفْعَةَ بَعْدَ عِلْمِهِ، فَلَيْسَ

¹³ Remarkably, the *mas'ala* debated in §§232-5 is mirrored in the *MF* (s.v. عهدة 2), as follows: “And does the *qāḍī* pronounce judgment, on the basis of the writing-down (*katb*) of the *uhda* — i.e., the *ḍamān* for the price in the event of *istiḥqāq* —, against the seller, or against the buyer, or against the first *shafīʿ*, when the absent one shows up and takes from him his *ḥiṣṣa*? The *fuqahāʾ* have disagreed (*ikhtalafa*) about that, for the *Mālikīyya* and the *Shāfiʿīyya* said: The *uhda* of the *shafīʿ* is [incumbent] upon the buyer, not upon the seller, regardless of whether he took the *shuʿfa* from the hand of the seller before the taking possession (*al-qabḍ*), or from the hand of the buyer after the taking possession, because the ownership (*al-milk*) was transferred to him from the buyer. [...] But the *Ḥanafīyya* said: If the house is sold to the buyer, and the *qāḍī* passes judgment in favour of the *shafīʿ* for the *shuʿfa*; if it [the house] has been taken [by the *shafīʿ*] from the possession of the seller, the *uhda* is [incumbent] upon the seller, because it is he who is the taker-of-possession (*al-qābiḍ*) of the price, and the *bayʿ* has been dissolved (*infasakha*) between the seller and the buyer. As for if the house was taken, by right of the *shuʿfa*, from the hand of the buyer; the first *bayʿ* is *ṣaḥīḥ*, and the *shafīʿ* pays the price to the buyer, and the *uhda* of the *shafīʿ* is [incumbent] upon the buyer, because he is the taker-of-possession of the price, and because the thing has been transferred from the *milk* of the buyer.”

¹⁴ Ḥassūn (ix.50, n.2) notes that in MS “*kāf*” this section begins with قال الشافعي . أخبرنا الربيع قال:

out; to the orphan belongs no <i>shufa</i> when he matures. ¹⁵	لِلْيَتِيمِ شُفْعَةٌ إِذَا أَدْرَكَ.
237 – And likewise the boy (<i>ghulām</i>), when his father is alive. And he [Abū Yūsuf] embraces it.	237 – وَكَذَلِكَ الْعُلَامُ إِذَا كَانَ أَبُوهُ حَيًّا. وَبِهِ يَأْخُذُ.
238 – But Ibn Abī Laylā used to say: There belongs no <i>shufa</i> to the minor (<i>al-ṣaghīr</i>). ¹⁶	238 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا شُفْعَةَ لِلصَّغِيرِ.
239 – And Abū Ḥanīfa, may God Most High have mercy upon him, said: The <i>shufa</i> belongs to the partner (<i>sharīk</i>) who did not apportion [the room/house] (<i>lam yuqāsīm</i>); ¹⁷ and, after him, it belongs to the <i>sharīk</i> who apportioned (<i>qāsama</i>), while the corridor is [but] one (<i>wa'l-ṭarīqu wāḥidat^{un}</i>) between them; and, after him, it belongs to the adjoining neighbour (<i>li'l-jārī al-mulāsiqī</i>); and, when the neighbours are all close together, and their adjacency is all equal, then they are partners (<i>shurakā'</i>) in the <i>shufa</i> . ¹⁸	239 – وَقَالَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى: الشُّفْعَةُ لِلشَّرِيكِ الَّذِي لَمْ يُقَاسِمَ وَهِيَ بَعْدَهُ لِلشَّرِيكِ الَّذِي قَاسَمَ، وَالطَّرِيقُ وَاحِدَةٌ بَيْنَهُمَا، وَهِيَ بَعْدَهُ لِلجَّارِ الْمُلاصِقِ، وَإِذَا اجْتَمَعَ الْجِيرَانُ وَكَانَ التَّصَاقُفُهُمْ سَوَاءً فَهُمْ شُرَكَاءُ فِي الشُّفْعَةِ.

¹⁵ Al-Afghānī (37, n.2) cites al-Sarakhsī: “And by the *qawl* of Muḥammad and Zufar the *shufa* belongs to him when he attains legal maturity (*adraka*); and it is the *qawl* of Ibn Abī Laylā. And we have explained it in the [book of] *shufa*.”

¹⁶ Schacht (*Origins*, 271-2) finds the *mas'ala* here debated (§48 by his system; §§236-8 by Ḥassūn's) to be, in a word, symptomatic: “On the exercise of a minor's right of pre-emption, Abū Ḥanīfa, followed by Abū Yūsuf, holds a reasonable and defensible opinion. Shaibānī, however, with complete disregard for the stability of real property, applies purely formal reasoning (see Sarakhsī, xiv. 155; xxx. 145); in this he is followed by Shāfiʿī. Both seem to lose sight of the purpose of pre-emption and to regard it as an institution existing for its own sake. This attitude heralds the end of the formative period of Muhammadan law.”

¹⁷ This is a reference to commixion; that is to say, “the *shufa* belongs to the partner in a partnership of commixion.” Hallaq (*Origins*, 44, n.47) defines this relationship as follows: “Partnership of commixion refers to a property owned by two or more persons without clear definition of their individual shares in it, such as a residential property inherited by two or more persons.”

¹⁸ Al-Afghānī (37, n.3) writes: “And it is the *qawl* of his two *ṣāḥibs*. And the *mas'ala* is in 14:94 of the *Mabsūt*. He [al-Sarakhsī] said: And this, i.e., the *qawl* of ʿAlī and Ibn ʿAbbās [cf. §241], is the *qawl* of the Ahl al-Madīna, but the Ahl al-Kūfa don't subscribe to it, except for that Ibn Abī Laylā has turned to it (etc.) But as for us, we embrace the *qawl* of ʿUmar.” Schacht (*Origins*, 219f.) discusses this *mas'ala* and its implications in considerable detail:

“The following example, taken from the doctrine of pre-emption, will show how cross-references to other schools enter into the development of legal doctrine in the pre-literary period. The result of this development, as it affected pre-emption, was that two opposite doctrines prevailed in the Medinese and the Iraqi school respectively: the Medinese restricted the right of pre-emption to the owner of a share in undivided property, and the Iraqians extended it to the neighbor. [Here he cites (n.6) not only this section (§49 by his system), but two recensions of the *Muwattaʿa*, the *Āthār* works of both Abū Yūsuf and al-Shaybānī, the *K. Ikhtilāf Mālik wa'l-Shāfiʿī*, and the *K.*

240 – And Ibn Abī Laylā used to profess the *qawl* of Abū Ḥanīfa, until Abū al-ʿAbbās, Amīr al-Muʿminīn [i.e., the first ʿAbbāsīd Caliph, al-Saffāḥ] wrote to him, ordering him that he not pass judgment for *shufa* except in favour of the *sharīk* who did not apportion; so he embraced that [doctrine], and used not to judge except in favour of the *sharīk* who did not apportion. And this is the *qawl* of the Ahl al-Ḥijāz.¹⁹

240 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ يَقُولُ أَبِي حَنِيفَةَ حَتَّى كَتَبَ إِلَيْهِ أَبُو الْعَبَّاسِ أَمِيرُ الْمُؤْمِنِينَ يَأْمُرُهُ أَنْ لَا يَقْضِيَ بِالشُّفْعَةِ إِلَّا لِلشَّرِيكِ الَّذِي لَمْ يُقَاسِمْ، فَأَخَذَ بِذَلِكَ وَكَانَ لَا يَقْضِيَ إِلَّا لِلشَّرِيكِ الَّذِي لَمْ يُقَاسِمْ. وَهَذَا

[*Ikhtilāf al-Ḥadīth*.] The oldest Iraqi formula, however, was that ‘the right of pre-emption goes by gates, and the person whose gate is nearest has the best right to pre-emption’; it was projected back to Ibrāhīm Nakhaʿī as his alleged former opinion, and on the fictitious authority of Ibrāhīm back to Shuraiḥ. This formula, which reflects the social background of the institution of pre-emption in early Muhammadan law, seems to be the common starting-point of the Medinese and of the Iraqi doctrines. [fn.7: A tradition in Kindī... reflects the change in Egypt from the common ancient to the final Medinese doctrine, and the arguments adduced in favour of the latter.]

The Basrians, while essentially maintaining this opinion, justified it as against the Medinese restriction of the right of pre-emption by pointing out that the lane, on which the several adjoining plots abutted, remained undivided and constituted an interest common to them all. The earlier Kufians, on the other hand, extended the right of pre-emption to all owners of plots within a single block or section not traversed by a thoroughfare, irrespective of whether the plots adjoined or opened on the same lane. Final systematic consistency was achieved in Iraq only in the time of Abū Ḥanīfa and his companions who gave the right to pre-emption to the owner of a share in undivided property in the first place [fn.1: This distinction is perhaps the result of further reference to the Medinese doctrine], then to the owner of a separate plot who had, however, retained a common interest in the lane, and finally to the owner of an adjoining plot. [fn.2: This opinion was also projected back to Shuraiḥ (Sarakhṣī, xiv. 92).]”

¹⁹ This allusion to the first ʿAbbāsīd caliph’s interference in a matter of substantive law is more than worthy of further exploration and analysis. The larger issues this anecdote may be said to embody have been a hot topic in modern scholarship — see, among others, Patricia Crone and Martin Hinds, *God’s Caliph: Religious Authority in the First Centuries of Islam* (Cambridge; New York: Cambridge UP, 1986); Muhammad Qasim Zaman, *Religion and Politics under the early ʿAbbāsids: the Emergence of the Proto-Sunnī Elite* (New York: E.J. Brill, 1997); and the very relevant discussion in Hallaq, *Origins*, 43 ff. Standing alone in this text, this allusion to al-Saffāḥ may doubtless be interpreted in a number of ways, according to the intentions of the scholar who takes it up. One who wishes support for a claim that early caliphs were legislators, or imposed pressures upon jurists, or in some way exerted influence in the early formation of substantive doctrine, may find it here. On the other hand, one might see this anecdote through the lens of polemic, and read it as a slight against the integrity of Ibn Abī Laylā, bound as he was by his judgeship (unlike Abū Ḥanīfa), and disallowed adherence to the “right” opinion. One might equally see this as an example of caliph-*qāḍī*-jurist symbiosis; the issue stems, after all, from the jurists’ *ikhtilāf*, itself arising from the conflicting doctrines/practices of ʿAlī, Ibn ʿAbbās, and ʿUmar — i.e., al-Saffāḥ is not imposing a novel decree of his own making —, and it is directed towards the actual practice of a *qāḍī* in his court. And perhaps we should not be surprised — considering the nature of the ʿAbbāsīd *daʿwā* — that the first caliph of that dynasty should pressure a *qāḍī* straddling the Umayyad-ʿAbbāsīd divide to abandon the doctrine of ʿUmar and take up that of ʿAlī and Ibn

	قَوْلُ أَهْلِ الْحِجَازِ.
241 – And likewise it has reached us on the authority of ʿAlī and Ibn ʿAbbās, may God Most High be pleased with them both.	241 – وَكَذَلِكَ بَلَّغْنَا عَنْ عَلِيٍّ وَابْنِ عَبَّاسٍ رَضِيَ اللَّهُ تَعَالَى عَنْهُمَا.
242 – Al-Shāfiʿī, may God Most High have mercy upon him, said, on the authority of ʿAbd Allāh b. Muḥammad b. ʿAbbād, on al-ʿAwwām, on Yahyā b. Saʿīd, on ʿAwn b. Abī Rāfiʿ, on ʿUbayd Allāh b. ʿAbd Allāh b. ʿUmar, who said: ʿUmar b. al-Khaṭṭāb said: When boundaries occur (<i>idhā waqaʿat al-ḥudūd</i>), there is no <i>shuʿfa</i> . ²⁰	242 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى عَنْ عَبْدِ اللَّهِ بْنِ مُحَمَّدٍ بْنِ عَبَّادٍ، عَنِ الْعَوَّامِ، عَنْ يَحْيَى بْنِ سَعِيدٍ، عَنْ عَوْنِ بْنِ أَبِي رَافِعٍ، عَنْ عُبَيْدِ اللَّهِ بْنِ عَبْدِ اللَّهِ بْنِ عُمَرَ، قَالَ: قَالَ عُمَرُ بْنُ الْخَطَّابِ: إِذَا وَقَعَتِ الْحُدُودُ فَلَا شُفْعَةَ.
243 – Al-Shāfiʿī reported to us, on the authority of ʿAbd Allāh b. Idrīs, on Muḥammad b. ʿUmāra, on Abū Bakr b. Jarīr, on Abān b. ʿUthmān, who said: When alleyways occur (<i>idhā waqaʿat al-aziqqa</i>), there is no <i>shuʿfa</i> . And the alleyways (<i>aziqqa</i>) are the boundaries (<i>ḥudūd</i>).	243 – أَخْبَرَنَا الشَّافِعِيُّ عَنْ عَبْدِ اللَّهِ بْنِ إِدْرِيسَ، عَنْ مُحَمَّدٍ بْنِ عُمَارَةَ، عَنْ أَبِي بَكْرٍ بْنِ جَرِيرٍ، عَنْ أَبَانَ بْنِ عُثْمَانَ، قَالَ: إِذَا وَقَعَتِ الْأَزِقَّةُ فَلَا شُفْعَةَ. وَالْأَزِقَّةُ الْحُدُودُ.

ʿAbbās. What is astonishing, however, is that Hallaq (*Origins*, 44) has revealed to us an earlier caliph-*qāḍī* dialogue on very nearly the same subject:

“The *qāḍīs*’ practice of writing letters seeking caliphal opinion on difficult cases confronting them in their courts was evidently a common one. So were caliphal letters to the *qāḍīs*, most of which appear to have been solicited, although some were written on the sole initiative of the caliph himself or — presumably — in his name, by his immediate advisors. Iyās [b. Muʿāwiya: *qāḍī* in Baṣra], for instance, used to grant neighbours — merely by virtue of being neighbours — the right of preemption (*shuʿfa*), a practice that did not seem to accord, for some reason, with caliphal public policy. On hearing of Iyās’ practice, ʿUmar II (99/717-101/720) wrote a letter ordering him to confine preemption rights to domiciles having a shared right of access (e.g., two houses sharing one gate) and to properties owned as partnerships of commixion [citing (n.47) the *Akhbār al-Quḍāt* of Wakī]. The same caliph wrote to another *qāḍī* in Egypt imposing a similar, but even more restrictive decree, saying: ‘We used to hear (*kunnā nasmaʿ*) that preemption rights can be enjoyed by the partner only, not by the neighbor’ [citing (n.48) the *Akhbār Quḍāt Miṣr* of al-Kindī]. It seems reasonable to infer that many *qāḍīs* were in the habit of bestowing rights of preemption on the neighbor, and this caliph deemed it necessary to intervene.”

At any rate, the anecdote in §240 may shed light upon a number of issues, and a worthwhile future project might be to collate such caliph-*qāḍī* anecdotes as occur in the early juridical literature and see if any patterns emerge.

²⁰ §§242-44: Ḥassūn here (and without notice) includes text which is relegated to a (nearly identical) footnote in both the Būlāq (vii.100, n.1) and Maṭrajī (vii.176) editions. Both footnotes are preceded by the phrase: “In some of the copies, here, there is more; this is its *naṣṣ*:....” After this, we find nearly the same text as in Ḥassūn’s edition. There are some very minor differences in §244: Būlāq (but not Maṭrajī) reads حجاج, rather than الحجاج; and there are, in both editions, two adjacent *qālas* (I have placed the second in brackets).

244 – Al-Shāfi'ī, may God Most High have mercy upon him, said: Mu'allā b. Asad reported to us, he said: 'Abd al-Wāhid b. Ziyād transmitted to us, on the authority of al-Ḥajjāj, on al-Ḥakam, who said: [He said:] When <i>ḥudūd</i> occur, there is no <i>shufa</i>.	244 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: أَخْبَرَنَا مُعَلَّى بْنُ أَسَدٍ، قَالَ: حَدَّثَنَا عَبْدُ الْوَاحِدِ بْنُ زِيَادٍ، عَنِ الْحَجَّاجِ، عَنِ الْحَكَمِ، قَالَ: [قَالَ] إِذَا وَقَعَتِ الْحُدُودُ فَلَا شُفْعَةَ.
245 – Al-Shāfi'ī, may God Most High be pleased with him, said: And when the portion (<i>shiqs</i>) from the house is sold, while to an orphan belongs right of <i>shufa</i> regarding it, or a boy under the protective-guardianship (<i>fi hijri</i>) of his father; to the guardian (<i>walī</i>) of the orphan, and [to] the father, belongs the right to take — on behalf of for whom they are guardian — by right of <i>shufa</i>, were it felicitous (<i>in kānat ghibṭat^{an}</i>). And if they don't do so; then when the two [the orphan and the boy] attain the capacity to administer their own property (<i>balaghā an yaliyā amwālahumā</i>), there belongs to them the right to take by <i>shufa</i>. And when they find out after attainment of capacity (<i>ba'da al-bulūgh</i>), and proceed to forsake — in that way which, if the <i>bay'</i> occurs in that circumstance, and they forsake it, their <i>shufa</i> is terminated — then their <i>shufa</i> is indeed terminated. And there is no <i>shufa</i> except regarding what is not apportioned (<i>fīmā lam yuqṣam</i>); and when <i>ḥudūd</i> occur, there is no <i>shufa</i>.	245 – قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ تَعَالَى عَنْهُ: وَإِذَا بَاعَ الشَّقْصُ مِنَ الدَّارِ وَلِيتِيمٍ فِيهِ شُفْعَةٌ أَوْ الْغُلَامِ فِي حِجْرِ أَبِيهِ، فَلَوْلِيَّ الْيَتِيمِ وَالْأَبُ أَنْ يَأْخُذَ لِلَّذِي يَلِيَانِ بِالشُّفْعَةِ إِنْ كَانَتْ غِبْطَةً، فَإِنْ لَمْ يَفْعَلَا فَإِذَا بَلَغَا أَنْ يَلِيَا أُمُورَهُمَا كَانَ لَهُمَا الْأَخْذُ بِالشُّفْعَةِ، فَإِذَا عَلِمَا بَعْدَ الْبُلُوغِ فَتَرَكَمَا التَّرِكَ الَّذِي لَوْ أَخَذْتَ الْبَيْعَ فِي تِلْكَ الْحَالِ فَتَرَكَاهُ انْقَطَعَتْ شُفْعَتُهُمَا فَقَدْ انْقَطَعَتْ شُفْعَتُهُمَا، وَلَا شُفْعَةَ إِلَّا فِيمَا لَمْ يُقْسَمَ فَإِذَا وَقَعَتِ الْحُدُودُ فَلَا شُفْعَةَ.
246 – And likewise if they divide among themselves (<i>iqtasamū</i>) the house, and the land, and they leave between them a passageway (<i>ṭarīq</i>), or they leave between them a trough/fountain (<i>mashrab</i>); there is no <i>shufa</i>. Nor do we oblige the <i>shufa</i> regarding what is divided of partnership (<i>fīmā qusima bi-shirkⁱⁿ</i>) in <i>ṭarīq</i>, nor in water (<i>wa lā māⁱⁿ</i>).	246 – وَكَذَلِكَ لَوْ اقْتَسَمُوا الدَّارَ وَالْأَرْضَ وَتَرَكَوا بَيْنَهُمْ طَرِيقًا أَوْ تَرَكَوا بَيْنَهُمْ مَشْرَبًا لَمْ تَكُنْ شُفْعَةً، وَلَا تُوجِبُ الشُّفْعَةَ فِيمَا قُسِمَ بِشِرْكِ فِي طَرِيقٍ وَلَا مَاءٍ.
247 – And some of the Ahl al-Baṣra have subscribed (<i>qad dhahaba</i>) to the general part of our doctrine (<i>ilā jumlati qawlinā</i>), and they say: There is no <i>shufa</i> except regarding what is between the partnership members (<i>al-qawmi al-shurakā</i>); and, when there remains between the members a <i>ṭarīq</i> owned by them (<i>mamlūkat^{un} lahum</i>), or a <i>mashrab</i> owned by them, then — if the	247 – وَقَدْ ذَهَبَ بَعْضُ أَهْلِ الْبَصْرَةِ إِلَى جُمْلَةِ قَوْلِنَا فَقَالُوا: لَا شُفْعَةَ إِلَّا فِيمَا بَيْنَ الْقَوْمِ الشُّرَكَاءِ، فَإِذَا بَقِيَتْ بَيْنَ الْقَوْمِ طَرِيقٌ مَمْلُوكَةٌ لَهُمْ أَوْ مَشْرَبٌ مَمْلُوكٌ لَهُمْ فَإِنْ كَانَتِ الدَّارُ

house and the land are apportioned (<i>maqsuma</i>) — there is <i>shufa</i> regarding them, because they are partners (<i>shurakaʾ</i>) in something from the owned-property (<i>fī shayʾin min al-milki</i>).²¹ And they [the Ahl al-Baṣra] transmitted a <i>ḥadīth</i> on the authority of ʿAbd al-Malik b. Abī Sulaymān, on ʿAṭāʾ, on Jābir, on the Prophet, may God bless and save him, resembling this <i>maʿnā</i> (<i>shabīh^{an} bi-hādhā al-maʿnā</i>), which I regard to both possibly bear a resemblance to this <i>maʿnā</i>, and to possibly bear its contrary (<i>aḥsabuhu yaḥtamilu shabīh^{an} bi-hādhā al-maʿnā wa yaḥtamilu khilāfahu</i>): He [the Prophet] said: «The neighbour has the greater right due to his nearness (<i>al-jāru aḥaqqu bi-saqabihi</i>)»,²² when the <i>ṭarīq</i> is [but] one.	وَالْأَرْضُ مَقْسُومَةٌ فَفِيهَا شُفْعَةٌ؛ لِأَنَّهُمْ شُرَكَاءُ فِي شَيْءٍ مِنَ الْمَلِكِ وَرَوَوْا حَدِيثًا عَنْ عَبْدِ الْمَلِكِ بْنِ أَبِي سُلَيْمَانَ، عَنْ عَطَاءٍ، عَنْ جَابِرٍ، عَنِ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - شَبِيهَا بِهَذَا الْمَعْنَى أَحْسَبُهُ يَحْتَمِلُ شَبِيهَا بِهَذَا الْمَعْنَى وَيَحْتَمِلُ خِلَافَهُ؛ قَالَ: «الْجَارُ أَحَقُّ بِسَقَبِهِ» إِذَا كَانَتْ الطَّرِيقُ وَاحِدَةً.
248 – And the only thing that prevents us from professing this doctrine (<i>wa innamā manaʿanā min al-qawl bi-hādhā</i>), is that Abū Salama and Abū al-Zubayr audited (<i>samiʿā</i>) Jābir, and that one of our Ḥijāzīs transmit(s) (<i>yarwī</i>) — on the authority of ʿAṭāʾ, on Jābir, on the Prophet, may God bless and save him — regarding the <i>shufa</i>, something which doesn't have this [i.e., the <i>maʿnā</i> of §247] in it, but has in it its contrary (<i>wa fīhi khilāfuhu</i>).²³ And two — when they concur (<i>ijtimaʿā</i>) on the <i>riwāya</i> on the authority of Jābir, while the third²⁴ is in concordance with them (<i>yuwāfiqhumā</i>) — are more principal [in rank] (<i>awlā</i>) by affirmation (<i>al-tathabbut</i>)	248 – وَإِنَّمَا مَنَعَنَا مِنَ الْقَوْلِ بِهَذَا أَنَّ أَبَا سَلَمَةَ وَأَبَا الزُّبَيْرِ سَمِعَا جَابِرًا، وَأَنَّ بَعْضَ حِجَازِيِّينَا يَرْوِي عَنْ عَطَاءٍ، عَنْ جَابِرٍ، عَنِ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - فِي الشُّفْعَةِ شَيْئًا لَيْسَ فِيهِ هَذَا وَفِيهِ خِلَافُهُ، وَكَانَ اثْنَانِ إِذَا اجْتَمَعَا عَلَى الرِّوَايَةِ عَنْ جَابِرٍ وَكَانَ الثَّالِثُ يُوَافِقُهُمَا أَوْ لَى بِالتَّثَبُّتِ فِي الْحَدِيثِ إِذَا اِخْتَلَفَ عَنِ الثَّالِثِ، وَكَانَ الْمَعْنَى الَّذِي بِهِ مَنَعَنَا الشُّفْعَةَ فِيمَا قُسِمَ قَائِمًا فِي هَذَا

²¹ I.e., because their partnership includes the *ṭarīq/mashrab*.

²² Ḥassūn (ix.52, n.1) defines *al-saqab* as “nearness”. He then notes: “He who obliges (*awjaba*) the right to *shufa* for the neighbor (*al-jār*) — even if he is not a partner/sharer (*muqāsīm*) —, uses this *ḥadīth* as proof (*yaḥtaju bi-hādhā al-ḥadīth*).” We have followed Ḥassūn insofar as the placement of quotation marks, but it seems likely that the transmitted *qawl* included “when the *ṭarīq* is but one,” not to mention an additional consideration. In the *Ikhtilāf al-Ḥadīth* attributed to al-Shāfiʿī (Maṭrajī, ix.608) the ʿAbd al-Mālik b. ʿAṭāʾ – Jābir transmission reads: “*al-jār aḥaqq bi-saqabihi*, and it [the *shufa*] is looked into — even if he is absent — when the *ṭarīq* is but one.” Maṭrajī does not provide quotations (neither does Būlāq [margin of vii.264]), but Najjār’s edition (viii.536) has the entire phrase in quotations. He renders “*bi-shufatihi*,” however, instead of “*bi-saqabihi*.”

²³ Schacht, *Origins*, 155, cites al-Shāfiʿī’s *K. Ikhtilāf al-Ḥadīth* (259, 264), where the *ḥadīth* on Jābir is discussed. Schacht notes: “Shāfiʿī mentions that the specialists on traditions suspect it because of Jābir’s doctrine to the contrary.”

²⁴ Abū Salama – Jābir – Prophet, and Abū al-Zubayr – Jābir – Prophet, and Ḥijāzī – ʿAṭāʾ – Jābir – Prophet.

regarding the <i>ḥadīth</i> , than when it diverges from (<i>ikhtalafa ‘an</i>) the third. ²⁵ And the <i>ma’nā</i> by which we prevent (<i>mana’nā</i>) the <i>shuʿfa</i> in what is divided (<i>fīmā qusima</i>) is conspicuously-existent (<i>qā’im^{an}</i>) in this divided thing (<i>maqsūm</i>) [i.e., the house or land separated by <i>ṭarīq</i> / <i>mashrab</i> owned by partners in §247].	المَقْسُوم.
249 – Don’t you see/opine (<i>alā tarā</i>) that the <i>khbar</i> on the authority of the Prophet, may God bless and save him, is: «Verily the <i>shuʿfa</i> is for what was not divided (<i>lam yuqṣam</i>), and when <i>ḥudūd</i> occur, there is no <i>shuʿfa</i> »? And no one who professes this <i>qawl</i> [i.e., that of the Ahl al-Baṣra] finds a way out (<i>makhraj^{an}</i>) from that he will have brought about (<i>ja’ala</i>) the <i>shuʿfa</i> in that in which <i>ḥudūd</i> occur.	249 – أَلَا تَرَى أَنَّ الْخَبَرَ عَنِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ –: «إِنَّ الشُّفْعَةَ فِيمَا لَمْ يُقَسَمْ، فَإِذَا وَقَعَتِ الْحُدُودُ فَلَا شُفْعَةَ» وَلَا يَجِدُ أَحَدٌ قَالَ بِهَذَا الْقَوْلِ مَخْرَجًا مِنْ أَنْ يَكُونَ قَدْ جَعَلَ الشُّفْعَةَ فِيمَا وَقَعَتْ فِيهِ الْحُدُودُ.
250 – And if he says (<i>fa-in qāla</i>): Indeed, I have only brought it about [the <i>shuʿfa</i>] in that in which <i>ḥudūd</i> occur, because there has remained of the milk something in which <i>ḥudūd</i> did not occur [i.e., the jointly-owned <i>ṭarīq</i> or <i>mashrab</i> of §247].	250 – فَإِنْ قَالَ: فَإِنِّي إِنَّمَا جَعَلْتُهَا فِيمَا وَقَعَتْ فِيهِ الْحُدُودُ؛ لِأَنَّهُ قَدْ بَقِيَ مِنَ الْمِلْكِ شَيْءٌ لَمْ تَقَعْ فِيهِ الْحُدُودُ.
251 – It is said: Then that remaining thing (<i>dhālika al-bāqī</i>) may permit (<i>yaḥtamilu</i>) that he bring about in it (<i>yaj’ala fīhi</i>) [i.e., in that remaining thing only] the <i>shuʿfa</i> . So if it permits (<i>iḥtamala</i>), then cause it [the <i>shuʿfa</i>] to be in it [the <i>bāqī</i>]; and don’t cause it to be in that in which <i>ḥudūd</i> occur – and you will have followed (<i>ittaba’ta</i>) the <i>khbar</i> . And if it does not permit; don’t bring about the <i>shuʿfa</i> in something else.	251 – قِيلَ: فَيَحْتَمِلُ ذَلِكَ الْبَاقِي أَنْ يَجْعَلَ فِيهِ الشُّفْعَةَ. فَإِنْ احْتَمَلَ فَاجْعَلْهَا فِيهِ وَلَا تَجْعَلْهَا فِيمَا وَقَعَتْ فِيهِ الْحُدُودُ فَتَكُونَ قَدْ اتَّبَعْتَ الْخَبَرَ، وَإِنْ لَمْ يَحْتَمِلْ فَلَا تَجْعَلِ الشُّفْعَةَ فِي غَيْرِهِ.
252 – And some/one of the Mashriqiyyīn ²⁶ said: The <i>shuʿfa</i> belongs to the neighbour	252 – وَقَالَ بَعْضُ الْمَشْرِقِيِّينَ: الشُّفْعَةُ

²⁵ ‘Abd al-Mālik b. Abī Sulaymān - ‘Aṭā’ – Jābir – Prophet.

²⁶ This reference to “The Easterners” is worthy of further investigation and analysis, for what it may reveal of intellectual groupings and trends, and geo-political diffusions of the times. In fact, al-Shāfi’ī refers to “al-Mashriqiyyūn”, or to “Ba’d al-Mashriqiyyīn”, or to the “Aṣḥāb al-Mashriqiyyīn” some thirty-six times throughout the *Umm*. An explanation is offered by al-Rabī who, in the context of a chapter on juridical disagreement regarding apostates (*al-khilāf fi’l-murtadd*), explains al-Shāfi’ī’s references as follows (Ḥassūn, vol.7, pt.12, 627, §23834): “When he [al-Shāfi’ī] says: *ba’d al-nās*; they are the Mashriqiyyīn. And when he says: *ba’d aṣḥābinā*, or *ba’d* Ahl Baladīnā; it is Mālik.” Yet another clue surfaces in the dialectic of the *Kitāb Ikhtilāf Mālik wa’l-Shāfi’ī*, during a discussion of the *imām* who must remain seated throughout the duration of prayer due to illness (Ḥassūn, vol.9, pt.14, 368, §§178-9): “So I said to al-Shāfi’ī: And has any one of the Mashriqiyyīn professed your *qawl*? And he said: Yes, Abū Ḥanīfa professes our *qawl* regarding it, but his two Ṣāhibs disagree with him (*yukhālifuḥu ṣāhibāhu*).” From these two references, we gather that Abū Ḥanīfa was among the “Mashriqiyyīn” and Mālik was not. We might conclude, therefore, that the term was used in a similar way as “Iraqis” – a means of

(<i>jār</i>) and to the partner (<i>sharīk</i>) when the neighbour is immediately adjacent (<i>mulāṣiq^{an}</i>), or there exists – between the sold house (<i>al-dāri al-mabīʿati</i>) and the house in which the <i>shuʿfa</i> belongs to him – a court of some kind (<i>raḥbat^{un} mā</i>), ²⁷ so long as there is no open and public pathway/corridor (<i>ṭarīq^{un} nāfidhat^{un}</i>) in it. And if there is an open and public <i>ṭarīq</i> in it – even if it is narrow (<i>wa in dāqat</i>); there belongs no <i>shuʿfa</i> to the neighbour.	لِلجَارِ وَلِلشَّرِيكِ إِذَا كَانَ الْجَارُ مُلَاصِقًا، أَوْ كَانَتْ بَيْنَ الدَّارِ الْمَبِيعَةِ وَالْدارِ الَّتِي لَهُ فِيهَا الشُّفْعَةُ رَحْبَةً مَا كَانَتْ إِذَا لَمْ يَكُنْ فِيهَا طَرِيقٌ نَافِذَةً، وَإِنْ كَانَ فِيهَا طَرِيقٌ نَافِذَةً وَإِنْ ضَاقَتْ فَلَا شُفْعَةَ لِلجَارِ.
253 – We said to one who professes this <i>qawl</i> : Upon which thing did you (pl.) rely [for proof]?	253 – قُلْنَا لِبَعْضِ مَنْ يَقُولُ هَذَا الْقَوْلَ: عَلَى أَيِّ شَيْءٍ اعْتَمَدْتُمْ؟
254 – He said: Upon the <i>athar</i> : Sufyān b. ʿUyayna reported to us, on the authority of Ibrāhīm b. Maysara, on ʿAmr b. al-Sharīd, on Abī Rāfiʿ, that the Messenger of God, may God bless and save him, said: «The neighbour has the greater right due to his nearness (<i>al-jāru aḥaqqu bi-saqabihi</i>).» ²⁸	254 – قَالَ: عَلَى الْأَثَرِ؛ أَخْبَرَنَا سُفْيَانُ بْنُ عُيَيْنَةَ، عَنْ إِبْرَاهِيمَ بْنِ مَيْسَرَةَ، عَنْ عَمْرِو بْنِ الشَّرِيدِ، عَنْ أَبِي رَافِعٍ أَنَّ رَسُولَ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – قَالَ: «الْجَارُ أَحَقُّ بِسَقَبِهِ.»
255 – So it was said to him: And this one does not contradict (<i>lā yukhālifu</i>) our <i>ḥadīth</i> ; however, this one is a general/non-specific rule [whose details must be provided elsewhere] (<i>jumlat^{un}</i>), while our <i>ḥadīth</i> is an interpretive provider of specificity (<i>mufassir^{un}</i>).	255 – فَقِيلَ لَهُ: فَهَذَا لَا يُخَالِفُ حَدِيثَنَا، وَلَكِنَّ هَذَا جُمْلَةٌ وَحَدِيثُنَا مُفَسِّرٌ.
256 – He said: And how does it not contradict your (pl.) <i>ḥadīth</i> ?	256 – قَالَ: وَكَيْفَ لَا يُخَالِفُ حَدِيثَكُمْ؟
257 – We said: The partner (<i>sharīk</i>) who did not apportion (<i>lam yuqāsīm</i>) is designated as neighbour (<i>yusammā jār^{an}</i>), and [likewise] is the divider into shares (<i>al-muqāsīm</i>) designated, and [likewise] is designated the	257 – قُلْنَا: الشَّرِيكُ الَّذِي لَمْ يُقَاسِمِ يُسَمَّى جَارًا وَيُسَمَّى الْمُقَاسِمُ، وَيُسَمَّى مَنْ يَبْنِي وَيَبْنِيهِ أَرْبَعُونَ دَارًا، فَلَمْ يَجْزُ فِي هَذَا الْحَدِيثِ

distinguishing such jurists who were not a part of, or did not subscribe to, the doctrines current in the Ḥijāz. Elsewhere we learn that among the “Mashriqiyyīn” there are Ahl al-Ḥadīth (K. *Ikhtilāf Mālik waʾl-Shāfiʿī*, §§201-3: Ḥassūn, vol.9, pt.14, 374). It is also significant that, for the most part, al-Shāfiʿī tends to treat the “Mashriqiyyīn” by name when their doctrine conflicts with his own; it is certain that he does not include himself in this group. Moreover, the Mashriqiyyūn often appear in contrast with “Aṣḥābunā” (see, e.g., such references as occur in the K. *Ibṭāl al-Istiḥṣān*, §§146ff.: Ḥassūn, vol.10, pt.15, 134). Significantly, so far as I have been able to discover, the only other reference to the “Mashriqiyyūn” among the books of the Shāfiʿī *madhhab* is that of al-Māwardī (d.450) in his commentary on the *Mukhtaṣar al-Muzanī* (*al-Ḥawī al-Kabīr*, v.307-8 of the 1999 Dār al-Kutub al-ʿIlmiyya edition).

²⁷ Doubtless a typo, Ḥassūn (ix.53) has رَحْبَةً instead of رَحْبَةً.

²⁸ See Schacht, *Origins*, 164. He claims this as a maxim of the Iraqi doctrine (thus, Mashriqiyyūn = Iraqi to Schacht).

one for whom there are forty houses between you and him; so it is not permitted as regards this <i>ḥadīth</i> except for what we said: it pertains to some <i>jīrān</i> , and not others. Yet, when we say as much, such is not granted us against [the opinions of] others except by means of an indicant (<i>bi'l-dalāla</i>) on the authority of the Messenger of God, may God bless and save him. And when the Messenger of God, may God bless and save him, said: «The <i>shuʿa</i> is in what was not divided (<i>lam yuqṣam</i>), and when <i>ḥudūd</i> occur, there is no <i>shuʿa</i> », this provides indicant (<i>dalla... 'alā</i>) that his <i>qawl</i> in the ambiguous/non-specific sense (<i>fi'l-jumlati</i>): «The <i>jār</i> has the greater right due to his nearness (<i>al-jāru aḥaqqu bi-saqabihi</i>)» pertains to some of the <i>jīrān</i> , not others, and that he [the object of specification] is the <i>jār</i> who did not divide into portions (<i>lam yuqāsīm</i>).	إِلَّا مَا قُلْنَا مِنْ أَنَّهُ عَلَى بَعْضِ الْجِيرَانِ دُونَ بَعْضٍ. فَإِذَا قُلْنَا لَهُ لَمْ يَجُزْ ذَلِكَ لَنَا عَلَى غَيْرِنَا إِلَّا بَدَلَالَةٍ عَنْ رَسُولِ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - فَلَمَّا قَالَ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ -: «الشُّعَةُ فِيمَا لَمْ يُقَسَّمْ، فَإِذَا وَقَعَتِ الْحُدُودُ فَلَا شُّعَةَ» دَلَّ هَذَا عَلَى أَنَّ قَوْلَهُ فِي الْجُمْلَةِ: «الْجَارُ أَحَقُّ بِسَقَبِهِ» عَلَى بَعْضِ الْجِيرَانِ دُونَ بَعْضٍ وَأَنَّهُ الْجَارُ الَّذِي لَمْ يُقَاسِمَ.
258 – And if he says: And the Arabs designated the <i>sharīk</i> as neighbour (<i>jār^{an}</i>)?	258 – فَإِنْ قَالَ: وَتُسَمَّى الْعَرَبُ الشَّرِيكَ جَارًا؟
259 – It is said: Yes — all whose body (<i>badan</i>) draws close to the body of his <i>ṣāhib</i> , it is said of him: Neighbour (<i>jār^{un}</i>).	259 – قِيلَ: نَعَمْ، كُلُّ مَنْ قَارَبَ بَدَنُهُ بَدَنَ صَاحِبِهِ قِيلَ لَهُ: جَارٌ.
260 – He said: Provide me an indicant for this (<i>fa'dlulnī 'alā hādḥā</i>).	260 – قَالَ: فَادُلِّنِي عَلَى هَذَا.
261 – It was said to him: Ḥamal b. Malik b. al-Nābigḥa said: I was between two of my <i>jāras</i> (<i>jārataynī lī</i>), and one of the two struck the other with a tent pole (<i>miṣṭāḥ</i>), and she gave birth to a dead foetus (<i>alqat janīn^{an} mayyit^{an}</i>), and the Messenger of God, may God bless and save him, passed judgment in this case for the best sort of slave (<i>al-ghurra</i>) [to be rendered as compensation].	261 – قِيلَ لَهُ: قَالَ حَمَلُ بْنُ مَالِكِ بْنِ النَّابِغَةِ: «كُنْتُ بَيْنَ جَارَتَيْنِ لِي فَضَرَبَتْ أَحَدَاهُمَا الْأُخْرَى بِمِسْطَاحٍ، فَالْقَتْ جَنِينًا مَيِّتًا، فَقَضَى فِيهِ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - بَعْرَةً.»
262 – And al-A'shā said to his wife: «O neighbour of ours (<i>a-jāratana</i>): part, and you are indeed divorced (<i>bīnī fa-innaki ṭāliqa</i>).» ²⁹	262 – وَقَالَ الْأَعَشَى لِمَرْأَتِهِ: «أَجَارَتَنَا بَيْنِي فَإِنَّكَ طَالِقَةٌ.»

²⁹ This *bayt* is from a short *qaṣīda* attributed to the famed Maymūn b. Qays al-A'shā (d. ca. 629 CE). A variant may be found in the *Kitāb Ṣubḥ al-Munīr fī Shi'r Abī Baṣīr Maymūn b. Qays b. Jandal al-A'shā wa'l-A'shā'īn al-Ākhirīn*, edited by Rudolf Geyer as the *Gedichte von 'Abū Baṣīr Maimūn ibn Qays al-A'shā: nebst Sammlungen von Stücken anderer Dichter des gleichen Beinamens und von al-Musayyab ibn 'Alas* (London: Printed for the trustees of the "E.J.W. Gibb Memorial" and published by Luzac & Co., 1928), *qaṣīda* 41, line 1, p.183:

263 – And it was said to him: And you, when you say: It [jār] is specialized for some of the <i>jīrān</i> (<i>khāṣṣ^{um} alā bā'ḍi al-jīrāni</i>) and not others – You do not bring for it a <i>dalāla</i> about the Prophet, may God bless and save him; nor do you fix it [jār] upon he to whom adheres the designation of proximity (<i>ismu al-jiwār</i>). While the <i>ḥadīth</i> of Ibrāhīm b. Maysara does not permit (<i>lā yaḥtamilu</i>) but one of the two <i>ma'nās</i>, and you have contradicted them both together (<i>khālaftahumā ma'^{an}</i>). Moreover, you claimed (<i>za'amtā</i>) of the house sold while there exists between it and the house of the man a courtyard (<i>raḥba</i>) of a thousand cubits (<i>dhirā'</i>) and more – so long as there exists in it no open and public pathway/corridor (<i>ṭarīq^{um} nāfidhat^{um}</i>) – that there is, regarding it, the right to <i>shufa</i>. Yet, even if there is between them a <i>ṭarīq^{um} nāfidhat^{um}</i> whose width is [but] a cubit, you don't effect (<i>lam taj'al</i>) <i>shufa</i> for it. So you have effected (<i>ja'alta</i>) the <i>shufa</i> for the most distant of two neighbours, and prevented it (<i>mana'tahā</i>) for the nearest of them. And you claimed, of who bequeaths (<i>awṣā</i>) to his neighbours, that you divide his bequest [into portions] (<i>qassamta waṣiyyatahu</i>) on behalf of the one who, between his house and his [the legator's] house are forty houses. So how did you not effect the <i>shufa</i> for what you divided his bequest, when you contradict (<i>khālafta</i>) our <i>ḥadīth</i>, and the <i>ḥadīth</i> of Ibrāhīm b. Maysara, which [latter] you hold up as <i>ḥujja</i> (<i>iḥtajajta bihi</i>)?	263 – فَقِيلَ لَهُ: فَأَنْتَ إِذَا قُلْتَ: هُوَ خَاصٌّ عَلَى بَعْضِ الْجِيرَانِ دُونَ بَعْضٍ. لَمْ تَأْتِ فِيهِ بِدَلَالَةٍ عَلَى النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – وَلَمْ تَجْعَلْهُ عَلَى مَنْ لَزِمَهُ اسْمُ الْجَوَارِ، وَحَدِيثُ إِبْرَاهِيمَ بْنِ مَيْسَرَةَ لَا يَحْتَمِلُ إِلَّا أَحَدَ الْمَعْنَيْنِ وَقَدْ خَالَفْتُهُمَا مَعًا، ثُمَّ زَعَمْتَ أَنَّ الدَّارَ تُبَاعُ وَبَيْنَهَا وَبَيْنَ دَارِ الرَّجُلِ رَحْبَةٌ فِيهَا أَلْفُ ذِرَاعٍ فَأَكْثَرَ إِذَا لَمْ يَكُنْ فِيهَا طَرِيقٌ نَافِذَةٌ فَيَكُونُ فِيهَا الشُّفْعَةُ، وَإِنْ كَانَتْ بَيْنَهُمَا طَرِيقٌ نَافِذَةٌ عَرَضُهَا ذِرَاعٌ لَمْ تَجْعَلْ فِيهَا الشُّفْعَةَ، فَجَعَلْتَ الشُّفْعَةَ لِأَبْعَدِ الْجَارَيْنِ وَمَنْعَتَهَا أَقْرَبَهُمَا، وَزَعَمْتَ أَنَّ مَنْ أَوْصَى لِجِيرَانِهِ قَسَمْتَ وَصِيَّتَهُ عَلَى مَنْ كَانَ بَيْنَ دَارِهِ وَدَارِهِ أَرْبَعُونَ دَارًا، فَكَيْفَ لَمْ تَجْعَلِ الشُّفْعَةَ عَلَى مَا قَسَمْتَ عَلَيْهِ الْوَصِيَّةَ إِذَا خَالَفْتَ حَدِيثَنَا وَحَدِيثَ إِبْرَاهِيمَ بْنِ مَيْسَرَةَ الَّذِي احْتَجَجْتَ بِهِ؟
264 – He said: Did any one of the Aṣḥāb of the Prophet, may God bless and save him, profess your <i>qawl</i>?	264 – قَالَ: فَهَلْ قَالَ بِقَوْلِكُمْ أَحَدٌ مِنْ أَصْحَابِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ؟
265 – We said: Yes. Nor would it harm us anyway (<i>wa lā yaḍurrunā ba'du</i>) – since it is confirmed (<i>thabata</i>) on the authority of the Prophet, may God bless and save him –	265 – قُلْنَا: نَعَمْ. وَلَا يَضُرُّنَا بَعْدُ إِذْ ثَبَتَ عَنِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – أَنَّ لَا

يَا جَارَتِي بَيْنِي فَإِنَّكَ طَالِقَةٌ كَذَلِكَ أُمُورُ النَّاسِ غَادٍ وَطَارِقٌ

The line as it appears in §262, however, is repeated in a number of *ḥadīth* commentaries, *fiqh* works, etc., most often employed, as it is here, to illustrate a connotation of *jār* and its effects on pre-emption. See, e.g., Ibn Baṭṭāl (d.449/1057), *Sharḥ Ṣaḥīḥ al-Bukhārī*, ed. Abū Tamīm Yāsir ibn Ibrāhīm (Riyāḍ: Maktabat al-Rushd, 2003), vi.381.

that no one professes it.	يَقُولُ بِهِ أَحَدٌ.
266 – He said: And who professed it?	266 – قَالَ: فَمَنْ قَالَ بِهِ؟
267 – It was said: ‘Umar b. al-Khaṭṭāb, may God Most High be pleased with him, and ‘Uthmān, may God Most High be pleased with him. And some of the Tābiʿīn professed [it]: ³⁰ ‘Umar b. ‘Abd al-‘Azīz, may the mercy of God Most High be upon him, and others.	267 – قِيلَ: عُمَرُ بْنُ الْخَطَّابِ رَضِيَ اللَّهُ تَعَالَى عَنْهُ – وَعُثْمَانُ رَضِيَ اللَّهُ تَعَالَى عَنْهُ. وَقَالَ بَعْضُ مِنَ التَّابِعِينَ؛ عُمَرُ بْنُ عَبْدِ الْعَزِيزِ رَحِمَهُ اللَّهُ تَعَالَى عَلَيْهِ – وَغَيْرُهُ.
268 – And when a man buys a house, and he names (<i>sammā</i>) more than what he took it for [to the <i>shafī</i>], and he contracts that by <i>salam</i> to the <i>shafī</i> (<i>sallama dhālika al-shafī</i>), then he [the <i>shafī</i>] finds out after that he took it [the house] for less/other than that (<i>akhadhahā bidūni dhālika</i>); then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: He is still in possession of the right to pre-emption (<i>huwa ‘alā shuʿfatihī</i>), because he only contracted <i>salam</i> for more than the [actual] price. And he [Abū Yūsuf] embraces it. ³¹	268 – وَإِذَا اشْتَرَى الرَّجُلُ الدَّارَ وَسَمَّى أَكْثَرَ مِمَّا أَخَذَهَا بِهِ، فَسَلَّمَ ذَلِكَ الشَّفِيعَ ثُمَّ عَلِمَ بَعْدَ ذَلِكَ أَنَّهُ أَخَذَهَا بِدُونِ ذَلِكَ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: هُوَ عَلَى شَفْعَتِهِ؛ لِأَنَّهُ إِنَّمَا سَلَّمَ بِأَكْثَرٍ مِنَ الثَّمَنِ. وَبِهِ يَأْخُذُ.
269 – But Ibn Abī Laylā, may God Most High have mercy upon him, used to say: No <i>shuʿfa</i> belongs to him, because he had contracted <i>salam</i> and expressed <i>riḍā</i> (<i>wa raḍiya</i>). ³²	269 – وَكَانَ ابْنُ أَبِي لَيْلَى رَحِمَهُ اللَّهُ تَعَالَى يَقُولُ: لَا شَفْعَةَ لَهُ؛ لِأَنَّهُ قَدْ سَلَّمَ وَرَضِيَ.
270 – Al-Ḥasan b. ‘Umāra reported to us, on the authority of al-Ḥakam, on Mujāhid, on Ibn ‘Abbās – and [alternate chain of transmission] on al-Ḥakam, on Yaḥyā, on ‘Alī – that both of them [i.e., Ibn ‘Abbās and ‘Alī] said: There belongs no <i>shuʿfa</i>	270 – أَخْبَرَنَا الْحَسَنُ بْنُ عُمَارَةَ، عَنْ الْحَكَمِ، عَنْ مُجَاهِدٍ، عَنْ ابْنِ عَبَّاسٍ، وَعَنْ الْحَكَمِ، عَنْ يَحْيَى، عَنْ عَلِيٍّ أَنَّهُمَا قَالَا: لَا

³⁰ The Būlāq edition (vii.101) has وقال به من التابعين rather than وَقَالَ بَعْضُ مِنَ التَّابِعِينَ, as in the other editions referenced.

³¹ In other words, for some reason the *shafī* did not act upon his right of pre-emption, but engaged the buyer in a *salam* contract instead, only to discover that he was paying more in *salam* than he would have paid had he exercised his *shuʿfa* (the buyer lied to him about the price of the portion he had paid). Abū Ḥanīfa’s opinion is that, since he had agreed to pay more by *salam*, he still has the right to sue for *shuʿfa* when he discovers the ruse. Had he paid less in *salam*, it would not make sense to sue for the “right” to pay more. Al-Afghānī (38, n.2) notes: “It is also the *qawl* of his *ṣāhib* [i.e., al-Shaybānī].” He then directs us to “an extended, well-explained, indicant-providing (*mabsūṭa mashrūḥa mudallila*)” treatment in the *Mabsūṭ* [14:105].

³² In §269, we see that Ibn Abī Laylā takes a more “formal” stance, claiming that the contracting of *salam* with *riḍā* cancels out the right of the *shafī* to his *shuʿfa*.

except to the partner (<i>sharīk</i>) who did not divide [into portions] (<i>lam yuqāsīm</i>). ³³	شُفْعَةٌ إِلَّا لِشَرِيكِ لَمْ يُقَاسِمَ.
271 – Al-Ḥajjāj b. Arṭāt [reports], on the authority of ʿAmr b. Shuʿayb, on ʿAmr b. al-Sharīd, on his father, he said: The Messenger of God, may God bless and save him, said: «The neighbour has the greater right due to his nearness, whatever it may be (<i>al-jāru aḥaqqu bisaqabihi mā kāna</i>).» ³⁴	271 – الْحَجَّاجُ بْنُ أَرْطَاةٍ عَنْ عَمْرِو بْنِ شُعَيْبٍ، عَنْ عَمْرِو بْنِ الشَّرِيدِ، عَنْ أَبِيهِ قَالَ: قَالَ رَسُولُ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «الْجَارُ أَحَقُّ بِسَقْبِهِ مَا كَانَ.»
272 – Abū Ḥanīfa [reports], on the authority of Abū Umayya, on al-Miswar b. Makhrama, or on Saʿd b. Mālik, he said: The Messenger of God, may God bless and save him, said: «The neighbour has the greater right due to his nearness.»	272 – أَبُو حَنِيفَةَ، عَنْ أَبِي أُمَيَّةَ، عَنْ الْمِسْوَرِ بْنِ مَخْرَمَةَ، أَوْ عَنْ سَعْدِ بْنِ مَالِكٍ قَالَ: قَالَ رَسُولُ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «الْجَارُ أَحَقُّ بِسَقْبِهِ.»
273 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man buys a portion (<i>naṣīb</i>) from a house, and he says [to the <i>shafiʿ</i>]: I took it for one hundred. Then he contracts that by <i>salam</i> to the <i>shafiʿ</i> , then the <i>shafiʿ</i> finds out afterwards that he took it for less than one hundred; there [still] belongs to him, at that time, the <i>shuʿfa</i> – his consenting to <i>salam</i> (<i>taslīmuḥu</i>) is in no way a termination (<i>qāṭiʿ</i>) of his <i>shuʿfa</i> . Indeed, he only contracted it [the portion] in <i>salam</i> for a price (<i>ʿalā thamān</i> ⁱⁿ), and when he found out how much less it [really] was (<i>mā huwa</i>	273 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اشْتَرَى الرَّجُلُ النَّصِيبَ مِنَ الدَّارِ فَقَالَ: أَخَذْتُهُ بِمِائَةٍ. فَسَلَّمَ ذَلِكَ الشَّفِيعُ ثُمَّ عَلِمَ الشَّفِيعُ بَعْدَ أَنَّهُ أَخَذَهُ بِأَقْلَ مِنَ الْمِائَةِ، فَلَهُ حِينَئِذٍ الشُّفْعَةُ، وَلَيْسَ تَسْلِيمُهُ بِقَاطِعٍ شَفْعَتِهِ، إِنَّمَا سَلَّمَهُ عَلَى تَمَنٍّ، فَلَمَّا عَلِمَ مَا هُوَ دُونُهُ كَانَ لَهُ الْأَخْذُ بِالشُّفْعَةِ، وَلَوْ عَلِمَ بَعْدَ أَنَّ التَّمَنَّ أَكْثَرَ مِنَ

³³ As for the *athar* and two Prophetic *ḥadīths* related in §§270-2, it is not clear to me what bearing they have on the current *masʿala*. It is quite possible, however, considering their position between the introduction of the *masʿala* of the *shafiʿ* who contracts *salam* (§§268-9), and al-Shāfiʿī’s analysis and conclusion regarding the same *masʿala* (§273), that these reports were tacked on to the Shaybānī Version at the end of the chapter on *shuʿfa*, either as the incorporated notes of al-Shaybānī, or as additional proofs originally listed by Abū Yūsuf due to their bearing on earlier *masāʾil*. Either way, that they appear sandwiched between a non-related *masʿala*, and al-Shāfiʿī’s evaluation of the same, provides yet another indicant bearing upon the authenticity of both the Shaybānī version and the Umm Version. To begin with, §§270-2 retain their position at the end of the chapter in al-Afghānī’s Shaybānī Version, hence their “tacked on” appearance. It thus appears also that the version commented upon by al-Shāfiʿī had the very same feature of tacked-on proofs, which was then faithfully reproduced, though it elicited no comment (due to its irrelevance to the *masʿala* at hand). That is to say, their very position in the Umm Version (and, for that matter, their lack of excision or relocation) creates as strong a bond between the Umm Version and the Shaybānī Version as we have yet seen.

³⁴ Note the significant addition of “*mā kāna*” in this version.

dūnahu) [i.e., he learns of the buyer's ruse], he had the right to take by *shufa*; but if he finds out afterwards that the price was more than that for which he contracted it [the portion] in *salam*, no *shufa* belongs to him, due to the fact that — when he contracts it in *salam* for the lesser [price], it is the greater [price] for which it is more suitable (*awlā*) that he contract it [the portion] in *salam*.

الَّذِي سَلَّمَهُ بِهِ لَمْ يَكُنْ لَهُ شُفْعَةٌ مِنْ قَبْلِ أَنَّهُ
إِذَا سَلَّمَهُ بِالْأَقَلِّ كَانَ الْأَكْثَرُ أَوْلَى أَنْ يُسَلَّمَهُ
بِهِ.

Bāb al-Muzāra'a

Chapter on Share-Cropping (al-Muzāra'a) ¹	بَابُ الْمَزَارَعَةِ
274 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man gives a man land for share-cropping (<i>muzāra'at^m</i>), for a half, or a third, or a quarter [of the produce]; or gives date-palms (<i>nakhl^m</i>) or trees (<i>shajar^m</i>) for cultivation in return for part of the produce (<i>mu'āmalat^m</i>), ² for half, or less than that, or more [of the produce]; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: This, all of it, is <i>bāṭil</i> , because he seeks to hire him (<i>ista'jarahu</i>) [in exchange] for something unknown.	274 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَعْطَى الرَّجُلُ الرَّجُلَ أَرْضًا مَزَارَعَةً بِالنِّصْفِ أَوْ الثُّلُثِ أَوْ الرَّبْعِ، أَوْ أَعْطَى نَخْلًا أَوْ شَجَرًا مُعَامَلَةً بِالنِّصْفِ أَوْ أَقَلِّ مِنْ ذَلِكَ أَوْ أَكْثَرَ فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: هَذَا كُلُّهُ بَاطِلٌ؛ لِأَنَّهُ اسْتَأْجَرَهُ بِشَيْءٍ مَجْهُولٍ.
275 – He says: Have you considered (<i>ara'ayta</i>) [what would happen] if nothing is produced from that; would not his work for that have been without wage (<i>bi-ghayri ajr^m</i>)?	275 – يَقُولُ: أَرَأَيْتَ لَوْ لَمْ يَخْرُجْ مِنْ ذَلِكَ شَيْءٌ، أَلَيْسَ كَانَ عَمَلُهُ ذَلِكَ بِغَيْرِ أَجْرٍ؟
276 – But Ibn Abī Laylā used to say: That, all of it, is <i>jā'iz</i> . It has reached us concerning the Messenger of God, may God bless and save him, that he gave Khaybar [in <i>muzāra'a/mu'āmalat</i>] for half [of the produce], and thus it was until he was taken [i.e., he died], and [during] the caliphate of Abū Bakr, may God Most High be pleased with him, and [during] the greater part of the caliphate of 'Umar. And he [Abū Yūsuf] embraces it.	276 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: ذَلِكَ كُلُّهُ جَائِزٌ، بَلَّغْنَا عَنْ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – أَنَّهُ أَعْطَى خَيْبَرَ بِالنِّصْفِ، فَكَانَتْ كَذَلِكَ حَتَّى قُبُضَ، وَخِلَافَةَ أَبِي بَكْرٍ رَضِيَ اللَّهُ تَعَالَى عَنْهُ وَعَامَّةَ خِلَافَةِ عُمَرَ. وَبِهِ يَأْخُذُ.
277 – And indeed the <i>qiyās</i> of this according to us is only [in concurrence] with the <i>athar</i> . Don't you see/opine (<i>alā tarā</i>) that a man gives a man <i>māl</i> for <i>muḍāraba</i> for half [the profit], and there is no harm in that (<i>wa lā ba'sa bi-dhālika</i>)?	277 – وَإِنَّمَا قِيَاسُ هَذَا عِنْدَنَا مَعَ الْأَثَرِ. أَلَا تَرَى أَنَّ الرَّجُلَ يُعْطِي الرَّجُلَ مَالًا مُضَارَبَةً بِالنِّصْفِ وَلَا بَأْسَ بِذَلِكَ.
278 – And it has reached us concerning 'Umar b. al-Khaṭṭāb, may God Most High be pleased with him, and concerning 'Abd Allāh b. Mas'ūd, and concerning 'Uthmān b. 'Affān, may God Most High be pleased with him, that they gave <i>māl</i> for <i>muḍāraba</i> .	278 – وَقَدْ بَلَّغْنَا عَنْ عُمَرَ بْنِ الْخَطَّابِ رَضِيَ اللَّهُ تَعَالَى عَنْهُ وَعَنْ عَبْدِ اللَّهِ بْنِ مَسْعُودٍ وَعَنْ عُثْمَانَ بْنِ عَفَّانَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ أَنَّهُمْ أَعْطَوْا مَالًا مُضَارَبَةً.

¹ (Ḥassūn, vol.9, pt.14, 57-9; Schacht: Tr. I, 51).

² See §202 and accompanying footnote re: *mu'āmalat* and *musāqā*.

279 – And it has reached us concerning Sa'd b. Abī Waqqāṣ, and concerning Ibn Ma'sūd, may God Most High be pleased with them both, that they both used to give their land for a quarter and for a third [of the produce].	279 – وَبَلَّغْنَا عَنْ سَعْدِ بْنِ أَبِي وَقَّاصٍ، وَعَنْ ابْنِ مَسْعُودٍ رَضِيَ اللَّهُ تَعَالَى عَنْهُمَا أَنَّهُمَا كَانَا يُعْطِيَانِ أَرْضَهُمَا بِالرُّبْعِ وَالثُّلُثِ.
280 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man turns over to (<i>dafa'a... ilā</i>) a man date palms, or grape [vines] (<i>al-'inaba</i>) that he cultivate them, with the understanding that half the fruit belongs to the worker (<i>li'l-'āmili</i>), or a third, or whatever they mutually stipulate for (<i>tashāraṭā 'alayhi</i>), as pertains to a portion of it; this is the lawful cultivation of trees for part of the produce (<i>hādhihi al-musāqātu al-ḥalālu</i>) which the Messenger of God, may God bless and save him, transacted (<i>'āmala 'alayhā</i>) with the Ahl Khaybar.	280 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا دَفَعَ الرَّجُلُ إِلَى الرَّجُلِ النَّخْلَ أَوْ الْعِنَبَ يَعْمَلُ فِيهِ عَلَى أَنْ لِلْعَامِلِ نِصْفَ الثَّمَرَةِ أَوْ ثُلُثَهَا أَوْ مَا تَشَارَطَا عَلَيْهِ مِنْ جُزْءٍ مِنْهَا، فَهَذِهِ الْمُسَاقَاةُ الْحَالَالُ الَّتِي عَامَلَ عَلَيْهَا رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - أَهْلَ خَيْبَرَ.
281 – And when a man turns over to a man “white” [i.e., uncultivated] land (<i>arḍ^{an} bayḍā'a</i>), with the understanding that the one to whom it is turned over (<i>al-madfū'atu ilayhi</i>) will cultivate it, and [that] whatever God brings forth from it of anything, there belongs to him, from it, a portion (<i>juz^{um} min al-ajzā'i</i>); this is the sale of a green crop for a known portion before its wholesomeness becomes apparent (<i>al-muḥāqala</i>), and the renting of land for some of what is produced from it (<i>al-mukhābara</i>), and the <i>muzāra'a</i> which the Messenger of God, may God bless and save him, proscribed (<i>nahā 'anhā</i>). And we have made lawful (<i>aḥlalnā</i>) the <i>mu'āmala</i> of date palms, on the basis of reports concerning (<i>khabar^{an} 'an</i>) the Messenger of God, may God bless and save him; while we have made unlawful (<i>ḥarramnā</i>) the <i>mu'āmala</i> of “white” land, on the basis of reports concerning the Messenger of God, may God bless and save him.	281 – وَإِذَا دَفَعَ الرَّجُلُ إِلَى الرَّجُلِ أَرْضًا بَيْضَاءَ عَلَى أَنْ يَزْرَعَهَا الْمَدْفُوعَةُ إِلَيْهِ، فَمَا أَخْرَجَ اللَّهُ مِنْهَا مِنْ شَيْءٍ فَلَهُ مِنْهُ جُزْءٌ مِنَ الْأَجْزَاءِ؛ فَهَذِهِ الْمُحَاقَلَةُ وَالْمُخَابَرَةُ وَالْمُزَارَعَةُ الَّتِي نَهَى عَنْهَا رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - فَأَحْلَلْنَا الْمُعَامَلَةَ فِي النَّخْلِ خَبَرًا عَنْ رَسُولِ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - وَحَرَّمْنَا الْمُعَامَلَةَ فِي الْأَرْضِ الْبَيْضَاءِ خَبَرًا عَنْ رَسُولِ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ.
282 – And the making unlawful (<i>tahrim</i>) of what we made unlawful (<i>ḥarramnā</i>) was no more obligatory for us (<i>awjaba 'alaynā</i>) than the making lawful (<i>iḥlāl</i>) of what we made lawful (<i>aḥlalnā</i>); nor was it our right that we discard (<i>naṭraḥa</i>), on the basis of one of his two <i>sunnas</i>, the other [<i>sunna</i>]; nor that	282 – وَلَمْ يَكُنْ تَحْرِيمُ مَا حَرَّمْنَا بِأَوْجَبَ عَلَيْنَا مِنْ إِحْلَالِ مَا أَحْلَلْنَا، وَلَمْ يَكُنْ لَنَا أَنْ نَطْرَحَ بِإِحْدَى سُنَّتَيْهِ الْأُخْرَى، وَلَا نُحَرِّمَ بِمَا حَرَّمَ مَا أَحَلَّ كَمَا لَا نُجِلُّ بِمَا أَحَلَّ مَا حَرَّمَ،

we make unlawful, on the basis of what he made unlawful, that which he made lawful; just as we don't make lawful, on the basis of what he made lawful, that which he made unlawful. And I have not seen (<i>lam ara</i>) one of the people free from <i>khilāf</i> with the Prophet, may God bless and save him, as pertains to one of the two commands (<i>min wāḥidⁱⁿ min al-amrayni</i>) – neither the one who made both of them [i.e., both <i>mu'āmala</i> of palm and vine, and <i>muzāra'a</i> of “white” land] lawful, together [as did Ibn Abī Laylā and Abū Yūsuf]; nor the one who made both of them unlawful, together [as did Abū Ḥanīfa].	وَلَمْ أَرْ بَعْضَ النَّاسِ سَلِمَ مِنْ خِلَافِ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - مِنْ وَاحِدٍ مِنَ الْأُمَرَاءِ؛ لَا الَّذِي أَحْلَاهُمَا جَمِيعًا وَلَا الَّذِي حَرَّمَهُمَا جَمِيعًا.
283 – And as for what was narrated concerning Sa'd and Ibn Mas'ūd, that they both turned over their land for <i>muzāra'a</i>; it is that which has not been confirmed by its like (<i>fa-mā lā yuthbitu huwa mithluhu</i>), nor [by] the Ahl al-Ḥadīth; but if that which is in one [of the narrations] had been confirmed [in accord] with the Prophet, may God bless and save him, [it would have been] <i>hujja</i>.³	283 - فَأَمَّا مَا رَوَى عَنْ سَعْدٍ وَابْنِ مَسْعُودٍ أَنَّهُمَا دَفَعَا أَرْضَهُمَا مُزَارَعَةً فَمَا لَا يُثْبِتُ هُوَ مِثْلُهُ وَلَا أَهْلُ الْحَدِيثِ، وَلَوْ ثَبِتَ مَا كَانَ فِي أَحَدٍ مَعَ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - حُجَّةٌ.
284 – And as for his [Abū Yūsuf & Ibn Abī Laylā in §277] <i>qiyās</i>, and what he permits of date palms and land based on [the <i>aṣl</i> of] <i>muḍāraba</i>; our knowledge (<i>ahdunā</i>) of the Ahl al-Fiqh is that they judge by <i>qiyās</i> (<i>yaqīsūna</i>) what has come [to us] concerning those beneath (<i>dūna</i>) the Prophet, may God bless and save him, on the basis of what has come [to us] concerning the Prophet, may God bless and save him. And as for that the Sunna of the Prophet, may God bless and save him, be judged by <i>qiyās</i> (<i>yuqāsa</i>) on the basis of a <i>khavar wāḥid</i> from the Ṣaḥāba, as though he seeks to confirm it [his Sunna] as being in concordance with the <i>khavar</i> concerning his <i>aṣḥāb</i> – this is ignorance (<i>jahl^{un}</i>). Indeed, God, to Him belong power and might, only fixed for the people (<i>al-khalq</i>), all of them, the need for (<i>al-ḥājata ilā</i>) the Prophet, may God bless and save him. And he [Abū Yūsuf & Ibn Abī Laylā in §277] also	284 - وَأَمَّا قِيَاسُهُ وَمَا أَجَازَ مِنَ النَّخْلِ وَالْأَرْضِ عَلَى الْمُضَارَبَةِ فَعَهْدُنَا بِأَهْلِ الْفِقْهِ يَقِيسُونَ مَا جَاءَ عَمَّنْ دُونِ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - عَلَى مَا جَاءَ عَنِ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، وَأَمَّا أَنْ يُقَاسَ سُنَّةُ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - عَلَى خَبَرٍ وَاحِدٍ مِنَ الصَّحَابَةِ، كَأَنَّهُ يَلْتَمِسُ أَنْ يُثْبِتَهَا بِأَنْ تُوَافِقَ الْخَبَرَ عَنْ أَصْحَابِهِ فَهَذَا جَهْلٌ، إِنَّمَا جَعَلَ اللَّهُ عَزَّ وَجَلَّ لِلْخَلْقِ كُلِّهِمُ الْحَاجَةَ إِلَى النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، وَهُوَ أَيْضًا يَغْلُطُ فِي الْقِيَاسِ، إِنَّمَا أَجَزْنَا نَحْنُ الْمُضَارَبَةَ وَقَدْ

³ This is a critical illustration of al-Shāfi'ī's epistemology of authority in practice: *āthār* which have not been confirmed by their own kind, nor upon the strength of transmission (i.e., confirmed by the Ahl al-Ḥadīth), cannot constitute *hujja* unless twinned with Prophetic Sunna.

commits a fallacy (<i>yaghlatu</i>) in the <i>qiyās</i>: we ourselves have permitted <i>muḍāraba</i> only since it has come [to us] concerning ‘Umar and ‘Uthmān that it [<i>muḍāraba</i>] was <i>qiyās</i> on the basis of the <i>mu‘āmala</i> of the date palms — so it [<i>muḍāraba</i>] was following as <i>qiyās</i>, not followed as the basis of <i>qiyās</i> (<i>fa-kānat taba^{an} qiyās^{an} lā matbū‘at^{an} maqīs^{an} ‘alayhā</i>).	جَاءَتْ عَنْ عُمَرَ وَعُثْمَانَ أَنَّهَا كَانَتْ قِيَاسًا عَلَى الْمُعَامَلَةِ فِي النَّخْلِ، فَكَانَتْ تَبْعًا قِيَاسًا لَا مَتَّبِعَةً مَقِيسًا عَلَيْهَا.
285 – And if one should say (<i>fa-in qāla qā’il^{un}</i>): And how does the <i>muḍāraba</i> resemble (<i>tushbiḥu</i>) the <i>musāqāt</i>?	285 – فَإِنْ قَالَ قَائِلٌ: فَكَيْفَ تُشْبِهُهُ الْمُضَارَبَةُ الْمُسَاقَاةُ؟
286 – It is said: The date palms remain fixed (<i>qā’imat^{un}</i>) to the <i>rabb al-māl</i>; he turns them over with the understanding that the <i>musāqī</i> performs on them such duties by which the healthy growth (<i>ṣalāḥ</i>) of their fruit may be expected, [and] with the understanding that some of it [the fruit] belongs to him. So when the turned-over <i>māl</i> remains fixed (<i>qā’im^{an}</i>) to the <i>rabb al-māl</i>, in the hands of he to whom he turned it over, that he perform with it such duties by which he can expect a surplus (<i>al-faḍl</i>), it is permitted to him that there belong to him some of that surplus according to what they mutually stipulated (<i>tashārātā ‘alayhi</i>) — it is in the like <i>ma’nā</i> of the <i>musāqāt</i>.	286 – قِيلَ: النَّخْلُ قَائِمَةٌ لِرَبِّ الْمَالِ؛ دَفَعَهَا عَلَى أَنْ يَعْمَلَ فِيهَا الْمُسَاقِي عَمَلًا يُرْجَى بِهِ صَلاَحُ ثَمَرِهَا عَلَى أَنْ لَهُ بَعْضُهَا، فَلَمَّا كَانَ الْمَالُ الْمَدْفُوعُ قَائِمًا لِرَبِّ الْمَالِ فِي يَدَيْ مَنْ دَفَعَ إِلَيْهِ يَعْمَلُ فِيهِ عَمَلًا يُرْجَوُ بِهِ الْفَضْلُ جَازَ لَهُ أَنْ يَكُونَ لَهُ بَعْضُ ذَلِكَ الْفَضْلِ عَلَى مَا تَشَارَطَا عَلَيْهِ وَكَانَ فِي مِثْلِ مَعْنَى الْمُسَاقَاةِ.
287 – And if he says: And why isn’t this [so] regarding the land?	287 – فَإِنْ قَالَ: فَلِمَ لَا يَكُونُ هَذَا فِي الْأَرْضِ؟
288 – It is said: The land is not that which grows healthily (<i>taṣluḥu</i>) so surplus is taken from it. Rather, there only thrives in it something other than it; nor is that something a fixed thing (<i>qā’im</i>) which is sold and its surplus taken — like <i>muḍāraba</i>; nor is that something a thing extensively productive (<i>muthmirⁱⁿ bālighⁱⁿ</i>) and its fruit taken, like the date palms. Indeed, that something is only a thing which happens in it [i.e., in the land], and, moreover, by a manner of administration (<i>bi-taṣarrufⁱⁿ</i>) which is not in the <i>ma’nā</i> of one of these two [i.e., neither <i>musāqāt</i> nor <i>muḍāraba</i>]; so it is not permitted that it [this thing which happens in the land] be determined by <i>qiyās</i> based upon it [<i>musāqāt</i>], while it is divergent from it (<i>mufāriq^{un} lahā</i>) from start	288 – قِيلَ: الْأَرْضُ لَيْسَتْ بِالَّتِي تَصْلُحُ فَيُؤْخَذُ مِنْهُ الْفَضْلُ، إِنَّمَا يَصْلُحُ فِيهَا شَيْءٌ مِنْ غَيْرِهَا وَلَيْسَ بِشَيْءٍ قَائِمٍ يُبَاعُ وَيُؤْخَذُ فَضْلُهُ، كَالْمُضَارَبَةِ، وَلَا شَيْءٍ مُثْمِرٍ بَالِغٍ فَيُؤْخَذُ ثَمَرُهُ كَالنَّخْلِ، وَإِنَّمَا هُوَ شَيْءٌ يَحْدُثُ فِيهَا، ثُمَّ بَتَصَرُّفٍ لَا فِي مَعْنَى وَاحِدٍ مِنْ هَذَيْنِ، فَلَا يَجُوزُ أَنْ يَكُونَ قِيَاسًا عَلَيْهَا وَهُوَ مُفَارِقٌ لَهَا فِي الْمُبْتَدَأِ وَالْمَتَعَقِبِ، وَلَوْ جَازَ أَنْ يَكُونَ قِيَاسًا مَا جَازَ أَنْ يُقَاسَ شَيْءٌ نَهَى عَنْهُ النَّبِيُّ –

to finish [lit. as regards both starting point and end result] (*fi'l-mubtada'i w'al-muta'qqabi*). And even were it permitted to be *qiyās*, it is not permitted that a thing be decided by *qiyās* which has been proscribed by the Prophet [i.e., *muzāra'a*]; and that there be made lawful by means of it [*qiyās*] something which he proscribed. Just as the Messenger of God, may God bless and save him, fixed, for the corruptor of the fast by sexual intercourse (*al-mufsiḍi li'l-ṣawmi bi'l-jimā'i*), [the manumission of] a slave (*raqabat^{an}*) [as penance]; yet the corruptor of prayer by sexual intercourse (*al-mufsiḍu li'l-ṣalāti bi'l-jimā'i*) is not determined by *qiyās* with it [the *raqaba*], even though each invalidated a *farḍ* through sex.⁴

صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - فَيَحِلُّ بِهِ شَيْءٌ حَرَّمَ؛
كَمَا جَعَلَ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ
- فِي الْمُفْسِدِ لِلصَّوْمِ بِالْجِمَاعِ رَقَبَةً، فَلَمْ
يُقَسَّ عَلَيْهَا الْمُفْسِدُ لِلصَّلَاةِ بِالْجِمَاعِ، وَكُلُّ
أَفْسَدَ فَرَضًا بِالْجِمَاعِ.

⁴ The example of the two invalidators-through-sex, one of fast, one of prayer, serves, if anything, to highlight that *qiyās* is at best a probabilistic enterprise. Here we have two very similar cases which, in the absence of authoritative *naṣṣ*, would invite *qiyās* based on their similarity. However, we have *naṣṣ* which enjoins a different penance for each invalidation. Certainly, we can't override the Sunna on the basis of *qiyās*; but this example also serves to underscore the necessarily presumptive underpinnings upon which the enterprise of *qiyās al-shabah* is based. God can give two different rulings regarding two very similar things; *qiyās al-shabah* rests on a presumption that similar properties provide indicant of a shared 'illa occasioning the same norm.

Bāb al-Da'wā wa'l-Ṣulḥ

Chapter on Claim (Da'wā) and Amicable Settlement (Ṣulḥ) ¹	بَابُ الدَّعْوَى وَالصُّلْحِ
289 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man raises a claim in the presence (qibala) of a man, as regards a house, or a debt, or something else, and that defendant denies the claim (fa-ankara dhālika al-mudda'ā 'alayhi al-da'wā), then he contracts amicable settlement with him as pertains to the claim (ṣālahahu min al-da'wā) while he yet denies that [claim]; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say regarding this: Jā'iz. And he [Abū Yūsuf] embraces it.	289 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا ادَّعَى الرَّجُلُ الدَّعْوَى قَبْلَ رَجُلٍ فِي دَارٍ أَوْ دَيْنٍ أَوْ غَيْرِ ذَلِكَ، فَأَنْكَرَ ذَلِكَ الْمُدَّعَى عَلَيْهِ الدَّعْوَى، ثُمَّ صَالَحَهُ مِنَ الدَّعْوَى وَهُوَ مُنْكَرٌ لِذَلِكَ، فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ فِي هَذَا: جَائِزٌ، وَبِهِ يَأْخُذُ.
290 – But Ibn Abī Laylā used not to permit amicable settlement during state of denial (lā yujīzu al-ṣulḥa 'alā al-inkār).	290 – وَكَانَ ابْنُ أَبِي لَيْلَى لَا يُجِيزُ الصُّلْحَ عَلَى الْإِنْكَارِ.
291 – But Abū Ḥanīfa use to say: How does he not permit this, while the most permissible thing of all is the ṣulḥ during the inkār; and, when confession/acknowledgment (al-iqrār) occurs, ṣulḥ does not occur? ²	291 – وَكَانَ أَبُو حَنِيفَةَ يَقُولُ: كَيْفَ لَا يَجُوزُ هَذَا وَأَجُوزُ مَا يَكُونُ الصُّلْحُ عَلَى الْإِنْكَارِ، وَإِذَا وَقَعَ الْإِقْرَارُ لَمْ يَقَعْ الصُّلْحُ.
292 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man raises a claim against a man (idda'ā al-rajulu 'alā al-rajuli da'wā), and the mudda'ā 'alayhi denies [it] (ankara), then he contracts amicable settlement (ṣālahā) with the mudda'ī pertaining to his claim, for something, [even] while he is denying [it] (wa huwa munkir ^{um}); the qiyās is that the ṣulḥ-contract is bāṭil, due to the fact that we indeed do not permit the ṣulḥ except for on the [same] basis by which sales-contracts (al-buyū') are permitted, from among the lawful, the معروفَة.	292 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا ادَّعَى الرَّجُلُ عَلَى الرَّجُلِ دَعْوَى، فَأَنْكَرَ الْمُدَّعَى عَلَيْهِ ثُمَّ صَالَحَ الْمُدَّعَى مِنْ دَعْوَاهُ عَلَى شَيْءٍ وَهُوَ مُنْكَرٌ، فَالْقِيَاسُ أَنْ يَكُونَ الصُّلْحُ بَاطِلًا؛ مِنْ قَبْلِ أَنَّا لَا نُجِيزُ الصُّلْحَ إِلَّا بِمَا تَجُوزُ بِهِ الْبُيُوعُ مِنَ الْأَثْمَانِ الْحَلَالِ الْمَعْرُوفَةِ.

¹ (Ḥassūn, vol.9, pt.14, 60-4; Schacht: Tr. I, 52-56).

² Abū Ḥanīfa's argument appears to be: "If ṣulḥ cannot obtain when there is iqrār, then how can it obtain except in a state if inkār?" Such an argument rests squarely upon an iqrār/inkār dichotomy; Abū Ḥanīfa's opinion works only if the necessary status of a defendant is truly dichotomous — i.e., he must either be confessing, or denying. Otherwise, Abū Ḥanīfa will be guilty of the fallacy of bifurcation. It is important to label this as a distinct type of reasoning, and to recognize that al-Shāfi'ī circumvents it entirely by appealing to qiyās.

well-known and accepted prices (<i>min al-athmāni al-ḥalālī al-ma'rūfati</i>). ³	
293 – And when this is so, according to us, and according to whosoever permits <i>ṣulḥ</i> during <i>inkār</i> ; then this would be as a compensation (<i>iwaḍ^{an}</i>), and the <i>iwaḍ</i> , all of it, is a price (<i>thaman^{un}</i>). But it settles nothing (<i>lā yaṣluḥu</i>) should the <i>iwaḍ</i> be anything except such as upon which the two mutually agree (<i>taṣādaqa</i> <i>'alayhi</i>) – the compensated (<i>al-mu'awwaḍ</i>), and the compensator (<i>al-mu'awwīḍ</i>); unless there is, regarding this, an <i>athar</i> that binds (<i>yalzamu</i>). For the <i>athar</i> is more principal [in rank] than (<i>awlā min</i>) the <i>qiyās</i> , and I for one do not know, regarding it, an <i>athar</i> the like of which binds. ⁴	293 – فَإِذَا كَانَ هَذَا هَكَذَا عِنْدَنَا وَعِنْدَ مَنْ أَجَازَ الصُّلْحَ عَلَى الْإِنْكَارِ، كَانَ هَذَا عِوَضًا، وَالْعِوَضُ كُلُّهُ ثَمَنٌ، وَلَا يَصْلُحُ أَنْ يَكُونَ الْعِوَضُ إِلَّا بِمَا تَصَادَقَا عَلَيْهِ الْمَعْوُضُ، وَالْمَعْوُضُ، إِلَّا أَنْ يَكُونَ فِي هَذَا أَثَرٌ يُلْزَمُ، فَيَكُونُ الْأَثَرُ أَوْلَى مِنَ الْقِيَاسِ. وَلَسْتُ أَعْلَمُ فِيهِ أَثَرًا يُلْزَمُ مِثْلُهُ.
294 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And I profess it (<i>wa bihi aqūlu</i>). ⁵ And when the man making the demand (<i>al-rajulu al-ṭālibu</i>) contracts amicable settlement from (<i>ṣālaḥa</i> <i>'an</i>) the one demanded from (<i>al-maṭlūb</i>) while the <i>maṭlūb</i> is absent (<i>mutaghayyib^{un}</i>);	294 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَبِهِ أَقُولُ، وَإِذَا صَالَحَ الرَّجُلُ الطَّالِبُ عَنِ الْمَطْلُوبِ وَالْمَطْلُوبُ مُتَغَيِّبٌ، فَإِنَّ أَبَا حَنِيفَةَ

³ Al-Shāfi'ī argues that *ṣulḥ* is a contract on the model of *buyū'*; and by *qiyās* with *buyū'*, the objects of commutation in an amicable settlement (i.e., the concessions of claimant and defendant) must be on the model of the objects of commutation in a sales-contract (i.e., “prices” which are both *ḥalāl* and *ma'rūfa*).

⁴ As the objects of commutation in both *bay'* and *ṣulḥ* must be governed by the same stipulations, then the “compensation” in *ṣulḥ* must be mutually agreed upon. Apparently, al-Shāfi'ī does not accept that the necessary level of agreement re: compensation can be obtained while the defendant denies any wrongdoing (perhaps this is a question of *niyya*? What is the relationship between *niyya* and *taṣādaqa* *'alā*?) Thus, *qiyās* must decide the issue in the negative, since there appears to be no binding, exemplary precedent (*athar*). This, in contrast to previous examples, illustrates *qiyās* deciding an issue in the absence of *āthār*, rather than *qiyās* being overruled on the strength of authenticated *āthār*.

⁵ Each of the various editions consulted presents this apparent affirmation of al-Shāfi'ī (*qāla al-Shāfi'ī... wa bihi aqūlu*) slightly differently, though not a single one addresses its odd formulation or placement directly (that is to say, it is nowhere footnoted). For the sake of convenience, I have followed Ḥassūn (ix.60), who has presented the affirmation as leading into the next *mas'ala* by placing it at the start of the new section, and linking it by a comma. Maṭrajī (vii.181) more boldly links the affirmation to what follows by using a colon; and Najjār (112) is non-committal, there appearing no indicant whatsoever as to whether the affirmation belongs to the previous, or to the following *mas'ala* in his edition. The Būlāq edition (vii.102), then, is alone in placing its customary *mas'ala*-divider mark (an asterisk), after this affirmation, and before the start of the next *mas'ala* (*wa idhā ṣālaḥa...*), thus clearly indicating that the editor believed the affirmation to belong to the previous *mas'ala*. Finally, as one would expect (and in confirmation that this represents the voice of al-Shāfi'ī, and not, e.g., Abū Yūsuf), any part of the affirmation is entirely absent from al-Afghānī's Shaybānī Version text. Whichever *mas'ala* the affirmation belongs to, it retains a certain strangeness in the face of the normal formulae; and although I have followed Ḥassūn above, I believe that the Būlāq edition has made the most sense by attributing it to the previous *mas'ala*. I cannot understand why it would be inserted at the start of a new *mas'ala*, when the “و” of “به” has not yet acquired a referent.

then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: The <i>ṣulḥ</i> is <i>jāʿiz</i> , and he [Abū Yūsuf] embraces it.	رضي الله تعالى عنه كَانَ يَقُولُ: الصُّلْحُ جَائِزٌ، وَبِهِ يَأْخُذُ.
295 – But Ibn Abī Laylā used to say: The <i>ṣulḥ</i> is refused (<i>mardūd^m</i>), because the <i>maṭlūb</i> is absent from the <i>ṭālib</i> .	295 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الصُّلْحُ مَرْدُودٌ؛ لِأَنَّ الْمَطْلُوبَ مُتَعَيِّبٌ عَنِ الطَّالِبِ.
296 – And likewise if he postpones from him a debt he owes, while he is absent; their two <i>qawls</i> , together [i.e., Abū Ḥanīfa’s and Ibn Abī Laylā’s], are as I have described for you (<i>ʿalā mā waṣaftu laka</i>). ⁶	296 – وَكَذَلِكَ لَوْ أَخَّرَ عَنْهُ دَيْنًا عَلَيْهِ وَهُوَ مُتَعَيِّبٌ كَانَ قَوْلُهُمَا جَمِيعًا عَلَى مَا وَصَفْتُ لَكَ.
297 – Al-Shāfiʿī, may God Most High be pleased with him, said: And when a man contracts <i>ṣulḥ</i> from a man, and the one from whom the settlement was contracted (<i>al-muṣālaḥu ʿanhu</i>) is absent, or the <i>ṣāhib al-ḥaqq</i> granted him a delay (<i>anzarahu</i>) while he is absent; that, all of it, is <i>jāʿiz</i> . Nor do I nullify (<i>ubṭilu</i>) due to absence (<i>biʾl-tagḥayyubi</i>) anything I permit in presence (<i>fiʾl-ḥuḍūri</i>), because this is not from among the <i>maʿānī</i> of the [type of] compulsion (<i>al-ikrāh</i>) which I reject.	297 – قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ تَعَالَى عَنْهُ: وَإِذَا صَالَحَ الرَّجُلُ عَنِ الرَّجُلِ وَالْمُصَالِحُ عَنْهُ غَائِبٌ، أَوْ أَنْظَرَهُ صَاحِبُ الْحَقِّ وَهُوَ غَائِبٌ، فَذَلِكَ كُلُّهُ جَائِزٌ، وَلَا أُبْطِلُ بِالتَّعْيِيبِ شَيْئًا أُجِيزُهُ فِي الْحُضُورِ؛ لِأَنَّ هَذَا لَيْسَ مِنْ مَعَانِي الْإِكْرَاهِ الَّذِي أَرُدُّهُ.
298 – And when a man contracts <i>ṣulḥ</i> with a man, or contracts a <i>bayʿ</i> , or acknowledges a debt (<i>aqarra bi-dayn^m</i>), and he furnishes <i>bayyina</i> that the <i>ṭālib</i> compelled him to [do] that (<i>akrahahu ʿalā dhālika</i>); then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: That, all of it, is <i>jāʿiz</i> . And I don’t accept from him <i>bayyina</i> that he compelled him. And he [Abū Yūsuf] embraces it. ⁷	298 – وَإِذَا صَالَحَ الرَّجُلُ الرَّجُلَ، أَوْ بَاعَ بَيْعًا، أَوْ أَقَرَّ بِدَيْنٍ فَأَقَامَ الْبَيِّنَةَ أَنَّ الطَّالِبَ أَكْرَهَهُ عَلَى ذَلِكَ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: ذَلِكَ كُلُّهُ جَائِزٌ، وَلَا أَقْبِلُ مِنْهُ بَيِّنَةً أَنَّهُ أَكْرَهَهُ، وَبِهِ يَأْخُذُ.

⁶ This must be construed as the voice of Abū Yūsuf; and thus does it appear in the Shaybānī version (Afghānī, 43). A full discussion of this *masʿala* appears in the *Mabsūt* of al-Sarakhsī [30:145], where he explains in more detail the arguments of Ibn Abī Laylā and of the Ḥanafī’s – the point of departure boils down to a difference in definition.

⁷ Abū Ḥanīfa’s viewpoint is explained in the *Mabsūt* [30:145-6], which al-Afghānī (44, n.1) quotes extensively, thus: “And in the *Mabsūt*: And Abū Yūsuf and Muḥammad said, etc. He said: And this is built upon what we explained (*bayyanā*) in the *Kitāb al-Ikrāh*, that, according to Abū Ḥanīfa, *ikrāh* is only realized from the *sultān*, for *ikrāh* of the ‘flock’ [i.e., the citizens] (*al-raʿiyya*) is not *ikrāh*. But according to them both [i.e., Abū Yūsuf and Muḥammad], *ikrāh* is realized from the one who is capable of effectuating that which he threatens, whether he is *sultān* or otherwise; and they both say: What is confirmed by testamentary evidence (*al-thābitu biʾl-bayyinati*) is like what is confirmed by observation (*kaʾl-thābitu biʾl-muʾāyanati*). And if he is absent (*ghāʾib^{am}*), or whoever does business with him compels him to that, its effectuation (*nufūdh*) is not prevented (*lam yamtani*), according to Abū Ḥanīfa. But according to them both [Abū Yūsuf and Muḥammad], its *nufūdh* is prevented. And likewise when it is confirmed by *bayyina* – except

299 – But Ibn Abī Laylā used to say: I accept the <i>bayyina</i> about compulsion (<i>al-ikrāh</i>), and I reject that [<i>ṣulḥ</i>, <i>bay'</i>, or <i>iqrār</i>] for him (<i>aruddu dhālika 'alayhi</i>).	299 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: أَقْبَلُ الْبَيِّنَةَ عَلَى الْإِكْرَاهِ وَأَرُدُّ ذَلِكَ عَلَيْهِ.
300 – And Abū Yūsuf, may God Most High have mercy upon him, said: When the <i>ikrāh</i> is in a situation in which blood may cause nullification (<i>fī mawḍi'āb ṭala fīhi al-damu</i>), I accept the <i>bayyina</i> for <i>ikrāh</i>; and the <i>tafsīr</i> of that is that a man, if he draws a sword (<i>shahara... say^{am}</i>) upon a man, and says: Verily you will confess, or I will kill you (<i>la-tuqirranna aw la-aqtulannaka</i>)! [Then the man will obviously comply.]⁸ So he [Abū Yūsuf] said: I accept from him the <i>bayyina</i> about <i>ikrāh</i>, and I nullify from him that confession (<i>iqrār</i>).	300 – وَقَالَ أَبُو يُوسُفَ رَحِمَهُ اللَّهُ تَعَالَى: إِذَا كَانَ الْإِكْرَاهُ فِي مَوْضِعٍ أَبْطَلَ فِيهِ الدَّمُ قَبِلْتُ الْبَيِّنَةَ عَلَى الْإِكْرَاهِ، وَتَفْسِيرُ ذَلِكَ؛ أَنَّ رَجُلًا لَوْ شَهَرَ عَلَى رَجُلٍ سَيْفًا فَقَالَ: لَتَقِرَّنَّ أَوْ لَاقْتُلَنَّكَ. فَقَالَ: أَقْبَلُ مِنْهُ الْبَيِّنَةَ عَلَى الْإِكْرَاهِ، وَأُبْطِلُ عَنْهُ ذَلِكَ الْإِقْرَارَ.
301 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man compels a man to a <i>bay'</i>, or <i>iqrār</i>, or charitable donation (<i>ṣadaqatⁱⁿ</i>), then the compelled one (<i>al-mukrahu</i>) furnishes the <i>bayyina</i> that he did that, all of it, while under compulsion (<i>wa huwa mukrah^{un}</i>); I nullify this, all of it, from him. And <i>ikrāh</i> comes from he who was stronger than (<i>aqwā min</i>) the compelled one in the circumstance (<i>ḥāl</i>) in which he compelled him, in which there was nothing preventing him (<i>lā māni'a lahu</i>) from his compelling him, nor did he himself refrain (<i>wa lā yamtani'u huwa bi-nafsihi</i>); whether he is <i>sulṭān</i> or thief (<i>liṣṣ^{an}</i>), or Kharijite, or a man in the desert or in a house locked against the one who is stronger than him.	301 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَكْرَهَ الرَّجُلُ الرَّجُلَ عَلَى بَيْعٍ أَوْ إِقْرَارٍ أَوْ صَدَقَةٍ، ثُمَّ أَقَامَ الْمُكْرَهُ الْبَيِّنَةَ أَنَّهُ فَعَلَ ذَلِكَ كُلَّهُ – وَهُوَ مُكْرَهُ – أَبْطَلْتُ هَذَا كُلَّهُ عَنْهُ، وَالْإِكْرَاهُ مِمَّنْ كَانَ أَقْوَى مِنَ الْمُكْرِهِ فِي الْحَالِ الَّتِي يُكْرَهُ فِيهَا الَّتِي لَا مَانِعَ لَهُ فِيهَا مِنْ إِكْرَاهِهِ، وَلَا يَمْتَنِعُ هُوَ بِنَفْسِهِ، سُلْطَانًا كَانَ أَوْ لِصًّا، أَوْ خَارِجِيًّا، أَوْ رَجُلًا فِي صَحْرَاءٍ أَوْ فِي بَيْتٍ مُغْلَقٍ عَلَى مَنْ هُوَ أَقْوَى مِنْهُ.

that, according to them both, the *bayyina* for this is only accepted when there is, in his/its situation/formulation (*mawḍi'ihī*) that one conceive of (*yataṣawwaru*) the *ikrāh*, from its like to him/it (*min mithlihi lahu*). But according to Ibn Abī Laylā, his *bayyina* is accepted against that, in any situation (*'alā kulli ḥālⁱⁿ*), because he confirmed the nullifying cause (*al-sababa al-mubṭila*) for the contract (*li'l-aqdī*) or for the paying/handing-over (*li'l-dafi*), due to the property of necessity (*li-ṣifati al-luzūmi*), by means of the *bayyina*. And what is confirmed by testamentary evidence (*al-thābitu bi'l-bayyinati*) is like what is confirmed by the agreement of the opposing party (*ka'l-thābitu bi-ittifāqi al-khaṣmi*). But if the *khaṣm* helps him to do that, the *ṣulḥ* and the *bay'* is nullified — likewise when it is confirmed by the *bayyina*.”

⁸ This is another example of an unfinished conditional; the consequent was apparently deemed too obvious to require mentioning.

302 – And when two men bring their quarrel to (ikhtaṣama ilā) the qāḍī [i.e., initiate litigation], then one of them acknowledges the right (aqarra... bi-ḥaqqi) of his ṣāhib — after their having stood before the qāḍī, and bayyina was furnished against him for that while he disavowed such (yaḥḍu dhālika); then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: That is jā'iz. And he [Abū Yūsuf] embraces it.	302 – وَإِذَا اخْتَصَمَ الرَّجُلَانِ إِلَى الْقَاضِي فَأَقَرَّ أَحَدُهُمَا بِحَقِّ صَاحِبِهِ بَعْدَمَا قَامَا مِنْ عِنْدِ الْقَاضِي، وَقَامَتْ عَلَيْهِ بِذَلِكَ بَيِّنَةٌ وَهُوَ يَجْحَدُ ذَلِكَ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: ذَلِكَ جَائِزٌ، وَبِهِ يَأْخُذُ.
303 – But Ibn Abī Laylā used to say: There is no iqrār for the one who litigates except in my presence, nor is there any ṣulḥ for them, except in my presence.	303 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا إِقْرَارَ لِمَنْ خَاصَمَ إِلَّا عِنْدِي، وَلَا صُلْحَ لَهُمَا إِلَّا عِنْدِي.
304 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when two men bring their quarrel to the qāḍī, and one of them confesses in the presence of the qāḍī, in the majlis al-ḥukm, or elsewhere besides his majlis, or the qāḍī finds out [that he confessed]; if the right (ḥaqq^{um}) of one over the other is established before the judgment (qabla al-ḥukmi) or after it, then the qawl regarding it must be one or the other of two qawls:	304 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اخْتَصَمَ الرَّجُلَانِ إِلَى الْقَاضِي، فَأَقَرَّ أَحَدُهُمَا عِنْدَ الْقَاضِي فِي مَجْلِسِ الْحُكْمِ أَوْ غَيْرِ مَجْلِسِهِ أَوْ عَلِمَ الْقَاضِي، فَإِنْ ثَبَتَ لِأَحَدِهِمَا عَلَى الْآخَرِ حَقٌّ قَبْلَ الْحُكْمِ أَوْ بَعْدَهُ فَالْقَوْلُ فِيهِ وَاحِدٌ مِنْ قَوْلَيْنِ:
305 – [As for] the one who professes: The qāḍī pronounces judgment based on his knowledge [of the confession] (yaqḍī al-qāḍī bi-'ilmihi), because he only [ever] pronounces judgment on the basis of two witnesses with the understanding that he knows, from an external perspective (fi'l-zāhir), that what they bear witness to is just as they witnessed (mā shahidā bihi kamā shahidā). He passed judgment on the basis of this, while his 'ilm was more principal in rank than (awlā min) the testimony of two witnesses, or of many witnesses, because he does not entertain doubt (lā yashukku) regarding his 'ilm, while he [may] entertain doubt regarding the testimony of the two witnesses.⁹	305 – مَنْ قَالَ: يَقْضِي الْقَاضِي بِعِلْمِهِ؛ لِأَنَّهُ إِنَّمَا يَقْضِي بِشَاهِدَيْنِ عَلَى أَنَّهُ عَالِمٌ فِي الظَّاهِرِ أَنَّ مَا شَهِدَا بِهِ كَمَا شَهِدَا. قَضَى بِهِذَا وَكَانَ عِلْمُهُ أَوْلَى مِنْ شَهَادَةِ شَاهِدَيْنِ وَشُهُودٍ كَثِيرَةٍ؛ لِأَنَّهُ لَا يَشُكُّ فِي عِلْمِهِ وَيَشُكُّ فِي شَهَادَةِ الشَّاهِدَيْنِ.

⁹ NB: These are issues of epistemology; i.e., the qāḍī's sensory experience is of greater epistemic strength than the two-witness-testimony he considers.

306 – And [as for] the one who professes: The <i>qāḍī</i> is like [any] man from among the people. He [who holds this doctrine] says: If he adjudicates between them (<i>ḥakama baynahumā</i>), he is not a witness, and he charges (<i>kallafa</i>) the litigator (<i>al-khaṣm</i>) with [the production of] two witnesses besides himself, and his <i>ḥukm</i> is as the <i>ḥukm</i> of the one who has heard nothing, and does not know him.	306 – وَمَنْ قَالَ: الْقَاضِي كَرَجُلٍ مِنَ النَّاسِ، قَالَ: إِنْ حَكَمَ بَيْنَهُمَا لَمْ يَكُنْ شَاهِدًا، وَكَلَّفَ الْخَصْمَ شَاهِدَيْنِ غَيْرَهُ، وَكَانَ حُكْمُهُ كَحُكْمِ مَنْ لَمْ يَسْمَعْ شَيْئًا وَلَمْ يَعْلَمْهُ.
307 – And this is the <i>qawl</i> of Shurayḥ. A man whom he knew to have a <i>ḥaqq</i> had come to him, and asked that he pass judgment in his favour for it. So he said: Bring me two witnesses if you want me to pass judgment in your favour. He [the man] said: [But] you know my right! He [Shurayḥ] said: Then go to the <i>Amīr</i> and I will give testimony for you (<i>fa-ashhada laka</i>).	307 – وَهَذَا قَوْلُ شُرَيْحٍ؛ قَدْ جَاءَهُ رَجُلٌ يَعْلَمُ لَهُ حَقًّا، فَسَأَلَهُ أَنْ يَقْضِيَ لَهُ بِهِ، فَقَالَ: أَتِنِّي بِشَاهِدَيْنِ إِنْ كُنْتَ تُرِيدُ أَنْ أَقْضِيَ لَكَ. قَالَ: أَنْتَ تَعْلَمُ حَقِّي. قَالَ: فَادْهَبْ إِلَى الْأَمِيرِ فَأَشْهَدْ لَكَ.
308 – And he who professes this [also] says: Verily God, to Him belong might and majesty, called the people to obedience (<i>ta'abbada al-khalqa</i>) in that rights be taken from them when they denounce one another (<i>tajāhadū</i>) by a [certain] number of testamentary-proofs (<i>bi-'adadi bayyinatⁱⁿ</i>), and [that they] not be taken by less than them; and that they not be nullified when they bring them, while the <i>ḥākim</i> is not certain (<i>'alā yaqīnⁱⁿ</i>) that what the <i>bayyina</i> bears witness to is just as it witnessed. And it may be that what is less than it in number is more pure (<i>azkā</i>), yet not accepted, and what completes the number is more lacking in purity (<i>anqaṣu min al-zakāti</i>),¹⁰ yet they accept when the least name of probity falls to them (<i>idhā waqa'a 'alayhim adnā ismi al-'adli</i>). And He did not make it the <i>ḥākim</i>'s right to take [rights] by his <i>'ilm</i> [alone], just as He did not make it his right to take by the <i>'ilm</i> of [only] one other than himself, nor that he be both witness and judge (<i>shāhid^{an} ḥākim^{an}</i>) in a single matter, just as he has not the right to pass judgment in his own favour, [even] if he knows that his right is right (<i>ḥaqqahu ḥaqq^{an}</i>).	308 – وَمَنْ قَالَ هَذَا قَالَ: إِنَّ اللَّهَ عَزَّ وَجَلَّ تَعَبَّدَ الْخَلْقَ بِأَنْ تُؤْخَذَ مِنْهُمْ الْحُقُوقُ إِذَا تَجَاحَدُوا بَعْدَ بَيِّنَةٍ، فَلَا تُؤْخَذُ بِأَقْلٍ مِنْهَا، وَلَا تُبْطَلُ إِذَا جَاءُوا بِهَا وَلَيْسَ الْحَاكِمُ عَلَى يَقِينٍ مِنْ أَنَّ مَا شَهِدَتْ بِهِ الْبَيِّنَةُ كَمَا شَهِدَتْ، وَقَدْ يَكُونُ مَا هُوَ أَقْلُ مِنْهَا عَدَدًا أَزْكَى، فَلَا يُقْبَلُ، وَمَا تَمَّ الْعَدَدُ أَنْقَصُ مِنَ الزَّكَاةِ فَيَقْبَلُونَ إِذَا وَقَعَ عَلَيْهِمْ أَدْنَى اسْمِ الْعَدْلِ، وَلَمْ يَجْعَلْ لِلْحَاكِمِ أَنْ يَأْخُذَ بِعِلْمِهِ، كَمَا لَمْ يَجْعَلْ لَهُ أَنْ يَأْخُذَ بِعِلْمِ وَاحِدٍ غَيْرِهِ، وَلَا أَنْ يَكُونَ شَاهِدًا حَاكِمًا فِي أَمْرٍ وَاحِدٍ، كَمَا لَمْ يَكُنْ لَهُ أَنْ يَحْكُمَ لِنَفْسِهِ لَوْ عَلِمَ أَنَّ حَقَّهُ حَقٌّ.

¹⁰ Ḥassūn (ix.64) has أَنْقَصَ, whereas أُنْقَصُ seems more appropriate.

309 – Al-Rabī said: That which al-Shāfi'ī [in fact] opined (<i>yadhhabu ilayhi</i>) is that he [the <i>qāḍī</i>] adjudicate according to his 'ilm, because his 'ilm is greater than the rendering of the two witnesses of testimony to him. And indeed he only disliked disclosing that (<i>kariha izhāra dhālika</i>), lest the <i>qāḍī</i> should be dishonest (<i>ghayra 'adlⁱⁿ</i>) and make off with the people's property (<i>fa-yadhhaba bi-amwālī al-nāsi</i>).¹¹	309 – قَالَ الرَّبِيعُ: الَّذِي يَذْهَبُ إِلَيْهِ الشَّافِعِيُّ أَنَّهُ يَحْكُمُ بِعِلْمِهِ؛ لِأَنَّ عِلْمَهُ أَكْبَرُ مِنْ تَأْدِيَةِ الشَّاهِدَيْنِ الشَّهَادَةَ إِلَيْهِ، وَإِنَّمَا كَرِهَ إِظْهَارَ ذَلِكَ لِغَلَا يَكُونُ الْقَاضِي غَيْرَ عَدْلٍ فَيَذْهَبَ بِأَمْوَالِ النَّاسِ.
310 – And when two men accept (<i>iṣṭalaḥa 'alā</i>) an arbiter (<i>ḥakam</i>) that he rule between them, and he judges between them by a judgment (<i>bi-qadā^m</i>) divergent (<i>mukhālifⁿ</i>) to the <i>ra'y</i> of the <i>qāḍī</i>, and they raise their case to (<i>irtafa'ā ilā</i>) that <i>qāḍī</i>; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: It is right for that <i>qāḍī</i> that he should nullify his [own] <i>ḥukm</i>, and receive the <i>ḥukm</i> [which is] between them. And he [Abū Yūsuf] embraces it.	310 – وَإِذَا اصْطَلَحَ الرَّجُلَانِ عَلَى حَكْمٍ يَحْكُمُ بَيْنَهُمَا، فَقَضَى بَيْنَهُمَا بِقَضَاءٍ مُخَالَفٍ لِرَأْيِ الْقَاضِي، فَارْتَفَعَا إِلَى ذَلِكَ الْقَاضِي، فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: يَنْبَغِي لِذَلِكَ الْقَاضِي أَنْ يُبْطِلَ حُكْمَهُ وَيَسْتَقْبِلَ الْحُكْمَ بَيْنَهُمَا، وَبِهِ يَأْخُذُ.
311 – But Ibn Abī Laylā used to say: His <i>ḥukm</i> for them both is <i>jā'iz</i>.	311 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: حُكْمُهُ عَلَيْهِمَا جَائِزٌ.
312 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when two men accept as <i>ṣulḥ</i> (<i>iṣṭalaḥa</i>) that a man pass judgment between them regarding something over which they contend (<i>shay^m yatanāza'āni fīhi</i>), and he rules in favour of one of them over the other, and then they raise their case to that <i>qāḍī</i>, and he opines the contrary of what the arbitrator opined between them (<i>fa-ra'ā khilāfa mā yarā al-ḥakamu baynahumā</i>); there is not permitted regarding this other than one of two <i>qawls</i>:¹²	312 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اصْطَلَحَ الرَّجُلَانِ عَلَى أَنْ يَحْكُمَ الرَّجُلُ بَيْنَهُمَا فِي شَيْءٍ يَتَنَازَعَانِ فِيهِ، فَحَكَمَ لِأَحَدِهِمَا عَلَى الْآخَرِ، فَارْتَفَعَا إِلَى الْقَاضِي، فَرَأَى خِلَافَ مَا يَرَى الْحَكْمَ بَيْنَهُمَا، فَلَا يَجُوزُ فِي هَذَا إِلَّا وَاحِدٌ مِنْ قَوْلَيْنِ:
313 – It is either: When they both, together, accept as <i>ṣulḥ</i> his [the <i>ḥakam</i>'s] <i>ḥukm</i>, the <i>qadā'</i> is confirmed – whether such is in accordance with (<i>wāfaqa</i>) the <i>qadā'</i> of the <i>qāḍī</i> or divergent to it (<i>khālafahu</i>); and it is not the right of the <i>qāḍī</i> to reject from his [the <i>ḥakam</i>'s] <i>ḥukm</i> except what he would reject from the <i>ḥukm</i> of another <i>qāḍī</i>, of divergence (<i>khilāf</i>) from <i>Kitāb</i>, or <i>Sunna</i>, or	313 – إِمَّا أَنْ يَكُونَ إِذَا اصْطَلَحَا جَمِيعًا عَلَى حُكْمِهِ ثَبَتَ الْقَضَاءُ، وَافَقَ ذَلِكَ قَضَاءَ الْقَاضِي أَوْ خَالَفَهُ، فَلَا يَكُونُ لِلْقَاضِي أَنْ يَرُدَّ مِنْ حُكْمِهِ إِلَّا مَا يَرُدُّ مِنْ حُكْمِ الْقَاضِي غَيْرِهِ مِنْ خِلَافِ كِتَابٍ أَوْ سُنَّةٍ أَوْ إِجْمَاعٍ

¹¹ One might argue this constitutes something like *maṣlaḥa*; cf. §20.

¹² Cf. al-Shāfi'ī's procedure in §§7-20; 304-9.

<i>ijmāʿ</i> , or from something falling within its <i>maʿnā</i> . ¹³	أَوْ شَيْءٍ دَاخِلٍ فِي مَعْنَاهُ.
314 – Or it is: His [the <i>ḥakam</i> ’s] <i>ḥukm</i> between them is like the <i>futyā</i> , and there is nothing binding upon either one of them, and the <i>qāḍī</i> initiates investigation between them (<i>yabtadiʿu... al-naẓara baynahumā</i>), just as he initiates it between such as have not been brought before anyone for judgment (<i>man lam yuḥākim ilā aḥad</i> ^m).	314 – وَإِمَّا أَنْ يَكُونَ حُكْمُهُ بَيْنَهُمَا كَالْفُتْيَا، فَلَا يُلْزَمُ وَاحِدًا مِنْهُمَا شَيْءٌ، فَيَبْتَدِئُ الْقَاضِي النَّظَرَ بَيْنَهُمَا كَمَا يَبْتَدِئُهُ بَيْنَ مَنْ لَمْ يُحَاكَمْ إِلَى أَحَدٍ.

¹³ This last phrase (“something falling within its *maʿnā*”) gives us an idea of how al-Shāfiʿī conceived of *qiyās* in terms of *maʿānī*. There may also be a perceptible link here, insofar as our fifth century H *jadāl* and *uṣūl* theorists called *qiyās* “*maʿnā al-khiṭāb*” (with *khiṭāb* designating such decrees as may be found in *Kitāb*, *Sunna*, and *ijmāʿ*). Schacht, however (*Origins*, 134), sees only that “*qiyās* is significantly absent from this list.”

Bāb al-Ṣadaqa wa'l-Hiba

Chapter on Charitable Donation (al-Ṣadaqa) and Gift (al-Hiba) ¹	بَابُ الصَّدَقَةِ وَالْهِبَةِ
315 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the wife contracts a gift (<i>wahabat... hibat^{am}</i>) to her husband, or makes a charitable donation (<i>taṣaddaqat</i>), or bequeaths to him (<i>tarakat lahu</i>) some of her <i>mahr</i> , then she says: He compelled me [to do it] (<i>akrahanī</i>), and she brings <i>bayyina</i> for that; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: I don't accept her <i>bayyina</i> , and I effectuate despite her (<i>amḍī 'alayhā</i>) what she has done of that.	315 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا وَهَبَتِ الْمَرْأَةُ لِرَوْحِهَا هِبَةً، أَوْ تَصَدَّقَتْ، أَوْ تَرَكَتْ لَهُ مِنْ مَهْرِهَا، ثُمَّ قَالَتْ: أَكْرَهَنِي. وَجَاءَتْ عَلَى ذَلِكَ بَيِّنَةً، فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا أَقْبَلُ بَيِّنَتَهَا وَأَمْضِي عَلَيْهَا مَا فَعَلَتْ مِنْ ذَلِكَ.
316 – But Ibn Abī Laylā, may God Most High have mercy upon him, used to say: I accept her <i>bayyina</i> for that, and I nullify what [transactions] she made.	316 – وَكَانَ ابْنُ أَبِي لَيْلَى رَحِمَهُ اللَّهُ تَعَالَى يَقُولُ: أَقْبَلُ بَيِّنَتَهَا عَلَى ذَلِكَ وَأُبْطِلُ مَا صَنَعَتْ.
317 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the wife makes a charitable donation of something to her husband, or puts down for him (<i>waḍa'at lahu</i>) some of her <i>mahr</i> , or some of a debt that he owes her, and she furnishes <i>bayyina</i> that he compelled her to do that, and the husband occupies a position of coercive force (<i>mawḍi' al-qahri</i>) over the woman; I nullified that from her, all of it [i.e., all of her transactions under coercion].	317 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا تَصَدَّقَتِ الْمَرْأَةُ عَلَى زَوْجِهَا بِشَيْءٍ، أَوْ وَضَعَتْ لَهُ مِنْ مَهْرِهَا أَوْ مِنْ دَيْنٍ كَانَ لَهَا عَلَيْهِ، فَأَقَامَتِ الْبَيِّنَةَ أَنَّهُ أَكْرَهَهَا عَلَى ذَلِكَ، وَالزَّوْجُ فِي مَوْضِعِ الْقَهْرِ لِلْمَرْأَةِ، أُبْطِلْتُ ذَلِكَ عَنْهَا كُلُّهُ.
318 – And when a man contracts the giving of a <i>hiba</i> , and the donee (<i>al-mawhūbu lahu</i>) takes possession of it, and it [the <i>hiba</i>] is a house, and he builds it up, and elevates the maintenance expenses (<i>a'zama al-naḥaqa</i>), or it [the <i>hiba</i>] is a minor <i>jāriya</i> , and he improves her lot (<i>aṣlahahā</i>) or shapes her (<i>ṣana'ahā</i>) until she grows to adolescence and attains majority (<i>shabbat wa adrakat</i>); then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: The donor (<i>al-wāhib</i>) revokes nothing of that (<i>lā yarji'u... fī shay' min dhālika</i>), nor in any gift which has been enhanced in excellence	318 – وَإِذَا وَهَبَ الرَّجُلُ هِبَةً وَقَبَضَهَا الْمَوْهُوبُ لَهُ؛ وَهِيَ دَارٌ فَبْنَاهَا بِنَاءً وَأَعْظَمَ التَّفَقَّةَ، أَوْ كَانَتْ جَارِيَةً صَغِيرَةً فَأَصْلَحَهَا أَوْ صَنَعَهَا حَتَّى شَبَّتْ وَأَدْرَكَتْ، فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: لَا يَرْجِعُ الْوَاهِبُ فِي شَيْءٍ مِنْ ذَلِكَ وَلَا فِي كُلِّ هِبَةٍ زَادَتْ عِنْدَ صَاحِبِهَا خَيْرًا.

¹ (Ḥassūn, vol.9, pt.14, 65-70; Schacht: Tr. I, 57-63).

(zādat... khayr ^{an}) in the keeping of its ṣāhib.	
319 – Don't you see/opine (<i>alā tarā</i>) there has occurred in it [the <i>hiba</i>], in the ownership (<i>milk</i>) of the donee, something that did not exist in the <i>milk</i> of the donor?	319 – أَلَا تَرَى أَنَّهُ قَدْ حَدَثَ فِيهَا فِي مِلْكِ الْمَوْهُوبَةِ لَهُ شَيْءٌ لَمْ يَكُنْ فِي مِلْكِ الْوَاهِبِ؟
320 – Have you considered (<i>ara'ayta</i>) [what would happen] if the <i>jāriya</i> gave birth to a son; would the donor have the right to revoke as regards him (<i>yarji'a fīhi</i>), and not give him [the son] to him [the donee], while he [the donor] does not own him at all (<i>lam yamlik-hu qatṭu</i>)? And he [Abū Yūsuf] embraces this [doctrine]. ²	320 – أَرَأَيْتَ إِنْ وَلَدَتِ الْجَارِيَةُ وَلَدًا كَانَ لِلْوَاهِبِ أَنْ يَرْجِعَ فِيهِ وَلَمْ يَهَبْهُ لَهُ وَلَمْ يَمْلِكْهُ قَطُّ؟ وَبِهَذَا يَأْخُذُ.
321 – But Ibn Abī Laylā used to say: He has the right to revoke as regards that, all of it, and as regards the son.	321 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَهُ أَنْ يَرْجِعَ فِي ذَلِكَ كُلِّهِ وَفِي الْوَلَدِ.
322 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man contracts the giving of a <i>jāriya</i> to a man, or a house, and the <i>jāriya</i> is enhanced [in value] in his [the donee's] possession, or he builds up the house; there does not belong to the donor who mentions that he gives for the sake of reward (<i>li'l-thawāb</i>), and does not stipulate that, any right to revoke as regards the <i>jāriya</i> – no matter the circumstances (<i>ayya ḥāl^m mā kānat</i>): had she enhanced in excellence, or diminished (<i>zādat khayr^{an} aw naqaṣat</i>).	322 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا وَهَبَ الرَّجُلُ لِلرَّجُلِ جَارِيَةً أَوْ دَارًا فَزَادَتِ الْجَارِيَةُ فِي يَدَيْهِ، أَوْ بَنَى الدَّارَ، فَلَيْسَ لِلْوَاهِبِ الَّذِي ذَكَرَ أَنَّهُ وَهَبَ لِلثَّوَابِ وَلَمْ يَشْتَرِطْ ذَلِكَ أَنْ يَرْجِعَ فِي الْجَارِيَةِ، أَيْ حَالٍ مَا كَانَتْ: زَادَتْ خَيْرًا أَوْ نَقَصَتْ.
323 – Just as there does not belong to him – when he gives as nuptial gift (<i>aṣdaqā</i>) to the wife a <i>jāriya</i> , and she is enhanced [in value] in her possession, then he unilaterally divorces her (<i>tallaqahā</i>) – any right to lay	323 – كَمَا لَا يَكُونُ لَهُ إِذَا أَصْدَقَ الْمَرْأَةَ جَارِيَةً فَزَادَتْ فِي يَدَيْهَا ثُمَّ طَلَّقَهَا أَنْ يَرْجِعَ بِنَصْفِهَا زَائِدَةً.

² Abū Ḥanīfa employs a classic *reductio ad absurdum*. This is of that species which reduces the consequences of a legal opinion to a doctrinal inconsistency, thus proving its invalidity. The hypothetical gifted-*jāriya*-who-gives-birth *reductio* of §320 is made analogous to the *mas'ala* at hand through the intermediary of the preceding underscoring of principle in §319 (donor cannot revoke what did not exist under his ownership). Being that §319 is introduced by *alā tarā*, and §320 by *ara'ayta*, we might understand a pattern of dialectical formulae to be at work here: In springing his *elenchus* upon the respondent, the questioner delivers a double blow – 1) he reminds the respondent of his own doctrine (Don't you, yourself, opine X?); and 2) he shows how the respondent, by maintaining his current stance on the problematic *mas'ala* at hand, is contradicting that very doctrine to which he has just confirmed his allegiance. This may be the very "Archetype" of the juridical-dialectical *elenchus* as practiced by legal specialists in the first centuries of Islam. Note well that, whereas *ara'ayta* seems consistently employed to introduce the hypothetical situation which leads to contradiction/absurdity; *alā tarā* seems consistently employed in presenting the *endoxon* premise which the respondent is bound to accept (usually a reference to his presumed doctrine: "Don't you, yourself, opine X?")

claim to half of her as enhanced [in value] (zā'idat ^{an}).	
324 – And as for the house: indeed the builder built up only what he owned, and there does not belong to him any right to discontinue (yubṭila) his structure, nor to destroy it; but it is said to him: If you give him the value of the structure, you take half the house and the structure, just as is your right and duty in <i>shufa</i> ; its [the house's] <i>ṣāhib</i> builds in it, and he does not lay claim to half of it, just as, if he gifts her with a house as nuptial gift (<i>aṣḍaqahā dār^{an}</i>), and she built it up, he does not lay claim to half of it — because it is, built up, of greater value than it is when not built up (<i>li'annahū mabniyy^{an} akhtharu qīmat^{an} minhu ghayra mabniyyⁱⁿ</i>).	324 – فَأَمَّا الدَّارُ، فَإِنَّ الْبَانِيَ إِنَّمَا بَنَى مَا يَمْلِكُ، فَلَا يَكُونُ لَهُ أَنْ يُبْطِلَ بِنَاءَهُ وَلَا يَهْدِمَهُ، وَيُقَالُ لَهُ: إِنْ أَعْطَيْتَهُ قِيَمَةَ الْبِنَاءِ أَخَذْتَ نِصْفَ الدَّارِ وَالْبِنَاءِ، كَمَا يَكُونُ لَكَ وَعَلَيْكَ فِي الشُّفْعَةِ؛ يَبْنِي فِيهَا صَاحِبُهَا وَلَا يَرْجِعُ بِنَصْفِهَا، كَمَا لَوْ أَصْدَقَهَا دَارًا فَبَنَتْهَا لَمْ يَرْجِعْ بِنَصْفِهَا؛ لِأَنَّهُ مَبْنِيًّا أَكْثَرَ قِيَمَةً مِنْهُ غَيْرَ مَبْنِيٍّ.
325 – And if the <i>jāriya</i> had given birth, the child would have belonged to the donee, because he [the child] came into being in his ownership (<i>ḥādith^{un} fī millihi</i>), separated from her (<i>bā'in^{un} minhā</i>), like the parting (<i>mubāyanati</i>) of the <i>kharāj</i> and <i>khidma</i> belonging to her; just as if she gives birth in the possession of the wife in receipt of her nuptial gift (<i>al-mar'ati al-muṣaddaqati</i>), then she is unilaterally divorced before consummation of the marriage (<i>ṭalūqat qabla al-dukḥūl</i>); the child belongs to the wife, and he lays claim to half of the <i>jāriya</i> should he so desire.	325 – وَلَوْ كَانَتْ الْجَارِيَةُ وَلَدَتْ كَانَ الْوَلَدُ لِلْمَوْهُوبَةِ لَهُ، لِأَنَّهُ حَادِثٌ فِي مِلْكِهِ بَائِنٌ مِنْهَا كَمُبَايَنَةِ الْخَرَاجِ وَالْخِدْمَةِ لَهَا، كَمَا لَوْ وَلَدَتْ فِي يَدِ الْمَرْأَةِ الْمُصَدَّقَةِ ثُمَّ طَلَّقَتْ قَبْلَ الدُّخُولِ كَانَ الْوَلَدُ لِلْمَرْأَةِ وَرَجَعَ بِنِصْفِ الْجَارِيَةِ إِنْ أَرَادَ ذَلِكَ.
326 – And when a man contracts the gift of a <i>jāriya</i> to his son, and his son is a major (<i>kabīr^{un}</i>), yet among his dependents (<i>fī 'iyālihi</i>); then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: It is not permitted unless he take possession (<i>yaqbiḍa</i>). And he [Abū Yūsuf] embraces it.	326 – وَإِذَا وَهَبَ الرَّجُلُ جَارِيَةً لِابْنِهِ وَابْنُهُ كَبِيرٌ وَهُوَ فِي عِيَالِهِ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا تَجُوزُ إِلَّا أَنْ يَقْبِضَ، وَبِهِ يَأْخُذُ.
327 – But Ibn Abī Laylā used to say: When the boy is still among the dependents of his father, even if he has attained majority (<i>adraka</i>), this <i>hiba</i> is <i>jā'iza</i> .	327 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: إِذَا كَانَ الْوَلَدُ فِي عِيَالِ أَبِيهِ وَإِنْ كَانَ قَدْ أَدْرَكَ فَهَذِهِ الْهَبَةُ حَائِزَةٌ.
328 – And so, too, the man, when he contracts a gift to his wife.	328 – وَكَذَلِكَ الرَّجُلُ إِذَا وَهَبَ لِمَرْأَتِهِ.

329 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man contracts the gift of a jāriya to his son, while his son is among his dependents; if the son is of the age of majority (<i>bāligh^{an}</i>), the <i>hiba</i> will not be concluded (<i>tāmmat^{an}</i>) until the son himself takes possession of her — and it is all the same (<i>wa sawā^{un}</i>) whether he is among his dependents or not.	329 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا وَهَبَ الرَّجُلُ لِابْنِهِ جَارِيَةً وَابْنُهُ فِي عِيَالِهِ؛ فَإِنْ كَانَ الابْنُ بَالِغًا لَمْ تَكُنْ الْهَبَةُ تَامَّةً حَتَّى يَقْبُضَهَا الابْنُ، وَسَوَاءٌ كَانَ فِي عِيَالِهِ أَوْ لَمْ يَكُنْ.
330 – And thus it was related concerning Abū Bakr, and 'Ā'isha, and 'Umar b. al-Khaṭṭāb, may God Most High be pleased with them, as regards the majors (<i>al-bālighīn</i>).	330 – وَكَذَلِكَ رُوِيَ عَنْ أَبِي بَكْرٍ وَعَائِشَةَ وَعُمَرَ بْنِ الْخَطَّابِ رَضِيَ اللَّهُ تَعَالَى عَنْهُمْ فِي الْبَالِغِينَ.
331 – And [it is related] concerning 'Uthmān, that he opined (<i>ra'ā</i>) that the father possesses on behalf of (<i>yaḥūzu li-...</i>) such of his sons as are minors; and this provides indicant (<i>yadullu 'alā</i>) that he does not possess on their behalves except in the state of minority (<i>fī ḥālī al-ṣighari</i>).	331 – وَعَنْ عُثْمَانَ أَنَّهُ رَأَى أَنَّ الْأَبَ يَحُوزُ لَوْلَدِهِ مَا كَانُوا صِغَارًا، وَهَذَا يُدَلُّ عَلَى أَنَّهُ لَا يَحُوزُ لَهُمْ إِلَّا فِي حَالِ الصَّغَرِ.
332 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And so it is with every gift (<i>hiba</i>), and present (<i>niḥla</i>), and charitable donation (<i>ṣadaqa</i>) which is not forbidden (<i>muḥarrama</i>), for they are, all of them, of the gifts (<i>aṭāyā</i>) for which no compensation (<i>iwaḍ</i>) is taken, and which are not concluded except through taking possession of the gift-object (<i>al-muṭā</i>).	332 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَهَكَذَا كُلُّ هِبَةٍ وَنِحْلَةٍ وَصَدَقَةٍ غَيْرِ مُحَرَّمَةٍ، فَهِيَ كُلُّهَا مِنَ الْعَطَايَا الَّتِي لَا يُؤْخَذُ عَلَيْهَا عَوَضٌ وَلَا تَتِمُّ إِلَّا بِقَبْضِ الْمُعْطَى.
333 – And when a man contracts the gift of a house to two men, or [the gift of] an article of merchandise (<i>matā^{an}</i>), and the <i>matā</i> is such as may be divided up (<i>yuqṣamu</i>), and they both take possession of it, together; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: This <i>hiba</i> is not permitted, unless there is divided up, for each one of them, his share of it.	333 – وَإِذَا وَهَبَ الرَّجُلُ دَارًا لِرَجُلَيْنِ أَوْ مَتَاعًا وَذَلِكَ الْمَتَاعُ مِمَّا يُقْسَمُ فَقَبْضَاهُ جَمِيعًا، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا تَحُوزُ تِلْكَ الْهِبَةُ إِلَّا أَنْ يُقْسَمَ لِكُلِّ وَاحِدٍ مِنْهُمَا مِنْهَا حِصَّتُهُ.
334 – But Ibn Abī Laylā used to say: The <i>hiba</i> is <i>jā'iza</i> . And he [Abū Yūsuf] embraces it.	334 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الْهِبَةُ جَائِزَةٌ. وَبِهِ يَأْخُذُ.
335 – And when two contract a gift to one, and he takes possession; it is <i>jā'iz</i> .	335 – وَإِذَا وَهَبَ ائْتَانِ لِوَاحِدٍ وَقَبِضَ فَهُوَ جَائِزٌ.
336 – And Abū Yūsuf said: They [the two cases] are one and the same (<i>humā sawā^{un}</i>).	336 – وَقَالَ أَبُو يُوسُفَ: هُمَا سَوَاءٌ.

337 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man contracts the gift, to two men, of some part of an un-apportioned house, or food, or clothes, or a slave not apportioned (<i>lā yanqasimu</i>), and they both take possession, together, of the <i>hiba</i>; then the <i>hiba</i> is <i>jā'iza</i>, just as the <i>bay'</i> [regarding such] is permitted.	337 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا وَهَبَ الرَّجُلُ لِرَجُلَيْنِ بَعْضَ دَارٍ لَا تُقْسَمُ أَوْ طَعَامًا أَوْ ثِيَابًا أَوْ عَبْدًا لَا يَنْقَسِمُ فَقَبِضَا حَمِيْعًا الْهَبَةُ فَالْهَبَةُ جَائِزَةٌ، كَمَا يَجُوزُ الْبَيْعُ.
338 – And likewise if two contract the gift of a house divided up between them, or undivided, or [the gift of] a slave, to a man, and he takes possession of it; the <i>hiba</i> is permitted.	338 – وَكَذَلِكَ لَوْ وَهَبَ اثْنَانِ دَارًا بَيْنَهُمَا تَنْقَسِمُ أَوْ لَا تَنْقَسِمُ أَوْ عَبْدًا لِرَجُلٍ وَقَبِضَ، جَازَتْ الْهَبَةُ.
339 – And when the house belongs to two men, and one of them contracts his share as gift to his <i>ṣāhib</i> and does not divide it for him (<i>lam yaqsimhu lahu</i>); then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: The <i>hiba</i> regarding this is <i>bātila</i>, and not permitted. And he [Abū Yūsuf] embraces it. And among his <i>hujja</i> for that is that he said: <i>Hiba</i> is not permitted except [if it be] apportioned (<i>maqsūmat^{am}</i>), known (<i>ma'lūmat^{am}</i>), taken possession of (<i>maqḥūdat^{am}</i>).	339 – وَإِذَا كَانَتِ الدَّارُ لِرَجُلَيْنِ فَوَهَبَ أَحَدُهُمَا حِصَّتَهُ لِصَاحِبِهِ وَلَمْ يَقْسِمْهُ لَهُ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: الْهَبَةُ فِي هَذَا بَاطِلَةٌ وَلَا تَجُوزُ. وَبِهِ يَأْخُذُ. وَمِنْ حُجَّتِهِ فِي ذَلِكَ أَنَّهُ قَالَ: لَا تَجُوزُ الْهَبَةُ إِلَّا مَقْسُومَةٌ مَعْلُومَةٌ مَقْبُوضَةٌ.
340 – It has reached us concerning Abū Bakr, may God Most High be pleased with him, that he made a present (<i>naḥala</i>) to 'Ā'isha, Umm al-Mu'minīn, may God Most High be pleased with her, of palm cuttings (<i>jadhādh</i>) – twenty <i>wasqs</i> – from some palms he had in al-'Āliya;³ and when death was close by him, he said to 'Ā'isha: You never did take possession of it – indeed, it is only <i>māl</i> for the heir [now]; and it was passed down among the heirs, because she had not taken possession of it.	340 – بَلَغَنَا عَنْ أَبِي بَكْرٍ رَضِيَ اللَّهُ تَعَالَى عَنْهُ أَنَّهُ نَحَلَ عَائِشَةَ أُمَّ الْمُؤْمِنِينَ رَضِيَ اللَّهُ تَعَالَى عَنْهَا جَذَازَ عِشْرِينَ وَسَقًّا مِنْ نَخْلٍ لَهُ بِالْعَالِيَةِ، فَلَمَّا حَضَرَهُ الْمَوْتُ قَالَ لِعَائِشَةَ: إِنَّكَ لَمْ تَكُونِي قَبِضْتِيهِ، وَإِنَّمَا هُوَ مَالُ الْوَارِثِ، فَصَارَ بَيْنَ الْوَرَثَةِ؛ لِأَنَّهَا لَمْ تَكُنْ قَبِضَتْهُ.
341 – And Ibrāhīm [al-Nakha'ī?] used to say: <i>Hiba</i> is not permitted except [as directly] taken possession of (<i>maqḥūdat^{am}</i>). And he [Abū Yūsuf] embraces it.	341 – وَكَانَ إِبْرَاهِيمُ يَقُولُ: لَا تَجُوزُ الْهَبَةُ إِلَّا مَقْبُوضَةً. وَبِهِ يَأْخُذُ.

³ Ḥassūn explains: (ix.68, n.1) that the *jadhādh* is a cutting from the palm if its fruits have ripened; (n.2) that a *wasq* is 60 *ṣā's*, and a *ṣā'* is five *raṭls* and a third, "and what is aimed at by the *wasq*, here, is the load (*wiqr*) of the palm"; and (n.3) that al-'Āliya refers to such places as occupied the highest parts of the lands of Medina, ranging from four to eight miles from Medina proper.

342 – But Ibn Abī Laylā used to say: When the house is [divided] between two men, and one of them contracts his portion (<i>naṣībahu</i>) to his <i>ṣāhib</i> as gift; this is a taking possession from him for the <i>hiba</i> (<i>qabḍ^{un} minhu li'l-hibati</i>), and this is known (<i>ma'lūmat^{un}</i>), and this is <i>jā'iza</i>.	342 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: إِذَا كَانَتْ الدَّارُ بَيْنَ رَجُلَيْنِ؛ فَوَهَبَ أَحَدُهُمَا لِصَاحِبِهِ نَصِيبَهُ فَهَذَا قَبْضٌ مِنْهُ لِلْهَبَةِ، وَهَذِهِ مَعْلُومَةٌ، وَهَذِهِ جَائِزَةٌ.
343 – And when two men contract a house as gift to a man, and he takes possession of it; it is <i>jā'iz</i> in the <i>qawl</i> of Abū Ḥanīfa, may God Most High have mercy upon him, and it does not invalidate the <i>hiba</i> – the fact that it belonged to two. And he [Abū Yūsuf] embraces it.	343 – وَإِذَا وَهَبَ الرَّجُلَانِ دَارًا لِرَجُلٍ فَقَبَضَهَا، فَهُوَ جَائِزٌ فِي قَوْلِ أَبِي حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى وَلَا يُفْسِدُ الْهَبَةَ أَنَّهَا كَانَتْ لِاثْنَيْنِ. وَبِهِ يَأْخُذُ.
344 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the house is [divided] between two men, and one of them contracts his portion as gift to his <i>ṣāhib</i>, and he takes possession of the <i>hiba</i>; the <i>hiba</i> is <i>jā'iza</i>. And the taking possession (<i>al-qabḍ</i>) is: that it [the <i>hiba</i>] was in the possession of the donor, then came into the possession of the donee, there being no agent with him as regards it (<i>lā wakīla ma'ahu fihā</i>); or that its owner (<i>rabbuhā</i>) surrenders it and removes himself from between it [the <i>hiba</i>] and him [the donee], that there be no obstruction before it (<i>lā ḥā'ila dūnahā</i>) – neither he, nor his agent. And when [all] this is so, it is <i>qabḍ</i>.⁴	344 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَتْ الدَّارُ بَيْنَ رَجُلَيْنِ؛ فَوَهَبَ أَحَدُهُمَا لِصَاحِبِهِ نَصِيبَهُ فَقَبَضَ الْهَبَةَ، فَالْهَبَةُ جَائِزَةٌ، وَالْقَبْضُ أَنْ تَكُونَ كَانَتْ فِي يَدَيِ الْوَاهِبِ فَصَارَتْ فِي يَدَيِ الْمَوْهُوبَةِ لَهُ لَا وَكِيلَ مَعَهُ فِيهَا، أَوْ يُسَلِّمَهَا رَبُّهَا وَيُخْلِي بَيْنَهُ وَبَيْنَهَا حَتَّى يَكُونَ لَا حَائِلَ دُونَهَا هُوَ وَلَا وَكِيلَ لَهُ، فَإِذَا كَانَ هَذَا هَكَذَا كَانَ قَبْضًا.
345 – And the <i>qabḍ</i> in <i>hibāt</i> is like the <i>qabḍ</i> in <i>buyū'</i> – what is [considered] <i>qabḍ</i> in the <i>bay'</i> is <i>qabḍ</i> in the <i>hiba</i>, and what is not <i>qabḍ</i> in the <i>bay'</i> is not <i>qabḍ</i> in the <i>hiba</i>.⁵	345 – وَالْقَبْضُ فِي الْهَبَاتِ كَالْقَبْضِ فِي الْبُيُوعِ؛ مَا كَانَ قَبْضًا فِي الْبَيْعِ كَانَ قَبْضًا فِي الْهَبَةِ، وَمَا لَمْ يَكُنْ قَبْضًا فِي الْبَيْعِ لَمْ يَكُنْ قَبْضًا فِي الْهَبَةِ.
346 – And when a man contracts <i>hiba</i> to a man and he takes possession of it – a house, or land –, then he recompenses him (<i>'awwāḍahu</i>) for it after that with compensation (<i>'iwaḍ^{an}</i>), and the donor takes possession [of the <i>'iwaḍ</i>]; then indeed Abū Ḥanīfa, may God Most High be pleased with	346 – وَإِذَا وَهَبَ الرَّجُلُ لِلرَّجُلِ الْهَبَةَ وَقَبَضَهَا؛ دَارًا أَوْ أَرْضًا ثُمَّ عَوَّضَهُ بَعْدَ ذَلِكَ مِنْهَا عَوْضًا وَقَبَضَ الْوَاهِبُ، فَإِنَّ أَبَا حَنِيفَةَ

⁴ As we have seen before, al-Shāfi'ī here offers a very precise, logical-philosophical definition of a key concept. It ought well to be recognized, therefore, that detailed refinement of definition plays an important role in his legal theory.

⁵ Cf. §§388 and 395 re: *qiyās*-correlation between *rahn* and *bay'*.

him, used to say: That is <i>jā'iz</i> , but there is no <i>shufa</i> regarding it. And he [Abū Yūsuf] embraces it. And this is not in the domain of purchase (<i>laysa hādha bi-manzilati al-shirā'i</i>).	رضي الله تعالى عنه كَانَ يَقُولُ: ذَلِكَ حَائِزٌ وَلَا يَكُونُ فِيهِ شُفْعَةٌ. وَبِهِ يَأْخُذُ، وَلَيْسَ هَذَا بِمَنْزِلَةِ الشَّرَاءِ.
347 – But Ibn Abī Laylā used to say: This is in the domain of <i>shirā'</i> , and the <i>shafi</i> takes by right of <i>shufa</i> , for the value of the <i>iwaḍ</i> ; and the donor cannot revoke the <i>hiba</i> after the <i>iwaḍ</i> , according to both of their <i>qawls</i> [Abū Ḥanīfa's and Ibn Abī Laylā's], together.	347 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هَذَا بِمَنْزِلَةِ الشَّرَاءِ، وَيَأْخُذُ الشَّافِعِيُّ بِالشُّفْعَةِ بِقِيَمَةِ الْعَوَضِ، وَلَا يَسْتَطِيعُ الْوَاهِبُ أَنْ يَرْجِعَ فِي الْهَبَةِ بَعْدَ الْعَوَضِ فِي قَوْلِهِمَا جَمِيعًا.
348 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man contracts a portion (<i>shiqṣ</i>) of a house as gift to a man, and he takes possession of it, then the donee recompenses him something and the donor takes possession of it; the donor is asked, and if he says: I gifted it for a reward (<i>li-thawābⁱⁿ</i>), there is <i>shufa</i> as regards it. But if he says: I gifted it for other than a <i>thawāb</i> , there is no <i>shufa</i> regarding it, and the reward/compensation (<i>al-mukāfa'atu</i>) is like the initiation (<i>ibtidā'</i>) of the gift-contract.	348 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا وَهَبَ الرَّجُلُ الرَّجُلَ شِقْصًا مِنْ دَارٍ فَقَبَضَهُ ثُمَّ عَوَّضَهُ الْمَوْهُوبُ لَهُ شَيْئًا فَقَبَضَهُ الْوَاهِبُ، سُئِلَ الْوَاهِبُ، فَإِنْ قَالَ: وَهَبْتُهَا لِثَوَابٍ، كَانَ فِيهَا الشُّفْعَةُ. وَإِنْ قَالَ: وَهَبْتُهَا لِغَيْرِ ثَوَابٍ. لَمْ يَكُنْ فِيهَا شُفْعَةٌ، وَكَانَتْ الْمُكَافَأَةُ كَابْتِدَاءِ الْهَبَةِ.
349 – And this, all of it, is in the <i>qawl</i> of one who professes: To the donor belongs the <i>thawāb</i> when he says: I wanted it. And as for whoso professes: No <i>thawāb</i> belongs to the donor if he doesn't stipulate it (<i>lam yashtarīthu</i>) in the <i>hiba</i> ; there belongs to him no right to revoke anything he contracted as gift, nor [does there belong to him] the <i>thawāb</i> from it.	349 – وَهَذَا كُلُّهُ فِي قَوْلٍ مَنْ قَالَ: لِلْوَاهِبِ الثَّوَابُ إِذَا قَالَ: أَرَدْتُهُ. فَأَمَّا مَنْ قَالَ: لَا ثَوَابَ لِلْوَاهِبِ إِنْ لَمْ يَشْتَرِطْهُ فِي الْهَبَةِ فَلَيْسَ لَهُ الرَّجُوعُ فِي شَيْءٍ وَهَبَهُ وَلَا الثَّوَابُ مِنْهُ.
350 – Al-Rabī said: And regarding it there is another <i>qawl</i> : When he contracts a gift and stipulates the reward (<i>ishtarāta al-thawāba</i>); the <i>hiba</i> is <i>bāṭila</i> , due to the fact that he stipulated an unknown compensation (<i>iwaḍ^{an} majhūl^{an}</i>). But when he contracts a gift for other than the <i>thawāb</i> , and the donee ⁶ takes possession of it; he has no right to revoke anything he contracted as gift. And it is the <i>ma'nā</i> of the <i>qawl</i> of al-Shāfi'ī.	350 – قَالَ الرَّبِيعُ: وَفِيهِ قَوْلٌ آخَرُ: إِذَا وَهَبَ وَاشْتَرَطَ الثَّوَابَ فَالْهَبَةُ بَاطِلَةٌ؛ مِنْ قَبْلِ أَنَّهُ اشْتَرَطَ عَوَضًا مَجْهُولًا، وَإِذَا وَهَبَ لِغَيْرِ الثَّوَابِ وَقَبَضَهُ الْمَوْهُوبُ [لَهُ] فَلَيْسَ لَهُ أَنْ يَرْجِعَ فِي شَيْءٍ وَهَبَهُ. وَهُوَ مَعْنَى قَوْلِ الشَّافِعِيِّ.

⁶ Ḥassūn has provided, in brackets, the *لَهُ*, which does not appear in any of the other editions consulted, and footnotes it as زيادة متعينة.

351 – And when a man contracts <i>hiba</i> to a man [while] in his [the donor's] illness (<i>fi maraḍihi</i>), and the donee does not take possession of it until the donor dies; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: The <i>hiba</i> , in this, is <i>bāṭila</i> , not permitted. And he [Abū Yūsuf] embraces it.	351 – وَإِذَا وَهَبَ الرَّجُلُ لِلرَّجُلِ هِبَةً فِي مَرَضِهِ فَلَمْ يَقْبِضْهَا الْمَوْهُوبَةُ لَهُ حَتَّى مَاتَ الْوَاهِبُ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: الْهِبَةُ فِي هَذَا بَاطِلَةٌ لَا تَحُوزُ. وَبِهِ يَأْخُذُ.
352 – He said: And it [the <i>hiba</i>] is not a bequest (<i>waṣiyya</i>) for him, unless that appears in the statement of his [the donor's] bequest (<i>fi dhikri waṣiyyatihi</i>).	352 – قَالَ: وَلَا تَكُونُ لَهُ وَصِيَّةٌ إِلَّا أَنْ يَكُونَ ذَلِكَ فِي ذِكْرِ وَصِيَّتِهِ.
353 – But Ibn Abī Laylā used to say: It is <i>jā'iza</i> pertaining to one third [of the estate].	353 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هِيَ جَائِزَةٌ مِنَ الثُّلُثِ.
354 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man contracts the <i>hiba</i> in his illness, and the donee does not take possession of it until he [the donor] dies; there belongs to the donee nothing, but it belongs to the heirs (<i>li'l-warathati</i>).	354 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا وَهَبَ الرَّجُلُ فِي مَرَضِهِ الْهِبَةَ فَلَمْ يَقْبِضْهَا الْمَوْهُوبَةُ لَهُ حَتَّى مَاتَ، لَمْ يَكُنْ لِلْمَوْهُوبَةِ لَهُ شَيْءٌ وَكَانَتْ لِلْوَرَثَةِ.
355 – Al-Ḥajjāj b. Arṭāt, on the authority of 'Aṭā' b. Abī Rabāḥ, on Ibn 'Abbās, may God Most High be pleased with them both, he said: The <i>ṣadaqa</i> is not permitted except [when] taken possession of (<i>maqḥūḍat^m</i>).	355 – الْحَجَّاجُ بْنُ أَرْطَاةَ، عَنْ عَطَاءِ بْنِ أَبِي رَبَاحٍ، عَنْ ابْنِ عَبَّاسٍ رَضِيَ اللَّهُ تَعَالَى عَنْهُمَا قَالَ: لَا تَحُوزُ الصَّدَقَةُ إِلَّا مَقْبُوضَةً.
356 – Al-A'mash [reported], on the authority of Ibrāhīm, he said: The <i>ṣadaqa</i> , when it is known, it is permitted; but the <i>hiba</i> is not permitted except [when] taken possession of.	356 – الْأَعْمَشُ، عَنْ إِبْرَاهِيمَ قَالَ: الصَّدَقَةُ إِذَا عُلِمَتْ جَازَتْ، وَالْهِبَةُ لَا تَحُوزُ إِلَّا مَقْبُوضَةً.
357 – And Abū Ḥanīfa, may God Most High have mercy upon him, used to embrace the <i>qawl</i> of Ibn 'Abbās regarding the <i>ṣadaqa</i> , and it is the <i>qawl</i> of Abū Yūsuf, may God Most High have mercy upon him.	357 – وَكَانَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى يَأْخُذُ بِقَوْلِ ابْنِ عَبَّاسٍ فِي الصَّدَقَةِ، وَهُوَ قَوْلُ أَبِي يُوسُفَ رَحِمَهُ اللَّهُ تَعَالَى.
358 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And there does not belong to the donor any right to revoke the <i>hiba</i> when he takes possession of compensation pertaining to it (<i>qabaḍa minhā 'iwaḍ^m</i>); [be it] little or much.	358 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَلَيْسَ لِلْوَاهِبِ أَنْ يَرْجِعَ فِي الْهِبَةِ إِذَا قَبِضَ مِنْهَا عَوْضًا؛ قَلٌّ أَوْ كَثُرٌ.

Bāb fi'l-Wadī'a

Chapter on Deposit (al-Wadī'a) ¹	بَابُ فِي الْوَدِيعَةِ
359 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man contracts a deposit (<i>istawda'a wadī'at^{am}</i>) with a man, and the depositary (<i>al-mustawda'u</i>) says: You ordered me to turn it over to so-and-so, so I turned it over to him; Abū Ḥanīfa, may God Most High be pleased with him, said: The [considered] <i>qawl</i> is the <i>qawl</i> of the <i>rabb al-wadī'a</i> [i.e., the depositor], and the <i>mustawda'</i> is liable (<i>dāmin^{un}</i>). And he embraces this [doctrine]; i.e., Abū Yūsuf. ²	359 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اسْتَوْدَعَ الرَّجُلُ الرَّجُلَ وَدِيعَةً فَقَالَ الْمُسْتَوْدَعُ: أَمَرْتَنِي أَنْ أَذْفَعَهَا إِلَى فُلَانٍ فَذَفَعْتُهَا إِلَيْهِ. قَالَ أَبُو حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ: فَالْقَوْلُ قَوْلُ رَبِّ الْوَدِيعَةِ، وَالْمُسْتَوْدَعُ ضَامِنٌ. وَبِهَذَا يَأْخُذُ. يَعْنِي أَبُو يُسُفَ.
360 – But Ibn Abī Laylā used to say: The [considered] <i>qawl</i> is the <i>qawl</i> of the <i>mustawda'</i> , and there is no <i>ḍamān</i> [enjoined] upon him, but [enjoined] upon him is the <i>yamīn</i> .	360 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الْقَوْلُ قَوْلُ الْمُسْتَوْدَعِ وَلَا ضَمَانَ عَلَيْهِ، وَعَلَيْهِ الْيَمِينَ.
361 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man contracts the <i>wadī'a</i> with a man, and they mutually sanction it (<i>taṣādaqā 'alayhā</i>), then the <i>mustawda'</i> says: You ordered me to turn the <i>wadī'a</i> over to a man, so I turned it over to him – but the <i>rabb al-wadī'a</i> denies that; the [considered] <i>qawl</i> is the <i>qawl</i> of the <i>rabb al-wadī'a</i> , and upon the <i>mustawda'</i> is [enjoined] the <i>bayyina</i> for what he claims (<i>bimā idda'a</i>).	361 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اسْتَوْدَعَ الرَّجُلُ الرَّجُلَ الْوَدِيعَةَ فَتَصَادَقَا عَلَيْهَا، ثُمَّ قَالَ الْمُسْتَوْدَعُ: أَمَرْتَنِي أَنْ أَذْفَعَ الْوَدِيعَةَ إِلَى رَجُلٍ فَذَفَعْتُهَا إِلَيْهِ. وَانْكَرَ ذَلِكَ رَبُّ الْوَدِيعَةِ، فَالْقَوْلُ قَوْلُ رَبِّ الْوَدِيعَةِ، وَعَلَى الْمُسْتَوْدَعِ الْبَيِّنَةُ بِمَا ادَّعَى.
362 – And when a man contracts a <i>wadī'a</i> with a man, and another comes along and claims it along with him [the depositor], and the <i>mustawda'</i> says: I don't know which one of you two contracted this <i>wadī'a</i> with me, and he refuses to swear for them, and neither one of them has <i>bayyina</i> ; then	362 – وَإِذَا اسْتَوْدَعَ الرَّجُلُ الرَّجُلَ الْوَدِيعَةَ فَجَاءَ آخَرُ يَدَّعِيهَا مَعَهُ، فَقَالَ الْمُسْتَوْدَعُ: لَا أَدْرِي أَيُّكُمَا اسْتَوْدَعَنِي هَذِهِ الْوَدِيعَةَ. وَأَبَى أَنْ

¹ (Ḥassūn, vol.9, pt.14, 71-3; Schacht: *Tr. I*, 64-67).

² As in the opening chapter of the *K. Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā*, this *mas'ala* is concerned with establishing a “benefit of assumption” (i.e., “*al-qawl qawl X*” means “party X receives the benefit of assumption”; cf. §§1-2, 50, 133-4, 196-9, 359-61, 459, 860-1, 1276-9). Note the same formulaic expressions using *qawl*: “the *qawl* is the *qawl* of P; and upon Q is enjoined the X.” It would be worthwhile investigating the discussions of “benefit of assumption” in other early texts, and then in later texts, to see if any patterns emerge. Is “*fa'l-qawlu qawlu X*; etc.” the standard formula? This is something that could be explored fairly quickly with electronic media. Note also, as in the opening chapter, we are reminded that the *bihi/bi-hādhā ya'khudhu* refers to Abū Yūsuf.

indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: He gives them that <i>wadʿa</i>, two halves [divided] between them, and he becomes liable to them both (<i>yaḍmanu lahumā</i>) for another [object] of the same kind, [divided] between them both, because he destroyed (<i>atlaḥa</i>) what was contracted as deposit through his folly (<i>bi-jahālatihi</i>).	يَحْلِفَ لَهُمَا، وَلَيْسَ لِوَاحِدٍ مِنْهُمَا بَيِّنَةٌ، فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: يُعْطِيهِمَا تِلْكَ الْوَدِيعَةَ بَيْنَهُمَا نَصْفَيْنِ وَيَضْمَنُ لَهُمَا أُخْرَى مِثْلَهَا بَيْنَهُمَا؛ لِأَنَّهُ أَتْلَفَ مَا اسْتَوْدَعَ بِجَهَالَتِهِ.
363 – Don't you see/opine (<i>alā tarā</i>) that – if he says: This one deposited it with me, then he says: I have erred; nay, it was this one – it is [enjoined] upon him that he turn over the <i>wadʿa</i> to the one he first averred (<i>aqarra</i>) that it belonged to, and that he becomes liable to the other for the like of that [deposit], because his <i>qawl</i> destroyed it?³ And likewise [concerning] the first one: indeed, he himself destroyed it [his right] only by his ignorance. And he [Abū Yūsuf] embraces this [doctrine].	363 – أَلَا تَرَى أَنَّهُ لَوْ قَالَ: هَذَا اسْتَوْدَعَنِيهَا. ثُمَّ قَالَ: أَخْطَأْتُ بَلْ هُوَ هَذَا. كَانَ عَلَيْهِ أَنْ يَدْفَعَ الْوَدِيعَةَ إِلَى الَّذِي أَقَرَّ لَهُ بِهَا أَوَّلًا وَيَضْمَنُ لِلْآخَرِ مِثْلَ ذَلِكَ؛ لِأَنَّ قَوْلَهُ أَتْلَفُهُ، وَكَذَلِكَ الْأَوَّلُ إِنَّمَا أَتْلَفَهُ هُوَ بِجَهْلِهِ. وَبِهَذَا يَأْخُذُ.
364 – But Ibn Abī Laylā used to say as regards the first one: There is [enjoined] upon him nothing; but the <i>wadʿa</i>, and the <i>muḍāraba</i>, are two halves [divided] between them.⁴	364 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ فِي الْأَوَّلِ: لَيْسَ عَلَيْهِ شَيْءٌ وَالْوَدِيعَةُ وَالْمُضَارَبَةُ بَيْنَهُمَا نَصْفَانِ.
365 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a <i>wadʿa</i> is in the possession of a man, and two men lay claim to it (<i>iddaʾāhā</i>), each one of them claiming that it belongs to him, and it [the deposited thing] is the sort of thing which is known by its distinctive substance (<i>yuʿrafu bi-ʾaynihi</i>) [i.e., a non-fungible which can't be confused for something else], like the slave, and the camel, and the house, and he [the depositary] says: It belongs to one of you two, but I don't know which one of you it is. It is said to	365 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَتْ فِي يَدَيِ الرَّجُلِ وَدِيعَةٌ، فَادَّعَاهَا رَجُلَانِ كِلَاهُمَا يَزْعُمُ أَنَّهَا لَهُ، وَهِيَ مِمَّا يُعْرَفُ بِعَيْنِهِ، مِثْلُ الْعَبْدِ وَالْبَعِيرِ وَالْدَّارِ، فَقَالَ: هِيَ لِأَحَدِكُمَا وَلَا أَدْرِي أَيُّكُمَا هُوَ. قِيلَ لَهُمَا: هَلْ تَدْعِيَانِ شَيْئًا غَيْرَ هَذَا بِعَيْنِهِ؟ فَإِنْ قَالَا: لَا. وَقَالَ كُلُّ وَاحِدٍ مِنْهُمَا: هُوَ لِي. أُحْلِفَ بِاللَّهِ لَا يَدْرِي

³ In other words, if the second is actually deserving, his right will have been destroyed by the depositary's affirmation of the false party first.

⁴ Al-Afghānī (51, n.5) is puzzled by the mention of *muḍāraba* in this formulation of Ibn Abī Laylā's opinion: "Thus it appears in the original. And in some of the copies of the *Kitāb al-Waḍʿa* of the Aṣl: And the *wadʿa* is [divided] between them both, and it is the correct opinion (*al-sawāb*), and perhaps the *lafz* of *al-muḍāraba* was incorporated by the copyist by mistake (*adrajahu al-nāsikhū sahwam*).” From the context, however, it merely appears that Ibn Abī Laylā is extending his ruling to cover a parallel case. I.e., when the *rabb al-māl* can't remember which of two *muḍārib* agents he contracted a particular *muḍāraba* contract with, he must split the rightful *muḍārib*'s portion between them both.

them both: Does either of you claim to something other than this very thing itself (<i>hādhā bi-'aynihi</i>)? Then — if they both say: No; and each one of them says: It belongs to me — he [the depositary] is made to swear (<i>uḥlifa</i>), by God, he does not know to which one of the two it belongs. And that [decision] is suspended (<i>wuqifa</i>) for both of them, together, until they reach amicable settlement regarding it (<i>yaṣṭaliḥā fīhi</i>), or each one of them furnishes <i>bayyina</i> against his <i>ṣāhib</i>, that it belongs to him exclusively (<i>annahu lahu dūnahu</i>). Or they both swear; and if one of them refuses to swear (<i>nakala</i>) while the other one swears, it belongs to him; but if they both refuse to swear, together, then it is suspended (<i>mawqūf^{an}</i>) between them both.	لَا يَهُمَا هُوَ وَوُقِفَ ذَلِكَ لَهُمَا جَمِيعًا حَتَّى يَصْطَلِحَا فِيهِ أَوْ يُقِيمَ كُلُّ وَاحِدٍ مِنْهُمَا الْبَيِّنَةَ عَلَى صَاحِبِهِ؛ أَنَّهُ لَهُ دُونَهُ أَوْ يَحْلِفَا، فَإِنْ نَكَلَ أَحَدُهُمَا وَحَلَفَ الْآخَرُ كَانَ لَهُ، وَإِنْ نَكَلَا مَعًا فَهُوَ مَوْقُوفٌ بَيْنَهُمَا.
366 – And there is another <i>qawl</i> regarding it which is possible (<i>wa fihā qawl^{un} ākharu yuḥtamalu</i>): It is that he in whose possession the <i>wadī'a</i> rests should swear, then it leaves his possession and there is nothing more [enjoined] upon him besides that, and it is suspended for them both until they reach amicable settlement over it. And who professes this <i>qawl</i> says: This thing is not in their possession, so I divide it between them both (<i>aqsimuhu baynahumā</i>), while the one in whose possession it rests claims that it belongs to one of them, not to both of them.	366 – وَفِيهَا قَوْلٌ آخَرُ يُحْتَمَلُ؛ وَهُوَ أَنْ يَحْلِفَ الَّذِي فِي يَدَيْهِ الْوَدِيعَةَ ثُمَّ تَخْرُجُ مِنْ يَدَيْهِ وَلَا شَيْءَ عَلَيْهِ غَيْرُ ذَلِكَ فَتَوْقُفُ لَهُمَا حَتَّى يَصْطَلِحَا عَلَيْهِ. وَمَنْ قَالَ هَذَا الْقَوْلَ قَالَ: هَذَا شَيْءٌ لَيْسَ فِي أَيْدِيهِمَا فَأَقْسِمُهُ بَيْنَهُمَا وَالَّذِي هُوَ فِي يَدَيْهِ يَزْعُمُ أَنَّهُ لِأَحَدِهِمَا لَا لَهُمَا.
367 – And when a man contracts a <i>wadī'a</i>, then the <i>mustawda'</i> contracts it as deposit to another; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: He is liable (<i>dāmin^{un}</i>), because he violated [the agreement] (<i>khālaḥa</i>). And he [Abū Yūsuf] embraces this [doctrine].	367 – وَإِذَا اسْتَوْدَعَ الرَّجُلُ وَدِيعَةً فَاسْتَوْدَعَهَا الْمُسْتَوْدَعُ غَيْرَهُ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: هُوَ ضَامِنٌ؛ لِأَنَّهُ خَالَفَ. وَبِهَذَا يَأْخُذُ.
368 – But Ibn Abī Laylā used to say: There is no <i>ḍamān</i> [enjoined] upon him.	368 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا ضَمَانٌ عَلَيْهِ.
369 – Al-Shāfi'ī, may God Most High have mercy upon him, said: When a man entrusts a deposit (<i>awda'a... al-wadī'ata</i>) with a man, then he [the depositary] contracts it as deposit with another; he is liable if it is destroyed (<i>ḍamina in talifat</i>), because the [original] depositor (<i>al-</i>	369 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَوْدَعَ الرَّجُلُ الرَّجُلَ الْوَدِيعَةَ فَاسْتَوْدَعَهَا غَيْرَهُ ضَمِنَ إِنْ تَلَفَتْ؛ لِأَنَّ الْمُسْتَوْدَعَ رَضِيَ بِأَمَانَتِهِ

<i>mustawdi'a</i>) gave consent to his fiduciary duty (<i>raḍiya bi-amānatihi</i>), not the <i>amāna</i> of another, and he did not authorize him (<i>lam yusalliṭhu</i>) to entrust it to another — so he is a transgressor, liable (<i>muta'addiy^{an} dāmin^{an}</i>) if it is destroyed.	لَا أَمَانَةَ غَيْرِهِ وَلَمْ يُسَلِّطْهُ عَلَى أَنْ يُودِعَهَا غَيْرَهُ، وَكَانَ مُتَعَدِّيًا ضَامِنًا إِنْ تَلَفَتْ.
370 – And when the man dies while he owes a known debt (<i>wa 'alayhi dayn^{un} ma'rūf^{un}</i>), and he owes [return of] a deposit of something other than [what is known] by its distinctive substance (<i>qibalahu wadī'at^{un} bi-ghayri 'aynihā</i>); then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: The entirety of what he leaves behind is [divided] between the creditors (<i>al-ghuramā'</i>) and the <i>ṣāhib</i> of the <i>wadī'a</i>, by shares (<i>bi'l-ḥiṣāsi</i>). And he [Abū Yūsuf] embraces this [doctrine].	370 – وَإِذَا مَاتَ الرَّجُلُ وَعَلَيْهِ دَيْنٌ مَعْرُوفٌ وَقَبْلَهُ وَدِيعَةٌ بَعِيرٍ عَيْنِهَا، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: جَمِيعُ مَا تَرَكَ بَيْنَ الْغُرَمَاءِ وَصَاحِبِ الْوَدِيعَةِ بِالْحِصَصِ. وَبِهَذَا يَأْخُذُ.
371 – But Ibn Abī Laylā used to say: It belongs to the creditors, and not to the <i>ṣāhib</i> of the <i>wadī'a</i>, because the <i>wadī'a</i> is an unknown thing (<i>shay^{un} majhūl^{un}</i>), not something [known] by its distinctive substance (<i>shayⁱⁿ bi-'aynihi</i>).	371 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هِيَ لِلْغُرَمَاءِ وَلَيْسَ لِصَاحِبِ الْوَدِيعَةِ؛ لِأَنَّ الْوَدِيعَةَ شَيْءٌ مَجْهُولٌ لَيْسَ بِشَيْءٍ بَعِينِهِ.
372 – And Abū Ḥanīfa said: And if the <i>wadī'a</i> is [known] by its distinctive substance (<i>bi-'aynihā</i>), then it belongs to the <i>ṣāhib</i> of the <i>wadī'a</i> when he finds that out.	372 – وَقَالَ أَبُو حَنِيفَةَ: فَإِنْ كَانَتْ الْوَدِيعَةُ بَعِينِهَا فَهِيَ لِصَاحِبِ الْوَدِيعَةِ إِذَا عَلِمَ ذَلِكَ.
373 – And likewise did Ibn Abī Laylā profess.	373 – وَكَذَلِكَ قَالَ ابْنُ أَبِي لَيْلَى.
374 – Abū Ḥanīfa, on the authority of Ḥammād, on Ibrāhīm, [reported] that he professed regarding the man who dies while in possession of a <i>wadī'a</i> and while owing a debt: They indeed share among each other (<i>yataḥāṣṣūna</i>), the creditors and the <i>aṣḥāb</i> of the <i>wadī'a</i>.	374 – أَبُو حَنِيفَةَ، عَنْ حَمَّادٍ، عَنْ إِبْرَاهِيمَ أَنَّهُ قَالَ فِي الرَّجُلِ يَمُوتُ وَعِنْدَهُ الْوَدِيعَةُ وَعَلَيْهِ دَيْنٌ؛ أَنَّهُمْ يَتَحَاصُّونَ؛ الْغُرَمَاءُ وَأَصْحَابُ الْوَدِيعَةِ.
375 – Al-Ḥajjāj b. Arṭāt, on the authority of Abū Ja'far and 'Aṭā': the like of that.	375 – الْحَجَّاجُ بْنُ أَرْطَاةَ، عَنْ أَبِي جَعْفَرٍ وَعَطَاءٍ مِثْلَ ذَلِكَ.
376 – Al-Ḥajjāj, on al-Ḥakam, on Ibrāhīm: the like.	376 – الْحَجَّاجُ، عَنْ الْحَكَمِ، عَنْ إِبْرَاهِيمَ مِثْلَهُ.

377 – Al-Shāfi'ī, may God Most High be pleased with him, said: And when a man contracts the *wadī'a* with a man, and the *mustawda'* dies while acknowledging (*aqarra*) the *wadī'a* by its distinctive substance (*bi-'aynihā*), or *bayyina* is furnished for him, and he owes a debt encompassing his property (*muhīt^{un} bi-mālihi*); the *wadī'a* belongs to its *ṣāhib* [the depositor]. But if the *wadī'a* is not known by its distinctive substance, by *bayyina* furnished, nor by *iqrār* from the deceased, but its number or value is known; the *ṣāhib* of the *wadī'a* is just like a creditor from among the creditors (*ka-gharīmⁱⁿ min al-ghuramā'i*).

377 – قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ تَعَالَى عَنْهُ:
وَإِذَا اسْتَوْدَعَ الرَّجُلُ الرَّجُلَ الْوَدِيعَةَ، فَمَاتَ
الْمُسْتَوْدَعُ وَأَقَرَّ بِالْوَدِيعَةِ بِعَيْنِهَا، أَوْ قَامَتْ عَلَيْهِ
بَيِّنَةٌ وَعَلَيْهِ دَيْنٌ مُحِيطٌ بِمَالِهِ، كَانَتْ الْوَدِيعَةُ
لِصَاحِبِهَا، فَإِنْ لَمْ تُعْرَفِ الْوَدِيعَةُ بِعَيْنِهَا بَيِّنَةً
تَقُومُ وَلَا إِقْرَارٍ مِنَ الْمَيِّتِ وَعُرِفَ لَهَا عَدَدٌ أَوْ
قِيَمَةٌ، كَانَ صَاحِبُ الْوَدِيعَةِ كَغَرِيمٍ مِنَ الْغُرَمَاءِ.

Bāb fi'l-Rahn

Chapter on Pledge/Security (<i>al-Rahn</i>) ¹	بَابُ فِي الرَّهْنِ
378 – Al-Rabī reported to us, he said: Al-Shāfiʿī, may God Most High have mercy upon him, said: And if a man contracts to receive security (<i>irtahana... rahn^{an}</i>), and he places it in the possession of a trustworthy third party (<i>ʿadl</i>) with the <i>riḍā</i> of its <i>ṣāhib</i> [i.e., the pledgor-debtor], and it is destroyed (<i>halaka</i>) in the care of the <i>ʿadl</i>, and its value and the debt [for which it was pledged] are equal; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: “The <i>rahn</i> is for what it was [pledged] for (<i>al-rahnu bimā fīhi</i>),” and the debt has been nullified (<i>wa qad baṭala al-daynu</i>).² And he [Abū Yūsuf] embraces it.	378 – أَخْبَرَنَا الرَّبِيعُ قَالَ: قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَلَوْ ارْتَهَنَ الرَّجُلُ رَهْنًا فَوَضَعَهُ عَلَى يَدَيِ عَدْلٍ بِرِضَا صَاحِبِهِ فَهَلَكَ مِنْ عِنْدِ الْعَدْلِ وَقِيمَتُهُ وَالْدَيْنُ سَوَاءً، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: الرَّهْنُ بِمَا فِيهِ وَقَدْ بَطَلَ الدَّيْنُ. وَبِهِ يَأْخُذُ.

¹ (Ḥassūn, vol.9, pt.14, 74-7; Schacht: *Tr. I*, 68-72). There are (at least) two independent treatments of *rahn* in the main body of the *Umm*, which at some point were most likely separate treatises. In fact, al-Nadīm (*Fihrist*, 353) lists both a *Kitāb al-Rahn al-Kabīr* and a *Kitāb al-Rahn al-ṣaghīr* among al-Shāfiʿī's works. It is little surprise, then, that both of these appear as headings in the Būlāq edition, though the second is not prefaced with “*Kitāb*” (see iii.122 for the *K. al-Rahn al-Kabīr*; and iii.164 for *al-Rahn al-ṣaghīr*). As both of these begin by explaining the Qurʾānic *aṣl* for the permissibility of *rahn* — and in combination with the above clues —, we may conclude with a degree of high probability that the *Kabīr* and *ṣaghīr* treatments of *rahn* were at one time independent books, both transmitted by al-Rabī, and incorporated — with so many other treatises, pamphlets, and books attributed to al-Shāfiʿī — into this massive compendium called the *Umm*. Interestingly, the Būlāq edition also reduplicates the entire *Bāb al-Rahn* as it appears here in the *K. Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā*, inserting it in a long footnote (iii.175-6, n.1) at the end of the chapter entitled *Jināyat al-Rahn* (which itself is the last section of *al-Rahn al-ṣaghīr*).

² I have placed the first half of Abū Ḥanīfa's ruling in quotes, for, as Schacht (*Origins*, 186) points out, this same formula may also be found in the *Muwattaʿa*ʿ (36:14). The context therein makes more sense of this apparent maxim, which is thus translated by Bewley: “the pledge is compensated for by the loan” (*Al-Muwattaʿa of Imam Malik ibn Anas: the First Formulation of Islamic Law*, transl. Aisha Abdurrahman Bewley (London : Kegan Paul International, 1989), 301). Schacht, on the other hand, translates “*al-rahnu bimā fīhi*” as: “the security takes the place of that for which it is given.” He also considers it of likely “foreign origin,” back-projected to Shurayḥ and the Prophet (*Origins*, 186). This phrase crops up in a number of related discussions within the *Umm*, as follows: 1) §9453, in the *Bāb al-Rahn al-Fāsid* (Ḥassūn, vol.4, pt.7, 73; which would once have appeared as a chapter in the *K. al-Rahn al-Kabīr*, under which heading it appears in Būlāq); and 2) §§9828, 9836, 9842, 9844, 9857, and 9899 in the *Bāb al-Rahn al-ṣaghīr* (Ḥassūn, vol.4, pt.7, 157f.; which, in all likelihood, was once the independent *Kitāb al-Rahn al-ṣaghīr* mentioned by Al-Nadīm.)

379 – But Ibn Abī Laylā used to say: The debt is [still] owed by the pledgor-debtor (<i>al-rāhin</i>), just as it was while the <i>rahn</i> was among his <i>māl</i>, because it was not in the possession of the pledgee-creditor (<i>al-murtahin</i>)— it was, rather, placed in the possession of another.	379 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الدَّيْنُ عَلَى الرَّاهِنِ كَمَا هُوَ وَالرَّهْنُ مِنْ مَالِهِ؛ لِأَنَّهُ لَمْ يَكُنْ فِي يَدَيِ الْمُرْتَهِنِ إِنَّمَا كَانَ مَوْضُوعًا عَلَى يَدَيِ غَيْرِهِ.
380 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man contracts the <i>rahn</i>, and he [the <i>murtahin</i>] takes possession of it [the <i>rahn</i>] from him, or an <i>ʿadl</i> they both consent to (<i>raḍiyā bihi</i>) takes possession of it, then the <i>rahn</i> is destroyed in his [the <i>murtahin</i>’s] possession, or in the possession of the <i>ʿadl</i>; it is one and the same (<i>fa-sawāʿun</i>): the <i>rahn</i> is a fiduciary duty (<i>amānat^{un}</i>) and the debt (<i>al-dayn</i>) is as it was, there diminishes from it nothing. And we have written a long treatise (<i>kitāb^{un} ṭawīl^{un}</i>) regarding this.³	380 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا رَهَنَ الرَّجُلُ الرَّهْنَ فَقَبَضَهُ مِنْهُ أَوْ قَبَضَهُ عَدْلٌ رَضِيًا بِهِ، فَهَلَكَ الرَّهْنُ فِي يَدَيْهِ أَوْ فِي يَدَيِ الْعَدْلِ فَسَوَاءٌ، الرَّهْنُ أَمَانَةٌ وَالْدَّيْنُ كَمَا هُوَ لَا يَنْقُصُ مِنْهُ شَيْءٌ. وَقَدْ كَتَبْنَا فِي هَذَا كِتَابًا طَوِيلًا.
381 – And when the <i>rāhin</i> dies while he owes a debt, and the <i>rahn</i> is in the possession of an <i>ʿadl</i>; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: The <i>murtahin</i> has more right (<i>aḥaqqu</i>) to this <i>rahn</i> than the creditors (<i>al-ghuramāʾ</i>). And he [Abū Yūsuf] embraces it.	381 – وَإِذَا مَاتَ الرَّاهِنُ وَعَلَيْهِ دَيْنٌ وَالرَّهْنُ عَلَى يَدَيِ عَدْلٍ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: الْمُرْتَهِنُ أَحَقُّ بِهَذَا الرَّهْنِ مِنَ الْغُرَمَاءِ. وَبِهِ يَأْخُذُ.
382 – But Ibn Abī Laylā used to say: The <i>rahn</i> is [divided] between the creditors and the <i>murtahin</i> by shares (<i>bi'l-ḥiṣāṣi</i>), according to the measure of their property (<i>ʿalā qadri amwālihim</i>). And when the <i>rahn</i> is in the possession of the <i>murtahin</i>, he has more right to it than the creditors. And their <i>qawl</i>, together, [i.e., the <i>qawl</i> of both Abū Ḥanīfa and Ibn Abī Laylā] regarding it is one.	382 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الرَّهْنُ بَيْنَ الْغُرَمَاءِ وَالْمُرْتَهِنِ بِالْحِصَصِ عَلَى قَدْرِ أَمْوَالِهِمْ، وَإِذَا كَانَ الرَّهْنُ فِي يَدَيِ الْمُرْتَهِنِ فَهُوَ أَحَقُّ بِهِ مِنَ الْغُرَمَاءِ. وَقَوْلُهُمَا جَمِيعًا فِيهِ وَاحِدٌ.
383 – Al-Shāfiʿī, may God Most High be pleased with him, said: And when the <i>rāhin</i> dies while he owes a debt, and he has contracted <i>rahn</i> in the possession of the <i>ṣāhib</i> of the debt, or the possession of another; it is one and the same (<i>fa-sawāʿun</i>), and the <i>murtahin</i> has more right to the price (<i>thaman</i>) of this <i>rahn</i> until he fully exacts (<i>yastawfiya</i>) his <i>ḥaqq</i> from it. And if there	383 – قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ تَعَالَى عَنْهُ: وَإِذَا مَاتَ الرَّاهِنُ وَعَلَيْهِ دَيْنٌ وَقَدْ رَهَنَ رَهْنًا عَلَى يَدَيِ صَاحِبِ الدَّيْنِ أَوْ يَدَيِ غَيْرِهِ فَسَوَاءٌ، وَالْمُرْتَهِنُ أَحَقُّ بِثَمَنِ هَذَا الرَّهْنِ حَتَّى

³ As per the previous notes, it is likely that this “*kitāb ṭawīl*” refers either to a treatment of the *masʿala* in the *K. al-Rahn al-Kabīr*, or the *K. al-Rahn al-Ṣaghīr*.

arises a surplus (<i>faḍala... faḍl^{an}</i>) from it, the creditors are legally [entitled] to it (<i>shar^{an} fihi</i>), ⁴ and if it (the <i>faḍl</i>) falls short of (<i>naqasha</i> ^{'an}) the debt, the <i>ahl</i> of the debt share out (<i>hāṣṣa</i>) what remains of the <i>māl</i> of the deceased.	يَسْتَوْفِي حَقَّهُ مِنْهُ، فَإِنْ فَضَلَ فِيهِ فَضْلٌ كَانَ الْغُرْمَاءُ شَرْعًا فِيهِ وَإِنْ نَقَصَ عَنِ الدَّيْنِ حَاصٌّ أَهْلَ الدَّيْنِ بِمَا يَبْقَى لَهُ فِي مَالِ الْمَيِّتِ.
384 – And when a man contracts a house as <i>rahn</i> with a man, then a portion (<i>shiqṣ</i>) of it becomes [someone's] rightful due (<i>ustuhiqqa</i>), but the <i>murtahin</i> has taken possession of it; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: The <i>rahn</i> is <i>bāṭil</i> , not permitted. And he [Abū Yūsuf] embraces this [doctrine].	384 – وَإِذَا رَهَنَ الرَّجُلُ الرَّجُلَ دَارًا ثُمَّ أُسْتُحِقَّ مِنْهَا شَيْءٌ وَقَدْ قَبَضَهَا الْمُرْتَهِنُ، فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: الرَّهْنُ بَاطِلٌ لَا يَجُوزُ. وَبِهَذَا يَأْخُذُ.
385 – My memory concerning him [Abū Ḥanīfa] (<i>hiḍḍi 'anhu</i>): For every invalid <i>rahn</i> which comes about invalidly (<i>waqa'a fāsid^{an}</i>), ⁵ the <i>ṣāhib</i> of the <i>māl</i> has more right regarding it, so that he exact full value from his <i>māl</i> , which is sold for his debt.	385 – حِفْظِي عَنْهُ فِي كُلِّ رَهْنٍ فَاسِدٍ وَقَعَ فَاسِدًا، فَصَاحِبُ الْمَالِ أَحَقُّ بِهِ حَتَّى يَسْتَوْفِيَ مَالَهُ يُبَاعُ لِدَيْنِهِ.
386 – But Ibn Abī Laylā used to say: What remains of the house – it is <i>rahn</i> for the <i>ḥaqq</i> .	386 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: مَا بَقِيَ مِنَ الدَّارِ فَهُوَ رَهْنٌ بِالْحَقِّ.
387 – But Abū Ḥanīfa, may God Most High be pleased with him, said concerning it: And how can that be, when indeed his <i>rahn</i> was merely an un-apportioned share (<i>naṣīb^{an} ghayra maqsūmⁱⁿ</i>)?	387 – وَقَالَ أَبُو حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ: وَكَيْفَ يَكُونُ ذَلِكَ وَإِنَّمَا كَانَ رَهْنُهُ نَصِيبًا غَيْرَ مَقْسُومٍ.
388 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man contracts a house as <i>rahn</i> with a man, and the <i>murtahin</i> takes possession of it, then something of the house becomes rightfully due [to another]; what remains of the house is <i>rahn</i> for the entire debt for which the house was <i>rahn</i> . And if he initiates (<i>ibtada'a</i>) a share (<i>naṣīb</i>) of a portion known, jointly owned (<i>shiqṣⁱⁿ ma'lūmⁱⁿ mushāⁱⁿ</i>), it is permitted. What is permitted to be <i>bay'</i> is permitted to be <i>rahn</i> ; and the taking-possession (<i>qabḍ</i>) regarding <i>rahn</i> is like the	388 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا رَهَنَ الرَّجُلُ الرَّجُلَ دَارًا فَقَبَضَهَا الْمُرْتَهِنُ ثُمَّ أُسْتُحِقَّ مِنَ الدَّارِ شَيْءٌ، كَانَ مَا يَبْقَى مِنَ الدَّارِ رَهْنًا بِجَمِيعِ الدَّيْنِ الَّذِي كَانَتْ الدَّارُ بِهِ رَهْنًا، وَلَوْ ابْتَدَأَ نَصِيبَ شَيْءٍ مَعْلُومٍ مُشَاعٍ جَازَ، مَا جَازَ أَنْ يَكُونَ بَيْعًا جَازَ أَنْ يَكُونَ رَهْنًا، وَالْقَبْضُ فِي الرَّهْنِ مِثْلُ الْقَبْضِ فِي الْبَيْعِ

⁴ Ḥassūn (ix.74, n.2) notes that, in MS copy *kāf*, instead of شَرْعًا there appears شركاء. Maṭrajī, Najjār, and Būlāq all have شَرْعًا.

⁵ This is Abū Yūsuf recounting his memory of the opinion of Abū Ḥanīfa. We will note other instances of the *hiḍḍi* formula: §439 (al-Rab' on al-Shāfi'ī); §514 (Muḥammad b. al-Ḥasan on Abū Yūsuf).

taking-possession in <i>bayʿ</i> — the two do not differ. And this is written in the <i>Kitāb al-Rahn</i>.⁶	لَا يَخْتَلِفَانِ. وَهَذَا مَكْتُوبٌ فِي كِتَابِ الرَّهْنِ.
389 – And when the man places the <i>rahn</i> in the possession of an <i>ʿadl</i>, and authorizes him to contract the sale of it (<i>wa sallatahu ʿalā bayʿihi</i>) at the coming due of the term (<i>ʿinda maḥalli al-ʿajali</i>), then the <i>rāhin</i> dies; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: To the <i>ʿadl</i> belongs the right to sell the <i>rahn</i>; for had the death of the <i>rāhin</i> nullified his <i>bayʿ</i>, the <i>rahn</i> [itself] would be nullified. And he [Abū Yūsuf] embraces it.	389 – وَإِذَا وَضَعَ الرَّجُلُ الرَّهْنَ عَلَى يَدَيْ عَدْلٍ وَسَلَّطَهُ عَلَى بَيْعِهِ عِنْدَ مَحَلِّ الْأَجَلِ ثُمَّ مَاتَ الرَّاهِنُ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لِلْعَدْلِ أَنْ يَبِيعَ الرَّهْنَ، وَلَوْ كَانَ مَوْتُ الرَّاهِنِ يُبْطِلُ بَيْعَهُ لَأَبْطَلَ الرَّهْنَ، وَبِهِ يَأْخُذُ.
390 – But Ibn Abī Laylā used to say: He has no right to contract <i>bayʿ</i>, for the <i>rahn</i> has been nullified (<i>qad baṭala</i>), and become [divided] among the creditors. But to the one authorized (<i>liʾl-musallaṭi</i>) belongs the right to sell it during the illness of the <i>rāhin</i>, and it belongs specifically/especially (<i>khāṣṣat^{an}</i>) to the <i>murtahin</i>, according to the <i>qiyās</i> of his <i>qawl</i>.	390 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَيْسَ لَهُ أَنْ يَبِيعَ وَقَدْ بَطَلَ الرَّهْنُ وَصَارَ بَيْنَ الْعُرَمَاءِ، وَلِلْمُسَلَّطِ أَنْ يَبِيعَهُ فِي مَرَضِ الرَّاهِنِ، وَيَكُونُ لِلْمُرْتَهِنِ خَاصَّةً فِي قِيَاسِ قَوْلِهِ.
391 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the <i>rāhin</i> places the <i>rahn</i> in the possession of an <i>ʿadl</i>, and authorizes him to contract sale of it at the coming-due of the right (<i>ʿinda maḥalli al-ḥaqqi</i>); then he is, as regards it, an agent (<i>wakīl</i>), and when the <i>ḥaqq</i> comes due, he has the right to sell it so long as the <i>rāhin</i> is living. And when he dies, there belongs to him no right to the <i>bayʿ</i> except by order of the <i>sultān</i>, or by <i>riḍā</i> of the heir (<i>al-wārith</i>), because the deceased, even if he consented to his fiduciary duty (<i>raḍiya bi-amānatihi</i>) regarding the <i>bayʿ</i> of the <i>rahn</i>, the <i>milk</i> of the <i>rahn</i> has transferred to someone else among the heirs who have not consented to his [the <i>ʿadl</i>’s] <i>amāna</i>. And the <i>rahn</i>-contract in its condition (<i>bi-ḥālihi</i>) is not dissolved (<i>lā yanfasikhu</i>) due to the fact that the heirs own of the <i>rahn</i> only what belonged to the	391 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا وَضَعَ الرَّاهِنُ الرَّهْنَ عَلَى يَدَيْ عَدْلٍ وَسَلَّطَهُ عَلَى بَيْعِهِ عِنْدَ مَحَلِّ الْحَقِّ فَهُوَ فِيهِ وَكِيلٌ، فَإِذَا حَلَّ الْحَقُّ كَانَ لَهُ أَنْ يَبِيعَهُ مَا كَانَ الرَّاهِنُ حَيًّا، فَإِذَا مَاتَ لَمْ يَكُنْ لَهُ الْبَيْعُ إِلَّا بِأَمْرِ السُّلْطَانِ أَوْ بِرِضَا الْوَارِثِ؛ لِأَنَّ الْمَيِّتَ وَإِنْ رَضِيَ بِأَمَانَتِهِ فِي بَيْعِ الرَّهْنِ فَقَدْ تَحَوَّلَ مِلْكُ الرَّهْنِ لِعَیْرِهِ مِنَ الْوَرَثَةِ الَّذِينَ لَمْ يَرْضَوْا أَمَانَتَهُ، وَالرَّهْنُ بِحَالِهِ لَا يَنْفَسِكُ مِنْ قَبْلِ أَنْ الْوَرَثَةُ إِثْمًا مَلَكَوْا مِنَ الرَّهْنِ مَا كَانَ لَهُ الرَّاهِنُ مَالِكًا، فَإِذَا كَانَ الرَّاهِنُ لَيْسَ لَهُ أَنْ

⁶ Again, this *Kitāb al-Rahn* may refer to the *K. al-Rahn al-Kabīr*, or the *K. al-Rahn al-Ṣaghīr*, as mentioned in Al-Nadīm’s *Fihrist*, and appearing as chapters in the main body of the *Umm*. The referenced discussion appears to be that which occurs under the subheading of مَا يَكُونُ قَبْضًا فِي (Hassūn, vol. 4, pt. 7, pp.16-20); especially at §9187. This occurs near the start of the *K. al-Rahn al-Kabīr*, as it appears in Būlāq (iii.125ff.)

<i>rāhin</i> [in his status] as <i>mālik</i>; and when the <i>rāhin</i> has no right to dissolve it [the <i>rahn</i>], the same is true of the <i>wārith</i>. And the agency (<i>al-wakālatu</i>) to contract the <i>bay'</i> of it, is not the <i>rahn</i> — the <i>wakāla</i>, even if it is nullified, the <i>rahn</i> is not nullified.	يَفْسَخُهُ كَانَ كَذَلِكَ الْوَارِثُ، وَالْوَكَاةُ بِيَعِهِ غَيْرُ الرَّهْنِ، الْوَكَاةُ لَوْ بَطَلَتْ لَمْ يَبْطُلِ الرَّهْنُ.
391m – And when a man contracts to receive a house as <i>rahn</i> (<i>irtahana... dār^{an}</i>), then he lets it out for rent (<i>qjarahā</i>) by permission of (<i>bi-idhni</i>) the <i>rāhin</i>; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: It [the house] departed from [the domain of] the <i>rahn</i> when he gave him permission to let it out for rent, and it came into the domain of the loan of a non-fungible (<i>ṣārat bi-manzilat al-‘āriyyati</i>). And he [Abū Yūsuf] embraces it.⁷	391م – وَإِذَا ارْتَهَنَ الرَّجُلُ دَارًا ثُمَّ أَجَرَهَا بِإِذْنِ الرَّاهِنِ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: قَدْ خَرَجَتْ مِنَ الرَّهْنِ حِينَ أَذِنَ لَهُ أَنْ يُؤْجِرَهَا وَصَارَتْ بِمَنْزِلَةِ الْعَارِيَّةِ. وَبِهِ يَأْخُذُ.
392 – But Ibn Abī Laylā used to say: It [the house] is <i>rahn</i>, as it was (<i>‘alā ḥālihā</i>), and the proceeds (<i>al-ghalla</i>) [from the renting out] are, to the <i>murtahin</i>, an effectuation (<i>qaḍā^{um}</i>) of his <i>ḥaqq</i>.⁸	392 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هِيَ رَهْنٌ عَلَى حَالِهَا، وَالْعَلَّةُ لِلْمُرْتَهِنِ قَضَاءٌ مِنْ حَقِّهِ.
393 – Al-Shāfi‘ī, may God Most High be pleased with him, said: And when a man contracts a house to a man as <i>rahn</i>, and he turns it over to the <i>murtahin</i> or to an <i>‘adl</i>, and he gives permission for its rental (<i>kirā’ihā</i>) and it is rented out; the rent (<i>al-kirā’</i>) belongs to the <i>rāhin</i>, because he is the <i>mālik</i> of the house, and it [the house] does not, by means of this [renting], exit [the domain of] the <i>rahn</i>.	393 – قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ تَعَالَى عَنْهُ: وَإِذَا رَهَنَ الرَّجُلُ الرَّجُلَ دَارًا وَدَفَعَهَا إِلَى الْمُرْتَهِنِ أَوْ عَدْلٍ وَأَذِنَ بِكِرَائِهَا فَأُكْرِيتَ كَانَ الْكِرَاءُ لِلرَّاهِنِ؛ لِأَنَّهُ مَالِكُ الدَّارِ وَلَا تَخْرُجُ بِهَذَا مِنَ الرَّهْنِ.
394 – And there only prevents us (<i>mana‘anā</i>) from making the <i>kirā’</i> as a <i>rahn</i>, or as a settlement (<i>qiṣāṣ^{um}</i>) of the debt, that the <i>kirā’</i> is a dwelling (<i>sakan^{um}</i>), and the <i>sakan</i> is not, in fact, what is pledged as security (<i>laysa huwa al-marhūna</i>). Don’t you see/opine (<i>alā tarā</i>) that — if he sold a house to him, and he [the buyer] dwelled in it, or reaped profit from it (<i>istaghallahā</i>), then returned it due to a defect — the <i>sakan</i> and the <i>ghalla</i> belong to the buyer? And if he takes anything from the <i>aṣl</i> of the house [i.e., he reduces it in	394 – وَإِنَّمَا مَنَعَنَا أَنْ نَجْعَلَ الْكِرَاءَ رَهْنًا أَوْ قِصَاصًا مِنَ الدَّيْنِ أَنَّ الْكِرَاءَ سَكْنٌ وَالسَّكْنُ لَيْسَ هُوَ الْمَرْهُونُ، أَلَا تَرَى أَنَّهُ لَوْ بَاعَهُ دَارًا فَسَكَنَهَا أَوْ اسْتَعْلَمَهَا ثُمَّ رَدَّهَا بَعِيْبٌ كَانَ السَّكْنُ وَالْعَلَّةُ لِلْمُسْتَعْتَرِي، وَلَوْ أَخَذَ مِنْ أَصْلِ الدَّارِ شَيْئًا لَمْ يَكُنْ لَهُ أَنْ يَرُدَّهَا؛ لِأَنَّ مَا أَخَذَ

⁷ §391m: Ḥassūn makes no mention as to why this section is so numbered, and the text in the Būlāq edition is continuous. I must assume it is a correction made after the original numbering was complete (i.e., 391 had mistakenly incorporated what ought to have been 392, and 392 – having been assigned – could not be changed without changing every subsequent number, so the mis-incorporated section was labelled 391m).

⁸ I.e., insofar as they recompense the debt owed by the *rāhin*.

substance], he has no right to return it, because what he took from the house is of the <i>aṣl</i> of the <i>bay'</i>, and the <i>kirā'</i> and the <i>ghalla</i> are not the <i>aṣl</i> of the <i>bay'</i>. And when the <i>rāhin</i> has indeed contracted as <i>rahn</i> only the substance (<i>raqaba</i>)⁹ of the house, and the <i>raqaba</i> of the house belongs to the <i>rāhin</i>, unless he stipulated a <i>haqq</i> regarding it to the <i>murtahin</i>, it is not permitted that the accretion (<i>al-namā'</i>) from <i>kirā'</i> and the <i>sakan</i> belong to anyone but the <i>rāhin</i> — the <i>mālik</i> of the <i>raqaba</i>; just as the <i>kirā'</i> and the <i>sakan</i> belong to the buyer — the <i>mālik</i> of the <i>raqaba</i>, at such a time.¹⁰	مِنْ الدَّارِ مِنْ أَصْلِ الْبَيْعِ، وَالْكَرَاءُ وَالْعَلَّةُ لَيْسَ أَصْلُ الْبَيْعِ، فَلَمَّا كَانَ الرَّاهِنُ إِنَّمَا رَهْنَ رَقَبَةِ الدَّارِ وَكَانَتْ رَقَبَةُ الدَّارِ لِلرَّاهِنِ إِلَّا أَنَّهُ شَرَطَ لِلْمُرْتَهِنِ فِيهَا حَقًّا لَمْ يَحْزُ أَنْ يَكُونَ التَّمَاءُ مِنَ الْكَرَاءِ وَالسَّكَنِ إِلَّا لِلرَّاهِنِ الْمَالِكِ الرَّقَبَةِ، كَمَا كَانَ الْكَرَاءُ وَالسَّكَنُ لِلْمُشْتَرِي الْمَالِكِ الرَّقَبَةِ فِي حِينِهِ ذَلِكَ.
395 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man contracts to receive, as <i>rahn</i>, a third of a house, or a quarter of it, and he takes possession of the <i>rahn</i>; the <i>rahn</i> is <i>jā'iz</i> — what is permitted to be as <i>bay'</i>, and as taking-possession in the <i>bay'</i>, is permitted to be as <i>rahn</i>, and as taking-possession in the <i>rahn</i>.	395 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا ارْتَهَنَ الرَّجُلُ ثُلُثَ دَارٍ أَوْ رُبُعَهَا وَقَبِضَ الرَّهْنَ فَالرَّهْنُ جَائِزٌ، مَا جَازَ أَنْ يَكُونَ بَيْعًا وَقَبْضًا فِي الْبَيْعِ جَازَ أَنْ يَكُونَ رَهْنًا وَقَبْضًا فِي الرَّهْنِ.
396 – And when a man contracts a house, or a beast (<i>dābba</i>), as <i>rahn</i>, and the <i>murtahin</i> takes possession of it, and the owner (<i>rabb</i>) of the <i>dābba</i> or the house gives permission for him to enjoy the usufruct (<i>yantafi'a</i>) of the house or the <i>dābba</i>, and he thus makes use of it; this is not, for it, an extraction (<i>ikhrāj</i>) from the [domain of] <i>rahn</i> — and what does this have to do with its <i>ikhrāj</i> from the <i>rahn</i> (<i>wa mā li-hādhā wa ikhrājihi min al-rahni</i>)? Indeed, this is only a <i>manfa'a</i> belonging to the <i>rāhin</i>, which is not in the <i>aṣl</i> of the <i>rahn</i>, because it is something which the <i>rāhin</i> owns (<i>yamlikuhu</i>) to the exclusion of the <i>murtahin</i>.	396 – وَإِذَا رَهَّنَ الرَّجُلُ الرَّجُلَ دَارًا أَوْ دَابَّةً فَقَبَضَهَا الْمُرْتَهِنُ فَأَذِنَ لَهُ رَبُّ الدَّابَّةِ أَوْ الدَّارِ أَنْ يَنْتَفِعَ بِالدَّارِ أَوْ الدَّابَّةِ فَاتَّفَعَ بِهَا، لَمْ يَكُنْ هَذَا إِخْرَاجًا لَهُ مِنَ الرَّهْنِ وَمَا لِهَذَا وَإِخْرَاجِهِ مِنَ الرَّهْنِ؟! وَإِنَّمَا هَذَا مَنَفَعَةٌ لِلرَّاهِنِ لَيْسَتْ فِي أَصْلِ الرَّهْنِ؛ لِأَنَّهُ شَيْءٌ يَمْلِكُهُ الرَّاهِنُ دُونَ الْمُرْتَهِنِ.

⁹ On *raqaba* as meaning “substance”, and its relation to *ayn*, see Schacht, *Introduction*, 134, 205.

¹⁰ This is an excellent argument for analysis. First, al-Shāfi'ī establishes (§393) that the house itself does not change domains — it remains fully in the domain of *rahn*. He then proceeds, employing a variety of legal-theoretical and dialectical terms (*man'*; *alā tarā*; *aṣl*; *raqaba*), to show why the proceeds from rent still go to the *rāhin* and no one else (and are not themselves counted as *rahn*). He initiates his *elenchus* by introducing an *endoxon* ruling which the respondent is bound to accept (re: the *aṣl* of the *bay'* of the house, and that *sakan* and *ghalla* do not constitute the *aṣl* — they are accretions which are not returned if the house is returned due to defect). By illustrating this, al-Shāfi'ī has at once shown how *rahn* is only of the *aṣl* of the house, i.e., of its *raqaba*, not the accretions (and we must keep in mind the other ties we have seen between *rahn* and *bay'* — ties which al-Shāfi'ī reminds us of in §395). By accepting the *aṣl* of *bay'* doctrine, the respondent must accept the *raqaba* of the *rahn* argument.

397 – And when it is something that doesn't enter into the *rahn*, and the *murtahin* takes possession of the *aṣl*, and then the usufruct of what is not pledged (*mā lam yurhan*) is permitted to him [by the *rāhin*] (*udhina lahu*); the *rahn*-contract is not dissolved (*lam yanfasikh*). Don't you see/opine (*alā tarā*) that the *kirā'* of the house and the earnings (*kharāj*) of the slave belong to the *rāhin*?

397 – وَإِذَا كَانَ شَيْءٌ لَمْ يَدْخُلْ فِي الرَّهْنِ
فَقَبِضَ الْمُرْتَهِنُ الْأَصْلَ ثُمَّ أُذِنَ لَهُ فِي الْإِئْتِفَاعِ
بِمَا لَمْ يُرْهَنْ لَمْ يَنْفَسِكِ الرَّهْنُ، أَلَا تَرَى أَنَّ
كِرَاءَ الدَّارِ وَخَرَاجَ الْعَبْدِ لِلرَّاهِنِ.

Bāb al-Ḥawāla wa'l-Kafāla fi'l-Dayn

Chapter on Transfer (Ḥawāla) and Guaranty (Kafāla) Regarding Debt (Dayn) ¹	بَابُ الْحَوَالَةِ وَالْكَفَالَةِ فِي الدَّيْنِ
398 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man is owed a debt by a man, and a man [a guarantor] guarantees it to him [the creditor] on his [the debtor's] behalf (<i>kafala lahu bihi 'anhu</i>); then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: To the demander (<i>tālib</i>) belongs the right to take whichever of the two he wishes.	398 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَ لِرَجُلٍ عَلَى رَجُلٍ دَيْنٌ فَكَفَلَ لَهُ بِهِ عَنْهُ رَجُلٌ، فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: لِلطَّالِبِ أَنْ يَأْخُذَ أَيَّهِمَا شَاءَ.
399 – And if it is a contract of cession/transfer (<i>hawālat^{an}</i>), he does not have the right to take the one with whom he contracted cession/transfer (<i>alladhī aḥālahu</i>), because he has absolved him [of the debt] (<i>qad abra'ahu</i>). And he [Abū Yūsuf] embraces this [doctrine].	399 – فَإِنْ كَانَتْ حَوَالَةً لَمْ يَكُنْ لَهُ أَنْ يَأْخُذَ الَّذِي أَحَالَهُ؛ لِأَنَّهُ قَدْ أَبْرَأَهُ. وَبِهَذَا يَأْخُذُ.
400 – But Ibn Abī Laylā used to say: He has no right to take the one who owes the <i>aṣl</i> [the debt which is the object of transfer/guarantee], regarding them both, together, because – when he accepted the guarantor (<i>al-kafil</i>) from him [the debtor] – he has absolved him of the <i>māl</i> , unless the <i>māl</i> has passed away (<i>tawīya</i>) before the <i>kafil</i> ; he lays claim to it against the one who owes the <i>aṣl</i> .	400 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَيْسَ لَهُ أَنْ يَأْخُذَ الَّذِي عَلَيْهِ الْأَصْلُ فِيهِمَا جَمِيعًا؛ لِأَنَّهُ حَيْثُ قَبِلَ مِنْهُ الْكَفِيلَ فَقَدْ أَبْرَأَهُ مِنَ الْمَالِ إِلَّا أَنْ يَكُونَ الْمَالُ قَدْ تَوَيَّ قَبْلَ الْكَفِيلِ، فَيَرْجِعَ بِهِ عَلَى الَّذِي عَلَيْهِ الْأَصْلُ.
401 – And if each one of the two is a <i>kafil</i> on behalf of his <i>ṣāhib</i> , to him [the creditor] belongs the right to take whichever of the two he wishes, according to both their <i>qawls</i> [i.e., Abū Ḥanīfa's and Ibn Abī Laylā's], together.	401 – وَإِنْ كَانَ كُلُّ وَاحِدٍ مِنْهُمَا كَفِيلًا عَنْ صَاحِبِهِ كَانَ لَهُ أَنْ يَأْخُذَ أَيَّهِمَا شَاءَ فِي قَوْلِهِمَا جَمِيعًا.

¹ (Ḥassūn, vol.9, pt.14, 78-86; Schacht: *Tr. I*, 73-86). Bear in mind that *hawāla* contracts are present among the early papyri; a brief discourse on the contents of such, should any prove relevant, would shed great light on the realities of substantive legal considerations (and associated disputations) in al-Shāfi'ī's Egypt. Dietrich has this to say in the *El*² (s.v. "Ḥawāla"):

The *hawāla* occurs rather often in Arabic papyri, usually in the form of "written obligation" (*dhukr ḥakḥ*); cf. A. Grohmann, *Arabic papyri in the Egyptian Library*, i, Cairo 1934, no. 48, and p. 116; ii, Cairo 1936, no. 102, and p. 118; A. Dietrich, *Arabische Papyri aus der Hamburger Staats- und Universitäts-Bibliothek* (= *Abhandlungen für die Kunde des Morgenlandes*, xxii/3), Leipzig 1937, no. 4. The cessionary may be represented through an agent (*wakīl*), as in the Papyrus no. 13, (for it see p. 84) in A. Dietrich, *Arabische Briefe aus der Hamburger Staats- und Universitäts-Bibliothek*, Hamburg 1955.

402 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the man is owed <i>māl</i> by a man, and another contracts <i>kafāla</i> for it (<i>kafala bihi ākharu</i>); to the <i>rabb al-māl</i> belongs the right to take them both, and either one of them both; and neither one of them is absolved until he exacts his <i>māl</i> in full (<i>yastawfiya mālahu</i>), when the <i>kafāla</i> is absolute (<i>muṭlaqat^{an}</i>). But if the <i>kafāla</i> is by stipulation (<i>bi-shartⁱⁿ</i>); to the creditor (<i>al-gharīm</i>) belongs the right to take the <i>kafil</i> according to what he stipulated for him, to the exclusion of what he did not stipulate for him. And if it is a <i>ḥawāla</i> contract; there is a rational understanding (<i>ma'qūl^{un}</i>) in the <i>ḥawāla</i> that it is the transfer (<i>taḥawwulu</i>) of a <i>ḥaqq</i> against (<i>'alā</i>) a man to another. And when it transfers from (<i>'an</i>) a man, it is not permitted that there return against him (<i>'alayhi</i>) what was transferred from him (<i>'anhu</i>), except by a [contractual] renewal (<i>tajdīd</i>) of its return against him. And he [the creditor] takes the one-to-whom-liability-is-transferred (<i>al-muḥāl 'alayhi</i>), to the exclusion of the one-from-whom-liability-was-transferred (<i>al-muḥīl</i>) [i.e., the original debtor], in every circumstance (<i>bi-kulli ḥālⁱⁿ</i>).	402 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَ لِلرَّجُلِ عَلَى الرَّجُلِ الْمَالُ وَكَفَلَ بِهِ آخَرُ، فَلِرَبِّ الْمَالِ أَنْ يَأْخُذَهُمَا وَكُلَّ وَاحِدٍ مِنْهُمَا، وَلَا يَبْرَأُ كُلُّ وَاحِدٍ مِنْهُمَا حَتَّى يَسْتَوْفِيَ مَالَهُ إِذَا كَانَتْ الْكَفَالَةُ مُطْلَقَةً، فَإِنْ كَانَتْ الْكَفَالَةُ بِشَرْطٍ كَانَ لِلْغَرِيمِ أَنْ يَأْخُذَ الْكَفِيلَ عَلَى مَا شَرَطَ لَهُ دُونَ مَا لَمْ يَشَرِّطْ لَهُ، وَلَوْ كَانَتْ حَوَالَةً فَالْحَوَالَةُ مَعْقُولٌ فِيهَا أَنَّهَا تَحَوُّلٌ حَقٌّ عَلَى رَجُلٍ إِلَى غَيْرِهِ، فَإِذَا تَحَوَّلَتْ عَنْ رَجُلٍ، لَمْ يَجْزُ أَنْ يَعُودَ عَلَيْهِ مَا تَحَوَّلَ عَنْهُ إِلَّا بِتَجْدِيدِ عَوْدَتِهِ عَلَيْهِ، وَيَأْخُذُ الْمُحَالَّ عَلَيْهِ دُونَ الْمُحِيلِ بِكُلِّ حَالٍ.
403 – And when a man takes from a man a guarantor-for-his-self (<i>kafil^{an} bi-nafsihi</i>) [i.e., one who guarantees appearance of the <i>makfūl</i> in court],² then he takes from him, after that, another [<i>kafil</i>] <i>bi-nafsihi</i>; then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: Both of them are <i>kafil</i>s, together. And he [Abū Yūsuf] embraces it.	403 – وَإِذَا أَخَذَ الرَّجُلُ مِنَ الرَّجُلِ كَفِيلًا بِنَفْسِهِ ثُمَّ أَخَذَ مِنْهُ بَعْدَ ذَلِكَ آخَرَ بِنَفْسِهِ، فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: هُمَا كَفِيلَانِ جَمِيعًا. وَبِهِ يَأْخُذُ.
404 – But Ibn Abī Laylā used to say: The first <i>kafil</i> was absolved when he took the other <i>kafil</i>.	404 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: قَدْ بَرِيَ الْكَفِيلُ الْأَوَّلُ حِينَ أَخَذَ الْكَفِيلَ الْآخَرَ.

² Y. Linant de Bellefonds (*Et²*, s.v. “Kafāla”) describes the two types of *kafāla* — *kafāla bi'l-nafs* and *kafāla bi'l-māl* —, and distinguishes the former as “the type for which the surety (*kafil*) is binding to secure only the appearance in court of the debtor (*aṣīl* or *makfūl*); this, known as the *kafāla bi'l-nafs*, is an institution peculiar to Muslim law.”

405 – Al-Shāfi'ī said: And when a man takes from a man a <i>kafil bi-nafsihi</i>, then he takes from him another <i>kafil bi-nafsihi</i>, and does not absolve the first; each one of them is a <i>kafil bi-nafsihi</i>.	405 – قَالَ الشَّافِعِيُّ: وَإِذَا أَخَذَ الرَّجُلُ مِنَ الرَّجُلِ كَفِيلًا بِنَفْسِهِ ثُمَّ أَخَذَ مِنْهُ كَفِيلًا آخَرَ بِنَفْسِهِ وَلَمْ يُبْرِئِ الْأَوَّلَ فَكِلَاهُمَا كَفِيلٌ بِنَفْسِهِ.
406 – And when a man contracts <i>kafāla</i> to a man for an unnamed debt; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: He is liable for it (<i>huwa lahu dāmin^{un}</i>). And he [Abū Yūsuf] embraces this [doctrine].	406 – وَإِذَا كَفَلَ الرَّجُلُ لِلرَّجُلِ لِرَجُلٍ بَدَيْنَ غَيْرِ مُسَمًّى، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: هُوَ لَهُ ضَامِنٌ. وَبِهَذَا يَأْخُذُ.
407 – But Ibn Abī Laylā used to say: It is not permitted that <i>damān</i> be [enjoined] upon him regarding that, because he became liable (<i>ḍamina</i>) for something unknown, unnamed (<i>shay^{un} majhūl^{un} ghayra musamm^{un}</i>). It is [as though] a man say to a man: I guarantee (<i>aḍmanu</i>) what the <i>qāḍī</i> judged as due to you from him, as pertaining to a thing; and [I guarantee] what he owes you, as pertains to a <i>ḥaqq</i>; and that for which the witnesses gave testimony for you; and what resembles this – for it is unknown (<i>majhūl^{un}</i>).	407 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا يَجُوزُ عَلَيْهِ الضَّمَانُ فِي ذَلِكَ؛ لِأَنَّهُ ضَمِنَ شَيْئًا مَجْهُولًا غَيْرَ مُسَمًّى؛ وَهُوَ أَنْ يَقُولَ الرَّجُلُ لِلرَّجُلِ: أَضْمَنْ مَا قَضَى لَكَ بِهِ الْقَاضِي عَلَيْهِ مِنْ شَيْءٍ، وَمَا كَانَ لَكَ عَلَيْهِ مِنْ حَقٍّ، وَمَا شَهِدَ لَكَ بِهِ الشُّهُودُ، وَمَا أَشَبَّهُ هَذَا فَهُوَ مَجْهُولٌ.
408 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man says to a man: What the <i>qāḍī</i> judges due to you from so-and-so, or [that] which witnesses give testimony as your due from him, or what resembles this – I am a guarantor for it (<i>fa-anā lahu dāmin^{un}</i>); he is not a <i>dāmin</i> for anything, due to the fact that he may or may not be favourably judged, and may or may not be provided testimony, and nothing of that which provided testimony for him binds him (<i>fa-lā yalzamuhu shay^{un} mim mā shahida lahu</i>), from a number of perspectives (<i>bi-wujūhⁱⁿ</i>). And when this is so, this is not <i>damān</i> – <i>damān</i> is bound only by what the <i>dāmin</i> knows (<i>'arafahu</i>), and as for what he does not know, it is of that sort of thing entailing risk (<i>fa-huwa min al-mukhāṭarati</i>).³	408 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا قَالَ الرَّجُلُ لِلرَّجُلِ: مَا قَضَى لَكَ بِهِ الْقَاضِي عَلَى فُلَانٍ، أَوْ شَهِدَ لَكَ بِهِ عَلَيْهِ شُهُودٌ، أَوْ مَا أَشَبَّهُ هَذَا فَأَنَا لَهُ ضَامِنٌ. لَمْ يَكُنْ ضَامِنًا لَشَيْءٍ مِنْ قَبْلِ أَنَّهُ قَدْ يُقْضَى لَهُ وَلَا يُقْضَى وَيُشْهَدُ لَهُ وَلَا يَشْهَدُ لَهُ، فَلَا يُلْزَمُهُ شَيْءٌ مِمَّا شَهِدَ لَهُ بِوُجُوهٍ، فَلَمَّا كَانَ هَذَا هَكَذَا لَمْ يَكُنْ هَذَا ضَمَانًا، وَإِنَّمَا يُلْزَمُ الضَّمَانُ بِمَا عَرَفَهُ الضَّامِنُ، فَأَمَّا مَا لَمْ يَعْرِفْهُ فَهُوَ مِنَ الْمُخَاطَرَةِ.

³ Re: §406-8, see Hallaq, *Sharī'a*, 260 and nn.104-5; he discusses this very situation and the *khilāf* of the Ithnā 'Asharī Shī'a and some Shāfi'ites. Note also the interplay in this *mas'ala* between *k-f-l* and *ḍ-m-n*. *Kafāla*, as Linant de Bellefonds (*Et*², s.v. "Kafāla") notes, is "*damān* in all but the Ḥanafī school."

409 – And when a man guarantees (<i>ḍamina</i>) the debt of the deceased after his death, and names it, and the deceased does not leave behind full compensation (<i>lam yatrūk... wafā^{un}</i>), nor anything, nor a little bit, nor a lot; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: There is no <i>ḍamān</i> [enjoined] upon the <i>kafīl</i>, because the debt has passed away (<i>qad tawīya</i>).	409 – وَإِذَا ضَمَّنَ الرَّجُلُ دَيْنَ مَيِّتٍ بَعْدَ مَوْتِهِ وَسَمَّاهُ وَلَمْ يَتْرُكِ الْمَيِّتُ وَفَاءً وَلَا شَيْئًا وَلَا قَلِيلًا وَلَا كَثِيرًا، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا ضَمَانَ عَلَى الْكَفِيلِ؛ لِأَنَّ الدَّيْنَ قَدْ تَوَيَّ.
410 – But Ibn Abī Laylā used to say: The <i>kafīl</i> is liable (<i>ḍāmin^{un}</i>). And he [Abū Yūsuf] embraces it.	410 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الْكَفِيلُ ضَامِنٌ. وَبِهِ يَأْخُذُ.
411 – But Abū Ḥanīfa, may God Most High have mercy upon him, said: If he left something, the <i>kafīl</i> guarantees (<i>ḍamina</i>) to the measure of what he left (<i>bi-qadri mā taraka</i>); and if he has left full compensation (<i>wafā^{un}</i>), then he is liable (<i>ḍāmin^{un}</i>) for the entirety of what he vouched for (<i>takaffala bihi</i>).	411 – وَقَالَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى: إِنْ تَرَكَ شَيْئًا ضَمَّنَ الْكَفِيلُ بِقَدْرِ مَا تَرَكَ، وَإِنْ كَانَ تَرَكَ وَفَاءً فَهُوَ ضَامِنٌ لِجَمِيعِ مَا تَكَفَّلَ بِهِ.
412 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man guarantees the debt of the deceased (<i>ḍamina dayna al-mayyiti</i>), after knowing it [i.e., its amount] and knowing to whom it is owed; the <i>ḍamān</i> is binding (<i>lāzim^{un}</i>) for him, whether the deceased left anything or not. And when the authorized slave (<i>al-ʿabdu al-maʿdhūnu</i>) guarantees him by <i>kafāla</i> in trade (<i>kafāla... lahu fiʾl-tijārati</i>); then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: His <i>kafāla</i> is <i>bāṭila</i>, because it [the <i>kafāla</i>] is known (<i>maʿrūf^{un}</i>), and the <i>maʿrūf</i> is not permitted to him. And he [Abū Yūsuf] embraces it.⁴	412 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا ضَمَّنَ الرَّجُلُ دَيْنَ الْمَيِّتِ بَعْدَ مَا يَعْرِفُهُ وَيَعْرِفُ لِمَنْ هُوَ فَالضَّمَانُ لَهُ لَازِمٌ، تَرَكَ الْمَيِّتُ شَيْئًا أَوْ لَمْ يَتْرُكْ، وَإِذَا كَفَلَ الْعَبْدُ الْمَأْذُونُ لَهُ فِي التَّجَارَةِ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: كَفَالَتُهُ بَاطِلَةٌ؛ لِأَنَّهَا مَعْرُوفٌ وَلَيْسَ يَجُوزُ لَهُ الْمَعْرُوفُ. وَبِهِ يَأْخُذُ.
413 – But Ibn Abī Laylā used to say: His <i>kafāla</i> is <i>jāʾiza</i>, because it pertains to trade.	413 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: كَفَالَتُهُ جَائِزَةٌ؛ لِأَنَّهَا مِنَ التَّجَارَةِ.

⁴ It is unclear why Ḥassūn left this new *masʿala* of the authorized slave attached to al-Shāfiʿī's previous ruling; perhaps it is merely an oversight. At any rate, al-Shāfiʿī does not deal with it until §417, having first dealt with the interposing *masʿala* of §§414-15.

414 – And when the <i>muḥtāl</i> 'alayhi becomes insolvent (<i>aflasa</i>); then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: It [the liability] does not revert back upon the one who contracted <i>ḥawāla</i> with him (<i>aḥālahu</i>) [i.e., the <i>muḥīl</i>], until the <i>muḥtāl</i> 'alayhi dies and leaves no <i>māl</i> .	414 – وَإِذَا أَفْلَسَ الْمُحْتَالُ عَلَيْهِ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا يَرْجِعُ عَلَى الَّذِي أَحَالَهُ حَتَّى يَمُوتَ الْمُحْتَالُ عَلَيْهِ وَلَا يَتْرُكُ مَالًا.
415 – But Ibn Abī Laylā used to say: He [the <i>muḥtāl</i> 'alayhi] has the right to return [the liability] when he becomes insolvent. And he [Abū Yūsuf] embraces this [doctrine].	415 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَهُ أَنْ يَرْجِعَ إِذَا أَفْلَسَ. وَبِهَذَا يَأْخُذُ.
416 – Al-Shāfi'ī, may God Most High have mercy upon him, said: The <i>ḥawāla</i> is a transferring (<i>tahwīl</i>) of a <i>ḥaqq</i> – he [the <i>muḥtāl</i> 'alayhi] has no right to return [the liability].	416 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: الْحَوَالَةُ تَحْوِيلُ حَقٍّ، فَلَيْسَ لَهُ أَنْ يَرْجِعَ.
417 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the authorized slave (<i>al-'abdu al-ma'dhūnu</i>) guarantees him by <i>kafāla</i> in trade; the <i>kafāla</i> is <i>bāṭila</i> , because <i>kafāla</i> is the consumption (<i>istiḥlāk</i>) of <i>māl</i> , not the gaining (<i>kasb</i>) of <i>māl</i> ; and when we prevented (<i>namna'ahu</i>) that he consume anything of his <i>māl</i> , be it little or much, likewise did we prevent that he vouch for (<i>yatakaffala</i>) and pay out (<i>yaghrama</i>) anything from his <i>māl</i> , be it little or much.	417 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَفَلَ الْعَبْدُ الْمَأْذُونُ لَهُ فِي التَّجَارَةِ بِكَفَالَةٍ فَالْكَفَالَةُ بَاطِلَةٌ؛ لِأَنَّ الْكَفَالَةَ اسْتِهْلَاكُ مَالٍ لَا كَسْبُ مَالٍ، وَإِذَا كُنَّا نَمْنَعُهُ أَنْ يَسْتَهْلِكَ مِنْ مَالِهِ شَيْئًا قَلًّا أَوْ كَثْرًا فَكَذَلِكَ نَمْنَعُهُ أَنْ يَتَكَفَّلَ فَيَغْرَمَ مِنْ مَالِهِ شَيْئًا قَلًّا أَوْ كَثْرًا.
418 – And when a man authorizes a man as agent (<i>wakkala... rajul^{am}</i>) for something, and the <i>wakīl</i> desires to authorize another as agent for that [same thing]; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: He has no right to do that, unless his <i>ṣāḥib</i> has ordered him to authorize another as agent for that. And he [Abū Yūsuf] embraces it.	418 – وَإِذَا وَكَّلَ الرَّجُلُ رَجُلًا فِي شَيْءٍ، فَأَرَادَ الْوَكِيلُ أَنْ يُوَكَّلَ بِذَلِكَ غَيْرَهُ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَيْسَ لَهُ ذَلِكَ إِلَّا أَنْ يَكُونَ صَاحِبُهُ أَمَرَهُ أَنْ يُوَكَّلَ بِذَلِكَ غَيْرَهُ. وَبِهِ يَأْخُذُ.
419 – But Ibn Abī Laylā used to say: He has the right to authorize another as agent when he desires to be absent, or falls ill. And as for when he is in full health and present (<i>ṣaḥīḥ^{am} ḥāḍir^{am}</i>): No.	419 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَهُ أَنْ يُوَكَّلَ غَيْرَهُ إِذَا أَرَادَ أَنْ يَغِيبَ أَوْ مَرِضَ، فَأَمَّا إِذَا كَانَ صَحِيحًا حَاضِرًا فَلَا.
420 – Abū Ḥanīfa, may God Most High have mercy upon him, said: And how can there belong to him the right to authorize another as agent, while his <i>ṣāḥib</i> did not consent (<i>lam yarḍa</i>) to the litigating of another (<i>khuṣūmati ḡhayrihi</i>) [on his behalf], but indeed only consented to his [the first	420 – قَالَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى: وَكَيْفَ يَكُونُ لَهُ أَنْ يُوَكَّلَ غَيْرَهُ وَلَمْ يَرْضَ صَاحِبُهُ بِخُصُومَةِ غَيْرِهِ وَإِنَّمَا رَضِيَ

wakīl's] <i>khuṣūma</i> [on his behalf]?	بِخُصُومَتِهِ.
421 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man contracts with a man authorization of agency (<i>wakkala... bi-wakālatⁱⁿ</i>); the <i>wakīl</i> has no right to authorize another as agent — whether the <i>wakīl</i> falls ill, or desires absence, or does not desire it —, because the authorizer of his agency [i.e., the principal] (<i>al-muwakkila lahu</i>) gave consent to his <i>wakāla</i> , and did not give consent to the <i>wakāla</i> of another. But if he [the <i>muwakkil</i>] says: He [the <i>wakīl</i>] has the right to authorize whomever he thinks right (<i>lahu an yuwakkila man ra'ā</i>); such is his right by <i>riḍā</i> of the <i>muwakkil</i> .	421 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا وَكَّلَ الرَّجُلُ الرَّجُلَ بَوَكَالَةٍ فَلَيْسَ لِلْوَكِيلِ أَنْ يُوَكَّلَ غَيْرُهُ؛ مَرَضَ الْوَكِيلُ أَوْ أَرَادَ الْعَبِيَّةَ أَوْ لَمْ يُرِدْهَا؛ لِأَنَّ الْمُوَكَّلَ لَهُ رَضِيَ بَوَكَالَتِهِ وَلَمْ يَرْضَ بَوَكَالَةِ غَيْرِهِ. فَإِنْ قَالَ: وَلَهُ أَنْ يُوَكَّلَ مَنْ رَأَى. كَانَ ذَلِكَ لَهُ بِرِضَا الْمُوَكَّلِ.
422 – And when a man authorizes a man as agent for a legal suit (<i>bi-khuṣūmatⁱⁿ</i>), and he confirms (<i>athbata</i>) the <i>wakāla</i> before the <i>qāḍī</i> , then he [the <i>wakīl</i>] acknowledges against (<i>aqarra 'alā</i>) his <i>ṣāhib</i> , who authorized him, that this <i>khuṣūma</i> is a <i>ḥaqq</i> belonging to his <i>ṣāhib</i> who litigates against him — confessing this before the <i>qāḍī</i> ; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: His <i>iqrār</i> is <i>jā'iz</i> . And he [Abū Yūsuf] embraces it.	422 – وَإِذَا وَكَّلَ رَجُلٌ رَجُلًا بِخُصُومَةٍ وَاثْبَتَ الْوَكَالَةَ عِنْدَ الْقَاضِي، ثُمَّ أَقَرَّ عَلَى صَاحِبِهِ الَّذِي وَكَّلَهُ أَنْ تِلْكَ الْخُصُومَةُ حَقٌّ لِصَاحِبِهِ الَّذِي يُخَاصِمُهُ أَقَرَّ بِهِ عِنْدَ الْقَاضِي، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: إِقْرَارُهُ جَائِزٌ. وَبِهِ يَأْخُذُ.
423 – He said: But if he makes acknowledgment (<i>aqarra</i>) before someone besides the <i>qāḍī</i> , and the witnesses testify about it/against him; his <i>iqrār</i> is <i>bāṭil</i> , and he exits the <i>khuṣūma</i> .	423 – قَالَ: وَإِنْ أَقَرَّ عِنْدَ غَيْرِ الْقَاضِي، وَشَهِدَ عَلَيْهِ الشُّهُودُ، فَإِقْرَارُهُ بَاطِلٌ، وَيَخْرُجُ مِنَ الْخُصُومَةِ.
424 – But Abū Yūsuf said: His <i>iqrār</i> before the <i>qāḍī</i> , and before another, is <i>jā'iz</i> against him.	424 – وَقَالَ أَبُو يُوسُفَ: إِقْرَارُهُ عِنْدَ الْقَاضِي وَعِنْدَ غَيْرِهِ جَائِزٌ عَلَيْهِ.
425 – And Ibn Abī Laylā used to say: His <i>iqrār</i> is <i>bāṭil</i> .	425 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: إِقْرَارُهُ بَاطِلٌ.
426 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man contracts <i>wakāla</i> with a man, and he does not say in the <i>wakāla</i> -contract that he authorized him to make acknowledgment against him (<i>yuqirra 'alayhi</i>), nor to seek amicable settlement (<i>yuṣāliḥa</i>), nor to acquit (<i>yubri'a</i>), nor to grant (<i>yahaba</i>); there belongs to him no right to make	426 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا وَكَّلَ الرَّجُلُ الرَّجُلَ بَوَكَالَةٍ وَلَمْ يَقُلْ فِي الْوَكَالَةِ أَنَّهُ وَكَّلَهُ بِأَنْ يُقَرَّ عَلَيْهِ وَلَا يُصَالِحَ وَلَا يُبْرَى وَلَا يَهَبَ، فَلَيْسَ لَهُ أَنْ يُقَرَّ وَلَا يُبْرَى

acknowledgment, nor to acquit, nor to grant, nor to settle. And if he does [one of these things]; whatever he does of that, all of it, is <i>bāṭil</i> ; because he did not authorize him for it, and he is not a <i>wakīl</i> regarding what he did not authorize him as <i>wakīl</i> for.	وَلَا يَهَبَ وَلَا يُصَالِحَ، فَإِنْ فَعَلَ فَمَا فَعَلَ مِنْ ذَلِكَ كُلُّهُ بَاطِلٌ؛ لِأَنَّهُ لَمْ يُؤَكِّلْهُ بِهِ؛ فَلَا يَكُونُ وَكِيلًا فِيمَا لَمْ يُؤَكِّلْهُ.
427 – And when a man authorizes a man as agent in [a matter of] homicide/bodily harm (<i>qisās</i>) or God's fixed penalty [for adultery, theft, etc.] (<i>ḥadd</i>); then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: <i>Wakāla</i> regarding that is not accepted. And he [Abū Yūsuf] embraces it.	427 – وَإِذَا وَكَّلَ رَجُلٌ رَجُلًا فِي قِصَاصٍ أَوْ حَدٍّ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: لَا تُقْبَلُ فِي ذَلِكَ وَكَالَةٌ. وَبِهِ يَأْخُذُ.
428 – And Abū Yūsuf transmitted that Abū Ḥanīfa said: I accept from the <i>wakīl</i> the <i>bayyina</i> in the claim (<i>da'wā</i>) regarding <i>ḥadd</i> and <i>qisās</i> ; but I do not administer (<i>lā uqimu</i>) the <i>ḥadd</i> or the <i>qisās</i> until the <i>mudda'ī</i> attends.	428 – وَرَوَى أَبُو يُوسُفَ أَنَّ أَبَا حَنِيفَةَ قَالَ: أَقْبَلُ مِنَ الْوَكِيلِ الْبَيِّنَةَ فِي الدَّعْوَى فِي الْحَدِّ وَالْقِصَاصِ، وَلَا أُقِيمُ الْحَدَّ وَلَا الْقِصَاصَ حَتَّى يَحْضُرَ الْمُدَّعِي.
429 – And Abū Yūsuf said: I don't accept the <i>bayyina</i> except from the <i>mudda'ī</i> , and I don't accept a <i>wakīl</i> regarding that.	429 – وَقَالَ أَبُو يُوسُفَ: لَا أَقْبَلُ الْبَيِّنَةَ إِلَّا مِنَ الْمُدَّعِي وَلَا أَقْبَلُ فِي ذَلِكَ وَكِيلًا.
430 – But Ibn Abī Laylā used to say: The <i>wakāla</i> regarding that is accepted.	430 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: تُقْبَلُ فِي ذَلِكَ الْوَكَالَةُ.
431 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man authorizes a man as agent for the demand (<i>ṭalab</i>) of a <i>ḥadd</i> on his behalf, or of <i>qisās</i> on his behalf, against a man; the <i>wakāla</i> is accepted for the establishing of evidence (<i>'alā tathbīti al-bayyina</i>).	431 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا وَكَّلَ الرَّجُلُ الرَّجُلَ بِطَلَبِ حَدٍّ لَهُ أَوْ قِصَاصٍ لَهُ عَلَى رَجُلٍ قُبِلَتْ الْوَكَالَةُ عَلَى تَثْبِيَتِ الْبَيِّنَةِ.
432 – And when he [the <i>wakīl</i>] attends the <i>ḥadd</i> and the <i>qisās</i> , I neither administer for him the <i>ḥadd</i> , nor administer <i>qisās</i> , until the one at whose request the <i>ḥadd</i> will be inflicted (<i>al-mahdūdu lahu</i>) and the one at whose request the <i>qisās</i> will be inflicted (<i>al-muqtaṣṣu lahu</i>), attend. [This is] due to the fact that he might make acknowledgment in his favour (<i>qad yuqirru lahu</i>) and nullify the <i>ḥaqq</i> ; and [he might] disown (<i>yukadhdhibu</i>) the <i>bayyina</i> , and nullify the <i>qisās</i> ; and [he might] pardon (<i>ya'fū</i>).	432 – وَإِذَا حَضَرَ الْحَدَّ وَالْقِصَاصَ لَمْ أَخْذُهُ وَلَمْ أَقْصِصْ حَتَّى يَحْضُرَ الْمَحْدُودُ لَهُ وَالْمُقْتَصَّصُ لَهُ، مِنْ قَبْلِ أَنَّهُ قَدْ يُقَرَّرَ لَهُ فَيُبْطِلُ الْحَقَّ، وَيُكَذِّبُ الْبَيِّنَةَ فَيُبْطِلُ الْقِصَاصَ، وَيَعْفُو.

433 – And when a house is in the possession of a man, and a man lays claim to it, and the one in whose possession it is says: So-and-so authorized me as agent (<i>wakkalanī</i>) for it — on behalf of an absent man — I stand in for him concerning it (<i>aqūmu lahu 'alayhā</i>); then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: I do not give credence to him (<i>lā uṣaddiquhu</i>) unless he brings <i>bayyina</i> about that, but I appoint him as a contender in litigation (<i>aj' aluhu khaṣm^{an}</i>). And he [Abū Yūsuf] embraces it.	433 – وَإِذَا كَانَتْ فِي يَدَي رَجُلٍ دَارٌ فَادَّعَاهَا رَجُلٌ، فَقَالَ الَّذِي هِيَ فِي يَدَيْهِ: وَكَلَّنِي بِهَا فَلَانٌ – لِرَجُلٍ غَائِبٍ – أَقُومُ لَهُ عَلَيْهَا. فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا أُصَدِّقُهُ إِلَّا أَنْ يَأْتِيَ عَلَى ذَلِكَ بَيِّنَةٌ وَأَجْعَلُهُ خَصْمًا. وَبِهِ يَأْخُذُ.
434 – And Abū Yūsuf, may God have mercy upon him, said, afterwards: If he is suspicious (<i>muttaham^{an}</i>), also, I do not accept <i>bayyina</i> from him, but I appoint him as a <i>khaṣm</i> — unless he brings forth witnesses whom I know.	434 – وَقَالَ أَبُو يُوسُفَ رَحِمَهُ اللَّهُ بَعْدُ إِنْ كَانَ مَتَّهَمًا – أَيْضًا – لَمْ أَقْبَلْ مِنْهُ بَيِّنَةً وَجَعَلْتُهُ خَصْمًا، إِلَّا أَنْ يَأْتِيَ بِشُهُودٍ أَعْرِفُهُمْ.
435 – But Ibn Abī Laylā used to say: I accept from him, and I believe him, and we don't bring about a lawsuit (<i>khuṣūma</i>) between them.	435 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: أَقْبَلُ مِنْهُ وَأُصَدِّقُهُ وَلَا نَجْعَلُ بَيْنَهُمَا خُصُومَةً.
436 – And Ibn Abī Laylā used to say, after that: When I suspect him, I ask him for <i>bayyina</i> about the <i>wakāla</i>, and if he does not furnish the <i>bayyina</i>, I appoint him as a <i>khaṣm</i>.	436 – وَكَانَ ابْنُ أَبِي لَيْلَى بَعْدَ ذَلِكَ يَقُولُ: إِذَا اتَّهَمْتُهُ سَأَلْتُهُ الْبَيِّنَةَ عَلَى الْوَكَالَةِ، فَإِنْ لَمْ يُقِمِ الْبَيِّنَةَ جَعَلْتُهُ خَصْمًا.
437 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And if the house is in the possession of a man, and a man lays claim to it, and the one in whose possession it is says: It does not belong to me, it is a deposit (<i>wadī'a</i>) in my possession, or it is mine for rental (<i>hiya 'alayya bi-kirā^{an}</i>), or I am, regarding it, a <i>wakīl</i>; the one who passes judgement against the absent one (<i>man qaḍā 'alā al-ghā'ib</i>) hears the <i>bayyina</i> from the <i>mudda'ī</i> and summons (<i>aḥḍara</i>) the one in whose possession it [the house] is, and if he confirms his <i>wakāla</i>, he passes judgment against him;⁵ and if he does not confirm it [his <i>wakāla</i>], he passes judgment on it [the house] in favour of the one who furnishes <i>bayyina</i> for it. And he writes in the judicial decision (<i>al-qaḍā'</i>): I passed judgment on it, while no <i>khaṣm</i> attended	437 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِنْ كَانَتْ الدَّارُ فِي يَدَي رَجُلٍ، فَادَّعَاهَا رَجُلٌ، فَقَالَ الَّذِي هِيَ فِي يَدَيْهِ: لَيْسَتْ لِي، هِيَ فِي يَدَيَّ وَدِيعَةٌ، أَوْ هِيَ عَلَيَّ بِكَرَاءٍ، أَوْ أَنَا فِيهَا وَكِيلٌ. فَمَنْ قَضَى عَلَى الْغَائِبِ سَمِعَ مِنَ الْمُدَّعِي الْبَيِّنَةَ وَأَحْضَرَ الَّذِي هِيَ فِي يَدَيْهِ، فَإِنْ أَثْبَتَ وَكَالَتْهُ قَضَى عَلَيْهِ، وَإِنْ لَمْ يُثْبِتْهَا قَضَى بِهَا لِلَّذِي أَقَامَ عَلَيْهَا الْبَيِّنَةَ وَكَتَبَ فِي الْقَضَاءِ: إِنِّي قَضَيْتُ بِهَا وَلَمْ يَحْضُرْنِي فِيهَا خَصْمٌ وَزَعَمَ فَلَانٌ أَنَّهَا لَيْسَتْ لَهُ.

⁵ That is to say, as confirmed *wakīl*, he is judged against in the place of the absentee owner, who would have been judged against were he present.

me regarding it, but so-and-so claimed that it did not belong to him.	
438 – And the one who does not pass judgment against the <i>ghā'ib</i> asks the one in whose possession it [the house] is for the <i>bayyina</i> about what he says; and if he brings it forth — that it is in his possession for <i>kirā'</i> , or <i>wadī'a</i> — he does not appoint him as a <i>khaṣm</i> . But if he brings forth the <i>bayyina</i> about the <i>wakāla</i> , I appoint him as a <i>khaṣm</i> .	438 – وَمَنْ لَمْ يَقْضِ عَلَى الْغَائِبِ سَأَلَ الَّذِي هِيَ فِي يَدَيْهِ الْبَيِّنَةَ عَلَى مَا يَقُولُ، فَإِنْ جَاءَ بِهَا عَلَى أَنَّهَا فِي يَدَيْهِ بِكَرَاءٍ أَوْ وَدِيعَةٍ لَمْ يَجْعَلْهُ خَصْمًا. فَإِنْ جَاءَ بِالْبَيِّنَةِ عَلَى الْوَكَالَةِ جَعَلْتُهُ خَصْمًا.
439 – Al-Rabī' said: And my memory concerning al-Shāfi'ī, may God Most High have mercy upon him, is that he passed judgment against the <i>ghā'ib</i> . ⁶	439 – قَالَ الرَّبِيعُ: وَحَفْظِي عَنِ الشَّافِعِيِّ رَحِمَهُ اللَّهُ تَعَالَى: أَنَّهُ يَقْضِي عَلَى الْغَائِبِ.
440 – He said: And when a man is owed <i>māl</i> by a man, and a man comes along and says: So-and-so has authorized me as agent (<i>wakkalanī</i>) to take possession of it from you, and the one who owes the <i>māl</i> says: I believe you (<i>ṣadaqta</i>). Then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: I compel him (<i>ajburuhu</i>) to give it to him.	440 – قَالَ: وَإِذَا كَانَ لِلرَّجُلِ عَلَى الرَّجُلِ مَالٌ، فَجَاءَ رَجُلٌ فَقَالَ: قَدْ وَكَّلَنِي بِقَبْضِهِ مِنْكَ فُلَانٌ، فَقَالَ الَّذِي عَلَيْهِ الْمَالُ: صَدَقْتَ. فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: أَجْبُرُهُ عَلَى أَنْ يُعْطِيَهُ إِيَّاهُ. وَبِهِ يَأْخُذُ.
441 – But Ibn Abī Laylā used to say: I do not compel him to that unless he [the supposed <i>wakīl</i>] furnishes <i>bayyina</i> for it, and I say: You [the debtor] are more knowing — if you wish, give it, and if you wish, leave it be.	441 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا أَجْبُرُهُ عَلَى ذَلِكَ إِلَّا أَنْ يُقِيمَ بَيِّنَةً عَلَيْهِ، وَأَقُولُ: أَنْتَ أَعْلَمُ، فَإِنْ شِئْتَ فَأَعْطِهِ، وَإِنْ شِئْتَ فَاتْرُكْهُ.
442 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man is owed <i>māl</i> by a man, and it is with him (<i>wa huwa 'indah</i>), and a man comes to him and states that the <i>ṣāhib</i> of the <i>māl</i> authorized him as agent for [taking] it, and the one whose possession the <i>māl</i> is in believes him; I don't compel him to turn it over to him. But if he does turn it over, he is not absolved (<i>lam yabra'</i>) from the <i>māl</i> unless the <i>rabb al-māl</i> acknowledges that he authorized him as agent, or <i>bayyina</i> is furnished about him for that.	442 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَ لِلرَّجُلِ عَلَى الرَّجُلِ مَالٌ وَهُوَ عِنْدَهُ، فَجَاءَهُ رَجُلٌ فَذَكَرَ أَنَّ صَاحِبَ الْمَالِ وَكَّلَهُ بِهِ، وَصَدَّقَهُ الَّذِي فِي يَدَيْهِ الْمَالُ، لَمْ أَجْبُرْهُ عَلَى أَنْ يَدْفَعَهُ إِلَيْهِ، فَإِنْ دَفَعَهُ لَمْ يَبْرَأْ مِنَ الْمَالِ إِلَّا أَنْ يُقَرَّ رَبُّ الْمَالِ بِأَنَّهُ وَكَّلَهُ أَوْ تَقُومَ عَلَيْهِ بَيِّنَةٌ بِذَلِكَ.

⁶ Again, as in §385, we have an interpolation of the transmitter whose personal memory of the concerned jurist's doctrine bears upon the discussion he transmits.

443 – And likewise, if this one who claims (<i>adda'a</i>) the <i>wakāla</i> claims a debt owed by the <i>rabb al-māl</i>; the one in whose possession is the <i>māl</i> is not compelled to give it to him; that is to say that his <i>iqrār</i> to him regarding it is an <i>iqrār</i> from him about another than himself – and his <i>iqrār</i> about another than himself is not legally permitted.	443 – وَكَذَلِكَ لَوْ ادَّعَى هَذَا الَّذِي ادَّعَى الْوَكَّالَةَ دَيْنًا عَلَى رَبِّ الْمَالِ لَمْ يُجْبَرِ الَّذِي فِي يَدَيْهِ الْمَالُ عَلَى أَنْ يُعْطِيَهُ إِيَّاهُ، وَذَلِكَ أَنَّ إِقْرَارَهُ إِيَّاهُ بِهِ إِقْرَارٌ مِنْهُ عَلَى غَيْرِهِ، فَلَا يَجُوزُ إِقْرَارُهُ عَلَى غَيْرِهِ.
444 – And when a man authorizes a man as agent regarding something; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: His <i>wakāla</i> is not confirmed unless he brings along with him a <i>khaṣm</i>. And he [Abū Yūsuf] embraces it.	444 – وَإِذَا وَكَّلَ الرَّجُلُ رَجُلًا فِي شَيْءٍ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: لَا تَثْبُتُ وَكَّالَتُهُ إِلَّا أَنْ يَأْتِيَ مَعَهُ بِخَصْمٍ. وَبِهِ يَأْخُذُ.
445 – But Ibn Abī Laylā used to say: We accept his <i>bayyina</i> for the <i>wakāla</i>, and we confirm it for him, while there is no <i>khaṣm</i> with him.	445 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: نَقْبَلُ بَيِّنَتَهُ عَلَى الْوَكَّالَةِ وَنُثَبِّتُهَا لَهُ وَلَيْسَ مَعَهُ خَصْمٌ.
446 – And Abū Yūsuf, may God Most High have mercy upon him – when a man he had known came to him desiring to absent himself, saying: This is my <i>wakīl</i> regarding every <i>ḥaqq</i> of mine, he will litigate for it (<i>yukhāṣimu fīhi</i>) – used to accept that and confirm his <i>wakāla</i>. But when the <i>khaṣm</i> was absent, he would authorize for him a <i>wakīl</i> and pass judgment against him.	446 – وَقَدْ كَانَ أَبُو يُوسُفَ رَحِمَهُ اللَّهُ تَعَالَى إِذَا جَاءَهُ رَجُلٌ قَدْ عَرَفَهُ يُرِيدُ أَنْ يَغِيبَ فَقَالَ: هَذَا وَكِيلِي فِي كُلِّ حَقٍّ لِي يُخَاصِمُ فِيهِ. قَبْلَ ذَلِكَ وَأَثْبَتَ وَكَّالَتَهُ، وَإِذَا تَغَيَّبَ الْخَصْمُ وَكَّلَ لَهُ وَكِيلًا وَقَضَى عَلَيْهِ.
447 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man authorizes a man as agent for something before the <i>qāḍī</i>; the <i>qāḍī</i> confirms his <i>bayyina</i> for the <i>wakāla</i> and makes him a <i>wakīl</i>, whether a <i>khaṣm</i> attends with him or does not attend. Nor is the <i>khaṣm</i> a means as pertains to this (<i>wa laysa al-khaṣmu min hādha bi-sabīl^m</i>), but indeed he only confirms for him the <i>wakāla</i> for the <i>muwakkil</i>, and the <i>wakāla</i> might be confirmed for him while nothing is incumbent upon the <i>khaṣm</i>; and he might rule in favour of the <i>khaṣm</i>, against the <i>muwakkil</i>, and that testimony be nothing but testimony in favour of the <i>khaṣm</i>, confirming for him a <i>ḥaqq</i> against the <i>muwakkil</i>.	447 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا وَكَّلَ الرَّجُلُ الرَّجُلَ عِنْدَ الْقَاضِي بِشَيْءٍ، أَثْبَتَ الْقَاضِي بَيِّنَتَهُ عَلَى الْوَكَّالَةِ وَجَعَلَهُ وَكِيلًا، حَضَرَ مَعَهُ خَصْمٌ أَوْ لَمْ يَحْضُرْ، وَلَيْسَ الْخَصْمُ مِنْ هَذَا بِسَبِيلٍ، وَإِنَّمَا أَثْبَتَ لَهُ الْوَكَّالَةَ عَلَى الْمُوَكَّلِ وَقَدْ تَثَبَّتْ لَهُ الْوَكَّالَةُ وَلَا يَلْزَمُ الْخَصْمُ شَيْءٌ، وَقَدْ يَقْضِي لِلْخَصْمِ عَلَى الْمُوَكَّلِ فَتَكُونُ تِلْكَ الشَّهَادَةُ إِنَّمَا هِيَ شَهَادَةٌ لِلْخَصْمِ تَثْبُتُ لَهُ حَقًّا عَلَى الْمُوَكَّلِ.

448 – And when a man authorizes a man as agent for everything little and much (<i>bi-kulli qalīlⁱⁿ wa kathīrⁱⁿ</i>); then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: His [the <i>wakīl</i>'s] <i>bay'</i> is not permitted, because he does not authorize him for <i>bay'</i> unless he says: What you do of a thing, it is permissible (<i>mā ṣana'ta min shay'ⁱⁿ fa-huwa jā'iz^{un}</i>). And he [Abū Yūsuf] embraces it.	448 – وَإِذَا وَكَّلَ رَجُلٌ رَجُلًا بِكُلِّ قَلِيلٍ وَكَثِيرٍ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا يَجُوزُ بَيْعُهُ؛ لِأَنَّهُ لَمْ يُؤَكِّلهُ بِالْبَيْعِ إِلَّا أَنْ يَقُولَ: مَا صَنَعْتَ مِنْ شَيْءٍ فَهُوَ جَائِزٌ. وَبِهِ يَأْخُذُ.
449 – But Ibn Abī Laylā used to say: When he authorizes him as agent regarding everything little and much, then he sells a house or other than that, it is <i>jā'iz</i>.	449 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: إِذَا وَكَّلَهُ فِي كُلِّ قَلِيلٍ وَكَثِيرٍ فَبَاعَ دَارًا أَوْ غَيْرَ ذَلِكَ، كَانَ جَائِزًا.
450 – Al-Shāfi'ī, may God have mercy upon him, said: And when a man gives testimony in favour of a man, that he authorized him for everything little and much on his behalf, not adding to this [statement]; the <i>wakāla</i> for this is not <i>jā'iza</i>, due to the fact that he might authorize him as agent for <i>bay'</i> of the little and much, and [he might] authorize him for the preservation (<i>ḥifẓ</i>) of the little and much and nothing else, and [he might] authorize him for the turning over (<i>daf'</i>) of the little and much and nothing else. And when these <i>ma'ānī</i>, and others, are possible (<i>yaḥtamilu</i>), it is not permitted that he be a <i>wakīl</i> until he clarify (<i>yubayyina</i>) the agencies (<i>wakālat</i>); [be they] pertaining to <i>bay'</i>, or <i>shirā'</i>, or <i>wadī'a</i>, or <i>khuṣūma</i>, or building/cultivation (<i>'imāra</i>), or other than that.	450 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا شَهِدَ الرَّجُلُ لِرَجُلٍ أَنَّهُ وَكَّلَهُ بِكُلِّ قَلِيلٍ وَكَثِيرٍ لَهُ لَمْ يَزِدْ عَلَى هَذَا، فَالْوَكَالَةُ عَلَى هَذَا غَيْرُ جَائِزَةٍ؛ مِنْ قَبْلِ أَنَّهُ قَدْ يُؤَكِّلهُ بِبَيْعِ الْقَلِيلِ وَالْكَثِيرِ، وَيُؤَكِّلهُ بِحِفْظِ الْقَلِيلِ وَالْكَثِيرِ لَا غَيْرَهُ، وَيُؤَكِّلهُ بِدَفْعِ الْقَلِيلِ وَالْكَثِيرِ لَا غَيْرَهُ، فَلَمَّا كَانَ يَحْتَمِلُ هَذِهِ الْمَعَانِيَ وَغَيْرَهَا لَمْ يَجْزُ أَنْ يَكُونَ وَكِيلاً حَتَّى يُبَيِّنَ الْوَكَالَاتِ؛ مِنْ بَيْعٍ أَوْ شِرَاءٍ أَوْ وَدِيعَةٍ أَوْ خُصُومَةٍ أَوْ عِمَارَةٍ أَوْ غَيْرِ ذَلِكَ.
451 – And when a woman authorizes a <i>wakīl</i> for the <i>khuṣūma</i>, while she is present (<i>ḥāḍirat^{un}</i>); then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: I don't accept unless the <i>khaṣm</i> expresses consent (<i>yaḥḍar</i>).	451 – وَإِذَا وَكَّلَتِ الْمَرْأَةُ وَكِيلاً بِالْخُصُومَةِ وَهِيَ حَاضِرَةٌ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: لَا أَقْبَلُ إِلَّا أَنْ يَرْضَى الْخَصْمُ.
452 – But Ibn Abī Laylā used to say: We accept that and we permit it. And he [Abū Yūsuf] embraces it.	452 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: نَقْبَلُ ذَلِكَ وَنُحْزِزُهُ. وَبِهِ يَأْخُذُ.
453 – Al-Shāfi'ī, may God have mercy upon him, said: And I accept the <i>wakāla</i> from the present one (<i>al-ḥāḍir</i>) among women and men, with excuse and otherwise (<i>fi'l-'udhri wa ghayrihi</i>).	453 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَأَقْبَلُ الْوَكَالَاتِ مِنَ الْحَاضِرِ مِنَ النِّسَاءِ وَالرِّجَالِ فِي الْعُذْرِ وَغَيْرِهِ.

454 – And 'Alī b. Abī Ṭālib, may God be pleased with him, had, in the presence of 'Uthmān, authorized 'Abd Allāh b. Ja'far as <i>wakīl</i> – while 'Alī b. Abī Ṭālib was present; and 'Uthmān, may God be pleased with him, accepted that. And he had authorized before (<i>qabla</i>) 'Abd Allāh b. Ja'far, 'Uqayl b. Abī Ṭālib – and I don't believe that he authorized him as <i>wakīl</i> except in the presence of 'Umar b. al-Khaṭṭāb, may God be pleased with him, and perhaps in the presence of Abū Bakr, may God be pleased with him.	454 – وَقَدْ كَانَ عَلِيُّ بْنُ أَبِي طَالِبٍ رَضِيَ اللَّهُ عَنْهُ وَكُلَّ عِنْدَ عُثْمَانَ عَبْدَ اللَّهِ بْنِ جَعْفَرٍ؛ وَعَلِيُّ بْنُ أَبِي طَالِبٍ حَاضِرٌ؛ فَقَبِلَ ذَلِكَ عُثْمَانُ رَضِيَ اللَّهُ عَنْهُ وَكَانَ يُوَكِّلُ قَبْلَ عَبْدِ اللَّهِ بْنِ جَعْفَرٍ عُقَيْلَ بْنَ أَبِي طَالِبٍ، وَلَا أَحْسَبُهُ أَنَّهُ كَانَ يُوَكِّلُهُ إِلَّا عِنْدَ عُمَرَ بْنِ الْخَطَّابِ رَضِيَ اللَّهُ عَنْهُ وَلَعَلَّ عِنْدَ أَبِي بَكْرٍ رَضِيَ اللَّهُ عَنْهُ.
455 – Al-Shāfi'ī, may God have mercy upon him, said: And 'Alī b. Abī Ṭālib, may God be pleased with him, used to say: «Verily, to the <i>khuṣūma</i> there belong rash undertakings (<i>quḥam</i>), and verily Satan attends it/them (<i>inna li'l-khuṣūmati quḥam</i>^{an} wa <i>inna al-shayṭāna yaḥḍuruhā</i>).»⁷	455 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَكَانَ عَلِيُّ بْنُ أَبِي طَالِبٍ رَضِيَ اللَّهُ عَنْهُ يَقُولُ: «إِنَّ لِلْخُصُومَةِ قُحَمًا وَإِنَّ الشَّيْطَانَ يَحْضُرُهَا.»

⁷ Ḥassūn (ix.86, n.1) notes that this phrase was uttered by 'Alī “when he authorized 'Abd Allāh b. Ja'far as agent for himself in a litigation. And its meaning is that the litigation impels (تقحم) its *ṣāhib* to something he doesn't want, and the *quḥam* are the matters of great hardship, its singular being *quḥma*.”

Bāb fi'l-Dayn

Chapter on Debt (Dayn) ¹	بَابُ فِي الدَّيْنِ
456 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man owes a debt, and there is a deposit (<i>wadī'a</i>) in his keeping, other than “known by its distinctive substance” (<i>ghayru ma'lūmatⁱⁿ bi-'aynihā</i>); then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: What the man left behind [as estate] (<i>taraka</i>) is [divided] between the creditors (<i>al-ghuramā</i>) and the <i>aṣḥāb</i> of the <i>wadī'a</i> , by shares (<i>bi'l-ḥiṣāṣi</i>). And he [Abū Yūsuf] embraces it.	456 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَ عَلَى الرَّجُلِ دَيْنٌ وَكَانَ عِنْدَهُ وَدِيعَةٌ غَيْرُ مَعْلُومَةٍ بِعَيْنِهَا، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: مَا تَرَكَ الرَّجُلُ فَهُوَ بَيْنَ الْغُرَمَاءِ وَأَصْحَابِ الْوَدِيعَةِ بِالْحِصَصِ. وَبِهِ يَأْخُذُ.
457 – But Ibn Abī Laylā used to say: Nothing belongs to the <i>ṣāhib</i> of the <i>wadī'a</i> , unless ² he knows his <i>wadī'a</i> by its distinctive substance (<i>bi-'aynihā</i>) – [in which case] it belongs to him, exclusively (<i>khāṣṣat^{am}</i>).	457 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَيْسَ لِصَاحِبِ الْوَدِيعَةِ شَيْءٌ إِلَّا أَنْ يَعْرِفَ وَدِيعَتَهُ بِعَيْنِهَا فَتَكُونَ لَهُ خَاصَّةً.
458 – But Abū Ḥanīfa, may God Most High have mercy upon him, said: It [the <i>wadī'a</i>] is a debt in his <i>māl</i> , that of which he did not say, before death: It has been consumed (<i>qad halakat</i>) [i.e., lawfully, by terms of contract]. Don't you see/opine (<i>alā tarā</i>) that no manner by which it disappeared is known (<i>lam yu'lam lahā sabīl^{un} dhahabat fihī</i>)? And likewise all <i>māl</i> the <i>aṣl</i> of which is fiduciary duty (<i>amānat^{un}</i>). And he [Abū Yūsuf] embraces it.	458 – وَقَالَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى: هِيَ دَيْنٌ فِي مَالِهِ مَا لَمْ يَقُلْ قَبْلَ الْمَوْتِ: قَدْ هَلَكَتْ. أَلَا تَرَى أَنَّهُ لَمْ يَعْلَمْ لَهَا سَبِيلٌ ذَهَبَتْ فِيهِ. وَكَذَلِكَ كُلُّ مَالٍ أَصْلُهُ أَمَانَةٌ. وَبِهِ يَأْخُذُ.
459 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when there is, in the keeping of the man, a <i>wadī'a</i> of distinctive substance (<i>bi-'aynihā</i>), and he owes debts; the <i>wadī'a</i> belongs to the <i>rabb al-wadī'a</i> – the creditors (<i>al-ghuramā</i>) do not impose upon him as regards it (<i>lā tadkhulu 'alayhi... fihā</i>). And if it [the <i>wadī'a</i>]	459 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَ عِنْدَ الرَّجُلِ وَدِيعَةٌ بِعَيْنِهَا وَكَانَتْ عَلَيْهِ دُيُونٌ، فَالْوَدِيعَةُ لِرَبِّ الْوَدِيعَةِ لَا تَدْخُلُ عَلَيْهِ الْغُرَمَاءُ فِيهَا، وَلَوْ كَانَتْ بِغَيْرِ عَيْنِهَا مِثْلَ دَنَانِيرَ

¹ (Hassūn, vol.9, pt.14, 87-111; Schacht: *Tr. I*, 87-115).

² §457: Ḥassūn has — against all the copies he worked with, apparently — replaced لَا أَنْ يَعْرِفَ with لَا أَنْ يَعْرِفَ; and he cautiously suggests that this might be the correct rendering (ix.87, n.1). Maṭrajī (vii.189) also has لَا, though the editor neglects to explain his choice. Both Būlāq (vii.110) and Najjār (vii.120), however, have لَا. I have followed Ḥassūn and Maṭrajī, unable to make sense of the sentence otherwise.

is other than distinctive in substance (<i>bi-ghayri 'aynihā</i>) — like <i>dīnārs</i>, and <i>dirhams</i>, and what is not known by its distinctive substance;³ the <i>rabb al-wadī'a</i> shares with the creditors, unless the deceased depositary (<i>al-mustawda'u al-mayyitu</i>) says, before he dies: The <i>wadī'a</i> has been consumed (<i>qad halakat</i>) [i.e., lawfully, by terms of contract]. The [considered] <i>qawl</i> [in that case] is his <i>qawl</i>, because he is one entrusted with fiduciary duty (<i>amīn^{un}</i>).	وَدَرَاهِمَ وَمَا لَا يُعْرِفُ بَعَيْنِهِ حَاصٌّ رَبُّ الْوَدِيعَةِ الْغُرْمَاءَ، إِلَّا أَنْ يَقُولَ الْمُسْتَوْدَعُ الْمَيِّتُ قَبْلَ أَنْ يَمُوتَ: قَدْ هَلَكَتِ الْوَدِيعَةُ. فَيَكُونُ الْقَوْلُ قَوْلُهُ؛ لِأَنَّهُ أَمِينٌ.
460 – And when a man acknowledges (<i>aqarra</i>) — during that illness (<i>fi maraḍihi</i>) in which he dies — a debt, while he owes a debt [confirmed] by witnesses during his [full] health (<i>fi ṣiḥḥatihi</i>), and he doesn't have an amount sufficient to pay off all the debts (<i>laysa lahu wafā^{un}</i>); then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: It [the settling of debts] is begun with the known debt (<i>yubda'u bi'l-dayni al-ma'rūfi</i>) which was during his <i>ṣiḥḥa</i>. And if there remains something as surplus after them [the health-known creditors]; it belongs to those to whom he made acknowledgement during the <i>marāḍ</i>, by shares (<i>bi'l-hiṣaṣi</i>). Don't you see/opine (<i>alā tarā</i>) that he — when he becomes ill (<i>marīḍa</i>) — doesn't own anything of his <i>māl</i>, and there is not permitted his bequest of it (<i>waṣīyyatuhu</i>) due to what he owes of debt? Likewise [regarding] his <i>iqrār</i> of it [of the debt]. And he [Abū Yūsuf] embraces it.	460 – وَإِذَا أَقَرَّ الرَّجُلُ فِي مَرَضِهِ الَّذِي مَاتَ فِيهِ بَدَيْنَ وَعَلَيْهِ دَيْنٌ بِشُهُودٍ فِي صِحَّتِهِ وَلَيْسَ لَهُ وَفَاءٌ، فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: يُبْدَأُ بِالَّذِينَ الْمَعْرُوفِ الَّذِي فِي صِحَّتِهِ، فَإِنْ فَضَلَ عَنْهُمْ شَيْءٌ كَانَ لِلَّذِينَ أَقَرَّ لَهُمْ فِي الْمَرَضِ بِالْحِصَصِ. أَلَا تَرَى أَنَّهُ حِينَ مَرَضَ أَنَّهُ لَيْسَ يَمْلِكُ مِنْ مَالِهِ شَيْئًا، وَلَا تَجُوزُ وَصِيَّتُهُ فِيهِ لِمَا عَلَيْهِ مِنَ الدَّيْنِ، فَكَذَلِكَ إِقْرَارُهُ لَهُ. وَبِهِ يَأْخُذُ.
461 – But Ibn Abī Laylā used to say: He is to be believed (<i>huwa muṣaddaq^{un}</i>) regarding what he acknowledged, and that for which he made acknowledgement in <i>ṣiḥḥa</i> and in	461 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هُوَ مُصَدِّقٌ فِيمَا أَقَرَّ بِهِ، وَالَّذِي أَقَرَّ لَهُ فِي الصَّحَّةِ

³ Al-Shāfi'ī here provides a contextual clue as to what he means by 'ayn and *bi-'aynihā*. It appears that the difference between *bi-'aynihā* and *bi-ghayri 'aynihā* is, basically, the difference between non-fungible and fungible (the latter here exemplified by coins). As such, *bi-'aynihā* vs. *bi-ghayri 'aynihā* may represent a precursor to the *mithlī* vs. *qīmī* distinction. Still of interest is the observation of S. van den Bergh (*El²*, s.v. "Ayn"), which we have partially quoted in a previous note (see §90, above). That Ibn al-Muqaffa' indeed employed Arabic 'ayn for Greek οὐσία in his logic work may be confirmed in a number of passages from the scholarly Iranian edition of *Al-Manṭiq li-Ibn al-Muqaffa'* (especially at 8 [§16] and 9 [§§18-19]). Here we see 'ayn distinguished over and against both *ṣifa* (property) and *'araḍ* (accident). As for van den Bergh's *El²* entry, there is much more of interest, including a connection between 'ayn and *ma'nā*, the use of 'ayn as an expression of "the identity of the individual thing," and the Arab grammarians' use of *ism 'ayn* for "a word denoting a concrete individual." Whatever connections may exist between the early jurists' usage of 'ayn to denote something like "fungible", and Ibn al-Muqaffa's selection of 'ayn to translate Gr. οὐσία, must await further exploration.

<i>marāḍ</i> is one and the same (<i>sawā^{un}</i>).	وَالْمَرَضِ سَوَاءٌ.
462 – Al-Shāfi‘ī, may God have mercy upon him, said: And when a man owes known debts (<i>duyūn^{un} ma‘rūfat^{un}</i>) pertaining to <i>buyū‘</i>, or offences (<i>jināyāt</i>), or something he consumed (<i>shayⁱⁿ istahlakahu</i>), or something he acknowledged, and this, all of it, is in <i>ṣiḥḥa</i>, then he falls [terminally] ill and acknowledges a <i>ḥaqq</i> belonging to a person; that, all of it, is one and the same (<i>fa-dhālika kulluhu sawā^{un}</i>), and they share among themselves, together (<i>yataḥāṣṣūna ma^{an}</i>) – not one is given priority over the other. And it is not permitted that anything but this be said regarding it [the <i>mas’ala</i>], and God Most High knows best.	462 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا كَانَتْ عَلَى الرَّجُلِ دُيُونٌ مَعْرُوفَةٌ مِنْ بَيُوعٍ أَوْ جَنَايَاتٍ أَوْ شَيْءٍ اسْتَهْلَكَهُ أَوْ شَيْءٍ أَقْرَبَ بِهِ، وَهَذَا كُلُّهُ فِي الصَّحَّةِ، ثُمَّ مَرَضَ فَاقْرَبَ بِحَقِّ لِإِنْسَانٍ، فَذَلِكَ كُلُّهُ سَوَاءٌ وَيَتَحَاصُّونَ مَعًا لَا يُقَدِّمُ وَاحِدٌ عَلَى الْآخَرِ، وَلَا يَجُوزُ أَنْ يُقَالَ فِيهِ إِلَّا هَذَا وَاللَّهُ تَعَالَى أَعْلَمُ.
463 – Or that a man say: When he falls [deathly] ill, his <i>iqrār</i> is <i>bāṭil</i>, like the <i>iqrār</i> of the one under guardianship (<i>al-mahjūr ‘alayhi</i>). And as for claiming that his <i>iqrār</i> binds him, thereupon his creditors do not share it out; this is arbitrariness (<i>taḥakkum^{un}</i>) – which is to say that he begins with the debt of <i>ṣiḥḥa</i>, and the <i>iqrār</i> of <i>ṣiḥḥa</i>. And if he owes a debt in <i>marāḍ</i>, by <i>bayyina</i>, he [the creditor] shares; and if it is not by <i>bayyina</i>, he does not share. And when a man separates (<i>fara’a</i>) the <i>ahl</i> of the debt of <i>ṣiḥḥa</i> and of the debt of <i>marāḍ</i> by means of the <i>bayyina</i>, there is not permitted for him a <i>waṣiyya</i>, nor is it transmitted as legacy (<i>wa lam yuwarraṭh</i>) until this one [the sick-acknowledged creditor] takes his <i>ḥaqq</i>. And this is a debt [only] once, given precedence over (<i>yubadda’u ‘alā</i>) legacies (<i>al-mawārīth</i>) and bequests (<i>al-waṣāyā</i>), and not a debt [at all] when it gets to the point where he can’t share in it (<i>idhā ṣāra lā yuḥāṣṣu bihi</i>).⁴	463 – أَوْ أَنْ يَقُولَ رَجُلٌ: إِذَا مَرَضَ فإِقْرَارُهُ بَاطِلٌ كإِقْرَارِ الْمَحْجُورِ عَلَيْهِ. فَأَمَّا أَنْ يَزْعُمَ أَنْ إِقْرَارَهُ يَلْزِمُهُ ثُمَّ لَا يُحَاصُّ بِهِ غُرْمَاؤُهُ فَهَذَا تَحَكُّمٌ، وَذَلِكَ أَنْ يَبْدَأَ بِدَيْنِ الصَّحَّةِ وَإِقْرَارِ الصَّحَّةِ. فَإِنْ كَانَ عَلَيْهِ دَيْنٌ فِي الْمَرَضِ بَيِّنَةً حَاصَّةً، وَإِنْ لَمْ يَكُنْ بَيِّنَةً لَمْ يُحَاصَّ، وَإِذَا فَرَعَ الرَّجُلُ أَهْلَ دَيْنِ الصَّحَّةِ وَدَيْنِ الْمَرَضِ بِالْبَيِّنَةِ لَمْ تَجْزَلْ لَهُ وَصِيَّةٌ وَلَمْ يُوَرَّثْ حَتَّى يَأْخُذَ هَذَا حَقَّهُ فَهَذَا دَيْنٌ مَرَّةً يَبْدَأُ عَلَى الْمَوَارِيثِ وَالْوَصَايَا وَغَيْرِ دَيْنٍ إِذَا صَارَ لَا يُحَاصُّ بِهِ.

⁴ §§460-3: My understanding of this *mas’ala* is as follows: First, Abū Ḥanīfa is saying that the acknowledgement made during the debtor’s death-sickness cannot take precedence over the (witnessed) acknowledgement made when he was healthy — the health-*iqrār* folk collect first, the sick-*iqrār* folk share what’s left. During his death-sickness he does not actually own his *māl* anymore, and can’t make bequests — he’s like the *maḥjūr*: not legally competent —, and thus his *iqrār* can’t be trusted, either. Contrary to this, Ibn Abī Laylā says no, there’s no difference between an acknowledgment made in health or in death-sickness. Al-Shāfi‘ī then seconds Ibn Abī Laylā, and adds that they all share together, no priority being recognized. Al-Shāfi‘ī confirms that whosoever says the *iqrār* of the deathly sick is *bāṭil* like that of the *maḥjūr* is wrong; then he points out that, if one says the death-sick *iqrār* is binding, but holds that they don’t share (i.e.,

464 – And when a woman incurs a debt (*istadānat*) while her husband is absent; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: I enjoin for her (*afriḍu lahā*), upon her husband, an appropriate maintenance (*nafaqata mithlihā*) in his absence. Then he withdrew from that [position] (*thumma rajaʿa ʿan dhālika*),⁵ and said: She has no right to anything while she is voluntarily engaged (*mutatawwiʿat*)⁶ regarding what she expends, and the *dayn* is upon her, exclusively (*khāṣṣat*).⁶

464 – وَإِذَا اسْتَدَانَتِ الْمَرْأَةُ زَوْجَهَا غَائِبٌ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: أَفْرِضُ لَهَا عَلَى زَوْجِهَا نَفَقَةً مِثْلَهَا فِي غَيْبَتِهِ. ثُمَّ رَجَعَ عَنْ ذَلِكَ فَقَالَ: لَا شَيْءَ لَهَا وَهِيَ مُتَطَوِّعَةٌ فِيمَا أَنْفَقَتْ وَالَّذِينَ عَلَيْهَا خَاصَّةً.

the health-*iqrār* folk get precedence), then this is purely arbitrary – why should they get precedence? It's all the same. The sensible conclusion is that if the death-sick *iqrār* is backed by evidence, it is equal to that made in health and backed by evidence – thus all creditors share the estate. If no evidence, no share. Finally, al-Shāfiʿi makes it clear that, if there is, in fact, a distinction in that one set of creditors have *bayyina* and the other doesn't; there can be no bequest or legacy until the one with *bayyina* collects his due; (and then the bequests and legacies [?]), and once it gets to the point where nothing of the estate can be shared out, death-sick debt can no longer even be considered a debt (the man is dead, and his estate is consumed).

⁵ An excellent example of Abū Ḥanīfa's "following the *hujja*," this simple record of opinion-change (following, we must assume, Abū Ḥanīfa's careful deliberation) speaks volumes against certain paradigms; Abū Ḥanīfa's behaviour does not conform to "polemical defence" of pre-determined doctrine. Nor, for that matter, does Abū Yūsuf's careful recording of his master's opinion-change, and subsequent adherence to the *qawl* of Ibn Abī Laylā (§466), conform to such a paradigm. It is not so unrealistic, in general, to assume the pious truth-seeking intent of renowned Muslim scholars – scions, as they are, of a pious tradition –, unless there is good reason to do otherwise. (Fischer, noting a general tendency among historians to assume darker motives behind human actions, speaks at some length of what he calls the "furtive fallacy" [*Historians' Fallacies*, 74-8.]) We should not be so surprised – and this is an understatement – to observe Muslim scholars revising their opinions when faced with stronger evidence. As regards Abū Ḥanīfa in particular, see our section in Part I, Chap. I.2 ("The *Kitāb al-Umm*, Our Jurist Dialecticians, and the Truth-Seeking Ethic"), and especially the note on Abū Ḥanīfa's "critical constructivism" as described by Oussama Arabi (*Early Muslim Legal Philosophy*, 58ff.) In particular, we might remember the anecdote wherein Abū Ḥanīfa says to Abū Yūsuf: "Ya'qūb! Don't write what you hear from me. I might hold an opinion today and abandon it tomorrow! And I might hold an opinion tomorrow and abandon it the day after!" (Ibid., 60 and n.18). Indeed, above in §464, when Abū Yūsuf states *thumma rajaʿa ʿan dhālika*, we see every confirmation of Abū Ḥanīfa's "critical constructivism."

⁶ Al-Afghānī (62-3, n.2): "He [al-Sarakhsī] said, in the *Mabsūṭ* [5:184]: «And likewise if she incurred debt against him (*istadānat ʿalayhi*) before the *qadāʾ* of the *qādī*, or the mutual consent (*al-tarāḍī*).» Because he is not responsible for her in terms of *wilāyat al-istidāna*, and indeed her *wilāya* is only upon herself, so what she incurred as debt (*istadānat*) is in her *dhimma*, and her expenditure (*infāquhā*) as pertains to what she incurred in debt is like her expenditure as pertains to the rest of her owned possessions (*amlākihā*); «and she lays claim to nothing of that over the husband, unless the *qādī* has enjoined for her upon him *nafaqa* every month, or she has contracted amicable settlement with him (*ṣālahat-hu*) for *nafaqa* every month, then he absented himself (*ghāba*) or was held back (*hubisa*) for the *nafaqa*, so she incurred debt against him, or did not – she imposes upon him (*akhdhat-hu bi-*) the *nafaqa* which has passed.» Because her *ḥaqq* is confirmed (*taʿakkada*) by the ruling of the *qādī*, or by the *ṣulḥ* on the strength of mutual consent (*an tarāḍīn*), and indeed his *wilāya* over himself regarding compulsion (*ilzām*) is above the *wilāya* of the *qādī* as regards obligation (*al-iltizām*). And it is related about Shurayḥ that he said: «Any

465 – But Ibn Abī Laylā used not to enjoin <i>nafaqa</i> for her, except regarding what was expected (<i>illā fīmā yustaqbalu</i>).	465 – وَكَانَ ابْنُ أَبِي لَيْلَى لَا يَفْرِضُ لَهَا نَفَقَةً إِلَّا فِيمَا يُسْتَقْبَلُ.
466 – And likewise it has reached us concerning Shurayḥ. And he [Abū Yūsuf] embraces this [doctrine].	466 – وَكَذَلِكَ بَلَّغْنَا عَنْ شُرَيْحٍ، وَبِهَذَا يَأْخُذُ.
467 – Al-Shāfiʿī, may God have mercy upon him, said: And when a man is absent from his wife, and he does not provide maintenance for her (<i>lam yunfiq 'alayhā</i>), I enjoin upon him the <i>nafaqa</i> for what has passed since he abandoned [payment of] the <i>nafaqa</i> for her until [the point] that he paid. And it is not permissible that — if he is present — we compel him (<i>alzamnāhu</i>) to her <i>nafaqa</i> while we sell for her regarding his <i>māl</i> ; then he absents himself from her or blocks her from (<i>yamna'uhā</i>) the <i>nafaqa</i> , and we not bring about his owing her a <i>dayn</i> , because the injustice (<i>al-zulm</i>), in that case, severs the established right (<i>yaqṭa'u al-ḥaqq</i>), and injustice must not sever a right (<i>wa'l-zulmu lā yaqṭa'u ḥaqq^m</i>). And whosoever claims that he enjoins upon him her <i>nafaqa</i> during the absence, claims that no judgment is passed against an absent one — except her husband (<i>lā yuqḍā 'alā ghā'ibⁱⁿ illā zawjihā</i>), ⁷ and that he indeed	467 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا غَابَ الرَّجُلُ عَنْ امْرَأَتِهِ فَلَمْ يُنْفِقْ عَلَيْهَا فَرَضْتُ عَلَيْهِ النَّفَقَةَ لِمَا مَضَى مُنْذُ تَرَكَ النَّفَقَةَ عَلَيْهَا إِلَى أَنْ أَنْفَقَ، وَلَا يَجُوزُ أَنْ يَكُونَ لَوْ كَانَ حَاضِرًا أَلْزَمْنَاهُ نَفَقَتَهَا وَبَعْنَا لَهَا فِي مَالِهِ ثُمَّ يَغِيبُ عَنْهَا أَوْ يَمْنَعُهَا النَّفَقَةَ وَلَا نَجْعَلُ لَهَا عَلَيْهِ دَيْنًا؛ لِأَنَّ الظُّلْمَ إِذَا يَقْطَعُ الْحَقَّ الثَّابِتَ وَالظُّلْمُ لَا يَقْطَعُ حَقًّا، وَالَّذِي يَزْعُمُ أَنَّهُ يَفْرِضُ عَلَيْهِ نَفَقَتَهَا فِي الْغَيْبَةِ يَزْعُمُ أَنَّهُ لَا يُقْضَى عَلَى غَائِبٍ إِلَّا زَوْجِهَا،

woman who incurred debt against her husband while he was absent — she has incurred debt only against herself.» And he means by it only that, when the *qāḍī* does not enjoin [upon the husband] *nafaqa* for her, or enjoins [*nafaqa*] for her but does not order her to indemnification (*al-istidāna*) against her husband; as for when he orders her to the *istidāna* against him, then that is owed by the husband — because the *qāḍī* has *wilāya* over him, and his ordering her to *istidāna* against him is like the order of the husband himself. He said, «And Abū Ḥanīfa, may God Most High have mercy upon him, said: I do not permit the loan of fungibles (*al-qarḍ*) to his debit when he is absent» — because the *qarḍ* to his debit, when he is absent, is a compulsion (*ilzām*), and to the *qāḍī* belongs no *wilāyat al-ilzām* over the absentee” [i.e., the *qāḍī* can oblige him to do his duty, but cannot compel him to take on a new, voluntary duty].

⁷ This appears to refer to a more basic *mas'ala*, treated in the *Kitāb al-Aqḍiyya* of the *Umm*, in the *Bāb al-Da'wā wa'l-Bayyināt* (Ḥassūn, pt.13, §§24845ff.):

24846 – قَالَ الشَّافِعِيُّ، رَحِمَهُ اللَّهُ تَعَالَى: وَلَيْسَ فِي الْقَضَاءِ عَلَى الْغَائِبِ إِلَّا وَاحِدٌ مِنْ قَوْلَيْنِ:

24847 – إِمَّا لَا يُقْضَى عَلَى غَائِبٍ بِدَيْنٍ وَلَا غَيْرِهِ.

24848 – وَإِمَّا يُقْضَى عَلَيْهِ فِي الدَّيْنِ وَغَيْرِهِ.

24849 – وَنَحْنُ نَرَى الْقَضَاءَ عَلَيْهِ بَعْدَ الْأَعْدَارِ، وَقَدْ كَتَبْنَا الْأَعْدَارَ فِي مَوْضِعٍ غَيْرِ هَذَا، وَسَوَاءٌ كَانَ إِقْرَارُ الَّذِي الدَّارُ فِي يَدَيْهِ قَبْلَ شَهَادَةِ الشُّهُودِ أَوْ بَعْدَهَا، وَسَوَاءٌ هَذَا فِي جَمِيعِ الْأَمْوَالِ.

enjoins upon him her <i>nafaqa</i> while he is absent; and he extracts it [the <i>nafaqa</i>] (<i>yukhrijuhā</i>) from his [the husband's] <i>māl</i> and pays it over to her; and he makes it [the <i>nafaqa</i>] more certain than the rights of the people (<i>yaj'aluhā awkada min huqūqi al-nāsi</i>), once, in this; then he discards it (<i>thumma yaṭraḥuhā</i>) by his absence if she does not stand against him (<i>in lam taqum 'alayhi</i>). But he does not discard a right (<i>lā yaṭraḥu ḥaqq^{an}</i>) by abandoning his <i>ṣāhib</i> who stands against him (<i>al-qiyāma 'alayhi</i>). And he marvels at the <i>qawl</i> of our <i>aṣḥāb</i> regarding the taking possession (<i>al-ḥiyāza</i>), and he says: The <i>ḥaqq</i> is new, and the abandoning (<i>al-tarku</i>) is not a departure from the <i>ḥaqq</i>. Then he brings about the <i>ḥiyāza</i> in the <i>nafaqa</i>.	فَإِنَّهُ يَفْرَضُ عَلَيْهِ نَفَقَتَهَا وَهُوَ غَائِبٌ، فَيَخْرِجُهَا مِنْ مَالِهِ فَيَدْفَعُهَا إِلَيْهَا فَيَجْعَلُهَا أَوْكَدَ مِنْ حُقُوقِ النَّاسِ مَرَّةً فِي هَذَا ثُمَّ يَطْرَحُهَا بِعَيْتِهِ إِنْ لَمْ تَقُمْ عَلَيْهِ وَهُوَ لَا يَطْرَحُ حَقًّا بَتَرَكِ صَاحِبِهِ الْقِيَامَ عَلَيْهِ، وَيَعْجَبُ مِنْ قَوْلِ أَصْحَابِنَا فِي الْحِيَازَةِ وَيَقُولُ: الْحَقُّ جَدِيدٌ وَالتَّرْكُ غَيْرُ خُرُوجٍ مِنَ الْحَقِّ. ثُمَّ يَجْعَلُ الْحِيَازَةَ فِي النَّفَقَةِ.
468 – Al-Rabī reported to us, he said: Al-Shāfi'ī reported to us, he said: Muslim b. Khālid reported to us, on the authority of 'Ubayd Allāh b. 'Umar, on Nāfi', on Ibn 'Umar, that 'Umar b. al-Khaṭṭāb, may God be pleased with him, wrote to the commanders of the soldiers (<i>umarā'i al-ajnādi</i>)⁸ regarding men who absented themselves (<i>ghābū</i>) from their wives; he ordered [of the commanders] that they oblige them to pay maintenance or pronounce unilateral divorce (<i>yunfiqū aw yuṭalliqū</i>), and if they pronounce <i>ṭalāq</i>, they send the <i>nafaqa</i> for what they held back (<i>ḥabasū</i>).	468 – أَخْبَرَنَا الرَّبِيعُ، قَالَ: أَخْبَرَنَا الشَّافِعِيُّ قَالَ: أَخْبَرَنَا مُسْلِمُ بْنُ خَالِدٍ، عَنْ عُبَيْدِ اللَّهِ بْنِ عُمَرَ، عَنْ نَافِعٍ، عَنْ ابْنِ عُمَرَ أَنَّ عُمَرَ بْنَ الْخَطَّابِ رَضِيَ اللَّهُ عَنْهُ كَتَبَ إِلَى أُمَرَاءِ الْأَجْنَادِ فِي رِجَالٍ غَابُوا عَنْ نِسَائِهِمْ؛ فَأَمَرَهُمْ بِأَنْ يَأْخُذُوهُمْ بِأَنْ يُنْفِقُوا أَوْ يُطَلِّقُوا، فَإِنْ طَلَّقُوا بَعَثُوا بِنَفَقَةٍ مَا حَبَسُوا.
469 – Al-Shāfi'ī, may God have mercy upon him, said: And they claim that they do not contradict even one of the <i>aṣḥāb</i> of the Prophet, may God bless and save him, but they have contradicted the <i>ḥukm</i> of 'Umar; and they claim that they do not accept the abandonment (<i>tark</i>) of <i>qiyās</i> from anyone, but they have abandoned it and professed regarding it a contradictory doctrine (<i>qawl^{an} mutanāqid^{an}</i>).	469 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَهُمْ يَزْعُمُونَ أَنَّهُمْ لَا يُخَالِفُونَ الْوَاحِدَ مِنْ أَصْحَابِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – وَقَدْ خَالَفُوا حُكْمَ عُمَرَ، وَيَزْعُمُونَ أَنَّهُمْ لَا يَقْبَلُونَ مِنْ أَحَدٍ تَرَكَ الْقِيَاسِ، وَقَدْ تَرَكَوهُ وَقَالُوا فِيهِ قَوْلًا مُتَنَاقِضًا.

It is no doubt in reference to this *mas'ala* that Ḥassūn vowels the phrase in §467 *lā yuqḍā 'alā ghā'ibⁱⁿ illā zawjihā*, rather than what, at first sight, might seem the more appropriate *lā yaqḍī 'alā ghā'ibⁱⁿ illā zawjahā*. I have followed Ḥassūn in this.

⁸ Ḥassūn has أمراء instead of أمراء (ix.89); I have assumed it to be a typo.

470 – And when a man [A] is owed <i>māl</i> by a man [B], while he [B] is owed by him [A] its like (<i>mithluhu</i>); then indeed Abū Ḥanīfa, may God be pleased with him, used to say: It is a reciprocation of like-for-like (<i>huwa qīṣās^{um}</i>). And he [Abū Yūsuf] embraces it.	470 – وَإِذَا كَانَ لِرَجُلٍ عَلَى رَجُلٍ مَالٌ وَلَهُ عَلَيْهِ مِثْلُهُ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: هُوَ قِصَاصٌ. وَبِهِ يَأْخُذُ.
471 – But Ibn Abī Laylā used to say: It is not <i>qīṣās</i> unless they both mutually consent to it (<i>yatarādāyā bihi</i>). And if there belongs to one of them, to the debit of his <i>ṣāhib</i>, <i>māl</i> incompatible (<i>mukhālifa^{um}</i>) to that; that is not <i>qīṣās</i>, according to both their <i>qawls</i> [Abū Ḥanīfa's and Ibn Abī Laylā's], together.	471 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا يَكُونُ قِصَاصًا إِلَّا أَنْ يَتَرَاضِيَ بِهِ، فَإِنْ كَانَ لِأَحَدِهِمَا عَلَى صَاحِبِهِ مَالٌ مُخَالَفٌ لِدَلِيلِكَ لَمْ يَكُنْ ذَلِكَ قِصَاصًا فِي قَوْلِهِمَا جَمِيعًا.
472 – Al-Shāfi'ī, may God have mercy upon him, said: And when a man [A] is owed <i>māl</i> by a man [B], while he [B] is owed by him [A] its like (<i>mithluhu</i>), neither of the two differing as regards weight or number, and they are both, together, lawful [objects] (<i>ḥallayni</i>); it is <i>qīṣās</i>. And if they are different (<i>mukhtalifayni</i>); it is not <i>qīṣās</i>, unless by mutual consent (<i>bi-tarād^{im}</i>), and the <i>tarādī</i> is not <i>jā'iz</i> except for that which is lawful in sales (<i>mā taḥillu bihi al-buyū'u</i>).	472 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا كَانَ لِرَجُلٍ عَلَى رَجُلٍ مَالٌ وَلَهُ عَلَيْهِ مِثْلُهُ لَا يَخْتَلِفَانِ فِي وَزْنٍ وَلَا عَدَدٍ وَكَانَا حَالَيْنِ مَعًا فَهُوَ قِصَاصٌ، فَإِنْ كَانَا مُخْتَلِفَيْنِ لَمْ يَكُنْ قِصَاصٌ إِلَّا بِتَرَاضٍ، وَلَمْ يَكُنْ التَّرَاضِي جَائِزًا إِلَّا بِمَا تَحِلُّ بِهِ الْبُيُوعُ.
473 – And when an heir (<i>wārith</i>) acknowledges a debt [of the deceased], and in his portion (<i>naṣībhi</i>) there is a sufficiency [to pay] (<i>wafā^{um}</i>) that debt; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: The creditor (<i>al-gharīm</i>) exacts in full (<i>yastawfi</i>) from that acknowledging <i>wārith</i> the entirety of his [the creditor's] <i>māl</i> from his portion, because there belongs to him no inheritance (<i>mīrāth</i>) until he settles (<i>yaqḍiya</i>) the <i>dayn</i>. And he [Abū Yūsuf] embraces it.	473 – وَإِذَا أَقَرَّ وَارِثٌ بِدَيْنٍ وَفِي نَصِيبِهِ وَفَاءٌ بِذَلِكَ الدَّيْنِ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: يَسْتَوْفِي الْغَرِيمُ مِنْ ذَلِكَ الْوَارِثِ الْمُقَرَّرَ جَمِيعَ مَالِهِ مِنْ نَصِيبِهِ؛ لِأَنَّهُ لَا مِيرَاثَ لَهُ حَتَّى يَقْضِيَ الدَّيْنَ. وَبِهِ يَأْخُذُ.
474 – But Ibn Abī Laylā used to say: He [the creditor] imposes upon him (<i>yadkhulu 'alayhi</i>) [i.e., upon the heir who acknowledged] of the <i>dayn</i> only to the measure of his portion (<i>bi-qadri naṣībhi</i>) of the <i>mīrāth</i>. And if it is he and his brother, then he [the creditor] imposes upon him half (<i>dakhala 'alayhi al-nisfu</i>), and if they are three, he imposes upon him a third. And the witness (<i>al-shāhid</i>), according to him [Ibn Abī Laylā], among them is alone in the position/status of the acknowledged (<i>bi-</i>	474 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: إِنَّمَا يَدْخُلُ عَلَيْهِ مِنَ الدَّيْنِ بِقَدْرِ نَصِيبِهِ مِنَ الْمِيرَاثِ، فَإِنْ كَانَ هُوَ وَأَخٌ لَهُ دَخَلَ عَلَيْهِ النِّصْفُ، وَإِنْ كَانُوا ثَلَاثَةً دَخَلَ عَلَيْهِ الثُّلُثُ، وَالشَّاهِدُ عِنْدَهُ مِنْهُمْ وَحْدَهُ بِمَنْزِلَةِ الْمُقَرَّرِ، وَإِنْ كَانَا اثْنَيْنِ جَازَتْ شَهَادَتُهُمَا فِي جَمِيعِ

<i>manzilati al-muqirri</i>). But if they are two, their <i>shahāda</i> is permitted regarding the entirety of the <i>mīrāth</i>, according to their two <i>qawls</i> [Abū Ḥanīfa's and Ibn Abī Laylā's], together, when they are both 'adls. And if they are not both 'adls, then that regards their portions, according to what we explained (<i>fassarnā</i>) of the <i>qawl</i> of Abū Ḥanīfa and Ibn Abī Laylā.	الْمِيرَاثِ فِي قَوْلِهِمَا جَمِيعًا إِذَا كَانَا عَدْلَيْنِ، فَإِنْ لَمْ يَكُونَا عَدْلَيْنِ كَانَ ذَلِكَ فِي أَنْصِبَائِهِمَا عَلَى مَا فَسَّرْنَا مِنْ قَوْلِ أَبِي حَنِيفَةَ وَابْنِ أَبِي لَيْلَى.
475 – Al-Shāfi'ī, may God Most High be pleased with him, said: When the man dies and leaves behind two sons, neither one an 'adl, and one of them acknowledges a debt owed by his father; some of our <i>aṣḥāb</i> have said: To the creditor of whom acknowledgment was made (<i>li'l-gharīmi al-muqarri lahu</i>) belongs the right to take from the acknowledger (<i>al-muqarri</i>) the like of which he would have obtained from what is in his possession, if the other [son] had [also] acknowledged it — and that is half of his <i>dayn</i>, pertaining to what is in his possession.	475 – قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ تَعَالَى عَنْهُ: إِذَا مَاتَ الرَّجُلُ وَتَرَكَ ابْنَيْنِ غَيْرَ عَدْلَيْنِ فَأَقْرَّ أَحَدُهُمَا عَلَى أَبِيهِ بَدَيْنٍ، فَقَدْ قَالَ بَعْضُ أَصْحَابِنَا: لِلْغَرِيمِ الْمُقَرَّرُ لَهُ أَنْ يَأْخُذَ مِنَ الْمُقَرَّرِ مِثْلَ الَّذِي كَانَ يُصِيبُهُ مِمَّا فِي يَدَيْهِ لَوْ أَقْرَّ بِهِ الْآخَرُ؛ وَذَلِكَ النَّصْفُ مِنْ دَيْنِهِ مِمَّا فِي يَدَيْهِ.
476 – And others of them [of our <i>aṣḥāb</i>] said: He takes the entirety of his <i>māl</i> from this one, and when the other acknowledges for him, the taken [<i>māl</i>] reverts from his possession (<i>raja'a al-ma'khūdhū min yadayhi</i>) to the one who inherits with him [his brother], and he divides it (<i>yuqāsīmu</i>) until they are both equal as regards the <i>mīrāth</i>.	476 – وَقَالَ غَيْرُهُمْ: يَأْخُذُ جَمِيعَ مَالِهِ مِنْ هَذَا، فَمَتَى أَقْرَّ لَهُ الْآخَرُ رَجَعَ الْمَأْخُوذُ مِنْ يَدَيْهِ عَلَى الْوَارِثِ مَعَهُ فَيُقَاسِمُهُ حَتَّى يَكُونَا فِي الْمِيرَاثِ سَوَاءً.
477 – And when a man writes for a loan of fungibles (<i>kataba bi-qarḍⁱⁿ</i>) in a statement-of-right (<i>fī dhikri ḥaqqⁱⁿ</i>), then he furnishes <i>bayyina</i> that its <i>aṣl</i> was <i>muḍāraba</i>; then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: I impose it [the <i>dhikr ḥaqq</i>] upon him (<i>ākhudhuhi bihi</i>). And his <i>iqrār</i> against himself for the <i>qarḍ</i> [as appears in the document] is more trustworthy than his claim (<i>aṣḍaqu min da'wāhu</i>) [i.e., his <i>bayyina</i>-backed <i>muḍāraba</i> claim]. And he [Abū Yūsuf] embraces it.⁹	477 – وَإِذَا كَتَبَ الرَّجُلُ بِقَرْضٍ فِي ذِكْرِ حَقٍّ ثُمَّ أَقَامَ بَيِّنَةً أَنَّ أَصْلَهُ كَانَ مُضَارَبَةً، فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: آخُذْهُ بِهِ، وَإِقْرَارُهُ عَلَى نَفْسِهِ بِالْقَرْضِ أَصْدَقُ مِنْ دَعْوَاهُ. وَبِهِ يَأْخُذُ.

⁹ §§477, 480, 483-4, etc.: These *masā'il* all incorporate a *dhikr ḥaqq*, which is a document-genre discussed by Michael Thung in his "Written Obligations from the 2nd/8th to the 4th/10th Century" (*Islamic Law and Society* 3,1 (1996): 1-12). A few notes of interest to this translation: 1) Thung translates *dhikr ḥaqq* as "written obligation;" 2) two of the texts he describes are on Egyptian papyri, dated 173 and 179 AH (i.e., between 31 and 25 years before the death of al-Shāfi'ī, and only some two decades or so before his arrival in Egypt); 3) Thung details the purpose and

478 – But Ibn Abī Laylā used to say: I nullify it from him (<i>ubṭiluhu ‘anhu</i>), and I make it his responsibility as <i>muḍāraba</i> ; he is, as regards it, one with fiduciary duty (<i>amīn^{um}</i>).	478 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: أُبْطِلُهُ عَنْهُ وَأَجْعَلُهُ عَلَيْهِ مُضَارَبَةً وَهُوَ فِيهِ أَمِينٌ.
479 – Al-Shāfi‘ī, may God have mercy upon him, said: And when the man acknowledges that he owes a man one thousand dirhams as <i>salaf</i> , then he brings <i>bayyina</i> that it is a <i>muqāraḍa</i> ; ¹⁰ the one to whom belongs the <i>salaf</i> is asked. And if he says: Yes, it is <i>muqāraḍa</i> , I intended that he be liable (<i>dāmin^{um}</i>) for it; we nullify from him (<i>abṭalnā ‘anhu</i>) the <i>salaf</i> and make it a <i>muqāraḍa</i> . But if the <i>rabb al-māl</i> does not acknowledge this, and the one for whom testimony was made (<i>al-mashhūdu lahu</i>) claims it [i.e., that it is <i>muqāraḍa</i> and not <i>salaf</i>], we make him [the <i>rabb al-māl</i>] swear (<i>aḥlafnāhu</i>), and if he swears, it is owed to him [the <i>rabb al-māl</i>], by him [the claimant], as a <i>dayn</i> . And his	479 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا أَقَرَّ الرَّجُلُ أَنَّ لِلرَّجُلِ عَلَيْهِ أَلْفَ دِرْهَمٍ سَلَفًا، ثُمَّ جَاءَ بِالْبَيِّنَةِ أَنَّهَا مُقَارَضَةٌ، سُئِلَ الَّذِي لَهُ السَّلَفُ. فَإِنْ قَالَ: نَعَمْ هِيَ مُقَارَضَةٌ أَرَدْتُ أَنْ يَكُونَ لَهُ ضَامِنًا. أُبْطَلْنَا عَنْهُ السَّلَفَ وَجَعَلْنَاهَا مُقَارَضَةً، وَإِنْ لَمْ يُقَرِّ بِهَذَا رَبُّ الْمَالِ وَادَّعَاهُ الْمَشْهُودُ لَهُ، أَحْلَفْنَاهُ، فَإِنْ حَلَفَ كَانَتْ لَهُ عَلَيْهِ دَيْنًا، وَكَانَ إِقْرَارُهُ عَلَى نَفْسِهِ أَوْلَى مِنْ

features of the *dhikr ḥaqq* — we will summarize some of his observations regarding *adhkār ḥuqūq* in general, and the first and oldest document in particular (“Written Obligations,” 2-5). As for the *dhikr ḥaqq* in general: its purpose is “to give written evidence to a legal claim (*ḥaqq*) held by one of the contracting parties against the other;” and it “provided a convenient instrument for different legal transactions.” As for the first and oldest of the papyri described by Thung: a) it uses ‘*alā*’ (“to the debit of”) to determine who is indebted to whom; b) it employs *qabaḍa* to denote the object was taken possession of, *raḍiyya* to denote the contentment of both parties at the time the *dhikr* was written and witnessed, words of root *ḥ-l-l* to determine due date, and words of root *ḥ-w-l* to denote that the debt may be transferred to whomever bears the document; c) it contains the debtor’s *iqrār*; and d) it contains the names of witnesses with the word *shahida*. Thung accompanies each property of this particular *dhikr ḥaqq* with the relevant discourse of al-Ṭahāwī (d.321/933), as found in one of his *shurūṭ* works, edited and studied by Joseph Schacht as *Das Kitāb Adhkār al-Ḥuqūq war-ruhūn aus dem al-Ġāmi’ al-Kabīr fiṣ-ṣurūṭ des Abū Ḡa’far Aḥmad ibn Muḥammad at-Ṭahāwī* (Heidelberg: C. Winter, 1927). It is again worthy to note the convergence of technical terms, concepts, and normative usages found in both the literary substantive legal discourses (such as we find in the *Umm*), and the surviving archival materials with their precious record of contemporary practice (such as we find in the papyri). Of particular interest is a claim of al-Ṭahāwī that *lahu* (in addition to ‘*alayhi*’ — i.e., *lahu ‘alayhi*, which we might translate “there belongs to him [A], to his [B’s] debit” or “he [A] is owed by him [B]”) is a 3rd century addition. That is to say, al-Ṭahāwī (in his *Adhkār al-Ḥuqūq*, 3ff.) claims that the full *lahu ‘alayhi* was not “introduced” until the 3rd/9th century, by Abū Zayd Aḥmad b. Zayd, nicknamed “al-Shurūṭī” (“Written Obligations,” 3, and nn.10-11). Thung’s findings corroborate al-Ṭahāwī’s claims: the earliest *dhikr ḥaqq* he knows of with *lahu ‘alayhi* is dated 256 H; those which are earlier only have ‘*alayhi*. Certainly this is not the case with the substantive legal discourse of the *Umm*, however, where we have seen *lahu* coupled with ‘*alayhi* in most instances denoting debt between two parties. As to whether or not al-Ṭahāwī’s claim is correct (or universally so), and why, are subjects quite worthy of further exploration. Whatever the case may be, the general lexical/conceptual/normative correspondence between contemporary “theory” (*Umm*) and “practice” (*dhikr ḥaqq* papyri) sources, and the later “theory” source of al-Ṭahāwī’s *Adhkār al-Ḥuqūq*, speaks volumes regarding a convergence of theory and practice in the formative period of Islamic substantive law.

¹⁰ As we have seen in §208, bear in mind that *muqāraḍa* can mean *muḍāraba*.

<i>iqrār</i> against himself is more principal [in rank] than (<i>awlā min</i>) witnesses who gave testimony for him in a matter in which it may be possible that they had spoken true (<i>ṣadaqū fihi</i>), and its <i>aṣl</i> was [indeed] a <i>muqāraḍa</i> he violated (<i>ta'addā</i>) and so was made liable for (<i>ḍamina</i>), or they may have lied (<i>kadhabū</i>).	شُهُودٌ شَهِدُوا لَهُ بِأَمْرٍ قَدْ يُمَكِّنُ أَنْ يَكُونُوا صَدَقُوا فِيهِ وَيَكُونُ أَصْلُهَا مُقَارَضَةً تَعْدَى فِيهَا فَضْمِينَ، أَوْ يَكُونُوا كَذَبُوا.
480 – And when a man furnishes <i>bayyina</i> against a man for <i>māl</i> in a <i>dhikr ḥaqq</i> pertaining to something <i>jā'iz</i>, and he who owes the <i>dayn</i> furnishes <i>bayyina</i> that it [the <i>māl</i>] consists of interest (<i>min rib^{an}</i>), but that he has acknowledged that he had written a <i>dhikr ḥaqq</i> pertaining to something <i>jā'iz</i>; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: I do not accept from him the means of evasion (<i>al-makhrāj</i>),¹¹ and the <i>māl</i> is incumbent upon him due to his <i>iqrār</i> [in the <i>dhikr ḥaqq</i>] that it is a price (<i>thaman</i>) of something <i>jā'iz</i>. And he [Abū Yūsuf] embraces it.¹²	480 – وَإِذَا أَقَامَ الرَّجُلُ عَلَى الرَّجُلِ الْبَيِّنَةَ بِمَالٍ فِي ذِكْرِ حَقٍّ مِنْ شَيْءٍ جَائِزٍ، فَأَقَامَ الَّذِي عَلَيْهِ الدَّيْنُ الْبَيِّنَةَ أَنَّهُ مِنْ رَبٍّ وَأَنَّهُ قَدْ أَقَرَّ أَنَّهُ قَدْ كَتَبَ ذِكْرَ حَقٍّ مِنْ شَيْءٍ جَائِزٍ، فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: لَا أَقْبَلُ مِنْهُ الْمَخْرَجَ وَيَلْزَمُهُ الْمَالُ بِإِقْرَارِهِ أَنَّهُ ثَمَنُ شَيْءٍ جَائِزٍ. وَبِهِ يَأْخُذُ.
481 – But Ibn Abī Laylā used to accept the <i>bayyina</i> from him for that, and restore it/him to the capital (<i>yarudduhu ilā ra'si al-māli</i>).	481 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقْبَلُ مِنْهُ الْبَيِّنَةَ عَلَى ذَلِكَ وَيَرُدُّهُ إِلَى رَأْسِ الْمَالِ.
482 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man [A] furnishes <i>bayyina</i> against a man for one thousand dirhams, and the one who owes the thousand [B] furnishes <i>bayyina</i> that it [the thousand] consists of interest (<i>min rib^{an}</i>); if [B's] <i>bayyina</i> testifies to (<i>shahidat...</i> 'alā) an original state of usurious sale (<i>aṣli bayⁱⁿ rib^{an}</i>), the one to whom the thousand	482 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَقَامَ الرَّجُلُ عَلَى الرَّجُلِ الْبَيِّنَةَ بِأَلْفِ دِرْهَمٍ، فَأَقَامَ الَّذِي عَلَيْهِ الْأَلْفُ الْبَيِّنَةَ أَنَّهَا مِنْ رَبٍّ، فَإِنْ شَهِدَتِ الْبَيِّنَةُ عَلَى أَصْلِ بَيْعِ رَبٍّ، سُئِلَ الَّذِي

¹¹ For the sense of *makhrāj* as “a way of escape or evasion,” see Lane, ii.720.

¹² Al-Afghānī (64, n.1): “And it is the *qawl* of our *aṣḥāb*, collectively. Al-Sarakhsī said: And Ibn Abī Laylā employed *istiḥsān* (*istaḥsana*) regarding the two *faṣls*, together, because he found regarding that an apparent customary practice (*'urf^{an} zāhir^{an}*) among the people — that they write the *qard* as a precaution (*li'l-iḥtiyāt*), even if they were turning over the *māl* for *muḍāraba*; and they acknowledge (*yuqirruna*) the price (*thaman*) of the commodity, even if the *aṣl* of the transaction (*mu'āmala*) was a *qard*, and the excess (*ziyāda*) was *ribā* stipulated for it (*shurīṭa 'alayhi*). And due to the *'urf zāhir* he said: His *bayyina* is accepted for that. However, this is not strong (*laysa bi-qawīyy^{an}*); for this *'urf* provides indicant for the testimony of the apparent practice for him (*yadullu 'alā shahādati al-zāhiri lahu*), and that is the *dalīl* of acceptance of his *qawl* with his *yamīn* — not a *dalīl* of acceptance of his *bayyina*. And, by agreement (*bi'l-ittifāq*), his *qawl* is not accepted with his *yamīn* due to what precedes of the *iqrār*, and likewise his *bayyina* is not accepted” [Mabsūt, 30:150]. In explaining Ibn Abī Laylā's reasoning for us, al-Sarakhsī has provided insight into the early legal theory of *'urf*. Reasoning from *'urf zāhir* in this case would at best have allowed acceptance of his *qawl* with his *yamīn*, not his *bayyina*. As things stand, both are cancelled anyway due to his previous *iqrār*.

belongs [A] is asked: Was what they [i.e., B's bayyina-providing witnesses] said part of the bay? And if they [A's bayyina-providing witnesses] say:¹³ There was no usurious sale (*bay'u rib^m*) between him [A] and him [B] whatsoever (*qaṭṭu*), and there belongs to him [A] no *ḥaqq* owed by him [B] from any perspective (*min wajhⁱⁿ min al-wujūhi*) except for this thousand, and it is from a valid sale (*hiya min bayⁱⁿ ṣaḥīḥⁱⁿ*); I accept the bayyina for it [the bay], and I nullify the [extra-contractual] *ribā*, whatever it may be, and I restore it [the bay] to its capital (*radadtuhu ilā ra'si mālihi*).¹⁴ But if he [A] declines from acknowledging it [the bayyina] (*imtana'a min an yuqirra bihā*), I make him swear to it/him, and if he swears, the thousand adheres/belongs to the creditor (*lazimat al-gharīma al-alfu*). And it is in the like *ma'nā* of the *mas'ala* preceding it,¹⁵ because it might be possible that he has usuriously exceeded him (*yakūna arbā 'alayhi*) regarding the thousand [i.e., the creditor is lying], and [it

لَهُ الْأَلْفُ: هَلْ كَانَ مَا قَالُوا مِنَ الْبَيْعِ؟

فَإِنْ قَالُوا: لَمْ يَكُنْ بَيْنَهُ وَبَيْنَهُ بَيْعٌ رَبًّا قَطُّ وَلَا لَهُ حَقٌّ عَلَيْهِ مِنْ وَجْهِ مِنَ الْوُجُوهِ إِلَّا هَذِهِ الْأَلْفُ وَهِيَ مِنْ بَيْعٍ صَحِيحٍ. قَبِلْتُ الْبَيِّنَةَ عَلَيْهِ وَأَبْطَلْتُ الرَّبَا كَائِنًا مَا كَانَ، وَرَدَدْتُهُ إِلَى رَأْسِ مَالِهِ، وَإِنْ أَمْتَنَعَ مِنْ أَنْ يُقَرَّرَ بِهَا أَحْلَفْتُهُ لَهُ، فَإِنْ حَلَفَ لَزِمَتْ الْغَرِيمَ الْأَلْفُ، وَهِيَ فِي مِثْلِ مَعْنَى الْمَسْأَلَةِ قَبْلَهَا؛ لِأَنَّهُ قَدْ يُمَكِّنُ أَنْ يَكُونَ أَرْبَى عَلَيْهِ فِي الْأَلْفِ وَيَكُونُ لَهُ أَلْفٌ غَيْرُهَا.

¹³ Ḥassūn (ix.92, n.1) notes: “His *qawl*: *fa-in qālū...* Sic in the copies, so I observe it (كذا في النسخ،).” It is uncertain to me precisely what he intends — perhaps he is suggesting the text should read *fa-in qāla*.

¹⁴ An apparent typo, Ḥassūn has *مَالِهِ إِلَّا رَأْسٌ مَالِهِ*, which I cannot make sense of here. Būlāq has *مَالِهِ*, which mirrors what Ibn Abī Laylā says, so I have preferred it.

¹⁵ This formula here expressed — “*wa hiya fī mithli ma'nā X*” — may stand as the very formula by which the occasion for *qiyās* is expressed; in other words, and taking into account al-Shāfi'ī's apparent use of the term *ma'nā* in a sense later expressed through *'illa*, this phrase may be seen as pointing towards the “occasioning factor” (to employ Weiss's translation of *'illa*). The phrase “*fī mithli ma'nā*” occurs some twenty times in the *Umm*; only thrice in the *Risāla*. Remarkably, not a single one of the other *uṣūl al-fiqh* / *qawā'id fiqhiyya* titles, nor any of the other books of *fiqh* (which I have searched in *al-Maktaba al-Shāmīla*) — Shāfi'ī or otherwise — appear to contain this precise phrase. More remarkably yet, the only other titles in the entire library which appear to contain this phrase go back (with a few exceptions) to al-Shāfi'ī. (For example: the *Tafsīr al-Imām al-Shāfi'ī* (8 instances); and a number of works attributed to al-Bayhaqī.) The conclusion we must reach is that this precise phrase (“*fī mithli ma'nā*”) — like so many others — is almost entirely peculiar to al-Shāfi'ī — certainly in any legal-theoretical contexts. What he means by it exactly thus becomes harder to determine, but it is clear indeed that it was not precisely taken up by those who followed him in the field. On the other hand, the phrase “*fī ma'nā al-aṣl*” (appearing only once in the *Risāla*, and once in the *Umm* — in the *K. Jimā' al-'Ilm*) enjoys a great many occurrences in the legal literature — theoretical and substantive. At any rate, the usages of “*fī mithli ma'nā*” and *fī ma'nā al-aṣl* in al-Shāfi'ī's work and elsewhere need to be read and compared. Of particular interest is a discussion of al-Shāfi'ī's in the *Bāb fī ljtihād al-Ḥākim* of the *Umm* (Ḥassūn, vol.8, pt.13, 528-30: §§27434-44), of which I have attempted a translation (see II.§482 in the appendices). Also of note is the opening of a very critical discussion of *qiyās* in the *Risāla* (Shākir 479, §§1334ff.), which is, moreover, presented in pure dialectical Q&A format. At this point I have only translated the opening section §1334 (in the previously mentioned appendix).

might be possible that] there belongs to him a thousand besides it [i.e., the debtor is lying].¹⁶	
483 – And when a man acknowledges <i>māl</i> [owed] in a <i>dhikr ḥaqq</i> pertaining to a <i>bay'</i>, then he says after that: I did not take possession of the object of sale (<i>al-mabī</i>). And no <i>bayyina</i> gives testimony against him for his taking possession of it; then indeed Abū Hanīfa, may God be pleased with him, used to say: The <i>māl</i> is incumbent upon him (<i>lahu lāzim^{un}</i>), and I do not take into account (<i>lā altafitu</i>) his <i>qawl</i>.	483 – وَإِذَا أَقَرَّ الرَّجُلُ بِمَالٍ فِي ذِكْرِ حَقٍّ مِنْ بَيْعٍ ثُمَّ قَالَ بَعْدَ ذَلِكَ: لَمْ أَقْبِضِ الْمَبِيعَ. وَلَمْ تَشْهَدْ عَلَيْهِ بَيِّنَةٌ بِقَبْضِهِ، فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: الْمَالُ لَهُ لَزِمٌ وَلَا أَلْتَفَيْتُ إِلَى قَوْلِهِ.
484 – But Ibn Abī Laylā used to say: Nothing of the <i>māl</i> is incumbent upon him until the <i>ṭālib</i> [of the owed <i>māl</i>] brings along the <i>bayyina</i> that he had taken the commodities to which the <i>dhikr ḥaqq</i> pertains.	484 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا يَلْزِمُهُ شَيْءٌ مِنَ الْمَالِ حَتَّى يَأْتِيَ الطَّالِبُ بِالْبَيِّنَةِ أَنَّهُ قَدْ قَبِضَ الْمَتَاعَ الَّذِي بِهِ عَلَيْهِ ذِكْرُ الْحَقِّ.
485 – And Abū Yūsuf, may God have mercy upon him, said: I ask the one to whom the <i>ḥaqq</i> belongs: Did you sell this? And if he says: Yes; I say: Then furnish the <i>bayyina</i> that you have given him his commodities in full (<i>qad waffaytahu matā'ahu</i>). And if the <i>ṭālib</i> says: I did not sell him anything; the <i>māl</i> is incumbent upon him (<i>lazimahu al-mālu</i>).	485 – وَقَالَ أَبُو يُسُفَ رَحِمَهُ اللَّهُ: أَسْأَلُ الَّذِي لَهُ الْحَقُّ: أَبَيْعْتَ هَذَا؟ فَإِنْ قَالَ: نَعَمْ. قُلْتُ: فَأَقِمِ الْبَيِّنَةَ عَلَى أَنَّكَ قَدْ وَفَيْتَهُ مَتَاعَهُ. فَإِنْ قَالَ الطَّالِبُ: لَمْ أَبْعُهُ شَيْئًا. لَزِمَهُ الْمَالُ.
486 – Al-Shāfi'ī, may God have mercy upon him, said: And when he brings a <i>dhikr ḥaqq</i> and <i>bayyina</i> against a man that he owes one thousand dirhams as pertains to the price of commodities (<i>thamani matā'ⁱⁿ</i>), or whatever may be, and the one against whom is the <i>bayyina</i> says: Indeed he sold me these commodities, but I did not take possession of them; I [al-Shāfi'ī] charge (<i>kaffaltu</i>) the one to whom the <i>ḥaqq</i> is due [to produce] <i>bayyina</i> that he had taken possession of it, or had acknowledged taking possession of it. And if he does not bring it, I make the one who owes the <i>ḥaqq</i> to swear: I did not take possession of the commodities for which this thousand is the price. Then I absolve him (<i>abra'tuhu</i>) of this thousand. That is because a man buys something from a man, and the price is incumbent upon him due to the seller's	486 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا جَاءَ بِذِكْرِ حَقٍّ وَبَيِّنَةٍ عَلَى رَجُلٍ أَنْ عَلَيْهِ أَلْفٌ دِرْهَمٍ مِنْ ثَمَنِ مَتَاعٍ أَوْ مَا كَانَ، فَقَالَ الَّذِي عَلَيْهِ الْبَيِّنَةُ: إِنَّهُ بَاعَنِي هَذَا الْمَتَاعَ وَلَمْ أَقْبِضْهُ. كَلَفْتُ الَّذِي لَهُ الْحَقُّ بَيِّنَةً أَنَّهُ قَدْ قَبِضَهُ أَوْ أَقَرَّ بِقَبْضِهِ. فَإِنْ لَمْ يَأْتِ بِهَا أَحَلَفْتُ الَّذِي عَلَيْهِ الْحَقُّ: مَا قَبِضْتُ الْمَتَاعَ الَّذِي هَذِهِ الْأَلْفُ ثَمَنُهُ، ثُمَّ أَبْرَأْتُهُ مِنْ هَذِهِ الْأَلْفِ، وَذَلِكَ أَنَّ الرَّجُلَ يَشْتَرِي مِنَ الرَّجُلِ الشَّيْءَ فَيَجِبُ عَلَيْهِ ثَمَنُهُ بِتَسْلِيمِ الْبَائِعِ مَا اشْتَرَى مِنْهُ، وَيَسْقُطُ عَنْهُ

¹⁶ That is to say: the creditor might be asking for more than he loaned (*ribā*), or the debtor might be paying back less than he owes.

surrendering (<i>taslīm</i>) of what he bought from him, and the price falls away from him (<i>yasqutū 'anhu</i>) due to the destruction (<i>halāk</i>) of the thing before he takes possession of it. And it is not incumbent upon him that he be paying the price, unless he turns over the article of merchandise (<i>al-sil'ata</i>) to him. And if the one to whom the thousand is owed had brought a <i>dhikr ḥaqq</i>, and two witnesses testifying that he owes one thousand dirhams from the price of commodities he bought from him, then the one testified against (<i>al-mashhūdu 'alayhi</i>) says: I did not take possession of it; the one testified for (<i>al-mashhūdu lahu</i>) is asked regarding the thousand. And if he says: This thousand pertains to the price of commodities (<i>thamani matā'im</i>) I sold to him and he took possession of them; he is charged with [producing] the <i>bayyina</i> that he did, indeed, take possession of them. And the solution (<i>al-jawāb</i>) regarding it, is like the solution regarding the <i>mas'ala</i> which precedes it. But if he says: He has acknowledged the thousand to me, so take it for me based on his <i>iqrār</i> (<i>fa-khudh-hu lī bi-iqrārihi</i>); I take it for him based upon it, and I make him swear (<i>aḥlaftuhu</i>) against the <i>da'wā</i> of the <i>mashhūd 'alayhi</i>.	الْثَمَنُ بِهَلَاكِ الشَّيْءِ قَبْلَ أَنْ يَقْبِضَهُ، وَلَا يَلْزَمُهُ أَنْ يَكُونَ دَافِعًا لِلثَّمَنِ إِلَّا بَأَنْ يَدْفَعَ السَّلْعَةَ إِلَيْهِ، وَلَوْ كَانَ الَّذِي لَهُ الْأَلْفُ أَتَى بِذِكْرِ حَقٍّ وَبِشَاهِدَيْنِ يَشْهَدَانِ أَنَّ عَلَيْهِ أَلْفَ دِرْهَمٍ مِنْ ثَمَنِ مَتَاعٍ اشْتَرَاهُ مِنْهُ، ثُمَّ قَالَ الْمَشْهُودُ عَلَيْهِ: لَمْ أَقْبِضْهُ. سُئِلَ الْمَشْهُودُ لَهُ بِالْأَلْفِ، فَإِنْ قَالَ: هَذِهِ الْأَلْفُ مِنْ ثَمَنِ مَتَاعٍ بَعْتُهُ إِيَّاهُ وَقَبِضْتُ. كُفِلَ الْبَيِّنَةُ عَلَى أَنَّهُ قَبِضَهُ، وَكَانَ الْجَوَابُ فِيهَا كَالْجَوَابِ فِي الْمَسْأَلَةِ قَبْلَهَا. وَإِنْ قَالَ: قَدْ أَقَرَّ لِي بِالْأَلْفِ فَخُذْهُ لِي بِإِقْرَارِهِ. أَخَذْتُهُ لَهُ بِهِ، وَأَحْلَفْتُهُ عَلَى دَعْوَى الْمَشْهُودِ عَلَيْهِ.
487 – And when a man claims (<i>idda'a</i>) a thousand dirhams against a man, and brings the <i>bayyina</i> against him, and one of his two witnesses testifies to one thousand but the other testifies to two thousand; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: There belongs no testimony (<i>shahāda</i>) to them, because they have diverged (<i>ikhtalafā</i>).	487 – وَإِذَا ادَّعَى الرَّجُلُ عَلَى الرَّجُلِ أَلْفَ دِرْهَمٍ وَجَاءَ عَلَيْهِ بِالْبَيِّنَةِ فَشَهِدَ أَحَدُ شَاهِدَيْهِ بِالْأَلْفِ وَشَهِدَ الْآخَرُ بِالْفَيْنِ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: لَا شَهَادَةَ لَهُمَا؛ لِأَنَّهُمَا قَدْ اخْتَلَفَا.
488 – But Ibn Abī Laylā used to permit from that one thousand dirhams, and pass judgment for it in favour of the <i>ṭālib</i>. And he [Abū Yūsuf] embraces it.	488 – وَكَانَ ابْنُ أَبِي لَيْلَى يُجِيزُ مِنْ ذَلِكَ أَلْفَ دِرْهَمٍ وَيَقْضِي بِهَا لِلطَّلِبِ. وَبِهِ يَأْخُذُ.
489 – And if one of them testifies to one thousand, but the other testifies to one thousand and five hundred, the thousand is <i>jā'iza</i> according to both their <i>qawls</i> [i.e., Abū Ḥanīfa's and Ibn Abī Laylā's], together.	489 – وَلَوْ شَهِدَ أَحَدُهُمَا بِالْأَلْفِ، وَشَهِدَ الْآخَرُ بِالْفِ وَخَمْسِمِائَةٍ، كَانَتْ الْأَلْفُ جَائِزَةً فِي قَوْلِهِمَا جَمِيعًا.

490 – And Abū Ḥanīfa only permitted this because he used to say: The two witnesses, together, have designated one thousand, but the other has said: [and] five hundred — so this became separated from (<i>maḥṣūlat^{an} min</i>) the thousand.	490 – وَإِنَّمَا أَجَارَ هَذَا أَبُو حَنِيفَةَ؛ لِأَنَّهُ كَانَ يَقُولُ: قَدْ سَمَى الشَّاهِدَانِ جَمِيعًا أَلْفًا، وَقَالَ الْآخَرُ: خَمْسِمِائَةٍ. فَصَارَتْ هَذِهِ مَفْصُولَةً مِنَ الْأَلْفِ.
491 – Al-Shāfiʿī, may God have mercy upon him, said: And when a man claims one thousand dirhams against a man, and brings against him two witnesses — one of them testifies in his favour for one thousand and the other for two thousand; I ask them both, and if they both claim (<i>zaʿamā</i>) that they both testify to it based on his <i>iqrār</i>, or the one who testified to one thousand claims that he reserves doubt (<i>shakka</i>) regarding the two thousand, but he confirms (<i>athbata</i>) the thousand; the thousand has been established for him by two witnesses — if he desires, he takes it without oath (<i>bilā yamīnⁱⁿ</i>).	491 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا ادَّعَى الرَّجُلُ عَلَى الرَّجُلِ أَلْفَ دِرْهَمٍ وَجَاءَ عَلَيْهِ بِشَاهِدَيْنِ؛ شَهِدَ لَهُ أَحَدُهُمَا بِأَلْفٍ وَالْآخَرُ بِأَلْفَيْنِ، سَأَلْتُهُمَا فَإِنْ زَعَمَا أَنَّهُمَا شَهِدَا بِهَا عَلَيْهِ بِإِقْرَارِهِ، أَوْ زَعَمَ الَّذِي شَهِدَ بِأَلْفٍ أَنَّهُ شَكَّ فِي الْأَلْفَيْنِ وَأَثْبَتَ الْأَلْفَ فَقَدْ ثَبَتَ عَلَيْهِ الْأَلْفُ بِشَاهِدَيْنِ إِنْ أَرَادَ أَخَذَهَا بِلَا يَمِينَ.
492 – But if he desires the other thousand, for which he has [only] one witness, he takes it by means of an oath with a witness (<i>bi-yamīnⁱⁿ maʿa shāhidⁱⁿ</i>).	492 – وَإِنْ أَرَادَ الْأَلْفَ الْآخَرَ الَّتِي لَهُ عَلَيْهَا شَاهِدٌ وَاحِدٌ أَخَذَهَا بِيَمِينَ مَعَ شَاهِدٍ.
493 – And if they both disagree, and the one who testifies to two thousand says: I testified to them both [i.e., both thousands] against him, as pertains to the price of a slave (<i>ʿabd</i>) he took possession of; and the one who testifies against him for one thousand says: I testified to it against him, as pertains to the price of clothing (<i>thiyāb</i>) he took possession of; they have made it clear (<i>faqad bayyanā</i>) that the <i>aṣl</i> of the two <i>ḥaqq</i>s is different (<i>mukhtalifⁱⁿ</i>), so he does not take except by means of an oath with each one of the two [witnesses].	493 – وَإِنْ كَانَا اخْتَلَفَا، فَقَالَ الَّذِي شَهِدَ بِالْأَلْفَيْنِ: شَهِدْتُ بِهِمَا عَلَيْهِ مِنْ ثَمَنِ عَبْدٍ قَبْضُهُ. وَقَالَ الَّذِي شَهِدَ عَلَيْهِ بِأَلْفٍ: شَهِدْتُ بِهَا عَلَيْهِ مِنْ ثَمَنِ ثِيَابٍ قَبْضَهَا، فَقَدْ بَيَّنَّا أَنَّ أَصْلَ الْحَقَّيْنِ مُخْتَلِفٌ، فَلَا يَأْخُذُ إِلَّا بِيَمِينَ مَعَ كُلِّ وَاحِدٍ مِنْهُمَا.
494 – And if he prefers (<i>aḥabba</i>), he swears (<i>ḥalafa</i>) with them both; and if he prefers, he swears with one of the two, and abandons the other, when he claims (<i>iddaʿā</i>) what they both said.	494 – فَإِنْ أَحَبَّ حَلَفَ مَعَهُمَا، وَإِنْ أَحَبَّ حَلَفَ مَعَ أَحَدِهِمَا وَتَرَكَ الْآخَرَ إِذَا ادَّعَى مَا قَالَا.
495 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And it is one and the same (<i>wa sawā^{um}</i>) — two thousand, or one thousand and five hundred.	495 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَسَوَاءُ أَلْفَيْنِ أَوْ أَلْفًا وَخَمْسِمِائَةٍ.

496 – And when the man gives testimony about the <i>shahāda</i> of a man, and another gives testimony about his own testimony (<i>shahādati nafsihi</i>) regarding a <i>dayn</i>, or <i>shirā'</i>, or <i>bay'</i>; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: The <i>shahāda</i> of a witness about the <i>shahāda</i> of a witness is not permitted, nor is there accepted against him other than two witnesses. And likewise it has reached us concerning 'Alī b. Abī Ṭālib, may God Most High be pleased with him. And he [Abū Yūsuf] embraces it.	496 – وَإِذَا شَهِدَ الرَّجُلُ عَلَى شَهَادَةِ رَجُلٍ، وَشَهِدَ آخَرُ عَلَى شَهَادَةِ نَفْسِهِ فِي دَيْنٍ، أَوْ شِرَاءٍ، أَوْ بَيْعٍ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: لَا تَجُوزُ شَهَادَةُ شَاهِدٍ عَلَى شَهَادَةِ شَاهِدٍ، وَلَا يُقْبَلُ عَلَيْهِ إِلَّا شَاهِدَانِ. وَكَذَلِكَ بَلَغَنَا عَنْ عَلِيِّ بْنِ أَبِي طَالِبٍ رَضِيَ اللَّهُ تَعَالَى عَنْهُ. وَبِهِ يَأْخُذُ.
497 – But Ibn Abī Laylā used to say: I accept the <i>shahāda</i> of a witness about the <i>shahāda</i> of a witness, and likewise has it reached us concerning Shurayḥ and Ibrāhīm.	497 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: أَقْبَلُ شَهَادَةَ شَاهِدٍ عَلَى شَهَادَةِ شَاهِدٍ، وَكَذَلِكَ بَلَغَنَا عَنْ شُرَيْحٍ وَإِبْرَاهِيمَ.
498 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when two witnesses testify about the <i>shahāda</i> of two witnesses; I do not accept for each witness other than the <i>shahāda</i> of two witnesses, together.	498 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا شَهِدَ شَاهِدَانِ عَلَى شَهَادَةِ شَاهِدَيْنِ لَمْ أَقْبَلْ عَلَى كُلِّ شَاهِدٍ إِلَّا شَهَادَةَ شَاهِدَيْنِ مَعًا.
499 – Al-Rabī said: [This is] due to the fact that the two witnesses [A and B], if they both testify about the <i>shahāda</i> of a witness [C], the <i>hākim</i> could not pass judgment (<i>lam yahkum bihā</i>) by means of it [the <i>shahāda</i> of C] except by means of another witness [D]. And when they [A and B] both testify about the <i>shahāda</i> of the other witness [D], they are merely causing to themselves (<i>jarrā ilā anfusihimā</i>) the authorization (<i>ijāza</i>) of their first <i>shahāda</i> [about C's <i>shahāda</i>] which the <i>hākim</i> annulled (<i>abṭalahā</i>).¹⁷ So we do not permit other than the <i>shahāda</i> of two witnesses about each witness.	499 – قَالَ الرَّبِيعُ: مِنْ قَبْلِ أَنْ الشَّاهِدَيْنِ لَوْ شَهِدَا عَلَى شَهَادَةِ شَاهِدٍ لَمْ يَحْكُمَ بِهَا الْحَاكِمُ إِلَّا بِشَاهِدٍ آخَرَ، فَلَمَّا شَهِدَا عَلَى شَهَادَةِ الشَّاهِدِ الْآخَرِ كَانَا إِنَّمَا جَرَّآ إِلَى أَنْفُسِهِمَا إِجَازَةَ شَهَادَتَيْهِمَا الْأُولَى الَّتِي أَبْطَلَهَا الْحَاكِمُ، فَلَمْ تُجْزَ إِلَّا شَهَادَةُ شَاهِدَيْنِ عَلَى كُلِّ شَاهِدٍ.
500 – And when witnesses give testimony about a house, that it belongs to so-and-so who died and left it as inheritance (<i>mīrāth</i>) [to be divided] between so-and-so and so-and-so; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: If they testify that they do not know that he has another heir (<i>wārith</i>) besides these, the	500 – وَإِذَا شَهِدَ الشُّهُودُ عَلَى دَارٍ أَنَّهَا لِفُلَانٍ مَاتَ وَتَرَكَهَا مِيرَاثًا بَيْنَ فُلَانٍ وَفُلَانٍ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: إِنْ شَهِدُوا أَنَّهُمْ لَا يَعْلَمُونَ لَهُ وَارِثًا غَيْرَ هَؤُلَاءِ

¹⁷ In other words, if two witnesses testify about two witnesses at once, it is *bāṭil*. But if the same two witnesses (A&B) both provide testimony about C and then both provide testimony about D, then it is no different than if they had provided testimony for C&D together.

<i>shahāda</i> (al-<i>shahāda</i>) is permitted. And he [Abū Yūsuf] embraces it.	جَازَتْ الشَّهَادَةُ. وَبِهِ يَأْخُذُ.
501 – But Ibn Abī Laylā used to say: Their <i>shahāda</i> is not permitted when they say: We do not know that he has another <i>wārith</i> besides these, until they confirm (<i>yuthbitū</i>) that, and they say: He has no <i>wārith</i> besides them. And when another besides them inherits, with <i>bayyina</i>, I insert him with them in the inheritance; but the <i>shahāda</i> of the first two is not annulled, according to both their <i>qawls</i> [i.e., Abū Ḥanīfa's and Ibn Abī Laylā's].	501 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا تَجُوزُ شَهَادَتُهُمْ إِذَا قَالُوا: لَا نَعْلَمُ لَهُ وَارِثًا غَيْرَ هَؤُلَاءِ. حَتَّى يُثْبِتُوا ذَلِكَ، فَيَقُولُوا: لَا وَارِثَ لَهُ غَيْرُهُمْ. وَإِذَا وَارِثَ غَيْرُهُمْ بَيِّنَةً أَدْخَلَهُ مَعَهُمْ فِي الْمِيرَاثِ وَلَمْ تَبْطُلْ شَهَادَةُ الْأَوَّلَيْنِ فِي قَوْلِهِمَا.
502 – Al-Shāfi'ī, may God be pleased with him, said: And when the witnesses testify that this house is the house of so-and-so, who died and left it as inheritance, not knowing he has an heir other than so-and-so and so-and-so; the <i>qāḍī</i> accepts their <i>shahāda</i>. And if the two witnesses are among the <i>ahl</i> with hidden knowledge (al-<i>ma'rifa al-bāṭina</i>) of him [the deceased], he judges the inheritance in their favour. But if other heirs besides them come along, I insert them among them.	502 – قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ عَنْهُ: وَإِذَا شَهِدَ الشُّهُودُ أَنَّ هَذِهِ الدَّارَ دَارُ فُلَانٍ مَاتَ وَتَرَكَهَا مِيرَاثًا لَا يَعْلَمُونَ لَهُ وَارِثًا إِلَّا فُلَانٌ وَفُلَانٌ قَبْلَ الْقَاضِي شَهَادَتُهُمْ. فَإِنْ كَانَ الشَّاهِدَانِ مِنْ أَهْلِ الْمَعْرِفَةِ الْبَاطِنَةِ بِهِ قَضَى لَهُمْ بِالْمِيرَاثِ. وَإِنْ جَاءَ وَرَثَةٌ غَيْرُهُمْ أَدْخَلْتُهُمْ عَلَيْهِمْ.
503 – And likewise if the <i>ahl</i> of a <i>waṣiyya</i> or a <i>dayn</i> come along.¹⁸ And if they are from besides those with hidden knowledge of the deceased, the <i>qāḍī</i> exercises prudence (<i>iḥtāṭa</i>)¹⁹ and asks the <i>ahl</i> of knowledge, and says: Do you know if he has another <i>wārith</i> besides them? And if they say: Yes, [such] has reached us; we indeed do not divide up the inheritance until we know how many they are, that we may divide it up for them. And if the establishing of that is prolonged, the <i>qāḍī</i> calls for the <i>wārith</i> to provide a	503 – وَكَذَلِكَ لَوْ جَاءَ أَهْلُ وَصِيَّةٍ أَوْ دَيْنٍ، فَإِنْ كَانُوا مِنْ غَيْرِ أَهْلِ الْمَعْرِفَةِ الْبَاطِنَةِ بِالْمَيِّتِ احْتَاطَ الْقَاضِي فَسَأَلَ أَهْلَ الْمَعْرِفَةِ فَقَالَ: هَلْ تَعْلَمُونَ لَهُ وَارِثًا غَيْرَهُمْ؟ فَإِنْ قَالُوا: نَعَمْ قَدْ بَلَعْنَا. فَإِنَّا لَا نَقْسِمُ الْمِيرَاثَ حَتَّى نَعْلَمَ كَمْ هُمْ فَتَقْسِمَهُ عَلَيْهِمْ، فَإِنْ تَطَاوَلَ أَنْ يُثْبِتَ ذَلِكَ

¹⁸ Both *waṣiyya* and *dayn* are to be settled before inheritance.

¹⁹ A great deal may be said of the use of the verb *iḥtāṭa* in a situation such as this. It is fair to say that *iḥtiyāt* was an oft-considered principle of al-Shāfi'ī's — the *maṣḍar* of *iḥtiyāt* occurs some 70 times throughout the *Umm*, and, so often as I have seen it, in precisely the same sense in which it is employed by Ithnā 'Asharī jurists. Additionally, we may note that *iḥtiyāt* in §503 is in a judicial-procedural context (not an *ijtihādī* context). Again, this shows the very real potential for cross-germination between court procedure, dialectical procedure, and *ijtihādī* procedure. Where unproven potentialities exist as regards a case, both *mujtahid* and *qāḍī* must take the most prudent route, in order to preserve maximum benefit and minimal harm should that potentiality prove true. As for the verb *iḥtāṭa*, it appears some 15 times in the *Umm*; *iḥtiyāt*, again, an astonishing 70 times. Surprisingly, however, *iḥtiyāt* appears only once in the *Risāla*. This is a phenomenon worthy of further investigation.

guarantor (<i>kafil</i>) for the <i>māl</i> , and turns it over to him, but does not compel him if he does not produce a <i>kafil</i> .	دَعَا الْقَاضِي الْوَارِثَ بِكَفِيلٍ بِالْمَالِ وَدَفَعَهُ إِلَيْهِ وَلَمْ يَجْبِرْهُ إِنْ لَمْ يَأْتِ بِكَفِيلٍ.
504 – And if the witnesses say: He has no <i>wārith</i> besides them; I accept it in the <i>ma'nā</i> of “We don’t know.” Even if they said that with comprehensive knowledge (<i>'alā al-iḥāṭati</i>), this is not correct (<i>ṣawāb^{am}</i>) on their part. ²⁰ Nor is there, as regards it, what rejects their <i>shahāda</i> , because testimony rendered with absolute certainty is reducible to / may be interpreted as knowledge (<i>al-shahādata 'alā al-batti tu'awwalu ilā al-'ilmi</i>). ²¹	504 – وَلَوْ قَالَ الشُّهُودُ: لَا وَارِثَ لَهُ غَيْرُهُمْ. قَبْلَتُهُ عَلَى مَعْنَى لَا نَعْلَمُ، وَلَوْ قَالُوا ذَلِكَ عَلَى الْإِحَاطَةِ لَمْ يَكُنْ هَذَا صَوَابًا مِنْهُمْ وَلَمْ يَكُنْ فِيهِ مَا رَدَّ شَهَادَتَهُمْ؛ لِأَنَّ الشَّهَادَةَ عَلَى الْبَتِّ تُؤَوَّلُ إِلَى الْعِلْمِ.
505 – And when the witnesses testify about an old [instance of] <i>zinā</i> , or an old [instance of] <i>sariqa</i> ; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: The <i>ḥadd</i> is averted (<i>yudra'u</i>) regarding that, and is judged according to <i>māl</i> , and decided according to dowry (<i>yunḥaru fi'l-mahri</i>), because he has had sexual intercourse (<i>qad waṭi'a</i>), and when the <i>ḥadd</i> is not administered for sexual intercourse, then there is no escape from [his paying] <i>mahr</i> .	505 – وَإِذَا شَهِدَ الشُّهُودُ عَلَى زِنَا قَدِيمٍ أَوْ سَرَقَةٍ قَدِيمَةٍ فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: يُدْرَأُ الْحَدُّ فِي ذَلِكَ وَيُقْضَى بِالْمَالِ وَيُنْظَرُ فِي الْمَهْرِ، لِأَنَّهُ قَدْ وَطِئَ، فَإِذَا لَمْ يُقَمْ الْحَدُّ بِالْوَطْءِ فَلَا بُدَّ مِنْ مَهْرٍ.

²⁰ The verb *aḥāṭa* appears some 16 times in the *Umm* (including the *K. Jimā' al-'ilm*); 8 times in conjunction with the word *'ilm* — as in *aḥāṭa al-'ilmu anna...*; the *maṣḍar* — *iḥāṭa* — appears a number of times as well, with quite some recurrence in the *K. Ibtāl al-Istiḥṣān*. Many of the discussions incorporating the verb *aḥāṭa* incorporate also the participles *zāhir* and *bāṭin*, and it is clear that the verb and its *maṣḍar* enjoyed a refined or even technical usage, in the sense of: comprehensive, all-inclusive knowledge as regards a thing, of all that is extrinsic and intrinsic to that thing (this is very much the sense that Lane [i.671] records). The usage in §504 shares a theoretical tie to what al-Shāfi'ī says in *Risāla* §1388 (Shākir ed.), in the context of who should follow whom in a case of disagreement over the direction of the *qibla*:

1388 – قال: إن قلت لا يجب عليهما أن يصلّيا حتى يعلمّا بإحاطة: فهما لا يعلمان أبداً المغيبَ بإحاطة، وهما إذا يدعان الصلاة، أو يرتفع عنهما فرض القبلة، فيصليان حيث شاءا، ولا أقول واحداً من هذين، وما أجد بُدّاً من أن أقول: يصلّي كل واحد منهما كما يرى، ولم يُكَلَّفَا غير هذا، أو أقول كُلفَ الصواب في الظاهر والباطن، ووُضِعَ عنهما الخطأ في الباطن دون الظاهر.

Note well that not only is certain/comprehensive knowledge of the *mughayyab* considered impossible; but a principle very nearly that of *taṣwīb* is at work here, and using the same noun: *ṣawāb*, in conjunction with *zāhir* and *bāṭin* [we see *bāṭin* above in reference to “hidden” knowledge of the deceased].

²¹ An illuminating example of an epistemological concern shaped in the real, dual contexts of judicial procedure as debated via juridical dialectic. Not only do the terms *iḥāṭa*, *ṣawāb*, and *bāṭin* conjoin in the course of the discussion, but *'alā al-iḥāṭati* appears to be equated to *'alā al-batti*, and the latter is related to *'ilm* through the verb *awwala/ya'awwalu*, which (with the recognizable *maṣḍar ta'wīl*) bears the connotation of discovering, revealing, interpreting what is hidden (*bāṭin*), such as is done in discovering the hidden meaning in Qur'ānic verses.

506 – And likewise it has reached us about ʿUmar b. al-Khaṭṭāb, that he said: Whichever group of people (<i>qawm</i>) testify about a <i>ḥadd</i>, which they did not testify about in the presence of (<i>ʿinda ḥaḍrati</i>) the same [i.e., at the time it occurred]; they have indeed only given testimony of spite (<i>ḍighn</i>), and they have no <i>shahāda</i>. And he [Abū Yūsuf] embraces it.	506 – وَكَذَلِكَ بَلَّغْنَا عَنْ عُمَرَ بْنِ الْخَطَّابِ أَنَّهُ قَالَ: أَيُّمَا قَوْمٍ شَهِدُوا عَلَى حَدٍّ لَمْ يَشْهَدُوا عِنْدَ حَضْرَةِ ذَلِكَ فَإِنَّمَا شَهِدُوا عَلَى ضِغْنٍ فَلَا شَهَادَةَ لَهُمْ. وَبِهِ يَأْخُذُ.
507 – But Ibn Abī Laylā used to say: I accept their <i>shahāda</i>, and I execute the <i>ḥadd</i>; but as for the intoxicated one (<i>al-sakrān</i>), if he is brought while he is not drunk, then there is no <i>ḥadd</i> upon him.	507 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: أَقْبَلُ شَهَادَتَهُمْ وَأَمْضِي الْحَدَّ، فَأَمَّا السَّكَرَانُ فَإِنْ أَتَى بِهِ وَهُوَ غَيْرُ سَكْرَانَ فَلَا حَدَّ عَلَيْهِ.
508 – And if he is taken while he is drunk; he is not brought before the <i>wālī</i> until the intoxication has left him — unless he is in the hands of the constabulary (<i>al-shuraṭ</i>), or an officer (<i>ʿāmil</i>) of the <i>wālī</i>; then indeed he is punished with the <i>ḥadd</i>.	508 – وَإِنْ كَانَ أُخِذَ وَهُوَ سَكْرَانٌ فَلَمْ يَرْتَفِعْ إِلَى الْوَالِي حَتَّى ذَهَبَ السُّكْرُ عَنْهُ إِلَّا أَنَّهُ فِي يَدَيِ الشَّرْطِ أَوْ عَامِلِ الْوَالِي فَإِنَّهُ يُحَدُّ.
509 – Al-Shāfiʿī, may God have mercy upon him, said: And when the witnesses testify to a <i>ḥadd</i> belonging to God, or to the people, or to a <i>ḥadd</i> in which there is something belonging to God — to Him belong might and majesty —, and [something] to the people — like <i>zinā</i>, and <i>sariqa</i>, and the drinking of grape-wine (<i>shurb al-khamr</i>)—, and they confirm of the <i>shahāda</i> against the <i>mashhūd ʿalayhi</i> that it [the <i>shahāda</i>] was after his attainment of majority (<i>bulūghihī</i>), in a condition (<i>ḥāl</i>) in which he was fully sensible (<i>yaʿqilu fihā</i>) that the <i>ḥadd</i> would be legally enacted against him — that <i>ḥadd</i> — unless, after it, he effectuated repentance (<i>tawba</i>); that which belongs to the people is incumbent upon him (<i>yalzamuhu</i>) but, what belongs to God falls away from him (<i>yasquṭu ʿanhu</i>), by virtue of <i>qiyās</i> with the <i>qawl</i> of God, to Him belong might and majesty, regarding brigands (<i>al-muḥārabin</i>): «Except for those who repent (<i>tābū</i>) before they overpower them,» to the end of the <i>āyā</i> [Q.5:34]. And what pertains to a <i>ḥadd</i> belonging to God, whose <i>ṣāḥib</i> repents before he is overpowered, falls away from him. And	509 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا شَهِدَ الشُّهُودُ عَلَى حَدٍّ لِلَّهِ أَوْ لِلنَّاسِ أَوْ حَدٍّ فِيهِ شَيْءٌ لِلَّهِ عَزَّ وَجَلَّ وَلِلنَّاسِ مِثْلَ الزِّنَا وَالسَّرِقَةِ وَشَرْبِ الْخَمْرِ وَأَثْبَتُوا الشَّهَادَةَ عَلَى الْمَشْهُودِ عَلَيْهِ أَنَّهَا بَعْدَ بُلُوغِهِ فِي حَالٍ يَعْقِلُ فِيهَا أُقِيمَ عَلَيْهِ الْحَدُّ ذَلِكَ الْحَدُّ، إِلَّا أَنْ يُحْدِثَ بَعْدَهُ تَوْبَةً، فَيَلْزِمُهُ مَا لِلنَّاسِ وَيَسْقُطُ عَنْهُ مَا لِلَّهِ قِيَاسًا عَلَى قَوْلِ اللَّهِ عَزَّ وَجَلَّ فِي الْمُحَارِبِينَ: «إِلَّا الَّذِينَ تَابُوا مِنْ قَبْلِ أَنْ تَقْدِرُوا عَلَيْهِمْ» الْآيَةَ [المائدة: 34]. فَمَا كَانَ مِنْ حَدٍّ لِلَّهِ تَابَ صَاحِبُهُ مِنْ قَبْلِ أَنْ يُقْدَرَ عَلَيْهِ سَقَطَ عَنْهُ، وَالتَّوْبَةُ مِمَّا كَانَ ذَنْبًا

repentance from what was a sin by speech (<i>dhanb^{an} bi'l-kalām</i>)²² — like <i>qadhif</i> — and what resembles speech, is [achieved] by the retraction of that [speech], and an abstention (<i>al-nuzūʿ</i>) from it; while repentance from what was a sin by deed (<i>dhanb^{an} bi'l-fiʿl</i>) — like <i>zinā</i> and what resembles it — is [achieved] by abandoning the deed for the period in which it is tried (<i>yukhtabaru fihā</i>), until the same is well-publicized (<i>maʾrūf^{an}</i>). Indeed he only exits the thing by abandoning that by means of which he entered into it.²³	بِالْكَلَامِ مِثْلَ الْقَذْفِ وَمَا أَشْبَهَهُ الْكَلَامَ بِالرَّجُوعِ عَنْ ذَلِكَ وَالتَّزْوُعِ عَنْهُ، وَالتَّوْبَةُ مِمَّا كَانَ ذَنْبًا بِالْفِعْلِ مِثْلَ الزِّنَا وَمَا أَشْبَهَهُ فَيَتْرَكَ الْفِعْلَ مُدَّةً يُخْتَبَرُ فِيهَا حَتَّى يَكُونَ ذَلِكَ مَعْرُوفًا، وَإِنَّمَا يَخْرُجُ مِنَ الشَّيْءِ بِتَرْكِ الَّذِي دَخَلَ بِهِ فِيهِ.
510 – Al-Rabī said: Regarding this al-Shāfiʿī has another <i>qawl</i>; that the <i>ḥadd</i> be enacted upon him even if he repents, because he who came to the Prophet, may God bless and save him, and confessed to the <i>ḥadd</i>,²⁴ did not come to him, if God Most High wills it, other than in a manner of repentance (<i>tāʾib^{an}</i>). But the Prophet, may God bless and save him, ordered his stoning (<i>amara bi-rajmihi</i>); and there is no discarding of the <i>ḥudūd</i> which belong to God, to Him belong might and majesty, except as regards the <i>muḥāribīn</i>, specifically (<i>khāṣṣat^{an}</i>). And as for what belongs to the people (<i>liʾl-ādamiyyīna</i>): if, indeed, they [the <i>muḥāribīn</i>] have killed; the blood-guardians (<i>awliyāʾ al-dam</i>) are possessors of choice (<i>mukhayyarūna</i>) as regards killing them, or taking the wergild (<i>al-diya</i>), or pardoning (<i>yaʿfū</i>). But if they [the <i>muḥāribīn</i>] have [also] taken <i>māl</i>, it [the aforementioned right] is taken from them [the blood-guardians].	510 – قَالَ الرَّبِيعُ: لِلشَّافِعِيِّ فِيهَا قَوْلٌ آخَرُ؛ أَنَّهُ يُقَامُ عَلَيْهِ الْحَدُّ وَإِنْ تَابَ؛ لِأَنَّ الَّذِي جَاءَ إِلَى النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – فَاقْرَأَ بِالْحَدِّ، لَمْ يَأْتِهِ – إِنْ شَاءَ اللَّهُ تَعَالَى – إِلَّا تَائِبًا وَقَدْ أَمَرَ النَّبِيُّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – بِرَجْمِهِ، وَلَيْسَ طَرَحُ الْحُدُودِ الَّتِي لِلَّهِ عَزَّ وَجَلَّ إِلَّا فِي الْمُحَارِبِينَ خَاصَّةً، فَأَمَّا مَا كَانَ لِلْأَدَمِيِّينَ فَإِنَّهُمْ إِنْ كَانُوا قَتَلُوا فَأَوْلِيَاءُ الدَّمِ مُخَيَّرُونَ فِي قَتْلِهِمْ أَوْ أَخْذِ الدِّيَةِ أَوْ أَنْ يَعْفُوا، وَإِنْ كَانُوا أَخَذُوا الْمَالَ أُخِذَ مِنْهُمْ.
511 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the witnesses give <i>shahāda</i> before the <i>qāḍī</i>, and the <i>mashhūd</i> <i>ʿalayhi</i> claims²⁵ that they give	511 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا شَهِدَ الشُّهُودُ عِنْدَ الْقَاضِي بِشَهَادَةٍ فَادَّعَى

²² Hassūn has *كَانَ ذَنْبًا* instead of *كَانَ ذَنْبًا* وَالتَّوْبَةُ مَا, as in Būlāq. I have followed the latter, as it appears more consistent.

²³ Importantly, Schacht explains §§509-10 in his *Origins* (125-6), with §509 as representative of al-Shāfiʿī's old doctrine, and §510 as his new. He also claims al-Shāfiʿī “falls short of his own theoretical requirements.” That is to say, §509 represents for Schacht “an analogy based on an exceptional case.”

²⁴ Hassūn has *فَاقْرَأَ الْحَدَّ* instead of *فَاقْرَأَ بِالْحَدِّ*, as in Būlāq.

²⁵ Hassūn has *بِشَهَادَةٍ ادَّعَى*, instead of *بِشَهَادَةٍ فَادَّعَى*, as in Būlāq (vii.113).

false testimony (<i>shahidū bi-zūr^m</i>), and he says: I myself impugn their legal credibility (<i>ajraḥuhum</i>), and I furnish <i>bayyina</i> that they have been hired (<i>ustu'jirū</i>) [i.e., to give false witness], and that they are an iniquitous group (<i>qawm^{un} fassāq^{un}</i>);²⁶ then indeed Abū Ḥanīfa, may God be pleased with him, used to say: I do not accept the impugnation of falsehood (<i>al-jarḥ</i>) in this manner.²⁷ And he [Abū Yūsuf] embraces it.	الْمَشْهُودُ عَلَيْهِ أَنَّهُمْ شَهِدُوا بِزُورٍ وَقَالَ: أَنَا أَجْرَحُهُمْ وَأَقِيمُ الْبَيِّنَةَ أَنَّهُمْ أُسْتُجِرُوا وَأَنَّهُمْ قَوْمٌ فَسَاقٌ. فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: لَا أَقْبَلُ الْجَرْحَ عَلَى مِثْلِ هَذَا. وَبِهِ يَأْخُذُ.
512 – But Ibn Abī Laylā used to accept it.	512 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقْبَلُهُ.
513 – And as for otherwise – as pertains to the one for whom the <i>ḥadd</i> of <i>qadh</i> has been confirmed, or the partner (<i>sharīk</i>), or the slave; they both [Abū Ḥanīfa and Ibn Abī Laylā], together, accept the <i>jarḥ</i> as regards this.	513 – فَأَمَّا غَيْرُ ذَلِكَ؛ مِنْ مَحْدُودٍ فِي قَدْفٍ، أَوْ شَرِيكِ، أَوْ عَبْدٍ فَهُمَا يَقْبَلَانِ فِي هَذَا الْجَرْحِ جَمِيعًا.
514 – And my memory of Abū Yūsuf (<i>wa ḥifẓī 'an Abī Yūsufa</i>) is that he said, afterwards: The <i>jarḥ</i> is accepted when one whom I know testifies, and I am confident of him (<i>athiqu bihi</i>).²⁸	514 – وَحَفْظِي عَنْ أَبِي يُوسُفَ أَنَّهُ قَالَ بَعْدُ: يُقْبَلُ الْجَرْحُ إِذَا شَهِدَ مَنْ أَعْرِفُهُ وَاثِقُ بِهِ.
515 – Al-Shāfi'ī, may God be pleased with him, said: And when the witnesses give <i>shahāda</i> against a man, and they behave justly (<i>adalū</i>),²⁹ it is right that the <i>qāḍī</i> should name them, and what they testify to against the <i>mashhūd 'alayhi</i>, and provide him [the <i>mashhūd 'alayhi</i>] an opportunity for their <i>jarḥ</i>. And if he brings what invalidates their testimony (<i>jurḥatihim</i>), he [the <i>qāḍī</i>] accepts it; but if he does not provide it, the <i>ḥaqq</i> is concluded against him. And he accepts as regards their <i>jurḥa</i> that they are such as had forsaken him / cut off communication with him [the <i>mashhūd 'alayhi</i>] (<i>yakūnū lahu muḥājirīna</i>)³⁰ in the circumstance in which they testified against him – even if they are <i>udūl</i>. And he accepts their <i>jurḥa</i> for such as by which the credibility of the witnesses is invalidated:	515 – قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ عَنْهُ: وَإِذَا شَهِدَ الشُّهُودُ عَلَى الرَّجُلِ بِشَهَادَةٍ فَعَدَلُوا اتَّبَعِي لِلْقَاضِي أَنْ يُسَمِّيَهُمْ وَمَا شَهِدُوا بِهِ عَلَى الْمَشْهُودِ عَلَيْهِ وَيُمْكِّنُهُ مِنْ جَرْحِهِمْ، فَإِنْ جَاءَ بِجُرْحَتِهِمْ قَبْلَهَا، وَإِنْ لَمْ يَأْتِ بِهَا أَمْضَى عَلَيْهِ الْحَقُّ، وَيَقْبَلُ فِي جُرْحَتِهِمْ أَنْ يَكُونُوا لَهُ مُهَاجِرِينَ فِي الْحَالِ الَّتِي شَهِدُوا فِيهَا عَلَيْهِ، وَإِنْ كَانُوا عَدُوًّا، وَيَقْبَلُ جُرْحَتَهُمْ بِمَا تُجْرَحُ بِهِ الشُّهُودُ مِنَ الْفُسْقِ وَغَيْرِهِ، وَيَنْبَغِي أَنْ يَقِفَ الشُّهُودُ عَلَى جُرْحَتِهِمْ وَلَا يَقْبَلُ مِنْهُمْ الْجُرْحَةَ

²⁶ *Fāsiq* being the opposite of *adl*.

²⁷ Ḥassūn nowhere commits to a vowelling of nouns of root *j-r-h*, so I have preferred *jarḥ* and *jurḥa(t)* throughout (see Lane, i:405).

²⁸ We must assume this to be the voice of Muḥammad b. al-Ḥasan. Certainly, al-Shāfi'ī never met Abū Yūsuf. Cf. similar formulae in §§385 and 439.

²⁹ Ḥassūn has preferred *فَعَدَلُوا*, as opposed to *فَعَدَلُوا*, though I see no problem with the latter [and have thus preferred it], and cannot quite grasp his usage.

³⁰ See Lane, i.2880.

of iniquity (<i>fisq</i>), and otherwise. And it is right that he should suspend (<i>yaqifa</i>) the witnesses upon their <i>jurḥa</i>, and [that he should] not accept from them [counter-] <i>jurḥa</i>, until they clear away (<i>yubayyinū</i>) that by which they are impugned, from that which he himself [the <i>qāḍī</i>] sees/opines³¹ to be <i>jarḥ</i>. For indeed there are among witnesses such as whose legal credibility is impugned by <i>taʿwīl</i>, and by means of a matter the like of which has no <i>jarḥ</i> in it. So it is not accepted until they confirm what he himself sees/opines to be <i>jarḥ</i>, whether the impugner of falsehood (<i>al-jāriḥ</i>) is one who wishes to be in understanding or in favour (<i>fi fiqhⁱⁿ aw faḍlⁱⁿ</i>).	إِلَّا بَأْنَ يُبَيِّنُوا مَا يُجْرَحُونَ بِهِ مِمَّا يَرَاهُ هُوَ جَرَحًا، فَإِنَّ مِنَ الشُّهُودِ مَنْ يُجْرَحُ بِالتَّأْوِيلِ وَبِالْأَمْرِ الَّذِي لَا جَرَحَ فِي مِثْلِهِ فَلَا يُقْبَلُ حَتَّى يُثْبِتُوا مَا يَرَاهُ هُوَ جَرَحًا، كَانَ الْجَارِحُ مَنْ شَاءَ أَنْ يَكُونَ فِي فَقْهِ أَوْ فَضْلٍ.
516 – And when the executor (<i>al-waṣī</i>) testifies that there is owed to the foremost heir, by the deceased (<i>li'l-wārithi al-kabīr ʿalā al-mayyiti</i>) a <i>dayn</i>, or a <i>ṣadaqa</i>, or a <i>hiba</i>, or a <i>shirāʾ</i>; then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: That is not permitted.	516 – وَإِذَا شَهِدَ الْوَصِيُّ لِلْوَارِثِ الْكَبِيرِ عَلَى الْمَيِّتِ بَدَيْنٍ أَوْ صَدَقَةٍ فِي دَارٍ أَوْ هِبَةٍ أَوْ شِرَاءٍ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: لَا يَجُوزُ ذَلِكَ.
517 – But Ibn Abī Laylā used to say: It is <i>jāʾiz</i>. And he [Abū Yūsuf] embraces it.	517 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هُوَ جَائِزٌ. وَبِهِ يَأْخُذُ.
518 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man dies and appoints a man as executor (<i>awṣā ilā rajulⁱⁿ</i>), then the <i>waṣī</i> testifies in favour of one over whom he exercises no management of affairs (<i>lā yalī amrahu</i>) – be he a foremost <i>wārith</i> of legal majority (<i>rashīd</i>), or an outsider (<i>ajnabī</i>) –, or an heir whose affairs are managed by another besides the <i>waṣī</i>; then his <i>shahāda</i> is <i>jāʾiza</i>, so long as there is nothing in it for which it would be rejected.³²	518 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا مَاتَ الرَّجُلُ فَأَوْصَى إِلَى رَجُلٍ فَشَهِدَ الْوَصِيُّ لِمَنْ لَا يَلِي أَمْرَهُ؛ مِنْ وَارِثٍ كَبِيرٍ رَشِيدٍ، أَوْ أَجْنَبِيٍّ، أَوْ وَارِثٍ يَلِيهِ غَيْرُ الْوَصِيِّ، فَشَهِدَتْهُ جَائِزَةً، وَلَيْسَ فِيهَا شَيْءٌ تُرَدُّ لَهُ.
519 – And likewise, when he testifies in favour of one whose affairs he does not manage, against an <i>ajnabī</i>.	519 – وَكَذَلِكَ إِذَا شَهِدَ لِمَنْ لَا يَلِي أَمْرَهُ عَلَى أَجْنَبِيٍّ.

³¹ Ḥassūn has مِمَّا يَرَاهُ هُوَ, instead of the Būlāq's مِمَّا يَرَاهُ هُوَ (vii.113).

³² This is a matter of conflict of interest; the claimant *waṣī* cannot be an interested party.

520 – And when the waṣī testifies against another besides the deceased, in favour of the foremost wārith, for something belonging to him, specifically (<i>khāṣṣat^{am}</i>); his <i>shahāda</i> is <i>jā'iza</i> according to both their <i>qawls</i> [i.e., Abū Ḥanīfa's and Ibn Abī Laylā's], together.	520 – وَإِذَا شَهِدَ الْوَصِيُّ عَلَى غَيْرِ الْمَيِّتِ لِلْوَارِثِ الْكَبِيرِ بِشَيْءٍ لَهُ خَاصَّةً فَشَهَادَتُهُ جَائِزَةٌ فِي قَوْلِهِمَا جَمِيعًا.
521 – Al-Shāfi'ī said: And likewise when he testifies in favour of one whose affairs he does not manage, against an <i>ajnaḇī</i> .	521 – قَالَ الشَّافِعِيُّ: وَكَذَلِكَ إِذَا شَهِدَ لِمَنْ لَا يَلِي أَمْرَهُ عَلَى أَجَنَبِيٍّ.
522 – And when a man claims a debt owed by a deceased party, and two witnesses testify about his <i>ḥaqq</i> in his favour, while he [the creditor] and another testify about a <i>waṣīyya</i> and a <i>dayn</i> owed by him [the deceased] to a man; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: Their <i>shahāda</i> is <i>jā'iza</i> , because the creditor (<i>al-gharīm</i>) harms himself (<i>yaḍurru nafsahu</i>) by his <i>shahāda</i> . And he [Abū Yūsuf] embraces it. ³³	522 – وَإِذَا ادَّعَى رَجُلٌ دَيْنًا عَلَى مَيِّتٍ فَشَهِدَ لَهُ شَاهِدَانِ عَلَى حَقِّهِ، وَشَهِدَ هُوَ وَآخَرُ عَلَى وَصِيَّةٍ وَدَيْنٍ لِرَجُلٍ عَلَيْهِ، فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: شَهَادَتُهُمْ جَائِزَةٌ؛ لِأَنَّ الْغَرِيمَ يَضُرُّ نَفْسَهُ بِشَهَادَتِهِ. وَبِهِ يَأْخُذُ.
523 – But Ibn Abī Laylā used to say: His <i>shahāda</i> is not permissible.	523 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا تَجُوزُ شَهَادَتُهُ.
524 – And when the <i>aṣḥāb</i> of the <i>waṣāya</i> testify, some of them in favour of some [others]; it is not permissible, because they are partners (<i>shurakā'</i>) in the <i>waṣīyya</i> , a third [divided] among them.	524 – وَإِذَا شَهِدَ أَصْحَابُ الْوَصَايَا بَعْضُهُمْ لِبَعْضٍ لَمْ تَجْزَ؛ لِأَنَّهُمْ شُرَكَاءُ فِي الْوَصِيَّةِ؛ الثُّلُثُ بَيْنَهُمْ.
525 – And Abū Yūsuf said: The <i>aṣḥāb</i> of the <i>waṣāya</i> and the creditors are the same; the <i>shahāda</i> of some of them in favour of some [others] is not permitted.	525 – وَقَالَ أَبُو يُوسُفَ: أَصْحَابُ الْوَصَايَا وَالْغُرَمَاءُ سَوَاءٌ؛ لَا تَجُوزُ شَهَادَةُ بَعْضِهِمْ لِبَعْضٍ.
526 – Al-Shāfi'ī, may God Most High be pleased with him, said: And when there is owed a debt to a man, [confirmed] by <i>bayyina</i> , by a deceased party, then he [the creditor] and another with him testify about a <i>waṣīyya</i> in favour of a man; their <i>shahāda</i> is <i>jā'iza</i> , so long as there is nothing in it of the sort for which it would be rejected; it is only rejected when by means of it they secure [some benefit] for	526 – قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ تَعَالَى عَنْهُ: وَإِذَا كَانَ لِرَجُلٍ دَيْنٌ بَيِّنَةٌ عَلَى مَيِّتٍ ثُمَّ شَهِدَ هُوَ وَآخَرُ مَعَهُ لِرَجُلٍ بِوَصِيَّةٍ، فَشَهَادَتُهُمَا جَائِزَةٌ وَلَا شَيْءَ فِيهَا مِمَّا تُرَدُّ لَهُ، إِنَّمَا تُرَدُّ بَأَن يَجْرَأَ إِلَى أَنْفُسِهِمَا بِهَا، وَهَذَا لَمْ يَجْرَأَ إِلَى

³³ That is to say: by testifying about the *waṣīyya* and *dayn* owed to others, the creditor decreases the estate from which his loan is to be satisfied.

themselves, and these to do not secure for themselves by means of it.	أَنْفُسِهِمَا بِهَا.
527 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the <i>aṣḥāb</i> of the <i>waṣāya</i> testify, some of them in favour of some [others]; it is not permissible, because they are partners (<i>shurakā'</i>) in the <i>waṣiyya</i> , a third [divided] among them.	527 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا شَهِدَ أَصْحَابُ الْوَصَايَا بَعْضُهُمْ لِبَعْضٍ لَمْ يَجْزْ؛ لِأَنَّهُمْ شُرَكَاءُ فِي الْوَصِيَّةِ؛ الثُّلُثُ بَيْنَهُمْ.
528 – And when a man testifies in favour of his wife; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: His <i>shahāda</i> in her favour is not permitted, and likewise has it reached us regarding Shurayḥ. And he [Abū Yūsuf] embraces this [doctrine].	528 – وَإِذَا شَهِدَ الرَّجُلُ لَامْرَأَتِهِ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: لَا تَجُوزُ شَهَادَتُهُ لَهَا، وَكَذَلِكَ بَلَغَنَا عَنْ شُرَيْحٍ. وَبِهَذَا يَأْخُذُ.
529 – But Ibn Abī Laylā used to say: His <i>shahāda</i> in her favour is <i>jā'iza</i> .	529 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: شَهَادَتُهُ لَهَا جَائِزَةٌ.
530 – Al-Shāfi'ī, may God Most High be pleased with him, said: Rejected is the <i>shahāda</i> of a man in favour of his parents and his grandparents — however so high on the part of his father and his mother —, and in favour of his son — however so low. And it is not rejected for anyone except them — neither wife, nor brother, nor paternal uncle, nor maternal uncle.	530 – قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ تَعَالَى عَنْهُ: تُرَدُّ شَهَادَةُ الرَّجُلِ لِوَالِدَيْهِ وَأُجْدَادِهِ وَإِنْ يَعْدُوا مِنْ قَبْلِ أَبِيهِ وَأُمِّهِ وَلَوْلَدِهِ وَإِنْ سَفَلُوا، وَلَا تُرَدُّ لِأَحَدٍ سِوَاهُمْ؛ زَوْجَةٍ وَلَا أَخٍ وَلَا عَمٍّ وَلَا خَالَ.
531 – And when a man testifies about a <i>shahāda</i> [made] while he is sound of sight (<i>ṣaḥīḥu al-baṣari</i>), then he goes blind (<i>'amiya</i>), and his sight departs; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: That [particular] <i>shahāda</i> of his is not permitted, when he testifies by means of it.	531 – وَإِذَا شَهِدَ الرَّجُلُ عَلَى شَهَادَةٍ وَهُوَ صَحِيحُ الْبَصَرِ ثُمَّ عَمِيَ فَذَهَبَ بَصَرُهُ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا تَجُوزُ شَهَادَتُهُ تِلْكَ إِذَا شَهِدَ بِهَا.
532 – It has reached us concerning 'Alī b. Abī Ṭālib, may God have mercy upon him: He rejected the <i>shahāda</i> of a blind man (<i>a'mā</i>) who testified before him.	532 – بَلَغَنَا عَنْ عَلِيِّ بْنِ أَبِي طَالِبٍ رَضِيَ اللَّهُ عَنْهُ رَدُّ شَهَادَةِ أَعْمَى شَهِدَ عِنْدَهُ.
533 – But Ibn Abī Laylā used to say: His <i>shahāda</i> is <i>jā'iza</i> . And he [Abū Yūsuf] embraces it, when it is something upon which he is not required to make [something] contingent.	533 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: شَهَادَتُهُ جَائِزَةٌ. وَبِهِ يَأْخُذُ، إِذَا كَانَ شَيْءٌ لَا يَحْتَاجُ أَنْ يَقِفَ عَلَيْهِ.

534 – Al-Shāfi'ī, may God have mercy upon him, said: And when a man witnesses while he is sighted (<i>baṣīr^{un}</i>), then he contributes the <i>shahāda</i> while he is blind (<i>a'mā</i>); his <i>shahāda</i> is permitted, due to the fact that most of what is in <i>shahāda</i> is hearing and sight, and both of them were [functioning] in him the day he witnessed.	534 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا شَهِدَ الرَّجُلُ وَهُوَ بَصِيرٌ ثُمَّ أَدَّى الشَّهَادَةَ وَهُوَ أَعْمَى جَازَتْ شَهَادَتُهُ؛ مِنْ قَبْلِ أَنْ أَكْثَرَ مَا فِي الشَّهَادَةِ السَّمْعُ وَالْبَصَرُ وَكِلَاهُمَا كَانَ فِيهِ يَوْمَ شَهِدَ.
535 – And if one should say (<i>fa-in qāla qā'il</i>): They [dual] are not in him on the day he testifies.	535 – فَإِنْ قَالَ قَائِلٌ: لَيْسَا فِيهِ يَوْمَ يَشْهَدُ.
536 – It is said: We have only relied upon (<i>ihtajna ilā</i>) the <i>shahāda</i> on the day that it was. As for the day on which it is furnished, it only refers back to the <i>hukm</i> of a thing he had confirmed in full sight (<i>qad athbatahu baṣīr^{un}</i>). And if we reject it when he is not sighted – because he does not see the thing testified about at the time he testifies –, it obliges us not to permit the <i>shahāda</i> of the sighted one against a deceased party, nor against an absent party, because the witness does not see the deceased, nor the absent. And whosoever claims that he does not permit his <i>shahāda</i> after the blindness – while he has confirmed it fully sighted–, permits the <i>shahāda</i> of the sighted one against the deceased and the absent.	536 – قِيلَ: إِنَّمَا احْتَجْنَا إِلَى الشَّهَادَةِ يَوْمَ كَانَتْ، فَأَمَّا يَوْمَ تُقَامُ فَإِنَّمَا هِيَ تُعَادُ بِحُكْمِ شَيْءٍ قَدْ أَثْبَتَهُ بَصِيرًا، وَلَوْ رَدَدْنَاهَا إِذَا لَمْ يَكُنْ بَصِيرًا؛ لِأَنَّهُ لَا يَرَى الْمَشْهُودَ عَلَيْهِ حِينَ يَشْهَدُ، لَزِمْنَا أَنْ لَا نُجِيزَ شَهَادَةَ بَصِيرٍ عَلَى مَيِّتٍ وَلَا عَلَى غَائِبٍ؛ لِأَنَّ الشَّاهِدَ لَا يَرَى الْمَيِّتَ وَلَا الْغَائِبَ وَالَّذِي يَزْعُمُ أَنَّهُ لَا يُجِيزُ شَهَادَتَهُ بَعْدَ الْعَمَى وَقَدْ أَثْبَتَهَا بَصِيرًا يُجِيزُ شَهَادَةَ الْبَصِيرِ عَلَى الْمَيِّتِ وَالْغَائِبِ.
537 – And when a man confesses to <i>zinā</i> four times in a single standing (<i>maqāmⁱⁿ wāḥidⁱⁿ</i>) before the <i>qāḍī</i>; then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: This, according to me, is in the status of (<i>bi-manzilati</i>) one time, and there is no <i>ḥadd</i> [inflicted] upon him for this. And he [Abū Yūsuf] embraces it.	537 – وَإِذَا أَقَرَّ الرَّجُلُ بِالزِّنَا أَرْبَعَ مَرَّاتٍ فِي مَقَامٍ وَاحِدٍ عِنْدَ الْقَاضِي، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: هَذَا عِنْدِي بِمَنْزِلَةِ مَرَّةٍ وَاحِدَةٍ، وَلَا حَدَّ عَلَيْهِ فِي هَذَا. وَبِهِ يَأْخُذُ.
538 – It has reached us concerning the Messenger of God, may God bless and save him, that Mā'iz b. Mālik came to him and confessed, before him, to <i>zinā</i>, and he rejected him. Then he came to him the second time and confessed before him, and he rejected him. Then he came to him the third time and confessed before him, and he rejected him. Then he came to him the fourth time and confessed before him, so he [the Prophet] asked his [Mā'iz's] people: Do you find something wrong with his mind? They said: No. So he ordered it, and	538 – بَلَغَنَا عَنْ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – أَنَّ مَاعِزَ بْنَ مَالِكٍ أَتَاهُ فَأَقَرَّ عِنْدَهُ بِالزِّنَا فَرَدَّهُ، ثُمَّ أَتَاهُ الثَّانِيَةَ فَأَقَرَّ عِنْدَهُ فَرَدَّهُ، ثُمَّ أَتَاهُ الثَّالِثَةَ فَأَقَرَّ عِنْدَهُ فَرَدَّهُ، ثُمَّ أَتَاهُ الرَّابِعَةَ فَأَقَرَّ عِنْدَهُ، فَسَأَلَ قَوْمَهُ: هَلْ تُنْكِرُونَ مِنْ عَقْلِهِ شَيْئًا؟ قَالُوا لَا. فَأَمَرَ بِهِ فَرَجِمَ. وَبِهِ يَأْخُذُ.

he was stoned (<i>rujima</i>). And he [Abū Yūsuf] embraces it.	
539 – But Ibn Abī Laylā used to administer the <i>ḥadd</i> when he confesses four times in a single standing [before the <i>qāḍī</i>].	539 – وَكَانَ ابْنُ أَبِي لَيْلَى يُقِيمُ الْحَدَّ إِذَا أَقَرَّ أَرْبَعَ مَرَّاتٍ فِي مَقَامٍ وَاحِدٍ.
540 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man confesses to <i>zinā</i> , and renders the description which obliges the <i>ḥadd</i> , in a [single] session (<i>majlis</i>), four times; he and the one who confesses to it in separate sessions are one and the same (<i>fa-sawāʿun</i>). If, indeed, we were only arguing (<i>iḥtajnā ilā</i>) that it [<i>zinā</i>] be confessed four times by way of <i>qiyās</i> with four witnesses, then he who does not administer [the <i>ḥadd</i>] upon him for four times in a single standing, but administers it upon him for four times in different standings, has abandoned the <i>aṣl</i> of his <i>qawl</i> – because he claims that the four witnesses are not accepted except in a single standing.	540 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَقَرَّ الرَّجُلُ بِالزِّنَا وَوَصَفَهُ الصِّفَةَ الَّتِي تُوجِبُ الْحَدَّ فِي مَجْلِسٍ أَرْبَعَ مَرَّاتٍ، فَسَوَاءٌ هُوَ وَالَّذِي أَقَرَّ بِهِ فِي مَجَالِسٍ مُتَفَرِّقَةٍ، إِنْ كُنَّا إِنَّمَا احْتَجْنَا إِلَى أَنْ يُقَرَّ أَرْبَعَ مَرَّاتٍ قِيَاسًا عَلَى أَرْبَعَةِ شُهُودٍ، فَالَّذِي لَمْ يُقَمْ عَلَيْهِ فِي أَرْبَعَ مَرَّاتٍ فِي مَقَامٍ وَاحِدٍ وَأَقَامَهَا عَلَيْهِ فِي أَرْبَعَ مَرَّاتٍ فِي مَقَامَاتٍ مُخْتَلِفَةٍ تَرَكَ أَصْلَ قَوْلِهِ؛ لِأَنَّهُ يَزْعُمُ أَنَّ الشُّهُودَ الْأَرْبَعَةَ لَا يُقْبَلُونَ إِلَّا فِي مَقَامٍ وَاحِدٍ.
541 – He said: And if they [confessors] diverge (<i>tafarraqū</i>) [regarding] their <i>ḥadd</i> ?	541 – قَالَ: وَلَوْ تَفَرَّقُوا حَدَّهُمْ.
542 – Then it is right that he should say: The <i>iqrār</i> four times in a [single] standing is more confirming (<i>athbata</i>) than it is in four standings.	542 – فَكَانَ يَنْبَغِي لَهُ أَنْ يَقُولَ: الْإِقْرَارُ أَرْبَعَ مَرَّاتٍ فِي مَقَامٍ أَثْبَتَ مِنْهُ فِي أَرْبَعَةِ مَقَامَاتٍ.
543 – And if he says: I have only embraced the <i>ḥadīth</i> of Māʿiz:	543 – فَإِنْ قَالَ: إِنَّمَا أَخَذْتُ بِحَدِيثِ مَاعِزٍّ.
544 – Then the <i>ḥadīth</i> of Māʿiz is not as he described. But even if it is as he described – that Māʿiz confessed in four separate circumstances (<i>amkinat</i> ^m) four times –, the acceptance of his <i>iqrār</i> in a session four times is not contrary (<i>khilāf</i> ^m) to this; because we do not examine (<i>lam nanẓur ilā</i>) the sessions, we examine only the articulation (<i>al-lafẓ</i>). And the matter is not as they both said, together [i.e., both Abū Ḥanīfa and Ibn Abī Laylā], for his <i>iqrār</i> once before the <i>ḥākim</i> obliges the <i>ḥadd</i> when it is confirmed for him, until he is stoned. Don't you look to (<i>alā tarā ilā</i>) the <i>qawl</i> of the Prophet, may God bless and save him: «Go, O Unays, to this woman, and if she confesses, then stone her;» and the <i>ḥadīth</i> of Māʿiz provides an indicant (<i>yadullu</i>) –	544 – فَلَيْسَ حَدِيثُ مَاعِزٍّ كَمَا وَصَفَ، وَلَوْ كَانَ كَمَا وَصَفَ أَنَّ مَاعِزًّا أَقَرَّ فِي أَرْبَعَةِ أَمَكِنَةٍ مُتَفَرِّقَةٍ أَرْبَعَ مَرَّاتٍ مَا كَانَ قَبُولُ إِقْرَارِهِ فِي مَجْلِسٍ أَرْبَعَ مَرَّاتٍ خِلَافًا لِهَذَا؛ لِأَنَّا لَمْ نَنْظُرْ إِلَى الْمَجَالِسِ إِنَّمَا نَنْظُرُنَا إِلَى اللَّفْظِ، وَلَيْسَ الْأَمْرُ كَمَا قَالَا جَمِيعًا، وَإِقْرَارُهُ مَرَّةً عِنْدَ الْحَاكِمِ يُوجِبُ الْحَدَّ إِذَا ثَبَتَ عَلَيْهِ حَتَّى يُرْجَمَ. أَلَا تَرَى إِلَى قَوْلِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ –: «اغْدُ يَا أُنَيْسُ إِلَى امْرَأَةٍ هَذَا،

when he asks “is he possessed/mad (<i>a-bihi junnat^{un}</i>)?” — that he rejected him four times due to a denial of his sanity (<i>li-inkāri 'aqlihi</i>).	فَإِنْ اعْتَرَفَتْ فَارْجُمَهَا» وَحَدِيثُ مَا عَزَّ يَدُلُّ حِينَ سَأَلَ أَبِي حَنْتَةَ؟ أَنَّهُ رَدَّهُ أَرْبَعَ مَرَّاتٍ لِلْإِنْكَارِ عَقْلِهِ.
545 – And when a man confesses to <i>zinā</i> before other than a <i>qāḍī</i> , four times; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used not to consider that to be anything (<i>lā yarā dhālika shay^{un}</i>), and [used] not to inflict the <i>ḥadd</i> upon him, and he [Abū Yūsuf] embraces it.	545 – وَإِذَا أَقَرَّ الرَّجُلُ بِالزِّنَا عِنْدَ غَيْرِ قَاضٍ أَرْبَعَ مَرَّاتٍ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ لَا يَرَى ذَلِكَ شَيْئًا وَلَا يَحُدُّهُ، وَبِهِ يَأْخُذُ.
546 – But Ibn Abī Laylā used to say: When the witnesses confirm that against him, I inflict the <i>ḥadd</i> upon him (<i>aḥudduhu</i>).	546 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: إِذَا قَامَتْ عَلَيْهِ الشُّهُودُ بِذَلِكَ أَحْدُهُ.
547 – Al-Shāfiʿī, may God be pleased with him, said: And when a man confesses before other than a <i>qāḍī</i> , to <i>zinā</i> , then it is right for the <i>qāḍī</i> that he should not stone him until he confesses before him. And that is to say he confesses before him and he rules for his stoning, then he retracts and he accepts his retraction. And when the <i>aṣl</i> of the <i>qawl</i> is thus in the <i>iqrār</i> , it is not right for him that he should stone him until he confesses before him. And it is right, when he sends him to be stoned, that he should say to them [those gathered to inflict the <i>ḥadd</i>]: When he retracts, leave him alone (<i>matā rajaʿa fa-atrukūhu</i>) — after the falling of the stones [begins], and before it — for the Prophet, may God bless and save him, did not say, as regards Māʿiz: «And did you not leave him be?» except after the falling of the stones.	547 – قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ عَنْهُ: وَإِذَا أَقَرَّ الرَّجُلُ عِنْدَ غَيْرِ قَاضٍ بِالزِّنَا، فَيَنْبَغِي لِلْقَاضِي أَنْ لَا يَرْجُمَهُ حَتَّى يُقَرَّ عِنْدَهُ، وَذَلِكَ أَنَّهُ يُقَرَّرُ عِنْدَهُ وَيَقْضِي بِرَجْمِهِ فَيَرْجِعُ فَيَقْبَلُ رُجُوعَهُ، فَإِذَا كَانَ أَصْلُ الْقَوْلِ فِي الْإِقْرَارِ هَكَذَا، لَمْ يَنْبَغِ أَنْ يَرْجُمَهُ حَتَّى يُقَرَّ عِنْدَهُ، وَيَنْبَغِي إِذَا بَعَثَ بِهِ لِيُرْجَمَ أَنْ يَقُولَ لَهُمْ: مَتَى رَجَعَ فَأْتُرْكُوهُ، بَعْدَ وَقُوعِ الْحِجَارَةِ وَقَبْلَهَا، وَمَا قَالَ النَّبِيُّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – فِي مَا عَزَّ: «فَهَلَّا تَرَكَتُمُوهُ؟» إِلَّا بَعْدَ وَقُوعِ الْحِجَارَةِ.
548 – And when a man recants (<i>rajaʿa</i>) from his <i>shahāda</i> to <i>zinā</i> , but its <i>ṣāhib</i> had been stoned due to it [his <i>shahāda</i>]; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: He is struck (<i>yudrabu</i>) with the <i>ḥadd</i> [for <i>qadhḥ</i>], and fined (<i>yaghramu</i>) a quarter of the <i>diyya</i> . And he [Abū Yūsuf] embraces it.	548 – وَإِذَا رَجَعَ الرَّجُلُ عَنْ شَهَادَتِهِ بِالزِّنَا وَقَدْ رُجِمَ صَاحِبُهُ بِهَا، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: يُضْرَبُ الْحَدُّ وَيَعْرَمُ رُبْعُ الدِّيَةِ. وَبِهِ يَأْخُذُ.
549 – But Ibn Abī Laylā used to say: I kill him, and if four of them recant, I kill them, and I do not fine them the <i>diyya</i> .	549 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: أَقْتُلُهُ، فَإِنْ رَجَعُوا أَرْبَعَتَهُمْ قَتَلْتَهُمْ وَلَا نُعْرِمُهُمُ الدِّيَةَ.

550 – And if three of them recant, according to the <i>qawl</i> of Abū Ḥanīfa, may God Most High have mercy upon him: They are struck with the <i>ḥadd</i>, and each one of them is fined a quarter of the <i>diya</i>.	550 – فَإِنْ رَجَعَ ثَلَاثَةٌ فِي قَوْلِ أَبِي حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى: ضَرَبُوا الْحَدَّ وَغَرِمَ كُلُّ وَاحِدٍ مِنْهُمْ رُبْعَ الدِّيَةِ.
551 – Al-Shāfiʿī, may God have mercy upon him, said: And when four testify against a man for <i>zinā</i>, and he is stoned, then one of them recants from his <i>shahāda</i>; the <i>qāḍī</i> asks him about his retraction. And if he says: I deliberately intended to testify falsely (<i>ashhada bi-zūrⁱⁿ</i>); the <i>qāḍī</i> says to him: Did you know that, when you testified with others, he would be killed? And if he says: Yes; I turn him over to the guardians of the slain one (<i>awliyāʾi al-maqtūli</i>) – if they wish, they kill, and if they wish, they pardon. And if they say: We forgo killing and take the <i>diya</i>; he owes them a quarter of the <i>diya</i>, and the <i>ḥadd</i> is inflicted upon him for this, all of it.	551 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا شَهِدَ أَرْبَعَةٌ عَلَى رَجُلٍ بِالزِّنَا فَرُجِمَ، فَرَجَعَ أَحَدُهُمْ عَنْ شَهَادَتِهِ سَأَلَهُ الْقَاضِي عَنْ رُجُوعِهِ، فَإِنْ قَالَ: عَمَدْتُ أَنْ أَشْهَدَ بِزُورٍ. قَالَ لَهُ الْقَاضِي: عَلِمْتَ أَنَّكَ إِذَا شَهِدْتَ مَعَ غَيْرِكَ قَتَلَ؟ فَإِنْ قَالَ: نَعَمْ. دَفَعَهُ إِلَى أَوْلِيَاءِ الْمَقْتُولِ؛ فَإِنْ شَاءُوا قَتَلُوا وَإِنْ شَاءُوا عَفَوْا. فَإِنْ قَالُوا: نَتْرُكُ الْقَتْلَ وَنَأْخُذُ الدِّيَةَ. كَانَ لَهُمْ عَلَيْهِ رُبْعُ الدِّيَةِ، وَعَلَيْهِ الْحَدُّ فِي هَذَا كُلِّهِ.
552 – But if he says: I testified, but I did not know what would be [inflicted] upon him, killing or otherwise; I make him swear he did not deliberately intend the killing (<i>uḥlifa mā ʿamada al-qatla</i>), and upon him is [imposed] a quarter of the <i>diya</i>, and the <i>ḥadd</i> [of <i>qadhḥ</i>].	552 – وَإِنْ قَالَ: شَهِدْتُ وَلَا أَعْلَمُ مَا يَكُونُ عَلَيْهِ الْقَتْلُ أَوْ غَيْرُهُ. أُحْلِفَ مَا عَمَدَ الْقَتْلَ وَكَانَ عَلَيْهِ رُبْعُ الدِّيَةِ وَالْحَدُّ.
553 – And likewise [regarding] the witnesses with him, all of them, when they recant.	553 – وَهَكَذَا الشُّهُودُ مَعَهُ كُلُّهُمْ إِذَا رَجَعُوا.
554 – And when the witnesses testify before the <i>qāḍī</i> about a slave, and they characterize his external qualities and describe him (<i>ḥallūhu wa waṣafūhu</i>), while he is in another town (<i>balḍatⁱⁿ ukhrā</i>), and the <i>qāḍī</i> writes down their <i>shahāda</i> about that; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: I do not accept that, and I do not turn the slave over to him [who came seeking], because external qualities (<i>al-ḥilya</i>) might coincide with external qualities, and he might enjoy usufruct of the slave (<i>yantafiʿu bi'l-ʿabdi</i>) until he brings him to the <i>qāḍī</i> who wrote for him. Have you considered [what would happen] (<i>araʿayta</i>) if it was a beautiful <i>jāriya</i>, and the man is not in a position of	554 – وَإِذَا شَهِدَ الشُّهُودُ عِنْدَ الْقَاضِي عَلَى عَبْدٍ وَحَلَّوْهُ وَوَصَفَوْهُ وَهُوَ فِي بَلَدَةٍ أُخْرَى، فَكَتَبَ الْقَاضِي شَهَادَتَهُمْ عَلَى ذَلِكَ، فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: لَا أَقْبَلُ ذَلِكَ وَلَا أَدْفَعُ إِلَيْهِ الْعَبْدَ؛ لِأَنَّ الْحِلْيَةَ قَدْ تَوَافَقَ الْحِلْيَةُ وَهُوَ يَنْتَفِعُ بِالْعَبْدِ حَتَّى يَأْتِيَ بِهِ إِلَى الْقَاضِي الَّذِي كَتَبَ لَهُ، أَرَأَيْتَ لَوْ كَانَتْ جَارِيَةً حَمِيلَةً وَالرَّجُلُ غَيْرُ أَمِينٍ أَكُنْتُ أَبْعَثُ بِهَا مَعَهُ؟

fiduciary duty (<i>ghayru amīnⁱⁿ</i>) – am I to send her off with him?³⁴	
555 – But Ibn Abī Laylā used to put a seal (<i>yakhtimu</i>) on the neck of the slave, and take from whomever came with the <i>kitāb</i> a guarantor (<i>kafil</i>), then send him [the slave] to the <i>qādī</i>. And when the slave and the second <i>kitāb</i> came to him [the other <i>qādī</i>], he would call upon the witnesses. And if they testified that he is his slave, he would discharge (<i>abra'a</i>) his [the slave owner's] <i>kafil</i>, and rule regarding the slave that it belongs to him, and write for him to that end a <i>kitāb</i> to the <i>qādī</i> who took from him the <i>kafil</i>, so that he might discharge his <i>kafil</i>. And he [Abū Yūsuf] embraces it.	555 – وَكَانَ ابْنُ أَبِي لَيْلَى يَخْتِمُ فِي عُنُقِ الْعَبْدِ وَيَأْخُذُ مِنَ الَّذِي جَاءَ بِالْكِتَابِ كَفِيلًا ثُمَّ يَبْعَثُ بِهِ إِلَى الْقَاضِي، فَإِذَا جَاءَهُ الْعَبْدُ وَالْكِتَابُ الثَّانِي دَعَا الشُّهُودَ، فَإِنْ شَهِدُوا أَنَّهُ عَبْدُهُ، أَبْرَأَ كَفِيلَهُ وَقَضَى بِالْعَبْدِ أَنَّهُ لَهُ، وَكَتَبَ لَهُ بِذَلِكَ كِتَابًا إِلَى الْقَاضِي الَّذِي أَخَذَ مِنْهُ الْكَفِيلَ حَتَّى يُرَى كَفِيلَهُ، وَبِهِ يَأْخُذُ.
556 – Al-Shāfi'ī, may God have mercy upon him, said: And when the witnesses testify in favour of a man regarding a missing riding mount (<i>dābbat^m ghā'ibat^m</i>), and they describe it and characterize its external qualities (<i>waṣafūhā wa ḥallūhā</i>); the <i>qiyās</i> is that he does not charge (<i>lā yukallifa</i>) the <i>ṣāhib</i> of the <i>dābba</i> to turn it over, due to the fact that external qualities might resemble external qualities (<i>al-ḥilya qad tushbiḥu al-ḥilya</i>).	556 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا شَهِدَ الشُّهُودُ لِرَجُلٍ عَلَى دَابَّةٍ غَائِبَةٍ فَوَصَفُوهَا وَحَلُّوْهَا، فَالْقِيَاسُ أَنْ لَا يُكَلِّفَ صَاحِبَ الدَّابَّةِ أَنْ يَدْفَعَهَا مِنْ قَبْلِ أَنْ الْحَلِيَّةَ قَدْ تُشَبِّهُ الْحَلِيَّةَ.
557 – And when the <i>qādī</i> who is in his <i>balad</i> places a seal around its [the <i>dābba</i>'s] neck, and sends it to the <i>qādī</i> before whom testimony was made; if he [the sealing <i>qādī</i>] claims that its <i>ḍamān</i> pertains to the one in whose possession it is, he has extracted it from his possession, and he does not absolve him from its <i>ḍamān</i>, and he severs from him its usufruct (<i>manfa'atahā</i>) [while en route] to the <i>balad</i> to which it shall arrive. And if the witnesses do not confirm [ownership] for him, or they die before it arrives at that <i>balad</i>, and it is sent back to him [the sealing <i>qādī</i>]; its usufruct has been cut off from him [the possessor], and he does not give for it a rent given in compensation for a loss not guaranteed by him (<i>ijārat^m 'awwaḍat talaḥ^m ghayra maḍmūnⁱⁿ lahu</i>). For if he makes its <i>ḍamān</i> pertain to the one to whom it is turned over, and	557 – وَإِذَا خَتَمَ الْقَاضِي الَّذِي هُوَ بِلَدِهِ فِي عُنُقِهَا وَبَعَثَ بِهَا إِلَى الْقَاضِي الْمَشْهُودِ عِنْدَهُ، فَإِنْ زَعَمَ أَنَّ ضَمَانَهَا مِنَ الَّذِي هِيَ فِي يَدَيْهِ فَقَدْ أَخْرَجَهَا مِنْ يَدَيْهِ وَلَمْ يُبْرِئْهُ مِنْ ضَمَانِهَا وَيَقْطَعُ عَنْهُ مَنَفَعَتَهَا إِلَى الْبَلَدِ الَّذِي تَصِيرُ إِلَيْهِ. فَإِنْ لَمْ يُثَبِّتْ عَلَيْهِ الشُّهُودُ أَوْ مَاتُوا قَبْلَ أَنْ تَصِلَ إِلَى ذَلِكَ الْبَلَدِ فَرُدَّتْ إِلَيْهِ كَانَتْ قَدْ انْقَطَعَتْ مَنَفَعَتُهَا عَنْهُ وَلَمْ يُعْطَ لَهَا إِجَارَةٌ عَوَضَتْ ثَلَاثًا غَيْرَ مَضْمُونٍ لَهُ. وَلَوْ جَعَلَ ضَمَانَهَا مِنَ الْمَدْفُوعَةِ لَهُ وَجَعَلَ عَلَيْهِ كِرَاءَهَا فِي مَغْيِبِهَا إِنْ رُدَّتْ كَانَتْ قَدْ أُلْزِمَ ضَمَانَهَا

³⁴ These *masā'il* (§§554 and following) are important, among other reasons, in that they illustrate early discourse on the practicalities of *kitābat al-qādī ilā al-qādī*.

makes its rent (<i>kirā'ahā</i>) his responsibility in its absence; if it is returned, its <i>ḍamān</i> has been imposed, and only the transgressor (<i>al-muta'addī</i>) should be made liable (<i>yaḍmanu</i>), while this one did not transgress.	وَإِنَّمَا يَضْمَنُ الْمُتَعَدِّي، وَهَذَا لَمْ يَتَعَدَّ.
558 – And Ibn Abī Laylā, and others of those who maintain his doctrine (<i>dhahaba madhhabahu</i>), merely assert that he said: There is no way (<i>lā sabīla</i>) to the taking of this <i>dābba</i> except in that it be brought to the witnesses, or that he bring the witnesses to it. And it is not [imposed] upon the witnesses that they be charged with (<i>yukallafū</i>) going out from their <i>buldān</i>, but the bringing forth of the <i>dābba</i> is the lighter (<i>akhaḥfu</i>) [of the two evils], and there belongs to the <i>rabb al-dābba</i>, as regards the <i>dābba</i>, the like of that which belongs to the witnesses as regards themselves — that he be not charged with (<i>lā yukallafu</i>) the taking out (<i>khurūj</i>) of something whilst not being compensated for it (<i>lam yastahiqqa 'alayhi</i>).	558 – وَإِنَّمَا ذَهَبَ ابْنُ أَبِي لَيْلَى وَغَيْرُهُ مِمَّنْ ذَهَبَ مَذْهَبُهُ إِلَى أَنْ قَالَ: لَا سَبِيلَ إِلَى أَخَذِ هَذِهِ الدَّابَّةِ إِلَّا بِأَنْ يُؤْتَى بِهَا إِلَى الشُّهُودِ أَوْ يَذْهَبَ بِالشُّهُودِ إِلَيْهَا، وَلَيْسَ عَلَى الشُّهُودِ أَنْ يُكَلَّفُوا الذَّهَابَ مِنْ بُلْدَانِهِمْ، وَالْإِثْنَانُ بِالدَّابَّةِ أَحَفُّ، وَلِرَبِّ الدَّابَّةِ فِي الدَّابَّةِ مِثْلُ مَا لِلشُّهُودِ فِي أَنْفُسِهِمْ مِنْ أَنْ لَا يُكَلَّفَ الْخُرُوجَ بِشَيْءٍ لَمْ يَسْتَحِقَّ عَلَيْهِ.
559 – And in such a way the slave is like the <i>dābba</i>, and the totality of animals (<i>jamī'u al-ḥayawāni</i>).	559 – وَهَكَذَا الْعَبْدُ مِثْلُ الدَّابَّةِ وَجَمِيعِ الْحَيَوَانِ.
560 – And when a man from the <i>ahl</i> of Kūfa gives <i>shahāda</i> and is confirmed as an '<i>adl</i>' (<i>'uddila</i>) in Mecca, and the <i>qāḍī</i> of Mecca writes of it [the <i>shahāda</i>] to the <i>qāḍī</i> of a garrison town (<i>miṣr</i>) — in a garrison town other than his [the Kūfan witness's] garrison town —, of the <i>shahāda</i>, and his credibility is attested to (<i>zukkīya</i>) there, and he writes that [confirmation] to the <i>qāḍī</i> of Kūfa, and a group of people (<i>qawm</i>^{un}) from the <i>ahl</i> of Kūfa testify that this witness is iniquitous (<i>fāsiq</i>) [the opposite of '<i>adl</i>']; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: Their <i>shahāda</i> is not accepted against him, that he is a <i>fāsiq</i>. And he [Abū Yūsuf] embraces it.	560 – وَإِذَا شَهِدَ الرَّجُلُ مِنْ أَهْلِ الْكُوفَةِ شَهَادَةً فَعَدَّلَ بِمَكَّةَ وَكَتَبَ بِهَا قَاضِي مَكَّةَ إِلَى قَاضِي مِصْرٍ فِي مِصْرٍ غَيْرِ مِصْرِهِ بِالشَّهَادَةِ وَرُكِّيَ هُنَاكَ، وَكَتَبَ بِذَلِكَ إِلَى قَاضِي الْكُوفَةِ، فَشَهِدَ قَوْمٌ مِنْ أَهْلِ الْكُوفَةِ أَنَّ هَذَا الشَّاهِدَ فَاسِقٌ، فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: شَهَادَتُهُمْ لَا تُقْبَلُ عَلَيْهِ أَنَّهُ فَاسِقٌ. وَبِهِ يَأْخُذُ.
561 – But Ibn Abī Laylā used to say: His <i>shahāda</i> is rejected, and their <i>qawl</i> is accepted.	561 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: تُرَدُّ شَهَادَتُهُ وَيُقْبَلُ قَوْلُهُمْ.

562 – And Abū Ḥanīfa, may God be pleased with him, said: It is not right for the <i>qāḍī</i> that he should do that, because he [the Kūfan witness] may have been absent from Kūfa some years, and he [the <i>qāḍī</i>] does not know what may have happened, and perhaps he has repented (<i>qad tāba</i>).	562 – وَقَالَ أَبُو حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ: لَا يَنْبَغِي لِلْقَاضِي أَنْ يَفْعَلَ ذَلِكَ؛ لِأَنَّهُ قَدْ غَابَ عَنِ الْكُوفَةِ سِنِينَ، فَلَا يَدْرِي مَا أَحْدَثَ، وَلَعَلَّهُ قَدْ تَابَ.
563 – Al-Shāfiʿī, may God be pleased with him, said: And when two men from the folk of Egypt (<i>ahli miṣra</i>)³⁵ give <i>shahāda</i>, and they are confirmed as <i>adls</i> in Mecca, and the <i>qāḍī</i> of Mecca writes to the <i>qāḍī</i> of Egypt, and the <i>mashhūd alayhi</i> [i.e., the one testified against by the two confirmed in Mecca] asks the <i>qāḍī</i> of Egypt that he bring him witnesses of their <i>jarḥ</i>; if their <i>jarḥ</i> is of animosity (<i>adāwa</i>) or distrust (<i>ẓinna</i>) or that by which the <i>shahāda</i> of the <i>adl</i> is to be rejected, then that [<i>jarḥ</i>] is accepted from him, and he [the <i>qāḍī</i> of Egypt] turns them [the two confirmed in Mecca] back from him. But if their <i>jarḥ</i> is of a bad condition in their personal selves (<i>bi-sū'i ḥāl</i>ⁱⁿ <i>fi anfusihimā</i>), he [the Egyptian <i>qāḍī</i>] looks into (<i>naẓara ilā</i>) the period in which they had left Egypt and headed to Mecca. And if it is a period within the like of which the condition undergoes a transformation (<i>tataghayyaru al-ḥālu fi mithlihā</i>) — a transformation which, had they both been accused of iniquity (<i>majrūḥayni</i>) in their garrison town, then had both transformed to it [the new <i>ḥāl</i>], their <i>shahāda</i> would have been accepted —; the <i>qāḍī</i> [of Egypt] accepts their <i>shahāda</i>, and he pays no heed to the <i>jarḥ</i>, because the <i>jarḥ</i> belongs to an older time (<i>mutaqaddim</i>^{um}).	563 – قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ عَنْهُ: وَإِذَا شَهِدَ الرَّجُلَانِ مِنْ أَهْلِ مِصْرَ بِشَهَادَةٍ فَعَدَّ لَا بِمَكَّةَ، وَكَتَبَ قَاضِي مَكَّةَ إِلَى قَاضِي مِصْرَ، فَسَأَلَ الْمَشْهُودُ عَلَيْهِ قَاضِي مِصْرَ أَنْ يَأْتِيَهُ بِشُهُودٍ عَلَى جَرَحِهِمَا، فَإِنْ كَانَ جَرَحُهُمَا بَعْدَاوَةً أَوْ ظَنَّةً أَوْ مَا تُرَدُّ بِهِ شَهَادَةُ الْعَدْلِ قَبْلَ ذَلِكَ مِنْهُ وَرَدَّهُمَا عَنْهُ، وَإِنْ جَرَحُهُمَا بِسُوءِ حَالٍ فِي أَنْفُسِهِمَا نَظَرَ إِلَى الْمُدَّةِ الَّتِي قَدْ زَايَلَا فِيهَا مِصْرَ وَصَارَا بِهَا إِلَى مَكَّةَ، فَإِنْ كَانَتْ مُدَّةٌ تَتَغَيَّرُ الْحَالُ فِي مِثْلِهَا التَّغْيِيرُ الَّذِي لَوْ كَانَا بِمِصْرَهِمَا مَجْرُوحَيْنِ فَتَغَيَّرَا إِلَيْهَا قَبِلْتُ شَهَادَتَهُمَا، قَبْلَ الْقَاضِي شَهَادَتَهُمَا وَلَمْ يَلْتَفِتْ إِلَى الْجَرَحِ؛ لِأَنَّ الْجَرَحَ مُتَقَدِّمٌ.
564 – And there [may have] happened to them a condition (<i>ḥāl</i>) after the <i>jarḥ</i>, by which they became other than <i>majrūḥayn</i>. And if a period of time has not come to them in which their <i>shahāda</i> would be accepted if they transformed; the <i>jarḥ</i> is accepted against them, and the <i>ahl</i> of their <i>balad</i> are more knowledgeable of them than the one who confirmed them as <i>adls</i> — whether stranger or <i>ahl</i> of their <i>balad</i> —,	564 – وَقَدْ حَدَّثَتْ لَهُمَا حَالٌ بَعْدَ الْجَرَحِ صَارَا بِهَا غَيْرَ مَجْرُوحَيْنِ، وَإِنْ لَمْ تَكُنْ أَتَتْ عَلَيْهِمَا مُدَّةٌ تُقْبَلُ فِيهَا شَهَادَتُهُمَا إِذَا تَغَيَّرَا قَبْلَ عَلَيْهِمَا الْجَرَحَ، وَكَانَ أَهْلُ بَلَدِهِمَا أَعْلَمَ بِهِمَا مِنْ عَدْلِهِمَا؛ غَرِيبًا أَوْ مِنْ أَهْلِ بَلَدِهِمَا؛ لِأَنَّ

³⁵ I have followed Ḥassūn's vowelling of *miṣra* (rather than *miṣr*^m), as "the *qāḍī* of Egypt" makes more sense in the given contexts than "the *qāḍī* of [an unspecified] *miṣr*."

because the <i>jarḥ</i> is more principal [in rank] than (<i>awlā min</i>) the confirmation of 'adl (<i>al-ta'dīl</i>).	الْجَرَحُ أَوْلَى مِنَ التَّعْدِيلِ.
565 – Al-Shāfi'ī, may God have mercy upon him, said: God, to Him belong might and majesty, said: «And take the testimony of those who possess 'adl among you» [Q.65:2], and He said: «from among those you approve of among the witnesses (<i>al-shuhadā</i>)» [Q.2:282].	565 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: قَالَ اللَّهُ عَزَّ وَجَلَّ: «وَأَشْهَدُوا ذَوِي عَدْلٍ مِنْكُمْ» [الطلاق: 2] وَقَالَ: «مِمَّنْ تَرْضَوْنَ مِنَ الشُّهَدَاءِ» [البقرة: 282].
566 – Al-Rabī reported to us, he said: Al-Shāfi'ī reported to us, he said: Muslim b. Khālid reported to us, on the authority of Ibn Abī Najīh, on Mujāhid, ³⁶ that he said: Two free, Muslim 'adls; then [he said]: I don't know of anyone from the <i>ahl al-'ilm</i> in disagreement with (<i>mukhālīf^{an} fi</i>) this being the <i>ma'nā</i> of the āyā.	566 – أَخْبَرَنَا الرَّبِيعُ قَالَ: أَخْبَرَنَا الشَّافِعِيُّ قَالَ: أَخْبَرَنَا مُسْلِمُ بْنُ خَالِدٍ، عَنْ ابْنِ أَبِي نَجِيحٍ، عَنْ مُجَاهِدٍ أَنَّهُ قَالَ: عَدْلَانِ حُرَّانِ مُسْلِمَانِ، ثُمَّ لَمْ أَعْلَمْ مِنْ أَهْلِ الْعِلْمِ مُخَالَفًا فِي أَنَّ هَذَا مَعْنَى الْآيَةِ.
567 – And when they don't disagree (<i>lam yakhtalifū</i>), they have claimed that the <i>shahāda</i> is not completed except by four [conditions]: that the two witnesses be free, Muslim, 'adls, of the age of majority (<i>bālighayni</i>); and that a slave, if he is a Muslim 'adl, his <i>shahāda</i> is not permitted, due to that he is lacking freedom (<i>nāqīṣu al-ḥurriyyati</i>), and it is one of the four conditions (<i>al-shurūṭ al-arba'a</i>).	567 – وَإِذَا لَمْ يَخْتَلِفُوا فَقَدْ زَعَمُوا أَنَّ الشَّهَادَةَ لَا تَتِمُّ إِلَّا بِأَرْبَعٍ؛ أَنْ يَكُونَ الشَّاهِدَانِ حَرَّيْنِ مُسْلِمَيْنِ عَدْلَيْنِ بَالِغَيْنِ، وَأَنْ عَبْدًا لَوْ كَانَ مُسْلِمًا عَدْلًا لَمْ تَجْزُ شَهَادَتُهُ بِأَنَّهُ نَاقِصُ الْحُرِّيَّةِ، وَهِيَ أَحَدُ الشُّرُوطِ الْأَرْبَعَةِ.
568 – And when they claim this; the lack of Islam is more principal [in rank] (<i>awlā</i>) – for no <i>shahāda</i> being permitted with it [the lack] – than the lack of freedom.	568 – فَإِذَا زَعَمُوا هَذَا فَتَقْصُ الْإِسْلَامُ أَوْلَى أَنْ لَا تَجُوزَ مَعَهُ الشَّهَادَةُ مِنْ نَقْصِ الْحُرِّيَّةِ.
569 – And if they claim that this āyā which combines these four qualities (<i>khiṣāl</i>) is a definitive injunction (<i>ḥatm^{un}</i>) that does not permit among witnesses except one in whom these four, combined qualities exist; they have contradicted (<i>khālafū</i>) what they claimed of the <i>ma'nā</i> of the Book of God, when they permitted the <i>shahāda</i> of a <i>kāfir</i> in a [certain] circumstance (<i>bi-ḥālⁱⁿ</i>).	569 – فَإِنْ زَعَمُوا أَنَّ هَذِهِ الْآيَةَ الَّتِي جَمَعَتْ هَذِهِ الْأَرْبَعَ الْخِصَالَ، حَتْمٌ أَنْ لَا يَجُوزَ مِنَ الشُّهُودِ إِلَّا مَنْ كَانَتْ فِيهِ هَذِهِ الْخِصَالُ الْأَرْبَعَةُ الْمُجْتَمِعَةُ، فَقَدْ خَالَفُوا مَا زَعَمُوا مِنْ مَعْنَى كِتَابِ اللَّهِ حِينَ أَجَازُوا شَهَادَةَ كَافِرٍ بِحَالٍ.

³⁶ Mujāhid b. Jabr (d.104/722); traditionist, *mufasssir*, *faqīh*.

570 – And if they claim that it [this āya] is a <i>dalāla</i>, and that it is not an impediment (<i>māniʿat</i>ⁱⁿ) to permitting other than one combining these four conditions; they have wronged (<i>ḡalamū</i>) the one who permits the <i>shahāda</i> of slaves. And I have asked them, and the most prominent of those whom they claimed to have permitted the <i>shahāda</i> of the <i>ahl al-dhimma</i>, some against others, was Shurayḥ.	570 – وَإِنْ زَعَمُوا أَنَّهَا دَلَالَةٌ وَأَنَّهَا غَيْرُ مَانِعَةٍ أَنْ يَجُوزَ غَيْرُ مَنْ جَمَعَ هَذِهِ الشُّرُوطَ الْأَرْبَعَةَ فَقَدْ ظَلَمُوا مَنْ أَجَازَ شَهَادَةَ الْعَبِيدِ، وَقَدْ سَأَلْتُهُمْ فَكَانَ أَعْلَى مَنْ زَعَمُوا أَنَّهُ أَجَازَ شَهَادَةَ أَهْلِ الذِّمَّةِ بَعْضُهُمْ عَلَى بَعْضٍ شُرَيْحَ.
571 – And Shurayḥ had permitted the <i>shahāda</i> of the slave, and the one testified against said: Do you permit against me the <i>shahāda</i> of a slave? He said: Stand, and all of you are equal (<i>qum fa-kullukum sawāʿun</i>) – male slaves, and female slaves (<i>ʿabīd^{un} wa imāʿ^{un}</i>). And if he claims that he disagrees (<i>yukhālifu</i>) with Shurayḥ due to the <i>qawl</i> of the <i>ahl al-tafsīr</i> that in the āyā there exists the condition (<i>shart</i>) of freedom; there is not in the āyā itself (<i>bi-ʿaynihā</i>), a <i>bayān</i> of freedom, but it is an implication of it (<i>muḥtamilat^{un} lahā</i>). Yet in the āyā is a <i>bayān</i> of the condition of Islam, so why did Shurayḥ agree one time and disagree another? And we have written this in the <i>Kitāb al-Aqdiya</i>, and the <i>shahāda</i> of neither male nor female as regards anything of the physical world (<i>al-dunyā</i>) is permitted – neither in favour of one, nor against one – until he is of the age of majority, of sound mind, free, Muslim, <i>ʿadl</i> (<i>bāligh^{an} ʿāqil^{an} ḥurr^{an} muslim^{an} ʿadl^{an}</i>). And the <i>shahāda</i> of a <i>dhimmī</i> is not permitted, nor of one who diverges (<i>khālafa</i>) from what we described, from any perspective whatsoever (<i>bi-wajhⁱⁿ min al-wujūhi</i>).³⁷	571 – وَقَدْ أَجَازَ شُرَيْحُ شَهَادَةَ الْعَبْدِ، فَقَالَ لَهُ الْمَشْهُودُ عَلَيْهِ: أَتَجِيزُ عَلَيَّ شَهَادَةَ عَبْدٍ؟ فَقَالَ: قُمْ فَكُلُّكُمْ سَوَاءٌ؛ عَبِيدٌ وَإِمَاءٌ. فَإِنْ زَعَمَ أَنَّهُ يُخَالِفُ شُرَيْحًا لِقَوْلِ أَهْلِ التَّفْسِيرِ أَنَّ فِي الْآيَةِ شَرْطَ الْحُرِّيَّةِ فَلَيْسَ فِي الْآيَةِ بَعَيْنُهَا بَيَانُ الْحُرِّيَّةِ وَهِيَ مُحْتَمِلَةٌ لَهَا، وَفِي الْآيَةِ بَيَانُ شَرْطِ الْإِسْلَامِ، فَلِمَ وَافَقَ شُرَيْحًا مَرَّةً وَخَالَفَهُ أُخْرَى؟ وَقَدْ كَتَبْنَا هَذَا فِي كِتَابِ الْأَقْضِيَّةِ، وَلَا تَجُوزُ شَهَادَةُ ذَكَرٍ وَلَا أُنْثَى فِي شَيْءٍ مِنْ الدُّنْيَا لِأَحَدٍ وَلَا عَلَى أَحَدٍ حَتَّى يَكُونَ بِالْعَاقِلِ حُرًّا مُسْلِمًا عَدْلًا، وَلَا تَجُوزُ شَهَادَةُ ذِمِّيٍّ وَلَا مَنْ خَالَفَ مَا وَصَفْنَا بِوَجْهِهِ مِنَ الْوُجُوهِ.
572 – And when two witnesses from among the Jews (<i>al-Yahūd</i>) testify against a man from among the Christians (<i>al-Naṣārā</i>), and two witnesses from among the Christians testify against a man from among the Jews; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: That	572 – وَإِذَا شَهِدَ الشَّاهِدَانِ مِنَ الْيَهُودِ عَلَى رَجُلٍ مِنَ النَّصَارَى، وَشَهِدَ شَاهِدَانِ مِنَ النَّصَارَى عَلَى رَجُلٍ مِنَ الْيَهُودِ، فَإِنَّ أَبَا حَنِيفَةَ

³⁷ This and preceding sections illustrate a number of important features; among them: 1) an argument of the *reductio* to inconsistency type; 2) the employment and partial delineation of hermeneutical concepts in a dialectical setting; and 3) cross reference to another treatise: the *Kitāb al-Aqdiya*. As for this last concern, the relevant discussion seems to occur in the *Bāb Hadd al-Dhimmiyyīn idhā Zanū*, of the *K. al-Ḥudūd* (Ḥassūn, §23329ff., Part XII, p.529ff.), not the *Kitāb al-Aqdiya*.

is permissible, because <i>kufr</i> , all of it, is a single confessional community (<i>millat^{un} wāḥidat^{un}</i>). And he [Abū Yūsuf] embraces it.	رضي الله تعالى عنه كَانَ يَقُولُ: ذَلِكَ حَائِزٌ؛ لَأَنَّ الْكُفْرَ كُلَّهُ مِلَّةٌ وَاحِدَةٌ. وَبِهِ يَأْخُذُ.
573 – But Ibn Abī Laylā used not to permit that, and would say: Because they are two different <i>millas</i> .	573 – وَكَانَ ابْنُ أَبِي لَيْلَى لَا يُجِيزُ ذَلِكَ وَيَقُولُ: لِأَنَّهُمَا مِلَّتَانِ مُخْتَلِفَتَانِ.
574 – And Abū Ḥanīfa used to pass inheritance (<i>yuwarrithu</i>) to the Jew from the Christian, and to the Christian from the Jew, and would say: The <i>ahl al-kufr</i> , some from others, even if their <i>millas</i> differ. And he [Abū Yūsuf] embraces it.	574 – وَكَانَ أَبُو حَنِيفَةَ يُورِثُ الْيَهُودِيَّ مِنَ النَّصْرَانِيِّ وَالنَّصْرَانِيَّ مِنَ الْيَهُودِيَّ وَيَقُولُ: أَهْلُ الْكُفْرِ بَعْضُهُمْ مِنْ بَعْضٍ وَإِنْ اخْتَلَفَتْ مِلَلُهُمْ. وَبِهِ يَأْخُذُ.
575 – But Ibn Abī Laylā used not to pass inheritance to some of them from others.	575 – وَكَانَ ابْنُ أَبِي لَيْلَى لَا يُورِثُ بَعْضَهُمْ مِنْ بَعْضٍ.
576 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the <i>ahl al-milal</i> appeal to us for judgment (<i>taḥākamu ilaynā</i>); our <i>ḥukm</i> between them is that we don't pass inheritance to the Muslim from a <i>kāfir</i> , nor to a <i>kāfir</i> from a Muslim, and we pass inheritance to the <i>kuffār</i> some from others, and we pass inheritance to the Jew from the Christian, and to the Christian from the Jew, and we make <i>kufr</i> a single <i>milla</i> , just as we make Islam a <i>milla</i> – because the <i>aṣl</i> , it can only be either <i>īmān</i> or <i>kufr</i> .	576 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا تَحَاكَمَ أَهْلُ الْمِلَالِ إِلَيْنَا فَحُكْمُنَا بَيْنَهُمْ لَمْ يُورَثْ مُسْلِمًا مِنْ كَافِرٍ وَلَا كَافِرًا مِنْ مُسْلِمٍ وَوَرَّثْنَا الْكُفَّارَ بَعْضُهُمْ مِنْ بَعْضٍ، فَنُورِثُ الْيَهُودِيَّ النَّصْرَانِيَّ وَالنَّصْرَانِيَّ الْيَهُودِيَّ، وَنَجْعَلُ الْكُفْرَ مِلَّةً وَاحِدَةً، كَمَا جَعَلْنَا الْإِسْلَامَ مِلَّةً؛ لِأَنَّ الْأَصْلَ إِنَّمَا هُوَ إِيْمَانٌ أَوْ كُفْرٌ.
577 – And when the witnesses testify before the <i>qāḍī</i> of Kūfa against a slave, and they characterize his external qualities and describe him (<i>ḥallūhu wa waṣafūhu</i>) as belonging to a man; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, said: I do not write for him.	577 – وَإِذَا شَهِدَ الشُّهُودُ عِنْدَ قَاضِي الْكُوفَةِ عَلَى عَبْدٍ وَحَلَّوْهُ وَوَصَفَوْهُ أَنَّهُ لِرَجُلٍ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى قَالَ: لَا أَكْتُبُ لَهُ.
578 – But Ibn Abī Laylā said: I write their <i>shahāda</i> to the <i>qāḍī</i> of the <i>balad</i> in which the slave is, and the <i>qāḍī</i> in whose <i>balad</i> the slave is brings together the one who brought the <i>kitāb</i> and the one in whose keeping is the slave.	578 – وَقَالَ ابْنُ أَبِي لَيْلَى: أَكْتُبُ شَهَادَتَهُمْ إِلَى قَاضِي الْبَلَدِ الَّذِي فِيهِ الْعَبْدُ، فَيَجْمَعُ الْقَاضِي الَّذِي الْعَبْدُ فِي بَلَدِهِ بَيْنَ الَّذِي جَاءَ بِالْكِتَابِ وَبَيْنَ الَّذِي عِنْدَهُ الْعَبْدُ.

579 – And if the one in whose keeping is the slave has <i>hujja</i>... [the obvious consequence]. And if not, he sends the slave with the man who brought the <i>kitāb</i>, sealed about his neck (<i>makhtūm^{an} fi 'unuqihi</i>), and takes from him [i.e., from the man who brought the <i>kitāb</i>] a <i>kafil</i> for his [the slave's] value, and he writes to the <i>qādī</i> a response to his <i>kitāb</i> for that. And the <i>qādī</i> of Kūfa brings together the <i>bayyina</i> [i.e., the testifying witnesses] and the slave, so that they may testify against him himself (<i>bi-'aynihi</i>). Then he sends him back, along with he who brought him, to the <i>qādī</i> of the <i>balad</i> in which the slave [originally] was, so that he bring him together with his opponent in litigation (<i>khaṣmihi</i>). Then he enacts judgment upon him (<i>yumḍiya 'alayhi al-qaḍā'a</i>), and he discharges his <i>kafil</i>. And he [Abū Yūsuf] embraces it.	579 – فَإِنْ كَانَ لِلَّذِي عِنْدَهُ الْعَبْدُ حُجَّةٌ، وَإِلَّا بَعَثَ بِالْعَبْدِ مَعَ الرَّجُلِ الَّذِي جَاءَ بِالْكِتَابِ مَخْتُومًا فِي عُنُقِهِ وَأَخَذَ مِنْهُ كَفِيلًا بِقِيمَتِهِ، وَيَكْتُبُ إِلَى الْقَاضِي بِجَوَابِ كِتَابِهِ بِذَلِكَ، فَيَجْمَعُ قَاضِي الْكُوفَةِ بَيْنَ الْبَيِّنَةِ وَبَيْنَ الْعَبْدِ حَتَّى يَشْهَدُوا عَلَيْهِ بِعَيْنِهِ، ثُمَّ يَرُدُّهُ مَعَ الَّذِي جَاءَ بِهِ إِلَى قَاضِي الْبَلَدِ الَّذِي كَانَ فِيهِ الْعَبْدُ حَتَّى يَجْمَعَ بَيْنَهُ وَبَيْنَ خَصْمِهِ ثُمَّ يُمْضِي عَلَيْهِ الْقَضَاءَ وَيَبْرَأُ كَفِيلُهُ. وَبِهِ يَأْخُذُ.
580 – Abū Yūsuf, may God Most High have mercy upon him, said: What accusation (<i>tuhmat^{un}</i>) or command (<i>amr^{un}</i>) does not bring, he suspects it of the slave (<i>al-ghulām</i>).	580 – قَالَ أَبُو يُوسُفَ رَحِمَهُ اللَّهُ تَعَالَى: مَا لَمْ تَجِئْ تُهْمَةً أَوْ أَمْرًا يَسْتَرِيه مِنْ الْعِلَامِ.
581 – And when a Muslim man is traveling, and death overcomes him (<i>ḥaḍarahu al-mawtu</i>), and he calls upon two men of the Ahl al-Kitāb as witness to his <i>waṣīyya</i>; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: Their <i>shahāda</i> is not permitted. And he [Abū Yūsuf] embraces it, due to the <i>qawl</i> of God, to Him belong might and majesty: «And call as witness the possessors of 'adl from among you» [Q.65:2].	581 – وَإِذَا سَافَرَ الرَّجُلُ الْمُسْلِمُ فَحَضَرَهُ الْمَوْتُ فَأَشْهَدَ عَلَى وَصِيَّتِهِ رَجُلَيْنِ مِنْ أَهْلِ الْكِتَابِ، فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا تَجُوزُ شَهَادَتُهُمَا. وَبِهِ يَأْخُذُ؛ لِقَوْلِ اللَّهِ عَزَّ وَجَلَّ: «وَأَشْهِدُوا ذَوِي عَدْلٍ مِنْكُمْ» [الطلاق: 2].
582 – But Ibn Abī Laylā used to say: That is <i>jā'iz</i>.	582 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: ذَلِكَ جَائِزٌ.
583 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the Muslim is traveling, and he calls upon two <i>dhimmi</i>s as witness to his <i>waṣīyya</i>; we do not accept them, due to what we have described of the condition (<i>shart</i>) of God, to Him belong might and majesty, as regards the witnesses.³⁸	583 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا سَافَرَ الْمُسْلِمُ فَأَشْهَدَ عَلَى وَصِيَّتِهِ ذَمِيمَيْنِ لَمْ نَقْبَلْهُمَا؛ لِمَا وَصَفْنَا مِنْ شَرْطِ اللَّهِ عَزَّ وَجَلَّ فِي الشُّهُودِ.

³⁸ See §571, above.

584 – And Abū Ḥanīfa, may God Most High have mercy upon him, used not to deem appropriate (<i>lā yarā</i>), against the witness of false testimony (<i>shāhid al-zūr</i>), any discretionary punishment (<i>taʿzīr</i>) other than that he be sent to his <i>sūq</i>, if he is of the vulgar/market-folk (<i>sūqīyy^{an}</i>), and to the mosque of his people (<i>masjid qawmihi</i>), if he is from among the Arabs, and that he declare: The <i>qāḍī</i> extends his greetings to you all, and says: Verily we have found this one to be a witness of false testimony, so be wary of him and warn the people about him (<i>iḥdharūhu wa ḥadhdharūhu al-nās</i>).³⁹	584 – وَكَانَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى لَا يَرَى عَلَى شَاهِدِ الزُّورِ تَعْزِيرًا غَيْرَ أَنَّهُ يَبْعَثُ بِهِ إِلَى سُوقِهِ إِنْ كَانَ سُوقِيًّا، وَإِلَى مَسْجِدِ قَوْمِهِ إِنْ كَانَ مِنَ الْعَرَبِ فَيَقُولُ: الْقَاضِي يُقْرِئُكُمْ السَّلَامَ وَيَقُولُ: إِنَّا وَجَدْنَا هَذَا شَاهِدَ زُورٍ فَاحْذَرُوهُ وَحَذَرُوهُ النَّاسَ.
585 – And Abū Ḥanīfa stated that on the authority of al-Qāsim, on Shurayḥ.	585 – وَذَكَرَ ذَلِكَ أَبُو حَنِيفَةَ عَنِ الْقَاسِمِ عَنْ شُرَيْحٍ.
586 – But Ibn Abī Laylā used to say: The <i>taʿzīr</i> is imposed upon him, and he does not send him off [to make the declaration], but he lashes him with seventy-five lashes (<i>sawt^{an}</i>).	586 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: عَلَيْهِ التَّعْزِيرُ وَلَا يَبْعَثُ بِهِ وَيَضْرِبُهُ خَمْسَةً وَسَبْعِينَ سَوْطًا.
587 – Abū Yūsuf, may God have mercy upon him, said: I impose <i>taʿzīr</i> upon him, and I do not exceed forty lashes in it, and he is circulated [among the people] with it (<i>yutāfu bihi</i>).	587 – قَالَ أَبُو يُوسُفَ رَحِمَهُ اللَّهُ: أُعْزِّرُهُ وَلَا أَبْلُغُ بِهِ أَرْبَعِينَ سَوْطًا، وَيُطَافُ بِهِ.
588 – And, after that, Abū Yūsuf said: I go up to [a maximum] of seventy-five lashes in it.	588 – وَقَالَ أَبُو يُوسُفَ بَعْدَ ذَلِكَ: أَبْلُغُ بِهِ خَمْسَةً وَسَبْعِينَ سَوْطًا.
589 – Al-Shāfiʿī, may God have mercy upon him, said: And when a man confesses that he has testified falsely (<i>qad shahida bi-zūrⁱⁿ</i>), or the <i>qāḍī</i> knows with certainty (<i>yaqīn^{an}</i>) that he has testified falsely; he applies <i>taʿzīr</i> to him (<i>ʿazzarahu</i>), and does not exceed in it forty [lashes], and he publicizes his case (<i>yushahhiru bi-amrihi</i>).	589 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا أَقَرَّ الرَّجُلُ بِأَن قَدْ شَهِدَ بِزُورٍ، أَوْ عَلِمَ الْقَاضِي يَقِينًا أَنَّهُ قَدْ شَهِدَ بِزُورٍ، عَزَّرَهُ، وَلَا يَبْلُغُ بِهِ أَرْبَعِينَ، وَيُشْهَرُ بِأَمْرِهِ.

³⁹ Here surfaces a fascinating social classification/division (the *sūqī* in the *sūq*, and the Arab in the *masjid* of his *qawm*). On the other hand, these are also the two most likely places in which public announcements would be made; it would make less sense to announce the false-witness of a non-Muslim in the mosque, or to publish the false-witness of a (presumably Muslim) Arab in the market place, at a time when the urban Arab Muslims in Kūfa, Fustāṭ, etc., may well have still been a minority.

590 – And if he is of the <i>ahl al-masjid</i>, he stands him in the mosque; and if he is of the <i>ahl al-qabila</i>, he stands him before his tribe; and if he is a <i>sūqī</i>, he stands him in his market; and he says: Verily we have found this one a bearer of false testimony, so know him, and be wary of him. And should it chance by some circumstance (<i>bi-hālⁱⁿ</i>) that he is not a bearer of false testimony, or the like is doubtful for that in which he erred, it is said to him: Do not have the audacity to give <i>shahāda</i> except after confirmation (<i>ithbāt</i>). And he does not apply <i>ta'zīr</i> to him.	590 – فَإِنْ كَانَ مِنْ أَهْلِ الْمَسْجِدِ وَقَفَهُ فِي الْمَسْجِدِ، وَإِنْ كَانَ مِنْ أَهْلِ الْقَبِيلَةِ وَقَفَهُ فِي قَبِيلَتِهِ، وَإِنْ كَانَ سُوقِيًّا وَقَفَهُ فِي سُوقِهِ. وَقَالَ: إِنَّا وَجَدْنَا هَذَا شَاهِدَ زُورٍ فَأَعْرِفُوهُ وَاحْذَرُوهُ. وَإِذَا أَمَكْنَ بِحَالٍ أَنْ لَا يَكُونَ شَاهِدَ زُورٍ أَوْ شَبَّهَ عَلَيْهِ بِمَا يَغْلُطُ بِهِ مِثْلُهُ، قِيلَ لَهُ: لَا تَقْدَمْ عَلَى شَهَادَةٍ إِلَّا بَعْدَ إِثْبَاتٍ. وَلَمْ يُعْزَرْهُ.
591 – And when two witnesses testify in favour of a man for a <i>ḥaqq</i> against a man, and the <i>mashhūd lahu</i> accuses them both of lying (<i>akdhabahumā</i>); their <i>shahāda</i> is rejected, because he nullifies (<i>abṭala</i>) his <i>ḥaqq</i> in their <i>shahāda</i>. And they are not subjected to <i>ta'zīr</i>, neither one of them, because we do not know which of them is the liar. As for the first two, it may be possible that they are truthful (<i>ṣādiqayni</i>), and he who gives them the lie is a liar (<i>kādhīb</i>). And when it is possible that one of the two [witnesses] is truthful, and the other is a liar; neither one of them is subjected to <i>ta'zīr</i>, due to the fact that we don't know which one of them is the liar.⁴⁰	591 – وَإِذَا شَهِدَ شَاهِدَانِ لِرَجُلٍ عَلَى رَجُلٍ بِحَقٍّ، فَأَكْذَبَهُمَا الْمَشْهُودُ لَهُ، رُدَّتْ شَهَادَتُهُمَا؛ لِأَنَّهُ أَبْطَلَ حَقَّهُ فِي شَهَادَتِهِمَا، وَلَمْ يُعْزَرَ وَلَا وَاحِدٌ مِنْهُمَا؛ لِأَنَّا لَا نَدْرِي أَيُّهُمَا الْكَاذِبُ؛ فَأَمَّا الْأَوَّلَانِ فَقَدْ يُمَكِّنُ أَنْ يَكُونَا صَادِقَيْنِ وَالَّذِي أَكْذَبَهُمَا كَاذِبٌ. فَإِذَا أَمَكْنَ أَنْ يَصْدُقَ أَحَدُهُمَا وَيَكْذِبَ الْآخَرُ لَمْ يُعْزَرْ وَاحِدٌ مِنْهُمَا؛ مِنْ قَبْلِ أَنَّا لَا نَدْرِي أَيُّهُمَا الْكَاذِبُ.
592 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And likewise if two men testify in favour of a man for more than he claims; they are not subjected to <i>ta'zīr</i>, because it may be possible that they are both truthful.	592 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَكَذَلِكَ لَوْ شَهِدَ رَجُلَانِ لِرَجُلٍ بِأَكْثَرِ مِمَّا ادَّعَى لَمْ يُعْزَرَ؛ لِأَنَّهُ قَدْ يُمَكِّنُ أَنْ يَكُونَا صَادِقَيْنِ.
593 – And when two witnesses disagree as regards the locality (<i>al-mawṭin</i>) in which they both witnessed; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: We do not inflict <i>ta'zīr</i> upon them. And he [used to] say: Because I don't know which one of them is the truthful one (<i>al-ṣādiq</i>) from the liar (<i>al-kādhīb</i>), when they	593 – وَإِذَا اخْتَلَفَ الشَّاهِدَانِ فِي الْمَوْطِنِ الَّذِي شَهِدَا فِيهِ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: لَا نُعْزَرُهُمَا. وَيَقُولُ: لِأَنِّي لَا أَدْرِي أَيُّهُمَا الصَّادِقُ مِنَ الْكَاذِبِ إِذَا كَانَا

⁴⁰ Ḥassūn has [فَإِذَا أَمَكْنَ أَنْ يَصْدُقَ أَحَدُهُمَا وَيَكْذِبَ الْآخَرُ لَمْ يُعْزَرْ وَاحِدٌ مِنْهُمَا؛ مِنْ قَبْلِ أَنَّا لَا نَدْرِي أَيُّهُمَا الْكَاذِبُ] which I can't make sense of. Note that Būlāq also has أَيُّهُمَا, instead of his أَيُّهُمَا.

were both testifying about an act.	شَهِدَا عَلَى فِعْلٍ.
594 – And if they were testifying about an <i>iqrār</i> ; then indeed he used to say: I don't know — perhaps they are both, together, truthful, even if they both disagree as regards the <i>iqrār</i> . And he [Abū Yūsuf] embraces it.	594 – فَإِنْ كَانَا شَهِدَا عَلَى إِقْرَارٍ، فَإِنَّهُ كَانَ يَقُولُ: لَا أَدْرِي لَعَلَّهُمَا صَادِقَانِ جَمِيعًا، وَإِنْ اخْتَلَفَا فِي الْإِقْرَارِ. وَبِهِ يَأْخُذُ.
595 – But Ibn Abī Laylā used to reject the two witnesses, and perhaps (<i>rubbamā</i>) he would beat them both (<i>ḍarabahumā</i>), and punish them both (<i>ʿāqabahumā</i>).	595 – وَكَانَ ابْنُ أَبِي لَيْلَى يَرُدُّ الشَّاهِدَيْنِ، وَرُبَّمَا ضَرَبَهُمَا وَعَاقَبَهُمَا.
596 – And likewise if the claimant (<i>al-muddaʿī</i>) disagreed with (<i>khālafa</i>) the two witnesses, according to the <i>qawl</i> of Abū Ḥanīfa, may God have mercy upon him, and they both testified to more than what he claimed; then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: We do not beat them, and we suspect the claimant in addition to them both (<i>nattahimu al-muddaʿī ʿalayhimā</i>).	596 – وَكَذَلِكَ لَوْ خَالَفَ الْمُدَّعِي الشَّاهِدَيْنِ فِي قَوْلِ أَبِي حَنِيفَةَ رَحِمَهُ اللَّهُ فَشَهِدَا بِأَكْثَرَ مِمَّا ادَّعَى، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: لَا نَضْرِبُهُمَا وَنَتَّهِمُ الْمُدَّعِي عَلَيْهِمَا.
597 – But Ibn Abī Laylā would maybe inflict <i>taʿzīr</i> upon them both, and beat them, and maybe not do so.	597 – وَكَانَ ابْنُ أَبِي لَيْلَى رُبَّمَا عَزَّرَهُمَا وَضَرَبَهُمَا، وَرُبَّمَا لَمْ يَفْعَلْ.
598 – Al-Shāfiʿī, may God be pleased with him, said: We do not inflict <i>taʿzīr</i> upon them when their sincerity (<i>ṣidquhumā</i>) is possible.	598 – قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ عَنْهُ: لَا نُعَزِّرُهُمَا إِذَا أُمِكنَ صِدْقُهُمَا.
599 – And when the litigating opponent (<i>al-khaṣmu</i>) does not contest/discredit (<i>lam yaʿan fi</i>) the witness; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: He is not questioned about the witness.	599 – وَإِذَا لَمْ يَطْعَنْ الْخَصْمُ فِي الشَّاهِدِ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: لَا يُسْأَلُ عَنِ الشَّاهِدِ.
600 – But Ibn Abī Laylā used to say: He is asked about him. And he [Abū Yūsuf] embraces this [doctrine].	600 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: يُسْأَلُ عَنْهُ. وَبِهَذَا يَأْخُذُ.
601 – And Abū Ḥanīfa, may God have mercy upon him, used not to permit the <i>shahāda</i> of minor boys (<i>al-ṣibyāni</i>), some of them against some others, and he [Abū Yūsuf] embraces it. ⁴¹	601 – وَكَانَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ لَا يُجِيزُ شَهَادَةَ الصَّبْيَانِ بَعْضُهُمْ عَلَى بَعْضٍ، وَبِهِ يَأْخُذُ.

⁴¹ From this and other contexts in which *ṣibyān* (s. *ṣabī*) appears in the *Umm* (and the *Mukhtaṣar* of al-Muzanī), it is evident the term refers to boys who have not yet attained the age of majority. Schacht discusses this *masʿala* to some extent in his *Origins* (218), presenting it as a “common ancient doctrine” slowly abandoned.

602 – But Ibn Abī Laylā used to permit the <i>shahāda</i> of minor boys, some of them against some others.	602 – وَكَانَ ابْنُ أَبِي لَيْلَى يُجِيزُ شَهَادَةَ الصَّبْيَانِ بَعْضُهُمْ عَلَى بَعْضٍ.
603 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And the <i>qāḍī</i> does not accept the <i>shahāda</i> of a witness until he knows of his <i>ʿadl</i> – whether the <i>khaṣm</i> contests/discredits him, or does not.	603 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَلَا يَقْبَلُ الْقَاضِي شَهَادَةَ شَاهِدٍ حَتَّى يَعْرِفَ عَدْلَهُ، طَعَنَ فِيهِ الْخَصْمُ أَوْ لَمْ يَطْعَنْ.
604 – And the <i>shahāda</i> of minor boys, some of them against some others, is not permitted as regards wounds (<i>al-jirāh</i>), or other things ⁴² – neither before they are separated (<i>yatafarraqū</i>), nor after they are separated – , because they are not of the stipulation (<i>shart</i>) of God, which He stipulated in His <i>qawl</i> : «from among those you approve of among the witnesses» [Q.2:282].	604 – وَلَا تَجُوزُ شَهَادَةُ الصَّبْيَانِ بَعْضُهُمْ عَلَى بَعْضٍ فِي الْجِرَاحِ وَلَا غَيْرِهَا، قَبْلَ أَنْ يَتَفَرَّقُوا وَلَا بَعْدَ أَنْ يَتَفَرَّقُوا؛ لِأَنَّهُمْ لَيْسُوا مِنْ شَرْطِ اللَّهِ الَّذِي شَرَطَهُ فِي قَوْلِهِ: «مِمَّنْ تَرْضَوْنَ مِنَ الشُّهَدَاءِ» [البقرة: 282].
605 – And this is the <i>qawl</i> of Ibn ʿAbbās, may God be pleased with them both [father and son].	605 – وَهَذَا قَوْلُ ابْنِ عَبَّاسٍ رَضِيَ اللَّهُ عَنْهُمَا.
606 – But Ibn al-Zubayr disagreed with him, and said: We permit their <i>shahāda</i> when they are not separated.	606 – وَخَالَفَهُ ابْنُ الزُّبَيْرِ وَقَالَ: نُجِيزُ شَهَادَتَهُمْ إِذَا لَمْ يَتَفَرَّقُوا.
607 – But the <i>qawl</i> of Ibn ʿAbbās, may God be pleased with them both, is closest in resemblance (<i>ashbaha</i>) to the Qurʾān and the <i>qiyās</i> . I do not recognize that a witness may be accepted against a minor boy, nor accepted against one who is of the age of majority (<i>bāligh</i>), while accepted in his standing [before the <i>qāḍī</i>] and rejected after his standing. And God, praise be to Him, Most High, is the Reconciler/Giver of Success (<i>al-Muwaffiq</i>).	607 – وَقَوْلُ ابْنِ عَبَّاسٍ رَضِيَ اللَّهُ عَنْهُمَا أَشْبَهَ بِالْقُرْآنِ وَالْقِيَاسِ، لَا أَعْرِفُ شَاهِدًا يَكُونُ مَقْبُولًا عَلَى صَبِيٍّ وَلَا يَكُونُ مَقْبُولًا عَلَى بَالِغٍ، وَيَكُونُ مَقْبُولًا فِي مَقَامِهِ وَمَرْدُودًا بَعْدَ مَقَامِهِ. وَاللَّهُ سُبْحَانَهُ وَتَعَالَى الْمُوَفِّقُ.

⁴² Hassūn has وَلَا غَيْرِهِمْ, instead of وَلَا غَيْرَهَا, as in the Būlāq edition (vii.117).

Bāb fi'l-Aymān [I]

[First] Chapter on Oaths (al-Aymān) ¹	بَابُ فِي الْإِيمَانِ
608 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man brings a <i>da'wā</i> against a man, and he furnishes <i>bayyina</i> ; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: We do not hold the opinion (<i>lā narā</i>) that there is [enjoined] upon him an oath (<i>yamīn</i>), along with his witnesses.	608 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا ادَّعَى الرَّجُلُ عَلَى الرَّجُلِ دَعْوَى وَجَاءَ بِالْبَيِّنَةِ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: لَا نَرَى عَلَيْهِ يَمِينًا مَعَ شُهُودِهِ.
609 – And from among his <i>ḥujja</i> regarding that, is that he said: It has reached us concerning the Messenger of God, may God bless and save him, that he said: «The [burden of] <i>yamīn</i> is upon the defendant (<i>al-mudda'ā 'alayhi</i>), and the <i>bayyina</i> is upon the claimant (<i>al-mudda'ī</i>)» ² so we don't impose upon the <i>mudda'ī</i> what the Messenger of God, may God bless and save him, did not impose upon him. The <i>yamīn</i> is not transferred (<i>lā tuḥawwalū</i>) from the locus (<i>al-mawḍi'</i>) upon which the Prophet, may God bless and save him, placed it (<i>waḍa'ahā</i>). And he [Abū Yūsuf] embraces it.	609 – وَمِنْ حُجَّتِهِ فِي ذَلِكَ أَنَّهُ قَالَ: بَلَّغْنَا عَنْ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – أَنَّهُ قَالَ: «الْيَمِينُ عَلَى الْمُدَّعَى عَلَيْهِ وَالْبَيِّنَةُ عَلَى الْمُدَّعِي» فَلَا نَجْعَلُ عَلَى الْمُدَّعِي مَا لَمْ يَجْعَلْ عَلَيْهِ رَسُولُ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، لَا تُحَوَّلُ الْيَمِينُ عَنِ الْمَوْضِعِ الَّذِي وَضَعَهَا عَلَيْهِ النَّبِيُّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ. وَبِهِ يَأْخُذُ.
610 – But Ibn Abī Laylā used to say: The [burden of] <i>yamīn</i> is upon the <i>mudda'ī</i> , along with his witnesses. And when he has no witnesses, he [the <i>qāḍī</i>] does not request that he swear (<i>lam yastahliḥu</i>), but imposes the <i>yamīn</i> upon the <i>mudda'ā 'alayhi</i> . And if the <i>mudda'ā 'alayhi</i> says: I turn the <i>yamīn</i> back upon him [the <i>mudda'ī</i>], then indeed he [the <i>qāḍī</i>] does not turn the <i>yamīn</i> back upon him [the <i>mudda'ī</i>] unless he suspects him (<i>yattahimahu</i>) – then he turns the <i>yamīn</i> upon him, when it is thus. And this is as regards <i>ḍayn</i> .	610 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: عَلَى الْمُدَّعِي الْيَمِينُ مَعَ شُهُودِهِ. وَإِذَا لَمْ يَكُنْ لَهُ شُهُودٌ لَمْ يَسْتَحْلِفْهُ وَجَعَلَ الْيَمِينَ عَلَى الْمُدَّعَى عَلَيْهِ. فَإِنْ قَالَ الْمُدَّعَى عَلَيْهِ: أَنَا أَرُدُّ الْيَمِينَ عَلَيْهِ فَإِنَّهُ لَا يَرُدُّ الْيَمِينَ عَلَيْهِ إِلَّا أَنْ يَتَّهِمَهُ فَيَرُدُّ الْيَمِينَ عَلَيْهِ إِذَا كَانَ كَذَلِكَ، وَهَذَا فِي الدَّيْنِ.
611 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man provides two witnesses against a man for a <i>ḥaqq</i> ; there is no <i>yamīn</i> [enjoined] upon him with his two witnesses.	611 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا جَاءَ الرَّجُلُ بِشَاهِدَيْنِ عَلَى رَجُلٍ بِحَقٍّ فَلَا يَمِينَ عَلَيْهِ مَعَ شَاهِدَيْهِ.

¹ (Ḥassūn, vol.9, pt.14, 112-14; Schacht: *Tr. I*, 116-118).

² Schacht discusses this *mas'ala* and its maxim to some extent (*Origins*, 187-8).

612 – For if we imposed the <i>yamīn</i> upon him with his two witnesses, there would belong to our imposition of swearing (<i>iḥlāfinā</i>), with the witness, no <i>maʿnā</i>; and it would be contrary (<i>khilāf^{an}</i>) to the <i>qawl</i> of the Prophet, may God bless and save him: «The <i>bayyina</i> is upon the <i>muddaʿī</i>, and the <i>yamīn</i> is upon the <i>muddaʿā ʿalayhi</i>.»	612 – وَلَوْ جَعَلْنَا عَلَيْهِ الْيَمِينَ مَعَ شَاهِدَيْهِ لَمْ يَكُنْ لِإِحْلَافِنَا مَعَ الشَّاهِدِ مَعْنَى وَكَانَ خِلَافًا لِقَوْلِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «الْبَيِّنَةُ عَلَى الْمُدَّعِي وَالْيَمِينَ عَلَى الْمُدَّعَى عَلَيْهِ».
613 – And when a man brings a <i>daʿwā</i> against a man, and he has no <i>bayyina</i>; we make the <i>muddaʿā ʿalayhi</i> swear. And if he swears he is absolved (<i>fa-in ḥalafa bariʿa</i>). And if he abstains (<i>nakala</i>), we say to the <i>ṣāhib</i> of the <i>daʿwā</i>: We give you nothing due to his abstention (<i>nukūlihi</i>), unless you swear along with his abstention. And if you swear, we give to you [your right]. But if you decline, we don't give to you. And to this [subject] there belongs a <i>kitāb</i> in the <i>Kitāb al-Aqḍiya</i>.³	613 – وَإِذَا ادَّعَى رَجُلٌ عَلَى رَجُلٍ دَعْوَى وَلَا بَيِّنَةَ لَهُ أَحْلَفْنَا الْمُدَّعَى عَلَيْهِ، فَإِنْ حَلَفَ بَرِيءٌ، وَإِنْ نَكَلَ قُلْنَا لِصَاحِبِ الدَّعْوَى: لَسْنَا نُعْطِيكَ بِنُكُولِهِ شَيْئًا إِلَّا أَنْ تَحْلِفَ مَعَ نُكُولِهِ، فَإِنْ حَلَفْتَ أَعْطَيْنَاكَ، وَإِنْ أَمْتَنَعْتَ لَمْ نُعْطِكَ. وَلِهَذَا كِتَابٌ فِي كِتَابِ الْأَقْضِيَةِ.
614 – And when a man inherits an inheritance (<i>mīrāth</i>) – a house, or land, or something else, and a man brings a <i>daʿwā</i> as regards it, but he has no <i>bayyina</i>, and he wants to demand that the one in possession of it swear an oath; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: The <i>yamīn</i> is on his knowledge (<i>ʿalā ʿilmihi</i>) that he does not know of any <i>ḥaqq</i> belonging to this one regarding it (<i>lā yaʿlamu li-hādhā fihi ḥaqq^{an}</i>).	614 – وَإِذَا وَرِثَ الرَّجُلُ مِيرَاثًا؛ دَارًا أَوْ أَرْضًا أَوْ غَيْرَ ذَلِكَ، فَادَّعَى رَجُلٌ فِيهَا دَعْوَى وَلَمْ تَكُنْ لَهُ بَيِّنَةٌ، فَأَرَادَ أَنْ يَسْتَحْلِفَ الَّذِي ذَلِكَ فِي يَدَيْهِ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: الْيَمِينَ عَلَى عِلْمِهِ أَنَّهُ لَا يَعْلَمُ لِهَذَا فِيهِ حَقًّا.
615 – And thus did Ibn Abī Laylā used to say, also.	615 – وَكَذَلِكَ كَانَ ابْنُ أَبِي لَيْلَى يَقُولُ – أَيْضًا.

³ Another reference to the *Kitāb al-Aqḍiya* (see §§53 and 571, above). In this case we find a near-verbatim parallel in the *Kitāb al-Aqḍiya* of the *Umm*, at the start of a subsection entitled *al-Daʿwā waʾl-Bayyināt*: §24798 (Ḥassūn, vol.8, pt.13, 102); following sections are also relevant. Another parallel is in the same *Kitāb al-Aqḍiya* of the *Umm*, under the subheading of *Bāb Radd al-Yamīn* (§26375 [Ḥassūn, vol.8, pt.13, 325-6]). There are also parallels in the *Bāb mā yaqibu fihi al-yamīn* of the *K. al-Aymān waʾl-Nudhūr* (§27459 [Ḥassūn, vol.8, pt.13, 536]), the *Bāb al-Qaḍāʾ* of our own *Ikhtilāf al-ʿIrāqīyyīn* (§1167), and elsewhere. Once again, this is strong evidence that the *Umm* is in fact a compilation of separate treatises (*Kitābs*), gathered together, arranged, and transmitted as a single, encyclopaedic work.

616 – And, indeed, Abū Ḥanīfa, may God be pleased with him, only imposed the <i>yamīn</i> upon this one [the <i>wārith</i>], on his '<i>ilm</i>, because the <i>mīrāth</i> adheres to him (<i>lazimahu</i>) whether he wishes or refuses. But <i>bay'</i> does not bind him (<i>lā yalzamuhu</i>) except by acceptance (<i>bi-qubūl^m</i>); and when the thing does not bind him except by his action and an acceptance from him — like <i>bay'</i>, and <i>hiba</i>, and <i>ṣadaqa</i> —, then the <i>yamīn</i> as regards that is absolute (<i>al-battata</i>). But the <i>mīrāth</i>, if he says: I don't accept it; that <i>qawl</i> of his is <i>bāṭil</i>, and the <i>mīrāth</i> is unavoidably his (<i>lahu lāzim^m</i>). And for that reason the <i>yamīn</i> is on his '<i>ilm</i> regarding the <i>mīrāth</i>.⁴	616 – وَإِنَّمَا جَعَلَ أَبُو حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ عَلَى هَذَا الْيَمِينَ عَلَى عِلْمِهِ؛ لِأَنَّ الْمِيرَاثَ لَزِمَهُ إِنْ شَاءَ وَإِنْ أَبَى، وَالْبَيْعُ لَا يَلْزِمُهُ إِلَّا بِقَبُولٍ، وَإِذَا كَانَ الشَّيْءُ لَا يَلْزِمُهُ إِلَّا بِفِعْلِهِ وَقَبُولٍ مِنْهُ مِثْلُ الْبَيْعِ وَالْهَبَةِ وَالصَّدَقَةِ فَالْيَمِينُ فِي ذَلِكَ أَلْبَتَّةَ، وَالْمِيرَاثُ لَوْ قَالَ: لَا أَقْبَلُهُ. كَانَ قَوْلُهُ ذَلِكَ بَاطِلًا، وَكَانَ الْمِيرَاثُ لَهُ لَازِمًا، فَلِذَلِكَ كَانَتْ الْيَمِينُ عَلَى عِلْمِهِ فِي الْمِيرَاثِ. وَبِهِ يَأْخُذُ.
617 – But Ibn Abī Laylā used to say: The <i>yamīn</i> is [enjoined] upon him, on his '<i>ilm</i>, as regards all of what I [Abū Yūsuf?] mentioned to you of <i>bay'</i> and other things.	617 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الْيَمِينُ عَلَيْهِ عَلَى عِلْمِهِ فِي جَمِيعِ مَا ذَكَرْتُ لَكَ مِنْ بَيْعٍ وَغَيْرِ ذَلِكَ.
618 – Al-Shāfi'ī, may God have mercy upon him, said: And when a man inherits a house, or something else, and a man brings a <i>da'wā</i> regarding it; we ask him about his <i>da'wā</i>. And if he claims something which was in the possession of the deceased; we make the heir swear (<i>aḥlafnā al-wāritha</i>), on his '<i>ilm</i>, that he does not know of any <i>ḥaqq</i> belonging to him as regards it. Then we absolve him (<i>abra'nāhu</i>).	618 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا وَرَثَ الرَّجُلُ دَارًا أَوْ غَيْرَهَا فَادَّعَى رَجُلٌ فِيهَا دَعْوَى سَأَلْنَاهُ عَنْ دَعْوَاهُ، فَإِنْ ادَّعَى شَيْئًا كَانَ فِي يَدَيِ الْمَيِّتِ، أَحْلَفْنَا الْوَارِثَ عَلَى عِلْمِهِ مَا يَعْلَمُ لَهُ فِيهَا حَقًّا، ثُمَّ أَبْرَأْنَاهُ.
619 – And if he claims something regarding it which is in the possession of the <i>wārith</i>, we make him [the <i>wārith</i>] swear on absolute certainty (<i>'alā al-batti</i>).⁵ We will make him swear (<i>nuḥallifuhu</i>) as regards all that is in his possession, upon absolute certainty. But what is in the possession of	619 – وَإِنْ ادَّعَى فِيهَا شَيْئًا كَانَ فِي يَدَيِ الْوَارِثِ أَحْلَفْنَاهُ عَلَى الْبَتِّ، نُحْلَفُهُ فِي كُلِّ مَا كَانَ فِي يَدَيْهِ عَلَى الْبَتِّ، وَمَا كَانَ فِي يَدَيْ غَيْرِهِ فَوَرِثَهُ عَلَى الْعِلْمِ.

⁴ This section provides unique insight into an early legal epistemology which combines elements of certainty and probability with elements of choice (and intent?) In *mīrāth* he is a passive recipient, exercising no choice, and need swear only on his '*ilm* that the contender has no right; but with *bay'*, etc., he is an active participant, in full freedom of acceptance/rejection, and so must swear *al-battata* that a contender has no right. Or, perhaps, the main consideration is that — as passive recipient — the *wārith* does not have full knowledge regarding the *mīrāth*; but as active participant in *bay'*, etc., he must have as complete a knowledge of the objects of transaction as he can. At any rate, these distinctions merit a deeper level of analysis and cross-referencing with other early disciplines.

⁵ As opposed to “on his knowledge (*'alā 'ilmihī*).”

another — he inherits it on knowledge (<i>ʿalā al-ʿilm</i>). ⁶	
620 – And when the <i>muddaʿī</i> demands that the <i>muddaʿā</i> <i>ʿalayhi</i> swear against his <i>daʿwā</i> , and the <i>qāḍī</i> makes him swear against that, then he [the <i>muddaʿī</i>] provides <i>bayyina</i> after that, for this <i>daʿwā</i> ; then indeed Abū Ḥanīfa, may God have mercy upon him, used to accept that from him, because it has reached us concerning ʿUmar b. al-Khaṭṭāb, may God be pleased with him, and Shurayḥ, that they both used to say: The iniquitous oath (<i>al-yamīnu al-fājiratu</i>) is more deserving of being rejected (<i>aḥaqqu an turadda</i>) than the equitable testimony-evidence (<i>al-bayyinati al-ʿādilati</i>). And he [Abū Yūsuf] embraces this [doctrine].	620 – وَإِذَا اسْتَحْلَفَ الْمُدَّعِي الْمُدَّعَى عَلَيْهِ عَلَى دَعْوَاهُ فَحْلَفَهُ الْقَاضِي عَلَى ذَلِكَ ثُمَّ أَتَى بِالْبَيِّنَةِ بَعْدَ ذَلِكَ عَلَى تِلْكَ الدَّعْوَى، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقْبَلُ مِنْهُ ذَلِكَ؛ لِأَنَّهُ بَلَغَنَا عَنْ عُمَرَ بْنِ الْخَطَّابِ رَضِيَ اللَّهُ عَنْهُ وَشُرَيْحٍ أَنَّهُمَا كَانَا يَقُولَانِ: الْيَمِينُ الْفَاجِرَةُ أَحَقُّ أَنْ تُرَدَّ مِنَ الْبَيِّنَةِ الْعَادِلَةِ. وَبِهَذَا يَأْخُذُ.
621 – But Ibn Abī Laylā used to say: I do not accept the <i>bayyina</i> from him after the <i>yamīn</i> , and after the rendering of judgment (<i>baʿda faṣli al-qaḍāʾi</i>).	621 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا أَقْبَلُ مِنْهُ الْبَيِّنَةَ بَعْدَ الْيَمِينِ وَبَعْدَ فَصْلِ الْقَضَاءِ.
622 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man brings a <i>daʿwā</i> against a man, and does not provide <i>bayyina</i> against him, and the <i>qāḍī</i> makes him [the <i>muddaʿā</i> <i>ʿalayhi</i>] swear, and he swears, then the <i>muddaʿī</i> provides <i>bayyina</i> ; I accept it, and I judge in his favour by means of it. And I don't suppress (<i>lam amna</i>) the equitable testimony-evidence (<i>al-bayyinata al-ʿādilata</i>) — by which, through the giving of it, the Muslims have delivered judgment (<i>ḥakama</i>) — on account of the iniquitous oath (<i>biʾl-yamīni al-fājirati</i>).	622 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا ادَّعَى الرَّجُلُ عَلَى الرَّجُلِ الدَّعْوَى وَلَمْ يَأْتِ عَلَيْهِ بِبَيِّنَةٍ وَأَحْلَفَهُ الْقَاضِي فَحْلَفَ، ثُمَّ جَاءَ الْمُدَّعِي بِبَيِّنَةٍ قَبْلَتْهَا وَقَضَيْتُ لَهُ بِهَا، وَلَمْ أَمْنَعْ الْبَيِّنَةَ الْعَادِلَةَ الَّتِي حَكَمَ الْمُسْلِمُونَ بِالْإِعْطَاءِ بِهَا بِالْيَمِينِ الْفَاجِرَةِ.

⁶ Al-Shāfiʿī makes a clear distinction, whose basis is ultimately empirical. The one being asked to swear can only do so *ʿalā al-batti* as regards that which is physically in his possession; as to that which is not physically in his possession, he can only swear *ʿalā ʿilmihi*. NB: If understood as a principle of empiricism, and if proven to be applied across a range of oath-taking contexts, then examples such as these militate against the conception of Islamic law as merely a casuistic project (in the sense of avoiding general rules, and only elaborating cases).

Bāb al-Waṣāyā

Chapter on Bequests (al-Waṣāyā) ¹	بَابُ الْوَصَايَا
623 – And when a man bequeaths (<i>awṣā</i>) to a man residence (<i>suknā</i>) in a house, or the service of a slave, or the yield (<i>ghalla</i>) of a garden or land, and that [bequest] is a third of it [the estate], or less; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: That is <i>jā'iz</i> . And he [Abū Yūsuf] embraces it. ²	623 – وَإِذَا أَوْصَى الرَّجُلُ لِلرَّجُلِ بِسُكْنَى دَارٍ أَوْ بِخِدْمَةِ عَبْدٍ أَوْ بِغَلَّةِ بُسْتَانٍ أَوْ أَرْضٍ وَذَلِكَ ثُلُثُهُ أَوْ أَقَلُّ، فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: ذَلِكَ جَائِزٌ. وَبِهِ يَأْخُذُ.
624 – But Ibn Abī Laylā used to say: That [bequest of usufruct or <i>ghalla</i>] is not permitted. And the <i>waqt</i> regarding that [bequest], and other than the <i>waqt</i> , according to the <i>qawl</i> of Ibn Abī Laylā, are one and the same. ³	624 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا يَجُوزُ ذَلِكَ. وَالْوَقْتُ فِي ذَلِكَ وَغَيْرُ الْوَقْتِ فِي قَوْلِ ابْنِ أَبِي لَيْلَى سَوَاءٌ.
625 – Al-Shāfi'ī, may God be pleased with him, said: And when a man bequeaths to a man the revenue (<i>ghalla</i>) of his house, or the fruit of his garden, and the third will bear it; that is <i>jā'iz</i> . ⁴ And when he bequeaths to him the service of his slave, and the third will bear the slave; then that is <i>jā'iz</i> . And if the third will not bear the slave; there is permitted for him [the legatee] of him [the slave] what the third will bear, and he returns/rejects what it will not bear.	625 – قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ عَنْهُ: وَإِذَا أَوْصَى الرَّجُلُ لِلرَّجُلِ بِغَلَّةِ دَارِهِ أَوْ ثَمَرَةِ بُسْتَانِهِ وَالثُّلُثُ يَحْمِلُهُ، فَذَلِكَ جَائِزٌ. وَإِذَا أَوْصَى لَهُ بِخِدْمَةِ عَبْدِهِ وَالثُّلُثُ يَحْمِلُ الْعَبْدَ فَذَلِكَ جَائِزٌ، وَإِنْ لَمْ يَحْمِلِ الثُّلُثُ الْعَبْدَ جَازَ لَهُ مِنْهُ مَا حَمَلَ الثُّلُثُ وَرَدَّ مَا لَمْ يَحْمِلْ.
626 – And when a man bequeaths to a man more than a third of it [his estate], and the heirs (<i>al-waratha</i>) gave their permission for that during his life, and while they were adults (<i>kibār</i>), then they revoked that after his death; then indeed Abū Ḥanīfa, may	626 – وَإِذَا أَوْصَى الرَّجُلُ لِلرَّجُلِ بِأَكْثَرَ مِنْ ثُلُثِهِ، فَأَجَازَ ذَلِكَ الْوَرَثَةُ فِي حَيَاتِهِ وَهُمْ كِبَارٌ، ثُمَّ رَدُّوا ذَلِكَ بَعْدَ مَوْتِهِ، فَإِنْ أَبَا حَنِيفَةَ رَضِيَ

¹ (Ḥassūn, vol.9, pt.14, 115-6; Schacht: *Tr. I*, 119-121).

² Note that the objects of bequest here mentioned are all usufruct or *ghalla* of property (residence, service, yield), not of the property itself (house, slave, garden).

³ Al-Sarakhsī (*Mabsūṭ* 27:181) undertakes to explain Ibn Abī Laylā's argument: "And according to the *qawl* of Ibn Abī Laylā, nothing of that is permitted — neither fixed for a specified time (*muwaqqat^{an}*), nor non-*muwaqqat^{an}*. Because the *mūṣī* bequeaths ownership to him by means of his offer (*ījābihi*), and that is not valid from him as regards what is not owned by him, and the *manfa'a* and the *ghalla* which occur after his death are not owned by him. And by means of his offer, he does not treat of the *manfa'a* and the *ghalla* which occur in the state (*hāl*) of his living — so his *waṣīya* becomes *bātil* by means of it [the offer]." See also the MF, s.v. وصية (§58) (بالمنافع), with regard to the bequest of time-specified usufruct.

⁴ I.e., if the value of the usufruct does not exceed the Sunnaic stipulation of one third of the estate.

God be pleased with him, used to say: That waṣiyya does not succeed over them (<i>lā tajūzu 'alayhim</i>), and they have the right to revoke it, because they gave their permission (<i>ajāzū</i>) while they did not own the [right of] giving permission (<i>lā yamlikūna al-ijāzata</i>), and while they did not own the <i>māl</i>.	اللَّهُ عَنْهُ كَانَ يَقُولُ: لَا تَجُوزُ عَلَيْهِمْ تِلْكَ الْوَصِيَّةُ، وَلَهُمْ أَنْ يَرُدُّوَهَا؛ لِأَنَّهُمْ أَجَازُوا وَهُمْ لَا يَمْلِكُونَ الْإِجَازَةَ، وَلَا يَمْلِكُونَ الْمَالَ.
627 – And likewise it has reached us concerning 'Abd Allāh b. Mas'ūd, may God be pleased with him, and Shurayḥ. And he [Abū Yūsuf] embraces this [doctrine].	627 – وَكَذَلِكَ بَلَغَنَا عَنْ عَبْدِ اللَّهِ بْنِ مَسْعُودٍ رَضِيَ اللَّهُ عَنْهُ وَشُرَيْحٍ. وَبِهَذَا يَأْخُذُ.
628 – But Ibn Abī Laylā used to say: Their <i>ijāza</i> succeeds over them — they cannot revoke a thing of it. And if they give their permission for it after his death, then they desire to revoke it before the waṣiyya is executed; that [right] does not belong to them. But their [original] <i>ijāza</i> is permissible in this situation (<i>mawḍi'</i>), according to both their <i>qawls</i> [i.e., Abū Ḥanīfa's and Ibn Abī Laylā's], together.	628 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: إِجَازَتُهُمْ جَائِزَةٌ عَلَيْهِمْ لَا يَسْتَطِيعُونَ أَنْ يَرْجِعُوا إِلَى شَيْءٍ مِنْهَا، وَلَوْ أَجَازُوهَا بَعْدَ مَوْتِهِ، ثُمَّ أَرَادُوا أَنْ يَرْجِعُوا فِيهَا قَبْلَ أَنْ تَنْفُذَ الْوَصِيَّةُ لَمْ يَكُنْ ذَلِكَ لَهُمْ، وَكَانَتْ إِجَازَتُهُمْ جَائِزَةً فِي هَذَا الْمَوْضِعِ فِي قَوْلِهِمَا جَمِيعًا.
629 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man bequeaths to a man more than a third of his <i>māl</i>, and the <i>waratha</i> give their permission for that while he is living, then they desire revocation of it after he has died; that is <i>jā'iz</i> for them, because they gave their permission for what they did not own.	629 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَوْصَى الرَّجُلُ لِلرَّجُلِ بِأَكْثَرِ مِنْ ثُلُثِ مَالِهِ، فَأَجَازَ ذَلِكَ الْوَرَثَةُ وَهُوَ حَيٌّ، ثُمَّ أَرَادُوا الرُّجُوعَ فِيهِ بَعْدَ أَنْ مَاتَ، فَذَلِكَ جَائِزٌ لَهُمْ؛ لِأَنَّهُمْ أَجَازُوا مَا لَمْ يَمْلِكُوا.
630 – And if he dies, and they give their permission for it after his death, then they desire revocation (<i>al-rujū'</i>) before the division (<i>al-qasam</i>) [of the estate]; that [right] does not belong to them, due to the fact that they gave permission for what they owned. And when they give permission for that before his death — whether the waṣiyya was [made] while their <i>ṣāhib</i> was ill or in full heath — there belongs to them the right of revocation, because they are in the two statuses (<i>al-ḥālayni</i>), together: non-owners, giving permission for what they do not own.	630 – وَلَوْ مَاتَ فَأَجَازُوهَا بَعْدَ مَوْتِهِ ثُمَّ أَرَادُوا الرُّجُوعَ قَبْلَ الْقَسَمِ، لَمْ يَكُنْ ذَلِكَ لَهُمْ؛ مِنْ قَبْلِ أَنَّهُمْ أَجَازُوا مَا مَلَكَوا، فَإِذَا أَجَازُوا ذَلِكَ قَبْلَ مَوْتِهِ، كَانَتْ الْوَصِيَّةُ وَصَاحِبُهُمْ مَرِيضٌ أَوْ صَحِيحٌ، كَانَ لَهُمُ الرُّجُوعُ؛ لِأَنَّهُمْ فِي الْحَالَيْنِ جَمِيعًا غَيْرُ مَالِكِينَ أَجَازُوا مَا لَمْ يَمْلِكُوا.

631 – He [Abū Yūsuf] said: And when a man bequeaths a third of his <i>māl</i> to a man, and his <i>māl</i> — all of it — to another, and the <i>waratha</i> revert that, all of it, to the third; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: The third [is divided] between them both [the two legatees] in two halves — the <i>ṣāhib</i> of the whole [i.e., to whom “all” was bequeathed] does not share in the portion of the <i>waratha</i> from the <i>māl</i>.	631 – قَالَ: وَإِذَا أَوْصَى رَجُلٌ بِثُلْثِ مَالِهِ لِرَجُلٍ، وَبِمَالِهِ كُلِّهِ لآخرَ فَرَدَّ ذَلِكَ الْوَرَثَةُ كُلُّهُ إِلَى الثُّلُثِ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: الثُّلُثُ بَيْنَهُمَا نِصْفَانِ لَا يَضْرِبُ صَاحِبُ الْجَمِيعِ بِحِصَّةِ الْوَرَثَةِ مِنَ الْمَالِ.
632 – But Ibn Abī Laylā used to say: The third [is divided] between them both, according to four shares (<i>arba'ati as-humⁱⁿ</i>), the <i>ṣāhib</i> of the <i>māl</i> [to whom “all” was bequeathed] shares in three shares, and the <i>ṣāhib</i> of the third shares in a single share. And he [Abū Yūsuf] embraces it.	632 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الثُّلُثُ بَيْنَهُمَا عَلَى أَرْبَعَةِ أَشْهُمٍ، يَضْرِبُ صَاحِبُ الْمَالِ بِثَلَاثَةِ أَشْهُمٍ وَيَضْرِبُ صَاحِبُ الثُّلُثِ بِأَشْهُمٍ وَاحِدٍ. وَبِهِ يَأْخُذُ.
633 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man bequeaths to a man a third of his <i>māl</i>, and to another his <i>māl</i> — all of it —, and the <i>waratha</i> do not permit that; the <i>waṣiyya</i> is divided according to four shares: to the <i>ṣāhib</i> of all belong three, and to the <i>ṣāhib</i> of the third belongs one, by way of <i>qiyās</i> with augmentation of inheritance shares (<i>qiyās^{an} 'alā 'awli al-farā'idī</i>). And a rational understanding (<i>ma'qūl^{un}</i>) in the <i>waṣiyya</i>, is that he desired for this one three, and for that one, one.	633 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَوْصَى الرَّجُلُ لِرَجُلٍ بِثُلْثِ مَالِهِ، وَلآخرَ بِمَالِهِ كُلِّهِ وَلَمْ يُجْزِ ذَلِكَ الْوَرَثَةُ أَقْسَمُ الْوَصِيَّةَ عَلَى أَرْبَعَةِ أَشْهُمٍ؛ لِصَاحِبِ الْكُلِّ ثَلَاثَةٌ وَلِصَاحِبِ الثُّلُثِ وَاحِدٌ، قِيَاسًا عَلَى عَوْلِ الْفَرَائِضِ، وَمَعْقُولٌ فِي الْوَصِيَّةِ أَنَّهُ أَرَادَ هَذَا بِثَلَاثَةٍ وَهَذَا بِوَاحِدٍ.

Bāb al-Mawārīth

Chapter on Inheritances (<i>al-Mawārīth</i>) ¹	بَابُ الْمَوَارِيثِ
634 – Al-Rabī related to us, he said: Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man dies and leaves behind his brother — by his father and his mother —, and his grandfather; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: The <i>māl</i> , all of it, belongs to the grandfather, and he is in the status of the father (<i>bi-manzilati al-abi</i>) as regards every <i>mīrāth</i> .	634 – أَخْبَرَنَا الرَّبِيعُ قَالَ: قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا مَاتَ الرَّجُلُ وَتَرَكَ أَخَاهُ لِأَبِيهِ وَأُمِّهِ وَجَدَّهِ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: الْمَالُ كُلُّهُ لِلْجَدِّ، وَهُوَ بِمَنْزِلَةِ الْأَبِ فِي كُلِّ مِيرَاثٍ.
635 – And likewise it has reached us concerning Abī Bakr al-Ṣiddīq, and 'Abd Allāh b. 'Abbās, and 'Ā'isha, Umm al-Mu'minīn, and 'Abd Allāh b. al-Zubayr, may God Most High be pleased with them, that they used to say: The grandfather is in the status (<i>bi-manzilati</i>) of the father, when no father [remains] to him.	635 – وَكَذَلِكَ بَلَّغْنَا عَنْ أَبِي بَكْرٍ الصِّدِّيقِ، وَعَنْ عَبْدِ اللَّهِ بْنِ عَبَّاسٍ، وَعَنْ عَائِشَةَ أُمِّ الْمُؤْمِنِينَ، وَعَنْ عَبْدِ اللَّهِ بْنِ الزُّبَيْرِ رَضِيَ اللَّهُ تَعَالَى عَنْهُمْ أَنَّهُمْ كَانُوا يَقُولُونَ: الْجَدُّ بِمَنْزِلَةِ الْأَبِ إِذَا لَمْ يَكُنْ لَهُ أَبٌ.
636 – But Ibn Abī Laylā used to profess as regards the grandfather the <i>qawl</i> of 'Alī b. Abī Ṭālib, may God be pleased with him: To the brother belongs half, and to the grandfather half.	636 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ فِي الْجَدِّ بِقَوْلِ عَلِيِّ بْنِ أَبِي طَالِبٍ رَضِيَ اللَّهُ عَنْهُ: لِلْأَخِ النِّصْفُ وَلِلْجَدِّ النِّصْفُ.
637 – And likewise did Zayd b. Thābit and 'Abd Allāh b. Mas'ūd profess as regards this status (<i>manzila</i>).	637 – وَكَذَلِكَ قَالَ زَيْدُ بْنُ ثَابِتٍ وَعَبْدُ اللَّهِ بْنُ مَسْعُودٍ فِي هَذِهِ الْمَنْزِلَةِ.
638 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man dies (<i>halaka</i>) and he leaves behind his grandfather and his brother — by his father and his mother —; the <i>māl</i> is [divided] between them both, two halves.	638 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا هَلَكَ الرَّجُلُ وَتَرَكَ جَدَّهُ وَأَخَاهُ لِأَبِيهِ وَأُمِّهِ، فَالْمَالُ بَيْنَهُمَا نِصْفَانِ.
639 – And likewise did profess Zayd b. Thābit, and 'Alī, and 'Abd Allāh b. Mas'ūd.	639 – وَهَكَذَا قَالَ زَيْدُ بْنُ ثَابِتٍ وَعَلِيٌّ وَعَبْدُ اللَّهِ بْنُ مَسْعُودٍ.
640 – And it is narrated (<i>ruwiya</i>) concerning 'Uthmān, may God be pleased with them; ² but Abū Bakr al-Ṣiddīq, may God be pleased with him, disagreed with them (<i>khālafahum</i>),	640 – وَرُوِيَ عَنْ عُثْمَانَ رَضِيَ اللَّهُ عَنْهُمْ؛ وَخَالَفَهُمْ أَبُو بَكْرٍ الصِّدِّيقُ رَضِيَ اللَّهُ عَنْهُ

¹ (Ḥassūn, vol.9, pt.14, 117-26; Schacht: *Tr. I*, 122-128).

² “Them” refers back to the three previously mentioned.

and caused the <i>māl</i> to belong to the grandfather.	فَجَعَلَ الْمَالَ لِلْجَدِّ.
641 – And ʿĀʾisha professed it along with him, and Ibn ʿAbbās, and Ibn al-Zubayr, and ʿAbd Allāh b. ʿUtba, may God be pleased with them. ³	641 – وَقَالَتْهُ مَعَهُ عَائِشَةُ وَابْنُ عَبَّاسٍ وَابْنُ الزُّبَيْرِ وَعَبْدُ اللَّهِ بْنُ عُتْبَةَ رَضِيَ اللَّهُ عَنْهُمْ.
642 – And it is the <i>madhhab</i> of the Ahl al-Kalām as regards the shares of inheritance (<i>al-farāʾid</i>), and that is to say that they are under the delusion (<i>yatawahhamūna</i>) that it is the <i>qiyās</i> – but not one of the two <i>qawls</i> is by <i>qiyās</i> , although the rejection of the brother for the grandfather is farther from the <i>qiyās</i> than the confirmation of the brother along with him.	642 – وَهُوَ مَذْهَبُ أَهْلِ الْكَلَامِ فِي الْفَرَائِضِ، وَذَلِكَ أَنَّهُمْ يَتَوَهَّمُونَ أَنَّهُ الْقِيَاسُ، وَلَيْسَ وَاحِدٌ مِنَ الْقَوْلَيْنِ بِقِيَاسٍ غَيْرَ أَنْ طَرَحَ الْأَخَ بِالْجَدِّ أَبَعَدَ مِنَ الْقِيَاسِ مِنْ إِبْطَاتِ الْأَخِ مَعَهُ.
643 – And one of those who subscribe to this <i>madhhab</i> has said: We have only rejected the brother for the grandfather due to three properties (<i>khiṣāl</i> ^m) regarding which you yourselves are in consensus with us (<i>mujtamiʿūna maʿanā ʿalayhā</i>): indeed, by him [the grandfather] you eclipse (<i>tahjubūna</i>) the sons of the mother – and likewise is the <i>manzila</i> of the father; and you do not diminish him as pertains to the sixth – and likewise is the <i>manzila</i> of the father; and, indeed, you name him (<i>tusammūnahu</i>) “father.”	643 – وَقَدْ قَالَ بَعْضُ مَنْ يَذْهَبُ هَذَا الْمَذْهَبَ: إِنَّمَا طَرَحْنَا الْأَخَ بِالْجَدِّ لِثَلَاثِ خِصَالٍ أَنْتُمْ مُجْتَمِعُونَ مَعَنَا عَلَيْهَا؛ إِنَّكُمْ تَحْجُبُونَ بِهِ بَنِي الْأُمِّ، وَكَذَلِكَ مَنْزِلَةُ الْأَبِ وَلَا تُنْقِصُونَهُ مِنَ السُّدُسِ، وَكَذَلِكَ مَنْزِلَةُ الْأَبِ وَأَنْتُمْ تُسَمُّونَهُ أَبًا.
644 – Al-Shāfiʿī, may God Most High have mercy upon him, said: I said: We eclipsed the sons of the mother by him [the grandfather] only by <i>khavar</i> , not by way of <i>qiyās</i> with the father (<i>khavar^{an} lā qiyās^{an} ʿalā al-abi</i>).	644 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: قُلْتُ: إِنَّمَا حَجَبْنَا بِهِ بَنِي الْأُمِّ خَبَرًا لَا قِيَاسًا عَلَى الْأَبِ.
645 – He [al-Shāfiʿī’s opponent in dialectic] said: And how is that?	645 – قَالَ: وَكَيْفَ ذَلِكَ؟
646 – I said: We, ourselves, eclipse the sons of the mother by the daughter of the son of a son, however-so-low (<i>mutasaffilatⁱⁿ</i>). And this one, even if she corresponds to (<i>wāfaqat</i>) the <i>manzila</i> of the father in this situation (<i>mawḍiʿ</i>), we would certainly not judge of her, we and you, that she stands in the place of the father (<i>taqūma maqāma al-abi</i>) in any other [<i>mawḍiʿ</i>] besides it.	646 – قُلْتُ: نَحْنُ نَحْجُبُ بَنِي الْأُمِّ بِنْتُ ابْنِ ابْنٍ مُتَسَفِّلَةٍ، وَهَذِهِ وَإِنْ وَافَقَتْ مَنْزِلَةَ الْأَبِ فِي هَذَا الْمَوْضِعِ فَلَمْ نَحْكَمْ لَهَا نَحْنُ وَأَنْتَ بِأَنْ تَكُونَ تَقُومَ مَقَامَ الْأَبِ فِي غَيْرِهِ.

³ Thus al-Shāfiʿī begins to explain the *khilāf* between these respected Ṣaḥāba by tracing the lineage of the two *qawls*. The “wrong” doctrine appears to have begun with Abū Bakr.

647 – And therefore he [the grandfather] corresponds to him (<i>wāfaqahu</i>) [the father] in one <i>ma'nā</i> , even if he differs from him (<i>khālafahu</i>) in another. And as for that we do not diminish him as pertains to the sixth: indeed we do not decrease him — by <i>khavar</i> ; and we, ourselves, do not diminish the grandmother as pertains to the sixth. Do you opine that we, and you (<i>afara'aytanā wa iyyāka</i>) should stand her in the place of the father (<i>aqamnāhā maqāma al-abī</i>), in that she corresponds to him in a <i>ma'nā</i> ? And as for the designation of “fatherhood” (<i>ismu al-ubuwwati</i>): we, and you, impose upon he who is between us and Ādam the <i>ism</i> of “fatherhood.”	647 – وَإِذَا وَافَقَهُ فِي مَعْنَى وَإِنْ خَالَفَهُ فِي غَيْرِهِ، وَأَمَّا أَنْ لَا تَنْقُصَهُ مِنَ السُّدُسِ فَإِنَّا لَمْ نَنْقُصَهُ خَبَرًا، وَنَحْنُ لَا نَنْقُصُ الْجَدَّةَ مِنَ السُّدُسِ، أَفَرَأَيْتِنَا وَإِيَّاكَ أَقَمْنَاهَا مَقَامَ الْأَبِ أَنْ وَافَقْتَهُ فِي مَعْنَى، وَأَمَّا اسْمُ الْأُبُوَّةِ فَنَحْنُ وَأَنْتَ نُلْزِمُ مَنْ بَيْنَنَا وَبَيْنَ آدَمَ اسْمَ الْأُبُوَّةِ.
648 – And when it is thus, and below one of them is a “father” nearer than him (<i>wa dūna aḥadihim ab^{un} aqrabu minhu</i>), he does not inherit.	648 – وَإِذَا كَانَ ذَلِكَ وَدُونَ أَحَدِهِمْ أَبٌ أَقْرَبُ مِنْهُ لَمْ يَرِثْ.
649 – And likewise, if he is a <i>kāfir</i> and the one inherited from (<i>al-mawrūthu</i>) a Muslim, or a killer (<i>qātil^{an}</i>) and the one inherited from murdered (<i>maqtūl^{an}</i>) [by him], or the one inherited from is free (<i>hur^{an}</i>) while the father is enslaved (<i>mamlūk^{an}</i>); if we had indeed transferred inheritance (<i>warrathnā</i>) only on the basis of the <i>ism</i> of fatherhood alone, we would have transferred inheritance to those whom we have forbidden — all of them. But, indeed, we have only transmitted inheritance to them by <i>khavar</i> , not on the basis of the <i>ism</i> .	649 – وَكَذَلِكَ لَوْ كَانَ كَافِرًا وَالْمَوْرُوثُ مُسْلِمًا، أَوْ قَاتِلًا وَالْمَوْرُوثُ مَقْتُولًا، أَوْ كَانَ الْمَوْرُوثُ حُرًّا وَالْأَبُ مَمْلُوكًا، فَلَوْ كَانَ إِنَّمَا وَرَثْنَا بِاسْمِ الْأُبُوَّةِ فَقَطْ وَرَثْنَا هَؤُلَاءِ الَّذِينَ حَرَمْنَاهُمْ كُلَّهُمْ، وَلَكِنَّا إِنَّمَا وَرَثْنَاهُمْ خَبَرًا لَا بِالْإِسْمِ.
650 – He said: And which of the two <i>qawls</i> is most resembling of (<i>ashbahu bi-</i>) the <i>qiyās</i> ?	650 – قَالَ: فَأَيُّ الْقَوْلَيْنِ أَشْبَهَ بِالْقِيَاسِ؟
651 – I said: There is no <i>qiyās</i> as regards either one, but the <i>qawl</i> which you have chosen is farther from the <i>qiyās</i> and rational understanding (<i>al-'aql</i>).	651 – قُلْتُ: مَا فِيهِمَا قِيَاسٌ، وَالْقَوْلُ الَّذِي اخْتَرْتَ أَبْعَدُ مِنَ الْقِيَاسِ وَالْعَقْلِ.
652 – He said: And wherefore, that?	652 – قَالَ: فَأَيْنَ ذَلِكَ؟
653 – I said: Have you considered (<i>ara'ayta</i>) the grandfather and the brother? When they both demand the <i>mīrāth</i> of the deceased; would they be united [to the deceased] by the kinship of themselves (<i>ayudliyāni bi-qarābati anfusihiṁā</i>), or by the kinship of others than themselves?	653 – قُلْتُ: أَرَأَيْتَ الْجَدَّ وَالْأَخَ إِذَا طَلَبَا مِيرَاثَ الْمَيِّتِ أَيْدِلْيَانِ بِقَرَابَةِ أَنْفُسِهِمَا أَمْ بِقَرَابَةِ غَيْرِهِمَا؟
654 – He said: And what of that?	654 – قَالَ: وَمَا ذَلِكَ؟

655 – I said: Would not the grandfather merely say: I am the father of the father of the deceased; and the brother say: I am the son of the father of the deceased?	655 – قُلْتُ: أَلَيْسَ إِنَّمَا يَقُولُ الْجَدُّ: أَنَا أَبُو أَبِي الْمَيِّتِ. وَيَقُولُ الْأَخُّ: أَنَا ابْنُ أَبِي الْمَيِّتِ؟
656 – He said: Of course (<i>balā</i>).	656 – قَالَ: بَلَى.
657 – I said: Then by the kinship of the father of the deceased they are, together, united to the deceased.	657 – قُلْتُ: فَبِقَرَابَةِ أَبِي الْمَيِّتِ يُدْلِيَانِ مَعًا إِلَى الْمَيِّتِ.
658 – I said: Now, make the father of the deceased himself the deceased one; [now] which of the two is foremost by greater quantity of his <i>mīrāth</i> , his son, or his father?	658 – قُلْتُ: فَاجْعَلِ أَبَا الْمَيِّتِ هُوَ الْمَيِّتَ أَتِيَهُمَا أَوْلَى بِكَثْرَةِ مِيرَاثِهِ، ابْنُهُ أَوْ أَبُوهُ؟
659 – He said: Indeed, it is his son, because there belong to him five sixths, and to his father the sixth.	659 – قَالَ: بَلِ ابْنُهُ؛ لِأَنَّ لَهُ خَمْسَةَ أَسْدَاسٍ وَلِأَبِيهِ السُّدُسَ.
660 – I said: So how is it that you have eclipsed the brother by the grandfather, while the brother — when the father dies — is more prior in rank (<i>awlā</i>) in quantity of his <i>mīrāth</i> than the grandfather? If you [must] be eclipsing one of the two by the other, then it would be right that you should eclipse the grandfather by the brother.	660 – قُلْتُ: فَكَيْفَ حَجَبْتَ الْأَخَ بِالْجَدِّ، وَالْأَخُ إِذَا مَاتَ الْأَبُ أَوْلَى بِكَثْرَةِ مِيرَاثِهِ مِنَ الْجَدِّ، لَوْ كُنْتَ حَاجِبًا أَحَدَهُمَا بِالْآخَرِ اتَّبَعِيَ أَنْ تَحْجُبَ الْجَدَّ بِالْأَخِ.
661 – He said: And how should the <i>qiyās</i> regarding it be?	661 – قَالَ: وَكَيْفَ يَكُونُ الْقِيَاسُ فِيهِ؟
662 – I said: No <i>ma'nā</i> belonging to the <i>qiyās</i> , as regards them both together, is permitted. And if there belonged to it a <i>ma'nā</i> , then it would have been right that we always make there belong to the brother — when he was with the grandfather [as sole survivors of the deceased] — five sixths, while [we make] there belong to the grandfather one sixth.	662 – قُلْتُ: لَا مَعْنَى لِلْقِيَاسِ فِيهِمَا مَعًا يَجُوزُ. وَلَوْ كَانَ لَهُ مَعْنَى اتَّبَعِيَ أَنْ نَجْعَلَ لِلْأَخِ أَبَدًا حَيْثُ كَانَ مَعَ الْجَدِّ خَمْسَةَ أَسْدَاسٍ وَلِلْجَدِّ السُّدُسَ.
663 – And I said: Have you considered (<i>ara'ayta</i>) the brothers (<i>al-ikhwata</i>); are they confirmed of the <i>farḍ</i> -share (<i>a-muthbatī al-farḍ</i>) in the Book of God?	663 – وَقُلْتُ: أَرَأَيْتَ الْإِخْوَةَ أَمْثَبَتِي الْفَرَضَ فِي كِتَابِ اللَّهِ؟
664 – He said: Yes.	664 – قَالَ: نَعَمْ.
665 – I said: And does there belong to the grandfather a <i>farḍ</i> -share in the Book of God?	665 – قُلْتُ: فَهَلْ لِلْجَدِّ فِي كِتَابِ اللَّهِ فَرَضٌ؟
666 – He said: No.	666 – قَالَ: لَا.

667 – I said: And likewise the <i>Sunna</i>. They [the brothers] are confirmed (<i>muthbatūna</i>) in it, but I do not know that there belongs to the grandfather a <i>farḍ</i> in the <i>Sunna</i> — except from a singular mode (<i>min wajhⁱⁿ wāḥidⁱⁿ</i>) for which the Ahl al-Ḥadīth have not granted the fullest confirmation (<i>lā yathbituhu... kulla al-tathbīti</i>). And I do not know except that you have discarded the stronger of each <i>wajh</i> for the weaker.	667 – قُلْتُ: وَكَذَلِكَ السُّنَّةُ. هُمْ مُثَبَّتُونَ فِيهَا وَلَا أَعْلَمُ لِلْجَدِّ فِي السُّنَّةِ فَرْضًا إِلَّا مِنْ وَجْهِ وَاحِدٍ لَا يُثَبِّتُهُ أَهْلُ الْحَدِيثِ كُلِّ الثَّيِّبِ، فَلَا أَعْلَمُكَ إِلَّا طَرَحْتَ الْأَقْوَى مِنْ كُلِّ وَجْهِ بِالْأَضْعَفِ.
668 – And when the sister acknowledges (<i>aqarrat</i>) — while she is of the father and mother, and the agnate (<i>al-ʿaṣaba</i>) has inherited along with her — a brother by the [same] father; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: We give him [her brother] half of what is in her possession [of the <i>mīrāth</i>], because she acknowledged that the <i>māl</i>, all of it, is [to be divided] between them in two halves — so what is in her possession of it is [divided] between them in two halves. And he [Abū Yūsuf] embraces it.	668 – وَإِذَا أَقَرَّتِ الْأُخْتُ وَهِيَ لِأَبٍ وَأُمٍّ وَقَدْ وَرَثَ مَعَهَا الْعَصَبَةُ بِأَخٍ لِأَبٍ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: نُعْطِيهِ نِصْفَ مَا فِي يَدِهَا؛ لِأَنَّهَا أَقَرَّتْ أَنَّ الْمَالَ كُلَّهُ بَيْنَهُمَا نِصْفَانِ فَمَا كَانَ فِي يَدِهَا مِنْهُ فَهُوَ بَيْنَهُمَا نِصْفَانِ. وَبِهِ يَأْخُذُ.
669 – But Ibn Abī Laylā used to say: We don't give him, from what is in her possession, anything; because she acknowledged what is in the possession of the <i>ʿaṣaba</i>. And it is one and the same as regards the heirs, all of them, [which] is what they both said, together.⁴	669 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا نُعْطِيهِ مِمَّا فِي يَدِهَا شَيْئًا؛ لِأَنَّهَا أَقَرَّتْ بِمَا فِي يَدَيِ الْعَصَبَةِ وَهُوَ سَوَاءٌ فِي الْوَرَثَةِ كُلِّهِمْ مَا قَالَا جَمِيعًا.
670 – Al-Shāfiʿī said: And when a man dies and leaves behind his sister by his father and his mother, and his <i>ʿaṣaba</i>, and the sister acknowledges a brother; then the <i>qiyās</i> is that he does not take anything.	670 – قَالَ الشَّافِعِيُّ: وَإِذَا مَاتَ الرَّجُلُ وَتَرَكَ أُخْتَهُ لِأَبِيهِ وَأُمِّهِ وَعَصَبَتِهِ فَأَقَرَّتِ الْأُخْتُ بِأَخٍ، فَالْقِيَاسُ أَنَّهُ لَا يَأْخُذُ شَيْئًا.
671 – And likewise all whom one acknowledges while he is a <i>wārith</i>, for his <i>iqrār</i> does not establish a relationship (<i>nisbat^{am}</i>). And the <i>qiyās</i> is that he [the acknowledged one] does not take anything, due to the fact that he [the acknowledger] merely acknowledged a <i>ḥaqq</i> belonging to him — he owes, as regards that <i>ḥaqq</i>, the	671 – وَهَكَذَا كُلُّ مَنْ أَقَرَّ بِهِ وَهُوَ وَارِثٌ فَكَانَ إِقْرَارُهُ لَا يَثْبُتُ نِسْبَةً، فَالْقِيَاسُ أَنْ لَا يَأْخُذَ شَيْئًا مِنْ قَبْلِ أَنَّهُ إِنَّمَا أَقَرَّ لَهُ بِحَقٍّ عَلَيْهِ فِي ذَلِكَ الْحَقِّ مِثْلَ الَّذِي أَقَرَّ لَهُ بِهِ؛ لِأَنَّهُ إِذَا

⁴ Ḥassūn (ix.120, n.1) attempts to explain this last phrase: “Perhaps his intention is: And likewise the *ḥukm* regarding the heirs, all of them, according to what they both said of the giving (*iʿtāʾ*) from what is in his possession, and his privation (*ʿadamihi*).” I would agree, and interpret this phrase as a variant of the familiar “*fi qawlihimā jamīʿan*.” Here, Abū Ḥanīfa and Ibn Abī Laylā hold their respective positions with regard to the entire genus.

like of which he acknowledged for him; because when he is a <i>wārith</i> by kinship (<i>bi'l-nasabi</i>), he is [also] one inherited from (<i>mawrūth^{an}</i>) by means of it.	كَانَ وَارِثًا بِالنَّسَبِ كَانَ مَوْرُوثًا بِهِ.
672 – And when he does not confirm the <i>nasab</i> so that he be a <i>mawrūth</i> by means of it, it is not permitted that he be a <i>wārith</i> by means of it. And that is like the man who acknowledges that he contracted the sale of his house from a man for a thousand, and the one for whom acknowledgment of the <i>bay'</i> was made repudiates him (<i>jaḥadahu al-muqarru lahu bi'l-bay'i</i>) – we don't give him the house, even if its seller had acknowledged that it had become <i>milk</i> belonging to him. That is because he did not acknowledge that it was <i>milk</i> belonging to him, except while it is an owned thing (<i>mamlūk^{an}</i>), he owes something of it [the house]. So when it falls away (<i>saqaṭa</i>) that it be an owned thing (<i>mamlūkat^{an}</i>) owed by him, the <i>iqrār</i> for him [also] falls away. And that is like the two men who mutually conclude the <i>bay'</i> (<i>yatabāya'āni</i>) of the slave, then disagree (<i>yakhtalifāni</i>) as regards his price (<i>thamanihi</i>), having been true to each other (<i>taṣādaqā</i>) in that he had departed from the ownership (<i>milk</i>) of the owner (<i>al-mālik</i>) to the <i>milk</i> of the buyer (<i>al-mushtarī</i>). And when there is not delivered to the <i>mushtarī</i> what he claimed that he owned by it, the <i>iqrār</i> falls away. So it is not permitted that there be confirmed, for the one for whom acknowledgement of <i>nasab</i> was made (<i>li'l-muqarri lahu bi'l-nasabi</i>), a <i>ḥaqq</i>, while we grasp fully (<i>aḥaṭnā</i>) that it [<i>nasab</i>] is not acknowledged of him as pertains to a <i>dayn</i>, nor to a <i>waṣīyya</i>. And there is no <i>ḥaqq</i> owed by the one acknowledging for him (<i>al-muqirri lahu</i>), except the <i>mīrāth</i> which – when it is confirmed for him – is confirmed that he be a <i>mawrūth</i> by means of it [the <i>nasab</i>].	672 – وَإِذَا لَمْ يُثَبِّتِ النَّسَبَ حَتَّى يَكُونَ مَوْرُوثًا بِهِ لَمْ يَجُزْ أَنْ يَكُونَ وَارِثًا بِهِ، وَذَلِكَ مِثْلُ الرَّجُلِ يُقَرُّ أَنَّهَ بَاعَ دَارَهُ مِنْ رَجُلٍ بِأَلْفٍ، فَجَحَدَهُ الْمُقَرُّ لَهُ بِالْبَيْعِ لَمْ تُعْطِهِ الدَّارَ وَإِنْ كَانَ بَايَعَهَا قَدْ كَانَ أَقَرَّ بِأَنَّهَا قَدْ صَارَتْ مِلْكًا لَهُ، وَذَلِكَ أَنَّهَ لَمْ يُقَرَّ أَنَّهَا كَانَتْ مِلْكًا لَهُ إِلَّا وَهُوَ مَمْلُوكٌ عَلَيْهِ بِهَا شَيْءٌ، فَلَمَّا سَقَطَ أَنْ تَكُونَ مَمْلُوكَةً عَلَيْهِ سَقَطَ الْإِقْرَارُ لَهُ، وَذَلِكَ مِثْلُ الرَّجُلَيْنِ يَتَبَايَعَانِ الْعَبْدَ فَيَخْتَلِفَانِ فِي ثَمَنِهِ وَقَدْ تَصَادَقَا عَلَى أَنَّهَ قَدْ خَرَجَ مِنْ مِلْكِ الْمَالِكِ إِلَى مِلْكِ الْمُشْتَرِي، فَلَمَّا لَمْ يُسَلِّمْ لِلْمُشْتَرِي مَا زَعَمَ أَنَّهَ مَلَكُهُ بِهِ سَقَطَ الْإِقْرَارُ، فَلَا يَجُوزُ أَنْ يُثَبِّتَ لِلْمُقَرَّرِ لَهُ بِالنَّسَبِ حَقٌّ وَقَدْ أَحْطْنَا أَنَّهَ لَمْ يُقَرَّ لَهُ بِهِ مِنْ دَيْنٍ وَلَا وَصِيَّةٍ، وَلَا حَقٌّ عَلَى الْمُقَرَّرِ لَهُ إِلَّا الْمِيرَاثُ الَّذِي إِذَا ثَبَتَ لَهُ ثَبَتَ أَنْ يَكُونَ مَوْرُوثًا بِهِ.
673 – And when it is not confirmed for him that he be a <i>mawrūth</i> by means of the <i>nasab</i>, it is not confirmed for him that he be a <i>wārith</i> by means of it.	673 – وَإِذَا لَمْ يُثَبِّتْ لَهُ أَنْ يَكُونَ مَوْرُوثًا بِالنَّسَبِ لَمْ يُثَبِّتْ لَهُ أَنْ يَكُونَ وَارِثًا بِهِ.

674 – And when a man dies and leaves behind a wife and her son, but he does not acknowledge the pregnancy (<i>ḥabal</i>) of his wife, then she produces a son after his death, and produces a woman testifying as to the delivery; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: I do not accept this, nor do I confirm his [the newborn son's] <i>nasab</i>, nor do I transfer inheritance to him (<i>uwarrithuhu</i>) by the <i>shahāda</i> of a [single] woman.	674 – وَإِذَا مَاتَ الرَّجُلُ وَتَرَكَ امْرَأَةً وَوَلَدَهَا وَلَمْ يُقَرِّ بِحَبْلِ امْرَأَتِهِ، ثُمَّ جَاءَتْ بِوَلَدٍ بَعْدَ مَوْتِهِ وَجَاءَتْ بِامْرَأَةٍ تَشْهَدُ عَلَى الْوَلَادَةِ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا أَقْبِلُ هَذَا وَلَا أَثْبِتُ نَسَبَهُ وَلَا أُورِثُهُ بِشَهَادَةِ امْرَأَةٍ.
675 – But Ibn Abī Laylā used to say: I confirm his <i>nasab</i> and I transfer inheritance to him by her <i>shahāda</i> alone. And he [Abū Yūsuf] embraces it.	675 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: أَثْبِتُ نَسَبَهُ وَأُورِثُهُ بِشَهَادَتِهَا وَحْدَهَا. وَبِهِ يَأْخُذُ.
676 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man dies and leaves behind a son and a wife, then she gives birth, and his son denies (<i>ankara</i>) her [newborn] son, so she produces four women who testify that she gave birth to him; his <i>nasab</i> is established (<i>thābit^{an}</i>), and he is a <i>wārith</i>. And I don't accept as regards it less than four women, by <i>qiyās</i> with the Qurʾān; because God, to Him belong might and majesty, mentioned two [male] witnesses, and a [male] witness and two women. And He stood two women, when He permitted them, in the place of a man; and when we gave permission to women as regards that from which men are absent [such as a delivery], it is not permitted that we permit of them except four, by <i>qiyās</i> with what I have described.	676 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا مَاتَ الرَّجُلُ وَتَرَكَ وَلَدًا وَزَوْجَةً فَوَلَدَتْ، فَأَنْكَرَ ابْنُهُ وَلَدَهَا، فَجَاءَتْ بِأَرْبَعِ نِسْوَةٍ يَشْهَدْنَ بِأَنَّهَا وَلَدَتْهُ، كَانَ نَسَبُهُ ثَابِتًا، وَكَانَ وَارِثًا، وَلَا أَقْبِلُ فِيهِ أَقَلَّ مِنْ أَرْبَعِ نِسْوَةٍ قِيَاسًا عَلَى الْقُرْآنِ؛ لِأَنَّ اللَّهَ عَزَّ وَجَلَّ ذَكَرَ شَاهِدَيْنِ وَشَاهِدًا وَامْرَأَتَيْنِ، فَأَقَامَ امْرَأَتَيْنِ حَيْثُ أَجَازَهُمَا مَقَامَ رَجُلٍ، فَلَمَّا أَجَزْنَا النِّسَاءَ فِيمَا يَغِيبُ عَنْهُ الرَّجَالُ، لَمْ يَجْزْ أَنْ نُجِيزَ مِنْهُنَّ إِلَّا أَرْبَعًا، قِيَاسًا عَلَى مَا وَصَفْتُ.
677 – And the entirety/generalty (<i>jumlatu</i>) of this <i>qawl</i> is the <i>qawl</i> of 'Aṭā' b. Abī Rabāḥ.	677 – وَجُمْلَةُ هَذَا الْقَوْلِ قَوْلُ عَطَاءِ بْنِ أَبِي رَبَاحٍ.
678 – And when there belongs to a man two [male] slaves (<i>abdāni</i>) born into his <i>milk</i>, each one of them from a female slave (<i>amatⁱⁿ</i>), and he acknowledges in his full health (<i>fī ṣiḥḥatihi</i>) that one of them is his son, then he dies and does not clarify that (<i>lam yubayyin dhālika</i>); then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: The <i>nasab</i> of neither one of them is established, and half of each one of them is manumitted (<i>yu'taqu</i>), and he	678 – وَإِذَا كَانَ لِلرَّجُلِ عَبْدَانِ وَلِدَا فِي مِلْكِهِ، كُلُّ وَاحِدٍ مِنْهُمَا مِنْ أَمَةٍ، فَأَقَرَّ فِي صِحَّتِهِ أَنْ أَحَدَهُمَا ابْنُهُ، ثُمَّ مَاتَ وَلَمْ يُبَيِّنْ ذَلِكَ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا يَثْبِتُ نَسَبُ وَاحِدٍ مِنْهُمَا، وَيُعْتَقُ مِنْ كُلِّ مِنْهُمَا نَصْفُهُ وَيَسْعَى فِي نَصْفِ

works [to obtain ransom] as regards half of his value (<i>yasʿā fi niṣfi qīmatihī</i>). And likewise their mothers [work for half-value]. And he [Abū Yūsuf] embraces it.	قِيمَتِهِ. وَكَذَلِكَ أُمَّهَاتُهُمَا. وَبِهِ يَأْخُذُ.
679 – But Ibn Abī Laylā used to confirm the <i>nasab</i> of one of them, while they both inherited the <i>mīrāth</i> of a son, and each one of them worked [to obtain ransom] as regards half of his value, and likewise their mothers.	679 – وَكَانَ ابْنُ أَبِي لَيْلَى يُثَبِّتُ نَسَبَ أَحَدِهِمَا وَيَرْتَانِ مِيرَاثَ ابْنٍ، وَيَسْعَى كُلُّ وَاحِدٍ مِنْهُمَا فِي نِصْفِ قِيمَتِهِ، وَكَذَلِكَ أُمَّهَاتُهُمَا.
680 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when there belongs to a man two female slaves (<i>amatāni</i>), no husband belonging to either one of them, and they both gave birth to sons, and the master (<i>al-sayyid</i>) acknowledges that one of them is his son, and he dies while it is not known which of the two he acknowledged; indeed we show them to the trait-examiners (<i>al-qāfata</i>). ⁵ And if they tie to him (<i>alḥaqū bihi</i>) one of them, we make him his son and transfer to him inheritance from him; and we make his mother an <i>umm walad</i> , emancipated by his death (<i>tuʿtaqu bi-mawtihi</i>), and we maintain the other in slavery (<i>arqaqnā al-ākharā</i>). And if there are no trait-examiners — or there are and it is ambiguous to them (<i>ashkala ʿalayhim</i>); we do not make one of them his son, but we cast lots between them (<i>aqraʿnā baynahumā</i>). And for whichever one of them whose arrow-shaft emerges (<i>kharaja sahmuhu</i>), we emancipate him (<i>aʿtaqnāhu</i>) and his mother — being that she is an <i>umm walad</i> , and we maintain the other and his mother in slavery.	680 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَ لِرَجُلٍ أَمَتَانِ لَا زَوْجَ لِوَاحِدَةٍ مِنْهُمَا، فَوَلَدَتَا وَلَدَيْنِ، فَاقَرَّ السَّيِّدُ بِأَنَّ أَحَدَهُمَا ابْنُهُ، وَمَاتَ وَلَا يُعْرَفُ أَيُّهُمَا أَقَرَّ بِهِ، فَإِنَّا نُرِيهِمَا الْقَافَةَ، فَإِنِ الْخَقُّوْا بِهِ أَحَدَهُمَا جَعَلْنَاهُ ابْنَهُ وَوَرَّثْنَاهُ مِنْهُ وَجَعَلْنَا أُمَّهُ أُمُّ وَلَدٍ تُعْتَقُ بِمَوْتِهِ، وَأَرْقَقْنَا الْآخَرَ. وَإِن لَمْ تَكُنْ قَافَةً، أَوْ كَانَتْ فَاشْكَلَ عَلَيْهِمْ لَمْ نَجْعَلِ ابْنَهُ وَاحِدًا مِنْهُمَا وَأَقَرَّعْنَا بَيْنَهُمَا، فَأَيُّهُمَا خَرَجَ سَهْمُهُ أَعْتَقْنَاهُ وَأُمَّهُ بِأَنَّهُمَا أُمُّ وَلَدٍ وَأَرْقَقْنَا الْآخَرَ وَأُمَّهُ.
681 – And the <i>aṣl</i> of this is written in the <i>Kitāb al-ʿItq</i> . ⁶	681 – وَأَصْلُ هَذَا مَكْتُوبٌ فِي كِتَابِ الْعَتَقِ.

⁵ The *qāʿif* (pl. *qāfah*) was employed to establish kinship through physical examination in cases of doubt.

⁶ There is indeed a *Kitāb al-ʿItq* to be found among the *Umm* treatises: the fourth chapter of the *K. Ikhtilāf Mālik waʿl-Shāfiʿī* is so titled (§§128-46, Ḥassūn, vol.9, pt.14, 362-5). Moreover, this short chapter is an illuminating example of cooperative truth-seeking *jadāl* in which the interpretation and epistemic value of a Prophetic report is fully explored. It remains to be seen, however, whether this report is the *aṣl* referred to by al-Shāfiʿī here in §681. Certainly, more relevant discussions seem to occur in other chapters.

682 – And when a house is in the possession of a man, and his cousin (lit. son of a paternal uncle) furnishes bayyina that it is the house of their grandfather, but he in whose possession it is denies that (<i>munkir^{un} li-dhālīka</i>); then indeed Abū Ḥanīfa, may God be pleased with him, used to say: I do not pass judgement (<i>lā aqdī</i>) on the basis of their [the cousin's bayyina witnesses'] <i>shahāda</i> until they testify that the grandfather left it as <i>mīrāth</i> to his [the cousin's] father and to the father of his <i>ṣāhib</i> – they don't know (<i>lā ya'lamūna</i>) there belongs to him [the grandfather] a <i>wārith</i> besides the two, then the father of this one [the cousin] passed away (<i>tuwuffiya</i>) and left his portion of it (<i>naṣībahu minhā</i>) as <i>mīrāth</i> to this one – they don't know (<i>lā ya'lamūna</i>) there belongs to him [the cousin's father] a <i>wārith</i> besides him.	682 – وَإِذَا كَانَتِ الدَّارُ فِي يَدَيْ رَجُلٍ فَأَقَامَ ابْنُ عَمٍّ لَهُ الْبَيِّنَةَ أَنَّهَا دَارُ جَدِّهِمَا، وَالَّذِي هِيَ فِي يَدَيْهِ مُنْكَرٌ لِذَلِكَ، فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: لَا أَقْضِي بِشَهَادَتِهِمْ حَتَّى يَشْهَدُوا أَنَّ الْجَدَّ تَرَكَهَا مِيرَاثًا لِأَبِيهِ وَلِأَبِي صَاحِبِهِ لَا يَعْلَمُونَ لَهُ وَارِثًا غَيْرَهُمَا، ثُمَّ تُوفِّيَ أَبُو هَذَا وَتَرَكَ نَصِيبَهُ مِنْهَا مِيرَاثًا لِهَذَا، لَا يَعْلَمُونَ لَهُ وَارِثًا غَيْرَهُ.
683 – But Ibn Abī Laylā used to say: I judge in his [the cousin's] favour on the basis of their <i>shahāda</i>, and I allocate lodging for him in the house along with he in whose possession it is. But they do not divide it between themselves (<i>lā yaqtasimāni</i>) until bayyina is furnished for the <i>mawārith</i>, just as I [Abū Yūsuf] described for you regarding the <i>qawl</i> of Abū Ḥanīfa. And they [dual; i.e., the two witnesses] do not say: We don't know (<i>lā na'lamu</i>), according to the <i>qawl</i> of Ibn Abī Laylā. However, they both say: He has no <i>wārith</i> besides them [dual], according to the <i>qawl</i> of Ibn Abī Laylā.⁷	683 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: أَقْضِي لَهُ بِشَهَادَتِهِمْ وَأُسْكِنُهُ فِي الدَّارِ مَعَ الَّذِي هِيَ فِي يَدَيْهِ، وَلَا يَقْتَسِمَانِ حَتَّى تَقُومَ الْبَيِّنَةُ عَلَى الْمَوَارِيثِ، كَمَا وَصَفْتُ لَكَ فِي قَوْلِ أَبِي حَنِيفَةَ، وَلَا يَقُولَانِ: لَا نَعْلَمُ فِي قَوْلِ ابْنِ أَبِي لَيْلَى. لَكِنْ يَقُولَانِ: لَا وَارِثَ لَهُ غَيْرُهُمَا فِي قَوْلِ ابْنِ أَبِي لَيْلَى.
684 – And Abū Yūsuf said: I allocate lodging to him [in the house], and they do not divide between themselves.	684 – وَقَالَ أَبُو يُوسُفَ: أُسْكِنُهُ وَلَا يَقْتَسِمَانِ.
685 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the house is in the possession of the man, and his cousin (<i>ibnu ʿammihi</i>) furnishes bayyina that it is the house of their grandfather, the father of both their fathers, and the bayyina does not say more than that, and he in whose possession the house is denies [that] (<i>yunkiru</i>); I judge by means of it [the	685 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَتِ الدَّارُ فِي يَدَيْ الرَّجُلِ فَأَقَامَ ابْنُ عَمِّهِ الْبَيِّنَةَ أَنَّهَا دَارُ جَدِّهِمَا أَبِي أَبِيهِمَا وَلَمْ تَقُلْ الْبَيِّنَةُ أَكْثَرَ مِنْ ذَلِكَ، وَالَّذِي فِي يَدَيْهِ الدَّارُ

⁷ As we have seen before (§501), Ibn Abī Laylā is making a distinction between types of positive statements; there is a big difference to him whether the witnesses say: “We don't know of another X,” or “There is no other X.” The latter is stronger, and he won't accept anything less.

bayyina] that the house belongs to their grandfather, and I don't divide it (*lam aqsimhā*) between them until the *bayyina* is confirmed as regards who inherits from their grandfather, and who inherits from their fathers; because I don't know — perhaps there are *waratha* along with them, or *aṣḥāb* of a *dayn*, or *waṣāyā*. And I accept the *bayyina* when they say: Their grandfather died and left it [the house] as *mīrāth*, he having no *wārith* besides the two. And they are not witnesses by this for what they do not know (*lā ya‘lamūna*); because they are, in this, all of it, only testifying about the *zāhir* — like their *shahāda* about *nasab*, and like their *shahāda* about *milk*, and like their *shahāda* about ‘*adl*. And I do not accept them when they say: We don't know (*lā na‘lamu*) of a *wārith* besides so-and-so and so-and-so — unless there are, of the *ahl* of experience of the one testified about (*min ahl al-khibrati bi'l-mashhūdi ‘alayhi*), such as who are the majority of them (*al-aghlabu minhum*), that he not conceal (*lā yakhfā*) from them a *wārith*, if he had one.⁸ That is to say that they be the possessors of kinship (*qarāba*), or of friendship (*muwadda*), or social connection/partnership (*khulṭa*), or special-experience (*khibra*), connected as neighbours or otherwise. And when they are thus, I accept them in the way of knowledge (*al-‘ilm*), because the *ma'nā* of absolute certainty (*al-batti*) is the *ma'nā* of *al-‘ilm*, and the *ma'nā* of *al-‘ilm* is the *ma'nā* of *al-batt*.⁹

يُنْكِرُ، قَضَيْتُ بِهَا دَارًا لِحَدَّثَهُمَا وَلَمْ أَقْسِمَهَا
بَيْنَهُمَا حَتَّى تَثْبُتَ الْبَيِّنَةُ عَلَى مَنْ وَرَثَ
حَدَّثَهُمَا وَمَنْ وَرَثَ آبَاهُمَا؛ لِأَنِّي لَا أَدْرِي
لَعَلَّ مَعَهُمَا وَرَثَةً أَوْ أَصْحَابَ دَيْنٍ أَوْ وَصَايَا،
وَأَقْبَلُ الْبَيِّنَةَ إِذَا قَالُوا: مَاتَ حَدُّهُمَا وَتَرَكَهَا
مِيرَاثًا لَا وَارِثَ لَهُ غَيْرُهُمَا، وَلَا يَكُونُونَ بِهَذَا
شُهُودًا عَلَى مَا لَا يَعْلَمُونَ؛ لِأَنَّهُمْ فِي هَذَا
كُلُّهُ إِنَّمَا يَشْهَدُونَ عَلَى الظَّاهِرِ كَشَهَادَتِهِمْ
عَلَى النَّسَبِ وَكَشَهَادَتِهِمْ عَلَى الْمِلْكِ
وَكَشَهَادَتِهِمْ عَلَى الْعَدْلِ، وَلَا أَقْبَلُهُمْ إِذَا
قَالُوا: لَا نَعْلَمُ وَارِثًا غَيْرَ فُلَانٍ وَفُلَانٍ. إِلَّا أَنْ
يَكُونُوا مِنْ أَهْلِ الْخَبَرَةِ بِالْمَشْهُودِ عَلَيْهِ الَّذِينَ
يَكُونُ الْأَغْلَبُ مِنْهُمْ أَنَّهُ لَا يَخْفَى عَلَيْهِمْ
وَارِثٌ لَوْ كَانَ لَهُ، وَذَلِكَ أَنْ يَكُونُوا ذَوِي
قَرَابَةٍ أَوْ مَوَدَّةٍ أَوْ خُلْطَةٍ أَوْ خَبَرَةٍ بِجَوَارٍ أَوْ
غَيْرِهِ، فَإِذَا كَانُوا هَكَذَا قَبِلْتُهُمْ عَلَى الْعِلْمِ؛
لِأَنَّ مَعْنَى الْبَتِّ مَعْنَى الْعِلْمِ، وَمَعْنَى الْعِلْمِ
مَعْنَى الْبَتِّ.

⁸ Note a first mention here of *ahl al-khibra*.

⁹ Al-Shāfi‘ī here mirrors, and elaborates upon, Ibn Abī Laylā’s epistemological concerns as expressed in §§501 and 683. We may note, among other things, the important epistemic pairing: [مَعْنَى الْبَتِّ مَعْنَى الْعِلْمِ، وَمَعْنَى الْعِلْمِ مَعْنَى الْبَتِّ], and al-Shāfi‘ī’s distinction of *zāhir*. This not only provides a hint as to al-Shāfi‘ī’s former usage of the term *al-batt*, but is itself a key consideration of *hujjiyya*, and deserves a detailed inquiry. Moreover, this must not go unnoticed as a key instance wherein an epistemological legal theory appears not only born from *jadal*, but from the actual procedural concerns of the court. We have already suggested a parallel between litigation and *jadal* insofar as burden of proof. Perhaps, as we have acknowledged an intellectual cross-germination between different disciplines — different scholars shifting to different hats —, so, too, must we acknowledge a *practical* cross-germination between different domains — as participants/observers of litigation participated in (private) *ijtihād*, and (public) *jadal*.

686 – And when the man passes away, and he leaves behind his wife, and he leaves in his house commodities (<i>matā^{an}</i>); then indeed Abū Ḥanīfa, may God be pleased with him, used to transmit a <i>ḥadīth</i> (<i>yuhaddithu</i>) on the authority of Ḥammād, on Ibrāhīm, that he said: What belongs to men of the <i>matā^{an}</i>, it belongs to the man; and what belongs to women, it belongs to the wife; and what belongs to [both] men and women, it belongs to the one remaining of the two (<i>li'l-bāqī minhumā</i>), be it the wife or the man.	686 – وَإِذَا تُوفِّيَ الرَّجُلُ وَتَرَكَ امْرَأَتَهُ وَتَرَكَ فِي بَيْتِهِ مَتَاعًا، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يُحَدِّثُ عَنْ حَمَّادٍ، عَنْ إِبْرَاهِيمَ أَنَّهُ قَالَ: مَا كَانَ لِلرِّجَالِ مِنَ الْمَتَاعِ فَهُوَ لِلرِّجُلِ، وَمَا كَانَ لِلنِّسَاءِ فَهُوَ لِلْمَرْأَةِ، وَمَا كَانَ لِلرِّجَالِ وَالنِّسَاءِ فَهُوَ لِلْبَاقِي مِنْهُمَا الْمَرْأَةُ كَانَتْ أَوْ الرَّجُلُ.
687 – And likewise the husband, when he unilaterally divorces (<i>ṭallaqa</i>); and the one remaining (<i>al-bāqī</i>) is the husband, in unilateral divorce (<i>al-ṭalāq</i>). And Abū Ḥanīfa and Abū Yūsuf used to embrace it [this doctrine].	687 – وَكَذَلِكَ الزَّوْجُ إِذَا طَلَّقَ؛ وَالْبَاقِي الزَّوْجُ فِي الطَّلَاقِ، وَبِهِ كَانَ يَأْخُذُ أَبُو حَنِيفَةَ وَأَبُو يُوسُفَ.
688 – Then he [Abū Yūsuf] said, after that: There does not belong to the woman except what her like would appropriately be provided with [as trousseau?] (<i>mā yujahazu bihi mithluhā</i>), as regards that, all of it; because he [might] be a merchant-man (<i>rajl^{un} tājir^{un}</i>), in whose keeping are <i>matā^{an}</i> of women from his mercantile dealings (<i>tijāratihī</i>). Or [he might be] an artisan (<i>ṣāni^{un}</i>), or there [might] be pledged articles (<i>ruhūn^{an}</i>) in the keeping of a man.	688 – ثُمَّ قَالَ بَعْدَ ذَلِكَ: لَا يَكُونُ لِلْمَرْأَةِ إِلَّا مَا يُجَهَّزُ بِهِ مِثْلُهَا فِي ذَلِكَ كُلِّهِ؛ لِأَنَّهُ يَكُونُ رَجُلٌ تَاجِرٌ عِنْدَهُ مَتَاعُ النِّسَاءِ مِنْ تِجَارَتِهِ أَوْ صَانِعٌ أَوْ تَكُونُ رُهُونًا عِنْدَ رَجُلٍ.
689 – But Ibn Abī Laylā used to say: When the man dies or unilaterally divorces; the <i>matā^{an}</i> of the house, all of them, are the <i>matā^{an}</i> of the man – except the blouse (<i>dir'a</i>), and the veil (<i>khimār</i>), and its like (<i>shibhahu</i>) – unless <i>bayyina</i> is furnished for one of the two about his claim.	689 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: إِذَا مَاتَ الرَّجُلُ أَوْ طَلَّقَ فَمَتَاعُ الْبَيْتِ كُلُّهُ مَتَاعُ الرَّجُلِ إِلَّا الدَّرْعَ وَالْخِمَارَ وَشِبْهَهُ، إِلَّا أَنْ تَقُومَ لِأَحَدِهِمَا بَيِّنَةٌ عَلَى دَعْوَاهُ.
690 – And if he unilaterally divorces her in her house, their <i>amr</i> used to be as I have described, according to both their <i>qawls</i> [i.e., Abū Ḥanīfa's and Ibn Abī Laylā's], together.	690 – وَلَوْ طَلَّقَهَا فِي دَارِهَا كَانَ أَمْرُهُمَا عَلَى مَا وَصَفْتُ فِي قَوْلِهِمَا جَمِيعًا.
691 – Al-Shāfi'ī said: And when two spouses disagree (<i>ikhtalafa</i>) regarding the <i>matā^{an}</i> of the house in which they both dwell, before they become separated (<i>yatafarraqā</i>), or after they are separated, whether the house belongs to the woman or to the man; or after they both die and the <i>waratha</i> of each disagree as regards that, after their death;	691 – قَالَ الشَّافِعِيُّ: وَإِذَا اخْتَلَفَ الزَّوْجَانِ فِي مَتَاعِ الْبَيْتِ يَسْكُنَانِهِ قَبْلَ أَنْ يَتَفَرَّقَا أَوْ بَعْدَ مَا تَفَرَّقَا، كَانَ الْبَيْتُ لِلْمَرْأَةِ أَوْ لِلرِّجُلِ، أَوْ بَعْدَ مَا يَمُوتَانِ وَاخْتَلَفَتْ فِي ذَلِكَ وَرَثَتُهُمَا

or the <i>waratha</i> of the deceased one of the two and the remaining one [disagree], whether the remaining one is the husband or the wife; that, all of it, is one and the same (<i>fa-sawā^{um} dhālika kulluhu</i>). For whosoever furnishes <i>bayyina</i> for something from that; it belongs to him. And whosoever does not furnish <i>bayyina</i> ; the <i>qiyās</i> for which no one can be excused, according to me, for negligence of it (<i>lā yu'dharu aḥad^{um} indī bi'l-ghaflati 'anhu</i>), by way of consensus (<i>alā al-ijmā'</i>), is that these <i>matā'</i> are in both of their possession, together, and it is [divided] between them in two halves. [This is] just like the two men who disagree as regards the <i>matā'</i> in their collective possession; it is [divided] between them in two halves, after the <i>aymān</i> .	بَعْدَ مَوْتِهِمَا أَوْ وَرَثَةُ الْمَيِّتِ مِنْهُمَا وَالْبَاقِي، كَانَ الْبَاقِي الزَّوْجَ أَوْ الزَّوْجَةَ فَسَوَاءٌ ذَلِكَ كُلُّهُ. فَمَنْ أَقَامَ الْبَيِّنَةَ عَلَى شَيْءٍ مِنْ ذَلِكَ فَهُوَ لَهُ، وَمَنْ لَمْ يُقِمِ بَيِّنَةً فَالْقِيَاسُ الَّذِي لَا يُعْذَرُ أَحَدٌ عِنْدِي بِالْغَفْلَةِ عَنْهُ عَلَى الْإِجْمَاعِ أَنَّ هَذَا الْمَتَاعَ فِي أَيْدِيهِمَا مَعًا فَهُوَ بَيْنَهُمَا نِصْفَانِ، كَمَا يَخْتَلِفُ الرَّجُلَانِ فِي الْمَتَاعِ بِأَيْدِيهِمَا جَمِيعًا فَيَكُونُ بَيْنَهُمَا نِصْفَيْنِ بَعْدَ الْإِيمَانِ.
692 – And if one should say (<i>fa-in qāla qā'il^{um}</i>): And how can there belong to the man <i>naḍūh</i> [a kind of perfume], and saffron-perfume (<i>khalūq</i>), and blouses (<i>durū'</i>), and veils, and there belong to a woman a sword, and a spear, and a coat of mail (<i>dir'u</i>)? ¹⁰	692 – فَإِنْ قَالَ قَائِلٌ: فَكَيْفَ يَكُونُ لِلرَّجُلِ النَّضُوحُ وَالْخُلُوقُ وَالْدُرُوعُ وَالْخُمُرُ، وَيَكُونُ لِلْمَرْأَةِ السِّيفُ وَالرَّمْحُ وَالْدَّرْعُ؟
693 – It is said: Men might own the <i>matā'</i> of women, and women the <i>matā'</i> of men.	693 – قِيلَ: قَدْ يَمْلِكُ الرَّجَالُ مَتَاعَ النِّسَاءِ وَالنِّسَاءُ مَتَاعَ الرِّجَالِ.
694 – Have you considered [what would happen] (<i>ara'ayta</i>) if the man furnished <i>bayyina</i> for the <i>matā'</i> of women, and the woman <i>bayyina</i> for the <i>matā'</i> of men — would not each be favourably judged for such as about which he furnished the <i>bayyina</i> ?	694 – أَرَأَيْتَ لَوْ أَقَامَ الرَّجُلُ الْبَيِّنَةَ عَلَى مَتَاعِ النِّسَاءِ، وَالْمَرْأَةُ الْبَيِّنَةَ عَلَى مَتَاعِ الرِّجَالِ، أَلَيْسَ يُفْضَى لِكُلِّ بِمَا أَقَامَ عَلَيْهِ الْبَيِّنَةُ؟
695 – And when he says: Of course (<i>balā</i>)!	695 – فَإِذَا قَالَ: بَلَى.
696 – It is said: And have you not claimed, and the community [of jurists?] (<i>al-nās</i>) claimed, that the existence of the thing (<i>kaynūnata al-shay'i</i>), in the possession of the two contenders (<i>fī yadayi al-mutanāzi'ayni</i>) confirms for each of them half?	696 – قِيلَ: أَفَلَيْسَ قَدْ زَعَمْتَ وَزَعَمَ النَّاسُ أَنَّ كَيْنُونََةَ الشَّيْءِ فِي يَدَيِ الْمُتَنَازِعَيْنِ تُثَبِّتُ لِكُلِّ النِّصْفَ؟

¹⁰ Note that *dir'* may mean either a female shift or a breast-plate / coat of mail; but the plural *durū'* seems only to mean the latter ("blouses" are *adrā'*, according to J.G. Hava, *Al-Farā'id Arabic English Dictionary*, 5th ed. [Beirut: Dār al-Mashriq, 1982]). It may be that, perhaps as a point of emphasis, the interlocutor is asking how a man or woman might possess both "manly" and "womanly" objects — how can the wearer of armour also possess perfumes, and the wearer of blouses wield a sword or spear? I have chosen, however, to interpret *durū'* as the plural "blouses."

697 – And if he says: Of course!	697 – فَإِنْ قَالَ: بَلَى.
698 – It is said: Just as the <i>bayyina</i> confirms it for him?	698 – قِيلَ: كَمَا تَثْبُتُ لَهُ الْبَيِّنَةُ.
699 – And if he says: Of course!	699 – فَإِنْ قَالَ: بَلَى.
700 – It is said: Then why don't you treat the two spouses like that, while it is in both their possession? For if you place over them [pl.] doubts (<i>ista'malta 'alayhim al-zunūna</i>), and you abandon the <i>zāhir</i> , it is said to you: Then what do you say as regards a perfume-merchant (<i>aṭṭār</i>) and a tanner (<i>dabbāgh</i>) in whose [joint-]possession there is perfume (<i>itr^{um}</i>) and the <i>matā'</i> of the tanner, which they both, together, claim against each other (<i>tadā'ayāhu ma'ān</i>)? ¹¹	700 – قِيلَ: فَلِمَ لَمْ تَجْعَلِ الزَّوْجَيْنِ هَكَذَا وَهِيَ فِي أَيْدِيهِمَا؟ فَإِنْ اسْتَعْمَلْتَ عَلَيْهِمُ الظُّنُونَ وَتَرَكْتَ الظَّاهِرَ قِيلَ لَكَ: فَمَا تَقُولُ فِي عَطَّارٍ وَدَبَّاحٍ فِي أَيْدِيهِمَا عِطْرٌ وَمَتَاعُ الدَّبَّاحِ تَدَايَاهُ مَعًا.
701 – And if you claim that you give to the tanner the <i>matā'</i> of the tanners, and the perfume-merchant the <i>matā'</i> of the perfume-merchants...	701 – فَإِنْ زَعَمْتَ أَنَّكَ تُعْطِي الدَّبَّاحَ مَتَاعَ الدَّبَّاحِينَ وَالْعَطَّارَ مَتَاعَ الْعَطَّارِينَ.
702 – It is said: Then what do you say as regards an insolvent man (<i>raju^lm ghayri mūsir^m</i>), and a solvent man, who claim against each other a ruby, and a pearl?	702 – قِيلَ: فَمَا تَقُولُ فِي رَجُلٍ غَيْرِ مُوسِرٍ وَرَجُلٍ مُوسِرٍ تَدَايَا يَاقُوتًا وَلَوْْلُؤًا؟
703 – For if you claim that you make it belong to the solvent man, while it is in both their possession, together, you contradict the doctrine of the general populace (<i>khālafta madhhaba al-ʿāmmati</i>).	703 – فَإِنْ زَعَمْتَ أَنَّكَ تَجْعَلُهُ لِلْمُوسِرِ وَهُوَ بِأَيْدِيهِمَا مَعًا خَالَفْتَ مَذْهَبَ الْعَامَّةِ.
704 – While if you claim that you divide it between them, and do not place over them [dual] doubt (<i>al-ẓanna</i>); then so is it right for you that you should say [the same] as regards the <i>matā'</i> of the man and the woman.	704 – وَإِنْ زَعَمْتَ أَنَّكَ تَقْسِمُهُ بَيْنَهُمَا وَلَا تَسْتَعْمِلُ عَلَيْهِمَا الظَّنَّ، فَهَكَذَا يَنْبَغِي لَكَ أَنْ تَقُولَ فِي مَتَاعِ الرَّجُلِ وَالْمَرْأَةِ.
705 – He [Abū Yūsuf] said: And when a man becomes a Muslim (<i>aslama</i>) at the hands of a man, and he contracts <i>muwālā</i> -patronage with him (<i>wālāhu</i>), and enters into a compact with him (<i>āqadahu</i>), then he dies without a <i>wārith</i> ; then indeed Abū Ḥanīfa,	705 – قَالَ: وَإِذَا أَسْلَمَ الرَّجُلُ عَلَى يَدَيِ الرَّجُلِ وَوَالَاهُ وَعَاقَدَهُ ثُمَّ مَاتَ وَلَا وَارِثَ لَهُ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ:

¹¹ NB: The Būlāq edition (vii.121) has: [فَإِنْ اسْتَعْمَلْتَ عَلَيْهِمُ الظُّنُونَ وَتَرَكْتَ الظَّاهِرَ قِيلَ لَكَ فَمَا تَقُولُ ...]; while Ḥassūn (ix.125) renders: [فَإِنْ اسْتَعْمَلْتَ عَلَيْهِمُ الظُّنُونَ وَتَرَكْتَ الظَّاهِرَ؟ قِيلَ ذَلِكَ. فَمَا تَقُولُ ...]; and Maṭrajī (vii.202) prefers: [فَإِنْ اسْتَعْمَلْتَ عَلَيْهِمُ الظُّنُونَ وَتَرَكْتَ الظَّاهِرَ قِيلَ ذَلِكَ، فَمَا تَقُولُ ...]. This may produce a significant difference in meaning. The Būlāq may be rendered as above; while Ḥassūn and Maṭrajī might be rendered: “For if you place over them [pl.] doubts, and you abandon the *zāhir*? That is said to you.” Neither Ḥassūn nor Maṭrajī make note of the difference with Būlāq.

may God Most High have mercy upon him, used to say: His <i>mīrāth</i> belongs to him. That has reached us concerning the Messenger of God, may God bless and save him; and on 'Umar b. al-Khaṭṭāb, may God be pleased with him; and on Ibn Mas'ūd, may God be pleased with him. And he [Abū Yūsuf] embraces this [doctrine].	مِيرَاثُهُ لَهُ. بَلَّغْنَا ذَلِكَ عَنْ رَسُولِ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ -، وَعَنْ عُمَرَ بْنِ الْخَطَّابِ رضي الله عنه، وَعَنْ ابْنِ مَسْعُودٍ رضي الله عنه. وَبِهَذَا يَأْخُذُ.
706 - But Ibn Abī Laylā used not to transfer anything of the inheritance to him (<i>lā yuwarriṭuhu shay^{am}</i>).	706 - وَكَانَ ابْنُ أَبِي لَيْلَى لَا يُورِثُهُ شَيْئًا.
707 - Muṭarrif [reported], on the authority of al-Sha'bī, that he said: There is no <i>muwālā</i> -patronage (<i>walā'a</i>) except to the possessor of benefaction (<i>dhī ni'mat^{im}</i>).	707 - مُطَرِّفٌ عَنْ الشَّعْبِيِّ أَنَّهُ قَالَ: لَا وَلَاءَ إِلَّا لِذِي نِعْمَةٍ.
708 - Al-Layth b. Abī Sulaym [reported], on the authority of Abū al-Ash'ath al-Ṣan'ānī, on 'Umar b. al-Khaṭṭāb, may God be pleased with him, that he was asked about the man who becomes a Muslim at the hands of a man, then he dies and leaves <i>māl</i> ; it belongs to him, and if he refuses, then to the common treasury (<i>bayt al-māl</i>).	708 - اللَّيْثُ بْنُ أَبِي سُلَيْمٍ، عَنْ أَبِي الْأَشْعَثِ الصَّنَعَانِيِّ، عَنْ عُمَرَ بْنِ الْخَطَّابِ رضي الله عنه أَنَّهُ سُئِلَ عَنْ الرَّجُلِ يُسْلِمُ عَلَى يَدَيِ الرَّجُلِ فَيَمُوتُ وَيَتْرُكُ مَالًا فَهُوَ لَهُ، وَإِنْ أَبِي فَلَيْتِ الْمَالِ.
709 - Abū Ḥanīfa, may God Most High have mercy upon him, [reported] on the authority of Ibrāhīm b. Muḥammad, on his father, on Masrūq, that a man from the <i>ahl al-arḍ</i> contracted <i>muwālā</i> -patronage (<i>wālā</i>) with his cousin [the son of his paternal uncle], then he died and left <i>māl</i> , and they asked Ibn Mas'ūd about that, and he said: His <i>māl</i> belongs to him.	709 - أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى عَنْ إِبْرَاهِيمَ بْنِ مُحَمَّدٍ، عَنْ أَبِيهِ، عَنْ مَسْرُوقٍ أَنَّ رَجُلًا مِنْ أَهْلِ الْأَرْضِ وَالَى ابْنَ عَمِّ لَهُ، فَمَاتَ وَتَرَكَ مَالًا، فَسَأَلُوا ابْنَ مَسْعُودٍ عَنْ ذَلِكَ فَقَالَ: مَالُهُ لَهُ.
710 - Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the man becomes a Muslim at the hands of a man, and he contracts <i>muwālā</i> -patronage with him (<i>wālāhu</i>), then he dies; there does not belong to him his <i>mīrāth</i> , on account of the <i>qawl</i> of the Prophet, may God bless and save him: « <i>Walā'</i> belongs only to he who manumits (<i>a'taqa</i>).» And this indicates (<i>yadullu 'alā</i>) two <i>ma'nās</i> :	710 - قَالَ فَالشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَسْلَمَ الرَّجُلُ عَلَى يَدَيِ رَجُلٍ وَوَالَاهُ ثُمَّ مَاتَ، لَمْ يَكُنْ لَهُ مِيرَاثُهُ مِنْ قَبْلِ قَوْلِ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ -: «فَإِنَّمَا الْوَلَاءُ لِمَنْ أَعْتَقَ.» وَهَذَا يَدُلُّ عَلَى مَعْنَيْنِ:
711 - One of them: That the <i>walā'</i> does not belong except to one who manumits (<i>li-man a'taqa</i>).	711 - أَحَدُهُمَا: أَنَّ الْوَلَاءَ لَا يَكُونُ إِلَّا لِمَنْ أَعْتَقَ.

712 – And the other: That *walāʾ* does not depart / is not transferred (*lā yataḥawwalu*) from he who manumits. And this is written in the *Kitāb al-Walāʾ*.¹²

712 – وَالْآخَرُ: أَنَّهُ لَا يَتَحَوَّلُ الْوَلَاءُ عَمَّنْ
 أَعْتَقَ. وَهَذَا مَكْتُوبٌ فِي كِتَابِ الْوَلَاءِ.

¹² Interestingly, the heading of *Kitāb al-Walāʾ* does not appear elsewhere in the *Umm*. We find, however, that a *Kitāb al-Walāʾ waʾl-Ḥilf* is listed by al-Nadīm (*Fihrist* 354), among the many writings attributed to al-Shāfiʿī in his time. We are not surprised, then, to find a *Bāb al-Walāʾ waʾl-Ḥilf* in the *Umm* (Ḥassūn, vol.4, pt.8, 353-62), in which the relevant Prophetic narrative — *innamā al-walāʾu li-man aʿtaqa* — is twice repeated and explained (at §§12367 and 12375). In fact, the use of this *ḥadīth* as *ḥujja* occurs in several sections of the *Umm*, and a full investigation of the contexts in which it appears may uncover more nuances to al-Shāfiʿī's argument here in §712. Certainly the discussion in the second *Bāb al-Mawārith* (the fifth subheading of the *Kitāb al-Farāʾid*; Ḥassūn, vol.4, pt.8, 204-16) is both relevant and instructive, with the *ḥadīth* occurring at §§11688 and 11692 as a primary indicant for al-Shāfiʿī's position, in a long and heated dialectical debate. We learn, for example (in §11692), that, just as *nasab* is preceded by birth (*wilād*), so too is *walāʾ* preceded by emancipation (*ʿitq*); “and the one who converts to Islam at the hands of a man is not like this, for *al-nasab* is a parallel (*shabīḥ^{am}*) to *al-walāʾ*, and *al-walāʾ* is a parallel to *al-nasab*.” It is noteworthy that long after these debates, the Ḥanafī *madhhab* maintained a wider scope for *walāʾ*, whereas the Mālikīs, Shāfiʿīs, and Ḥanbalīs restricted its scope to freedmen (see the MF, s.v. “وَلَاء”).

Bāb fi'l-Awṣiyā'

Chapter on Executor-Guardians (al-Awṣiyā') ¹	بَابُ فِي الْأَوْصِيَاءِ
713 – Al-Shāfi'ī, may God have mercy upon him, said: And if a man appoints as executor-guardian (awṣā ilā) a man, then the one appointed as waṣiyy (al-mūṣā ilayhi) dies, and appoints as waṣiyy another [while on his deathbed]; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: This other is the waṣiyy of the two men, together. And he [Abū Yūsuf] embraces this [doctrine].	713 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَلَوْ أَنَّ رَجُلًا أَوْصَى إِلَى رَجُلٍ فَمَاتَ الْمُوصَى إِلَيْهِ فَأَوْصَى إِلَى آخَرَ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: هَذَا الْآخَرُ وَصِيُّ الرَّجُلَيْنِ جَمِيعًا. وَبِهَذَا يَأْخُذُ.
714 – Thus has it reached us concerning Ibrāhīm.	714 – وَكَذَلِكَ بَلَّغْنَا عَنْ إِبْرَاهِيمَ.
715 – But Ibn Abī Laylā, may God Most High have mercy upon him, used to say: This other one is the waṣiyy of the one who appointed him waṣiyy, and he is not the waṣiyy for the first one, unless the other one had appointed him as waṣiyy for the waṣiyya of the first – then he is the waṣiyy for both of them, together.	715 – وَكَانَ ابْنُ أَبِي لَيْلَى رَحِمَهُ اللَّهُ تَعَالَى يَقُولُ: هَذَا الْآخَرُ وَصِيُّ الَّذِي أَوْصَى إِلَيْهِ، وَلَا يَكُونُ وَصِيًّا لِلأَوَّلِ إِلَّا أَنْ يَكُونَ الْآخَرُ أَوْصَى إِلَيْهِ بِوَصِيَّةِ الْأَوَّلِ فَيَكُونُ وَصِيَّهُمَا جَمِيعًا.
716 – And Abū Yūsuf, may God Most High have mercy upon him, said, afterwards: He is not a waṣiyy for the first, unless the second says: I have appointed you waṣiyy as regards everything. Or he mentions the waṣiyya of the other.	716 – وَقَالَ أَبُو يُوسُفَ رَحِمَهُ اللَّهُ تَعَالَى بَعْدُ: لَا يَكُونُ وَصِيًّا لِلأَوَّلِ إِلَّا أَنْ يَقُولَ الثَّانِي: قَدْ أَوْصَيْتُ إِلَيْكَ فِي كُلِّ شَيْءٍ. أَوْ يَذْكُرَ وَصِيَّةَ الْآخَرِ.
717 – Al-Shāfi'ī, may God have mercy upon him, said: And when a man appoints a man as waṣiyy, then death (al-wafātu) attends the waṣiyy, so he [on his deathbed] appoints executorship of his māl, and his son, and the waṣiyya which was appointed to him, to another man; the other [man] is not, via the waṣiyya of the middle one (al-awsaṭ), the waṣiyy for the first – but he is the waṣiyy for the middle one, who appointed executor-guardianship to him (al-mūṣā ilayhi). And that is because the first one consented to the fiduciary duty (amāna) of the middle one, but did not consent to the amāna of the one after him. And the waṣiyy is of a less potent status	717 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا أَوْصَى الرَّجُلُ إِلَى رَجُلٍ ثُمَّ حَضَرَتْ الْوَصِيَّةُ الْوَفَاةُ فَأَوْصَى بِمَالِهِ وَوَلَدِهِ وَوَصِيَّةَ الَّذِي أَوْصَى إِلَيْهِ إِلَى رَجُلٍ آخَرَ، فَلَا يَكُونُ الْآخَرُ بِوَصِيَّةِ الْأَوْسَطِ وَصِيًّا لِلأَوَّلِ وَيَكُونُ وَصِيًّا لِلأَوْسَطِ الْمُوصَى إِلَيْهِ؛ وَذَلِكَ أَنَّ الْأَوَّلَ رَضِيَ بِأَمَانَةِ الْأَوْسَطِ وَلَمْ يَرْضَ أَمَانَةَ الَّذِي بَعْدَهُ، وَالْوَصِيُّ أَوْصَى حَالًا فِي أَكْثَرِ أَمْرِهِ مِنَ الْوَكِيلِ.

¹ (Ḥassūn, vol.9, pt.14, 127-30; Schacht: Tr. I, 129-131).

(aḍ'afu ḥāl ^{an}), as regards the majority of his concerns, than the agent (al-wakīl).	
718 – And if a man appoints as wakīl a man (wakkala rajul ^{an}) for something, there belongs to the wakīl no right to appoint as wakīl anyone else for that which he was appointed wakīl, in order that he be worthy of the right (li-yastawjiba al-ḥaqqā). And if the first deceased has appointed in executorship for the waṣiyy that “To you belongs the right to appoint executor-guardianship for what I appointed in executorship to you, to whomever you see fit (ilā man ra'ayta), then he [the second] appoints a man as waṣiyy for his own estate (bi-tarikati nafsīhi); he [the third] is not a waṣiyy for the first. Nor will he be a waṣiyy for the first until he [the second] says: I have appointed you as waṣiyy for the tarika of so-and-so. Thus he becomes, at that time, his [the first's] waṣiyy.	718 – وَلَوْ أَنَّ رَجُلًا وَكَّلَ رَجُلًا بِشَيْءٍ لَمْ يَكُنْ لِلْوَكِيلِ أَنْ يُوَكَّلَ غَيْرَهُ بِالَّذِي وَكَّلَهُ بِهِ لَيْسَتْ وَجِبَ الْحَقُّ. وَلَوْ كَانَ الْمَيِّتُ الْأَوَّلُ أَوْصَى إِلَى الْوَصِيِّ، أَنَّ لَكَ أَنْ تُوصِيَ بِمَا أَوْصَيْتُ بِهِ إِلَيْكَ إِلَى مَنْ رَأَيْتَ، فَأَوْصَى إِلَى رَجُلٍ بِتَرِكَةِ نَفْسِهِ لَمْ يَكُنْ وَصِيًّا لِلأَوَّلِ وَلَا يَكُونُ وَصِيًّا لِلأَوَّلِ حَتَّى يَقُولَ: قَدْ أَوْصَيْتُ إِلَيْكَ بِتَرِكَةِ فُلَانٍ. فَيَكُونُ حِينَئِذٍ وَصِيًّا لَهُ.
719 – And if a waṣiyy for some orphans (aytām) engages in trade on their behalf (tajara lahum) with their property, or turns it over as muḍāraba; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: It is jā'iz – to their disadvantage, and to their gain ('alayhim wa lahum).	719 – وَلَوْ أَنَّ وَصِيًّا لِأَيْتَامٍ تَجَرَ لَهُمْ بِأَمْوَالِهِمْ أَوْ دَفَعَهَا مُضَارَبَةً، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: هُوَ حَائِزٌ عَلَيْهِمْ وَلَهُمْ.
720 – That has reached us on the authority of Ibrāhīm al-Nakha'ī.	720 – بَلَغَنَا ذَلِكَ عَنْ إِبْرَاهِيمَ النَّخَعِيِّ.
721 – But Ibn Abī Laylā used to say: It is not permitted to their disadvantage ('alayhim), and the waṣiyy is liable (dāmin ^{um}) for that.	721 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا تَجُوزُ عَلَيْهِمْ، وَالْوَصِيُّ ضَامِنٌ لِذَلِكَ.
722 – And Ibn Abī Laylā also said: Upon the orphans (al-yatāmā) is [enjoined] the zakāt as regards their property. So if the waṣiyy renders it [zakāt] from them (addāhā... 'anhum), then he is dāmin.	722 – وَقَالَ ابْنُ أَبِي لَيْلَى أَيْضًا: عَلَى الْيَتَامَى الزَّكَاةُ فِي أَمْوَالِهِمْ، فَإِنْ أَدَّاهَا الْوَصِيُّ عَنْهُمْ فَهُوَ ضَامِنٌ.
723 – And Abū Ḥanīfa, may God be pleased with him, said: There is no zakāt upon an orphan until he attains majority (yablughā). Don't you see/opine (alā tarā) that there is no ṣalāt [enjoined] upon him, nor any religious duty (farīḍa) [enjoined] upon him? And he [Abū Yūsuf] embraces this [doctrine].	723 – وَقَالَ أَبُو حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ: لَيْسَ عَلَى يَتِيمٍ زَكَاةٌ حَتَّى يَبْلُغَ، أَلَا تَرَى أَنَّهُ لَا صَلَاةَ عَلَيْهِ وَلَا فَرِيضَةَ عَلَيْهِ. وَبِهَذَا يَأْخُذُ.

724 – Al-Shāfi'ī, may God be pleased with him, said: And when the man is a waṣīyy for the <i>tarika</i> of a deceased person, managing their [the orphans'] property; it is more preferable to me (<i>aḥabba ilayya</i>) that he engage in trade on their behalf by means of it (<i>yattajira lahum bihā</i>).² Trade by means of it is not an infringement (<i>ta'addīy^{an}</i>) according to me. And if it is not an infringement, he is not <i>dāmin</i> if it is destroyed. And 'Umar b. al-Khaṭṭāb, may God be pleased with him, had certainly engaged in trade with the <i>māl</i> of an orphan for whom he was guardian.	724 – قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ عَنْهُ: وَإِذَا كَانَ الرَّجُلُ وَصِيًّا بِتَرَكَةِ مَيِّتٍ يَلِي أَمْوَالَهُمْ، كَانَ أَحَبَّ إِلَيَّ أَنْ يَتَجَرَ لَهُمْ بِهَا، لَمْ تَكُنِ التَّجَارَةُ بِهَا عِنْدِي تَعَدِّيًّا، وَإِذَا لَمْ تَكُنْ تَعَدِّيًّا لَمْ يَكُنْ ضَامِنًا إِنْ تَلَفَتْ، وَقَدْ اتَّجَرَ عُمَرُ بْنُ الْخَطَّابِ رَضِيَ اللَّهُ عَنْهُ بِمَالِ يَتِيمٍ كَانَ يَلِيهِ.
725 – And 'Ā'isha, may God be pleased with her, used to invest (<i>tubḍī'u</i>) the property of the sons of Muḥammad b. Abī Bakr in the sea-trade (<i>fi'l-baḥr</i>), while they were orphans, and she was guardian over them (<i>talīhim</i>), and she rendered from it the <i>zakāt</i>.	725 – وَكَانَتْ عَائِشَةُ رَضِيَ اللَّهُ عَنْهَا تُبْذِعُ بِأَمْوَالِ بَنِي مُحَمَّدٍ بْنِ أَبِي بَكْرٍ فِي الْبَحْرِ وَهُمْ أَيْتَامٌ وَلِيْلِهِمْ وَتُؤَدِّي مِنْهَا الزَّكَاةَ.
726 – And [enjoined] upon the <i>walī</i> of the orphan is that he render the <i>zakāt</i> from him as regards the entirety of his <i>māl</i>, just as he renders it from himself; there is no difference (<i>lā farqa</i>) between him and the major (<i>al-kabīr al-bāligh</i>) as regards what is enjoined upon them both (<i>fīmā yajibu 'alayhimā</i>). Likewise is it [enjoined] upon the <i>walī</i> of the orphan that he give, from the <i>māl</i> of the orphan, what is required of him as pertains to an instance of homicide or bodily harm — if he perpetrated it (<i>jināyatⁱⁿ law janāhā</i>), or his maintenance (<i>naḥaqatⁱⁿ lahu</i>) — as pertains to his well-being (<i>ṣalāhihi</i>).	726 – وَعَلَى وَلِيِّ الْيَتِيمِ أَنْ يُؤَدِّيَ الزَّكَاةَ عَنْهُ فِي جَمِيعِ مَالِهِ كَمَا يُؤَدِّيَهَا عَنْ نَفْسِهِ، لَا فَرْقَ بَيْنَهُ وَبَيْنَ الْكَبِيرِ الْبَالِغِ فِيمَا يَجِبُ عَلَيْهِمَا. كَمَا عَلَى وَلِيِّ الْيَتِيمِ أَنْ يُعْطِيَ مِنْ مَالِ الْيَتِيمِ مَا لَزِمَهُ مِنْ جَنَائَةٍ لَوْ جَنَاهَا أَوْ نَفَقَةٍ لَهُ مِنْ صَلَاحِهِ.

² Such an expression as *aḥabbu ilayya* deserves special investigation, especially considering al-Shāfi'ī's negative stance towards *istiḥsān*; this phrase may well be taken as leaning in the direction of a sort of juridical preference. The comparative *aḥabbu ilayya* occurs some 150 times throughout the chapters and treatises of the *Umm*; while the past tense verb *aḥbabtu* occurs some 115 times; and the present *uḥibbu* some 105 times. It seems fair to say, however, after reviewing a large number of these instances, that a great many — if not the majority — of these phrases occur in conjunction with other terms and phrases which indicate: 1) the action is preferred in a context of *iḥtiyāt* or *ikhtiyār*; and 2) the action is not *wājib*. A prime example may be found in §6463 of the *Kitāb al-Ḥajj* (Ḥassūn, vol.3, pt.5, 328): "And it is more preferable to me that he fast by way of prudence, not obligation (*wa aḥabbu ilayya an yaṣūma iḥtiyāt^{an} lā wājib^{an}*)." The early use of expressions *aḥabbu ilayya*, *aḥbabtu*, and *uḥibbu*, should be explored further, in the *Umm* and elsewhere. What relation do they bear towards the legal norms — are they, in effect, the ruling of an act to be *mustaḥabb*?

727 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: ‘Abd al-Majīd b. ‘Abd al-‘Azīz reported to us, on the authority of Ma‘mar b. Rāshid, on Ayyūb b. Abī Tamīma, on Muḥammad b. Sīrīn, that ‘Umar b. al-Khaṭṭāb, may God be pleased with him, said to a man: Indeed, the <i>zakāt</i> has hastened away with the <i>māl</i> of an orphan in our keeping. And he mentioned that he turned it over (<i>dafa’ahu</i>) to a man who invested it in trade (<i>yattajiru fihi</i>).	727 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: أَخْبَرَنَا عَبْدُ الْمَجِيدِ بْنُ عَبْدِ الْعَزِيزِ، عَنْ مَعْمَرِ بْنِ رَاشِدٍ، عَنْ أَيُّوبَ بْنِ أَبِي تَمِيمَةَ، عَنْ مُحَمَّدِ بْنِ سِيرِينَ، أَنَّ عُمَرَ بْنَ الْخَطَّابِ رَضِيَ اللَّهُ عَنْهُ قَالَ لِرَجُلٍ: إِنَّ عِنْدَنَا مَالًا لِيَتِيمٍ قَدْ أَسْرَعَتْ فِيهِ الزَّكَاةُ. وَذَكَرَ أَنَّهُ دَفَعَهُ إِلَى رَجُلٍ يَتَجَرُّ فِيهِ.
728 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: Either he [‘Umar b. al-Khaṭṭāb] said: as <i>muḍāraba</i>; or he said: as merchandise (<i>biḍā‘at^{am}</i>).	728 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: إِمَّا قَالَ مُضَارَبَةً. وَإِمَّا قَالَ بِضَاعَةً.
729 – And one of the people (<i>ba‘du al-nāsi</i>) said: There is no <i>zakāt</i> on the hard money of the orphan (<i>mālī al-yatīmi al-nāḍi</i>), but on his crops there is <i>zakāt</i>, and [enjoined] upon him is <i>zakāt al-fiṭr</i>, rendered from him [by a <i>walī</i>], and such of his <i>jināyāt</i> which obligate [payment] from his <i>māl</i>. And he bolstered his argument with (<i>aḥtajja bi-</i>) [the fact] that there is no <i>ṣalāt</i> [enjoined] upon him. But, indeed — if the falling-away (<i>suqūṭ</i>) of <i>ṣalāt</i> from him [the orphan] has caused the <i>zakāt</i> to fall away from him — he [the opposing “one of the people”] has departed from (<i>fāraqa</i>) his <i>qawl</i>, since he claims that upon him is [enjoined] the <i>zakāt al-fiṭr</i> and the <i>zakāt</i> of crops (<i>al-zar‘</i>). And this has been written in the <i>Kitāb al-Zakāt</i>.³	729 – وَقَالَ بَعْضُ النَّاسِ: لَا زَكَاةَ فِي مَالِ الْيَتِيمِ النَّاضِ، وَفِي زَرْعِهِ الزَّكَاةُ، وَعَلَيْهِ زَكَاةُ الْفِطْرِ تُؤَدَّى عَنْهُ وَجَنَائِثُهُ الَّتِي تَلْزَمُ مِنْ مَالِهِ. وَاحْتَجَّ بِأَنَّهُ لَا صَلَاةَ عَلَيْهِ، وَأَنَّهُ لَوْ كَانَ سَقُوطُ الصَّلَاةِ عَنْهُ يُسْقِطُ عَنْهُ الزَّكَاةَ كَانَ قَدْ فَارَقَ قَوْلَهُ إِذْ زَعَمَ أَنَّ عَلَيْهِ زَكَاةَ الْفِطْرِ وَزَكَاةَ الزَّرْعِ. وَقَدْ كُتِبَ هَذَا فِي كِتَابِ الزَّكَاةِ.
730 – He [Abū Yūsuf] said: And if the <i>waṣīyy</i> of a deceased person whose <i>waratha</i> are majors and minors (<i>kibār^{am} wa ṣighār^{am}</i>) — there being no debt owed by the deceased, and he did not bequest anything — contracts the sale of real property (<i>bā‘a ‘aqār^{am}</i>) from among the ‘<i>aqār</i> of the deceased; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say regarding that: His <i>bay‘</i> is <i>jā‘iz</i>, [even] to the disadvantage of the minors,	730 – قَالَ: وَلَوْ أَنَّ وَصِيَّ مَيِّتٍ وَرَثَتُهُ كِبَارٌ وَصِغَارٌ وَلَا دَيْنَ عَلَى الْمَيِّتِ وَلَمْ يُوصِ بِشَيْءٍ بَاعَ عَقَارًا مِنْ عَقَارِ الْمَيِّتِ، فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ فِي ذَلِكَ: يَبِيعُهُ جَائِزٌ عَلَى الصِّغَارِ وَالْكِبَارِ.

³ We do indeed find al-Shāfi‘ī’s extended argument and proofs in the *Kitāb al-Zakāt* of the *Umm*, regarding this very *mas‘ala*, under the subheading of “The Second Chapter on the *Zakāt* of the *Māl* of the Orphan (*Bāb Zakāt Māl al-Yatīm al-Thānī*)” (Ḥassūn, vol.2, pt.4, 101-7). In fact, what we read in §729 above is the briefest condensation of the complicated dialectical debate related in §§3966-87 of the *K. al-Zakāt*.

and the majors.	
731 – But Ibn Abī Laylā used to say: It is permitted to the disadvantage of the minors and the majors when that is of the sort of thing from which there is no escape (<i>mimmā lā budda minhu</i>).	731 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: يَجُوزُ عَلَى الصَّغَارِ وَالْكِبَارِ إِذَا كَانَ ذَلِكَ مِمَّا لَا بُدَّ مِنْهُ.
732 – And Abū Yūsuf, may God Most High have mercy upon him, said: His bay' to the disadvantage of the minors is permitted, as regards everything — whether there is escape from it or not. ⁴ But it is not permitted to the disadvantage of the majors for anything pertaining to bay' of 'aqār, when the deceased has not appointed executor-guardianship for something to be sold from it [the 'aqār], or [when] he owes a dayn.	732 – وَقَالَ أَبُو يُوسُفَ رَحِمَهُ اللَّهُ تَعَالَى: يَبْعُهُ عَلَى الصَّغَارِ جَائِزٌ فِي كُلِّ شَيْءٍ كَانَ مِنْهُ بُدٌّ وَلَمْ يَكُنْ، وَلَا يَجُوزُ عَلَى الْكِبَارِ فِي شَيْءٍ مِنْ بَيْعِ الْعَقَارِ إِذَا لَمْ يَكُنِ الْمَيِّتُ أَوْصَى بِشَيْءٍ يُبَاعُ فِيهِ أَوْ يَكُونُ عَلَيْهِ دَيْنٌ.
733 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And if a man dies, and appoints a man as waṣīyy, and he leaves behind waratha — majors of the ahl of full mental capacity and minors (<i>bālighīna ahla rushd^m wa ṣighār^{an}</i>) —, and he does not contract a waṣīyya, and he owes no dayn, and the waṣīyy contracts bay' of 'aqār from what the deceased left behind as estate; his bay' to the disadvantage of the majors is bāṭil, and his bay' to the disadvantage of the minors is investigated (<i>nuzīra fī</i>). And if he has contracted bay' to their disadvantage for such as which, without it [the bay'], there would be no welfare for their livelihoods (<i>lā ṣalāḥa li-mā āshihim illā bihi</i>); or he contracted bay' to their disadvantage intending for them a fortuitous sale (<i>naẓar^{an} lahum bay'a ghibṭat^{an}</i>); it is a permissible bay'. But if he did not sell in one of [these] two manners (<i>wajhayn</i>), and no matter compelled them [to sell], his bay' is rejected (<i>mardūd^{an}</i>).	733 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَلَوْ أَنَّ رَجُلًا مَاتَ وَأَوْصَى إِلَى رَجُلٍ وَتَرَكَ وَرَثَةً بَالِغِينَ أَهْلَ رُشْدٍ وَصِغَارًا وَلَمْ يُوصِ بِوَصِيَّةٍ وَلَمْ يَكُنْ عَلَيْهِ دَيْنٌ، فَبَاعَ الْوَصِيُّ عَقَارًا مِمَّا تَرَكَ الْمَيِّتُ، كَانَ يَبْعُهُ عَلَى الْكِبَارِ بَاطِلًا وَنُظِرَ فِي بَيْعِهِ عَلَى الصَّغَارِ، فَإِنْ كَانَ بَاعَ عَلَيْهِمْ فِيمَا لَا صَلَاحَ لِمَعَاشِهِمْ إِلَّا بِهِ، أَوْ بَاعَ عَلَيْهِمْ نَظَرًا لَهُمْ بَيْعَ غِبْطَةٍ كَانَ بَيْعًا جَائِزًا، وَإِنْ لَمْ يَبْعَ فِي وَاحِدٍ مِنَ الْوَجْهَيْنِ وَلَا أَمْرٍ لَزِمَهُمْ كَانَ يَبْعُهُ مَرْدُودًا.
734 – And when we command him — when hard money (<i>al-nāḍḍ</i>) is in his possession — to buy for them, by means of it, the 'aqār which is better for them than hard money; we do not permit him to sell the real property except by one [of the two manners] which I have described of excuse (<i>min al-'udhri</i>).	734 – وَإِذَا أَمَرْنَاهُ إِذَا كَانَ فِي يَدِهِ النَّاضُ أَنْ يَشْتَرِيَ لَهُمْ بِهِ الْعَقَارَ الَّذِي هُوَ خَيْرٌ لَهُمْ مِنَ النَّاضِ لَمْ نُجْزِ لَهُ أَنْ يَبِيعَ الْعَقَارَ إِلَّا بِبَعْضِ مَا وَصَفْتُ مِنَ الْعُذْرِ.

⁴ Būlāq has كَانَ مِنْهُ بُدٌّ وَلَمْ يَكُنْ. This appears to be a typo, as Ḥassūn notes (ix.129, n.2).

Bāb fi’l-Sharika wa’l-‘Itq wa Ghayrihi

Chapter on Partnership (al-Sharika), Manumission (al-‘Itq), and Other Things. ¹	بَابُ فِي الشَّرِكَةِ وَالْعِتْقِ وَغَيْرِهِ
735 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And when two men contract <i>mufāwāḍa</i> -partnership (<i>ishtaraka... sharikata mufāwāḍat^{an}</i>), while to one of them belongs a thousand dirhams and to the other more than that; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: This is not <i>mufāwāḍa</i> . And he [Abū Yūsuf] embraces this [doctrine].	735 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اشْتَرَكَ الرَّجُلَانِ شَرِكَةَ مُفَاوَضَةٍ وَلَا أَحَدَهُمَا أَلْفُ دِرْهَمٍ وَلِلْآخَرِ أَكْثَرُ مِنْ ذَلِكَ، فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَيْسَتْ هَذِهِ بِمُفَاوَضَةٍ. وَبِهَذَا يَأْخُذُ.
736 – But Ibn Abī Laylā used to say: This is a permitted <i>mufāwāḍa</i> , and the <i>māl</i> is [divided] between them, two halves.	736 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هَذِهِ مُفَاوَضَةٌ جَائِزَةٌ، وَالْمَالُ بَيْنَهُمَا نِصْفَانِ.
737 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: <i>Mufāwāḍa</i> -partnership is <i>bāṭila</i> – I don’t know anything from the material world (<i>al-dunyā</i>) to be <i>bāṭil</i> , if <i>mufāwāḍa</i> -partnership is not <i>bāṭila</i> (!) Unless they are two partners (<i>sharikayni</i>) who hold the <i>mufāwāḍa</i> to be a mixing (<i>khalṭa</i>) of <i>māl</i> with <i>māl</i> , and the work regarding it, and the division of the profit (<i>iqtisāma al-ribḥi</i>) – for in this there is no harm (<i>lā ba’sa bihi</i>). And this is the <i>sharika</i> of which some of the Mashriqiyyīn say: ‘ <i>Inān</i> -partnership (<i>sharikata ‘inān^{an}</i>). ²	737 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَشَرِكَةُ الْمُفَاوَضَةِ بَاطِلَةٌ وَلَا أَعْرِفُ شَيْئًا مِنَ الدُّنْيَا يَكُونُ بَاطِلًا إِنْ لَمْ تَكُنْ شَرِكَةُ الْمُفَاوَضَةِ بَاطِلَةً، إِلَّا أَنْ يَكُونَا شَرِيكَيْنِ يُعَدَّانِ الْمُفَاوَضَةَ خَلْطَ الْمَالِ بِالْمَالِ وَالْعَمَلَ فِيهِ وَاقْتِسَامَ الرِّبْحِ فَهَذَا لَا بَأْسَ بِهِ، وَهَذِهِ الشَّرِكَةُ الَّتِي يَقُولُ بَعْضُ الْمَشْرِقِيِّينَ لَهَا: شَرِكَةُ عِنَانٍ.
738 – And when they contract <i>mufāwāḍa</i> -partnership, and they mutually stipulate that the <i>mufāwāḍa</i> , according to them, is in this <i>ma’nā</i> ; the <i>sharika</i> is valid (<i>ṣaḥīḥa</i>). And whatever one of them is provided with (<i>ruziqa</i>), from outside of this <i>māl</i> for which they have, together, contracted partnership (<i>ishtarakā fihi ma^{an}</i>) – from trade (<i>tijāra</i>), or rent (<i>ijāra</i>), or found-treasure (<i>kanz</i>), or gift (<i>hiba</i>), or anything else – it belongs to him, to the exclusion of his <i>ṣāhib</i> .	738 – فَإِذَا اشْتَرَكَ مُفَاوَضَةً وَتَشَارَطَا أَنْ الْمُفَاوَضَةَ عِنْدَهُمَا هَذَا الْمَعْنَى فَالشَّرِكَةُ صَحِيحَةٌ، وَمَا رُزِقَ أَحَدُهُمَا مِنْ غَيْرِ هَذَا الْمَالِ الَّذِي اشْتَرَكَ فِيهِ مَعًا مِنْ تِجَارَةٍ أَوْ إِجَارَةٍ أَوْ كَنْزٍ أَوْ هِبَةٍ أَوْ غَيْرِ ذَلِكَ فَهُوَ لَهُ دُونَ صَاحِبِهِ.

¹ (Ḥassūn, vol.9, pt.14, 131-8; Schacht: *Tr. I*, 132-137).

² See our earlier discussion of the Mashriqiyyūn in the note attached to §252. As for later distinctions between *sharikat mufāwāḍa* and *sharikat ‘inān*, see, among other sources: Hallaq, *Sharī’a*, 252-3; the MF, s.v. “شركة العقد,” especially at §§10ff., under the subheading “تقسيم شركة العقد”; and the EF², s.v. “Sharika.”

739 – But if they [dual] claim that the <i>mufāwada</i> , according to them both, is that they are both partners (<i>sharikayn</i>), in all that they gain (<i>afādā</i>), in one way or another (<i>bi-wajhⁱⁿ min al-wujūhi</i>), because of the <i>māl</i> and otherwise; the <i>sharika</i> regarding it is <i>fāsida</i> – I don't know of gambling (<i>al-qimār</i>) except in this, or in less than it: that the two men contract partnership (<i>yashtarika</i>) for two-hundred dirhams, then one of them finds a treasure (<i>kanz</i>), and it is [divided] between them.	739 – وَإِنْ زَعَمَا بَأَنَّ الْمُفَاوَضَةَ عِنْدَهُمَا بَأَنَّ يَكُونَا شَرِيكَيْنِ فِي كُلِّ مَا أَفَادَا بَوَجْهِ مِنَ الْوُجُوهِ بِسَبَبِ الْمَالِ وَغَيْرِهِ، فَالشَّرَكَةُ فِيهِ فَاسِدَةٌ، وَلَا أَعْرِفُ الْقِمَارَ إِلَّا فِي هَذَا أَوْ أَقَلِّ مِنْهُ؛ أَنْ يَشْتَرِكَ الرَّجُلَانِ بِمِائَتَيْ دِرْهَمٍ فَيَجِدُوا أَحَدُهُمَا كَنْزًا فَيَكُونَنَّ بَيْنَهُمَا.
740 – Have you considered [what would happen] (<i>ara'ayta</i>), if they mutually stipulate (<i>tashāraṭā</i>) this, without mutually mixing (<i>takhālaṭā</i>) any <i>māl</i> ; would it be permitted?	740 – أَرَأَيْتَ لَوْ تَشَارَطَا عَلَى هَذَا مِنْ غَيْرِ أَنْ يَتَخَالَطَا بِمَالٍ كَانَ يَجُوزُ.
741 – And if he says: It is not permitted, because it is a giving (<i>aṭiyyatu</i>) of that which belonged neither to the giver nor the given, and [a giving] of that about which neither one of the two knew [at the time of contract]. So would you permit it (<i>a-fa-tujīzuhu</i>) for two-hundred dirhams in which they share (<i>ishtarakā bihā</i>)?	741 – فَإِنْ قَالَ: لَا يَجُوزُ؛ لِأَنَّهُ عَطِيَّةٌ مَا لَمْ يَكُنْ لِلْمُعْطَى وَلَا لِلْمُعْطَى وَمَا لَمْ يَعْلَمْهُ وَاحِدٌ مِنْهُمَا، أَتُجْزِئُهُ عَلَى مِائَتَيْ دِرْهَمٍ اشْتَرَكََا بِهَا؟
742 – And if they deem it (<i>'addūhu</i>) to be <i>bay'</i> ; the <i>bay'</i> of what is not (<i>mā lam yakun</i>), is not permitted.	742 – فَإِنْ عَدُوهُ بَيْعًا فَبَيْعٌ مَا لَمْ يَكُنْ لَا يَجُوزُ.
743 – Have you considered (<i>ara'ayta</i>) a man, to whom a gift is given (<i>wuhiba lahu hibat^{um}</i>), or who hires himself out (<i>ajara nafsahu</i>) for work, and gains <i>māl</i> from work, or gift; is the other one a partner in it? They have rejected less than this (<i>laqad ankarū aqalla min hādhā</i>). ³	743 – أَرَأَيْتَ رَجُلًا وَهَبَ لَهُ هِبَةً أَوْ أَجَرَ نَفْسَهُ فِي عَمَلٍ فَأَفَادَ مَالًا مِنْ عَمَلٍ أَوْ هِبَةٍ، أَيْكُونُ الْآخَرُ فِيهَا شَرِيكًا؟ لَقَدْ أَنْكَرُوا أَقَلَّ مِنْ هَذَا.
744 – He [Abū Yūsuf] said: And if there is a slave [jointly owned] between two men, one of whom manumits his portion (<i>a'taqa... naṣībahu</i>) while he is solvent (<i>mūsir^{um}</i>); the option (<i>al-khiyār</i>) belongs to the other, according to the <i>qawl</i> of Abū Ḥanīfa, may God be pleased with him. And if he wishes,	744 – قَالَ: وَلَوْ أَنَّ عَبْدًا بَيْنَ رَجُلَيْنِ أَعْتَقَ أَحَدُهُمَا نَصِيبَهُ وَهُوَ مُوسِرٌ، كَانَ الْخِيَارُ لِلْآخَرِ فِي قَوْلِ أَبِي حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ فَإِنْ شَاءَ أَعْتَقَ الْعَبْدَ كَمَا أَعْتَقَ صَاحِبُهُ، وَإِنْ شَاءَ

³ Schacht (*Origins*, 120, and n.3) cites al-Shāfi'ī's use of *ara'ayta* here, and in §740, as part of his discussion regarding al-Shāfi'ī's use of *ra'y*. As with many of his other assessments, however, the language is vague. Having indicated passages where he believes al-Shāfi'ī to “use *ra'y* in the same loose way as the ancient schools,” and pointed out a preponderance of instances wherein al-Shāfi'ī “formulates his conclusions cautiously by giving them as his opinion in a non-technical sense;” Schacht adds: “He also uses *ara'aita* and *alā tarā* for introducing systematic arguments.”

he manumits the slave just as his <i>ṣāhib</i> manumitted him. And if he wishes, he enables the slave to strive [to earn his ransom] (<i>istas'ā al-'abda</i>) for half of his value — and the <i>mawlā</i>-patronage (<i>al-walā'</i>) is [divided] between them both. And if he wishes, he makes liable (<i>ḍammāna</i>) his <i>sharīk</i> for half of his value, and the <i>sharīk</i> lays claim to that for which he was made liable from the slave [i.e., the slave pays for it] — and the <i>walā'</i> belongs to the <i>sharīk</i>, all of it. And he is a slave so long as there remains something owed by him as pertains to the striving to earn ransom (<i>al-si'āyati</i>).	اسْتَسْعَى الْعَبْدُ فِي نَصْفِ قِيَمَتِهِ، فَيَكُونُ الْوَلَاءُ بَيْنَهُمَا، وَإِنْ شَاءَ ضَمَّنَ شَرِيكَهُ نَصْفَ قِيَمَتِهِ وَيَرْجِعُ الشَّرِيكَ بِمَا ضَمَّنَ مِنْ ذَلِكَ عَلَى الْعَبْدِ، وَيَكُونُ الْوَلَاءُ لِلشَّرِيكَ كُلُّهُ، وَهُوَ عَبْدٌ مَا بَقِيَ عَلَيْهِ مِنَ السَّعَايَةِ شَيْءٌ.
745 – But Ibn Abī Laylā, may God Most High have mercy upon him, used to say: He is free (<i>ḥurr^{am}</i>), all of him, the day on which the first one manumitted him. And the first one is liable (<i>dāmin</i>) for half of the value; he does not lay claim to it from the slave; the <i>walā'</i> belongs to him; and he grants his <i>ṣāhib</i> no <i>khiyār</i> as to whether he manumit the slave, or enable him to purchase his freedom (<i>yastas'iyahu</i>).	745 – وَكَانَ ابْنُ أَبِي لَيْلَى رَحِمَهُ اللَّهُ تَعَالَى يَقُولُ: هُوَ حُرٌّ كُلُّهُ يَوْمَ أَعْتَقَهُ الْأَوَّلُ، وَالْأَوَّلُ ضَامِنٌ لِنَصْفِ الْقِيَمَةِ، وَلَا يَرْجِعُ بِهَا عَلَى الْعَبْدِ، وَلَهُ الْوَلَاءُ، وَلَا يُخَيِّرُ صَاحِبَهُ فِي أَنْ يُعْتِقَ الْعَبْدَ أَوْ يَسْتَسْعِيَهُ.
746 – But if he who manumits the slave is insolvent (<i>mu'sir^{am}</i>) [not <i>mūsir</i>, as above]; the <i>khiyār</i> — according to the <i>qawl</i> of Abū Ḥanīfa — belongs to the other <i>sharīk</i>. If he wishes, he makes the slave liable for half of his value, for which he works to ransom himself, and the <i>walā'</i> is [divided] between them both. And if he wishes, he manumits him, just as his <i>ṣāhib</i> manumitted, and the <i>walā'</i> is [divided] between them both.	746 – وَلَوْ كَانَ الَّذِي أَعْتَقَ الْعَبْدَ مُعْسِرًا، كَانَ الْخِيَارُ فِي قَوْلِ أَبِي حَنِيفَةَ لِلشَّرِيكَ الْآخَرِ؛ إِنْ شَاءَ ضَمَّنَ الْعَبْدُ نَصْفَ قِيَمَتِهِ يَسْعَى فِيهَا وَالْوَلَاءُ بَيْنَهُمَا، وَإِنْ شَاءَ أَعْتَقَهُ كَمَا أَعْتَقَ صَاحِبُهُ، وَالْوَلَاءُ بَيْنَهُمَا.
747 – But Ibn Abī Laylā used to say: When he [the manumitter] is insolvent; the slave works for ransom for the <i>sharīk</i> who did not manumit, for half of his value. And the slave lays claim to that from he who manumitted him, and the <i>walā'</i>, all of it, belongs to he who manumitted him. And there belongs to the other no right to manumit any part of him.	747 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: إِذَا كَانَ مُعْسِرًا سَعَى الْعَبْدُ لِلشَّرِيكَ الَّذِي لَمْ يُعْتِقْ فِي نَصْفِ قِيَمَتِهِ، وَيَرْجِعُ بِذَلِكَ الْعَبْدُ عَلَى الَّذِي أَعْتَقَهُ، وَالْوَلَاءُ كُلُّهُ لِلَّذِي أَعْتَقَهُ، وَلَيْسَ لِلْآخَرِ أَنْ يُعْتِقَ مِنْهُ شَيْئًا.
748 – And he used to say: When he manumits a portion (<i>shiqṣ^{am}</i>) in a slave (<i>mamlūkⁱⁿ</i>), he has manumitted him — all of him. The slave is not divisible (<i>lā yataba'aḍu</i>) so that some of him be enslaved (<i>raqīq^{am}</i>) and some of him be free.	748 – وَكَانَ يَقُولُ: إِذَا أَعْتَقَ شِقْصًا فِي مَمْلُوكٍ فَقَدْ أَعْتَقَهُ كُلُّهُ، وَلَا يَتَبَعَضُ الْعَبْدُ فَيَكُونُ بَعْضُهُ رَقِيقًا وَبَعْضُهُ حُرًّا، وَبِهِ يَأْخُذُ.

And he [Abū Yūsuf] embraces it. Have you considered (<i>ara'ayta</i>) what he manumitted of him; would it be enslaved? ⁴	أَرَأَيْتَ مَا أَعْتَقَ مِنْهُ أَيْكُونُ رَقِيقًا؟
749 – And if what he manumitted of him be enslaved, then it has been manumitted; so how can there be combined in a single manumitted entity (<i>mu'tiqⁱⁿ wāhidⁱⁿ</i>), manumission and enslavement (<i>'itq^{un} wa riq^{un}</i>)?	749 – فَإِنْ كَانَ مَا أَعْتَقَ مِنْهُ يَكُونُ رَقِيقًا فَقَدْ عَتَقَ، فَكَيْفَ يَجْتَمِعُ فِي مُعْتَقٍ وَاحِدٍ عِتْقٌ وَرِقٌّ؟
750 – Don't you see/opine (<i>alā tarā</i>) that there may not combine in a woman: some of her unilaterally divorced (<i>tāliq^{un}</i>), and some of her not unilaterally divorced, while some of her is a woman belonging to the husband, as she is (<i>'alā ḥālihā</i>)?	750 – أَلَا تَرَى أَنَّهُ لَا يَجْتَمِعُ فِي امْرَأَةٍ بَعْضُهَا طَالِقٌ وَبَعْضُهَا غَيْرُ طَالِقٍ وَبَعْضُهَا امْرَأَةٌ لِلزَّوْجِ عَلَى حَالِهَا.
751 – Likewise the slave (<i>al-raqīq</i>). And he [Abū Yūsuf] embraces this [doctrine], except for a certain property (<i>khaṣlat^{an}</i>): the slave does not lay claim to what he strives for [to earn ransom] from the one who manumitted him.	751 – وَكَذَلِكَ الرَّقِيقُ وَبِهَذَا يَأْخُذُ إِلَّا خَصْلَةً لَا يَرْجِعُ الْعَبْدُ بِمَا سَعَى فِيهِ عَلَى الَّذِي أَعْتَقَهُ.
752 – But Abū Ḥanīfa, may God Most High have mercy upon him, said: Some of him is not manumitted while some of him is a slave; but this one, all of him, is in the status of the slave (<i>bi-manzilati al-'abdi</i>), so long as something of him is enslaved, or he strives [to earn ransom] for his value. ⁵	752 – وَقَالَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى: لَا يُعْتَقُ بَعْضُهُ وَبَعْضُهُ رَقِيقٌ وَهَذَا كُلُّهُ بِمَنْزِلَةِ الْعَبْدِ مَا دَامَ مِنْهُ شَيْءٌ رَقِيقٌ أَوْ يَسْعَى فِي قِيَمَتِهِ.
753 – Have you considered (<i>ara'ayta</i>) [what would happen] if the <i>sharīk</i> said: The portion (<i>naṣīb</i>) of my partner pertaining to him [the slave] is free; but as for my portion: no. Has he manumitted of him what he does not own [i.e., his partner's portion]? And when he manumits of him what he does own, then how can he manumit of him what he does not own [i.e., post-manumission, with no say as regards the slave's status]? And does manumission occur in what the man does not own?	753 – أَرَأَيْتَ لَوْ أَنَّ الشَّرِيكَ قَالَ: نَصِيبُ شَرِيكِي مِنْهُ حُرٌّ وَأَمَّا نَصِيبِي فَلَا، هَلْ كَانَ يُعْتَقُ مِنْهُ مَا لَا يَمْلِكُ؟ وَإِذَا أَعْتَقَ مِنْهُ مَا يَمْلِكُ، فَكَيْفَ يُعْتَقُ مِنْهُ مَا لَا يَمْلِكُ؟ وَهَلْ يَقَعُ عِتْقٌ فِيمَا لَا يَمْلِكُ الرَّجُلُ؟

⁴ Ibn Abī Laylā, it seems, is no stranger to the *reductio*, either. Here he employs the *ad impossibile* species. Can the manumitted portion be both free and enslaved (X and Not X) at the same time?

⁵ Abū Ḥanīfa sidesteps the contradiction charge simply by stating he never suggested such a mixing of states: the slave is wholly a slave so long as any portion of him is enslaved. He asserts that slavery and freedom do not coexist in the individual so long as any part of him is enslaved, or he strives to purchase freedom; his overall *manzila* remains that of the slave. This is more than side-stepping the mixed-state contradiction, it is in fact a counter-thesis to Ibn Abī Laylā's ruling; mainly, that manumission extends from the portion to the whole. Abū Ḥanīfa is saying that slavery extends from the portion to the whole.

754 – Al-Shāfiʿī, may God have mercy upon him, said: And when the slave is [jointly owned] between two men, and one of them manumits his portion of him; if he is solvent (<i>mūsir^{am}</i>) so that he produce half of his value, then the slave is free, all of him, and the <i>walāʾ</i> belongs to the first manumitter, and there belongs no <i>khiyār</i> to the other master of the slave. But if he is insolvent (<i>muʿsir^{am}</i>),⁶ then the first half is free, and the second half belongs to its owner, and there is no <i>siʿāya</i> [enjoined] upon him. And this is written in the <i>Kitāb al-ʿItq</i>, with its proofs/arguments (<i>bi-ḥujajihi</i>); except for that we found in this book [i.e., in the Shaybānī Version of the <i>K. Ikhtilāf al-ʿIrāqiyīn</i>] the addition of a word (<i>ziyādata ḥarfⁿ</i>) we did not hear of, in their <i>ḥujaj</i> [this refers back to §750].⁷	754 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا كَانَ الْعَبْدُ بَيْنَ الرَّجُلَيْنِ فَأَعْتَقَ أَحَدُهُمَا نَصِيبَهُ مِنْهُ، فَإِنْ كَانَ مُوسِرًا بَأَن يُوَدِّي نِصْفَ قِيَمَتِهِ فَالْعَبْدُ حُرٌّ كُلُّهُ، وَالْوَلَاءُ لِلْمُعْتِقِ الْأَوَّلِ وَلَا خِيَارَ لِسَيِّدِ الْعَبْدِ الْآخَرِ. وَإِنْ كَانَ مُعْسِرًا فَالنِّصْفُ الْأَوَّلُ حُرٌّ وَالنِّصْفُ الثَّانِي لِمَالِكِهِ وَلَا سِعَايَةَ عَلَيْهِ. وَهَذَا مَكْتُوبٌ فِي كِتَابِ الْعَتَقِ بِحُجَجِهِ إِلَّا أَنَّا وَجَدْنَا فِي هَذَا الْكِتَابِ زِيَادَةَ حَرْفٍ لَمْ نَسْمَعْ بِهِ فِي حُجَجِهِمْ.
755 – There was, in that by which they argue (<i>mimmā ihtajjū bihi</i>) in this book [i.e., back in §750], that their proponent said (<i>qāla qāʾiluhum</i>): How can [the proposition]: “a single entity (<i>nafsⁿ wāḥidatⁿ</i>), some of it free (<i>ḥurr^{um}</i>) and some of it owned (<i>mamlūk^{um}</i>),” not be just like [the proposition]: “the woman is not: some of her <i>ṭāliq</i>, and some of her not <i>ṭāliq</i>?”⁸	755 – كَانَ مِمَّا احْتَجُّوا بِهِ فِي هَذَا الْكِتَابِ أَنْ قَالَ قَائِلُهُمْ: كَيْفَ تَكُونُ نَفْسٌ وَاحِدَةٌ بَعْضُهَا حُرٌّ وَبَعْضُهَا مَمْلُوكٌ لَا يَكُونُ، كَمَا لَا تَكُونُ الْمَرْأَةُ بَعْضُهَا طَالِقٌ وَبَعْضُهَا غَيْرُ طَالِقٍ؟

⁶ Ḥassūn has وَإِنْ كَانَ مُعْسِرًا instead of وَإِنْ كَانَ مُعْسِرًا, as in Būlāq. This is assumed to be a typo.

⁷ §§754-5 has momentous bearing upon the “problem” of authorship and compilation of the *Umm*. Certainly we have already seen several references in this treatise to other “books” and chapters of the *Umm*; indeed, we have even encountered a reference, as we do here, to a *Kitāb al-ʿItq* (§681, above). In this instance, there seems little doubt that the book so referenced is that *Kitāb al-ʿItq* which comprises the fourth “chapter” of the *Kitāb Ikhtilāf Mālik waʾl-Shāfiʿī* (Ḥassūn, vol.9, pt.14, 362-5). The “this book” to which al-Shāfiʿī twice refers, however, is none other than our subject-text itself – more accurately, it is the Shaybānī Version of our subject text, upon which al-Shāfiʿī is commenting. What he is saying, in short, is that much has already been argued in the *K. al-ʿItq*, but he found something new here, in the *Ikhtilāf al-ʿIrāqiyīn*; namely, the *qiyās*-comparison of slave-manumission and wife-*ṭalāq*. §§754-5, then, are very strong indicants indeed that the attribution of the *Umm* Version to al-Shāfiʿī is to be respected, and that he truly held the Shaybānī Version in hand (or memory) whilst commenting upon it.

⁸ Al-Shāfiʿī – referring back to §750 of this very same treatise – summarizes the *problema* to be investigated, and it would appear that the questioner is attempting to lead the proponent into committing to *qiyās* (as we see more clearly in the following section). The question compares two propositions and demands to know how they *not* be deemed similar: “*Kayfa _____ lā yakūn kamā _____?*” How can situation X not be deemed to be like situation Y? Now, if we follow the preceding reference to a *Kitāb al-ʿItq*, we should expect *not* to find this same sort of argument reproduced therein; and we find, in fact, only the barest hint of *qiyās* at all. In fact, the bulk of the debate centers upon what would later be known as *taʾarūḍ al-adilla* (in this case, contradictory *ḥadīths*). This, and the fact that preliminary searches have not revealed anything on this model of *qiyās* with the wife’s *ṭalāq* elsewhere in the *Umm*, leads us to conclude that the

756 – And if he claims of the slave that there is, in him, [both] slavery and freedom, by means of <i>qiyās</i> with the woman; it is said to him: Is it permitted to the man that he contract in marriage some of a woman?	756 – فَإِنْ زَعَمَ أَنَّ الْعَبْدَ يَكُونُ فِيهِ الرِّقُّ وَالْحُرِّيَّةُ قِيَاسًا عَلَى الْمَرْأَةِ. قِيلَ لَهُ: أَيْجُوزُ لِلرَّجُلِ أَنْ يَنْكِحَ بَعْضَ امْرَأَةٍ؟
757 – And if he says: No. She is nothing but either married (<i>mankūḥat^{an}</i>), all of her, or not married.	757 – فَإِنْ قَالَ: لَا. لَا تَكُونُ إِلَّا مَّنْكَوْحَةً كُلِّهَا أَوْ غَيْرَ مَّنْكَوْحَةٍ.
758 – It is said to him: And is it permitted that some of a slave be purchased?	758 – قِيلَ لَهُ: أَفَيَجُوزُ أَنْ يُشْتَرَى بَعْضُ عَبْدٍ؟
759 – And if he says: Yes.	759 – فَإِنْ قَالَ: نَعَمْ.
760 – It is said to him: So where is the slave in relation to the woman (<i>fa-ayna al-ʿabdu min al-marʿati</i>)? ⁹	760 – قِيلَ لَهُ: فَأَيْنَ الْعَبْدُ مِنَ الْمَرْأَةِ؟
761 – And it is said to him: Is it permitted for him that he contract <i>kitāba</i> with the wife for unilateral divorce (<i>yukātiba al-marʿata ʿalā al-ṭalāq</i>), and that it [the <i>ṭalāq</i>] be held back (<i>mamnū^{an}</i>) until she fulfills the [terms of] the <i>kitāba</i> , or she defaults (<i>taʿjaza</i>)?	761 – وَقِيلَ لَهُ: أَيْجُوزُ لَهُ أَنْ يُكَاتِبَ الْمَرْأَةَ عَلَى الطَّلَاقِ وَيَكُونَ مَمْنُوعًا حَتَّى تُؤَدِّيَ الْكِتَابَةَ أَوْ تَعْجَزَ؟
762 – And if he says: No.	762 – فَإِنْ قَالَ: لَا.
763 – It is said: And is this permitted to him as regards the slave?	763 – قِيلَ: أَفَيَجُوزُ هَذَا لَهُ فِي الْعَبْدِ؟
764 – And if he says: Yes.	764 – فَإِنْ قَالَ: نَعَمْ.
765 – It is said: Then why do you link them together (<i>tajmaʿu baynahumā</i>) [for <i>qiyās</i>]?	765 – قِيلَ: فَلِمَ تَجْمَعُ بَيْنَهُمَا؟
766 – And if he says: They are not linked (<i>lā yajtamʿāni</i>) [in these cases].	766 – فَإِنْ قَالَ: لَا يَجْتَمِعَانِ.
767 – It is said: Likewise they are not linked wherever you have linked them together. ¹⁰	767 – قِيلَ: وَكَذَلِكَ لَا يَجْتَمِعَانِ حَيْثُ جَمَعْتَ بَيْنَهُمَا.

Kitāb al-ʿItq referenced in §§754-5 is indeed that which we find in the *Umm* compendium. Moreover, because *taʾarūḍ al-adilla* is a critical issue in *uṣūl al-fiqh*, and in order to bring further elements of the half-emancipated slave *masʿala* to light, we have translated the *Kitāb al-ʿItq* from the *Kitāb Ikhtilāf Mālik wa l-Shāfiʿī* in its entirety, in the appendices (see II. §755).

⁹ The exchange in §§756-60 is reminiscent of the discussions one sees in later *furūq* treatises—though absent the common formula: *wa l-farq baynahumā*. Still, the *sāʿil* here questions the proponent claiming *qiyās* by confronting him with the *farq* between partial-purchase of a slave (permitted) vs. partial-marriage of a woman (not permitted). His *elenchus* is sealed with a rhetorical question, asking, in so many words: “On what basis, *qiyās*?”

¹⁰ In §§761-767, al-Shāfiʿī drives home the second *farq*: there is no correlation between *mukātaba* of a slave (permitted) vs. a *kitāba*-like contracting of the future *ṭalāq* of the wife (not permitted).

768 – And it is also said to him: Does the wife belong to two [men], just as the slave is owned by two [men] (<i>mamlūk^m li-ithnayni</i>); and does there belong to the husband of the wife the right to gift her (<i>yahabahā</i>) to a man, so that she be a wife to him – just as the slave, when he gifts him, becomes a slave belonging to the one to whom he gifted him?	768 – وَيُقَالُ لَهُ أَيضًا: أَتَكُونُ الْمَرْأَةُ لِاثْنَيْنِ، كَمَا يَكُونُ الْعَبْدُ مَمْلُوكًا لِاثْنَيْنِ وَيَكُونُ لِزَوْجِ الْمَرْأَةِ أَنْ يَهَبَهَا لِلرَّجُلِ فَتَكُونَ زَوْجَةً لَهُ، كَمَا يَكُونُ الْعَبْدُ إِذَا وَهَبَهُ صَارَ عَبْدًا لِمَنْ وَهَبَهُ لَهُ؟
769 – And if he says: No.	769 – فَإِنْ قَالَ: لَا.
770 – It is said: So why is it (<i>fa-mā bālu</i>) that the woman is correlated [for <i>qiyās</i>] (<i>tuqāsu 'alā</i>) with the slave (<i>al-mamlūk</i>)? ¹¹	770 – قِيلَ: فَمَا بَالُ الْمَرْأَةِ تُقَاسُ عَلَى الْمَمْلُوكِ؟
771 – And it is said to him: Have you considered (<i>ara'ayta</i>) the slave, when he is manumitted once (<i>idhā 'ataqa marrat^m</i>); does there belong to his master the right to seek to [re-]enslave him, just as he has the right – when he unilaterally divorces (<i>ṭallaqa</i>) the wife once – that her return (<i>raj'atuhā</i>) yet belong to him?	771 – وَيُقَالُ لَهُ: أَرَأَيْتَ الْعَبْدَ إِذَا عَتَقَ مَرَّةً أَيْكُونُ لِسَيِّدِهِ أَنْ يَسْتَرْقَهُ، كَمَا يَكُونُ لَهُ إِذَا طَلَّقَ الْمَرْأَةَ مَرَّةً أَنْ يَكُونَ لَهُ رَجْعَتُهَا؟
772 – And if he says: No.	772 – فَإِنْ قَالَ: لَا.
773 – It is said: Then we don't know of anything more distant from it, than what he correlated it with [for <i>qiyās</i>] (<i>fa-mā na'lamu shay^m ab'ada mim mā qāsahu bihi minhu</i>). ¹²	773 – قِيلَ: فَمَا نَعْلَمُ شَيْئًا أَبْعَدَ مِمَّا قَاسَهُ بِهِ مِنْهُ.
774 – He [Abū Yūsuf] said: And if there is a slave [jointly owned] between two men, one of whom contracts <i>mukātaba</i> with him (<i>kātabahu</i>) without the permission (<i>idhn</i>) of his <i>ṣāhib</i> , nor his consent (<i>riḍāhu</i>), and his <i>ṣāhib</i> rejects that (<i>ankara dhālika</i>), before	774 – قَالَ: وَلَوْ أَنَّ عَبْدًا بَيْنَ رَجُلَيْنِ كَاتَبَهُ أَحَدُهُمَا بِغَيْرِ إِذْنِ صَاحِبِهِ وَلَا رِضَاهُ، فَأَنْكَرَ ذَلِكَ صَاحِبُهُ قَبْلَ أَنْ يُؤَدِّيَ الْمَكَاتَبُ شَيْئًا،

¹¹ In §§768-770, al-Shāfi'ī drives home the third and fourth *farq*.

¹² Finally, in §§771-773, al-Shāfi'ī drives home the fifth *farq*: there is no correlation between re-enslaving your freed slave (not permitted) vs. re-marrying your wife after a single *ṭalāq* (permitted). Again, we might recognize the extended dialectic of §§755-73 as a predecessor of the *furūq* literature, or of the *ashbāh wa'l-nazā'ir*; and, indeed, a clearer indication of the dialectical origins of these genres could hardly be found. The cases are apparently similar – a woman cannot be partly married and partly divorced, how then, can a slave be partly manumitted and partly enslaved? – until, that is, the questioner points out that there is a critical difference between them (*wa'l farq baynahumā*). In fact, in this dialectical sequence, the questioner points out no less than five *furūq*. These, as we see in §§760, 765, 767, and 770, are naturally followed by (rhetorical) demands for the proponent's *ilal* – or at least some basis of *shabah*. If not these properties, then what is it that links them? Once the questioner has cycled through his (divergent) properties, he closes with §773: a definitive statement that these cases cannot be correlated for purposes of *qiyās*.

the <i>mukātab</i> fulfills anything [of his <i>mukātaba</i>]; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: The <i>mukātaba</i> is <i>bāṭila</i>, and to his <i>ṣāhib</i> belongs the right to reject it (<i>yaruddahā</i>); because it is a <i>manfa'a</i> coming to him (<i>taṣīlu ilayhi</i>), and that does not belong to him to the exclusion of (<i>dūna</i>) his <i>ṣāhib</i>. And he [Abū Yūsuf] embraces it.	فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: الْمُكَاتَبَةُ بَاطِلَةٌ وَلِصَاحِبِهِ أَنْ يَرُدَّهَا؛ لِأَنَّهَا مَنَفَعَةٌ تَصِلُ إِلَيْهِ وَلَيْسَ ذَلِكَ لَهُ دُونَ صَاحِبِهِ. وَبِهِ يَأْخُذُ.
775 – But Ibn Abī Laylā used to say: The <i>mukātaba</i> is <i>jā'iza</i>, and the <i>sharīk</i> has no right to reject it.	775 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الْمُكَاتَبَةُ جَائِزَةٌ وَلَيْسَ لِلشَّرِيكِ أَنْ يَرُدَّهَا.
776 – And if the <i>sharīk</i> manumits the slave; the <i>'itq</i> is <i>bāṭil</i>, according to the <i>qawl</i> of Ibn Abī Laylā, until he investigates (<i>yanẓura</i>) what he [the slave] does (<i>yaṣna'u</i>) as regards the <i>mukātaba</i>. And if he fulfills/pays it (<i>addāhā</i>) to its <i>ṣāhib</i>, he is manumitted. But the one who contracted <i>mukātaba</i> (<i>kātaba</i>) is <i>ḍāmin</i> for half of the value – and the <i>walā'</i>, all of it, belongs to him.	776 – وَلَوْ أَنَّ الشَّرِيكَ أَعْتَقَ الْعَبْدَ كَانَ الْعِنَقُ بَاطِلًا فِي قَوْلِ ابْنِ أَبِي لَيْلَى حَتَّى يَنْظُرَ مَا يَصْنَعُ فِي الْمُكَاتَبَةِ، فَإِنْ أَدَّاهَا إِلَى صَاحِبِهَا عَتَقَ، وَكَانَ الَّذِي كَاتَبَ ضَامِنًا لِنَصْفِ الْقِيَمَةِ، وَالْوَلَاءُ كُلُّهُ لَهُ.
777 – But Abū Ḥanīfa, may God Most High have mercy upon him, used to say: That <i>'itq</i> is <i>jā'iz</i>, and the <i>mukātaba</i> is given <i>khiyār</i> (<i>yukhayyara</i>). If he wishes, he cancels the written contract (<i>alghā al-kitāba</i>), and he defaults from it (<i>'ajaza 'anhā</i>). And if he wishes he strives to fulfill it (<i>sa'a fihā</i>). And if he defaults from it, the <i>sharīk</i> of the one who contracted <i>mukātaba</i> has the <i>khiyār</i>. If he wishes, he makes liable (<i>ḍammana</i>) the one who manumitted, if he is solvent (<i>mūsir^m</i>). And if he wishes, he enables the slave to strive [for ransom] for half his value. And if he wishes, he manumits the slave. And if he makes liable the one who manumits, he [the <i>ḍāmin</i>] has the right to lay claim to that for which he was made liable (<i>bimā ḍamina</i>), from the slave.	777 – وَكَانَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى يَقُولُ: عِنَقُ ذَلِكَ جَائِزٌ، وَيُخَيَّرُ الْمُكَاتَبُ، فَإِنْ شَاءَ أُلْعِيَ الْكِتَابَةَ وَعَجَزَ عَنْهَا، وَإِنْ شَاءَ سَعَى فِيهَا، فَإِنْ عَجَزَ عَنْهَا كَانَ الشَّرِيكَ الَّذِي كَاتَبَ بِالْخِيَارِ، إِنْ شَاءَ ضَمَّنَ الَّذِي أَعْتَقَ إِنْ كَانَ مُوسِرًا، وَإِنْ شَاءَ اسْتَسْعَى الْعَبْدَ فِي نَصْفِ قِيَمَتِهِ، وَإِنْ شَاءَ أَعْتَقَ الْعَبْدَ، فَإِنْ ضَمَّنَ الَّذِي أَعْتَقَ كَانَ لَهُ أَنْ يَرْجِعَ عَلَى الْعَبْدِ بِمَا ضَمَّنَ.
778 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the slave is [jointly-owned] between two men, and one of them contracts <i>mukātaba</i> with his portion (<i>kātaba... naṣībahu</i>), without the permission of his <i>sharīk</i>; the <i>mukātaba</i> is unilaterally annulled (<i>mafsūkhāt^m</i>), and what is taken from him [the slave] is [divided] between them in two halves – providing he did not fulfill/pay the entirety	778 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَ الْعَبْدُ بَيْنَ رَجُلَيْنِ فَكَاتَبَ أَحَدُهُمَا نَصِيبَهُ بَعِيرٍ إِذْنِ شَرِيكِهِ فَالْكِتَابَةُ مَفْسُوخَةٌ، وَمَا أُخِذَ مِنْهُ بَيْنَهُمَا نَصْفَانِ مَا لَمْ يُؤَدَّ جَمِيعَ الْكِتَابَةِ، فَإِنْ أَدَّى جَمِيعَ الْكِتَابَةِ عَتَقَ نَصْفُ الْمُكَاتَبِ

of the <i>kitāba</i>. For if he fulfilled/paid the entirety of the <i>kitāba</i>, half of the <i>mukātab</i> is manumitted, and he [the contracting owner] is as one who initiated 'itq regarding a slave [jointly-owned] between him and a man: If he is solvent; he, all of him, is manumitted at his expense] ('<i>ataqa 'alayhi kulluhu</i>). And if he is insolvent, there is manumitted from him what is manumitted [i.e., half, and no more].¹³	وَكَانَ كَمَنْ ابْتَدَأَ الْعِتْقَ فِي عَبْدٍ بَيْنَهُ وَبَيْنَ رَجُلٍ، إِنْ كَانَ مُوسِرًا عَتَقَ عَلَيْهِ كُلَّهُ، وَإِنْ مُعْسِرًا عَتَقَ مِنْهُ مَا عَتَقَ.
779 – And if the <i>kitāba</i> is rejected (<i>ruddat</i>) before fulfillment/payment (<i>al-adā'</i>), he is jointly-owned between them (<i>mamlūk^{an} baynahumā</i>).	779 – وَلَوْ رُدَّتِ الْكِتَابَةُ قَبْلَ الْأَدَاءِ كَانَ مَمْلُوكًا بَيْنَهُمَا.
780 – And if the <i>mālik</i> of the half, who did not contract <i>mukātaba</i> with him, manumits him before the fulfillment [of the <i>mukātaba</i>]; his half from him is free. And if he is solvent, he is liable (<i>ḍamina</i>) for the remaining half of him; because the <i>kitāba</i> regarding him was <i>bāṭila</i>. And I do not give <i>khiyār</i> (<i>lā ukhayyiru</i>) to the slave, because the contract ('<i>aqd</i>) of the <i>kitāba</i> was <i>fāsid</i>. And if he [the manumitting owner] is insolvent, there is manumitted from him what is manumitted [i.e., half], while the <i>kitāba</i> between them is <i>bāṭila</i>, unless the <i>mālik</i> of the slave wishes to renew it (<i>yujaddidahā</i>).	780 – وَلَوْ أَعْتَقَهُ مَالِكُ النِّصْفِ الَّذِي لَمْ يُكَاتِبْهُ قَبْلَ الْأَدَاءِ كَانَ نَصْفُهُ مِنْهُ حُرًّا، فَإِنْ كَانَ مُوسِرًا ضَمِنَ نَصْفَهُ الْبَاقِي؛ لِأَنَّ الْكِتَابَةَ كَانَتْ فِيهِ بَاطِلَةً وَلَا أُخِيرَ الْعَبْدُ؛ لِأَنَّ عَقْدَ الْكِتَابَةِ كَانَ فَاسِدًا. وَإِنْ كَانَ مُعْسِرًا عَتَقَ مِنْهُ مَا عَتَقَ وَكَانَتْ الْكِتَابَةُ بَيْنَهُمَا بَاطِلَةً إِلَّا أَنْ يَشَاءَ مَالِكُ الْعَبْدِ أَنْ يُجَدِّدَهَا.
781 – He [Abū Yūsuf] said: And if there is a slave (<i>mamlūk^{an}</i>) [jointly-owned] between two [men], one of whom contracts <i>tadbīr</i> with him (<i>dabbarahu</i>); then indeed Abū Ḥanīfa, may God be pleased with him, used to say: There belongs to the other [owner] no right to sell him, due to what is interposed, with regard to it (<i>dakhala fihi</i>), of 'itq. And he [Abū Yūsuf] embraces it.	781 – قَالَ: وَلَوْ أَنَّ مَمْلُوكًا بَيْنَ اثْنَيْنِ دَبَّرَهُ أَحَدُهُمَا، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: لَيْسَ لِلْآخَرِ أَنْ يَبِيعَهُ لِمَا دَخَلَ فِيهِ مِنَ الْعِتْقِ. وَبِهِ يَأْخُذُ.
782 – But Ibn Abī Laylā used to say: He has the right to sell his share (<i>ḥiṣṣatahu</i>). And when one of the two parties to <i>mufāwada</i> (<i>aḥadu al-mutafāwiḍayni</i>) inherits a <i>mīrāth</i>; then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: It belongs to him, specifically (<i>khāṣṣat^{an}</i>). And he [Abū Yūsuf] embraces this [doctrine].	782 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَهُ أَنْ يَبِيعَ حِصَّتَهُ، وَإِذَا وَرِثَ أَحَدُ الْمُتَفَاوِضِينَ مِيرَاثًا، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: هُوَ لَهُ خَاصَّةٌ. وَبِهَذَا يَأْخُذُ.

¹³ Cf. the wording of the Prophetic *ḥadīth* with which serves as both the opening, and the focus, of the *Kitāb al-'Itq* (Ḥassūn, vol.9, pt.14, 362, §128).

783 – He said: But the <i>mufāwāḍa</i> is undone (<i>tuntaqadu</i>) when he takes possession of that [inheritance].	783 – قَالَ: وَتُنْتَقِضُ الْمُفَاوِضَةُ إِذَا قَبِضَ ذَلِكَ.
784 – But Ibn Abī Laylā used to say: It is [divided] between them, two halves. ¹⁴	784 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هُوَ بَيْنَهُمَا نِصْفَانِ.
785 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the slave is [jointly-owned] between two men, and one of them contracts <i>tadbīr</i> with him (<i>dabbarahu</i>); to the other belongs the right of <i>bayʿ</i> of his portion (<i>naṣībhi</i>); because the <i>tadbīr</i> , according to me, is a <i>waṣīyya</i> . And likewise there belongs to the one who contracted <i>tadbīr</i> with him the right to sell him. And this is written in the <i>Kitāb al-Mudabbar</i> . ¹⁵	785 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَ الْعَبْدُ بَيْنَ رَجُلَيْنِ فَدَبَّرَهُ أَحَدُهُمَا فَلِلْآخَرِ بَيْعُ نَصِيبِهِ؛ لِأَنَّ التَّدْبِيرَ عِنْدِي وَصِيَّةٌ. وَكَذَلِكَ لِلَّذِي دَبَّرَهُ أَنْ يَبِيعَهُ. وَهَذَا مَكْتُوبٌ فِي كِتَابِ الْمُدَبِّرِ.
786 – And whosoever claims that the <i>mudabbir</i> has no right to sell the <i>mudabbar</i> ; he is obliged to claim that [enjoined] upon the <i>mudabbir</i> -master is [payment of] half the value to his <i>sharīk</i> – if he is solvent, and he [the slave] is a <i>mudabbar</i> , all of him. Just as this is obliged of him regarding <i>ʿitq</i> . When he treats this as <i>ʿitq</i> , it [<i>tadbīr</i>] belongs to it [<i>ʿitq</i>] in every circumstance (<i>bi-kulli ḥāl</i>). ¹⁵	786 – وَمَنْ زَعَمَ أَنَّهُ لَيْسَ لِلْمُدَبِّرِ أَنْ يَبِيعَ الْمُدَبَّرَ لَزِمَهُ أَنْ يَزْعُمَ أَنَّ عَلَى السَيِّدِ الْمُدَبِّرِ نِصْفَ الْقِيَمَةِ لِشَرِيكِهِ إِنْ كَانَ مُوسِرًا وَيَكُونُ مُدَبِّرًا كُلَّهُ، كَمَا يَلْزِمُهُ هَذَا فِي الْعِتْقِ إِذَا جَعَلَ هَذَا عِتْقًا يَكُونُ لَهُ بِكُلِّ حَالٍ.

¹⁴ §§782ff.: It is as yet unclear to me the relevance of what appears to be a separate *masʿala* occurring in the middle of §782, and why Ḥassūn did not break off with a new number. Nor does al-Shāfiʿī appear to deal with this *mufāwāḍa* issue in his following analysis. Certainly he has already expressed his views on *mufāwāḍa* clearly enough; we might have considered it an editorial intrusion — an attempt to explain the reasoning behind Abū Ḥanīfa’s and Ibn Abī Laylā’s doctrines concerning the *mudabbar* (how, exactly, is not at all clear to me). In al-Afghānī’s edition (97), however, §§782ff. appears simply as another *masʿala*, appropriate to the general heading of this chapter — not at all out of place. If al-Afghānī’s text indeed represents the same Shaybānī version upon which al-Shāfiʿī relied, then his lack of treatment of §§782ff. may simply reflect his disdain for this type of *mufāwāḍa*, already amply demonstrated in §§737-9, or signify the perceived sufficiency of his explanation re: the valid form of *mufāwāḍa*.

¹⁵ Interestingly, this is the only reference to a *Kitāb al-Mudabbar* made in the entire *Umm*. Certainly no such *Kitāb* appears among its many chapters and subheadings. Once again, however, we find a *Kitāb al-Mudabbar* among the works attributed to al-Shāfiʿī by al-Nadīm (*Fihrist*, 354). In all likelihood this *Kitāb* survives in the *Umm*, in either whole or piecemeal fashion; certainly another *dalīl* for al-Shāfiʿī’s stance may be found in the *Kitāb Ikhtilāf Mālik wa l-Shāfiʿī*, under the subheading *Bāb fī Bayʿ al-Mudabbar* (Ḥassūn, vol.9, pt.14, 523). Here we find that ʿĀ’isha was reported to have sold a *jāriya* with whom she had contracted *tadbīr* — as a punishment for having practiced sorcery against her; al-Shāfiʿī and companions have maintained this doctrine (*wa naḥnu naqūlu bi-qawli ʿĀ’ishata wa ghayrihā*), while Mālik and companions maintain the *mudabbar* cannot be sold.

787 – And if he says: Then the 'itq for which you have imposed (<i>alzamtahu fihi</i>) half the value, is an 'itq happening on the spot (<i>wāqī^{un} makānahu</i>) [as opposed to after the death of the <i>mudabbir</i>].	787 – فَإِنْ قَالَ: فَالْعِتْقُ الَّذِي أَلْزَمْتُهُ فِيهِ نِصْفَ الْقِيَمَةِ عِتْقٌ وَاقِعٌ مَكَانَهُ.
788 – It is said: And you yourself claim, as regards the <i>jāriya</i> [jointly-owned] between two men – one of whom has sexual intercourse with her and she gives birth, that she is an <i>umm walad</i>, and he owes half the value. And this is an 'itq which does not happen on the spot; it only occurs after a period of time (<i>ba'da muddatⁱⁿ</i>), just as the 'itq of the <i>mudabbar</i> occurs after a period of time.	788 – قِيلَ: فَأَنْتَ تَزْعُمُ فِي الْجَارِيَةِ بَيْنَ الرَّجُلَيْنِ يَطْوُهَا أَحَدُهُمَا فَتِلِدُ أَنَّهَا أُمٌّ وَلَدٍ وَعَلَيْهِ نِصْفُ الْقِيَمَةِ، وَهَذَا عِتْقٌ لَيْسَ بِوَاقِعٍ مَكَانَهُ، إِنَّمَا هُوَ وَاقِعٌ بَعْدَ مُدَّةٍ كَعِتْقِ الْمُدَبَّرِ يَقَعُ بَعْدَ مُدَّةٍ.
789 – And if the slave is [jointly-owned] between two [men], and one of them contracts <i>tadbīr</i> with him, then the other one manumits him unconditionally (<i>a'taqahu... al-battata</i>); then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: He who contracted <i>tadbīr</i> with him has <i>khiyār</i>: if he wishes, he manumits; and if he wishes, he enables the slave to work [for ransom] for half his value, as a <i>mudabbar</i>; ¹⁶ and if he wishes, he makes the manumitter liable (<i>ḍammana al-mu'tiq</i>) for half of his value as a <i>mudabbar</i> – if he is solvent, and the <i>mu'tiq</i> lays claim to it from the slave, and the <i>walā'</i> is [divided] between them, two halves.	789 – وَإِنْ كَانَ الْعَبْدُ بَيْنَ اثْنَيْنِ فَدَبَّرَهُ أَحَدُهُمَا ثُمَّ أَعْتَقَهُ الْآخَرُ أَلْبَتَّةَ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: الَّذِي دَبَّرَهُ بِالْخِيَارِ؛ إِنْ شَاءَ أَعْتَقَ، وَإِنْ شَاءَ اسْتَسْعَى الْعَبْدَ فِي نِصْفِ قِيَمَتِهِ مُدَبَّرًا، وَإِنْ شَاءَ ضَمَّنَ الْمُعْتَقَ نِصْفَ قِيَمَتِهِ مُدَبَّرًا إِنْ كَانَ مُوسِرًا، وَيَرْجِعُ بِهِ الْمُعْتَقُ عَلَى الْعَبْدِ، وَالْوَلَاءُ بَيْنَهُمَا نِصْفَانِ.
790 – But Ibn Abī Laylā used to say: The <i>tadbīr</i> is <i>bāṭil</i>, and the manumission is <i>jā'iz</i>, and the <i>mu'tiq</i> is <i>ḍāmin</i> for half of his value – if he is solvent. And if he is insolvent, the slave works [for ransom] as regards it, then he [the slave] lays claim upon the <i>mu'tiq</i> [for his half-value]. And the <i>walā'</i>, all of it, belongs to the <i>mu'tiq</i>.	790 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: التَّدْبِيرُ بَاطِلٌ وَالْعِتْقُ جَائِزٌ، وَالْمُعْتَقُ ضَامِنٌ لِنِصْفِ قِيَمَتِهِ إِنْ كَانَ مُوسِرًا، وَإِنْ كَانَ مُعْسِرًا سَعَى فِيهِ الْعَبْدُ، ثُمَّ يَرْجِعُ عَلَى الْمُعْتَقِ، وَالْوَلَاءُ كُلُّهُ لِلْمُعْتَقِ.
791 – But Abū Yūsuf said: When one of them contracts <i>tadbīr</i> with him, then he is a <i>mudabbar</i>, all of him, and he [the <i>mudabbir</i>] is <i>ḍāmin</i> for half of his value. And the 'itq of the other [owner] is <i>bāṭil</i> – it is not permitted as regards him.	791 – وَقَالَ أَبُو يُوسُفَ: إِذَا دَبَّرَهُ أَحَدُهُمَا فَهُوَ مُدَبَّرٌ كُلُّهُ وَهُوَ ضَامِنٌ نِصْفَ قِيَمَتِهِ، وَعِتْقُ الْآخَرِ بَاطِلٌ لَا يَجُوزُ فِيهِ.

¹⁶ No doubt the market-value of a slave decreased once he/she had contracted the status of *mudabbar(a)*.

792 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And when the slave is [jointly-owned] between two [men], and one of them contracts <i>tadbīr</i> with his portion (<i>naṣībahu</i>) while the other manumits unconditionally (<i>a‘taqa... batāt^{an}</i>); if he [the <i>mu‘tiq</i>] is solvent, then the slave is free, all of him, and he owes half of his value, and his <i>walā’</i> belongs to him. But if he is insolvent, then his portion of him is free, while the portion of his <i>sharīk</i> is <i>mudabbbar</i>. And whosoever claims that he cannot sell the <i>mudabbbar</i>; he is obliged to nullify (<i>yubṭila</i>) the other <i>‘itq</i> and treat him as a <i>mudabbbar</i>, all of him, when the first <i>mudabbbar</i> is solvent — because the <i>tadbīr</i> of the first is an <i>‘itq</i>, and the first <i>‘itq</i> has priority over (<i>awlā min</i>) the other.	792 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَ الْعَبْدُ بَيْنَ اثْنَيْنِ؛ فَدَبَّرَ أَحَدُهُمَا نَصِيبَهُ وَأَعْتَقَ الْآخَرَ بَتَاءً، فَإِنْ كَانَ مُوسِرًا فَالْعَبْدُ حُرٌّ كُلُّهُ وَعَلَيْهِ نَصْفُ قِيَمَتِهِ وَلَهُ وَلَاؤُهُ، وَإِنْ كَانَ مُعْسِرًا فَنَصِيبُهُ مِنْهُ حُرٌّ وَنَصِيبُ شَرِيكِهِ مُدَبَّرٌ. وَمَنْ زَعَمَ أَنَّهُ لَا يَبِيعُ الْمُدَبَّرَ فَيَلْزِمُهُ أَنْ يُبْطَلَ الْعِتْقُ الْآخَرَ وَيَجْعَلَهُ مُدَبَّرًا كُلَّهُ إِذَا كَانَ الْمُدَبَّرُ الْأَوَّلُ مُوسِرًا؛ لِأَنَّ تَدْبِيرَ الْأَوَّلِ عِتْقٌ وَالْعِتْقُ الْأَوَّلُ أَوْلَى مِنَ الْآخَرِ.
793 – He said: And thus have professed the <i>Ahl al-Qiyās</i> who do not sell the <i>mudabbbar</i>.¹⁷	793 – قَالَ: وَهَكَذَا قَالَ أَهْلُ الْقِيَاسِ الَّذِينَ لَمْ يَبِيعُوا الْمُدَبَّرَ.

¹⁷ It seems likely in this case that al-Shāfi‘ī does not refer to any sort of ideological collective through the appellation of *Ahl al-Qiyās*; rather, he is merely singling out those who exercise *qiyās* in general, and with specific regard to the *mas‘ala* at hand. This may also, however, be read in an accusatory light; i.e., the *Ahl al-Qiyās* are such as who prefer *qiyās* over the confirmed practice of one of the Prophet’s Companions — in this case, ‘Ā’isha.

Bāb fi'l-Mukātab

Chapter on the Slave Contracted to Purchase His Freedom (al-Mukātab) ¹	بَابُ فِي الْمُكَاتَّبِ
794 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man contracts <i>mukātaba</i> with the <i>mukātab</i> at his own [the <i>mukātab</i> 's] expense (<i>'alā nafsihi</i>); then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: His [the <i>mukātab</i> 's] <i>māl</i> belongs to his <i>mawlā</i> , when the <i>mukātab</i> does not stipulate that. And he [Abū Yūsuf] embraces it.	794 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَاتَبَ الرَّجُلُ الْمُكَاتَّبَ عَلَى نَفْسِهِ، فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: مَالُهُ لِمَوْلَاهُ إِذَا لَمْ يَشْتَرِطِ الْمُكَاتَّبُ ذَلِكَ. وَبِهِ يَأْخُذُ.
795 – But Ibn Abī Laylā used to say: The <i>māl</i> belongs to the <i>mukātab</i> , even if he does not stipulate.	795 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الْمُكَاتَّبُ لَهُ الْمَالُ وَإِنْ لَمْ يَشْتَرِطِ.
796 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man contracts <i>mukātaba</i> with his slave, and in the possession of the slave there is <i>māl</i> ; the <i>māl</i> belongs to the master — because no <i>māl</i> belongs to the slave, unless the <i>mukātab</i> ² stipulates his <i>māl</i> to the debit of the master — then it belongs to him by stipulation (<i>bi'l-sharṭi</i>), and this is the <i>ma'nā</i> of the Sunna, univocally (<i>naṣṣ^{an}</i>). The Messenger of God, may God bless and save him, said: «Whosoever sells a slave while he [the slave] has <i>māl</i> ; his <i>māl</i> belongs to the seller, unless the purchaser stipulates (<i>yashtarīṭa al-mubtā'</i>).» And the <i>mukātab</i> can be nothing other than either: [1] a purchaser of himself (<i>mushtariy^{an} li-nafsihi</i>), and the <i>rabb al-mukātab</i> is a seller (<i>bā'i^{un}</i>) — and the Messenger of God, may God bless and save him, has made the <i>māl</i> belong to him [the seller]; or [he can be] [2] non-departing (<i>ghayra khārijⁱⁿ</i>) from the <i>milk</i> of his <i>mawlā</i> — and be, with him, like the dependent one (<i>al-mu'allaq</i>). And that is more appropriate (<i>aḥrā</i>), that he does not own to the debit of his <i>mawlā</i> such <i>māl</i> as belonged to his <i>mawlā</i> before the <i>kitāba</i> . And the purchaser who gave his <i>māl</i> for the slave is more entitled (<i>awlā</i>) to be a	796 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَاتَبَ الرَّجُلُ عَبْدَهُ، وَبِيدِ الْعَبْدِ مَالٌ، فَالْمَالُ لِلْسَيِّدِ؛ لِأَنَّهُ لَا مَالَ لِلْعَبْدِ إِلَّا أَنْ يَشْتَرِطَ الْمُكَاتَّبُ عَلَى السَيِّدِ مَالَهُ فَيَكُونُ لَهُ بِالشَّرْطِ، وَهَذَا مَعْنَى السُّنَّةِ نَصًّا. قَالَ رَسُولُ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «مَنْ بَاعَ عَبْدًا وَلَهُ مَالٌ، فَمَالُهُ لِلْبَائِعِ إِلَّا أَنْ يَشْتَرِطَ الْمُبْتَاعُ» وَلَا يَعْدُو الْمُكَاتَّبُ أَنْ يَكُونَ مُشْتَرِيًا لِنَفْسِهِ فَرَبُّ الْمُكَاتَّبِ بَائِعٌ، وَقَدْ جَعَلَ لَهُ رَسُولُ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – الْمَالُ، أَوْ يَكُونُ غَيْرَ خَارِجٍ مِنْ مِلْكِ مَوْلَاهُ فَيَكُونُ مَعَهُ كَالْمُعْلَقِ، فَذَلِكَ أُخْرَى أَنْ لَا يَمْلِكَ عَلَى مَوْلَاهُ مَالًا كَانَ لِمَوْلَاهُ قَبْلَ الْكِتَابَةِ، وَالْمُشْتَرِي الَّذِي أَعْطَى مَالَهُ فِي الْعَبْدِ أَوْلَى أَنْ يَكُونَ مَالِكًا لِمَالِ الْعَبْدِ بِشِرَاءِ الْعَبْدِ؛ لِأَنَّهُ لَوْ مَاتَ مَكَانَهُ

¹ (Hassūn, vol.9, pt.14, 139-41; Schacht: *Tr. I*, 138-140).

² Hassūn has *mukātīb*, rather than *mukātab*. I assume this to be a typo, as it is difficult to make sense of otherwise.

<i>mālik</i> of the <i>māl</i> of the slave, by the purchase (<i>shirāʾ</i>) of the slave — because if he [the slave] dies on the spot (<i>māta makānahu</i>), he dies from his [the purchaser's] <i>māl</i> — than the <i>mukātab</i> who, if he dies, nothing is incumbent upon him. ³	مَاتَ مِنْ مَالِهِ مِنَ الْمُكَاتَبِ الَّذِي لَوْ مَاتَ لَمْ يَلْزَمُهُ شَيْءٌ.
797 – And when the <i>mukātab</i> says: I have defaulted (<i>qad ʿajaztu</i>); and he breaks (<i>kasara</i>) his <i>mukātaba</i> , and his <i>mawlā</i> returns him to slavery (<i>raddahu... fi'l-riqqi</i>); then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: That is <i>jāʾiz</i> . And he [Abū Yūsuf] embraces this [doctrine].	797 – وَإِذَا قَالَ الْمُكَاتَبُ: قَدْ عَجَزْتُ. وَكَسَرَ مُكَاتَبَتَهُ، وَرَدَّهُ مَوْلَاهُ فِي الرِّقِّ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: ذَلِكَ جَائِزٌ. وَبِهَذَا يَأْخُذُ.
798 – And it has reached us concerning ʿAbd Allāh b. ʿUmar that he returned [to slavery] a <i>mukātab</i> belonging to him, when he defaulted. And he broke his <i>mukātaba</i> other than before a <i>qāḍī</i> .	798 – وَقَدْ بَلَغَنَا عَنْ عَبْدِ اللَّهِ بْنِ عُمَرَ أَنَّهُ رَدَّ مُكَاتَبًا لَهُ حِينَ عَجَزَ، وَكَسَرَ مُكَاتَبَتَهُ عِنْدَ غَيْرِ قَاضٍ.
799 – But Ibn Abī Laylā used to say: That is not permitted except before a <i>qāḍī</i> .	799 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا يَجُوزُ ذَلِكَ إِلَّا عِنْدَ قَاضٍ.
800 – And likewise, if he [the <i>mukātab</i>] comes to a <i>qāḍī</i> and says: I have defaulted. Then indeed Abū Ḥanīfa, may God be pleased with him, used to return him [to slavery]. And he [Abū Yūsuf] embraces this [doctrine].	800 – وَكَذَلِكَ لَوْ أَتَى الْقَاضِي فَقَالَ: قَدْ عَجَزْتُ. فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَرُدُّهُ. وَبِهَذَا يَأْخُذُ.

³ This complicated *masʿala* addresses an apparent contradiction in the question of whether or not a slave can actually own *māl*. We know that, according to al-Shāfiʿī, whatever the slave “owns” is the *de jure* property of the master. So, if we understand that — by *mukātaba* — the slave is allowed the opportunity to work (on the side) to earn his ransom, we are struck with the apparent inconsistency whereby a slave “pays” what he may “own” only in the *de facto* sense. Furthermore, whatever the slave “owned” before the *mukātaba* may become his *de jure* property if stipulated in the *mukātaba*. Al-Shāfiʿī confirms this with the Prophetic *ḥadīth* whereby the purchaser of a slave must include the slave’s *māl* as a condition in the *bayʿ*, or it will remain with the current master. In the case of *mukātaba*, it is the slave who is the purchaser, and by including the *māl* of the purchased (himself) as a condition in the *mukātaba*, he not only guarantees that what he earns on the side will be his to pay as ransom, but he will also become the *de jure* owner of what he “owned” before the *mukātaba*. Al-Shāfiʿī finds it inappropriate that he should come to possess through the *mukātaba* what in fact belonged to the master before the *mukātaba*, so he prefers to treat the *mukātab* as still owned by the master, but in the position of a dependent. In addition to this, he reasons that the (external) purchaser of a slave has more right to the *de facto* *māl* of the slave, than does the slave who is purchasing himself through *mukātaba*. Why? Because if the slave dies on the spot, the external purchaser may still be indebted to the seller (and in greater need of the *māl* which came along with the slave); but if the slave himself is the purchaser, and he dies, both object and debtor perish.

801 – But Ibn Abī Laylā used to say: I do not return him [to slavery] until there combine to his debit two instalments (<i>najmāni</i>) which have come due for him (<i>qad ḥallā 'alayhi</i>), ⁴ on the day on which he comes suing to him (<i>fī yawmⁱⁿ khāṣama ilayhi</i>).	801 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا أَرُدُّهُ حَتَّى يَجْتَمِعَ عَلَيْهِ نَجْمَانِ قَدْ حَلَا عَلَيْهِ فِي يَوْمٍ خَاصَمَ إِلَيْهِ.
802 – Then Abū Yūsuf said, afterwards: I don't return him until I investigate (<i>anzura</i>); and if his instalment is near, and it is hoped for (<i>yurjā</i>), I don't press him for it (<i>lam yu'ajjal 'alayhi</i>).	802 – ثُمَّ قَالَ أَبُو يُوسُفَ بَعْدُ: لَا أَرُدُّهُ حَتَّى أَنْظُرَ، فَإِنْ كَانَ نَجْمُهُ قَرِيْبًا وَكَانَ يُرْجَى لَمْ يُعَجَّلْ عَلَيْهِ.
803 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the <i>mukātab</i> says: I have defaulted, at the coming due of one of his instalments (<i>'inda maḥalli najmⁱⁿ min nujūmihi</i>); he is just as he says. And he is like one who was not contracted in <i>mukātaba</i> (<i>lam yukātab</i>) – his master sells him, and does with him as he wishes, whether that is before a <i>qāḍī</i> or not.	803 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا قَالَ الْمُكَاتَبُ: قَدْ عَجَزْتُ. عِنْدَ مَحَلِّ نَجْمٍ مِنْ نُجُومِهِ، فَهُوَ كَمَا قَالَ، وَهُوَ كَمَنْ لَمْ يُكَاتَبْ؛ يَبِيعُهُ سَيِّدُهُ وَيَصْنَعُ بِهِ مَا شَاءَ، كَانَ ذَلِكَ عِنْدَ قَاضٍ أَوْ لَمْ يَكُنْ.
804 – Al-Shāfi'ī, may God Most High have mercy upon him, said: Al-Thaqafī reported to us, and Ibn 'Ulayya, on the authority of Ayyūb, on Nāfi', on Ibn 'Umar, may God Most High be pleased with them both, that he returned a <i>mukātab</i> of his, who defaulted, to slavery.	804 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: أَخْبَرَنَا الثَّقَفِيُّ، وَابْنُ عُلَيَّةَ، عَنْ أَيُّوبَ، عَنْ نَافِعٍ، عَنْ ابْنِ عُمَرَ رَضِيَ اللَّهُ تَعَالَى عَنْهُمَا أَنَّهُ رَدَّ مُكَاتَبًا لَهُ عَجَزَ فِي الرِّقِّ.
805 – Al-Shāfi'ī said: Sufyān b. 'Uyayna reported to us, on the authority of Shabīb b. Gharqada, that he witnessed Shurayḥ return a <i>mukātab</i> who defaulted to slavery.	805 – قَالَ الشَّافِعِيُّ: أَخْبَرَنَا سُفْيَانُ بْنُ عُيَيْنَةَ، عَنْ شَبِيبِ بْنِ غَرْقَدَةَ أَنَّهُ شَهِدَ شُرَيْحًا رَدَّ مُكَاتَبًا عَجَزَ فِي الرِّقِّ.
806 – And when the <i>mukātab</i> marries (<i>tazawwaja</i>), or gives a gift (<i>wahaba hibat^{an}</i>), or manumits a slave, or contracts <i>kafāla</i> , or a man contracts <i>kafāla</i> on his behalf (<i>kafala 'anhu</i>) to his <i>mawlā</i> for that which he owes him [in <i>mukātaba</i> payment]; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: This, all of it, is <i>bāṭil</i> , not permitted. And he [Abū Yūsuf] embraces it.	806 – وَإِذَا تَزَوَّجَ الْمُكَاتَبُ، أَوْ وَهَبَ هِبَةً، أَوْ أَعْتَقَ عَبْدًا، أَوْ كَفَلَ بِكَفَالَةٍ، أَوْ كَفَلَ عَنْهُ رَجُلٌ لِمَوْلَاهُ بِالَّذِي عَلَيْهِ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: هَذَا كُلُّهُ بَاطِلٌ لَا يَجُوزُ. وَبِهِ يَأْخُذُ.

⁴ Ḥassūn and Maṭrajī merely have حَلَا, which I can't make sense of. Judging by the '*inda maḥalli*' of §803, I have therefore preferred حَلَا.

807 – But Ibn Abī Laylā used to say: His <i>nikāḥ</i> and his <i>kafāla</i> are <i>bāṭil</i>. But that for which a man guarantees (<i>takafalla</i>) on his behalf to his <i>mawlā</i>; it is <i>jā'iz</i>. And as for his manumitting and his gifting; it is suspended (<i>mawqūf^{un}</i>). And if he is manumitted, I put that into effect; but if he returns as a slave (<i>raja'a mamlūk^{an}</i>), then that, all of it, is rejected (<i>mardūd^{un}</i>).	807 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: نِكَاحُهُ وَكَفَالَتُهُ بَاطِلٌ، وَمَا تَكْفَلُ بِهِ رَجُلٌ عَنْهُ لِمَوْلَاهُ فَهُوَ جَائِزٌ، وَأَمَّا عَتَقُهُ وَهَبْتُهُ فَهُوَ مَوْقُوفٌ. فَإِنْ عَتَقَ أَمْضَى ذَلِكَ وَإِنْ رَجَعَ مَمْلُوكًا فَذَلِكَ كُلُّهُ مَرْدُودٌ.
808 – But Abū Ḥanīfa, may God Most High have mercy upon him, said: How can his <i>'itq</i> and his <i>hiba</i> be permitted, and how can the <i>kafāla</i> on his behalf to his <i>mawlā</i> be permitted?	808 – وَقَالَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى: كَيْفَ يَجُوزُ عَتَقُهُ وَهَبْتُهُ، وَكَيْفَ تَجُوزُ الْكَفَالَةُ عَنْهُ لِمَوْلَاهُ؟
809 – Have you considered (<i>ara'ayta</i>) a man who contracts <i>kafāla</i> to a man on behalf of his slave (<i>'abdihi</i>); is it [the <i>kafāla</i>] not <i>bāṭil</i>? Likewise his <i>mukātab</i>. And he [Abū Yūsuf] embraces this [doctrine].	809 – أَرَأَيْتَ رَجُلًا كَفَلَ لِرَجُلٍ عَنْ عَبْدِهِ كَفَالَةً، أَلَيْسَتْ بَاطِلًا؟ فَكَذَلِكَ مُكَاتَبُهُ. وَبِهَذَا يَأْخُذُ.
810 – And it has reached us on the authority of Ibrāhīm al-Nakhaṭī, that he said: It is not permitted that a man guarantee (<i>yakfula</i>) to a man the <i>mukātaba</i> of his slave; because he is his slave, and he has merely guaranteed for him his [own] property (<i>kafala lahu bi-mālihi</i>).⁵	810 – وَبَلَّغْنَا عَنْ إِبْرَاهِيمَ النَّخَعِيِّ أَنَّهُ قَالَ: لَا يَجُوزُ أَنْ يَكْفُلَ الرَّجُلُ لِلرَّجُلِ بِمُكَاتَبَةِ عَبْدِهِ؛ لِأَنَّهُ عَبْدُهُ وَإِنَّمَا كَفَلَ لَهُ بِمَالِهِ.
811 – And Abū Ḥanīfa, may God have mercy upon him, said: When he has ready <i>māl</i> (<i>māl^{un} ḥāḍir^{un}</i>), and he says: I will pay it (<i>u'addīhi</i>) today or tomorrow; then indeed he [Abū Ḥanīfa] used to say: He postpones it (<i>yu'ajjiluhu</i>) three days.	811 – وَقَالَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ: إِذَا كَانَ لَهُ مَالٌ حَاضِرٌ فَقَالَ: أُؤَدِّيهِ الْيَوْمَ أَوْ غَدًا، فَإِنَّهُ كَانَ يَقُولُ: يُؤَجِّلُهُ ثَلَاثَةَ أَيَّامٍ.
812 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the <i>mukātab</i> marries, or gifts, or manumits, or contracts <i>kafāla</i> on someone's behalf; that, all of it, is <i>bāṭil</i>, because in this there is a destruction (<i>itlāf^{un}</i>) of his <i>māl</i>, while he is not one who is authorized over the <i>māl</i> (<i>huwa ghayru musallaṭⁱⁿ 'alā al-māli</i>).⁶ As for the marriage, we nullify it due to the state of slavery (<i>bi'l-'ubūdiyyati</i>) in which there belongs to the slave no right to marry,	812 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا تَزَوَّجَ الْمُكَاتَبُ، أَوْ وَهَبَ، أَوْ أَعْتَقَ، أَوْ كَفَلَ عَنْ أَحَدٍ بِكَفَالَةٍ فَذَلِكَ كُلُّهُ بَاطِلٌ؛ لِأَنَّ فِي هَذَا إِتْلَافًا لِمَالِهِ وَهُوَ غَيْرُ مُسَلَّطٍ عَلَى الْمَالِ، أَمَّا التَّزْوُجُ فَابْطُلَانُهُ بِالْعُبُودِيَّةِ الَّتِي فِيهِ أَنَّهُ لَا يَكُونُ لِلْعَبْدِ أَنْ يَنْكِحَ إِلَّا بِإِذْنِ سَيِّدِهِ.

⁵ All too common in post-dating projects are arguments based on assumptions that older material can't possibly be sophisticated; somehow, if it is not crude, it is not old. Schacht (*Origins*, 235) discusses this *mas'ala* to some extent, concluding it “so incisive and abstract that the historical Ibrāhīm cannot possibly be credited with it.”

⁶ A reiteration of al-Shāfi'ī's stance that the *mukātab* is like a dependent.

except by the permission of his master (<i>bi-idhni sayyidihi</i>).	
813 – And if a man contracts <i>kafāla</i> to the <i>rabb al-mukātab</i> for the <i>kitāba</i> ; the <i>kafāla</i> is <i>bāṭila</i> , due to the fact that he is merely guaranteeing his <i>māl</i> for him, on behalf of his <i>māl</i> .	813 – وَلَوْ كَفَلَ رَجُلٌ لِرَبِّ الْمُكَاتَبِ بِالْكِتَابَةِ كَانَتِ الْكَفَالَةُ بَاطِلَةً؛ مِنْ قَبْلِ أَنَّهُ إِنَّمَا تَكْفُلُ لَهُ بِمَالِهِ عَنْ مَالِهِ.

Bāb fi'l-Aymān [II]

[Second] Chapter on Oaths (al-Aymān) ¹	بَابُ فِي الْأَيْمَانِ
814 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the man says to his slave: If I sell you, you are free (<i>in bi'tuka fa-anta ḥurr^{um}</i>) – then he sells him; then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: He is not manumitted (<i>lā yu'taqu</i>), because the <i>'itq</i> falls upon him only after the <i>bay'</i> , and after he departs from his <i>milk</i> and he comes to belong to another (<i>ṣāra li-ghayrihi</i>). And he [Abū Yūsuf] embraces this [doctrine].	814 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا قَالَ الرَّجُلُ لِعَبْدِهِ: إِنْ بَعَيْتَكَ فَأَنْتَ حُرٌّ. ثُمَّ بَاعَهُ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: لَا يُعْتَقُ؛ لِأَنَّ الْعِتْقَ إِنَّمَا وَقَعَ عَلَيْهِ بَعْدَ الْبَيْعِ وَبَعْدَمَا خَرَجَ مِنْ مِلْكِهِ وَصَارَ لغيرِهِ. وَبِهَذَا يَأْخُذُ.
815 – But Ibn Abī Laylā used to say: The <i>'itq</i> occurs, with respect to the <i>māl</i> of the seller. But he returns the price to the buyer; because he swore on the day that he swore (<i>ḥalafa yawma ḥalafa</i>), while he was in his <i>milk</i> .	815 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: يَقَعُ الْعِتْقُ مِنْ مَالِ الْبَائِعِ وَيَرُدُّ الثَّمَنَ عَلَى الْمُشْتَرِي؛ لِأَنَّهُ حَلَفَ يَوْمَ حَلَفَ وَهُوَ فِي مِلْكِهِ.
816 – And likewise if the seller says: If I speak to so-and-so, you are free; and he sells him, then speaks to so-and-so; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: He is not manumitted.	816 – وَكَذَلِكَ لَوْ قَالَ الْبَائِعُ: إِنْ كَلَّمْتُ فُلَانًا فَأَنْتَ حُرٌّ. فَبَاعَهُ ثُمَّ كَلَّمَ فُلَانًا، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا يُعْتَقُ.
817 – Don't you see (<i>alā tarā</i>) that he has exited from the <i>milk</i> of the oath-taking seller (<i>al-bā'i al-ḥālifi</i>)? Have you considered (<i>ara'ayta</i>) [what would happen] if the buyer manumitted him; would he return to the oath-taker (<i>al-ḥālif</i>), while he has become a <i>mawlā</i> of the buyer?	817 – أَلَا تَرَى أَنَّهُ قَدْ خَرَجَ مِنْ مِلْكِ الْبَائِعِ الْحَالِفِ، أَرَأَيْتَ لَوْ أَعْتَقَهُ الْمُشْتَرِي أَيْرَجِعُ إِلَى الْحَالِفِ وَقَدْ صَارَ مَوْلَى لِلْمُشْتَرِي؟
818 – Have you considered (<i>ara'ayta</i>) [what would happen] if the buyer laid claim to him, and claimed that he was his son, and the <i>qāḍī</i> confirmed his <i>nasab</i> – he being a man from among the Arabs – and made him his son, then the seller spoke to that man about whom he swore that he will not	818 – أَرَأَيْتَ لَوْ أَنَّ الْمُشْتَرِي ادَّعَاهُ وَزَعَمَ أَنَّهُ ابْنُهُ، فَأَثْبَتَ الْقَاضِي نَسَبَهُ – وَهُوَ رَجُلٌ مِنَ الْعَرَبِ – وَجَعَلَهُ ابْنَهُ، ثُمَّ كَلَّمَ الْبَائِعَ ذَلِكَ الرَّجُلَ الَّذِي حَلَفَ عَلَيْهِ أَنْ لَا يُكَلِّمَهُ، أَبْطَلَ

¹ (Ḥassūn, vol.9, pt.14, 142-6; Schacht: *Tr. I*, 141-144).

speak to him; are they made <i>bāṭil</i> (a-<i>baṭala</i>),² the <i>da'wā</i> of this one and his <i>nasab</i>, and does the <i>walā'</i> return to the first?	دَعَوَى هَذَا وَنَسَبَهُ، وَيَرْجِعُ الْوَلَاءُ إِلَى الْأَوَّلِ.
819 – But Ibn Abī Laylā used to say regarding this: The <i>walā'</i> returns to the first, and the price is returned, and the <i>nasab</i> is nullified (<i>yabṭulu</i>).	819 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ فِي هَذَا: يَرْجِعُ الْوَلَاءُ إِلَى الْأَوَّلِ وَيُرَدُّ الثَّمَنُ وَيَبْطُلُ النَّسَبُ.
820 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the man says to his slave: If I sell you, you are free – then he sells him, [though] not by a <i>bay'</i> of <i>khiyār</i> by <i>shart</i>; he is free when the sale is completely contracted (<i>hīna 'aqada al-bay'</i>). And I have only claimed that he is manumitted due to the fact that the Prophet, may God bless and save him, said: «The two parties contracting <i>bay'</i> have option (<i>al-mutabāy'i āni bi'l-khiyār</i>) so long as they have not departed company (<i>mā lam yatafarraqā</i>).»	820 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا قَالَ الرَّجُلُ لِعَبْدِهِ: إِنْ بَعْتُكَ فَأَنْتَ حُرٌّ. فَبَاعَهُ بَيْعًا لَيْسَ بِبَيْعِ خِيَارٍ بِشَرْطٍ، فَهُوَ حُرٌّ حِينَ عَقَدَ الْبَيْعَ، وَإِنَّمَا زَعَمْتُ أَنَّهُ يُعْتَقُ مِنْ قَبْلِ أَنْ النَّبِيُّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – قَالَ: «الْمُتَبَايِعَانِ بِالْخِيَارِ مَا لَمْ يَتَفَرَّقَا.»
821 – Al-Shāfi'ī said: And their parting company (<i>tafarquhumā</i>): it is their parting company from their location (<i>maqāmihimā</i>) in which they mutually contract <i>bay'</i> (<i>tabāyā'ā fihi</i>). For when there belongs to the <i>mālik</i> of the slave, who swore to his <i>itq</i>, the right to grant permission to the sale, and to its rejection (<i>ijāzatu al-bay'i wa radduhu</i>), his <i>milk</i> has not been severed from him with total severance.³	821 – قَالَ الشَّافِعِيُّ: وَتَفَرُّقُهُمَا؛ تَفَرُّقُهُمَا عَنْ مَقَامِهِمَا الَّذِي تَبَايَعَا فِيهِ، فَلَمَّا كَانَ لِمَالِكِ الْعَبْدِ الْحَالِفِ بَعْتُهُ إِجَازَةُ الْبَيْعِ وَرَدُّهُ، كَانَ لَمْ يَنْقَطِعْ مِلْكُهُ عَنْهُ الْإِنْقِطَاعَ كُلَّهُ.
822 – And if he initiates the <i>itq</i>, in this state (<i>fi hādhihi al-hāli</i>), for his slave whom he sells; he is manumitted, and he is manumitted by the breaking of the oath (<i>bi'l-ḥinṭhi</i>).⁴	822 – وَلَوْ ابْتَدَأَ الْعَتَقَ فِي هَذِهِ الْحَالِ لِعَبْدِهِ الَّذِي بَاعَهُ عَتَقَ فَعَتَقَ بِالْحِنْثِ.

² I have preferred, rather than *أُبْطِلَ* in the last part of this section, that it should read *أَبْطُلَ*. In this way it conforms to the more typical pattern of *ara'ayta* + conditional + interrogative *أ*. This also seems supported by Ibn Abī Laylā's use of *yabṭulu* in §819.

³ That is to say, he is still in a position to manumit.

⁴ §§822 and 825: To understand the significance of *al-ḥinṭh*, perhaps it is best to think of the owner as making his/her original avowal in a context of atonement; i.e.: “I have sworn not to do action X; if I do action X, you are free [as my act of *kaffāra*].”

823 – And even if he has sold him by a bay' of khiyār; it is likewise, according to me — because I claim that the khiyār is only ever after the bay'.⁵	823 – وَلَوْ كَانَ بَاعَهُ بَيْعَ خِيَارٍ كَانَ هَكَذَا عِنْدِي؛ لِأَنِّي أَرْعُمُ أَنَّ الْخِيَارَ إِنَّمَا هُوَ بَعْدَ الْبَيْعِ.
824 – And whosever claims that the khiyār is permitted with the completion of the sale (ma'a 'aqd al-bay'); he is not manumitted — because the transaction-concluding handclasp (al-ṣafqata) extricated him (akhrajat-hu) from the milk of the oath-taker, with an extraction regarding which he has no khiyār; and the 'itq falls upon him while he is outside of his milk.⁶	824 – وَمَنْ زَعَمَ أَنَّ الْخِيَارَ يَجُوزُ مَعَ عَقْدِ الْبَيْعِ لَمْ يُعْتَقْ؛ لِأَنَّ الصَّفْقَةَ أَخْرَجَتْهُ مِنْ مِلْكِ الْحَالِفِ خُرُوجًا لَا خِيَارَ لَهُ فِيهِ، فَوَقَعَ الْعِتْقُ عَلَيْهِ وَهُوَ خَارِجٌ مِنْ مِلْكِهِ.
825 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And likewise if a man says to his slave-boy (ghulāmihi): You are free if I speak to so-and-so, or I enter the house; then he sells him, and parts company with (fāraqa) the buyer, then he speaks to so-and-so, or enters the house; he is not manumitted — because the oath-breaking (al-ḥinṭh) occurred while he was outside of his milk.	825 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَهَكَذَا لَوْ قَالَ رَجُلٌ لِغُلَامِهِ: أَنْتَ حُرٌّ لَوْ كَلَّمْتُ فُلَانًا أَوْ دَخَلْتُ الدَّارَ. فَبَاعَهُ وَفَارَقَ الْمُشْتَرِي ثُمَّ كَلَّمَ فُلَانًا أَوْ دَخَلَ الدَّارَ لَمْ يُعْتَقْ؛ لِأَنَّ الْحِنْثَ وَقَعَ وَهُوَ خَارِجٌ مِنْ مِلْكِهِ.
826 – And when the man says to his wife: You are unilaterally divorced (ṭāliq^{un}) if I speak to so-and-so, then he unilaterally divorces her once, irrevocably (ṭallaqahā wāḥidatⁱⁿ bā'inat^{un}) — or once, maintaining possession of revocation (yamliku al-raǧ'ata) —, and her 'idda comes to an end, then he speaks to so-and-so; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: There does not occur for him the ṭalāq to which he swore (ḥalafa bihi), because she has exited from his milk. Don't you see/opine (alā tarā) that, if she marries another husband besides	826 – وَإِذَا قَالَ الرَّجُلُ لِمَرْأَتِهِ: أَنْتِ طَالِقٌ إِنْ كَلَّمْتُ فُلَانًا ثُمَّ طَلَّقَهَا وَاحِدَةً بَائِنَةً أَوْ وَاحِدَةً يَمْلِكُ الرَّجْعَةَ وَانْقَضَتْ عِدَّتُهَا ثُمَّ كَلَّمَ فُلَانًا، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا يَقَعُ عَلَيْهِ الطَّلَاقُ الَّذِي حَلَفَ بِهِ؛ لِأَنَّهَا قَدْ خَرَجَتْ مِنْ مِلْكِهِ. أَلَا تَرَى أَنَّهَا لَوْ تَزَوَّجَتْ زَوْجًا غَيْرَهُ ثُمَّ كَلَّمَ الْأَوَّلَ فُلَانًا وَهِيَ

⁵ In other words — with the 'itq hanging upon completion of the bay' — the stipulation of khiyār is irrelevant, since it can only happen, according to al-Shāfi'ī, after the bay'.

⁶ The distinction here is a fine one. If you believe, like al-Shāfi'ī, that khiyār can only ever happen after the bay' is completed, then this arrangement will work — because the slave does not leave the milk of the oath-taker until after the condition of the oath has been met (the contract is complete, but the transfer of milk has not occurred, in a state of khiyār). If, however, you believe that khiyār is permitted only until the completion of the bay', then the arrangement will not work — because the completion of the bay' becomes a simultaneous transfer of milk. The ḥinṭh is dependent upon, and thus posterior to, the completion of the bay'. But since bay' and exit-from-milk are simultaneous, then 'itq can only fall upon a slave no longer owned by the mu'tiq — and this cannot be permitted.

him, then the first [husband] speaks to so-and-so while she is in the keeping of ('inda) this man; the <i>ṭalāq</i> does not fall upon her while she is under (<i>taḥta</i>) another besides him? And he [Abū Yūsuf] embraces it.	عِنْدَ هَذَا الرَّجُلِ لَمْ يَقَعْ عَلَيْهَا الطَّلَاقُ وَهِيَ تَحْتَ غَيْرِهِ. وَبِهِ يَأْخُذُ.
827 – But Ibn Abī Laylā used to say: The <i>ṭalāq</i> falls upon her, because he swore that (<i>ḥalafa bi-dhālika</i>) while she was within his <i>milk</i> .	827 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: يَقَعْ عَلَيْهَا الطَّلَاقُ؛ لِأَنَّهُ حَلَفَ بِذَلِكَ وَهِيَ فِي مِلْكِهِ.
828 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And if he says to his wife: You are <i>ṭāliq</i> if I speak to so-and-so, then he contracts <i>khulʿ</i> with her (<i>khālaʿahā</i>), then he speaks to so-and-so; no <i>ṭalāq</i> falls upon her, due to the fact that the <i>ṭalāq</i> fell while she was outside his <i>milk</i> .	828 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَلَوْ قَالَ لِامْرَأَتِهِ: أَنْتِ طَالِقٌ إِنْ كَلَّمْتُ فُلَانًا ثُمَّ خَالَعَهَا ثُمَّ كَلَّمْتُ فُلَانًا، لَمْ يَقَعْ عَلَيْهَا طَلَاقٌ، مِنْ قَبْلِ أَنْ الطَّلَاقَ وَقَعَ وَهِيَ خَارِجَةٌ مِنْ مِلْكِهِ.
829 – And likewise if he unilaterally divorces her once, and her <i>ʿidda</i> expires, then he speaks to so-and-so; the <i>ṭalāq</i> does not occur for him, because the <i>ṭalāq</i> does not fall except upon a wife, and she is not a wife. But if he marries her with a new <i>nikāḥ</i> ; he does not break his oath (<i>lam yahṇath</i>) for this <i>ṭalāq</i> , even if he speaks to him [so-and-so] anew – because the <i>ḥinṭh</i> does not occur but once, and it has [already] occurred while she was outside of his <i>milk</i> .	829 – وَهَكَذَا لَوْ طَلَّقَهَا وَاحِدَةً فَأَنْقَضَتْ عِدَّتُهَا ثُمَّ كَلَّمْتُ فُلَانًا، لَمْ يَقَعْ عَلَيْهِ الطَّلَاقُ؛ لِأَنَّ الطَّلَاقَ لَا يَقَعْ إِلَّا عَلَى زَوْجَةٍ وَهِيَ لَيْسَتْ بِزَوْجَةٍ، وَلَوْ نَكَحَهَا نِكَاحًا جَدِيدًا لَمْ يَحْنُثْ بِهَذَا الطَّلَاقِ وَإِنْ كَلَّمَهُ كَلَامًا جَدِيدًا؛ لِأَنَّ الْحِنْثَ لَا يَقَعُ إِلَّا مَرَّةً، وَقَدْ وَقَعَ وَهِيَ خَارِجَةٌ مِنْ مِلْكِهِ.
830 – He [Abū Yūsuf] said: And when the man says: Every woman I marry, forever, she is triply-divorced (<i>ṭāliq^{un} thalāth^{un}</i>), and every slave I come to own, he is free, for the sake of God, Most High (<i>li-wajhi Allāhi taʿālā</i>) – then he buys a slave and marries a woman; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: The <i>ʿitq</i> falls upon the slave, and the <i>ṭalāq</i> upon the woman.	830 – قَالَ: وَإِذَا قَالَ الرَّجُلُ: كُلُّ امْرَأَةٍ أَتَزَوَّجُهَا أَبَدًا فَهِيَ طَالِقٌ ثَلَاثًا، وَكُلُّ مَمْلُوكٍ أَمْلِكُهُ فَهُوَ حُرٌّ لَوْجِهَ اللَّهِ تَعَالَى. فَاشْتَرَى مَمْلُوكًا وَتَزَوَّجَ امْرَأَةً، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: يَقَعُ الْعِتْقُ عَلَى الْمَمْلُوكِ، وَالطَّلَاقُ عَلَى الْمَرْأَةِ.
831 – Don't you see/opine (<i>alā tarā</i>) that he unilaterally divorced after he owned (<i>ṭallaqa baʿdamā malaka</i>), and manumitted after he owned (<i>aʿtaqa baʿdamā malaka</i>)?	831 – أَلَا تَرَى أَنَّهُ طَلَّقَ بَعْدَمَا مَلَكَ وَأَعْتَقَ بَعْدَمَا مَلَكَ.

832 – And it has reached us concerning 'Alī, may God be pleased with him, that he used to say: There is no <i>ṭalāq</i> except after <i>nikāḥ</i> , and there is no <i>'itq</i> except after <i>milk</i> . And this only happens after <i>milk</i> , all of it.	832 – وَقَدْ بَلَّغْنَا عَنْ عَلِيٍّ رَضِيَ اللَّهُ عَنْهُ أَنَّهُ كَانَ يَقُولُ: لَا طَلَاقَ إِلَّا بَعْدَ نِكَاحٍ، وَلَا عِتْقَ إِلَّا بَعْدَ مِلْكٍ. فَهَذَا إِنَّمَا وَقَعَ بَعْدَ الْمِلْكِ كُلِّهِ.
833 – Don't you see/opine (<i>alā tarā</i>) that he, if he says: When I marry her or come to own her, then she is <i>ṭāliq</i> ; she becomes <i>ṭāliq</i> ? And he [Abū Yūsuf] embraces this [doctrine].	833 – أَلَا تَرَى أَنَّهُ لَوْ قَالَ: إِذَا تَزَوَّجْتُهَا أَوْ مَلَكَتُهَا فَهِيَ طَالِقٌ. صَارَتْ طَالِقًا؟ وَبِهَذَا يَأْخُذُ.
834 – Don't you see/opine (<i>alā tarā</i>) that a man, if he says to his female-slave (<i>amatihi</i>): Every boy you give birth to, he is free; then she gives birth after ten years; that he is free? And this is the <i>'itq</i> of what he does not own. ⁷	834 – أَلَا تَرَى أَنَّ رَجُلًا لَوْ قَالَ لِأَمَتِهِ: كُلُّ وَلَدٍ تَلِدِيْنَهُ فَهُوَ حُرٌّ، ثُمَّ وَلَدَتْ بَعْدَ عَشْرِ سِنِينَ كَانَ حُرًّا، فَهَذَا عِتْقُ مَا لَمْ يَمْلِكْ.
835 – Don't you see/opine (<i>alā tarā</i>) that a man, if there is a woman in his keeping, and he says to her: If I marry you, you are triply- <i>ṭāliq</i> ; then he unilaterally divorces her once, irrevocably (<i>bā'inat^{am}</i>), then he marries her during the <i>'idda</i> or after it; indeed, such [<i>a ṭāliq</i>] is falling upon her, because he swore while he owned her, and the <i>ṭalāq</i> occurred while he owned her?	835 – أَلَا تَرَى أَنَّ رَجُلًا لَوْ كَانَتْ عِنْدَهُ امْرَأَةٌ فَقَالَ لَهَا: إِنْ تَزَوَّجْتُكَ فَأَنْتِ طَالِقٌ ثَلَاثًا. ثُمَّ طَلَّقَهَا وَاحِدَةً بَائِنَةً ثُمَّ تَزَوَّجَهَا فِي الْعِدَّةِ أَوْ بَعْدَهَا أَنَّ ذَلِكَ وَقَعَ عَلَيْهَا؛ لِأَنَّهُ حَلَفَ وَهُوَ يَمْلِكُهَا وَوَقَعَ الطَّلَاقُ وَهُوَ يَمْلِكُهَا.
836 – Have you considered (<i>ara'ayta</i>) [what would happen] if he said to a slave belonging to him: If I buy you, you are free. Then he sells him, and buys him; is he not manumitted (<i>a-mā kāna yu'taqu</i>)?	836 – أَرَأَيْتَ لَوْ قَالَ لِعَبْدٍ لَهُ: إِنْ اشْتَرَيْتُكَ فَأَنْتَ حُرٌّ. فَبَاعَهُ ثُمَّ اشْتَرَاهُ، أَمَا كَانَ يُعْتَقُ.
837 – But Ibn Abī Laylā used to say: No <i>'itq</i> occurs in that, nor <i>ṭalāq</i> , unless he fixes a time (<i>yuwaqqita waqt^{am}</i>). And if he fixes a time, in known years (<i>fi sinīna ma'lūmatⁱⁿ</i>); or he says: however long so-and-so [masc.] or so-and-so [fem.] live; or he schedules for one of the garrison-towns (<i>miṣr^{an} min al-amṣāri</i>), or a city, or a tribe, [a period for which] he will neither marry [from it], nor buy from it a slave (<i>mamlūk^{am}</i>); then indeed Ibn Abī Laylā causes the <i>ṭalāq</i> to fall upon this. ⁸	837 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا يَقَعُ فِي ذَلِكَ عِتْقٌ وَلَا طَلَاقٌ إِلَّا أَنْ يُوقَّتَ وَقْتًا. فَإِنْ وَقَّتَ وَقْتًا فِي سِنِينَ مَعْلُومَةٍ أَوْ قَالَ: مَا عَاشَ فُلَانٌ أَوْ فُلَانَةٌ. أَوْ وَقَّتَ مِصْرًا مِنَ الْأَمْصَارِ أَوْ مَدِينَةً أَوْ قَبِيلَةً لَا يَتَزَوَّجُ وَلَا يَشْتَرِي مِنْهَا مَمْلُوكًا، فَإِنَّ ابْنَ أَبِي لَيْلَى يُوقِعُ عَلَى هَذَا الطَّلَاقَ.

⁷ This is because he swears concerning a child who does not exist at the time of swearing.

⁸ §837, *passim*: Keep in mind that it is quite possible a number of these seemingly strange *ṭalāq*-oath *masā'il* may have surfaced as real cases (as early anti-polygamy *nikāḥ* stipulations).

838 – And as for the <i>qawl</i> of Abū Ḥanīfa, may God Most High have mercy upon him, he indeed causes [the <i>ṭalāq</i>] to fall on the [fixed] time, and other than the [fixed] time.	838 – وَأَمَّا قَوْلُ أَبِي حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى فَإِنَّهُ يُوقِعُ فِي الْوَقْتِ وَغَيْرِ الْوَقْتِ.
839 – And it has reached us concerning 'Abd Allāh b. Mas'ūd, may God Most High be pleased with him, that he said: When he fixes a time, or a tribe, or so long as so-and-so [fem.] lives, it occurs [at that time].	839 – وَقَدْ بَلَّغْنَا عَنْ عَبْدِ اللَّهِ بْنِ مَسْعُودٍ رَضِيَ اللَّهُ تَعَالَى عَنْهُ أَنَّهُ قَالَ: إِذَا وَقَّتَ وَقْتًا أَوْ قَبِيلَةً أَوْ مَا عَاشَتْ فَلَانَةٌ وَقَعَ.
840 – When a man says: If I have sexual intercourse with so-and-so (<i>in waṭi'tu fulānata</i>), she is free – then he buys her and has sexual intercourse with her; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: She is not manumitted, due to the fact that he swore while he did not own her. And he [Abū Yūsuf] embraces it.	840 – إِذَا قَالَ الرَّجُلُ: إِنْ وَطِئْتُ فَلَانَةً فَهِيَ حُرَّةٌ. فَاشْتَرَاهَا فَوَطِئَهَا، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: لَا تُعْتَقُ، مِنْ قَبْلِ أَنَّهُ حَلَفَ وَهُوَ لَا يَمْلِكُهَا. وَبِهِ يَأْخُذُ.
841 – But Ibn Abī Laylā, may God Most High have mercy upon him, used to say: She is manumitted (<i>ta'tiqu</i>).	841 – وَكَانَ ابْنُ أَبِي لَيْلَى رَحِمَهُ اللَّهُ تَعَالَى يَقُولُ: تُعْتَقُ.
842 – And if he says: If I buy you (f.) and I have sexual intercourse with you, then you are free – then he buys her and has sexual intercourse with her; she is free according to both their <i>qawls</i> [i.e., Abū Ḥanīfa's and Ibn Abī Laylā's], together.	842 – فَإِنْ قَالَ: إِنْ اشْتَرَيْتُكَ فَوَطِئْتُكَ فَأَنْتِ حُرَّةٌ. فَاشْتَرَاهَا فَوَطِئَهَا فَهِيَ حُرَّةٌ فِي قَوْلِهِمَا جَمِيعًا.
843 – Al-Rabī said: For al-Shāfi'ī, may God Most High have mercy upon him, herein lies an answer (<i>hā hunā jawāb^{un}</i>). ⁹	843 – قَالَ الرَّبِيعُ: لِلشَّافِعِيِّ رَحِمَهُ اللَّهُ تَعَالَى هَا هُنَا جَوَابٌ.

⁹ In reaction to this mysterious-sounding ending, Ḥassūn (ix.146, n.1) notes: “Thus have the words come to us in the copies, but he does not provide a response for al-Shāfi'ī.” However, this statement may be no more mysterious than al-Shāfi'ī agreeing with §842, and having no further elaboration to add; keep in mind that *jawāb* denotes the solution to a *mas'ala*, or the response to an objection. Upon a comparison of §840 and §842, we can isolate why Abū Ḥanīfa says no to the former and yes to the latter: it is a function of *milk* (in §840 he swears to do something which he cannot do at the time of swearing – she is not within his *milk*; in §842 he combines two oaths – first for something he can do while she is outside of his *milk* [purchase her], and then for something he will be able to do in that context of *milk*.) In other words, in §840 he swears to something he cannot legally do at the time of swearing; in §842 he makes the second contingent upon the first, committing to nothing he cannot legally do at the time he swears. We may also note there is a difference insofar as §840 is sworn before some anonymous third party; but §842 is addressed to the object of the oath herself. We might also revisit §785, where al-Shāfi'ī says: “the *tadbīr*, according to me, is a bequest (*waṣīyyat^{un}*);” and §787, where he appears to assert that a time-fixed emancipation (as with *tadbīr* and the *umm walad*) adheres to the slave to whom it was made, even if jointly-owned, and goes into effect at the fixed event, whatever the status of the slave at that time. At any rate, we might suggest that al-Shāfi'ī found the solution to this *mas'ala* to be self-evident in §842, and to require no further comment.

Bāb fi'l-'Āriya wa Akl al-Ghalla

Chapter on the Free Loan of Non-Fungibles (al-'Āriya) and the Consumption of Produce (Akl al-Ghalla) ¹	بَابُ فِي الْعَارِيَةِ وَأَكْلِ الْغَلَّةِ
844 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man loans (a'āra) to a man land on which to build, and he does not fix a time period (<i>lam yuwaqqit waqt^{am}</i>), then he sees fit to remove him (<i>badā lahu an yukhrijahu</i>) after he has built; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: We remove him, and it is said to he who built: Tear down your building. And he [Abū Yūsuf] embraces this [doctrine].	844 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَعَارَ الرَّجُلُ الرَّجُلَ أَرْضًا يَبْنِي فِيهَا وَلَمْ يُوقَّتْ وَقْتًا، ثُمَّ بَدَأَ لَهُ أَنْ يُخْرِجَهُ بَعْدَ مَا بَنَى، فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: نُخْرِجُهُ، وَيُقَالُ لِلَّذِي بَنَى: أَنْقِضْ بِنَاءَكَ. وَبِهَذَا يَأْخُذُ.
845 – But Ibn Abī Laylā used to say: Whoever loans to him is <i>dāmin</i> for the value of the structure (<i>al-bunyān</i>), and the building belongs to the lender (<i>al-mu'īr</i>).	845 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الَّذِي أَعَارَهُ ضَامِنٌ لِقِيَمَةِ الْبِنْيَانِ، وَالْبِنَاءُ لِلْمُعِيرِ.
846 – And likewise has it reached us concerning Shurayḥ. But if he fixed for him a time period, and he removes him before he reaches that time; he is <i>dāmin</i> for the value of the building, according to both their <i>qawls</i> [i.e., Abū Ḥanīfa's and Ibn Abī Laylā's], together.	846 – وَكَذَلِكَ بَلَغَنَا عَنْ شُرَيْحٍ: فَإِنْ وَقَّتَ لَهُ وَقْتًا فَأَخْرَجَهُ قَبْلَ أَنْ يَبْلُغَ ذَلِكَ الْوَقْتَ فَهُوَ ضَامِنٌ لِقِيَمَةِ الْبِنَاءِ، فِي قَوْلِهِمَا جَمِيعًا.
847 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man loans a man a plot (<i>buq'at^{am}</i>) of land on which to build a structure, and he builds it; to the <i>ṣāhib</i> of the plot belongs no right to remove him from his building until he gives him its value — as it stands on the day he removes him (<i>qā'im^{am} yawma yukhrijahu</i>). And if he fixes for him a time, and says: I loan it to you for ten years and I give you permission for building, absolutely (<i>adhintu laka fi'l-binā'i mutlaq^{am}</i>); it is thus. However, if he says: And if the ten years are up, it is your duty to tear down your building; then such is [enjoined] upon him, because he has not been deceptively put at risk (<i>lam yugharra</i>), he has only deceived himself (<i>gharra nafsahu</i>).	847 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَعَارَ الرَّجُلُ الرَّجُلَ بُقْعَةً مِنَ الْأَرْضِ يَبْنِي فِيهَا بِنَاءً فَبَنَاهُ، لَمْ يَكُنْ لِصَاحِبِ الْبُقْعَةِ أَنْ يُخْرِجَهُ مِنْ بَنَائِهِ حَتَّى يُعْطِيَهُ قِيَمَتَهُ قَائِمًا يَوْمَ يُخْرِجُهُ، وَلَوْ وَقَّتَ لَهُ وَقْتًا وَقَالَ: أَعَرْتُكَهَا عَشْرَ سِنِينَ وَأَذْنْتُ لَكَ فِي الْبِنَاءِ مُطْلَقًا. كَانَ هَكَذَا، وَلَكِنَّهُ لَوْ قَالَ: فَإِنْ أَنْقَضَتِ الْعَشْرُ السِّنِينَ كَانَ عَلَيْكَ أَنْ تَنْقُضَ بِنَاءَكَ. كَانَ ذَلِكَ عَلَيْهِ؛ لِأَنَّهُ لَمْ يَعَرَّ إِنَّمَا هُوَ غَرَّ نَفْسَهُ.

¹ (Ḥassūn, vol.9, pt.14, 147-9; Schacht: *Tr. I*, 145-149).

848 – He said: And when a man furnishes bayyina about land and date-palms (<i>arḍⁱⁿ wa nakhlⁱⁿ</i>), that they belong to him, and he in whose possession it is has gained (<i>aṣāba</i>) from the produce (<i>ghallati</i>) of the palms and the land; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: He in whose possession they are is <i>dāmin</i> for what he took of the fruit (<i>al-thamari</i>). And he [Abū Yūsuf] embraces it.	848 – قَالَ: وَإِذَا أَقَامَ الرَّجُلُ الْبَيِّنَةَ عَلَى أَرْضٍ وَنَخْلٍ أَنَّهَا لَهُ، وَقَدْ أَصَابَ الَّذِي هُوَ فِي يَدَيْهِ مِنْ غَلَّةِ النَّخْلِ وَالْأَرْضِ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: الَّذِي كَانَتْ فِي يَدَيْهِ ضَامِنٌ لِمَا أَخَذَ مِنَ الثَّمَرِ. وَبِهِ يَأْخُذُ.
849 – But Ibn Abī Laylā used to say: There is no <i>ḍamān</i> [enjoined] upon him as regards that.	849 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا ضَمَانٌ عَلَيْهِ فِي ذَلِكَ.
850 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when palms and land are in the possession of the man, and a man furnishes bayyina about them, that they have belonged to him for ten years, and he in whose possession they are has gained its fruits for ten years; they [palms and land] are removed from his possession and he becomes liable (<i>ḍamina</i>) for its fruits and what he gained from them of anything — and he turns it over (<i>dafaʿahu</i>) to the <i>ṣāhib</i> of the bayyina. And if the land is cultivated, and he cultivates it; the produce belongs to the cultivator (<i>faʿl-zarʿu liʿl-zāriʿi</i>), and he owes a rent appropriate to the like sort of land (<i>kirāʿu mithli al-arḍi</i>) — even if he has not cultivated it, he owes a rent appropriate to the like sort of land.	850 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَتْ النَّخْلُ وَالْأَرْضُ فِي يَدَيِ الرَّجُلِ، فَأَقَامَ رَجُلٌ عَلَيْهَا الْبَيِّنَةَ أَنَّهَا لَهُ مِنْذُ عَشْرِ سِنِينَ، وَقَدْ أَصَابَ الَّذِي هِيَ فِي يَدَيْهِ ثَمَرَهَا مِنْذُ عَشْرِ سِنِينَ، أُخْرِجَتْ مِنْ يَدَيْهِ وَضُمِّنَ ثَمَرَهَا وَمَا أَصَابَ مِنْهَا مِنْ شَيْءٍ، فَدَفَعَهُ إِلَى صَاحِبِ الْبَيِّنَةِ، فَإِنْ كَانَتْ الْأَرْضُ تُزْرَعُ فَزَرْعُهَا، فَالزَّرْعُ لِلزَّارِعِ وَعَلَيْهِ كِرَاءٌ مِثْلِ الْأَرْضِ، وَإِنْ كَانَ لَمْ يَزَرْعُهَا فَعَلَيْهِ كِرَاءٌ مِثْلِ الْأَرْضِ.
851 – He said: And when a man cultivates the land; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: The produce (<i>al-zarʿu</i>) belongs to the one in whose possession it [the land] is, and he is <i>dāmin</i> for what has diminished of the land (<i>limā naqaṣa al-arḍa</i>), according to the <i>qawl</i> of Abū Ḥanīfa, and he donates the surplus as alms (<i>yataṣaddaqu biʿl-faḍli</i>).	851 – قَالَ: وَإِذَا زَرَعَ الرَّجُلُ الْأَرْضَ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: الزَّرْعُ لِلَّذِي كَانَتْ فِي يَدَيْهِ، وَهُوَ ضَامِنٌ لِمَا نَقَصَ الْأَرْضَ فِي قَوْلِ أَبِي حَنِيفَةَ، وَيَتَصَدَّقُ بِالْفَضْلِ.
852 – But Ibn Abī Laylā used to say: He does not donate anything as alms, and there is no <i>ḍamān</i> [enjoined] upon him.	852 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا يَتَصَدَّقُ بِشَيْءٍ وَلَيْسَ عَلَيْهِ ضَمَانٌ.

853 – He [Abū Yūsuf] said: And when the man takes the land of a man as rental for a year (<i>ijārat^{an} sanat^{an}</i>), and he works it, and resides in it, for two years; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: He is <i>dāmin</i> for what has diminished of the land in the second year, and he donates the surplus as alms, and he gives the rent (<i>ajra</i>) of the first year.	853 – قَالَ: وَإِذَا أَخَذَ الرَّجُلُ أَرْضَ رَجُلٍ إِجَارَةً سَنَةً وَعَمِلَهَا وَأَقَامَ فِيهَا سَنَتَيْنِ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: هُوَ ضَامِنٌ لِمَا نَقَصَ الْأَرْضَ فِي السَّنَةِ الثَّانِيَةِ، وَيَتَصَدَّقُ بِالْفَضْلِ، وَيُعْطِي أَجَرَ السَّنَةِ الْأُولَى.
854 – But Ibn Abī Laylā used to say: He owes a rent appropriate to its [the land's] kind (<i>ajri mithlihā</i>) as regards the second year.	854 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: عَلَيْهِ أَجْرٌ مِثْلُهَا فِي السَّنَةِ الثَّانِيَةِ.
855 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man rents (<i>takārā</i>) the land in order to cultivate it for a year, then he cultivates it for two years; he owes its rent which they mutually stipulated for him in the first year, and the appropriate rent for its kind (<i>kirā'u mithlihā</i>) as regards the second year. And if there happened to it [the land], in the second year, some accident (<i>ḥadath^{un}</i>) which diminishes from it, he is liable <i>dāmin</i> .	855 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا تَكَارَى الرَّجُلُ الْأَرْضَ لِيَزْرَعَهَا سَنَةً، فَزَرَعَهَا سَنَتَيْنِ، فَعَلَيْهِ كِرَاؤُهَا الَّذِي تَشَارَطَا عَلَيْهِ فِي السَّنَةِ الْأُولَى وَكِرَاءُ مِثْلِهَا فِي السَّنَةِ الثَّانِيَةِ. وَلَوْ حَدَثَ عَلَيْهَا فِي السَّنَةِ الثَّانِيَةِ حَدَثٌ يُنْقِصُهَا كَانَ ضَامِنًا.
856 – And likewise [for] houses, and slaves, and riding-mounts (<i>al-dawwābu</i>), and everything hired/rented (<i>istu'jira</i>).	856 – وَهَكَذَا الدُّورُ وَالْعَبِيدُ وَالْدَّوَابُّ وَكُلُّ شَيْءٍ اسْتُؤْجِرَ.
857 – He said: And when a man finds an ancient treasure (<i>kanz^{an} qadīm^{an}</i>) in the land of a man or in his house; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: It belongs to the owner of the house (<i>rabb al-dār</i>), and he owes the <i>khumus</i> ; and there belongs of it, to the one who found it, nothing.	857 – قَالَ: وَإِذَا وَجَدَ الرَّجُلُ كَنْزًا قَدِيمًا فِي أَرْضِ رَجُلٍ أَوْ دَارِهِ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: هُوَ لِرَبِّ الدَّارِ وَعَلَيْهِ الْخُمْسُ، وَلَيْسَ لِلَّذِي وَجَدَهُ مِنْهُ شَيْءٌ.
858 – But Ibn Abī Laylā used to say: It belongs to the one who found it, and he owes the <i>khumus</i> , and nothing regarding it belongs to the <i>ṣāhib</i> of the house and land. And he (Abū Yūsuf) embraces it.	858 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هُوَ لِلَّذِي وَجَدَهُ وَعَلَيْهِ الْخُمْسُ، وَلَا شَيْءَ لِصَاحِبِ الدَّارِ وَالْأَرْضِ فِيهِ. وَبِهِ يَأْخُذُ.

859 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the man finds a *Jāhili*-era treasure (*kanz^{an} jāhiliyy^{an}*) in the house of a man; the treasure belongs to the *rabb al-dār*, and as regards it [he owes] the *khumus*. And the treasure only belongs to the one who found it when he finds it in a location (*mawḍi'^{sin}*) which no one owns. And when the treasure is Islamic, and it is not found in the *milk* of anyone [i.e., in their house or land], then it is a found-object (*luqaṭat^{un}*) – he announces it publicly (*yu'arrifuhu*) for a year, then it belongs to him.²

859 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا وَجَدَ الرَّجُلُ كَنْزًا جَاهِلِيًّا فِي دَارِ رَجُلٍ فَالْكَنْزُ لِلرَّبِّ الدَّارِ وَفِيهِ الْخُمْسُ، وَإِنَّمَا يَكُونُ الْكَنْزُ لِمَنْ وَجَدَهُ إِذَا وَجَدَهُ فِي مَوْضِعٍ لَا يَمْلِكُهُ أَحَدٌ، وَإِذَا كَانَ الْكَنْزُ إِسْلَامِيًّا وَلَمْ يُوجَدْ فِي مِلْكٍ أَحَدٍ فَهُوَ لِقِطَّةٍ يُعْرِفُهُ سَنَةً ثُمَّ هُوَ لَهُ.

² The public announcement, of course, is to allow any rightful claimants to make their claim known. As for those who would maintain that finding “ancient treasure” sounds a bit far-fetched, they ought to be reminded that al-Shāfi'ī resided for long periods in both Mesopotamia and Egypt. These, of course, were centers of power and trade for dozens of ancient city states and empires, and their treasures continue to be discovered (accidentally and otherwise) to this day — and with notable frequency. If archaeology may be said to be a modern pursuit, treasure-hunting and looting ancient sites may not. A visitor to the Near East knows that ancient sites are ubiquitous, and that many are pitted not only by archaeologists' excavations, but scarred with holes dug by treasure-seekers. Moreover, and with specific regard to the “houses” and the *rabb al-dār* above, we must remember that — in the days before bank safe-deposit boxes — it was common practice to bury valuables beneath the floor-stones of the house, or to secret them away in the walls or other locations.

Bāb fi'l-Ajīr wa'l-Ijāra

Chapter on the Hired Worker (Ajīr) and Rental/Hire (Ijāra) ¹	بَابُ فِي الْأَجِيرِ وَالْإِجَارَةِ
860 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the hired worker (<i>al-ajīr</i>) and the hirer (<i>al-musta'jir</i>) disagree (<i>ikhtalafa</i>) as regards the wage (<i>al-ujra</i>); then indeed Abū Ḥanīfa, may God be pleased with him, used to say: The <i>qawl</i> is the <i>qawl</i> of the <i>musta'jir</i> , with his <i>yamīn</i> , when he [the <i>ajīr</i>] has performed the work. And he [Abū Yūsuf] embraces this [doctrine].	860 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اِخْتَلَفَ الْأَجِيرُ وَالْمُسْتَأْجِرُ فِي الْأَجْرَةِ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: الْقَوْلُ قَوْلُ الْمُسْتَأْجِرِ مَعَ يَمِينِهِ إِذَا عَمِلَ الْعَمَلَ. وَبِهَذَا يَأْخُذُ.
861 – But Ibn Abī Laylā used to say: The <i>qawl</i> is the <i>qawl</i> of the <i>ajīr</i> – as regards what is between it [his <i>qawl</i>] and the appropriate wage for his type (<i>ajri mithlihi</i>) – unless he is the one who claims less; [in which case] such is given to him. And if he has not performed the work, they mutually swear (<i>taḥālafa</i>) and mutually reject (<i>tarāddā</i>) [the contract], according to the <i>qawl</i> of Abū Ḥanīfa.	861 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الْقَوْلُ قَوْلُ الْأَجِيرِ فِيمَا بَيْنَهُ وَبَيْنَ أَجْرِ مِثْلِهِ، إِلَّا أَنْ يَكُونَ الَّذِي ادَّعَى أَقْلَ فَيُعْطِيهِ إِيَّاهُ، وَإِنْ لَمْ يَكُنْ عَمِلَ الْعَمَلَ تَحَالَفَا وَتَرَادَّا فِي قَوْلِ أَبِي حَنِيفَةَ.
862 – And it must likewise be so, according to the <i>qawl</i> of Ibn Abī Laylā.	862 – وَيَنْبَغِي كَذَلِكَ فِي قَوْلِ ابْنِ أَبِي لَيْلَى.
863 – But Abū Yūsuf said, afterwards: When it [the claimed wage] is something approximately the same (<i>mutaqārib^{um}</i>), I accept the <i>qawl</i> of the <i>musta'jir</i> and I make him swear (<i>aḥlaftuhu</i>). But when it differs significantly (<i>tafāwata</i>), I don't accept, and I make belong to the worker (<i>'āmil</i>) the appropriate wage for his type (<i>ajri mithlihi</i>), when he swears.	863 – وَقَالَ أَبُو يُوسُفَ بَعْدُ: إِذَا كَانَ شَيْءٌ مُتَقَارِبٌ قَبِلْتُ قَوْلَ الْمُسْتَأْجِرِ وَأَخْلَفْتُهُ، وَإِذَا تَفَاوَتَ لَمْ أَقْبَلْ، وَأَجْعَلُ لِلْعَامِلِ أَجْرَ مِثْلِهِ إِذَا حَلَفَ.
864 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man hires an <i>ajīr</i> , and they mutually consent (<i>taṣādaqa</i>) to the <i>ijāra</i> , but they disagree (<i>ikhtalafa</i>): How much is it? If he has not performed the work, they mutually swear, and mutually reject the <i>ijāra</i> -contract. But if he has worked, they mutually swear and mutually reject the appropriate wage, whether it is greater than what he [the <i>ajīr</i>]	864 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اسْتَأْجَرَ الرَّجُلُ أَجِيرًا فَتَصَادَقَا عَلَى الْإِجَارَةِ وَاخْتَلَفَا، كَمْ هِيَ؟ فَإِنْ كَانَ لَمْ يَعْمَلْ تَحَالَفَا وَتَرَادَّا الْإِجَارَةَ، وَإِنْ كَانَ عَمِلَ تَحَالَفَا وَتَرَادَّا أَجْرَ مِثْلِهِ، كَانَ أَكْثَرُ مِمَّا ادَّعَى أَوْ أَقْلَ مِمَّا

¹ (Ḥassūn, vol.9, pt.14, 150-2; Schacht: *Tr. I*, 150-153).

claims, or less than what the <i>musta'jir</i> acknowledges. When I nullify the contract (<i>abtaltu al-uqdata</i>), and claim that it is rescinded (<i>mafsūkha</i>), it is not permitted that I draw conclusions (<i>astadilla</i>), by means of the <i>mafsūkh</i>, about anything. And even if I could draw conclusions based on it, I could not put into operation the <i>mafsūkh</i>, nor the <i>ṣahīh</i>, for anything.	أَقَرَّ بِهِ الْمُسْتَأْجِرُ؛ إِذَا أَبْطَلْتُ الْعُقْدَةَ وَزَعَمْتُ أَنَّهَا مَفْسُوخَةٌ، لَمْ يَجْزُ أَنْ أَسْتَدِلَّ بِالْمَفْسُوحِ عَلَى شَيْءٍ، وَلَوْ اسْتَدَلْتُ بِهِ كُنْتُ لَمْ أُعْمِلِ الْمَفْسُوحَ وَلَا الصَّحِيحَ عَلَى شَيْءٍ.
865 – He said: And when a man rents a house/room (<i>ista'jara... bayt^m</i>) for a month that he reside in it (<i>yaskunuhu</i>), and he resides in it for two months; or he rents a <i>dābba</i> to a place, and he goes beyond that place; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: The rent is as regards what he designated (<i>al-ajru fīmā sammā</i>), and there belongs to him no rent as regards what he did not designate, because he has breached [the contract] (<i>qad khālaḥa</i>), and he is <i>dāmin</i> at the time he breaches, and there may not combine to his debit (<i>wa lā yaḡtami'u 'alayhi</i>) [both] the <i>ḍamān</i> and the <i>ujra</i>. And he [Abū Yūsuf] embraces this [doctrine].²	865 – قَالَ: وَإِذَا اسْتَأْجَرَ الرَّجُلُ بَيْتًا شَهْرًا يَسْكُنُهُ فَسَكَنَهُ شَهْرَيْنِ، أَوْ اسْتَأْجَرَ دَابَّةً إِلَى مَكَانٍ فَجَاوَزَ ذَلِكَ الْمَكَانَ، فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: الْأَجْرُ فِيمَا سَمَّى، وَلَا أَجْرَ لَهُ فِيمَا لَمْ يُسَمِّ؛ لِأَنَّهُ قَدْ خَالَفَ وَهُوَ ضَامِنٌ حِينَ خَالَفَ، وَلَا يَجْتَمِعُ عَلَيْهِ الضَّمَانُ وَالْأَجْرَةُ. وَبِهَذَا يَأْخُذُ.
866 – But Ibn Abī Laylā used to say: There belongs to him the <i>ujra</i> as regards what he designated, and as regards what he breached, if he designates [it]. But if he does not designate that; he is made liable (<i>ḍamina</i>). And we don't enjoin upon him an <i>ajr</i> regarding the breach (<i>al-khilāf</i>), when he is made liable for it.³	866 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَهُ الْأَجْرُ فِيمَا سَمَّى وَفِيمَا خَالَفَ إِنْ سَمَّى وَإِنْ لَمْ يُسَمِّ ذَلِكَ ضَمِنَ، وَلَا نَجْعَلُ عَلَيْهِ أَجْرًا فِي الْخِلَافِ إِذَا ضَمِنَهُ.
867 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man rents (<i>takārā</i>) a <i>dābba</i> to a location, then goes beyond it to another; he owes the rent (<i>kirā'</i>) for the location to which he contracted it [the <i>dābba</i>] – the rent for which he [first] rented it. And he owes – from the time he transgressed to the point	867 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا تَكَارَى الرَّجُلُ الدَّابَّةَ إِلَى مَوْضِعٍ فَجَاوَزَهُ إِلَى غَيْرِهِ، فَعَلَيْهِ كِرَاءُ الْمَوْضِعِ الَّذِي تَكَارَاهَا إِلَيْهِ الْكِرَاءُ الَّذِي تَكَارَاهَا بِهِ، وَعَلَيْهِ مِنْ حِينَ

² We may bear in mind the maxim: *al-kharāj bi'l-ḍamān*; “gain by liability [for loss].” Abū Ḥanīfa is adhering to a general principle, and basing his argument upon it.

³ The difference, if I understand correctly, is that renters — if they precisely designate the extent to which they exceed the contract — may pay the additional rent, and escape liability for what happens during that extension. With Abū Ḥanīfa, they do not have this option. Interestingly, Ḥassūn (ix.151, nn.1-2) notes that Būlāq has [*إِنْ سَلَّمَ وَإِنْ لَمْ يُسَلِّمْ*], rather than [*إِنْ سَمَّى وَإِنْ لَمْ يُسَمِّ*], which is true. Though he makes no note as to whether his copies have that which he himself renders (and we have followed him), we must assume that the Būlāq (vii.128) text is the only divergence.

he returns it — the appropriate rent (<i>kirā'u mithlihā</i>) pertaining to that location. And when it [the <i>dābba</i>] perishes (<i>aṭibat</i>), there is incumbent upon him the rent to the location in which it perished, and its [the <i>dābba</i> 's] value. And this is written in the <i>Kitāb al-Ijārāt</i> . ⁴	تَعَدَّى إِلَى أَنْ رَدَّهَا كِرَاءُ مِثْلِهَا مِنْ ذَلِكَ الْمَوْضِعِ، وَإِذَا عَطِبَتْ لَزِمَهُ الْكِرَاءُ إِلَى الْمَوْضِعِ الَّذِي عَطِبَتْ فِيهِ وَفِيمَتُهَا. وَهَذَا مَكْتُوبٌ فِي كِتَابِ الْإِجَارَاتِ.
868 – He said: And when a man rents (<i>takārā</i>) a <i>dābba</i> to load upon it ten <i>makhātīm</i> , ⁵ then he loads upon it more than that, and the <i>dābba</i> perishes (<i>aṭibat</i>); then indeed Abū Ḥanīfa, may God be pleased with him, used to say: He is <i>dāmin</i> for the value of the animal by the reckoning of what he exceeded [in loading] upon it (<i>bi-hisābi mā zāda 'alayhā</i>). And he owes the <i>qjr</i> in its entirety if it had reached the [destined] place. And he [Abū Yūsuf] embraces it.	868 – قَالَ: وَإِذَا تَكَارَى الرَّجُلُ دَابَّةً لِيَحْمِلَ عَلَيْهَا عَشْرَةَ مَخَاتِيمَ، فَحَمَلَ عَلَيْهَا أَكْثَرَ مِنْ ذَلِكَ، فَعَطِبَتِ الدَّابَّةُ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: هُوَ ضَامِنٌ قِيَمَةَ الدَّابَّةِ بِحِسَابِ مَا زَادَ عَلَيْهَا، وَعَلَيْهِ الْأَجْرُ تَامًّا إِذَا كَانَتْ قَدْ بَلَغَتْ الْمَكَانَ. وَبِهِ يَأْخُذُ.
869 – But Ibn Abī Laylā used to say: He owes its value in full (<i>'alayhi qīmatuhā tāmmat^{am}</i>), but he owes no rent.	869 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: عَلَيْهِ قِيَمَتُهَا تَامَّةً وَلَا أَجْرَ عَلَيْهِ.
870 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man rents the <i>dābba</i> with the understanding that he load upon it ten <i>makāyīl</i> , designated (<i>musammāt^{am}</i>) [in the contract], then he loads upon it eleven <i>mikyāl</i> and it perishes; he is <i>dāmin</i> for the value of the <i>dābba</i> , all of it, and he owes the rent (<i>al-kirā'</i>).	870 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا تَكَارَى الرَّجُلُ الدَّابَّةَ عَلَى أَنْ يَحْمِلَ عَلَيْهَا عَشْرَةَ مَكَايِيلَ مُسَمَّاءَ، فَحَمَلَ عَلَيْهَا أَحَدَ عَشَرَ مَكْيَالًا فَعَطِبَتْ، فَهُوَ ضَامِنٌ لِقِيَمَةِ الدَّابَّةِ كُلِّهَا، وَعَلَيْهِ الْكِرَاءُ.
871 – And Abū Ḥanīfa, may God Most High have mercy upon him, used to make incumbent upon him the <i>ḍamān</i> by the measure of the excess [load] (<i>bi-qadr al-ziyāda</i>) — as though he rented it [the animal], with the understanding that he load upon it ten <i>makāyīl</i> , and he loaded it with eleven. So he [used to] make him liable for a share (<i>sahm</i>) from among eleven	871 – وَكَانَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى يَجْعَلُ عَلَيْهِ الضَّمَانَ بِقَدْرِ الزِّيَادَةِ؛ كَأَنَّهُ تَكَارَاهَا عَلَى أَنْ يَحْمِلَ عَلَيْهَا عَشْرَةَ مَكَايِيلَ فَحَمَلَ عَلَيْهَا أَحَدَ عَشَرَ فَيُضَمُّنُهُ سَهْمًا مِنْ أَحَدَ عَشَرَ سَهْمًا، وَيَجْعَلُ الْأَحَدَ عَشَرَ كُلِّهَا

⁴ Al-Nadīm lists both a *Kitāb al-Ijārāt wa'l-Ghārimīn wa'l-Rajul Yukrī al-Dābba*, and a *Kitāb al-Ijārāt al-Kabīr* (*Fihrist*, 253-4). In the *Umm*, there is one other reference to a *Kitāb al-Ijārāt* — in §11031 of the *Bāb Kirā' al-Arḍ al-Bayḍā'* (Ḥassūn, vol.4, pt.8, 52) — but there is no separate chapter by that exact title. We do find, however, a lengthy section under the simple heading of *Ijārāt* (Ḥassūn, vol.4, pt.8, 57-87); and several related sections, including a *Kirā' al-Dawwāb* (56), a *Kirā' al-Ibl wa'l-Dawwāb* (88-93), and an *Ikhtilāf al-Ajīr wa'l-Musta'jir* (100). Discussions of this particular *mas'ala* (the renter exceeds the contract limits) are in §11041 of the *Kirā' al-Dawwāb*; and §§11175ff. of the *Ijārāt* (79ff.)

⁵ Sing. *makhātīm*: a measure of corn.

shares, and treat the eleven, all of them, as [what] killed it (<i>qatalat-hā</i>). Nevertheless, Abū Ḥanīfa, may God Most High have mercy upon him, claimed that, if he rented it⁶ for a hundred miles, and he exceeded with it the hundred miles for a mile, or a few miles, and it perished; he is <i>ḍāmin</i> for the <i>dābba</i>, all of it.	فَقَتَلَتْهَا، ثُمَّ يَزْعُمُ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى أَنَّهُ إِنْ تَكَارَاهَا مِائَةَ مِيلٍ فَتَعَدَّى بِهَا عَلَى الْمِائَةِ مِيلًا أَوْ بَعْضَ مِيلٍ فَعَطِيتُ ضَمِنَ الدَّابَّةَ كُلَّهَا.
872 – And it was right, regarding the <i>aṣl</i> of his <i>qawl</i>, that he should have treated the hundred and the excess over a hundred as what killed it (<i>qatalat-hā</i>), and [to] make him liable by the measure of the excess; because he claims that he is <i>ḍāmin</i> for the <i>dābba</i> from the time when he exceeded with it (<i>ta'ddā bihā</i>) until he returned it, even if the rent was for front and back [loading], and it died in the hundred miles.	872 – وَكَانَ يَنْبَغِي فِي أَصْلِ قَوْلِهِ أَنْ يَجْعَلَ الْمِائَةَ وَالزِّيَادَةَ عَلَى الْمِائَةِ قَتَلَتْهَا فَيُضَمُّهُ بِقَدْرِ الزِّيَادَةِ؛ لِأَنَّهُ يَزْعُمُ أَنَّهُ ضَامِنٌ لِلدَّابَّةِ حِينَ تَعَدَّى بِهَا حَتَّى يَرُدَّهَا، وَلَوْ كَانَ الْكَرَاءُ مُقْبِلًا وَمُدْبِرًا فَمَاتَتْ فِي الْمِائَةِ مِيلٍ.
873 – And when the ship of the sea-farer founders (<i>ghariqat safinatu al-mallāhi</i>), and what is in it sinks, and he [the <i>mallāh</i>] had loaded it for a fee (<i>qad ḥamalahu bi-ajrⁱⁿ</i>), and it sank as a result of his prolongation of time/distance (<i>min maddihi</i>) or his handling/manipulation of the ship (<i>mu'ālajatihi al-safinata</i>); then indeed Abū Ḥanīfa, may God be pleased with him, used to say: He [the <i>mallāh</i>] is <i>ḍāmin</i>. And he [Abū Yūsuf] embraces it.	873 – وَإِذَا غَرِقَتْ سَفِينَةُ الْمَلَّاحِ فَغَرِقَ الَّذِي فِيهَا وَقَدْ حَمَلَهُ بِأَجْرٍ فَغَرِقَتْ مِنْ مَدِّهِ أَوْ مُعَالَجَتِهِ السَّفِينَةِ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: هُوَ ضَامِنٌ. وَبِهِ يَأْخُذُ.
874 – But Ibn Abī Laylā used to say: There is no <i>ḍamān</i> [enjoined] upon him as regards the prolongation of time/distance (<i>al-maddi</i>), specifically (<i>khāṣṣat^{an}</i>).	874 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا ضَمَانَ عَلَيْهِ فِي الْمَدِّ خَاصَّةً.
875 – Al-Shāfi'ī, may God have mercy upon him, said: And when he performs, as pertains to that [handling of the ship], the sort of action whose like is performed at that time he performed; he is not liable (<i>lam yaḍman</i>). But when he oversteps that [convention] (<i>ta'addā dhālika</i>), he is liable. And God, praise be to Him, Most High, is the Reconciler/Giver of Success (<i>al-Muwaffiq</i>).⁷	875 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا فَعَلَ مِنْ ذَلِكَ الْفِعْلَ الَّذِي يُفَعَّلُ بِمِثْلِهَا فِي ذَلِكَ الْوَقْتِ الَّذِي فَعَلَ لَمْ يَضْمَنْ، وَإِذَا تَعَدَّى ذَلِكَ ضَمِنَ. وَاللَّهُ سُبْحَانَهُ وَتَعَالَى الْمُوَفِّقُ.

⁶ Note that both Būlāq and Maṭrajī have أَنَّهُ تَكَارَاهَا, while Ḥassūn (ix.152) has إِنْ تَكَارَاهَا, as I have followed above. Ḥassūn makes no note of this divergence.

⁷ The issue at stake appears to be whether the *mallāh* was doing anything unconventional at the time the ship sank with all its goods; if he was sailing in the customary manner, by the customary route, etc., then he is not *ḍāmin*. Otherwise, he is. Sea-transport convention is neatly paired with minimizing risk.

Bāb al-Qisma

Chapter on Apportionment (al-Qisma) ¹	بَابُ الْقِسْمَةِ
876 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the house is small, [jointly-owned] between two, or a meagre portion (<i>shiqṣ^{um} qalīl^{um}</i>) in a house, it [the portion] not being a room (<i>bayt^{um}</i>); then indeed Abū Ḥanīfa, may God be pleased with him, used to say: Whichever of them demands apportionment (<i>al-qismata</i>), and his <i>ṣāhib</i> refuses; it is apportioned for him (<i>qusimat lahu</i>). Don't you see/opine (<i>alā tarā</i>) that the <i>ṣāhib al-qalīl</i> benefits (<i>yantafi'u</i>) from the portion of the <i>ṣāhib al-kathīr</i> ? And he [Abū Yūsuf] embraces this [doctrine].	876 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَتْ الدَّارُ صَغِيرَةً بَيْنَ اثْنَيْنِ، أَوْ شِقْصٌ قَلِيلٌ فِي دَارٍ لَا يَكُونُ بَيْتًا، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: أَيُّهُمَا طَلَبَ الْقِسْمَةَ وَأَبَى صَاحِبُهُ، قُسِمَتْ لَهُ. أَلَا تَرَى أَنَّ صَاحِبَ الْقَلِيلِ يَنْتَفِعُ بِنَصِيبِ صَاحِبِ الْكَثِيرِ. وَبِهَذَا يَأْخُذُ.
877 – But Ibn Abī Laylā used to say: Nothing of it [the house] is apportioned.	877 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا يُقَسَّمُ شَيْءٌ مِنْهَا.
878 – Al-Shāfi'ī said: And when the house, or the room, is [jointly-owned] between <i>shurakā'</i> , and one of them requests <i>qisma</i> while the remainder do not request that; if, by means of the allotment (<i>bi'l-qasmi</i>), something by which he benefits (<i>shay^{um} yantafi'u bihi</i>) should come to him – even if the <i>manfa'a</i> is slight, it is apportioned for him, even if his <i>aṣḥāb</i> disapprove (<i>kariha</i>). But if there comes to him no <i>manfa'a</i> , nor to anyone, it is not apportioned for him.	878 – قَالَ الشَّافِعِيُّ: وَإِذَا كَانَتْ الدَّارُ أَوْ الْبَيْتُ بَيْنَ شُرَكَاءَ، فَسَأَلَ أَحَدُهُمُ الْقِسْمَةَ وَلَمْ يَسْأَلْ ذَلِكَ مَنْ بَقِيَ، فَإِنْ كَانَ يَصِلُ إِلَيْهِ بِالْقَسَمِ شَيْءٌ يَنْتَفِعُ بِهِ – وَإِنْ قَلَّتِ الْمَنْفَعَةُ – قُسِمَ لَهُ، وَإِنْ كَرِهَ أَصْحَابُهُ، وَإِنْ كَانَ لَا يَصِلُ إِلَيْهِ مَنَفَعَةٌ وَلَا إِلَى أَحَدٍ لَمْ يُقَسَّمْ لَهُ.

¹ (Ḥassūn, vol.9, pt.14, 153; Schacht: *Tr. I*, 154).

Bāb al-Ṣalāt

Chapter on Prayer (<i>al-Ṣalāt</i>) ¹	بَابُ الصَّلَاةِ
879 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man comes to the <i>imām</i> in the <i>ayyām al-tashrīq</i>,² and he [the <i>imām</i>] has preceded him by a <i>rakʿa</i>, and the <i>imām</i> performs <i>taslīm</i> upon his finishing (<i>sallama... ʿinda farāghihi</i>); then indeed Abū Ḥanīfa, may God be pleased with him, used to say: The man performs [the prayer] and finishes (<i>yaqūmu... fa-yaqḍī</i>), but he does not perform <i>takbīr</i> (<i>lā yukabbiru</i>) with him, because the <i>takbīr</i> is not of the <i>ṣalāt</i>, it is only after it. And he [Abū Yūsuf] embraces it.	879 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَتَى الرَّجُلُ إِلَى الْإِمَامِ فِي أَيَّامِ التَّشْرِيقِ وَقَدْ سَبَقَهُ بِرَكْعَةٍ فَسَلَّمَ الْإِمَامُ عِنْدَ فَرَاعِهِ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: يَقُومُ الرَّجُلُ فَيَقْضِي وَلَا يُكَبِّرُ مَعَهُ؛ لِأَنَّ التَّكْبِيرَ لَيْسَ مِنَ الصَّلَاةِ إِنَّمَا هُوَ بَعْدَهَا. وَبِهِ يَأْخُذُ.
*NB: An error has occurred in Ḥassūn's line numbering: §879 proceeds directly to §890, and no explanation is offered. I have chosen to replicate this error, for the sake of consistency, and for the sake of simplicity as regards tables of line and paragraph numbers, etc. By doing so, of course, the numbering of this translation is linked forever to this particular (Dār Qutayba, 2003) edition of Ḥassūn's text (any corrections in future editions will skew line correspondence). So far as comparison with Būlāq and Maṭrajī, however, it is evident that no text has been omitted — this is merely a problem of missing numbers.	
890 – But Ibn Abī Laylā used to say: He performs <i>takbīr</i>, then he performs [the prayer] and he finishes.	890 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: يُكَبِّرُ ثُمَّ يَقُومُ فَيَقْضِي.
891 – He [Abū Yūsuf] said: And when the man prays (<i>ṣallā</i>) in the <i>ayyām al-tashrīq</i>, alone, or the woman; then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: No <i>takbīr</i> is [enjoined] upon him, nor is <i>takbīr</i> [enjoined] upon the one who prays in a group (<i>jamāʿa</i>), somewhere besides a congregational town (<i>fī ghayri miṣrⁱⁿ jāmiⁱⁿ</i>), nor is <i>takbīr</i> enjoined upon the travelers (<i>al-musāfirīn</i>).	891 – قَالَ: وَإِذَا صَلَّى الرَّجُلُ فِي أَيَّامِ التَّشْرِيقِ وَحْدَهُ أَوْ الْمَرْأَةُ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: لَا تَكْبِيرَ عَلَيْهِ، وَلَا تَكْبِيرَ عَلَى مَنْ صَلَّى فِي جَمَاعَةٍ فِي غَيْرِ مِصْرٍ جَامِعٍ، وَلَا تَكْبِيرَ عَلَى الْمُسَافِرِينَ.

¹ (Ḥassūn, vol.9, pt.14, 154-7; Schacht: *Tr. I*, 155-157).

² *Ayyām al-tashrīq*: “the old name of the three days following the Day of Immolation (10th of Zu’l-hijja) during the hadj festival” (Hans Wehr, 4th ed., s.v. *tashrīq*). The *MF* (s.v. “أيام التشريق”) contains a full exposition on the signification of the term, the ritual observances attached to these days, and the juridical differences and debated *masā’il* — including this very question of *takbīr* (see §13 “التكبير في أيام التشريق”). The “Day of Immolation” (*yawm al-naḥr*) occurs on the 10th of Dhū al-Ḥijja, and is followed by the three *ayyām al-tashrīq* (11th-13th of Dhū al-Ḥijja); these four days together are called the *ayyām Minā*ⁿ, due to the pilgrims’ return to the valley of Minā after circumambulation of the Ka’ba, and their camping out for all three nights of the *ayyām al-tashrīq* there.

892 – But Ibn Abī Laylā used to say: Upon them is [enjoined] the <i>takbīr</i> .	892 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: عَلَيْهِمُ التَّكْبِيرُ.
893 – Abū Yūsuf [reported], on the authority of ‘Ubayda, on Ibrāhīm, that he said: The <i>takbīr</i> is [enjoined] upon the <i>musāfirīn</i> , and upon the settled (<i>al-muqīmīn</i>), and upon he who prays alone, and in a group, and upon the woman. And he [Abū Yūsuf] embraces it.	893 – أَبُو يُوسُفَ، عَنْ عُبَيْدَةَ، عَنْ إِبْرَاهِيمَ أَنَّهُ قَالَ: التَّكْبِيرُ عَلَى الْمُسَافِرِينَ، وَعَلَى الْمُقِيمِينَ، وَعَلَى الَّذِي يُصَلِّي وَحْدَهُ، وَفِي جَمَاعَةٍ، وَعَلَى الْمَرْأَةِ. وَبِهِ يَأْخُذُ.
894 – Mujālid, on the authority of ‘Āmir [reported] the like.	894 – مُجَالِدٌ عَنْ عَامِرٍ مِثْلَهُ.
895 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And when the man is preceded by part of the <i>ṣalāt</i> (<i>subiqaw... bi-shayⁱⁿ min al-ṣalāti</i>) during the <i>ayyām al-tashrīq</i> , and the <i>imām</i> performs the <i>taslīm</i> , and performs the <i>takbīr</i> ; the preceded one (<i>al-masbūq</i>) does not perform <i>takbīr</i> for any part of the <i>ṣalāt</i> , but he completes (<i>qaḍā</i>) that which [remains] upon him. And when he performs <i>taslīm</i> , he performs <i>takbīr</i> . That is because the <i>takbīr</i> of the <i>ayyām al-tashrīq</i> is not of the <i>ṣalāt</i> — it is only a remembrance (<i>dhikr^{un}</i>) after it. And the <i>imām</i> is only followed as regards what is of the <i>ṣalāt</i> — and this is not of the <i>ṣalāt</i> .	895 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا سَبَقَ الرَّجُلُ بِشَيْءٍ مِنَ الصَّلَاةِ فِي أَيَّامِ التَّشْرِيقِ فَسَلَّمَ الْإِمَامُ وَكَبَّرَ لَمْ يُكَبِّرِ الْمَسْبُوقُ بِشَيْءٍ مِنَ الصَّلَاةِ وَقَضَى الَّذِي عَلَيْهِ، فَإِذَا سَلَّمَ كَبَّرَ؛ وَذَلِكَ أَنَّ التَّكْبِيرَ أَيَّامَ التَّشْرِيقِ لَيْسَ مِنَ الصَّلَاةِ إِنَّمَا هُوَ ذِكْرٌ بَعْدَهَا، وَإِنَّمَا يُتَّبَعُ الْإِمَامُ فِيمَا كَانَ مِنَ الصَّلَاةِ وَهَذَا لَيْسَ مِنَ الصَّلَاةِ.
896 – And there performs <i>takbīr</i> in the <i>ayyām al-tashrīq</i> : the woman, and the slave, and the traveler, and the lone supplicant, and the not alone, and the man standing and sitting and reclining, and in every condition (<i>wa ‘alā kulli ḥālⁱⁿ</i>).	896 – وَيُكَبِّرُ فِي أَيَّامِ التَّشْرِيقِ: الْمَرْأَةُ، وَالْعَبْدُ، وَالْمُسَافِرُ وَالْمُصَلِّي مُتَفَرِّدًا وَغَيْرَ مُتَفَرِّدٍ وَالرَّجُلُ قَائِمًا وَقَاعِدًا وَمُضْطَجِعًا وَعَلَى كُلِّ حَالٍ.
897 – And when he catches up to (<i>adraka</i>) the <i>imām</i> while he is bowing (<i>rāki^{un}</i>), and he performs <i>takbīr</i> with him, then he does not bow (<i>lam yarka</i>) until the <i>imām</i> raises his head; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: He prostrates (<i>yaṣjudu</i>) with him, and does not reckon (<i>lā ya’taddu</i>) that <i>rak‘a</i> .	897 – وَإِذَا أَدْرَكَ الْإِمَامَ وَهُوَ رَاكِعٌ فَكَبَّرَ مَعَهُ ثُمَّ لَمْ يَرْكَعْ حَتَّى رَفَعَ الْإِمَامُ رَأْسَهُ، فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: يَسْجُدُ مَعَهُ وَلَا يَعْتَدُ بِتِلْكَ الرَّكْعَةِ.
898 – He reported that to us (<i>akhbarnā bi-dhālīka</i>) on the authority of al-Ḥasan, on al-Ḥakam, on Ibrāhīm. And he [Abū Yūsuf] embraces it.	898 – أَخْبَرَنَا بِذَلِكَ عَنْ الْحَسَنِ عَنْ الْحَكَمِ عَنْ إِبْرَاهِيمَ. وَبِهِ يَأْخُذُ.

899 – But Ibn Abī Laylā used to say: He bows and he prostrates, and he counts that (<i>yarkaʿu wa yaṣjudu wa yaḥtasibu bi-dhālika</i>) as part of his <i>ṣalāt</i> .	899 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: يَرْكَعُ وَيَسْجُدُ وَيَحْتَسِبُ بِذَلِكَ مِنْ صَلَاتِهِ.
900 – And Abū Ḥanīfa, may God Most High have mercy upon him, used to forbid (<i>yanhāʿan</i>) the <i>qunūt</i> -supplication in the dawn prayer (<i>al-fajr</i>). And he [Abū Yūsuf] embraces it. ³	900 – وَكَانَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى يَنْهَى عَنِ الْقُنُوتِ فِي الْفَجْرِ. وَبِهِ يَأْخُذُ.
901 – And he transmitted as <i>ḥadīth</i> (<i>yuḥaddithu bihi</i>) concerning the Messenger of God, may God bless and save him, that he did not perform the <i>qunūt</i> -supplication (<i>lam yaqnut</i>) except for a single month in which he made war against a tribe from among the polytheists (<i>ḥāraba ḥayy^{am} min al-mushrikīna</i>); he performed the <i>qunūt</i> calling down evil upon them (<i>yadʿū ʿalayhim</i>).	901 – وَيُحَدِّثُ بِهِ عَنْ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – أَنَّهُ لَمْ يَقْنُتْ إِلَّا شَهْرًا وَاحِدًا حَارِبَ حَيًّا مِنَ الْمُشْرِكِينَ، فَقَنْتَ يَدْعُو عَلَيْهِمْ.
902 – And [he transmitted] that Abū Bakr, may God be pleased with him, did not perform <i>qunūt</i> -supplication [even] until he joined God (<i>ḥattā laḥiqa bi-Allāhi</i>), to Him belong might and majesty.	902 – وَأَنَّ أَبَا بَكْرٍ رَضِيَ اللَّهُ عَنْهُ لَمْ يَقْنُتْ حَتَّى لَحِقَ بِاللَّهِ عَزَّ وَجَلَّ.
903 – And [he transmitted] that Ibn Masʿūd, may God be pleased with him, did not perform the <i>qunūt</i> -supplication – neither during travel, nor in residence.	903 – وَأَنَّ ابْنَ مَسْعُودٍ رَضِيَ اللَّهُ عَنْهُ لَمْ يَقْنُتْ فِي سَفَرٍ وَلَا فِي حَضَرٍ.
904 – And [he transmitted] that ʿUmar b. al-Khaṭṭāb did not perform the <i>qunūt</i> -supplication.	904 – وَأَنَّ عُمَرَ بْنَ الْخَطَّابِ لَمْ يَقْنُتْ.
905 – And Ibn ʿAbbās, may God be pleased with him, did not perform the <i>qunūt</i> -supplication.	905 – وَأَنَّ ابْنَ عَبَّاسٍ رَضِيَ اللَّهُ عَنْهُ لَمْ يَقْنُتْ.

³ See the *Et*, s.v. “*Qunūt*” for Wensinck’s detailed discussion regarding this particular supplication, including an account of the Prophet’s month-long *qunūt*. Lane, too (i.2566-7), treats the root *q-n-t* in great detail, and includes a customary formula. Among meanings associated with *q-n-t* are obedience, keeping silent, and standing long; these, of course, are features of this supplication. As Wensinck writes: “*Qunūt*”, however, usually seems to be connected in meaning with *duʿāʾ*, e.g. in the oft-quoted tradition which tells how Muḥammad in the *ṣalāt al-ṣubḥ* appealed to Allāh for a month against the tribe of Riʿl and Dhakwān, as they had slain the *ḥurrāʾ* at Biʾr Maʿūna... in this case the meaning is certain from the explanation *yadʿū ʿalā...*” Other traditions relate that during his *qunūt* the Prophet would call down evil upon whichever aggressor had caused him to appeal to God for aid. Wensinck shows that there was a considerable amount of ambiguity and *ikhtilāf* on the subject, and a number of formulae in the *ḥadīth* collections for *qunūt al-witr*, as well as ʿUmar’s *qunūt* in §909, and what is related by Lane.

906 – And [he transmitted] that ‘Abd Allāh b. ‘Umar, may God be pleased with them both, did not perform the <i>qunūt</i>-supplication. And he said: O <i>Ahl al-ʿIrāq</i>! I have been informed (<i>unbi’tu</i>) that your <i>imām</i> stands [in prayer], neither reading Qur’ān, nor bowing. He means by that the <i>qunūt</i>-supplication.	906 – وَأَنَّ عَبْدَ اللَّهِ بْنَ عُمَرَ رَضِيَ اللَّهُ عَنْهُمَا لَمْ يَقْنُتْ. وَقَالَ: يَا أَهْلَ الْعِرَاقِ، أُنبِئْتُ أَنَّ إِمَامَكُمْ يَقُومُ لَا قَارِئَ قُرْآنٍ وَلَا رَاكِعٍ. يَعْنِي بِذَلِكَ الْقُنُوتَ.
907 – And [he transmitted] that ‘Alī, may God be pleased with him, performed the <i>qunūt</i>-supplication in war, calling down evil upon Mu‘āwiya; so the <i>Ahl al-Kūfa</i> took up that [practice] from him.	907 – وَأَنَّ عَلِيًّا رَضِيَ اللَّهُ عَنْهُ قَنَتَ فِي حَرْبٍ يَدْعُو عَلَى مُعَاوِيَةَ فَأَخَذَ أَهْلُ الْكُوفَةِ عَنْهُ ذَلِكَ.
908 – And Mu‘āwiya performed <i>qunūt</i>-supplication in Syria (<i>al-Shām</i>), calling down evil upon ‘Alī, may God be pleased with him; so the <i>Ahl al-Shām</i> took up that [practice] from him.⁴	908 – وَقَنَتَ مُعَاوِيَةُ بِالشَّامِ يَدْعُو عَلَى عَلِيٍّ رَضِيَ اللَّهُ عَنْهُ فَأَخَذَ أَهْلُ الشَّامِ عَنْهُ ذَلِكَ.
909 – But Ibn Abī Laylā, may God Most High have mercy upon him, used to opine that (<i>kāna... yarā</i>) the <i>qunūt</i>-supplication was in the last <i>rak‘a</i> after the recitation (<i>ba‘da al-qirā‘ati</i>), and before the <i>rukū‘</i> in the <i>fajr</i>. And he narrated that concerning ‘Umar b. al-Khaṭṭāb, may God Most High have mercy upon him; that he performed the <i>qunūt</i>-supplication with these two <i>sūras</i>: «O God, verily we seek Your aid and we seek Your forgiveness, and we extol the very best of You. We thank You and we are not ungrateful to You; and we renounce (<i>nakhla‘u</i>) and we abandon whosoever is iniquitous to You (<i>yafjuruka</i>). [This corresponds to <i>Sūrat al-Khal’</i>, from the <i>maṣḥaf</i> of Ubayy b. Ka‘b]. O God, it is You we worship, and to You we pray and prostrate; and towards You we strive and hasten in service (<i>naḥfidu</i>). We beg for Your mercy, and we dread Your chastisement (<i>nakhshā ‘adhābaka</i>); verily Your chastisement to the <i>kuffār</i> is overwhelming.⁵ [This corresponds to <i>Sūrat</i>	909 – وَكَانَ ابْنُ أَبِي لَيْلَى رَحِمَهُ اللَّهُ تَعَالَى يَرَى الْقُنُوتَ فِي الرَّكْعَةِ الْآخِرَةِ بَعْدَ الْقِرَاءَةِ وَقَبْلَ الرُّكُوعِ فِي الْفَجْرِ وَيُرْوِي ذَلِكَ عَنْ عُمَرَ بْنِ الْخَطَّابِ رَضِيَ اللَّهُ عَنْهُ أَنَّهُ قَنَتَ بِهَاتَيْنِ السُّورَتَيْنِ: «اللَّهُمَّ إِنَّا نَسْتَعِينُكَ وَنَسْتَغْفِرُكَ وَنُثْنِي عَلَيْكَ الْخَيْرَ، نَشْكُرُكَ وَلَا نَكْفُرُكَ، وَنَخْلَعُ وَنَتْرُكُ مَنْ يَفْجُرُكَ، اللَّهُمَّ إِنَّاكَ نَعْبُدُ، وَلَكَ نُصَلِّي وَنَسْجُدُ، وَإِلَيْكَ نَسْعَى وَنَخْشَى، نَرْجُو رَحْمَتَكَ، وَنَخْشَى عَذَابَكَ، إِنَّ عَذَابَكَ بِالْكَفَّارِ مُلْحَقٌ» وَكَانَ يُحَدِّثُ عَنْ ابْنِ عَبَّاسٍ رَضِيَ اللَّهُ عَنْهُمَا عَنْ عُمَرَ رَضِيَ اللَّهُ عَنْهُ بِهَذَا الْحَدِيثِ، وَيُحَدِّثُ عَنْ عَلِيٍّ رَضِيَ اللَّهُ عَنْهُ أَنَّهُ

⁴ These passages serve as a remarkable illustration; the understanding that different *ṣaḥāba* influenced differently the legal doctrines of the various centers wherein they took up residence is clear to see. Of particular note is that ‘Alī and Mu‘āwiya — though bitterly opposed — seem to have bequeathed the same practice of *qunūt* to their capitals, and specifically on account of each calling down evil upon the other.

⁵ Lane, in his rendering of one of the *qunūt* supplications (i.2566-7) prefers *mulḥiq*, over *mulḥaq*, as in: “Verily Thy punishment overtakes the unbelievers.” He explains: “thus this clause is expl.

<i>al-Ḥaḍf</i>, from the <i>maṣḥaf</i> of Ubayy b. Kaʿb].» And he used to transmit, on the authority of Ibn ʿAbbās, may God be pleased with them both, on ʿUmar, may God be pleased with him, this <i>ḥadīth</i>. And he transmitted [as <i>ḥadīth</i>], concerning ʿAlī, may God be pleased with him, that he performed the <i>qunūt</i>-supplication.⁶	قَتَّ.
910 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And he who catches up to (<i>adraka</i>) the <i>imām</i> as he bows, and performs the <i>takbīr</i>, but does not bow until the <i>imām</i> raises his head; he prostrates with the <i>imām</i>, but does not reckon (<i>lam yaʿtadda</i>) that prostration, because he did not catch up to his <i>rukūʿ</i>.⁷ And if he bows after the <i>imām</i> raises his head; he does not reckon that <i>rakʿa</i>, because he did not reach it with the <i>imām</i>, and he did not recite for it — and he will have been praying by	910 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَمَنْ أَدْرَكَ الْإِمَامَ رَاكِعًا فَكَبَّرَ وَلَمْ يَرْكَعْ حَتَّى يَرْفَعَ الْإِمَامُ رَأْسَهُ سَجَدَ مَعَ الْإِمَامِ وَلَمْ يَعْتَدِ بِذَلِكَ السُّجُودِ؛ لِأَنَّهُ لَمْ يُدْرِكْ رُكُوعَهُ، وَلَوْ رَكَعَ بَعْدَ رَفْعِ الْإِمَامِ رَأْسَهُ لَمْ يَعْتَدِ بِتِلْكَ الرَّكْعَةِ؛ لِأَنَّهُ لَمْ يُدْرِكْهَا مَعَ الْإِمَامِ، وَلَمْ يَقْرَأْ لَهَا فَيَكُونُ صَلَّى

on the authority of [al-Kisāʿī]: or, as some say, it means, *causes others to overtake*, or *become associated with, the unbelievers*.” For this last, he cites the *Mughrib* of al-Muṭarrizī. Notably, certain Shāfiʿī scholars have allowed for this latter (*mulḥaq*) reading as well (see al-Nawawī’s *Majmūʿ Sharḥ al-Muḥadhdhab* [Cairo: Dār al-Fikr, n.d.], 17:400; and the *Ḥāshiya* of al-Shabrāmaliṣī in Shams al-Dīn al-Ramlī’s *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj* [Beirut: Dār al-Fikr, 1984], 2:116).

⁶ It is of extraordinary import that the narrator (original and subsequent) refers to these supplications as two *sūras*. They are, in fact, just that — but from a surprising source. Indeed, these two *sūras* (known as *Sūrat al-Ḥafd* and *Sūrat al-Khalʿ*) are reported to have belonged to the *maṣḥaf* of Ubayy b. Kaʿb, and do not appear in the ʿUthmānic recension. They match the text exactly as it appears in Arthur Jeffery, ed., *Materials for the History of the Text of the Qurʾān: the Old Codices; etc.* (Baghdad: Maktabat al-Muthannā, 1937, 180-1), which is compiled in part from the *Kitāb al-Maṣāḥif* of Abū Bakr b. Abī Dāwūd al-Sijistānī (d.316). Note that in §909 they are referred to first as *sūras*, and then afterwards as belonging to a *ḥadīth* (al-Afghānī [114, n.1] supplies references and quotations from several sources for related reports). Of real import is that neither Abū Ḥanīfa, Ibn Abī Laylā, Abū Yūsuf, Muḥammad b. al-Ḥasan, al-Shāfiʿī, nor al-Rabī seems to proffer any remark (or reprimand), as regards them. As regards the *maṣḥaf* of Ubayy b. Kaʿb, the *EF*, s.v. “al-Ḥurʾān,” has this to say:

“Ubayy’s codex seems according to the extant evidence to have been less important than Ibn Masʿūd’s. It appears not to have been the source of any secondary codices, and very few unique variants are attributed to it. Most variants attributed to Ubayy are attributed also to either Ibn Masʿūd or Ibn ʿAbbās. Probably the best known feature of Ubayy’s codex is that it is said to have included two short *sūra*s not in the ʿUthmānic and Ibn Masʿūd texts, *Sūrat al-Khalʿ*, with three verses, and *Sūrat al-Ḥafd*, with six (see *Materials*, 180f.). The order of *sūra*s in Ubayy’s codex is said to have differed from that of ʿUthmān’s and Ibn Masʿūd’s, and again we have two slightly different lists (*Fihrist*, 27; Dodge tr., 58-61; and *Itkān*, i, 64). [...] Ibn Naḍīm states at the end of his list in the *Fihrist* that Ubayy’s codex contained 116 *sūras*, and he reports that his source of information, Faḍl b. Shādhān, saw a copy of an Ubayy codex in a village near Baṣra in the middle of the 3rd century A.H.”

⁷ Ḥassūn has يُدْرِكُ, of which I cannot make sense, and so have preferred يُدْرِكُ, as seems consistent with the rest of the passage.

himself and reciting, and not praying with the <i>imām</i> regarding what he reached with the <i>imām</i>. And he performs the <i>qunūt</i>-supplication in the morning prayer (<i>ṣalāt al-ṣubḥ</i>), after the second <i>rak'a</i>.	لِنَفْسِهِ فَقَرَأَ وَلَا صَلَّى مَعَ الْإِمَامِ فِيمَا أَدْرَكَ مَعَ الْإِمَامِ، وَيَقْنُتُ فِي صَلَاةِ الصُّبْحِ بَعْدَ الرَّكْعَةِ الثَّانِيَةِ.
911 – The Messenger of God, may God bless and save him, performed the <i>qunūt</i>-supplication (<i>qanata</i>), and he did not abandon — we know this (<i>'alimnāhu</i>) — the <i>qunūt</i>, in the <i>ṣubḥ</i>, ever (<i>qaṭṭu</i>). And the Prophet, may God bless and save him, only performed the <i>qunūt</i> — when there came to him the [news of] the killing (<i>qatlu</i>) of the Ahl Bi'r Ma'ūna — for only fifteen nights, calling down evil upon (<i>yad'u 'alā</i>) a group from among the <i>mushrikīn</i> in the [night] <i>ṣalawāt</i>, all of them. Then he abandoned the <i>qunūt</i> in the [night] <i>ṣalawāt</i>, all of them. But as for the <i>ṣalāt al-ṣubḥ</i>; I don't know that he abandoned it. Nay, rather we know that he performed the <i>qunūt</i>-supplication in the <i>ṣubḥ</i> — before the killing of the Ahl Bi'r Ma'ūna, and after.	911 - قَنْتَ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - وَلَمْ يَتْرُكْ - عَلِمْنَاهُ - الْقُنُوتَ فِي الصُّبْحِ قَطُّ، وَإِنَّمَا قَنْتَ النَّبِيَّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - حِينَ جَاءَهُ قَتْلُ أَهْلِ بَيْرِ مَعُونَةَ خَمْسَ عَشْرَةَ لَيْلَةً يَدْعُو عَلَى قَوْمٍ مِنَ الْمُشْرِكِينَ فِي الصَّلَوَاتِ كُلِّهَا، ثُمَّ تَرَكَ الْقُنُوتَ فِي الصَّلَوَاتِ كُلِّهَا. فَأَمَّا فِي صَلَاةِ الصُّبْحِ فَلَا أَعْلَمُ أَنَّهُ تَرَكَهُ، بَلْ نَعْلَمُ أَنَّهُ قَنْتَ فِي الصُّبْحِ قَبْلَ قَتْلِ أَهْلِ بَيْرِ مَعُونَةَ وَبَعْدُ.
912 – And there have performed <i>qunūt</i> after the Messenger of God, may God bless and save him: Abū Bakr, and 'Umar, and 'Alī b. Abī Ṭālib, may God be pleased with them, all of them, after the <i>rukū'</i>. And 'Uthmān, may God be pleased with him, in some [part] of his <i>amīr</i>-ship (<i>fī ba'di imāratihī</i>); then he advanced the <i>qunūt</i> before the <i>rukū'</i>, and said: So that whosoever has been preceded (<i>subīqa</i>) in the <i>ṣalāt</i> can catch up to the <i>rak'a</i>.	912 - وَقَدْ قَنْتَ بَعْدَ رَسُولِ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - أَبُو بَكْرٌ وَعُمَرُ وَعَلِيٌّ بْنُ أَبِي طَالِبٍ رَضِيَ اللَّهُ عَنْهُمْ كُلُّهُمْ بَعْدَ الرُّكُوعِ وَعُثْمَانُ رَضِيَ اللَّهُ عَنْهُ فِي بَعْضِ إِمَارَتِهِ ثُمَّ قَدَّمَ الْقُنُوتَ عَلَى الرُّكُوعِ، وَقَالَ: لِيُدْرِكَ مَنْ سَبَقَ بِالصَّلَاةِ الرَّكْعَةَ.

Bāb Ṣalāt al-Khawf

Chapter on the Prayer of Alarm (Ṣalāt al-Khawf) ¹	بَابُ صَلَاةِ الْخَوْفِ
913 – He [Abū Yūsuf] said: And Abū Ḥanīfa, may God have mercy upon him, used to say as regards the ṣalāt al-khawf: The imām stands, and a group (ṭā'ifa) stands with him, and they perform the takbīr with the imām for a rak'a and two sajdās, and they prostrate with him, then they are released (yanfalitūna) without speaking until they are in the face of the enemy (bi-izā' al-'adduwwi). Then the group which has been in the face of the enemy comes, and they take up the takbīr, then the imām leads them in prayer for another rak'a and two sajdās, and the imām performs taslīm, and they themselves are released without taslīm, and they do not speak, and they stand in the face of the enemy. Then the other [group] comes and they pray a single rak'a, then they perform the taslīm. And that is due to the qawl of God, to Him belong might and majesty: «And let another group who have not prayed come, and let them pray with you» [Q.4:102].	913 – قَالَ: وَكَانَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ يَقُولُ فِي صَلَاةِ الْخَوْفِ: يَقُومُ الْإِمَامُ وَتَقُومُ مَعَهُ طَائِفَةٌ فَيُكَبِّرُونَ مَعَ الْإِمَامِ رَكْعَةً وَسَجْدَتَيْنِ وَيَسْجُدُونَ مَعَهُ فَيَنْفَلِتُونَ مِنْ غَيْرِ أَنْ يَتَكَلَّمُوا حَتَّى يَقِفُوا بِإِزَاءِ الْعَدُوِّ، ثُمَّ تَأْتِي الطَّائِفَةُ الَّتِي كَانَتْ بِإِزَاءِ الْعَدُوِّ فَيَسْتَقْبِلُونَ التَّكْبِيرَ ثُمَّ يُصَلِّي بِهِمُ الْإِمَامُ رَكْعَةً أُخْرَى وَسَجْدَتَيْنِ وَيُسَلِّمُ الْإِمَامُ فَيَنْفَلِتُونَ هُمْ مِنْ غَيْرِ تَسْلِيمٍ، وَلَا يَتَكَلَّمُوا فَيَقُومُوا بِإِزَاءِ الْعَدُوِّ، وَتَأْتِي الْأُخْرَى فَيُصَلُّونَ رَكْعَةً وَحَدَانَا ثُمَّ يُسَلِّمُونَ؛ وَذَلِكَ لِقَوْلِ اللَّهِ عَزَّ وَجَلَّ: «وَلْتَأْتِ طَائِفَةٌ أُخْرَى لَمْ يُصَلُّوا فَلْيُصَلُّوا مَعَكُمْ» [النساء: 102].
914 – And likewise has it reached us on the authority of 'Abd Allāh b. 'Abbās, and Ibrāhīm al-Nakhaṭī.	914 – وَكَذَلِكَ بَلَغَنَا عَنْ عَبْدِ اللَّهِ بْنِ عَبَّاسٍ، وَإِبْرَاهِيمَ النَّخَعِيِّ.
915 – But Ibn Abī Laylā used to say: The imām and the two groups stand together when the enemy is between them and the qibla, and he performs the takbīr and they perform the takbīr, and he bows and they bow, together. And the imām and the first rank (al-ṣaffu al-awwalu) prostrate, while the other rank stands in the faces of the enemy (fī wujūhi al-'aduwwi); and when the imām raises, the first rank raises their heads, and they stand, and the latter rank prostrates. And when they complete their prostrations they stand, then the latter rank advances, while the first rank moves back, and the imām leads them in prayer	915 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: يَقُومُ الْإِمَامُ وَالطَّائِفَتَانِ جَمِيعًا إِذَا كَانَ الْعَدُوُّ بَيْنَهُمَا وَبَيْنَ الْقِبْلَةِ، فَيُكَبِّرُ وَيُكَبِّرُونَ، وَيَرْكَعُ وَيَرْكَعُونَ جَمِيعًا، وَيَسْجُدُ الْإِمَامُ وَالصَّفُّ الْأَوَّلُ، وَيَقُومُ الصَّفُّ الْآخَرُ فِي وَجْهِ الْعَدُوِّ، فَإِذَا رَفَعَ الْإِمَامُ رَفَعَ الصَّفُّ الْأَوَّلُ رُءُوسَهُمْ وَقَامُوا وَسَجَدَ الصَّفُّ الْمُؤَخَّرُ، فَإِذَا فَرَغُوا مِنْ سُجُودِهِمْ قَامُوا ثُمَّ تَقَدَّمَ الصَّفُّ الْمُؤَخَّرُ،

¹ (Ḥassūn, vol.9, pt.14, 158-63; Schacht: Tr. I, 158-165).

with the other <i>rak'a</i> , likewise.	وَيَتَأَخَّرُ الصَّفُّ الْأَوَّلُ فَيُصَلِّي بِهِمُ الْإِمَامُ الرَّكْعَةَ الْأُخْرَى كَذَلِكَ.
916 – And Ibn Abī Laylā transmits that [as <i>ḥadīth</i>] on the authority of 'Aṭā' b. Abī Rabāḥ, on Jābir b. 'Abd Allāh, on the Messenger of God, may God bless and save him.	916 – وَيُحَدِّثُ بِذَلِكَ ابْنُ أَبِي لَيْلَى عَنْ عَطَاءِ بْنِ أَبِي رَبَاحٍ، عَنْ جَابِرِ بْنِ عَبْدِ اللَّهِ، عَنْ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ.
917 – And Ibn Abī Laylā used to say: When the enemy is to the back (<i>fī duburi</i>) [with respect to] the <i>qibla</i> [i.e., the Muslims are between <i>qibla</i> and enemy], the <i>imām</i> , and a rank with him, stand facing the <i>qibla</i> , and the other rank facing the enemy. And he performs <i>takbīr</i> and they perform <i>takbīr</i> together, and he bows and they bow together. Then the rank which is with the <i>imām</i> performs two prostrations, then they are released and go forth to face the enemy. And the others come and prostrate, and the <i>imām</i> leads them in prayer with the second <i>rak'a</i> , and they bow together, and the rank which is with him prostrates with him. Then they are released and go forth to face the enemy; and the others come and they prostrate and finish [the cycle of prayer]. Then the <i>imām</i> performs the <i>taslīm</i> while they are together.	917 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: إِذَا كَانَ الْعَدُوُّ فِي دُبُرِ الْقِبْلَةِ قَامَ الْإِمَامُ وَصَفُّ مَعَهُ مُسْتَقْبِلَ الْقِبْلَةِ وَالصَّفُّ الْآخَرُ مُسْتَقْبِلَ الْعَدُوِّ، وَيُكَبِّرُ وَيُكَبِّرُونَ جَمِيعًا، وَيَرْكَعُ وَيَرْكَعُونَ جَمِيعًا، ثُمَّ يَسْجُدُ الصَّفُّ الَّذِي مَعَ الْإِمَامِ سَجْدَتَيْنِ ثُمَّ يَنْفَتِلُونَ فَيَسْتَقْبِلُونَ الْعَدُوَّ، وَيَجِيءُ الْآخَرُونَ فَيَسْجُدُونَ وَيُصَلِّي بِهِمُ الْإِمَامُ الرَّكْعَةَ الثَّانِيَةَ فَيَرْكَعُونَ جَمِيعًا، وَيَسْجُدُ مَعَهُ الصَّفُّ الَّذِي مَعَهُ ثُمَّ يَنْفَتِلُونَ فَيَسْتَقْبِلُونَ الْعَدُوَّ، وَيَجِيءُ الْآخَرُونَ فَيَسْجُدُونَ وَيَفْرُغُونَ، ثُمَّ يُسَلِّمُ الْإِمَامُ وَهُمْ جَمِيعًا.
918 – Al-Shāfi'ī said: And when the <i>imām</i> leads the <i>ṣalāt al-khawf</i> , while traveling, he puts a group from among his <i>aṣḥāb</i> between himself and the enemy, and he leads a group in prayer with a <i>rak'a</i> . Then they remain standing, reciting and praying for themselves the <i>rak'a</i> which remains upon them, and they perform <i>tashahhud</i> and <i>taslīm</i> . Then they disperse and stand in the face of the enemy, and the group which was in the face of the enemy comes. And they perform <i>takbīr</i> for themselves, and he leads them in prayer with the <i>rak'a</i> which remains upon them. And if he sits during the <i>tashahhud</i> they stand and pray the <i>rak'a</i> which remains upon them, then they sit and perform <i>tashahhud</i> . And when the <i>imām</i> sees that they have completed their	918 – قَالَ الشَّافِعِيُّ: وَإِذَا صَلَّى الْإِمَامُ صَلَاةَ الْخَوْفِ مُسَافِرًا جَعَلَ طَائِفَةً مِنْ أَصْحَابِهِ بَيْنَهُ وَبَيْنَ الْعَدُوِّ، وَصَلَّى بِطَائِفَةٍ رَكْعَةً، ثُمَّ ثَبَتَ قَائِمًا يَقْرَأُ وَصَلُّوا لَأَنْفُسِهِمْ الرَّكْعَةَ الَّتِي بَقِيَتْ عَلَيْهِمْ وَتَشْهَدُوا وَسَلَّمُوا ثُمَّ انْصَرَفُوا وَقَامُوا بِإِزَاءِ الْعَدُوِّ، وَجَاءَتِ الطَّائِفَةُ الَّتِي كَانَتْ بِإِزَاءِ الْعَدُوِّ فَكَبَّرُوا لَأَنْفُسِهِمْ وَصَلَّى بِهِمُ الرَّكْعَةَ الَّتِي كَانَتْ بَقِيَتْ عَلَيْهِ، فَإِذَا جَلَسَ فِي التَّشَهُّدِ قَامُوا فَصَلُّوا الرَّكْعَةَ الَّتِي بَقِيَتْ عَلَيْهِمْ ثُمَّ جَلَسُوا

<i>tashahhud</i> , he leads them in <i>taslīm</i> .	فَتَشْهَدُوا. فَإِذَا رَأَى الْإِمَامُ أَنَّ قَدْ قَضَوْا تَشْهَدُهُمْ سَلَّمَ بِهِمْ.
919 – And in this <i>maʿnā</i> the Prophet, may God bless and save him, prayed the <i>ṣalāt al-khawf</i> on the <i>Yawm Dhāt al-Riqāʿ</i> . ²	919 – وَبِهَذَا الْمَعْنَى صَلَّى النَّبِيُّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – صَلَاةَ الْخَوْفِ يَوْمَ ذَاتِ الرِّقَاعِ.
920 – But there has been narrated concerning him, as regards the <i>ṣalāt al-khawf</i> , the <i>khilāf</i> of this. And this is written in the <i>Kitāb al-Ṣalāt</i> . ³	920 – وَقَدْ رُوي عَنْهُ فِي صَلَاةِ الْخَوْفِ خِلَافٌ هَذَا. وَهَذَا مَكْتُوبٌ فِي كِتَابِ الصَّلَاةِ.
921 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the enemy is between him and the <i>qibla</i> , there being no barrier (<i>ḥāʾil</i>) between him and them, nor screening cover (<i>sutra</i>), but [he is] where arrows cannot reach him, and the enemy are few, innocuous (<i>maʿmūnīna</i>), and	921 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَ الْعَدُوُّ بَيْنَهُ وَبَيْنَ الْقِبْلَةِ لَا حَائِلَ بَيْنَهُ وَبَيْنَهُمْ وَلَا سُتْرَةَ، وَحَيْثُ لَا يَنَالُهُ النَّبْلُ، وَكَانَ

² We may refer to the *El*² (s.v. “*Ṣalāt al-Khawf*”) for some detail as to such background events — important contexts in the deliberations of jurists on this particular *masʿala*:

“They record various measures taken by Muḥammad in different circumstances, where the requirements of security were not always of the same urgency. Two examples are recalled with particular clarity. On the one hand, the encounter at *Dhāt al-Riqāʿ*, in *Nadīd*, during the expedition against the *Ghatafān*, in 4/626 [Ibn Hishām; al-Ṭabarī; and al-Masʿūdī are cited]. The place is mentioned in the tradition of Sahl b. Abī Ḥaṭhma, also for example in the tradition of Abū Hurayra [al-Nasāʾī is cited]. The enemy was then located in the direction opposite to the *qibla*; while performing the prayer, the Muslims then turned their backs towards the adversary, putting themselves in the greatest danger. On the other hand, on an occasion when the Muslims, at ʿUṣfān, confronted an enemy hand commanded by Khālīd b. al-Walīd, the enemy was located in the direction of the *qibla*, a much more advantageous situation (tradition of Abū ʿAyyāsh al-Zuraḳī, [Abū Dāwūd and al-Nasāʾī are cited]).”

³ There is, as one would expect, a quite lengthy *Kitāb al-Ṣalāt* in the *Umm*; it is some 450 pages in length in Ḥassūn’s edition, spanning parts of two volumes (vol.1, pt.2, 5-332; cont. in vol.2, pt.3, 7-128), and leading into the *Kitāb Ṣalāt al-Khawf* (vol.2, pt.3, 131-199). Not surprisingly, al-Nadīm (353) lists both a *Kitāb al-Ṣalāt* and a *Kitāb Ṣalāt al-Khawf* among al-Shāfiʿī’s writings. Certainly, it seems more likely we should find the contrary narration which al-Shāfiʿī mentions in the latter, though I have yet to locate it. However, in §2246-7, under the subheading *Kayfa Ṣalāt al-Khawf* (vol.2, pt.3, 132) we find al-Shāfiʿī’s Qurʾānic indicant (Q.4:102), and the Prophetic *ḥadīth*, both of which, together, constitute the basis of his ruling. He in fact says as much in §2252: “And when the *imām* prays the *ṣalāt al-khawf*, he prays just as I have described — by the *dalāla* of the Qurʾān, then the *ḥadīth* of the Messenger of God, may God bless and save him.” There follows this *ḥadīth* — transmitted to al-Shāfiʿī by no less a personage than his teacher Mālik b. Anas — a lengthy discussion of related *masāʾil* spanning some sixty pages. Again not surprisingly, we find the very same *ḥadīth* in the *Kitāb Ikhtilāf Mālik waʾl-Shāfiʿī*, at the end of the (untitled) opening of the book, after other *wuḍʿū* and *ṣalāt* related *masāʾil*, before the first subheading of *Bāb mā Jāʾa fiʾl-Ṣadaqāt* (§§72-7, vol.9, pt.14, 350-1). We have attempted a translation of the discussion, as it illustrates several matters of legal-theoretical import (see II.§920 in the appendices).

his <i>aṣḥāb</i> are many, and they [the enemy] are distant from him, incapable — during the prostrations — of attacking him (<i>al-ghārati 'alayhi</i>) before they [his <i>aṣḥāb</i>] betake themselves to riding (<i>al-rukūb</i>) and resistance (<i>al-imtīnā</i>); he leads his <i>aṣḥāb</i> in prayer, all of them, and when he bows, they bow, all of them; and when he raises [his head], they raise [their heads], all of them; and when he prostrates, they prostrate, all of them — except for a rank who are standing at his head. And when he raises his head from the two <i>sajdas</i>, and straightens up (<i>istawā</i>) — standing, or sitting on bended knees (<i>qā'id^{an} fī mathn^{an}</i>) — they follow him and prostrate. Then they stand at his standing, and sit at his sitting.	الْعَدُوُّ قَلِيلًا مَّا مُؤْنِنَ وَأَصْحَابُهُ كَثِيرًا، وَكَانُوا بَعِيدًا مِنْهُ لَا يَقْدِرُونَ فِي السُّجُودِ عَلَى الْغَارَةِ عَلَيْهِ قَبْلَ أَنْ يَصِيرُوا إِلَى الرُّكُوبِ وَالْإِمْتِنَاعِ صَلَّى بِأَصْحَابِهِ كُلِّهِمْ، فَإِذَا رَكَعَ رَكَعُوا كُلُّهُمْ، وَإِذَا رَفَعَ رَفَعُوا كُلُّهُمْ، وَإِذَا سَجَدَ سَجَدُوا كُلُّهُمْ إِلَّا صَفًّا يَكُونُونَ عَلَى رَأْسِهِ قِيَامًا، فَإِذَا رَفَعَ رَأْسَهُ مِنْ السَّجْدَتَيْنِ فَاسْتَوَى قَائِمًا أَوْ قَاعِدًا فِي مَثْنِي اتَّبَعُوهُ فَسَجَدُوا ثُمَّ قَامُوا بِقِيَامِهِ وَقَعَدُوا بِقُعُودِهِ.
922 – And thus did the Messenger of God, may God bless and save him, pray during the campaign (<i>ghazāt</i>) of al-Ḥudaybiya in 'Uṣfān,⁴ while Khālīd b. al-Walīd was between him and the <i>qibla</i>. And Khālīd, in the company of two hundred horsemen, was withdrawn from (<i>muntabidh^{an} min</i>) the Prophet, may God bless and save him, in a smooth desert (<i>ṣaḥrā'a malsā'a</i>) — there being in it neither mountain nor tree. And the Prophet, may God bless and save him, was in the company of one thousand and four hundred. And Khālīd was not — so far as we believe (<i>fīmā narā</i>) — desirous of fighting them, but was merely the vanguard (<i>ṭalī'at^{an}</i>), bringing news of them (<i>ya'tī bi-khabarihim</i>).⁵	922 – وَهَكَذَا صَلَّى رَسُولُ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – فِي غَزَاةِ الْحُدَيْبِيَّةِ بِعُسْفَانَ، وَخَالِدُ بْنُ الْوَلِيدِ بَيْنَهُ وَبَيْنَ الْقِبْلَةِ، وَكَانَ خَالِدٌ فِي مَائَتِي فَارِسٍ مُتَنَبِّذًا مِنَ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – فِي صَحْرَاءَ مَلْسَاءَ لَيْسَ فِيهَا جَبَلٌ وَلَا شَجَرٌ، وَالنَّبِيُّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – فِي أَلْفٍ وَأَرْبَعِمِائَةٍ، وَلَمْ يَكُنْ خَالِدٌ – فِيمَا نَرَى – يَطْمَعُ بِقِتَالِهِمْ، وَإِنَّمَا كَانَ طَلِيعَةً يَأْتِي بِخَبَرِهِمْ.
923 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the <i>imām</i> raises his voice (<i>jahara</i>) in the <i>ṣalāt</i>, not raising his voice in it [the <i>ṣalāt</i>] at the recitation, deliberately (<i>'amdan</i>); then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: He has	923 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا جَهَرَ الْإِمَامُ فِي صَلَاةٍ لَا يَجْهَرُ فِيهَا بِالْقِرَاءَةِ عَمَدًا، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: قَدْ أَسَاءَ، وَصَلَاتُهُ تَامَةٌ.

⁴ Ḥassūn (ix.160, n.1) identifies 'Uṣfān as one of the watering places on the road between Juhfa and Mecca.

⁵ Note that this refers to events during the historic Treaty of Ḥudaybiya; the 1,400 with the Prophet are those on the pilgrimage-expedition, while those led by Khālīd represent the force sent to cut them off. Khālīd was not to convert until a little more than a year later. Of particular note is that al-Shāfi'ī refers to the incident as the *ghazāt* al-Ḥudaybiya, which seems to support the belief of some modern historians that this was more than just an 'umra-pilgrimage.

done badly (<i>qad asā'a</i>), but his ṣalāt is complete.	
924 – But Ibn Abī Laylā used to say: He repeats with them the ṣalāt.	924 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: يُعِيدُ بِهِمُ الصَّلَاةَ.
925 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the imām raises his voice in the midday prayer (<i>al-zuhr</i>), or the afternoon prayer (<i>al-ʿaṣr</i>), or lowers his voice (<i>khāfata</i>) during the sunset prayer (<i>al-maghrib</i>), or the evening prayer (<i>al-ʾishā</i>); there is [enjoined] upon him no redoing [of the prayer] (<i>iʿādat^{um}</i>), but he has done badly if it was deliberate. ⁶	925 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا جَهَرَ الْإِمَامُ فِي الظُّهْرِ، أَوْ الْعَصْرِ، أَوْ خَافَتْ فِي الْمَغْرِبِ، أَوْ الْعِشَاءِ، فَلَيْسَ عَلَيْهِ إِعَادَةٌ وَقَدْ أَسَاءَ إِنْ كَانَ عَمْدًا.
926 – And when a man prays four rak'as at night, and does not perform <i>taslīm</i> in them; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: There is no harm in that (<i>lā ba'sa bi-dhālika</i>).	926 – وَإِذَا صَلَّى الرَّجُلُ أَرْبَعَ رَكَعَاتٍ بِاللَّيْلِ وَلَمْ يُسَلِّمْ فِيهَا، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا بَأْسَ بِذَلِكَ.
927 – But Ibn Abī Laylā used to say: I disapprove of that for him (<i>akrahu dhālika lahu</i>), until he performs <i>taslīm</i> for every two rak'as. And he [Abū Yūsuf] embraces it. ⁷	927 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: أَكْرَهُ ذَلِكَ لَهُ حَتَّى يُسَلِّمَ فِي كُلِّ رَكَعَتَيْنِ. وَبِهِ يَأْخُذُ.
928 – Al-Shāfi'ī, may God Most High have mercy upon him, said: The ṣalāt of the night and the day, as pertains to supererogation (<i>al-nāfila</i>), are one and the same (<i>sawā^{um}</i>) – he performs <i>taslīm</i> for every two rak'as. And thus has come [to us] the <i>khābar</i> concerning the Prophet, may God bless and save him, as regards the night prayer (<i>ṣalāt al-layl</i>).	928 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: صَلَاةُ اللَّيْلِ وَالنَّهَارِ مِنَ النَّافِلَةِ سَوَاءٌ؛ يُسَلِّمُ فِي كُلِّ رَكَعَتَيْنِ، وَهَكَذَا جَاءَ الْخَبَرُ عَنِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – فِي صَلَاةِ اللَّيْلِ.

⁶ The *mas'ala* of *jahr* is described in the *EF*² (s.v. “Ṣalāt,” ii.A.9: “*djahr*”). In brief, preference is for: 1) *ṣubḥ/fajr*: loud voice; 2) *zuhr*: whisper; 3) *ʿaṣr*: whisper; 4) *maghrib*: loud voice; 5) *ʾishā*: loud voice.

⁷ As we have seen phrases such as *aḥabbu ilayya* (§724) we have also seen phrases such as *akrahu*, and *lā ba'sa bi-*, and other formulae. This is the language of attribution of normative values to acts; it is worthy of a detailed study across individual scholars, schools and eras, if such has not already been undertaken. How systematic are these formulae, and how universal? And I am puzzled that phrases such as *aḥabbu ilayya* and *akrahu* tend to reinforce the point of decision as emanating from the human decision-maker. That is to say, a phrase such as “it is preferable to me that one do X” or “I disapprove that one do X” have a far different flavor than something like “the *uṣūl* have made it plain that it is preferable/reprehensible to do X.” The locus of authority, through these formulae, is shifted from inherence in the *uṣūl*, to emanation from the breast of the *mujtahid*.

929 – And there may be transmitted concerning him a <i>khavar</i> the like of which the Ahl al-Ḥadīth have confirmed (<i>yuthbitu... mithlahu</i>), as regards the prayer of the daytime (<i>ṣalāt al-nahār</i>).⁸ But even if it were not confirmed, [then] – since the Messenger of God, may God bless and save him, commanded (<i>amara</i>), as regards the <i>ṣalāt al-layl</i>, that he perform <i>taslīm</i> for every two <i>rak'as</i> – there is a rational understanding (<i>ma'qūl^{un}</i>) in the <i>khavar</i> about him, that he – and God Most High knows best – aimed at (<i>arāda</i>) the distinction (<i>al-farq</i>) between the obligatory (<i>al-farīda</i>) and the supererogatory (<i>al-nāfila</i>). And the supererogatory in the night and in the day do not differ (<i>lā takhtalifu</i>), just as that which is written (<i>al-maktūba</i>) do not differ as regards the night and the day, because they are linked together (<i>mawṣūlat^{un}</i>), all of them.	929 – وَقَدْ يُرَوَّى عَنْهُ خَبَرٌ يُثْبِتُ أَهْلُ الْحَدِيثِ مِثْلَهُ فِي صَلَاةِ النَّهَارِ، وَلَوْ لَمْ يُثْبِتْ كَانَ إِذْ أَمَرَ رَسُولُ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – فِي صَلَاةِ اللَّيْلِ أَنْ يُسَلِّمَ مِنْ كُلِّ رَكْعَتَيْنِ كَانَ مَعْقُولًا فِي الْخَبَرِ عَنْهُ أَنَّهُ أَرَادَ – وَاللَّهُ تَعَالَى أَعْلَمُ – الْفَرْقَ بَيْنَ الْفَرِيضَةِ وَالنَّافِلَةِ، وَلَا تَخْتَلِفُ النَّافِلَةُ فِي اللَّيْلِ وَالنَّهَارِ كَمَا لَا تَخْتَلِفُ الْمَكْتُوبَةُ فِي اللَّيْلِ وَالنَّهَارِ، لِأَنَّهَا مَوْصُولَةٌ كُلُّهَا.
930 – He said: And it is requisite that the supererogatory should be thus, during the night and the day.	930 – قَالَ: وَهَكَذَا يَنْبَغِي أَنْ تَكُونَ النَّافِلَةُ فِي اللَّيْلِ وَالنَّهَارِ.
931 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And the <i>takbīr</i> over the funeral processions (<i>al-janā'iz</i>) is four [times]; and I do not know of anyone who memorized [a report] (<i>hafīza</i>) concerning the Prophet, may God bless and save him – in a manner the like of which has been confirmed (<i>min wajhⁱⁿ yathbutu mithlahu</i>) – that he performed <i>takbīr</i> except for four [times].⁹	931 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَالتَّكْبِيرُ عَلَى الْجَنَائِزِ أَرْبَعٌ، وَمَا عَلِمْتُ أَحَدًا حَفِظَ عَنِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – مِنْ وَجْهِ يَثْبِتُ مِثْلَهُ أَنَّهُ كَبَّرَ إِلَّا أَرْبَعًا.

⁸ It is worthy of note that, to this point, we have heard reference to the Ahl al-Ḥadīth mainly in their capacity as confirmers or deniers of sound transmission. They – their conclusions, rather – played a crucial role in al-Shāfi'ī's epistemology of *ḥadīth*, and its use in epistemic justification. We might consider them, in Aristotelian terms, as a reference group for *endoxa* premises (i.e., “some of the wise”). This is part of the greater scheme of juridical dialectic, and al-Shāfi'ī's deference to the Ahl al-Ḥadīth, Ahl al-'Ilm, et al., illustrates an important element of this scheme. In the course of a debate, before bringing forth a *ḥadīth* as a premise to a juridical conclusion (*ḥukm*), such a *ḥadīth* is rendered difficult-not-to-accept (another way we might express *endoxon*) by presenting it with the quality of having been confirmed by the experts – the Ahl al-Ḥadīth.

⁹ We have seen this formula (*lā*) *yathbutu mithluhu* a number of times, and may note that it is remarkably consistent as an expression of epistemic valuation – either for a transmission-method (here: *wajh*), or for the source itself. It may be worthwhile to explore this further in various contexts, as it appears another appeal to the *endoxic* authority of the Ahl al-Ḥadīth, or the Ahl al-'Ilm in general. They have either confirmed the like of X, or they have not confirmed it. And when no specific group is mentioned, but the agent of confirmation is not mentioned (as

932 – And Abū Ḥanīfa used to perform <i>takbīr</i> over the <i>janā'iz</i> four [times].	932 – وَكَانَ أَبُو حَنِيفَةَ يُكَبِّرُ عَلَى الْجَنَائِزِ أَرْبَعًا.
933 – But Ibn Abī Laylā use to perform <i>takbīr</i> five [times] over the <i>janā'iz</i> .	933 – وَكَانَ ابْنُ أَبِي لَيْلَى يُكَبِّرُ خَمْسًا عَلَى الْجَنَائِزِ.
934 – Al-Shāfi'ī said: And he raises his voice (<i>yajharu</i>) in the <i>ṣalāt</i> for « <i>Bismi Allāhi al-Raḥmāni al-Raḥīmi</i> », before the <i>Umm al-Qur'ān</i> [i.e., <i>Sūrat al-Fātiḥa</i>], and before the <i>sūra</i> which is after it. And if he combines <i>sūras</i> in a [single] <i>rak'a</i> , he raises his voice with « <i>Bismi Allāhi al-Raḥmāni al-Raḥīmi</i> », before each <i>sūra</i> .	934 – قَالَ الشَّافِعِيُّ: وَيَجْهَرُ فِي الصَّلَاةِ بِ «بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ» قَبْلَ أُمِّ الْقُرْآنِ وَقَبْلَ السُّورَةِ الَّتِي بَعْدَهَا. فَإِنْ جَمَعَ فِي رَكْعَةٍ سُورًا جَهَرَ بِ «بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ» قَبْلَ كُلِّ سُورَةٍ.
935 – But Abū Ḥanīfa, may God Most High have mercy upon him, used to disapprove (<i>yakrahu</i>) that he raise his voice with « <i>Bismi Allāhi al-Raḥmāni al-Raḥīmi</i> .»	935 – وَكَانَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى يَكْرَهُ أَنْ يَجْهَرَ بِ «بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ».
936 – And Ibn Abī Laylā used to say: When you raise your voice, then good (<i>fa-ḥasan^{um}</i>). And when you lower your voice (<i>akhfayta</i>), then good.	936 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: إِذَا جَهَرْتَ فَحَسَنٌ. وَإِذَا أَخْفَيْتَ فَحَسَنٌ.
937 – He [Abū Yūsuf] said: And it is related (<i>dhukira</i>) about Ibn Abī Laylā, concerning a man who performed ablution (<i>tawadda'a</i>) and wiped over (<i>masaḥa 'alā</i>) his two <i>khuff</i> -foot-coverings [to purify] from <i>ḥadath</i> -impurity, then pulled off his <i>khuff</i> -foot-coverings, [that] he said: He prays as he is (<i>yusallī kamā huwa</i>).	937 – قَالَ: وَذَكَرَ عَنْ ابْنِ أَبِي لَيْلَى، عَنْ رَجُلٍ تَوَضَّأَ وَمَسَحَ عَلَى خُفَيْهِ مِنْ حَدَثٍ ثُمَّ نَزَعَ الْخُفَيْنِ قَالَ: يُصَلِّي كَمَا هُوَ.
938 – And he transmitted that [as <i>ḥadīth</i>] on the authority of al-Ḥakam, on Ibrāhīm.	938 – وَحَدَّثَ بِذَلِكَ عَنْ الْحَكَمِ، عَنْ إِبْرَاهِيمَ.
939 – But Abū Ḥanīfa, may God Most High have mercy upon him, related (<i>dhakara</i>) on the authority of Ḥammād, on Ibrāhīm, that he said: He does not pray until he washes (<i>yaghsila</i>) his two feet. And he [Abū Yūsuf] embraces it.	939 – وَذَكَرَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى عَنْ حَمَّادٍ، عَنْ إِبْرَاهِيمَ أَنَّهُ قَالَ: لَا يُصَلِّي حَتَّى يَغْسِلَ رِجْلَيْهِ. وَبِهِ يَأْخُذُ.

in “the like of which has not been confirmed”), then it may be understood as an *endoxic* appeal to “all the people.” See the *Risāla* (Shākir, §§706, 715, 1116) for more illustrative instances.

940 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And when a man prays, having wiped over his two <i>khuff</i>-foot-coverings, then he takes them off; I think it preferable for him (<i>aḥbabbtu lahu</i>) that he not pray until he renews (<i>yasta’nifa</i>) the <i>wuḍū’</i>; because the ritual purification (<i>al-ṭahāra</i>), when it is undone from a [single] limb (<i>intaqaḍat ‘an ‘uḍwⁱⁿ</i>), it is likely (<i>uḥtumilat</i>) that it be so for the limbs, all of them. And when he does not further the washing of his two feet, it suffices for him (<i>ajza’ahu</i>).¹⁰	940 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا صَلَّى الرَّجُلُ وَقَدْ مَسَحَ عَلَى خُفَيْهِ ثُمَّ نَزَعَهُمَا أَحَبَّبْتُ لَهُ أَنْ لَا يَصَلِّيَ حَتَّى يَسْتَأْنِفَ الْوُضُوءَ؛ لِأَنَّ الطَّهَارَةَ إِذَا انْتَقَضَتْ عَنْ عُضْوٍ احْتَمِلَتْ أَنْ تَكُونَ عَلَى الْأَعْضَاءِ كُلِّهَا، فَإِذَا لَمْ يَزِدْ عَلَى غَسْلِ رِجْلَيْهِ أَجْزَأُهُ.
941 – And it has been narrated concerning Ibn ‘Umar that he performed <i>wuḍū’</i> and went out to the market, then he was called upon to attend a funeral procession (<i>du‘iyya li-jināzatⁱⁿ</i>), so he wiped over his two <i>khuff</i>-foot-coverings and prayed.	941 – وَقَدْ رُوِيَ عَنْ ابْنِ عُمَرَ أَنَّهُ تَوَضَّأَ وَخَرَجَ إِلَى السُّوقِ، ثُمَّ دُعِيَ لِحِنَازَةٍ فَمَسَحَ عَلَى خُفَيْهِ وَصَلَّى.
942 – And it was related (<i>dhukira</i>) [by Ibn Abī Laylā] on the authority of al-Ḥakam also, on Ibrāhīm, that he said: There is no harm in the enumeration of <i>āyas</i> (<i>lā ba’sa bi-‘addi al-āyi</i>) during the <i>ṣalāt</i>.	942 – وَذُكِرَ عَنِ الْحَكَمِ أَيْضًا، عَنْ إِبْرَاهِيمَ أَنَّهُ قَالَ: لَا بَأْسَ بَعْدَ الْآيِ فِي الصَّلَاةِ.
943 – He [al-Shāfi‘ī] said:¹¹ And if he leaves off from the enumeration of <i>āyas</i> during <i>ṣalāt</i>, it is more preferable to me (<i>aḥabba ilayya</i>).¹² But if he is merely counting them to keep tally (<i>‘aqd^{an}</i>), and does not pronounce their numbering out loud (<i>lā yalfiẓu bi-‘adadihā lafẓ^{an}</i>), there is nothing [enjoined] upon him. But if he pronounces something of that out loud, and says: One, and two, while he is recalling his <i>ṣalāt</i>; his <i>ṣalāt</i> is undone (<i>intaqaḍat</i>) and renewal (<i>al-isti’nāf</i>) is [enjoined] upon him.	943 – قَالَ: وَلَوْ تَرَكَ عَدَّ الْآيِ فِي الصَّلَاةِ كَانَ أَحَبَّ إِلَيَّ. وَإِنْ كَانَ إِنَّمَا يَعُدُّهَا عَقْدًا وَلَا يَلْفِظُ بَعْدِدِهَا لَفْظًا لَمْ يَكُنْ عَلَيْهِ شَيْءٌ، وَإِنْ لَفِظَ بِشَيْءٍ مِنْ ذَلِكَ لَفْظًا فَقَالَ: وَاحِدَةٌ وَثَنَانٍ. وَهُوَ ذَاكِرٌ لِصَلَاتِهِ انْتَقَضَتْ صَلَاتُهُ وَكَانَ عَلَيْهِ الْإِسْتِنَافُ.
944 – He said: And when a man performs some of his ablution, then does not complete it until what he has washed dries out (<i>jaffa mā qad ghasala</i>); then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: He completes what	944 – قَالَ: وَإِذَا تَوَضَّأَ الرَّجُلُ بَعْضَ وَضُوئِهِ ثُمَّ لَمْ يُتِمَّهُ حَتَّى جَفَّ مَا قَدْ غَسَلَ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: يُتِمُّ

¹⁰ See §§724, 927, and accompanying notes. This (§940) is a perfect example of how al-Shāfi‘ī uses *aḥbabbtu*. First, he shows us that the condition which prompts his preference is merely probable (*uḥtumilat*); then he reconfirms that it is permissible that the actor in question not comply with his preference. Again, the location of the preferred act in the jurist – rather than in a text – is noteworthy.

¹¹ I am assuming that “he” refers to al-Shāfi‘ī, as section §943 does not appear in the Shaybānī Version (Afghānī, 120).

¹² Cf. §§724, 927, 940 and accompanying notes.

remains, and he does not repeat what he carried out (<i>mā maḍā</i>). And he [Abū Yūsuf] embraces it.	مَا قَدْ بَقِيَ وَلَا يُعِيدُ عَلَى مَا مَضَى. وَبِهِ يَأْخُذُ.
945 – But Ibn Abī Laylā used to say: If it was during the search (<i>ṭalab</i>) for water, or during the <i>wuḍū'</i> ; he indeed completes what remains. But if he has started some other task besides that, he repeats it for what dried out.	945 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: إِنْ كَانَ فِي طَلَبِ الْمَاءِ أَوْ فِي الْوُضُوءِ فَإِنَّهُ يُتِمُّ مَا بَقِيَ، وَإِنْ كَانَ قَدْ أَخَذَ فِي عَمَلٍ غَيْرِ ذَلِكَ أَعَادَهُ عَلَى مَا جَفَّ.
946 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And I considered/opined (<i>ra'aytu</i>) the Muslims coming to <i>wuḍū'</i> as followers of a system (<i>mutatābi^{an} nasaq^{an}</i>), in the manner by which the Prophet, may God bless and save him, performed ablution. And whosoever comes to it in such a way, and does not break it off – for anything but an excuse of a disruption/absence of water and a search for it, he builds upon his <i>wuḍū'</i> [i.e., continues where he left off]. But whosoever breaks it off without excuse, so that he prolongs that, and it is known (<i>ma'rūf^{an}</i>) that he engaged in some other task; it is preferable to me (<i>fa-aḥabba ilayya</i>) that he renew (<i>yasta'nifa</i>) [his <i>wuḍū'</i>]. But if he completes what remains it suffices him. ¹³	946 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَرَأَيْتُ الْمُسْلِمِينَ جَاءُوا بِالْوُضُوءِ مُتَتَابِعًا نَسَقًا عَلَى مِثْلِ مَا تَوَضَّأَ بِهِ النَّبِيُّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَمَنْ جَاءَ بِهِ كَذَلِكَ وَلَمْ يَقْطَعْهُ لَغَيْرِ عُذْرٍ مِنْ انْقِطَاعِ الْمَاءِ وَطَلَبِهِ بَنَى عَلَى وَضُوءِهِ، وَمَنْ قَطَعَهُ بِغَيْرِ عُذْرٍ حَتَّى يَتَطَاوَلَ ذَلِكَ فَيَكُونُ مَعْرُوفًا أَنَّهُ أَخَذَ فِي عَمَلٍ غَيْرِهِ، فَأَحَبُّ إِلَيَّ أَنْ يَسْتَأْنِفَ، وَإِنْ أَتَمَّ مَا بَقِيَ أَجْزَأَهُ.
947 – Ibn Abī Laylā [reported], on the authority of al-Hakam, on Sa'īd b. Jubayr, on Ibn 'Abbās that he said: He does not wipe (<i>yamsaḥu</i>) his face [free] of earth (<i>min al-turābi</i>) in <i>ṣalāt</i> until he performs the <i>tashahhud</i> and the <i>taslīm</i> . And he [Abū Yūsuf] embraces it. ¹⁴	947 – ابْنُ أَبِي لَيْلَى، عَنِ الْحَكَمِ، عَنْ سَعِيدِ بْنِ جُبَيْرٍ، عَنْ ابْنِ عَبَّاسٍ أَنَّهُ قَالَ: لَا يَمْسَحُ وَجْهَهُ مِنَ التُّرَابِ فِي الصَّلَاةِ حَتَّى يَتَشَهَّدَ وَيُسَلِّمَ. وَبِهِ يَأْخُذُ.
948 – Abū Ḥanīfa [reported], on the authority of Ḥammād, on Ibrāhīm that he used to wipe the earth from his face during the <i>ṣalāt</i> , before performing <i>taslīm</i> .	948 – أَبُو حَنِيفَةَ، عَنْ حَمَّادٍ، عَنْ إِبْرَاهِيمَ أَنَّهُ كَانَ يَمْسَحُ التُّرَابَ عَنْ وَجْهِهِ فِي الصَّلَاةِ قَبْلَ أَنْ يُسَلِّمَ.
949 – And Abū Ḥanīfa, may God Most High have mercy upon him, used not to see/opine any harm in that (<i>lā yarā bi-dhālika ba's^{an}</i>). And he [Abū Yūsuf] embraces	949 – وَكَانَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى لَا يَرَى بِذَلِكَ بَأْسًا. وَبِهِ يَأْخُذُ.

¹³ Cf. §§724, 927, 940, 943. Again, al-Shāfi'ī makes it plain that his preference is not a statement of obligation; non-compliance with his preference yet “suffices” the actor (*ajza'ahu*).

¹⁴ NB: Abū Yūsuf also adheres to a contrary *qawl* indicating a status of *mubāḥ* (see §949).

it.	
950 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And if the praying one (<i>al-muṣallī</i>) leaves off the wiping of earth from his face until he performs <i>taslīm</i> , that is preferable to me (<i>aḥabba ilayya</i>); yet if he does so, nothing is [enjoined] upon him. ¹⁵	950 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَلَوْ تَرَكَ الْمُصَلِّي مَسْحَ وَجْهِهِ مِنَ التُّرَابِ حَتَّى يُسَلِّمَ كَانَ أَحَبَّ إِلَيَّ، فَإِنْ فَعَلَ فَلَا شَيْءَ عَلَيْهِ.

¹⁵ Cf. §946, etc., and accompanying notes. Again, here in §950, the actor is not obliged to follow al-Shāfi‘ī’s preference.

Bāb al-Zakāt

Chapter on the Alms-Tax (al-Zakāt) ¹	بَابُ الزَّكَاةِ
951 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man owes a <i>dayn</i> of a thousand dirhams, and the people (<i>al-nās</i>) owe him a <i>dayn</i> of a thousand dirhams, and in his possession is a thousand dirhams; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: There is no <i>zakāt</i> [incumbent] upon him, as regards what is in his possession, until he extracts (<i>yukhriju</i>) his <i>dayn</i> — then he pays <i>zakāt</i> from it [i.e., from what is in his possession] (<i>yuzakkiyahu</i>).	951 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَ عَلَى رَجُلٍ دَيْنٌ أَلْفٌ دِرْهَمٍ، وَلَهُ عَلَى النَّاسِ دَيْنٌ أَلْفٌ دِرْهَمٍ، وَفِي يَدِهِ أَلْفٌ دِرْهَمٍ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: لَيْسَ عَلَيْهِ زَكَاةٌ فِيمَا فِي يَدَيْهِ حَتَّى يُخْرِجَ دَيْنَهُ فَيُزَكِّيَهُ.
952 – But Ibn Abī Laylā used to say: Upon him, as regards what is in his possession, is [enjoined] the <i>zakāt</i> .	952 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: عَلَيْهِ فِيمَا فِي يَدَيْهِ الزَّكَاةُ.
953 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a thousand dirhams is in the possession of a man, and he owes the like (<i>'alayhi mithluhā</i>), then no <i>zakāt</i> is [incumbent] upon him.	953 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَتْ فِي يَدَيْ رَجُلٍ أَلْفٌ دِرْهَمٍ وَعَلَيْهِ مِثْلُهَا فَلَا زَكَاةَ عَلَيْهِ.
954 – And if the <i>mas'ala</i> is in its due year (<i>bi-hālihā</i>), and he is owed a <i>dayn</i> of a thousand dirhams; if he pays the alms-tax in advance (<i>'ajjala al-zakāt</i>), it is preferable to me (<i>aḥabba ilayya</i>). ² But he has the right to postpone it (<i>yu'akkhkirahā</i>) until he takes possession of (<i>yaqbiḍu</i>) his <i>māl</i> . And if he takes possession of it, he pays <i>zakāt</i> (<i>zakkā</i>) from what is in his possession; but if it is lost (<i>talifa</i>), there is not [incumbent] upon him, regarding it, <i>zakāt</i> .	954 – وَإِنْ كَانَتْ الْمَسْأَلَةُ بِحَالِهَا وَلَهُ دَيْنٌ أَلْفٌ دِرْهَمٍ، فَلَوْ عَجَّلَ الزَّكَاةَ كَانَ أَحَبُّ إِلَيَّ، وَلَهُ أَنْ يُؤَخِّرَهَا حَتَّى يَقْبِضَ مَالَهُ، فَإِنْ قَبِضَهُ زَكَّى مِمَّا فِي يَدَيْهِ، وَإِنْ تَلَفَ لَمْ يَكُنْ عَلَيْهِ فِيهِ زَكَاةٌ.
955 – Al-Rabī said: The final doctrine (<i>ākhiru qawl</i>) of al-Shāfi'ī: When there is in his possession a thousand, and he owes a thousand, then he owes the <i>zakāt</i> .	955 – قَالَ الرَّبِيعُ: آخِرُ قَوْلِ الشَّافِعِيِّ: إِذَا كَانَتْ فِي يَدَيْهِ أَلْفٌ وَعَلَيْهِ أَلْفٌ، فَعَلَيْهِ الزَّكَاةُ.
956 – Al-Rabī said: Due to the fact that what is in his possession — if it is lost, it is from him. And if he wishes he makes a gift	956 – قَالَ الرَّبِيعُ: مِنْ قَبْلِ أَنْ الَّذِي فِي يَدَيْهِ إِنْ تَلَفَ كَانَ مِنْهُ، وَإِنْ شَاءَ وَهَبَهَا، وَإِنْ شَاءَ

¹ (Hassūn, vol.9, pt.14, 164-70; Schacht: *Tr. I*, 166-172).

² Regarding the phrase *aḥabba ilayya*, cf. §§927, 940 and other sections, as indicated in accompanying notes.

of it (<i>wahabahā</i>), and if he wishes he makes a charitable donation of it (<i>taṣaddaqa bihā</i>). And when it is, as regards the entirety of its <i>aḥkām</i> , <i>māl</i> from his <i>māl</i> [i.e., legally his in every way] — and God, to Him belong might and majesty, has said: «Take from their wealth (<i>amwālihim</i>) in charitable donation (<i>ṣadaqat^{an}</i>)» [Q.9:103] — then there is [incumbent] upon him, regarding it, the <i>zakāt</i> .	تَصَدَّقَ بِهَا، فَلَمَّا كَانَتْ فِي جَمِيعِ أَحْكَامِهَا مَالًا مِنْ مَالِهِ وَقَدْ قَالَ اللَّهُ عَزَّ وَجَلَّ: «خُذْ مِنْ أَمْوَالِهِمْ صَدَقَةً» [التوبة: 103] كَانَتْ عَلَيْهِ فِيهَا الزَّكَاةُ.
957 – He [Abū Yūsuf] said: And Ibn Abī Laylā used to say: <i>Zakāt</i> of the <i>dayn</i> is [incumbent] upon whosoever owes it.	957 – قَالَ: وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: زَكَاةُ الدَّيْنِ عَلَى الَّذِي هُوَ عَلَيْهِ.
958 – Abū Ḥanīfa, may God Most High have mercy upon him, said: Nay, it [the <i>zakāt</i>] is [incumbent] upon his <i>ṣāhib</i> to whom it [the <i>dayn</i>] is due when it is extracted (<i>kharaja</i>).	958 – فَقَالَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى: بَلْ هِيَ عَلَى صَاحِبِهِ الَّذِي هُوَ لَهُ إِذَا خَرَجَ.
959 – Likewise has it reached us concerning 'Alī b. Abī Tālib, may God have mercy upon him. And he [Abū Yūsuf] embraces this [doctrine].	959 – كَذَلِكَ بَلَّغْنَا عَنْ عَلِيِّ بْنِ أَبِي طَالِبٍ رَضِيَ اللَّهُ عَنْهُ. وَبِهَذَا يَأْخُذُ.
960 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when there belongs to a man a <i>dayn</i> owed by the people; if it is annual/ come due (<i>ḥāl^{an}</i>), and the assessment-year has elapsed for it (<i>qad ḥāla 'alayhi al-ḥawlu</i>) in the possession of the one who owes it, or more than a year, and if he [the creditor] was able to take it from him yet he left it; upon him [the creditor], regarding it, is [enjoined] the <i>zakāt</i> . And it is like <i>māl</i> belonging to him as a deposit (<i>wadī'atⁱⁿ</i>) in the possession of a man — it is [enjoined] upon him [the depositor] that he pay <i>zakāt</i> from it (<i>yuzakkiyahu</i>), when he is able to do so.	960 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَ لِلرَّجُلِ دَيْنٌ عَلَى النَّاسِ؛ فَإِنْ كَانَ حَالًا وَقَدْ حَالَ عَلَيْهِ الْحَوْلُ فِي يَدَيِ الَّذِي هُوَ عَلَيْهِ أَوْ أَكْثَرَ مِنْ حَوْلٍ، فَإِنْ كَانَ يَقْدِرُ عَلَى أَخْذِهِ مِنْهُ فَتَرَكَهُ فَعَلَيْهِ فِيهِ الزَّكَاةُ وَهُوَ كَمَالُ لَهُ وَدِيعَةٌ فِي يَدَيِ رَجُلٍ عَلَيْهِ أَنْ يُزَكِّيَهُ إِذَا كَانَ قَادِرًا عَلَيْهِ.
961 – And if he didn't know — perhaps he would cause him to become insolvent by means of it (<i>sayuflisu lahu bihi</i>) —, or [if] he is absent from him (<i>mutaghayyib^{an} 'anhu</i>); then [enjoined] upon him — when he [the debtor] is present — is that he [the creditor] demand it from him in the most insistent manner he is capable of (<i>bi-alahḥi mā yaqdiru 'alayhi</i>). And when he pays hard coin into his possession (<i>naḍḍa fī yadayhi</i>), upon him [the creditor] is [enjoined] the <i>zakāt</i> for what has passed (<i>limā maḍā</i>), in his [the debtor's] possession, of the years.	961 – وَإِنْ كَانَ لَا يَدْرِي لَعَلَّهُ سَيُفْلِسُ لَهُ بِهِ أَوْ كَانَ مُتَغَيِّبًا عَنْهُ، فَعَلَيْهِ إِذَا كَانَ حَاضِرًا طَلَبُهُ مِنْهُ بِالْحَقِّ مَا يَقْدِرُ عَلَيْهِ، فَإِذَا نَصَّ فِي يَدَيْهِ، فَعَلَيْهِ الزَّكَاةُ لِمَا مَضَى فِي يَدَيْهِ مِنَ السِّنِينَ.

962 – And if it is lost (<i>talifa</i>) before he takes possession of it, then there is no <i>zakāt</i> [incumbent] upon him regarding it.	962 – فَإِنْ تَلَفَ قَبْلَ أَنْ يَقْبِضَهُ فَلَا زَكَاةَ عَلَيْهِ فِيهِ.
963 – And likewise when the <i>ṣāhib</i> of the <i>dayn</i> is absent from him.	963 – وَهَكَذَا إِذَا كَانَ صَاحِبُ الدَّيْنِ مُتَعَيِّبًا عَنْهُ.
964 – He [Abū Yūsuf] said: And when it is land from the land of the <i>kharāj</i> ; then indeed, Abū Ḥanīfa, may God Most High have mercy upon him, used to say: There is no one-tenth tithe (<i>ʿushr</i>) regarding it – <i>ʿushr</i> and <i>kharāj</i> are not to be combined. ³	964 – قَالَ: وَإِذَا كَانَتْ أَرْضٌ مِنْ أَرْضِ الْخَرَاجِ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَيْسَ فِيهَا عَشْرٌ لَا يَجْتَمِعُ عَشْرٌ وَخَرَاجٌ.
965 – And he [Abū Yūsuf] embraces it.	965 – وَبِهِ يَأْخُذُ.
966 – But Ibn Abī Laylā used to say: [Incumbent] upon him, regarding it, is the <i>ʿushr</i> , along with the <i>kharāj</i> .	966 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: عَلَيْهِ فِيهَا الْعَشْرُ مَعَ الْخَرَاجِ.
967 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the man cultivates land from the land of <i>kharāj</i> ; [incumbent] upon him, as regards its crop (<i>zarʿihā</i>), is the <i>ʿushr</i> .	967 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا زَرَعَ الرَّجُلُ أَرْضًا مِنْ أَرْضِ الْخَرَاجِ فَعَلَيْهِ فِي زَرْعِهَا الْعَشْرُ.
968 – Just as there is [incumbent] upon him, regarding the crop of a land belonging to a man which he rents from him, while it [the land] belongs to that	968 – كَمَا يَكُونُ عَلَيْهِ فِي زَرْعِ أَرْضٍ لِرَجُلٍ تَكَارَاهَا مِنْهُ، وَهِيَ لِذَلِكَ الرَّجُلِ أَوْ هِيَ

³ For brief overviews of *ʿushr* and *kharāj* – and the interplay and relationship between these categories and their *ahkām*, see the MF (s.v. “خراج”, §10 “العشر”; and s.v. “”, §§1, 2, 4). The EF² (s.v. “*Kharāj*”) provides a detailed look at early historical dynamics of *kharāj* in the opening section. Of particular interest is this note:

“...at the side of the non-Muslims' individual possessions, the new Islamic state allotted to some leading Muslims grants (*kaṭāʿi*) in emphyteusis out of lands inherited from the previous régimes or from the territories of the old landlords who had since disappeared, and these grants were substantially the same as the properties already held by the Muslims in Arabia. From the fiscal point of view, these lands were henceforth only liable to the *zakāt* covering all the Muslims' possessions, taking here the form of a tithe (*ʿushr*); the difference between this tithe and the payments exacted from the cultivators, analogous to the ordinary land tax of the *kharāj*, which was much higher, constituted the beneficial interest of this class of Muslim notables.”

The EF² (s.v. “*Ushr*”) also provides detailed coverage of early substantive rulings and historical practices regarding *ʿushr* and *kharāj* in the opening paragraphs. As for this *masʿala* of combining *ʿushr* and *kharāj*, specifically, see the MF (s.v. “خراج”, §63 “اجتماع العشر والخراج على المسلم”).

man, or it is a suspended endowment (<i>ṣadaqat^{un} mawqūfat^{un}</i>) [i.e., <i>waqf</i>]. ⁴	صَدَقَةٌ مَوْقُوفَةٌ.
969 – He [Abū Yūsuf] said: And when the land is from the land of the <i>ʿushr</i> ; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: Regarding all things few and many it [the land] produces (<i>akhrajāt</i>) – of wheat, and barley, and raisins, and dates, and corn, and other than that from among the species of produce (<i>min aṣnāf al-ghallati</i>) – the <i>ʿushr</i> and half the <i>ʿushr</i> .	969 – قَالَ: وَإِذَا كَانَتْ الْأَرْضُ مِنْ أَرْضِ الْعُشْرِ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: فِي كُلِّ قَلِيلٍ وَكَثِيرٍ أَخْرَجَتْ مِنَ الْحِنْطَةِ وَالشَّعِيرِ وَالزَّيْبِ وَالتَّمْرِ وَالذَّرَّةَ وَغَيْرِ ذَلِكَ مِنْ أَصْنَافِ الْعَلَّةِ الْعُشْرُ وَنِصْفُ الْعُشْرِ.
970 – And the few and the many regarding that are one and the same (<i>sawā^{un}</i>) – even if it is a bundle of herbs (<i>ḥuzmat^{an} min baqlⁱⁿ</i>).	970 – وَالْقَلِيلُ وَالْكَثِيرُ فِي ذَلِكَ سَوَاءٌ. وَإِنْ كَانَتْ حُزْمَةً مِنْ بَقْلِ.
971 – And likewise Abū Ḥanīfa transmitted to us [as <i>ḥadīth</i>] (<i>ḥaddathanā</i>), on the authority of Ḥammād, on Ibrāhīm.	971 – وَكَذَلِكَ حَدَّثَنَا أَبُو حَنِيفَةَ، عَنْ حَمَّادٍ، عَنْ إِبْرَاهِيمَ.
972 – But Ibn Abī Laylā used to say: There is not, for anything of that, <i>ʿushr</i> , except as regards the wheat, and barley, and dates, and raisins. And there is no <i>ʿushr</i> for it until it reaches five <i>wasqs</i> and above (<i>fa-ṣāʿid^{an}</i>).	972 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَيْسَ فِي شَيْءٍ مِنْ ذَلِكَ عُشْرٌ إِلَّا فِي الْحِنْطَةِ وَالشَّعِيرِ وَالتَّمْرِ وَالزَّيْبِ وَلَا يَكُونُ فِيهِ الْعُشْرُ حَتَّى يُلْغَ خَمْسَةَ أَوْسُقٍ فَصَاعِدًا.
973 – And the <i>wasq</i> , according to us, is sixty <i>ṣāʿ</i> s.	973 – وَالْوُسْقُ عِنْدَنَا سِتُّونَ صَاعًا.
974 – And the <i>ṣāʿ</i> is a <i>makhtūm</i> -measure by the Ḥajjājī [standard], and it is a quarter by the Greater Hāshimī [standard], and it is eight <i>raṭls</i> , and the <i>mudd</i> is two <i>raṭls</i> . And he [Abū Yūsuf] embraces it. ⁵	974 – وَالصَّاعُ مَخْتُومٌ بِالْحَجَّاجِيِّ، وَهُوَ رُبْعٌ بِالْهَاشِمِيِّ الْكَبِيرِ، وَهُوَ ثَمَانِيَةُ ارْطَالٍ،

⁴ The *El*² (s.v. “*Ṣadaqa*”) explains the variety of usages to which the term *ṣadaqa* was – and continues to be – applied, in addition to the most common meaning of *zakāt*: “Although *ṣadaqa* continues to be used for *waqf*, an effort to reduce ambiguity can be observed in such expressions as *al-ṣadaqāt al-mawqūfāt*, *al-ṣadaqāt al-muḥarramāt* [the author cites the *Umm*].”

⁵ Note that the *wasq* of §973 (60 *ṣāʿ*s) differs from the Ḥijāzī *wasq* in the Prophet’s time, according to the *El*² (s.v. “*Mawāzin*”): “The measures of capacity which were used in the Ḥijāz in the days of Muḥammad, the *ṣāʿ* equal to 4 *mudds* and the *wasq* equal to 60 *mudds*, did not spread to other countries....” By these figures we would conclude that a Prophetic *ṣāʿ* was in fact 1/15 of a Prophetic *wasq* (rather than 1/60, as per Abū Yūsuf in §973). In other words, the Prophetic *ṣāʿ* was four times greater than the *ṣāʿ* mentioned by Abū Yūsuf – if both the Prophetic *wasq* and Abū Yūsuf’s *wasq* are the same. This would suggest that we equate the Prophetic *ṣāʿ* with what he calls the Hāshimī (of which the Ḥajjājī appears to be one quarter). The *MF* (s.v. “مقادير”, 6 “الصاع”) confirms the Prophetic *ṣāʿ* of 4 *mudds*, and confirms also that, according to Abū Ḥanīfa, the *ṣāʿ* was eight *raṭls* (as in §974 above). Furthermore, the two most treated *ṣāʿ* measurements among *fuqahāʾ* are defined as: 1) the *ṣāʿ* of the Ahl al-Madīna (also known as the Ḥijāzī); and 2) the *ṣāʿ* of the Ahl al-ʿIrāq (also known as the Ḥajjājī or Baghdādī *ṣāʿ*, or the Ḥajjājī *qafiz*). However, the

	وَالْمُدُّ رِطْلَانِ. وَبِهِ يَأْخُذُ.
975 – And Abū Yūsuf, may God Most High have mercy upon him, said: There is no <i>ʿushr</i> regarding greens (<i>al-buqūl</i>) and vegetables. And I don't opine/consider (<i>lā arā</i>) any of that as <i>ʿushr</i> except for wheat, and barley, and grain/seed (<i>al-ḥubūb</i>). And there is nothing regarding it until it reaches five <i>wasqs</i> .	975 – وَقَالَ أَبُو يُوسُفَ رَحِمَهُ اللَّهُ تَعَالَى: لَيْسَ فِي الْبُقُولِ وَالْخَضِرَاوَاتِ عَشْرٌ، وَلَا أَرَى فِي شَيْءٍ مِنْ ذَلِكَ عَشْرًا إِلَّا الْحِنْطَةَ وَالشَّعِيرَ وَالْحُبُوبَ، وَلَيْسَ فِيهِ شَيْءٌ حَتَّى يَبْلُغَ خَمْسَةَ أَوْسُقٍ.
976 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man cultivates land from the land of <i>ʿushr</i> ; there is no <i>zakāt</i> [enjoined] upon him until he brings forth from it five <i>wasqs</i> , of every species (<i>ṣinf</i>) it produces to which <i>zakāt</i> pertains. And that is three hundred <i>ṣāʿ</i> 's by [measure of] the <i>ṣāʿ</i> of the Prophet, may God bless and save him.	976 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا زَرَعَ الرَّجُلُ أَرْضًا مِنْ أَرْضِ الْعَشْرِ فَلَا زَكَاةَ عَلَيْهِ حَتَّى يُخْرِجَ مِنْهَا خَمْسَةَ أَوْسُقٍ مِنْ كُلِّ صِنْفٍ مِمَّا أَخْرَجَتْ مِمَّا فِيهِ الزَّكَاةُ، وَذَلِكَ ثَلَاثُمِائَةِ صَاعٍ بِصَاعِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ.
977 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And there is no <i>zakāt</i> regarding vegetables – the <i>zakāt</i> pertains to what is gathered up bit by bit (<i>uqtīta</i>), and becomes dry, and is stored away – like wheat, and corn, and barley, and raisins, and the seeds/grains which are in this <i>maʿnā</i> , which the people cultivate (<i>yunbitu</i>).	977 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَلَيْسَ فِي الْخَضِرِ زَكَاةٌ، وَالزَّكَاةُ فِيمَا أُفْتِتَ وَيَيْسَ وَأُذْخِرَ، مِثْلُ: الْحِنْطَةِ، وَالذَّرَّةِ، وَالشَّعِيرِ، وَالزَّيْبِ، وَالْحُبُوبِ الَّتِي فِي هَذَا الْمَعْنَى الَّتِي يُنْبِتُ النَّاسُ.

former is then said to be the *smaller* of the two. Finally, a detailed explanation for these designations is provided by al-Afghānī (125, n.2), who quotes directly from that famed lexicon, the *Mughrib* of al-Muṭarrizī. First, he quotes (*Mughrib*, s.v. “ح ج ج”): “And *al-ḥajjāj*, applied to people of distinction (*al-aʿlām*), is probably from ‘refutation’ (*al-ḥajj*), the overcoming (*al-ghalaba*) by means of *hujja*, or from the aim (*al-qasḍ*); and by it Ibn Yūsuf was named; and to him is attributed the *ṣāʿ* – because he adopted it from the *ṣāʿ* of ‘Umar, may God be pleased with him, and it is said: *al-ṣāʿ al-ḥajjājī*, and *al-qafiz al-ḥajjājī*; and it is a quarter of the Hāshimī, and it is eight *raṭls*.” And again he quotes from the *Mughrib* (s.v. “خ ت م”): “And the *makhtūm* is the *ṣāʿ* itself (*bi-ʿaynihi*), according to Abū ‘Ubayd, and the *ḥadīth* of al-Khudrī testifies to it: «The *wasq* is sixty *makhtūms*».” Finally, al-Afghānī adds: “I say: Yaḥyā b. Ādām al-Qurashī narrated, on the authority of Isrāʾīl, on Abī Ishāq, he said: Al-Ḥajjāj reached us from Medina, and he said: Indeed, I have adopted for you (pl.) the *makhtūm* by the measure of the *ṣāʿ* of ‘Umar b. al-Khaṭṭāb. Abū ‘Ubayd said, in *al-Amwāl*: And it is only named *makhtūm* because the rulers used to make on top of it an impressed seal (*khātim^{am} maṭbū^{am}*) – so that nothing be added to it, nor diminished from it.”

978 – He [Abū Yūsuf] said: And when there belongs to a man forty-one cows (<i>baqara</i>); then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: When the assessment-year has elapsed for them (<i>ḥāla 'alayhā al-ḥawlu</i>); there is, for them [as <i>zakāt</i>], a more-than-two-years' [cow] (<i>musinnat^{un}</i>), and one quarter of one tenth (<i>rub'u 'ushri</i>) [i.e., one fortieth] of a <i>musinna</i>. And what increases [of the herd]; by that reckoning (<i>bi-ḥisābi dhālika</i>) to the point that it reaches sixty cows.	978 – قَالَ: وَإِذَا كَانَ لِرَجُلٍ إِحْدَى وَأَرْبَعُونَ بَقَرَةً، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: إِذَا حَالَ عَلَيْهَا الْحَوْلُ فَفِيهَا مُسِنَّةٌ وَرُبْعُ عَشْرٍ مُسِنَّةٍ، وَمَا زَادَ فَبِحِسَابِ ذَلِكَ إِلَى أَنْ تَبْلُغَ سِتِّينَ بَقَرَةً.
979 – And I believe that Abū Ḥanīfa transmitted it (<i>azunnuhu ḥaddathahu</i>) on the authority of Ḥammād, on Ibrāhīm.	979 – وَأَظْنُهُ حَدَّثَهُ أَبُو حَنِيفَةَ، عَنْ حَمَّادٍ، عَنْ إِبْرَاهِيمَ.
980 – But Ibn Abī Laylā used to say: There is nothing regarding what goes beyond forty, until it reaches sixty cows. And he [Abū Yūsuf] embraces it.	980 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا شَيْءَ فِي الزِّيَادَةِ عَلَى الْأَرْبَعِينَ حَتَّى تَبْلُغَ سِتِّينَ بَقَرَةً. وَبِهِ يَأْخُذُ.
981 – And it has reached us concerning the Messenger of God, may God bless and save him, that he said: «There is nothing regarding the <i>awqāṣ</i>.»	981 – وَبَلَّغْنَا عَنْ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – أَنَّهُ قَالَ: «لَا شَيْءَ فِي الْأَوْقَاصِ».
982 – And the <i>awqāṣ</i>, according to us, is that [number of animals] which is between the two [legally-prescribed] amounts (<i>al-farīḍatayni</i>). And he [Abū Yūsuf] embraces it.	982 – وَالْأَوْقَاصُ عِنْدَنَا مَا بَيْنَ الْفَرِیْضَتَيْنِ. وَبِهِ يَأْخُذُ.
983 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And there is no <i>ṣadaqa</i> regarding cows until they reach thirty. And when they reach thirty, there is a more-than-one-year [cow] (<i>tabī^{un}</i>) for it [the <i>ṣadaqa</i>]. Then there is no <i>ṣadaqa</i> for an increase above thirty until they reach forty. And when they reach forty, there is a more-than-two-years' [cow] (<i>musinnat^{un}</i>) for it. Then there is nothing regarding their increase until they reach sixty. And when they reach sixty, there are two <i>tabī</i> [cows] for it. Then there is no <i>ṣadaqa</i> regarding the surplus over sixty until they reach seventy. And when they reach seventy, there is a <i>tabī</i> and a <i>musinna</i> for it. Then there is no <i>ṣadaqa</i> regarding the surplus over seventy until they reach	983 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَلَيْسَ فِي الْبَقَرِ صَدَقَةٌ حَتَّى تَبْلُغَ ثَلَاثِينَ، فَإِذَا بَلَغَتْ ثَلَاثِينَ فَفِيهَا تَبِيعٌ، ثُمَّ لَيْسَ فِي الزِّيَادَةِ عَلَى الثَّلَاثِينَ صَدَقَةٌ حَتَّى تَبْلُغَ أَرْبَعِينَ، فَإِذَا بَلَغَتْ أَرْبَعِينَ فَفِيهَا مُسِنَّةٌ، ثُمَّ لَيْسَ فِي زِيَادَتِهَا شَيْءٌ حَتَّى تَبْلُغَ سِتِّينَ، فَإِذَا بَلَغَتْ سِتِّينَ فَفِيهَا تَبِيعَانِ، ثُمَّ لَيْسَ فِي الْفَضْلِ عَلَى السَّتِّينَ صَدَقَةٌ حَتَّى تَبْلُغَ سَبْعِينَ، فَإِذَا بَلَغَتْ سَبْعِينَ فَفِيهَا تَبِيعٌ وَمُسِنَّةٌ، ثُمَّ لَيْسَ فِي الْفَضْلِ عَلَى السَّبْعِينَ

eighty. And when they reach eighty, there are two <i>musinnas</i> for it. Then [i.e., beyond that], their <i>ṣadaqa</i> is thus [i.e., the calculation repeats].	صَدَقَةٌ حَتَّى تَبْلُغَ ثَمَانِينَ، فَإِذَا بَلَغَتْ الثَّمَانِينَ فَفِيهَا مُسْتَتَانٍ. ثُمَّ هَكَذَا صَدَقَتُهَا.
984 – And all <i>ṣadaqa</i> from cattle (<i>al-māshiya</i>) — there is nothing for it as pertains to what is between the <i>farīdatayn</i>. And all that is above the lower <i>fard</i>, not yet attaining the higher <i>fard</i> — the surplus is a kindness [from God] (<i>ʿafw^{um}</i>); its <i>ṣadaqa</i> is the <i>ṣadaqa</i> of the lower [<i>fard</i>] (<i>al-asfal</i>).⁶	984 – وَكُلُّ صَدَقَةٍ مِنَ الْمَاشِيَةِ فَلَا شَيْءَ فِيهَا فِيمَا بَيْنَ الْفَرِيضَتَيْنِ، وَكُلُّ مَا كَانَ فَوْقَ الْفَرَضِ الْأَسْفَلِ لَمْ يَبْلُغِ الْفَرَضَ الْأَعْلَى فَالْفَضْلُ فِيهِ عَفْوٌ، صَدَقَتُهُ صَدَقَةُ الْأَسْفَلِ.
985 – He [Abū Yūsuf] said: And when there belong to a man ten <i>mithqāls</i> of gold and one hundred [silver] dirhams, and the assessment-year has elapsed for them (<i>ḥāla ʿalayhā al-ḥawlu</i>);⁷ then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say regarding the <i>zakāt</i>: He admixes the lesser of the two species to the greater of the two (<i>yudāyyifu aqalla al-ṣinfayni ilā aktharihimā</i>). Then he pays <i>zakāt</i> for it (<i>yuzakkiyahu</i>) if the <i>dīnārs</i> are less than ten dirhams to the <i>dīnār</i> [in value], the dirhams being assessed (<i>tuqawwamu</i>) [in terms of] <i>dīnārs</i>. Then he combines them together and they are more than twenty <i>mithqāls</i> of gold and he pays <i>zakāt</i> for them — for each twenty <i>mithqāls</i> there is half of a <i>mithqāl</i> [as <i>zakāt</i>].⁸ And what	985 – قَالَ: وَإِذَا كَانَ لِلرَّجُلِ عَشْرَةُ مِثْقَالٍ ذَهَبٍ وَمِائَةُ دِرْهَمٍ فَحَالَ عَلَيْهَا الْحَوْلُ، فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ فِي الزَّكَاةِ: يُصَيِّفُ أَقْلَ الصَّنْفَيْنِ إِلَى أَكْثَرِهِمَا ثُمَّ يَزَكِّيهِ إِنْ كَانَتْ الدَّنَانِيرُ أَقْلَ مِنْ عَشْرَةِ دَرَاهِمٍ بِدِينَارٍ، تُقَوِّمُ الدَّرَاهِمَ دَنَانِيرَ ثُمَّ يَجْمَعُهَا جَمِيعًا فَتَكُونُ أَكْثَرَ مِنْ عِشْرِينَ مِثْقَالًا مِنَ الذَّهَبِ فَيَزَكِّيْهَا؛ فِي كُلِّ عِشْرِينَ مِثْقَالًا نِصْفُ مِثْقَالٍ، فَمَا زَادَ فَلَيْسَ فِيهِ شَيْءٌ مِنَ الزَّكَاةِ حَتَّى يَبْلُغَ أَرْبَعَةَ

⁶ The rulings and *masāʾil* inherent to §§978-83 are nicely summarized in the *El*² (s.v. “Zakāt”):

“Cattle and sheep. The *niṣāb* for cattle is thirty. The rate of *zakāt* is one cow or bull in its second year (*tabī*) for every thirty head and one cow in its third year (*musinna*, *ṭhaniyya*) for every forty. The Mālikīs understand the animals required to be in their third and fourth years respectively. The Shāfiʿīs, Mālikīs and Ḥanbalīs impose this rate on multiples of thirty and forty, and according to them one *tabī* is due for from 40 to 59 head of cattle. The Ḥanafīs impose *zakāt* at the rate of one-fortieth of the value of a *musinna* for each additional head from 40 to 59.”

⁷ Note that — treated independently — neither the *niṣāb* for gold (20 *mithqāls*), nor the *niṣāb* for silver (200 dirhams) is met in the *masʾala* introduced here in §985. In fact, the amounts mentioned are both half of their respective *niṣābs*, and it becomes evident that the *masʾala* will raise the question as to whether or not they are to be joined (in terms of value) to reach the *niṣāb* of one or the other. We must further bear in mind that *dīnārs* are gold coins whose weight-measure is the *mithqāl* (at an apparent 1:1 ratio), while dirhams are both silver coins (varying in type and weight country to country), and used as a weight-measure. According to the *MF* (s.v. “مقادير”, 48, “المِثْقَال”), the standard weight ratio of the *mithqāl* is: one *mithqāl* = 1 and 3/7 dirhams. Thus: seven *mithqāls* = ten dirhams.

⁸ In terms of value, then, in this *masʾala* — with the dirham being less than ten to the *dīnār* — the *niṣāb* for gold (20 *mithqāls*/dīnārs) is reached after value-combination. If we say, for example, that there are 8 dirhams to the *dīnār*, then, upon value-conversion, we obtain (from the silver) a

increases [beyond that] — there is nothing of <i>zakāt</i> regarding it until it reaches four <i>mithqāls</i> , then there is a tenth of a <i>mithqāl</i> for it.	مَثَاقِيلَ، فَيَكُونُ فِيهَا عَشْرُ مِثْقَالٍ.
986 – And when the <i>dīnārs</i> are more than ten dirhams to a <i>dīnār</i> , he assesses (<i>qawwama</i>) the <i>dīnārs</i> [in terms of] dirhams, and admixes them (<i>aḍāfahā</i>) to the dirhams so that they be greater than two hundred dirhams. ⁹ And for each two hundred there are five dirhams [as <i>zakāt</i>]. And there is nothing for what increases [beyond] the two hundred until it reaches forty dirhams. And if it reaches [forty], then there is, for each forty increased after the two hundred, one dirham [as <i>zakāt</i>].	986 – وَإِذَا كَانَتِ الدِّنَانِيرُ أَكْثَرَ مِنْ عَشْرَةِ دَرَاهِمٍ بِدِينَارٍ قَوْمَ الدِّنَانِيرِ دَرَاهِمٍ وَأَضَافَهَا إِلَى الدَّرَاهِمِ فَتَكُونُ أَكْثَرَ مِنْ مِائَتِي دِرْهَمٍ فِي كُلِّ مِائَتَيْنِ خَمْسَةَ دَرَاهِمٍ، وَلَا شَيْءَ فِيمَا زَادَ عَلَى الْمِائَتَيْنِ حَتَّى يَبْلُغَ أَرْبَعِينَ دِرْهَمًا، فَإِذَا بَلَغَتْ فِي كُلِّ أَرْبَعِينَ زَادَتْ بَعْدَ الْمِائَتَيْنِ دِرْهَمٌ.
987 – But Ibn Abī Laylā used to say: There is no <i>zakāt</i> regarding anything of that until the gold reaches twenty <i>mithqāls</i> , and the silver reaches two hundred dirhams. And he does not add some of it to the other, but he says: This is different property (<i>māl^{un} mukhtaliḥ^m</i>). [It is] in the status of (<i>bi-manzilati</i>) a man to whom belong thirty sheep, and twenty cows, and four camels — he does not admix some of them to the other.	987 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا زَكَاةَ فِي شَيْءٍ مِنْ ذَلِكَ حَتَّى يَبْلُغَ الذَّهَبُ عِشْرِينَ مِثْقَالًا، وَتَبْلُغَ الْفِضَّةُ مِائَتِي دِرْهَمٍ، وَلَا يُضَيَّفُ بَعْضُهَا إِلَى بَعْضٍ، وَيَقُولُ: هَذَا مَالٌ مُخْتَلِفٌ؛ بِمَنْزِلَةِ رَجُلٍ لَهُ ثَلَاثُونَ شَاةً وَعِشْرُونَ بَقَرَةً وَأَرْبَعَةً أَعْرَافَ، فَلَا يُضَافُ بَعْضُهَا إِلَى بَعْضٍ.
988 – And Ibn Abī Laylā said: Whatever increased over the two hundred dirhams and the twenty <i>mithqāls</i> ; by that [unmixed] reckoning (<i>bi-ḥisābi dhālika</i>) [it is calculated], whatever there is — little or much. And he [Abū Yūsuf] embraces this [doctrine] as regards the increase (<i>fi'l-ziyādati</i>).	988 – وَقَالَ ابْنُ أَبِي لَيْلَى: مَا زَادَ عَلَى الْمِائَتِي الدَّرْهَمِ وَالْعِشْرِينَ الْمِثْقَالِ مِنْ شَيْءٍ فَبِحِسَابِ ذَلِكَ مَا كَانَ مِنْ قَلِيلٍ أَوْ كَثِيرٍ. وَبِهَذَا يَأْخُذُ فِي الزِّيَادَةِ.
989 – But Abū Ḥanīfa, may God be pleased with him, said: There is nothing for what increases beyond the two hundred until it reaches forty dirhams.	989 – وَقَالَ أَبُو حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ: لَيْسَ فِيمَا زَادَ عَلَى الْمِائَتَيْنِ شَيْءٌ حَتَّى يَبْلُغَ أَرْبَعِينَ دِرْهَمًا.

value of $100 \div 8 = 12.5$ *dīnārs*. If we add this to the amount of gold (with 1 *dīnār* being equivalent to 1 *mithqāl*), we end up with 22.5 *mithqāls*/*dīnārs*, or 2.5 over the *niṣāb*.

⁹ Again, in terms of value — with the dirham being more than ten to the *dīnār* — the *niṣāb* for silver (200 dirhams) is reached after value-combination. By way of example, if there are twelve dirhams to the *dīnār*, then we convert *dīnārs* to dirhams, we obtain (from the gold) a value of $10 \times 12 = 120$ dirhams. If we add this to the 100 dirhams of silver, we end up with 220 dirhams, or twenty over the *niṣāb*.

990 – And likewise has it reached us concerning 'Umar b. al-Khaṭṭāb, may God be pleased with him.	990 – وَكَذَلِكَ بَلَّغْنَا عَنْ عُمَرَ بْنِ الْخَطَّابِ رَضِيَ اللَّهُ عَنْهُ.
991 – And Abū Yūsuf, may God Most High have mercy upon him, said: He assesses neither the gold nor the silver [in terms of value] (<i>lā yuqawwimu al-dhahaba wa lā al-fiḍḍata</i>) — the <i>zakāt</i> is only according to its weight. The <i>sunna</i> set that forth: if there belong to him of them [<i>dīnārs</i>] fifteen <i>mithqāls</i> of gold, there is not [incumbent] upon him, for them, <i>zakāt</i> — even if its value were one thousand dirhams; because the <i>ḥadīth</i> only came forth as regards twenty <i>mithqāls</i>. But if there belong to him, along with that, forty dirhams; he does not pay <i>zakāt</i> for it until it is fifty dirhams. For when it [the <i>niṣāb</i> for one] is completed from the other (<i>kumila min al-ukhrā</i>), I enjoin (<i>awjabtu</i>) the <i>zakāt</i> regarding it.¹⁰ And likewise, if it is half of this [<i>niṣāb</i>], and half of that [<i>niṣāb</i>]; there is <i>zakāt</i> regarding it — he admixes some of it to the other, and he pays it (<i>yukhrijuhu</i>) as dirhams or <i>dīnārs</i>. But if he wishes, he pays <i>zakāt</i> on the gold and the silver according to their portions (<i>bi-ḥiṣṣatihimā</i>). Whichever of that he does, I am content with him (<i>ajza'ahu</i>).¹¹ And if there belong to him two hundred dirhams and ten <i>mithqāls</i>; he pays five dirhams as <i>zakāt</i> for the two hundred dirhams, and he pays a quarter <i>mithqāl</i> as <i>zakāt</i> for the ten <i>mithqāls</i>.	991 – وَقَالَ أَبُو يُوسُفَ رَحِمَهُ اللَّهُ تَعَالَى: لَا يُقَوِّمُ الذَّهَبَ وَلَا الْفِضَّةَ، إِنَّمَا الزَّكَاةُ عَلَى وَزْنِهِ، جَاءَتْ بِذَلِكَ السُّنَّةُ، إِنْ كَانَ لَهُ مِنْهَا خَمْسَةَ عَشَرَ مِثْقَالًا ذَهَبًا لَمْ يَكُنْ عَلَيْهِ فِيهَا زَكَاةٌ، وَلَوْ كَانَ قِيمَتُهَا أَلْفَ دِرْهَمٍ؛ لِأَنَّ الْحَدِيثَ إِنَّمَا جَاءَ فِي عِشْرِينَ مِثْقَالًا. وَلَوْ كَانَ لَهُ مَعَ ذَلِكَ أَرْبَعُونَ دِرْهَمًا لَمْ يُزَكَّهُ حَتَّى يَكُونَ خَمْسِينَ دِرْهَمًا. فَإِذَا كَمُلَ مِنَ الْآخَرَى أَوْجَبْتُ فِيهِ الزَّكَاةَ. وَكَذَلِكَ لَوْ كَانَ نَصْفٌ مِنْ هَذَا وَنَصْفٌ مِنْ هَذَا فَفِيهِ الزَّكَاةُ فَيُضَيَّفُ بَعْضُهُ إِلَى بَعْضٍ وَيُخْرِجُهُ دَرَاهِمَ أَوْ دِينَارٍ، وَإِنْ شَاءَ زَكَّى الذَّهَبَ وَالْفِضَّةَ بِحِصَّتَيْهِمَا، أَيْ ذَلِكَ فَعَلَ أَجْزَأَهُ. وَلَوْ كَانَ لَهُ مِائَتَا دِرْهَمٍ وَعَشْرَةُ مِثْقَالٍ زَكَّى الْمِائَتِي الدَّرْهَمِ بِخَمْسَةِ دَرَاهِمٍ، وَزَكَّى الْعَشْرَةَ مِثْقَالٍ بِرُبْعِ مِثْقَالٍ.

¹⁰ Here, we must remember that *mithqāl* and dirham are being considered by weight. However, we might benefit from a note from the *EF*² (s.v. “Zakāt”) before calculating:

“The majority of jurists, but not the *Shāfi'īs*, *Zāhirīs* and Twelver *Shī'īs*, combine gold and silver (*ḍamm, ḥaml*) in determining whether a *niṣāb* exists and in assessing *zakāt*. The calculation proceeds according to “units” (*adjizā*), that is, according to the legal exchange rate of ten dirhams per *dīnār*, except for the *Zaydīs* and *Ibādīs*, who combine the metals according to actual market value (*taḳwīm*).”

Bearing this in mind, we may make sense of Abū Yūsuf's calculations. Considering that we begin with fifteen *mithqāls* of gold (paying no *zakāt*, as it does not attain the *niṣāb* of twenty *mithqāls*), if we were to have also forty dirhams (at the rate of ten dirhams to the *dīnār*/*mithqāl*), we would still only have the equivalent of $15 + 4 = 19$ *mithqāls* — i.e., below the *niṣāb*. Had we fifty dirhams, however, we would have $15 + 5 = 20$ *mithqāls*' equivalent, and would thus owe *zakāt*.

¹¹ This is reminiscent of al-Shāfi'ī's formulations of *aḥabbu ilayya, aḥbabtu*, etc.

992 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when there belong to a man ten <i>mithqāls</i> of gold and one hundred dirhams, and the assessment-year has elapsed for them (<i>hāla 'alayhā al-ḥawlu</i>); there is no <i>zakāt</i> regarding them. Nor does he combine (<i>yaḍummu</i>) the gold to the silver — it being a species (<i>ṣinfiyya</i>) other than it, the surplus in one coming down to the other (<i>yaḥillu al-faḍlu fī ba'dihā 'alā ba'dihā</i>), from hand to hand (<i>yad bi-yad</i>). Just so, he does not combine the dates to the raisins — and indeed dates and raisins are greater in resemblance (<i>ashbahu</i>) than silver and gold, and closer in price, one from the other.¹² And just so, the camels are not combined to the cows, nor the cows to the sheep.	992 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَتْ لِرَجُلٍ عَشْرَةُ مِثْقَالٍ ذَهَبٍ وَمِائَةُ دِرْهَمٍ فَحَالَ عَلَيْهَا الْحَوْلُ فَلَا زَكَاةَ فِيهَا وَلَا يَضُمُّ الذَّهَبَ إِلَى الْوَرِقِ وَهُوَ صِنْفٌ غَيْرُهَا، يَحِلُّ الْفَضْلُ فِي بَعْضِهَا عَلَى بَعْضٍ يَدًا بِيَدٍ، كَمَا لَا يَضُمُّ التَّمْرَ إِلَى الزَّيْبِ، وَلَتَمْرٌ بِالزَّيْبِ أَشْبَهُ مِنْ الْفِضَّةِ بِالذَّهَبِ وَأَقْرَبُ ثَمَنًا بَعْضُهُ مِنْ بَعْضٍ، وَكَمَا لَا تُضْمُّ الْإِبِلُ إِلَى الْبَقَرِ وَلَا الْبَقَرُ إِلَى الْغَنَمِ.
993 – He [Abū Yūsuf] said: And if there belong to a man two hundred dirhams and ten <i>mithqāls</i> of gold; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: When the assessment-year has elapsed for them (<i>hāla 'alayhā al-ḥawlu</i>), he admixes some of it to the other, and he pays <i>zakāt</i> for it, all of it.	993 – قَالَ: وَلَوْ أَنَّ رَجُلًا لَهُ مِائَتَا دِرْهَمٍ وَعَشْرَةُ مِثْقَالٍ ذَهَبًا، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: إِذَا حَالَ عَلَيْهَا الْحَوْلُ يُضَيَّفُ بَعْضُهُ إِلَى بَعْضٍ وَيَزَكِّيهِ كُلُّهُ.
994 – But Ibn Abī Laylā said: These are two different monies (<i>mālāni mukhtalifāni</i>); the <i>zakāt</i> is enjoined for (<i>tajibu... 'alā</i>) the dirhams, but not enjoined for the gold.	994 – وَقَالَ ابْنُ أَبِي لَيْلَى: هَذَانِ مَالَانِ مُخْتَلِفَانِ، تَجِبُ الزَّكَاةُ عَلَى الدَّرَاهِمِ، وَلَا تَجِبُ عَلَى الذَّهَبِ.
995 – And Abū Yūsuf said: There is <i>zakāt</i> for it, all of it. Don't you see/opine (<i>alā tarā</i>) that there belong to the merchant <i>matā'</i> for trade (<i>li'l-tijārati</i>) — they being different (<i>mukhtalif</i>) —, and he assesses them [in terms of value] (<i>yuqawwimu</i>) and admixes some of them to the other, and he pays <i>zakāt</i> for it? And likewise the gold and the silver.	995 – وَقَالَ أَبُو يُوسُفَ: فِيهِ الزَّكَاةُ كُلُّهُ. أَلَا تَرَى أَنَّ التَّاجَرَ يَكُونُ لَهُ الْمَتَاعُ لِلتَّجَارَةِ وَهُوَ مُخْتَلِفٌ فَيَقْوَمُ وَيُضَيَّفُ بَعْضُهُ إِلَى بَعْضٍ وَيَزَكِّيهِ. وَكَذَلِكَ الذَّهَبُ وَالْفِضَّةُ.
996 – And it has reached us concerning 'Umar b. al-Khaṭṭāb, may God be pleased with him, that he ordered a merchant man to assess [in terms of value] his merchandise (<i>tijāratahu</i>) at the [elapsing of] the assessment-year (<i>'inda al-ḥawli</i>), and that he pay <i>zakāt</i> for it.	996 – وَقَدْ بَلَغَنَا عَنْ عُمَرَ بْنِ الْخَطَّابِ رَضِيَ اللَّهُ عَنْهُ أَنَّهُ أَمَرَ رَجُلًا تَاجِرًا أَنْ يَقْوَمَ تِجَارَتَهُ عِنْدَ الْحَوْلِ فَيَزَكِّيَهَا.

¹² This is an *a fortiori qiyās*: If you do not allow the admixture of P and Q for *zakāt*; then all the more so should you not allow it for X and Y, which have even less in common than P and Q.

997 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And if there belong to him two hundred dirhams and nineteen *mithqāls*; he pays *zakāt* for the two hundred, but he does not pay one tenth of a *mithqāl* as *zakāt* [for the gold]. Just as [when] there belong to him five *wasqs* of dates, and five *wasqs* of raisins, less one *ṣāʿ* – he pays *zakāt* on the dates, but he does not pay *zakāt* on the raisins.

997 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَلَوْ كَانَ لَهُ مِائَتَا دِرْهَمٍ وَتِسْعَةَ عَشَرَ مِثْقَالًا، زَكَى الْمِائَتِينَ وَلَمْ يُزَكِّ عَشَرَ مِثْقَالًا، كَمَا يَكُونُ لَهُ خَمْسَةُ أَوْسُقٍ تَمْرًا، وَخَمْسَةُ أَوْسُقٍ زَبِيبًا إِلَّا صَاعًا فَيُزَكَّى التَّمْرَ وَلَا يُزَكَّى الزَّبِيبَ.

Bāb al-Ṣiyām

Chapter on Fasting (al-Ṣiyām) ¹	بَابُ الصِّيَامِ
998 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man applies <i>kuhl</i> (<i>ikṭaḥala</i>) during the month of Ramaḍān, or other than Ramaḍān — while he is fasting; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: There is no harm in that (<i>lā ba'sa bi-dhālika</i>). And he [Abū Yūsuf] embraces it.	998 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اكْتَحَلَ الرَّجُلُ فِي شَهْرِ رَمَضَانَ أَوْ غَيْرِ رَمَضَانَ – وَهُوَ صَائِمٌ – فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا بَأْسَ بِذَلِكَ. وَبِهِ يَأْخُذُ.
999 – But Ibn Abī Laylā used to disapprove of that (<i>yakrahu dhālika</i>); and he disapproved that he anoint (<i>yad-huna</i>) his moustache with [edible] oil (<i>duhn</i>), coming across its taste while he is fasting.	999 – وَكَانَ ابْنُ أَبِي لَيْلَى يَكْرَهُ ذَلِكَ، وَيَكْرَهُ أَنْ يَذْهَنَ شَارِبَهُ بِذَهْنٍ يَجِدُ طَعْمَهُ وَهُوَ صَائِمٌ.
1000 – Al-Shāfi'ī, may God Most High have mercy upon him, said: There is no harm in that the one fasting (<i>al-ṣā'im</i>) should apply <i>kuhl</i> , and that he anoint his moustache, and his head, and his face, and his two feet, and the whole of his body, with any oil he wishes — be it perfume of musk and ambergris (<i>ghāliya</i>), or other than <i>ghāliya</i> .	1000 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: لَا بَأْسَ أَنْ يَكْتَحِلَ الصَّائِمُ، وَيَذْهَنَ شَارِبَهُ وَرَأْسَهُ وَوَجْهَهُ وَقَدَمَيْهِ وَجَمِيعَ بَدَنِهِ بِأَيِّ ذَهْنٍ شَاءَ؛ غَالِيَةً أَوْ غَيْرَ غَالِيَةٍ.
1001 – And when a man fasts a day of the month of Ramaḍān, then doubts (<i>shakka</i>) as to whether it is of the month of Ramaḍān, then he learns after that that it is of Ramaḍān; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, said: It suffices him (<i>yujzīhi</i>). And he [Abū Yūsuf] embraces it.	1001 – وَإِذَا صَامَ الرَّجُلُ يَوْمًا مِنْ شَهْرِ رَمَضَانَ فَشَكَّ أَنَّهُ مِنْ شَهْرِ رَمَضَانَ ثُمَّ عَلِمَ بَعْدَ ذَلِكَ أَنَّهُ مِنْ رَمَضَانَ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى قَالَ: يُجْزِيهِ. وَبِهِ يَأْخُذُ.
1002 – But Ibn Abī Laylā used to say: That does not suffice him, and [enjoined] upon him is the making-good of a day in its place (<i>qadā'u yawmⁱⁿ makānahu</i>).	1002 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا يُجْزِيهِ ذَلِكَ، وَعَلَيْهِ قَضَاءُ يَوْمٍ مَكَانَهُ.
1003 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man awakens on the Day of Doubt (<i>yawm al-shakk</i>) of Ramaḍān, and he has planned (<i>qad battata</i>) the fast from the night, with the understanding that it is of Ramaḍān; this is a complete intent (<i>niyyat^{um} kāmilat^{um}</i>) fulfilling as substitute (<i>tu'addi 'anhu</i>) that	1003 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَصْبَحَ الرَّجُلُ يَوْمَ الشَّكِّ مِنْ رَمَضَانَ وَقَدْ بَيَّتَ الصَّوْمَ مِنَ اللَّيْلِ عَلَى أَنَّهُ مِنْ رَمَضَانَ فَهَذِهِ نِيَّةٌ كَامِلَةٌ تُؤَدِّي عَنْهُ ذَلِكَ الْيَوْمَ إِنْ كَانَ مِنْ شَهْرِ

¹ (Ḥassūn, vol.9, pt.14, 171-3; Schacht: *Tr. I*, 173-177).

day, if it is of the month of Ramaḍān. And if it is not of the month of Ramaḍān, he breaks his fast (<i>aftara</i>). ²	رَمَضَانَ، وَإِنْ لَمْ يَكُنْ مِنْ شَهْرِ رَمَضَانَ أَفْطَرَ.
1004 – Al-Rabī said: Al-Shāfi'ī said, in another passage (<i>fī mawḍi'īn ākhara</i>): It does not suffice him, because he fasted in doubt (<i>'alā al-shakki</i>). ³	1004 – قَالَ الرَّبِيعُ: قَالَ الشَّافِعِيُّ فِي مَوْضِعٍ آخَرَ: لَا يُجْزِيهِ؛ لِأَنَّهُ صَامَ عَلَى الشَّكِّ.
1005 – And when a woman breaks fast on a day of Ramaḍān, with deliberate intent (<i>muta'ammidat^m</i>), then she begins her menses (<i>hāḍat</i>) from the end of the day; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: There is no penance (<i>kaffāra</i>) [enjoined] upon her, but upon her is [enjoined] a making-up [of the missed day] (<i>al-qaḍā'</i>).	1005 – وَإِذَا أَفْطَرَتِ الْمَرْأَةُ يَوْمًا مِنْ رَمَضَانَ مُتَعَمِّدَةً ثُمَّ حَاضَتْ مِنْ آخِرِ النَّهَارِ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَيْسَ عَلَيْهَا كَفَّارَةٌ، وَعَلَيْهَا الْقَضَاءُ. وَبِهِ يَأْخُذُ.
1006 – But Ibn Abī Laylā used to say: Upon her is [enjoined] the <i>kaffāra</i> , and upon her is [enjoined] the <i>qaḍā'</i> .	1006 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: عَلَيْهَا الْكَفَّارَةُ وَعَلَيْهَا الْقَضَاءُ.
1007 – Al-Shāfi'ī, may God Most High have mercy upon him, said: When a man has sexual intercourse with his wife (<i>aṣāba... imra'atahu</i>) during the month of Ramaḍān, then the man falls ill at the end of this day, and his mind goes (<i>dhahaba 'aqluhu</i>), or the woman begins her menses; it has been said: Upon the man [is enjoined] the manumission of a slave (<i>itqu raqabat^m</i>). But it has [also] been said: Nothing is enjoined upon him.	1007 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَصَابَ الرَّجُلُ امْرَأَتَهُ فِي شَهْرِ رَمَضَانَ ثُمَّ مَرَضَ الرَّجُلُ فِي آخِرِ يَوْمِهِ فَذَهَبَ عَقْلُهُ، أَوْ حَاضَتْ الْمَرْأَةُ، فَقَدْ قِيلَ: عَلَى الرَّجُلِ عِتْقُ رَقَبَةٍ. وَقِيلَ: لَا شَيْءَ عَلَيْهِ.

² The heart of the *mas'ala*, as al-Shāfi'ī has clarified for us, is whether or not doubting that it is the last day of Ramaḍān (*yawm al-shakk*) — thus entertaining that Ramaḍān might have ended the day previously — is sufficient to cancel out the *niyya* which the *ṣā'im* must inwardly express as a vital part of his fast. If it is confirmed to be the last day after his moment of doubt, we find three opinions: Abū Ḥanīfa seems to say it doesn't matter; his *niyya* is intact. Ibn Abī Laylā says the opposite; his *niyya* is broken. Al-Shāfi'ī takes a more particular stance: if his *niyya* for the coming day was expressed the night before, it is sufficient to carry through into the day of doubt, and is not broken by that doubt.

³ §1004 is an important editorial note from al-Rabī [indicating an opinion held by al-Shāfi'ī which is contradictory to that which he expresses in §1003], with a number of implications which may be pursued through text-search and analysis. First would be to attempt to locate the passage — if extant — in which al-Shāfi'ī's contradictory opinion is expressed. Second would be to ascertain, if possible, whether or not it may be said to belong to the Old (Iraqi) Doctrine (*al-qaḍīm*). Third would be to locate any commentary as regards the two opinions by his *aṣḥāb* and later Shāfi'ī scholars. I have so far proceeded only by locating the related discussion in the *Kitāb al-Ṣiyām* of the *Umm*, and al-Muzanī's epitome of the *mas'ala* in his *Mukhtaṣar*; the translations of both may be found in the appendices (II. §1004).

1008 – And as for when he departs on a journey (<i>sāfara</i>) [after sexual intercourse?]; then indeed, there is [enjoined] upon him the manumission (<i>ʿitq</i>) of a slave. That is because the journey is a thing he brings about (<i>yuhdithuhu</i>) — and there does not fall away from him that which is enjoined upon him (<i>lā yasqutu ʿanhu mā wajaba ʿalayhi</i>) by means of something he brings about. ⁴	1008 – فَأَمَّا إِذَا سَافَرَ فَإِنَّ عَلَيْهِ عِتْقَ رَقَبَةٍ؛ وَذَلِكَ أَنَّ السَّفَرَ شَيْءٌ يُحْدِثُهُ فَلَا يَسْقُطُ عَنْهُ مَا وَجَبَ عَلَيْهِ بِشَيْءٍ يُحْدِثُهُ.
1009 – He said: And when there is [enjoined] upon a man a fast of two months from a penance of breaking fast (<i>min kaffāratī ifṭāʾin</i>) for Ramaḍān; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: Those two months are consecutive (<i>mutatābiʿāni</i>) — there belongs to him no right to fast them both except consecutively.	1009 – قَالَ: وَإِذَا وَجَبَ عَلَى الرَّجُلِ صَوْمُ شَهْرَيْنِ مِنْ كَفَّارَةِ إِفْطَارٍ مِنْ رَمَضَانَ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: ذَانِكَ الشَّهْرَانِ مُتَتَابِعَانِ، لَيْسَ لَهُ أَنْ يَصُومَهُمَا إِلَّا مُتَتَابِعَيْنِ.
1010 – And Abū Ḥanīfa mentioned something of that sort (<i>naḥw^{an} min dhālika</i>) concerning the Prophet, may God bless and save him. And he [Abū Yūsuf] embraces it.	1010 – وَذَكَرَ أَبُو حَنِيفَةَ نَحْوًا مِنْ ذَلِكَ عَنْ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، وَبِهِ يَأْخُذُ.
1011 – But Ibn Abī Laylā used to say: They are not consecutive.	1011 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَيْسَا بِمُتَتَابِعَيْنِ.
1012 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the one who had sexual intercourse (<i>al-mujāmiʿu</i>) during the month of Ramaḍān does not find [an opportunity for] manumission (<i>lam yajid... ʿitq^{an}</i>), so he fasts; there is not permitted from him other than two consecutive months. And his <i>kaffāra</i> is the <i>kaffāra</i> of <i>ḡihār</i> . But neither <i>ṣawm</i> nor <i>ṣadaqa</i> takes the place of it for him, while he finds [an opportunity for] <i>ʿitq</i> . ⁵	1012 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا لَمْ يَجِدِ الْمُجَامِعُ فِي شَهْرِ رَمَضَانَ عِتْقًا، فَصَامَ لَمْ يُجْزَ عَنْهُ إِلَّا شَهْرَانِ مُتَتَابِعَانِ، وَكَفَّارَتُهُ كَفَّارَةُ الظَّهَارِ، وَلَا يُجْزِي عَنْهُ الصَّوْمُ وَلَا الصَّدَقَةُ وَهُوَ يَجِدُ عِتْقًا.

⁴ The final phrase from this section has the ring of a *qāʿida fihiyya*, but a search for this particular formula has produced nothing yet. As for §§1005-8, a juxtaposition of these rulings reveals the underlying distinction at the heart of the debate, indicated most clearly by al-Shāfiʿī in §1008. In brief, the distinction is that between an involuntary vs. voluntary invalidation of the fast, occurring *after* a voluntary invalidation of the fast. Does the involuntary (menses; loss of *ʿaql*) remove the obligation of *kaffāra*? As for a (second) voluntary invalidation, obviously it does not.

⁵ The *EF*², s.v. “Ṣawm,” notes: “A distinction is made between the major and minor *kaffāra* (compensating). The first is imposed on anyone who (a) breaks the fast in Ramaḍān by sexual intercourse; (b) is guilty of illegal killing...; (c) has pronounced the *ḡihār* formula but not the *ṭalāk* immediately after it; (d) has broken a valid oath (*yamīn*)....” In §1012 al-Shāfiʿī explains that the *kaffāra* of (a) is the same as that of (c).

1013 – He said: And when a man performs ablution (<i>tawaḍḍa'a</i>) for the textually-enjoined prayer (<i>al-ṣalāt al-maktūba</i>), and the water enters his throat — while he is fasting — in Ramaḍān, mindful (<i>dhākir^{am}</i>) of his fast; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: If he is mindful of his fast when he performs ablution and the water entered his throat; upon him is [enjoined] the <i>qaḍā'</i>. But if he was forgetful (<i>nāsiy^{am}</i>) of his fast, then no <i>qaḍā'</i> is [enjoined] upon him.	1013 – قَالَ: وَإِذَا تَوَضَّأَ الرَّجُلُ لِلصَّلَاةِ الْمَكْتُوبَةِ فَدَخَلَ الْمَاءُ حَلَقَهُ – وَهُوَ صَائِمٌ – فِي رَمَضَانَ ذَاكِرًا لَصَوْمِهِ، فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: إِنْ كَانَ ذَاكِرًا لَصَوْمِهِ حِينَ تَوَضَّأَ فَدَخَلَ الْمَاءُ حَلَقَهُ فَعَلَيْهِ الْقَضَاءُ، وَإِنْ كَانَ نَاسِيًا لَصَوْمِهِ فَلَا قَضَاءَ عَلَيْهِ.
1014 – And Abū Ḥanīfa stated [this] on the authority of Ḥammād, on Ibrāhīm.	1014 – وَذَكَرَ أَبُو حَنِيفَةَ عَنْ حَمَّادٍ، عَنْ إِبْرَاهِيمَ.
1015 – But Ibn Abī Laylā used to say: There is no <i>qaḍā'</i> [enjoined] upon him when he performs ablution for a <i>ṣalāt maktūba</i> — even if he was mindful of his fast.	1015 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا قَضَاءَ عَلَيْهِ إِذَا تَوَضَّأَ لِصَّلَاةٍ مَكْتُوبَةٍ، وَإِنْ كَانَ ذَاكِرًا لَصَوْمِهِ.
1016 – And it has been stated on the authority of 'Aṭā', on Ibn 'Abbās, may God be pleased with them both, that he said: When he performs ablution for a <i>ṣalāt maktūba</i> while he is fasting, and the water enters his throat; there is nothing [enjoined] upon him. But if he was performing ablution for a supererogatory prayer (<i>li-ṣalāti taṭawwuⁱⁿ</i>), upon him is [enjoined] the <i>qaḍā'</i>.	1016 – وَقَدْ ذَكَرَ عَنْ عَطَاءٍ عَنْ ابْنِ عَبَّاسٍ رَضِيَ اللَّهُ عَنْهُمَا أَنَّهُ قَالَ: إِذَا تَوَضَّأَ لِصَّلَاةٍ مَكْتُوبَةٍ وَهُوَ صَائِمٌ فَدَخَلَ الْمَاءُ حَلَقَهُ فَلَا شَيْءَ عَلَيْهِ، وَإِنْ كَانَ تَوَضَّأَ لِصَّلَاةٍ تَطَوُّعٍ فَعَلَيْهِ الْقَضَاءُ.
1017 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man performs ablutions for prayer while he is fasting, and he rinses (<i>tamaḍmaḍa</i>) and the water enters his inside (<i>jawfihi</i>) while he is forgetful (<i>nāsⁱⁿ</i>) of his fast; nothing is [enjoined] upon him. And if he drinks while he is forgetful; that does not invalidate (<i>lam yanquḍ</i>) his fast.	1017 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا تَوَضَّأَ الرَّجُلُ لِلصَّلَاةِ وَهُوَ صَائِمٌ، فَتَمَضَّمَضَ وَدَخَلَ الْمَاءُ جَوْفَهُ وَهُوَ نَاسٍ لَصَوْمِهِ فَلَا شَيْءَ عَلَيْهِ، وَلَوْ شَرِبَ وَهُوَ نَاسٍ لَمْ يَنْقُضْ ذَلِكَ صَوْمَهُ.
1018 – But when he is mindful of his fast, and the water enters his inside; it is preferable to me (<i>aḥabba ilayya</i>) that he repeat the fast by way of precaution (<i>iḥtiyāt^{am}</i>).⁶	1018 – وَإِذَا كَانَ ذَاكِرًا لَصَوْمِهِ فَدَخَلَ الْمَاءُ جَوْفَهُ فَأَحَبُّ إِلَيَّ أَنْ يُعِيدَ الصَّوْمَ

⁶ This is a perfect example of how al-Shāfi'ī appears only to express juristic preference in situations where precaution is called for on the part of the agent, or when he/she has free

	احْتِيَاطًا.
1019 – And as for what is incumbent upon him (<i>yalzamahu</i>); it is not incumbent upon him that he repeat (<i>yuʿīda</i>) [his fast] until he has brought about some kind of gulping (<i>izdirādⁱⁿ</i>) or he does some act not belonging to it [i.e., something besides gulping] (<i>faʿala fiʿl^{an} laysa lahu</i>), by which the water enters his inside.	1019 – وَأَمَّا الَّذِي يَلْزَمُهُ، فَلَا يَلْزَمُهُ أَنْ يُعِيدَ حَتَّى يَكُونَ أَحْدَثَ شَيْئًا مِنْ اِزْدِرَادٍ، أَوْ فَعَلَ فِعْلًا لَيْسَ لَهُ دَخَلَ بِهِ الْمَاءُ جَوْفَهُ.
1020 – But as for when he was merely desiring to rinse, and something shot out of his control (<i>sabaqahu</i>) into his throat, without [his] causing a gulping, by which he intends of the water nothing but the entering of the self and its expulsion; there is not enjoined upon him that he repeat the fast. And this is an error (<i>khaṭaʿa</i>) in the <i>maʿnā</i> of forgetfulness (<i>al-nisyān</i>), or lighter than it (<i>akhaffu minhu</i>).	1020 – فَأَمَّا إِذَا كَانَ إِنَّمَا أَرَادَ الْمَضْمَضَةَ فَسَبَقَهُ شَيْءٌ فِي حَلْقِهِ بِلَا إِحْدَاثِ اِزْدِرَادٍ تَعَمَّدَ بِهِ الْمَاءَ إِلَّا إِدْخَالَ النَّفْسِ وَإِخْرَاجَهُ، فَلَا يَجِبُ عَلَيْهِ أَنْ يُعِيدَ الصَّوْمَ. وَهَذَا خَطَأٌ فِي مَعْنَى النَّسْيَانِ أَوْ أَخَفُّ مِنْهُ.

option between acts. For other examples of *aḥabbu ilayya* and *iḥtiyāt*, and accompanying discussions, see §§724, 927, 940, 943, 946, 950, etc. Again, it would be very interesting indeed to explore the relationship between *iḥtiyāt* as a basis of reasoning, and what al-Shāfiʿī expresses preference for. Consider: Does *aḥabbu ilayya* indeed convey the same notion as *mustaḥabb*? Why did *iḥtiyāt* never achieve the status among Sunnī jurists that it did among Shīʿīs? Note also that this is not the only parallel between al-Shāfiʿī's legal method and later Shīʿī theoretical discourse: we have not only *iḥtiyāt* in common, but *ʿaql* and *maʿqūl* (*adilla ʿaqliyya*).

Bāb fi'l-Ḥajj

Chapter on the Pilgrimage (al-Ḥajj) ¹	بَابُ فِي الْحَجِّ
1021 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And Abū Ḥanīfa, may God Most High have mercy upon him, used to say: The sacrificial camels are not to be marked by incision (<i>lā tushʿaru al-budnu</i>). And he used to say: The marking by incision is a torment (<i>al-ishʿāru muthlat^{um}</i>). ²	1021 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَكَانَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى يَقُولُ: لَا تُشْعَرُ الْبُذْنُ. وَيَقُولُ: الْإِشْعَارُ مُثْلَةٌ.
1022 – But Ibn Abī Laylā used to say: The <i>ishʿār</i> is on the hump (<i>al-sanāmi</i>), from the left side. And he [Abū Yūsuf] embraces it.	1022 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الْإِشْعَارُ فِي السَّنَامِ مِنَ الْجَانِبِ الْأَيْسَرِ. وَبِهِ يَأْخُذُ.
1023 – Al-Shāfiʿī, may God Most High have mercy upon him, said: The sacrificial camels are marked by incision on their humps, and the cows on their humps, or places (<i>mawāḍiʿi</i>) of the humps; and the sheep are not marked by incision. And the <i>ishʿār</i> is on the right exterior (<i>al-ṣafḥati al-yumnā</i>).	1023 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَتُشْعَرُ الْبُذْنُ فِي أَسْنِمَتِهَا وَالْبَقَرُ فِي أَسْنِمَتِهَا أَوْ مَوَاضِعِ الْأَسْنِمَةِ، وَلَا تُشْعَرُ الْغَنَمُ. وَالْإِشْعَارُ فِي الصَّفْحَةِ الْيُمْنَى.
1024 – And likewise did the Messenger of God, may God bless and save him, mark by incision.	1024 – وَكَذَلِكَ أَشْعَرَ رَسُولُ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ.
1025 – And it is narrated on the authority of Ibn ʿAbbās, may God Most High be pleased with them both, concerning the Prophet, may God bless and save him, that he marked by incision on the right side (<i>fi'l-shiqqi al-aymani</i>). ³	1025 – وَرَوَى عَنْ ابْنِ عَبَّاسٍ رَضِيَ اللَّهُ تَعَالَى عَنْهُمَا عَنِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – أَنَّهُ أَشْعَرَ فِي الشَّقِّ الْأَيْمَنِ.
1026 – And due to that we abandoned the <i>qawl</i> of whosoever professed: It is not marked by incision except on the left side.	1026 – وَبِذَلِكَ تَرَكْنَا قَوْلَ مَنْ قَالَ: لَا يُشْعَرُ إِلَّا فِي الشَّقِّ الْأَيْسَرِ.
1027 – But it has been transmitted that Ibn ʿUmar marked by incision on the left side.	1027 – وَقَدْ رَوَى أَنَّ ابْنَ عُمَرَ أَشْعَرَ فِي الشَّقِّ الْأَيْسَرِ.

¹ (Ḥassūn, vol.9, pt.14, 174-81; Schacht: *Tr. I*, 178-185).

² The *El*² (s.v. “Ḥadjj”) is instructive on this *masʿala*:

“In ancient times the camels to be sacrificed were distinguished by special marks (*taḳlīd*) even on the journey to the *ḥaram*; for example two sandals were hung around their necks. Mention is also made of the *ishʿār*, the custom of making an incision in the side of the hump and letting blood flow from it; or wounds were made in the animal's skin. It is frequently mentioned also that a special covering was laid on the animals.”

³ §§1025ff.: Note this is an example of al-Shāfiʿī choosing a *ḥadīth* over an *athar*; and he takes special care to point that out in §1026.

1028 – Muslim b. Khālīd reported to us, on the authority of Ibn Jurayj, on Nāfiʿ that ʿAbd Allāh b. ʿUmar, may God Most High be pleased with them both, used not to care (<i>lā yubālī</i>) whichever of the two sides he marked by incision — on the right or the left.	1028 – أَخْبَرَنَا مُسْلِمُ بْنُ خَالِدٍ، عَنْ ابْنِ جُرَيْجٍ، عَنْ نَافِعٍ أَنَّ عَبْدَ اللَّهِ بْنَ عُمَرَ رَضِيَ اللَّهُ تَعَالَى عَنْهُمَا كَانَ لَا يُبَالِي فِي أَيِّ الشَّقَيْنِ أَشْعَرَ؛ فِي الْأَيْمَنِ أَوْ الْأَيْسَرِ.
1029 – He [Abū Yūsuf] said: And when a man gets under way for lesser pilgrimage (<i>ahalla... bi-ʿumrat^m</i>) then invalidates it (<i>fa-afsadahā</i>), yet he comes to Mecca [in order to] redo it (<i>qaḍāhā</i>); then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: It compensates for it (<i>yajziyuhu</i>) that he redo it from the border of the <i>ḥaram</i> [from the direction of Medina] (<i>al-tanʿim</i>). And he [Abū Yūsuf] embraces it. ⁴	1029 – قَالَ: وَإِذَا أَهَلَ الرَّجُلُ بَعْمَرَةَ فَأَفْسَدَهَا، فَقَدِمَ مَكَّةَ وَقَضَاهَا، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: يَجْزِيهِ أَنْ يَقْضِيَهَا مِنَ التَّنْعِيمِ. وَبِهِ يَأْخُذُ.
1030 – But Ibn Abī Laylā used to say: It does not compensate for it that he redo it except from the pilgrimage rendezvous (<i>mīqāt</i>) of his country.	1030 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا يَجْزِيهِ أَنْ يَقْضِيَهَا إِلَّا مِنْ مِيقَاتِ بِلَادِهِ.
1031 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man sets out for ʿumra from a <i>mīqāt</i> , then invalidates it; it does not compensate for it that he redo it except from the <i>mīqāt</i> from which he began the ʿumra he invalidated. And we do not know of <i>qaḍāʾ</i> for something from among the [religious] acts (<i>al-aʿmāl</i>) except for an act just like it (<i>bi-ʿamal^m mithlihi</i>). And as for an act less than it — this is a <i>qaḍāʾ</i> of a part, without the whole (<i>li-baʿḍ dūna al-kulli</i>), and only the <i>qaḍāʾ</i> of the whole compensates, not the part. ⁵	1031 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَهَلَ الرَّجُلُ بَعْمَرَةَ مِنْ مِيقَاتٍ فَأَفْسَدَهَا فَلَا يَجْزِيهِ أَنْ يَقْضِيَهَا إِلَّا مِنَ الْمِيقَاتِ الَّتِي أَبْتَدَأَ مِنْهُ الْعُمْرَةَ الَّتِي أَفْسَدَهَا. وَلَا نَعْلَمُ الْقَضَاءَ فِي شَيْءٍ مِنَ الْأَعْمَالِ إِلَّا بِعَمَلٍ مِثْلِهِ، فَأَمَّا عَمَلٌ أَقْلٌ مِنْهُ فَهَذَا قَضَاءٌ لِبَعْضٍ دُونَ الْكُلِّ، وَإِنَّمَا يَجْزِي قَضَاءُ الْكُلِّ لَا الْبَعْضُ.
1032 – And whosoever said: He has the right to make it up outside of the <i>ḥaram</i> [i.e., starting from its border], there is interposed upon him (<i>dakhala ʿalayhi</i>) a <i>khilāf</i> of what we have described of the <i>qiyās</i> , and a <i>khilāf</i> of the <i>āthār</i> . And I have assumed (<i>qad zanantu</i>) that he [who says this] merely fashioned his opinion (<i>dhahaba</i>	1032 – وَمَنْ قَالَ: لَهُ أَنْ يَقْضِيَهَا خَارِجًا مِنَ الْحَرَمِ دَخَلَ عَلَيْهِ خِلَافٌ مَا وَصَفْنَا مِنَ الْقِيَاسِ وَخِلَافٌ الْآثَارِ، وَقَدْ ظَنَنْتُ أَنَّهُ إِنَّمَا ذَهَبَ إِلَى أَنَّ عَائِشَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهَا

⁴ Thus the core issue of the *masʿala* reveals itself: if the ʿumra is invalidated en route to Mecca, how far does the pilgrim have to retrace his/her steps in order to redo it? That is, from exactly which point need one start over?

⁵ Note this focus on definition, and the whole/part distinction on which al-Shāfiʿī bases his (broad) *qiyās* (which he identifies as such in §1032). A preliminary search (of both *Umm* and *Risāla*) shows only this one instance of a whole/part distinction in this particular formula. However, the phrase *baʿḍ dūna baʿḍ* (and variants) has some frequency.

<i>ilā</i>) [on the belief] that 'Ā'isha, may God Most High be pleased with her, was only getting under way for 'umra, but that she abandoned (<i>rafaḍat</i>) the 'umra, and the Prophet, may God bless and save him, commanded her to make it up from the <i>tan'im</i> — and this is not how it was narrated. The Prophet, may God bless and save him, only ordered her to incorporate the <i>hajj</i> over the 'umra, for it was a combined [pilgrimage] (<i>qārinat^{am}</i>). And her 'umra [on its own] was merely something she desired (<i>istaḥabbat-hu</i>). So the Prophet, may God bless and save him, ordered her to it, and she performed 'umra (<i>i'tamarat</i>) — [it is] not that her 'umra was a <i>qaḍā'</i>.⁶	إِنَّمَا كَانَتْ مُهَلَّةً بِعُمْرَةٍ وَأَنَّهَا رَفَضَتْ الْعُمْرَةَ وَأَمَرَهَا النَّبِيُّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - بِأَنْ تَقْضِيَهَا مِنَ التَّنْعِيمِ، وَهَذَا لَيْسَ كَمَا رُوِيَ. إِنَّمَا أَمَرَهَا النَّبِيُّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - أَنْ تُدْخِلَ الْحَجَّ عَلَى الْعُمْرَةِ فَكَانَتْ قَارِنَةً. وَإِنَّمَا كَانَتْ عُمْرَتُهَا شَيْئًا اسْتَحَبَّتهُ، فَأَمَرَهَا النَّبِيُّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - بِهَا فَاعْتَمَرَتْ لَا أَنَّ عُمْرَتَهَا كَانَتْ قَضَاءً.
1033 – And when a man [on pilgrimage] catches of the quarry of the sea (<i>min ṣayd al-baḥri</i>) anything besides fish (<i>shay^{xm} siwā al-samaki</i>); then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: There is no good (<i>lā khayra</i>) in anything of the quarry of the sea besides fish. And he [Abū Yūsuf] embraces it.	1033 - وَإِذَا أَصَابَ الرَّجُلُ مِنَ صَيْدِ الْبَحْرِ شَيْئًا سِوَى السَّمَكِ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: لَا خَيْرَ فِي شَيْءٍ مِنْ صَيْدِ الْبَحْرِ سِوَى السَّمَكِ. وَبِهِ يَأْخُذُ.
1034 – But Ibn Abī Laylā used to say: There is no harm (<i>lā ba'sa</i>) in the quarry of the sea, all of it.	1034 - وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا بَأْسَ بِصَيْدِ الْبَحْرِ كُلِّهِ.
1035 – Al-Shāfi'ī, may God Most High be pleased with him, said: And there is no harm in that the pilgrim in a state of <i>iḥrām</i> (<i>al-muḥrimu</i>) catch the entirety of such as whose life was in the water, of fish, and otherwise. God, to Him belong might and majesty, said: «Permitted to you [pl.] are the quarry of the sea, and its food-stuff (<i>ta'āmuhu</i>) — as a beneficial provision (<i>matā^{am}</i>) for you [pl.], and for the voyagers; but forbidden to you [pl.] are the quarry of the land (<i>ṣaydu al-barri</i>), so long as you are in a state of <i>iḥrām</i> (<i>ḥurum^{am}</i>)» [Q.5:96]. And one of the <i>Ahl al-'Ilm</i> said by way of <i>tafsīr</i>: <i>Ṭa'āmahu</i> — all that was in it [the sea]; and it is almost the same as (<i>shibhu</i>) what He said.	1035 - قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ تَعَالَى عَنْهُ: وَلَا بَأْسَ بِأَنْ يَصِيدَ الْمُحْرِمُ جَمِيعَ مَا كَانَ مَعَاشُهُ فِي الْمَاءِ مِنَ السَّمَكِ وَغَيْرِهِ. قَالَ اللَّهُ عَزَّ وَجَلَّ: «أُحِلَّ لَكُمْ صَيْدُ الْبَحْرِ وَطَعَامُهُ مَتَاعًا لَكُمْ وَلِلسَّيَّارَةِ وَحُرِّمَ عَلَيْكُمْ صَيْدُ الْبَرِّ مَا دُمْتُمْ حُرُمًا» [المائدة: 96] فَقَالَ بَعْضُ أَهْلِ الْعِلْمِ بِالتَّفْسِيرِ: طَعَامُهُ؛ كُلُّ مَا كَانَ فِيهِ، وَهُوَ شِبْهُ مَا قَالَ. وَاللَّهُ تَعَالَى أَعْلَمُ.

⁶ There are a number of versions of this event in *Ṣaḥīḥ al-Bukhārī*, which shed light on al-Shāfi'ī's reasoning. In brief, 'Ā'isha had wanted to do combined pilgrimage, but she started her menses; so the Prophet ordered her to let her hair down and do only *hajj*. Afterwards, she still wanted to do 'umra, so he sent her outside the *ḥaram* with someone to guide her through it, which she did successfully. So in fact, she was not making it up or doing it over (*qaḍā'*), but doing it for the first time, having just completed *hajj*.

And God Most High knows best.	
1036 – And Abū Yūsuf, may God have mercy upon him, said: I asked Abū Ḥanīfa, may God Most High be pleased with him, about the grasses (<i>hashīsh</i>) of the <i>ḥaram</i> . And he said: I disapprove (<i>akrahu</i>) that he graze [his flocks on] anything of the grasses of the <i>ḥaram</i> , or that he garner (<i>yaḥtashsha</i>) [anything] from it.	1036 – وَقَالَ أَبُو يُوسُفَ رَحِمَهُ اللَّهُ: سَأَلْتُ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ عَنْ حَشِيشِ الْحَرَمِ. فَقَالَ: أَكْرَهُ أَنْ يَرْعَى مِنْ حَشِيشِ الْحَرَمِ شَيْئًا أَوْ يَحْتَشَّ مِنْهُ.
1037 – He said: And I asked Ibn Abī Laylā about that. And he said: There is no harm (<i>lā ba'sa</i>) in that it be garnered from the <i>ḥaram</i> , and that it be grazed from.	1037 – قَالَ: وَسَأَلْتُ ابْنَ أَبِي لَيْلَى عَنْ ذَلِكَ. فَقَالَ: لَا بَأْسَ أَنْ يُحْتَشَّ مِنَ الْحَرَمِ وَيُرْعَى مِنْهُ.
1038 – He said: And I asked al-Ḥajjāj b. Arṭāt. And he reported to me that he had asked 'Aṭā' b. Abī Rabāḥ, and he said: There is no harm (<i>lā ba'sa</i>) in that it be grazed, but it was disapproved (<i>kariha</i>) that it be garnered. And he [Abū Yūsuf] embraces it.	1038 – قَالَ: وَسَأَلْتُ الْحَجَّاجَ بْنَ أَرْطَاةَ. فَأَخْبَرَنِي أَنَّهُ سَأَلَ عَطَاءَ بْنَ أَبِي رَبَاحٍ، فَقَالَ: لَا بَأْسَ أَنْ يُرْعَى. وَكَرِهَ أَنْ يُحْتَشَّ. وَبِهِ يَأْخُذُ.
1039 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And there is no harm (<i>lā ba'sa</i>) in that the plants of the <i>ḥaram</i> be grazed — its trees/shrubs (<i>shajarah</i>) and its pasturage. But there is no good (<i>lā khayra</i>) in that anything be garnered from it, due to what the Messenger of God, may God bless and save him, forbade (<i>ḥarrama</i>) as pertains to Mecca — that its herbage be cut (<i>yukhtalā khalāhā</i>) except for the fragrant rush (<i>al-idhkhira</i>). And the “cutting of herbage” (<i>al-ikhtilā</i>): garnering by plucking or cutting. And he forbade the pruning of its trees/shrubs, but he did not forbid that they be grazed.	1039 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَلَا بَأْسَ أَنْ يُرْعَى نَبَاتُ الْحَرَمِ؛ شَجَرُهُ وَمَرْعَاهُ، وَلَا خَيْرَ فِي أَنْ يُحْتَشَّ مِنْهُ شَيْءٌ؛ لِأَنَّ الَّذِي حَرَّمَ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - مِنْ مَكَّةَ أَنْ يُخْتَلَى خَلَاهَا إِلَّا الْإِذْخِرَ، وَالْإِخْتِلَاءُ: الْإِحْتِشَاشُ نَتْفًا وَقَطْعًا. وَحَرَّمَ أَنْ يُعْصَدَ شَجَرُهَا وَلَمْ يُحَرِّمْ أَنْ يُرْعَى.
1040 – Abū Yūsuf, may God Most High have mercy upon him, said: I asked Abū Ḥanīfa, may God be pleased with him. He said: There is no harm in that he remove of the earth (<i>turāb</i>) of the <i>ḥaram</i> and its stones to outside the <i>ḥaram</i> (<i>ilā al-ḥilli</i>). And he [Abū Yūsuf] embraces it.	1040 – قَالَ أَبُو يُوسُفَ رَحِمَهُ اللَّهُ تَعَالَى: سَأَلْتُ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ قَالَ: لَا بَأْسَ أَنْ يُخْرِجَ مِنْ تُرَابِ الْحَرَمِ وَحِجَارَتِهِ إِلَى الْحِلِّ. وَبِهِ يَأْخُذُ.

1041 – He said: And I heard Ibn Abī Laylā transmit [as <i>ḥadīth</i>] (<i>yuḥaddithu</i>) on the authority of ʿAṭāʾ b. Abī Rabāḥ, on Ibn ʿAbbās and Ibn ʿUmar, may God Most High be pleased with them, that they both disapproved (<i>karihā</i>) that he remove anything of the earth of the <i>ḥaram</i> and its stone to the <i>ḥill</i>.	1041 – قَالَ: وَسَمِعْتُ ابْنَ أَبِي لَيْلَى يُحَدِّثُ عَنْ عَطَاءِ بْنِ أَبِي رَبَاحٍ، عَنْ ابْنِ عَبَّاسٍ وَابْنِ عُمَرَ رَضِيَ اللَّهُ تَعَالَى عَنْهُمَا كَرِهَا أَنْ يُخْرَجَ مِنْ ثَرَابِ الْحَرَمِ وَحِجَارَتِهِ إِلَى الْحِلِّ شَيْئًا.
1042 – And a <i>shaykh</i> transmitted to us [as <i>ḥadīth</i>] (<i>ḥaddathanā</i>) on the authority of Razīn the <i>mawlā</i> of ʿAlī b. ʿAbd Allāh b. ʿAbbās, that ʿAlī b. ʿAbd Allāh wrote to him that there be sent to him a piece of al-Marwa, which he might use as a prayer-place upon which to prostrate (<i>muṣallā yasjudu ʿalayhi</i>).	1042 – وَحَدَّثَنَا شَيْخٌ عَنْ رَزِينٍ مَوْلَى عَلِيِّ بْنِ عَبْدِ اللَّهِ بْنِ عَبَّاسٍ أَنَّ عَلِيَّ بْنَ عَبْدِ اللَّهِ كَتَبَ إِلَيْهِ أَنْ يُبْعَثَ إِلَيْهِ بِقِطْعَةٍ مِنَ الْمَرْوَةِ يَتَّخِذُهَا مُصَلًّى يَسْجُدُ عَلَيْهِ.
1043 – Al-Shāfiʿī, may God Most High have mercy upon him, said: There is no good (<i>lā khayra</i>) in that he remove anything of the stone of the <i>ḥaram</i>, nor of its earth, to the <i>ḥill</i>; because there belongs to it a sanctity which is established (<i>ḥuramat^{um} thabatat</i>), by which it is distinct from others among the lands (<i>bāyana bihā mā siwāhā min al-buldāni</i>).	1043 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: لَا خَيْرَ فِي أَنْ يُخْرَجَ مِنْ حِجَارَةِ الْحَرَمِ وَلَا ثَرَابِهِ شَيْءٌ إِلَى الْحِلِّ؛ لِأَنَّ لَهُ حُرْمَةً ثَبَتَتْ، بَايَنَ بَهَا مَا سِوَاهَا مِنَ الْبُلْدَانِ.
1044 – And I do not opine (<i>wa lā arā</i>) – and God Most High knows best – that it is <i>jāʿiz</i> for anyone that he remove it (<i>yuzīlahu</i>) from the locus (<i>al-mawḍiʿ</i>) by which it is distinct from the lands, to the ends that it become like others.	1044 – وَلَا أَرَى – وَاللَّهُ تَعَالَى أَعْلَمُ – أَنْ جَائِزًا لِأَحَدٍ أَنْ يُزِيلَهُ مِنَ الْمَوْضِعِ الَّذِي بَايَنَ بِهِ الْبُلْدَانُ إِلَى أَنْ يَصِيرَ كَغَيْرِهِ.
1045 – Al-Shāfiʿī said: And ʿAbd al-Raḥmān b. al-Ḥasan b. al-Qāsim al-Azraq reported to us, on the authority of his father, on ʿAbd al-Aʿlā b. ʿAbd Allāh b. ʿĀmir, he said: I came, with my mother – or, he said: my grandmother – to Mecca; and Ṣafiyya bint Shayba came to [call on] her, so she [the mother/grandmother] offered her hospitality (<i>akramat-hā</i>), and took care of her (<i>faʿalat bihā</i>). And Ṣafiyya said: I don't know by what means I can recompense her (<i>ukāfiʿuhā bihi</i>). So she sent to her a piece of the corner [of the Kaʿba] (<i>al-rukn</i>),⁷ and she	1045 – قَالَ الشَّافِعِيُّ: وَقَدْ أَخْبَرَنَا عَبْدُ الرَّحْمَنِ بْنُ الْحَسَنِ بْنِ الْقَاسِمِ الْأَزْرَقِيُّ، عَنْ أَبِيهِ، عَنْ عَبْدِ الْأَعْلَى بْنِ عَبْدِ اللَّهِ بْنِ عَامِرٍ، قَالَ: قَدِمْتُ مَعَ أُمِّي – أَوْ قَالَ جَدَّتِي – مَكَّةَ، فَأَتَتْهَا صَفِيَّةُ بِنْتُ شَيْبَةَ فَأَكْرَمَتْهَا وَفَعَلَتْ بِهَا. فَقَالَتْ صَفِيَّةُ: مَا أَدْرِي مَا

⁷ In Abū Walīd al-Azraqī's version (see final note for this section), this is *al-rukn al-aswad* – that corner of the Kaʿba which holds the Black Stone. Abū Walīd mentions that the piece in question had broken off when the *rukn* was burned. Al-Fākihī also mentions the fire. As Ṣafiyya bint Shayba was said to have lived up to the reign of the Umayyad Caliph al-Walīd b. ʿAbd al-Malik

[the mother/grandmother] brought it out [of Mecca] with her, and we stopped over at the first way-station. Then he [the narrator] spoke of their illness and their sickness (*marāḍihim wa ʿillatihim*), the lot of them. He said: And my mother, or my grandmother, said: I don't think that it would have come to us except for that we removed this piece from the *ḥaram*. And she said to me [ʿAbd al-Aʿlā] — I being the most exemplary among them [in fitness] (*amthalahum*):⁸ Run along with this piece to Ṣafīyya and give it back to her, and say to her: Verily God, to Him belong majesty and transcendence,⁹ placed something in His *ḥaram* — and it is not right that it should be removed from it. ʿAbd al-Aʿlā said: And they [pl.] said to me: Before long we anticipated the time of your entering the *ḥaram* — and it was as though we were released from shackles/hobbling-cords (*unshiṭnā min ʿuqul*).¹⁰

أَكَاْفُهَا بِهِ. فَأَرْسَلَتْ إِلَيْهَا بِقِطْعَةٍ مِنَ الرُّكْنِ
فَخَرَجَتْ بِهَا، فَتَزَلْنَا أَوَّلَ مَنْزِلٍ، فَذَكَرَ مِنْ
مَرَضِهِمْ وَعِلَّتِهِمْ جَمِيعًا. قَالَ: فَقَالَتْ أُمِّي أَوْ
جَدَّتِي: مَا أَرَانَا أَتَيْنَا إِلَّا أَنَا أَخْرَجْنَا هَذِهِ
الْقِطْعَةَ مِنَ الْحَرَمِ. فَقَالَتْ لِي، وَكُنْتُ
أَمْتَلَهُمْ: انْطَلِقْ بِهِدِهِ الْقِطْعَةَ إِلَى صَفِيَّةَ فَزِدْهَا
وَقُلْ لَهَا: إِنَّ اللَّهَ جَلَّ وَعَلَا وَضَعَ فِي حَرَمِهِ
شَيْئًا فَلَا يَنْبَغِي أَنْ يُخْرَجَ مِنْهُ. قَالَ عَبْدُ
الْأَعْلَى: فَقَالُوا لِي: فَمَا هُوَ إِلَّا أَنْ تَحِينَا
دُخُولَكَ الْحَرَمَ، فَكَأَنَّمَا أَتَشِطُّنَا مِنْ عُقْلٍ.

(see §118 of al-Dhahabī's *Siyar Aʿlām al-Nubalāʾ*, 25 vols. [Beirut: Muʾassasat al-Risāla, 1985], 3:505-9), the fire in question is most likely that associated with al-Ḥajjāj b. Yūsuf's siege of Mecca.

⁸ Ḥassūn (ix.177) has أَمْتَلَهُمْ, which I cannot make sense of. But Abū Walīd al-Azraqī's account makes it clear that أَمْتَلَهُمْ is meant.

⁹ Ḥassūn has إِنَّ اللَّهَ عَزَّ وَجَلَّ, whereas Būlāq (vii.135) and Maṭrajī (vii.227) both have إِنَّ اللَّهَ جَلَّ وَعَلَا.

¹⁰ This captivating account appears to be quite rare in the *ḥadīth* literature — at least in anything like its articulation here in §1045. I have found only four occurrences among *ḥadīth* sources in a preliminary search. Al-Bayhaqī's version (§9985 in his *al-Sunan al-Kubrā*, ed. Muḥammad ʿAbd al-Qādir ʿAṭā, 3rd ed. 11 vols. [Beirut: Dār al-Kutub al-ʿIlmiyya, 2003], 5:330; and §10640 in his *Maʿrifat al-Sunan wa'l-Āthār*, ed. ʿAbd al-Muṭī Amīn Qalʿajī, 15 vols. [Karachi, Jāmiʿat al-Dirāsāt al-Islāmiyya; Aleppo: Dār al-Waʿy, 1991], 7:446) is the same, as he is transmitting al-Shāfiʿī's version. In the *Akhbār Makka wa Mā Jāʿa fihā min al-Āthār* (ed. Rushdī al-Ṣāliḥ Maḥās, 3rd ed., 2 vols. in 1 [Beirut: Dār al-Andalūs, 1969], 1:326-7) of Abū al-Walīd Muḥammad b. ʿAbd Allāh al-Azraqī (d. ca. 250/865), however, we find a more detailed version which has helped shed light on al-Shāfiʿī's version, and provided many details for the above translation. The same is true for the more detailed account (§31) rendered by al-Fākihī in his *Akhbār Makka* (ed. ʿAbd al-Malik b. ʿAbd Allāh b. Duḥaysh, 2nd ed., 6 vols. in 3 [Beirut: Dār Khidr, 1994], 1:95). Note that all versions I have found depend upon ʿAbd al-Raḥmān b. al-Ḥasan b. al-Qāsim al-Azraqī (as opposed to al-Azraq, as al-Shāfiʿī has, with the *nisba* of al-Azraqī even more indicative of an affiliation to the Azāriqa subsect of Khārijites). Even more telling is the version in the *Akhbār Makka* of al-Fākihī, which provides a full rendering of his name as ʿAbd al-Raḥmān b. al-Ḥasan b. al-Qāsim al-Azraqī al-Qāṣṣ. These last two descriptors, of course, place him not only among the Azāriqa, but within that special set of early sermonizers, story-tellers, and moral edifiers known as *quṣṣās* (s. *qāṣṣ*; see Hallaq, *Origins*, 39-40, *passim*; and Ch. Pellat's article “Qāṣṣ” in the *El*). This is yet another avenue worthy of further exploration: to what extent might we find the material of Khārijī transmitters, and *quṣṣās*, in the works of al-Shāfiʿī; and what significance, if any, does this have?

1046 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And more than one of the <i>Ahl al-ʿilm</i> said: It is not right that anything should be removed from the <i>ḥaram</i> to another place.	1046 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَقَالَ غَيْرُ وَاحِدٍ مِنْ أَهْلِ الْعِلْمِ: لَا يَنْبَغِي أَنْ يُخْرَجَ مِنَ الْحَرَمِ شَيْءٌ إِلَى غَيْرِهِ.
1047 – And when a man kills [in hunting] (<i>aṣāba</i>) a pigeon (<i>ḥamām^{an}</i>) from among the pigeons of the <i>ḥaram</i> ; then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: [Incumbent] upon him is its value. And he [Abū Yūsuf] embraces it.	1047 – وَإِذَا أَصَابَ الرَّجُلُ حَمَامًا مِنْ حَمَامِ الْحَرَمِ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: عَلَيْهِ قِيمَتُهُ. وَبِهِ يَأْخُذُ.
1048 – But Ibn Abī Laylā used to say: [Incumbent] upon him is a sheep (<i>shāt^{um}</i>). And I [Abū Yūsuf] heard (<i>samīʿtu</i>) Ibn Abī Laylā say, as regards the pigeons of the <i>ḥaram</i> , on the authority of ʿAṭāʾ b. Abī Rabāḥ: A sheep.	1048 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: عَلَيْهِ شَاةٌ. وَسَمِعْتُ ابْنَ أَبِي لَيْلَى يَقُولُ فِي حَمَامِ الْحَرَمِ – عَنْ عَطَاءِ بْنِ أَبِي رَبَاحٍ – شَاةٌ.
1049 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man kills [in hunting], in Mecca, a pigeon from among its pigeons; [incumbent] upon him is a sheep – following upon [the practice of] (<i>ittibāʿ^{an} li-</i>) ʿUmar, and ʿUthmān, and Ibn ʿAbbās, and Ibn ʿUmar, and Nāfiʿ b. ʿAbd al-Ḥārith, and ʿĀṣim b. ʿUmar, and ʿAṭā, and Ibn al-Musayyib, and others, may the sanction of God Most High be upon them, all together.	1049 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَصَابَ الرَّجُلُ بِمَكَّةَ حَمَامًا مِنْ حَمَامِهَا فَعَلَيْهِ شَاةٌ؛ اتَّبَاعًا لِعُمَرَ وَعُثْمَانَ وَابْنِ عَبَّاسٍ وَابْنِ عُمَرَ وَنَافِعِ بْنِ عَبْدِ الْحَارِثِ وَعَاصِمِ بْنِ عُمَرَ وَعَطَاءِ بْنِ الْمُسَيَّبِ وَغَيْرِهِمْ، رِضْوَانُ اللَّهِ تَعَالَى عَلَيْهِمْ أَجْمَعِينَ.
1050 – And he has claimed – the one who says, regarding it: Value (<i>qīmat^{um}</i>) – that he does not contradict (<i>lā yukhālifu</i>) any one of the <i>aṣḥāb</i> of the Messenger of God, may God bless and save him. Yet he has contradicted four [<i>aṣḥāb</i>] as regards the pigeons of Mecca. ¹¹	1050 – وَقَدْ زَعَمَ الَّذِي قَالَ: فِيهِ قِيمَةٌ، أَنَّهُ لَا يُخَالِفُ وَاحِدًا مِنْ أَصْحَابِ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – وَقَدْ خَالَفَ أَرْبَعَةً فِي حَمَامِ مَكَّةَ.
1051 – And Abū Ḥanīfa, may God Most High have mercy upon him, was asked about the <i>muḥrim</i> who kills quarry [in hunting] (<i>yuṣību al-ṣayda</i>), so there is ruled, for this, as [incumbent] upon him (<i>fa-yuḥkamu ʿalayhi</i>) a less-than-one-year female lamb/kid (<i>anāq^{um}</i>), or a lamb/kid fattened enough for pasturing (<i>jafrat^{um}</i>), or what approximates	1051 – وَسُئِلَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى عَنْ الْمُحْرِمِ يُصِيبُ الصَّيْدَ، فَيُحْكَمُ عَلَيْهِ فِيهِ عَنَاقٌ أَوْ جَفْرَةٌ أَوْ شِبْهُ ذَلِكَ. فَقَالَ: لَا يُجْزَى فِي هَذِي الصَّيْدِ إِلَّا مَا يُجْزَى فِي هَذِي

¹¹ We may assume that the four *aṣḥāb* are ʿUmar, ʿUthmān, Ibn ʿAbbās, Ibn ʿUmar, as named in §1049.

that (<i>shibhu dhālīka</i>). And he said: there does not suffice ¹² – regarding the sacrificial animal [given to the <i>ḥaram</i>] for [unlawfully] hunted quarry (<i>hadyi al-ṣayd</i>) – except what suffices regarding the sacrificial animal [given to the <i>ḥaram</i>] for the incorporation of <i>ʿumra</i> into <i>ḥajj</i> (<i>hadyi al-mutʿati</i>): the lamb old enough for sacrifice (<i>al-jadhaʿu</i>) from among the sheep, when it is large; or the two-years-or-older (<i>al-thaniyyu</i>) of goats, cows, and camels. And what is above that [in value, of the <i>hady al-ṣayd</i>] (<i>mā fawqa dhālīka</i>) does not recompense what is below that [in value, of the hunted animal] (<i>mā dūna dhālīka</i>). ¹³	الْمُتْعَةُ؛ الْجَذْعُ مِنَ الضَّأْنِ إِذَا كَانَ عَظِيمًا أَوْ النَّيْءُ مِنَ الْمَعَزِ وَالْبَقَرِ وَالْإِبِلِ، فَمَا فَوْقَ ذَلِكَ لَا يُجْزِئُ مَا دُونَ ذَلِكَ.
1052 – Don't you look to (<i>alā tarā ilā</i>) the <i>qawl</i> of God, to Him belong might and majesty, in His Book, regarding the compensation (<i>jazāʿ</i>) for the [unlawfully] hunted quarry: «A sacrificial animal (<i>hady^{am}</i>) brought to the <i>Kaʿba</i> » [Q.5:95]?	1052 – أَلَا تَرَى إِلَى قَوْلِ اللَّهِ عَزَّ وَجَلَّ فِي كِتَابِهِ فِي جَزَاءِ الصَّيْدِ: «هَدْيًا بَالِغَ الْكَعْبَةِ» [المائدة: 95].
1053 – And I asked Ibn Abī Laylā about that, and he said: It is sent [up, as sacrifice?] (<i>yubʿathu bihi</i>), even if it is a less-than-one-year female lamb/kid (<i>ʿanāq^{am}</i>), or a young ram (<i>ḥamal^{am}</i>).	1053 – وَسَأَلْتُ ابْنَ أَبِي لَيْلَى عَنْ ذَلِكَ فَقَالَ: يُبْعَثُ بِهِ، وَإِنْ كَانَ عَنَاقًا أَوْ حَمَلًا.
1054 – Abū Yūsuf, may God have mercy upon him, said: He [Ibn Abī Laylā] embraced the <i>athar</i> regarding the <i>ʿanāq</i> and the <i>jafra</i> . ¹⁴	1054 – قَالَ أَبُو يُوسُفَ رَحِمَهُ اللَّهُ: أَخَذَ بِالْأَثَرِ فِي الْعَنَاقِ وَالْجَفْرَةِ.
1055 – But Abū Ḥanīfa, may God have mercy upon him, said: Regarding that, all of it: its value (<i>qīmatuhu</i>). And he [Abū Yūsuf] embraces it.	1055 – وَقَالَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ: فِي ذَلِكَ كُلِّهِ قِيمَتُهُ. وَبِهِ يَأْخُذُ.
1056 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man kills [in hunting] a small quarry, he redeems it through sacrificing (<i>fadāhu</i>) a small sheep; because God, to Him belong might and majesty, says: « <i>mithlu</i> » [Q.5:95], and the	1056 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَصَابَ الرَّجُلُ صَيْدًا صَغِيرًا فَدَاهُ بِشَاةٍ صَغِيرَةٍ؛ لِأَنَّ اللَّهَ عَزَّ وَجَلَّ يَقُولُ «مِثْلُ»

¹² Ḥassūn and Maṭrajī have يجزى throughout; while Būlāq and Najjār have يجزى. Al-Afghānī's Shaybānī Version, however, has يجزى throughout. I have followed the latter.

¹³ In other words, when the hunted quarry does not reach the value of the *jadhaʿ* or the *thaniyy*, it is not to be recompensed by way of either. Abū Ḥanīfa's point is that nothing smaller than a *jadhaʿ* or *thaniyy* can be sacrificed as a *hady al-ṣayd*, and this applies when the value of the hunted quarry attains that of the *ḥamal* or *ʿanāq*. Anything less is to be judged by value. See the note attached to §1055 for al-Sarakhsī's explanation.

¹⁴ Ḥassūn has أَخَذَ بِالْأَثَرِ, as against the Būlāq and Maṭrajī, which I have preferred above. Ḥassūn does not note the divergence.

mithlu is the like of that which is redeemed through sacrifice (*mithlu alladhī yufdā*) — when it is large, then it [the sacrifice] is large; and when that which is to be redeemed through sacrifice is small, then it [the sacrifice] is small. And I do not know who said: It is not permitted that the small [unlawfully] hunted quarry be redeemed through sacrifice of something small like it of sheep; except who has contradicted (*khālafa*) the Qur'ān, and the *āthār*, and the *qiyās*, and the rational understanding (*al-ma'qūl*).

1057 – And if he has claimed that the hunted quarry is forbidden (*anna al-ṣayda muḥarram^{um}*), all of it; and he has claimed that the locust (*al-jarādatu*) is redeemed through the offering of a dried date (*tamrat^{im}*), or less than a dried date, due to its smallness and insignificance of value; and a feral cow (*baqaratu al-waḥshi*) is redeemed through the sacrifice of a cow, due to its largeness — then how does he not claim that the small is redeemed through the sacrifice of the small, while he has offered a small thing in sacrifice for the small, and a large thing in sacrifice for the large; while God, to Him belong might and majesty, has said: «A compensation (*jazā^{um}*) of the like of what he has killed (*mithlu mā qatala*), from the grazing livestock (*al-na'ami*)» [Q.5:95]?

And he only raised and lowered by the *mithl*, according to him — so how does he offer up a dried date, and not offer up an *'anāq*? And what of the sacrificial animals [for *ḥajj*] (*al-ḍaḥāyā*), and the animal offered for combining *'umra* and *ḥajj* (*hadyi al-mut'ati*), and the compensation for the hunted-quarry (*jazā'i al-ṣaydi*) — does he consider it (*hal ra'āhu*) the *qiyās* for the *jazā' al-ṣayd*, when the *muḥrim* kills (*aṣāba*) a cow, so that he says: a sheep suffices him, just as it suffices for the one combining *'umra* and *ḥajj* (*al-mutamatti'u*), or the one sacrificing during *ḥajj* (*al-muḍaḥḥi*)? Or did he exercise *qiyās* with it (*qāsaḥu*) — when the *muḥrim* killed a locust — so that he said: there will not suffice the *muḥrim* except a sheep, just as there will not suffice the *muḍaḥḥi* and the

[المائدة: 95] وَالْمِثْلُ مِثْلُ الَّذِي يُفْدَى. فَإِذَا كَانَ كَبِيرًا كَانَ كَبِيرًا. وَإِذَا كَانَ الَّذِي يُفْدَى صَغِيرًا كَانَ صَغِيرًا، وَلَا أَعْلَمُ مَنْ قَالَ: لَا يَجُوزُ أَنْ يُفْدَى الصَّيْدُ الصَّغِيرُ بِصَغِيرٍ مِثْلِهِ مِنَ الْعَنَمِ إِلَّا خَالَفَ الْقُرْآنَ وَالْأَثَارَ وَالْقِيَاسَ وَالْمَعْقُولَ.

1057 – وَإِذَا كَانَ يَزْعُمُ أَنَّ الصَّيْدَ مُحَرَّمٌ كُلُّهُ فَرَعَمَ أَنَّهُ تُفْدَى الْجَرَادَةُ بِتَمْرَةٍ أَوْ أَقَلٍّ مِنْ تَمْرَةٍ؛ لِصِغَرِهَا وَقِلَّةِ قِيَمَتِهَا. وَتُفْدَى بَقَرَةٌ الْوَحْشِ بِبَقَرَةٍ لِكِبَرِهَا، فَكَيْفَ لَمْ يَزْعُمْ أَنَّهُ يُفْدَى الصَّغِيرُ بِالصَّغِيرِ وَقَدْ فَدَى الصَّغِيرَ بِصَغِيرٍ وَالْكَبِيرَ بِكَبِيرٍ. وَقَدْ قَالَ اللَّهُ عَزَّ وَجَلَّ: «فَجَزَاءٌ مِثْلُ مَا قُتِلَ مِنَ النَّعَمِ» [المائدة: 95]

وَإِنَّمَا رَفَعَ وَخَفَضَ بِالْمِثْلِ عِنْدَهُ فَكَيْفَ يَفْدِي بِتَمْرَةٍ وَلَا يَفْدِي بِعَنَاقٍ وَمَا لِلضَّحَايَا وَهَذِي الْمُتَعَةِ وَجَزَاءِ الصَّيْدِ، هَلْ رَأَاهُ قِيَاسَ جَزَاءِ الصَّيْدِ حِينَ أَصَابَ الْمُحْرِمُ الْبَقَرَةَ بَأَنْ قَالَ: يَكْفِيهِ شَاةٌ كَمَا يَكْفِيهِ الْمُتَمَتِّعُ أَوْ الْمُضْحِي. أَوْ قَاسَهُ حِينَ أَصَابَ الْمُحْرِمُ جَرَادَةً بَأَنْ قَالَ: لَا يُجْزِي الْمُحْرِمَ إِلَّا شَاةٌ كَمَا لَا يُجْزِي الْمُضْحِي وَالْمُتَمَتِّعَ إِلَّا شَاةٌ.

<i>mutamattiʿ</i> except a sheep?	
1058 – And if he says: No.	1058 – فَإِنْ قَالَ: لَا.
1059 – It is said: Is it because the <i>jazāʾ al-ṣayd</i> is, just as God, Most Blessed, Most High, said: « <i>mithlu</i> »; and the <i>mithlu</i> is only small or large by the measure of what was killed (<i>alā qadri al-muṣābi</i>)?	1059 – قِيلَ: أَلَا أَنَّ جَزَاءَ الصَّيْدِ كَمَا قَالَ اللَّهُ تَبَارَكَ وَتَعَالَى: «مِثْلُ» وَإِنَّمَا الْمِثْلُ صَغِيرًا أَوْ كَبِيرًا عَلَى قَدْرِ الْمُصَابِ.
1060 – And if he says: Yes.	1060 – فَإِنْ قَالَ: نَعَمْ.
1061 – It is said: Then what leads you away from (<i>aḍalluka ʿan</i>) the <i>jafra</i> , when it is like what was killed (<i>mithla mā uṣība</i>)? And [even] if you were following the doctrine (<i>tuqallidu</i>) of ʿUmar b. al-Khaṭṭāb, may God Most High be pleased with him, [his doctrine] alone, regarding a case (<i>aqḍiyatⁱⁿ</i>) for no part of which you have any <i>ḥujja</i> except for <i>taqlīd</i> of him – then how have you come to contradict him, and, along with him, the Qurʾān, and the <i>qiyās</i> , and the <i>maʿqūl</i> , and others besides him of the <i>aṣḥāb</i> of the Prophet, may God bless and save him? For ʿUmar, may God be pleased with him, has ruled for the hare (<i>al-arnab</i>): an <i>ʿanāq</i> ; and for the jerboa: a <i>jafra</i> . And he ruled for the lizard (<i>al-ḍabb</i>): a kid (<i>jadyⁱⁿ</i>) which has gathered water and shrubs (<i>qad jamaʿa al-māʾa waʾl-shajara</i>). ¹⁵ And Ibn Masʿūd, may God be pleased with him, has ruled for the jerboa: a <i>jafra</i> or <i>jafra</i> s. And ʿUthmān, may God be pleased with him, ruled for a chameleon (<i>ummi ḥubaynⁱⁿ</i>): a <i>ḥullān</i> from the sheep, meaning a small ram (<i>ḥamalⁱⁿ</i>).	1061 – قِيلَ: فَمَا أَضَلُّكَ عَنِ الْجَفْرَةِ إِذَا كَانَتْ مِثْلَ مَا أُصِيبَ. وَإِنْ كُنْتَ تُقَلِّدُ عُمَرَ بْنَ الْخَطَّابِ رَضِيَ اللَّهُ تَعَالَى عَنْهُ وَحَدَّهُ فِي أَقْضِيَّةٍ لَا حُجَّةَ لَكَ فِي شَيْءٍ مِنْهَا إِلَّا تَقْلِيدُهُ فَكَيْفَ خَالَفْتَهُ وَمَعَهُ الْقُرْآنُ وَالْقِيَاسُ وَالْمَعْقُولُ وَغَيْرُهُ مِنْ أَصْحَابِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ؟ وَقَدْ قَضَى عُمَرُ رَضِيَ اللَّهُ عَنْهُ فِي الْأَرَنْبِ بَعْنَاقٍ، وَفِي الْيَرْبُوعِ بِجَفْرَةٍ، وَقَضَى فِي الضَّبِّ بِجَدْيٍ قَدْ جَمَعَ الْمَاءَ وَالشَّجَرَ. وَقَضَى ابْنُ مَسْعُودٍ رَضِيَ اللَّهُ عَنْهُ فِي الْيَرْبُوعِ بِجَفْرَةٍ أَوْ جَفْرِ. وَقَضَى عُثْمَانُ رَضِيَ اللَّهُ عَنْهُ فِي أُمِّ حُبَيْنٍ بِحُلَانٍ مِنَ الْعَنَمِ، يَعْنِي حَمَلًا.
1062 – And it is mentioned on the authority of Khuṣayf al-Jazariyy, on Abū ʿUbayda, on ʿAbd Allāh b. Masʿūd, that he said: For the ostrich-egg (<i>bayḍi al-naʾāmāti</i>) which the <i>muḥrim</i> seizes (<i>yuṣībuhu</i>): its price (<i>thamanuhu</i>). ¹⁶	1062 – وَذُكِرَ عَنْ خُصَيْفِ الْجَزَرِيِّ، عَنْ أَبِي عُبَيْدَةَ، عَنْ عَبْدِ اللَّهِ بْنِ مَسْعُودٍ أَنَّهُ قَالَ: فِي بَيْضِ النَّعَامَةِ يُصِيبُهُ الْمُحْرِمُ ثَمَنُهُ.
1063 – Dāwūd b. Abī Hind [reported], on the authority of ʿĀmir: the like.	1063 – دَاوُدُ بْنُ أَبِي هِنْدٍ، عَنْ عَامِرٍ مِثْلَهُ.

¹⁵ That is, a kid which has been weaned and started to drink and graze on its own. See al-Māwardī's *al-Ḥawāl al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfiʿī* (wa-huwa sharḥ Mukhtaṣar al-Muzanī), Ed. ʿAlī Muḥammad Maʿūd, et al., 20 vols. (Beirut: Dār al-Kutub al-ʿIlmiyya), 4:284.

¹⁶ §1062 marks the return to Abū Yūsuf's voice (as in the Shaybānī Version); al-Shāfiʿī's dialectical *elenchus* has concluded in §1061.

1064 – And I [Abū Yūsuf] heard (<i>samiʿtu</i>) Ibn Abī Laylā say, on the authority of ʿAṭāʾ b. Abī Rabāḥ: For the egg: a dirham.	1064 – وَسَمِعْتُ ابْنَ أَبِي لَيْلَى يَقُولُ عَنْ عَطَاءِ بْنِ أَبِي رَبَاحٍ: فِي الْبَيْضَةِ دِرْهَمٌ.
1065 – But Abū Ḥanīfa, may God have mercy upon him, said: Its value (<i>qīmatuhā</i>).	1065 – وَقَالَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ: قِيمَتُهَا.
1066 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the <i>muḥrim</i> seizes the eggs of ostriches, or the eggs of pigeons, or the eggs of the <i>ṣayd</i> ; for it, its value — by <i>qiyās</i> with the locust, and [by <i>qiyās</i>] with that for which there belongs no <i>mithl</i> from among the grazing livestock (<i>al-naʿami</i>).	1066 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَصَابَ الْمُحْرِمُ بَيْضَ نَعَامٍ أَوْ بَيْضَ حَمَامٍ أَوْ بَيْضًا مِنَ الصَّيْدِ فَفِيهِ قِيمَتُهُ؛ قِيَاسًا عَلَى الْجَرَادَةِ وَعَلَى مَا لَمْ يَكُنْ لَهُ مِثْلٌ مِنَ النَّعَمِ.

Bāb al-Diyāt

Chapter on Compensations for Homicide/Bodily Injury (<i>al-Diyāt</i>) ¹	بَابُ الدِّيَّاتِ
1067 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man kills a man with deliberate intent (<i>ʿamd^{un}</i>), and to the slain belong heirs (<i>liʾl-maqtūli warathat^{un}</i>) – minors and majors; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: To the majors belongs the right to kill their <i>ṣāhib</i> if they desire.	1067 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا قَتَلَ الرَّجُلُ الرَّجُلَ عَمْدًا وَلِلْمَقْتُولِ وَرَثَةٌ صِغَارٌ وَكِبَارٌ، فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لِلْكِبَارِ أَنْ يَقْتُلُوا صَاحِبَهُمْ إِنْ شَاءُوا.
1068 – But Ibn Abī Laylā used to say: They have no right to kill until the minors grow older (<i>yakbura</i>). And he [Abū Yūsuf] embraces it.	1068 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَيْسَ لَهُمْ أَنْ يَقْتُلُوا حَتَّى يَكْبُرَ الْأَصَاغِرُ. وَبِهِ يَأْخُذُ.
1069 – Abū Yūsuf transmitted to us [as <i>ḥadīth</i>] (<i>ḥaddathanā</i>), on the authority of a man (<i>ʿan rajulⁱⁿ</i>), on Abū Jaʿfar, that al-Ḥasan b. ʿAlī, may God be pleased with them both, killed Ibn Muljam [in retaliation] for ʿAlī.	1069 – حَدَّثَنَا أَبُو يُوسُفَ عَنْ رَجُلٍ، عَنْ أَبِي جَعْفَرٍ؛ أَنَّ الْحَسَنَ بْنَ عَلِيٍّ – رَضِيَ اللَّهُ عَنْهُمَا – قَتَلَ ابْنَ مُلْجَمٍ بَعْلِيٍّ.
1070 – And Abū Yūsuf said: And to ʿAlī, may God be pleased with him, there belonged minor children. ²	1070 – وَقَالَ أَبُو يُوسُفَ: وَكَانَ لِعَلِيٍّ رَضِيَ اللَّهُ عَنْهُ أَوْلَادٌ صِغَارٌ.
1071 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man kills a man with deliberate intent while he has <i>waratha</i> – minors and majors, or absent majors (<i>kibār^{un} ghuyyab^{un}</i>); not one of them has the right to kill [in retaliation] until the minors reach the age of majority (<i>tabluḡha</i>), and the absent ones are present, and whosoever has a share (<i>sahm^{un}</i>) in his <i>mūrāth</i> – of wife, or mother, or grandmother – agrees to the killing (<i>yajtamiʿu... ʿalā al-qatli</i>). And when they agree together, there belongs to them the right to kill. And when they do not agree together, there does not belong to them the right to kill. And when	1071 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا قَتَلَ الرَّجُلُ الرَّجُلَ عَمْدًا وَلَهُ وَرَثَةٌ؛ صِغَارٌ وَكِبَارٌ أَوْ كِبَارٌ غُيُوبٌ، فَلَيْسَ لِأَحَدٍ مِنْهُمْ أَنْ يَقْتُلَ حَتَّى تَبْلُغَ الصِّغَارُ وَتَحْضُرَ الْغُيُوبُ وَيَجْتَمِعَ مَنْ لَهُ سَهْمٌ فِي مِيرَاثِهِ؛ مِنْ زَوْجَةٍ أَوْ أُمٍّ أَوْ جَدَّةٍ عَلَى الْقَتْلِ، فَإِذَا اجْتَمَعُوا كَانَ لَهُمْ أَنْ يَقْتُلُوا. فَإِذَا لَمْ يَجْتَمِعُوا لَمْ يَكُنْ لَهُمْ أَنْ يَقْتُلُوا. وَإِذَا كَانَ هَذَا هَكَذَا فَلَا يَبْهَمُ شَاءَ مَنْ

¹ (Hassūn, vol.9, pt.14, 182-90; Schacht: *Tr. I*, 186-195).

² The employment of such a dramatic historical event as an *aṣl* (albeit one with a surprisingly ambiguous *isnād*, depending upon an anonymous “man”) can hardly pass without comment. One may wonder, in fact, if the assassination of ʿAlī at the hands of the proto-Khārījī Ibn Muljam – an event that altered forever the Islamic political and theological (and legal) landscape – did not provide an epistemically-authoritative context all its own, overshadowing the questionable chain of transmission provided by Abū Yūsuf for the event of al-Ḥasan’s retaliatory killing.

this [latter] is the case; there belongs to any of the present majors who wishes to take his share (<i>ḥiṣṣatahu</i>) of the <i>diya</i> from the <i>māl</i> of the offender (<i>al-jānī</i>) to the measure of his <i>mīrāth</i> from the slain. And when he does so, there belongs [that] right to the <i>awliyaʾ</i> of the absent ones. And upon the <i>awliyaʾ</i> of the minors is [enjoined] that they take, on their behalf, their portions from the <i>diya</i>; because the killing [in retaliation] has transformed/passed (<i>qad ḥāla</i>) and become <i>māl</i>, and the <i>walī</i> of the minor has no right to call for it [the killing], when his taking of it [the <i>māl</i>] is possible for him.	الْبَالِغِينَ الْحُضُورِ أَنْ يَأْخُذَ حِصَّتَهُ مِنَ الدِّيَةِ مِنْ مَالِ الْجَانِي بِقَدْرِ مِيرَاثِهِ مِنَ الْمَقْتُولِ، وَإِذَا فَعَلَ كَانَ لِأَوْلِيَاءِ الْغَيْبِ وَعَلَى أَوْلِيَاءِ الصَّغَارِ أَنْ يَأْخُذُوا لَهُمْ حِصَصَهُمْ مِنَ الدِّيَةِ؛ لِأَنَّ الْقَتْلَ قَدْ حَالَ وَصَارَ مَالًا، فَلَا يَكُونُ لَوَلِيِّ الصَّغِيرِ أَنْ يَدْعَهُ وَقَدْ أَمَكَّنَهُ أَخْذُهُ.
1072 – And if one should say (<i>fa-in qāla qāʾil^{un}</i>): How have you arrived at this opinion (<i>dhahabta ilā hādhā</i>) to the exclusion of other doctrines (<i>dūna ghayrihi min al-aqāwīl</i>); while one of the <i>Ahl al-ʿilm</i> has said: Any of the blood-guardians (<i>wulāti al-dami</i>)³ who endorses it, kills — even if the others pardoned (<i>ʿafā</i>)? And he places it in the status of the <i>ḥadd</i> (<i>anzalahu bi-manzilati al-ḥadd</i>)?	1072 – فَإِنْ قَالَ قَائِلٌ: كَيْفَ ذَهَبْتَ إِلَى هَذَا دُونَ غَيْرِهِ مِنَ الْأَقَاوِيلِ وَقَدْ قَالَ بَعْضُ أَهْلِ الْعِلْمِ: أَيُّ وُلَاةِ الدَّمِ قَامَ بِهِ قَتْلٌ وَإِنْ عَفَا الْآخَرُونَ. فَأَنْزَلَهُ بِمَنْزِلَةِ الْحَدِّ.
1073 – And another from among the <i>Ahl al-ʿilm</i> said: The majors (<i>al-bālighūna</i>) kill, and they don't wait for the minors?⁴	1073 – وَقَالَ غَيْرُهُ مِنْ أَهْلِ الْعِلْمِ: يَقْتُلُ الْبَالِغُونَ وَلَا يَنْتَظِرُونَ الصَّغَارَ.
1074 – And another said: The boy kills, and they don't wait for the wife?	1074 – وَقَالَ غَيْرُهُ: يَقْتُلُ الْوَلَدُ وَلَا يَنْتَظِرُونَ الزَّوْجَةَ؟
1075 – It is said: We have arrived at this opinion (<i>dhahabnā ilayhi</i>), that it is the <i>Sunna</i> which ought not to be contradicted — or in the like meaning (<i>fī mithli maʿnā</i>) of the <i>Sunna</i>; and the <i>qiyās</i> based upon <i>ijmāʿ</i>.	1075 – قِيلَ: ذَهَبْنَا إِلَيْهِ أَنَّهُ السُّنَّةُ الَّتِي لَا يَنْبَغِي أَنْ تُخَالَفَ أَوْ فِي مِثْلِ مَعْنَى السُّنَّةِ وَالْقِيَاسِ عَلَى الْإِجْمَاعِ.
1076 – And if he says: Then where is the <i>Sunna</i> regarding it?	1076 – فَإِنْ قَالَ: فَأَيْنَ السُّنَّةُ فِيهِ؟

³ We must bear in mind here to keep a distinction between the *wulāt al-dam* (equivalent to the heirs of the slain; see §§20980-4 of the *Kitāb Jirāḥ al-ʿAmd*, subheading *Wulāt al-Qiṣāṣ* (Ḥassūn, vol.7, pt.12, 43)), and the *awliyaʾ al-ghuyyib* and *awliyaʾ al-ṣighār*. The first set are themselves the heirs; the second sets are representatives of those who are absent (*ghuyyib*) or of minor age (*ṣighār*) from among the first set.

⁴ Note this is the position of Abū Ḥanīfa in §1067.

1077 – It is said: The Messenger of God, may God bless and save him, said: «If someone is killed (<i>man qutila lahu qatīl^{un}</i>); his <i>ahl</i> are between two choices (<i>bayna khīratayni</i>): If they prefer they take the <i>qīṣāṣ</i>, and if they prefer, the <i>diya</i>.» And when it was, as pertains to the <i>ḥukm</i> of the Messenger of God, may God bless and save him, that there belonged to the <i>wulāt al-dam^s</i> the right to kill, and there belonged to them the right to take the <i>māl</i>; and the <i>ijmāʿ</i> of the Muslims is that the <i>diya</i> is inherited (<i>mawrūthat^{un}</i>) – it not being permitted (<i>lam yaḥillu</i>) to a <i>wārith</i> that he block the <i>mīrāth</i> of the one who inherits along with him, even to the extent that the <i>wārith</i> block himself from the <i>mīrāth</i>. And this is the <i>maʿnā</i> of the Qurʾān, in the <i>qawl</i> of God, to Him belong might and majesty: «And to he who is pardoned (<i>uḥfiya</i>) belongs something from his brother — and compliance with the well-known custom (<i>ittibāʿ^{un} biʿl-maʿrūfi</i>), and payment to him in charity (<i>adāʿ^{un} ilayhi bi-iḥsānⁱⁿ</i>)» [Q.2:178].⁶ And this is written in the <i>Kitāb al-Diyāt</i>.⁷	1077 – قِيلَ: قَالَ رَسُولُ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «مَنْ قُتِلَ لَهُ قَتِيلٌ فَأَهْلُهُ بَيْنَ خَيْرَتَيْنِ: إِنْ أَحْبَبُوا أَخَذُوا الْقِصَاصَ، وَإِنْ أَحْبَبُوا فَالْدِّيَّةُ» فَلَمَّا كَانَ مِنْ حُكْمِ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – أَنْ لَوْلَاةِ الدِّمِ أَنْ يَقْتُلُوا وَلَهُمْ أَنْ يَأْخُذُوا الْمَالَ، وَكَانَ إِجْمَاعُ الْمُسْلِمِينَ أَنَّ الدِّيَّةَ مَوْرُوثَةٌ لَمْ يَحِلَّ لَوَارِثِ أَنْ يَمْنَعَ الْمِيرَاثَ مَنْ وَرِثَ مَعَهُ حَتَّى يَكُونَ الْوَارِثُ يَمْنَعُ نَفْسَهُ مِنَ الْمِيرَاثِ، وَهَذَا مَعْنَى الْقُرْآنِ فِي قَوْلِ اللَّهِ عَزَّ وَجَلَّ: «فَمَنْ عُفِيَ لَهُ مِنْ أَخِيهِ شَيْءٌ فَاتَّبَاعْ بِالْمَعْرُوفِ وَأَدَاءٌ إِلَيْهِ بِإِحْسَانٍ» [البقرة: 178]. وَهَذَا مَكْتُوبٌ فِي كِتَابِ الدِّيَّاتِ.
1078 – And we found of that which contradicts it from among the doctrines (<i>mā khālafahu min al-aqāwīl</i>), that there is no <i>ḥujja</i> in it, due to what I described (<i>limā waṣaftu</i>) from the <i>Sunna</i> in opposition to them (<i>bi-khilāfihim</i>).	1078 – وَوَجَدْنَا مَا خَالَفَهُ مِنَ الْأَقَاوِيلِ لَا حُجَّةَ فِيهِ لِمَا وَصَفْتُ مِنَ السُّنَّةِ بِخِلَافِهِمْ.

⁵ These being the heirs of the slain.

⁶ One might expect that SH would have begun his argument with the Qurʾānic indicant (as carrying the greatest epistemic authority). It is easy to see that the wording of this verse is ambiguous and open to multiple interpretations, however. By establishing his argument on the bases of *Sunna* and *ijmāʿ* first, SH has brought his Qurʾānic indicant as a final seal to his argument, implying through the process that his combination of *Sunna* and *ijmāʿ* play the role of *mufasssir*. Any opponent to his interpretation of Q.2:178 would be referred back to *Sunna* and *ijmāʿ*; the ambiguity of the verse prevents it from serving as primary indicant.

⁷ Interestingly, no such *Kitāb al-Diyāt* appears in al-Nadīm's list of writings attributed to al-Shāfiʿī. In fact, there are only two such titles in the whole of the *Fihrist* — one of which, intriguingly, is attributed to Muḥammad b. al-Ḥasan (*Fihrist*, 345). As for within the *Umm*, a search also reveals no such exact title. There is, however, a *Bāb al-Diyāt* in the *Kitāb Ikhtilāf ʿAlī wa ʿAbd Allāh b. Masʿūd* (Ḥassūn, vol.9, pt.14, 287ff.), and another in the *Kitāb al-Radd ʿalā Muḥammad b. al-Ḥassan* (Ḥassūn, vol.10, pt.15, 141-50), in addition to this one here present. As for the former, it does not appear to contain much of relevance to the *masʿala* at hand; and as to the *Bāb al-Diyāt* of the *Radd ʿalā Muḥammad b. al-Ḥassan*, it contains nothing of relevance whatsoever. It constitutes, however, the opening chapter of this treatise, and, like so much of the treatise as a whole, is replete with extensive and complex debate in dialectical format. Perhaps the most relevant discussion to this *masʿala*, then, is that found in the *Kitāb Jirāh al-ʿAmd* under the subheading of *Wulāt al-Qīṣāṣ* (§§20980ff., especially at §§20985-9; Ḥassūn, vol.7, pt.12, 43ff.)

1079 – And I found, along with that, that their <i>qawl</i> is contradictory (<i>mutanāqid^{an}</i>), since they claim that they forbid that they prevent (<i>imtanaʿū</i>) them from taking the <i>diya</i> from the killer, because only blood is [incumbent] upon him, not <i>māl</i>. And if they claim that one of the <i>waratha</i>, if he pardons, the blood is transformed into <i>māl</i> (<i>hāla al-damu māl^{an}</i>); they do not adhere to their <i>qawl</i>, but they have contradicted it (<i>laqad naqaḍūhu</i>).	1079 – وَوَجَدْتُ مَعَ ذَلِكَ قَوْلَهُمْ مُتَنَاقِضًا إِذْ زَعَمُوا أَنَّهُمْ امْتَنَعُوا مِنْ أَنْ يَأْخُذُوا الدِّيَةَ مِنَ الْقَاتِلِ؛ لِأَنَّهُ إِنَّمَا عَلَيْهِ دَمٌ لَا مَالٌ. فَلَوْ زَعَمُوا أَنَّ وَاحِدًا مِنَ الْوَرَثَةِ لَوْ عَفَا حَالَ الدَّمِ مَالًا، مَا لَزِمُوا قَوْلَهُمْ وَلَقَدْ نَقَضُوهُ.
1080 – And as for those who said: It is like the <i>ḥadd</i> – any one of the <i>waratha</i> who wishes executes it (<i>yaqūmu bihi</i>), even if someone else pardons; they have raised a contradiction between it [retaliatory killing] and the <i>ḥadd</i> (<i>faqad khālafū baynahu wa bayna al-ḥadd</i>), because they claim that the <i>waratha</i> have a right to waive punishment for the killing (<i>al-ʿafwa ʿani al-qatli</i>), while they claim that they have no right to waive punishment for the <i>ḥadd</i>. And they claim that, if they accept the <i>diya</i> for the killing (<i>iṣṭalaḥū fiʾl-qatli ʿalā al-diyati</i>), that such is permitted; while they claim that, if they accept <i>māl</i> for the <i>ḥadd</i>, it is not permitted.	1080 – فَأَمَّا الَّذِينَ قَالُوا: هُوَ كَالْحَدِّ يَقُومُ بِهِ أَيُّ الْوَرَثَةِ شَاءَ، وَإِنْ عَفَا غَيْرُهُ فَقَدْ خَالَفُوا بَيْنَهُ وَبَيْنَ الْحَدِّ، مِنْ أَجْلِ أَنَّهُمْ يَزْعُمُونَ أَنَّ لِلْوَرَثَةِ الْعَفْوَ عَنِ الْقَتْلِ، وَيَزْعُمُونَ أَنَّهُ لَا عَفْوَ لَهُمْ عَنِ الْحَدِّ، وَيَزْعُمُونَ أَنَّهُمْ لَوْ اصْطَلَحُوا فِي الْقَتْلِ عَلَى الدِّيَةِ جَازَ ذَلِكَ، وَيَزْعُمُونَ أَنَّهُمْ لَوْ اصْطَلَحُوا عَلَى مَالٍ فِي الْحَدِّ لَمْ يَجْزَ.
1081 – And when a group of people are fighting one another (<i>iqṭatala al-qawmu</i>), and they end up with one slain (<i>fa-anjalū ʿan qatīlⁱⁿ</i>), it not being known which of them killed him (<i>aṣābahu</i>); then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: He is the responsibility of the blood-money collective of the tribe (<i>huwa ʿalā ʿāqilati al-qabīlati</i>) in which he was found, when the <i>awliyaʾ</i> of the slain do not charge that [responsibility] upon others besides them (<i>lam yaddaʿi dhālika... ʿalā ghayrihim</i>).	1081 – وَإِذَا اقْتَتَلَ الْقَوْمُ فَانْجَلُوا عَنْ قَتِيلٍ لَمْ يَدْرَ أَيُّهُمْ أَصَابَهُ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: هُوَ عَلَى عَاقِلَةِ الْقَبِيلَةِ الَّتِي وَجَدَ فِيهَا إِذَا لَمْ يَدَّعِ ذَلِكَ أَوْلِيَاءُ الْقَتِيلِ عَلَى غَيْرِهِمْ.
1082 – But Ibn Abī Laylā, may God Most High have mercy upon him, used to say: He is the responsibility of the <i>ʿāqila</i> of those who fought together, collectively – unless the <i>awliyaʾ</i> of the slain charge others than those. And he [Abū Yūsuf] embraces this [doctrine].	1082 – وَكَانَ ابْنُ أَبِي لَيْلَى رَحِمَهُ اللَّهُ تَعَالَى يَقُولُ: هُوَ عَلَى عَاقِلَةِ الَّذِينَ اقْتَتَلُوا جَمِيعًا إِلَّا أَنْ يَدَّعِيَ أَوْلِيَاءُ الْقَتِيلِ عَلَى غَيْرِ أَوْلَيْكَ. وَبِهَذَا يَأْخُذُ.
1083 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a group of people are fighting one another, and they	1083 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا

end up with one slain, and his *awliyāʾ* charge one in particular (*aḥadⁱⁿ bi-ʿaynihi*), or a particular faction (*ṭāʾifatⁱⁿ bi-ʿaynihā*), or they say: One of the two factions has killed him — it not being known which of the two killed him; it is said to them: If you [pl.] produce that which obliges (*mā yūjibu*) the *qasāma* upon one of the two factions, or one of them (*baḍiḥim*) [i.e., one of several], or upon one in particular, or more, it is said to you [pl.]: Swear against one (*aqsimū ʿalā wāḥidⁱⁿ*), and if you don't produce that [which obliges the *qasāma*], then there is no blood-money (*lā ʿaqla*), and no retaliation (*lā qawada*).⁸ And whosoever you wish that we make swear for you (*nuḥallifuhu lakum*), against killing him; we will make him swear. And he whom we make swear, we absolve (*man aḥlafnāhu abra'nāhu*).

أَقْتَتَلَ الْقَوْمُ فَأَنْجَلُوا عَنْ قَتِيلٍ، فَادَّعَى أَوْلِيَاؤُهُ
 عَلَى أَحَدٍ بَعَيْنِهِ، أَوْ عَلَى طَائِفَةٍ بَعَيْنِهَا، أَوْ
 قَالُوا: قَدْ قَتَلْتُهُ إِحْدَى الطَّائِفَتَيْنِ لَا يُدْرَى
 أَيُّهُمَا قَتَلْتُهُ، قِيلَ لَهُمْ: إِنْ جِئْتُمْ بِمَا يُوجِبُ
 الْقَسَامَةَ عَلَى إِحْدَى الطَّائِفَتَيْنِ أَوْ بَعْضِهِمْ أَوْ
 وَاحِدٍ بَعَيْنِهِ أَوْ أَكْثَرَ، قِيلَ لَكُمْ: أَقْسِمُوا عَلَى
 وَاحِدٍ فَإِنْ لَمْ تَأْتُوا بِذَلِكَ فَلَا عَقْلَ وَلَا قَوْدَ.
 وَمَنْ شِئْتُمْ أَنْ نُحْلِفَهُ لَكُمْ عَلَى قَتْلِهِ أَحْلَفْنَاهُ،
 وَمَنْ أَحْلَفْنَاهُ أَبْرَأْنَاهُ.

⁸ We may note that there were two fundamentally distinct notions of *qasāma* among early jurists, one belonging to the early Ḥanafī's (as a defence), and the other to the early Mālikīs (as an accusation). For the former, the *qasāma* was a collective set of oaths made by (and absolving) the inhabitants of the place where an unwitnessed killing took place (i.e., where the body was found). If such a *qasāma* were properly made, the *wulāt al-dam* had recourse to *diya*, not retaliatory killing. For the Mālikī's, however, the *qasāma* was made by the victim's relatives — as an accusation — when they were in possession of strong evidence (*qarā'in* evincing probability, but not *bayyina*) which pointed towards the identity of the murderer(s). Such grounds were termed *lawth*; and if a *qasāma* were properly made on the basis of *lawth*, the *wulāt al-dam* had recourse to retaliatory killing. Al-Shāfi'ī's solution to such a killing without *bayyina*, as we find it here, is: 1) if those relatives of the slain bringing the *da'wā* are capable of evincing such *lawth* as would require the *qasāma* of the accused, then they (the accusers) take the accusatory *qasāma* against the accused, (what they are thus entitled to is not mentioned); and 2) if no such *lawth* may be evinced, then the accused swears against killing the victim, and neither *diya* nor retaliation are available to the *wulāt al-dam*. (On *qasāma* in general, see the MF, s.v. “قسامة”; the EI², s.v. “Qasam”; Hallaq, *Sharī'a*, 321.) It is of singular interest that al-Shāfi'ī does not mention what the successful accusers who take the *qasāma* are entitled to, and of greater interest yet that he mentions — when they cannot evince *lawth* — that they are entitled to *neither* blood-money (*ʿaql*) *nor* retaliation (*qawad*). In other words, we may read this as an indication that, were they successful and took the *qasāma*, they would have been entitled to either/or. If such is the case, then this corresponds to his so-called Old Doctrine (*al-qadīm*), and not the New (*al-jadīd*; see the MF, s.v. “قسامة”, 19, “الأحكام المترتبة على القسامة”). Is it possible that al-Shāfi'ī's arguments and conclusions in the *Umm* Version of the *K. Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā* are representative of the *qadīm* — or some transitional phase — and not the *jadīd*? (This appears to be Schacht's opinion; see his *Origins*, Appendix I). May the *Umm*, as great a collection of his disparate writings as it appears to be, contain older, pre-*jadīd* arguments and solutions? Such a consideration has enormous significance for the task of determining not only the chronology and authorship of the *K. Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā*, but the compilation and canonization of the *Umm* itself.

1084 – And likewise if he is wounded (<i>jarīh^{an}</i>), then he dies; he [the wounded] lays charges against one, or he does not lay charges against him. When I do not accept his [singular] claim (<i>daʿwāhu</i>) for what is less than blood, I do not accept it for blood. And I know neither <i>aṣl</i> nor <i>farʿ</i> for the <i>qawl</i> of the one who professes: The <i>qasāma</i> is obliged (<i>tajibu</i>) by the <i>daʿwā</i> of the deceased. For what is the <i>qasāma</i> regarding which the Messenger of God, may God bless and save him, ruled (<i>qaḍā fiḥā</i>) for [the slaying of] ʿAbd Allāh b. Sahl, if not the contrary of what he [the proponent of the above <i>qawl</i>] said, regarding it [that <i>qasāma</i>]: <i>daʿwā</i>, and not <i>lawth</i> of <i>bayyina</i>”?⁹	1084 – وَهَكَذَا إِنْ كَانَ حَرِيحًا ثُمَّ مَاتَ، ادَّعَى عَلَى أَحَدٍ أَوْ لَمْ يَدَّعِ عَلَيْهِ؛ إِذَا لَمْ أَقْبَلْ دَعْوَاهُ فِيمَا هُوَ أَقْلٌ مِنَ الدَّمِ لَمْ أَقْبَلْهَا فِي الدَّمِ، وَمَا أَعْرِفُ أَصْلًا وَلَا فَرْعًا لِقَوْلِ مَنْ قَالَ: تَجِبُ الْقَسَامَةُ بِدَعْوَى الْمَيِّتِ، وَمَا الْقَسَامَةُ الَّتِي قَضَى فِيهَا رَسُولُ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – فِي عَبْدِ اللَّهِ بْنِ سَهْلٍ إِلَّا عَلَى خِلَافِ مَا قَالَ فِيهَا دَعْوَى وَلَا لَوْثٌ مِنْ بَيِّنَةٍ.
1085 – And when a man is attacked (<i>uṣība</i>), and bears a wound (<i>bihi jirāhat^{un}</i>), and endures (<i>iḥtamala</i>), and he remains ill until he dies; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: His <i>diya</i> is owed by that tribe among whom he was attacked. And he [Abū Yūsuf] embraces it.	1085 – وَإِذَا أُصِيبَ الرَّجُلُ وَبِهِ جِرَاحَةٌ فَاحْتَمَلَ، فَلَمْ يَزَلْ مَرِيضًا حَتَّى مَاتَ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: دِيَّتُهُ عَلَى تِلْكَ الْقَبِيلَةِ الَّتِي أُصِيبَ فِيهِمْ. وَبِهِ يَأْخُذُ.
1086 – But Ibn Abī Laylā used to say: There is [enjoined] upon them nothing.	1086 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَيْسَ عَلَيْهِمْ شَيْءٌ.
1087 – And Abū Ḥanīfa, may God Most High have mercy upon him, used to say: The right to <i>qīṣāṣ</i> belongs to every <i>wārith</i>. And he [Abū Yūsuf] embraces it.	1087 – وَكَانَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى يَقُولُ: الْقِصَاصُ لِكُلِّ وَارِثٍ. وَبِهِ يَأْخُذُ.
1088 – But Ibn Abī Laylā used to appoint the right to <i>qīṣāṣ</i> to every <i>wārith</i>, except the husband and the wife.	1088 – وَكَانَ ابْنُ أَبِي لَيْلَى يَجْعَلُ لِكُلِّ وَارِثٍ قِصَاصًا إِلَّا الزَّوْجَ وَالْمَرْأَةَ.
1089 – Al-Shāfiʿī, may God Most High have mercy upon him, said: The husband, and the free wife, and the grandmother, and the son’s daughter, and every <i>wārith</i> from male or female — there belongs to him a	1089 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: الزَّوْجُ وَالْمَرْأَةُ الْحُرَّةُ وَالْحَدَّةُ وَبِنْتُ الْإِبْنِ

⁹ This last phrase, which connects *lawth* and *bayyina*, may be clarified by a definition for *lawth* provided by al-Azharī (*Zāhir*, 241): he calls it “the little *bayyina* (*al-bayyina al-ṣaḡhira*), not the complete (*ghayr al-kāmila*).” As for the *ḥadīth* referenced in §1084, a full account of the incident (transmitted to al-Shāfiʿī by Mālik) may be found in the *Kitāb Jirāḥ al-ʿAmd*, at the start of the chapter entitled *Al-Qasāma* (§22309, Ḥassūn, vol.7, pt.12, 316-7). It is again referenced in §1097, below. Variants may be found in most of the authoritative *ḥadīth* collections (see, e.g., the *Ṣaḥīḥ al-Bukhārī*, §3173, 7192 [ʿAbd al-Bāqī ed. numbering]; the *Ṣaḥīḥ Muslim*, §1669 [ʿAbd al-Bāqī ed. numbering]; and the *Sunan Abī Dāwūd*, §4521 [ʿAbd al-Ḥamīd ed.]), and, of course, in Mālik’s *Muwattaʿ* (§§44.1.1,2 [ʿAbd al-Bāqī ed. numbering]).

right (<i>ḥaqq^{un}</i>) in the <i>qīṣāṣ</i> , and in the <i>diya</i> .	وَكُلُّ وَارِثٍ مِّنْ ذَكَرٍ أَوْ أُتْنَىٰ فَلَهُ حَقٌّ فِي الْقِصَاصِ وَفِي الدِّيَةِ.
1090 – And when the slain one (<i>al-qatīl</i>) is found among a tribe (<i>qabīlat^{un}</i>); then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: The <i>qasāma</i> is [enjoined] upon the <i>ahl al-khiṭṭa</i> , and the blood-money (<i>al-ʿaql</i>) is [enjoined] upon them. But nothing is [enjoined] upon the inhabitants (<i>al-sukkān</i>), nor upon the buyers (<i>al-mushtarīn</i>). And he [Abū Yūsuf] embraces it. ¹⁰	1090 – وَإِذَا وُجِدَ الْقَتِيلُ فِي قَبِيلَةٍ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: الْقَسَامَةُ عَلَى أَهْلِ الْخِطَّةِ وَالْعَقْلُ عَلَيْهِمْ، وَلَيْسَ عَلَى السُّكَّانِ وَلَا عَلَى الْمُشْتَرِينَ شَيْءٌ. وَبِهِ يَأْخُذُ.
1091 – Then Abū Yūsuf, may God Most High have mercy upon him, said, afterwards: [It is enjoined] upon the <i>mushtarīn</i> , the <i>sukkān</i> , and the <i>ahl al-khiṭṭa</i> .	1091 – ثُمَّ قَالَ أَبُو يُوسُفَ رَحِمَهُ اللَّهُ تَعَالَى بَعْدُ: عَلَى الْمُشْتَرِينَ وَالسُّكَّانِ وَأَهْلِ الْخِطَّةِ.
1092 – And Ibn Abī Laylā used to say: The <i>diya</i> is [enjoined] upon the <i>sukkān</i> , and the <i>mushtarīn</i> along with them, and the <i>ahl al-khiṭṭa</i> .	1092 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الدِّيَةُ عَلَى السُّكَّانِ وَالْمُشْتَرِينَ مَعَهُمْ وَأَهْلِ الْخِطَّةِ.
1093 – And likewise, when he is found in a house; it is [enjoined] upon the <i>ahl al-qabīla</i> of the tribe of that house, and the <i>sukkān</i> who are in it, according to the <i>qawl</i> of Ibn Abī Laylā.	1093 – وَكَذَلِكَ إِذَا وُجِدَ فِي الدَّارِ، فَهُوَ عَلَى أَهْلِ الْقَبِيلَةِ قَبِيلَةَ تِلْكَ الدَّارِ وَالسُّكَّانِ الَّذِينَ فِيهَا، فِي قَوْلِ ابْنِ أَبِي لَيْلَى.

¹⁰ The *ahl al-khiṭṭa* and the *mushtarīn* here referenced are demystified once this *masʿala* is placed in Abū Ḥanīfa’s Kūfan context. Al-Sarakhsī (*Mabsūṭ*, 26:112) provides clarification when he speaks of “a *qabīla* in Kūfa, and in it are residents (*sukkān*), and in it is one who has purchased of their houses (*man qad ishtarā min dūrihim*).” Lane (i.760, s.v. “خِطَّة”) provides yet more context, when he defines *khiṭṭa* as “A piece of ground, or land, which a man takes to himself, and upon which he makes a mark, in order to its being known that he has chosen it to build there a house; whence the خِطَط of El-Koofeh and of El-Baṣrah [...] or a piece of ground, and a house, which a man takes to himself, and upon which he makes a mark, in land not possessed, that he may have it for himself exclusively, and build there; this being done when the Sulṭān gives permission to a number of Muslims to found houses in a particular place, and to make their abodes there, as they did in El-Koofeh and El-Baṣrah [...]” Finally, the *El*² (s.v. “Kūfa”) speaks of the process of *takhiṭ*, and mentions: “From the monumental centre there radiated out the *khiṭaṭ* or tribal lots which constituted the main part of the dwellings of Kūfa.” We may imagine, then, the still burgeoning *amṣār* of Kūfa and Baṣra, with Arab tribes still settling on the outskirts in areas specially-designated by the Caliph; this was a system, no doubt, with its own set of legal exigencies regarding boundaries, settlements, claims, etc. See also Hishām Jaʿīṭ (the author of the above *El*² article), *Al-Kūfa: Nashʿat al-Madīna al-ʿArabiyya al-Islāmiyya* (Beirut: Dār al-Ṭalīʿa, 1986), especially 121ff., and the map of tribal *khiṭaṭ* on 128.

1094 – And Abū Ḥanīfa, may God Most High have mercy upon him, used to say: [It is enjoined] upon the <i>ʿāqila</i> of the owners of the houses (<i>arbābi al-dūri</i>), specifically (<i>khāṣṣat^{an}</i>), even if they are <i>mushtarīn</i>. And as for the <i>sukkān</i>: No. And he [Abū Yūsuf] embraces this [doctrine].	1094 – وَكَانَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى يَقُولُ: عَلَى عَاقِلَةِ أَرْبَابِ الدُّورِ خَاصَّةً وَإِنْ كَانُوا مُشْتَرِينَ، وَأَمَّا السُّكَّانُ فَلَا. وَبِهَذَا يَأْخُذُ.
1095 – Abū Yūsuf, may God Most High have mercy upon him, reverted to (<i>rajaʿa... ilā</i>) the <i>qawl</i> of Ibn Abī Laylā.	1095 – رَجَعَ أَبُو يُوسُفَ رَحِمَهُ اللَّهُ تَعَالَى إِلَى قَوْلِ ابْنِ أَبِي لَيْلَى.
1096 – And the [most] well-known doctrine of Abū Ḥanīfa (<i>qawlu Abī Ḥanīfata al-maʿrūfi</i>): Not a man from the <i>ahl al-khiṭṭa</i> is left behind, and nothing is [enjoined] upon the <i>mushtarī</i>.	1096 – وَقَوْلُ أَبِي حَنِيفَةَ الْمَعْرُوفُ: مَا بَقِيَ مِنْ أَهْلِ الْخِطَّةِ رَجُلٌ فَلَيْسَ عَلَى الْمُشْتَرِيِّ شَيْءٌ.
1097 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man is found slain in the house of a man, or [among] the <i>ahl al-khiṭṭa</i>, or [among] <i>sukkān</i>, or [in] a desert (<i>ṣaḥrāʾ</i>), or an army (<i>ʿaskarⁱⁿ</i>); all of them are one and the same (<i>sawā^{un}</i>) – there is no blood-money (<i>ʿaql</i>) nor retaliation (<i>qawad</i>) except on the basis of <i>bayyina</i> furnished, or by what obliges the <i>qasāma</i> [i.e., <i>lawth</i>] so the <i>awliyāʾ</i> swear oaths (<i>yuqsimu</i>). And when the <i>awliyāʾ</i> lay charges against (<i>iddaʾā... ʿalā</i>) one thousand and one, we make them swear, and we absolve them (<i>aḥlafnāhum wa abraʿnāhum</i>); because the Prophet, may God bless and save him, said to the Anṣārīyyīn: «Then the Jews acquit themselves before you [pl.] (<i>fatubarriʾukum yahūdū</i>) by fifty oaths (<i>bi-khamsīna yamīn^{an}</i>).» And when they [the Anṣārīyyīn] refused to accept their <i>aymān</i>, he did not impose anything upon the Jews, though the slain one had been found in their midst (<i>bayna aẓhurihim</i>). And the Prophet, may God bless and save him, paid the blood-money for him (<i>wadāhu</i>) [i.e., for the slain ʿAbd Allāh b. Sahl] from his own pocket (<i>min ʿindahu</i>), voluntarily (<i>mutaṭawwiʿ^{an}</i>).¹¹	1097 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا وَجَدَ الرَّجُلُ قَتِيلًا فِي دَارِ رَجُلٍ، أَوْ أَهْلِ الْخِطَّةِ، أَوْ سُكَّانٍ أَوْ صَحْرَاءَ، أَوْ عَسْكَرٍ فَكُلُّهُمْ سَوَاءٌ لَا عَقْلَ وَلَا قَوْدَ إِلَّا بَيِّنَةٌ تَقُومُ، أَوْ بِمَا يُوجِبُ الْقَسَامَةَ فَيُقْسِمُ الْأَوْلِيَاءُ، فَإِذَا ادَّعَى الْأَوْلِيَاءُ عَلَى وَاحِدٍ وَأَلْفٍ أَحْلَفْنَاهُمْ وَابْرَأْنَاهُمْ؛ لِأَنَّ النَّبِيَّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – قَالَ لِلْأَنْصَارِيِّينَ: «فَتَبَرُّوكُمُ يَهُودٌ بِخَمْسِينَ يَمِينًا» فَلَمَّا أَبَوْا أَنْ يَقْبَلُوا أَيْمَانَهُمْ لَمْ يَجْعَلْ عَلَى يَهُودٍ شَيْئًا، وَقَدْ وَجَدَ الْقَتِيلَ بَيْنَ أَظْهُرِهِمْ، وَوَدَّاهُ النَّبِيُّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – مِنْ عِنْدِهِ مُتَطَوِّعًا.

¹¹ This is the case of the murder, in Khaybar, of ʿAbd Allāh b. Sahl (referenced in §1084 above, and attached note).

1098 – And when a man cuts [off] (<i>qaṭaʿa</i>) the hand of a woman, or a woman the hand of a man; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: There is no <i>qīṣāṣ</i> for this, nor any <i>qīṣāṣ</i> for what is between men and women, for anything less than a life (<i>fīmā dūna al-naḥsi</i>); nor for what is between free-born and slaves, for anything less than a life; nor any <i>qīṣāṣ</i> between minor boys (<i>ṣibyān</i>) – neither for a life, nor otherwise.	1098 – وَإِذَا قَطَعَ رَجُلٌ يَدَ امْرَأَةٍ، أَوْ امْرَأَةٌ يَدَ رَجُلٍ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: لَيْسَ فِي هَذَا قِصَاصٌ، وَلَا قِصَاصٌ بَيْنَ الرَّجَالِ وَالنِّسَاءِ فِيمَا دُونَ النَّفْسِ، وَلَا فِيمَا بَيْنَ الْأَحْرَارِ وَالْعَبِيدِ فِيمَا دُونَ النَّفْسِ، وَلَا قِصَاصٌ بَيْنَ الصَّبْيَانِ فِي النَّفْسِ وَلَا غَيْرَهَا.
1099 – And likewise did Abū Ḥanīfa transmit to us [as <i>ḥadīth</i>] (<i>ḥaddathanā</i>), on the authority of Ḥammād, on Ibrāhīm. And he [Abū Yūsuf] embraces it.	1099 – وَكَذَلِكَ حَدَّثَنَا أَبُو حَنِيفَةَ، عَنْ حَمَّادٍ، عَنْ إِبْرَاهِيمَ، وَبِهِ يَأْخُذُ.
1100 – But Ibn Abī Laylā used to say: The <i>qīṣāṣ</i> is between them regarding that, and for all the wounds (<i>al-jirāḥāt</i>) for which <i>qīṣāṣ</i> is allowed.	1100 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الْقِصَاصُ بَيْنَهُمْ فِي ذَلِكَ وَفِي جَمِيعِ الْجِرَاحَاتِ الَّتِي يُسْتَطَاعُ فِيهَا الْقِصَاصُ.
1101 – Al-Shāfiʿī, may God Most High have mercy upon him, said: The <i>qīṣāṣ</i> is between the man and the woman, for wounds and for life; and likewise the slaves, one from the other.	1101 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: الْقِصَاصُ بَيْنَ الرَّجُلِ وَالْمَرْأَةِ فِي الْجِرَاحِ وَفِي النَّفْسِ، وَكَذَلِكَ الْعَبِيدُ بَعْضُهُمْ مِنْ بَعْضٍ.
1102 – And when they were saying [ref. back to §1098]: The <i>qīṣāṣ</i> is between them for a life; while it [life] is the greater (<i>al-akthar</i>), the wound, which is the lesser (<i>al-aqall</i>), is more primary (<i>awlā</i>); because God, to Him belong might and majesty, stated the life and the wounds in His Book – with a single statement (<i>dhikr^{an} wāḥid^{an}</i>).	1102 – وَإِذَا كَانُوا يَقُولُونَ: الْقِصَاصُ بَيْنَهُمْ فِي النَّفْسِ. وَهِيَ الْأَكْثَرُ، كَانَ الْجُرْحُ الَّذِي هُوَ الْأَقْلُ أَوْلَى؛ لِأَنَّ اللَّهَ عَزَّ وَجَلَّ ذَكَرَ النَّفْسَ وَالْجِرَاحَ فِي كِتَابِهِ ذِكْرًا وَاحِدًا.
1103 – And as for the <i>ṣibyān</i> ; there is no <i>qīṣāṣ</i> between them.	1103 – وَأَمَّا الصَّبْيَانُ فَلَا قِصَاصَ بَيْنَهُمْ.
1104 – And when a man kills a man with a stick (<i>aṣā</i>) or a stone (<i>ḥajar</i>), and strikes him repeatedly until he dies from that; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: There is no <i>qīṣāṣ</i> between them.	1104 – وَإِذَا قَتَلَ الرَّجُلُ رَجُلًا بَعْصًا أَوْ بِحَجَرٍ فَضْرَبُهُ ضَرْبَاتٍ حَتَّى مَاتَ مِنْ ذَلِكَ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا قِصَاصَ بَيْنَهُمَا.
1105 – But Ibn Abī Laylā used to say: There is <i>qīṣāṣ</i> between them. And he [Abū Yūsuf] embraces it.	1105 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: بَيْنَهُمَا الْقِصَاصُ. وَبِهِ يَأْخُذُ.

1106 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man attacks (<i>aṣāba</i>) a man with iron that pierces (<i>bi-ḥadīdat^m tamūru</i>), or with something that pierces, and he pierces him with the penetrating of iron (<i>fa-māra fihi mawarāna al-ḥadīdi</i>), and he dies from that; there is <i>qīṣāṣ</i> regarding it.¹²	1106 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَصَابَ الرَّجُلُ الرَّجُلَ بِحَدِيدَةٍ تَمُورُ أَوْ بِشَيْءٍ يَمُورُ فَمَارَ فِيهِ مَوْرَانِ الْحَدِيدِ فَمَاتَ مِنْ ذَلِكَ فَفِيهِ الْقِصَاصُ.
1107 – And when he attacks him with a stick, or a stone, or what does not pierce with the penetration of the weapon (<i>lā yamūru mawarāna al-silāhi</i>); its <i>aṣl</i> is two things: [1] If he has struck him with a large stone, and a large piece of wood, from which the most likely result is that he not live from the like (<i>lā yuʿāshu min mithlihā</i>) – which is to say he might break (<i>yashdakha</i>) his head by means of it, or strike his belly (<i>jawfahu</i>) with it, or his side (<i>khāṣiratahu</i>), or a mortal organ (<i>maqatl^m</i>) from among his mortal organs; or [2] he attacks him striking with something lighter than that until his blows reach the most likely point, according to the people, that he not live from the like – he being killed by it. This is killing with deliberate intent and more (<i>ʿamda al-qatli wa ziyādata</i>). It is more severe (<i>ashaddu</i>) than killing with iron, because killing with iron is quicker. And if he strikes him with the stick, or the scourge (<i>sawṭ</i>), or the stone from which it is most likely he will live from the like; this is the mistaken quasi-intentional [killing] (<i>al-khaṭaʿu shibhu al-ʿamdi</i>). And regarding it there is the more severe blood-price (<i>al-diyatu al-mughallaḥat^m</i>), but there is no retaliation (<i>qawad</i>) for it.¹³	1107 – وَإِذَا أَصَابَهُ بَعْصًا أَوْ بِحَجَرٍ أَوْ مَا لَا يَمُورُ مَوْرَانِ السَّلَاحِ فَأَصْلُهُ شَيْئَانِ: إِنْ كَانَ ضَرْبُهُ بِالْحَجَرِ الْعَظِيمِ وَالْخَشَبَةِ الْعَظِيمَةِ الَّتِي الْأَغْلَبُ مِنْهَا أَنَّهُ لَا يُعَاشُ مِنْ مِثْلِهَا، وَذَلِكَ أَنْ يَشْدَخَ بِهَا رَأْسَهُ أَوْ يَضْرِبَ بِهَا جَوْفَهُ أَوْ خَاصِرَتَهُ أَوْ مَقْتَلًا مِنْ مَقَاتِلِهِ، أَوْ حَمَلَ عَلَيْهِ الضَّرْبَ بِشَيْءٍ أَخَفَّ مِنْ ذَلِكَ حَتَّى بَلَغَ مِنْ ضَرْبِهِ مَا الْأَغْلَبُ عِنْدَ النَّاسِ أَنْ لَا يُعَاشَ مِنْ مِثْلِهِ، قُتِلَ بِهِ، وَكَانَ هَذَا عَمْدَ الْقَتْلِ وَزِيَادَةً أَنَّهُ أَشَدُّ مِنَ الْقَتْلِ بِالْحَدِيدِ؛ لِأَنَّ الْقَتْلَ بِالْحَدِيدِ أَوْحَى. وَإِنْ ضَرْبُهُ بِالْعَصَا أَوْ السَّوْطِ أَوْ الْحَجَرِ الضَّرْبَ الَّذِي الْأَغْلَبُ مِنْهُ أَنَّهُ يُعَاشُ مِنْ مِثْلِهِ فَهَذَا الْخَطَأُ شِبْهُ الْعَمْدِ، فَفِيهِ الدِّيَةُ مُعْلَظَةً وَلَا قَوْدَ فِيهِ.
1108 – And when a man bites (<i>ʿaḍa</i>) the hand of a man, and the bitten one tears his hand away (<i>intazaʿa... yadahu</i>), thus plucking	1108 – وَإِذَا عَضَّ الرَّجُلُ يَدَ الرَّجُلِ فَانْتَرَعَ

¹² Ḥassūn (ix.187, n.1) provides the following definition: “*māra yamūru mawr^m*: when it runs (*jarā*) and flows (*sāla*).” It would seem that the flowing of blood is meant; this is born out by the lexicons. I have, however, had great trouble making sense of this still, and have meanwhile found that *māra/yamūru* carries also the sense of the movement of a piercing weapon (sword, spear, arrow), from side to side in the wound (see Lane, i.2743). Furthermore, the active participle — *māʿir* — bears the sense of “penetrating the body” (*Lisān*, s.v. “مور”, xiv.150). Within the context of §§1104-7, then — considering that (presumably edged/pointed) iron implements are held in contradistinction from (presumably blunt) wood and stone — I have preferred to interpret *māra/yamūru* as having to do with piercing and penetration.

¹³ Of note is the manner in which the term *aṣl* is employed in this section.

out (<i>qala'a</i>) a tooth from the teeth of the biter; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: There is no <i>ḍamān</i> [imposed] upon him for the tooth, because there had belonged to him the right to tear his hand out of his mouth. And he [Abū Yūsuf] embraces it.	الْمَعْضُوضُ يَدَهُ فَقَلَعَ سِنًا مِنْ أَسْنَانِ الْعَاضِ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا ضَمَانَ عَلَيْهِ فِي السِّنِّ؛ لِأَنَّهُ قَدْ كَانَ لَهُ أَنْ يَنْزِعَ يَدَهُ مِنْ فِيهِ. وَبِهِ يَأْخُذُ.
1109 – And it has reached us concerning the Messenger of God, may God bless and save him, that a man bit the hand of a man, and he tore his hand out of his mouth, and plucked out his middle incisor (<i>thaniyyatahu</i>), and the Messenger of God, may God bless and save him, nullified it [the demand for compensation] (<i>abṭalahā</i>), and said: «Will one of you bite his brother with the champing of a horse (<i>ʿaḍḍa al-fahli</i>)?»	1109 – وَقَدْ بَلَغَنَا عَنْ رَسُولِ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - أَنَّ رَجُلًا عَضَّ يَدَ رَجُلٍ فَأَنْتَزَعَ يَدَهُ مِنْ فِيهِ فَتَنَزَعَ ثَنِيَّتَهُ فَأَبْطَلَهَا رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - وَقَالَ: «أَيَعْضُّ أَحَدُكُمْ أَخَاهُ عَضَّ الْفَحْلِ».
1110 – But Ibn Abī Laylā used to say: He is <i>ḍāmin</i> for the <i>diya</i> of the tooth. But they [Abū Ḥanīfa and Ibn Abī Laylā] are both in agreement as to the like of that, as pertains to what is wounded of the body (<i>yujnā fi'l-jasadi</i>) – one and the same (<i>sawāʿun</i>), as regards the <i>ḍamān</i>.	1110 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هُوَ ضَامِنٌ لِذِيَةِ السِّنِّ، وَهُمَا يَتَّفِقَانِ فِيمَا سِوَى ذَلِكَ مِمَّا يُجْنَى فِي الْجَسَدِ سِوَاءٍ فِي الضَّمَانِ.
1111 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man bites the hand of a man, or his foot/leg, or some part of his body, and the bitten one tears away that [part] of him which was bitten from the mouth of the biter, and some part of his front tooth (<i>thaghrīhi</i>) falls out, or all of it; nothing is [imposed] upon him; because there belonged to the bitten one the right to tear out his hand from the mouth of the biter. And he was not transgressing (<i>mutaʿaddiy^{an}</i>), by the tearing out [of his hand], and thus made liable. And the Messenger of God, may God bless and save him, has ruled for the likes of this (<i>qad qaḍā... fī mithli hādha</i>).	1111 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا عَضَّ الرَّجُلُ يَدَ الرَّجُلِ أَوْ رِجْلَهُ أَوْ بَعْضَ جَسَدِهِ فَأَنْتَزَعَ الْمَعْضُوضُ مَا عَضَّ مِنْهُ مِنْ فِيِّ الْعَاضِ فَسَقَطَ بَعْضُ نَعْرِهِ أَوْ كُلُّهُ فَلَا شَيْءَ عَلَيْهِ؛ لِأَنَّهُ كَانَ لِلْمَعْضُوضِ أَنْ يَنْزِعَ يَدَهُ مِنْ فِيِّ الْعَاضِ وَلَمْ يَكُنْ مُتَعَدِّيًا بِالْإِنْتِزَاعِ فَيُضْمَنُ. وَقَدْ قَضَى رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - فِي مِثْلِ هَذَا.
1112 – Al-Shāfiʿī, may God Most High have mercy upon him, said: Muslim b. Khālīd reported to us, on the authority of Ibn Jurayj, on ʿAṭā, on Ṣafwān b. Yaʿlā b. Umayya, on his father, that a man bit the hand of a man, and the bitten one tore out his hand from the mouth of the biter, and his middle incisor or two middle incisors	1112 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: أَخْبَرَنَا مُسْلِمُ بْنُ خَالِدٍ، عَنْ ابْنِ جُرَيْجٍ، عَنْ عَطَاءٍ، عَنْ صَفْوَانَ بْنِ يَعْلَى بْنِ أُمَيَّةَ، عَنْ أَبِيهِ أَنَّ رَجُلًا عَضَّ يَدَ رَجُلٍ فَأَنْتَزَعَ الْمَعْضُوضُ

fell out, so the Messenger of God, may God bless and save him, ignored/invalidated it [the demand for compensation] (<i>ahdarahā</i>), and said: «Will you put his hand in your mouth, gnawing at it as though it were in the mouth of a horse?»	يَدُهُ مِنْ فِيِّ الْعَاضِ فَسَقَطَتْ نَيْبَتُهُ أَوْ نَيْبَتَاهُ فَأَهْدَرَهَا رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - وَقَالَ: «أَيْدُعُ يَدَهُ فِي فَيْكَ تَقْضُمُهَا كَأَنَّهَا فِي فِيِّ فَحُلٍّ».
1113 – And when the <i>dābba</i> kicks out with its foot (<i>naḥāḥat... bi-rjlihā</i>) while it goes; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: There is no <i>ḍamān</i> [imposed] upon its <i>ṣāhib</i>; because it has reached us concerning the Messenger of God, may God bless and save him, that he said: «The foot is a <i>jubār</i>.»¹⁴ And he [Abū Yūsuf] embraces it.	1113 - وَإِذَا نَفَحَتِ الدَّابَّةُ بِرِجْلِهَا وَهِيَ تَسِيرُ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا ضَمَانَ عَلَى صَاحِبِهَا؛ لِأَنَّهُ بَلَغَنَا عَنْ رَسُولِ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - أَنَّهُ قَالَ: «الرَّجْلُ جُبَارٌ». وَبِهِ يَأْخُذُ.
1114 – But Ibn Abī Laylā used to say: He [the <i>ṣāhib</i> of the <i>dābba</i>] is <i>ḍāmin</i> in this, for whatever it wounded (<i>limā aṣābat</i>).	1114 - وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هُوَ ضَامِنٌ فِي هَذَا لِمَا أَصَابَتْ.
1115 – Al-Shāfiʿī, may God Most High have mercy upon him, said: Liable are the one leading (<i>qāʿid</i>) the <i>dābba</i>, and its driver (<i>sāʾiq</i>), and its rider (<i>rāḥib</i>), for what it injured by foreleg (<i>yad</i>), or mouth, or foot, or tail, and naught but this is permitted. But he is not liable for anything unless he induces it to trample something (<i>yaḥmilahā ʿalā an taṭaʿa shayʾ^{um}</i>) — then he is liable; because its trampling is of his action (<i>waṭʾahā min fīʾlihi</i>), and it is, at that time, like an implement of his (<i>ka-adāt^{im} min adātihi</i>), by which he inflicts harm (<i>janā bihā</i>).	1115 - قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: يَضْمَنُ قَائِدُ الدَّابَّةِ وَسَائِقُهَا وَرَاكِبُهَا مَا أَصَابَتْ بِيَدٍ أَوْ فَمٍ أَوْ رِجْلٍ أَوْ ذَنْبٍ، وَلَا يَجُوزُ إِلَّا هَذَا، وَلَا يَضْمَنُ شَيْئًا إِلَّا أَنْ يَحْمِلَهَا عَلَى أَنْ تَطَأَ شَيْئًا فَيَضْمَنُ؛ لِأَنَّ وَطْأَهَا مِنْ فِعْلِهِ فَتَكُونُ حِينَئِذٍ كَأَدَاةٍ مِنْ أَدَاتِهِ حَتَّى بِهَا.
1116 – And should we say: He is liable concerning its foreleg, but he is not liable concerning its back leg? This is arbitrariness (<i>taḥakkum^{um}</i>)!	1116 - فَأَمَّا أَنْ تَقُولَ: يَضْمَنُ عَنْ يَدِهَا وَلَا يَضْمَنُ عَنْ رِجْلِهَا فَهَذَا تَحَكُّمٌ.
1117 – And if he [the dialectical opponent] says [in response]: He does not see its back leg.	1117 - فَإِنْ قَالَ: لَا يَرَى رِجْلَهَا.

¹⁴ Ḥassūn equates *jubār* with *hadar^{um}* (waste; useless extravagance); then explains: “And the meaning of the *ḥadīth* — and God Most High knows best — is that the dumb beast escapes and injures a person or something during its escape, and its wounding [in retaliation] is a waste” (ix.189, n.1). Lane (i.374), however, defines *jubār* as: “a thing of which no account, or for which no revenge or retaliation or mulct, is taken.”

1118 – Then he, when he is driving [i.e., from behind], does not see its foreleg. Thus, it is right that he should say, regarding the driver: He is liable concerning the back leg, and not liable concerning the foreleg. But there is no <i>qawl</i> like this.	1118 – فَهُوَ إِذَا كَانَ سَائِقًا لَا يَرَى يَدَهَا، فَيَنْبَغِي أَنْ يَقُولَ فِي السَّائِقِ: يَضْمَنُ عَنِ الرَّجُلِ، وَلَا يَضْمَنُ عَنِ الْيَدِ. وَلَيْسَ هَكَذَا يَقُولُ.
1119 – And as for what was narrated concerning the Messenger of God, may God bless and save him, as pertains to the leg being a <i>jubār</i> ; it — and God Most High knows best — is wrong (<i>ghalaṭ^{um}</i>), because the Ḥuffāz did not commit anything like this to memory (<i>lam yaḥfazū ḥākadhā</i>).	1119 – فَأَمَّا مَا رُوِيَ عَنْ رَسُولِ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - مِنْ أَنَّ الرَّجُلَ جُبَارٌ، فَهُوَ - وَاللَّهُ تَعَالَى أَعْلَمُ - غَلَطٌ؛ لِأَنَّ الْحُفَّازَ لَمْ يَحْفَظُوا هَكَذَا.
1120 – And Abū Ḥanīfa, may God have mercy upon him, used to say regarding the man, when he kills the slave: Verily, his value (<i>qīmatahu</i>) is [incumbent] upon the <i>‘āqila</i> of the killer. And he [Abū Yūsuf] embraces it.	1120 – وَكَانَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ يَقُولُ فِي الرَّجُلِ إِذَا قَتَلَ الْعَبْدَ: إِنَّ قِيمَتَهُ عَلَى عَاقِلَةِ الْقَاتِلِ. وَبِهِ يَأْخُذُ.
1121 – But Ibn Abī Laylā used to say: The <i>‘āqila</i> does not pay his [the slave’s] blood-money (<i>lā ta‘qiluhu</i>).	1121 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا تَعْقِلُهُ الْعَاقِلَةُ.
1122 – Then Abū Yūsuf recanted (<i>raja‘a</i>), and said: He [the slave] is <i>māl</i> for which the <i>‘āqila</i> does not pay blood-money. And upon the killer is [imposed] his current market value (<i>qīmatuhu mā balagha ḥāl^{um}</i>).	1122 – ثُمَّ رَجَعَ أَبُو يُوسُفَ فَقَالَ: هُوَ مَالٌ لَا تَعْقِلُهُ الْعَاقِلَةُ، وَعَلَى الْقَاتِلِ قِيمَتُهُ مَا بَلَغَ حَالًا.
1123 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And when the man kills the slave by mistake (<i>khaṭa^{um}</i>); his <i>‘āqila</i> pays his blood-money; because it is only paying for the <i>jināya</i> of a free-born [the killer], as regards a protected life (<i>naḥs^{um}</i> <i>muḥarramat^{um}</i>) [the slave], for which there might have been retaliation (<i>al-qawadu</i>).	1123 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا قَتَلَ الرَّجُلُ الْعَبْدَ خَطَأً عَقَلْتُهُ عَاقِلَتُهُ؛ لِأَنَّهَا إِنَّمَا تَعْقِلُ جَنَايَةَ حُرٍّ فِي نَفْسٍ مُحَرَّمَةٍ قَدْ يَكُونُ فِيهَا الْقَوْدُ.
1124 – He said: And there is, regarding it, <i>kaffāra</i> — just as there is for the free-born in every circumstance (<i>bi-kulli ḥāl^{um}</i>). For he [the slave] is, in terms of <i>nufūs</i> , closer in resemblance (<i>ashbaha</i>) than he is in terms of <i>amwāl</i> ; he does not unite with (<i>lā yujāmi‘u</i>) the <i>amwāl</i> in any <i>ma‘nā</i> except that his <i>diya</i> is his <i>qīma</i> . And as for other things besides that; he becomes distinct (<i>mufāriq^{um}</i>) from the <i>amwāl</i> , uniting (<i>mujāmi‘^{um}</i>) with <i>nufūs</i> , as regards the greater part of his [associated] <i>aḥkām</i> . And by God Most High comes success.	1124 – قَالَ: وَيَكُونُ فِيهَا الْكَفَّارَةُ كَمَا تَكُونُ فِي الْحُرِّ بِكُلِّ حَالٍ، فَهُوَ بِالنُّفُوسِ أَشْبَهَ مِنْهُ بِالْأَمْوَالِ، هُوَ لَا يُجَامِعُ الْأَمْوَالَ فِي مَعْنَى إِلَّا فِي أَنْ دِيَّتُهُ قِيمَتُهُ. فَأَمَّا مَا سِوَى ذَلِكَ فَهُوَ مُفَارِقٌ لِلْأَمْوَالِ مُجَامِعٌ لِلنُّفُوسِ فِي أَكْثَرِ أَحْكَامِهِ، وَبِاللَّهِ تَعَالَى التَّوْفِيقُ.

Bāb al-Sariqa

Chapter on Theft (al-Sariqa) ¹	بَابُ السَّرِقَةِ
1125 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And when a man confesses (<i>aqarra</i>) to theft (<i>al-sariqa</i>) a single time, and the <i>sariqa</i> is equivalent to ten dirhams or more; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: I cut him [i.e., his hand] (<i>aqṭa‘uhu</i>). And [he used to] say: If I don’t cut him, I make it as a <i>dayn</i> [enjoined] upon him, and there is no cutting for a <i>dayn</i> .	1125 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَقَرَّ الرَّجُلُ بِالسَّرِقَةِ مَرَّةً وَاحِدَةً، وَالسَّرِقَةُ تُسَاوِي عَشْرَةَ دَرَاهِمٍ فَصَاعِدًا، فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: أَقْطَعُهُ. وَيَقُولُ: إِنْ لَمْ أَقْطَعُهُ جَعَلْتُهُ عَلَيْهِ دَيْنًا وَلَا قَطْعَ فِي الدَّيْنِ.
1126 – But Ibn Abī Laylā used to say: I don’t cut him until he confesses twice. And he [Abū Yūsuf] embraces this [doctrine]. Then he reverted to (<i>raja’a ilā</i>) the <i>qawl</i> of Abū Ḥanīfa. ²	1126 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا أَقْطَعُهُ حَتَّى يُقَرَّ مَرَّتَيْنِ. وَبِهَذَا يَأْخُذُ. ثُمَّ رَجَعَ إِلَى قَوْلِ أَبِي حَنِيفَةَ.
1127 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And when a man confesses to <i>sariqa</i> a single time, and he stands by the confession (<i>thabata ‘alā al-iqrāri</i>), and it [the <i>sariqa</i>] is of that for which the hand is cut; he is cut. And it is	1127 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَقَرَّ الرَّجُلُ بِالسَّرِقَةِ مَرَّةً وَاحِدَةً وَثَبَتَ عَلَى الْإِقْرَارِ وَكَانَتْ مِمَّا تُقْطَعُ فِيهِ الْيَدُ قَطْعًا،

¹ (Ḥassūn, vol.9, pt.14, 191-5; Schacht: *Tr. I*, 196-201).

² From the *Mabsūṭ* of al-Sarakhsī [9:182; quoted by al-Afghānī, 152-3, n.1], we learn the history and reasoning purported to lay behind these variant rulings: 1) Muḥammad b. al-Ḥasan adhered to Abū Ḥanīfa’s *qawl*; 2) the ruling of Ibn Abī Laylā and Abū Yūsuf (double *iqrār*) was general in nature, applicable also to *shurb al-khamr*; 3) some “*bashar*” mentioned Abū Yūsuf’s *rujū’* to the Abū Ḥanīfa *qawl*; 4) “Their [Ibn Abī Laylā’s and Abū Yūsuf’s] *hujja* is what was narrated concerning ‘Alī... that a man confessed to *sariqa* twice before him, so he cut his hand. And that is because it is a *ḥadd Allāh Ta’ālā*, so the number of *iqrār* for it is considered by the number of the *shahāda*, like the *ḥadd of zinā* [which requires four witnesses, thus four confessions]. And due to this, it is narrated concerning Abū Yūsuf that he stipulated two *iqrārs* in two different sessions (*fi majlisayn mukhtalifayn*);” 5) “But Abū Ḥanīfa and Muḥammad b. al-Ḥasan... drew their *dalīl* (*istadalla*) by what was narrated concerning the Prophet... that he came to a *sāriq* and said: ‘Did you steal? I can’t imagine he stole.’ And he said: ‘I stole it.’ So he ordered his cutting, but he did not stipulate the number of *iqrār* regarding it. And because the *shahāda* of the *shāhidayn* as pertains to the ‘*uqūbāt* is confirmed by a singular *iqrār*, like *al-qīṣāṣ*. And we have explained that *zinā* is special (*makhṣūṣ*) among its similar-but-different cases (*naẓā’irihi*);” 6) “And in the *kitāb* he [Abū Ḥanīfa] fixed an ‘*illa*’ (*‘allala*), saying: If I don’t cut him for the first time, I don’t cut him for the second time, because the *māl* became a *dayn* owed by him by the first *iqrār*, and he, by the second *iqrār*, intends the elimination of the *ḍamān* from himself by the cutting of his hand, and is suspected of that. And if the *māl* still remains as it was (*qā’iman bi-‘aynihi*) I/you return it after the first *iqrār* before the second *iqrār*; so how is the cutting incumbent upon him by the *iqrār* after the return of the *māl*? Don’t you see/opine (*alā tarā*) that, by the *shahāda*, the cutting is not imposed upon him after the return of the *māl*? And by the *iqrār*: [it is] *awlā*;” etc.

one and the same (<i>sawāʿun</i>): whether his <i>iqrār</i> was one time, or more.	وَسَوَاءٌ إِقْرَارُهُ مَرَّةً أَوْ أَكْثَرَ.
1128 – And if one should say (<i>fa-in qāla qāʿil^{un}</i>): Likewise, I do not cut him except by two witnesses.	1128 – فَإِنْ قَالَ قَائِلٌ: كَمَا لَا أَقْطَعُهُ إِلَّا بِشَاهِدَيْنِ.
1129 – Then he, when two witnesses testify against him, cuts him; and he pays no heed to his recanting (<i>rujūʾihi</i>) if he has confessed. But he, even if he confesses before him one hundred times, then recants, does not cut him. ³	1129 – فَهُوَ إِذَا شَهِدَ عَلَيْهِ شَاهِدَانِ قَطَعَهُ وَلَمْ يَلْتَفِتْ إِلَى رُجُوعِهِ لَوْ كَانَ أَقَرَّ، وَهُوَ لَوْ أَقَرَّ عِنْدَهُ مِائَةَ مَرَّةٍ ثُمَّ رَجَعَ لَمْ يَقْطَعُهُ.
1130 – And if one should say (<i>fa-in qāla qāʿil^{un}</i>): And likewise, if the witnesses recant, we do not cut him.	1130 – فَإِنْ قَالَ قَائِلٌ: فَهَكَذَا لَوْ رَجَعَتِ الشُّهُودُ لَمْ نَقْطَعُهُ.
1131 – It is said: If the witnesses recant from the <i>shahāda</i> against him, then they return and testify against him for what they had recanted from; their <i>shahāda</i> is not accepted. But if he confesses, then recants, then confesses; it is accepted from him — for the <i>iqrār</i> is different (<i>mukhālīf^{un}</i>) from the <i>shahādāt</i> from start to finish [lit. as regards starting point and end result] (<i>fiʾl-badʾi waʾl-mutaʿqqabi</i>). ⁴	1131 – قِيلَ: لَوْ رَجَعَ الشُّهُودُ عَنِ الشَّهَادَةِ عَلَيْهِ ثُمَّ عَادُوا فَشَهِدُوا عَلَيْهِ بِمَا رَجَعُوا عَنْهُ لَمْ تُقْبَلْ شَهَادَتُهُمْ، وَلَوْ أَقَرَّ ثُمَّ رَجَعَ ثُمَّ أَقَرَّ قُبِلَ مِنْهُ، فَلَا إِقْرَارَ مُخَالَفٍ لِلشَّهَادَاتِ فِي الْبَدْءِ وَالْمُتَعَقَّبِ.
1132 – And if the one stolen from (<i>al-masrūqu minhu</i>) is absent (<i>ghāʾib^{un}</i>); then indeed Abū Ḥanīfa, may God Most High have mercy upon him, said: I don't cut him	1132 – وَإِنْ كَانَ الْمَسْرُوقُ مِنْهُ غَائِبًا، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى قَالَ: لَا أَقْطَعُهُ.

³ Al-Shāfiʿī's point is that his opponent pays no heed to the recanting of an *iqrār* when there are two witnesses testifying against the accused thief. Recanting, in this first critique-*masʾala*, simply does not occasion a *ḥukm* of aversion of the *ḥadd*. In a second *masʾala*, however, the recanting gains efficiency in occasioning an aversion of the *ḥadd* — even in the face of a hundred previous confessions. Al-Shāfiʿī thus appears to be levelling a charge of *ʿadam al-taʿthīr* against his opponent, in stages: 1) neither confession nor recanting occasions anything when there are two witnesses (thus the number of confessions is irrelevant); 2) when there are no witnesses, whether confession is made once or a hundred times, all are cancelled by a single recanting (the number of confessions is again irrelevant); 3) the *waṣf* of “two/twice” appears to have no bearing upon the efficiency of the *illa* of *iqrār*; and 4) thus, as al-Shāfiʿī has stated, one confession and multiple confessions are one and the same (*sawāʿun*).

⁴ This phrase (فَلَا يَجُوزُ أَنْ يَكُونَ قِيَاسًا عَلَيْهَا وَهُوَ) (cf. §288), and (فَلَا إِقْرَارَ مُخَالَفٍ لِلشَّهَادَاتِ فِي الْبَدْءِ وَالْمُتَعَقَّبِ) seems to serve as a “final word” statement closing a refutation of *qiyās*. That is to say, once the specific problems of the opponent's *qiyās* have been identified, and if they are particularly sweeping in scope, the one refuting might close by saying: “How could you consider this *qiyās*, when the two cases are different from start to finish?” A search for this phrase and its usage throughout the *Umm* — at least in this particular formulation terminating in *mutaʿqqab* — has only produced one additional instance, however; and this instance, though preserving the same sense of “from start to finish”, does not occur in a context of *qiyās* refutation.

[the <i>sāriq</i>]. And he [Abū Yūsuf] embraces this [doctrine].	وَبِهَذَا يَأْخُذُ.
1133 – But Ibn Abī Laylā used to say: I cut him when he confesses twice – even if the <i>masrūq minhu</i> is absent.	1133 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: أَقْطَعُهُ إِذَا أَقَرَّ مَرَّتَيْنِ وَإِنْ كَانَ الْمَسْرُوقُ مِنْهُ غَائِبًا.
1134 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the <i>masrūq minhu</i> is absent; the <i>sāriq</i> is detained (<i>hubisa</i>) until the <i>masrūq minhu</i> is present; because he may, perhaps, provide for him a way out (<i>yaʿtiya lahu bi-makhrāj^m</i>) which causes the cutting to fall away from him (<i>yusqītu ʿanhu al-qatʿa</i>), or the cutting and the <i>ḍamān</i> .	1134 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَ الْمَسْرُوقُ مِنْهُ غَائِبًا حُبِسَ السَّارِقُ حَتَّى يَحْضُرَ الْمَسْرُوقُ مِنْهُ؛ لِأَنَّهُ لَعَلَّهُ أَنْ يَأْتِيَ لَهُ بِمَخْرَجٍ يُسْقِطُ عَنْهُ الْقَطْعَ، أَوْ الْقَطْعَ وَالضَّمَانَ.
1135 – And if the <i>sariqa</i> is equal to five dirhams; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: There is no cutting for it. It has reached us concerning the Messenger of God, may God bless and save him, and on the authority of ʿAlī, may God be pleased with him, and on Ibn Masʿūd, that they said: The hand is not cut except for ten dirhams. And he [Abū Yūsuf] embraces this [doctrine].	1135 – وَإِنْ كَانَتِ السَّرِقَةُ تُسَاوِي خَمْسَةَ دَرَاهِمَ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا قَطْعَ فِيهَا؛ بَلَعْنَا عَنْ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، وَعَنْ عَلِيٍّ رَضِيَ اللَّهُ عَنْهُ، وَعَنْ ابْنِ مَسْعُودٍ أَنَّهُمْ قَالُوا: لَا تُقَطَّعُ الْيَدُ إِلَّا فِي عَشْرَةِ دَرَاهِمَ. وَبِهَذَا يَأْخُذُ.
1136 – But Ibn Abī Laylā used to say: The hand is cut for five dirhams, but it is not cut for less than that (<i>fī dūnihā</i>).	1136 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: تُقَطَّعُ الْيَدُ فِي خَمْسَةِ دَرَاهِمَ، وَلَا تُقَطَّعُ فِي دُونِهَا.
1137 – Al-Shāfiʿī, may God Most High have mercy upon him, said: The trustworthy transmitter (<i>al-thiqa</i>) has reported to us ⁵ – on the authority of ʿAbd Allāh b. ʿUmar b. Ḥaḥṣ, and Sufyān b. ʿUyayna – on al-Zuhrī, on ʿAmra, on ʿĀʾisha, may God be pleased with her, that the Messenger of God, may God bless and save him, said: «The cutting	1137 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: أَخْبَرَنَا الثَّقَةُ عَنْ عَبْدِ اللَّهِ بْنِ عُمَرَ بْنِ حَفْصٍ، وَسُفْيَانَ بْنِ عُيَيْنَةَ، عَنِ الزُّهْرِيِّ، عَنْ عَمْرَةَ، عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا أَنَّ رَسُولَ اللَّهِ –

⁵ Al-Shāfiʿī's following arguments against Abū Ḥanīfa's source *aḥādīth*, may shed some light as to why he begins his *isnād* here with *al-thiqa* (see §§1138-9). Still, I am uncertain as to how to interpret what appears at first sight to be the insertion of an anonymous *thiqa* between al-Shāfiʿī and the two sources which he claims elsewhere to have transmitted directly to him. Certainly, we know that Sufyān b. ʿUyayna (d.198/814) was not only a primary teacher of al-Shāfiʿī's, but in §23018 of the *Kitāb al-Ḥudūd wa Ṣifatu al-Naḥī* (Ḥassūn, vol.7, pt.12, 480) al-Shāfiʿī transmits this same *ḥadīth* directly from him, by the same *isnād* (see Ḥassūn's attached note listing all the other collections in which it appears). Moreover, some pages later, in §23468 and under the subheading of *Ḥadd al-Sariqa wa'l-Qaṭi' fihā wa Ḥadd Qaṭi' al-Ṭarīq wa Ḥadd al-Zānī* (Ḥassūn, vol.7, pt.12, 551), we find this *ḥadīth* once again, transmitted this time by both Sufyān b. ʿUyayna and al-ʿUmarī (who is the ʿAbd Allāh b. ʿUmar b. Ḥaḥṣ of §1137, above) to al-Shāfiʿī, directly, with the same *isnād*.

is for a quarter-dīnār and above.» And we embrace it.	صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - قَالَ: «الْقَطْعُ فِي رُبْعِ دِينَارٍ فَصَاعِدًا». وَبِهِ نَأْخُذُ.
1138 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And as for that by which Abū Ḥanīfa formed his opinion (<i>mā dhahaba ilayhi</i>), as pertains to the <i>riwāya</i> concerning the Prophet, may God bless and save him [in §1135], which contradicts (<i>tukhālifu</i>) this [<i>ḥadīth</i> in §1137]; indeed, it is not through a means the like of which is confirmed (<i>laysat min wajhⁱⁿ yathbutu mithluhu</i>), if it is solitary (<i>law infarada</i>). ⁶	1138 - قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: فَأَمَّا مَا ذَهَبَ إِلَيْهِ أَبُو حَنِيفَةَ مِنَ الرَّوَايَةِ عَنِ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - الَّتِي تُخَالِفُ هَذَا فَإِنَّهَا لَيْسَتْ مِنْ وَجْهِ يَثْبُتُ مِثْلُهُ لَوْ أَنْفَرَدَ.
1139 – And as for that which was narrated on the authority of ‘Alī, may God be pleased with him, and Ibn Mas‘ūd [referenced in §1135]; there is, in one with the Prophet (<i>aḥadⁱⁿ ma‘a al-nabī</i>), may God bless and save him, no <i>ḥujja</i> . And I don’t know that it is verified (<i>thābit^{am}</i>) as concerns either one of the two. ⁷	1139 - وَأَمَّا مَا رُوِيَ عَنْ عَلِيٍّ رَضِيَ اللَّهُ عَنْهُ وَابْنِ مَسْعُودٍ فَلَيْسَتْ فِي أَحَدٍ مَعَ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - حُجَّةٌ، وَلَا أَعْلَمُهُ ثَابِتًا عَنْ وَاحِدٍ مِنْهُمَا.
1140 – But Sufyān b. ‘Uyayna has reported to us, on the authority of Ḥumayd al-Ṭawīl, that he heard Qatāda ask Anas b. Mālīk, may God Most High have mercy upon him, ⁸ about the cutting, and he said: I attended	1140 - وَقَدْ أَخْبَرَنَا سُفْيَانُ بْنُ عُيَيْنَةَ، عَنْ حُمَيْدِ الطَّوِيلِ أَنَّهُ سَمِعَ قَتَادَةَ يَسْأَلُ أَنَسَ بْنَ مَالِكٍ رَحِمَهُ اللَّهُ تَعَالَى عَنِ الْقَطْعِ، فَقَالَ:

⁶ Juynboll’s article on the *khavar al-wāḥid* in the *Et*, though brief, is of some utility here. First, he explains that among synonyms for the *khavar al-wāḥid*, we find *khavar al-āḥād*, *khavar al-infirād*, and *khavar al-khāṣṣa*. It is very possible that this second is what al-Shāfi‘ī is indicating when he says “*laysat min wajhⁱⁿ yathbutu mithluhu law infarada*.” However, Juynboll goes on to tell us that al-Nawawī believed al-Shāfi‘ī to be the first to write about the *khavar al-wāḥid*, and adds: “In his *Risāla* he devotes two chapters to it. He argues that a *khavar al-wāḥid* constitutes an argument (*ḥudjdja*), if only there is at every stage of the *isnād* one reliable transmitter (*thiqa*).” This is confirmed in Shākir’s edition §1049ff., in the *Bāb Khavar al-Wāḥid* (pp.383ff.) This leads us to a number of possibilities, among them: 1) he is attacking the chains of transmission as marred by non-*thiqa* transmitters (hence his going out of the way to precede his own *isnād* with *al-thiqa* in §1137); or 2) he, by *infarada*, means that Abū Ḥanīfa’s *aḥādīth* are both non-*thiqa*, and not supported by any *thiqa*-transmitted material — they are both solitary, and isolated. The answer, so far as we can tell from the discussions in the *Kitāb al-Ḥudūd wa Ṣifatu al-Naḥī* of the *Umm* (§§23015; Ḥassūn, vol.7, pt.12, 479ff.) — where al-Shāfi‘ī not only critiques his dialectical opponent’s *aḥādīth* going back to the Prophet, and ‘Alī, and Ibn Mas‘ūd, et al. (presumably the same as upon which Abū Ḥanīfa relied), but supplies his own *thiqa aḥādīth* (as we have seen), and, moreover, supports them with similar material from Mālīk going back to both ‘Alī and the Prophet — is the second option: his complaint seems more to do with the quality of transmitters than with the *infirād* form of the *aḥādīth*.

⁷ The argument, so far as I understand it, is that one of the two — going back to the Prophet — constitutes no *ḥujja* for Abū Ḥanīfa’s claim. Additionally, neither the *ḥadīth* on ‘Alī, nor the *ḥadīth* on Ibn Mas‘ūd, are *thābit*.

⁸ The Būlāq edition has أَنَسَ بْنَ مَالِكٍ رَحِمَهُ اللَّهُ تَعَالَى عَنْهُ عَنِ الْقَطْعِ, whilst Ḥassūn and Maṭrajī are as I have preferred above. Ḥassūn makes no note of the discrepancy. I assume it is a typo.

Abū Bakr al-Ṣiddīq, may God be pleased with him, [while] he cut [the hand of] a <i>sāriq</i> for something equivalent to three dirhams. Or he said: [something] which I would be pleased to have for three dirhams (<i>mā yasurrunī annahu lī bi-thalāthati darāhima</i>) [thus indicating what the fair price would be for the object].	حَضَرْتُ أَبَا بَكْرٍ الصِّدِّيقَ رَضِيَ اللَّهُ عَنْهُ قَطَعَ سَارِقًا فِي شَيْءٍ مَا يَسْوَى ثَلَاثَةِ دَرَاهِمٍ. أَوْ قَالَ: مَا يَسُرُّنِي أَنَّهُ لِي بِثَلَاثَةِ دَرَاهِمٍ.
1141 – And it is confirmed (<i>thabata</i>) on the authority of 'Ā'isha, may God be pleased with her, that she said: «The cutting is for a quarter-dīnār and above.» And it is written in the <i>Kitāb al-Sariqa</i> . ⁹	1141 – وَثَبَتَ عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا أَنَّهَا قَالَتْ: «الْقَطْعُ فِي رُبْعِ دِينَارٍ فَصَاعِدًا». وَهُوَ مَكْتُوبٌ فِي كِتَابِ السَّرِقَةِ.
1142 – He [Abū Yūsuf] said: And when the two witnesses give testimony against a man for <i>sariqa</i> , and the <i>masrūq minhu</i> is absent; then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: I do not accept the <i>shahāda</i> while the <i>masrūq minhu</i> is absent.	1142 – قَالَ: وَإِذَا شَهِدَ الشَّاهِدَانِ عَلَى رَجُلٍ بِالسَّرِقَةِ وَالْمَسْرُوقُ مِنْهُ غَائِبٌ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: لَا أَقْبَلُ الشَّهَادَةَ وَالْمَسْرُوقُ مِنْهُ غَائِبٌ.
1143 – Have you considered (<i>ara'ayta</i>) [what would happen] if he says: He did not steal anything from me; will I have cut the <i>sāriq</i> ? And he [Abū Yūsuf] embraces it. ¹⁰	1143 – أَرَأَيْتَ لَوْ قَالَ: لَمْ يَسْرِقْ مِنِّي شَيْئًا أَكُنْتُ أَقْطَعُ السَّارِقَ؟ وَبِهِ يَأْخُذُ.
1144 – But Ibn Abī Laylā used to say: I accept the <i>shahāda</i> against him, and I cut the <i>sāriq</i> .	1144 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: أَقْبَلُ الشَّهَادَةَ عَلَيْهِ، وَأَقْطَعُ السَّارِقَ.
1145 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when two witnesses testify against a man for <i>sariqa</i> , while the <i>masrūq minhu</i> is absent; I accept the <i>shahāda</i> and I ask about the witnesses, but I delay the cutting until the <i>masrūq minhu</i> arrives.	1145 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا شَهِدَ شَاهِدَانِ عَلَى رَجُلٍ بِسَرِقَةٍ وَالْمَسْرُوقُ مِنْهُ غَائِبٌ، قَبِلْتُ الشَّهَادَةَ وَسَأَلْتُ عَنِ الشُّهُودِ وَأَخَّرْتُ الْقَطْعَ إِلَى أَنْ يَقْدَمَ الْمَسْرُوقُ مِنْهُ.

⁹ Al-Nadīm (*Fihrist*, 354) lists a *Kitāb al-Qaṭ' wa'l-Sariqa* among the writings of al-Shāfi'ī, but nothing with the exact title of *Kitāb al-Sariqa*. Nor, for that matter, does either title appear in such a form in the *Umm*. We have seen, however, that the bulk of related argument occurs in the *Kitāb al-Ḥudūd wa Ṣifatu al-Nafī*. We have seen, too, that a part of the argument (§§22468ff.) occurs under the subheading *Ḥadd al-Sariqa wa'l-Qāṭi' fihā wa Ḥadd Qāṭi' al-Tariq wa Ḥadd al-Zānī* (Hassūn, vol.7, pt.12, 551ff.) We might conjecture, based on the repetitive nature (and sources) of this second set of arguments, that it is the whole, or part, of a single treatise (al-Nadīm's *Kitāb al-Qaṭ' wa'l-Sariqa*?) which has been incorporated into the *Umm* with so many others.

¹⁰ This short *reductio* is of that species of reduction to negative consequence. In fact, we might consider this particular example a *reductio ad consequens horrenda*.

1146 – He [Abū Yūsuf] said: And when the man confesses (i'tarafa) to sariqa twice, and to zinā four times, then denies (ankara) after that; then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: We avert from him (nadra'u 'anhu) the ḥadd, for both of them, together. But we make him liable (nuḍamminuhu) for the sariqa.	1146 – قَالَ: وَإِذَا اعْتَرَفَ الرَّجُلُ بِالسَّرِقَةِ مَرَّتَيْنِ وَبِالزِّنَا أَرْبَعَ مَرَّاتٍ ثُمَّ أَنْكَرَ بَعْدَ ذَلِكَ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: نَدْرَأُ عَنْهُ الْحَدَّ فِيهِمَا جَمِيعًا وَنُضَمِّنُهُ السَّرِقَةَ.
1147 – And it has reached us concerning the Messenger of God, may God bless and save him, when Mā'iz b. Mālik confessed before him (i'tarafa 'indahū), and he ordered that he be stoned; he fled when the stones hit him (aṣābat-hu), and the Messenger of God, may God bless and save him, said: «And did you not leave his way open (fa-halā khallaytum sabīlahu)?» Abū Ḥanīfa, may God have mercy upon him, related that to us [as ḥadīth] (ḥaddathanā), tracing it back (yarfa'uhu) to the Prophet, may God bless and save him.¹¹ And he [Abū Yūsuf] embraces it.	1147 – وَقَدْ بَلَّغْنَا عَنْ رَسُولِ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - حِينَ اعْتَرَفَ عِنْدَهُ مَاعِزُ بْنُ مَالِكٍ وَأَمَرَ بِهِ أَنْ يُرْجَمَ، هَرَبَ حِينَ أَصَابَتْهُ الْحِجَارَةُ، فَقَالَ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «فَهَلَا خَلَيْتُمْ سَبِيلَهُ» حَدَّثَنَا بِذَلِكَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ يَرْفَعُهُ إِلَى النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ. وَبِهِ يَأْخُذُ.
1148 – But Ibn Abī Laylā used to say: I do not accept his rujū' for both of them, together, and I inflict the ḥadd upon him (umḍī 'alayhi al-ḥadda).	1148 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا أَقْبَلُ رُجُوعَهُ فِيهِمَا جَمِيعًا وَأُضْطَرُّ عَلَيْهِ الْحَدَّ.
1149 – Al-Shāfi'ī said: And when the man confesses to zinā, or to shurb al-khamr, or to sariqa, then he recants; I accept his rujū' – before the scourges take him, or the stones, or the iron, and after – whether he brings a cause (jā'a bisabab^m) or does not produce it, condemned ('uyyara) or not condemned; by qiyās with the fact that the Prophet, may God bless and save him, said, regarding Mā'iz: «And did you not leave him be (fa-halā taraktumūhu)?» And likewise every ḥadd belonging to God.	1149 – قَالَ الشَّافِعِيُّ: وَإِذَا أَقَرَّ الرَّجُلُ بِالزِّنَا، أَوْ بِشُرْبِ الْخَمْرِ، أَوْ بِالسَّرِقَةِ، ثُمَّ رَجَعَ قَبْلَ رُجُوعِهِ قَبْلَ أَنْ تَأْخُذَهُ السَّيَاطُ، أَوْ الْحِجَارَةُ، أَوْ الْحَدِيدُ وَبَعْدُ، جَاءَ بِسَبَبٍ أَوْ لَمْ يَأْتِ بِهِ، غَيْرَ أَوْ لَمْ يُعَيِّرْ قِيَاسًا عَلَى أَنَّ النَّبِيَّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - قَالَ فِي مَاعِزٍ: «فَهَلَا تَرَكْتُمُوهُ». وَهَكَذَا كُلُّ حَدٍّ لِلَّهِ.
1150 – And as for that in which there belongs to humans (li'l-ādamiyyīn) a right (ḥaqq^{mm}); it is imposed upon him (yalzamuhu), and his rujū' for it is not accepted, and I fine him (ugharrimuhu) for	1150 – فَأَمَّا مَا كَانَ لِلْأَدَمِيِّينَ فِيهِ حَقٌّ فَيَلْزَمُهُ وَلَا يُقْبَلُ رُجُوعُهُ فِيهِ وَأُغْرِمُهُ السَّرِقَةَ؛ لِأَنَّهَا حَقٌّ لِلْأَدَمِيِّينَ.

¹¹ In other words, it is marfū' – going all the way back to the Prophet (with or without complete isnād), rather than only back to a Companion (mawqūf), or to a Successor (maqṭū').

the sariqa, because it is a right belonging to humans (<i>ḥaqq^{un} li'l-ādamiyyīni</i>). ¹²	
1151 – And when a man from the <i>Ahl al-Ḥarb</i> enters among us by right of safe-conduct (<i>bi-amānⁱⁿ</i>), and he commits a theft while in our keeping (<i>sariqa 'indanā sariqat^{an}</i>); then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: He is liable for the <i>sariqa</i> , but he is not cut; because he did not take up the <i>amān</i> so that the <i>aḥkāma</i> be enacted against him (<i>lam ya'khudh al-amāna li-tajriya 'alayhi al-aḥkāma</i>).	1151 – وَإِذَا دَخَلَ الرَّجُلُ مِنْ أَهْلِ الْحَرْبِ إِلَيْنَا بِأَمَانٍ فَسَرَقَ عِنْدَنَا سَرِقَةً، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: يَضْمَنُ السَّرِقَةَ، وَلَا يُقْطَعُ؛ لِأَنَّهُ لَمْ يَأْخُذِ الْأَمَانَ لِتَجْرِي عَلَيْهِ الْأَحْكَامُ.
1152 – But Ibn Abī Laylā used to say: His hand is cut. And he [Abū Yūsuf] embraced it; then he reverted to the <i>qawl</i> of Abū Ḥanīfa, may God be pleased with him.	1152 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: تُقْطَعُ يَدُهُ. وَبِهِ يَأْخُذُ، ثُمَّ رَجَعَ إِلَى قَوْلِ أَبِي حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ.
1153 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the <i>ḥarbī</i> enters the <i>Dār al-Islām</i> by right of <i>amān</i> , and he steals; he is liable for the <i>sariqa</i> , but he is not cut. And it is said to him: We throw your compact back at you (<i>nanbidhu ilayka 'ahdaka</i>), and we will convey you to your safe-haven (<i>nuballighuka ma'manaka</i>); because this is a house (<i>dār</i>) that does not benefit should there reside in it any but to whom the law applies.	1153 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا دَخَلَ الْحَرْبِيُّ دَارَ الْإِسْلَامِ بِأَمَانٍ فَسَرَقَ ضَمِنَ السَّرِقَةَ وَلَا يُقْطَعُ، وَيُقَالُ لَهُ: نَنبِذُ إِلَيْكَ عَهْدَكَ وَنُبَلِّغُكَ مَأْمَنَكَ؛ لِأَنَّ هَذِهِ دَارٌ لَا يَصْلُحُ أَنْ يُقِيمَ فِيهَا إِلَّا مَنْ يَجْرِي عَلَيْهِ الْحُكْمُ.
1154 – Al-Rabī said: He is not cut when he is ignorant [of the law] (<i>jāhil^{an}</i>); and if he is knowing (<i>ālim^{an}</i>), he is cut.	1154 – قَالَ الرَّبِيعُ: لَا يُقْطَعُ إِذَا كَانَ جَاهِلًا، فَإِنْ كَانَ عَالِمًا قُطِعَ.
1155 – Al-Shāfi'ī, may God have mercy upon him, said: It is not right for anyone that he should give anyone <i>amān</i> with the understanding that the <i>ḥukm</i> of Islam does not apply to him so long as he is residing in the <i>Dār al-Islām</i> .	1155 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: لَا يَنْبَغِي لِأَحَدٍ أَنْ يُعْطِيَ أَحَدًا أَمَانًا عَلَى أَنْ لَا يَجْرِيَ عَلَيْهِ حُكْمُ الْإِسْلَامِ مَا دَامَ مُقِيمًا فِي دَارِ الْإِسْلَامِ.

¹² Here we see that al-Shāfi'ī incorporates a well-defined theory of *ḥuqūq Allāh* and *ḥuqūq al-'ibād* (cf. §510).

Bāb al-Qaḍā’

Chapter on Judicial Decision (<i>al-Qaḍā’</i>) ¹	بَابُ الْقَضَاءِ
1156 – Al-Shāfi‘ī, may God have mercy upon him, said: And when the <i>qāḍī</i> registers in his <i>dīwān</i> (<i>athbata... fī dīwānihi</i>) the <i>iqrār</i> , and the <i>shahāda</i> of the witnesses, then that [event of <i>iqrār</i> and <i>shahāda</i>] is brought before him (<i>rufi‘a ilayhi</i>) but he, himself, does not remember it (<i>lā yadhkuruhi</i>); then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: It is not right for him that he should permit it (<i>lā yanbaghī lahu an yujīzahu</i>). ²	1156 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا أَثْبَتَ الْقَاضِي فِي دِيْوَانِهِ الْإِقْرَارَ وَشَهَادَةَ الشُّهُودِ، ثُمَّ رَفَعَ إِلَيْهِ ذَلِكَ وَهُوَ لَا يَذْكُرُهُ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: لَا يَنْبَغِي لَهُ أَنْ يُجِيزَهُ.
1157 – But Ibn Abī Laylā, may God have mercy upon him, used to permit that [previous <i>iqrār</i> / <i>shahāda</i> as basis]. And he [Abū Yūsuf] embraces it.	1157 – وَكَانَ ابْنُ أَبِي لَيْلَى رَحِمَهُ اللَّهُ يُجِيزُ ذَلِكَ، وَبِهِ يَأْخُذُ.
1158 – Abū Ḥanīfa, may God Most High have mercy upon him, said: If he has remembered it, but has not registered it in his keeping (<i>lam yuthbit-hu ‘indahū</i>) [i.e., in his <i>dīwān</i>], he permits it [to be used as basis]. And he [Abū Yūsuf] embraces it.	1158 – قَالَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى: إِنْ كَانَ يَذْكُرُهُ وَلَمْ يُثْبِتْهُ عِنْدَهُ أَجَازَهُ. وَبِهِ يَأْخُذُ.
1159 – But Ibn Abī Laylā used to say: He does not permit it [to be used as basis] until he registers it in his keeping — even if he remembers it.	1159 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا يُجِيزُهُ حَتَّى يُثْبِتْهُ عِنْدَهُ وَإِنْ ذَكَرَهُ.

¹ (Ḥassūn, vol.9, pt.14, 196-9; Schacht: *Tr. I*, 202-207).

² That is to say, he does not permit that the previous *iqrār* or *shahāda* be used as the basis for anything. This *mas‘ala* is explained by al-Sarakhsī (*Mabsūt*, 16:92; Afghānī, 158-9, n.2): “And when the *qāḍī* finds in his *dīwān* a document (*ṣaḥīfa*) on which is the *shahāda* of witnesses which he does not remember (*lā yaḥfuẓū*) that they gave testimony before him of that [matter]; according to the *qawl* of Abū Ḥanīfa, may God have mercy on him, he must think about that until he remembers — and there does not belong to him the right to pass judgment on the basis of that if he doesn’t remember. But according to Abū Yūsuf and Muḥammad, may God have mercy on them both, when he finds that in a book-receptacle (*qimaṭratⁱⁿ*), under his seal; it is [enjoined] upon him that he pass judgment by means of it — even if he does not remember it. And this is, from them both [Abū Yūsuf and Muḥammad] a type of permissive-license (*naw‘u rukḥṣatⁱⁿ*); for the *qāḍī*, due to the quantity of his business, is incapable of memorizing every event (*kulla ḥādithati*). And for this purpose, he writes; and he only ever obtains the aim (*maqṣūd*) of writing, when it is permitted to him that he depend upon the writing at the time of forgetting. For verily the human (*al-ādami*) has not in his capacity a sufficient guard at the time of forgetting (*laysa fī wus‘ihi al-taḥarruzu ‘inda al-nisyanī*).” Al-Sarakhsī goes on to provide Qur’ānic indicants, and to argue how being forced to memorize everything would constitute *ḥaraj*. This is an old and recurrent *mas‘ala* of trusting written document vs. trusting memory; and it is, ultimately, an epistemological concern. For, as al-Sarakhsī points out in this same passage, “there belongs no right to the *qāḍī* to pass judgment except on the basis of ‘ilm (*laysa li’l-qāḍī an yaqḍiya illā bi-‘ilmⁱⁿ*).” Note also that a document might be forged and slipped into the *qāḍī*’s *dīwān*.

1160 – Al-Shāfi‘ī, may God have mercy upon him, said: And when the <i>qāḍī</i> finds in his <i>dīwān</i> a scripted document (<i>khatt^{am}</i>) — he having no doubt that it is his script (<i>khatt^u</i>), or the script of his <i>kātib</i> — of an <i>iqrār</i> of a man for another; or of the confirmation of a right (<i>bi-thabti haqqⁱⁿ</i>) about him in some manner (<i>bi-wajhⁱⁿ</i>); there belongs to him no right to pass judgment on the basis of it (<i>yaqḍiya bihi</i>) until he remembers [what] pertains to it; nor that he [the litigant] bear testimony by means of it before him. Likewise, it is not permitted, when he knows his <i>khatt</i>, but does not remember the <i>shahāda</i>, that he [the litigant] bear testimony [using the <i>khatt</i> as basis].	1160 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا وَجَدَ الْقَاضِي فِي دِيْوَانِهِ خَطًّا لَا يَشْكُ أَتَهُ خَطُّهُ، أَوْ خَطُّ كَاتِبِهِ بِإِقْرَارِ رَجُلٍ لآخر، أَوْ بَيَّنَّ حَقٌّ عَلَيْهِ بوجهٍ لَمْ يَكُنْ لَهُ أَنْ يَقْضِيَ بِهِ حَتَّى يَذْكُرَ مِنْهُ، أَوْ يَشْهَدَ بِهِ عِنْدَهُ، كَمَا لَا يَجُوزُ إِذَا عَرَفَ خَطُّهُ وَلَمْ يَذْكُرِ الشَّهَادَةَ أَنْ يَشْهَدَ.
1161 – And when a man brings a writing-of-a-<i>qāḍī</i>-to-a-<i>qāḍī</i> (<i>kitābi qāḍīⁱⁿ ilā qāḍīⁱⁿ</i>), and the <i>qāḍī</i> does not recognize his writing, nor his seal (<i>lā ya‘rifu kitābahu wa lā khātamahu</i>); then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: It is not right for the <i>qāḍī</i> to whom the <i>kitāb</i> arrived that he should accept it until two ‘<i>adl</i> witnesses testify about the <i>khātam</i> of the <i>qāḍī</i>, and about what is in the <i>kitāb</i>, all of it, if it is recited to him (<i>qurī’a ‘alayhi</i>) — whether the <i>qāḍī</i> recognizes the <i>kitāb</i> and the <i>khātam</i>, or he does not recognize it. And he does not accept it except by two witnesses, in the manner I have described (<i>‘alā mā waṣaftu</i>); because it is a <i>haqq</i>, and it is like testimony-about-testimony (<i>shahādatⁱⁿ ‘alā shahādatⁱⁿ</i>). Then Abū Yūsuf, may God have mercy upon him, recanted (<i>raja’a</i>). He [Abū Ḥanīfa/Abū Yūsuf?] said: He does not accept the <i>kitāb</i> until the witnesses testify that he [the other <i>qāḍī</i>] recited it aloud to them, and gave them a copy [presently] with them (<i>nuskhat^{am} ma‘ahum</i>), that it be presented to this <i>qāḍī</i> along with the <i>kitāb</i> of the <i>qāḍī</i>.³	1161 – وَإِذَا جَاءَ رَجُلٌ بِكِتَابِ قَاضٍ إِلَى قَاضٍ وَالْقَاضِي لَا يَعْرِفُ كِتَابَهُ وَلَا خَاتَمَهُ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: لَا يَنْبَغِي لِلْقَاضِي الَّذِي أَتَاهُ الْكِتَابُ أَنْ يَقْبَلَهُ حَتَّى يَشْهَدَ شَاهِدًا عَدْلًا عَلَى خَاتَمِ الْقَاضِي وَعَلَى مَا فِي الْكِتَابِ كُلِّهِ إِذَا قُرِئَ عَلَيْهِ، عَرَفَ الْقَاضِي الْكِتَابَ وَالْخَاتَمَ أَوْ لَمْ يَعْرِفْهُ، وَلَا يَقْبَلُهُ إِلَّا بِشَاهِدَيْنِ عَلَى مَا وَصَفْتُ؛ لِأَنَّهُ حَقٌّ، وَهُوَ مِثْلُ شَهَادَةٍ عَلَى شَهَادَةٍ. ثُمَّ رَجَعَ أَبُو يُوسُفَ رَحِمَهُ اللَّهُ وَقَالَ: لَا يَقْبَلُ الْكِتَابَ حَتَّى يَشْهَدَ الشُّهُودُ أَنَّهُ قَرَأَهُ عَلَيْهِمْ وَأَعْطَاهُمْ نُسخَةً مَعَهُمْ يُحْضِرُونَهَا هَذَا الْقَاضِي مَعَ كِتَابِ الْقَاضِي.

³ Thus Abū Yūsuf appears — at first — to have sided originally with Ibn Abī Laylā, as we see in §1162. Although the implications are still difficult to work out, it may be of some significance that the phrase: “*thumma raja’a Abū Yūsuf, raḥimahu Allāh*” does not appear in this line of the Shaybānī Version (cf. Afghānī, 159). Rather, we have, at the very end of §1161 “*wa bihi na’khudhu. thumma raja’a Abū Yūsuf.*” We may consider the *bihi na’khudhu* as the voice either of Abū Yūsuf or Muḥammad b. al-Ḥasan; while *thumma raja’a Abū Yūsuf* would belong to the narrative voice of Muḥammad b. al-Ḥasan. What is peculiar is that, due to a mere shifting of this recantation

1162 – But Ibn Abī Laylā used to say: When they testify to the <i>khātām</i> of the <i>qāḍī</i>, he accepts that from them. And he [Abū Yūsuf] embraces it.	1162 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: إِذَا شَهِدُوا عَلَى خَاتَمِ الْقَاضِي قَبْلَ ذَلِكَ مِنْهُمْ. وَبِهِ يَأْخُذُ.
1163 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And when the two witnesses testify about a <i>kitāb al-qāḍī ilā al-qāḍī</i>; whether the one written to recognizes the <i>kitāb</i> of the <i>qāḍī</i> and his <i>khātām</i>, or he does not recognize it — it is one and the same (<i>sawā‘un</i>) as regards the <i>ḥukm</i>. And he does not accept [the <i>kitāb</i>] except by two ‘<i>adl</i> witnesses who both testify that this is the <i>kitāb</i> of so-and-so, the <i>qāḍī</i> of such-and-such a <i>balad</i>, to so-and-so, the <i>qāḍī</i> of such-and-such a <i>balad</i>. And they both testify as to what is in the <i>kitāb</i> — either by [full] memorization of it (<i>bi-ḥifẓin lahu</i>), or by a copy [presently] with them both, which concurs with what is in it (<i>tuwāfiqun mā fihi</i>). And I do not opine (<i>lā arā</i>) that he should accept it sealed (<i>makhtūm</i>), while they both say: We don’t know what is in it; because the <i>khātām</i> might be forged over (<i>yuṣna‘u ‘alā</i>) the <i>khātām</i>, and the <i>kitāb</i> exchanged (<i>yubaddalu</i>).	1163 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا شَهِدَ الشَّاهِدَانِ عَلَى كِتَابِ الْقَاضِي إِلَى الْقَاضِي، عَرَفَ الْمَكْتُوبُ إِلَيْهِ كِتَابَ الْقَاضِي وَخَاتَمَهُ أَوْ لَمْ يَعْرِفْهُ، فَهُوَ سَوَاءٌ فِي الْحُكْمِ، وَلَا يَقْبَلُ إِلَّا بِشَاهِدَيْنِ عَدْلَيْنِ يَشْهَدَانِ أَنَّ هَذَا كِتَابُ فُلَانٍ قَاضِي بَلَدٍ كَذَا إِلَى فُلَانٍ قَاضِي بَلَدٍ كَذَا، وَيَشْهَدَانِ عَلَى مَا فِي الْكِتَابِ؛ إِمَّا بِحِفْظٍ لَهُ، وَإِمَّا بِنُسْخَةٍ مَعَهُمَا تُوَافِقُ مَا فِيهِ، وَلَا أَرَى أَنْ يَقْبَلَهُ مَخْتُومًا وَهُمَا يَقُولَانِ: لَا نَدْرِي مَا فِيهِ؛ لِأَنَّ الْخَاتَمَ قَدْ يُصْنَعُ عَلَى الْخَاتَمِ وَيُبَدَّلُ الْكِتَابُ.
1164 – And when the opposing party (<i>al-khaṣm</i>) [i.e., the <i>mudda‘ā ‘alayhi</i>] says to the <i>qāḍī</i>: I neither acknowledge nor deny (<i>lā uqirru wa lā unkiru</i>). Then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: I don’t compel him towards that (<i>lā ajburuhu ‘alā dhālika</i>); but the <i>mudda‘ī</i> summons his witnesses. And he	1164 – وَإِذَا قَالَ الْخَصْمُ لِلْقَاضِي: لَا أُقِرُّ وَلَا أُنْكِرُ. فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: لَا أَجْبُرُهُ عَلَى ذَلِكَ، وَلَكِنَّهُ يَدْعُو الْمُدَّعِي بِشُهودِهِ. وَبِهَذَا يَأْخُذُ.

phrase before or after the last stated opinion of §1161, we gain what appears — at first — two contradictory accounts of what Abū Yūsuf is purported to have recanted from, and finally subscribed to. In the Shaybānī Version, it appears as though he is recanting from Abū Ḥanīfa, and subscribing to Ibn Abī Laylā in §1162. This, in fact, is exactly what al-Sarakhsī says, and is confirmed by al-Afghānī — what equates to §1162 in his edition is “the final *qawl* of Abū Yūsuf” (Afghānī, 160, n.1). The placement of the phrase in question in the *Umm* Version (confirmed in Būlāq [140]; Maṭraji [234]; Najjār [152]; Ḥassūn [as above]; and thus, a host of source manuscripts), however, appears to lead into the last statement of opinion, as in “*thumma raja’a Abū Yūsuf, raḥimahu Allāh, wa qāla lā yaqbalu...* etc.” When we reach the “*wa bihi ya’khudhu*” following Ibn Abī Laylā in §1162, we would infer that this was the original position from which he is recanting in §1161. This is also significant: the absence of a *wa bihi ya’khudhu* in the *Umm* Version §1161 makes it all the more strange — we are told that Abū Yūsuf is recanting from something before we are told what he first embraced. Whatever — if any — significance this divergence has for the histories of the texts, I am not certain.

[Abū Yūsuf] embraces this [doctrine].	
1165 – He [Abū Yūsuf] said: But Ibn Abī Laylā used not to desist (<i>lā yada’uhu</i>) until he acknowledges or denies.	1165 – قَالَ: وَكَانَ ابْنُ أَبِي لَيْلَى لَا يَدَعُهُ حَتَّى يُقِرَّ أَوْ يُنْكِرَ.
1166 – And Abū Yūsuf, when he [the <i>khaṣm</i>] maintained silence (<i>sakata</i>), would say to him, several times: Swear (<i>iḥlif</i>). And if he would not swear; he would pass judgment against him (<i>qaḍā’ alayhi</i>).	1166 – وَكَانَ أَبُو يُوسُفَ إِذَا سَكَتَ يَقُولُ لَهُ: احْلِفْ. مِرَارًا. فَإِنْ لَمْ يَحْلِفْ قَضَى عَلَيْهِ.
1167 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And when two men dispute one another (<i>tanāza’a</i>), and one of them raises a <i>da’wā</i> against the other, and the <i>mudda’a’ alayhi</i> says: I neither acknowledge nor deny. It is said to the <i>mudda’ī</i> : If you desire that we should make him swear (<i>nuḥlifahu</i>), we will put the oath to him (<i>‘araḍnā alayhi al-yamīna</i>). And if he swears, he is absolved (<i>in ḥalafa bari’a</i>) – unless you bring forth <i>bayyina</i> . But if he refuses the oath (<i>nakala</i>), we will say to you: Swear to your <i>da’wā</i> , and take [your right]. And if you refuse (<i>abayta</i>), we don’t give you anything by his refusal without your oath – with his refusal. ⁴	1167 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا تَنَازَعَ الرَّجُلَانِ وَادَّعَى أَحَدُهُمَا عَلَى الْآخَرِ دَعْوَى، فَقَالَ الْمُدَّعَى عَلَيْهِ: لَا أَقِرُّ وَلَا أَنْكُرُ. قِيلَ لِلْمُدَّعِي: إِنْ أَرَدْتَ أَنْ نُحْلِفَهُ عَرْضْنَا عَلَيْهِ الْيَمِينَ. فَإِنْ حَلَفَ بَرِيءٌ إِلَّا أَنْ تَأْتِيَ بَبَيِّنَةٍ، وَإِنْ نَكَلَ قُلْنَا لَكَ: احْلِفْ عَلَى دَعْوَاكَ وَخُذْ فَإِنْ أَبَيْتَ لَمْ نُعْطِكَ بُكُؤْلَهُ شَيْئًا دُونَ يَمِينِكَ مَعَ نُكُؤْلِهِ.
1168 – And when the <i>khaṣm</i> [i.e., the <i>mudda’a’ alayhi</i>] denies the <i>da’wā</i> , then he brings forth the <i>shahāda</i> of witnesses about a loophole / way out of it (<i>al-makhrāj minhu</i>); then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: I accept that from him. And he [Abū Yūsuf] embraces this [doctrine].	1168 – وَإِذَا أَنْكَرَ الْخَصْمُ الدَّعْوَى ثُمَّ جَاءَ بِشَهَادَةِ الشُّهُودِ عَلَى الْمَخْرَجِ مِنْهُ، فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: أَقْبَلُ ذَلِكَ مِنْهُ. وَبِهَذَا يَأْخُذُ.
1169 – But Ibn Abī Laylā used to say: I do not accept from him, after denial (<i>al-inkār</i>), a <i>makhrāj</i> . And the explanation (<i>tafsīr</i>) for that is that the man alleges a <i>dayn</i> owed by the man, ⁵ so he [the alleged debtor] says: I owe him nothing (<i>mālahu qibalī shay^{un}</i>). Then the demander (<i>al-ṭālib</i>) furnishes <i>bayyina</i> about what is owed to him (<i>‘alā mālahu</i>), ⁶ but the other furnishes <i>bayyina</i>	1169 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا أَقْبَلُ مِنْهُ بَعْدَ الْإِنْكَارِ مَخْرَجًا. وَتَفْسِيرُ ذَلِكَ أَنَّ الرَّجُلَ يَدَّعِي قَبْلَ الرَّجُلِ الدَّيْنَ فَيَقُولُ: مَا لَهُ قِبَلِي شَيْءٌ. فَيَقِيمُ الطَّالِبُ الْبَيِّنَةَ عَلَى مَا لَهُ،

⁴ Al-Shāfi‘ī drives the point home: upon refusal of the defendant to swear against wrongdoing, the claimant gets nothing until he, himself, swears to the defendant’s wrongdoing. The defendant’s refusal to swear is not alone sufficient to grant the claimant his claimed right.

⁵ The phrase “*lī qibalahū dayn*” means “he owes me a debt, he is indebted to me” (Hans Wehr, 4th ed., 867-8, s.v. “qibal”). In other words, “qibalahū” is simply a synonym for “alayhi”.

⁶ I have preserved Ḥassūn’s vowelling (*‘alā mālahu*; as opposed to *‘alā mālihi* as one might expect) here, though I cannot yet claim to comprehend it. All the *Umm* editions I have referenced have

that he had paid it to him in full (<i>qad awfāhu iyyāhu</i>). ⁷	وَيَقِيمُ الْآخِرُ الْبَيِّنَةَ أَنَّهُ قَدْ أَوْفَاهُ إِيَّاهُ.
1170 – And Abū Ḥanīfa said: The one of whom the demand is made (<i>al-maṭlūb</i>) is genuine (<i>ṣādiq^{um}</i>) in what he said: I owe nothing (<i>laysa qibalī shay^{um}</i>). But this, his <i>qawl</i> , is not a giving-the-lie (<i>ikdhāb</i>) to his [own] witnesses about [his] innocence (<i>‘alā al-barā’ati</i>) [i.e., his first claim does not contradict his later <i>bayyina</i>].	1170 – وَقَالَ أَبُو حَنِيفَةَ: الْمَطْلُوبُ صَادِقٌ بِمَا قَالَ: لَيْسَ قِبَلِي شَيْءٌ. وَلَيْسَ قَوْلُهُ هَذَا بِإِكْذَابٍ لِشُهُودِهِ عَلَى الْبَرَاءَةِ.
1171 – Al-Shāfi‘ī, may God have mercy upon him, said: And when a man claims a <i>dayn</i> against a man, and the <i>mudda’ā ‘alayhi</i> denies [it] (<i>ankara</i>), so the <i>mudda’ī</i> furnishes <i>bayyina</i> against him, then the one testified against (<i>al-mashhūdu ‘alayhi</i>) produces a <i>makhraj</i> from that for which he was testified against; I accept it [the <i>makhraj</i>] from him. And his denial of the <i>dayn</i> is not a giving-the-lie (<i>ikdhāb</i>) to the <i>bayyina</i> ; for he is truthful (<i>ṣādiq^{um}</i>) that he owes nothing so far as may be seen (<i>fi’l-zāhiri</i>), if he produces the <i>makhraj</i> pertaining to it. ⁸ And perhaps he desired, first, to save him(self?) the burden (<i>yaqṭa’a ‘anhu al-mu’nata</i>). ⁹	1171 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا ادَّعَى الرَّجُلُ عَلَى الرَّجُلِ دَيْنًا فَأَنْكَرَ الْمُدَّعَى عَلَيْهِ، فَأَقَامَ عَلَيْهِ الْمُدَّعِي بَيِّنَةً فَجَاءَ الْمَشْهُودُ عَلَيْهِ بِمَخْرَجٍ مِمَّا شُهِدَ بِهِ عَلَيْهِ قَبْلَتُهُ مِنْهُ، وَلَيْسَ إِنْكَارُهُ الدَّيْنَ إِكْذَابًا لِلْبَيِّنَةِ، فَهُوَ صَادِقٌ أَنَّهُ لَيْسَ عَلَيْهِ شَيْءٌ فِي الظَّاهِرِ إِذَا جَاءَ بِالْمَخْرَجِ مِنْهُ، وَلَعَلَّهُ أَرَادَ أَوَّلًا أَنْ يَقْطَعَ عَنْهُ الْمُؤَنَةَ.

[ماله قبلي شيء] and [فَيَقِيمُ الطَّالِبُ الْبَيِّنَةَ عَلَى مَالِهِ]; so does al-Afghānī in his Shaybānī Version. Even Rāḍī’s edition of the *Mabsūṭ* (30:163) preserves the form [ماله], which I am unable to make sense of. Al-Sarakhsī’s explanation of Ibn Abī Laylā’s *tafsīr*, however, and §1170 — where Abū Ḥanīfa says the defendant is to be believed when he said (لَيْسَ قِبَلِي شَيْءٌ), or “I owe nothing” — makes it clear that *mālahu* means, simply, *mā lahu*, though I cannot understand why *mā* and *lahu* are consistently combined.

⁷ Ibn Abī Laylā’s problem with this, and al-Sarakhsī (*Mabsūṭ*, 30:163) makes it clear, is that the second statement of the defendant contradicts his first; i.e., first he says “I never owed him anything,” then he claims “I already paid him what I owed him,” and provides *bayyina* for that.

⁸ That is to say, if there has been a *bayyina*-backed *makhraj* all along, did he really owe the *dayn* in the first place? NB: Both the Būlāq and Maṭraḥī have (إِذَا جَاءَ بِالْمَخْرَجِ مِنْهُ), while Ḥassūn has (إِذَا جَاءَ (الْمَخْرَجِ مِنْهُ)), without noting the divergence. I have preferred the former.

⁹ In other words, he may simply have denied the charge because the real situation would be too difficult to explain, or witnesses too difficult to find, etc. But once the claimant persisted and brought *bayyina* against him, he had to take action and produce *bayyina* for the *makhraj* he had all along.

1172 – And when a man alleges a <i>da'wā</i> against (<i>qibala</i>) a man, and he [the defendant] says: I have the <i>makhraj</i>; then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: This is not, according to me, an <i>iqrār</i>. He is only saying: I have the exoneration (<i>al-barā'atu</i>). And there might be, according to him, <i>barā'a</i> as pertains to the <i>ḥaqq</i> and as pertains to the <i>bātil</i>. And he [Abū Yūsuf] embraces this [doctrine].	1172 – وَإِذَا ادَّعَى رَجُلٌ قَبْلَ رَجُلٍ دَعْوَى فَقَالَ: عِنْدِي الْمَخْرَجُ، فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: لَيْسَ هَذَا عِنْدِي بِإِقْرَارٍ، إِنَّمَا يَقُولُ: عِنْدِي الْبَرَاءَةُ. وَقَدْ تَكُونُ عِنْدَهُ الْبَرَاءَةُ مِنَ الْحَقِّ وَمِنَ الْبَاطِلِ. وَبِهَذَا يَأْخُذُ.
1173 – But Ibn Abī Laylā used to say: This is an <i>iqrār</i> [e.g., of an original <i>dayn</i>]. And if he brings forth a <i>makhraj</i>... [the obvious consequence]. And if not; I impose the <i>da'wā</i> upon him.¹⁰	1173 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هَذَا إِقْرَارٌ. فَإِنْ جَاءَ بِمَخْرَجٍ وَإِلَّا الزَّمَمُ الدَّعْوَى.
1174 – And Abū Ḥanīfa says: If he does not bring the <i>makhraj</i>, the <i>da'wā</i> is not imposed upon him except by <i>bayyina</i>.	1174 – وَأَبُو حَنِيفَةَ يَقُولُ: إِنْ لَمْ يَأْتِ بِالْمَخْرَجِ لَمْ تَلْزَمَهُ الدَّعْوَى إِلَّا بَيِّنَةً.
1175 – Al-Shāfi'ī, may God have mercy upon him, said: And when a man claims a <i>ḥaqq</i> against a man, and the <i>mudda'ā 'alayhi</i> says: I have, from it, the <i>makhraj</i>, so the <i>mudda'ī</i> asks of the <i>qāḍī</i> that he treat this as an <i>iqrār</i> by which he might take it [his alleged due], unless he [the <i>mudda'ā 'alayhi</i>] produces the <i>makhraj</i> from it; this is not an <i>iqrār</i> — because the <i>makhraj</i> might, in his view (<i>indahū</i>), consist in that he not acknowledge it, while no <i>bayyina</i> is found against him. And the <i>mudda'ī</i> does not take [his alleged due] except by <i>bayyina</i> which he confirms (<i>yuthbituhā</i>); and the <i>makhraj</i> is accepted from the <i>mudda'ā 'alayhi</i>, even if he [the <i>mudda'ī</i>] testifies against it.	1175 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا ادَّعَى الرَّجُلُ عَلَى الرَّجُلِ حَقًّا، فَقَالَ الْمُدَّعَى عَلَيْهِ: عِنْدِي مِنْهَا الْمَخْرَجُ. فَسَأَلَ الْمُدَّعِيَ الْقَاضِيَ أَنْ يَجْعَلَ هَذَا إِقْرَارًا يَأْخُذُهُ بِهِ إِلَّا أَنْ يَجِيءَ مِنْهُ بِالْمَخْرَجِ، فَلَيْسَ هَذَا بِإِقْرَارٍ؛ لِأَنَّهُ قَدْ يَكُونُ عِنْدَهُ الْمَخْرَجُ بِأَنْ لَا يُقَرَّرَ بِهِ، وَلَا يُوجَدَ عَلَيْهِ بَيِّنَةٌ، وَلَا يَأْخُذُ الْمُدَّعِيَ إِلَّا بَيِّنَةٌ يُثْبِتُهَا وَيُقْبَلُ مِنَ الْمُدَّعَى عَلَيْهِ الْمَخْرَجُ وَإِنْ شَهِدَ عَلَيْهِ.

¹⁰ Al-Sarakhsī (*Mabsūṭ*, 30:163; Afghānī, 162, n.1) explains: “Because the *makhraj* from it is only realized after the entering-into of it (*al-dukhūl fihā*); and this, and his saying ‘I paid it to him in full’, or ‘he absolved me of it’, are one and the same. And that is an *iqrār* of the *aṣl* of the *māl*. But we say: He claims the *makhraj* from his *da'wā*, not from the *māl*; and that is not an *iqrār* of the *māl* in a clear and indicative fashion (*ṣarīḥ^{an} dalālat^{an}*). And likewise do we say regarding the *ibrā'*; for if he says: He absolved me from this *da'wā* — that is not an *iqrār* of the *māl*. Then the *makhraj* from the *da'wā* is through explanation regarding the manner of the invalidity in it (*bayān wajhi al-fasādi fihī*). And the *wajh* of the *fasād* is non-specific (*ghayr muta'ayyin*); that might be through *bayān* that it was never an absolute obligation (*mā kāna wājib^{an} qatṭu*); and that might be through *bayān* of the falling-away after the obligation (*al-musqīṭi ba'da al-wujūbi*) — and with probability (*ma'a al-iḥtimālī*), the *māl* is not obliged (*lā yajib*).”

1176 – He said: And when the man confesses before the <i>qāḍī</i> to something, and the <i>qāḍī</i> does not judge against him by means of it, and he [the <i>qāḍī</i>] does not register it in his <i>dīwān</i>, then he [the claimant] brings legal action against him [the confessor] to him [the <i>qāḍī</i>], regarding it [the <i>iqrār</i>], after that; then indeed Abū Ḥanīfa, may God have mercy upon him, said: When the <i>qāḍī</i> remembers that [<i>iqrār</i>], he enacts it against him (<i>amḍāhu ‘alayhi</i>). And he [Abū Yūsuf] embraces this [doctrine].¹¹	1176 – قَالَ: وَإِذَا أَقَرَّ الرَّجُلُ عِنْدَ الْقَاضِي بِشَيْءٍ فَلَمْ يَقْضِ بِهِ الْقَاضِي عَلَيْهِ وَلَمْ يُثَبِّتْهُ فِي دِيْوَانِهِ ثُمَّ خَاصَمَهُ إِلَيْهِ فِيهِ بَعْدَ ذَلِكَ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ قَالَ: إِذَا ذَكَرَ الْقَاضِي ذَلِكَ أَمْضَاهُ عَلَيْهِ. وَبِهَذَا يَأْخُذُ.
1177 – But Ibn Abī Laylā, may God have mercy upon him, used to say: He does not enact that [<i>iqrār</i>] against him – even if he is mindful of it – until he records it [the <i>iqrār</i>] in his <i>dīwān</i>.¹²	1177 – وَكَانَ ابْنُ أَبِي لَيْلَى رَحِمَهُ اللَّهُ يَقُولُ: لَا يُمْضِي ذَلِكَ عَلَيْهِ، وَإِنْ كَانَ ذَاكِرًا لَهُ حَتَّى يُثَبِّتَهُ فِي دِيْوَانِهِ.
1178 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And when the man confesses before the <i>hākim</i>, and the <i>hākim</i> registers his <i>iqrār</i> in his <i>dīwān</i>, or he is mindful of his <i>iqrār</i> but does not register in his <i>dīwān</i>; it is one and the same (<i>fa-sawā‘um</i>): if he [the claimant] is of those who take [their due] by means of the <i>iqrār</i> in his [the <i>qāḍī</i>’s] presence, he takes [his due] by means of it (<i>akhadhahu bihi</i>). And there is no <i>ma’nā</i> to the <i>dīwān</i> except for recollection (<i>al-dhikr</i>). And when the <i>qāḍī</i> is mindful; it is one and the same (<i>fa-sawā‘um</i>), whether it is in the <i>dīwān</i> or it is not.¹³	1178 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَقَرَّ الرَّجُلُ عِنْدَ الْحَاكِمِ فَأُتِبَتِ الْحَاكِمُ إِقْرَارُهُ فِي دِيْوَانِهِ أَوْ كَانَ ذَاكِرًا لِإِقْرَارِهِ وَلَمْ يُثَبِّتْ فِي دِيْوَانِهِ فَسَوَاءٌ. فَإِنْ كَانَ مِمَّنْ يَأْخُذُ بِالْإِقْرَارِ عِنْدَهُ أَخَذَهُ بِهِ وَلَا مَعْنَى لِلدِّيْوَانِ إِلَّا الذِّكْرُ. وَإِذَا كَانَ الْقَاضِي ذَاكِرًا، فَسَوَاءٌ كَانَ فِي الدِّيْوَانِ أَوْ لَمْ يَكُنْ.
1179 – Al-Rabī said: And al-Shāfi‘ī used to permit (<i>yujīzu</i>) the <i>iqrār</i> before the <i>qāḍī</i> – he only disliked to speak of his <i>ijāza</i>, due to the iniquitous comportment of some of the <i>qāḍīs</i> (<i>li-ḥālī ḡalimi ba‘ḍi al-quḍātī</i>).¹⁴	1179 – قَالَ الرَّبِيعُ: وَكَانَ الشَّافِعِيُّ يُجِيزُ الْإِقْرَارَ عِنْدَ الْقَاضِي، وَإِنَّمَا كَرِهَ أَنْ يَتَكَلَّمَ بِإِجَازَتِهِ لِحَالِ ظُلْمِ بَعْضِ الْقُضَاةِ.

¹¹ To Abū Ḥanīfa, the *qāḍī*’s memory of the past *iqrār* is what is relevant; so long as he remembers it, he may base judgment upon it – whether or not said *iqrār* was documented.

¹² To Ibn Abī Laylā, the *iqrār* may as well have never happened unless it is registered in the *dīwān*; even if the *qāḍī* remembers it, he may not base judgment upon it.

¹³ To al-Shāfi‘ī, then, is the middle ground: when the *qāḍī* forgets, he refers to the *dīwān*; when he is mindful, it suffices that he rely on memory. The only way then, that the claimant will not benefit from the previous *iqrār* of the defendant, is if the *qāḍī* both forgets, and fails to register, the previous *iqrār*.

¹⁴ This is not the first time al-Rabī has suggested that al-Shāfi‘ī refrained from making his opinion known on a particular legal issue due to potentially negative social (or in this case, even political) consequences. In the *Bāb al-Ghaṣb* (§20), he withheld publishing his opinion “that there is no *ḡamān* upon the artisans (*al-ṣunnā’i*) except for that which their hands criminally incur.” The motive, al-Rabī informs us, was “out of fear of the artisans.” Cf. §309 as well.

Bāb al-Firya

Chapter on Slander (<i>al-Firya</i>) ¹	بَابُ الْفِرْيَةِ
1180 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And when a man says to a man of the Arabs: O, Nabataean (<i>yā nabaṭī</i>)! Or: You are not of the Banī so-and-so; to a tribe. Then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: There is no <i>ḥadd</i> [enjoined] upon him for that. This, his <i>qawl</i> , is merely like his saying: O, Kūfan! Or: O, Baṣran! Or: O, Syrian!	1180 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا قَالَ رَجُلٌ لِرَجُلٍ مِنَ الْعَرَبِ: يَا نَبْطِي؛ أَوْ: لَسْتَ مِنْ بَنِي فُلَانٍ. لِقَبِيلَةٍ. فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: لَا حَدَّ عَلَيْهِ فِي ذَلِكَ. وَإِنَّمَا قَوْلُهُ هَذَا مِثْلُ قَوْلِهِ: يَا كُوفِي، يَا بَصْرِي، يَا شَامِي.
1181 – Abū Yūsuf transmitted to us (<i>ḥaddathanā</i>) just that, on the authority of the one who transmitted to him, on ‘Aṭā’ b. Abī Rabāḥ, on Ibn ‘Abbās.	1181 – حَدَّثَنَا أَبُو يُوسُفَ عَمَّنْ حَدَّثَهُ، عَنْ عَطَاءِ بْنِ أَبِي رَبَاحٍ، عَنْ ابْنِ عَبَّاسٍ بِذَلِكَ.
1182 – And as for his <i>qawl</i> : You are not from the Banī so-and-so; he is telling the truth. Indeed, he is not of the son of so-and-so, of his loins (<i>li-ṣulbihi</i>). But he is only of the son of the son. Verily, the <i>qadhif</i> , in this instance, falls only upon the <i>Ahl al-Shirk</i> , who were in the <i>Jāhiliyya</i> . And he [Abū Yūsuf] embraces this [doctrine].	1182 – وَأَمَّا قَوْلُهُ: لَسْتَ مِنْ بَنِي فُلَانٍ. فَهُوَ صَادِقٌ لَيْسَ هُوَ مِنْ وَلَدِ فُلَانٍ لِصُلْبِهِ، وَإِنَّمَا هُوَ مِنْ وَلَدِ الْوَلَدِ؛ إِنَّ الْقَذْفَ هَهُنَا إِنَّمَا وَقَعَ عَلَى أَهْلِ الشِّرْكِ الَّذِينَ كَانُوا فِي الْجَاهِلِيَّةِ. وَبِهَذَا يَأْخُذُ.
1183 – But Ibn Abī Laylā used to say: Regarding them both, together: the <i>ḥadd</i> .	1183 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: فِيهِمَا جَمِيعًا الْحَدُّ.
1184 – Al-Shāfi‘ī, may God have mercy upon him, said: And when a man says to a man of the Arabs: O, Nabataean (<i>yā nabaṭī</i>)! I detain him (<i>waqaftuhu</i>). And if he says: I meant (<i>‘anaytu</i>) “Nabataean of house (<i>nabaṭī al-dār</i>);” or “Nabataean of tongue (<i>nabaṭī al-lisān</i>);” I make him swear by God he did not intend to dissociate him (<i>yanfiyahu</i>) [i.e., from his lineage], and ascribe his origin (<i>yansubahu</i>) to the Nabaṭ. And if he swears, I forbid him (<i>nahaytuhu</i>) from saying that <i>qawl</i> , and I educate him (<i>addabtuhu</i>) as to the offense (<i>al-adhā</i>). ² But	1184 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا قَالَ رَجُلٌ لِرَجُلٍ مِنَ الْعَرَبِ: يَا نَبْطِي. وَقَفْتُهُ. فَإِنْ قَالَ: عَنَيْتُ نَبْطِي الدَّارَ؛ أَوْ نَبْطِي اللِّسَانَ. أَحْلَفْتُهُ بِاللَّهِ مَا أَرَادَ أَنْ يَنْفِيَهُ وَيَنْسُبَهُ إِلَى النَّبْطِ، فَإِنْ حَلَفَ نَهَيْتُهُ عَنْ أَنْ يَقُولَ ذَلِكَ الْقَوْلَ وَادَّبْتُهُ عَلَى الْأَذَى. وَإِنْ أَبَى أَنْ يَحْلِفَ

¹ (Hassūn, vol.9, pt.14, 200-4; Schacht: *Tr. I*, 208-213).

² The special significance to an Arab being calumniated as a Nabataean would have differed in different times and places. Situated in 2nd and 3rd century Islamic Kūfa, however, we may assume

if he refuses to swear, I make the one to whom it [the offense] was said (*al-maqūla lahu*) swear: He had intended to dissociate you. And if he swears, I ask the one who spoke it (*al-qā'il*): From whom did he dissociate. And if he says: I did not dissociate him, and I did not say what he said; I treat the *qadhif* as falling upon the mother of the *maqūl lahu*. And if she is free-born, Muslim, I inflict the *ḥadd* upon him if she demands the *ḥadd*. And if she pardons, then she has no right to [demand] the *ḥadd*. And if she is deceased, then to her son belongs the right to administer the *ḥadd* (*al-qiyāmu bi'l-ḥadd*).

But if he says: I meant *qadhif* of the *Jāhili*-era father; I make him swear that he did not intend by it anyone of the *Ahl al-Islām*, and I punish him with *ta'zīr* ('*azzartuhu*), but I do not inflict the *ḥadd* upon him (*lam aḥuddahu*). And if he says: You are not of the Banī so-and-so of his grandfather (*li-jaddihi*), then he says: I merely meant "you are not of his sons of his loins (*banihi li-ṣulbihi*), you are merely of the sons of his sons;" I don't accept that from him, and I treat him as a *qadhif* to his [the *maqūl lahu*'s] mother. And if she demands the *ḥadd*, and she is free, that [right] belongs to her — unless he says: I dissociated the highest grandfather (*al-jadd al-a'lā*), who himself was a *Jāhili*. Then I punish him with *ta'zīr*, but do not inflict the *ḥadd* upon him; because the *qadhif* fell upon a (f.) polytheist (*waqa'a 'alā mushrikat^m*).

1185 – And when the man says to a man: You are not the son of so-and-so, and his mother is a female slave (*amat^m*) or a Christian (*naṣrāniyyat^m*), while his father is a Muslim; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: There is no *ḥadd* [imposed] upon the *qadhif*. The *qadhif* in this instance has

أَحْلَفْتُ الْمَقُولَ لَهُ، لَقَدْ أَرَادَ نَفْيَكَ، فَإِذَا حَلَفَ سَأَلْتُ الْقَائِلَ عَمَّنْ نَفَى. فَإِذَا قَالَ: مَا نَفَيْتُهُ، وَلَا قُلْتُ مَا قَالَ، جَعَلْتُ الْقَذْفَ وَاقِعًا عَلَى أُمِّ الْمَقُولِ لَهُ، فَإِنْ كَانَتْ حُرَّةً مُسْلِمَةً حَدَّذْتُهَ إِنْ طَلَبَتْ الْحَدَّ فَإِنْ عَفَتْ فَلَا حَدَّ لَهَا. وَإِنْ كَانَتْ مَيِّتَةً فَلَا بِنَهَا الْقِيَامُ بِالْحَدِّ.

وَإِنْ قَالَ: عَنَيْتُ بِالْقَذْفِ الْأَبَ الْجَاهِلِيَّ. أَحْلَفْتُهُ مَا عَنَى بِهِ أَحَدًا مِنْ أَهْلِ الْإِسْلَامِ وَعَزَّرْتُهُ وَلَمْ أَحُدَّهُ. وَإِنْ قَالَ: لَسْتُ مِنْ بَنِي فَلَانٍ لِجَدِّهِ، ثُمَّ قَالَ: إِنَّمَا عَنَيْتُ لَسْتُ مِنْ بَنِيهِ لِصُلْبِهِ إِنَّمَا أَنْتَ مِنْ بَنِي بَنِيهِ. لَمْ أَقْبَلْ ذَلِكَ مِنْهُ وَجَعَلْتُهُ قَاذِفًا لِأُمِّهِ. فَإِنْ طَلَبْتَ الْحَدَّ وَهِيَ حُرَّةٌ كَانَ لَهَا ذَلِكَ، إِلَّا أَنْ يَقُولَ: نَفَيْتُ الْجَدَّ الْأَعْلَى الَّذِي هُوَ جَاهِلِيٌّ. فَأَعَزَّرُهُ وَلَا أَحُدُّهُ؛ لِأَنَّ الْقَذْفَ وَقَعَ عَلَى مُشْرِكَةٍ.

1185 – وَإِذَا قَالَ الرَّجُلُ لِلرَّجُلِ: لَسْتُ ابْنَ فَلَانٍ. وَأُمُّهُ أَمَةٌ أَوْ نَصْرَانِيَّةٌ وَأَبُوهُ مُسْلِمٌ؛ فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا حَدَّ عَلَى الْقَاذِفِ، إِنَّمَا وَقَعَ الْقَذْفُ هَهُنَا عَلَى الْأُمِّ،

that the implications were: 1) that the target was of "local" non-Arab (Aramaic) genesis; and 2) that his progenitors were city folk or farmers (rather than free-roaming Bedouin). See the *EF*², s.v. "Nabaṭ," for conceptions of the Anbāṭ in early Islamic Arabic literature. See also Lane (i.2759-60), s.v. *nabaṭ*; among other things, Lane notes that after its usage as a descriptor for farm-folk from Iraq, it was "afterwards applied to *mixed people*, or *people of the lowest*, or *basest*, or *meanest sort*; or *the refuse of men*; *the vulgar sort thereof* [...]"

only fallen upon the mother, and there is no <i>ḥadd</i> [imposed] upon her <i>qādhif</i> . And he [Abū Yūsuf] embraces it.	وَلَا حَدٌّ عَلَى قَاذِفِهَا. وَبِهِ يَأْخُذُ.
1186 – But Ibn Abī Laylā used to say regarding that: Upon him is [imposed] the <i>ḥadd</i> .	1186 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ فِي ذَلِكَ: عَلَيْهِ الْحَدُّ.
1187 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the man dissociates (<i>naḥā</i>) the man from his father, and the mother of the dissociated one (<i>ummu al-manfiyyi</i>) is a <i>dhimmiyya</i> , or an <i>ama</i> ; there is no <i>ḥadd</i> [imposed] upon him — because the <i>qadhif</i> falls only upon one to whom no <i>ḥadd</i> belongs. However, he is taught a lesson about offending the people (<i>yunakkalu ʿan adhā al-nāsi</i>) by <i>taʿzīr</i> , not <i>ḥadd</i> .	1187 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا نَفَى الرَّجُلُ الرَّجُلَ مِنْ أَبِيهِ، وَأُمُّ الْمَنْفِيِّ ذِمِّيَّةٌ، أَوْ أُمَّةٌ فَلَا حَدَّ عَلَيْهِ؛ لِأَنَّ الْقَذْفَ إِنَّمَا وَقَعَ عَلَى مَنْ لَا حَدَّ لَهُ، وَلَكِنَّهُ يُنَكَّلُ عَنْ أَذَى النَّاسِ بِتَعْزِيرٍ لَا حَدٍّ.
1188 – He [Abū Yūsuf] said: And when a man slanders (<i>qadhafa</i>) a man, and says: O, son of two adulterers (<i>al-zāniyayni</i>), and the parents have died; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: There is only one <i>ḥadd</i> [imposed] upon him, because it [<i>zāniyayn</i>] is one word. And he [Abū Yūsuf] embraces this [doctrine].	1188 – قَالَ: وَإِذَا قَذَفَ رَجُلٌ رَجُلًا فَقَالَ: يَا ابْنَ الزَّانِيَيْنِ. وَقَدْ مَاتَ الْأَبَوَانِ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: إِنَّمَا عَلَيْهِ حَدٌّ وَاحِدٌ؛ لِأَنَّهَا كَلِمَةٌ وَاحِدَةٌ. وَبِهَذَا يَأْخُذُ.
1189 – I [Abū Yūsuf] said: ³ If he divides (<i>farraqa</i>) the <i>qawl</i> or combines it; it is one and the same (<i>sawāʿun</i>), and upon him is [imposed] one <i>ḥadd</i> .	1189 – قُلْتُ: إِنْ فَرَّقَ الْقَوْلَ أَوْ جَمَعَهُ فَهُوَ سَوَاءٌ، وَعَلَيْهِ حَدٌّ وَاحِدٌ.
1190 – But Ibn Abī Laylā used to say: Upon him are [imposed] two <i>ḥadds</i> . And he [used to] beat him the two <i>ḥadds</i> in a single session (<i>fī maqāmⁱⁿ wāḥidⁱⁿ</i>). And he did that in the mosque.	1190 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: عَلَيْهِ حَدَّانِ وَيَضْرِبُهُ الْحَدَّيْنِ فِي مَقَامٍ وَاحِدٍ، وَقَدْ فَعَلَ ذَلِكَ فِي الْمَسْجِدِ.
1191 – Al-Shāfiʿī, may God have mercy upon him, said: And when the man says to the man: O, son of two <i>zānīs</i> , and his parents are deceased, free, Muslims; upon him are [imposed] two <i>ḥadds</i> . But he is not beaten them both in a single session	1191 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا قَالَ الرَّجُلُ لِلرَّجُلِ: يَا ابْنَ الزَّانِيَيْنِ، وَأَبَوَاهُ حُرَّانِ مُسْلِمَانِ مَيِّتَانِ، فَعَلَيْهِ حَدَّانِ، وَلَا يُضْرِبُهُمَا فِي

³ Note that the Shaybānī Version does not contain the introductory *qultu*; although it is apparent from the Shaybānī Version that the voice of Abū Yūsuf is intended (the additional opinion following, as it does, upon *wa bihi naʾkhudhu*). Along with the changing of *yaʾkhudhu* to *naʾkhudhu*, and other features we have noticed, this may be seen as providing more support for the thesis that both texts as they have come down to us are exactly what they claim to be: 1) the *riwāya* of Muḥammad b. al-Ḥasan; and 2) the same, as transmitted, critiqued, and expanded/commented upon by al-Shāfiʿī, and then transmitted by al-Rabʿī, with his comments.

(mawqif ^m wāhid ⁱⁿ); rather, he is inflicted with the <i>ḥadd</i> , then detained (<i>yuhbasu</i>) until — if his skin has recovered — he is inflicted with a second <i>ḥadd</i> (<i>ḥudda ḥadd^{an} thāniy^{an}</i>). ⁴	مَوْقِفٍ وَاحِدٍ؛ وَلَكِنَّهُ يُحَدُّ ثُمَّ يُحْبَسُ حَتَّى إِذَا بَرَأَ جِلْدُهُ حَدًّا ثَانِيًا.
1192 – And likewise, whether he divided the <i>qawl</i> , or combined it, or slandered (<i>qadhafa</i>) a group by a single word, or by distinct words; to each one of them [the calumniated] belongs his [right to] <i>ḥadd</i> .	1192 – وَكَذَلِكَ لَوْ فَرَّقَ الْقَوْلَ أَوْ جَمَعَهُ، أَوْ قَذَفَ جَمَاعَةً بِكَلِمَةٍ وَاحِدَةٍ أَوْ بِكَلَامٍ مُتَفَرِّقٍ فَلِكُلِّ وَاحِدٍ مِنْهُمْ حَدٌّ.
1193 – Don't you see/opine (<i>alā tarā</i>) that, if he slandered three for <i>zinā</i> , and one of them does not demand the <i>ḥadd</i> , and another one confesses to <i>zinā</i> ; he is inflicted — due to the third <i>ṭālib</i> [demanding his right] — with a complete <i>ḥadd</i> ?	1193 – أَلَا تَرَى أَنَّهُ لَوْ قَذَفَ ثَلَاثَةً بِالزِّنَا فَلَمْ يَطْلُبْ وَاحِدَ الْحَدِّ وَأَقَرَّ آخَرُ بِالزِّنَا حَدًّا لِلطَّالِبِ الثَّلَاثِ حَدًّا تَامًّا.
1194 – And if they were partners (<i>shurakā'</i>) in the <i>ḥadd</i> , then it would not have been right that he should be beaten except a third of a <i>ḥadd</i> ; because two <i>ḥadds</i> had fallen away from him — one of them due to the confession (<i>i'tirāf</i>) of its <i>ṣāhib</i> , and the other due to its <i>ṣāhib</i> 's abandoning the demand [for <i>ḥadd</i>] and his pardon (<i>'afwihi</i>). And when the <i>ḥadd</i> is a <i>ḥaqq</i> belonging to a Muslim, then how can it be nullified by any circumstance (<i>yabṭulu bi-ḥāl^m</i>)? ⁵	1194 – وَلَوْ كَانُوا شُرَكَاءَ فِي الْحَدِّ مَا كَانَ يَنْبَغِي أَنْ يُضْرَبَ إِلَّا ثُلُثَ حَدٍّ؛ لِأَنَّ حَدَّيْنِ قَدْ سَقَطَا عَنْهُ أَحَدُهُمَا بِاعْتِرَافِ صَاحِبِهِ، وَالْآخَرُ بِتَرْكِ صَاحِبِهِ الطَّلَبَ وَعَفْوِهِ. وَإِذَا كَانَ الْحَدُّ حَقًّا لِمُسْلِمٍ فَكَيْفَ يَبْطُلُ بِحَالٍ؟
1195 – Have you considered (<i>ara'ayta</i>) [what would happen] if a man killed three, or ten, together; would there not be [imposed] upon him, for each one of them, a <i>diya</i> , if he killed them mistakenly (<i>khaṭa^{an}</i>)? And [would there not be imposed] upon him retaliation (<i>al-qawadu</i>), if he killed them with deliberate intent, and a <i>diya</i> for each one who did not retaliate upon him (<i>lam yaqud minhu</i>), because they could find no path to	1195 – أَرَأَيْتَ لَوْ قَتَلَ رَجُلٌ ثَلَاثَةً أَوْ عَشْرَةً مَعًا أَمَا كَانَ عَلَيْهِ لِكُلِّ وَاحِدٍ مِنْهُمْ دِيَةٌ إِنْ قَتَلَهُمْ خَطَأً، وَعَلَيْهِ الْقَوْدُ إِنْ قَتَلَهُمْ عَمْدًا وَدِيَةٌ لِكُلِّ مَنْ لَمْ يَقْدَمْ مِنْهُ؛ لِأَنَّهُمْ لَا يَجِدُونَ إِلَى الْقَوْدِ سَبِيلًا.

⁴ Notice, as we have seen many times before, al-Shāfi'ī's deliberate choice of synonym (*mawqif* rather than *maqām*). Again, this bears witness to one of the aims of this work as a commentary. We might conjecture, as well, as to whether or not, generally speaking, his choice of synonyms betrays a regional preference of terms (what is more common in Egypt, say, than in Iraq). More likely in this case he is simply making sure everything is perfectly clear, and precise. Certainly a concern for precision is evident throughout the text, from start to finish (note, e.g., his insertion here of precise conditions for the parents).

⁵ This is a very interesting, mathematical *reductio* to doctrinal inconsistency. The suggestion is that, in the hypothetical opponent's *shurakā'* thesis, the *qādhif* would receive the full number of lashes for *qadhif*, not a third of them (as though the *ḥadd* lashings were apportioned into shares among *shurakā'*). Thus, it can only be one full number of stripes for each person impugned.

retaliation (<i>lā yajidūna ilā al-qawadi sabīl^m</i>) [i.e., once he was killed]? ⁶	
1196 – And when the man says to the man: O, son of two <i>zānīs</i> ; or the woman says to the man: O, son of two <i>zānīs</i> ; and the two parents are living; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: When they are both living in Kūfa; there is no <i>ḥadd</i> [imposed] upon their [d.] <i>qādhif</i> , unless they both come along demanding that. ⁷ And the man is not beaten two <i>ḥadds</i> in a single session (<i>maqām^m wāḥid^m</i>), even if they were to both be enjoined upon him, together. And he [Abū Yūsuf] embraces it.	1196 – وَإِذَا قَالَ الرَّجُلُ لِلرَّجُلِ: يَا ابْنَ الزَّانِيَيْنِ، أَوْ قَالَتِ الْمَرْأَةُ لِلرَّجُلِ: يَا ابْنَ الزَّانِيَيْنِ، وَالْأَبَوَانِ حَيَّانِ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: إِذَا كَانَا حَيِّينِ بِالْكُوفَةِ لَمْ يَكُنْ عَلَى قَاذِفِهِمَا الْحَدُّ إِلَّا أَنْ يَأْتِيَا يَطْلُبَانِ ذَلِكَ، وَلَا يُضْرَبُ الرَّجُلُ حَدَّيْنِ فِي مَقَامٍ وَاحِدٍ وَإِنْ وَجِبَا عَلَيْهِ جَمِيعًا. وَبِهِ يَأْخُذُ.
1197 – He [Abū Ḥanīfa/Abū Yūsuf?] said: But there is not, regarding this, ever, other than a single <i>ḥadd</i> .	1197 – قَالَ: وَلَا يَكُونُ فِي هَذَا أَبَدًا إِلَّا حَدٌّ وَاحِدٌ.
1198 – But Ibn Abī Laylā used to beat both of them, together, two <i>ḥadds</i> , in a single session (<i>maqām^m wāḥid^m</i>). And he beat the woman standing. And he beat both of them, two <i>ḥadds</i> , for a single word; and he administered the <i>ḥudūd</i> in the mosque.	1198 – وَكَانَ ابْنُ أَبِي لَيْلَى يَضْرِبُهُمَا جَمِيعًا حَدَّيْنِ فِي مَقَامٍ وَاحِدٍ، وَيَضْرِبُ الْمَرْأَةَ قَائِمَةً، وَيَضْرِبُهُمَا حَدَّيْنِ فِي كَلِمَةٍ وَاحِدَةٍ، وَيُقِيمُ الْحُدُودَ فِي الْمَسْجِدِ.
1199 – I [Abū Yūsuf, or Muḥammad b. al-Ḥasan] believe (<i>azunnu</i>) that Abū Ḥanīfa, may God Most High have mercy upon him, said: No, and nor is there [imposed] upon he who slanders (<i>qadhafa</i>) by a single word — or two words, or [against] a group, or singly (<i>furādā</i>) — other than a single <i>ḥadd</i> . For if one of them takes him, and he is inflicted with the <i>ḥadd</i> for him, it is [also] for the remainder that he slandered. [This] has reached us concerning the Messenger of God, may God bless and save him. And he [Abū Yūsuf] embraces it. ⁸	1199 – أَظُنُّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى قَالَ: لَا، وَلَا يَكُونُ عَلَى مَنْ قَذَفَ بِكَلِمَةٍ وَاحِدَةٍ، أَوْ كَلِمَتَيْنِ، أَوْ جَمَاعَةً، أَوْ فُرَادَى إِلَّا حَدٌّ وَاحِدٌ، فَإِنْ أَخَذَهُ بَعْضُهُمْ فَحَدُّ لَهُ كَانَ لِجَمِيعِ مَا قَذَفَ. بَلَّغْنَا عَنْ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ. وَبِهِ يَأْخُذُ.

⁶ Another distinct type of *reductio*: al-Shāfiʿī's reasoning as regards the case-at-hand is extended by *qiyās* to a related area of punishment, then shown to lead to *endoxa* judgments.

⁷ The significance of Kūfa, as Abū Ḥanīfa's own abode and juridical setting, is that we would presume the *qadhif*-event occurred there. Thus, if the living parents resided there as well, there would be no obstacle to their coming forth to demand their right.

⁸ Al-Afghānī (167, n.1) observes the unusual form of this sentence — starting abruptly with *balaghanā* — and he suggests some introductory words (such as *dhālika* or *nahwuhu*) may have been dropped from the original. We will note, however, that the same is the case in the *Umm* Version as in the Shaybānī Version. This means that either: 1) the peculiarity was in the source-

1200 – And he [Abū Ḥanīfa/Abū Yūsuf?] said: The <i>ḥudūd</i> are not to be administered in the mosques.	1200 – وَقَالَ: لَا تُقَامُ الْحُدُودُ فِي الْمَسَاجِدِ.
1201 – Al-Shāfiʿī said: And there are not to be administered upon a man two <i>ḥadd</i> s imposed — such as are incumbent upon him (<i>wajabā ʿalayhi</i>) — in a single <i>maqām</i> . Rather, he is inflicted with one of the two <i>ḥadd</i> s, then detained (<i>yuhbasu</i>) until he recovers, then he is inflicted with the other <i>ḥadd</i> . And he is not to be inflicted with the <i>ḥadd</i> in a mosque.	1201 – قَالَ الشَّافِعِيُّ: وَلَا يُقَامُ عَلَى رَجُلٍ حَدَّانِ وَجَبَا عَلَيْهِ فِي مَقَامٍ وَاحِدٍ، وَلَكِنَّهُ يُحَدُّ أَحَدُهُمَا، ثُمَّ يُحْبَسُ حَتَّى يَبْرَأَ، ثُمَّ يُحَدُّ الْآخَرُ، وَلَا يُحَدُّ فِي مَسْجِدٍ.
1202 – And whosoever slanders (<i>qadhafa</i>) the father of a man, while his father is living; he is not punished by the <i>ḥadd</i> for him, until it is the father who demands [it]. But when he dies, there belongs to the son the right to administer the <i>ḥadd</i> . And if he has a number of sons; for any such as take up the task (<i>qāma bihi</i>), he is inflicted with the <i>ḥadd</i> for him.	1202 – وَمَنْ قَذَفَ أَبَا رَجُلٍ، وَأَبُوهُ حَيٌّ لَمْ يُحَدَّ لَهُ حَتَّى يَكُونَ الْأَبُ الَّذِي يَطْلُبُ، وَإِذَا مَاتَ كَانَ لِلْإِبْنِ أَنْ يَقُومَ بِالْحَدِّ، وَإِنْ كَانَ لَهُ عَدَدُ بَنِينَ فَأَيُّهُمْ قَامَ بِهِ حُدُّ لَهُ.
1203 – And Abū Ḥanīfa, may God have mercy upon him, said: The man is not struck with two <i>ḥadd</i> s in a single <i>maqām</i> — even if they are both, together, incumbent upon him. Rather, one of them is administered upon him, then he is detained until the blow abates (<i>yakhiffu al-ḍarbu</i>), then he is struck the other <i>ḥadd</i> . And the two <i>ḥadd</i> s [combined] are only for <i>shurb</i> [<i>al-khamr</i>] and <i>qadhaf</i> , or <i>zinā</i> and	1203 – وَقَالَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ: لَا يُضْرَبُ الرَّجُلُ حَدَّيْنِ فِي مَقَامٍ وَاحِدٍ وَإِنْ وَجَبَا عَلَيْهِ جَمِيعًا، وَلَكِنَّهُ يُقِيمُ عَلَيْهِ أَحَدَهُمَا، ثُمَّ يُحْبَسُ حَتَّى يَخِفَّ الضَّرْبُ، ثُمَّ يُضْرَبُ الْحَدَّ الْآخَرَ، وَإِنَّمَا الْحَدَّانِ فِي شُرْبِ

text for both versions, thus making it necessarily quite ancient; or 2) the peculiarity evolved in the *Umm* Version, and was studiously duplicated by the scholar who carefully excerpted the opinions and comments of Abū Ḥanīfa and Abū Yūsuf, in order to reconstitute an “original” text. Already, based on accumulating indicants, this latter hypothesis is beginning to look less plausible. We ought also to consider that al-Sarakhsī’s *Mabsūṭ* incorporates a limited commentary on *masā’il* of the Shaybānī Version of our subject-text (*Mabsūṭ* 30:128-67, *Kitāb Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā*), with only the rarest mention of al-Shāfiʿī’s opinion (six times). It seems very likely indeed that the Shaybānī version was not only published very early on, but that it was widely transmitted or copied. Of particular note, however, is the fact that al-Nadīm does not list any similar title to a *Kitāb Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā*, and only to al-Shāfiʿī is attributed a *Kitāb Ikhtilāf al-ʿIrāqīyyīn* (*Fihrist*, 344). To Abū Yūsuf, however, are attributed — in addition to a number of treatises on individual substantive legal categories (*ṣalāt*, *ṣiyām*, *ghaṣb*, *ḥudūd*, etc.) — a dictated work (*imlāʾ*; said to contain 36 *kitābs* on what he developed via *ijtihād* (*mimmā farraʾahu Abū Yūsuf*), as transmitted by Bishr b. al-Walīd al-Qaḍī,); a *Kitāb Ikhtilāf al-Amṣār*; and a *Kitāb al-Jawāmiʿ* that “he compiled (*allafahu*) for Yaḥyā b. Khālīd, [and] which contains forty books in which are mentioned the disagreements of the people (*ikhtilāf al-nās*), and the opinion taken up by them (*al-raʾy al-maʾkhūdh bihi*).” Certainly this last collection might have included the disagreements of Abū Ḥanīfa and Ibn Abī Laylā, as may have the *Kitāb Ikhtilāf al-Amṣār* (although both jurists were resident in Kūfa).

<i>qadhif</i>, or <i>zinā</i> and <i>shurb</i>. And as for <i>qadhif</i>, all of it, and <i>shurb</i>, all of it, repeatedly (<i>mirār^{am}</i>); or <i>zinā</i>, repeatedly; there is only [imposed] upon him a single <i>ḥadd</i>.⁹	وَقَذَفٍ، أَوْ زِنًا وَقَذَفٍ، أَوْ زِنًا وَشُرْبٍ، فَأَمَّا قَذَفٌ كُلُّهُ وَشُرْبٌ كُلُّهُ مِرَارًا أَوْ زِنًا مِرَارًا، فَإِنَّمَا عَلَيْهِ حَدٌّ وَاحِدٌ.
1204 – He said: And if the two slandered parents (<i>al-abawāni al-maqdhufāni</i>) are both living; they are both in the status (<i>bi-manzilati</i>) of two deceased ones, according to the <i>qawl</i> of Ibn Abī Laylā.	1204 – قَالَ: وَلَوْ كَانَ الْأَبَوَانِ الْمَقْدُوفَانِ حَيَّيْنِ كَانَا بِمَنْزِلَةِ الْمَيِّتَيْنِ فِي قَوْلِ ابْنِ أَبِي لَيْلَى.
1205 – And as for the <i>qawl</i> of Abū Ḥanīfa: There belongs no <i>ḥaqq</i> to the [slandered] son, until the two parents [implicated by the <i>qādhif</i>], or one of them, comes along demanding his [the slanderer's] <i>qadhif</i>. And there is only [imposed] upon him a single <i>ḥadd</i> for that, all of it.	1205 – وَأَمَّا فِي قَوْلِ أَبِي حَنِيفَةَ: فَلَا حَقٌّ لِلْوَلَدِ حَتَّى يَجِيءَ الْوَالِدَانِ أَوْ أَحَدُهُمَا يَطْلُبُ قَذْفَهُ، وَإِنَّمَا عَلَيْهِ حَدٌّ وَاحِدٌ فِي ذَلِكَ كُلِّهِ.
1206 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And the men are beaten for the <i>ḥudūd</i> standing (<i>qiyām^{am}</i>), and for the <i>taʿzīr</i>. And their hands are left to them, that they protect themselves with them (<i>yattaqūna bihā</i>), and they are not bound, nor stretched out (<i>yumaddūna</i>). And the women are beaten sitting, and their clothing is fastened tightly about them, and they are bound – that they be not exposed. And they (f.) take charge of the binding of their clothing, or a woman from among them takes charge of it.	1206 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَتُضْرَبُ الرِّجَالُ فِي الْحُدُودِ قِيَامًا وَفِي التَّعْزِيرِ، وَتُتْرَكُ لَهُمْ أَيْدِيهِمْ يَتَّقُونَ بِهَا وَلَا تُرْبَطُ وَلَا يُمَدُّونَ، وَتُضْرَبُ النِّسَاءُ جُلُوسًا وَتُضَمَّ عَلَيْهِنَّ ثِيَابُهُنَّ وَيُرْبَطْنَ لِئَلَّا يَنْكَشِفْنَ وَيَلِينَ رِبَاطُ ثِيَابِهِنَّ أَوْ تَلِيَهُ مِنْهُنَّ امْرَأَةٌ.
1207 – And when the man slanders (<i>qadhafa</i>) a dead man; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: No one takes up the <i>ḥadd</i> of the deceased except for the child/son (<i>al-walad</i>) or the father/parent (<i>al-wālid</i>). And he [Abū Yūsuf] embraces this [doctrine].	1207 – وَإِذَا قَذَفَ الرَّجُلُ رَجُلًا مَيِّتًا، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا يَأْخُذُ بِحَدِّ الْمَيِّتِ إِلَّا الْوَلَدُ أَوْ الْوَالِدُ. وَبِهَذَا يَأْخُذُ.
1208 – But Ibn Abī Laylā, may God Most High have mercy upon him, used to say: The brother and the sister, also, take it up; and as for other than these: No.	1208 – وَكَانَ ابْنُ أَبِي لَيْلَى رَحِمَهُ اللَّهُ تَعَالَى يَقُولُ: يَأْخُذُ – أَيْضًا – الْأَخُ وَالْأُخْتُ، وَأَمَّا غَيْرُ هَؤُلَاءِ فَلَا.

⁹ That is to say, the only separately-punishable *ḥadd* punishments which can simultaneously obtain in a single individual are 1) *shurb* [*al-khamr*] and *qadhif*; 2) *zinā* and *qadhif*; or 3) *zinā* and *shurb*. As for multiple repetitions of the same offence, not mixed with another offence, such as 1) multiple *qadhif*, 2) multiple *shurb*, or 3) multiple *zinā*; the repetitions are combined into the punishment for a single offence.

1209 – Al-Shāfiʿī, may God Most High have mercy upon him, said: His child/son takes up the <i>ḥadd</i> , and his agnates (<i>ʿaṣabatuhu</i>), whoever they may be.	1209 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: يَأْخُذُ حَدَّ الْمَيِّتِ وَلَدُهُ وَعَصَبَتُهُ مَنْ كَانُوا.
1210 – And when the man slanders (<i>qadhafa</i>) his wife, and the witnesses testify against him for that, but he himself repudiates [their] testimony (<i>yajḥadu</i>); then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: When news of him is raised to the <i>imām</i> , he detains him until he utters the <i>liʿān</i> -oath (<i>yulāʿina</i>). And he [Abū Yūsuf] embraces this [doctrine].	1210 – وَإِذَا قَذَفَ الرَّجُلُ امْرَأَتَهُ وَشَهِدَ عَلَيْهِ الشُّهُودُ بِذَلِكَ وَهُوَ يَجْحَدُ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: إِذَا رُفِعَ إِلَى الْإِمَامِ خَبَرُهُ حَبْسَهُ حَتَّى يُلَاعِنَ. وَبِهَذَا يَأْخُذُ.
1211 – But Ibn Abī Laylā used to say: When he repudiates testimony; I beat him with the <i>ḥadd</i> . And I do not compel him to the <i>liʿān</i> as pertains to her, when he repudiates.	1211 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: إِذَا جَحَدَ ضَرْبَتُهُ الْحَدَّ وَلَا أُجْبِرُهُ عَلَى اللَّعَانِ مِنْهَا إِذَا جَحَدَ.
1212 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the two witnesses testify against a man, that he slandered (<i>qadhafa</i>) his Muslim wife, and she requests that he be stricken with the <i>ḥadd</i> on her behalf, and he repudiates their [dual] <i>shahāda</i> ; it is said to him: If you utter the <i>liʿān</i> -oath (<i>in lāʿanta</i>), you remove yourself from the <i>ḥadd</i> . But if you do not utter the <i>liʿān</i> -oath, we inflict the <i>ḥadd</i> upon you.	1212 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا شَهِدَ الشَّاهِدَانِ عَلَى رَجُلٍ أَنَّهُ قَذَفَ امْرَأَتَهُ مُسْلِمَةً، وَطَلَبَتْ أَنْ يُحَدَّ لَهَا، وَجَحَدَ شَهَادَتَهُمَا، قِيلَ لَهُ: إِنْ لَاعَنْتَ خَرَجْتَ مِنَ الْحَدِّ، وَإِنْ لَمْ تُلَاعِنْ حَدَدْنَاكَ.

Bāb al-Nikāh

Chapter on Marriage (<i>al-Nikāh</i>) ¹	بَابُ النِّكَاحِ
1213 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the man marries (<i>tazawwaja</i>) the woman, without a designated dowry (<i>mahrⁱⁿ musamm^{an}</i>), and he consummates the marriage [lit., penetrates her] (<i>dakhala bihā</i>); then indeed she has the right to her appropriate dowry (<i>mahra mithlihā</i>), as pertains to “her women” (<i>min nisāʾihā</i>) — neither diminished, nor in excess (<i>lā wakṣa wa lā shaṭaṭa</i>). ²	1213 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا تَزَوَّجَ الرَّجُلُ الْمَرْأَةَ بِغَيْرِ مَهْرٍ مُسَمًّى، فَدَخَلَ بِهَا، فَإِنَّ لَهَا مَهْرَ مِثْلِهَا مِنْ نِسَائِهَا، لَا وَكَسَ وَلَا شَطَطَ.
1214 – And Abū Ḥanīfa, may God Most High have mercy upon him, said: “Her women” (<i>nisāʾuhā</i>) [means] her sisters, and the daughters of her paternal uncle. And he [Abū Yūsuf] embraces it.	1214 – وَقَالَ أَبُو حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى: نِسَاؤُهَا؛ أَخَوَاتُهَا وَبَنَاتُ عَمِّهَا. وَبِهِ يَأْخُذُ.
1215 – But Ibn Abī Laylā used to say: “Her women” (<i>nisāʾuhā</i>) [means] her mother, and her maternal aunts. ³	1215 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: نِسَاؤُهَا؛ أُمُّهَا وَخَالَاتُهَا.
1216 – Al-Shāfiʿī said: And when the man marries the woman without a <i>mahr</i> , and he consummates; then she has the right to her appropriate dowry (<i>ṣadāqu mithlihā</i>), as pertains to “her women.” And “her women” [means] the women of her agnates (<i>nisāʾu ʿuṣbatihā</i>) — the sisters and the daughters of the paternal uncle —, and not the mother, nor the maternal aunts, when they are not daughters of her <i>ʿuṣba</i> among the men. And “her women,” are those by whom it is learned who is “her like” (<i>allātī yuʿtabaru ʿalayhā bihinna man kāna mithlahā</i>) from among the <i>ahl</i> of her <i>balad</i> , and	1216 – قَالَ الشَّافِعِيُّ: وَإِذَا تَزَوَّجَ الرَّجُلُ الْمَرْأَةَ بِغَيْرِ مَهْرٍ، فَدَخَلَ بِهَا، فَلَهَا صَدَاقٌ مِثْلِهَا مِنْ نِسَائِهَا، وَنِسَاؤُهَا نِسَاءُ عُصْبَتِهَا؛ الْأَخَوَاتُ وَبَنَاتُ الْعَمِّ، وَلَيْسَ الْأُمُّ وَلَا الْخَالَاتُ إِذَا لَمْ يَكُنَّ بَنَاتِ عُصْبَتِهَا مِنَ الرِّجَالِ، وَنِسَاؤُهَا اللَّاتِي يُعْتَبَرُ عَلَيْهَا بِهِنَّ مَنْ كَانَ مِثْلَهَا مِنْ أَهْلِ بَلَدِهَا وَفِي سِنِّهَا وَجَمَالِهَا وَمَالِهَا وَأَدَبِهَا

¹ (Ḥassūn, vol.9, pt.14, 205-13; Schacht: *Tr. I*, 214-224).

² The Shaybānī Version begins with “*qāla* Abū Yūsuf,” so we may consider this his opinion.

³ By this point it is evident that an issue of semantics lies at the heart of this *masʿala*. So far as I can tell, the relevant *aṣl* — in which the object of hermeneutic: *nisāʾihā*, occurs — is a *ḥadīth* concerning the Prophet’s ruling as regards one Birwaʾ bint Wāshiq. The *ḥadīth* is summarized in §16188, under the subheading of *Al-Tafwīd*, in the *Kitāb al-Ṣadāq* (Ḥassūn, vol.5, pt.10, 230): “And it has been narrated concerning the Prophet, may God bless and save him, that he passed judgment regarding Birwaʾ bint Wāshiq, who had been married without *mahr*, and her husband died. He ruled for her the dowry of ‘her women’ (*qaḍā lahā bi-mahri nisāʾihā*), and he ruled for her the *mīrāth*.” In an appended note, Ḥassūn provides a list of collections in which this referenced *ḥadīth* may be found.

regarding her age, and her beauty, and her <i>māl</i> , and her learning/manners (<i>adabihā</i>), and the purity of her Arab lineage (<i>ṣarāḥatihā</i>); because the <i>mahr</i> differs on the basis of the difference of these conditions (<i>ḥālāt</i>).	وَصَرَّاحَتِهَا؛ لِأَنَّ الْمَهْرَ يَخْتَلِفُ بِاخْتِلَافِ هَذِهِ الْحَالَاتِ.
1217 – And when the man marries off (<i>zawwaja</i>) his daughter – while she is a minor (<i>ṣaghīrat^{um}</i>) – to the son of his brother – while he is a minor, an orphan (<i>yatīm^{um}</i>) in his care (<i>fī ḥajrihi</i>); then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: The <i>nikāh</i> is <i>jāʾiz</i> , ⁴ and to him belongs the <i>khiyār</i> when he attains sexual maturity (<i>adraka</i>). And he [Abū Yūsuf] embraces it. ⁵	1217 – وَإِذَا زَوَّجَ الرَّجُلُ ابْنَتَهُ وَهِيَ صَغِيرَةٌ ابْنِ أَخِيهِ وَهُوَ صَغِيرٌ يَتِيمٌ فِي حَجْرِهِ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: النِّكَاحُ جَائِزٌ وَلَهُ الْخِيَارُ إِذَا أَدْرَكَ. وَبِهِ يَأْخُذُ.
1218 – But Ibn Abī Laylā used to say: That is not permitted over him until he attains sexual maturity. Then Abū Yūsuf recanted (<i>rajaʿa</i>), and said: When the <i>walī</i> marries	1218 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا يَحْزُرُ ذَلِكَ عَلَيْهِ حَتَّى يُدْرِكَ. ثُمَّ رَجَعَ أَبُو يُسُفَ

⁴ Al-Sarakhsī's report in the *Mabsūt* (4:214; mistakenly cited as 4:215 by al-Afghānī [169, n.2]) once again reveals a great deal about the purported reasoning behind the position of Abū Ḥanīfa on this *masʿala*. We learn: 1) “our *ḥujja*” [i.e., that of Abū Ḥanīfa's position] is Q.4:3 (enjoining the marriage of two, three, or four women in order to care for orphans), its *maʿnā* being interpreted to include the marriage of orphans (*wa maʿnāhu fī nikāḥ al-yatāmī*), for “this *kalām* can only be realized when the marriage of the female orphan is allowed;” 2) supporting *taʾwīl* of this *āya* is narrated on ʿĀʾisha; 3) *taʾwīl* for Q.4:127 is also narrated on ʿĀʾisha, which provides a *dalīl* for the allowance of the marrying off (by the *walī*) of female orphans under guardianship; 4) the Prophet married off Bint Ḥamza while she was a minor; and 5) “the *āthār* for the allowance of that are *mashhūra*, on ʿUmar, ʿAlī, ʿAbd Allāh b. Masʿūd, Ibn ʿUmar, and Abū Hurayra.” (Al-Afghānī's citation stops here, and he invites us to pursue reading the *Mabsūt* for more detail.) Following this list of sources (still vol. 4, p.214), al-Sarakhsī delves into rational argument: “The *maʿnā* regarding it is that he is her *walī* after maturity (*al-bulūgh*), so he is her *walī* during the status of minority (*ḥāl al-ṣighar*), like the father and the grandfather. This is due to the *taʾthīr* of *al-bulūgh* as regards the removal (*zawāl*) of *wilāya*; and when he is made her *walī* after her *bulūgh* by way of this *sabab*, we know that he is her *walī* during the *ḥāl al-ṣighar*, and by way of it he divides the *māl* [upon the death of the parent];” etc. Other arguments and *adilla* follow.

⁵ Again, we learn much from al-Sarakhsī's report in the *Mabsūt* (4:215; quoted by al-Afghānī in 170, n.1): 1) the *khiyār* after maturity is also the *qawl* of Muḥammad b. al-Ḥasan, Ibn ʿUmar, and Abū Hurayra; 2) the recanting of Abū Yūsuf from this *qawl* (as we see here in §1218) is again stated, and his new *qawl* (they have no *khiyār*) is said to be that of ʿUrwa b. al-Zubayr; 3) the argument (a *qiyās al-illa*) of this latter is reported: “this is an *ʿaqd* contracted for a *wilāya* merited by family relationship (*al-qarāba*), so *khiyār al-bulūgh* is not confirmed for it, like the *ʿaqd* of the father and the grandfather” [NB: the formulation of this argument — “This (*far*) is an (*illa*-property), so (*ḥukm*), like (*aṣl*)” — is precisely the same as we find in the example-*masʿal* of the *jadāl*-theorists a generation or so after al-Sarakhsī]; etc. (other arguments follow). The upshot of all this is an example of Abū Yūsuf's *manzila*-subsumption: the *walī* is in the *manzila* of the father, with regard to the marrying off of minor wards. The *ḥukm* for the minor married off by the father (no *khiyār* upon *bulūgh*) is the *ḥukm* of the minor married off by the *walī*.

[him] off, then there is no <i>khiyār</i> while he [the <i>walī</i>] is like the father. ⁶	وَقَالَ: إِذَا زَوَّجَ الْوَلِيُّ فَلَا خِيَارَ وَهُوَ مِثْلُ الْأَبِ.
1219 – Al-Shāfiʿī, may God have mercy upon him, said: And it is not permitted: the <i>nikāh</i> of the minors from among men, nor from among women, unless the fathers marry them [the female minors] off – and the grandfathers, when they [fem.] don’t have fathers; for they [the grandfathers] are fathers. And if someone besides them marries them off, then the <i>nikāh</i> is cancelled (<i>mafsūkh^{un}</i>), and they do not mutually inherit (<i>lā yatawārathāni</i>) as regards it – even if they matured (<i>kaburā</i>) [together]. And if he consummates, and has sexual relations with her (<i>dakhala ʿalayhā fa-aṣābahā</i>); the <i>mahr</i> belongs to her, and they are separated (<i>yufarraqu baynahumā</i>). And if he unilaterally divorces her (<i>tallaqahā</i>) before the <i>nikāh</i> is cancelled (<i>yufsakha</i>); his <i>ṭalāq</i> does not occur – nor his <i>ṣihār</i> , nor his <i>ilāʾ</i> ; because she was never a wife at all (<i>lam takun zawjat^{an} qatṭu</i>).	1219 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَلَا يَجُوزُ نِكَاحُ الصِّغَارِ مِنَ الرِّجَالِ، وَلَا مِنَ النِّسَاءِ إِلَّا أَنْ يُزَوِّجَهُنَّ الْآبَاءُ وَالْأَجْدَادُ إِذَا لَمْ يَكُنْ لَهُنَّ آبَاءٌ، فَإِنَّهُمْ آبَاءٌ، وَإِذَا زَوَّجَهُنَّ أَحَدٌ سِوَاهُمْ فَلِلنِّكَاحِ مَفْسُوخٌ وَلَا يَتَوَارَثَانِ فِيهِ، وَإِنْ كَبُرَا، فَإِنْ دَخَلَ عَلَيْهَا فَأَصَابَهَا فَلَهَا الْمَهْرُ، وَيُفْرَقُ بَيْنَهُمَا، وَلَوْ طَلَّقَهَا قَبْلَ أَنْ يُفْسَخَ النِّكَاحُ لَمْ يَقَعْ طَلَاقُهُ وَلَا ظَهَارُهُ وَلَا إِيلَاؤُهُ؛ لِأَنَّهَا لَمْ تَكُنْ زَوْجَةً قَطُّ.
1220 – And when a man marries a woman and the wife of her father [i.e., her stepmother]; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: It is <i>jāʿiz</i> . That has reached us concerning ʿAbd Allāh b. Jaʿfar, ⁷ that he did that. And he [Abū Yūsuf] embraces it.	1220 – وَإِذَا تَزَوَّجَ الرَّجُلُ الْمَرْأَةَ وَامْرَأَةَ أَبِيهَا، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: هُوَ جَائِزٌ. بَلَغَنَا ذَلِكَ عَنْ عَبْدِ اللَّهِ بْنِ جَعْفَرٍ أَنَّهُ فَعَلَ ذَلِكَ. وَبِهِ يَأْخُذُ.

⁶ Certain key elements from §1217ff. are neatly summarized by Schacht in the *Et*, s.v. “Nikāh,” (pt. I. “In Classical Islamic Law”), as follows:

“The *walī* can only give the bride in marriage with her consent, but in the case of a virgin, silent consent is sufficient. The father or grandfather, however, has the right to marry his daughter or granddaughter against her will, so long as she is a virgin (he is therefore called *walī mudjibir*, *walī* with power of coercion); the exercise of this power is, however, very strictly regulated in the interests of the bride. As minors are not in a position to make a declaration of their wishes which is valid in law, they can only be married at all by a *walī mudjibir*. According to the Ḥanafis, on the other hand, every blood relative acting as *walī* is entitled to give a virgin under age in marriage without her consent; but a woman married in this way by another than her ascendant is entitled on coming of age to demand that her marriage be declared void (*faskh*) by the *kaḍī*. A bridegroom who is a minor may also be married by his *walī mudjibir*.”

⁷ This is ʿAbd Allāh b. Jaʿfar b. Abī Ṭālib (d. btwn. 80-90 H), a nephew of ʿAlī. See the *Et*, s.v. “ʿAbd Allāh b. Djaʿfar b. Abī Ṭālib.”

1221 - 'Abd Allāh b. Ja'far married the wife of 'Alī, may God be pleased with him, and his daughter, together.	1221 - تَزَوَّجَ عَبْدُ اللَّهِ بْنُ جَعْفَرٍ امْرَأَةً عَلِيٍّ رَضِيَ اللَّهُ عَنْهُ وَابْنَتَهُ جَمِيعًا.
1222 - But Ibn Abī Laylā used to say: The <i>nikāh</i> is not permitted. And [he used to] say: [For] either of the two women, if one of them were a man, the <i>nikāh</i> of her <i>ṣāhibā</i> would not be permitted for her; so it is not right for the man that he should combine them (<i>yajma'a baynahumā</i>) [as wives]. ⁸	1222 - وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا يَجُوزُ النِّكَاحُ. وَقَالَ: كُلُّ امْرَأَتَيْنِ لَوْ كَانَتْ إِحْدَاهُمَا رَجُلًا لَمْ يَحِلَّ لَهَا نِكَاحُ صَاحِبَتِهَا فَلَا يَنْبَغِي لِلرَّجُلِ أَنْ يَجْمَعَ بَيْنَهُمَا.
1223 - Al-Shāfi'ī, may God Most High have mercy upon him, said: There is no harm in that he combine [in marriage] the wife of a man, and his daughter from another [wife] than she.	1223 - قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: لَا بَأْسَ أَنْ يَجْمَعَ بَيْنَ امْرَأَةِ رَجُلٍ وَابْنَتِهِ مِنْ غَيْرِهَا.
1224 - Al-Shāfi'ī said: And if one should say (<i>fa-in qāla qā'il^{um}</i>): Due to what did you assert that the fathers marry off (<i>yuzawwijūna</i>) the minors?	1224 - قَالَ الشَّافِعِيُّ: فَإِنْ قَالَ قَائِلٌ: لِمَ زَعَمْتَ أَنَّ الْأَبَاءَ يُزَوِّجُونَ الصِّغَارَ؟
1225 - It is said: Abū Bakr married off, to the Messenger of God, may God bless and save him, 'Ā'isha, while she was a girl of six or seven. And the Prophet, may God bless and save him, consummated (<i>banā bihā</i>) while she was a girl of nine. So the two conditions (<i>al-hālāni</i>) within which the <i>nikāh</i> and the <i>dukhūl</i> occurred, were while 'Ā'isha was a minor: one to whom there belongs no authority regarding herself (<i>lā amra lahā fī nafsihā</i>).	1225 - قِيلَ: زَوَّجَ أَبُو بَكْرٍ رَسُولَ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - عَائِشَةَ وَهِيَ بِنْتُ سِتٍّ أَوْ سَبْعٍ وَبَنَى بِهَا النَّبِيُّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - وَهِيَ بِنْتُ تِسْعٍ فَالْحَالَانِ اللَّذَانِ كَانَا فِيهِمَا النِّكَاحُ وَالْدُخُولُ كَانَا وَعَائِشَةُ صَغِيرَةٌ مِمَّنْ لَا أَمْرَ لَهَا فِي نَفْسِهَا.
1226 - And more than one of the <i>aṣḥāb</i> of the Messenger of God, may God bless and save him, married off his minor daughter.	1226 - وَزَوَّجَ غَيْرُ وَاحِدٍ مِنْ أَصْحَابِ رَسُولِ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - ابْنَتَهُ صَغِيرَةً.
1227 - And if one should say (<i>fa-in qāla qā'il^{um}</i>): And when you permit this to the fathers, and you pay no heed to the <i>qiyās</i> , that it is not permitted that <i>nikāh</i> be contracted (<i>yu'qada</i>) over a free [f.] minor, then there belong to her the <i>khiyār</i> ;	1227 - فَإِنْ قَالَ قَائِلٌ: فَإِذَا أُجِزَتْ هَذَا لِلْآبَاءِ، وَلَمْ تُلْتَفَتْ إِلَى الْقِيَاسِ فِي أَنَّهُ لَا يَجُوزُ أَنْ يُعْقَدَ عَلَى حُرَّةٍ صَغِيرَةٍ نِكَاحٌ ثُمَّ يَكُونَ لَهَا

⁸ This is a fascinating piece of reasoning, based upon a complete role-reversal, which is to say: 1) were the daughter a son, he could not marry his father's wife; and 2) were the wife the husband, he could not marry his wife's daughter; in short, the forbidden degrees between them, were either one of them a man, prevents their being "combined" in marriage to a single man. Cf. al-Shāfi'ī in §658, where the father of the deceased is made to take the place of the deceased for argument's sake.

because the <i>aṣl</i> of <i>nikāh</i> does not permit that there be <i>khiyār</i> in it except as regards the slave women (<i>al-imāʿi</i>), when their status transforms (<i>tahawwalat ḥāluhunna</i>); while [as for] the free-born (<i>al-ḥarāʾiru</i>), their status does not transform; and it is not permitted that there be contracted over them that from which they have an escape (<i>mā lahunna minhu budd^{un}</i>), then make it incumbent upon them (<i>yulzimuhunna</i>) — how do you not treat the <i>awliyāʾ</i> by <i>qiyās</i> with the fathers?	الْخِيَارُ؛ لِأَنَّ أَصْلَ النِّكَاحِ لَا يَجُوزُ أَنْ يَكُونَ فِيهِ خِيَارٌ إِلَّا فِي الْإِمَاءِ إِذَا تَحَوَّلَتْ حَالُهُنَّ، وَالْحَرَائِرُ لَا تُحَوَّلُ حَالُهُنَّ، وَلَا يَجُوزُ أَنْ يُعْقَدَ عَلَيْهِنَّ مَا لَهُنَّ مِنْهُ بُدٌّ، ثُمَّ يُلْزِمُهُنَّ فَكَيْفَ لَمْ تَجْعَلِ الْأَوْلِيَاءَ قِيَاسًا عَلَى الْآبَاءِ؟
1228 – It is said: Due to the disunion (<i>iftirāq</i>) between the fathers and the <i>awliyāʾ</i>; and that the father owns (<i>yamliku</i>) pertaining to the contract (<i>al-ʿaqd</i>) over his son/child (<i>waladihi</i>) what none other besides him owns of it.⁹	1228 – قِيلَ: لِإِفْتِرَاقِ الْآبَاءِ وَالْأَوْلِيَاءِ وَأَنَّ الْأَبَ يَمْلِكُ مِنَ الْعَقْدِ عَلَى وَلَدِهِ مَا لَا يَمْلِكُهُ مِنْهُ غَيْرُهُ.
1229 – Don't you see/opine (<i>alā tarā</i>) that he [the father] contracts over the virgin as a major (<i>yaʿqidu ʿalā al-bikri bāligh^m</i>), and it is not held back from her (<i>lā yuraddu ʿanhā</i>) even if she disapproves (<i>karihat</i>); and that right does not belong to the paternal uncle, nor to the brother, nor to any <i>walī</i> besides him [the father]?¹⁰	1229 – أَلَا تَرَى أَنَّهُ يَعْقِدُ عَلَى الْبِكْرِ بَالِغًا وَلَا يُرَدُّ عَنْهَا وَإِنْ كَرِهَتْ، وَلَا يَكُونُ ذَلِكَ لِلْعَمِّ وَلَا لِلْأَخِ وَلَا وَلِيِّ غَيْرِهِ.
1230 – And if one should say (<i>fa-in qāla qāʾil^{un}</i>): And we indeed do not give permission to the father that he contract over the <i>bikr</i> as a major; but we treat him, in her regard, and as regards the non-virgin (<i>al-thayyib</i>), like others of the <i>awliyāʾ</i>.	1230 – فَإِنْ قَالَ قَائِلٌ: فَإِنَّا لَا نُجِيزُ لِلْأَبِ أَنْ يَعْقِدَ عَلَى الْبِكْرِ بَالِغًا، وَتَجْعَلُهُ فِيهَا وَفِي الثَّيِّبِ مِثْلَ غَيْرِهِ مِنَ الْأَوْلِيَاءِ.
1231 – It is said: Yet you make of his [the father's] taking possession of the <i>mahr</i> of the <i>bikr</i> a [true] taking possession (<i>qabḍ^m</i>), while you do not make that the right of any <i>walī</i> besides him, except a legal-guardian (<i>waṣī</i>) of <i>māl</i>. And you make his contract over her, as a minor, <i>jāʾiz</i> — there belonging no <i>khiyār</i> to her as regards it, while you make the <i>khiyār</i> belong to her if there contracts over her another <i>walī</i> besides him.	1231 – قِيلَ: فَأَنْتَ تَجْعَلُ قَبْضَهُ لِمَهْرِ الْبِكْرِ قَبْضًا وَلَا تَجْعَلُ ذَلِكَ لِوَلِيِّ غَيْرِهِ إِلَّا وَصِيًّا بِمَالٍ، وَتَجْعَلُ عَقْدَهُ عَلَيْهَا صَغِيرَةً جَائِزًا لَا خِيَارَ لَهَا فِيهِ، وَتَجْعَلُ لَهَا الْخِيَارَ إِنْ عَقَدَ عَلَيْهَا وَلِيُّ غَيْرِهِ.
1232 – And if he were like the rest of the <i>awliyāʾ</i>, I would not have made a distinction	1232 – وَلَوْ كَانَ مِثْلَ سَائِرِ الْأَوْلِيَاءِ مَا

⁹ Al-Shāfiʿī's response is the classic move of *farq*; between fathers and other *awliyāʾ* is a critical distinction, which renders *qiyās* in this *masʿala* untenable.

¹⁰ In rhetorical fashion, al-Shāfiʿī underscores the *farq* between fathers and other *awliyāʾ*. Asked in this manner, the opponent must either concede to the *farq*, or reject an *endoxon* ruling. Note that role-reversal now occurs.

(<i>farraqtu</i>) between him and the <i>awliyāʾ</i> . And this is written in the <i>Kitāb al-Nikāḥ</i> . ¹¹	كُنْتُ قَدْ فَرَّقْتُ بَيْنَهُ وَبَيْنَ الْأَوْلِيَاءِ. وَهَذَا مَكْتُوبٌ فِي كِتَابِ النِّكَاحِ.
1233 – And when a man gazes at the genitals (<i>farj</i>) of a woman out of lust (<i>min shahwat^m</i>); then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: She is forbidden to (<i>tuḥarramu ʿalā</i>) his son, and to his father, and forbidden to him [the man who gazes] are her mother and her daughter. That has reached us on the authority of Ibrāhīm.	1233 – وَإِذَا نَظَرَ الرَّجُلُ إِلَى فَرْجِ الْمَرْأَةِ مِنْ شَهْوَةٍ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: تُحَرِّمُ عَلَى ابْنِهِ وَعَلَى أَبِيهِ، وَتُحَرِّمُ عَلَيْهِ أُمُّهَا وَابْنَتُهَا. بَلَغَنَا ذَلِكَ عَنْ إِبْرَاهِيمَ.
1234 – And it has reached us concerning ʿUmar b. al-Khaṭṭāb, may God Most High ¹² be pleased with him, that he secluded himself with a slave and undressed her (<i>khalā bi-jāriyat^m fa-jarradahā</i>), and that a son of his requested her as a gift from him (<i>istawhabahā</i>), so he said to him: Verily, she is not lawful for you (<i>lā taḥillu laka</i>).	1234 – وَبَلَغَنَا عَنْ عُمَرَ بْنِ الْخَطَّابِ رَضِيَ اللَّهُ تَعَالَى عَنْهُ أَنََّّهُ خَلَا بِجَارِيَةٍ لَهُ فَجَرَّدَهَا، وَأَنَّ ابْنًا لَهُ اسْتَوْهَبَهَا مِنْهُ فَقَالَ لَهُ: إِنَّهَا لَا تَحِلُّ لَكَ.
1235 – And it has reached us concerning ʿUmar b. al-Khaṭṭāb, may God Most High be pleased with him, that he said: Accursed	1235 – وَبَلَغَنَا عَنْ عُمَرَ بْنِ الْخَطَّابِ رَضِيَ اللَّهُ تَعَالَى عَنْهُ أَنَّهُ قَالَ: مَلْعُونٌ مَنْ نَظَرَ إِلَى

¹¹ Al-Shāfiʿī seals his *elenchus* with what we might be tempted to read as a snappish remark, then refers us to the details of his argument as found in another writing (and no doubt formulated in an earlier disputation). As with other references of this sort, take note of the fact that it is, in fact, a reference to *writing* and *written* material (*kitāb*). If this is indeed al-Shāfiʿī's voice making the reference; his discourses, explications, and didactic dialectics (whether dictated or hand-scribed himself) can only have been available (published) in his own time. And indeed, even if it is the voice of a later compiler/editor, it may yet refer to a treatise written or dictated by al-Shāfiʿī himself and published in his own time. In other words, even if the phrase “*wa ḥādḥā maktūb^{an} fī kitāb al-nikāḥ*” were irrefutably proven to be the comment of a significantly posterior editor, this would still have no bearing on al-Shāfiʿī's authorship of that *Kitāb*, nor even of its being published in his lifetime. Whatever the case may be, it is easy enough to see that such a title is indeed to be found within the collection of the *Umm* (Ḥassūn, vol.5, pt.10, 7-192). Interestingly, however, no such title is attributed to al-Shāfiʿī by al-Nadīm; though it most certainly would have been among the only partially-listed contents of his *Mabsūṭ* (as transmitted by al-Rabī and al-Zaʿfarānī; *Fihrist*, 353). Moreover, there is another internal cross-reference to a *Kitāb al-Nikāḥ* in the *Umm*, in §25252, under the subheading of *Bāb Daʿwā al-Walad*, in the *Kitāb al-Aqḍiyya* (Ḥassūn, vol.8, pt.13, 181); and, as we shall see, no less than four other references to such a *Kitāb al-Nikāḥ* in this current chapter of the *K. Ikhtilāf al-ʿIrāqīyyīn* (at §§1241, 1253, 1257, and 1268). Some of these latter are very specific in their reference to the indicants and *ḥujja* of this *kitāb*. Finally, it may also be of note that such a title is attributed to Muḥammad b. al-Ḥasan by al-Nadīm (*Fihrist*, 345). Whatever the case may be, as regards this particular *masʿala* (the *farq* between fathers and other *awliyāʾ*) we certainly find, as promised, a more detailed discussion in the *Kitāb al-Nikāḥ* of the *Umm*. The *masʿala*, in fact, receives its own subheading of *Mā Jāʾa fī Nikāḥ al-Ābāʾ* (§§15394-15414, Ḥassūn, vol.5, pt.10, 57-61), where al-Shāfiʿī's indicants and arguments are laid out in full.

¹² Ḥassūn has neglected (تعالى), which appears in the *Būlāq*, so I have retained it.

(malʿūn ^{un}) be he who gazes upon the <i>farj</i> of a daughter ¹³ and her mother. And he [Abū Yūsuf] embraces it.	فَرَجِ ابْنَةِ وَأُمِّهَا. وَبِهِ يَأْخُذُ.
1236 – But Ibn Abī Laylā used to say: Nothing of that is forbidden which he has not touched.	1236 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا يَحْرُمُ مِنْ ذَلِكَ شَيْءٌ مَا لَمْ يَلْمَسْهُ.
1237 – Al-Shāfiʿī, may God Most High have mercy upon him, said: When the man touches (<i>lamasa</i>) the <i>jāriya</i> , she is forbidden to (<i>ḥurrimat ʿalā</i>) his father and to his son. But she is not forbidden to him due to gazing without touching.	1237 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: إِذَا لَمَسَ الرَّجُلُ الْجَارِيَةَ حُرِّمَتْ عَلَى أَبِيهِ وَابْنِهِ، وَلَا تُحْرَمُ عَلَيْهِ بِالنَّظَرِ دُونَ اللَّمَسِ.
1238 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And there is no harm (<i>lā baʿsa</i>) in that the man marry the daughter of the man and the wife of the man, and combine them [in marriage]; because God, to Him belong might and majesty, forbade only the combining between two sisters [Q.4:23] — and these two are not two sisters. And He forbade the mother and the daughter, one of them after the other — and these are neither mother nor daughter [to each other]. And ʿAbd Allāh b. Jaʿfar combined [in marriage] the wife of ʿAlī, may God be pleased with him, and his daughter; while ʿAbd Allāh b. Ṣafwān [combined in marriage] the wife of a man and his daughter. ¹⁴	1238 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَلَا بَأْسَ أَنْ يَتَزَوَّجَ الرَّجُلُ ابْنَةَ الرَّجُلِ وَامْرَأَةَ الرَّجُلِ فَيَجْمَعَ بَيْنَهُمَا؛ لِأَنَّ اللَّهَ عَزَّ وَجَلَّ إِنَّمَا حَرَّمَ الْجَمْعَ بَيْنَ الْأُخْتَيْنِ، وَهَاتَانِ لَيْسَتَا بِأُخْتَيْنِ، وَحَرَّمَ الْأُمَّ وَالْبِنْتَ؛ إِحْدَاهُمَا بَعْدَ الْأُخْرَى، وَهَذِهِ لَيْسَتْ بِأُمٍّ وَلَا بِنْتٍ، وَقَدْ جَمَعَ عَبْدُ اللَّهِ بْنُ جَعْفَرٍ بَيْنَ امْرَأَةِ عَلِيِّ رَضِيَ اللَّهُ عَنْهُ وَابْنَتِهِ، وَعَبْدُ اللَّهِ ابْنُ صَفْوَانَ بَيْنَ امْرَأَةِ رَجُلٍ وَابْنَتِهِ.

¹³ As Ḥassūn notes, (ابْنَةِ) is missing from the Būlāq edition.

¹⁴ §1238 seems oddly incongruent with the *masʿal* which precede and follow it; except insofar as it deals with an issue of forbidden conditions/degrees. It in fact refers back to the *masʿala* of §§1220-3, which al-Shāfiʿī only answered briefly, before launching into a dialectic establishing the special rights of fathers, due to the *farq* between them and other *awliyāʾ*. After this, the new *masʿala* of gazing/touching was introduced; and bear in mind that this included an *athar* on ʿUmar (§1235) which cursed the man who gazes upon the *farj* of both a woman and her daughter. This may be the context for the placement of §1238; in effect, it answers §§1220-3 and §1235. Without carrying conjecture too far, one might wonder if this arrangement is not indicative of “live” dictation and discussion. Might it not have been the case that al-Shāfiʿī held a *ḥalaqa* wherein he 1) transmitted the Shaybānī Version he got from Muḥammad b. al-Ḥasan himself, or from someone else; and 2) commented upon, critiqued, and argued his own rulings on the same *masʿal*, having first recited the opinions of Abū Ḥanīfa, et al.? The student(s) attendant would have engaged in several activities: 1) copying down the Shaybānī Version as it was dictated, *masʿala* by *masʿala*; 2) copying down al-Shāfiʿī’s critiques and arguments, as they followed on the recited *masʿala*; 3) asking questions and even engaging al-Shāfiʿī in dialectic (certainly it is known that Muḥammad b. al-Ḥasan encouraged his students to engage him in *munāẓara*, and there is no reason to believe al-Shāfiʿī himself did not do the same); and 4) abstracting these questions and debates, and including them along with al-Shāfiʿī’s arguments. The end product of

1239 – And when a man [A] gazes at the <i>farj</i> of his female slave (<i>amatihi</i>) [X] with lust; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: She is not lawful to his father [A ^F], nor to his son [A ^S]; nor is her mother [X ^M] lawful to him [A], nor her daughter [X ^D]. And he [Abū Yūsuf] embraces it.	1239 – وَإِذَا نَظَرَ الرَّجُلُ إِلَى فَرْجِ أُمَّتِهِ مِنْ شَهْوَةٍ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا تَحِلُّ لِأَبِيهِ وَلَا لِابْنِهِ، وَلَا تَحِلُّ لَهُ أُمُّهَا وَلَا بِنْتُهَا. وَبِهِ يَأْخُذُ.
1240 – But Ibn Abī Laylā, may God be pleased with him, used to say: She [X ^M or X ^D] is <i>ḥalāl</i> to him until he [A] touches her [X].	1240 – وَكَانَ ابْنُ أَبِي لَيْلَى رَضِيَ اللَّهُ عَنْهُ يَقُولُ: هِيَ لَهُ حَلَالٌ حَتَّى يَلْمَسَهَا.
1241 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man commits <i>zinā</i> with a woman; she herself is not forbidden to him, if he wants to marry her, nor [are] her mother, nor her daughter [forbidden]; because God, to Him belong might and majesty, only made <i>ḥarām</i> through the <i>ḥalāl</i> . And the <i>ḥarām</i> is the opposite of (<i>ḍiddu</i>) the <i>ḥalāl</i> . And this is written in the <i>Kitāb al-Nikāḥ</i> , as pertains to the <i>aḥkām al-Qurʾān</i> . ¹⁵	1241 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا زَنَا الرَّجُلُ بِالْمَرْأَةِ فَلَا تَحْرُمُ عَلَيْهِ هِيَ إِنْ أَرَادَ أَنْ يَنْكِحَهَا وَلَا أُمُّهَا وَلَا ابْنَتُهَا؛ لِأَنَّ اللَّهَ عَزَّ وَجَلَّ إِنَّمَا حَرَّمَ بِالْحَلَالِ، وَالْحَرَامُ ضِدُّ الْحَلَالِ، وَهَذَا مَكْتُوبٌ فِي كِتَابِ النِّكَاحِ مِنْ أَحْكَامِ الْقُرْآنِ.

such notes might then be compiled and edited, with the final result consisting of the *Umm* Version of the *Kitāb Ikhtilāf al-ʿIrāqīyyīn*, as transmitted by al-Rabī.

¹⁵ Al-Shāfiʿī's conclusion relies upon a complex argument which is presented here in so terse a manner as to be nearly incomprehensible. Luckily, we are once again directed to a *Kitāb al-Nikāḥ*, although this is not at first as productive as one may hope. Instead, we find the answer in a full-blown dialectical engagement covering some 16 pages of Ḥassūn's edition (vol.6, pt.11, 14-30), consisting of the entire chapter entitled *Al-Khilāf fīmā Yu'tā bi'l-Zinā*. This, in turn, is located among a group of mixed *masā'il* having to do with *nikāḥ*, *ṭalāq*, and other marriage-related categories, tailing upon the previous *kutub* of *al-Nikāḥ*, *al-Ṣadāq*, *al-Shighār*, and *al-Nafaqāt* (in that order). It is more than possible, however, that this series once constituted, all together, a larger *Kitāb al-Nikāḥ*. At any rate, the opening sections of this *Khilāf fīmā Yu'tā bi'l-Zinā* make clear the complex argument that al-Shāfiʿī puts forward so tersely in §1241, and I have attempted a translation of them (see Appendix II. §1241). In brief, al-Shāfiʿī's opponent argues that once a man has committed *zinā* with the wife of his son or the wife of his father, then those wives become *ḥarām* to their respective husbands (due to the matter of forbidden degrees). Al-Shāfiʿī, however, argues that they do not, and he claims that God only makes things *ḥarām* through *ḥalāl* acts. That is to say, women are made *ḥarām* to the fathers and sons of their husbands through the *ḥalāl* act of marriage. When God only makes *ḥarām* through *ḥalāl* in this fashion, al-Shāfiʿī does not see that he can make *ḥarām* through *ḥarām* (i.e., women are made *ḥarām* to their husbands through the *ḥarām* act of *zinā* with his father or son) — especially considering that *ḥarām* is the opposite of *ḥalāl*. By extending this line of reasoning to the *mas'ala* in §1241 above, he comes to the rather counterintuitive conclusion that even if a man commits *zinā* with a woman, her mother or daughter are not *ḥarām* to him; the *ḥarām* act of *zinā* cannot produce a *ḥarām* relationship with mother and daughter; only the *ḥalāl* act of marriage might have done so. Thus, by taking the *mas'ala* one step further to *zinā*, al-Shāfiʿī counters the lines of reasoning of Abū Ḥanīfa, Abū Yūsuf, and Ibn Abī Laylā above in §§1239-40, to reach his rather surprising conclusion.

1242 – And when a man marries a woman by two witnesses, without a <i>walī</i> having married her off, and the husband is an appropriate match for her (<i>kufu^{um} lahā</i>); then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: The <i>nikāh</i> is <i>jāʾiz</i> .	1242 – وَإِذَا تَزَوَّجَ الرَّجُلُ الْمَرْأَةَ بِشَاهِدَيْنِ مِنْ غَيْرِ أَنْ يُزَوِّجَهَا وَلِيُّهَا، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: النِّكَاحُ جَائِزٌ.
1243 – Don't you see/opine (<i>alā tarā</i>) that — if her case was raised to the <i>ḥākim</i> , and her <i>walī</i> refused to marry her off — it would be the right of the <i>ḥākim</i> to marry her off, and that he strive for nothing but that, and that it would not be right for him [that he should do] other than that? So how can that be — as pertains to the <i>ḥākim</i> and the <i>walī</i> — permissible; and [yet] that not be — as pertains to her — permissible, while she has placed herself (<i>waḍaʿat nafsahā</i>) in circumstance of match-suitability (<i>fi'l-kafāʾati</i>)?	1243 – أَلَا تَرَى أَنَّهَا لَوْ رَفَعَتْ أَمْرَهَا إِلَى الْحَاكِمِ وَأَبَى وَلِيُّهَا أَنْ يُزَوِّجَهَا كَانَ لِلْحَاكِمِ أَنْ يُزَوِّجَهَا وَلَا يَسْعُهُ إِلَّا ذَلِكَ، وَلَا يَنْبَغِي لَهُ غَيْرُهُ. فَكَيْفَ يَكُونُ ذَلِكَ مِنَ الْحَاكِمِ وَالْوَلِيِّ جَائِزًا، وَلَا يَجُوزُ ذَلِكَ مِنْهَا وَهِيَ قَدْ وَضَعَتْ نَفْسَهَا فِي الْكَفَاءَةِ؟
1244 – It has reached us concerning ʿAlī b. Abī Ṭālib, may God Most High be pleased with him, that a woman married off her daughter, and her <i>awliyāʾ</i> came along and raised litigation (<i>khāṣamū</i>) against the husband, to ʿAlī, may God Most High be pleased with him. And ʿAlī gave permission for the <i>nikāh</i> .	1244 – بَلَغَنَا عَنْ عَلِيِّ بْنِ أَبِي طَالِبٍ رَضِيَ اللَّهُ تَعَالَى عَنْهُ أَنَّ امْرَأَةً زَوَّجَتْ ابْنَتَهَا، فَجَاءَ أَوْلِيَائُهَا فَخَاصَمُوا الزَّوْجَ إِلَى عَلِيِّ رَضِيَ اللَّهُ تَعَالَى عَنْهُ فَأَجَازَ عَلِيُّ النِّكَاحَ.
1245 – But Ibn Abī Laylā used not to give permission for that.	1245 – وَكَانَ ابْنُ أَبِي لَيْلَى لَا يُحْجِزُ ذَلِكَ.
1246 – And Abū Yūsuf said: It is suspended (<i>mawqūf^{um}</i>). But if it is raised to the <i>ḥākim</i> , and he is a suitable match; I give permission for that. It is as though the <i>qāḍī</i> in this case were a <i>walī</i> , to whom it had reached that his daughter had been married off; and he gave his sanction to that.	1246 – وَقَالَ أَبُو يُوسُفَ: هُوَ مَوْقُوفٌ، وَإِنْ رُفِعَ إِلَى الْحَاكِمِ وَهُوَ كُفُوٌ أَجَزْتُ ذَلِكَ، كَأَنَّ الْقَاضِيَ هَاهُنَا وَلِيُّ بَلْعُهُ أَنْ ابْنَتَهُ قَدْ تَزَوَّجَتْ، فَأَجَازَ ذَلِكَ.
1247 – Al-Shāfiʿī, may God Most High have mercy upon him, said: Every <i>nikāh</i> without a <i>walī</i> — it is <i>bāṭil</i> ; due to the <i>qawl</i> of the Prophet, may God bless and save him: «Whichever woman who is married (<i>nukihāt</i>) without the permission of her <i>walī</i> ; her <i>nikāh</i> is <i>bāṭil</i> .» Thrice. ¹⁶	1247 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: كُلُّ نِكَاحٍ بَغَيْرِ وَلِيٍّ فَهُوَ بَاطِلٌ؛ لِقَوْلِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «أَيُّمَا امْرَأَةٍ نُكِحَتْ

¹⁶ I have chosen to follow the Būlāq and Maṭrajī editions here, rather than Ḥassūn who, unnecessarily in my opinion, renders: (أَيُّمَا امْرَأَةٍ نَكَحَتْ نَفْسَهَا بِغَيْرِ إِذْنٍ وَلِيِّهَا). It would appear that

	بَغِيرِ إِذْنٍ وَلِيَّهَا فَنِكَاحُهَا بَاطِلٌ». ثَلَاثًا.
1248 – And when a man marries a woman and publicly announces (aʿlana) the <i>mahr</i> , but he has, before that, secretly confided (asarra) a <i>mahr</i> , and called witnesses to it (ashhada shuhūd ^{an} alayhi), and informed the witnesses that the <i>mahr</i> which he will announce is such-and-such — a bit of good fame (sumʿat ^{un}) by which he will make himself heard among the <i>qawm</i> —, and that the <i>asl</i> of the <i>mahr</i> is [actually] such-and-such, which is to be kept secret; then he marries and announces that which he said; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: The <i>mahr</i> ; it is the first. It is the <i>mahr</i> which was in secret; and the <i>sumʿa</i> is <i>bāṭil</i> , which he made known to the <i>qawm</i> . And he [Abū Yūsuf] embraces it.	1248 – وَإِذَا تَزَوَّجَ الرَّجُلُ الْمَرْأَةَ فَأَعْلَنَ الْمَهْرَ، وَقَدْ كَانَ أَسَرَ قَبْلَ ذَلِكَ مَهْرًا، وَأَشْهَدَ شُهُودًا عَلَيْهِ، وَأَعْلَمَ الشُّهُودَ أَنَّ الْمَهْرَ الَّذِي يُظْهِرُهُ فَهُوَ كَذَا وَكَذَا سُمْعَةً يُسْمِعُ بِهَا الْقَوْمَ، وَأَنَّ أَصْلَ الْمَهْرِ هُوَ كَذَا وَكَذَا الَّذِي فِي السِّرِّ، ثُمَّ تَزَوَّجَ فَأَعْلَنَ الَّذِي قَالَ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: الْمَهْرُ هُوَ الْأَوَّلُ، وَهُوَ الْمَهْرُ الَّذِي فِي السِّرِّ، وَالسُّمْعَةُ بَاطِلٌ الَّذِي أَظْهَرَ لِلْقَوْمِ. وَبِهِ يَأْخُذُ.
1249 – But Ibn Abī Laylā used to say: The <i>sumʿa</i> ; it is the <i>mahr</i> . And that which he confided in secret is <i>bāṭil</i> .	1249 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: السُّمْعَةُ هِيَ الْمَهْرُ، وَالَّذِي أَسَرَ بَاطِلٌ.
1250 – Abū Yūsuf [reported], on the authority of Muṭarrif, on ʿĀmir, he said: When the man confides a <i>mahr</i> in secret, but announces more than that, it is taken for the publicized (<i>ukhidha biʾl-ʿalāniyati</i>).	1250 – أَبُو يُوسُفَ عَنْ مُطَرِّفٍ، عَنْ عَامِرٍ، قَالَ: إِذَا أَسَرَ الرَّجُلُ مَهْرًا وَأَعْلَنَ أَكْثَرَ مِنْ ذَلِكَ أُخِذَ بِالْعَلَانِيَةِ.
1251 – Abū Yūsuf [reported], on the authority of al-Ḥasan b. ʿUmārata, on al-Ḥakam, on Shurayḥ and Ibrāhīm: the like.	1251 – أَبُو يُوسُفَ، عَنْ الْحَسَنِ بْنِ عُمَارَةَ، عَنْ الْحَكَمِ، عَنْ شُرَيْحٍ وَإِبْرَاهِيمَ مِثْلَهُ.
1252 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man marries a woman with a publicly-announced <i>mahr</i> , but he secretly confided before that a <i>mahr</i> less than it; the <i>mahr</i> is the publicly-announced <i>mahr</i> upon which occurred (<i>waqaʿat alayhi</i>) the contract of marriage (<i>uqdatu al-nikāh</i>) — unless the witnesses of the two <i>mahrs</i> are one [and the same], and they confirm that the <i>mahr</i> is the secretly-confided <i>mahr</i> , and that the woman and the husband contracted (<i>aqadā</i>) the <i>nikāh</i> upon its basis, and they publicly announced the engagement (<i>al-</i>	1252 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا تَزَوَّجَ الرَّجُلُ امْرَأَةً بِمَهْرٍ عَلَانِيَةٍ وَأَسَرَ قَبْلَ ذَلِكَ مَهْرًا أَقْلَ مِنْهُ، فَالْمَهْرُ الْمَهْرُ الْعَلَانِيَةِ الَّذِي وَقَعَتْ عَلَيْهِ عُقْدَةُ النِّكَاحِ إِلَّا أَنْ يَكُونَ شُهُودُ الْمَهْرَيْنِ وَاحِدًا فَيُشْتَبُونَ عَلَى أَنَّ الْمَهْرَ مَهْرُ السِّرِّ، وَأَنَّ الْمَرْأَةَ وَالزَّوْجَ عَقَدَا النِّكَاحَ عَلَيْهِ، وَأَعْلَنَّا الْخِطْبَةَ بِمَهْرٍ غَيْرِهِ، أَوْ يَشْهَدُونَ أَنَّ

the text as rendered by Būlāq may be found in the sources (such as Tirmidhī) as it is. As for the (ثَلَاثًا) after the *ḥadīth*, it seems to indicate that the last phrase was thrice repeated.

<i>khiṭbata</i>) with a different <i>mahr</i>; or [unless] they testify that the woman, after the contract, acknowledged that such as by which testimony for her was made from him was a <i>sumʿa</i>, not a <i>mahr</i>.	الْمَرْأَةُ بَعْدَ الْعَقْدِ أَقَرَّتْ بِأَنَّ مَا شَهِدَ لَهَا بِهِ مِنْهُ سُمْعَةٌ لَا مَهْرٌ.
1253 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And the <i>nikāh</i> is not permitted except by a <i>wālī</i>, and two <i>ʿadl</i> witnesses, and the unforced consent (<i>riḍā</i>) of the bride (<i>al-mankūḥa</i>) and the groom (<i>al-nākiḥ</i>); except as regards the <i>ama</i> – for indeed her master marries her off; and the <i>bikr</i> – for indeed her father marries her off. And whosoever has not attained age of majority (<i>lam yablugh</i>); indeed the fathers marry them off. And this is written in the <i>Kitāb al-Nikāh</i>.¹⁷	1253 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَلَا يَجُوزُ النِّكَاحُ إِلَّا بِوَلِيِّ وَشَاهِدَيْنِ عَدْلٍ وَرِضَا الْمَنْكُوحَةِ وَالنَّكَاحِ، إِلَّا فِي الْأَمَةِ فَإِنَّ سَيِّدَهَا يُزَوِّجُهَا، وَالْبَكْرَ فَإِنَّ أَبَاهَا يُزَوِّجُهَا. وَمَنْ لَمْ يَبْلُغْ فَإِنَّ الْآبَاءَ يُزَوِّجُونَهُمْ. وَهَذَا مَكْتُوبٌ فِي كِتَابِ النِّكَاحِ.
1254 – He said: And when a man marries off his daughter while she has attained sexual maturity (<i>qad adrakat</i>); then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: When she disapproves of (<i>karihat</i>) that, the <i>nikāh</i> is not permitted over her; because she has attained maturity, and taken ownership of her affairs (<i>malakat amrahā</i>), and she is not to be compelled (<i>lā tukrahu</i>) to that.	1254 – قَالَ: وَإِذَا زَوَّجَ الرَّجُلُ ابْنَتَهُ وَقَدْ أَدْرَكَتْ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: إِذَا كَرِهَتْ ذَلِكَ لَمْ يَجْزِ النِّكَاحُ عَلَيْهَا؛ لِأَنَّهَا قَدْ أَدْرَكَتْ وَمَلَكَتْ أَمْرَهَا، فَلَا تُكْرَهُ عَلَى ذَلِكَ.
1255 – It has reached us concerning the Messenger of God, may God bless and save him, that he said: «The virgin (<i>al-bikru</i>) is consulted (<i>tustaʿmaru</i>) regarding herself, and her permission is her silence (<i>ṣumātuhā</i>).» So if she is, when she disapproves of [the proposed marriage], compelled to that [anyway] – she has not been “consulted.” And he [Abū Yūsuf] embraces it.	1255 – بَلَّغْنَا عَنْ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – أَنَّهُ قَالَ: «الْبِكْرُ تُسْتَأْمَرُ فِي نَفْسِهَا وَإِذْنُهَا صُمَاتُهَا» فَلَوْ كَانَتْ إِذَا كَرِهَتْ أُجْبِرَتْ عَلَى ذَلِكَ لَمْ تُسْتَأْمَر. وَبِهِ يَأْخُذُ.
1256 – But Ibn Abī Laylā used to say: The <i>nikāh</i> is <i>jāʿiz</i> over her, even if she disapproves of [it].	1256 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: النِّكَاحُ جَائِزٌ عَلَيْهَا وَإِنْ كَرِهَتْ.

¹⁷ The third reference to a *Kitāb al-Nikāh* which has occurred in this current *Bāb al-Nikāh* (cf. §§1232 and 1241 and attached notes). The details of the *masʿala* under consideration in §1253 are quite basic and broad of scope; no doubt material relevant to them may be found scattered throughout the current *Kitāb al-Nikāh* as it occurs in the *Umm*, as well as through subsequent chapters (see §1241 and attached note).

1257 – Al-Shāfiʿī, may God Most High have mercy upon him, said: The giving in marriage (*inkāh*) of the father, specifically (*khāṣṣat^{an}*), is *jāʿiz* over the *bikr* – be she sexually mature (*bālighat^{an}*) or otherwise. And the *dalāla* for that is the *qawl* of the Messenger of God, may God bless and save him: «The widow (*al-ayyim*) has more right to herself than her *walī*, but the virgin (*al-bikr*) is consulted (*tustaʿmaru*) regarding herself.» So the Messenger of God, may God bless and save him, made a distinction (*farraqa*) between the two. And he treated the widow as having more right to herself. And he commanded, regarding this one [the *bikr*], consultation (*amara fī hādhihi biʿl-muʿamarati*). And the consultation might be against self-gratification (*istiṭābati al-nafsi*); because it is narrated that the Prophet, may God bless and save him, said: «And consult (*āmirū*) the women regarding their daughters.» And due to the *qawl* of God, to Him belong might and majesty: «And seek their counsel (*shāwirhum*) in the matter» [Q.3:159]. And if the command concerning them [fem. pl.] were one, he [the Prophet] would have said: “The widow and the virgin have more right to themselves.” And this, all of it, is deeply examined (*mustaqṣ^{an}*) on the basis of its *hujaj*, in the *Kitāb al-Nikāh*.¹⁸

1257 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى:
 إِنْكَاحُ الْأَبِ خَاصَّةً جَائِزٌ عَلَى الْبِكْرِ بِالْعَةِ
 وَغَيْرِ بِالْعَةِ، وَالِدَّلَالَةُ عَلَى ذَلِكَ قَوْلُ رَسُولِ
 اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «الْأَيِّمُ أَحَقُّ
 بِنَفْسِهَا مِنْ وَلِيِّهَا، وَالْبِكْرُ تُسْتَأْمَرُ فِي نَفْسِهَا». فَفَرَّقَ رَسُولُ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ –
 بَيْنَهُمَا؛ فَجَعَلَ الْأَيِّمَ أَحَقَّ بِنَفْسِهَا، وَأَمَرَ فِي
 هَذِهِ بِالْمُؤَامَرَةِ، وَالْمُؤَامَرَةُ قَدْ تَكُونُ عَلَى
 اسْتِطَابَةِ النَّفْسِ؛ لِأَنَّهُ رُوِيَ أَنَّ النَّبِيَّ – صَلَّى
 اللَّهُ عَلَيْهِ وَسَلَّمَ – قَالَ: «وَأْمِرُوا النِّسَاءَ فِي
 بَنَاتِهِنَّ». وَلِقَوْلِ اللَّهِ عَزَّ وَجَلَّ: «وَشَاوِرْهُمْ
 فِي الْأَمْرِ» [آل عمران: 159] وَلَوْ كَانَ الْأَمْرُ
 فِيهِنَّ وَاحِدًا لَقَالَ: الْأَيِّمُ وَالْبِكْرُ أَحَقُّ
 بِنَفْسَيْهِمَا. وَهَذَا كُلُّهُ مُسْتَقْصَى بِحُجَجِهِ فِي
 كِتَابِ النِّكَاحِ.

¹⁸ This pointer to a *K. al-Nikāh* is especially worthy of cross-referencing, as it promises to uncover a number of supporting arguments. As we have seen, this now constitutes the fourth reference to such a *Kitāb* in this particular chapter (cf. §§1232, 1241, 1253). Note first that al-Shāfiʿī refers once again to the special rights of fathers in this case; they, specifically, have the right to compulsion, whether she is *bāligha* or not. He then draws upon three indicants – two Sunnaic, and one Qurʾānic – in support of his distinction between the treatment of the virgin and the non-virgin. Interestingly, he concludes by saying that the Prophet – had he intended that virgin and non-virgin (widow, in the Sunnaic *dalīl*) were to be treated the same in this regard – would have said as much. It may be arguable that this constitutes an *e silentio* argument; but certainly al-Shāfiʿī’s hermeneutic, if accurate, would outweigh such a consideration, were “widow” (*ayyim*) shown to be a strong indicant for “non-virgin” (*thayyib*). From what we can tell of al-Shāfiʿī’s arguments elsewhere in the *Umm* (the most relevant of which do, indeed, fall within the purview of a greater *Kitāb al-Nikāh* – as suggested in the note attached to §1241, above, and to which we are referenced by the either al-Shāfiʿī or another narrator here in §1257), he most certainly proceeded from these Sunnaic indicants to argue that the Prophet made a distinction between the *bikr* and the *thayyib*. In particular, see §§15398-15403 of the chapter *Mā Jā’a fī Nikāh al-Ābā’* (Ḥassūn, vol.5, pt.10, 57-9), where a *ḥadīth* transmitted from Mālik about the Prophet’s rejection of a *thayyib*’s marriage against her approval (§15399) appears to provide a link from *ayyim* to *thayyib*, along with a number of other arguments. See also the arguments in §§18235ff. of the *Bāb Nikāh al-Wulāt wa’l-Nikāh bi’l-Shahāda* (Ḥassūn, vol.6, pt.11, 69ff.), where al-Shāfiʿī

1258 – And when a man marries a woman, then they disagree (<i>ikhtalafā</i>) regarding the <i>mahr</i>, and he consummates with her (<i>dakhala bihā</i>), and between them both there is no <i>bayyina</i>; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say regarding that: To her belongs her appropriate dowry (<i>mahru mithlihā</i>), unless that which she laid claim to is less than that – there belongs to her what she claimed.	1258 – وَإِذَا تَزَوَّجَ الرَّجُلُ الْمَرْأَةَ ثُمَّ اخْتَلَفَا فِي الْمَهْرِ فَدَخَلَ بِهَا وَلَيْسَ بَيْنَهُمَا بَيِّنَةٌ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ فِي ذَلِكَ: لَهَا مَهْرٌ مِثْلِهَا إِلَّا أَنْ يَكُونَ مَا ادَّعَتْ أَقْلَ مِنْ ذَلِكَ فَيَكُونُ لَهَا مَا ادَّعَتْ.
1259 – But Ibn Abī Laylā used to say: There belongs to her only that which the husband designated for her, and she has no right to anything besides that. And he [Abū Yūsuf] embraces it.	1259 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: إِنَّمَا لَهَا مَا سَمَّى لَهَا الزَّوْجُ، وَلَيْسَ لَهَا شَيْءٌ غَيْرُ ذَلِكَ. وَبِهِ يَأْخُذُ.
1260 – Then Abū Yūsuf said, afterwards: If the husband makes acknowledgment for what is [equivalent to] her appropriate dowry, or close to it, it is accepted from him. But if not, it is not accepted from him.	1260 – ثُمَّ قَالَ أَبُو يُوسُفَ بَعْدُ: إِنْ أَقَرَّ الزَّوْجُ بِمَا يَكُونُ مَهْرَ مِثْلِهَا أَوْ قَرِيبًا مِنْهُ قَبْلَ مِنْهُ وَإِلَّا لَمْ يُقْبَلْ مِنْهُ.
1261 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And when a man marries a woman, consummating with her or not, then they disagree concerning the <i>mahr</i>; they mutually swear (<i>tahālafā</i>), and to her belongs the appropriate dowry (<i>mahru mithlihā</i>) – whether it is less than what she claimed, or less than what the husband acknowledged, or more. [This is] like the <i>qawl</i> regarding the elapsed sales contracts (<i>al-buyū‘ al-fā’itātī</i>), except that we do not reject the contract in <i>nikāh</i> on the same basis for which we reject it in sales contracts. But we rule for him the <i>ḥukm</i> of the <i>buyū‘ al-fā’ita</i>, because the <i>buyū‘ al-fā’ita</i> are ruled according to the value; and this is ruled according to the value, and the value for it [for the <i>mahr</i>] is the <i>mahr</i> “of her kind” (<i>mithlihā</i>), just as in the <i>buyū‘</i> it is a value “of the commodity’s kind” (<i>mithlu al-sil’ati</i>).¹⁹	1261 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا تَزَوَّجَ الرَّجُلُ الْمَرْأَةَ دَخَلَ بِهَا أَوْ لَمْ يَدْخُلْ بِهَا، فَاخْتَلَفَا فِي الْمَهْرِ تَحَالَفَا وَكَانَ لَهَا مَهْرٌ مِثْلِهَا، كَانَ أَقْلٌ مِمَّا ادَّعَتْ أَوْ أَقْلٌ مِمَّا أَقَرَّ بِهِ الزَّوْجُ أَوْ أَكْثَرُ، كَالْقَوْلِ فِي الْبُيُوعِ الْفَائِتَةِ، إِلَّا أَنَّا لَا نَرُدُّ الْعَقْدَ فِي النِّكَاحِ بِمَا يُرَدُّ فِي الْعَقْدِ فِي الْبُيُوعِ، وَنَحْكُمُ لَهُ حُكْمَ الْبُيُوعِ الْفَائِتَةِ؛ لِأَنَّ الْبُيُوعَ الْفَائِتَةَ يُحْكَمُ فِيهَا بِالْقِيَمَةِ وَهَذَا يُحْكَمُ فِيهِ بِالْقِيَمَةِ، وَالْقِيَمَةُ فِيهِ مَهْرٌ مِثْلِهَا، كَمَا هِيَ فِي الْبُيُوعِ قِيَمَةٌ مِثْلُ السَّلْعَةِ.

claims directly (at §18236) that within the very same Prophetic *ḥadīth* we see in §1257 (*ayyim* and *bikr*) is “a *dalāla* of the *farq* between the *bikr* and the *thayyib*.” In pursuant dialectic, he provides his full hermeneutic for the questioner.

¹⁹ This appears a unique kind of “limited *qiyās*,” whereby *qiyās* is performed by way of some efficient properties, but not others.

1262 – And when the <i>ama</i> is manumitted (<i>u'tiqat</i>), and her husband is freeborn (<i>hurr^{un}</i>); then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to make it so that there belongs to her the <i>khiyār</i> : if she wishes, she chooses herself (<i>ikhtārat nafsahā</i>), and if she wishes, she resides with her husband.	1262 – وَإِذَا أُعْتِقَتِ الْأَمَةُ وَزَوَّجَهَا حُرٌّ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَجْعَلُ لَهَا الْخِيَارَ؛ إِنْ شَاءَتْ اخْتَارَتْ نَفْسَهَا، وَإِنْ شَاءَتْ أَقَامَتْ مَعَ زَوْجِهَا.
1263 – But Ibn Abī Laylā used to say: No <i>khiyār</i> belongs to her.	1263 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا خِيَارَ لَهَا.
1264 – And among the <i>hujja</i> of Ibn Abī Laylā regarding Barīra ²⁰ is that he says: Her husband was a slave.	1264 – وَمِنْ حُجَّةِ ابْنِ أَبِي لَيْلَى فِي بَرِيرَةَ أَنَّهُ يَقُولُ: كَانَ زَوْجُهَا عَبْدًا.
1265 – And among the <i>hujja</i> of Abū Ḥanīfa regarding that, is that he says: Verily the <i>ama</i> does not own herself (<i>lā tamliku nafsahā</i>), nor her <i>nikāh</i> .	1265 – وَمِنْ حُجَّةِ أَبِي حَنِيفَةَ فِي ذَلِكَ أَنَّهُ يَقُولُ: إِنَّ الْأَمَةَ لَا تَمْلِكُ نَفْسَهَا وَلَا نِكَاحَهَا.
1266 – And it has reached us concerning the Messenger of God, may God bless and save him, that he gave <i>khiyār</i> (<i>khayyara</i>) to Barīra when she was manumitted.	1266 – وَقَدْ بَلَّغْنَا عَنْ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – أَنَّهُ خَيَّرَ بَرِيرَةَ حِينَ عَتَقَتْ.
1267 – And it has reached us on the authority of ʿĀ'isha, may God be pleased with her, that the husband of Barīra was free.	1267 – وَقَدْ بَلَّغْنَا عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا أَنَّ زَوْجَ بَرِيرَةَ كَانَ حُرًّا.
1268 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the <i>ama</i> is manumitted; if she is beneath a slave (<i>tahta ʿabdⁱⁿ</i>), then she has the <i>khiyār</i> ; but if she is beneath a freeborn, she has no <i>khiyār</i> . That is because the husband of Barīra was a slave. And this is written in the <i>Kitāb al-Nikāh</i> . ²¹	1268 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أُعْتِقَتِ الْأَمَةُ؛ فَإِنْ كَانَتْ تَحْتَ عَبْدٍ فَلَهَا الْخِيَارُ، وَإِنْ كَانَتْ تَحْتَ حُرٍّ فَلَا خِيَارَ لَهَا، وَذَلِكَ أَنَّ زَوْجَ بَرِيرَةَ كَانَ عَبْدًا. وَهَذَا مَكْتُوبٌ فِي كِتَابِ النِّكَاحِ.

²⁰ Note this Barīra is the same *mawlāt* of ʿĀ'isha mentioned in §74, above.

²¹ The last reference to a *Kitāb al-Nikāh* we will see in this chapter (cf. §§1232, 1241, 1253, 1257 and attached notes). The referenced arguments and *adilla* are indeed to be found in what we might consider the greater *Kitāb al-Nikāh* of the *Umm*, as part of the mixed *masā'il* after the *Kitāb al-Nafaqāt*. In fact, the current *mas'ala* receives two subheadings of its own, and the material relevant to it (the *ḥadīth* regarding Barīra and associated arguments) may be found under *Infisākh al-Nikāh bayna al-Amati wa Zawjihā al-'Abdi idhā 'Ataqat* (especially at §17195; Ḥassūn, vol.5, pt.10, 418f.); and under the subsequent subheading *Al-Khilāf fī Khiyār al-Amati*, which consists entirely of an extended dialectical debate (§§17198-17264; Ḥassūn, vol.5, pt.10, 420-26). Al-Shāfiʿī introduces this debate (§17198) with: “And one of the people contradicts us (*khālafanā*) as regards the *khiyār* of the *ama*; he says: She is given *khiyār* under the freeborn just as she is given *khiyār* under the slave” (which is precisely the stance of Abū Ḥanīfa in §1262). Following this is yet another illuminating example of Q&A format juridical debate, illustrating a range of hermeneutic, rational-inference, and informal argument.

1269 – And when she marries while her husband is absent, his death having been announced to her (<i>kāna qad nu‘iya ilayhā</i>), and she gives birth from (<i>waladat min</i>) her other husband, then her first husband comes along; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: The child belongs to the first, and he is “the owner of the bed” (<i>ṣāhibu al-firāshi</i>).	1269 – وَإِذَا تَزَوَّجَتْ وَزَوْجُهَا غَائِبٌ، كَانَ قَدْ نُعِيَ إِلَيْهَا، فَوَلَدَتْ مِنْ زَوْجِهَا الْآخِرِ ثُمَّ جَاءَ زَوْجُهَا الْأَوَّلُ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: الْوَلَدُ لِلْأَوَّلِ، وَهُوَ صَاحِبُ الْفِرَاشِ.
1270 – And it has reached us concerning the Messenger of God, may God bless and save him, that he said: «The child belongs to the bed, and to the adulterer belongs the stone (<i>al-waladu li'l-firāshi wa li'l-‘āhiri al-ḥajaru</i>).» ²²	1270 – وَقَدْ بَلَّغْنَا عَنْ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – أَنَّهُ قَالَ: «الْوَلَدُ لِلْفِرَاشِ وَلِلْعَاهِرِ الْحَجَرُ».
1271 – But Ibn Abī Laylā used to say: The child belongs to the other one, because he is not an ‘āhir – “the ‘āhir” is “the zānī” – because he is married (<i>mutazawwij^{un}</i>).	1271 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: الْوَلَدُ لِلْآخِرِ؛ لِأَنَّهُ لَيْسَ بِعَاهِرٍ، وَالْعَاهِرُ الزَّانِي؛ لِأَنَّهُ مُتَزَوِّجٌ.
1272 – And thus it has reached us on the authority of ‘Alī b. Abī Ṭālib, may God be pleased with him. And he [Abū Yūsuf] embraces it.	1272 – وَكَذَلِكَ بَلَّغْنَا عَنْ عَلِيِّ بْنِ أَبِي طَالِبٍ رَضِيَ اللَّهُ عَنْهُ وَبِهِ يَأْخُذُ.
1273 – Al-Shāfi‘ī, may God have mercy upon him, said: And when the death of her husband reaches the woman, and she performs her ‘idda (<i>i’taddat</i>), then she is married and bears children, then her lamented husband (<i>zawjuhā al-man‘iyyu</i>) comes along, alive; the other <i>nikāh</i> is cancelled (<i>fusikha</i>), and she performs ‘idda from it, and she is the wife of the first as she is (<i>kamā hiya</i>). But the child belongs to the other, because he contracted <i>nikāh</i> with her by a <i>nikāh</i> which was <i>ḥalāl</i> as regards all outward appearances (<i>fi’l-zāhiri</i>) – its <i>ḥukm</i> is the <i>ḥukm</i> of the <i>firāsh</i> .	1273 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا بَلَغَ الْمَرْأَةُ وَفَاةُ زَوْجِهَا فَاعْتَدَّتْ ثُمَّ نَكَحَتْ فَوَلَدَتْ أَوْلَادًا ثُمَّ جَاءَ زَوْجُهَا الْمُنْعِيُّ حَيًّا، فَسُخِيَ النِّكَاحُ الْآخِرُ وَاعْتَدَّتْ مِنْهُ وَكَانَتْ زَوْجَةَ الْأَوَّلِ كَمَا هِيَ، وَكَانَ الْوَلَدُ لِلْآخِرِ؛ لِأَنَّهُ نَكَحَهَا نِكَاحًا حَلَالًا فِي الظَّاهِرِ، حُكْمُهُ حُكْمُ الْفِرَاشِ.

²² As regards this fascinating and ancient maxim, see Uri Rubin, “‘Al-Walad li-l-Firāsh:’ on the Islamic Campaign against Zinā’,” *Studia Islamica* 78 (1993): 5-26; and my own *Stoning and Hand-Amputation: The Pre-Islamic Origins of the Ḥadd Penalties for Zinā and Sariqa* (M.A. Thesis, McGill University, 2005), 180ff.

1274 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the man touches the <i>jāriya</i> , she is forbidden to his father and his son; but she is not forbidden to his father and his son due to gazing without touching. ²³	1274 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا لَمَسَ الرَّجُلُ الْجَارِيَةَ حُرِّمَتْ عَلَى أَبِيهِ وَابْنِهِ، وَلَا تَحْرُمُ عَلَى أَبِيهِ وَابْنِهِ بِالنَّظَرِ دُونَ اللَّمَسِ.

²³ This curious repetition, near verbatim, of the contents of §1237 — so entirely out of context here — is worth a certain amount of conjecture. Its location here is consistent throughout the other editions I have referenced (Būlāq, vii.145; Maṭrajī, vii.241; and Najjār, vii.157) — and thus quite a number of manuscripts, but it draws no comment from any of the editors. Although I have not quite worked out its significance (if any), §1274 may yet offer another clue for the compositional or redactional history of the *Umm* Version.

Bāb al-Ṭalāq

Chapter on Unilateral Repudiation (al-Ṭalāq) ¹	بَابُ الطَّلَاقِ
1275 – Abū Yūsuf said, on the authority of al-Ash'ath b. Sawwār, on al-Ḥakam, on Ibrāhīm, on Ibn Mas'ūd, that he used to say regarding the ḥarām: If he intended (nawā) an oath (yamīn); then a yamīn. And if he intended unilateral repudiation (ṭalāq); then a ṭalāq. It is what he intended as pertains to that.	1275 – قَالَ أَبُو يُوسُفَ، عَنِ الْأَشْعَثِ بْنِ سَوَّارٍ، عَنِ الْحَكَمِ، عَنِ إِبْرَاهِيمَ، عَنِ ابْنِ مَسْعُودٍ أَنَّهُ كَانَ يَقُولُ فِي الْحَرَامِ: إِنْ نَوَى يَمِينًا فَيَمِينٌ، وَإِنْ نَوَى طَلَاقًا فَطَلَاقٌ، وَهُوَ مَا نَوَى مِنْ ذَلِكَ.
1276 – And when the man says: Every lawful thing is unlawful for me (kullu ḥill ⁱⁿ 'alayya ḥarām ^{um}); then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: The qawl [to be considered] is the qawl of the husband; for if he did not mean (lam ya'ni) ṭalāq, then it is not a ṭalāq — it is merely a yamīn which he will break with kaffāra (yamīn ^{um} yukaffiruhā). But if he means ṭalāq, and he intends three [ṭalāqs]; then three [ṭalāqs]. And if he intends one [ṭalāq]; then one [ṭalāq], irrevocable (bā'inat ^{um}). And if he intends ṭalāq, but does not intend a number; it is one [ṭalāq], bā'ina.	1276 – وَإِذَا قَالَ الرَّجُلُ: كُلُّ حِلٍّ عَلَيَّ حَرَامٌ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: الْقَوْلُ قَوْلُ الزَّوْجِ، فَإِنْ لَمْ يَعْزِ طَلَاقًا فَلَيْسَ بِطَلَاقٍ، وَإِنَّمَا هِيَ يَمِينٌ يُكْفَرُهَا. وَإِنْ عَزَى الطَّلَاقَ وَنَوَى ثَلَاثًا فَثَلَاثٌ. وَإِنْ نَوَى وَاحِدَةً فَوَاحِدَةٌ بَائِنَةٌ. وَإِنْ نَوَى طَلَاقًا وَلَمْ يَنْوِ عَدَدًا فَفِيهِ وَاحِدَةٌ بَائِنَةٌ.
1277 – And likewise when he says to his wife: She is, for me, ḥarām (hiya 'alayya ḥarām ^{um}).	1277 – وَكَذَلِكَ إِذَا قَالَ لِامْرَأَتِهِ: هِيَ عَلَيَّ حَرَامٌ.
1278 – And likewise, when he says to his wife: Released (khaliyyat ^{um}), or free (barriyyat ^{um}), or final (bā'in ^{um}), or definite (battat ^{um}); the qawl [to be considered] is the qawl of the husband, and it is what he intends. And if he intends one [ṭalāq]; then it is one [ṭalāq], bā'ina. And if he intends three [ṭalāqs]; then three [ṭalāqs]. That has reached us on the authority of Shurayḥ. But if he intends two [ṭalāqs]; it is one [ṭalāq], bā'ina. And if he does not intend ṭalāq; then it is not ṭalāq. However, upon him is [enjoined] the yamīn [that] he did not intend ṭalāq. And he [Abū Yūsuf] embraces it.	1278 – وَكَذَلِكَ إِذَا قَالَ لِامْرَأَتِهِ: خَلِيَّةٌ، أَوْ بَرِيَّةٌ، أَوْ بَائِنٌ، أَوْ بَتَّةٌ، فَالْقَوْلُ قَوْلُ الزَّوْجِ وَهُوَ مَا نَوَى، إِنْ نَوَى وَاحِدَةً فَفِيهِ وَاحِدَةٌ بَائِنَةٌ. وَإِنْ نَوَى ثَلَاثًا فَثَلَاثٌ. بَلَّغْنَا ذَلِكَ عَنْ شُرَيْحٍ. وَإِنْ نَوَى اثْنَتَيْنِ فَفِيهِ وَاحِدَةٌ بَائِنَةٌ. وَإِنْ لَمْ يَنْوِ طَلَاقًا فَلَيْسَ بِطَلَاقٍ، غَيْرَ أَنَّ عَلَيْهِ الْيَمِينَ مَا نَوَى طَلَاقًا. وَبِهِ يَأْخُذُ.

¹ (Ḥassūn, vol.9, pt.14, 214-32; Schacht: Tr. I, 225-253).

1279 – But Ibn Abī Laylā used to say, as regards the entirety of what I have stated: It is three² pronouncements of ṭalāq (<i>thalāthu ṭaṭliqāt^m</i>); we do not confirm his intention (<i>lā nudayyīnuhu</i>) regarding anything of them. And we do not treat the <i>qawl</i> [to be considered] as his <i>qawl</i> regarding anything of that.	1279 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ، فِي جَمِيعِ مَا ذَكَرْتُ: هِيَ ثَلَاثُ تَطْلِيقَاتٍ لَا تُدَيِّنُهُ فِي شَيْءٍ مِنْهَا، وَلَا نَجْعَلُ الْقَوْلَ قَوْلَهُ فِي شَيْءٍ مِنْ ذَلِكَ.
1280 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when a man says to his wife: You are, for me, <i>ḥarām</i>. If he intends <i>ṭalāq</i>; then it is a <i>ṭalāq</i>, and it is what he desired as pertains to the number of the <i>ṭalāq</i>. And the <i>qawl</i> for that is his <i>qawl</i>, with his <i>yamīn</i>. And if he doesn't mean <i>ṭalāq</i>, then it is not <i>ṭalāq</i>, and he performs the <i>kaffāra</i> which breaks the oath (<i>yukaffiru kaffārata yamīn^m</i>). [This is] by <i>qiyās</i> with one who forbids [himself] (<i>yuharrimu</i>) his <i>ama</i>; for upon him, regarding her, is [enjoined] the <i>kaffāra</i>. [This is] because the Messenger of God, may God bless and save him, forbade [himself] his <i>ama</i>, then God, to Him belong might and majesty, revealed: «Why do you forbid that which God made lawful to you, seeking the satisfaction of your wives» [Q.66:1]. And God made it [the <i>kaffāra</i>] a <i>yamīn</i>, and said: «God has allocated you (<i>faraḍa lakum</i>) the expiation of your oaths (<i>taḥillata aymānikum</i>)» [Q.66:2].	1280 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا قَالَ الرَّجُلُ لِمَرْأَتِهِ: أَنْتِ عَلَيَّ حَرَامٌ. فَإِنْ نَوَى طَلَاقًا فَهُوَ طَلَاقٌ وَهُوَ مَا أَرَادَ مِنْ عَدَدِ الطَّلَاقِ، وَالْقَوْلُ فِي ذَلِكَ قَوْلُهُ مَعَ يَمِينِهِ، وَإِنْ لَمْ يُرِدْ طَلَاقًا فَلَيْسَ بِطَلَاقٍ وَيُكَفِّرُ كَفَّارَةَ يَمِينٍ، قِيَاسًا عَلَى الَّذِي يُحَرِّمُ أَمَّتَهُ، فَيَكُونُ عَلَيْهِ فِيهَا الْكُفَّارَةُ؛ لِأَنَّ رَسُولَ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – حَرَّمَ أَمَّتَهُ فَأَنْزَلَ اللَّهُ عَزَّ وَجَلَّ: «لَمْ تُحَرِّمْ مَا أَحَلَّ اللَّهُ لَكَ تَبْتَغِي مَرْضَاةَ أَزْوَاجِكَ» [التحریم: 1]. وَجَعَلَهَا اللَّهُ يَمِينًا فَقَالَ: «قَدْ فَرَضَ اللَّهُ لَكُمْ تَحِلَّةَ أَيْمَانِكُمْ» [التحریم: 2].
1281 – And when the man says to his wife: Your affairs are in your hands (<i>amruki fī yadiki</i>). Then she says: I have repudiated myself with three [<i>ṭalāqs</i>] (<i>tallaqtu nafsī ṭalāth^m</i>). Then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: When the husband intended (<i>nawā</i>) three [<i>ṭalāqs</i>], then it is three [<i>ṭalāqs</i>]. And if he intended one [<i>ṭalāq</i>], then it is one [<i>ṭalāq</i>], <i>bā'ina</i>. And he [Abū Yūsuf] embraces it.	1281 – وَإِذَا قَالَ الرَّجُلُ لِمَرْأَتِهِ: أَمْرُكِ فِي يَدِكَ. فَقَالَتْ: قَدْ طَلَّقْتُ نَفْسِي ثَلَاثًا. فَإِنْ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: إِذَا كَانَ الزَّوْجُ نَوَى ثَلَاثًا فَهِيَ ثَلَاثٌ. وَإِنْ كَانَ نَوَى وَاحِدَةً فَهِيَ وَاحِدَةٌ بَائِنَةٌ. وَبِهِ يَأْخُذُ.
1282 – But Ibn Abī Laylā used to say: It is three [<i>ṭalāqs</i>], and the husband is not asked about anything.	1282 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هِيَ ثَلَاثٌ، وَلَا يُسْأَلُ الزَّوْجُ عَنْ شَيْءٍ.

² ثلاث تطلقات Hassūn has

1283 – Al-Shāfi'ī said: And when a man gives his wife <i>khiyār</i> (<i>khayyara... imra'atahu</i>), or puts her in ownership of her affairs (<i>mallakahā amrahā</i>), then she unilaterally repudiates herself with pronouncement of a <i>ṭalāq</i> (<i>taṭlīqat^{un}</i>); he owns the right to return (<i>al-raj'ata</i>) regarding her, just as he owns it if he had initiated her <i>ṭalāq</i> .	1283 – قَالَ الشَّافِعِيُّ: وَإِذَا خَيَّرَ الرَّجُلُ امْرَأَتَهُ أَوْ مَلَكَهَا أَمْرَهَا فَطَلَّقَتْ نَفْسَهَا تَطْلِيقَةً، فَهُوَ يَمْلِكُ الرَّجْعَةَ فِيهَا، كَمَا يَمْلِكُهَا لَوْ ابْتَدَأَ طَلَقَهَا.
1284 – And Abū Ḥanīfa used to say regarding the <i>khiyār</i> : If she chooses herself (<i>ikhtārat nafsaḥā</i>); then it is one [<i>ṭalāq</i>], irrevocable (<i>fa-wāḥidat^{un} bā'inat^{un}</i>). And if she chooses her husband; then nothing. And he [Abū Yūsuf] embraces it.	1284 – وَكَانَ أَبُو حَنِيفَةَ يَقُولُ فِي الْخِيَارِ: إِنْ اخْتَارَتْ نَفْسَهَا فَوَاحِدَةٌ بَائِنَةٌ. وَإِنْ اخْتَارَتْ زَوْجَهَا فَلَا شَيْءَ. وَبِهِ يَأْخُذُ.
1285 – But Ibn Abī Laylā used to say: If she chooses herself; then it is one [<i>ṭalāq</i>], for which he owns the right to return (<i>wāḥidat^{un} yamliku bihā al-raj'ata</i>). And if she chooses her husband; then nothing.	1285 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: إِنْ اخْتَارَتْ نَفْسَهَا فَوَاحِدَةٌ يَمْلِكُ بِهَا الرَّجْعَةَ، وَإِنْ اخْتَارَتْ زَوْجَهَا فَلَا شَيْءَ.
1286 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the man says to his wife, while he does not have penetrative sexual intercourse with her (<i>wa lam tadkhul bihā</i>): You are repudiated (<i>anti ṭāliq^{un}</i>), You are repudiated, You are repudiated; she is irrevocably separated by the first (<i>bānat bi'l-ūlā</i>), and no 'idda is [enjoined] upon her. And the two [<i>ṭalāqs</i>] adhere to her (<i>talzamuḥā al-thintāni</i>); but each one of the two happened to her only while she was irrevocably separated (<i>bā'in^{un}</i>) from him, <i>ḥalāl</i> to others. And thus said Abū Bakr b. 'Abd al-Raḥmān b. al-Ḥārith b. Hishām. ³	1286 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا قَالَ الرَّجُلُ لَامْرَأَتِهِ وَلَمْ يَدْخُلْ بِهَا: أَنْتِ طَالِقٌ، أَنْتِ طَالِقٌ، أَنْتِ طَالِقٌ. بَأْتِ بِالْأُولَى وَلَمْ يَكُنْ عَلَيْهَا عِدَّةٌ فَتَلَزُمُهَا الثَّنَانِ، وَإِنَّمَا أَحْدَثَ كُلُّ وَاحِدَةٍ مِنْهُمَا لَهَا وَهِيَ بَائِنٌ مِنْهُ حَلَالٌ لغيرِهِ. وَهَكَذَا قَالَ أَبُو بَكْرٍ بْنُ عَبْدِ الرَّحْمَنِ بْنِ الْحَارِثِ بْنِ هِشَامٍ.
1287 – And when a man says to his wife, while he does not have penetrative sexual intercourse with her: <i>Anti ṭāliq^{un}</i> , <i>anti ṭāliq^{un}</i> , <i>anti ṭāliq^{un}</i> ; she is unilaterally repudiated by the first <i>taṭlīqa</i> . But the remaining two <i>taṭlīqas</i> do not fall upon her. And this is the <i>qawl</i> of Abū Ḥanīfa.	1287 – وَإِذَا قَالَ الرَّجُلُ لَامْرَأَتِهِ وَلَمْ يَدْخُلْ بِهَا: أَنْتِ طَالِقٌ، أَنْتِ طَالِقٌ، أَنْتِ طَالِقٌ. أَنْتِ طَالِقٌ. طَلَّقْتَ بِالتَّطْلِيقَةِ الْأُولَى وَلَمْ يَقَعْ عَلَيْهَا التَّطْلِيقَتَانِ الْبَاقِيَتَانِ. وَهَذَا قَوْلُ أَبِي حَنِيفَةَ.
1288 – That has reached us on the authority of 'Umar b. al-Khaṭṭāb and on 'Alī, and 'Abd Allāh b. Mas'ūd, and Zayd b. Thābit, and Ibrāhīm; because there is no 'idda [enjoined] upon his wife — she had become irrevocably separated from him by	1288 – بَلَّغْنَا عَنْ عُمَرَ بْنِ الْخَطَّابِ وَعَنْ عَلِيٍّ، وَعَبْدِ اللَّهِ بْنِ مَسْعُودٍ، وَزَيْدِ بْنِ ثَابِتٍ، وَإِبْرَاهِيمَ بِذَلِكَ؛ لِأَنَّ امْرَأَتَهُ لَيْسَتْ عَلَيْهَا عِدَّةٌ،

³ (d.94/172); one of the Fuqahā' al-Madīna al-Sab'a.

the first <i>ṭalīqa</i> , and become lawful to [other] men.	فَقَدْ بَانَتْ مِنْهُ بِالتَّطْلِيقَةِ الْأُولَى وَحَلَّتْ لِلرَّجَالِ.
1289 – Don't you see/opine (<i>alā tarā</i>) that, if she marries – after the first <i>ṭalīqa</i> , before he utters the second [<i>ṭalīqa</i>] – a husband; her <i>nikāḥ</i> is <i>jā'iz</i> ? So how does the <i>ṭalāq</i> fall upon her while she is not his wife, but she is the wife of another? And he [Abū Yūsuf] embraces it.	1289 – أَلَا تَرَى أَنَّهَا لَوْ تَزَوَّجَتْ بَعْدَ التَّطْلِيقَةِ الْأُولَى قَبْلَ أَنْ يَتَكَلَّمَ بِالثَّانِيَةِ زَوْجًا كَانَ نِكَاحُهَا جَائِزًا، فَكَيْفَ يَقَعُ عَلَيْهَا الطَّلَاقُ وَهِيَ لَيْسَتْ بِامْرَأَتِهِ وَهِيَ امْرَأَةٌ غَيْرُهُ. وَبِهِ يَأْخُذُ.
1290 – But Ibn Abī Laylā used to say: Upon her [fall] the three <i>ṭalīqas</i> when they are from the man in a single session (<i>fī majlisⁱⁿ wāḥidⁱⁿ</i>), according to what I described to you.	1290 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: عَلَيْهَا الثَّلَاثُ التَّطْلِيقَاتُ إِذَا كَانَتْ مِنَ الرَّجُلِ فِي مَجْلَسٍ وَاحِدٍ، عَلَى مَا وَصَفْتُ لَكَ.
1291 – And when a witness testifies against a man that he unilaterally repudiated his wife with one [<i>ṭalāq</i>], but another testifies that he repudiated her with two [<i>ṭalāqs</i>]; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: Both of their <i>shahādas</i> are <i>bāṭila</i> , because they have diverged (<i>ikhtalafā</i>).	1291 – وَإِذَا شَهِدَ شَاهِدٌ عَلَى رَجُلٍ أَنَّهُ طَلَّقَ امْرَأَتَهُ وَاحِدَةً، وَشَهِدَ آخَرُ أَنَّهُ طَلَّقَهَا اثْنَتَيْنِ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: شَهَادَتُهُمَا بَاطِلَةٌ؛ لِأَنَّهُمَا قَدِ اخْتَلَفَا.
1292 – But Ibn Abī Laylā used to say: There falls upon her, from that, a <i>ṭalīqa</i> ; because they have both converged on it (<i>ijṭamaʿā ʿalayhā</i>). And he [Abū Yūsuf] embraces this [doctrine].	1292 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: يَقَعُ عَلَيْهَا مِنْ ذَلِكَ تَطْلِيقَةٌ؛ لِأَنَّهُمَا قَدِ اجْتَمَعَا عَلَيْهَا. وَبِهَذَا يَأْخُذُ.
1293 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the man testifies that he heard a man say to his wife: You are repudiated with one [<i>ṭalāq</i>] (<i>anti ṭaliq^{un} wāḥidat^{un}</i>), but another testifies that he heard him say to her: You are repudiated with two [<i>ṭalāqs</i>]; this is divergent testimony (<i>shahādat^{un} mukhtalifat^{un}</i>), and is not permitted. But if they both testify and say: We testify that he unilaterally repudiated his wife; and one of them says: I might confirm (<i>qad uthbita</i>) the <i>ṭalāq</i> , but not confirm its number; and the other says: I might confirm the <i>ṭalāq</i> , and it is two [<i>ṭalāqs</i>]; one [<i>ṭalāq</i>] adheres to him (<i>lazimat-hu wāḥidat^{un}</i>), because they both converge on it.	1293 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا شَهِدَ الرَّجُلُ أَنَّهُ سَمِعَ رَجُلًا يَقُولُ لَامْرَأَتِهِ: أَنْتِ طَالِقٌ وَاحِدَةً، وَشَهِدَ آخَرُ أَنَّهُ سَمِعَهُ يَقُولُ لَهَا: أَنْتِ طَالِقٌ ثَنَتَيْنِ. فَهَذِهِ شَهَادَةٌ مُخْتَلِفَةٌ فَلَا تَحُوزُ – وَلَوْ شَهِدَا فَقَالَ: نَشْهَدُ أَنَّهُ طَلَّقَ امْرَأَتَهُ. وَقَالَ أَحَدُهُمَا: قَدْ أُثْبِتَ الطَّلَاقَ وَلَمْ أُثْبِتْ عَدَدَهُ. وَقَالَ الْآخَرُ: قَدْ أُثْبِتَ الطَّلَاقَ وَهُوَ ثَنَتَانِ. لَزِمَتْهُ وَاحِدَةٌ؛ لِأَنَّهُمَا يَجْتَمِعَانِ عَلَيْهَا.

1294 – And when a man unilaterally repudiates (<i>ṭallaqa</i>) his wife with three [<i>ṭalāqs</i>], and has had penetrative sexual intercourse with her; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say regarding that: To her belongs the right of dwelling place (<i>al-suknā</i>) and maintenance (<i>al-naḥaqa</i>) until her <i>ʿidda</i> is fulfilled (<i>tanqāḍiya</i>). And he [Abū Yūsuf] embraces it.	1294 – وَإِذَا طَلَّقَ الرَّجُلُ امْرَأَتَهُ ثَلَاثًا وَقَدْ دَخَلَ بِهَا، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ فِي ذَلِكَ: لَهَا السُّكْنَى وَالتَّقَّةُ حَتَّى تَنْقَضِيَ عِدَّتُهَا. وَبِهِ يَأْخُذُ.
1295 – But Ibn Abī Laylā used to say: To her belongs the right of <i>suknā</i> , but there does not belong to her the right of <i>naḥaqa</i> .	1295 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَهَا السُّكْنَى وَلَيْسَ لَهَا التَّقَّةُ.
1296 – And Abū Ḥanīfa said: Due to what? While God, to Him belong might and majesty, said in His Book: «Maintain (<i>anfiqū</i>) them [fem. pl.] until they deliver what they carry [in pregnancy] (<i>yaḍʿana ḥamlahunna</i>)» [Q.65:6]? ⁴	1296 – وَقَالَ أَبُو حَنِيفَةَ: لِمَ؟ وَقَدْ قَالَ اللَّهُ عَزَّ وَجَلَّ فِي كِتَابِهِ: «فَأَنْفِقُوا عَلَيْهِنَّ حَتَّى يَضَعْنَ حَمْلَهُنَّ» [الطلاق: 6].
1297 – And it has reached us concerning ʿUmar b. al-Khaṭṭāb, may God Most High be pleased with him, that he caused there to belong to the one unilaterally repudiated with three [<i>ṭalāqs</i>] (<i>al-muṭallaqati thalāth^{an}</i>) [both] the <i>suknā</i> and the <i>naḥaqa</i> .	1297 – وَبَلَّغَنَا عَنْ عُمَرَ بْنِ الْخَطَّابِ رَضِيَ اللَّهُ تَعَالَى عَنْهُ أَنَّهُ جَعَلَ لِلْمُطَلَّاقَةِ ثَلَاثًا السُّكْنَى وَالتَّقَّةَ.
1298 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man unilaterally repudiates his wife with three [<i>ṭalāqs</i>], and there is no pregnancy (<i>ḥabala</i>) regarding her; there belongs to her the <i>suknā</i> , but no <i>naḥaqa</i> belongs to her. And this is written in the <i>Kitāb al-Ṭalāq</i> . ⁵	1298 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا طَلَّقَ الرَّجُلُ امْرَأَتَهُ ثَلَاثًا وَلَا حَبْلَ بِهَا، فَلَهَا السُّكْنَى وَلَيْسَ لَهَا نَفَقَةٌ. وَهَذَا مَكْتُوبٌ فِي

⁴ Abū Ḥanīfa engages in a rhetorical *muṭālaba bi'l-dalīl* — simultaneously stating his own (assumedly unassailable) Qurʾānic *dalīl*.

⁵ Again, the flow of words in this section seem to imply that al-Shāfiʿī had authored — hand-written, or dictated — the referenced *K. al-Ṭalāq*, before he wrote, or dictated, the present treatise. That is to say, if we are to understand that this is his voice making the reference, and not that of al-Rabī. As for it being the intrusion of a far-later editor or compiler, this would require proof as compelling as that which would be required to deny it. From all outward appearances — that is, from the *zāhir* of this treatise — we may simply be witnessing al-Shāfiʿī cross-referencing his own written work. This is the first of two references in our current *Bāb al-Ṭalāq* to a *Kitāb al-Ṭalāq* (cf. §1379, below); and we may note two other references to such a *Kitāb al-Ṭalāq* in other “chapters” of the *Umm*: 1) §18260 of the *Bāb Nikāḥ al-Wulāt waʿl-Nikāḥ biʿl-Shahāda* (Ḥassūn, vol.6, pt.11, 74); and 2) §24363, near the opening of the *Kitāb al-Aqḍiya* (Ḥassūn, vol.8, pt.13, 8). Interestingly enough, we do not find the exact title of *Kitāb al-Ṭalāq* attributed to al-Shāfiʿī by al-Nadīm, although he does list a *Kitāb Ibāhat al-Ṭalāq* (*Fihrist*, 354); and, once again (as with the *Kitāb al-Nikāḥ*), we do find attributed to Muḥammad b. al-Ḥasan a book by the same title as that referenced above: *Kitāb al-Ṭalāq* (*Fihrist*, 345). One might be hesitant to suggest this is indicative of anything at all, considering both *Kitāb al-Nikāḥ* and *Kitāb al-Ṭalāq* must have been very common titles. One is surprised to see, however, that al-Nadīm records only six of the

	كِتَابُ الطَّلَاقِ.
1299 – And when the man refrains from [sexual intercourse with] (<i>ālā min</i>) his wife, and swears (<i>ḥalafa</i>) he will not come near to her for a month, or two months, or three; <i>ilāʾ</i> does not fall upon him due to that, nor does <i>ṭalāq</i> , because his <i>yamīn</i> was for less than four months.	1299 – وَإِذَا آلَى الرَّجُلُ مِنْ امْرَأَتِهِ فَحَلَفَ لَا يَقْرُبُهَا شَهْرًا أَوْ شَهْرَيْنِ أَوْ ثَلَاثًا، لَمْ يَقَعْ عَلَيْهِ بِذَلِكَ إِيلَاءٌ، وَلَا طَلَاقٌ؛ لِأَنَّ يَمِينَهُ كَانَتْ عَلَى أَقَلِّ مِنْ أَرْبَعَةِ أَشْهُرٍ.
1300 – Saʿīd b. Abī ʿArūba transmitted [this] to us [as <i>ḥadīth</i>] (<i>ḥaddathanā</i>), on the authority of ʿAmir al-Aḥwal, on ʿAṭāʾ b. Abī Rabāḥ, on Ibn ʿAbbās, may God be pleased with them both; and it is the <i>qawl</i> of Abū Ḥanīfa. And he [Abū Yūsuf] embraces it.	1300 – حَدَّثَنَا سَعِيدُ بْنُ أَبِي عَرُوبَةَ، عَنْ عَامِرِ الْأَحْوَلِ، عَنْ عَطَاءِ بْنِ أَبِي رَبَاحٍ، عَنْ ابْنِ عَبَّاسٍ رَضِيَ اللَّهُ عَنْهُمَا وَهُوَ قَوْلُ أَبِي حَنِيفَةَ. وَبِهِ يَأْخُذُ.
1301 – But Ibn Abī Laylā used to say: He is one who has effected <i>ilāʾ</i> from her (<i>muwallīn minhā</i>); if he abandons her for four months, she is irrevocably separated (<i>bānat</i>) by the <i>ilāʾ</i> – and the <i>ilāʾ</i> is an irrevocable pronouncement of <i>ṭalāq</i> (<i>ṭaṭlīqat^{un} bāʾinat^{un}</i>).	1301 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هُوَ مُوَلِّ مِنْهَا إِنْ تَرَكَهَا أَرْبَعَةَ أَشْهُرٍ بَانَتْ بِالْإِيلَاءِ، وَالْإِيلَاءُ تَطْلِيقَةٌ بَائِنَةٌ.
1302 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the man swears he will not have sexual intercourse with (<i>lā yaṭaʿu</i>) his wife for four months or less; the <i>ḥukm</i> of <i>ilāʾ</i> is not effected upon him, because the <i>ḥukm</i> of <i>ilāʾ</i> is only after the passing (<i>muḍīyyⁱⁿ</i>) of four months – and the day on which there is the <i>ḥukm</i> of <i>ilāʾ</i> , the husband will be bound by no <i>yamīn</i> . And if he is bound by no <i>yamīn</i> ; there is no	1302 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا حَلَفَ الرَّجُلُ لَا يَطْأُ امْرَأَتَهُ أَرْبَعَةَ أَشْهُرٍ أَوْ أَقَلَّ لَمْ يَقُمْ عَلَيْهِ حُكْمُ الْإِيلَاءِ؛ لِأَنَّ حُكْمَ الْإِيلَاءِ إِنَّمَا يَكُونُ بَعْدَ مُضِيِّ الْأَرْبَعَةِ الْأَشْهُرِ، فَيَوْمَ يَكُونُ حُكْمُ الْإِيلَاءِ يَكُونُ الزَّوْجُ لَا يَمِينَ

former, and five of the latter. We ought also bear in mind that, as I have suggested previously regarding the *Kitāb al-Nikāh* (see §1232 above, and attached note), a *Kitāb al-Ṭalāq* may well have been among the contents of the *Mabsūṭ* attributed to al-Shāfiʿī. As for this latter compendium – a *Kitāb al-Mabsūṭ fi l-Fiqh* – al-Nadīm seems to have wearied of listing its contents (each section headed by “*kitāb*”) after the first few categories of *ibādāt* (*Fihrist*, 353). Notably, Ḥassūn himself (Intro., i.80-1) posits that there was probably not a great deal of difference between the *Mabsūṭ* and the *Umm*; the *Mabsūṭ* of al-Zaʿfarānī, he suggests, was more-or-less the same as the *Hujja* (old doctrine), and that al-Rabīʿ’s *Mabsūṭ* would have evolved from that basis and become the most authoritative work of al-Shāfiʿī’s final *jadīd* doctrine in Egypt. In other words, they are all stages of the same work, varying only according to expanding *masāʾil*, al-Shāfiʿī’s recanting on older opinions, and other refinements and additions. At any rate, so far as I have found, there is no exact heading of *Kitāb al-Ṭalāq* within the volumes of the *Umm*. We find, however, a grouped collection of treatises/chapters having to do with *ṭalāq* within the mixed chapters following the *Nikāh*-related *kutub*. The core of these begin with a subheading of *ibāḥat al-Ṭalāq* (cf. al-Shāfiʿī’s *Kitāb ibāḥat al-Ṭalāq* in the *Fihrist*), and proceed through *ṭalāq* and *khulʿ*-related issues (see Ḥassūn, vol.6, pt.11, 113ff.) It is earlier, however, within the mixed *masāʾil* tailing upon the *Kitāb al-Nafaqāt*, that we find the discussion most relevant to al-Shāfiʿī’s pronouncement in §1298, under the subheading of *Al-Khilāf fi al-Ṭalāq al-Thalāth* (§§17546ff., Ḥassūn, vol.5, pt.10, 469ff.)

<i>ḥukm</i> of <i>ilāʾ</i> upon him. And this is written in the <i>Kitāb al-ḥilāʾ</i>.⁶	عَلَيْهِ. وَإِذَا لَمْ يَكُنْ عَلَيْهِ يَمِينٌ فَلَيْسَ عَلَيْهِ حُكْمُ الْإِيلَاءِ. وَهَذَا مَكْتُوبٌ فِي كِتَابِ الْإِيلَاءِ.
1303 – And when the man swears he will not come near to his wife “in this room/house (<i>bayt</i>)” for four months, then he leaves her for four months and does not come near to her in it [the <i>bayt</i>], nor in another [<i>bayt</i>]; then indeed Abū Ḥanīfa used to say: There is [enjoined] upon him, regarding that, no <i>ilāʾ</i>. Don’t you see (<i>alā tarā</i>) that he has the right to come near to her in another [<i>bayt</i>] besides that <i>bayt</i>, and the <i>kaffāra</i> will not be incumbent upon him [for breaking an oath]?	1303 – وَإِذَا حَلَفَ الرَّجُلُ لَا يَقْرَبُ امْرَأَتَهُ فِي هَذَا الْبَيْتِ أَرْبَعَةَ أَشْهُرٍ، فَتَرَكَهَا أَرْبَعَةَ أَشْهُرٍ فَلَمْ يَقْرَبَهَا فِيهِ وَلَا فِي غَيْرِهِ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: لَيْسَ عَلَيْهِ فِي هَذَا إِيلَاءٌ، أَلَا تَرَى أَنَّ لَهُ أَنْ يَقْرَبَهَا فِي غَيْرِ ذَلِكَ الْبَيْتِ وَلَا تَجِبُ عَلَيْهِ الْكَفَّارَةُ.
1304 – And the <i>ilāʾ</i> is only every <i>yamīn</i> which prohibits sexual union [<i>al-jimāʾ</i>] for four months [in which] he cannot come near to her unless he breaks his oath with <i>kaffāra</i> (<i>yukaffira yamīnahu</i>). And he [Abū Yūsuf] embraces it.	1304 – وَإِنَّمَا الْإِيلَاءُ كُلُّ يَمِينٍ تَمْنَعُ الْجِمَاعَ أَرْبَعَةَ أَشْهُرٍ لَا يَسْتَطِيعُ أَنْ يَقْرَبَهَا إِلَّا أَنْ يُكَفِّرَ يَمِينَهُ. وَبِهِ يَأْخُذُ.
1305 – But Ibn Abī Laylā used to say regarding this: He is one who has effected <i>ilāʾ</i> (<i>muwallīn</i>); if he abandons her for four months, she is irrevocably separated (<i>bānat</i>) by the <i>ilāʾ</i> – and the <i>ilāʾ</i> is an irrevocable pronouncement of <i>ṭalāq</i> (<i>taṭlīqat^{un} bāʾinat^{un}</i>).⁷	1305 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ فِي هَذَا: هُوَ مُوَلٌّ؛ إِنْ تَرَكَهَا أَرْبَعَةَ أَشْهُرٍ بَانَتْ بِالْإِيلَاءِ، وَالْإِيلَاءُ تَطْلِيقَةٌ بَاطِنَةٌ.
1306 – Al-Shāfiʿī, may God have mercy upon him, said: And when the man swears he will not come near to his wife in this <i>bayt</i>, or in this room (<i>ghurfā</i>), or in some place (<i>mawḍiʿⁱⁿ</i>) he designates; there is no <i>ḥukm</i> of <i>ilāʾ</i> for this. The <i>ḥukm</i> of <i>ilāʾ</i> is only [enjoined] upon one who could not attain sexual intercourse with his wife in any	1306 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا حَلَفَ الرَّجُلُ لَا يَقْرَبُ امْرَأَتَهُ فِي هَذَا الْبَيْتِ أَوْ فِي هَذِهِ الْغُرْفَةِ أَوْ فِي مَوْضِعٍ يُسَمِّيهِ، فَلَيْسَ عَلَى هَذَا حُكْمُ الْإِيلَاءِ، إِنَّمَا حُكْمُ الْإِيلَاءِ عَلَى مَنْ

⁶ Al-Nadīm (*Fihrist*, 354) lists a *Kitāb al-ḥilāʾ* among works attributed to al-Shāfiʿī. As for the *Umm*, though we do not find this exact title among its contents, we encounter once again a cluster of related *masāʾil* tailing upon the *kutub* of marriage and divorce. The *masāʾil* of *ilāʾ* begin with a subheading of *Al-ḥilāʾ wa Ikhtilāf al-Zawjayn fiʾl-Ḥilāʾ*, and it is in the midst of this cluster, under the subheading *Al-Tawqīf fiʾl-ḥilāʾ*, that we find the argument for al-Shāfiʿī’s stance in §1302 above (especially at §20212; Ḥassūn, vol.6, pt.11, 444).

⁷ This is nearly verbatim from §1301; Ibn Abī Laylā may be understood as discounting certain *masāʾil* – as we have also seen al-Shāfiʿī do – by underlining his original stance. It is as though he were saying: The law is clear, and these concerns are subsumed by it; these are not real *masāʾil* for debate. He is simply maintaining his understanding of *ilāʾ* as, essentially, a *taṭlīqa bāʾina*, in opposition to Abū Ḥanīfa and Abū Yūsuf (and al-Shāfiʿī), who understand *ilāʾ* as, essentially, a *yamīn*.

circumstance (<i>bi-ḥālⁱⁿ</i>) — except [such] as compels the breaking of his oath (<i>lazimahu al-ḥinthu</i>). And as for one who is capable of sexual intercourse with his wife without a <i>ḥinṭh</i>; there is no <i>ḥukm</i> for <i>ilā'</i> [enjoined] upon him.	كَانَ لَا يَصِلُ إِلَى أَنْ يُصِيبَ امْرَأَتَهُ بِحَالٍ إِلَّا لَزِمَهُ الْحِنْثُ. فَأَمَّا مَنْ يَقْدِرُ عَلَى إِصَابَةِ امْرَأَتِهِ بِلَا حِنْثٍ فَلَا حُكْمَ لِلْإِيلَاءِ عَلَيْهِ.
1307 – And when the man makes the <i>ḡihār</i>-repudiation to his wife (<i>zāhara... min amra'atihi</i>), and says: You are, for me, like the back of my mother (<i>anti 'alayya ka-zahri ummī</i>), for a day, or he fixes a time greater than that; then indeed Abū Ḥanīfa, may God be pleased with him, used to say: He is one who has made <i>ḡihār</i>-repudiation of her (<i>muzāhir^{um} minhā</i>) — he does not come near to her in that time until he breaks the <i>ḡihār</i> with <i>kaffāra</i> (<i>yukaffira kaffārata al-ḡihār</i>). But when that time passes, the [obligation of] <i>kaffāra</i> falls away from him, and he has the right to come near to her without <i>kaffāra</i>. And he [Abū Yūsuf] embraces it.	1307 – وَإِذَا ظَاهَرَ الرَّجُلُ مِنْ امْرَأَتِهِ فَقَالَ: أَنْتِ عَلَيَّ كَظْهَرِ أُمِّي يَوْمًا. أَوْ وَقْتُ وَقْتًا أَكْثَرَ مِنْ ذَلِكَ، فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: هُوَ مُظَاهِرٌ مِنْهَا لَا يَقْرُبُهَا فِي ذَلِكَ الْوَقْتِ حَتَّى يُكَفِّرَ كَفَّارَةَ الظُّهَارِ. فَإِذَا مَضَى ذَلِكَ الْوَقْتُ سَقَطَتْ عَنْهُ الْكَفَّارَةُ، وَكَانَ لَهُ أَنْ يَقْرُبَهَا بِغَيْرِ كَفَّارَةٍ. وَبِهِ يَأْخُذُ.
1308 – But Ibn Abī Laylā used to say: He is a <i>muzāhir</i> as pertains to her, forever more (<i>abad^{an}</i>); even if that time passes, he is a <i>muzāhir</i> [who] does not come near to her until he breaks the <i>ḡihār</i> with <i>kaffāra</i>.	1308 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هُوَ مُظَاهِرٌ مِنْهَا أَبَدًا، وَإِنْ مَضَى ذَلِكَ الْوَقْتُ فَهُوَ مُظَاهِرٌ لَا يَقْرُبُهَا حَتَّى يُكَفِّرَ كَفَّارَةَ الظُّهَارِ.
1309 – Al-Shāfi'ī, may God have mercy upon him, said: And when the man makes the <i>ḡihār</i>-repudiation to his wife, for a day, and he desires to come near to her on that day; he breaks the <i>ḡihār</i> with <i>kaffāra</i>. But if that day passes, and he does not come near to her during it; there is no <i>kaffāra</i> for the <i>ḡihār</i> [enjoined] upon him, just as we said for the <i>mas'ala</i> regarding the <i>ilā'</i>: When the <i>yamīn</i> falls away, the <i>ḥukm</i> of the <i>yamīn</i> falls away.⁸ And the <i>ḡihār</i> is a <i>yamīn</i>, not a <i>ṭalāq</i>.	1309 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا ظَاهَرَ الرَّجُلُ مِنْ امْرَأَتِهِ يَوْمًا فَأَرَادَ أَنْ يَقْرُبَهَا فِي ذَلِكَ الْيَوْمِ كَفَّرَ كَفَّارَةَ الظُّهَارِ. وَإِنْ مَضَى ذَلِكَ الْيَوْمُ وَلَمْ يَقْرُبَهَا فِيهِ فَلَا كَفَّارَةَ لِلظُّهَارِ عَلَيْهِ، كَمَا قُلْنَا فِي الْمَسْأَلَةِ فِي الْإِيلَاءِ، إِذَا سَقَطَتِ الْيَمِينُ سَقَطَ حُكْمُ الْيَمِينِ. وَالظُّهَارُ يَمِينٌ لَا طَلَاقٌ.

⁸ This phrase — *idhā saqaṭat al-yamīn saqaṭa ḥukmu al-yamīn* — has a certain maxim-like quality; though a search for something resembling this formula has so far produced nothing. We may certainly note, however, that al-Shāfi'ī is here arguing on the basis of essences and definitions: so long as *ḡihār* fulfills the definition of *yamīn*, rather than *ṭalāq*, it may be understood as subsumed by the general principles governing the *yamīn*. This effect of persistent definition-based rulings may be observed in the previous *mas'ail* of *ilā'*: Abū Ḥanīfa, Abū Yūsuf, and al-Shāfi'ī consistently hold to a *yamīn*-based definition, while Ibn Abī Laylā consistently holds to a *ṭalāq*-based definition.

1310 – And when the husband apostatizes from Islam and becomes a <i>kāfir</i> (<i>irtadda... ʿan al-Islām wa kafara</i>); then indeed Abū Ḥanīfa, may God have mercy upon him, used to say: His wife is irrevocably separated from him (<i>bānat minhu</i>) when he apostatizes; there is to be no <i>Muslima</i> beneath a <i>kāfir</i>. And he [Abū Yūsuf] embraces it.	1310 – وَإِذَا ارْتَدَّ الزَّوْجُ عَنِ الْإِسْلَامِ وَكَفَرَ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ كَانَ يَقُولُ: بَأَتْ مِنْهُ امْرَأَتُهُ إِذَا ارْتَدَّ، لَا تَكُونُ مُسْلِمَةً تَحْتَ كَافِرٍ. وَبِهِ يَأْخُذُ.
1311 – But Ibn Abī Laylā used to say: She is his wife as she was (<i>ʿalā ḥālīhā</i>), until he is called upon to repent (<i>yustatāba</i>). And if he repents, then she is his wife; and if he refuses, he is killed and there belongs to her inheritance from him.⁹	1311 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هِيَ امْرَأَتُهُ عَلَى حَالِهَا حَتَّى يُسْتَتَابَ. فَإِنْ تَابَ فَهِيَ امْرَأَتُهُ، وَإِنْ أَبَى قُتِلَ وَكَانَ لَهَا مِيرَاثُهَا مِنْهُ.
1312 – Al-Shāfiʿī, may God have mercy upon him, said: And when the man apostatizes from Islam; the <i>nikāḥ</i> of his wife is suspended (<i>mawqūf^{un}</i>). And if he returns to Islam before her <i>ʿidda</i> is completed, then they are bound by the first <i>nikāḥ</i>. But if her <i>ʿidda</i> is completed before his return to Islam, she has been irrevocably separated from him (<i>bānat minhu</i>). And the separation (<i>al-baynūna</i>) is an annulment without a <i>ṭalāq</i> (<i>faskh^{un} bilā ṭalāq^m</i>). And if he returns to Islam, and is engaged to her, this is not a <i>ṭalāq</i>.¹⁰ And this is written in the <i>Kitāb al-Murtadd</i>.¹¹	1312 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا ارْتَدَّ الرَّجُلُ عَنِ الْإِسْلَامِ فَنِكَاحُ امْرَأَتِهِ مَوْقُوفٌ؛ فَإِنْ رَجَعَ إِلَى الْإِسْلَامِ قَبْلَ أَنْ تَنْقُضِيَ عِدَّتُهَا فَهُمَا عَلَى النِّكَاحِ الْأَوَّلِ، وَإِنْ انْقَضَتْ عِدَّتُهَا قَبْلَ رُجُوعِهِ إِلَى الْإِسْلَامِ فَقَدْ بَأَتْ مِنْهُ، وَالْبَيْتُونَةُ فَسَخٌ بِلا طَلَاقٍ. وَإِنْ رَجَعَ إِلَى الْإِسْلَامِ فَخَطْبُهَا لَمْ يَكُنْ هَذَا طَلَاقًا. وَهَذَا

⁹ Al-Sarakhsī (*Mabsūt*, 5:49; partially quoted [though incorrectly cited as 5:59] by al-Afghānī, 199, n.1) reports the reasoning behind these rulings: 1) Ibn Abī Laylā reached his ruling through *qiyās* from the *aṣl* wherein one of the (non-Muslim) spouses converts to Islam; 2) the Ḥanafī position is that *ridda* is incompatible with marriage (*tunāfi al-nikāḥ*), and “the objection of the incompatible cause for marriage (*iʿtirād sabab al-munāfi liʿl-nikāḥ*) is itself an efficient cause for the separation (*mūjib liʿl-furqa*), like [the one prohibited due to] forbidden degrees (*al-mahramiyya*). And as for *ikhtilāf al-dīn* itself, it is not incompatible with *nikāḥ*, such that initiation of *nikāḥ* is allowed between the Muslim and the Kitābiyya; likewise al-Islām is not incompatible with *nikāḥ* — for indeed *nikāḥ* is a blessing (*niʿma*). And through Islam the *niʿam* become preserved for him, and due to this the *furqa* does not occur there except by the judgment of the *qāḍī* after the rejection (*ibāʿ*) of the other [of Islam];” etc.

¹⁰ That is to say, their previous separation does not subject them to the same requirements as if it had been a *ṭalāq*. We find al-Shāfiʿī’s reasoning in the *Mabsūt* as well (5:49, not quoted by al-Afghānī), but I find it difficult to reconcile with what al-Shāfiʿī says here in §1312: “if it [the *ridda*] is after the *dukhūl*, the severance of *nikāḥ* is not conditional upon the elapsing of three menstruations; building upon his [al-Shāfiʿī’s] *aṣl* as regards the *farq* between the confirmation (*taʾakkud*) of *nikāḥ* by way of *dukhūl*, and its lack of confirmation, according to what we have explained re: al-Islām [i.e., the *masʿalat al-farq*, wherein the non-Muslim spouse converts to Islam]. For he, by way of *ridda*, aims at secession from the religious community (*munābadhat al-milla*), not from the wife (*al-ḥalīla*), so that is not an efficient cause for separation (*mūjib liʿl-furqa*)

	مَكْتُوبٌ فِي كِتَابِ الْمُرْتَدِّ.
1313 – He said: And when the woman recants from the <i>Ahl al-Islām</i> to polytheism (<i>al-shirk</i>); this, and the first category (<i>al-bābu al-awwalu</i>) [as in §§1310-11], are one and the same (<i>sawāʿun</i>) according to both their <i>qawls</i> [i.e., Abū Ḥanīfa’s and Ibn Abī Laylā’s], together; except that Abū Ḥanīfa used to say: Islam is strongly urged upon (<i>yuʿraḍu ʿalā</i>) the woman, and if she submits to Islam, she is left alone (<i>in aslamat khulliya sabīluhā</i>). But if she refuses, she is detained in prison (<i>hubisat fiʾl-sijni</i>) until she repents — but she will not be killed. That has reached us on the authority of Ibn ʿAbbās, may God be pleased with them both.	1313 – قَالَ: وَإِذَا رَجَعَتِ الْمَرْأَةُ مِنْ أَهْلِ الْإِسْلَامِ إِلَى الشِّرْكِ كَانَ هَذَا وَالْبَابُ الْأَوَّلُ سَوَاءً فِي قَوْلِهِمَا جَمِيعًا، غَيْرَ أَنَّ أَبَا حَنِيفَةَ كَانَ يَقُولُ: يُعْرَضُ عَلَى الْمَرْأَةِ الْإِسْلَامُ؛ فَإِنْ أَسْلَمَتْ خُلِّيَ سَبِيلُهَا. وَإِنْ أَبَتْ حُبِسَتْ فِي السِّجْنِ حَتَّى تَتُوبَ وَلَا تُقْتَلُ. بَلَغَنَا ذَلِكَ عَنْ ابْنِ عَبَّاسٍ رَضِيَ اللَّهُ عَنْهُمَا.
1314 – But Ibn Abī Laylā used to say: If she does not repent, she is killed. And he [Abū Yūsuf] embraces it.	1314 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: إِنْ لَمْ تَتُبْ قُتِلَتْ. وَبِهِ يَأْخُذُ.
1315 – Then he reverted to (<i>rajaʿa ilā</i>) the <i>qawl</i> of Abū Ḥanīfa.	1315 – ثُمَّ رَجَعَ إِلَى قَوْلِ أَبِي حَنِيفَةَ.
1316 – And how is she to be killed, when the Messenger of God, may God bless and save him, has prohibited the killing of women in wars, as pertains to the <i>Ahl al-Shirk</i> , and this one [fem.] is like them (<i>mithluhum</i>)?	1316 – وَكَيْفَ تُقْتَلُ وَقَدْ نَهَى رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – عَنْ قَتْلِ النِّسَاءِ فِي الْحُرُوبِ مِنْ أَهْلِ الشِّرْكِ، فَهَذِهِ مِثْلُهُمْ.
1317 – Al-Shāfiʿī, may God have mercy upon him, said: And when the woman apostatizes from Islam; there is no difference (<i>lā farqa</i>) between her and the man: she is called upon to repent (<i>tustatābu</i>), and if she repents [the obvious consequence]. And if not; she is killed, just as is done with the man.	1317 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ: وَإِذَا ارْتَدَّتِ الْمَرْأَةُ عَنِ الْإِسْلَامِ فَلَا فَرْقَ بَيْنَهَا وَبَيْنَ الرَّجُلِ، تُسْتَتَابُ، فَإِنْ تَابَتْ، وَإِلَّا قُتِلَتْ كَمَا يُصْنَعُ بِالرَّجُلِ.
1318 – And one of the people disagreed with us (<i>fa-khālafanā... baʿdu al-nāsi</i>) regarding this, and said: The man is killed when he apostatizes, but the woman is not	1318 – فَخَالَفَنَا فِي هَذَا بَعْضُ النَّاسِ فَقَالَ: يُقْتَلُ الرَّجُلُ إِذَا ارْتَدَّ وَلَا تُقْتَلُ الْمَرْأَةُ. وَاحْتَجَّ

after its confirmation, so long as there is not combined with it another *sabab*: like when one of them converts to Islam.”

¹¹ Al-Nadīm (*Fihrist*, 353) lists both a *Kitāb al-Murtadd al-ṣaghīr* and a *Kitāb al-Murtadd al-Kabīr* among works attributed to al-Shāfiʿī; and it is notable that we find a *Bāb al-Murtadd al-Kabīr* in the *Umm* (Ḥassūn, vol.7, pt.12, 587ff.) Also in the *Umm*, we find another reference to a *Kitāb al-Murtadd*, under the subheading *Fiʾl-Murtadd* — the very last of a long *Kitāb al-Ḥukm fi Qitāl al-Mushrikīn wa Masʿalat Māl al-Ḥarbī* (at §15126; Ḥassūn, vol.5, pt.9, 481). As for the current *masʿala*, it is found within the *Bāb al-Murtadd al-Kabīr*, at the opening of a subheading entitled *Māl al-Murtadd wa Zawjat al-Murtadd* (§§23701ff., Ḥassūn, vol.7, pt.12, 601).

killed. And he draws <i>ḥujja</i> (<i>aḥtajja</i>) from something he narrated on the authority of Ibn ʿAbbās, the likes of which the <i>Ahl al-Ḥadīth</i> have not confirmed (<i>lā yuthbitu ahla al-ḥadīth mithlahu</i>).	بَشِيءٌ رَوَاهُ عَنْ ابْنِ عَبَّاسٍ لَا يُثْبِتُ أَهْلُ الْحَدِيثِ مِثْلَهُ.
1319 – And the likeness (<i>shabīh^{un}</i>) of that <i>isnād</i> has been narrated concerning Abū Bakr al-Ṣiddīq, may God be pleased with him, that he killed women who had apostatized from Islam — but we do not see fit (<i>lam nara</i>) to draw <i>ḥujja</i> from it, when its <i>isnād</i> is of the sort which the <i>Ahl al-Ḥadīth</i> do not confirm.	1319 – وَقَدْ رُوِيَ شَبِيهٌ بِذَلِكَ الْإِسْنَادِ عَنْ أَبِي بَكْرٍ الصِّدِّيقِ رَضِيَ اللَّهُ عَنْهُ أَنَّهُ قَتَلَ نِسْوَةً ارْتَدَدْنَ عَنِ الْإِسْلَامِ، فَلَمْ نَرَ أَنْ نَحْتَجَّ بِهِ إِذَا كَانَ إِسْنَادُهُ مِمَّا لَا يُثْبِتُهُ أَهْلُ الْحَدِيثِ.
1320 – And the one who disagrees with us drew <i>ḥujja</i> from the fact that the Prophet, may God bless and save him, forbade the killing of women in the <i>Dār al-Ḥarb</i> . And he [“one of the people”] said: When the killing of female polytheists (<i>al-mushrikāt</i>), who do not believe, is forbidden (<i>nuhiya ʿan</i>); the female believer (<i>al-muʾmina</i>) who apostatizes from Islam is more prior [in rank] (<i>awlā</i>) for not being killed. ¹²	1320 – وَاحْتَجَّ مَنْ خَالَفَنَا بِأَنَّ النَّبِيَّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – نَهَى عَنْ قَتْلِ النِّسَاءِ فِي دَارِ الْحَرْبِ، وَقَالَ: إِذَا نُهِِيَ عَنْ قَتْلِ الْمُشْرِكَاتِ اللَّاتِي لَمْ يُؤْمِنَنَّ، فَالْمُؤْمِنَةُ الَّتِي ارْتَدَّتْ عَنِ الْإِسْلَامِ أَوْلَى أَنْ لَا تُقْتَلَ.
1321 – It was said to one of those who profess this <i>qawl</i> : You have narrated that the Prophet, may God bless and save him, forbade the killing of the elderly (<i>al-kabīr al-fānī</i>), and the killing of the labourer (<i>al-ajīr</i>). And you have narrated that Abū Bakr al-Ṣiddīq forbade the killing of monks (<i>al-ruhbān</i>). And have you considered (<i>afaraʿayta</i>) [what would happen], if an elderly <i>shaykh</i> apostatized, or a labourer; would you desist from their killing (<i>atadaʿu qatlahumā</i>)? Or if a monastic-type (<i>rajul^{un} rāhib^{un}</i>) [i.e., an ascetic Muslim] apostatized; would you desist from his killing?	1321 – قِيلَ لِبَعْضِ مَنْ يَقُولُ هَذَا الْقَوْلَ: قَدْ رَوَيْتَ أَنَّ النَّبِيَّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – نَهَى عَنْ قَتْلِ الْكَبِيرِ الْفَانِي، وَعَنْ قَتْلِ الْأَجِيرِ، وَرَوَيْتَ أَنَّ أَبَا بَكْرٍ الصِّدِّيقَ نَهَى عَنْ قَتْلِ الرُّهْبَانِ. أَفَرَأَيْتَ إِنْ ارْتَدَّ شَيْخٌ فَإِنْ أَوْ أَجِيرٌ أَتَدْعُ قَتْلَهُمَا؟ أَوْ ارْتَدَّ رَجُلٌ رَاهِبٌ أَتَدْعُ قَتْلَهُ؟
1322 – He said: No.	1322 – قَالَ: لَا.

¹² We have seen (أُولَى) on a great many occasions; and it is more than evident that so consistent a formula as *awlā* (*min/an*) plays an important role in the dialectician’s toolbox. Here, an individual is ranked in terms of deserving punishment: “If the *mushrika* is not to be killed, then all the more so should the *muʾmina* who apostatizes not be killed...” (she is *awlā* when it comes to not being killed). In this particular instance, *awlā* conveys an *minore ad maius* inference — a species of the genus variously known as *faḥwā al-khiṭāb*, *mafḥūm al-khiṭāb*, *al-tanbīh*, or *al-qiyās al-jalī*.

1323 – It was said: Due to what (<i>limā</i>)? Is it because the norm of killing for apostasy (<i>ḥukm al-qatli 'alā al-ridda</i>) is a <i>ḥukm</i> of killing for a <i>ḥadd</i> — which the governing administrator (<i>al-wālī</i>) is not allowed to obstruct (<i>lā yasa'u... ta'ṭīlahu</i>) — different (<i>mukhālif^{un}</i>) to the <i>ḥukm</i> of killing for <i>mushrikīn</i> in the <i>Dār al-Ḥarb</i> ?	1323 – قِيلَ: وَلِمَ؟ أَلَاَنَّ حُكْمَ الْقَتْلِ عَلَى الرِّدَّةِ حُكْمٌ قَتْلٍ حَدٌّ لَا يَسَعُ الْوَالِيَّ تَعْطِيلُهُ مُخَالَفٌ لِحُكْمِ قَتْلِ الْمُشْرِكِينَ فِي دَارِ الْحَرْبِ؟
1324 – He said: Yes.	1324 – قَالَ: نَعَمْ.
1325 – I said: Then how have you drawn <i>ḥujja</i> (<i>iḥtajajta</i>) from the <i>ḥukm</i> of the <i>Dār al-Ḥarb</i> as regards the killing of women, but did not see it (<i>lam tarahu</i>) as <i>ḥujja</i> regarding the killing of the elderly, and the labourer, and the ascetic?	1325 – قُلْتُ: فَكَيْفَ احْتَجَجْتَ بِحُكْمِ دَارِ الْحَرْبِ فِي قَتْلِ الْمَرْأَةِ وَلَمْ تَرَهُ حُجَّةً فِي قَتْلِ الْكَبِيرِ الْفَانِي وَالْأَجِيرِ وَالرَّاهِبِ.
1326 – Then you said: We have the right to desist from the <i>Ahl al-Ḥarb</i> after mastering them (<i>ba'da al-qudrati 'alayhim</i>), and we do not kill them. But we do not have the right to desist from a <i>murtadd</i> . So how has there escaped you (<i>dahaba 'alayka</i>) their division (<i>iftirāqhumā</i>) as regards the woman? And indeed the woman is killed, wherever the man is killed, for <i>zinā</i> and for homicide (<i>al-qatl</i>).	1326 – ثُمَّ قُلْتُ: لَنَا أَنْ نَدَعَ أَهْلَ الْحَرْبِ بَعْدَ الْقُدْرَةِ عَلَيْهِمْ وَلَا نَقْتُلَهُمْ، وَلَيْسَ لَنَا أَنْ نَدَعَ مُرْتَدًّا، فَكَيْفَ ذَهَبَ عَلَيْكَ افْتِرَاقُهُمَا فِي الْمَرْأَةِ؟ فَإِنَّ الْمَرْأَةَ تُقْتَلُ حَيْثُ يُقْتَلُ الرَّجُلُ فِي الزِّنَا وَالْقَتْلِ.
1327 – And when the man says: Every woman I marry — she is repudiated (<i>ṭāliq^{un}</i>); then indeed Abū Ḥanīfa used to say: It is as he said, and any woman he marries; she is repudiated with one [<i>ṭalāq</i>] (<i>ṭāliq^{un} wāḥidat^{un}</i>). And he [Abū Yūsuf] embraces this [doctrine].	1327 – وَإِذَا قَالَ الرَّجُلُ: كُلُّ امْرَأَةٍ أَتَزَوَّجُهَا فَهِيَ طَالِقٌ. فَإِنَّ أَبَا حَنِيفَةَ كَانَ يَقُولُ: هُوَ كَمَا قَالَ، وَأَيُّ امْرَأَةٍ تَزَوَّجَهَا فَهِيَ طَالِقٌ وَاحِدَةٌ. وَبِهَذَا يَأْخُذُ.
1328 – But Ibn Abī Laylā used to say: The <i>ṭalāq</i> does not fall upon him; because he has generalized (<i>'ammama</i>), and said: “Every woman I marry.” And when he designates a woman by naming, or a large town (<i>miṣr^{an}</i>) by its distinct qualities (<i>bi-'aynihi</i>); or when he fixes that [<i>ṭalāq</i>] to a term (<i>ajal</i>); their two <i>qawls</i> [i.e., Abū Ḥanīfa's and Ibn Abī Laylā's] regarding it are one and the same (<i>sawā^{un}</i>), and the <i>ṭalāq</i> occurs by means of it.	1328 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا يَقَعُ عَلَيْهِ الطَّلَاقُ؛ لِأَنَّهُ عَمَّمَ فَقَالَ: كُلُّ امْرَأَةٍ أَتَزَوَّجُهَا، فَإِذَا سَمَى امْرَأَةً مُسَمَّاةً أَوْ مِصْرًا بَعَيْنِهِ أَوْ جَعَلَ ذَلِكَ إِلَى أَجَلٍ فَقَوْلُهُمَا فِيهِ سَوَاءٌ، وَيَقَعُ بِهِ الطَّلَاقُ.
1329 – Al-Rabī said: For al-Shāfi'ī there is, in it, a reply (<i>jawāb^{un}</i>). ¹³	1329 – قَالَ الرَّبِيعُ: لِلشَّافِعِيِّ فِيهِ جَوَابٌ.

¹³ This is the second time al-Rabī has made such a comment (cf. §843) in the *Umm* Version of our text. The first time, Ḥassūn made a note of it, and questioned the lack of follow-up in the text; as if to say: Where is the purported *jawāb*? Here in §1329, however, Ḥassūn is silent. Seeing that a

1330 – He [Abū Yūsuf] said: And when the man says to the woman: If I marry you; you are <i>ṭāliq</i> . Or he says: If I marry — up to such-and-such a term (<i>ajal</i>) — a woman; she is <i>ṭāliq</i> . Or he says: Every woman I marry from such-and-such a village; she is	1330 – قَالَ: وَإِذَا قَالَ الرَّجُلُ لَامْرَأَةٍ: إِن تَزَوَّجْتُكَ فَأَنْتِ طَالِقٌ. أَوْ قَالَ: إِذَا تَزَوَّجْتُ إِلَى كَذَا وَكَذَا مِنَ الْأَجَلِ امْرَأَةً فَهِيَ طَالِقٌ. أَوْ

quite similar phrase is here expressed, and to the same result (no *jawāb* follows in the text), it becomes more obvious that this is not some sort of omission on the part of al-Rabī. We can immediately note a similarity between §§843 and 1329; mainly, that Abū Ḥanīfa and Ibn Abī Laylā are in full concordance as regards the *masʿala* of the preceding section. That is to say, in §843 we are told: “*fī qawlihimā jamīʿan*,” and in §1329: “*fa-qawlihimā fīhi sawāʿun*.” Most likely the best interpretation for §§843 and 1329, then, is: “And al-Shāfiʿī is in agreement with them.” In searching through the *Umm* for confirmation of this interpretation, however, far more interesting results than could have been imagined began to appear. First, there are at least two instances where al-Rabī himself supplies al-Shāfiʿī’s *jawāb* from his own knowledge (§4245 of the *Bāb Zakāt al-Tijāra*, Ḥassūn, vol.2, pt.4, 169; and §12129 of the *Bāb al-Waṣīyyat bi-Shayʿin bi-Ṣifatihi*, Ḥassūn, vol.4, pt.8, 302). Second, there is at least one instance where al-Rabī complains that al-Shāfiʿī did not bring one forth — *lam yaʿjiʾ biʾl-jawāb* — (§25005 of the *Bāb al-Daʿwā fīʾl-Shirāʾ waʾl-Hiba waʾl-Ṣadaqa*, Ḥassūn, vol.8, pt.13, 144). But it is attached to the aforementioned §12129 of the *Bāb al-Waṣīyyat bi-Shayʿin bi-Ṣifatihi*, however, that something of a revelation appears. In a section previous to this we hear of al-Shāfiʿī’s ruling on a certain *masʿala* of *waṣīyya*, and then:

12129 – Al-Rabī said: I fear that this may be an error on the part of the scribe (<i>ghalaṭ^{am} min al-kātibī</i>); because he did not study under [or: recite to] al-Shāfiʿī (<i>lam yaqraʾ ʿalā al-Shāfiʿī</i>), and he did not audit him (<i>lam yasmaʾ minhu</i>). And the <i>jawāb</i> regarding it [the <i>masʿala</i> at hand], according to me, is that he...[etc.]	12129 – قَالَ الرَّبِيعُ: أَخَافُ أَنْ يَكُونَ هَذَا غَلَطًا مِنَ الْكَاتِبِ؛ لِأَنَّهُ لَمْ يَقْرَأْ عَلَى الشَّافِعِيِّ، وَلَمْ يَسْمَعْ مِنْهُ وَالْجَوَابُ فِيهَا عِنْدِي؛ أَنَّهُ....

This is an extraordinary piece of evidence for the question of the authorship and compilation of the *Umm*. Considering that al-Rabī died 66 years after al-Shāfiʿī, we should perhaps not be surprised that he was working from a hand-written copy of the text (or, at least, a text of this particular material on *waṣīyya*). Although I am still considering the implications of this, one thing is certain: the purported voice of al-Rabī claims, in this instance, that he was working from a text copied by an anonymous *kātib* who did not audit al-Shāfiʿī. If, as Calder has implied (*Studies*, 74), no such material could have existed in al-Rabī’s time, then §12129 could only constitute a rather sophisticated conspiracy: an alleged forger can only have taken on the voice and manner of al-Rabī to such a depth as to complain about a scribal error in written material which actually never sat before al-Rabī himself. This would be something of an extraordinary claim, were one to make it, and would require extraordinary proof that I do not believe has been supplied by any current arguments for the re-attribution or post-dating of the treatises of the *Umm*. There is no reason, in my view — and especially with such an instance as §12129, not to read these comments of al-Rabī at face value; no reason, that is, not to accept this as the voice of al-Rabī himself, providing a precious rare glimpse at his compilation and commentary procedures. And, as such, our “missing *jawāb*” comments make a great deal more sense; either 1) al-Rabī complained that no *jawāb* is written, and none has come down to him; 2) none is written, but he knows what it is and supplies it; 3) none is written, but he knows it, and it is the same as Abū Ḥanīfa’s and Ibn Abī Laylā’s; or 4) the *jawāb* is written, but he suspects it to be a scribal error and corrects it from his own material. One must ask how, if these comments are not genuinely those of al-Rabī, they may be distributed through the treatises as they are, and in so uncontrived, but consistent, a fashion. A claim of deception grows even less plausible when we add other innocuous comments (such as “*wa qāla al-Rabī fīhi qawl^{um} ākharu*” — of which I have so far counted some 26 incidents). Of course the possibility of deception can never be ruled out; but a positive claim for re-attribution and/or post-dating of the *Umm* cannot rest on a mere possibility.

<i>ṭāliq</i>. Or from the Banī so-and-so; she is <i>ṭāliq</i>. They, both of them together [i.e., Abū Ḥanīfa and Ibn Abī Laylā], used to say: When he marries that one; she is <i>ṭāliq</i>.	قَالَ: كُلُّ امْرَأَةٍ أَتَزَوَّجُهَا مِنْ قَرِيَةٍ كَذَا وَكَذَا فَهِيَ طَالِقٌ. أَوْ مِنْ بَنِي فُلَانٍ فَهِيَ طَالِقٌ. فَهُمَا جَمِيعًا كَأَنَّا يَقُولَانِ: إِذَا تَزَوَّجَ تِلْكَ فَهِيَ طَالِقٌ.
1331 – And if he has penetrative sexual intercourse with her (<i>dakhala bihā</i>); then indeed Abū Ḥanīfa used to say: To her belongs a <i>mahr</i> and half a <i>mahr</i>; a <i>mahr</i> for the <i>dukhūl</i>, and half a <i>mahr</i> for the <i>ṭalāq</i> which fell upon her before the <i>dukhūl</i>. And he [Abū Yūsuf] embraces it.¹⁴	1331 – وَإِنْ دَخَلَ بِهَا، فَإِنَّ أَبَا حَنِيفَةَ كَانَ يَقُولُ: لَهَا مَهْرٌ وَنِصْفُ مَهْرٍ، مَهْرٌ بِالْدُّخُولِ وَنِصْفُ مَهْرٍ بِالطَّلَاقِ الَّذِي وَقَعَ عَلَيْهَا قَبْلَ الدُّخُولِ. وَبِهِ يَأْخُذُ.
1332 – But Ibn Abī Laylā used to say: To her belongs half a <i>mahr</i>. But they are separated (<i>yufarraqu baynahumā</i>), according to both their <i>qawls</i> [i.e., Abū Ḥanīfa's and Ibn Abī Laylā's], together.	1332 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَهَا نِصْفُ مَهْرٍ وَيُفَرِّقُ بَيْنَهُمَا فِي قَوْلِهِمَا جَمِيعًا.
1333 – He [Abū Yūsuf] said: And when the man slanders (<i>qadhafa</i>) his wife, and she has been engaged in unlawful sexual intercourse (<i>qad wuṭi'at waṭ^{an} ḥarām^{an}</i>) before that; then indeed Abū Ḥanīfa used to say: There is no <i>ḥadd</i> [imposed] upon him, nor <i>li'ān</i>. And he [Abū Yūsuf] embraces it.	1333 – قَالَ: وَإِذَا قَذَفَ الرَّجُلُ امْرَأَتَهُ وَقَدْ وَطِئَتْ وَطْئًا حَرَامًا قَبْلَ ذَلِكَ، فَإِنَّ أَبَا حَنِيفَةَ كَانَ يَقُولُ: لَا حَدَّ عَلَيْهِ وَلَا لِعَانَ. وَبِهِ يَأْخُذُ.
1334 – But Ibn Abī Laylā used to say: Upon him is [imposed] the <i>ḥadd</i>.	1334 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: عَلَيْهِ الْحَدُّ.
1335 – And if another besides her husband slanders her (<i>qadhafahā</i>), there is no <i>ḥadd</i> [imposed] upon him according to the <i>qawl</i> of Abū Ḥanīfa.	1335 – وَلَوْ قَذَفَهَا غَيْرُ زَوْجِهَا لَمْ يَكُنْ عَلَيْهِ حَدٌّ فِي قَوْلِ أَبِي حَنِيفَةَ.
1336 – But Ibn Abī Laylā used to say: The <i>ḥadd</i> is [imposed] upon him.	1336 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: عَلَيْهِ الْحَدُّ.
1337 – It is right, according to the <i>qawl</i> of Ibn Abī Laylā, that the <i>li'ān</i> should be in the place of the <i>ḥadd</i>.	1337 – يَنْبَغِي فِي قَوْلِ ابْنِ أَبِي لَيْلَى أَنْ يَكُونَ مَكَانَ الْحَدِّ اللَّعَانُ.

¹⁴ Al-Sarakhsī (*Mabsūt*, 6:132; Afghānī, 203, n.1) explains the half-mahr as a *ḥadd*-payment: “when the *ḥadd* falls away due to *shubha*, the *mahr* is obliged.”

1338 – Al-Shāfiʿī said: And when the woman engages in unlawful sexual intercourse of the sort for which the <i>ḥadd</i> is averted from her, then her husband slanders her (<i>qadhafahā</i>); he is asked. And if he slanders her while pregnant, and dissociates himself from her child (<i>intaḥā min waladihā</i>); the <i>liʿān</i>-oath is administered between them (<i>lūʿina baynahumā</i>), because the child is not denied except through <i>liʿān</i>. And if he slanders her while not pregnant, of the first sexual intercourse (<i>biʾl-waṭʾi al-awwalī</i>), or of some <i>zinā</i> besides it; there is no <i>ḥadd</i> [imposed] upon him, but upon him is <i>taʿzīr</i>.	1338 – قَالَ الشَّافِعِيُّ: وَإِذَا وَطِئَتِ الْمَرْأَةُ وَطْئًا حَرَامًا مِمَّا يُدْرَأُ عَنْهَا الْحَدُّ فِيهِ، ثُمَّ قَذَفَهَا زَوْجَهَا، سُئِلَ؛ فَإِنْ قَذَفَهَا حَامِلًا وَانْتَفَى مِنْ وَلَدِهَا لَوْ عَنِ بَيْنَهُمَا؛ لِأَنَّ الْوَلَدَ لَا يُنْفَى إِلَّا بِلَعَانٍ. وَإِنْ قَذَفَهَا غَيْرَ حَامِلٍ بِالْوِطْءِ الْأَوَّلِ أَوْ بَزْنًا غَيْرِهِ فَلَا حَدَّ عَلَيْهِ، وَعَلَيْهِ التَّعْزِيرُ.
1339 – And likewise if he slanders her for [unlawful sexual intercourse with] a third party (<i>qadhafahā bi-ajnabiyy^m</i>), and says: I meant (<i>ʿanaytu</i>) that sexual intercourse which was forbidden (<i>muḥarram^{um}</i>); there is no <i>ḥadd</i> [imposed] upon him, but upon him there is <i>taʿzīr</i>.	1339 – وَكَذَلِكَ إِنْ قَذَفَهَا بِأَجْنَبِيٍّ فَقَالَ: عَنِيتُ ذَلِكَ الْوِطْءَ الَّذِي هُوَ مُحَرَّمٌ. فَلَا حَدَّ عَلَيْهِ، وَعَلَيْهِ التَّعْزِيرُ.
1340 – And when the man says to his wife: I have no need/desire for you (<i>lā ḥājata lī fiki</i>). Then indeed Abū Ḥanīfa used to say: This is not a <i>ṭalāq</i>, even if he meant by it <i>ṭalāq</i>. And he [Abū Yūsuf] embraces it. [But Ibn Abī Laylā used to say: She is thrice repudiated.]¹⁵	1340 – وَإِذَا قَالَ الرَّجُلُ لَامْرَأَتِهِ: لَا حَاجَةَ لِي فِيكَ. فَإِنَّ أَبَا حَنِيفَةَ كَانَ يَقُولُ: لَيْسَ هَذَا بِطَّلَاقٍ وَإِنْ أَرَادَ بِهِ الطَّلَاقَ. وَبِهِ يَأْخُذُ. [وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هِيَ تَطْلُقُ ثَلَاثًا]
1341 – And Abū Ḥanīfa said: And how can this be a <i>ṭalāq</i>, when it is in the status of (<i>bi-manzilati</i>): I do not desire you; and: I do not want you; and: I do not love you (<i>lā aḥwākī</i>); and: I do not love you (<i>lā uḥibbukī</i>)? For there is not, in anything of this, a <i>ṭalāq</i>.	1341 – وَقَالَ أَبُو حَنِيفَةَ: وَكَيْفَ يَكُونُ هَذَا طَلَاقًا، وَهُوَ بِمَنْزِلَةِ: لَا أَشْتَهِيكَ وَلَا أُرِيدُكَ وَلَا أَهْوَاكَ وَلَا أُحِبُّكَ؟ فَلَيْسَ فِي شَيْءٍ مِنْ هَذَا طَلَاقٌ.
1342 – Al-Shāfiʿī said: And when the man says to his wife: I have no need/desire for you; if he says: I did not mean a <i>ṭalāq</i>, then it is not a <i>ṭalāq</i>. But if he says: I meant a <i>ṭalāq</i>, then it is a <i>ṭalāq</i>, and it [fem.] is one [<i>ṭalāq</i>] (<i>wāḥidat^{um}</i>) – unless he had wanted	1342 – قَالَ الشَّافِعِيُّ: وَإِذَا قَالَ الرَّجُلُ لَامْرَأَتِهِ: لَا حَاجَةَ لِي فِيكَ. فَإِنْ قَالَ: لَمْ أُرِدْ طَلَاقًا. فَلَيْسَ بِطَّلَاقٍ. وَإِنْ قَالَ: أُرَدْتُ طَلَاقًا.

¹⁵ Ibn Abī Laylā, for the first time in this treatise (cf. §1400[b]), is missing from both the *Umm* and Shaybānī versions. Al-Afghānī (206) supplies his missing *qawl* from the *Mabsūt* [no citation given] as we have rendered it above in brackets. Al-Afghānī claims: “And this sentence fell out of the *aṣl*, but there is no escape from it in order to know, by its means, their [d.] *ikhtilāf*” (ibid., n.1). Previously (205, n.2) al-Afghānī quotes the *Mabsūt* [again, no citation] where al-Sarakhsī supplies a full account of Ibn Abī Laylā’s argument. That his *qawl* is missing from both *Umm* and Shaybānī Versions, but known to al-Sarakhsī, adds yet another indicant to the puzzle of the Shaybānī Version’s authorship. I am uncertain, however, as to how it might best be interpreted.

more than it. And it is not a ṭalāq unless he was desiring by it the occasioning (iḡā'a) of a ṭalāq. And if he was, he need only say: I have no need/desire for you, I will bring about for you (sa-ūqi'u 'alayki) the ṭalāq. And there is no ṭalāq until he brings it about by another ṭalāq besides this.	فَهُوَ طَلَاقٌ وَهِيَ وَاحِدَةٌ، إِلَّا أَنْ يَكُونَ أَرَادَ أَكْثَرَ مِنْهَا. وَلَا يَكُونُ طَلَاقًا إِلَّا أَنْ يَكُونَ أَرَادَ بِهِ إِيقَاعَ طَلَاقٍ، فَإِنْ كَانَ إِثْمًا قَالَ: لَا حَاجَةَ لِي فِيكَ سَأَوْفِعُ عَلَيْكَ الطَّلَاقَ. فَلَا طَلَاقَ حَتَّى يُوقِعَهُ بِطَلَاقٍ غَيْرِ هَذَا.
1343 – And when the man — he being a slave, slanders his wife — she being free, and one of the two sharīks has manumitted half of the slave, and he [the slave] is striving [to earn ransom] (yas'ā) for half of his value for the other [sharīk]; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: He is a slave so long as there remains something of the si'āya upon him — and upon him is [imposed] the ḥadd of the slave.	1343 – وَإِذَا قَذَفَ الرَّجُلُ – وَهُوَ عَبْدٌ – امْرَأَتَهُ – وَهِيَ حُرَّةٌ – وَقَدْ أَعْتَقَ نِصْفَ الْعَبْدِ أَحَدُ الشَّرِيكَيْنِ وَهُوَ يَسْعَى لِلْآخَرِ فِي نِصْفِ قِيمَتِهِ، فَإِنْ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: هُوَ عَبْدٌ مَا بَقِيَ عَلَيْهِ شَيْءٌ مِنَ السَّعَايَةِ، وَعَلَيْهِ حَدُّ الْعَبْدِ.
1344 – But Ibn Abī Laylā used to say: He is free, and upon him is [enjoined] the li'ān-procedure. And he [Abū Yūsuf] embraces it.	1344 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هُوَ حُرٌّ وَعَلَيْهِ اللَّعَانُ. وَبِهِ يَأْخُذُ.
1345 – And likewise if he gives a shahāda; Abū Ḥanīfa nullifies it (abṭalahā), but Ibn Abī Laylā gives permission for it (ajāzahā).	1345 – وَكَذَلِكَ لَوْ شَهِدَ شَهَادَةً؛ أَبْطَلَهَا أَبُو حَنِيفَةَ وَأَجَازَهَا ابْنُ أَبِي لَيْلَى.
1346 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And the 'abd and the ama are inflicted, in regard to everything, with the ḥadd of the 'abd and the ama, until there reaches completion within them (takmula fihimā), together, freedom. But even if there remains [in subjection] a single share from a thousand shares — he is a slave (raqīq ^{un}).	1346 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَيُحَدُّ الْعَبْدُ وَالْأَمَةُ فِي كُلِّ شَيْءٍ حَدُّ الْعَبْدِ وَالْأَمَةِ حَتَّى تَكْمُلَ فِيهِمَا جَمِيعًا الْحُرِّيَّةُ، وَلَوْ بَقِيَ سَهْمٌ مِنْ أَلْفِ سَهْمٍ فَهُوَ رَقِيقٌ.
1347 – Al-Shāfi'ī said: And likewise the ḥadd is not inflicted on his behalf (lā yuḥaddu lahu) until freedom is complete within him. Nor is qīṣāṣ, from wounds, to be inflicted on his behalf until the slave fulfills (yastakmila) [the conditions of] freedom.	1347 – قَالَ الشَّافِعِيُّ: وَكَذَلِكَ لَا يُحَدُّ لَهُ حَتَّى تَكْمُلَ فِيهِ الْحُرِّيَّةُ، وَلَا يُقْصَرُ لَهُ مِنْ جُرْحٍ حَتَّى يَسْتَكْمِلَ الْعَبْدُ الْحُرِّيَّةَ.
1348 – And when a man slanders (qadhafa) this slave who strives [to earn ransomed] for half his value; there is no ḥadd [imposed] upon him [the qādhif], according to the qawl of Abū Ḥanīfa; because he [the maqdhūf] is in the status of (bi-manzilati) the slave.	1348 – وَلَوْ قَذَفَ رَجُلٌ هَذَا الْعَبْدَ الَّذِي يَسْعَى فِي نِصْفِ قِيمَتِهِ، لَمْ يَكُنْ عَلَيْهِ حَدٌّ فِي قَوْلِ أَبِي حَنِيفَةَ؛ لِأَنَّهُ بِمَنْزِلَةِ الْعَبْدِ.

1349 – But there is, upon his <i>qādhif</i> , [imposed] the <i>ḥadd</i> , according to the <i>qawl</i> of Ibn Abī Laylā. And he [Abū Yūsuf] embraces it.	1349 – وَكَانَ عَلَى قَاذِفِهِ الْحَدُّ، فِي قَوْلِ ابْنِ أَبِي لَيْلَى. وَبِهِ يَأْخُذُ.
1350 – And if this slave cuts the hand of a man with deliberate intent (<i>muta'ammid^{an}</i>), there is no <i>qisās</i> imposed upon him, according to the <i>qawl</i> of Abū Ḥanīfa. And he [Abū Yūsuf] embraces it. And he is in the status of (<i>bi-manzilati</i>) the slave. ¹⁶	1350 – وَلَوْ قَطَعَ هَذَا الْعَبْدُ يَدَ رَجُلٍ مُتَعَمِّدًا، لَمْ يَكُنْ عَلَيْهِ الْقِصَاصُ فِي قَوْلِ أَبِي حَنِيفَةَ، وَبِهِ يَأْخُذُ. وَهُوَ بِمَنْزِلَةِ الْعَبْدِ.
1351 – But there is indeed [imposed] upon him the <i>qisās</i> , according to the <i>qawl</i> of Ibn Abī Laylā. And he is in the status of (<i>bi-manzilati</i>) the free person (<i>al-ḥurri</i>) – for all [things] small and great, or for a <i>ḥadd</i> , or for <i>shahāda</i> , or [other things] besides that.	1351 – وَكَانَ عَلَيْهِ الْقِصَاصُ فِي قَوْلِ ابْنِ أَبِي لَيْلَى، وَهُوَ بِمَنْزِلَةِ الْحُرِّ فِي كُلِّ قَلِيلٍ أَوْ كَثِيرٍ، أَوْ حَدٍّ أَوْ شَهَادَةٍ، أَوْ غَيْرِ ذَلِكَ.
1352 – Yet he is, according to the <i>qawl</i> of Abū Ḥanīfa, in the <i>manzila</i> of the slave so long as he owes a [single] dirham of his value.	1352 – وَهُوَ فِي قَوْلِ أَبِي حَنِيفَةَ بِمَنْزِلَةِ الْعَبْدِ مَا دَامَ عَلَيْهِ دِرْهَمٌ مِنْ قِيَمَتِهِ.
1353 – And likewise is he [slave or free], according to both their <i>qawls</i> [i.e., Abū Ḥanīfa's and Ibn Abī Laylā's], together: if a part (<i>juz^{um}</i>) from one hundred parts were manumitted; or if there remains [in his debt] a part from one hundred parts of his <i>kitāba</i> , if God Most High so wills it.	1353 – وَكَذَلِكَ هُوَ فِي قَوْلِهِمَا جَمِيعًا لَوْ أُعْتِقَ جُزْءٌ مِنْ مِائَةِ جُزْءٍ، أَوْ بَقِيَ عَلَيْهِ جُزْءٌ مِنْ مِائَةِ جُزْءٍ مِنْ كِتَابَتِهِ إِنْ شَاءَ اللَّهُ تَعَالَى.
1354 – And when there is an <i>ama</i> [shared] between two, and she has a husband [who is] a slave, [and] one of her two <i>mawlās</i> manumits her and enjoins upon her the <i>si'āya</i> for the other; she has no <i>khiyār</i> regarding the <i>nikāḥ</i> – according to the <i>qawl</i> of Abū Ḥanīfa – until she is free of the <i>si'āya</i> , and [fully] manumitted.	1354 – وَإِذَا كَانَتْ أُمَةٌ بَيْنَ اثْنَيْنِ وَلَهَا زَوْجٌ عَبْدٌ أَعْتَقَهَا أَحَدُ مَوْلَيْيْهَا وَقَضَى عَلَيْهَا بِالسَّعَايَةِ لِلْآخَرِ، لَمْ يَكُنْ لَهَا خِيَارٌ فِي النِّكَاحِ فِي قَوْلِ أَبِي حَنِيفَةَ حَتَّى تَفْرُغَ مِنَ السَّعَايَةِ وَتُعْتَقَ.
1355 – But she has the <i>khiyār</i> according to the <i>qawl</i> of Ibn Abī Laylā, on the day the <i>itq</i> fell upon her. And he [Abū Yūsuf] embraces it.	1355 – وَكَانَ لَهَا الْخِيَارُ فِي قَوْلِ ابْنِ أَبِي لَيْلَى يَوْمَ يَقَعُ الْعِتْقُ عَلَيْهَا. وَبِهِ يَأْخُذُ.
1356 – And if she gets a <i>ṭalāq</i> (<i>law ṭaluqat</i>) on that day, her <i>'idda</i> and her <i>ṭalāq</i> – according to the <i>qawl</i> of Abū Ḥanīfa – is the <i>'idda</i> of an <i>ama</i> , and the <i>ṭalāq</i> of an <i>ama</i> .	1356 – وَلَوْ طَلَّقَتْ يَوْمَئِذٍ كَانَتْ عِدَّتُهَا وَطَلَّاقُهَا فِي قَوْلِ أَبِي حَنِيفَةَ عِدَّةَ أُمَةٍ وَطَلَّاقَ أُمَةٍ.

¹⁶ The opinion of Abū Yūsuf is, to say the least, incongruous and unexpected. I have yet to come across an explanation.

1357 – But her <i>ʿidda</i> and her <i>ṭalāq</i> — according to the <i>qawl</i> ¹⁷ of Ibn Abī Laylā — is the <i>ʿidda</i> of the free woman, and the <i>ṭalāq</i> of the free woman.	1357 – وَكَانَتْ عِدَّتُهَا وَطَلَّاقُهَا فِي قَوْلِ ابْنِ أَبِي لَيْلَى عِدَّةَ حُرَّةٍ وَطَلَّاقَ حُرَّةٍ.
1358 – And if she has no husband, and wants to marry; she has no right to that until the one to whom she owes the <i>siʿāya</i> gives permission. For she, according to the <i>qawl</i> of Abū Ḥanīfa, is in the <i>manzila</i> of the <i>ama</i> .	1358 – وَلَوْ لَمْ يَكُنْ لَهَا زَوْجٌ وَأَرَادَتْ أَنْ تَتَزَوَّجَ لَمْ يَكُنْ لَهَا ذَلِكَ حَتَّى يَأْذَنَ الَّذِي لَهُ عَلَيْهَا السَّعَايَةُ، فَهِيَ فِي قَوْلِ ابْنِ أَبِي حَنِيفَةَ بِمَنْزِلَةِ الْأَمَةِ.
1359 – But, according to the <i>qawl</i> of Ibn Abī Laylā, [she is] in the <i>manzila</i> of the free woman.	1359 – وَفِي قَوْلِ ابْنِ أَبِي لَيْلَى بِمَنْزِلَةِ الْحُرَّةِ.
1360 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when an <i>ama</i> is under (<i>taḥta</i>) an <i>ʿabd</i> ; she has no <i>khiyār</i> until the freedom is completed within her (<i>takmilu fihā al-ḥurriyyatu</i>). And the day on which the freedom is completed within her, she has the <i>khiyār</i> . And if she gets a <i>ṭalāq</i> while the freedom is not complete within her; her <i>ʿidda</i> is the <i>ʿidda</i> of an <i>ama</i> , and her <i>ḥukm</i> in everything is the <i>ḥukm</i> of an <i>ama</i> .	1360 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا كَانَتْ أَمَةٌ تَحْتَ عَبْدٍ لَمْ يَكُنْ لَهَا الْخِيَارُ حَتَّى تَكْمُلَ فِيهَا الْحُرِّيَّةُ، فَيَوْمَ تَكْمُلُ فِيهَا الْحُرِّيَّةُ فَلَهَا الْخِيَارُ فَإِنْ طَلَّقَتْ وَهِيَ لَمْ تَكْمُلْ فِيهَا الْحُرِّيَّةُ كَانَتْ عِدَّتُهَا عِدَّةَ أَمَةٍ، وَحُكْمُهَا فِي كُلِّ شَيْءٍ حُكْمُ أَمَةٍ.
1361 – And when the man says to his wife: You are <i>ṭāliq</i> if so-and-so wishes, while [1] so-and-so is absent [and] he [the husband] doesn't know [whether] he is living, or he is dead, or [2] so-and-so is dead, he having known that; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: The <i>ṭalāq</i> does not fall upon her. And he [Abū Yūsuf] embraces this [doctrine].	1361 – وَإِذَا قَالَ الرَّجُلُ لَامْرَأَتِهِ: أَنْتِ طَالِقٌ إِنْ شَاءَ فُلَانٌ. وَفُلَانٌ غَائِبٌ لَا يَدْرِي أَحْيٌ هُوَ أَوْ مَيِّتٌ، أَوْ فُلَانٌ مَيِّتٌ قَدْ عَلِمَ بِذَلِكَ، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا يَقَعُ عَلَيْهَا الطَّلَاقُ. وَبِهَذَا يَأْخُذُ.
1362 – But Ibn Abī Laylā used to say: The <i>ṭalāq</i> falls upon her.	1362 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: يَقَعُ عَلَيْهَا الطَّلَاقُ.

¹⁷ As Ḥassūn notes (ix.225, n.1), this “*qawl*” is missing from the Būlāq edition.

1363 – Abū Ḥanīfa said: And how does the ṭalāq fall upon her, when so-and-so does not wish [it]? ¹⁸	1363 – قَالَ أَبُو حَنِيفَةَ: وَكَيْفَ يَقَعُ عَلَيْهَا الطَّلَاقُ وَلَمْ يَشَأْ فَلَانٌ؟
1364 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the man says to his wife: You are ṭāliq if so-and-so wishes, and [1] so-and-so is dead before that, or [2] so-and-so dies after he says that, and before he wishes [it]; she is not ṭāliq, ever, due to this ṭalāq, since — if so-and-so is present, living, but does not wish [it] — she does not get a ṭalāq, and the ṭalāq is only completed through his wishing (bi-mashī'atihi). And when he dies before he wishes, we know that he will not wish [it], ever, and he did not wish [it] before, and she gets a ṭalāq [only] through his wishing.	1364 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا قَالَ الرَّجُلُ لِمَرْأَتِهِ: أَنْتِ طَالِقٌ إِنْ شَاءَ فَلَانٌ. وَفُلَانٌ مَيِّتٌ قَبْلَ ذَلِكَ أَوْ مَاتَ فَلَانٌ بَعْدَمَا قَالَ ذَلِكَ وَقَبْلَ أَنْ يَشَاءَ، فَلَا تَكُونُ طَالِقًا أَبَدًا بِهَذَا الطَّلَاقِ، إِذْ لَوْ كَانَ فَلَانٌ حَاضِرًا حَيًّا وَلَمْ يَشَأْ لَمْ تَطْلُقِي، وَإِنَّمَا يَتِمُّ الطَّلَاقُ بِمَشِيئَتِهِ، فَإِذَا مَاتَ قَبْلَ أَنْ يَشَاءَ عَلِمْنَا أَنَّهُ لَا يَشَاءُ أَبَدًا وَلَمْ يَشَأْ قَبْلَ فَتَطْلُقِي بِمَشِيئَتِهِ.
1365 – And when the man slanders (qadhafa) his wife and bayyina is furnished for her, but he repudiates [the testimony] (yajhadu); then indeed Abū Ḥanīfa used to say: He makes the li'ān-oath (yulā'inu). And he [Abū Yūsuf] embraces it.	1365 – وَإِذَا قَذَفَ الرَّجُلُ امْرَأَتَهُ وَقَامَتْ لَهَا الْبَيِّنَةُ وَهُوَ يَجْحَدُ، فَإِنَّ أَبَا حَنِيفَةَ كَانَ يَقُولُ: يُلَاعِنُ. وَبِهِ يَأْخُذُ.
1366 – But Ibn Abī Laylā used to say: He does not take the li'ān-oath, but he is beaten with the ḥadd.	1366 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَا يُلَاعِنُ وَيُضْرَبُ الْحَدَّ.
1367 – And when the 'abd marries without the permission (idhn) of his mawlā, and his mawlā says to him: Repudiate her (talliḡhā); then indeed Abū Ḥanīfa used to say: This is not an acknowledgment of the marriage (laysa hādha bi-iqrār ^m bi'l-nikāhi) — he merely commanded him to separate from her (yufāriqahā). So how can this be an iqrār of the nikāh? And he [Abū Yūsuf] embraces it.	1367 – وَإِذَا تَزَوَّجَ الْعَبْدُ بِغَيْرِ إِذْنِ مَوْلَاهُ، فَقَالَ لَهُ مَوْلَاهُ: طَلَّقْهَا. فَإِنَّ أَبَا حَنِيفَةَ كَانَ يَقُولُ: لَيْسَ هَذَا بِإِقْرَارٍ بِالنِّكَاحِ، إِنَّمَا أَمْرُهُ بِأَنْ يُفَارِقَهَا. فَكَيْفَ يَكُونُ هَذَا إِقْرَارًا بِالنِّكَاحِ. وَبِهِ يَأْخُذُ.
1368 – But Ibn Abī Laylā used to say: This is an iqrār of the nikāh.	1368 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هَذَا إِقْرَارٌ بِالنِّكَاحِ.

¹⁸ See Afghānī 208, n.1, for al-Sarakhsī's presentation of Abū Ḥanīfa's and Ibn Abī Laylā's arguments (no citation given). In brief: Abū Ḥanīfa / Abū Yūsuf / Muḥammad b. al-Ḥasan are of the opinion that if the *sharṭ* is something that can be realized, then the husband's *kalām* constitutes no occurrence of *ṭalāq* until the *sharṭ* takes place. But if the *sharṭ* is something which cannot be realized, then the husband's *kalām* could never have constituted *ṭalāq* in the first place. As for Ibn Abī Laylā: even if the *sharṭ* can never be realized, the *aṣl* of *iqā'* remains in the *kalām* of the husband, so the *ṭalāq* occurs once the *sharṭ* can never be realized.

1369 – Al-Shāfiʿī said: And when the ʿabd marries without the permission of his mawlā, and his mawlā says to him: Ṭalliḡhā; this is not an iqrār of the nikāḡh on the part of his mawlā, according to the qawl of one who professes: If his mawlā gives permission for it (ajāzahu); the nikāḡh is permitted.¹⁹	1369 – قَالَ الشَّافِعِيُّ: وَإِذَا تَزَوَّجَ الْعَبْدُ بِغَيْرِ إِذْنِ مَوْلَاهُ، فَقَالَ لَهُ مَوْلَاهُ: طَلَّقَهَا. فَلَيْسَ هَذَا بِإِقْرَارٍ بِالنِّكَاحِ مِنْ مَوْلَاهُ فِي قَوْلٍ مَنْ يَقُولُ: إِنَّ أَجَازَهُ مَوْلَاهُ فَالنِّكَاحُ يَجُوزُ.
1370 – But as regards our qawl: [even] if the mawlā gives him permission for it; it is not permitted. [This is] because the aṣl of that by which we formulate our doctrine (aṣla mā nadhhabu ilayhi), is that [for] every contract of marriage (ʿuqdati nikāḡhⁱⁿ) which occurs while sexual intercourse (al-jimāʿu) may not lawfully exist in it (lā yaḡillu an yakūna fihā), or there belongs to someone the right to cancel it (li-aḡhadⁱⁿ faskhuhā); it [the contract] is, itself, invalid (fāsida) — we do not give permission for it unless it is renewed (tujaddada).²⁰ And [as for] one who gives permission for it [the contract], through the ijāza of someone after it, [with the understanding that] if he [the “one after it”] does not give permission for it, it is cancelled (mafsūkhah^{an});²¹ it supervenes upon him (dakhala ʿalayhi) [the consequence] that he allow a man to marry a woman with the understanding that he has khiyār, and that she has khiyār. But khiyār is not permitted, according to him, in nikāḡh, as it is permitted in buyū.²²	1370 – وَأَمَّا فِي قَوْلِنَا؛ فَلَوْ أَجَازَهُ لَهُ الْمَوْلَى لَمْ يَجْزْ؛ لِأَنَّ أَصْلَ مَا نَذْهَبُ إِلَيْهِ أَنَّ كُلَّ عَقْدَةِ نِكَاحٍ وَقَعَتْ وَالْجِمَاعُ لَا يَحِلُّ أَنْ يَكُونَ فِيهَا، أَوْ لِأَحَدٍ فَسَخُهَا فَهِيَ فَاسِدَةٌ لَا تُجِيزُهَا إِلَّا أَنْ تُجَدَّدَ. وَمَنْ أَجَازَهَا بِإِجَازَةِ أَحَدٍ بَعْدَهَا، فَإِنْ لَمْ يُجْزِهَا كَانَتْ مَفْسُوخَةً، دَخَلَ عَلَيْهِ أَنْ يُجِيزَ أَنْ يَنْكِحَ الرَّجُلُ الْمَرْأَةَ عَلَى أَنَّهُ بِالْخِيَارِ وَعَلَى أَنَّهَا بِالْخِيَارِ، وَالْخِيَارُ لَا يَجُوزُ عِنْدَهُ فِي النِّكَاحِ كَمَا يَجُوزُ فِي الْبَيْعِ.

¹⁹ Al-Shāfiʿī explains the components of the masʿala to this point. So far, we have approached the masʿala from the perspective of one who subscribes to the doctrine that a slave’s non-sanctioned nikāḡh may be *ex post facto* sanctioned by the mawlā’s permission. On this basis, the masʿala is whether or not the mawlā’s command that the slave repudiate his wife (employing the imperative cognate of ṭalāq) constitutes an (inadvertent) acknowledgment (and thus sanctioning) of the slave’s nikāḡh. Al-Shāfiʿī, like Abū Ḥanīfa and Abū Yūsuf, says no; such would not be the case, from the *ex post facto* sanction position. He then proceeds (in §1370) to explain the solution from his own position.

²⁰ Here, al-Shāfiʿī explains how his position differs, fundamentally, from that of Abū Ḥanīfa, et al. In brief: the slave’s nikāḡh-contract had come about in such a context as to render it, automatically, fāsīd. Not even an intentional sanction from the mawlā could reverse that fact, and there can simply be no marriage without a newly-drawn-up contract.

²¹ Al-Shāfiʿī now returns to the base-position from which Abū Ḥanīfa, et al., extend their opinions: the doctrine permitting the mawlā’s *ex post facto* sanction.

²² Finally, we arrive at al-Shāfiʿī’s *elenchus*: it takes the form of a reduction to doctrinal inconsistency (*naqd*). In brief: if one accepts the *ex post facto* sanction doctrine, then 1) one has affixed the operation of the contract to a factor external to the control of the contracting parties; which 2) necessitates that these parties enjoy the right of khiyār in their contract; but 3) the proponent of the *ex post facto* sanction doctrine does not accept that there be khiyār in a

1371 – And when the man repudiates (<i>ṭallaqa</i>) his wife irrevocably (<i>bāʿinat^{an}</i>), ²³ and he desires to marry a fifth [wife] during her [the repudiated wife's] <i>ʿidda</i> ; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: I do not give permission for that, and I disapprove of it for him (<i>akrahuhu lahu</i>). ²⁴	1371 – وَإِذَا طَلَّقَ الرَّجُلُ امْرَأَتَهُ بَائِنَةً فَأَرَادَ أَنْ يَتَزَوَّجَ فِي عِدَّتِهَا خَامِسَةً، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا أُجِيزُ ذَلِكَ وَأَكْرَهُهُ لَهُ.
1372 – But Ibn Abī Laylā used to say: It is <i>jāʿiz</i> . And he [Abū Yūsuf] embraces it.	1372 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: هُوَ جَائِزٌ. وَبِهِ يَأْخُذُ.
1373 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the man separates (<i>fāraqa</i>) from his wife by <i>khulʿ</i> , or <i>faskh</i> of the <i>nikāh</i> ; he has the right to marry four while she [the separated one] is in the <i>ʿidda</i> . And he has the right – if he hasn't found surplus (<i>ṭawl^{an}</i>) [for the dowry] for a free woman, and he fears the temptation-to- <i>zinā</i> (<i>al-ʿanata</i>) for himself – to marry a Muslim <i>ama</i> ; because the separated one (<i>al-mufāraqa</i>) – to whom there is no returning for him (<i>lā rajʿata lahu ʿalayhā</i>) – is not a wife (<i>ghayru zawjatⁱⁿ</i>).	1373 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا فَارَقَ الرَّجُلُ امْرَأَتَهُ بِخُلْعٍ، أَوْ فَسَخَ نِكَاحٍ، كَانَ لَهُ أَنْ يَنْكِحَ أَرْبَعًا وَهِيَ فِي الْعِدَّةِ، وَكَانَ لَهُ – إِنْ كَانَ لَا يَجِدُ طَوْلًا لِحُرَّةٍ وَخَافَ الْعَنْتَ عَلَى نَفْسِهِ – أَنْ يَنْكِحَ أَمَةً مُسْلِمَةً؛ لِأَنَّ الْمُفَارِقَةَ الَّتِي لَا رَجْعَةَ لَهُ عَلَيْهَا غَيْرُ زَوْجَةٍ.
1374 – And when the man repudiates (<i>ṭallaqa</i>) his wife with three [<i>ṭalāqs</i>], while he is ill (<i>marīḍ</i>); then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: If he dies after the fulfillment (<i>inqiḍāʾ</i>) of the <i>ʿidda</i> ; there belongs to her no <i>mīrāth</i> from him. And he [Abū Yūsuf] embraces it.	1374 – وَإِذَا طَلَّقَ الرَّجُلُ امْرَأَتَهُ ثَلَاثًا وَهُوَ مَرِيضٌ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: إِنْ مَاتَ بَعْدَ انْقِضَاءِ الْعِدَّةِ فَلَا مِيرَاثَ لَهَا مِنْهُ. وَبِهِ يَأْخُذُ.
1375 – But Ibn Abī Laylā used to say: The <i>mīrāth</i> belongs to her, so long as she did not [re-]marry.	1375 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَهَا الْمِيرَاثُ مَا لَمْ تَتَزَوَّجَ.
1376 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the man repudiates (<i>ṭallaqa</i>) his wife with three [<i>ṭalāqs</i>], or a [single] pronouncement of <i>ṭalāq</i> (<i>ṭaṭlīqat^{an}</i>) – there being no other [<i>ṭalāqs</i>] against her remaining to him,	1376 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا طَلَّقَ الرَّجُلُ امْرَأَتَهُ ثَلَاثًا أَوْ تَطْلِيقَةً لَمْ يَكُنْ بَقِيَ لَهُ عَلَيْهَا غَيْرُهَا وَهُوَ مَرِيضٌ، ثُمَّ مَاتَ بَعْدَ

contract of *nikāh*. As for *khiyār* in *nikāh*, see the MF (s.v. “نكاح”, 59-60, “خيار المجلس والشرط في النكاح”). In brief, it would seem that only the Mālikīs allow for any consideration of *khiyār*, and that only in very severely limited forms.

²³ Būlāq has *ṭaṭlīqa bāʿinatan*.

²⁴ Again, and as we have seen with *aḥabbu ilayya*, etc., the language of norm valuation in this case (*akrahuhu lahu*) finds its genitive locus in the jurist (Abū Ḥanīfa), not in an authoritative text or method.

besides it — while he is ill, then he dies after the fulfillment of her <i>ʿidda</i> ; then indeed the greater part (<i>āmmata</i>) of our <i>aṣḥāb</i> subscribe to the opinion (<i>yadhabūna ilā</i>) that there belongs to her <i>mīrāth</i> from him, so long as she did not [re-] marry. ²⁵	انْقِضَاءِ عِدَّتِهَا، فَإِنَّ عَامَّةَ أَصْحَابِنَا يَذْهَبُونَ إِلَى أَنَّ لَهَا مِنْهُ الْمِيرَاثَ مَا لَمْ تَتَزَوَّجْ.
1377 – But some of the people have disagreed with us regarding this (<i>qad khālafanā fī hādha baʿḍu al-nāsi</i>), by [a number of] <i>qawls</i> (<i>bi-aqāwila</i>): ²⁶	1377 – وَقَدْ خَالَفَنَا فِي هَذَا بَعْضُ النَّاسِ بِأَقَاوِيلَ:
1378 – One of them said: There does not belong to her the <i>mīrāth</i> during an <i>ʿidda</i> , nor during something besides an <i>ʿidda</i> . And this is the <i>qawl</i> of Ibn al-Zubayr. ²⁷	1378 – فَقَالَ أَحَدُهُمْ: لَا يَكُونُ لَهَا الْمِيرَاثُ فِي عِدَّةٍ وَلَا فِي غَيْرِ عِدَّةٍ. وَهَذَا قَوْلُ ابْنِ الزُّبَيْرِ.
1379 – And another said: She inherits from him, so long as the <i>ʿidda</i> was not completed (<i>lam tanqad</i>). And he narrated it on the authority of ʿUmar, by an <i>isnād</i> the likes of which the <i>Ahl al-ʿIlm bi'l-Ḥadīth</i> do not confirm (<i>lā yathbutu mithluhu</i>). And it is written in the <i>Kitāb al-Ṭalāq</i> . ²⁸	1379 – وَقَالَ غَيْرُهُ: هِيَ تَرْتُهُ مَا لَمْ تَنْقَضِ الْعِدَّةُ. وَرَوَاهُ عَنْ عُمَرَ بِإِسْنَادٍ لَا يَثْبُتُ مِثْلُهُ عِنْدَ أَهْلِ الْعِلْمِ بِالْحَدِيثِ. وَهُوَ مَكْتُوبٌ فِي كِتَابِ الطَّلَاقِ.
1380 – And another said: She inherits from him even if she [re-]marries.	1380 – وَقَالَ غَيْرُهُ: تَرْتُهُ وَإِنْ تَزَوَّجَتْ.

²⁵ We have seen al-Rabī suggest that when al-Shāfiʿī refers to “our *aṣḥāb*,” he is in fact speaking of Mālik and his students (see §252 and attached note re: the Mashriqiyyūn). This is supported by the fact that one of the *āthār* in support of the “she inherits even after the *ʿidda*” opinion is related to al-Shāfiʿī by Mālik himself (see the note attached to §1379, below — the Mālik *athar* is §19181).

²⁶ This, as we have seen, is the formulaic introduction to a “historical” dialectic (cf. §§1318 and 1406). Interestingly, insofar as our text is concerned, these are the only three such instances, and they all occur in the *Bāb al-Ṭalāq*. Also, note that only two of the three opinions may be in consonance with Abū Ḥanīfa and Abū Yūsuf in §1374, while the third goes beyond Ibn Abī Laylā in §1375. Still, this may yet conform to al-Rabī’s comment in our note attached to §252.

²⁷ I am uncertain as to why al-Shāfiʿī lists this opinion here, as it is in full agreement with his — he cites it again as the right opinion in §1381. Perhaps we may interpret this as an example of al-Shāfiʿī changing his opinion from an older, proto-Mālikī stance — the *khālafanā* of §1377 referring back to that older position.

²⁸ We have discussed many issues relevant to the referenced *Kitāb al-Ṭalāq* previously (see §1298 and attached note). In this instance, the only related material I could find within the *Umm* occurs within the *Kitāb al-ʿIdad* (one of the books tailing upon the mixed *masāʾil* of *nikāḥ* and *ṭalāq*), under the subheading of *ʿiddat al-Madkhūl bihā allatī Taḥayyaḍa* (especially at §§19181-3, Ḥassūn, vol.6, pt.11, 234-5). Here we find three mentions of a report which indicates that all of ʿUthmān, ʿAlī b. Abī Ṭālib, and Zayd b. Thābit agreed that she inherits through to the end of her *ʿidda*. There is no mention of ʿUmar. However, §19183 alerts us to the presence of a similar report on the same events, and on the authority of ʿUmar b. ʿAbd al-ʿAzīz — we will assume that this is what al-Shāfiʿī references above in §1379.

1381 – Al-Shāfiʿī, may God Most High have mercy upon him, said: One bearing no relation (<i>mabtūtāt^m</i>) does not inherit – whether during an <i>ʿidda</i> , or something besides an <i>ʿidda</i> . And it is the <i>qawl</i> of Ibn al-Zubayr.	1381 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: لَا تَرِثُ مَبْتُوتَةٌ فِي عِدَّةٍ كَانَتْ أَوْ غَيْرِ عِدَّةٍ. وَهُوَ قَوْلُ ابْنِ الزُّبَيْرِ.
1382 – And ʿAbd al-Raḥmān ²⁹ repudiated (<i>ṭallaqa</i>) his wife, if God wills, with the understanding that she would not inherit.	1382 – وَعَبْدُ الرَّحْمَنِ طَلَّقَ امْرَأَتَهُ إِنْ شَاءَ اللَّهُ عَلَى أَنَّهَا لَا تَرِثُ.
1383 – And the Muslims reached consensus (<i>ajmaʿa</i>) that, when he repudiates her with three [<i>ṭalāqs</i>], then practices <i>ilāʾ</i> from her (<i>ālā minhā</i>); he is not a <i>muwallī</i> . And [that], if he makes the <i>zihār</i> -repudiation (<i>taẓāhara</i>); he is not a <i>mutaẓāhir</i> . And [that], when he slanders her (<i>qadhafahā</i>); there belongs to him no right to perform <i>liʾān</i> -oath procedure with her, and be acquitted of the <i>ḥadd</i> . And [that], if she dies; he does not inherit from her. So when they reach consensus, collectively (<i>ajmaʿū jamīʿan</i>), that she is outside (<i>khārijat^m</i>) the <i>maʿānī</i> of the married couple (<i>al-azwāji</i>); she does not inherit from him. ³⁰	1383 – وَأَجْمَعَ الْمُسْلِمُونَ أَنَّهُ إِذَا طَلَّقَهَا ثَلَاثًا ثُمَّ أَلَى مِنْهَا لَمْ يَكُنْ مُوَلِّيًا، وَإِنْ تَظَاهَرَ لَمْ يَكُنْ مُتَظَاهِرًا، وَإِذَا قَذَفَهَا لَمْ يَكُنْ لَهُ أَنْ يُلَاعِنَهَا وَيَبْرَأَ مِنَ الْحَدِّ، وَإِنْ مَاتَتْ لَمْ يَرِثَهَا. فَلَمَّا أَجْمَعُوا جَمِيعًا أَنَّهَا خَارِجَةٌ مِنْ مَعَانِي الْأَزْوَاجِ لَمْ تَرِثْهُ.
1384 – And when the man repudiates his wife in full health, with three [<i>ṭalāqs</i>], then the husband disavows that [repudiation] while the wife raises a claim to it against him, then the man dies after the <i>qāḍī</i> exacts an oath from him (<i>istaḥlafahu</i>); then indeed Abū Ḥanīfa, may God be pleased with him, used to say: No <i>mīrāth</i> belongs to her. And he [Abū Yūsuf] embraces it. ³¹	1384 – وَإِذَا طَلَّقَ الرَّجُلُ امْرَأَتَهُ فِي صِحَّتِهِ ثَلَاثًا، فَحَدَّ ذَلِكَ الزَّوْجَ وَادَّعَتْهُ عَلَيْهِ الْمَرْأَةُ، ثُمَّ مَاتَ الرَّجُلُ بَعْدَ أَنْ اسْتَحْلَفَهُ الْقَاضِي، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ كَانَ يَقُولُ: لَا مِيرَاثَ لَهَا. وَبِهِ يَأْخُذُ.
1385 – But Ibn Abī Laylā used to say: The <i>mīrāth</i> belongs to her, unless she acknowledges (<i>tuqirru</i>) after his death that he had repudiated her with three [<i>ṭalāqs</i>]. ³²	1385 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَهَا الْمِيرَاثُ إِلَّا أَنْ تُقَرَّ بَعْدَ مَوْتِهِ أَنَّهُ كَانَ طَلَّقَهَا

²⁹ Ḥassūn points out that this is ʿAbd al-Raḥmān b. ʿAwf (vol.9, pt.14, 228, n.3).

³⁰ In sum, al-Shāfiʿī's refutation of competing opinions rests on a pair of *āthār* and a series of *ijmāʿ*-sanctioned substantive rulings which point towards an obvious substantive principle: once a woman is divorced by irrevocable *ṭalāq*, she may no longer be considered in the status of a wife (*zawja*) for anything — be it *masāʾil* pertaining to *ilāʾ*, *zihār*, *qadhaf*, or *mīrāth*.

³¹ The point of her raising the claim, of course, is that she wanted to be divorced, and did not wish to return to him. The *masʾala* at hand questions whether or not she should inherit from him after being compelled to return to him, and having claimed openly that she had been repudiated with three *ṭalāqs*.

³² In other words, in order that she be disqualified for *mīrāth*, Ibn Abī Laylā requires that she repeat her claim of irrevocable divorce after his death.

	ثَلَاثًا.
1386 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the wife raises a claim about her husband that he repudiated her with three [<i>ṭalāqs</i>], categorically (<i>al-battata</i>), and the <i>qāḍī</i> extracts his oath, after his denial (<i>inkārihi</i>), and sends [compels] her back to him (<i>raddahā ʿalayhi</i>), then he dies; it is not lawful for her (<i>lam yaḥilla lahā</i>) that she inherit from him anything, if she had known that she was truthful (<i>ṣāḍiqat^{um}</i>), and not with regard to the <i>ḥukm</i> due to circumstance (<i>wa lā fiʾl-ḥukmi bi-ḥālⁱⁿ</i>); because she acknowledged that she was not a wife (<i>ghayru zawjatⁱⁿ</i>). And if she had known that she was lying (<i>kādhibat^{um}</i>), it is lawful for her — regarding what is between her and God — that she inherit from him. ³³	1386 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا ادَّعَتِ الْمَرْأَةُ عَلَى زَوْجِهَا أَنَّهُ طَلَّقَهَا ثَلَاثًا أَلْبَتَةً، فَأَحْلَفَهُ الْقَاضِي بَعْدَ إِنكَارِهِ، وَرَدَّهَا عَلَيْهِ، ثُمَّ مَاتَ، لَمْ يَحِلَّ لَهَا أَنْ تَرِثَ مِنْهُ شَيْئًا إِنْ كَانَتْ تَعْلَمُ أَنَّهَا صَادِقَةٌ وَلَا فِي الْحُكْمِ بِحَالٍ؛ لِأَنَّهَا تُقَرُّ أَنَّهَا غَيْرُ زَوْجَةٍ. فَإِنْ كَانَتْ تَعْلَمُ أَنَّهَا كَاذِبَةٌ حَلَّ لَهَا فِيمَا بَيْنَهَا وَبَيْنَ اللَّهِ أَنْ تَرِثَهُ.
1387 – And when the man abstains from (<i>khalā</i>) his wife while she is menstruating, or while she is ill, then he repudiates her before having penetrative sexual intercourse with her; then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: To her belongs half the <i>mahr</i> . And he [Abū Yūsuf] embraces it.	1387 – وَإِذَا خَلَا الرَّجُلُ بِامْرَأَتِهِ وَهِيَ حَائِضٌ أَوْ وَهِيَ مَرِيضَةٌ ثُمَّ طَلَّقَهَا قَبْلَ أَنْ يَدْخُلَ بِهَا، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَهَا نِصْفُ الْمَهْرِ. وَبِهِ يَأْخُذُ.
1388 – But Ibn Abī Laylā used to say: To her belongs the <i>mahr</i> in its entirety (<i>kāmil^{an}</i>).	1388 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَهَا الْمَهْرُ كَامِلًا.
1389 – And when the man says to his wife: If I add to you (<i>ḍamamtu ilayki</i>) a wife, you are <i>ṭāliq</i> , with one [<i>ṭalāq</i>], then he repudiates her, and she is irrevocably separated from him (<i>bānat minhu</i>), and the <i>ʿidda</i> is completed, then he marries another woman, then he marries that woman for whom he swore (<i>ḥalafa ʿalayhā</i>); then indeed Abū Ḥanīfa used to say: The <i>ṭalāq</i> does not fall upon her, due to the fact that he did not add her [the other wife] to her. And he [Abū Yūsuf] embraces it.	1389 – وَإِذَا قَالَ الرَّجُلُ لَامْرَأَتِهِ: إِنْ ضَمَمْتُ إِلَيْكَ امْرَأَةً فَأَنْتِ طَالِقٌ وَاحِدَةً. فَطَلَّقَهَا فَبَانَتْ مِنْهُ وَانْقَضَتِ الْعِدَّةُ، ثُمَّ تَزَوَّجَ امْرَأَةً أُخْرَى، ثُمَّ تَزَوَّجَ تِلْكَ الْمَرْأَةَ الَّتِي حَلَفَ عَلَيْهَا، فَإِنَّ أَبَا حَنِيفَةَ كَانَ يَقُولُ: لَا يَقَعُ عَلَيْهَا الطَّلَاقُ؛ مِنْ قَبْلِ أَنَّهُ لَمْ يَضْمَمْهَا إِلَيْهَا. وَبِهِ يَأْخُذُ.

³³ The point, if I understand correctly, is that — if she lied in the original claim of repudiation, or in denouncing that original (but truthful) claim — such lies are between her and God, and do not bear upon the operation of the laws of *mīrāth*.

1390 – But Ibn Abī Laylā used to say: The ṭalāq falls upon her. ³⁴	1390 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: يَقَعُ عَلَيْهَا الطَّلَاقُ.
1391 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And when the man says to his wife: If I add to you a wife, you are ṭāliq, with three [ṭalāqs], then he repudiates her, and her 'idda is completed, then he marries another besides her, then he marries her after a new nikāḥ; there is no ṭalāq [imposed] upon her. For he did not add a wife to her – rather, he added her to a wife.	1391 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا قَالَ الرَّجُلُ لِمَرْأَتِهِ: إِنْ ضَمَمْتُ إِلَيْكَ امْرَأَةً فَأَنْتِ طَالِقٌ ثَلَاثًا. فَطَلَّقَهَا وَانْقَضَتْ عِدَّتُهَا، ثُمَّ نَكَحَ غَيْرَهَا، ثُمَّ نَكَحَهَا بَعْدَ نِكَاحٍ جَدِيدٍ فَلَا طَلَاقَ عَلَيْهَا، وَهُوَ لَمْ يَضُمْ إِلَيْهَا امْرَأَةً إِنَّمَا ضَمَّهَا هِيَ إِلَى امْرَأَةٍ.
1392 – And when the man says: If I marry so-and-so, then she is ṭāliq, and he marries her for a designated mahr, and has penetrative sexual intercourse with her; then indeed Abū Ḥanīfa, may God Most High be pleased with him, used to say: She is ṭāliq, with one [ṭalāq], irrevocably (bā'inat ^{an}), and upon her is [enjoined] the 'idda, and to her belongs a mahr and a half – half of that due to the ṭalāq, and a [full] mahr due to the penetrative sexual intercourse (al-dukhūl). And he [Abū Yūsuf] embraces it.	1392 – وَإِذَا قَالَ الرَّجُلُ: إِنْ تَزَوَّجْتُ فُلَانَةً فَهِيَ طَالِقٌ. فَتَزَوَّجَهَا عَلَى مَهْرٍ مُسَمًّى وَدَخَلَ بِهَا، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ تَعَالَى عَنْهُ كَانَ يَقُولُ: هِيَ طَالِقٌ وَاحِدَةً بَائِنَةً وَعَلَيْهَا الْعِدَّةُ وَلَهَا مَهْرٌ وَنِصْفٌ؛ نِصْفٌ مِنْ ذَلِكَ بِالطَّلَاقِ وَمَهْرٌ بِالدُّخُولِ. وَبِهِ يَأْخُذُ.
1393 – But Ibn Abī Laylā used to say: To her belongs half a mahr due to the ṭalāq, and there belongs to her due to the dukhūl nothing. And from among his ḥujja for that is that a man practiced ilā' from (ālā min) his wife, then he approached after four months, and had penetrative sexual intercourse with his wife, then Ibn Mas'ūd came along, and ordered that he engage her (yakhtubahā), so he engaged her and dowered her (aṣdaqahā) with an advance dowry (ṣadāq ^{an} mustaqbal ^{an}). And it did not reach us that he fixed, as regards that sexual act (al-waṭ'i), any ṣadāq.	1393 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: لَهَا نِصْفُ مَهْرٍ بِالطَّلَاقِ، وَلَيْسَ لَهَا بِالدُّخُولِ شَيْءٌ. وَمِنْ حُجَّتِهِ فِي ذَلِكَ أَنَّ رَجُلًا آلَى مِنْ امْرَأَتِهِ، فَقَدِمَ بَعْدَ أَرْبَعَةِ أَشْهُرٍ، فَدَخَلَ بِامْرَأَتِهِ ثُمَّ أَتَى ابْنُ مَسْعُودٍ، فَأَمَرَهُ أَنْ يَخْطُبَهَا، فَخَطَبَهَا وَأَصْدَقَهَا صَدَاقًا مُسْتَقْبَلًا، وَلَمْ يَبْلُغْنَا أَنَّهُ جَعَلَ فِي ذَلِكَ الْوَطْءِ صَدَاقًا.
1394 – And from the ḥujja of Abū Ḥanīfa is that he said: The ṭalāq had fallen before the sexual union (al-jimā'); so half the mahr is obliged to her. And he had sexual	1394 – وَمِنْ حُجَّةِ أَبِي حَنِيفَةَ أَنَّهُ قَالَ: قَدْ وَقَعَ الطَّلَاقُ قَبْلَ الْجِمَاعِ، فَوَجِبَ لَهَا نِصْفُ

³⁴ Again, we see a fundamental difference of principle between Abū Ḥanīfa and Ibn Abī Laylā with regard to efficiency of a *sharṭ* in the *mas'ala* context. Al-Sarakhsī explains their reasoning in the *Mabsūt* (see Afghānī, 212-13, n.2; no citation).

intercourse with her in a state resembling legitimacy (<i>bi-shubhatⁱⁿ</i>), so he owes the [full] <i>mahr</i> . And if I don't make him owe the <i>mahr</i> , I make him owe the <i>ḥadd</i> .	الْمَهْرَ وَجَامَعَهَا بِشُبْهَةٍ، فَعَلَيْهِ الْمَهْرُ، وَلَوْ لَمْ أَجْعَلْ عَلَيْهِ الْمَهْرَ جَعَلْتُ عَلَيْهِ الْحَدَّ.
1395 – And Abū Ḥanīfa said: Every [unlawful] sexual union in which the <i>ḥadd</i> is averted — there is <i>ṣadāq</i> for it. There is no escape from the <i>ṣadāq</i> — when I avert the <i>ḥadd</i> , the <i>ṣadāq</i> is incumbent (<i>wajaba</i>). And when I don't fix the <i>ṣadāq</i> , then there is no escape from the <i>ḥadd</i> . ³⁵	1395 – وَقَالَ أَبُو حَنِيفَةَ: كُلُّ جِمَاعٍ يُدْرَأُ فِيهِ الْحَدُّ فَفِيهِ صَدَاقٌ، لَا بُدَّ مِنَ الصَّدَاقِ إِذَا دَرَأْتُ الْحَدَّ وَجَبَ الصَّدَاقُ، وَإِذَا لَمْ أَجْعَلِ الصَّدَاقَ فَلَا بُدَّ مِنَ الْحَدِّ.
1396 – Abū Yūsuf said: A <i>muḥaddith</i> transmitted to me (<i>ḥaddathanī</i>), on the authority of Ḥammād, on Ibrāhīm, that he said regarding it: There belongs to her a <i>mahr</i> and half a <i>mahr</i> , like the <i>qawl</i> of Abū Ḥanīfa.	1396 – قَالَ أَبُو يُوسُفَ: حَدَّثَنِي مُحَدِّثٌ، عَنْ حَمَّادٍ، عَنْ إِبْرَاهِيمَ أَنَّهُ قَالَ فِيهِ: لَهَا مَهْرٌ وَنِصْفُ مَهْرٍ، مِثْلَ قَوْلِ أَبِي حَنِيفَةَ.
1397 – And when the man says to his wife: If you enter the house, you are <i>ṭāliq</i> , if God wishes (<i>in shā' Allāhu</i>), and she enters the house; then indeed Abū Ḥanīfa and Ibn Abī Laylā both said: The <i>ṭalāq</i> does not occur.	1397 – وَإِذَا قَالَ الرَّجُلُ لِمَرْأَتِهِ: إِنْ دَخَلْتَ الدَّارَ فَأَنْتِ طَالِقٌ إِنْ شَاءَ اللَّهُ. فَدَخَلَتِ الدَّارَ، فَإِنَّ أَبَا حَنِيفَةَ وَابْنَ أَبِي لَيْلَى قَالَا: لَا يَقَعُ الطَّلَاقُ.
1398 – And if he says: You are <i>ṭāliq</i> , <i>in shā' Allāh</i> ; but he does not say: If you enter the house; then indeed Abū Ḥanīfa, may God be pleased with him, said: The <i>ṭalāq</i> does not occur. And he said: This, and the first [§1397], are one and the same (<i>sawā^{um}</i>). And he [Abū Yūsuf] embraces it.	1398 – وَلَوْ قَالَ: أَنْتِ طَالِقٌ إِنْ شَاءَ اللَّهُ وَلَمْ يَقُلْ: إِنْ دَخَلْتَ الدَّارَ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ قَالَ: لَا يَقَعُ الطَّلَاقُ. وَقَالَ: هَذَا وَالْأَوَّلُ سَوَاءٌ. وَبِهِ يَأْخُذُ.
1399 – Abū Ḥanīfa [reported], on the authority of Ḥammād, on Ibrāhīm, that he said regarding that: The <i>ṭalāq</i> does not occur, nor does the manumission (<i>lā yaqa'u al-ṭalāqu, wa lā al-'atāqu</i>). ³⁶	1399 – أَبُو حَنِيفَةَ عَنْ حَمَّادٍ، عَنْ إِبْرَاهِيمَ أَنَّهُ قَالَ فِي ذَلِكَ: لَا يَقَعُ الطَّلَاقُ وَلَا الْعَتَاقُ.
1400 – And 'Abd al-Malik b. Abī Sulaymān reported to us, on the authority of 'Aṭā' b. Abī Rabāḥ, that he said: The <i>ṭalāq</i> does not	1400 – وَأَخْبَرَنَا عَبْدُ الْمَلِكِ ابْنُ أَبِي سُلَيْمَانَ، عَنْ عَطَاءِ بْنِ أَبِي رَبَاحٍ أَنَّهُ قَالَ: لَا

³⁵ An obvious concern of Abū Ḥanīfa's is that all possible loopholes to deceptive means to unlawful cohabitation be sealed off with deterrents. Thus, this form of restrictive disjunction ruling.

³⁶ This rhyming *ḥukm* (§1399 and §1401) may have behind it a mnemonic intent, and may even be a maxim. General searches have so far revealed nothing in this particular formula, however.

occur. [But Ibn Abī Laylā said: The <i>ṭalāq</i> occurs here, and likewise the manumission.] ³⁷	يَقَعُ الطَّلَاقُ. [وقال ابن أبي ليلى: يقع الطلاق هنا، وكذلك العتاق.]
1401 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the man says to his wife: You are <i>ṭaliq</i> , in <i>shāʾ Allāhu taʾālā</i> ; there is neither <i>ṭalāq</i> nor <i>ʿatāq</i> .	1401 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا قَالَ الرَّجُلُ لِمَرْأَتِهِ: أَنْتِ طَالِقٌ إِنْ شَاءَ اللَّهُ تَعَالَى. فَلَا طَلَاقَ وَلَا عَتَاقَ.
1402 – And when the man repudiates his wife with one [<i>ṭalāq</i>], and her <i>ʿidda</i> is completed, and she marries a husband and he has penetrative sexual intercourse with her then repudiates her, then the first marries her; then indeed Abū Ḥanīfa said: She is [freed of previous] <i>ṭalāq</i> , all of it (<i>hiya ʿalā al-ṭalāqi kullihī</i>). And he [Abū Yūsuf] embraces it. ³⁸	1402 – وَإِذَا طَلَّقَ الرَّجُلُ امْرَأَتَهُ وَاحِدَةً فَأَنْقَضَتْ عِدَّتُهَا، فَتَزَوَّجَتْ زَوْجًا وَدَخَلَ بِهَا ثُمَّ طَلَّقَهَا، ثُمَّ تَزَوَّجَهَا الْأَوَّلُ، فَإِنَّ أَبَا حَنِيفَةَ قَالَ: هِيَ عَلَى الطَّلَاقِ كُلِّهِ. وَبِهِ يَأْخُذُ.
1403 – But Ibn Abī Laylā said: She is [at the stage of] what remains [from the <i>ṭalāq</i>] (<i>hiya ʿalā mā baqiya</i>).	1403 – وَقَالَ ابْنُ أَبِي لَيْلَى: هِيَ عَلَى مَا بَقِيَ.
1404 – Al-Shāfiʿī said: And when the man repudiates his wife with one [<i>ṭalāq</i>], or with two [<i>ṭalāqs</i>], and her <i>ʿidda</i> elapses and she marries another husband besides him, then he [the new husband] has sexual intercourse with her (<i>aṣābahā</i>), then he repudiates her, or dies on her, and her <i>ʿidda</i> elapses and she marries the first husband;	1404 – قَالَ الشَّافِعِيُّ: وَإِذَا طَلَّقَ الرَّجُلُ امْرَأَتَهُ وَاحِدَةً أَوْ اثْنَتَيْنِ، فَأَنْقَضَتْ عِدَّتُهَا وَنَكَحَتْ زَوْجًا غَيْرَهُ، ثُمَّ أَصَابَهَا، ثُمَّ طَلَّقَهَا أَوْ مَاتَ عَنْهَا، فَأَنْقَضَتْ عِدَّتُهَا فَنَكَحَتْ

³⁷ For the second time in this chapter (cf. §1340[b]), the qawl of Ibn Abī Laylā has been omitted; this is beginning to look more like a pattern than a mistake, as though we are meant to infer Ibn Abī Laylā's opinion from that of Abū Ḥanīfa. Al-Afghānī, once again, supplies the missing qawl (215-16), saying: "This *lafẓ* fell away from the *aṣl*, and I will add it from the *Mabsūṭ* of al-Sarakhsī" (216, n.1; no citation given). In the quotation, al-Sarakhsī proceeds to explain Ibn Abī Laylā's and Abū Ḥanīfa's reasoning.

³⁸ Al-Sarakhsī (*Mabsūṭ*, 6:95, Afghānī, 216, n.2) sheds some light on these terse pronouncements: "And if he repudiates his wife with one *ṭalāq*, or two, then he marries her after a husband has cohabited with her; she is, from his perspective, in possession of three future pronunciations of *ṭalāq* (*hiya ʿindahū ʿalā thalāthi taṭlīqāt^m mustaqbalāt^m*), according to the qawl of Abū Ḥanīfa and Abū Yūsuf, may God Most High have mercy upon them both. And it is the qawl of Ibn ʿAbbās, and Ibn ʿUmar, and Ibrāhīm, and the *aṣḥāb* of ʿAbd Allāh b. Masʿūd, may God be pleased with them. But according to Muḥammad and Zufar and al-Shāfiʿī, may God Most High have mercy upon them, she is, from his perspective, at whatever remains of her *ṭalāq* (*hiya ʿindahū bimā baqiya min ṭalāqihā*). And it is the qawl of ʿUmar, and ʿAlī, and Ubayy b. Kaʿb, and Imrān b. al-Ḥuṣayn, and Abī Hurayra, may God be pleased with them." NB: al-Sarakhsī's mention of al-Shāfiʿī corresponds with al-Shāfiʿī's opinion in §1404, and his *naql* in §1405. Although al-Shāfiʿī's opinion is referenced frequently in the *Mabsūṭ*, we have noted that it appears only six times in al-Sarakhsī's commentary on the *Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā*.

she is, from his perspective, [at the stage of] what remains from the <i>ṭalāq</i> (<i>hiya ʿindahū ʿalā mā baqiya min al-ṭalāqi</i>). The second husband eliminates (<i>yahdimu</i>) the three (<i>ṭalāqs</i>), but he does not eliminate the one [<i>ṭalāq</i>], nor the two [<i>ṭalāqs</i>].	الرَّوْجِ الْأَوَّلِ، فَهِيَ عِنْدَهُ عَلَى مَا بَقِيَ مِنَ الطَّلَاقِ، يَهْدِمُ الرَّوْجَ الثَّانِي الثَّلَاثَ وَلَا يَهْدِمُ الْوَاحِدَةَ وَلَا الثَّانِيَيْنِ.
1405 – And this, our <i>qawl</i> , is the <i>qawl</i> of ʿUmar b. al-Khaṭṭāb, may God Most High be pleased with him, and a number of the greats (<i>kibār</i>) of the <i>aṣḥāb</i> of the Prophet, may God bless and save him.	1405 – وَقَوْلُنَا هَذَا قَوْلُ عُمَرَ بْنِ الْخَطَّابِ رَضِيَ اللَّهُ تَعَالَى عَنْهُ وَعَدَدٌ مِنْ كِبَارِ أَصْحَابِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ.
1406 – And one of the people has disagreed with us regarding some of this (<i>khālafanā fī baʿḍi hādhā baʿḍu al-nāsi</i>), and he said: If the husband eliminates (<i>hadama</i>) the three [<i>ṭalāqs</i>], he eliminates the one [<i>ṭalāq</i>] and the two [<i>ṭalāqs</i>]. And he [“one of the people”] draws <i>ḥujja</i> (<i>iḥtajja</i>) from the <i>qawl</i> of Ibn ʿUmar and Ibn ʿAbbās, may God be pleased with them.	1406 – وَقَدْ خَالَفْنَا فِي بَعْضِ هَذَا بَعْضُ النَّاسِ فَقَالَ: إِذَا هَدَمَ الرَّوْجُ ثَلَاثًا هَدَمَ وَاحِدَةً وَاثْنَتَيْنِ. وَاحْتَجَّ بِقَوْلِ ابْنِ عُمَرَ وَابْنِ عَبَّاسٍ رَضِيَ اللَّهُ عَنْهُمْ.
1407 – And he asked us, and said: From where do you claim (<i>zaʿamtum</i>) that the husband eliminates the three [<i>ṭalāqs</i>], but does not eliminate what is less than it?	1407 – وَسَأَلْنَا فَقَالَ: مِنْ أَيْنَ زَعَمْتُمْ أَنَّ الرَّوْجَ يَهْدِمُ الثَّلَاثَ وَلَا يَهْدِمُ مَا هُوَ أَقَلُّ مِنْهَا؟
1408 – We said: We claim it based upon the command (<i>al-amr</i>) which no one may rightly reject (<i>yadfaʿahu</i>).	1408 – قُلْنَا: زَعَمْنَاهُ بِالْأَمْرِ الَّذِي لَا يَنْبَغِي لِأَحَدٍ أَنْ يَدْفَعَهُ.
1409 – He said: And what is it?	1409 – قَالَ: وَمَا هُوَ؟
1410 – We said: God made her <i>ḥarām</i> (<i>ḥarrahā</i>) after the three [<i>ṭalāqs</i>], until she marries another husband besides him. ³⁹ And the Messenger of God, may God bless and save him, clarified, concerning God (<i>bayyana... ʿan Allāh</i>), to Him belong might and majesty, that the “ <i>nikāḥ</i> ” by means of which God made her lawful (<i>aḥallahā bihi</i>) after the three [<i>ṭalāqs</i>], is the sexual intercourse of the [second] husband (<i>iṣābatu al-zawji</i>). ⁴⁰ And she was <i>muḥarrama</i> before the [second] husband, not to be made lawful by any circumstance except by the [second] husband. So there	1410 – قُلْنَا: حَرَّمَهَا اللَّهُ بَعْدَ الثَّلَاثِ حَتَّى تَنْكِحَ زَوْجًا غَيْرَهُ. وَبَيَّنَ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - عَنْ اللَّهِ عَزَّ وَجَلَّ أَنَّ النِّكَاحَ الَّذِي أَحَلَّهَا اللَّهُ بِهِ بَعْدَ الثَّلَاثِ إِصَابَةُ الزَّوْجِ، وَكَانَتْ مُحَرَّمَةً قَبْلَ الزَّوْجِ لَا تَحِلُّ بِحَالٍ إِلَّا بِالزَّوْجِ، فَكَانَ لِلزَّوْجِ حُكْمُ هَدْمِ الثَّلَاثِ لِهَذَا الْمَعْنَى، وَكَانَتْ فِي الْوَاحِدَةِ وَالثَّانِيَيْنِ حَلَالًا،

³⁹ The reference is to Q.2:230, which al-Shāfiʿī partially quotes: «And if he unilaterally divorces her (*ṭallaqahā*), she is not lawful for him thereafter until she contracts *nikāḥ* with another husband besides him (*ḥattā tankiḥa zawj^{an} ghayrahu*).»

⁴⁰ It must be remembered that *nikāḥ* has another nuanced meaning; mainly, “the sexual act.” See Lane, i.2848 (s.v. “نَكَحَ”); and my own “Towards an Early History of *Milk al-Nikāḥ*: A Preliminary Exploration” (unpublished).

belonged to the husband the <i>ḥukm</i> of the elimination (<i>hadm</i>) of the three [<i>ṭalāqs</i>], due to this <i>maʿnā</i>. For she was, regarding the one [<i>ṭalāq</i>] and the two [<i>ṭalāqs</i>], <i>ḥalāl</i> [to the first husband]; and there does not belong to the husband, in this case, a <i>ḥukm</i>. And we claimed that he eliminates whenever she was not lawful for him [the first husband] except by way of it [i.e., of that <i>ḥukm</i>], and his <i>ḥukm</i> was standing (<i>qāʾim^{an}</i>); and [that] he does not eliminate when no <i>ḥukm</i> belongs to him, and when she was <i>ḥalāl</i> to another besides him.	فَلَمْ يَكُنْ لِلزَّوْجِ هَاهُنَا حُكْمٌ، فَزَعَمْنَا أَنَّهُ يَهْدِمُ حَيْثُ كَانَتْ لَا تَحِلُّ لَهُ إِلَّا بِهِ، وَكَانَ حُكْمُهُ قَائِمًا، وَلَا يَهْدِمُ حَيْثُ لَا حُكْمَ لَهُ وَحَيْثُ كَانَتْ حَالًا بغيره.
1411 – And the <i>aṣl al-maʿqūl</i> was that nothing is made <i>ḥalāl</i> for anyone by means of the action of another besides him (<i>anna aḥadⁱⁿ lā yaḥillu lahu bi-fiʿli ḡhayrihi shay^{um}</i>). So when God made lawful for him by the action of another, we made lawful for him when God made lawful for him. But it was not permitted that we correlate by <i>qiyās</i> with it,⁴¹ what diverges from it (<i>mā khālafahu</i>), if the <i>aṣl</i> belonged to the <i>maʿqūl fihi</i>.	1411 – وَكَانَ أَصْلُ الْمَعْقُولِ أَنَّ أَحَدًا لَا يَحِلُّ لَهُ بِفِعْلِ غَيْرِهِ شَيْءٌ، فَلَمَّا أَحَلَّ اللَّهُ لَهُ بِفِعْلِ غَيْرِهِ أَحَلَّلْنَا لَهُ حَيْثُ أَحَلَّ اللَّهُ لَهُ، وَلَمْ يَجُزْ أَنْ نَقِيسَ عَلَيْهِ مَا خَالَفَهُ لَوْ كَانَ الْأَصْلُ لِلْمَعْقُولِ فِيهِ.
1412 – And Muḥammad b. al-Ḥasan has reverted to this <i>qawl</i>, after having professed the <i>qawl</i> of Abū Ḥanīfa. And God knows best.⁴²	1412 – وَقَدْ رَجَعَ إِلَى هَذَا الْقَوْلِ مُحَمَّدُ بْنُ الْحَسَنِ بَعْدَمَا كَانَ يَقُولُ بِقَوْلِ أَبِي حَنِيفَةَ، وَاللَّهُ أَعْلَمُ.

⁴¹ See our discussion in Part I, Chapter IV.2 with regard to the meaning of *aṣl al-maʿqūl*.

⁴² Note first that we have seen this recanting of Muḥammad b. al-Ḥasan confirmed by al-Sarakḥsī (see note attached to §1402). More interestingly yet, this section on his recanting does not appear in the Shaybānī Version of al-Afghānī's edition. This provides yet another clue to the redactional histories of these versions, and points towards the Shaybānī Version as being — just as tradition would have it — older than the *Umm* Version. It would be easy to explain that al-Shāfiʿī or al-Rabī added this comment; it is more difficult to explain how a later Ḥanafī editor — bent on creating a “lost” book of *ikhtilāf* by extracting and altering parts of the *Umm* Version (leaving out al-Shāfiʿī's opinions, changing *yaʾkhudhu* to *naʾkhudhu*, etc.) — chose to ignore this particular reference to al-Shaybānī, which would only add credibility to his project. Again, these small clues provide nothing against the “status quo” of traditional redactional history (Abū Yūsuf to Muḥammad b. al-Ḥasan to al-Shāfiʿī to al-Rabī); but as they accumulate, the revisionist post-dating / re-ascription stance becomes more difficult to maintain. Finally, it is interesting to conjecture on one point: considering that some accounts have al-Shāfiʿī studying with Muḥammad b. al-Ḥasan, who encouraged him to engage him in *munāẓara*; might §1411 indicate that al-Shāfiʿī influenced his teacher to change his mind? Could Muḥammad b. al-Ḥasan himself be the “one of the people” referenced in §1406? Of course, this is mere conjecture; it is certainly possible that the theory expressed in §1411 predates al-Shāfiʿī, and that Muḥammad came to it gradually, by other means. One thing is for certain, however: his recanting illustrates — once again — that jurists were moved by strong argument far more than by a perceived “school loyalty.” In this case it may even be that Muḥammad b. al-Ḥasan was moved to reconsider his opinion based on the argument of a star pupil.

Bāb al-Ḥudūd

Chapter on the Ḥudūd ¹	بَابُ الْحُدُودِ
1413 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And when the <i>ḥadd</i> is administered to the <i>bikr</i> , and he is lashed one hundred lashes (<i>julida mi’ata jaldat^m</i>); then indeed Abū Ḥanīfa, may God Most High have mercy upon him, used to say: I do not banish him (<i>lā anfīhi</i>), due to the fact that it has reached us concerning ‘Alī b. Abī Ṭālib that he forbade that, and said: Banishment offers the greatest temptation (<i>kafā bi’l-nafī fitnat^m</i>). And he [Abū Yūsuf] embraces it.	1413 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أُقِيمَ الْحَدُّ عَلَى الْبِكْرِ وَجُلِدَ مِائَةً جَلْدَةً، فَإِنَّ أَبَا حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى كَانَ يَقُولُ: لَا أَنْفِيهِ؛ مِنْ قَبْلِ أَنَّهُ بَلَّغَنَا عَنْ عَلِيِّ بْنِ أَبِي طَالِبٍ أَنَّهُ نَهَى عَنْ ذَلِكَ، وَقَالَ: كَفَى بِالنَّفْيِ فِتْنَةً. وَبِهِ يَأْخُذُ.
1414 – But Ibn Abī Laylā used to say: He is banished (<i>yunfā</i>) for a year to a <i>balad</i> other than the <i>balad</i> in which he fornicated (<i>fajara</i>).	1414 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: يُنْفَى سَنَةً إِلَى بَلَدٍ غَيْرِ الْبَلَدِ الَّذِي فَجَرَ بِهِ.
1415 – And that is narrated concerning the Messenger of God, may God bless and save him, and Abū Bakr, and ‘Alī, may God be pleased with them both.	1415 – وَرُويَ ذَلِكَ عَنْ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، وَعَنْ أَبِي بَكْرٍ، وَعَلِيٍّ رَضِيَ اللَّهُ عَنْهُمَا.
1416 – Al-Shāfi‘ī said: And the two <i>bikr zānīs</i> are banished from their locale (<i>mawḍi‘ihimā</i>), in which they committed <i>zinā</i> (<i>zanayā</i>), to another <i>balad</i> , after the beating (<i>ḍarb</i>) of the hundred [lashes].	1416 – قَالَ الشَّافِعِيُّ: وَيُنْفَى الزَّانِيَانِ الْبِكْرَانِ مِنْ مَوْضِعِهِمَا الَّذِي زَنَيَا بِهِ إِلَى بَلَدٍ غَيْرِهِ بَعْدَ ضَرْبِ مِائَةٍ.
1417 – And the Prophet, may God bless and save him, has banished the <i>zānī</i> ; and Abū Bakr banished, and ‘Umar, and ‘Uthmān, and ‘Alī, may God Most High be pleased with them. But one of the people has disagreed with this (<i>qad khālafa hādhā ba‘ḍu al-nāsi</i>). ² And this is written in the <i>Kitāb al-Ḥudūd</i> ³ with all its <i>hujaj</i> . ⁴	1417 – وَقَدْ نَفَى النَّبِيُّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – الزَّانِي، وَنَفَى أَبُو بَكْرٍ وَعُمَرُ وَعُثْمَانُ وَعَلِيٌّ رَضِيَ اللَّهُ تَعَالَى عَنْهُمْ وَقَدْ خَالَفَ هَذَا بَعْضُ النَّاسِ. وَهَذَا مَكْتُوبٌ فِي كِتَابِ الْحُدُودِ بِحُجَجِهِ.

¹ (Ḥassūn, vol.9, pt.14, 233-5; Schacht: *Tr. I*, 254-256).

² A slightly variant formula – *khālafa... ba‘ḍu al-nāsi* – introduces a “historical” dialectic (cf. §§1318, 1377, 1406); this time we are not offered a summary, but referred to another written source in order to access the arguments related to this *mas’ala* of banishment. Having found the reference, however (see following notes), we see the relevant material in a context of “instructional” dialectic. Perhaps we might consider, then, a process by which “historical” debates are abstracted and abridged for the sake of instruction.

³ With regard to a *Kitāb al-Ḥudūd*, such references appear thrice more in the corpus of the *Umm*; among them we read “*wa’l-hujaj fi Kitāb al-Ḥudūd*” (in §17391 of *Al-Li‘ān* [Ḥassūn, vol.5, pt.10,

1418 – And when the two polytheists (<i>al-mushrikāni</i>) commit <i>zinā</i> , while they are both non-virgins (<i>thayyibāni</i>); then indeed Abū Ḥanīfa, may God be pleased with him, said: There is not [imposed], upon either one of them, the stoning (<i>al-rajm</i>).	1418 – وَإِذَا زَنَى الْمُشْرِكَانِ وَهُمَا ثَيِّبَانِ، فَإِنَّ أَبَا حَنِيفَةَ رَضِيَ اللَّهُ عَنْهُ قَالَ: لَيْسَ عَلَى وَاحِدٍ مِنْهُمَا الرَّجْمُ.

452]); and “*wa hādhā mawḍūʿum fī Kitāb al-Ḥudūd*” (in §18384 of the *Bāb mā Yustahabbu min Taḥṣīn al-Imāʿan al-Zinā* [Ḥassūn, vol.6, pt.11, 94]). A third reference, however, in the *Bāb Daʿwā al-Walad* of the *Kitāb al-Aqḍiya* (Ḥassūn, vol.8, pt.13, 180) is deserving of special comment:

25247 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when a man contracts the borrowing (<i>istaʿāra</i>) from a man of a <i>jāriya</i> , then he has sexual intercourse with her. Then he [al-Shāfiʿī] said: This, and the <i>masʿala</i> of the <i>ghāṣib</i> who has sexual intercourse [with the usurped slave], is in the <i>Kitāb al-Ḥudūd</i> , under the <i>masʿala</i> of the averting of the <i>ḥudūd</i> due to uncertainties (<i>darʿ al-ḥudūd biʾl-shubuhāt</i>). So take [pl.] its <i>jawāb</i> from there; indeed, the <i>ḥujja</i> regarding it is therein (<i>thamma</i>).	25247 – قَالَ الشَّافِعِيُّ، رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا اسْتَعَارَ رَجُلٌ مِنْ رَجُلٍ حَارِيَّةً فَوَطَّئَهَا فَقَالَ: هَذِهِ وَمَسْأَلَةُ الْغَاصِبِ الَّذِي وَطَّئَ فِي كِتَابِ الْحُدُودِ فِي مَسْأَلَةِ دَرْءِ الْحُدُودِ بِالشُّبُهَاتِ فَخُذُوا جَوَابَهَا مِنْ هُنَالِكَ فَإِنَّ الْحُجَّةَ فِيهَا ثُمَّ.

This remarkable section, if read at face value, sheds light upon a number of outstanding questions we have encountered. First, it is a strong indication that the voice which has directed us so many times to other written material belongs to al-Shāfiʿī himself. This, in turn, implies that al-Shāfiʿī’s own material was available in written form at the time these references were made. Rather than repeat a complex set of indicants and arguments, he simply refers the student/opponent to that *kitāb* of his in which that set is already recorded. Not surprisingly, §25247 occurs in a dialectical context, following immediately upon an extended “historical dialectic” (which is introduced by the now-familiar *khālafanā baʿḍu al-nāsi* formula: “But one of the people has disagreed with us regarding the Christian *umm walad* who converts to Islam” [§§25193-25246]). Again, the clues regarding authorship and redaction as found within the *Umm* appear internally consistent and fully supportive of the “traditional status quo” account of the authorship, compilation, and transmission of these texts. Post-dating and re-attribution projects must take account of these references; arbitrary valuations of sophistication and presumptions of growth over generations *after* al-Rabīʿ (Calder, *Studies*, 82-5) have, in my opinion, provided no evidence to challenge this status quo. Certainly, such revisionist narratives are possible. But possible does not mean plausible, nor does it mean probable. And neither possibilities, nor plausibilities, may be said to accumulate in the manner which probabilities accumulate, in order to produce something akin to certainty.

⁴ Returning to the reference to a *Kitāb al-Ḥudūd*, we may note that al-Nadīm lists the rather oddly-titled *Kitāb al-Ḥudūd wa Karī al-Dawwāb* (*Fihrist*, 353) among the works attributed to al-Shāfiʿī; the juxtaposition of *ḥudūd* with the lessor of a beast of burden, however, causes us to doubt that *ḥudūd* is meant in the same sense as in the context of our current *Bāb al-Ḥudūd* (although it may be, regardless). It is plausible, too, that a *Kitāb al-Ḥudūd* was among the only partially-listed contents of al-Shāfiʿī’s *Mabsūṭ*. What is certainly the case, however, is that we find a number of *kutub* and *abwāb* which incorporate *al-ḥudūd* into their titles within the general corpus of the *Umm*. Prominent among them is the *Kitāb al-Ḥudūd wa Ṣifat al-Nafī*, which incorporates the very *masʿala* at hand — banishment — into its title. Moreover, within this *Kitāb*, and under the subheading of *Bāb al-Nafī waʾl-ʾIṭirāf fīʾl-Zinā*, we find not only reference to the Prophet, Abū Bakr, ʿUmar, ʿUthmān, and ʿAlī banishing (as above in §1417), but this occurs in the context of an “instructional dialectic” (introduced by “*fa-in qāla qāʾilum*”; §§23121-23157, Ḥassūn, vol.7, pt.12, 499-503). The details of this particular debate as it unfolds have some bearing on this dissertation, and so I have attempted a translation (see appendix II. §1417).

1419 – But Ibn Abī Laylā used to say: Upon them both is [imposed] the <i>rajm</i> .	1419 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: عَلَيْهِمَا الرَّجْمُ.
1420 – And he narrated that on the authority of Nāfiʿ, on Ibn ʿUmar, may God be pleased with them both, concerning the Messenger of God, may God bless and save him, that he stoned a Jewish man and a Jewish woman (<i>rajama yahūdiyy^{an} wa yahūdiyyat^{an}</i>).	1420 – وَيُرَوَّى ذَلِكَ عَنْ نَافِعٍ، عَنْ ابْنِ عُمَرَ رَضِيَ اللَّهُ تَعَالَى عَنْهُمَا عَنْ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – أَنَّهُ رَجَمَ يَهُودِيًّا وَيَهُودِيَّةً.
1421 – And Abū Yūsuf embraces it.	1421 – وَبِهِ يَأْخُذُ أَبُو يُوسُفَ.
1422 – Abū Ḥanīfa said: The <i>ḥudūd</i> are not administered in the mosques. And that has been narrated concerning the Messenger of God, may God bless and save him. And he [Abū Yūsuf] embraces it.	1422 – قَالَ أَبُو حَنِيفَةَ: لَا تُقَامُ الْحُدُودُ فِي الْمَسَاجِدِ. وَرَوَى ذَلِكَ عَنْ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ. وَبِهِ يَأْخُذُ.
1423 – But Ibn Abī Laylā used to say: We administer the <i>ḥudūd</i> in the mosques. And he has done just that (<i>wa qad faʿala dhālika</i>).	1423 – وَكَانَ ابْنُ أَبِي لَيْلَى يَقُولُ: نُقِيمُ الْحُدُودَ فِي الْمَسَاجِدِ. وَقَدْ فَعَلَ ذَلِكَ.
1424 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the <i>Ahl al-Kitāb</i> bring one another before us for judgment (<i>tahākama ilaynā</i>), and they consent to (<i>raqū</i>) that we judge between them, and they raise a case of adultery (<i>tarāfaʿū fi l-zinā</i>), and they confess to it; we stone the <i>thayyib</i> , and we beat the <i>bikr</i> with a hundred [lashes], and we banish him for a year.	1424 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا تَحَاكَمَ إِلَيْنَا أَهْلُ الْكِتَابِ وَرَضُوا أَنْ نَحْكُمَ بَيْنَهُمْ، فَتَرَاَفَعُوا فِي الزَّانَا وَأَقْرُوا بِهِ، رَجَمْنَا الثَّيِّبَ وَضَرَبْنَا الْبِكْرَ مِائَةً وَتَفَيْنَاهُ سَنَةً.
1425 – And the Messenger of God, may God bless and save him, has stoned two Jews who committed <i>zinā</i> . And it is the <i>maʿnā</i> of the Book of God, Most Blessed, Most High. For indeed God, to Him belong might and majesty, says to His Prophet, may God bless and save him: «And if you pass judgment, judge between them with equity (<i>biʿl-qisṭi</i>)» [Q.5:42]. ⁵ And He said: «Judge	1425 – وَقَدْ رَجَمَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – يَهُودِيَيْنِ زَنِيًّا، وَهُوَ مَعْنَى كِتَابِ اللَّهِ – تَبَارَكَ وَتَعَالَى – فَإِنَّ اللَّهَ عَزَّ وَجَلَّ يَقُولُ لِنَبِيِّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «وَإِنْ حَكَمْتَ فَاحْكُم بَيْنَهُم بِالْقِسْطِ» [المائدة: 42] وَقَالَ:

⁵ A few interesting points from Ḥassūn's notes (ix.234, nn.2-4) regarding this āya of the Qur'ān. First (n.2), he notes that the MS "ك" has (وَإِنْ) instead of (وَإِن). Then he claims (n.3) that, after (حَكَمْتَ) in the Būlāq edition, there is a mistaken addition of (بَيْنَهُمْ); which I do not find in the reproduction. Finally, (n.4), he notes that, in the MS "ك", the (بَيْنَهُمْ) is missing from where it appears above. Though one might conjecture such inconsistencies in both the MS "ك" and the Būlāq edition's MSS are the result of a variant (non-ʿUthmānic) rendering of Q.5:42, I have found no examples of any variant whatsoever for Q.5:42 among the codices of Jeffery's *Materials*.

between them by means of what God revealed» [Q.5:49]. And it is not permitted that he judge between them regarding anything of the material world (<i>al-dunyā</i>) except by the <i>ḥukm</i> of the Muslims; because the <i>ḥukm</i> of God is one (<i>wāḥid^{un}</i>), it does not differ (<i>lā yakhtalifu</i>).	«وَأَن احْكُم بَيْنَهُم بِمَا أَنزَلَ اللَّهُ» [المائدة: 49] وَلَا يَجُوزُ أَنْ يَحْكُمَ بَيْنَهُمْ فِي شَيْءٍ مِنَ الدُّنْيَا إِلَّا بِحُكْمِ الْمُسْلِمِينَ؛ لِأَنَّ حُكْمَ اللَّهِ وَاحِدٌ لَا يَخْتَلِفُ.
1426 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And the <i>ḥudūd</i> are not to be administered in the mosques.	1426 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَلَا تُقَامُ الْحُدُودُ فِي الْمَسَاجِدِ.
1427 – And when the man has sexual intercourse with (<i>waṭiʿa</i>) the <i>jāriya</i> of his mother, and he says: I thought that she was lawful to me (<i>taḥillu lī</i>); then indeed Abū Ḥanīfā used to say: The <i>ḥadd</i> is averted from him. So when he confesses to that in a single <i>maqām</i> , four times, he is not inflicted with the <i>ḥadd</i> . And he [Abū Yūsuf] embraces it. But [incumbent] upon him is the <i>mahr</i> .	1427 – وَإِذَا وَطِئَ الرَّجُلُ جَارِيَةَ أُمِّهِ، فَقَالَ: ظَنَنْتُ أَنَّهَا تَحِلُّ لِي. فَإِنْ أَبَا حَنِيفَةَ كَانَ يَقُولُ: يُدْرَأُ عَنْهُ الْحَدُّ. فَإِذَا أَقَرَّ بِذَلِكَ فِي مَقَامٍ وَاحِدٍ أَرْبَعَ مَرَّاتٍ لَمْ يُحَدِّ. وَبِهِ يَأْخُذُ، وَعَلَيْهِ الْمَهْرُ.
1428 – And Ibn Abī Laylā said, while I [Abū Yūsuf] was auditing (<i>wa anā asmaʿu</i>): A man confessed before me that he had had sexual intercourse with the <i>jāriya</i> of his mother. So he [Ibn Abī Laylā] said to him: Did you have sex with her (<i>awaṭiʿtahā</i>)? He said: Yes. So he said to him: Did you have sex with her? He said: Yes. So he said to him: Did you have sex with her? He said: Yes. He said to him, the fourth [time]: You had sex with her? He said: Yes. Ibn Abī Laylā said: So I ordered it, and he was lashed with the <i>ḥadd</i> (<i>julida al-ḥadda</i>). And I ordered the <i>jilwāz</i> , and he took him by his hand and sent him out (<i>akhrajahu</i>) from the Bāb al-Jisr, banished. ⁶	1428 – وَقَالَ ابْنُ أَبِي لَيْلَى وَأَنَا أَسْمَعُ: أَقَرَّ عِنْدِي رَجُلٌ أَنَّهُ وَطِئَ جَارِيَةَ أُمِّهِ فَقَالَ لَهُ: أَوْطِئْتَهَا؟ قَالَ: نَعَمْ. فَقَالَ لَهُ: أَوْطِئْتَهَا؟ قَالَ: نَعَمْ. فَقَالَ لَهُ: أَوْطِئْتَهَا؟ قَالَ: نَعَمْ. قَالَ لَهُ الرَّابِعَةُ: وَطِئْتَهَا؟ قَالَ: نَعَمْ. قَالَ ابْنُ أَبِي لَيْلَى: فَأَمَرْتُ بِهِ فَجُلِدَ الْحَدَّ، وَأَمَرْتُ الْجُلُوزَ فَأَخَذَهُ بِيَدِهِ فَأَخْرَجَهُ مِنْ بَابِ الْجِسْرِ نَفِيًّا.
1429 – Al-Shāfiʿī, may God Most High have mercy upon him, said: And when the man has sexual intercourse with (<i>aṣāba</i>) the <i>jāriya</i> of his mother, and he says: I thought she was lawful to me; he is made to swear	1429 – قَالَ الشَّافِعِيُّ رَحِمَهُ اللَّهُ تَعَالَى: وَإِذَا أَصَابَ الرَّجُلُ جَارِيَةَ أُمِّهِ، وَقَالَ: ظَنَنْتُهَا تَحِلُّ

⁶ §1428 offers us a number of insights. First of all, the voice of Abū Yūsuf stresses that he had indeed audited the account he renders, at the feet of Ibn Abī Laylā (cf. §§1041, 1048, 1064). Moreover, we obtain a rare glimpse of Ibn Abī Laylā putting his rulings into action as a *qāḍī* in Kūfa through this account. Certainly that familiar fixture of the *qāḍī*'s court, the *jilwāz* (similar to a bailiff; see Hallaq, *Origins*, 60, 85ff., *passim*) is present, and assists Ibn Abī Laylā in carrying out part of the sentence. As for the Bāb al-Jisr, we may assume it faced north-east towards the bridge over the Euphrates; the convicted *zānī* would have set out along the Sikkat al-Barīd into banishment (see Ja ʿīṭ's map between 318-19 of his *Al-Kūfa*).

(uḥlifa) that he did not have sex with her (waṭi'ahā) except believing that she was ḥalāl (wa huwa yarāhā ḥalāl^m). Then the ḥadd is averted from him, and he is fined (ughrima) the mahr. And if he says: I had known that she was ḥarām for me before the sex act (qabla al-waṭ'i), then I had sex with her; he is inflicted with the ḥadd (ḥudda). And this [confession of ignorance] is not accepted except as regards whom it is possible he be ignorant like this (yajhalu mithla hādha). As for one of the Ahl al-Fiqh; No.	لِي، أُحْلِفَ مَا وَطَّئَهَا إِلَّا وَهُوَ يَرَاهَا حَلَالًا، ثُمَّ دُرِيَ عَنْهُ الْحَدُّ وَأُغْرِمَ الْمَهْرَ، فَإِنْ قَالَ: قَدْ عَلِمْتُ أَنَّهَا حَرَامٌ عَلَيَّ قَبْلَ الْوَطْءِ ثُمَّ وَطَّئْتُهَا. حَدٌّ، وَلَا يُقْبَلُ هَذَا إِلَّا مِنْ مَنْ أَمَكَنَ فِيهِ أَنَّهُ يَجْهَلُ مِثْلَ هَذَا، فَأَمَّا مِنْ أَهْلِ الْفِقْهِ فَلَا.
1430 – Abū Ḥanīfa said: It is not right for the ḥākim that he should say to him: Did you do it (afa'alta)? And we do not impose upon him (lā nūjibu 'alayhi) the ḥadd by an iqrār of four times in a single maqām.	1430 – قَالَ أَبُو حَنِيفَةَ: لَيْسَ يَنْبَغِي لِلْحَاكِمِ أَنْ يَقُولَ لَهُ: أَفَعَلْتَ؟ وَلَا نُوْجِبُ عَلَيْهِ الْحَدَّ بِإِقْرَارٍ أَرْبَعَ مَرَّاتٍ فِي مَقَامٍ وَاحِدٍ.
1431 – And if he says: I had sex with (waṭi'tu) the jāriya of my mother in four “spots” (mawāṭina); there is no ḥadd [imposed] upon him; because the waṭ' might be ḥalāl and ḥarām, and this one has not confessed to zinā. And God knows best.⁷	1431 – وَلَوْ قَالَ: وَطَّئْتُ جَارِيَةَ أُمِّي. فِي أَرْبَعَةِ مَوَاطِنَ، لَمْ يَكُنْ عَلَيْهِ حَدٌّ؛ لِأَنَّ الْوَطْءَ قَدْ يَكُونُ حَلَالًا وَحَرَامًا فَلَمْ يُقَرَّرْ هَذَا بِالزَّنَا، وَاللَّهُ أَعْلَمُ.

⁷ In neither the Shaybānī nor the Umm Version is this opinion and argument attributed to a particular jurist. All we can do is rule out al-Shāfi'ī and al-Rabī, and guess that — due to its position after an opinion of Abū Ḥanīfa — it belongs to him as well.

APPENDIX I: TABLE OF LINKED TREATISES AND CHAPTERS¹

Section(s) of the <i>K. Ikhtilāf al-ʿIrāqīyyīn</i>	Referenced <i>Kitāb</i> ; and suggested <i>kutub</i> , <i>abwāb</i> , and relevant sections of the <i>Kitāb al-Umm</i>	Focus <i>Masʿala</i>
§53; <i>Bāb al-Ikhtilāf fiʾl-ʿAyb</i>	Reference is to the <i>Kitāb al-Aqḍīya</i> ; §24360 (Ḥassūn, vol.8, pt.13, 7)	returning the oath upon the claimant when the accused refuses
§378-80; <i>Bāb fiʾl-Rahn</i>	Reference is to “a long book”; 1) §9453, in the <i>Bāb al-Rahn al-Fāsīd</i> (Ḥassūn, vol.4, pt.7, 73); which would once have appeared as a chapter in the <i>K. al-Rahn al-Kabīr</i> , under which heading it appears in <i>Būlāq</i> ; 2) §§9828, 9836, 9842, 9844, 9857, and 9899 in the <i>Bāb al-Rahn al-Ṣaghīr</i> (Ḥassūn, vol.4, pt.7, 157f.); which, in all likelihood, was once the independent <i>Kitāb al-Rahn al-Ṣaghīr</i> . Both <i>Kitābs</i> are mentioned by al-Nadīm (<i>Fihrist</i> , 353).	<i>rahn</i> is destroyed in the keeping of a third-party ‘ <i>adl</i> ”; “The <i>rahn</i> is for what it was [pledged] for (<i>al-rahnu bimā fīhi</i>),” and the debt has been nullified (<i>wa qad baṭala al-daynu</i>).
§384-88; <i>Bāb fiʾl-Rahn</i>	Reference is to the <i>Kitāb al-Rahn</i> ; §9187, in <i>Mā Yakūnu Qabḍan fī al-Rahn wa lā yakūnu, wa mā yajūzu an yakūna rahnan</i> (Ḥassūn, vol.4, pt.7, 16)	What is permitted to be <i>bayʿ</i> is permitted to be <i>rahn</i> ; and the taking-possession (<i>qabḍ</i>) regarding <i>rahn</i> is like the taking-possession in <i>bayʿ</i> — the two do not differ. And this is written in the <i>Kitāb al-Rahn</i> .
§571; <i>Bāb fiʾl-Dayn</i>	Reference is to the <i>Kitāb al-Aqḍīya</i> ; but the relevant discussion seems to begin in the <i>Bāb Ḥadd al-Dhimmiyyīn idhā Zanū</i> , of the <i>K. al-Ḥudūd</i> : §23329ff. (Ḥassūn, vol.7, pt.12, 529ff.)	the <i>shahāda</i> of neither male nor female is permitted until of the age of majority, sound mind, free, Muslim, ‘ <i>adl</i> . The <i>shahāda</i> of a <i>dhimmī</i> is not permitted.
§613; <i>Bāb fiʾl-Aymān</i> [I]	Reference is to the <i>Kitāb al-Aqḍīya</i> ; a near-verbatim parallel is in the <i>Kitāb al-Aqḍīya</i> of the <i>Umm</i> , at the start of a subsection entitled <i>al-Daʿwā waʾl-Bayyināt</i> :	<i>Muddaʿā ʿalayhi</i> swears when <i>muddaʿī</i> has no <i>bayyina</i> . If he abstains <i>muddaʿī</i> gets nothing

¹ This is a table of sections from the *Umm* Version of the *Kitāb Ikhtilāf al-ʿIrāqīyyīn* in which reference is made to other *kutub* (e.g., “*wa hādihā maktūb^{um} fī Kitābi al-Nikāḥi*”). These sections are matched to the *kutub* and *abwāb* of the *Umm* which are thought either to consist of the original *kitāb* referenced (at some point incorporated into the *Umm*), or which are seen to contain the *adilla*, *hujja*, etc. thought to be referenced in that *kitāb* (whether that particular *kitāb* was incorporated or not).

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	§24798 (Ḥassūn, vol.8, pt.13, 102); following sections are also relevant. Another parallel is in the same <i>Kitāb al-Aqḍiyya</i> of the <i>Umm</i>, under the subheading of <i>Bāb Radd al-Yamīn</i>: §26375 (Ḥassūn, vol.8, pt.13, 325-6). There are also parallels in the <i>Bāb mā yajibū fīhi al-yamīn</i> of the <i>K. al-Aymān wa’l-Nudhūr</i>: §27459 (Ḥassūn, vol.8, pt.13, 536), the <i>Bāb al-Qaḍā’</i> of our own <i>Ikhtilāf al-‘Irāqīyyīn</i> (§1167), and elsewhere.	unless he swears.
§681; <i>Bāb al-Mawārith</i>	Reference is to the <i>Kitāb al-‘Itq</i>; There is a <i>Kitāb al-‘Itq</i> among the <i>Umm</i> treatises: the fourth chapter of the <i>K. Ikhtilāf Mālik wa’l-Shāfi’ī</i> is so titled: §§128-46 (Ḥassūn, vol.9, pt.14, 362-5).	Two pregnant slaves, master acknowledges child of one of them, then dies – we don’t know which one he acknowledged; so who inherits, who is <i>umm walad</i> ?
§712; <i>Bāb al-Mawārith</i>	Reference is to the <i>Kitāb al-Walā’</i>; the heading of <i>Kitāb al-Walā’</i> does not appear elsewhere in the <i>Umm</i>. But a <i>Kitāb al-Walā’ wa’l-Ḥilf</i> is listed by al-Nadīm (<i>Fihrist</i> 354), and a <i>Bāb al-Walā’ wa’l-Ḥilf</i> appears in the <i>Umm</i> (Ḥassūn, vol.4, pt.8, 353-62). The relevant Prophetic narrative is twice repeated and explained (at §§12367 and 12375). The discussion in the second <i>Bāb al-Mawārith</i> (the fifth subheading of the <i>Kitāb al-Farā’id</i>; Ḥassūn, vol.4, pt.8, 204-16) is both relevant and instructive, with the <i>ḥadīth</i> occurring at §§11688 and 11692.	the man becomes a Muslim at the hands of a man, and he contracts <i>muwālā</i> -patronage with him (<i>wālāhu</i>), then he dies; there does not belong to him his <i>mīrath</i> , on account of the <i>qawl</i> of the Prophet, may God bless and save him: « <i>Walā’</i> belongs only to he who manumits (<i>a’taqa</i>).»
§729; <i>Bāb fī’l-Awsiyā’</i>	Reference is to the <i>Kitāb al-Zakāt</i>; We do find al-Shāfi’ī’s extended argument and proofs in the <i>Kitāb al-Zakāt</i> of the <i>Umm</i>, regarding this very <i>mas’ala</i>, under the subheading of <i>Bāb Zakāt Māl al-Yatīm al-Thānī</i> (Ḥassūn, vol.2, pt.4, 101-7). What we read in §729 is the briefest condensation of the complicated dialectical debate related in §§3966-87 of the <i>K. al-Zakāt</i>.	“Historical” dialectic: Opponent says there is no <i>zakāt</i> on the hard money of the orphan. He bolstered his argument with the fact that there is no <i>ṣalāt</i> enjoined upon him.
§754-5; <i>Bāb fī’l-Sharika wa’l-‘Itq wa Ghayrihi</i>	Reference is to the <i>Kitāb al-‘Itq</i>; there seems little doubt that the book so referenced is that <i>Kitāb al-‘Itq</i> which comprises the fourth “chapter” of the <i>Kitāb Ikhtilāf Mālik wa’l-Shāfi’ī</i> (Ḥassūn, vol.9, pt.14, 362-5).	the slave jointly owned; one manumits his portion – if solvent the slave is completely free, and the <i>walā’</i> belongs to the manumitter, and no <i>khiyār</i> to the other.

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		If insolvent the first half is free, the second half still belongs to the other, and no <i>si'āya</i> enjoined upon the slave. “Historical” dialectic re: <i>qiyās</i>
§867; <i>Bāb fi'l-Ajīr wa'l-Ijāra</i>	Reference is to the <i>Kitāb al-Ijārāt</i> ; al-Nadīm lists both a <i>Kitāb al-Ijārāt wa'l-Ghārimīn wa'l-Rajul Yukrī al-Dābba</i> , and a <i>Kitāb al-Ijārāt al-Kabīr</i> (<i>Fihrist</i> , 253-4). In the <i>Umm</i> , there is no separate chapter by that exact title. But there is a lengthy discussion under the heading of <i>Ijārāt</i> (Ḥassūn, vol.4, pt.8, 57-87); and several related sections, including a <i>Kirā' al-Dawwāb</i> (56), a <i>Kirā' al-Ibl wa'l-Dawwāb</i> (88-93), and an <i>Ikhtilāf al-Ajīr wa'l-Musta'jir</i> (100). Discussions of this particular <i>mas'ala</i> (the renter exceeds the contract limits) are in §11041 of the <i>Kirā' al-Dawwāb</i> ; and §§11175ff. of the <i>Ijārāt</i> (79ff.)	What to do when a man rents a <i>dābba</i> to a location, then goes beyond it to another; and when the <i>dābba</i> perishes.
§920; <i>Ṣalāt al-Khawf</i> (notes are for §918-20)	Reference is made to a <i>Kitāb al-Ṣalāt</i> ; There is a lengthy <i>Kitāb al-Ṣalāt</i> in the <i>Umm</i> ; spanning parts of two volumes (Ḥassūn, vol.1, pt.2, 5-332; cont. in vol.2, pt.3, 7-128), and leading into the <i>Kitāb Ṣalāt al-Khawf</i> (vol.2, pt.3, 131-199). Al-Nadīm (<i>Fihrist</i> , 353) lists both a <i>Kitāb al-Ṣalāt</i> and a <i>Kitāb Ṣalāt al-Khawf</i> . In §2246-7, under the subheading <i>Kayfa Ṣalāt al-Khawf</i> (vol.2. pt.3, 132) we find al-Shāfi'ī's Qur'ānic indicant (Q.4:102), and his Prophetic <i>ḥadīth</i> . There follows a lengthy discussion of related <i>masā'il</i> spanning some sixty pages. We find the same <i>ḥadīth</i> in the <i>Kitāb Ikhtilāf Mālik wa'l-Shāfi'ī</i> , at the end of the (untitled) opening of the book, after other <i>wuḍū'</i> and <i>ṣalāt</i> related <i>masā'il</i> , before the first subheading of <i>Bāb mā jā'a fi'l-Ṣadaqāt</i> (§§72-7, Ḥassūn, vol.9, pt.14, 350-1). See II. §920 for translation.	How precisely the <i>ṣalāt al-khawf</i> is to be performed, and al-Shāfi'ī's defence of the Prophetic <i>ḥadīth</i> he uses as basis
§1077; <i>Bāb al-Diyāt</i>	Reference is made to a <i>Kitāb al-Diyāt</i> ; No <i>Kitāb al-Diyāt</i> appears in al-Nadīm's list; no such exact title within the <i>Umm</i> , either. But there is a <i>Bāb al-Diyāt</i> in the <i>Kitāb Ikhtilāf 'Alī wa 'Abd Allāh b. Mas'ūd</i> (Ḥassūn, vol.9, pt.14, 287ff.), and another in the <i>Kitāb al-Radd 'alā Muḥammad b. al-Ḥassan</i> (Ḥassūn, vol.10, pt.15, 141-50). The former is of little	minors and absent major <i>wulāt al-dam</i> , and the present majors choose <i>diya</i> — the <i>awliyā'</i> of the absent and minor take the <i>diya</i> (which is now <i>māl</i> of the <i>mīrāth</i>)

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	relevance, the latter of none whatsoever. The most relevant discussion is found in the <i>Kitāb Jirāh al-ʿAmd</i> under the subheading of <i>Wulāt al-Qiṣāṣ</i> (§§20980ff., especially at §§20985-9; Ḥassūn, vol.7, pt.12, 43ff.)	
§1141; <i>Bāb al-Sariqa</i>	Reference made to a <i>Kitāb al-Sariqa</i> ; al-Nadīm (<i>Fihrist</i> , 354) lists a <i>Kitāb al-Qaṭʿ waʾl-Sariqa</i> , but nothing with the exact title of <i>Kitāb al-Sariqa</i> . Neither does the title appear in the <i>Umm</i> . The bulk of related argument occurs in the <i>Kitāb al-Ḥudūd wa Ṣifatu al-Naḥḥ</i> ; though a part of the argument (§§22468ff.) occurs under the subheading <i>Ḥadd al-Sariqa waʾl-Qāṭiʿ fihā wa Ḥadd Qāṭiʿ al-Ṭarīq wa Ḥadd al-Zānī</i> (Ḥassūn, vol.7, pt.12, 551ff.)	what is the <i>niṣāb</i> for cutting; al-Shāfiʿī attacks opponent's <i>ḥadīth-ḥujja</i> (10 dirhams), and supports his own (1/4 dīnār)
§1232; <i>Bāb al-Nikāḥ</i>	Reference made to a <i>Kitāb al-Nikāḥ</i> ; we find, as promised, a more detailed discussion in the <i>Kitāb al-Nikāḥ</i> of the <i>Umm</i> . The <i>masʿala</i> receives its own subheading of <i>Mā Jāʾa fī Nikāḥ al-Ābāʾ</i> (§§15394-15414, Ḥassūn, vol.5, pt.10, 57-61), where al-Shāfiʿī's indicants and arguments are laid out in full.	the <i>farq</i> between the fathers and other <i>awliyāʾ</i> ; which permits of special rights to the fathers not enjoyed by other <i>awliyāʾ</i>
§1241; <i>Bāb al-Nikāḥ</i>	Reference made to a <i>Kitāb al-Nikāḥ</i> ; We find the relevant material in a dialectical engagement (Ḥassūn, vol.6, pt.11, 14-30) — the entire chapter entitled <i>Al-Khilāf fīmā Yuʾtā biʾl-Zinā</i> — located among a group of mixed <i>masʿal</i> having to do with <i>nikāḥ</i> , <i>ṭalāq</i> , and other marriage-related categories, tailing upon the previous <i>kutub</i> of <i>al-Nikāḥ</i> , <i>al-Ṣadāq</i> , <i>al-Shighār</i> , and <i>al-Nafaqāt</i> . Possibly, once, a larger <i>Kitāb al-Nikāḥ</i> . For translation see Appendix II. §1241.	A man commits <i>zinā</i> with a woman; she is not forbidden to him; nor her mother, nor her daughter. God made <i>ḥarām</i> through the <i>ḥalāl</i> ; <i>ḥarām</i> is the opposite of <i>ḥalāl</i> .
§1253; <i>Bāb al-Nikāḥ</i>	Reference made to a <i>Kitāb al-Nikāḥ</i> ; §1253 is basic and broad of scope; relevant material is scattered throughout the current <i>Kitāb al-Nikāḥ</i> as it occurs in the <i>Umm</i> , and subsequent chapters.	<i>nikāḥ</i> not permitted without a <i>walī</i> , and two <i>ʿadl</i> witnesses, and <i>riḍā</i> of the bride and the groom; except the <i>ama</i> (master marries her off); and the <i>bikr</i> (father marries her off) — whoever has not attained age of majority, the fathers marry them off.
§1257; <i>Bāb al-</i>	Reference made to a <i>Kitāb al-Nikāḥ</i> ;	father's special right

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<i>Nikāḥ</i>	the most relevant arguments fall within the purview of a greater <i>Kitāb al-Nikāḥ</i> — as suggested in the note attached to §1241; in particular, §§15398-15403 of the chapter <i>Mā Jā’a fī Nikāḥ al-Ābā’</i> (Ḥassūn, vol.5, pt.10, 57-9), with a <i>ḥadīth</i> about the Prophet’s rejection of a <i>thayyib</i> against her approval (§15399), along with a number of arguments. Also, the arguments in §§18235ff. of the <i>Bāb Nikāḥ al-Wulāt wa’l-Nikāḥ bi’l-Shahāda</i> (Ḥassūn, vol.6, pt.11, 69ff.) — al-Shāfi’ī claims directly (at §18236) the same Prophetic <i>ḥadīth</i> of §1257 (<i>ayyim</i> and <i>bikr</i>) is “a <i>dalāla</i> of the <i>farq</i> between the <i>bikr</i> and the <i>thayyib</i>.” In pursuant dialectic, he provides his full hermeneutic for the questioner.	to compel the major <i>bikr</i> to marriage; the <i>farq</i> between <i>bikr</i> and <i>thayyib</i>
§1268; <i>Bāb al-Nikāḥ</i>	Reference made to a <i>Kitāb al-Nikāḥ</i>; The referenced arguments and <i>adilla</i> are found in the greater <i>Kitāb al-Nikāḥ</i> of the <i>Umm</i>, as part of the mixed <i>masā’il</i> after the <i>Kitāb al-Nafaqāt</i>. The current <i>mas’ala</i> receives two subheadings of its own, and the material relevant to it (the <i>ḥadīth</i> regarding Barīra and associated arguments) may be found under <i>Infisākh al-Nikāḥ bayna al-Amati wa Zawjihā al-ʿAbdi idhā ʿAtaqat</i> (especially at §17195; Ḥassūn, vol.5, pt.10, 418f.); and under the subsequent subheading <i>Al-Khilāf fī Khiyār al-Amati</i>, which consists entirely of an extended dialectical debate (§§17198-17264; Ḥassūn, vol.5, pt.10, 420-26.)	Choice of the manumitted female slave to stay with her husband or not
§1298; <i>Bāb al-Ṭalāq</i>	Reference is to a <i>Kitāb al-Ṭalāq</i>; we do not find the exact title of <i>Kitāb al-Ṭalāq</i> attributed to al-Shāfi’ī by al-Nadīm — he lists a <i>Kitāb Ibāḥat al-Ṭalāq</i> (<i>Fihrist</i>, 354); and there is no exact heading of <i>Kitāb al-Ṭalāq</i> within the volumes of the <i>Umm</i>; but a grouped collection of treatises/chapters having to do with <i>ṭalāq</i>, within the mixed chapters following the <i>Nikāḥ</i>-related <i>kutub</i>. Tailing upon the <i>Kitāb al-Nafaqāt</i>, we find the discussion most relevant to al-Shāfi’ī’s pronouncement in §1298, under the subheading of <i>Al-Khilāf fī al-Ṭalāq al-Thalāth</i> (§§17546ff., Ḥassūn, vol.5, pt.10, 469ff.)	A man repudiates his wife with three <i>ṭalāqs</i> , wife is not pregnant; she gets <i>suknā</i> , but not <i>nafaqa</i>
§1302; <i>Bāb al-</i>	Reference is to a <i>Kitāb al-Īlā’</i> ;	a man swears he will

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Ṭalāq	Al-Nadīm (<i>Fihrist</i> , 354) lists a <i>Kitāb al-Ḍalā’</i> . As for the <i>Umm</i> , no such exact title, but we find a cluster of related <i>masā’il</i> tailing upon the <i>kutub</i> of marriage and divorce. The <i>masā’il</i> of <i>Ḍalā’</i> begin with a subheading of <i>Al-Ḍalā’ wa Ikhtilāf al-Zawjayn fi’l-Iṣāba</i> — in the middle, under the subheading <i>Al-Tawqīf fi’l-Ḍalā’</i> , we find the arguments for al-Shāfi’ī’s stance in §1302 (especially at §20212; Ḥassūn, vol.6, pt.11, 444).	not have sexual intercourse with his wife for four months or less; the <i>ḥukm</i> of <i>Ḍalā’</i> is not effected upon him.
§1312; Bāb al-Ṭalāq	Reference is to a <i>Kitāb al-Murtadd</i> ; al-Nadīm (<i>Fihrist</i> , 353) lists both a <i>Kitāb al-Murtadd al-Ṣaghīr</i> and a <i>Kitāb al-Murtadd al-Kabīr</i> ; and we find a <i>Bāb al-Murtadd al-Kabīr</i> in the <i>Umm</i> (Ḥassūn, vol.7, pt.12, 587ff.) wherein the current <i>mas’ala</i> is found, at the opening of a subheading entitled <i>Māl al-Murtadd wa Zawjat al-Murtadd</i> (§§23701ff., Ḥassūn, vol.7, pt.12, 601).	the wife of the <i>murtadd</i> ; consequent separation is not a <i>ṭalāq</i>
§1379; Bāb al-Ṭalāq	Reference is to a <i>Kitāb al-Ṭalāq</i> ; the only related material within the <i>Umm</i> occurs within the <i>Kitāb al-‘Idā</i> (one of the books tailing upon the mixed <i>masā’il</i> of <i>nikāḥ</i> and <i>ṭalāq</i>), under the subheading of <i>‘Iddat al-Madkhūl bihā allatī Tahayyaḍa</i> (especially at §§19181-3, Ḥassūn, vol.6, pt.11, 234-5).	“Historical” dialectic: Opponent says: Divorced wife inherits, so long as the <i>‘idda</i> was not completed; narrated on ‘Umar, by an <i>isnād</i> which al-Shāfi’ī does not trust
§1417; Bāb al-Ḥudūd	Reference is to a <i>Kitāb al-Ḥudūd</i> ; al-Nadīm lists the oddly-titled <i>Kitāb al-Ḥudūd wa Karī al-Dawwāb</i> (<i>Fihrist</i> , 353); we find a number of <i>kutub</i> and <i>abwāb</i> which incorporate <i>al-ḥudūd</i> into their titles within the general corpus of the <i>Umm</i> . Most prominent is the <i>Kitāb al-Ḥudūd wa Ṣifat al-Nafī</i> , whose title incorporates the very <i>mas’ala</i> at hand; under the subheading of <i>Bāb al-Nafī wa’l-I’tirāf fi’l-Zinā</i> , we find not only reference to the Prophet, Abū Bakr, ‘Umar, ‘Uthmān, and ‘Alī banishing (as above in §1417), but this occurs in the context of an “instructional dialectic” (introduced by “ <i>fa-in qāla qā’il^{um}</i> ”; §§23121-23157, Ḥassūn, vol.7, pt.12, 499-503). For translation see appendix II. §1417.	Prophet banished the <i>zānī</i> ; and Abū Bakr, ‘Umar, ‘Uthmān, and ‘Alī. Then reference to a “historical” dialectic, “written in the <i>Kitāb al-Ḥudūd</i> with all its <i>ḥujaj</i> .”

APPENDIX II: SELECT TRANSLATIONS OF LINKED ARGUMENTS²

II.§482

From the *Bāb fī Ijtihād al-Ḥākim* (Ḥassūn, vol.8, pt.13, 528-30)

27439 – He [al-Shāfi‘ī] said: And <i>qiyās</i> is of two kinds (<i>al-qiyāsu qiyāsāni</i>): One of the two is in the like <i>ma’nā</i> of the <i>aṣl</i> (<i>fī mithli ma’nā al-aṣl</i>) — and such is the one with which disagreement is lawful to no one (<i>lā yaḥillu li-aḥadⁱⁿ khilāfuhu</i>). Then [there is] a <i>qiyās</i> that the thing [property <i>A_x</i>] is likened to the thing [property <i>A_y</i>] from the <i>aṣl</i> (<i>yushabbaha al-shay’u bi’l-shay’i min al-aṣli</i>), and to the thing [property <i>A_z</i>] from another <i>aṣl</i> besides (<i>wa’l-shay’i min al-aṣli ghayrihi</i>); and this one [property <i>A_x</i>] is likened to this <i>aṣl</i>, and another [besides property <i>A_x</i>] is likened to another <i>aṣl</i>.	27439 – قَالَ: وَالْقِيَاسُ قِيَاسَانِ؛ أَحَدُهُمَا يَكُونُ فِي مِثْلِ مَعْنَى الْأَصْلِ؛ فَذَلِكَ الَّذِي لَا يَحِلُّ لِأَحَدٍ خِلَافُهُ. ثُمَّ قِيَاسٌ أَنْ يُشَبَّهَ الشَّيْءُ بِالشَّيْءِ مِنَ الْأَصْلِ، وَالشَّيْءِ مِنَ الْأَصْلِ غَيْرِهِ، فَيُشَبَّهَ هَذَا بِهَذَا الْأَصْلِ وَيُشَبَّهَ غَيْرُهُ بِالْأَصْلِ غَيْرِهِ.
27440 – Al-Shāfi‘ī said: And the right way of going about it (<i>mawḍi‘u al-ṣawābi fīhi</i>), according to us — and God Most High knows best — is that he investigate (<i>yanẓura</i>), and whichever of the two is more principal in rank (<i>awlā</i>) due to its likeness (<i>bi-shabahihi</i>), he links it to it (<i>ṣayyarahu ilayhi</i>); if one of the two is alike as regards two properties (<i>ashbaha... fī khaṣlatayni</i>), and the other [is alike] as regards a [single] property (<i>fī khaṣlatⁱⁿ</i>), he connects it (<i>alḥaqahu</i>) to that which is more alike as regards the two properties (<i>ashbahu fī’l-khaṣlatayni</i>).	27440 – قَالَ الشَّافِعِيُّ: وَمَوْضِعُ الصَّوَابِ فِيهِ عِنْدَنَا – وَاللَّهُ تَعَالَى أَعْلَمُ – أَنْ يَنْظُرَ فَأَيُّهُمَا كَانَ أَوْلَى بِشَبِّهِ صَيْرُهُ إِلَيْهِ؛ إِنْ أَشَبَّهَ أَحَدُهُمَا فِي خَصَلَتَيْنِ وَالْآخَرَ فِي خَصَلَةٍ، أَلْحَقَهُ بِالَّذِي هُوَ أَشَبُّهُ فِي خَصَلَتَيْنِ.
27441 – And whosoever of the <i>Ḥukkām</i> should perform <i>ijtihād</i>, then see/opine that his <i>ijtihād</i> is erroneous (<i>khaṭa^{nm}</i>), or has contradicted (<i>khālafa</i>) the Kitāb, or the Sunna, or <i>Ijmā’</i>, or something in the like <i>ma’nā</i> of these; he rejects it (<i>raddahu</i>) — nor is other than that allowed him (<i>lā yasa’uhu ghayru dhālika</i>).	27441 – وَمَنْ اجْتَهَدَ مِنَ الْحُكَّامِ ثُمَّ رَأَى أَنَّ اجْتِهَادَهُ خَطَأٌ أَوْ قَدْ خَالَفَ كِتَابًا أَوْ سُنَّةً أَوْ إِجْمَاعًا أَوْ شَيْئًا فِي مِثْلِ مَعْنَى هَذَا رَدَّهُ، وَلَا يَسَعُهُ غَيْرُ ذَلِكَ.
27442 – But if it [his <i>ijtihād</i>] is of the sort which allows for the possibility of what he opines (<i>mā dhahaba ilayhi</i>), and allows for	27442 – وَإِنْ كَانَ مِمَّا يَحْتَمِلُ مَا ذَهَبَ

² Translated segments are identified by the section number of the *Kitāb Ikhtilāf al-‘Irāqīyyīn* to which they are linked, and will appear in the order of those linked section numbers.

the possibility of something else; he does not reject it — from this we see that whosoever performs <i>ijtihād</i> towards the invisible, then comes to certain knowledge of the error (<i>ijtahada 'alā mughayyabⁱⁿ fa-stayqana al-khaṭa'a</i>), the retraction [of his <i>ijtihād</i>] is [enjoined] upon him (<i>kāna 'alayhi al-rujū'u</i>).	إِلَيْهِ، وَيَحْتَمِلُ غَيْرَهُ لَمْ يَرُدَّهُ مِنْ ذَلِكَ أَنْ عَلَى مَنْ اجْتَهَدَ عَلَى مُعَيَّبٍ فَاسْتَيْقَنَ الْخَطَأَ، كَانَ عَلَيْهِ الرَّجُوعُ.
27443 – And if he prays on a mountain among the mountains of Mecca during the night, and he seeks to obtain the [direction of the] House [of God] (<i>ta'akhhā al-Bayta</i>), then he perceives, and sees the Bayt in another direction than that to which he prayed; he repeats [his prayer] (<i>a'āda</i>). But if he is in a location in which he can not see it; he does not repeat. [This is] due to the fact that he reverted in the first instance from invisibility to certainty (<i>min mughayyabⁱⁿ ilā yaqīnⁱⁿ</i>), and that he, in this [other] instance, reverts from <i>mughayyab</i> to <i>mughayyab</i>. And this is written down (<i>mawdū^{un}</i>) in the <i>Kitāb Jimā' al-'ilm min al-Kitāb wa'l-Sunna</i>, and the <i>Kitāb al-Qaḍā'</i>.	27443 – وَلَوْ صَلَّى عَلَى جَبَلٍ مِنْ جِبَالِ مَكَّةَ لَيْلًا فَتَأَخَّى الْبَيْتَ ثُمَّ أَبْصَرَ فَرَأَى الْبَيْتَ فِي غَيْرِ الْجِهَةِ الَّتِي صَلَّى إِلَيْهَا أَعَادَ، وَإِنْ كَانَ بِمَوْضِعٍ لَا يَرَاهُ لَمْ يُعِدْ؛ مِنْ قَبْلِ أَنَّهُ رَجَعَ فِي الْمَرَّةِ الْأُولَى مِنْ مُعَيَّبٍ إِلَى يَقِينٍ، وَهُوَ فِي هَذِهِ الْمَرَّةِ يَرْجِعُ مِنْ مُعَيَّبٍ إِلَى مُعَيَّبٍ. وَهَذَا مَوْضُوعٌ فِي كِتَابِ «جِمَاعِ الْعِلْمِ مِنَ الْكِتَابِ وَالسُّنَّةِ» وَكِتَابِ الْقَضَاءِ.

From the Risāla (Shākir, 479)

1334 – <i>Qiyās</i> is of two types (<i>wajhayn</i>): One of the two is that the thing be in the <i>ma'nā</i> of the <i>aṣl</i> — the <i>qiyās</i> does not disagree as regards it [i.e., there can be no <i>ikhtilāf</i>]. And [the other] is that there belong to the thing, in the <i>uṣūl</i>, likenesses (<i>ashbāh^{un}</i>), and that [thing] is connected (<i>yulḥaqu</i>) on the basis of the most prior in rank of them to it (<i>awlāhā bihi</i>), and the greatest of them in likeness as regards it (<i>aktharihā shabah^{an} fihi</i>). And the <i>Qāyisūn</i> might disagree (<i>qad yakhtalifu</i>) regarding this.	1334 – وَالْقِيَاسُ مِنْ وَجْهَيْنِ: أَحَدُهُمَا أَنْ يَكُونَ الشَّيْءُ فِي مَعْنَى الْأَصْلِ، فَلَا يَخْتَلِفُ الْقِيَاسُ فِيهِ. وَأَنْ يَكُونَ الشَّيْءُ لَهُ فِي الْأَصُولِ أَشْبَاهٌ، فَذَلِكَ يُلْحَقُ بِأَوْلَاهَا بِهِ وَأَكْثَرِهَا شَبَهًا فِيهِ. وَقَدْ يَخْتَلِفُ الْقَائِسُونَ فِي هَذَا.

II. §651

From the Kitāb Ibtāl al-Istihsān (Ḥassūn, vol.10, pt.15, 125-6)

91 – Al-Shāfi‘ī said: And whosoever deems it permissible that he give a ruling or issue a <i>fatwā</i> (<i>yaḥkuma aw yuftiya</i>), without a compelling report (<i>khabarⁱⁿ lāzimⁱⁿ</i>) or <i>qiyās</i> for it, is confuted (<i>maḥjū^{an}</i>) by the fact that the <i>ma’nā</i> of his <i>qawl</i> – I will do what I like (<i>aḥalu mā hawaytu</i>), even if I am not commanded to it (<i>lam ūmar bihi</i>) – is contradictory (<i>mukhālif^{um}</i>) to the <i>ma’nā</i> of the Kitāb and the Sunna. So he is confuted by his own tongue, and [by] the <i>ma’nā</i> of such a thing as regarding which I do not know a contradictory.	91 – قَالَ الشَّافِعِيُّ: وَمَنْ اسْتَجَازَ أَنْ يَحْكُمَ أَوْ يُفْتِيَ بِلَا خَبَرٍ لَازِمٍ وَلَا قِيَاسٍ عَلَيْهِ كَانَ مُحْجُوجًا بِأَنْ مَعْنَى قَوْلِهِ: أَفْعَلُ مَا هَوَيْتُ وَإِنْ لَمْ أَوْمَرْ بِهِ. مُخَالَفٌ مَعْنَى الْكِتَابِ وَالسُّنَّةِ، فَكَانَ مُحْجُوجًا عَلَى لِسَانِهِ. وَمَعْنَى مَا لَمْ أَعْلَمْ فِيهِ مُخَالَفًا.
92 – And if it is said: What is it [whose <i>ma’nā</i> knows nothing contradictory]?	92 – فَإِنْ قِيلَ مَا هُوَ؟
93 – It is said: I do not know of any one of the Ahl al-‘Ilm who gives license to (<i>rakḥkhaṣa li-</i>) any one of the Ahl al-‘Uqūl wa’l-Ādāb that he issue a <i>fatwā</i> or give a ruling by the <i>ra’y</i> of his own self – when he is not knowledgeable (<i>‘ālim^{an}</i>) of that with which the matters (<i>umūr</i>) of <i>qiyās</i> from the Kitāb, and the Sunna, and the <i>ijmā’</i>, and the <i>‘aql</i> have to deal with – for the fine particularization of what is obscure (<i>li-tafṣīli al-mushtabahi</i>).³	93 – قِيلَ: لَا أَعْلَمُ أَحَدًا مِنْ أَهْلِ الْعِلْمِ رَخَّصَ لِأَحَدٍ مِنْ أَهْلِ الْعُقُولِ وَالْآدَابِ فِي أَنْ يُفْتِيَ وَلَا يَحْكُمَ بِرَأْيِ نَفْسِهِ إِذَا لَمْ يَكُنْ عَالِمًا بِالَّذِي تَدُورُ عَلَيْهِ أُمُورُ الْقِيَاسِ مِنَ الْكِتَابِ وَالسُّنَّةِ وَالْإِجْمَاعِ وَالْعَقْلِ؛ لِتَفْصِيلِ الْمُشْتَبِهَةِ.
94 – And when they claim this, it is said to them: And why is it not permitted – to the <i>ahl</i> of such <i>‘uqūl</i> as surpass (<i>tafūqu</i>) many of the <i>‘uqūl</i> of the <i>ahl</i> of <i>‘ilm</i> of Qur’ān, and Sunna, and <i>futyā</i> – that they profess regarding what has been revealed (<i>qad nazala</i>), as pertains to what they know, together, that there is, regarding it, neither Kitāb, nor Sunna, nor <i>ijmā’</i>, while they are more endowed with <i>‘uqūl</i> (<i>awfaru ‘uqūl^{an}</i>) and more proficient of elucidation (<i>aḥsanu ibānat^{an}</i>) due to what they say, than your layfolk (<i>‘āmmatikum</i>)?	94 – فَإِذَا زَعَمُوا هَذَا قِيلَ لَهُمْ: وَلِمَ لَمْ يَحْزَرْ لِأَهْلِ الْعُقُولِ الَّتِي تَفُوقُ كَثِيرًا مِنْ عُقُولِ أَهْلِ الْعِلْمِ بِالْقُرْآنِ وَالسُّنَّةِ وَالْفُتْيَا أَنْ يَقُولُوا فِيمَا قَدْ نَزَلَ مِمَّا يَعْلَمُونَهُ مَعًا أَنْ لَيْسَ فِيهِ كِتَابٌ وَلَا سُنَّةٌ وَلَا إِجْمَاعٌ وَهُمْ أَوْفَرُ عُقُولًا وَأَحْسَنُ إِبَانَةً لِمَا قَالُوا مِنْ عَامَّتِكُمْ؟
95 – And if you (pl.) say: Because there belongs to them no <i>‘ilm</i> of the <i>uṣūl</i>.⁴	95 – فَإِنْ قُلْتُمْ لَا تَنْهَمُ لَا عِلْمَ لَهُمْ بِالْأُصُولِ.

³ The Ahl al-‘Uqūl wa’l-Ādāb appear only this once in the *Umm*; there is no other mention of an Ahl al-Ādāb; and the Ahl al-‘Uqūl appear only twice more – once more in §94, and once in §152 of the *K. Jimā’ al-‘ilm* (Ḥassūn, vol.10, pt.15, 31).

⁴ Here we see a technical usage of the term *uṣūl*.

96 – It is said to you: And what is your (pl.) *ḥujja* as regards your 'ilm of the *uṣūl*, when you say: with neither *aṣl*, nor *qiyās* from an *aṣl*? Do you fear for (*hal khiftum 'alā*) the *ahl* of such '*uqūl* as are ignorant of the *uṣūl* (*ahl al-'uqūli al-jahalati bi'l-uṣūl*) more than that they [the *ahl*] don't know (*lā ya'rifūna*) the *uṣūl*, and so are not proficient in applying *qiyās* (*lā yuḥsinūna an yaqīsū*) on the basis of what they don't know? And does your 'ilm of the *uṣūl* secure for yourselves the *qiyās* from them [from the *uṣūl*], or authorize you to abandon them? And when their abandonment is permitted to you; permitted to them [the *ahl*] is the *qawl* along with you, because most of what contradicts against them (*yukhālifu 'alayhim*) is the abandonment of the *qiyās* from them [from the *uṣūl*] or error (*al-khaṭa'u*).

Moreover, I don't know them except as more praiseworthy for the correct answer (*illā aḥmada 'alā al-ṣawābi...*) – if they profess without a paradigm (*qālū 'alā ḡhayri mithāl^{im}*) – than you (...*minkum*), if one is to be praised for professing without a *mithāl*; because they did not know a *mithāl* and so abandon it. And [I don't know them except] as more excusable of error than you (*a'dhara bi'l-khaṭa'i minkum*), so long as they err regarding what they don't know.

Nor do I know you (pl.) except as greater in sin than they are (*illā a'ḡama wizr^{am} minhum*), since you abandoned what you know of the *qiyās* from the *uṣūl* you are not ignorant of.

96 – قِيلَ لَكُمْ: فَمَا حُجَّتُكُمْ فِي عِلْمِكُمْ بِالْأُصُولِ إِذَا قُلْتُمْ بِلَا أَصْلٍ وَلَا قِيَاسٍ عَلَى أَصْلٍ؟ هَلْ خِفْتُمْ عَلَى أَهْلِ الْعُقُولِ الْجَهْلَةِ بِالْأُصُولِ أَكْثَرَ مِنْ أَنَّهُمْ لَا يَعْرِفُونَ الْأُصُولَ فَلَا يُحْسِنُونَ أَنْ يَقِيسُوا بِمَا لَا يَعْرِفُونَ، وَهَلْ أَكْسَبَكُمْ عِلْمُكُمْ بِالْأُصُولِ الْقِيَاسَ عَلَيْهَا أَوْ أَحَازَ لَكُمْ تَرْكُهَا؟ فَإِذَا جَازَ لَكُمْ تَرْكُهَا جَازَ لَهُمُ الْقَوْلُ مَعَكُمْ؛ لِأَنَّ أَكْثَرَ مَا يُخَالِفُ عَلَيْهِمْ تَرْكُ الْقِيَاسِ عَلَيْهَا أَوْ الْخَطَأَ،

ثُمَّ لَا أَعْلَمُهُمْ إِلَّا أَحْمَدَ عَلَى الصَّوَابِ إِنْ قَالُوا عَلَى غَيْرِ مِثَالٍ مِنْكُمْ لَوْ كَانَ أَحَدٌ يَحْمَدُ عَلَى أَنْ يَقُولَ عَلَى غَيْرِ مِثَالٍ؛ لِأَنَّهُمْ لَمْ يَعْرِفُوا مِثَالًا فَتَرَكَوْهُ، وَأَعَذَرَ بِالْخَطَأِ مِنْكُمْ، وَهُمْ أَخْطَئُوا فِيمَا لَا يَعْلَمُونَ

وَلَا أَعْلَمُكُمْ إِلَّا أَعْظَمَ وَزَرًا مِنْهُمْ إِذْ تَرَكْتُمْ مَا تَعْرِفُونَ مِنَ الْقِيَاسِ عَلَى الْأُصُولِ الَّتِي لَا تَجْهَلُونَ.

The Kitāb al-'Itq of the Kitāb Ikhtilāf Mālik wa'l-Shāfi'ī (Hassūn, vol.9, pt.14, 362-5)

128 – Al-Shāfi'ī, may God Most High have mercy upon him, said: Mālik reported to us, on the authority of Nāfi', on Ibn 'Umar, that the Messenger of God, may God bless and save him, said: «Whosoever manumits his share (<i>shirk^{an} lahu</i>) in a slave, and there belongs to him <i>māl</i> amounting to the price (<i>thaman</i>) of the slave; the fair value (<i>qīmatu al-'adli</i>) is assessed for him, and his partners are given their shares (<i>hiṣṣahum</i>), and the slave is manumitted for him. And if not [i.e., he is insolvent], there is manumitted from him [only] what is manumitted.»	128 – قَالَ الشَّافِعِيُّ – رَحِمَهُ اللَّهُ تَعَالَى: أَخْبَرَنَا مَالِكٌ، عَنْ نَافِعٍ، عَنْ ابْنِ عُمَرَ أَنَّ رَسُولَ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – قَالَ: «مَنْ أَعْتَقَ شِرْكَاءَ لَهُ فِي عَبْدٍ فَكَانَ لَهُ مَالٌ يَبْلُغُ ثَمَنَ الْعَبْدِ قَوْمَ عَلَيْهِ قِيَمَةُ الْعَدْلِ فَأُعْطِيَ شُرَكَاءُؤُهُ حَصَصَهُمْ وَعَتَقَ عَلَيْهِ الْعَبْدُ وَإِلَّا فَقَدْ عَتَقَ مِنْهُ مَا عَتَقَ».
129 – And we, ourselves, and you all, have embraced this <i>ḥadīth</i>; and by means of it we have nullified (<i>abṭalnā</i>) the working-for-ransom (<i>al-istis'ā'</i>); and we have shared/associated slavery and freedom (<i>sharaknā al-riqqa wa'l-ḥurriyyata</i>) in the slave, when the manumitter of the slave is insolvent (<i>muflis^{an}</i>).	129 – فَأَخَذْنَا نَحْنُ وَأَنْتُمْ بِهَذَا الْحَدِيثِ، وَأَبْطَلْنَا بِهِ الْإِسْتِسْعَاءَ، وَشَرَكْنَا الرِّقَّ وَالْحُرِّيَّةَ فِي الْعَبْدِ إِذَا كَانَ الْمُعْتِقُ لِلْعَبْدِ مُفْلِسًا.
130 – But one of the people has contradicted us (<i>khālafanā</i>) regarding it [the <i>ḥadīth</i>], and charged it with weakness (<i>wahhanahu</i>) by saying: Sālim narrated it, on the authority of Ibn 'Umar, and he did not say in it: «And if not, there is manumitted from him what is manumitted.» And Ayyūb narrated it, on the authority of Nāfi', on Ibn 'Umar; Ayyūb said: Maybe Nāfi' said: «And if not, there is manumitted from him what is manumitted,» and maybe he didn't say it. And the most probable (<i>akthara ḡannī</i>) is that it is something Nāfi' used to profess according to his <i>ra'y</i>. And he [the opponent] charged it with weakness by saying: It is a <i>ḥadīth</i> which Ibn 'Umar alone narrated (<i>rawāhu...waḥdahū</i>). And there has been narrated, on the authority of Abū Hurayra, on the Prophet, may God bless and save him, its contrary (<i>khilāfuhu</i>). And on other than Abū Hurayra, on the Prophet, may God bless and save him, that there is, regarding it, <i>al-istis'ā'</i>. And he [the opponent] charged it with weakness by	130 – وَخَالَفْنَا فِيهِ بَعْضُ النَّاسِ وَوَهَّنَهُ بَأْنُ قَالَ: رَوَاهُ سَالِمٌ، عَنْ ابْنِ عُمَرَ فَلَمْ يَقُلْ فِيهِ: «وَإِلَّا فَقَدْ عَتَقَ مِنْهُ مَا عَتَقَ». وَرَوَاهُ أَيُّوبُ، عَنْ نَافِعٍ، عَنْ ابْنِ عُمَرَ وَقَالَ أَيُّوبُ: وَرُبَّمَا قَالَ نَافِعٌ: «وَإِلَّا فَقَدْ عَتَقَ مِنْهُ مَا عَتَقَ» وَرُبَّمَا لَمْ يَقُلْ. وَأَكْثَرُ ظَنِّي أَنَّهُ شَيْءٌ كَانَ يَقُولُهُ نَافِعٌ بِرَأْيِهِ، وَوَهَّنَهُ بَأْنُ قَالَ: حَدِيثُ رَوَاهُ ابْنُ عُمَرَ وَحْدَهُ. وَقَدْ رُوِيَ عَنْ أَبِي هُرَيْرَةَ، عَنْ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – خِلَافَهُ. وَعَنْ غَيْرِ أَبِي هُرَيْرَةَ، عَنْ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – فِيهِ الْإِسْتِسْعَاءُ، وَوَهَّنَهُ بَأْنُ قَالَ: لَمْ يُرَوْ عَنْ أَبِي بَكْرٍ، وَلَا عُمَرَ، وَلَا عُثْمَانَ، وَلَا عَلِيٍّ مَا يُوَافِقُهُ، بَلْ رَوَيْنَا عَنْ عُمَرَ خِلَافَهُ.

saying: There was not narrated on the authority of Abū Bakr, nor on ‘Umar, nor on ‘Uthmān, nor on ‘Alī, that which is in conformity with it (<i>yuwāfiquhu</i>) — nay, rather, we have narrated, on the authority of ‘Umar, its <i>khilāf</i>.	
131 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And our <i>hujja</i> against him was that Sālim — even if he did not narrate it —; Nāfi‘ is a <i>thiqa</i>. And there is, regarding the <i>qawl</i> of Ayyūb, no such: “Maybe he said it, and maybe he didn’t say it.” When another besides him says it on his authority, it is <i>hujja</i> (<i>idhā qālahu ‘anhu ghayruhu hujjat^{um}</i>). And what is narrated on the authority of Abū Hurayra, on the Prophet, may God bless and save him, is the object of <i>ikhtilāf</i> (<i>mukhtalaf^{um} fihi</i>). For the Ḥuffāz narrate it without contradicting (<i>lā yukhālifu</i>) our <i>ḥadīth</i>; while others narrate it contradicting our <i>ḥadīth</i>. And even if it contradicts it; our <i>ḥadīth</i> is more strongly confirmed (<i>athbata</i>) than it. And the <i>ḥadīth</i> which he mentions contradicting our <i>ḥadīth</i> is not strongly confirmed, nor is it narrated by the Ḥuffāz as contradicting our <i>ḥadīth</i>. And when there belongs to us <i>hujja</i> for this, against whosoever contradicts us; likewise is it right for us that we should obligate ourselves as regards the <i>ḥadīth</i>, all of it. And that we be satisfied (<i>nastaghniya</i>) with the report of the trustworthy ones (<i>bi-khabari al-ṣādiqīna</i>), on the Messenger of God, may God bless and save him — even if there has not come, on the authority of any one of his Khulafā’, that which is in conformity with it (<i>yuwāfiquhu</i>).	131 – قَالَ الشَّافِعِيُّ – رَحِمَهُ اللَّهُ تَعَالَى: فَكَانَتْ حُجَّتُنَا عَلَيْهِ أَنْ سَالِمًا وَإِنْ لَمْ يَرَوْهُ فَنَافِعُ ثَقَّةٌ، وَلَيْسَ فِي قَوْلِ أَيُّوبَ: رُبَّمَا قَالَهُ وَرُبَّمَا لَمْ يَقُلْهُ. إِذَا قَالَهُ عَنْهُ غَيْرُهُ حُجَّةٌ. وَمَا رَوَى عَنْ أَبِي هُرَيْرَةَ، عَنِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – مُخْتَلَفٌ فِيهِ، فَالْحِفَاطُ يَرُونَهُ لَا يُخَالِفُ حَدِيثَنَا وَغَيْرُهُمْ يَرُونَهُ يُخَالِفُ حَدِيثَنَا، وَلَوْ خَالَفَهُ كَانَ حَدِيثُنَا أَثْبَتَ مِنْهُ، وَالْحَدِيثُ الَّذِي ذَكَرَهُ يُخَالِفُ حَدِيثَنَا لَا يَثْبُتُ وَلَا يَرَوِيهِ الْحِفَاطُ يُخَالِفُ حَدِيثَنَا. وَإِذَا كَانَتْ لَنَا الْحُجَّةُ بِهَذَا عَلَى مَنْ خَالَفَنَا، فَهَكَذَا يَنْبَغِي لَنَا أَنْ نُلْزِمَ أَنْفُسَنَا فِي الْحَدِيثِ كُلِّهِ وَأَنْ نَسْتَغْنِيَ بِخَبَرِ الصَّادِقِينَ عَنْ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، وَإِنْ لَمْ يَأْتِ عَنْ أَحَدٍ مِنْ خُلَفَائِهِ مَا يُوَافِقُهُ.
132 – Al-Shāfi‘ī, may God Most High have mercy upon him, said: And they interposed against us, regarding it (<i>adkhalū ‘alaynā fihi</i>), [the proposition] that a slave be half of him free, and half of him a slave; and there belongs not to him, by the freedom, that he inherit, nor be inherited from. And the rights of freedom (<i>ḥuqūq al-ḥurriyyati</i>), all of them, are inoperative (<i>mu‘aṭṭalat^{um}</i>) in him; unless he bequeaths to himself one day, then obtains that same day; and he is forbidden from gifting his <i>māl</i>.	132 – قَالَ الشَّافِعِيُّ – رَحِمَهُ اللَّهُ تَعَالَى: وَأَدْخَلُوا عَلَيْنَا فِيهِ؛ أَنْ عَبْدًا يَكُونُ نِصْفُهُ حُرًّا وَنِصْفُهُ عَبْدًا، فَلَا يَكُونُ لَهُ بِالْحُرِّيَّةِ أَنْ يَرِثَ وَلَا يُوْرَثَ، وَتَكُونُ حُقُوقُ الْحُرِّيَّةِ كُلُّهَا فِيهِ مُعْطَلَّةً، إِلَّا أَنَّهُ يَتْرُكُ لِنَفْسِهِ يَوْمًا ثُمَّ يَكْسِبُ فِي يَوْمِهِ فَيَمْنَعُ أَنْ يَهَبَ مَالَهُ.

133 – So we said: We do not abandon the <i>ḥadīth</i> concerning the Messenger of God, may God bless and save him, because what you have described of <i>qiyās</i> interposes in it (<i>yadkhulahu</i>), nor more [instances of <i>qiyās</i>]; there is no locus (<i>mawḍi'</i>) for <i>qiyās</i> with the Sunna.	133 – فَقُلْنَا: لَا تَتْرُكُ الْحَدِيثَ عَنْ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – بَأَنْ يَدْخُلَهُ مِنَ الْقِيَاسِ مَا وَصَفْتَ، وَلَا أَكْثَرُ، وَلَا مَوْضِعَ لِلْقِيَاسِ مَعَ السُّنَّةِ.
134 – So I [al-Rabī] said to al-Shāfi': I have understood what you have written, as pertains to that which you embrace, and which we embrace, from the <i>ḥadīth</i> of the Messenger of God. And I have found, regarding it [f.] that which you have described: that we have confirmed many <i>aḥādīth</i> which have not come except by a singular mode (<i>lam ta'ti illā min wajhⁱⁿ wāḥidⁱⁿ</i>), while there is not, as regards it, on the authority of any one of his Khulafā', something which is in conformity with it, nor contradicts it. And we have found, as regards it, that which we confirm on the authority of the Prophet, may God bless and save him; while, regarding it, on the authority of one of his Khulafā', is something which contradicts it. So we have taken up as doctrine (<i>dhahabnā ilā</i>) the <i>ḥadīth</i> on the authority of the Prophet, may God bless and Save him, and we have abandoned that which contradicts it regarding the <i>qasāma</i>.⁵ And we have narrated, concerning 'Umar, as regards the <i>qasāma</i>, the <i>khilāf</i> of what we narrated concerning the Prophet, may God bless and save him; then we wound up with (<i>ṣirnā ilā</i>) the <i>ḥadīth</i> of the Prophet, may God bless and save him. And likewise, we narrated on 'Umar as regards the molar (<i>al-dīrs</i>), and other things. And we embraced as doctrine the <i>ḥadīth</i> of the Prophet, may God bless and save him, without what we narrated on 'Umar, and on Ibn 'Umar, regarding things; and other than those two, from among the <i>aṣḥāb</i> of the Prophet, may God bless and save him.	134 – فَقُلْتُ لِلشَّافِعِيِّ: قَدْ فَهِمْتُ مَا كَتَبْتَ مِمَّا أَخَذْتَ وَأَخَذْنَا بِهِ مِنْ حَدِيثِ رَسُولِ اللَّهِ، وَوَجَدْتُ فِيهَا مَا وَصَفْتَ مِنْ أَنَّا ثَبَتْنَا أَحَادِيثَ كَثِيرَةً لَمْ تَأْتِ إِلَّا مِنْ وَجْهِ وَاحِدٍ، وَلَيْسَ فِيهِ عَنْ أَحَدٍ مِنْ خُلَفَائِهِ شَيْءٌ يُوَافِقُهُ وَلَا يُخَالِفُهُ. وَوَجَدْنَا فِيهِ مَا نُثَبِّتُهُ عَنْ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – وَفِيهِ عَنْ بَعْضِ خُلَفَائِهِ شَيْءٌ يُخَالِفُهُ؛ فَذَهَبْنَا إِلَى الْحَدِيثِ عَنْ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – وَتَرَكْنَا مَا خَالَفَهُ [فِي الْقَسَامَةِ]. وَقَدْ رَوَيْنَا عَنْ عُمَرَ فِي الْقَسَامَةِ خِلَافَ مَا رَوَيْنَا عَنْ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – ثُمَّ صِرْنَا إِلَى حَدِيثِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – وَكَذَلِكَ رَوَيْنَا عَنْ عُمَرَ فِي الضَّرْسِ وَغَيْرِهَا، وَذَهَبْنَا إِلَى حَدِيثِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – دُونَ مَا رَوَيْنَا عَنْ عُمَرَ وَعَنْ ابْنِ عُمَرَ فِي أَشْيَاءَ وَغَيْرِهِمَا مِنْ أَصْحَابِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ.
135 – I [al-Rabī] said to al-Shāfi': Yet has it become clear to me (<i>a-fa-tabayyana lī</i>) that we have narrated concerning the Prophet,	135 – قُلْتُ لِلشَّافِعِيِّ: أَفْتَبَيَّنَ لِي أَنَّا رَوَيْنَا

⁵ Ḥassūn interprets this as meaning that they did the same as regards a similar *mas'ala* of *qasāma*.

may God bless and save him, something; then abandoned it for something else?	عَنْ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - شَيْئًا ثُمَّ تَرَكَنَاهُ لِغَيْرِهِ؟
136 - And he said: Often (<i>kathīr^{um}</i>).	136 - فَقَالَ: كَثِيرٌ.
137 - So I said to al-Shāfi'ī: And what is the <i>ḥujja</i> for doing this?	137 - فَقُلْتُ لِلشَّافِعِيِّ: فَمَا حُجَّةُ فِعْلٍ هَذَا؟
138 - And he said: I have struggled (<i>qad jahadtu</i>) to find for you [pl.] something which is, according to me, or according to one of the Ahl al-'Ilm, a <i>ḥujja</i> by means of which it will be excused (<i>yu'dharu bihā</i>) - and I did not find it. And that is because those on whose authority you narrated what you all embraced from the <i>ḥadīth</i> of the Messenger of God, may God bless and save him - you verified their trustworthiness (<i>waththaqtumūhum</i>). While those on whose authority you narrated what you all abandoned from the <i>ḥadīth</i> of the Messenger of God, may God bless and save him - it is not permitted for you to say: They are suspected (<i>hum muttahaḥamūna</i>).	138 - فَقَالَ: قَدْ جَهَدْتُ أَنْ أَجِدَ لَكُمْ شَيْئًا يَكُونُ عِنْدِي أَوْ عِنْدَ أَحَدٍ مِنْ أَهْلِ الْعِلْمِ حُجَّةً يُعَذَّرُ بِهَا فَلَمْ أَجِدْهُ؛ وَذَلِكَ أَنَّ الَّذِينَ رَوَيْتُمْ عَنْهُمْ مَا أَخَذْتُمْ مِنْ حَدِيثِ رَسُولِ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - وَتَقَبَّلْتُمُوهُمْ، وَالَّذِينَ رَوَيْتُمْ عَنْهُمْ مَا تَرَكَتُمْ مِنْ حَدِيثِ رَسُولِ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - فَلَا يَجُوزُ لَكُمْ أَنْ تَقُولُوا: هُمْ مَتَّهَمُونَ.
139 - For if you say: They may have erred (<i>qad yaḡhlaṭūna</i>); it might be permitted for others than yourselves to say: We do not take up [doctrine] from the Ahl al-Ghalaṭ.	139 - فَإِنْ قُلْتُمْ: قَدْ يَغْلَطُونَ. فَقَدْ يَجُوزُ لِغَيْرِكُمْ أَنْ يَقُولَ: لَا نَأْخُذُ مِنْ أَهْلِ الْغَلَطِ.
140 - And if you say: They erred (<i>yaḡhlaṭūna</i>) regarding some, but accurately preserved (<i>yaḡfazu</i>) regarding some; it is permitted for others than yourselves to say: There only indicates (<i>yadullu 'alā</i>) the error of the traditionist (<i>ghalaṭi al-muḡhaddithi</i>) that others than him contradict him, from among those who are more accurate in preservation than him (<i>aḡfazu minhu</i>), or more numerous than him (<i>aktharu minhu</i>).	140 - وَإِنْ قُلْتُمْ: يَغْلَطُونَ فِي بَعْضٍ وَيَحْفَظُونَ فِي بَعْضٍ جَاَزَ لِغَيْرِكُمْ أَنْ يَقُولَ: إِنَّمَا يَدُلُّ عَلَى غَلَطِ الْمُحَدِّثِ أَنْ يُخَالَفَهُ غَيْرُهُ مِمَّنْ هُوَ أَحْفَظُ مِنْهُ أَوْ أَكْثَرُ مِنْهُ.
141 - And if you [pl.] say, regarding it: There does not contradict by it, concerning the Prophet, may God bless and save him, that his <i>ṣāḡhib</i> erred once, and accurately preserved [another time]; then it is permitted that it be said against you: He erred - whenever you claim that he accurately preserved, and: He accurately preserved - whenever you claim that he erred. And it is permitted against you, and	141 - فَإِنْ قُلْتُمْ فِيهِ لَا يُخَالَفُ بِهِ عَنْ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - أَنَّ صَاحِبَهُ غَلِطَ مَرَّةً وَحَفِظَ. جَاَزَ عَلَيْكَ أَنْ يُقَالَ: غَلِطَ. حَيْثُ زَعَمْتَ أَنَّهُ حَفِظَ، وَحَفِظَ حَيْثُ زَعَمْتَ أَنَّهُ غَلِطَ، وَجَاَزَ عَلَيْكَ وَعَلَى غَيْرِكَ أَنْ

others besides you, that it be said: All of it is probably wrong (<i>kulluhu yaḥtamilu al-ghalata</i>). So will we claim, and seek out 'ilm from the <i>ḥadīth</i> of others than they.	يُقَالُ: كُلُّهُ يَحْتَمِلُ الْغَلَطَ. فَتَدْعُهُ وَتَطْلُبُ الْعِلْمَ مِنْ حَدِيثِ غَيْرِهِمْ.
142 – Al-Shāfi'ī, may God Most High have mercy upon him, said: And this is not found except from among the <i>ḥadīth</i> of the Ahl al-Ṣidq. And there is not permitted, regarding it, except that it be accepted; and there not be abandoned something narrated on the Prophet, may God bless and save him, except by way of what is narrated concerning the Prophet himself; and in the people there is a need for the Messenger of God (<i>bi'l-nāsi al-ḥājatu ilā rasūli Allāhi</i>), may God bless and save him, due to what God has obliged of them, insofar as following his [the Prophet's] command (<i>ittibā'i amrihi</i>).	142 – قَالَ الشَّافِعِيُّ – رَحِمَهُ اللَّهُ تَعَالَى: وَهَذَا لَا يُوجَدُ إِلَّا مِنْ حَدِيثِ أَهْلِ الصِّدْقِ، وَلَا يَجُوزُ فِيهِ إِلَّا أَنْ يُقْبَلَ فَلَا يُتْرَكُ شَيْءٌ رُوِيَ عَنِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – إِلَّا بِمَا رُوِيَ عَنِ النَّبِيِّ نَفْسِهِ، وَبِالنَّاسِ الْحَاجَّةُ إِلَى رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – بِمَا أَلَزَمَهُمُ اللَّهُ مِنْ اتِّبَاعِ أَمْرِهِ.
143 – And I said to al-Shāfi'ī: So mention something of what has been narrated.	143 – فَقُلْتُ لِلشَّافِعِيِّ: فَادْكُرْ مِمَّا رُوِيَ شَيْئًا.
144 – And al-Shāfi'ī said: There is no need for me to mention it (<i>lā araba lī fī dhikrihi</i>); and if you ask me about my <i>qawl</i> , in order that I might clarify the <i>ḥujja</i> regarding what I like of you, yourself, in your <i>qawl</i> . And I have given you a general rule (<i>jumlat^{am}</i>) which should satisfy you, God willing: Don't omit (<i>lā tada'u</i>), for the Messenger of God, may God bless and save him, a <i>ḥadīth</i> , ever, unless there comes, concerning the Messenger of God, its <i>khilāf</i> ; and do as regards it what I have said to you of the <i>ahādīth</i> when they contradict (<i>idhā ikhtalafat</i>).	144 – فَقَالَ الشَّافِعِيُّ: لَا أَرَبَ لِي فِي ذِكْرِهِ، وَإِنْ سَأَلْتَنِي عَنْ قَوْلِي لِأَوْضَحِ الْحُجَّةَ فِيمَا حَبِيتُكَ أَنْتَ نَفْسَكَ فِي قَوْلِكَ، وَقَدْ أَعْطَيْتُكَ جُمْلَةً تُغْنِيكَ إِنْ شَاءَ اللَّهُ لَا تَدْعُ لِرَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – حَدِيثًا أَبَدًا إِلَّا أَنْ يَأْتِيَ عَنِ رَسُولِ اللَّهِ خِلَافُهُ فَتَفْعَلُ فِيهِ بِمَا قُلْتُ لَكَ فِي الْأَحَادِيثِ إِذَا اخْتَلَفَتْ.
145 – Then I said to al-Shāfi'ī: I don't want your <i>mas'ala</i> of what you disapprove of pertaining to the mention of anyone. But I ask you regarding a matter I would like for you to clarify, in it, the <i>ḥujja</i> .	145 – فَقُلْتُ لِلشَّافِعِيِّ: فَلَسْتُ أُرِيدُ مَسْأَلَتَكَ مَا كَرِهْتَ مِنْ ذِكْرِ أَحَدٍ، وَلَكِنِّي أَسْأَلُكَ فِي أَمْرٍ أُحِبُّ أَنْ تُوَضِّحَ لِي فِيهِ الْحُجَّةَ.
146 – He said: So ask.	146 – قَالَ: فَسَلْ.

II. §920

From the Untitled Opening of the Kitāb Ikhtilāf Mālik wa'l-Shāfi'ī (Ḥassūn, vol.9, pt.14, 350-1)

72 – Al-Shāfi'ī said:⁶ Mālik reported to us (akhbaranā), on the authority of Yazīd b. Rūmān, on Ṣāliḥ b. Khawwāt,⁷ concerning/on the authority of those who ('amman) prayed with the Prophet,⁸ may God bless and save him, on the Yawm Dhāt al-Riqā', the ṣalāt al-khawf: That a group (ṭā'ifa) formed ranks with him, while a group was facing (wijāha) the enemy, and he led those with him in prayer for a rak'a. Then he remained standing, and they finished for themselves. Then they dispersed, and they formed ranks facing the enemy, and the other group came,⁹ and he led them in prayer for the rak'a that remained from his ṣalāt.¹⁰ Then he remained seated, while they finished for themselves. Then he led them in taslīm.	72 – قَالَ الشَّافِعِيُّ: أَخْبَرَنَا مَالِكٌ، عَنْ يَزِيدَ بْنِ رُومَانَ، عَنْ صَالِحِ بْنِ خَوَّاتٍ، عَمَّنْ صَلَّى مَعَ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – يَوْمَ ذَاتِ الرِّقَاعِ صَلَاةَ الْخَوْفِ؛ أَنَّ طَائِفَةً صَفَّتْ مَعَهُ وَطَائِفَةٌ وَجَّاهُ الْعَدُوَّ فَصَلَّى بِالَّذِينَ مَعَهُ رَكْعَةً، ثُمَّ ثَبَتَ قَائِمًا فَأَتَمُّوا لَأَنْفُسِهِمْ، ثُمَّ انْصَرَفُوا فَصَفُّوا وَجَّاهُ الْعَدُوَّ، وَجَاءَ الطَّائِفَةُ الْأُخْرَى فَصَلَّى بِهِمُ الرَّكْعَةَ الَّتِي بَقِيَتْ مِنْ صَلَاتِهِ، ثُمَّ ثَبَتَ جَالِسًا وَأَتَمُّوا لَأَنْفُسِهِمْ ثُمَّ سَلَّمَ بِهِمْ.
73 – Al-Shāfi'ī said: Some/one of our aṣḥāb reported to us, on the authority of 'Abd Allāh b. 'Umar, on his brother 'Ubayd Allāh b. 'Umar, on al-Qāsim, on Ṣāliḥ b. Khawwāt, on Khawwāt b. Jubayr, on the Prophet, may God bless and save him, its like ma'nā.	73 – قَالَ الشَّافِعِيُّ: أَخْبَرَنَا بَعْضُ أَصْحَابِنَا، عَنْ عَبْدِ اللَّهِ بْنِ عُمَرَ، عَنْ أَخِيهِ عُبَيْدِ اللَّهِ بْنِ عُمَرَ، عَنِ الْقَاسِمِ، عَنْ صَالِحِ بْنِ خَوَّاتٍ، عَنْ خَوَّاتِ بْنِ جُبَيْرٍ، عَنِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – مِثْلَ مَعْنَاهُ.
74 – And we ourselves, and he, took up this [doctrine], until there was related for us (ḥukiya lanā), as concerns him [the Prophet], other than what we proposed for him (ghayru mā 'araḍnā 'alayhi).	74 – فَأَخَذْنَا نَحْنُ وَهُوَ بِهَذَا، حَتَّى حُكِيَ لَنَا عَنْهُ غَيْرُ مَا عَرَضْنَا عَلَيْهِ.
75 – And one of the people (ba'du al-nāsi) disagreed with us (khālafanā), and he	75 – وَخَالَفَنَا بَعْضُ النَّاسِ فَقَالَ فِيهِ بِخِلَافٍ

⁶ This same account is delivered nearly verbatim – but not exactly so – in §2247 of the K. Ṣalāt al-Khawf. Differences are detailed in the notes which follow. Ḥassūn points out in his footnote to §2247 that we may find the same rendering in Mālik's Muwaṭṭa' [his citation corresponds to the first ḥadīth of the K. Ṣalāt al-Khawf (11.1) of the Yaḥyā b. Yaḥyā al-Laythī recension]; al-Shāfi'ī's Risāla (Shākir, §§509, 677); in the Maḡhāzī of al-Bukhārī, the K. al-Ṣalāt of Muslim, and the Dalā'il al-Nubuwwa, the Sunan al-Kabīr, and the Ma'rifa al-Sunan wa'l-Āthār of al-Bayhaqī.

⁷ In §2247, Ḥassūn here adds [بن جُبَيْرٍ], which he notes as missing from manuscript (د).

⁸ In §2247, we find [رَسُولُ اللَّهِ] rather than [النَّبِيُّ].

⁹ In §2247, we find [وَجَاءَتْ] rather than [وَجَاءَتْ].

¹⁰ In §2247, we find [عليه] rather than [من صَلَاتِهِ].

professed as regards it the <i>khilāf</i> of our <i>qawl</i> . And he said: The <i>ṣalāt al-khawf</i> is not prayed these days (<i>lā tuṣallā... al-yawma</i>).	قَوْلُنَا، فَقَالَ: لَا تُصَلِّي صَلَاةَ الْخَوْفِ الْيَوْمَ.
76 – And our <i>ḥujja</i> against him was what is confirmed concerning the Messenger of God, may God bless and save him.	76 – فَكَانَتْ حُجَّتُنَا عَلَيْهِ مَا ثَبَتَ عَنْ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ.
77 – But among his <i>ḥujja</i> was that he said: You have contradicted the <i>aḥādīth</i> regarding the <i>ṣalāt al-khawf</i> on the Prophet, may God bless and save him. And we didn't know (<i>lam naʿlam</i>) that Abū Bakr, nor ʿUmar, nor ʿUthmān – nor is it confirmed concerning ʿAlī – that [any] one of them prayed the <i>ṣalāt al-khawf</i> , nor commanded it (<i>wa lā amarū bihā</i>). And the <i>ṣalāt</i> behind (<i>khalfā</i>) the Prophet, may God bless and save him, as regards grace (<i>fiʾl-faḍli</i>), is not like it is behind someone else. And by [the fact] that there was not narrated (<i>lam yurwa</i>) on the authority of his <i>khulafāʾ</i> , a <i>ḥadīth</i> confirming its [i.e., the <i>ṣalāt al-khawf</i>]'s <i>ṣalāt</i> . And they were still warriors and on campaign (<i>muḥāribīna wa muḥārib^{am}</i>) in their time – and this indicates (<i>yadullu ʿalā</i>) that it [performance of <i>ṣalāt al-khawf</i>] had belonged to the Prophet, may God bless and save him, specifically (<i>khāṣṣat^{am}</i>).	77 – وَكَانَ مِنْ حُجَّتِهِ أَنْ قَالَ: قَدْ اخْتَلَفَتِ الْأَحَادِيثُ فِي صَلَاةِ الْخَوْفِ عَنِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – وَلَمْ نَعْلَمْ أَنَّ أَبَا بَكْرٍ، وَلَا عُمَرَ، وَلَا عُثْمَانَ، وَلَا ثَبَتَ عَنْ عَلِيٍّ أَنَّ وَاحِدًا مِنْهُمْ صَلَّى صَلَاةَ الْخَوْفِ وَلَا أَمَرُوا بِهَا، وَالصَّلَاةُ خَلْفَ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – فِي الْفَضْلِ لَيْسَتْ كَهِيَ خَلْفَ غَيْرِهِ، وَبِأَنَّ لَمْ يُرَوْ عَنْ خُلَفَائِهِ حَدِيثٌ يَثْبُتُ بِصَلَاتِهَا، وَلَمْ يَزَالُوا مُحَارِبِينَ وَمُحَارِبًا فِي زَمَانِهِمْ، فَهَذَا يَدُلُّ عَلَى أَنَّهُ كَانَ لِلنَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – خَاصَّةً.
78 – And our <i>ḥujja</i> against him was that, when it is confirmed on the authority of the Messenger of God, may God bless and save him, then it is generally normative (<i>ʿamm^{um}</i>) – except by indication (<i>bi-dalālat^{im}</i>); because something of his action is not specifically normative (<i>khāṣṣ^{am}</i>), until the <i>dalāla</i> is brought to us – from Kitāb, or Sunna, or <i>ijmāʿ</i> – that it is <i>khāṣṣ</i> . And if not: We are satisfied (<i>iktafaynā</i>) by the <i>ḥadīth</i> on the Prophet, may God bless and save him, on the authority of those after him (<i>ʿamman baʿdahu</i>). Just as we have said regarding what is previous to him/it (<i>kamā qulnā fīmā qablahu</i>). ¹¹	78 – فَكَانَتْ حُجَّتُنَا عَلَيْهِ أَنَّهُ إِذَا ثَبَتَ عَنْ رَسُولِ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – فَهُوَ عَامٌّ إِلَّا بِدَلَالَةٍ؛ لِأَنَّهُ لَا يَكُونُ شَيْءٌ مِنْ فِعْلِهِ خَاصًّا حَتَّى تَأْتِيَنَا الدَّلَالَةُ مِنْ كِتَابٍ، أَوْ سُنَّةٍ، أَوْ إِجْمَاعٍ أَنَّهُ خَاصٌّ، وَإِلَّا اكْتَفَيْنَا بِالْحَدِيثِ عَنِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – عَمَّنْ بَعْدَهُ، كَمَا قُلْنَا فِيمَا قَبْلَهُ.

¹¹ This whole explanation is a wonderful example of al-Shāfiʿī's hermeneutic of *ʿamm* and *khāṣṣ* at work. Of special note is that it was his opponent who raised the issue of the *ṣalāt al-khawf* as being *khāṣṣ* to the Prophet [i.e., the *ʿamm-khāṣṣ* distinction is no invention of al-Shāfiʿī's, but was used by his opponents as well]. As for the last sentence of this section, it appears to mean something like: "Just as we have said previously;" and, indeed, we find that the greater part of the preceding sections in this opening to the *Ikhtilāf Mālik waʾl-Shāfiʿī* are concerned with reliance upon Prophetic *aḥādīth* over all others, and with preponderating contradictory Prophetic

II.§1004

From the Kitāb al-Ṣiyām; Bāb al-Jimā' fī Ramaḍān wa'l-Khilāf 'alayhi (Ḥassūn, vol.2, pt.4, 367-9)

4995 – Al-Shāfi'ī said:¹² And if the months are obscured from (ishtabahat 'alā) a prisoner (asīr^{un}), and he attends to (taḥarrā) the month of Ramaḍān, and he coincides with it (wāfaqahu), or what is after it of the months, and he fasts for a month, or thirty days; it suffices for him (qjza'ahu) — even if he fasts what is before it [i.e., before the actual month of Ramaḍān]. And one has professed (fa-qad qāla qā'il^{un}): It does not suffice him unless he hits upon it (yuṣṭibahu), or a month after it — for it [fasting the month after] will be like a making-up for him (ka'l-qadā'i lahu) [for missing Ramaḍān]. And this is one opinion (madhhab).	4995 – قَالَ الشَّافِعِيُّ: وَلَوْ اشْتَبَهَتْ الشُّهُورُ عَلَى أَسِيرٍ، فَتَحَرَّى شَهْرَ رَمَضَانَ، فَوَافَقَهُ أَوْ مَا بَعْدَهُ مِنَ الشُّهُورِ، فَصَامَ شَهْرًا، أَوْ ثَلَاثِينَ يَوْمًا، أَجَزَّاهُ، وَلَوْ صَامَ مَا قَبْلَهُ، فَقَدْ قَالَ قَائِلٌ: لَا يُجْزِيهِ إِلَّا أَنْ يُصِيبَهُ، أَوْ شَهْرًا بَعْدَهُ فَيَكُونَ كَالْقَضَاءِ لَهُ. وَهَذَا مَذْهَبٌ.
4996 – But if an opinion-holder were to opine (wa-law dhahaba dhāhib^{un}) that when he does not know it exactly (lam ya'rifhu bi-'aynihi), and he seeks to attain it (ta'akhkhāhu), it suffices him — whether it was before [Ramaḍān], or after; this [also] is a madhhab. And that is because he might seek to attain the qibla, and when he knows after completion of the ṣalāt that he has erred, it [the wrongly-oriented ṣalāt] serves for him (qjza'at 'anhu).	4996 – وَلَوْ ذَهَبَ ذَاهِبٌ إِلَى أَنَّهُ إِذَا لَمْ يَعْرِفْهُ بَعَيْنُهُ فَتَأَخَّاهُ، أَجَزَّاهُ، قَبْلُ كَانَ أَوْ بَعْدُ، كَانَ هَذَا مَذْهَبًا، وَذَلِكَ أَنَّهُ قَدْ يَتَأَخَّى الْقِبْلَةَ، فَإِذَا عَلِمَ بَعْدَ كَمَالِ الصَّلَاةِ أَنَّهُ قَدْ أَخْطَأَهَا، أَجَزَّاتُ عَنْهُ.
4997 – And that serves for him as regards an error of [prayer-orientation at] 'Arafa, and the Fiṭr.	4997 – وَيُجْزِي ذَلِكَ عَنْهُ فِي خَطَأٍ عَرَفَةَ وَالْفِطْرَ.
4998 – And indeed the people are only charged (kullifa), in regard to the what-is-hidden (al-mughayyab), with the what-is-apparent (al-zāhir). And the prisoner, when the months are obscured from him; it [Ramaḍān] is like the mughayyab from him. And God knows best.	4998 – وَإِنَّمَا كُلِّفَ النَّاسُ فِي الْمُعَيَّبِ الظَّاهِرِ، وَالْأَسِيرُ إِذَا اشْتَبَهَتْ عَلَيْهِ الشُّهُورُ فَهُوَ مِثْلُ الْمُعَيَّبِ عَنْهُ وَاللَّهُ أَعْلَمُ.

ahādīth on the basis of the epistemic authority of transmitters. This opening chapter is a treasure-trove for al-Shāfi'ī's epistemology and hermeneutic, and ought to be explored further in future.

¹² The importance of the reflections of al-Shāfi'ī and al-Rabī in these sections cannot be overstated; they serve as a clear illustration of a most fundamental epistemological principle in legal theory and method.

4999 – Al-Rabī said: And the last opinion (<i>ākhiru qawl</i>) of al-Shāfi'ī, is that it does not suffice him, when he fasts it in doubt (<i>'alā al-shakki</i>), unless he hits upon it [Ramaḍān] exactly (<i>yuṣībahu bi-'aynihi</i>), or a month after it.	4999 – قَالَ الرَّبِيعُ: وَآخِرُ قَوْلِ الشَّافِعِيِّ؛ أَنَّهُ لَا يُجْزِيهِ إِذَا صَامَهُ عَلَى الشَّكِّ حَتَّى يُصِيبَهُ بَعِيْنُهُ أَوْ شَهْرًا بَعْدَهُ.
5000 – And his last <i>qawl</i> regarding the <i>qibla</i> is likewise: it does not suffice him. And likewise it does not suffice him when he seeks to attain (<i>ta'akhkhā</i>) — even if he hits upon (<i>aṣāba</i>) the <i>qibla</i> . And [enjoined] upon him is the redoing (<i>al-i'ādatu</i>), when he sought to attain it without an indication (<i>bi-lā dalālat^{an}</i>).	5000 – وَآخِرُ قَوْلِهِ فِي الْقِبْلَةِ كَذَلِكَ؛ لَا يُجْزِيهِ، وَكَذَلِكَ لَا يُجْزِيهِ إِذَا تَأَخَّحَى، وَإِنْ أَصَابَ الْقِبْلَةَ؛ فَعَلَيْهِ الْإِعَادَةُ إِذَا كَانَ تَأَخَّحِيهِ بِلَا دَلَالَةٍ.
5001 – But as for 'Arafa, and the day of the Fiṭr, and the Aḍḥā; it suffices him — because this is a command (<i>amr^{un}</i>) which he enacts only due to the conventional agreement upon it of the generality (<i>bi-ijtimā'i al-'āmmati 'alayhi</i>). And the <i>ṣawm</i> and the <i>ṣalāt</i> are a thing which he enacts in his own self, specifically (<i>fī dhāti nafsīhi khāṣṣat^{an}</i>). ¹³	5001 – وَأَمَّا عَرَفَةُ وَيَوْمُ الْفِطْرِ وَالْأَضْحَى، فَيُجْزِيهِ؛ لِأَنَّ هَذَا أَمْرٌ إِنَّمَا يَفْعَلُهُ بِاجْتِمَاعِ الْعَامَّةِ عَلَيْهِ، وَالصَّوْمُ وَالصَّلَاةُ شَيْءٌ يَفْعَلُهُ فِي ذَاتِ نَفْسِهِ خَاصَّةً.
5002 – Al-Shāfi'ī said: And if he awakes on the <i>yawm al-shakk</i> , not intending to fast (<i>lā yanwī al-ṣawma</i>), but he does not eat and he does not drink until he knows that it is of the month of Ramaḍān, and he completes his fast; I opine (<i>ra'aytu</i>) the redoing of his fast (<i>i'ādata ṣawmihi</i>). And it is one and the same (<i>sawā^{un}</i>) whether he sees/opines that before noon (<i>al-zawāl</i>) or after it; when he wakes up not intending his fasting of the month of Ramaḍān.	5002 – قَالَ الشَّافِعِيُّ: وَلَوْ أَصْبَحَ يَوْمَ الشَّكِّ لَا يَنْوِي الصَّوْمَ، وَلَمْ يَأْكُلْ وَلَمْ يَشْرَبْ حَتَّى عَلِمَ أَنَّهُ مِنْ شَهْرِ رَمَضَانَ، فَأَتَمَّ صَوْمَهُ، رَأَيْتُ إِعَادَةَ صَوْمِهِ، وَسَوَاءٌ رَأَى ذَلِكَ قَبْلَ الزَّوَالِ أَوْ بَعْدَهُ إِذَا أَصْبَحَ لَا يَنْوِي صِيَامَهُ مِنْ شَهْرِ رَمَضَانَ.
5003 – Al-Shāfi'ī said: And I opine (<i>arā</i>) — and God knows best — likewise, if he awakes intending his fast as voluntary	5003 – قَالَ الشَّافِعِيُّ: وَأَرَى – وَاللَّهُ أَعْلَمُ

¹³ This passage delineates an epistemological principle behind the normative consideration; it is a determination of the locus of responsibility for determining a requirement for a ritual act. In the case of *ṣalāt* and *ṣawm*, the responsibility of determining *qibla* and day of the month is located within the individual performing the act; in the case of 'Arafa, Fiṭr, and Aḍḥā it is located in the general agreement of the community. Not only is this a fascinating epistemological issue in its own right, but it has recognizable parallels in *endoxon*-theory, and the responsibilities of the individual *mujtahid*, and the sanction of *ijmā'*. Consider: if the *mujtahid* finds out later that his *ijtihād* is conclusively wrong, must he not re-engage in *ijtihād*? Whereas the sanction of *ijmā'* removes a case from *ijtihād* consideration — the locus of responsibility has shifted from the *mujtahid* to the body forming consensus. NB: al-Shāfi'ī shows a great fondness for using the *qibla*-determination as a metaphor in his discussions of *qiyās* and *ijtihād*. Are we not seeing, again, a crossover — between the exigencies of ritual practice, the fundamentals of epistemology, legal theory, and legal argumentation?

(<i>yanwī ṣawmahu taṭawwu</i> ^{am}); it does not suffice him as pertains to Ramaḍān. And I do not opine Ramaḍān suffices him except by his volition (<i>bi-irādatihi</i>). And God knows best.	– كَذَلِكَ لَوْ أَصْبَحَ يَنْوِي صَوْمَهُ تَطَوُّعًا، لَمْ يُجْزِهِ مِنْ رَمَضَانَ، وَلَا أَرَى رَمَضَانَ يُجْزِيهِ إِلَّا بِإِرَادَتِهِ. وَاللَّهُ أَعْلَمُ.
5004 – And I don't know — between it and the vow of prayer (<i>nadhri al-ṣalāti</i>), and besides that, as pertains to what does not suffice except by <i>niyya</i> — of any difference (<i>farq</i> ^{am}).	5004 – وَلَا أَعْلَمُ بَيْنَهُ وَبَيْنَ نَذْرِ الصَّلَاةِ وَغَيْرِ ذَلِكَ مِمَّا لَا يُجْزِي إِلَّا بِنِيَّةٍ فَرَقًا.
5005 – Al-Shāfiʿī said: And if one observing [the fast] (<i>muqīm</i> ^{am}) intends the fasting (<i>nawā al-ṣiyāma</i>) before the dawn, then he departs after the dawn, travelling (<i>musāfir</i> ^{am}); he does not break fast (<i>lam yuṣṭir</i>) that day of his — because he has entered upon the fast as an observer [of the fast].	5005 – قَالَ الشَّافِعِيُّ: وَلَوْ أَنَّ مُقِيمًا نَوَى الصِّيَامَ قَبْلَ الْفَجْرِ، ثُمَّ خَرَجَ بَعْدَ الْفَجْرِ مُسَافِرًا، لَمْ يُفْطِرْ يَوْمَهُ ذَلِكَ؛ لِأَنَّهُ قَدْ دَخَلَ فِي الصَّوْمِ مُقِيمًا.
5006 – Al-Rabī said: And in a <i>kitāb</i> besides this, from among his [al-Shāfiʿī's] <i>kutub</i> : Unless a <i>ḥadīth</i> proves authentic (<i>yaṣiḥḥa</i>), concerning the Prophet, may God bless and save him — when he broke fast at al-Kadīd — that he intended fasting that day and he was observing [the fast] (<i>wa huwa muqīm</i> ^{un}). ¹⁴	5006 – قَالَ الرَّبِيعُ: وَفِي كِتَابٍ غَيْرِ هَذَا مِنْ كُتُبِهِ: إِلَّا أَنْ يَصِحَّ حَدِيثٌ عَنِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – حِينَ أَفْطَرَ بِالْكَدِيدِ أَنَّهُ نَوَى صِيَامَ ذَلِكَ الْيَوْمِ وَهُوَ مُقِيمٌ.
5007 – Al-Shāfiʿī said: And if he intended it from the night, then he departed before the dawn; it is as though he did not enter upon the <i>ṣawm</i> until the point he travelled. And there belongs to him, if he wishes, [the right] that he complete, and he fast; and, if he wishes, that he break fast.	5007 – قَالَ الشَّافِعِيُّ: وَلَوْ نَوَاهُ مِنَ اللَّيْلِ، ثُمَّ خَرَجَ قَبْلَ الْفَجْرِ، كَانَ كَأَنَّ لَمْ يَدْخُلْ فِي الصَّوْمِ حَتَّى سَافَرَ، وَكَانَ لَهُ إِنْ شَاءَ أَنْ يُتِمَّ فَيَصُومَ، وَإِنْ شَاءَ أَنْ يُفْطِرَ.

¹⁴ This passage is interesting in that al-Shāfiʿī suggests his opinion might be conditional upon the verification of a *ḥadīth*. And indeed, such a *ḥadīth* was in circulation in his time — variants appear, in fact, at least twice in his *Musnad* (both in Maṭrajī ix.423). Moreover, such *aḥādīth* of the Prophet's breaking fast at al-Kadīd (a spring en route to Mecca, between ʿUṣfān and Qudayd) are found in a number of early works, among them: Mālik's *Muwatṭaʾ* (not surprisingly, as al-Shāfiʿī narrated his versions from Mālik; §18.7.21, 22 [ʿAbd al-Bāqī ed.]), ʿAbd al-Razzāq al-Ṣanʿānī's *Muṣannaf* (§§4471-2, 4474, 7762, 9738 [al-Aʿẓamī ed.]), and over a dozen variants in the *Musnad* of Aḥmad b. Ḥanbal. Finally, it would appear that a number of variants were indeed verified as *ṣaḥīḥ*, as they appear in both the *ṣaḥīḥ* collections of al-Bukhārī (§§1944, 2953, 4275, 4276 [Nāṣir ed., numbering of ʿAbd al-Bāqī]) and Muslim (§1113 [ʿAbd al-Bāqī ed.]). Also in the *Sunan* of Abī Dāwūd (§2678, though considered *ḍaʿīf* by al-Albānī [ʿAbd al-Ḥamīd ed.]) and al-Nasāʾī (§2313, considered *ṣaḥīḥ* by al-Albānī [Abū Ghada ed.]); and in a number of other collections. However, we should note that al-Shāfiʿī appears to be asking that more than just the *ḥadīth* be verified; it must also be verified that the Prophet had embarked with the *niyya* of fasting, and was observing fast up to the point he broke it. This would require a close examination of the accepted *aḥādīth* and variants, and an exploration of the commentaries.

5008 – Al-Shāfi'ī said: And when the man seeks to attain the qibla without indicants (<i>bi-lā dalā'ila</i>), then, when he awakes, he knows that he hit upon (<i>aṣāba</i>) the qibla; upon him is [enjoined] the redoing (<i>al-i'āda</i>) — because he performed prayer when he prayed in doubt (<i>ṣallā ḥīna ṣallā 'alā al-shakki</i>).	5008 – قَالَ الشَّافِعِيُّ: وَإِذَا تَأَخَّى الرَّجُلُ الْقِبْلَةَ بِلَا دَلَائِلَ، فَلَمَّا أَصْبَحَ عَلِمَ أَنَّهُ أَصَابَ الْقِبْلَةَ، كَانَتْ عَلَيْهِ الْإِعَادَةُ؛ لِأَنَّهُ صَلَّى حِينَ صَلَّى عَلَى الشَّكِّ.

From the Mukhtaṣar al-Muzanī; Bāb al-Niyya fī'l-Ṣawm (Maṭrajī ix.64)

He [al-Muzanī] said: Ibrāhīm transmitted to me [as <i>ḥadīth</i>], he said: I audited (<i>sami'tu</i>) al-Rabī reporting (<i>akhbara</i>) on al-Shāfi'ī, he said: That which I prefer (<i>uḥibbu</i>) is that he break fast on the <i>yawm al-shakk</i> , that there not be a <i>ṣawm</i> which he is fasting. And the <i>madhhab</i> of Ibn 'Umar is possible, that he be voluntarily committed (<i>mutatawi'am</i>) before it, but its <i>khilāf</i> is possible. He said: If he awakes not of the opinion (<i>lā yarā</i>) that his day is of Ramaḍān, but does not eat (<i>lam ya'am</i>), then that [i.e., that it is in fact Ramaḍān] becomes evident to him (<i>istabāna lahu</i>); upon him is [incumbent] his fasting, and his <i>i'āda</i> .	(قَالَ): وَحَدَّثَنِي إِبْرَاهِيمُ: قَالَ سَمِعْتُ الرَّبِيعَ أَخْبَرَ عَنِ الشَّافِعِيِّ قَالَ: الَّذِي أُحِبُّ أَنْ يُفْطِرَ يَوْمَ الشَّكِّ أَنْ لَا يَكُونَ صَوْمًا كَانَ يَصُومُهُ، وَيَحْتَمِلُ مَذْهَبُ ابْنِ عُمَرَ أَنْ يَكُونَ مُتَطَوِّعًا قَبْلَهُ وَيَحْتَمِلُ خِلَافُهُ. (قَالَ): وَإِنْ أَصْبَحَ لَا يَرَى أَنَّ يَوْمَهُ مِنْ رَمَضَانَ وَلَمْ يَطْعَمْ ثُمَّ اسْتَبَانَ ذَلِكَ لَهُ فَعَلَيْهِ صِيَامُهُ وَإِعَادَتُهُ.
And if he intended (<i>nawā</i>) to fast tomorrow; if it is the beginning of the month then it is <i>farḍ</i> ; and if not, it is voluntary. And if it becomes plain to him (<i>bāna lahu</i>) that it is of Ramaḍān; it does not suffice him (<i>lam yujzi'hu</i>) — because he did not fast it with the understanding that it is <i>farḍ</i> , but he only fasted it in doubt (<i>'alā al-shakki</i>).	وَلَوْ نَوَى أَنْ يَصُومَ غَدًا فَإِنْ كَانَ أَوَّلَ الشَّهْرِ فَهُوَ فَرَضٌ وَإِلَّا فَهُوَ تَطَوُّعٌ، فَإِنْ بَانَ لَهُ أَنَّهُ مِنْ رَمَضَانَ لَمْ يُجْزِئْهُ لِأَنَّهُ لَمْ يَصُمْهُ عَلَى أَنَّهُ فَرَضٌ وَإِنَّمَا صَامَهُ عَلَى الشَّكِّ.
And if a man is determined (<i>'aqada</i>) that tomorrow, according to him (<i>'indahu</i>) is of Ramaḍān, in a day of doubt, then it becomes evident to him (<i>bāna lahu</i>) that it is of Ramaḍān; it suffices him. But if he ate something in a state of doubt (<i>shākk'an</i>) in the dawn; there is nothing [incumbent] upon him.	وَلَوْ عَقَدَ رَجُلٌ عَلَى أَنَّ غَدًا عِنْدَهُ مِنْ رَمَضَانَ فِي يَوْمٍ شَكٍّ ثُمَّ بَانَ لَهُ أَنَّهُ مِنْ رَمَضَانَ أَجْزَأُ، وَإِنْ أَكَلَ شَاكًّا فِي الْفَجْرِ فَلَا شَيْءَ عَلَيْهِ.

II.§1241

Opening Sections of *Al-Khilāf fīmā Yu'tā bi'l-Zinā* (Ḥassūn, vol.6, pt.11, 14-15)

17870 – Al-Rabī reported to us, he said: Al-Shāfi'ī reported to us, he said: And we said: When a man [A] marries (<i>nakaha</i>) a woman [X]; she is forbidden to (<i>ḥarumat 'alā</i>) his son [A^S] and his father [A^F]. And forbidden to him [A] is her mother [X^M] on the basis of what I related of the <i>qawl</i> of God, to Him belong might and majesty.	17870 – أَخْبَرَنَا الرَّبِيعُ، قَالَ: أَخْبَرَنَا الشَّافِعِيُّ، قَالَ: وَقُلْنَا: إِذَا نَكَحَ رَجُلٌ امْرَأَةً، حُرِّمَتْ عَلَى ابْنِهِ وَأَبِيهِ، وَحُرِّمَتْ عَلَيْهِ أُمُّهَا بِمَا حَكَيْتُ مِنْ قَوْلِ اللَّهِ عَزَّ وَجَلَّ.
17871 – He said: But if he [A] commits <i>zinā</i> by the wife of his father [A^{FW}] or of his son [A^{SW}], or the mother of his wife [X^M]; he [A] has rebelled against (<i>fa-qad 'aṣā</i>) God Most High, but there is not forbidden to him [A] his wife [X] — nor [is there forbidden] to his father [A^F], nor to his son [A^S], his wife [A^{FW} and A^{SW}, respectively], if he [A] committed <i>zinā</i> by one of them [either A^{FW} or A^{SW}],¹⁵ because God, to Him belong might and majesty, only made <i>ḥarām</i> through the sanctity of the <i>ḥalāl</i> (<i>innamā ḥarrama bi-ḥurmati al-ḥalālī</i>), as a strengthening of His <i>ḥalāl</i>, and an augmentation in His grace (<i>ni'matihi</i>), by what He permits of it — so that He confirm by it the forbidden things (<i>al-ḥurum</i>) which did not exist before it, and oblige by means of them the <i>ḥuqūq</i>. And the <i>ḥarām</i> is the <i>khilāf</i> of the <i>ḥalāl</i>.	17871 – قَالَ: فَإِنْ زَنَى بِامْرَأَةِ أَبِيهِ أَوْ ابْنِهِ أَوْ أُمِّ امْرَأَتِهِ، فَقَدْ عَصَى اللَّهَ تَعَالَى، وَلَا تَحْرُمُ عَلَيْهِ امْرَأَتُهُ، وَلَا عَلَى أَبِيهِ، وَلَا عَلَى ابْنِهِ امْرَأَتُهُ لَوْ زَنَى بِوَاحِدَةٍ مِنْهُمَا؛ لِأَنَّ اللَّهَ عَزَّ وَجَلَّ إِنَّمَا حَرَّمَ بِحُرْمَةِ الْحَلَالِ تَعْزِيزًا لِلْحَلَالِ وَزِيَادَةً فِي نِعْمَتِهِ بِمَا أَبَاحَ مِنْهُ بَأَنِّ أَثْبَتَ بِهِ الْحُرْمَ الَّتِي لَمْ تَكُنْ قَبْلَهُ، وَأَوْجَبَ بِهَا الْحُقُوقَ، وَالْحَرَامُ خِلَافُ الْحَلَالِ.
17872 – But one of the people said: If the man [A] commits <i>zinā</i> by a woman [X], her mother [X^M] is forbidden to him [A], and her daughter [X^D]; and if he [A] commits <i>zinā</i> with the wife of his father [A^{FW}], or of his son [A^{SW}]; forbidden to them [A^F and A^S, respectively] are their wives [A^{FW} and A^{SW}, respectively].¹⁶	17872 – وَقَالَ بَعْضُ النَّاسِ: إِذَا زَنَى الرَّجُلُ بِامْرَأَةٍ، حُرِّمَتْ عَلَيْهِ أُمُّهَا، وَابْنَتُهَا وَإِنْ زَنَى بِامْرَأَةِ أَبِيهِ أَوْ ابْنِهِ، حُرِّمَتْ عَلَيْهِمَا امْرَأَتَاهُمَا.

¹⁵ In other words, once man [A] commits *zinā* with the mother of his wife [X^M], then his own wife [X] should become forbidden to him, because he has cohabited with her mother. But [X] does not become forbidden to [A]. Likewise, if man [A] commits *zinā* with the wife of his father [A^{FW}], then she should become forbidden to his father [A^F] because she has cohabited with his son [A]. Yet [A^{FW}] does not become forbidden to [A^F]. Finally, if man [A] commits *zinā* with the wife of his son [A^{SW}], then she should become forbidden to his son [A^S], because she has cohabited with his father [A]. However, [A^{SW}] does not become forbidden to [A^S].

¹⁶ In other words, the opponent believes that — through the *zinā* of man [A] with the wife of his son [A^{SW}] or the wife of his father [A^{FW}] — the wife of the son [A^{SW}] becomes forbidden for the son [A^S], and the wife of the father [A^{FW}] becomes forbidden to the father [A^F].

17873 – And likewise, if he [A] kisses (qabbala) one of them [either A ^{FW} or A ^{SW}], or touches her out of lust; it is like zinā, and the zinā makes ḥarām that which the ḥalāl makes ḥarām. ¹⁷	17873 – وَكَذَلِكَ إِنْ قَبَّلَ وَاحِدَةً مِنْهُمَا، أَوْ لَمَسَهَا بِشَهْوَةٍ فَهُوَ مِثْلُ الزِّنَا، وَالزِّنَا يُحَرِّمُ مَا يُحَرِّمُ الْحَلَالُ.
17874 – And he said to me: Due to what did you say that the ḥarām does not make ḥarām that which the ḥalāl makes ḥarām?	17874 – فَقَالَ لِي: لِمَ قُلْتَ إِنَّ الْحَرَامَ لَا يُحَرِّمُ مَا يُحَرِّمُ الْحَلَالُ؟
17875 – I said: There belongs to it an istidlāl in the Book of God, to Him belong might and majesty, and [in] such a qiyās as upon the ma'nā of which the Muslims have achieved ijma', and [in] the ma'qūl, and [in] the majority of the qawl of the Ahl Dār al-Sunna wa'l Hijra wa Ḥaram Allāh. ¹⁸	17875 – فَقُلْتُ: لَهُ اسْتِدْلَالٌ بِكِتَابِ اللَّهِ عَزَّ وَجَلَّ وَالْقِيَّاسِ عَلَى مَا أَجْمَعَ الْمُسْلِمُونَ عَلَيْهِ بِمَا هُوَ فِي مَعْنَاهُ، وَالْمَعْقُولِ، وَالْأَكْثَرِ مِنْ قَوْلِ أَهْلِ دَارِ السُّنَّةِ وَالْهِجْرَةِ، وَحَرَّمَ اللَّهُ.
17876 – He said: Find/produce for me (awjidnī) what you have described.	17876 – قَالَ: فَأَوْجِدْنِي مَا وَصَفْتَ.
17877 – I said: God, Most Blessed, Most High, said: «Don't marry (lā tankihū) whom your fathers have married among the women» [Q.4:22]. And He, Most High, said: «And the [previous wives, now ḥalāl to others] of your sons (ḥalāl'il abnā'ikum)» [Q.4:23]. And He said: «And the mothers of your women, and your step-daughters who are under your protection, originating from among your women with whom you have made consummation» [Q.4:23]. Do you yourself not find (a-fa-lastā tajidu) that the revelation (al-tanzīl) only makes ḥarām the ones He designates by nikāḥ, or by nikāḥ and consummation (al-dukhūl)?	17877 – قُلْتُ: قَالَ اللَّهُ تَبَارَكَ وَتَعَالَى: «وَلَا تَنْكِحُوا مَا نَكَحَ آبَاؤُكُمْ مِنَ النِّسَاءِ» [النساء: 22]. وَقَالَ تَعَالَى: «وَحَلَائِلُ أَبْنَائِكُمُ» [النساء: 23]. وَقَالَ: «وَأُمَّهَاتُ نِسَائِكُمْ وَرَبَائِبُكُمُ اللَّاتِي فِي حُجُورِكُمْ مِنْ نِسَائِكُمُ اللَّاتِي دَخَلْتُمْ بِهِنَّ» [النساء: 23] أَفَلَسْتَ تَجِدُ التَّنْزِيلَ إِنَّمَا حَرَّمَ مَنْ سَمِيَ بِالنِّكَاحِ أَوْ النِّكَاحِ وَالْدُخُولِ؟
17878 – He said: Of course (balā).	17878 – قَالَ: بَلَى.
17879 – I said: And is it permissible that it be: God, Most Blessed, Most High, in His name, made a thing ḥarām through the ḥalāl, and I make it ḥarām through the ḥarām – while the ḥarām is the opposite (ḍiddu) of the ḥalāl?	17879 – قُلْتُ: أَفِيَحُوزُ أَنْ يَكُونَ اللَّهُ – تَبَارَكَ وَتَعَالَى بِاسْمِهِ – حَرَّمَ بِالْحَلَالِ شَيْئًا، فَأَحَرَّمَهُ بِالْحَرَامِ، وَالْحَرَامُ ضِدُّ الْحَلَالِ؟

¹⁷ The opponent is claiming that the ḥarām act of zinā with a woman makes her ḥarām in the same way that the ḥalāl act of marriage makes her ḥarām. Thus, although [A^F] and [A^S] have made [A^{FW}] and [A^{SW}] ḥarām to [A] through the ḥalāl act of marrying their respective wives; [A] has in turn made [A^{FW}] and [A^{SW}] ḥarām to [A^F] and [A^S], respectively, through the ḥarām act of zinā.

¹⁸ I am assuming that this last reference is to the folk of Medina (Dār al-Sunna wa'l Hijra) and Mecca (Ḥaram Allāh). Among other items of note are the use of istidlāl; and the use of ma'nā with qiyās, and the sense that the strongest basis for qiyās is a ma'nā sanctioned by ijma'; and, once again, the appearance of al-ma'qūl among the list of adilla.

17880 – And he said to me: Then did He not make a distinction between them (<i>fa-mā farraqa baynahumā</i>)?	17880 – فَقَالَ لِي: فَمَا فَرَّقَ بَيْنَهُمَا؟
17881 – I said: God, Most High, has indeed made a distinction between them.	17881 – قُلْتُ: فَقَدْ فَرَّقَ اللَّهُ تَعَالَى بَيْنَهُمَا.
17882 – He said: And where?	17882 – قَالَ: فَأَيْنَ؟
17883 – I said: I find that God, to Him belong might and majesty, showed approval of (<i>nadaba ilā</i>) <i>nikāḥ</i> , and He commanded it (<i>amara bihi</i>), and He made it the cause (<i>sabab</i>) of lineage (<i>nasab</i>), and marriage-relationship (<i>ṣihr</i>) and harmony (<i>ulfa</i>) and habitation (<i>sakan</i>). And by means of it [<i>nikāḥ</i>] He confirmed the forbidden things (<i>al-ḥurum</i>) and the <i>ḥaqq</i> belonging to one against another in the <i>mawārīth</i> , and the <i>nafaqa</i> ; and [He confirmed] the <i>ḥaqq</i> of the husband of obedience (<i>bi'l-ṭā'ati</i>), and the permissibility (<i>ibāḥa</i>) of what had been forbidden (<i>muḥarram^{an}</i>) before the <i>nikāḥ</i> .	17883 – قُلْتُ: وَجَدْتُ اللَّهَ عَزَّ وَجَلَّ نَدَبَ إِلَى النِّكَاحِ، وَأَمَرَ بِهِ وَجَعَلَهُ سَبَبَ التَّسَبُّبِ وَالصُّهْرِ وَالْأُلْفَةِ وَالسَّكَنِ، وَأَثْبَتَ بِهِ الْحُرْمَ وَالْحَقَّ لِبَعْضٍ عَلَى بَعْضٍ بِالْمَوَارِيثِ وَالتَّفَقُّعِ، وَالْمَهْرَ وَحَقَّ الزَّوْجِ بِالطَّاعَةِ وَإِبَاحَةَ مَا كَانَ مُحَرَّمًا قَبْلَ النِّكَاحِ.
17884 – 18027 [This lengthy dialectical sequence continues right through to the end of the chapter.]	18027 – 17884

II.§1417

A Historical/Instructional Dialectic on Banishment from the Kitāb al-Ḥudūd wa Ṣifat al-Nafī, under the subheading of Bāb al-Nafī wa'l-'Irāf fi'l-Zinā (Ḥassūn, vol.7, pt.12, 499-503)

23121 – And if someone says (<i>fa-in qāla qā'il^{un}</i>): I don't banish anyone (<i>lā anfi aḥadⁱⁿ</i>).	23121 – فَإِنْ قَالَ قَائِلٌ: لَا أَنْفِي أَحَدًا.
23122 – It was said to one who professes his <i>qawl</i> : And due to what have you rejected the <i>nafī</i> for <i>zinā</i> , when it is confirmed (<i>thābit^{un}</i>) concerning the Prophet, may God bless and save him, and Abū Bakr, and 'Umar, and 'Uthmān, and 'Alī, and Ibn Mas'ūd, and the people, according to us (<i>indanā</i>), up to today?	23122 – فَقِيلَ لِبَعْضٍ مَنْ يَقُولُ قَوْلَهُ: وَلَمْ رَدَدْتَ النَّفْيَ فِي الزِّنَا وَهُوَ ثَابِتٌ عَنِ النَّبِيِّ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – وَأَبِي بَكْرٍ، وَعُمَرَ، وَعُثْمَانَ، وَعَلِيٍّ، وَابْنِ مَسْعُودٍ، وَالنَّاسِ عِنْدَنَا إِلَى الْيَوْمِ؟
23123 – He said: I rejected it because the Messenger of God, may God bless and save him, said: «The woman does not embark upon a journey which will be three days [or more] – except with a male within the forbidden degrees (<i>dhī maḥramⁱⁿ</i>).» ¹⁹	23123 – قَالَ: رَدَدْتُهُ لِأَنَّ رَسُولَ اللَّهِ – صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ – قَالَ: «لَا تُسَافِرُ الْمَرْأَةُ سَفَرًا يَكُونُ ثَلَاثَةَ أَيَّامٍ إِلَّا مَعَ ذِي مَحْرَمٍ.»
23124 – So I said to him: The “journey” of the woman is something from which the woman is protected (<i>ḥiṭat</i>), as regards what is not imposed upon her (<i>lā yalzamuhā</i>) of journeys. For she has been forbidden to be alone in the city (<i>fi'l-miṣri</i>) with a man; and she has been commanded to remain in her house; and it was said to her: Your <i>ṣalāt</i> in your house is preferable – that you be not exposed to being tempted, and that no one be tempted by you. ²⁰ And this is not of what compels her to the road (<i>yulzimuhā bi-sabīlⁱⁿ</i>). ²¹	23124 – فَقُلْتُ لَهُ: سَفَرُ الْمَرْأَةِ شَيْءٌ حِيطَتْ بِهِ الْمَرْأَةُ فِيمَا لَا يُلْزِمُهَا مِنَ الْأَسْفَارِ، وَقَدْ نَهَيْتُ أَنْ تَخْلُوَ فِي الْمِصْرِ بِرَجُلٍ، وَأُمِرَتْ بِالْقَرَارِ فِي بَيْتِهَا، وَقِيلَ لَهَا: صَلَاتُكَ فِي بَيْتِكَ أَفْضَلُ؛ لِئَلَّا تُعَرِّضِي أَنْ تُفْتَنِّي وَلَا يُفْتَنَنَّ بِكَ أَحَدٌ. وَلَيْسَ هَذَا مِمَّا يُلْزِمُهَا بِسَبِيلٍ.
23125 – Have you considered (<i>ara'ayta</i>) [what would happen] if someone who attached no importance (<i>yastakhiffu</i>) to <i>khilāf</i> of the Sunna, said: I don't lash her, for reasons of protection (<i>lā aqliduhā bi-</i>	23125 – أَرَأَيْتَ لَوْ قَالَ قَائِلٌ يَسْتَخِفُّ بِخِلَافِ السُّنَّةِ: لَا أَجْلِدُهَا بِمِجَنٍّ. مَا الْحُجَّةُ عَلَيْهِ إِلَّا تَرْكُ الْحُجَّةِ بِالْكِتَابِ وَالْخَبَرِ.

¹⁹ The proponent's response: a Sunnaic *dalīl* which is to serve as the *aṣl* for *qiyās*.

²⁰ Ḥassūn has [لِئَلَّا تُعَرِّضِي أَنْ تُفْتَنِّي وَلَا يُفْتَنَنَّ بِكَ أَحَدٌ], but I have chosen to vowel this phrase differently.

²¹ Again, I have chosen to vowel this differently from Ḥassūn, who has [يُلْزِمُهَا بِسَبِيلٍ]. Al-Shāfi'ī is, in this section, attempting the move of *farq* – he is showing that the *aṣl* chosen by the proponent is ill-suited as a basis of *qiyās* in a matter of *nafī*; it concerns non-essential journeys of the sort from which she is normally discouraged – the key issue being one of “protection.”

<i>mijann</i> ^m); what is the <i>hujja</i> for it, except the abandonment of the <i>hujja</i> in <i>Kitāb</i> and <i>khavar</i> ? ²²	
23126 – Or did you consider (<i>raʿayta</i>), if you offer [as <i>illa</i>] (<i>iʿtalalta</i>), regarding the <i>naḥī</i> , that the Prophet, may God bless and save him, forbade that the woman journey for three [days] unless with a <i>dhī mahram</i> ; what does it have to do with the <i>ḥadd</i> of <i>zinā</i> ? ²³	23126 – أَوْ رَأَيْتَ إِذَا اعْتَلَلْتَ فِي النَّهْيِ بِأَنَّ النَّبِيَّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - نَهَى أَنْ تُسَافِرَ الْمَرْأَةُ ثَلَاثًا إِلَّا مَعَ ذِي مَحْرَمٍ، مَا هُوَ مِنْ حَدِّ الزَّوْنِ.
23127 – He said: Indeed, they both converge (<i>yajtamiʿāni</i>) in a <i>maʿnā</i> : that in the <i>naḥī</i> there is a journey. ²⁴	23127 – قَالَ: إِنَّهُمَا يَجْتَمِعَانِ فِي مَعْنَى أَنَّ فِي النَّهْيِ سَفَرًا.
23128 – We said: And when the two <i>ḥadīths</i> from the two different categories (<i>min al-ṣinḥayni al-mukhtalifayni</i>) converge in a <i>maʿnā</i> of the <i>maʿānī</i> ; do you eliminate (<i>azalta</i>) one of them by means of the other? ²⁵	23128 – قُلْنَا: وَإِذَا اجْتَمَعَ الْحَدِيثَانِ مِنَ الصَّنَفَيْنِ الْمُخْتَلِفَيْنِ فِي مَعْنَى مِنَ الْمَعَانِي أَزَلْتَ أَحَدَهُمَا بِالْآخَرِ؟
23129 – He said: Yes. ²⁶	23129 – قَالَ: نَعَمْ.
23130 – We said: If the <i>naḥī</i> is of the most firmly established of what has been narrated (<i>min athbati mā ruwiya</i>) concerning the Messenger of God, may God bless and save him, and the Imams after him, and the people up to today, according to us (<i>indanā</i>); ²⁷ [Is it not permitted] that we say, just as you have said, when they both converge insofar as there being a journey in it: We permit (<i>abahnā</i>) for the	23130 – قُلْنَا: إِذَا كَانَ النَّهْيُ مِنْ أَثْبَتِ مَا رُوِيَ عَنْ رَسُولِ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - وَالْأَئِمَّةِ بَعْدَهُ وَالنَّاسِ إِلَى الْيَوْمِ عِنْدَنَا أَنْ نَقُولَ كَمَا قُلْتَ لَمَّا اجْتَمَعَا فِي أَنَّ فِيهِ سَفَرًا، أَبَحْنَا لِلْمَرْأَةِ أَنْ تُسَافِرَ ثَلَاثًا أَوْ أَكْثَرَ مَعَ غَيْرِ

²² So far as I can tell, this rhetorical *reductio ad absurdum* is designed to show how the practice of advancing a principle (such as “protection”) over the *hujja* of Qurʾān and Sunna can lead to the unthinkable: a forthright abandonment of the flogging *ḥadd* (a *ḥaqq Allāh*). This is exactly what al-Shāfiʿī is accusing the proponent of doing; this may be seen as the drawing of a parallel – but more obviously absurd – situation, in an attempt to bring the proponent to see the error of his reasoning.

²³ Here al-Shāfiʿī, as questioner, proceeds to his next move: what would be known in the later *jadāl/munāzara* literature as *al-muṭālaba bi-taṣḥīḥ al-illa*.

²⁴ The proponent duly identifies his *illa* – the shared *maʿnā* of “journey;” if considerable travel occasions prohibition in one case, so he reasons, it must produce the same in the case of banishment (which requires considerable travel).

²⁵ I have not yet identified this move of al-Shāfiʿī’s. It constitutes a verification of the proponent’s methodology in what appears to be a question of *taʾarūḍ al-adilla*. When two *adilla* with apparently contrary *aḥkām* (*naḥī-ḥadīth* and *āthār* and continuous *ijmāʿ*ic practice vs. three-day-journey-*ḥadīth*) share the same *maʿnā*, must one cancel the other? How to determine which *ḥukm* wins out?

²⁶ The proponent concedes that one must cancel the other(s) out.

²⁷ Ḥassūn (vol.7, pt.12, 500, n.1) suggests there may be an alteration or lacuna in the text at this point.

women that she travel three [days] or more with another besides a <i>dhī mahram</i> ? ²⁸	ذِي مَحْرَمٍ؟
23131 – He said: No. ²⁹	23131 – قَالَ: لَا.
23132 – We said: And due to what does there belong to you [the right] to eliminate one of the two [<i>ḥadīths</i>] by the other, while that [right] does not belong to us, against you? ³⁰	23132 – قُلْنَا: فَلِمَ كَانَ لَكَ أَنْ تُزِيلَ أَحَدَهُمَا بِالْآخَرِ وَلَا يَكُونُ ذَلِكَ لَنَا عَلَيْكَ؟
23133 – And I said: Have you considered (<i>ara'ayta</i>), if you offer [as 'illa] (<i>i'talalta</i>) that you abandon the <i>naḥī</i> because there is, in it, a journey with other than a <i>dhī mahram</i> ; if a <i>bikr</i> commits <i>zinā</i> in Baghdād and you lash her, then her father comes along, and her brothers, ³¹ and a great number — all of them <i>mahram</i> for her, and they say: She has sinned (<i>fasadat</i>) in Baghdād, but her <i>ahl</i> are in al-Madā'in; and you yourself permit the journey with a <i>dhī mahram</i> to what is distant, and you permit it for less than three [days] with another besides a <i>dhī mahram</i> , and the two matters (<i>al-amrānī</i>) have converged for you; ³² and we ourselves are <i>dhawū mahram</i> , so you will banish her from Baghdād, and she will go out with a <i>dhī mahram</i> — for a time appointed (<i>ilā shahr^{im}</i>) which you have permitted her with another besides a <i>dhī mahram</i> — to her <i>ahl</i> , and you will remove her from (<i>tunahīyuhā</i>) a <i>balad</i> in which she has sinned, and yet remain, by [doing] that, a benefactor to us?	23133 – وَقُلْتُ: أَرَأَيْتَ إِذَا اعْتَلَلْتَ بِأَنَّكَ تَرَكْتَ النَّهْيَ لِأَنَّ فِيهِ سَفَرًا مَعَ غَيْرِ ذِي مَحْرَمٍ، إِنْ زَنَتْ بَكْرٌ بَعْدَادَ فَجَلَدْتَهَا، فَجَاءَ أَبُوهَا وَإِخْوَتُهَا وَعَدَدٌ كَثِيرٌ كُلُّهُمْ مَحْرَمٌ لَهَا فَقَالُوا: قَدْ فَسَدَتْ بَعْدَادَ وَأَهْلُهَا بِالْمَدَائِنِ، وَأَنْتَ تُبَيِّحُ السَّفَرَ مَعَ ذِي مَحْرَمٍ إِلَى مَا يَبْعُدُ وَتُبَيِّحُهُ أَقْلَ مِنْ ثَلَاثٍ مَعَ غَيْرِ ذِي مَحْرَمٍ، وَقَدْ اجْتَمَعَ لَكَ الْأَمْرَانِ، فَتَحْنُ ذَوُو مَحْرَمٍ فَتَنْفِيهَا عَنْ بَعْدَادَ، فَتَخْرُجُ مَعَ ذِي مَحْرَمٍ إِلَى شَهْرٍ قَدْ تُبَيِّحُهُ لَهَا مَعَ غَيْرِ ذِي مَحْرَمٍ إِلَى أَهْلِهَا وَتُنَحِّيهَا عَنْ بَلَدٍ قَدْ فَسَدَتْ بِهِ، وَلَا تَزَالُ بِذَلِكَ مُنْعِمًا عَلَيْنَا.
23134 – He said: I would not banish her, because she is in full ownership of herself (<i>mālikat^{un} li-nafsihā</i>); so I would not banish her.	23134 – قَالَ: لَا أَنْفِيهَا لِأَنَّهَا مَالِكَةٌ لِنَفْسِهَا، فَلَا أَنْفِيهَا.
23135 – We said: Then there has disappeared (<i>faqad zāla</i>) the two <i>ma'nās</i> by	23135 – قُلْنَا: فَقَدْ زَالَ الْمَعْنَيَانِ اللَّذَانِ

²⁸ Al-Shāfi'ī, his cancellation premise conceded, offers his next premise. It is a principle of epistemic authority (which his *adilla* obviously enjoy). Accepting that the *adilla* converge in the "journey" *ma'nā*, and that one *ḥukm* must cancel the other; should he not be allowed to cancel out the *ḥukm* of the three-day-journey-*ḥadīth* with his epistemically superior *adilla*?

²⁹ The proponent will not concede this point.

³⁰ Al-Shāfi'ī aims to underscore the proponent's inconsistency of method — exposed through his refusal of §23130 — through a rhetorical question.

³¹ I have preferred this over Ḥassūn, who has [وأخواتها].

³² I believe the referenced convergence to be: 1) all of her proposed escorts are *dhawū mahram*; and 2) Al-Madā'in (the old Sasānid capital) is a mere 20 miles away — certainly less than three nights' journey from Baghdād.

which you adduced an 'illa (i'talalta bihimā). For if you had abandoned the nafi for her due to them (min aqlihimā) [the two ma'nās], you would have banished her in those two circumstances (hātayni al-hālatayni).	اعْتَلَّتْ بِهِمَا، فَلَوْ كُنْتَ تَرَكْتَ النَّفْيَ لَهَا مِنْ أَجْلِهِمَا نَفَيْتَهَا فِي هَاتَيْنِ الْحَالَتَيْنِ.
23136 – And we said to him: Have you considered (ara'ayta) [what would happen] if she is in a desert (bādiya), there being no qādī at her village except at three nights' [distance] or greater, and a mudda' raised claim to a haqq against her, or she perpetrated (aṣābat) a ḥadd? ³³	23136 – وَقُلْنَا لَهُ: أَرَأَيْتَ إِنْ كَانَتْ بِبَادِيَةٍ لَا قَاضِيَ عِنْدَ قَرْيَتِهَا إِلَّا عَلَى ثَلَاثِ لَيَالٍ أَوْ أَكْثَرَ، فَادَّعَى عَلَيْهَا مُدَّعٍ حَقًّا، أَوْ أَصَابَتْ حَدًّا.
23137 – He said: She is brought before the qādī.	23137 – قَالَ: تُرْفَعُ إِلَى الْقَاضِي.
23138 – We said: With other than a dhī maḥram? ³⁴	23138 – قُلْنَا: مَعَ غَيْرِ ذِي مَحْرَمٍ؟
23139 – He said: Yes.	23139 – قَالَ: نَعَمْ.
23140 – We said: So you have permitted for her that she travel three [days] or more with other than a dhī maḥram?	23140 – قُلْنَا: فَقَدْ أَبَحْتَ لَهَا أَنْ تُسَافِرَ ثَلَاثًا أَوْ أَكْثَرَ مَعَ غَيْرِ ذِي مَحْرَمٍ.
23141 – He said: This is enjoined upon her (yalzamuhā).	23141 – قَالَ: هَذَا يَلْزُمُهَا
23142 – We said: So this is imposed upon her, in your opinion (bi-ra'yika), and you permitted it for her; but you prevented her from it regarding that for which the Messenger of God, may God bless and save him, has laid down sunna (sanna fīhi), and which he reported on the authority of God, Most Mighty, Most Sublime, as regards her. ³⁵	23142 – قُلْنَا: فَهَذَا يَلْزُمُهَا بِرَأْيِكَ، فَأَبَحْتَهُ لَهَا وَمَنْعْتَهَا مِنْهُ فِيمَا سَنَّ فِيهِ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - وَأَخْبَرَ بِهِ عَنْ اللَّهِ جَلَّ وَعَلَا فِيهَا.
23143 – Al-Shāfi'ī said: And we said: Have you considered (ara'ayta), when you adduced as 'illa (i'talalta) regarding the woman, that which you have adduced as 'illa by it; does the man require a dhī maḥram?	23143 – قَالَ الشَّافِعِيُّ: وَقُلْنَا: أَرَأَيْتَ إِذَا اعْتَلَّتْ فِي الْمَرْأَةِ بِمَا اعْتَلَّتْ بِهِ أَيْحْتَاجُ الرَّجُلُ إِلَى ذِي مَحْرَمٍ؟
23144 – He said: No.	23144 – قَالَ: لَا.
23145 – We said: So due to what do you not banish him?	23145 – قُلْنَا: فَلِمَ لَمْ تُنْفِهِ؟

³³ Note that, unlike in many other instances of ara'ayta, no answer is suggested by the questioner; the question is thus open-ended, and not restricted to a yes/no response.

³⁴ Presumably, it would be the jilwāz, or some other functionary, who brought her to the qādī.

³⁵ As we have seen before, the intermediacy of the Prophet is expressed with the same formula as is used in an isnād — only in this case God is the source: akhbara bihi 'an Allāh.

23146 – He said: Indeed it is one <i>ḥadd</i> ; if it disappears from (<i>zāla</i> 'an) one of them, it disappears from the other.	23146 – قَالَ: إِنَّهُ حَدٌّ وَاحِدٌ فَإِذَا زَالَ عَنْ أَحَدِهِمَا زَالَ عَنِ الْآخَرِ.
23147 – And this is also from among your sophisms (<i>shubahikum</i>), by which you [pl.] adduce as 'illa (<i>ta'tallūna bihā</i>); while you [pl.] know that you are in error regarding it (<i>mukhṭi'ūna fihā</i>) – or you intend the positing of error (<i>ta'nūna mawḍi'a al-khaṭa'i</i>).	23147 – قُلْنَا: وَهَذَا أَيْضًا مِنْ شُبْهِكُمُ الَّتِي تَعْتَلُونَ بِهَا وَأَنْتُمْ تَعْلَمُونَ أَنَّكُمْ مُخْطِئُونَ فِيهَا، أَوْ تَعْنُونَ مَوْضِعَ الْخَطَأِ.
23148 – He said: And how so?	23148 – قَالَ: وَكَيْفَ؟
23149 – We said: What do you say regarding a free <i>thayyib</i> who commits <i>zinā</i> with a <i>bikr</i> ; and a free <i>thayyib</i> who commits <i>zinā</i> with an <i>ama</i> ; and a free <i>thayyib</i> who commits <i>zinā</i> with one who is forced against her will (<i>mustakrahāt^m</i>)?	23149 – قُلْنَا: مَا تَقُولُ فِي ثَيِّبٍ حُرٍّ زَنَى بَبِكْرٍ، وَثَيِّبٍ حُرٍّ زَنَى بِأَمَةٍ، وَثَيِّبٍ حُرٍّ زَنَى بِمُسْتَكْرَهَةٍ؟
23150 – He said: Upon the <i>thayyib</i> is [imposed], as regards this, all of it, the <i>rajm</i> . And upon the <i>bikr</i> is [imposed] the hundred [lashes], and upon the <i>ama</i> is [imposed] fifty. And there is not [imposed] upon the <i>mustakraha</i> anything.	23150 – قَالَ: عَلَى الثَّيِّبِ فِي هَذَا كُلُّهُ الرَّجْمُ، وَعَلَى الْبِكْرِ مِائَةٌ، وَعَلَى الْأَمَةِ خَمْسُونَ، وَلَيْسَ عَلَى الْمُسْتَكْرَهَةِ شَيْءٌ.
23151 – We said: And likewise, if the woman is a <i>thayyib</i> , and the one with whom she commits <i>zinā</i> is a slave; she is stoned, and the slave is lashed fifty [lashings]?	23151 – قُلْنَا: وَكَذَلِكَ إِنْ كَانَتِ الْمَرْأَةُ ثَيِّبًا وَمَنْ زَنَى بِهَا عَبْدًا، رُجِمَتْ وَجُلِدَ الْعَبْدُ خَمْسِينَ؟
23152 – He said: Yes.	23152 – قَالَ: نَعَمْ.
23153 – We said: And due to what? Is it not because you impose upon each one of them his own <i>ḥadd</i> , and you do not remove it from him due to the fact that another besides him makes him share in it?	23153 – قُلْنَا: وَلِمَ؟ أَلَيْسَ لَأَنَّكَ تُلْزِمُ كُلَّ وَاحِدٍ مِنْهُمَا حَدَّ نَفْسِهِ وَلَا تُزِيلُهُ عَنْهُ بِأَنْ يَشْرِكَهُ فِيهِ غَيْرُهُ؟
23154 – He said: Yes.	23154 – قَالَ: نَعَمْ.
23155 – I said: Then due to what is the man – when he has no need for a <i>maḥram</i> – not banished (<i>lā yakūnu... manfiyy^{am}</i>); while the <i>naḥī</i> is his <i>ḥadd</i> ?	23155 – قُلْتُ: فَلِمَ لَا يَكُونُ الرَّجُلُ إِذَا كَانَ لَا يَحْتَاجُ إِلَى مَحْرَمٍ مَنَفِيًّا، وَالنَّهْيُ حَدُّهُ.
23156 – He said: 'Umar had banished a man, and he said: I will not banish after him (<i>lā anfi ba'dahu</i>).	23156 – قَالَ: فَقَدْ نَفَى عُمَرُ رَجُلًا وَقَالَ: لَا أَنْفِي بَعْدَهُ.
23157 – I said: 'Umar banished a man for drinking (<i>fi'l-khamr</i>); while the <i>naḥī</i> in the Sunna is [imposed] upon the <i>zānī</i> and the	23157 – قُلْتُ: نَفَى عُمَرُ رَجُلًا فِي الْخَمْرِ،

mukhannath,³⁶ and in the Kitāb, upon the brigand (*muḥārib*). And it [‘Umar’s *naḥī*] is the *khilāf* of both their [Sunna and Qur’ān’s] *naḥī* [which is] not for anyone besides them [*zānī*, *mukhannath*, and *muḥārib*]. And if ‘Umar opined *naḥī* for the [drinking of] *khamr*, then he opined to cease from that; then *khamr* is not *zinā*. And ‘Umar has banished for *zinā* — so due to what do you not base you *ḥujja* upon (*taḥtajja bi-*) the *naḥī* of ‘Umar for *zinā*? While it has become evident to us — to us, and to you — that there is, in a solitary [report] with the Messenger of God (*aḥadⁱⁿ ma’a rasūli Allāhi*), may God bless and save him, no *ḥujja*?

وَالنَّهْيُ فِي السُّنَّةِ عَلَى الزَّانِي وَالْمُخَنَّثِ، وَفِي
الْكِتَابِ عَلَى الْمُحَارِبِ، وَهُوَ خِلَافٌ بَيْنَهُمَا،
لَا عَلَى أَحَدٍ غَيْرِهِمْ، فَإِنْ رَأَى عُمَرُ نَهْيًا فِي
الْخَمْرِ، ثُمَّ رَأَى أَنْ يَدْعَهُ، فَلَيْسَ الْخَمْرُ بِالزِّنَا،
وَقَدْ نَهَى عُمَرُ فِي الزِّنَا، فَلِمَ لَمْ تَحْتَجَّ بِنَهْيِ
عُمَرَ فِي الزِّنَا؟ وَقَدْ تَبَيَّنَا نَحْنُ وَأَنْتَ أَنْ لَيْسَ
فِي أَحَدٍ مَعَ رَسُولِ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ
وَسَلَّمَ - حُجَّةٌ؟

³⁶ See the MF (s.v. “مخنث”) for a full definition. The term has been applied to effeminate males, or as a synonym for *lūṭī*.

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