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THE LEGAL HERMENEUTICS OF AL-SHĀFI'Ī AND IBN QUTAYBA: A RECONSIDERATION*

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Abstract

In a 1993 monograph Norman Calder argued that Shāfi'ī's (d. 204/820) *Risāla* must be a product of the early fourth/tenth centuries. Calder's argument, which has not been seriously challenged, rested mostly on a comparison of the *Risāla*'s hermeneutic techniques with those of Ibn Qutayba's (d. 276/889) *Ta'wīl mukhtalif al-ḥadīth*. A comparison of these two works shows that the evidence is much more equivocal than Calder allowed. Moreover, the overriding purposes of the two works differ to an extent which robs Calder's argument of much of its force. A close examination of the two authors' hermeneutics shows, however, that Ibn Qutayba's relatively unsystematic *Ta'wīl* stands closer to classical *uṣūl al-fiqh* in several important respects than does Shāfi'ī's *Risāla*. The relationship between the two works is thus broadly consistent with their traditional datings and ascriptions.

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I. *Introduction*

In his 1993 monograph *Studies in Early Muslim Jurisprudence*,[1] Norman Calder argued that the *Risāla*, attributed to Muḥammad b. Idrīs al-Shāfiʿī (d. 204/820), must post-date the *Taʾwīl Mukhtalif al-Ḥadīth* of Ibn Qutayba (d. 276/889).

Calder's sensational redating of the *Risāla* rested mostly on a comparison of the hermeneutic techniques employed in these two works. Although certain other of Calder's revisionist conclusions in his *Studies* have been shown to be without merit,[2] his work remains an important contribution to the study of early Islamic law. Still, Calder's conclusions in regard to Shāfiʿī and Ibn Qutayba simply do not follow from the evidence that he adduces. Therefore, convinced by the importance of Calder's project to compare these two authors' legal hermeneutics but unconvinced by his conclusions, I retrace some

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[1] N. Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Clarendon Press, 1993).

[2] Calder's redating of the early Mālikī textual tradition, for example, is untenable. See the reviews by M. Muranyi, "Die frühe Rechtsliteratur zwischen Quellenanalyse und Fiktion," *Islamic Law and Society* 4:2 (1997), 225-41; Y. Dutton, *Journal of Islamic Studies* 5:1 (1994), 102-8; and M. Fierro, "Nuevas Perspectivas Sobre la Formación del Derecho Islámico," *Al-Qanṭara* 21 (2000), 511-23. See also the articles by H. Motzki, "The Prophet and the Cat: On Dating Mālik's *Muwaṭṭaʾ* and Legal Traditions," *Jerusalem Studies in Arabic and Islam* 22 (1998): 18-83; Y. Dutton, "*ʿAmal* vs. *Ḥadīth* in Islamic Law: The Case of *Sadl al-Yadayn* (Holding One's Hands by One's Sides) When Doing Prayer," *Islamic Law and Society* 3 (1996): 13-40, esp. 28-33; and W. Hallaq, "On Dating Malik's *Muwatta*," *UCLA Journal of Islamic and Near Eastern Law* 1 (2001): 47-65. A more general critique is offered by J. Burton, "Rewriting the Timtetable of Early Islam," *Journal of the American Oriental Society* 115:3 (1995), 453-62. Less critical but with some reservations are R. Peters, *International Journal of Middle East Studies* 26 (1994), 699-701 and I. Schneider, *Journal of Religion* 75:4 (1995), 604-6. Favorable, but not uncritical, are B. Weiss, *British Journal of Middle East Studies* 21:2 (1994), 253-5; A. Rippin, *Journal of Semitic Studies* 39:2 (1994), 346-7; G.R. Hawting, *Bulletin of the School of Oriental and African Studies* 59:1 (1996) 139-41; and L. Rosen, *Law and History Review* 13:1 (1995), 137-9. Relentlessly negative is M. al-Faruque, *Muslim World Book Review* 15:1 (1994), 11-5. Of these, only two mention Calder's comparison of Shāfiʿī and Ibn Qutayba. Burton dismisses "Calder's incongruous comparison of Shāfiʿī's forensic skills with the bumbling performance of the humorless and unimaginative Ibn Qutayba" (p. 460). Peters notes that in light of the failure of Shāfiʿī's doctrines to gain immediate acceptance (see the works by Wael Hallaq cited below), Ibn Qutayba's apparent ignorance of Shāfiʿī's hemeneutical techniques is easily explained (p. 700). See the following note for the reception of Calder's ideas in the scholarship of Chistopher Melchert.

of the ground that he covered in his *Studies*, finding it to be of inherent interest, but not, perhaps, as compelling as he claimed. I also consider material and issues which, though ignored by Calder, are vital to understanding how and why Shāfiʿī's *Risāla* and Ibn Qutayba's *Taʾwīl* differ. Accordingly, in this article, I will undertake a detailed comparison of the legal-hermeneutic approaches of Shāfiʿī's *Risāla* and the *Taʾwīl Mukhtalif al-Ḥadīth* of Ibn Qutayba. This study is warranted, in the first place, because Calder's revisionist claims about the *Risāla* and the *Taʾwīl* deserve to be tested,[3] but this study is also of general interest for the early history of Islamic legal hermeneutics.[4] The origins

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[3] Christopher Melchert has agreed with Calder that the *Risāla* post-dates Shāfiʿī. He initially accepted Calder's redating. See C. Melchert, *Formation of the Sunni Schools of Law* (Leiden: E.J. Brill, 1997), 68 (but see his review, "Discerning the Will of God: Four Recent Books on Islamic Law," *Religious Studies Review* 23:1 (1997), 11-5, which is more reticent). Subsequently, however, he modified his view and now assigns the *Risāla* to the later ninth century. See "Qurʾānic Abrogation across the Ninth Century: Shāfiʿī, Abū ʿUbayd, Muḥāsibī, and Ibn Qutaybah," in Bernard G. Weiss ed., *Studies in Islamic Legal Theory* (Leiden: E.J. Brill, 2002), 75-98. In that article, Melchert compares the hermeneutic techniques, doctrines, and legal reasoning of the jurists named in the title, in the process covering some of the same ground as this article. Whereas Calder argues that the *Risāla* and the *Taʾwīl* are very different, Melchert argues that their substantial similarities compel the conclusion that they are roughly contemporaneous. In another article, Melchert again compares the *Taʾwīl* and the *Risāla*, finding that they both belong to a mid- to late ninth-century trend of arguing for the equally revelational character of Qurʾān and prophetic *ḥadīth*. "Traditionist-Jurisprudents and the Framing of Islamic Law," *Islamic Law and Society* 8 (2001), 383-406, at 394, 402-4. This article aims primarily to correct Calder's conclusions, but I will refer to Melchert's views on occasion in the notes. I should note that I have benefited from discussions of these issues with Dr. Melchert, and am grateful to him for providing me with a copy of his above-cited review.

[4] Gerard Lecomte has compared Ibn Qutayba's *Taʾwīl* with another work by Shāfiʿī, the *Ikhtilāf al-Ḥadīth*, "Un Exemple d'Évolution de la Controverse en Islam: De l'Iḫtilāf al-Ḥadīth d'al-Šāfiʿī au Muḫtalif al-Ḥadīth d'Ibn Qutayba," *Studia Islamica* 27 (1967), 5-40. Calder seems to have been unaware of Lecomte's comparison, even though Lecomte also refers occasionally to the *Risāla*. In terms of outward literary form, Shāfiʿī's *Ikhtilāf* and the *Taʾwīl* are similar to one another: both have a substantial theoretical introduction followed by a discussion of numerous legal problems involving contradictory *ḥadīth* and related textual difficulties. Although Lecomte focused more on results than reasoning techniques, he did make two valid observations: Ibn Qutayba is inferior to Shāfiʿī in regard to technical legal reasoning, and Ibn Qutayba is also much more concerned with theology than with law. Similarities between the harmonizing approaches of Shāfiʿī and Ibn Qutayba have been recognized by Ignaz Goldziher, Joseph Schacht, and most recently Eerik Dickinson. I. Goldziher, *Muslim Studies*, 2 vols., tr. C.R. Barber, S.M. Stern (London: George Allen and Unwin, 1971), v. 2, 86; J. Schacht, *The*

of Islamic legal theory, which are still poorly understood, lie in the ninth century, and the few preserved texts that engage in self-conscious legal interpretation, such as the *Risāla* and the *Ta'wīl*, constitute a major part of what little evidence we have on the subject.

After a few brief remarks concerning these two authors, I will compare their hermeneutic strategies in a variety of legal example-problems, using the hermeneutic rubric *ʿāmm:khāṣṣ* as a starting-point, and then turning to a more general examination of their strategies for harmonizing contradictory revealed texts. I will then offer a broader, summary comparison of the specific hermeneutic techniques employed by each. It will emerge that, in many instances, Ibn Qutayba and Shāfiʿī exhibit more similarities in their hermeneutic techniques than Calder allowed. It will also become clear that to the extent that there are important differences between their approaches—and there are—these flow from the very different purposes of the *Risāla* and the *Ta'wīl Mukhtalif al-Ḥadīth*. The former elaborates a systematic and complete theory of a revealed law; the latter comprises a theological treatise in defense of the Prophetic *ḥadīth*.

Shāfiʿī and Ibn Qutayba[5]

Shāfiʿī spent his entire life steeped in the study, teaching, and elaboration of the law.[6] His teachers included legal luminaries such as Sufyān

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Origins of Muhammadan Jurisprudence (Oxford: Clarendon Press, 1950), 257; E. Dickinson, *The Development of Early Sunnite Ḥadīth Criticism* (Leiden: E.J. Brill, 2001), 6. Both Goldziher and Schacht suggest that Ibn Qutayba was influenced in his hermeneutics by Shāfiʿī.

[5] Both the *Risāla* and the *Ta'wīl* represent works that were composed later in their respective authors' lives. Up-to-date background information on Shāfiʿī may be found in E. Chaumont, "al-Shāfiʿī," *Encyclopaedia of Islam*, New Edition (Leiden: Brill, 1954 -) (hereinafter *EI*[2]), v. 9, 181-5. My dissertation contains a detailed study of Shāfiʿī's *Risāla*: "The Legal-Theoretical Content of the *Risāla* of Muḥammad b. Idrīs al-Shāfiʿī," Ph.D. Diss. (University of Pennsylvania, 1999). For Ibn Qutayba's life and works, see G. Lecomte, "Ibn Ḳutayba," *EI*[2], v. 3, 845-7, Lecomte's study *Ibn Qutayba: L'Homme, son Oeuvre, ses Idées* (Damascus: Institut Français, 1965), and his French translation of the *Ta'wīl*, *Le Traité des Divergences du Ḥadīth d'Ibn Qutayba* (Damascus: Institut Français de Damas, 1962). Michael Cook usefully characterizes a number of Ibn Qutayba's concerns in the *Ta'wīl* in "Ibn Qutayba and the Monkeys," *Studia Islamica* 89 (1999), 43-74. See also my articles on "al-Shafi'i" and "Ibn Qutayba" in the forthcoming volume of the *Dictionary of Literary Biography* entitled *Arabic Literary Culture c. 500-925* (Detroit: Gale).

[6] Shāfiʿī's legal output was enormous. He is also said to have authored a work on archery, and a *dīwān* of poems is attributed to him. See F. Sezgin,

b. ʿUyayna (d. 196/811) in Mecca, Mālik b. Anas (d. 179/796) in Medina, and Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/805) in Baghdad. He was through and through a jurist. What is more, he aimed not merely at correctly stating legal doctrine on points of substantive law (as in his voluminous *Kitāb al-Umm*), but also at justifying the supremacy of law in Islam generally through the elaboration of an overarching theory of the fundamentally legislative character of revelation (above all in his *Risāla*, but in other works as well).

Ibn Qutayba's commitments were no less far-reaching or significant than Shāfiʿī's, but they were of an altogether different sort. Ibn Qutayba sought to mold a mass of disparate textual materials of the most diverse kinds into a uniquely Arabo-Islamic literary tradition. This tradition needed, on the one hand, to serve as the basis for a broad and vigorous, and ideologically powerful and attractive, high culture; on the other hand, it needed to form a bulwark against foreign and speculative intellectual pursuits, especially rationalist theology and its Greek underpinnings.[7] In pursuing this project to create an appropriate cultural memory, Ibn Qutayba's interests ranged exceptionally widely, from belletristic literature, to history, to the linguistic competence and the general cultural literacy of the bureaucracy, to problems in the language of revealed texts. Crucially, Ibn Qutayba, quite unlike Shāfiʿī, was not necessarily writing for specialists.[8] Nonetheless, Ibn Qutayba also

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Geschichte des arabischen Schriftums, 9 vols. to date (Leiden: E.J. Brill, 1967 -), v. 1, 490 (no. IX) and *Dīwān al-Shāfiʿī*, ed. M. ʿA. al-Zughbī (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, 1983). Titles of three additional, possibly non-legal works have recently been noted by Dickinson, *Early Sunnite Ḥadīth Criticism*, 39. I owe this last reference to Christopher Melchert.

[7] The latter concern is expressed, for example, in two works written twenty years apart, the *Adab al-Kātib*, ed. M.M. ʿAbd al-Ḥamīd (Cairo: Maktabat al-Saʿāda, 1963), composed shortly after 850, and in his penultimate (or final) work, the *Taʾwīl*, composed after 870. In the former he chastises the *kuttāb* for being enchanted by the technical terms of theological and philosophical debate, including *al-kayfīya wa'l-kamīya...wa'l-jawhar wa'l-ʿaraḍ* (pp. 3-4). In the *Taʾwīl*, he complains that the *ahl al-kalām* use a superfluously un-Islamic vocabulary, including *al-ʿaraḍ wa'l-jawhar wa'l-kayfīya wa'l-kamīya* (p. 13, tr. p. 15). The substantial terminological overlap is noteworthy.

[8] Excellent appraisals of Ibn Qutayba's project are given by Bray, "Lists and Memory: Ibn Qutayba and Muhammad b. Habib," and Montgomery, "Of Models and Amanuenses." The *Taʾwīl* was written at the urging of an unnamed patron, possibly someone connected with the de facto ʿAbbasid head of government al-Muwaffaq (d. 278/891), brother of the caliph al-Muʿtamid (r. 256-79/870-92). Still, the question of its intended audience remains an open one, but in light of Ibn Qutayba's other works, it is possible that it was intended for an emergent, literate class of private readers, not for jurists or theologians (specialists).

made forays into law and theology, and he even held judicial appointments for a time.[9] Ibn Qutayba is a generalist, albeit gifted enough to move competently in many different intellectual arenas, and even excelling in not a few. For Ibn Qutayba the generalist, law is one piece of a larger puzzle; for Shāfiʿī, the specialist, it is everything. It would be surprising indeed if the two works under discussion in this article did not differ in substantial ways.

II. *Shāfiʿī's and Ibn Qutayba's Hermeneutics*

It will be convenient to begin the comparison of these two authors' works on hermeneutics by considering some of the conclusions reached by Calder. Calder's analysis of the *Risāla* and the *Taʾwīl* consists of a comparison of the respective authors' hermeneutic approaches.[10] After finding that certain specific techniques or refinements of techniques are present in the *Risāla* but not in the *Taʾwīl*, he concludes that the *Risāla* "fits" "much more comfortably into a proposed dating of *c.* 300 [/912-13] than into any earlier period" (*Studies*, p. 242).[11] This conclusion would assign the *Risāla* to a period approximately a quarter century after Ibn Qutayba's death (276/889), about a century later than its traditional ascription.[12]

Calder identifies in the *Taʾwīl* not only absences indicative of historical precedence, but also qualitative differences between it and the *Risāla*, a point to which he frequently returns:

> As a master of *adab*, Ibn Qutayba was perhaps undisturbed by the abrupt transitions and inconsequential juxtapositions, and disinclined towards systematic theoretical thought. His solutions are *ad hoc*; his skills are those of a sensitive littérateur rather than a jurist or a theologian; his theoretical framework is large but not evidently scientific. When compared with the systematic theoretical exposition of Shāfiʿī's *Risāla* ... the rudimentary nature of his categories and terminology becomes evident. (*Studies*, p. 224)

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[9] Lecomte, *Ibn Qutayba*, 32-7, 42-3. He also studied law with at least one jurist of good reputation: Isḥāq b. Rāhōya (d. 237/851), himself a student of Aḥmad b. Ḥanbal. *Ibn Qutayba*, 52-3.

[10] *Studies*, 223-7, 233-4 and 241-2. Most of these are quoted in this article.

[11] Calder also detects signs of organic growth and redaction in the *Risāla* consistent with corporate authorship over a period of time. *Studies*, 241-2. Against this view, see my "Legal-Theoretical Content."

[12] Ibn Qutayba mentions Shāfiʿī in the *Taʾwīl*, numbering him among a group of jurists (*qawm min al-fuqahāʾ*), along with Ibn Qutayba's teacher, Isḥāq b. Rāhōya (problem 95, p. 213; see below for citation conventions).

> Though Ibn Qutayba's intelligence, cunning and resourcefulness are everywhere evident, as also his broad sensitivity to literary problems, he clearly does not have access to a systematic hermeneutic framework such as is provided in the *Risāla*. (*Studies*, p. 225)

> In all categories except one, the *Risāla* is a more sophisticated work and it should accordingly be recognized as representing a later stage of development.[13] (*Studies*, p. 226)

ʿĀmm and Khāṣṣ

Calder sensed, and quite rightly, the centrality of the pair *ʿāmm:khāṣṣ* to the argument presented by Shāfiʿī in his *Risāla*.

> Shāfiʿī's *Risāla* shows an astonishing technical foregrounding of the hermeneutic device known as *ʿāmm:khāṣṣ*. This is both the first major topic addressed in that work and one of the lengthier. (*Studies*, p. 233)

It is one of three "major devices signalled" in the *Risāla* (*Studies*, p. 241).[14] Particularly significant for Calder, however, is its absence from Ibn Qutayba's *Taʾwīl*:

> A fundamental hermeneutic category adduced and explored in the *Risāla* is that known by the terms *ʿāmm* and *khāṣṣ*, the general and the particular. Though there are numerous instances where this terminology would be appropriate, I have found no instances at all where it is used by Ibn Qutayba. (*Studies*, p. 224)

Notwithstanding the importance of the *ʿāmm:khāṣṣ* rubric for Shāfiʿī's way of thinking about the law, the suggestion made in the above quotation—that the *ʿāmm:khāṣṣ* technique post-dates the *Taʾwīl* and that Ibn Qutayba could not therefore have known it—is simply wrong.

Not only is the *ʿāmm:khāṣṣ* rubric attested in the ninth century, Ibn Qutayba knew it. The two terms are used in eighth- and ninth-century *tafsīr*s, informally sometimes, but also technically, and also as labels for text types in the Qurʾān.[15] The root ʿ-m-m in a technical sense also appears in the *Maʿānī al-Qurʾān* of al-Farrāʾ (d. 207/822), though the root kh-ṣ-ṣ does not appear in that work.[16] The word *khāṣṣ*,

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[13] The one category, according to Calder, is identification of figurative language, an issue that I take up below.

[14] Along with *naskh* and the pair *jumla:tabyīn*, discussed below.

[15] C.H.M. Versteegh, *Arabic Grammar and Qurʾānic Exegesis in Early Islam* (Leiden: E.J. Brill, 1993), 74-5 (technical usages), 104-5, 107 (text types).

[16] N. Kinberg, *A Lexicon of al-Farrāʾ's Terminology in his Qurʾān Commentary* (Leiden: E.J. Brill, 1996), 495-6: "general, all-embracing," "in contrast to a form which refers to a particular entity."

and the pair *ʿāmm:khāṣṣ*, appear as technical terms in the *Kitāb al-ʿAyn* of the eighth-century grammarian al-Khalīl (d. ca. 163/780?).[17] The term *ʿāmma* is applied by the jurist Abū Yūsuf (d. 182/798) to Q 59:6 in what looks like a technical sense in his *Kitāb al-Kharāj*.[18] Its use by both Abū ʿUbayd (d. 224/839?) and al-Muḥāsibī (243/857-8) has been noted.[19] Finally, one of Shāfiʿī's students, al-Muzanī (d. 264/878), uses *ʿāmm* and *khāṣṣ* in a full-blown technical sense, and he was born over 35 years before Ibn Qutayba.[20] One could, I suppose, redate all these texts on the basis of Ibn Qutayba's *Taʾwīl* or other criteria, but even putting them all in the last quarter of the ninth century would undermine Calder's argument. And redating would not help with the fact that Ibn Qutayba himself knows the two terms in his *Taʾwīl Mushkil al-Qurʾān*. In that work, he identifies the two concepts as among the *majāzāt* that are part of the Arabic language. He refers specifically to *al-qaṣd bi-lafẓ al-khuṣūṣ li-maʿnā al-ʿumūm wa-bi-lafẓ al-ʿumūm li-maʿnā al-khuṣūṣ*.[21] In fact, as we will see in the next

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[17] In Talmon's reconstruction of al-Khalīl's *Kitāb al-ʿAyn*, *ʿāmm* and *khāṣṣ* denote nouns which are regular, or proper, respectively, and also denote the scope of reference of a noun. R. Talmon, *Arabic Grammar in its Formative Age* (Leiden: E.J. Brill, 1997), 328, 5.13 (proper noun: *ism khāṣṣ lā yajrī majrā al-asmāʾ al-ʿawāmm*), 338, 6.58 (scope of application of a noun: *waʾl-inbijās ʿāmm waʾl-yanbūʿ liʾl-ʿayn khāssatan* [ignoring the obvious misprint of *ḥāʾ* for *khāʾ*]).

[18] *Kitāb al-Kharāj*, ed. I. ʿAbbās (ʿAmmān: Dār al-Shurūq, 1985), 116-7. The verse in question concerns the Prophet's share of the booty taken from the Jewish tribe of Naḍīr. Abū Yūsuf holds that the verse is "generally applicable to all villages," *ʿāmma fī al-qurā kullihā*.

[19] Melchert, "Qurʾānic Abrogation," 81-2, who also surmises that Calder was wrong to think that Ibn Qutayba did not know the opposition *ʿāmm:khāṣṣ*. Muḥāsibī's usage is at least partly driven by the theological question of whether the threat of divine punishment applies generally or only narrowly, not by an interest in harmonizing rules, as it is for Shāfiʿī (see below). On the theological aspects of the *ʿāmm:khāṣṣ* rubric, see Aron Zysow, "The Economy of Certainty," Ph.D. Diss. (Harvard University, 1984), 131-42. It is not clear to me that either Shāfiʿī or Ibn Qutayba has a theological agenda in his employment of this vocabulary, but it is not impossible.

[20] See his *Kitāb al-Amr waʾl-Nahy*, R. Brunschvig ed. and tr., "'Le Livre de l'ordre et de la défense' d'al-Muzani," *Bulletin d'Études Orientales* 11 (1945-1946), 145-96. I discuss this work in a forthcoming article, "The Recepttion of Shāfiʿī's Concept of *amr* and *nahy* in the Thought of his Student al-Muzanī," in *Law and Legal Education in Islam: Studies in Memory of George Makdisi*, eds. J. Lowry, D. Stewart, and S. Toorawa (E.J.W. Gibb Memorial Trust, forthcoming).

[21] *Taʾwīl Mushkil al-Qurʾān*, ed. S.A. al-Ṣaqr (Cairo: al-Ḥalabī, 1954), 15-6. For a discussion of this list of *majāzāt*, see W. Heinrichs, "On the Gensesis of the *Ḥaqīqa-Majāz* Dichotomy," *Studia Islamica* 59 (1984), 111-40, at 130-1, and, by the same author, "Contacts between Scriptural Hermeneutics and Literary Theory

section, Ibn Qutayba even uses cognates from the root kh-ṣ-ṣ in a technical sense in the *Taʾwīl*.

One should not, however, ignore Calder's other insights. He was right to be curious about the hermeneutic strategies in these two texts, right to call attention to their differences, and right to focus on techniques such as the *ʿāmm:khāṣṣ* rubric. I will begin my own analysis of these materials by summarizing what is characteristic about Shāfiʿī's use of the pair *ʿāmm:khāṣṣ*. I will then consider Ibn Qutayba's use of words derived from the root kh-ṣ-ṣ and move from there to an examination of other problems in which he might have been expected to use the *ʿāmm:khāṣṣ* rubric. This procedure offers a convenient means for isolating example-problems in the *Taʾwīl* which might be thought to elicit hermeneutic concerns common to both authors.

Shāfiʿī's Use of ʿāmm and khāṣṣ

There are two salient features of the *ʿāmm:khāṣṣ* rubric as it is used in Shāfiʿī's *Risāla*. First, it functions by taking a legislative pronouncement found in one text, which pronouncement seems to apply to a large, undifferentiated group of persons and then, on the basis of another text, narrowing the scope of the first text's application. For example, in the *Risāla* Shāfiʿī states that the Qurʾānic rules governing inheritance by spouses and parents of the deceased at Q 4:11-12 are "expressed in unrestricted terms" (*ʿāmm al-makhraj*), but that their sphere of application has been limited by the Sunna:

> The Sunna of God's Messenger indicates that He [= God] only meant certain parents and spouses and not others. That is, [he required] that the religion of the parents and their children, and of the spouses, be the same, and that the heir who is a parent or spouse not be a murderer [of the deceased] and not a slave. (*Risāla* §216)[22]

We have, then, a Qurʾānic rule (suggesting that all parents and spouses inherit) which appears to apply unrestrictedly to the entirety of a certain class of heirs and a Sunnaic rule (providing that only some parents and spouses inherit) which restricts the scope of the Qurʾānic rule to those heirs who are Muslims, not slaves, and not the killers of the deceased. The unrestricted, Qurʾānic version of the rule appears *ʿāmm*

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in Islam: The Case of *Majāz*," *Zeitschrift für Geschichte der Arabisch-Islamischen Wissenschaften* 7 (1991-1992), 253-84, at 255-8.

[22] The Sunnaic basis for this statement by Shāfiʿī consists of various *ḥadīth* that he cites later in the *Risāla*, at §§466-80.

at first reading, but when read in conjunction with the Sunnaic text, it emerges that the Qur'ānic text is, in fact, *khāṣṣ*.

Second, Shāfiʿī's use of *ʿāmm:khāṣṣ* almost always represents a technique for harmonizing Qur'ān and Sunna, and it applies asymmetrically to those two texts. Shāfiʿī does not say this, but it is true for the most prominent examples he gives in the *Risāla*. That is, just as in the example above, passages from the Qur'ān always appear *ʿāmm* and individual *ḥadīth*s always show that the Qur'ānic passage in question should be read as *khāṣṣ*. Thus, even though it seems that the *ʿāmm:khāṣṣ* rubric should work for any two texts whatever their provenance, in practice it represents one of Shāfiʿī's principal means of harmonizing potential contradictions between Qur'ān and Sunna. It should be noted, too, that the application of the *ʿāmm:khāṣṣ* technique functions, clumsily perhaps, to create exceptions to rules. It would be simpler to consider the example above as one in which the Sunna carves out an exception to a rule expressed in the Qur'ān.

In any event, the *ʿāmm:khāṣṣ* rubric offers a means of harmonizing apparently inconsistent rules by allowing one to adjust the size of the group to which one of the rules applies. This becomes possible because the class of persons to which the rule applies, whether expressly mentioned or implicit in the rule's structure, could always be a subset of that class (as in the case of the heirs mentioned at Q 4:11-12). In other words, this technique depends on an ambiguity inherent in the presence of any class of persons, or, in grammatical terms, inherent in the use of the plural. That ambiguity can be exploited for purposes of harmonization with a second, potentially inconsistent text. Shāfiʿī considers the specific ambiguity which attends the determination of the precise referent of an express or implied class to be a (hermeneutically useful) property unique to the Arabic language (e.g., *Risāla*, §173).[23]

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[23] It must be emphasized, however, that Shāfiʿī does not conceive of hermeneutic problems in grammatical or linguistic terms, even though he does occasionally suggest that they can involve (unspecified) properties of Arabic. Even his assertion that *ʿumūm* and *khuṣūṣ* are special properties of Arabic feels much more like a theological claim about the special qualities of Arabic than an assessement of Arabic as a linguistic phenomenon. Classical *uṣūl al-fiqh* does conceive of many hermeneutic problems, including those involving the *ʿāmm:khāṣṣ* rubric, as linguistic ones. E.g., Bernard G. Weiss, *The Spirit of Islamic Law* (Athens: University of Georgia Press, 1998), 58-65. Recall that, in the *Mushkil al-Qur'ān*, Ibn Qutayba listed *ʿāmm* and *khāṣṣ* among the *majāz*-properties of the Arabic language. I will return to this point below.

Ibn Qutayba's Use of the Root kh-ṣ-ṣ

Ibn Qutayba uses words derived from the root kh-ṣ-ṣ in four problems, though Calder is right that the word *ʿāmm* and relevant cognates do not appear. I begin my consideration of the *Taʾwīl* by examining these four problems in detail.

Problem 22 (pp. 88-89)[24] concerns a *ḥadīth* "whose beginning," according to Ibn Qutayba's opponents, "is spoiled by its end" (*yufsidu awwalahu ākhiruhu*), in other words, the *ḥadīth* is allegedly incoherent. The *ḥadīth* in question states that "If one of you awakes from sleep, then he should not plunge his hand into the water-container until he washes it three times [*ḥattā yaghsilahā thalāthan*]—after all, he doesn't know where his hand has spent the night."[25] Ibn Qutayba's opponents claim that the last phrase ("he doesn't know where his hand has spent the night") is (a) patently absurd, since everyone knows where their hand has been during the night; (b) legally inapposite, since even if one touches one's genitalia while awake, that does not vitiate one's previous ablutions; and (c) inconsistent with a general precept of the law, to wit, that involuntary acts (e.g., those committed while sleeping) have no adverse legal consequences for the person who commits them. Ibn Qutayba disputes point (b) and in the course of that discussion, he says the following:

> So if the ablutions for touching the genitalia are that one wash the hands, then it is clear that God's Messenger (sl'm) commanded the person waking up from sleep to wash his hand before he puts it into the water-container, because that person does not know where his hand has spent the night. Perhaps, he says, during his sleep he touched his genitalia or his anus with it, and it cannot be certain that a drop of urine or the remnants of semen did not get on his hand if he had sexual intercourse before falling asleep. So if he put it into the water-container before washing it, he would defile the water and spoil it. *He singled out the*

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[24] I cite the number of the problem according to Lecomte's numbering in his French translation and the corresponding pages of the Arabic text. The Arabic text that I am using (Beirut: Dār al-Kitāb al-ʿArabī, n.d.) corresponds in its text and notes to the edition of M. Zuhrī al-Najjār (Cairo: Maktabat al-Kulliyāt al-Azharīya, 1966), but has a different pagination. The individual problems are relatively easy to count so that citations can be located. When citing to the introduction of the *Taʾwīl*, I give the Arabic page numbers first, and then the corresponding pages from Lecomte's translation (e.g.: p. x, tr. p. y).

[25] See A.J. Wensinck, *Concordance et Indices de la Tradition Musulmane*, 8 vols., (Leiden: E.J. Brill, 1943), v. 1, 128, for this *hadīth* (under *inā'*, "water-container").

> *sleeping person for this* [*wa-khaṣṣa al-nā'im bi-hādhā*][26] because the sleeping person's hand might alight on these places, or on his anus, without him being aware of it. (emphasis added)

Ibn Qutayba uses the verb *khaṣṣa* to indicate that the rule in question applies only to sleepers, or rather only to persons who awake from sleep. There is no confusion here about the group to which the rule in question applies. By its own terms, it applies to *all* sleepers (all other things being equal). It is true that sleepers are a subset of the group of persons who must perform ablutions, and it is also true that a slightly more rigorous rule applies to the sleepers than to other members of the class of ablutions-performers, but there is no confusion in the rule itself about the scope of its application. Put differently, this is not a problem requiring the harmonization of two inconsistent rules: there is only one rule and only one group of persons to whom it applies, and there is no competing, inconsistent revealed text which complicates the *ḥadīth* that expresses the rule. Thus, the usual sort of ambiguity which requires Shāfi'ī to invoke the *'āmm:khāṣṣ* technique is absent. The argument in this problem centers on whether the rule—which everyone understands perfectly well—is a good rule or not, and further, and perhaps more importantly, whether, if it is a bad rule (because incoherent), it seems right that it and other rules like it (in the corpus of *ḥadīth*) could be expected to form part of a divine law. Ibn Qutayba's opponents think that it is a characteristically silly rule that reflects badly on Prophetic *ḥadīth*s in general; Ibn Qutayba thinks that it is a rule which can and must be defended in order to maintain the dignity of the corpus of *ḥadīth*.

Whether Ibn Qutayba's deployment of the root kh-ṣ-ṣ in this problem is a garden-variety usage of the verb *khaṣṣa* in the ordinary course or a technical usage is very difficult to say. There is no place in this problem for the term *'āmm* or a cognate in the sense in which such terms are used by Shāfi'ī for the reasons already mentioned, because there is neither a potentially ambiguous class of persons at issue, nor a potentially inconsistent second text.

The second problem, number 65 (pp. 152-3), involves a *ḥadīth* in which Muḥammad insists that his wives conceal themselves completely (*iḥtijāb*) from a blind male visitor. When his wives complain that the man is blind, Muḥammad replies that the issue is that his wives

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[26] Lecomte, *Traité*, 148: "Il a parlé en particulier de l'homme endormi à ce propos..."

should not look at the man. The opponents allege that the Qur'ān and consensus (*ijmāʿ*) invalidate the *ḥadīth*. Consensus, they allege, allows that women may lawfully look at men so long as the women are appropriately covered (*istatarna*). What is more, Q 24:31 provides that women need not cover those of their charms (*zīna*) which in the ordinary course are open to view (*ẓahara*). Ibn Qutayba responds that Muḥammad's wives were implicitly ordered to conceal themselves from all male visitors in Q 33:53.[27] The rule in the *ḥadīth* applies, then, to Muḥammad's wives in particular:

> This [verse] is *for the wives of God's Messenger (ṣlʿm) in particular [khāṣṣatan li-azwāj rasūl allāh], just as they were singled out [khuṣṣiṣna]* in regard to it being unlawful for any Muslim to marry them.[28]

Ibn Qutayba goes on to say, however, that the rule applies mostly in their dwellings, not when they must perform public religious obligations such as the pilgrimage, or have other pressing reasons to go out in public. Repetition of cognates from the root kh-ṣ-ṣ to illustrate the same phenomenon across two different texts raises the possibility that we are dealing with a technical usage of kh-ṣ-ṣ to refer to the application of a rule to a restricted class.

Does the technical term *ʿāmm* have a role to play in this problem? Ibn Qutayba might have said that Q 24:31 should be read as *khāṣṣ* in light of the *ḥadīth* (or in light of Q 33:53, for that matter), i.e., as applying to all women *except* Muḥammad's wives. Instead, however, he seems to be saying that Q 24:31 is simply irrelevant and that the *ḥadīth* in question, consistent with the rule of Q 33:53, applies exclusively to Muḥammad's wives. Put differently, Ibn Qutayba denies that there is anything in this problem, as posed, to harmonize. Again, this problem does not necessarily bear on whether Ibn Qutayba was able to employ the term *ʿāmm* or relevant cognates in legal argumentation.

The third problem, number 103 (pp. 228-9), concerns two allegedly contradictory *ḥadīth*s (*mutanāqiḍān*). One provides that water cannot

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[27] The verse provides, in relevant part: "If you need to ask [the Prophet's] wives for something, then ask from behind a curtain, which is more in keeping with purity for your hearts and theirs."

[28] Lecomte, *Traité*, 250, has: "C'était là un privilège des épouses du Prophète, auxquelles il était en outre spécialement interdit, d'épouser aucun Musulman." His rendering hardly does justice to the obvious technical usage of the root kh-ṣ-ṣ, which is repeated in the parallel example, signaling that it applies across a range of problems.

be defiled by anything and the other that water in an amount greater than or equal to two pitchers full (*idhā balagha...qullatayn*) cannot be defiled. The opponents say that the negative implication of the second *ḥadīth* (small amounts of water can be defiled) contradicts the general import[29] of the first (no matter how small the amount, water cannot be defiled by anything). In this problem we find ourselves clearly in the sort of terrain where Shāfiʿī likes to deploy *ʿāmm* and *khāṣṣ*. Ibn Qutayba replies to his opponents that the first *ḥadīth* refers to water in the sense of largish bodies or amounts of water, which usage, in turn, is the more usual. I quote his analysis in full:

> We say that it [= the second *ḥadīth*] does not contradict the first one. Rather, God's Messenger (ṣlʿm) merely said that water cannot be defiled by anything in the most usual case and for the most part, since what is most usual for wells and pools is that they have a large amount of water. *Accordingly, he uttered the phrase in a way that was of restricted import* [*fa-akhraja al-kalām makhraj al-khuṣūṣ*].[30] This is just like when one says, "Nothing can repel the flood-stream" and, in the same vein, "A wall couldn't hold it [= the flood-stream] back." One intends [thereby] a large amount of it, not a little. It is also like saying, "Nothing can withstand fire." One does not intend thereby the flame in a lantern, which can be extinguished by blowing, and not sparks either. Rather, one intends the fire in a conflagration. Then, after saying that [in the first *ḥadīth*, in the second *hadīth*] he used the term "two pitchers full" to distinguish [*bayyana*] the amount of water that is subject to defilement from a large amount of water that cannot be defiled by anything.

This is an interesting usage of the word *khuṣūṣ*. Ibn Qutayba means to restrict the sphere of the noun's application, but to its most usual and predominant ambit, not to some small, exceptional meaning or range of meanings. Thus, although its meaning is restricted, the resulting sense is the most prevalent one. It is true that Ibn Qutayba

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[29] "Negative implication" and "general import" are my terms, not those of Ibn Qutayba's opponents, who do not use a descriptive technical vocabulary.

[30] Lecomte, *Traité*, 369: "Il a exprimé cette sentence [générale] comme si elle était applicable à tous les cas particuliers." This translation is unsatisfactory—though it is interesting that Lecomte adds the word "générale" in square brackets, presumably as a rendering of an unstated *ʿāmm*. Obviously, Ibn Qutayba means that the word "water" in the *ḥadīth* in question refers to some kinds of water only rather than *all* kinds of water. What is confusing, and what probably confused Lecomte, is Ibn Qutayba's labeling of the most usual usage as "restricted," but it *is* restricted in the sense that it excludes marginal cases. Note also that Lecomte seems to take the word *makhraj* as implying that the utterance in question was made "as if" it were a *khuṣūṣ*-usage. In fact, it is a common way of referring to the modality of the utterance (*ʿāmm* vs. *khāṣṣ*) and has no such implication. See below.

has reduced the universe of potential denotations, but only by excluding the marginal cases illustrated by his examples. When Shāfiʿī uses the word *khuṣūṣ* or a cognate, he often envisions a more clear-cut reduction of the relevant class. It is a subtle difference, perhaps, but a difference nonetheless.

Still, the phrase *makhraj al-khuṣūṣ* looks technical, and even resembles the technical vocabulary of the *Risāla* (compare *Risāla* §216: *ʿāmm al-makhraj*). The procedure employed in this problem in the *Taʾwīl* aids in the harmonization of two apparently inconsistent texts by resolving a putative ambiguity. The ambiguity is resolved by adjusting the scope of reference of a particular noun. It is the sort of procedure that would be very much at home in the *Risāla*, even though Shāfiʿī generally uses such procedures to deal with groups of persons affected by a rule, not for substances like water.

Could Ibn Qutayba have used the term *ʿāmm* or a cognate in this problem? Here is a conjecture: If Shāfiʿī had analyzed this problem using *ʿāmm* and *khāṣṣ*, he might have said that the first *ḥadīth* (water cannot be defiled) looked *ʿāmm* (unrestricted in its application) until the second *ḥadīth* came along. The second *ḥadīth* showed that the first was in fact *khāṣṣ*: the word "water" as used in it refers to water in pools and wells (i.e., all water down to an amount of two *qulla*s) and not to other kinds of water. So, it would have been possible, hypothetically speaking, to use the term *ʿāmm* here, and, I suppose, one could argue that Ibn Qutayba's analysis is slightly clumsier for not having availed itself of that technical term. Nevertheless, Ibn Qutayba's approach to these two texts is broadly consistent with Shāfiʿī's, and so is his use of a word derived from the root kh-ṣ-ṣ.[31]

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[31] Shāfiʿī does analyze these two *ḥadīth* in the *Ikhtilāf al-ḥadīth*, as well as several others that treat related issues. Shāfiʿī engages in an extensive harmonization of these texts by constructing a legislative matrix that distinguishes between standing (or permanent bodies of) water (*dāʾim*), flowing water (*jārī*), water used for ritual purification, water not so used, and large and small amounts of water. He carefully fits each of the several *ḥadīth* into the relevant part of the matrix in order to create a coherent legislative scheme treating the defilement of each of these kinds of water. He nowhere uses the terms *ʿāmm* or *khāṣṣ*, but he does use other technical terms, including *qiyās*, *maʿqūl*, *ḥujja*, and *dalīl* and cognates from the root d-l-l. His analysis is more sophisticated than Ibn Qutayba's, largely because he sets out to analyze a much more complex textual problem. His solution, though systematic, does not depend on the exploitation of a technical vocabulary. *Ikhtilāf al-Ḥadīth*, ed. ʿA.A. Ḥaydar (Beirut: Muʾassasat al-Kutub al-Thaqāfīya, 1985), 104-14 ("Bāb al-Ṭahāra biʾl-Mā'").

Finally, problem number 104 (p. 229) concerns two different characterizations by ʿĀʾisha of her own pilgrimage at the time of the Prophet Muḥammad's so-called farewell pilgrimage (*ḥajjat al-wadāʿ*) in the year 10/632. According to one report, she said "*ahlaltu bi-ḥajj*," and according to another, "*ahlaltu bi-ʿumra*."[32] Ibn Qutayba's opponents consider these two *ḥadīth*s contradictory (*mutanāqiḍān*). The real issue for the opponents in this problem, however, is not the doctrinal content of the two *ḥadīth*s, but rather the fact that two eminent transmitters cannot agree on what ʿĀʾisha said. The two persons in question, al-Qāsim b. Muḥammad (d. ca. 106/724-5) and ʿUrwa b. al-Zubayr (d. 94/712-13), are grandsons of Abū Bakr al-Ṣiddīq and nephews of ʿĀʾisha. Both are numbered among the so-called seven jurists of Medina, both are major sources of traditions from ʿĀʾisha, and both are, accordingly, culture heroes of the *ahl al-ḥadīth*.[33] If their reporting can be impugned, then so can the texts on which the *ahl al-ḥadīth* place so much reliance.

Ibn Qutayba sets out, accordingly, to show that neither of the two transmitters of these reports (al-Qāsim and ʿUrwa, respectively, for *ḥajj* and *ʿumra*) could have made a mistake (*lam yaqaʿ fīhi ghalaṭ min al-Qāsim aw ʿUrwa*). Still, to accomplish this, he must harmonize

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[32] Lecomte, *Traité*, 370, renders the phrase in question as "J'ai prononcé l'*ihlāl* pour la *ḥajj*/*ʿumra*!" The verb *ahalla* (*bi-ḥajj*/*ʿumra*) can be a synonym for either *labbayka* (*ḥajjan*/*ʿumratan*) or *aḥrama* (*biʾl-ḥajj*/*ʿumra*). Ibn Manẓūr, *Lisān al-ʿArab* (Beirut: Dār Ṣādir, 1990), v. 11, 701 (h-l-l). I am grateful to Shawkat Toorawa for discussing appropriate uses of these phrases with me.

[33] N. Abbot, *Aisha: The Beloved of Muhammad* (Chicago: University of Chicago Press, 1942), 199, 209, 217; C. Pellat, "Fuḳahāʾ al-Madīna al-Sabʿa," *EI*², Supplement, ed. C.E. Bosworth et al. (Leiden: E.J. Brill, 1980), 310-12; G. Schoeler, "ʿUrwa b. al-Zubayr," *EI*², v. 10, 910-13. ʿĀʾisha took al-Qāsim in after his father's death. ʿUrwa, brother of the counter-caliph ʿAbdallāh b. al-Zubayr, is said to have been among the chief official mourners at ʿĀʾisha's funeral. Lecomte seems not to understand what is at stake in this problem since he provides a note (*Traité*, 370, n. 5) which suggests that the dispute concerns when to utter the *talbiya*, and no further clarification is offered in his "Addenda et Corregenda," *Arabica* 17 (1970), 187-99, with G.H.A. Juynboll and in collaboration with J. Van Ess. In the "Addenda" (p. 199), however, he does upgrade al-Qāsim from "non-identifié" (*Traité*, 448) to ibn Abī Bakr al-Ṣiddīq, presumably for ibn Muḥammad ibn Abī Bakr al-Ṣididīq. The problem only makes sense if it is about the transmitters, which is the issue that immediately commands Ibn Qutayba's attention, as should be clear from the quotation above. Interstingly, the immediate source of the two reports, according to the opponents, is Ismāʿīl b. ʿUlayya (d. 193/809), one of Shāfiʿī's teachers, though Ibn Qutayba could not have had it directly from Ibn ʿUlayya.

the two reports,[34] which he does by arguing that ʿĀʾisha set out originally to perform the *ḥajj*, but was then directed by Muḥammad to perform the *ʿumra* instead, along with many other Companions:

> We say that there is, for [each of] these two *ḥadīth*, a solution [*makhraj*] which does not entail that al-Qāsim or ʿUrwa made a mistake in regard to either one. Namely, the Companions of God's Messenger (ṣlʿm) proceeded to Mecca, having pronounced the formula "*labbayka*" for the *ḥajj*-pilgrimage. God's Messenger (ṣlʿm) then ordered them to circumambulate [the Kaaba] and to run [between Ṣafā and Marwa], and then to end their ritual state and to make it into an *ʿumra*-pilgrimage. So the people exited their ritual state and returned to the enjoyments of the profane state before undertaking the *ḥajj* [*tamattaʿū*]. The Prophet (ṣlʿm) said, "If it were not for the fact that I have a sacrificial animal with me, I would exit the ritual state, too." Abū Dharr[35] held that *this—in regard to cancelling the [obligation of] the ḥajj-pilgrimage—applied specifically to them* [*inna hādhā min faskh al-ḥajj lahum khāṣṣatan*],[36] and many jurists have so concluded as well. Thus, it was permissible for ʿĀʾisha (may God be pleased with her) to have said the *ihlāl* formula first in regard to the *ḥajj*, and so she said to al-Qāsim, "*ahlaltu bi-ḥajj*" and then to have canceled it and made it into an *ʿumra*, whereupon she said to ʿUrwa, "*ahlaltu bi-ʿumra*," being truthful in both regards. This is because the *ḥajj* in regard to which she said the *ihlāl* formula became an *ʿumra* by command of God's Messenger (ṣlʿm).[37]

The use of *khāṣṣatan* in this problem seems to connote a one-time dispensation applicable solely to those persons whom Muḥammad commanded to cancel their *ḥajj*-pilgrimage. In other words, although they had obligated themselves to perform the *ḥajj*, on this one occasion their failure to do so was excusable. Thus, not only could ʿĀʾisha

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[34] Again—not because there is a doctrinal problem, but in order to show that information received in the form of *ḥadīth*, from transmitters such as al-Qāsim and ʿUrwa, is reliable and not self-contradictory.

[35] Jundub b. Junāda, a companion of the Prophet noted for his piety and also the source of a modest number of traditions (d. 31 or 32/651-2 or 652-3). J. Robson, "Abū Dharr," *EI*², v. 1, 114-5.

[36] Lecomte, *Traité*, 370: "pour eux en particulier."

[37] For an account of this episode, with further citations to parallels in other primary sources, see *The History of al-Ṭabarī, Volume IX: The Last Years of the Prophet*, tr. I. Poonawalla (Albany: State University of New York Press, 1990), 109-15. ʿĀʾisha and the Companions apparently completed the *ʿumra*, exited the ritual state, reentered the ritual state, and undertook the *ḥajj* shortly thereafter, a variation on the pilgrimage referred to as *tamattuʿ*. The Prophet performed the *ḥajj* right away and was joined therein by ʿAlī b. Abī Ṭālib. On *tamattuʿ* see A. Gribetz, *Strange Bedfellows: Mutʿat al-nisāʾ and Mutʿat al-ḥajj. A Study Based on Sunnī and Shiʿī Sources of Tafsīr, Ḥadīth, and Fiqh* (Berlin: Klaus Schwarz Verlag, 1994).

validly have said "*ahlaltu bi-ḥajj*" and then "*ahlaltu bi-ʿumra*," but the two transmitters in question could in fact have heard and duly reported both utterances, even though they appear to contain a contradiction. So, although this problem involves a contradiction (though one not, strictly speaking, in a revealed text), the use of the root kh-ṣ-ṣ plays little role in Ibn Qutayba's strategy for resolving it. It is possible that *khāṣṣatan* here indicates an exception for certain of the Companions and ʿĀʾisha, but it is difficult to tell whether it is a technical usage. It vaguely recalls the use of *khāṣṣatan* in problem 65, and perhaps of the cognate verb in problem 22. Ibn Qutayba's result depends on asserting the occurrence of a particular historical event, not on the fact that *khāṣṣatan* indicates the scope of application of a particular obligation or ruling. Thus, it probably would not have been helpful to use the term *ʿāmm* or its cognates in this problem. What Ibn Qutayba has done is imagine a context in which two apparently contradictory statements could be true. This is a favorite technique of Shāfiʿī.

In problems 22, 65, and 104 Ibn Qutayba uses cognates from the root kh-ṣ-ṣ to indicate that a class of persons is "singled out" for a particular obligation, status, etc. By contrast, in problem 103, he uses a word from the same root to "restrict" the denotation of a noun for purposes of harmonizing two texts. Only this last usage resembles that of Shāfiʿī, and not surprisingly, since it is the one problem that most resembles those instances in which Shāfiʿī likes to deploy the *ʿāmm*:*khāṣṣ* rubric.

Ibn Qutayba's usage of the root kh-ṣ-ṣ, admittedly neither as consistent nor as productive as Shāfiʿī's, seems only to border on the technical. This is because he uses it in the largely non-technical way that a ninth-century *mufassir* would, "to pinpoint the exact referent for each historical and anaphoric referent" in revealed texts.[38] Put differently, the root kh-ṣ-ṣ serves in three of the four problems to identify or characterize a class, not to change the parameters of a class in order to resolve an ambiguity arising from inconsistent rules

[38] Versteegh, *Arabic Grammar and Qurʾānic Exegesis*, 74. The quotation refers to pinpointing referents in the Qurʾān. Versteegh concludes that in general the use of *ʿāmm* and *khāṣṣ* in the early *tafsīr*s is at best only barely technical, if at all: "In itself the terminology of *ʿāmmatan* and *khāṣṣatan* is not particularly relevant to the development of linguistic studies, but it provides a good example of the non-technical origin of two terms which were to become later two of the important categories of *uṣūlī* hermeneutics." *Arabic Grammar and Qurʾānic Exegesis*, 75.

which appear to apply to that class.[39] This *tafsīr*-usage of kh-ṣ-ṣ prefigures the later *uṣūl al-fiqh* usage, which concerns, from primarily a linguistic perspective, a noun's scope of reference.[40] Shāfiʿī's usage, which serves exclusively the goal of harmonization, concerns the scope of application of a rule and seems not to be the origin of the later *uṣūl al-fiqh* usage. This distinction is concededly subtle, since a noun's scope of reference can determine the scope of a rule's application, but the fact remains that in later *uṣūl al-fiqh*, the *ʿāmm:khāṣṣ* rubric concerns what I would call linguistic ambiguity in one text (ambiguity of implication) while for Shāfiʿī it primarily concerns rules in two or more texts (ambiguity arising from apparent contradiction). It seems significant, in this regard, that Ibn Qutayba, unlike Shāfiʿī, is able to use kh-ṣ-ṣ in ways which do not really require (or imply) *ʿāmm* or some cognate as a necessary counterpart or complement. That is, identification of something as *khāṣṣ* is sufficient in and of itself for Ibn Qutayba. Perhaps it is not surprising that, in the defensive context of the *Taʾwīl*, it was more availing to argue that things were *khāṣṣ* rather than *ʿāmm*. If my interpretation is correct, then it raises the question why *uṣūl al-fiqh* received this idea and terminology from the *tafsīr* (and grammatical) tradition and not from Shāfiʿī. It would also mean that Ibn Qutayba's employment of the root kh-ṣ-ṣ is not a more primitive version of Shāfiʿī's (unusual) technique of appealing to *ʿāmm* and *khāṣṣ*, but a different, separately evolved (and more usual, though still emergent) technical usage.

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Are there other problems in the *Taʾwīl* in which Ibn Qutayba could have invoked the *ʿāmm/khāṣṣ* distinction? Calder clearly thought so ("there are numerous instances where this terminology would be

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[39] Put differently, Ibn Qutayba chooses between identifying a class as A, or as B. Shāfiʿī, by contrast, shows that a class which looks like it should contain all A in fact contains a subset of A. The usage of the root kh-ṣ-ṣ in problem 103, as noted, differs from that of the other three problems.

[40] This is not to say that *ʿāmm:khāṣṣ* could not be a harmonization technique in later *uṣūl al-fiqh*, only that it is presented as a linguistic phenomenon. See, e.g., Weiss, *Spirit of Islamic Law*, 107; by the same author, *The Search for God's Law* (Salt Lake City: University of Utah Press, 1992), 389-446; Wael Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī uṣūl al-fiqh* (Cambridge: Cambridge University Press, 1997), 45; Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence*, rev. ed. (Cambridge: Islamic Texts Society, 1991), 104-13; and Zysow, "Economy of Certainty," 126-52.

appropriate"). In fact, as I will argue below, most of the problems dealt with in the *Ta'wīl* concern issues of dogma, not legal doctrine, and the *ʿāmm:khāṣṣ* rubric works for harmonizing rules, not for defending or denying theological propositions. Of the 109 problems analyzed by Ibn Qutayba in the *Ta'wīl*, I would call only 38 "legal" in the narrow sense. Of those 38 problems, only six involve a conflict between Qur'ān and Sunna,[41] the situation in which Shāfiʿī deploys the *ʿāmm:khāṣṣ* technique. One of these is number 65, which I have already discussed. I will turn first to the remaining five such problems, and then to a consideration of a few additional problems that are analyzed by both authors and that involve apparently contradictory *ḥadīth*.

Qur'ān-Sunna Conflict in the Ta'wīl

Problem 5 (pp. 63-4) concerns adultery. The opponents claim that a *ḥadīth* in which Muḥammad announces his intention to impose the punishments of stoning and exile "on the basis of God's Book" (*bi-kitāb allāh*) contradicts the Qur'ān (*yukhālif al-kitāb*), which contains no mention of stoning or exile. Ibn Qutayba offers an ad hoc argument to the effect that "God's Book" in this instance refers not to the Qur'ān, but rather to God's ruling (*ḥukm*) or imposition of an obligation (*farḍ*). He cites some further verses of the Qur'ān that allegedly use cognates from the root k-t-b in this way, and a verse of poetry, as proof of his claim. The *ḥadīth* in question is well known and was the subject of much discussion in early legal texts. Shāfiʿī offers a very complex analysis of this same problem in the *Risāla*, mostly under the rubric of abrogation, but he also hints at the relevance of the *ʿāmm:khāṣṣ* rubric.[42]

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[41] Problems 5, 44, 45, 46, 65, and 99. Eleven of the "dogmatic" problems involve Qur'ān-*ḥadīth* conflict.

[42] For Shāfiʿī's analysis of this problem, see Lowry, "Legal-Theoretical Content," 131-43 and cp. J. Burton, *The Sources of Islamic Law: Islamic Theories of Abrogation* (Edinburgh: Edinburgh University Press, 1990), 136-58. Again in this problem, Shāfiʿī analyzes a larger body of materials (more *ḥadīth* and more verses from the Qur'ān) than Ibn Qutayba. Shāfiʿī's analysis is more sophisticated, but he is also dealing with a much more complex textual problem. Lecomte compares Ibn Qutayba's discussion with Shāfiʿī's in his *Ikhtilāf*, "Un Exemple," 27-9. I cannot agree with Lecomte's remark (p. 28, n. 1) "il est facile de voir que la démonstration concerne exclusivement l'exercise du *qiyās* juridique." The problem for both Ibn Qutayba and Shāfiʿī is one of harmonizing extant but conflicting texts, not analogizing from extant texts to an unregulated legal situation.

In problem 44 (p. 130), the opponents allege that the *ḥadīth* which has Muḥammad stone an adulterer conflicts with Q 4:25, which provides that the punishment for adultery is flogging.[43] The dispute centers, at least in part, on what the word *muḥṣanāt* means in the verse in question.[44] The opponents claim that it must mean female slaves (sg. *ama*). Ibn Qutayba argues that it means "free virgin women" and cites the beginning of the same verse, which, he argues, uses *muḥṣanāt* in that sense. Ibn Qutayba also expressly labels his interpretation a *ta'wīl*. Shāfiʿī's analysis of the materials in the immediately preceding problem also includes the passages analyzed separately in this problem by Ibn Qutayba. Shāfiʿī's analysis depends on a complex series of abrogations (*naskh*) but he, too, must argue that *muḥṣanāt* in Q 4:25 means "free virgins." He bases his interpretation on an inference from a *ḥadīth* (*istidlāl bi'l-sunna*) and *ijmāʿ* (*Risāla* §388).[45] Note that both authors invoke other texts in support of a lexicographical argument.

Problem 45 (pp. 130-1) involves the well-known conflict between the *ḥadīth* which provides that no statutory heir may receive a bequest, and Q 2:180, which provides that parents and other near relatives should receive bequests. Ibn Qutayba responds that Q 2:180 was abrogated by Q 4:11-12, which provides a detailed scheme of fixed inheritance shares. This is more or less the argument made by Shāfiʿī in the *Risāla* (§§393-415).[46]

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[43] See the preceding note.

[44] Q 4:25 uses the word *muḥṣanāt* three times, and the cognate passive verb *uḥṣinna* once. It reads in relevant part (following Paret's translation): "And those of you who do not have the means to marry upstanding [*muḥṣanāt*], believing women should marry instead your believing slave-girls that you own...Marry them with the permission of their families and give them their rightful due. They should be upstanding [*muḥṣanāt*] women, not those who engage in lewdness or take lovers. If they become upstanding [*uḥṣinna*] and then commit an indecent act, then they receive one-half the punishment of upstanding [*muḥsanāt*] women..." For a plausible argument that *muḥṣanāt* and cognates denote women who enjoy some kind of non-familial protected status, see J. Burton, "The Meaning of 'Ihsan,'" *Journal of Semitic Studies* 19 (1974), 47-75.

[45] The *ḥadīth* in question, cited at *Risāla* §386, provides that slave-girls who commit adultery should be flogged. It is not clear to me what inference Shāfiʿī draws from it. Shāfiʿī argues that the first occurrence of *muḥṣanāt* in Q 4:25 means "female converts to Islam." See the references to Burton's writings in the preceding notes and also to my "Legal-Theoretical Content."

[46] Shāfiʿī also cites Q 2:240, which provides that a bequest should be made for widows (*Risāla* §394). He alludes to, but does not quote directly from, Q 4:11-12 and says that they might have abrogated the verses which provide for a bequest

In problem 46 (pp. 131-4), a *ḥadīth* is said to be incompatible with Q 4:23-4 (*yadfaʿuhu al-kitāb*). Q 4:23-4 lists certain women whom one may not marry, whether because of consanguinity or fosterage, and then expressly provides that all other women are lawful [*uḥilla*]. Thus, by its own terms, the Qurʾān appears to state an exclusive rule. The *ḥadīth* in question provides that certain additional women are off-limits. As the opponents point out, the *ḥadīth* in question ought not to make something unlawful that God has so emphatically declared lawful in the Qurʾān. Ibn Qutayba replies that, in this instance, the *ḥadīth* has abrogated the Qurʾān (presumably he means abrogated it to the relatively limited extent that the two are inconsistent on this point). Shāfiʿī discusses this same set of rules in the *Risāla* (§§624-35), but harmonizes them using a different hermeneutic technique. For Shāfiʿī, the Qurʾānic pronouncement is non-specific (*jumal*) and the *ḥadīth* furnishes evidence (*dalīl*) that the Qurʾānic text should be read as restricted in scope (*khāṣṣ*). Thus, the *ḥadīth* supplies additional, clarifying detail, and narrows the scope of the language which says that all other women are lawful (i.e., to mean all other women except for those mentioned in the subsequent *ḥadīth*). Presumably this means that, for Shāfiʿī, the two texts in question were deemed potentially divergent to an extent that required some interpretive intervention, but not so utterly inconsistent as to necessitate invocation of the doctrine of abrogation. Shāfiʿī's approach does seem more subtle, by virtue of his application of two technical devices (*jumla/mufassar* and *ʿāmm/khāṣṣ*), whereas Ibn Qutayba's resort to abrogation could be thought crude by comparison.

In problem 99 (pp. 220-1), the opponents argue that a *ḥadīth* is invalidated by consensus (*ijmāʿ*) and scripture (*al-kitāb*). The *ḥadīth* provides that whoever breaks a bone or becomes lame (*kusira*, *ʿaraja*) during the pilgrimage automatically exits the state of ritual purity (*ḥalla*) and becomes obligated to perform the pilgrimage at a later

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(§396). Then, he adduces *ḥadīth*s to show that abrogation did in fact occur. Shāfiʿī argues, then, that we know the inconsistency in the Qurʾān to be an instance of abrogation because we have the *ḥadīth*s which allow us so to infer. Ibn Qutayba argues that the Qurʾān does not contradict the *ḥadīth* because another passage in the Qurʾān tells us that the first passage was abrogated. Both have the same understanding of the law and its legislative history, but each is answering a slightly different question. On the history of early Islamic inheritance law, see D. Powers, *Studies in Qurʾan and Ḥadīth: The Formation of the Islamic Law of Inheritance* (Berkeley: University of California Press, 1986). On abrogation in early Islamic law generally, see Burton, *Sources*.

date.[47] This, allege the opponents, contradicts both current practice and Q 2:196, which provides that one should complete the pilgrimage and, in case of difficulties, do one's best. Ibn Qutayba, using a technique known to Shāfiʿī, argues that the two texts apply in different circumstances: the *ḥadīth* in Mecca, and the Qurʾānic verse prior to entry into Mecca. Shāfiʿī's notion of *ʿāmm* and *khāṣṣ* could have been used here: The Qurʾānic verse would have looked unrestricted in its scope (i.e., would have appeared to apply to all pilgrims), but the *ḥadīth* would have shown that it was in fact *khāṣṣ*, and only applied to pilgrims prior to their entry into the *ḥaram*, not to all pilgrims wherever located.

In all of these problems, Ibn Qutayba uses techniques also used by Shāfiʿī: citing of *shawāhid* to prove points of lexicography; arguing that apparently contradictory rules apply in different contexts; and abrogation. In one of the problems, he even uses the same argument used by Shāfiʿī. On the other hand, in one problem (number 99), the *ʿāmm*:*khāṣṣ* rubric could have been employed.

*Apparently Contradictory Ḥadīth*s

There is no reason why Shāfiʿī's technique of *ʿāmm* and *khāṣṣ* could not have been used for resolving contradictions between *ḥadīth*s.[48] Thus, it will be appropriate to consider problems from the *Taʾwīl* involving contradictory *ḥadīth*s. Since there are many such problems in the *Taʾwīl*, I have chosen to focus on those four that are dealt with also by Shāfiʿī in the *Risāla*. I now turn to a brief survey of these.

Problem 34 (pp. 112-13) concerns the punishment of amputation for theft. Ibn Qutayba's opponents pose it as an instance of two contradictory *ḥadīth*s, one providing for a de minimis exception,[49] and one denying that there is a de minimis exception. Ibn Qutayba first cites Q 5:38, which states the unqualified rule that thieves' hands should be amputated. He then says that the *ḥadīth* denying the de minimis exception was in accord with the apparent meaning (*ẓāhir*) of Q 5:38, but that God subsequently made known that there was a de minimis exception, by means of the other *ḥadīth*. God did not reveal the whole rule all at once (*jumlatan*), but rather in stages. Ibn

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[47] See Wensinck, *Concordance*, v. 4, 175 (*ʿaraja*).

[48] In fact, his student Muzanī did just that in his *Kitāb al-Amr wa'l-Nahy*, cited above.

[49] I.e., the punishment does not apply to thefts of items below a certain value.

Qutayba also offers a *ta'wīl* (his term) of the anti-de minimis exception *ḥadīth* to show that, in the alternative, it can also be harmonized with the existence of a de minimis exception. The principal legal-theoretical notion here, however, is that rules may sometimes be revealed piecemeal and may look contradictory if their correct sequence is not borne in mind.[50] For Shāfiʿī, this problem is one of how to characterize the relationship between Q 5:38, which appears to state an unqualified rule, and the de minimis exception in the *ḥadīth*. He uses the *ʿāmm:khāṣṣ* rubric: Q 5:38 looks as though it applies to all thieves, but in fact the de minimis *ḥadīth* shows that it applies only to those who steal something with a certain minimum value (*Risāla* §§223-4, reprised at §§1619-20).

Problem 47 (pp. 134-5) concerns whether a major ritual ablution (*ghusl*) is required before the Friday prayer. According to Ibn Qutayba's opponents, one *ḥadīth* makes such a washing mandatory while another merely makes it preferable (*afḍal*) to lesser ablutions (*tawaḍḍu'*). Ibn Qutayba harmonizes the two *ḥadīth*s by using a technique known to Shāfiʿī: the apparently mandatory language in the *ḥadīth* requiring a major ablution only indicates that it would be best if one did that, not that one must. In fact, such an ablution entails merit, but is optional (*ʿalā al-faḍīla wa'l-ikhtiyār*). In an arresting formulation, he says that it is a strict injunction to do something non-binding which entails merit, but not with the implication that it is obligatory: *ījāb ʿalā al-faḍīla lā ʿalā jihat al-farḍ*. It is hard to see what legal force the term *ījāb* could possibly have after such a sentence, but on the other hand, such a slippery characterization of the *ḥadīth* in question shows that Ibn Qutayba had the capacity to think very much like lawyer. For Shāfiʿī, too, this is a problem of contradictory *ḥadīth* (*aḥādīth mukhtalifa*), and his analysis is very much in the spirit of Ibn Qutayba's: The strict *ḥadīth* is ambiguous (*yaḥtamilu maʿnayayn*). The apparent meaning (*ẓāhir*) is that a major washing is indeed obligatory, but it is possible, too, that the obligation is optional, and concerns only manners and personal hygiene. Shāfiʿī's formulation is equally clever and does equal violence to the word *wājib*: *wājib fī al-ikhtiyār wa'l-akhlāq wa'l-niẓāfa*. It is "obligatory"

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[50] This point strikes me as consonant with the concern of classical *uṣūl al-fiqh* with sequence, apart from questions of abrogation. E.g., Weiss, *Search for God's Law*, 416-62 (*mujmal* and *mubayyan*); Kamali, *Principles of Islamic Jurisprudence*, 110-1 (*ʿāmm* and *khāṣṣ*).

or binding in respect of its optional character, and in regard to manners and personal hygiene, that is, binding in respect of non-binding matters—another quintessentially lawyerly formulation (*Risāla* §§ 838-46). In this problem, the similarities in technique and formulation are striking.

Problem 66 (p. 153) concerns an interesting issue in sales law: when goods are returned because of a latent defect (*ʿayb*), may the returning buyer keep any gains reaped as a result of having had possession of the goods from the time of delivery to the time of their return to the seller? Ibn Qutayba's opponents allege a contradiction between two *ḥadīth*, one which provides that the buyer may keep the resulting profits even if the sale goods are returned, and another which provides that the return of a ewe or she-goat which was purchased with a full udder (*muṣarrāt*)[51] but then milked must include a small amount of compensation for the milk. Ibn Qutabya holds that the two cases are not analogous for the reason that, in the case of the ewe, the milk was already in existence at the time of the sale and constituted part of the bargain. Thus, the sale expressly included the animal and its milk and so some accounting must be made for the milk, which cannot be returned.[52] In the other case, the gain arose after the transaction, was never part of the seller's property, and so need not be returned.[53]

Shāfiʿī reaches the same conclusion as Ibn Qutayba, but his argument is subtler, and the counterarguments to which he responds have to do not only with contradictory texts, but with important policy questions in regard to sales law. The issue for Shāfiʿī is this: allowing the purchaser to keep subsequently arising profits even after returning the goods that were the source of the profits presents the problem that the purchaser seems to have got something (profits) for nothing (after a full refund of the sale price). Unequal exchanges are abhorrent to Islamic law and this looks like an unequal exchange (of precisely the sort that the *ḥadīth* about the unmilked ewe sought to avoid). Shāfiʿī describes the profits (as opposed to the milk) as "subsequently

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[51] See E.W. Lane, *Arabic-English Lexicon*, 2 vols. (Cambridge: Islamic Texts Society, 1984), v. 2, 1686.

[52] Ibn Qutayba's analysis is not quite as smooth as I have presented it, but this seems to be his point.

[53] Ibn Qutayba also makes the superfluous suggestion that, in the case of the ewe, there might have been fraud, since the milk could have been allowed to collect in order to induce the buyer to think that the animal produced milk regularly. Once it ceased producing, the buyer would have returned it.

arising within the purchaser's property and scope of liability" (*ḥāditha fī milkihi wa-ḍamānihi*, *Risāla*, §1504; a point also emphasized by Ibn Qutayba in regard to ownership but not in regard to liability). That is, the buyer owns *and* bears the risk of loss of the profits. More important, however, he bears the risk of loss with respect to the underlying property until it is returned. It is by virtue of bearing this risk of loss for the underlying property that the buyer is entitled to keep the gains from property returned to the seller (*Risāla*, §1659). This point gives rise to the slogan in the *ḥadīth* at issue: *al-kharāj bi'l-ḍamān*, profit in exchange for liability. That is, the buyer keeps the profits in exchange for bearing the risk of loss of the underlying sale goods, so that no unequal exchange results. Had the underlying goods perished before their return, it would have been the buyer's loss. This is legal (and economic) reasoning at a high level, especially in the conceptualization of an intangible form of value for purposes of imagining a bilateral exchange (see *Risāla* §§ 1503-17 and §§1657-64).[54]

Finally, problem 83 (pp. 177-8) concerns two *ḥadīth*s that take opposite positions on whether enemy non-combatants (women and children of the *mushrikūn*) may be killed in combat. In the first *ḥadīth*, Muḥammad appears to endorse the killing of such persons and in the second he disapproves of it. Ibn Qutayba harmonizes the two reports by arguing that such persons have, strictly speaking, the same legal status (*ḥukm*) as enemy combatants (accounting for the first *ḥadīth*) but that it is disapproved to kill them intentionally (accounting for the second *ḥadīth*). It is perhaps a fitting note on which to end this survey: these are precisely the argument and result found in Shāfiʿī's *Risāla* (§§823-37). Shāfiʿī knows a couple of other relevant

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[54] Both the cited discussions occur within the larger framework of Shāfiʿī's treatment of *qiyās*. They illustrate his point that some *ḥadīth* may validly serve as the basis for an analogy and some may not. One may generally analogize from the *ḥadīth* about the subsequently arising profits (which concerns a slave as the underlying goods), but not from the case of the unmilked ewe. The first *ḥadīth* covers all sorts of sales where the underlying goods generate after-arising gain (animals, fruit trees, slaves, etc.), but the second *ḥadīth* refers to a specific situation where an unknown quantity (milk in the udder) passes from the seller's property to the buyer's property in a manner incidental to the underlying transaction. Hence, the Prophet decreed in the second instance (sale of the unmilked ewe) that one need merely pay a token amount in exchange for the unknown quantity, since the point is to avoid the appearance of an unequal exchange, but not to provide a precise accounting.

*ḥadīth*s, and he also reports (but without endorsing) the opinion of his teacher Sufyān b. ʿUyayna that the more militant *ḥadīth* was abrogated by the more tolerant one.[55] But in the end, he reaches the same conclusion, using the same argument, as Ibn Qutayba.[56]

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The differences in technique and result between Shāfiʿī and Ibn Qutayba are, in many instances, relatively slight. If anything, what is striking is how broadly comparable they are—at least in their analyses of legal problems. Still, I think Calder is right (and also Lecomte and Burton) when he suggests that Shāfiʿī's skills in legal analysis surpass those of Ibn Qutayba, and the above-discussed problem concerning sales law provides a good illustration of Shāfiʿī's heightened sensitivity to the interplay of facts, rules, policies and argumentation. This qualitative difference, which struck Calder, goes back partly to the fact that Shāfiʿī was a more accomplished jurist than Ibn Qutayba.[57] Perhaps more important in this regard, however, is another, more fundamental difference: the *Taʾwīl* concerns dogmatic theology and the *Risāla* law.[58]

Law, Theology, and Hermeneutics

Any comparison of the *Risāla* with the *Taʾwīl* which rests on the assumption that both seek to articulate a legal hermeneutic would be manifestly unfair to Ibn Qutayba. Above, I noted that only about one-third of the problems in the *Taʾwīl* (38 out of 109) are legal in the narrow sense. Every one of the approximately 60 total problems in the *Risāla* is legal in the narrow sense. Most problems in the *Taʾwīl*

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[55] Shāfiʿī also adduces Q 4:92 to bolster his position, arguing that its rules for compensation in cases of wrongful death—which apply to Muslims—indicate by negative implication that no adverse legal consequences follow from the killing of the enemy's non-combatant women and children, who are non-Muslims. This move underscores that the more militant of the two *ḥadīth*s is in accord with the Qurʾān and therefore need not be discarded just because the more tolerant *ḥadīth* is valid.

[56] Lecomte, "Un Exemple," 29, also analyzes this problem. Strangely, he pays no attention whatsoever to either author's strategy for harmonizing the inconsistent *ḥadīth*s that give rise to the problem in the first place.

[57] Lecomte suggests that Ibn Qutayba's judicial position in the provinces was more sinecure than substance. "Évolution de la Controverse," 25.

[58] A point repeatedly emphasized by Lecomte in his comparison of the *Taʾwīl* with Shāfiʿī's *Ikhtilāf al-Ḥadīth*. "Évolution de la Controverse," 11, 26-7.

concern issues of theological dogma. This fact has real consequences for the sorts of hermeneutic techniques that were available to Ibn Qutayba: strategies for teasing legal rules out of texts simply do not work for texts which impart dogmatic lessons.

Legal rules apply (1) to particular groups of people, (2) at particular moments in time, and (3) at particular points in space. Thus, for any given legal rule, there are three variables—who, when, and where—that can be massaged as needed when harmonizing apparently contradictory legal texts, such as apparently contradictory *ḥadīth*. As we have seen, the *ʿāmm:khāṣṣ* rubric functions, for Shāfiʿī, by adjusting the groups of people to which certain rules apply. *Naskh*, the notion that certain rules were once binding but have now been abrogated, adjusts the points in time when different rules apply. The claim that different rules apply in different places (as in Ibn Qutayba's problem 99, above) functions to assign divergent rules to separate sets of spatial coordinates (temporal coordinates may be differentiated in this way as well, not only in cases of *naskh*, where a rule is discarded, but also in order to retain in force two inconsistent rules). Many of the techniques employed by Shāfiʿī and Ibn Qutayba can be understood in this way. The utility of such procedures, for retaining rather than discarding revelatory material, seems obvious.

These sorts of harmonizing strategies do not work, however, for *ḥadīth*s that express, say, abstract notions about the nature of God, that is, eternal verities, or for *ḥadīth* that are doctrinally repugnant. For example, one *ḥadīth* defended by Ibn Qutayba (problem 54; p. 142) asserts that God has two right hands. Now, either God does or does not have two right hands. But if we were to use one of Shāfiʿī's techniques, we might find ourselves in the uncomfortable position of having to argue that God only had one right hand last Wednesday or, worse yet, that some other doubly right-handed God, perhaps in some other place, was meant. Eternal verities are just that (quite obviously): true for all time or, in the case of those eternally false propositions that one wishes to refute, not true at any time. To the extent that one is faced with apparently contradictory eternal verities (so to speak), they could possibly be reconciled by idiosyncratic, ad hoc interpretations. This, in fact, constitutes one of Ibn Qutayba's strategies: he engages in ad hoc, speculative readings of texts. The term *taʾwīl*, which appears in the title of Ibn Qutayba's work, frequently denotes precisely the overtly ad hoc, individualized

interpretation of revealed texts. Ad hoc readings have the further benefit that they do not lead to the development, from problematic texts, of generalizable procedures that could be mischievously (mis-)applied to other texts.

Ad hoc reading is possible for analyses of some legal texts, too, but not very useful if, like Shāfiʿī, one is engaged in system-building through classification of texts according to hermeneutic features. Another favorite technique of Ibn Qutayba, however, the appeal to figurative language, does not help with deciphering rules. Appeals to figurative language help with uncomfortably vivid formulations by allowing an argument to the effect that a particular proposition is true, but in some symbolic sense (in the case of our doubly-right handed God: "it's not literally about hands as such"). Legal rules are highly resistant to symbolic readings.[59]

The point is this: if one is going to claim that the *Risāla* post-dates the *Taʾwīl* on the basis of the *Risāla*'s more fulsome array of legal-hermeneutic techniques, then one could equally well claim that the *Taʾwīl* post-dates the *Risāla* on the basis of its more generous supply of interpretive techniques which help with problems of dogma. Neither claim would be very sensible. It is much more useful to recognize that the two works differ in important ways, notwithstanding the fact that their overlap in the area of legal reasoning and interpretation is a happy coincidence for the study of the history of legal hermeneutics in the ninth century.

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[59] Classical *uṣūl al-fiqh* explored the *ḥaqīqa*:*majāz* opposition as a preliminary to deciding whether a text constituted a rule at all. Legal theorists were interested in two questions in particular: was a particular word or phrase meant tropologically, and if so, under what conditions did tropological language engender legal obligation? Shāfiʿī's analyses usually concern texts in conflict, in other words, he starts at a point when he has already decided that they are to some extent normative. Ibn Qutayba asserts the existence of tropological formulations in regard to texts that do not engender any legal obligations. He does this in order to disarm his opponents' objections to embarrassing turns of phrase, and to avoid having to do away with the allegedly objectionable texts themselves. Still, Ibn Qutayba, unlike Shāfiʿī, shares with classical *uṣūl al-fiqh* the notion that tropological language inhabits revealed texts, and that its existence can be exploited for certain interpretive ends. On *ḥaqīqa* and *majāz* in classical *uṣūl al-fiqh*, see, e.g., Weiss, *Search for God's Law*, 134-50 and the discussion below.

III. Overview of Hermeneutic Techniques in the Risāla and the Ta'wīl

I now offer a more bird's eye view of the differences between the hermeneutic techniques in the *Risāla* and those in the *Ta'wīl Mukhtalif al-Ḥadīth* than has thus far been attempted.[60]

Hermeneutic Concepts Common to Ibn Qutayba and Shāfiʿī

1. *ʿĀmm:Khāṣṣ*: We have seen that Ibn Qutayba knew this pair in his *Mushkil al-Qur'ān*, and that he used words derived from the root kh-ṣ-ṣ in the *Ta'wīl*. On the other hand, as Calder noted, he does not use the pair in the *Ta'wīl*, and does not really use the root kh-ṣ-ṣ therein in the technically consistent and productive way that Shāfiʿī does in the *Risāla*. Perhaps the evidence is too equivocal to claim it as a shared technique, but then it is also too equivocal to serve as the basis for the radical redating of the *Risāla* proposed by Calder.

It is nonetheless interesting that Ibn Qutayba seems to know this pair of terms as part of an exegetical hermeneutics for the Qur'ān, but not as part of a legal hermeneutics. It is, perhaps, even more noteworthy that Ibn Qutayba's formulation in the *Mushkil al-Qur'ān* arguably represents a stage of development not yet attained even by Shāfiʿī's disciples. For Shāfiʿī, all texts from the Qur'ān begin life as *ʿāmm*; some are then shown to be *khāṣṣ* by other texts from the Sunna. Shāfiʿī's student al-Muzanī realized that *ʿāmm* and *khāṣṣ* did not have to be strictly identified with Qur'ān and Sunna. Accordingly, he uses the *ʿāmm:khāṣṣ* rubric to combine Qur'ānic and Sunnaic texts in many more ways than Shāfiʿī did.[61] Neither Shāfiʿī nor Muzanī, however, seems to have contemplated the possibility that texts could begin life as *khāṣṣ* and then be shown to be *ʿāmm*, in other words, have their sphere of reference or application widened. But that is exactly what Ibn Qutayba contemplates when he refers, in the passage quoted above from the *Mushkil al-Qur'ān*, to *al-qaṣd bi-lafẓ al-khuṣūṣ li-maʿnā al-ʿumūm wa-bi-lafẓ al-ʿumūm li-maʿnā al-khuṣūṣ*.[62]

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[60] Lecomte has surveyed Ibn Qutayba's hermeneutic techniques, *Traité*, XX-XLII, and also compared these with Shāfiʿī's in his "Évolution de la Controverse," 11-27. As already noted, Melchert has compared both authors' doctrines of abrogation in the above-cited "Qur'ānic Abrogation."

[61] He seems not to allow the possibility that the Qur'ān could make *khāṣṣ* a passage from the Sunna which looks, initially, *ʿāmm*. This seems to be a scruple retained from the hermeneutics of the *Risāla*.

[62] It is interesting that Ibn Qutayba does not give any examples of the

2. *Distinguishing the Sphere of Application*: Both authors know how to distinguish apparently contradictory rules by arguing that the rules in question apply in different circumstances (or, we might say, by imagining appropriate contexts). Shāfiʿī has no consistent technical vocabulary for this type of argument, but it does represent a principal means by which he harmonizes conflicting *ḥadīth*.[63] By contrast, Ibn Qutayba has a recurring phrase which signals this particular strategy, for example in problem 30 (pp. 105-6): *li'l-ḥadīth al-awwal mawḍiʿ wa-li'l-thānī mawḍiʿ wa-idhā wuḍiʿa kullu wāḥid minhumā mawḍiʿahu zāla al-ikhtilāf*. In this and seven other problems, Ibn Qutayba uses the verb *waḍaʿa* and cognates to express this idea.[64] In fifteen other problems, he uses this technique, but not the root w-ḍ-ʿ (as we saw above in problem 99).[65] Most of these problems, whether they use the root in question or not, are of the legal variety.

3. *Abrogation*: Both authors use the technique of abrogation to harmonize texts, the difference being, however, that Ibn Qutayba allows both intra-source (Qurʾān-Qurʾān, Sunna-Sunna) abrogation and inter-source (Qurʾān-Sunna, Sunna-Qurʾān) abrogation whereas Shāfiʿī expressly disavows the inter-source variety (noted by Calder, *Studies*, p. 224).[66] According to Calder (*Studies*, p. 221), *naskh* is one of the three major devices signalled in the *Risāla* (along with

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transformation of a text from *khāṣṣ* to *ʿāmm*, though he does give examples of the usual transformation, from *ʿāmm* to *khāṣṣ*. *Mushkil al-Qurʾān*, 217-8.

[63] See Lowry, "Legal-Theoretical Content," p. 176 and n. 95.

[64] Problems 2, 3, 4, 30, 31, 92, 98, 101.

[65] Problems 10, 37, 38, 39, 51, 66, 67, 72, 75, 83, 94, 97, 99, 102, 106.

[66] See *Taʾwīl*, no. 45 (and also nos. 46, 89, 95, and 2; he could have used *naskh* in no. 42 but did not) and *Risāla* §§314ff. and §569. Melchert, I think, pays too little attention to this important difference. He attributes Shāfiʿī's scruple on this point to "simple conservatism: if it were possible for the Qurʾān to abrogate the Sunnah, many ordinances based on the Sunnah would have to be thrown away, as one could not be sure that the Qurʾānic dicta on these points had not come later." "Qurʾānic Abrogation," 86. If simple conservatism accounts for Shāfiʿī's position, then he could just have easily have worried about the abrogation of the Qurʾān by the Sunna, but he does not discuss the possibility. Shāfiʿī betrays nervousness that the Sunna has not yet established itself fully as legal authority which is co-equal to the Qurʾān, whereas Ibn Qutayba evidences no such fear. While it is true that both are engaged to some extent in the defense of the *ḥadīth*, Shāfiʿī defends them as the legislative complement to the Qurʾān and Ibn Qutayba defends them as an article of faith. This difference seems, to me, to indicate differing polemical contexts and concerns. Zysow takes the view, which I share, that Shāfiʿī's position aims "to save the prophetic traditions from a blanket rejection." "Economy of Certainty," 142.

ʿāmm:khāṣṣ and *jumla:naṣṣ*). Moreover, the *Risāla*'s discussion is "sophisticated and nuanced...representing a scholastic subtlety which transcends the basic ad hoc devices of Ibn Qutayba's work" (p. 225, note omitted). It is certainly noteworthy that Shāfiʿī's notion of abrogation appears narrower than Ibn Qutayba's.[67] Interestingly (or ingeniously), Calder sees the more expansive use of *naskh* in the *Taʾwīl* as the historically earlier stage of development: Shāfiʿī's concept of *naskh*, he claims, does less work because it is supplemented by the *ʿāmm:khāṣṣ* technique, which takes over some of the functions required of *naskh* in the *Taʾwīl*, notably Qurʾān-Sunna harmonization. Notwithstanding his strictures on the operation of *naskh*, Shāfiʿī is quite clear that *naskh* frequently involves complex interaction between Qurʾān and Sunna.[68]

4. *Permitted/Mandatory Distinction*: Both authors also harmonize conflicting legislative texts by distinguishing between rules that are mandatory and rules that are merely optional (as we saw above in the case of the major ablution for the Friday prayer). That is, the contradiction between two rules that provide "do X" and "don't do X," respectively, can be resolved by making one of the two rules optional, so that doing the opposite does not result in a violation of law. The contradiction only obtains if one interprets both rules as mandatory.

5. *Ḥadīth criticism*: Both the *Risāla* and the *Taʾwīl* focus on hermeneutic problems arising from the use of *ḥadīth*. In one problem, Ibn Qutayba labels a *ḥadīth* "*ṣaḥīḥ*," sound, because of the "*tatābuʿ al-riwāyāt ʿan thiqāt bihi min wujūh kathīra*" (problem 52, at p. 138; quoted by Calder, *Studies*, p. 224). This turn of phrase seems to refer to recurrent, parallel transmissions. It is unclear to me, however, whether this phrase refers to both uninterrupted *isnād*s (*tatābuʿ al-riwāyāt*) *and* their parallel recurrence (*ʿan wujūh kathīra*) or solely to the existence of parallel recurrence.[69] My guess, and Lecomte's

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[67] As we saw above, Ibn Qutayba also arguably has a more expansive version of the *ʿāmm:khāṣṣ* technique.

[68] Shāfiʿī says that instances of intra-Qurʾānic abrogation are known from indicants in the Sunna (*Risāla* §608), and rejects the cruder view of his interlocutor that abrogation may be employed to remedy apparent conflict between Qurʾān and Sunna (*Risāla* §§610-11).

[69] According to Lane, *tatābaʿa* means to be or become uninterrupted, so *tatābuʿ* could be expected to refer to an *isnād* in that sense. *Lexicon*, 295. But G.H.A. Juynboll has recently identified *tābaʿa* and *mutābiʿāt* as technical terms of *ḥadīth*

position, is that he is referring to both.[70] However that may be, it is not a recurring turn of phrase in the *Ta'wīl*, though the term *ṣaḥīḥ* does recur. Ibn Qutayba has no term for the opposite of recurrent reports, isolate reports (*akhbār āḥād*), though he does turn briefly to *ḥadīth* criticism in his introduction to the *Ta'wīl* (tr. pp. 73-4; pp. 45-6). There he argues that a report may be established by as few as one veracious transmitter (*yuthbat al-khabar bi'l-wāḥid al-ṣādiq*), using a phrase that at least echoes the technical phrase *khabar al-wāḥid* (Calder, *Studies*, p. 224, holds that the *Ta'wīl* does not know the term *khabar al-wāḥid*, though it does have a "basic terminology for the description of hadith").[71] One may at least agree with Calder's assessment (*Studies*, p. 224, n. 4) that Ibn Qutayba does not have a systematic set of criteria for evaluation of the formal properties (as opposed to the content) of *ḥadīth*s.[72] But then, none of the interlocutors' objections in the *Ta'wīl* concern a *ḥadīth*'s pedigree (not surprisingly—that would be to concede Ibn Qutayba's major premise), so there would have been no reason for Ibn Qutayba to invoke the concepts of *tawātur* or *akhbār āḥād* (though he does reject a few *ḥadīth*s as inauthentic; e.g., problems 74, 80, and 88).

Shāfiʿī's *Risāla* deals relatively extensively with *ḥadīth* criticism (§§998-1308). He has a concept of recurrence, expressed in one passage by the verbs *tawātara* and *taẓāhara* (*Risāla* §1190; Calder, *Studies*, p. 224, claims that he does not know the term *tawātur*), and also

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criticism that refer to recurrent but slightly less authoritative lines of transmission, specifically the creation of alternative "diving" *isnād*s. "(Re)Appraisal of Some Technical Terms in *Ḥadīth* Science," *Islamic Law and Society* 8 (2001), 303-49, at 315-22.

[70] Lecomte, *Traité*, 229, thinks that Ibn Qutayba is referring both to complete *and* recurrent *isnād*s: "transmission ininterrompue par des chaînes d'autorités diverses."

[71] ʿĪsā b. Abān (d. ca. 220/835) is said to have authored a work entitled *Kitāb khabar al-wāḥid*, a fact which tends to undermine Calder's suggestion that the term post-dates Ibn Qutayba. The work is listed in Muḥammad b. Isḥāq al-Nadīm, *Kitāb al-Fihrist*, 2d ed., ed. R. Tajaddud (Tehran: Marvi, n.d.), 258. Al-Nadīm also notes there that ʿĪsā b. Abān was polemically engaged with the doctrines of Shāfiʿī. On ʿĪsā's critique of Shāfiʿī, see now M. Bedir, "An Early Response to Shāfiʿī: ʿĪsā b. Abān on the Prophetic Report (*Khabar*)," *Islamic Law and Society* 9 (2002): 285-311.

[72] He is aware that there are general problems attending the vagaries of transmission, some of which he lists in problem 82 (at p. 176). Shāfiʿī, too, is aware of such problems, but believes that they can be guarded against by carefully weighing the probity of individual transmitters. See, e.g., *Risāla* §§1001ff., 1009, 1251-2. See also Lowry, "Legal-Theoretical Content," 195-202.

uses the phrase *khabar al-wāḥid* and cognate terminology frequently. More usual for Shāfiʿī, however, is the vague phrase *al-sunna al-mujtamaʿ ʿalayhā* (e.g., *Ris.* §§1815-6), which indicates widespread acceptance (perhaps a synonym for what other authors call *mashhūr*). In addition, Shāfiʿī has terminology for describing the completeness of *isnād*s: *mursal* and *munqaṭiʿ* for incomplete *isnād*s and *muttaṣil* for complete ones (*Risāla* §§1262-8). Finally, Shāfiʿī has a list of criteria for choosing between competing *ḥadīth*s and these involve *isnād* criticism and a few other matters, such as doctrinal similarity to passages in the Qurʾān (*Risāla* §§778-82).

Ibn Qutayba, it should also be noted, offers a tripartite hermeneutic typology of *ḥadīth*: (1) those brought by the angel Gabriel, containing fundamental legal rules (*uṣūl*); (2) those which God permits Muḥammad to institute (*sunna abāḥa allāh lahu [= Muḥammad] an yasunnahā*) and in which Muḥammad may employ his judgment (*istiʿmāl raʾyihi*) in order to create exceptions and special dispensations for cause (*yatarakhkhaṣ fīhā li-man yashāʾ ʿalā ḥasab al-ʿilla waʾl-ʿudhr*); and (3) those which Muḥammad instituted for the sake of inculcating manners (*taʾdīb*) and urging supererogatory acts entailing reward (*faḍīla*) (*Taʾwīl*, problem 46, pp. 132-5). This typology rests on a notion of descending degrees of legal force, ranging from the mandatory, to the potentially omissible or excusable, to the optional but edifying.[73] Interestingly, Ibn Qutayba implies that Muḥammad's role as (human) initiator of such *sunan* stands in an inverse relation to the strictness of the legal obligation which they impose.

Shāfiʿī, too, claims that revealed texts may have gradations of legal force, from the mandatory to the merely edifying. He elaborates this idea specifically in relation to prohibitions in *ḥadīth*s (*Risāla* §§926-60) and also more generally in relation to the Qurʾān (*Risāla* §§127-30, 1469).[74]

6. *Ijtihād*: Ibn Qutayba allows *ijtihād* and offers a defense of it in problem 27 (pp. 99-101). He acknowledges that God may reward

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[73] This same typology appears in Ibn Qutayba's *Kitāb al-Ashriba*, ed. Y.M. al-Sawwās (Beirut: Dār al-Fikr, 1998), 115-6, but with the Qurʾān occupying the place of *sunan* brought by Gabriel (for those using a different edition than mine, this typology appears at the beginning of Ibn Qutayba's conclusion, which is preceded by the subtitle "*ʿadl al-qawl fī al-sharāb*" in my edition, and begins with the sentence "*Wa-ammā mā nadhhab ilayhi wa-narāhu ʿadlan min al-qawl.*"

[74] I discuss this aspect of Shāfiʿī's hermeneutics in my forthcoming article, "The Reception of Shāfiʿī's Concept of *amr* and *nahy* in the Thought of his Student al-Muzanī."

exercises of *ijtihād* that do not attain an objectively correct result (*ṣawāb*), and insists (against a Muʿtazilī position?)[75] that there is no necessary correlation between the relative exertions of *mujtahid*s and their divine rewards. He also allows, in another passage, the possibility of legal disagreement (*ikhtilāf*) in regard to details of positive law (*furūʿ*), but does not connect that idea with *ijtihād* (tr. pp. 16-17; p. 13).[76] Shāfiʿī insists on *ijtihād* as an indispensable part of legal theory and practice and offers a detailed description and justification of it which is methodologically self-conscious and epistemologically sophisticated (*Risāla* §§1321-1670). For Shāfiʿī, *ijtihād* and *qiyās* are functionally and semantically equivalent (*Risāla* §1324) whereas Ibn Qutayba repeatedly denounces *qiyās* (*Taʾwīl*, e.g., p. 14, tr. p. 17).[77] Both Shāfiʿī and Ibn Qutayba dislike *istiḥsān* intensely (*Taʾwīl*, e.g., p. 14, tr. p. 17; *Risāla*, e.g., §1456). According to Calder (*Studies*, p. 226), Ibn Qutayba is "clearly unaware of the more sophisticated defence [of *ijtihād*] made available in the *Risāla*." Certainly, Shāfiʿī's discussion of *ijtihād* is more sophisticated than Ibn Qutayba's, but a defense of *ijtihād* is hardly of central importance to the overall argument presented in the *Taʾwīl*.

7. *Taʾwīl*. "Technique" is probably too generous a word for describing what is involved in *taʾwīl*. It is the name Ibn Qutayba gives, in a number of problems, to ad hoc, individualized readings of texts, words, etc. (see, e.g., *Taʾwīl*, problem 51, pp. 137-8). In many problems, he offers readings of this type, but without identifying his procedure as a *taʾwīl*. Shāfiʿī knows the term, too, in the sense of an individualized interpretation of a passage or word, and uses it occasionally (e.g., *Risāla*, §904). As signalled in the title of his work (*Taʾwīl Mukhtalif al-Ḥadīth*), the notion and the term play a considerably more important role for Ibn Qutayba than for Shāfiʿī.

Finally, there is a terminological overlap that probably does not rise to the level of a hermeneutic technique. Both authors use the root ẓ-h-r to characterize the apparent or plain (pre-interpretive) meaning of texts (*Risāla*, e.g, §§557-8; *Taʾwīl*, e.g., problem 34, pp. 112-13).

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[75] Zysow, "Economy of Certainty," 463-83 (esp. 466 and 468), shows that the Muʿtazila were resolutely infallibilist in regard to the result of *ijtihād*.

[76] His point is that disagreement in regard to the details of positive law is permissible, but not disagreement in regard to matters of theological doctrine.

[77] See also Lecomte, *Ibn Qutayba*, 256-7.

Techniques Known Only to Ibn Qutayba

Ibn Qutayba knows a number of techniques that are not found in Shāfiʿī's *Risāla*. Not surprisingly, perhaps, these techniques are most useful for sorting out apparent conflicts among *ḥadīth*s with a dogmatic content, or for interpreting away or discarding *ḥadīth*s identified as doctrinally repugnant.

1. *Language and Figures of Speech*: Several of Ibn Qutayba's techniques focus on language and might be termed literary-critical as opposed to legal-hermeneutical. As Calder implies (*Studies*, pp. 225-6), Ibn Qutayba is at his best when resolving interpretive difficulties by invoking the notion of figurative language. This represents by far the most common technique to which he resorts in the *Taʾwīl* and it is employed in some 33 problems altogether, 7 of which use various recurring technical terms. These include (as Calder has noted, *Studies*, p. 225), the verb *kannā*, as well as *tashbīh*, *tamthīl*, *takhyīl* and *īmāʾ*.[78] On two occasions, he uses the term *ḥaqīqa*,[79] but in the *Taʾwīl* he never uses the term *majāz*.[80] Ibn Qutayba also occasionally appeals more generally to idiomatic usage to explain away troubling phrases, invoking the notion of *kalām al-ʿarab*.[81] Shāfiʿī, too, appeals to the irreducibly idiomatic usage of the Arabs, identifying *ʿāmm* and *khāṣṣ*, and *jumla*, as linguistic phenomena unique to Arabic (*Risāla* §§173, 425),[82] but such appeals are not generally a means for interpreting individual texts. Ibn Qutayba also, on a few occasions, asserts that the Qurʾān, and also other texts, express ideas in abbreviated form (*ikhtiṣār*, *ḥadhf*) and he even uses the term *jumla* in one instance (problem 34) as a synonym for *ikhtiṣār*. *Jumla* is found in the *Risāla*,

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[78] I decline to translate these. Ibn Qutayba never employs them in such a way that their specific senses could be deduced, or explains what they mean, but rather only lists them as characteristics of texts he analyzes. See, e.g., problem 33 (pp. 110-2).

[79] In problems 87 and 96 he denies that certain texts are meant veridically (*ḥaqīqa*).

[80] As we have seen, he does use the term in the *Mushkil al-Qurʾān*. Heinrichs notes that Ibn Qutayba sometimes uses *majāz* to mean figurative language, and sometimes to mean idiomatic figures of speech. "Genesis," 130-2; "Contacts," 255-8. See below.

[81] For example, in problem 63 (pp. 151-2) he adduces the pre-Islamic usage of the word *dahr* in order to excuse an embarrassing formulation in a *ḥadīth* that equates God with *dahr*.

[82] On this aspect of Shāfiʿī's thought, see now Sherman Jackson, "Fiction and Formalism: Toward a Functional Analysis of *Uṣūl al-fiqh*," in: *Studies in Islamic Legal Theory*, ed. Weiss, 177-201.

but in a very precise sense, meaning a "general rule the details of which are found elsewhere" (see below).

Calder rightly notes that the *Risāla* "shows no (overt) interest in the category of the non-literal" (*Studies*, p. 225), and goes on to say that "[t]he single category which is signalled in Ibn Qutayba and not developed in the *Risāla* is that of the non-literal, covering allusion, simile, and metaphor" (*Studies*, p. 226). Of course, this difference reflects precisely the fact that Ibn Qutayba deals mostly with dogma and Shāfiʿī exclusively with law.

2. *Bi-lā kayf*: Ibn Qutayba occasionally trots out the phrase *bi-lā kayf* or equivalents, especially when defending *ḥadīth*s against the charge that they involve anthropomorphism (*tashbīh*) (e.g., problem 52, pp. 138-41).[83] This phrase is not in the *Risāla*, which in general has little time for the usual problems or terminology of early Muslim theological debate.[84]

Techniques Known Only to Shāfiʿī

The techniques and rubrics known to Shāfiʿī but not, apparently, to Ibn Qutayba in his *Taʾwīl Mukhtalif al-Ḥadīth* are the following:

1. *Jumla:Naṣṣ*: In general, this is a means for harmonizing Qurʾān and *ḥadīth*. Passages in the Qurʾān labeled *jumla* contain a general but undefined obligation (e.g., *aqīmū al-ṣalāt*!) the details of which are supplied by *ḥadīth*s. Passages that do not require to be supplemented by another text (that is, are hermeneutically self-sufficient), are labeled *naṣṣ*. As we have seen, Ibn Qutayba uses *jumla* on one occasion as a synonym for *ikhtiṣār*, that is, in his vocabulary describing idiomatic usages (here brevity). Calder rightly notes that *jumla* and associated terms have, in the *Risāla*, "a significantly more structured role than in Ibn Qutayba's work" (*Studies*, p. 225), and he identifies it as one of the three major devices signalled in the *Risāla* (along with *ʿāmm:khāṣṣ* and *naskh*) (*Studies*, p. 241).[85]

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[83] For an excellent brief overview of this term and its history, with references, see Josef Van Ess, *Theologie und Gesellschaft im 2. und 3. Jahrhundert Hidschra*, 6 vols. (Berlin: Walter de Gruyter, 1991-1997), v. 4, 418-9.

[84] The only technical vocabulary it uses from early theological debates is predestinarian, and then only in connection with the structure of the law (which is foreordained), not in connection with the usual problems of the predestinarian debate. See Lowry, "Legal-Theoretical Content," 399-414.

[85] One might quarrel, however, with Calder's claim that *jumal* and cognates are connected with words derived from the root b-y-n (*Studies*, p. 225). *Naṣṣ* and very occasionally *mufassar* are opposed to *jumla/jumal*, but, more importantly,

2. *Amr:Nahy*: Shāfiʿī has a theoretical account of God's prohibition (*nahy*, *Risāla* §§ 926-60) and a hermeneutic rule concerning divine commands and prohibitions (§591: they are to be construed as absolute in the absence of other textual evidence). He also groups together problems involving commands and prohibitions (*Risāla* §§846-925) as part of a larger treatment of contradictory *ḥadīth*s (*aḥādīth mukhtalifa*, discussed at *Risāla* §§7120-925).[86] The notion that texts may appear contradictory, at least, is prominently signalled in the title of Ibn Qutayba's *Taʾwīl*.

3. *Qiyās*: As already noted, Shāfiʿī considers *qiyās* the equivalent of *ijtihād* whereas Ibn Qutayba allows *ijtihād* but considers *qiyās* something highly suspect. For Shāfiʿī, *qiyās* is highly regulated and generally limited to two varieties, *qiyās* based on a shared policy reason (*maʿnā*) and *qiyās* based on superficial similarity (*shabah*) (see *Risāla* §§122-5, 1334).

Finally, Calder points out that Ibn Qutayba is unaware of Shāfiʿī's "painstaking distinction between two types of knowledge" (*Studies*, p. 226; see also pp. 241-2).[87] Calder is surely right about this, but since Shāfiʿī's is not the epistemology of later *uṣūl al-fiqh*, it is not clear that its absence from the *Taʾwīl* is significant.

V. Conclusions: The Risāla, the Taʾwīl, and Islamic Legal Theory

Major differences between the *Risāla* and the *Taʾwīl* in purpose and content render a comparison such as that undertaken by Calder subject to certain qualifications.

The *Risāla* offers an all-encompassing legal hermeneutic whereas the *Taʾwīl* offers a theologically driven defense of individual *ḥadīth*. As a result, only a relatively small part of the *Taʾwīl* concerns legal hermeneutics. A comparison of the two works' legal hermeneutics,

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the word *bayān* has a special role all its own in the *Risāla*. See, e.g., my "Does Shāfiʿī Have a Theory of Four Sources of Law?" in: *Studies in Islamic Legal Theory*, ed. Weiss, 23-50, at 45-50.

[86] On this aspect of Shāfiʿī's legal thought see my forthcoming article, "The Reception of Shāfiʿī's Concept of *amr* and *nahy* in the Thought of his Student al-Muzanī."

[87] The distinction in question—between knowledge of matters unproblematic and accessible to all Muslims and knowledge of difficult matters requiring the intervention of specialists—is developed by Calder in an excellent article, "Ikhtilāf and Ijmāʿ in Shāfiʿī's *Risāla*," *Studia Islamica* 58 (1983), 55-81. See also Lowry, "Legal-Theoretical Content," 317-61.

though possible, yields evidence that can be difficult to interpret. On the one hand, in terms of the actual problems analyzed and techniques used to address them, the two texts exhibit considerable overlap. On the other hand, both texts know and employ techniques and technical terms which are unknown to the other. And given that the whole point of the *Risāla*, quite unlike that of the *Ta'wīl*, seems to be to offer a comprehensive account of the architecture of the divine law, it is hardly surprising that its approach to legal matters appears more sophisticated than that of the *Ta'wīl*. One might also add that the prose style of the *Ta'wīl* seems more fluid and developed than that of the *Risāla*, which latter proceeds in a dense, archaic Arabic. Such equivocal evidence, drawn from a narrow and heavily qualified comparison, hardly compels the conclusion that the texts are so dissimilar as to require a reversal of their traditional datings.[88]

Dating and ascription aside, it may be interesting to consider the relationship of these two works in terms of the history of *uṣūl al-fiqh*. In two masterful articles tracing the history of the terms *ḥaqīqa* and *majāz*, Wolfhart Heinrichs shows how the term *majāz* originates as a device of paraphrastic exegesis among grammarians and Qur'ān exegetes, and then develops two specialized senses: that of "idiomatic expression" and that of "figurative language."[89] Most relevant for present purposes is Heinrichs' discussion of Ibn Qutayba's use of the term *majāz*. Ibn Qutayba uses the term in both senses, that is, in ways traceable to the grammar-*tafsīr* tradition ("idiomatic expression"), but also in ways influenced by the theologians (specifically by the Mu'tazila—"figurative language").[90] In the sense of "figurative language," *majāz* then ends up becoming a stock technical term, and issue, in classical works on *uṣūl al-fiqh*.[91]

Without wishing to claim Ibn Qutayba as a major progenitor of classical *uṣūl al-fiqh*, it is nonetheless striking that, in regard to the term *majāz*, he lies on a line of development originating with the grammar-*tafsīr* tradition, affected by theological debates, and pointing toward mature *uṣūl al-fiqh*. Shāfi'ī, by contrast, does not invoke or

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[88] Neither do they appear to me similar enough to require that they be roughly contemporaneous, as Melchert has argued. "Qur'ānic Abrogation," 92-3.

[89] See his "Genesis" and "Contacts," cited above. Inevitably, I have somewhat oversimplified Heinrichs's presentation of a complex matter.

[90] "Genesis," 132; "Contacts," 257-8.

[91] See generally the two articles by Heinrichs, as well as Hallaq, *History of Islamic Legal Theories*, 42-3.

have much use for a concept of figurative or veridical language in the *Risāla*. Above, I suggested that Ibn Qutayba's usage of the root kh-ṣ-ṣ also stems from the grammar-*tafsīr* tradition, and that it more resembles the usage of mature *uṣūl al-fiqh* than does Shāfiʿī's use of the term. In this regard, too, Ibn Qutayba's *Taʾwīl* seems to lie on a route that bypasses Shāfiʿī's *Risāla*. One might also add that Ibn Qutayba's concept of abrogation (allowing both inter- and intra-source abrogation) is more consistent with later *uṣūl al-fiqh* than is Shāfiʿī's much narrower concept of the functioning of abrogation.[92] Finally, Shāfiʿī mostly ignores theological issues, whereas a relatively wide range of standard theological problems appears in Ibn Qutayba's *Taʾwīl*, especially in the non-legal problems, which take up the balance of his discussion.[93] Later *uṣūl al-fiqh* is clearly a literature by and for theologians.

Lest it be thought that I am portraying Ibn Qutayba's *Taʾwīl* as the precursor to *uṣūl al-fiqh*, it is also worth noting the following global similarity between the *Risāla* and the *Taʾwīl*: Both proceed, mostly, by offering discrete example problems in which hermeneutic techniques are employed to reach a desired result. To this extent, both works proceed inductively rather than deductively. Works on classical *uṣūl al-fiqh* proceed deductively and dispense, for the most part, with in-depth examinations of discrete legal or textual problems.

Still, Ibn Qutayba combines an interest in language, grammar and exegesis with a sensitivity to theological debates, a passable knowledge of current legal issues, and a perspective conditioned (very strongly in his case) by the increasing importance of the *ahl al-ḥadīth*.[94] These considerations seem, paradoxically perhaps, to suggest that Ibn Qutayba stood much closer in his concerns in the *Taʾwīl* to the mix of elements that gave rise to classical *uṣūl al-fiqh* than did Shāfiʿī in the *Risāla*. This is not to say that the *Risāla* had no effect (however

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[92] E.g., Weiss, *Search for God's Law*, 533-4.

[93] This does not mean, however, that Shāfiʿī did not aim his *Risāla* squarely at *kalām*, but rather that he wished to offer a systematic alternative to it. See G. Makdisi, "The Juridical Theology of al-Shāfiʿī: Origins and Significance of *uṣūl al-fiqh*," *Studia Islamica* 59 (1984), 5-47. Shāfiʿī's account is, however more structural than methodological and so represents an alternative account of the functioning of revelation rather than an alternative methdology.

[94] For the traditionists' contribution to the formation of the Islamic legal tradition, see Melchert, "Traditionist-Jurisprudents and the Framing of Islamic Law," *Islamic Law and Society* 8:3 (2001), 383-406.

attenuated) on the formation of classical *uṣūl al-fiqh*, but rather to point out the somewhat surprising fact that certain foreshadowings of *uṣūl al-fiqh* appear more in evidence in Ibn Qutayba's relatively unsystematic *Ta'wīl*. This picture would accord with the traditional ascription and dating of both works.[95]

However that may be, both Shāfiʿī and Ibn Qutayba welcome and combine, though in their own ways, the intellectualism of the *ahl al-kalām* with the textual postulates of *ḥadīth*-piety.[96] What is interesting about the two works considered in this article is how differently they combine these two trends while remaining, at least in hindsight, within a common intellectual tradition from which Sunnism emerged.

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[95] It would also seem to confirm, to some extent, Hallaq's conclusions that Shāfiʿī's legal thought was ignored for several decades and not immediately relevant to the development of the science of *uṣūl al-fiqh*. "Was al-Shafiʿi the Master Architect of Islamic Jurisprudence?", *International Journal of Middle East Studies* 4 (1993), 587-605.

[96] On other features of the piety of the *ahl al-ḥadīth*, see now Melchert, "The Piety of the Hadith Folk," *International Journal of Middle East Studies* 34 (2002), 425-39.