

and *ijtihād*. There is no fourth category. *Ijtihād* in our view only refers to selection from these opinions if they differ or contradict one another by careful consideration and assiduous pursuit of what is closest to rectitude and correctness. . . .<sup>15</sup>

Abū 'Ubayd uses the term *uṣūl al-aḥkām* "the sources of legal rulings" here as an equivalent of *uṣūl al-fiqh*, in the same way it would be used in the later genre. He conceives of the *uṣūl* as a finite, countable collection of principles or sources from which all legal assessments may be derived. What is more, his remarks imply criticism of similar lists, proposed by other legal theorists, where *ijtihād* certainly, and possibly consensus as well, appeared as independent principles. This concept, absent in al-Shāfi'ī's *Risālah* and at the heart of the *uṣūl al-fiqh* genre, had become important by the early ninth century.

A second crucial feature of the *uṣūl al-fiqh* genre is the use of the term *uṣūl* itself, with the particular sense of basic sources or principles on which further elaboration of the law is based. Here again, al-Shāfi'ī's *Risālah* stands apart, for it neither bears the term in its title nor uses it as such in the text. Bibliographic information available shows that the term *uṣūl* "roots, principles" became popular in book titles in a number of fields in the ninth and tenth centuries. The terms *uṣūl al-fiqh* or *uṣūl al-aḥkām* belong to this general trend, as does the term *uṣūl al-dīn*, referring to theology. The term *uṣūl* here refers to principles on the basis of which the further conclusions of the science may be elaborated. A *Kitāb uṣūl al-dīn* is attributed to the Mu'tazilī Abū Mūsā 'Īsā b. Ṣubayḥ al-Mirdār (d. 226/840–41), reputed to have been the first to spread Mu'tazilī teachings in Baghdad.<sup>16</sup> Ibn Khallād al-Baṣrī (fl. 4th/10th c.) also wrote a work on dogmatic theology entitled *Kitāb al-uṣūl*.<sup>17</sup> Abū Marwān 'Abd al-Malik b. Ḥabīb al-Sulamī al-Mirdāsī al-Ilbīrī al-Qurṭubī (d. 238/853 or 239/854) supposedly wrote *Kitāb uṣūl al-farā'id*, on inheritance law.<sup>18</sup> Another work with an analogous title is *Uṣūl al-naḥw* by Abū Bakr Muḥammad Ibn al-Sarrāj (d. 316/928).<sup>19</sup> These two fundamental

<sup>15</sup> Al-Qāḍī al-Nu'mān, *Ikhtilāf uṣūl al-madhāhib*, 212.

<sup>16</sup> Ibn al-Nadīm, *al-Fihrist*, ed. Tajaddud, 206–7.

<sup>17</sup> Ibn al-Nadīm, *al-Fihrist*, ed. Tajaddud, 222.

<sup>18</sup> Brockelmann, *GAL*, GI:156.

<sup>19</sup> The title is given thus in Abū Bakr Muḥammad b. al-Ḥasan al-Zabīdī al-Andalusī, *Ṭabaqāt al-naḥwīyīn wa'l-lughawīyīn*, ed. Muḥammad Abū al-Faḍl Ibrāhīm

conditions for the existence of the *uṣūl al-fiqh* genre, the concept of a finite, ordered set of sources of the law and the use of the term *uṣūl* to denote the fundamental principles of a science, had both been met by the early ninth century.

If the sources provide nothing more than a title, it is difficult to make a strong case for the existence of the *uṣūl al-fiqh* genre, but in some cases, they preserve more substantial hints of early works which have now been lost. These are sufficient to dispel any doubts that the works in question were manuals of *uṣūl al-fiqh* of the type familiar from later extant works. The earliest of these that has come to light so far is the description of a work on jurisprudence by ‘Amr b. Baḥr al-Jāḥiẓ (d. 255/869). The work is often referred to as *Kitāb al-futyā* (“*The Book of Legal Responsa*”), but citations in other sources give the title *Kitāb uṣūl al-futyā* (“*The Book of the Principles of Legal Responsa*”).<sup>20</sup> Al-Jāḥiẓ himself describes the work in *Kitāb al-ḥayawān* as follows: *kitābī fī al-qawl fī uṣūl al-futyā wa’l-aḥkām* (“My book discussing the principles of legal responsa and legal rulings”).<sup>21</sup> In an extant letter, he presents the work as a gift to the Mu‘tazilī chief judge of Baghdad, Aḥmad b. Abī Du‘ād al-Iyādī (d. 240/854).<sup>22</sup> It is clear from the letter that Ibn Abī Du‘ād was serving as judge when al-Jāḥiẓ sent him the book, which must have been written before 233/848, because *Kitāb al-ḥayawān*, where he mentions the work, dates to that year.

Pellat discussed al-Jāḥiẓ’ letter to Ibn Abī Du‘ād in the *Gibb Festschrift*, expressing regret that so little is known about the legal scholarship of a thinker who wrote so brilliantly in other fields. He

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(Cairo: Dār al-ma‘ārif, 1984), 112. Ibn al-Nadīm gives the work the title *Kitāb al-uṣūl al-kabīr* and reports another work entitled *Kitāb jumal al-uṣūl. al-Fihrist*, ed. Tajaddud, 68.

<sup>20</sup> It is cited as such in Abū al-Ḥusayn al-Baṣrī, *Sharḥ al-‘Umad*, 2 vols., ed. ‘Abd al-Ḥamīd b. ‘Alī Abū Zunayd (Medina: Maktabat al-‘ulūm wa’l-ḥikam, 1989), 2:6. I thank Aron Zysow for pointing out that the work published as *Sharḥ al-‘Umad* is actually the *Mujzī* of the Zaydī Imam al-Nāṭiq bi’l-Ḥaqq (d. 424/1033), edited from MS Vat. arab. 1100. See Wilferd Madelung, *Der Imam al-Qāsim ibn Ibrāhīm und di Glaubenslehre der Zāiditen* (Berlin: Walter de Gruyter, 1965), 179–80.

<sup>21</sup> ‘Amr b. Baḥr al-Jāḥiẓ, *Kitāb al-ḥayawān*, 7 vols. (Cairo: al-Maṭba‘ah al-ḥamīdīyah al-miṣrīyah, 1905–7), 1:9.

<sup>22</sup> al-Jāḥiẓ, *al-Rasā’il*, 4 vols., ed. ‘Abd al-Salām Muḥammad Hārūn (Beirut: Dār al-jil, 1991), 1:309–19. Ibn Abī Du‘ād was appointed chief judge in Baghdad in 218/833 by the Abbasid Caliph al-Mu‘taṣim (218–27/833–42) and remained in this position, with his son Abū al-Walīd Muḥammad as deputy, until they were both dismissed by al-Mutawakkil (232–47/847–61) in 237/851–52. On Ibn Abī Du‘ād, see K. V. Zetterstéen and Ch. Pellat, “Aḥmad b. Abī Du‘ād”, *EF*, 1:271. On al-Jāḥiẓ, see Ch. Pellat, “al-Djāḥiẓ”, *EF*, 2:385–87.

wrote, "Ce qui importe en effet c'est l'existence même de ce *Kūtāb al-Futyā*, sorte d'avant-projet de codification de la *sharī'a* et non simple traité d'*ikhtilāf* comme tant d'autres. Il est regrettable qu'on ne puisse en dire davantage sur les aptitudes juridiques d'un homme qui a brillé dans tant d'autres domaines et sur les résultats, sans doute éphémères, de ses efforts en vue de faire réduire par les 'autorités compétentes' des divergences qui heurtaient sa raison et son sens de la justice".<sup>23</sup> Pellat's description suggests to the reader that al-Jāhiz' work is a compendium of *fiqh*, describing the points of law. Certainly that is what a codification of the *sharī'ah* would conjure up in the minds of most scholars. Pellat does not describe the work as treating *uṣūl al-fiqh* per se, and does not connect it with the tradition of *uṣūl al-fiqh* manuals.

Like Pellat's discussion, van Ess' study of al-Jāhiz' *Kūtāb al-futyā* does not identify it explicitly as a work on *uṣūl al-fiqh*. Van Ess, who collected and assembled passages quoted in later extant works, was particularly interested in the citations al-Jāhiz' work preserved from al-Nazzām (d. 221/836) and notes that the medieval authors seem to have been interested the work mainly for that reason as well. Van Ess argues that the extant citations come from a work of al-Nazzām entitled *Kūtāb al-nakth* ("The Book of the Breach") and that they provide, not a reconstruction of the work, but a basic idea of its structure and intent. *Kūtāb al-nakth* apparently aimed to refute the validity of consensus as a legal argument. In the course of his presentation, al-Nazzām demonstrates the defects of the Prophet's Companions, and most of the extant citations have to do with these defects. It is not surprising, therefore, that Shiite authors such as al-Shaykh al-Mufīd (d. 413/1022) and al-Sharīf al-Murtaḍā (d. 436/1044) paid a great deal of attention to the work, or at least to the parts which al-Jāhiz had transmitted.<sup>24</sup> They were of course concerned to impugn the character of Companions such as the first three Caliphs: Abū Bakr, 'Umar, and 'Uthmān.

<sup>23</sup> Charles Pellat, "À Propos du *Kūtāb al-Futyā* de Jāhiz", pp. 538-46 in *Arabic and Islamic Studies in Honor of Hamilton A. R. Gibb*, ed. George Makdisi (Leiden: Brill, 1965), 540-41.

<sup>24</sup> Josef van Ess, *Das Kūtāb al-nakth des Nazzām und seine Rezeption im Kūtāb al-Futyā des Jāhiz: Eine Sammlung der Fragmente mit Übersetzung und Kommentar* (Göttingen: Vandenhoeck & Reprecht, 1971). See also idem, pp. 170-201 in *Festschrift Spies: Der Orient in der Forschung* (Wiesbaden: Otto Harrassowitz, 1967).

*Kitāb al-nakth* apparently treated a single topic in jurisprudence, consensus, supporting the opinion that consensus is not in general a valid source of law. It was not, therefore, a discussion of jurisprudence as a whole, a comprehensive exposition of *uṣūl al-fiqh*. The work of al-Jāḥiẓ, however, may indeed have been a comprehensive work on jurisprudence that cited the material from *Kitāb al-nakth* under the heading of consensus, but presumably included as well the other topics dealt with in typical works of jurisprudence as we know them from the following centuries: the language of the Koran and the Sunnah, *qiyās*, *ijtihād*, and so forth. The picture we get of the original work has obviously been skewed by a number of factors which are difficult to gauge. Transmitters seem concerned with preserving the statements of al-Nazzām much more than those of his pupil, al-Jāḥiẓ. The fact that the main transmitters were Shiite theologians writing in particular polemical contexts also played a role in skewing the contents.

It is clear, though, that the work was not devoted to *fiqh*, the points of law. The fact that it is cited as *Kitāb al-futyā* in later works should not mislead us. This is merely an abbreviation of *Kitāb uṣūl al-futyā*, as is evident from al-Jāḥiẓ' own use of the title *Uṣūl al-futyā wa'l-aḥkām*. The larger topic dealt with in al-Nazzām's work, which was cited in extenso in *Kitāb uṣūl al-futyā*, is consensus, and not merely the defects of the Companions, which one might expect to find in a theological work on the Imamate. Consensus would not have been given such a prominent place, if any, in a work on the points of law. This is corroborated by al-Jāḥiẓ' description of the work in his letter. He refers to it as a comprehensive study of "the principles of issuing legal opinions" (*uṣūl al-futyā*) over which scholars have differed.<sup>25</sup> His statement clearly distinguishes *uṣūl* "roots, principles" from *furūʿ* "branches, particulars", placing the latter in parallel with *aḥkām* "rulings, assessments" and identifying the substance of the work as lying within the former category.

Citations preserved in later works on jurisprudence corroborate the assessment that al-Jāḥiẓ' work treats *uṣūl al-fiqh* in particular. The Zaydī jurist and Imam Abū Ṭālib Yaḥyā b. al-Ḥusayn, known as al-Nāṭiq bi'l-Ḥaqq (d. 424/1033) cites in *al-Mujzī* (published as Abū Ḥusayn al-Baṣrī's *Sharḥ al-ʿUmad*) the work of al-Jāḥiẓ. The passage

<sup>25</sup> Pellat, "À Propos du *Kitāb al-Futyā*", 542-44.

reads, "Among the rejectors of legal analogy who profess this opinion is al-Nazzām, because al-Jāhiz related from him in *Uṣūl al-futyā* that he said, 'Legal rulings can only be established by a scriptural text or by causes which a scriptural text provides', and a group of Zāhirīs, such as al-Nahrabānī, al-Qāshānī, and al-Maghribī".<sup>26</sup> This text is significant because it treats neither the defects of the Companions, nor the general topic of the validity of consensus, but rather the validity of analogical reasoning as a source for the law. *Kitāb uṣūl al-futyā wa'l-ahkām* thus included a significant discussion of *qiyās*, and al-Jāhiz cited al-Nazzām in this discussion as well. *Al-Mujzī* also cites *Naqd al-futyā*, by the Mu'tazilī theologian and Ḥanafī jurist Abū 'Abd Allāh al-Baṣrī (d. 367/977–78), known as "al-Ju'ī". While this title as well might imply that the work deals with the points of law, it is clearly an abbreviation of *Naqd uṣūl al-futyā*: the work is a refutation of al-Jāhiz' *Kitāb uṣūl al-futyā wa'l-ahkām*. The topics dealt with in these passages are *qiyās* and *ijtihād*.<sup>27</sup> Another anecdote reports that when the Ḥamdānid ruler Sayf al-Dawlah had sent a question on *ijtihād* to the famous Ḥanafī jurist Abū al-Ḥasan al-Karkhī, al-Karkhī had his student Abū 'Abd Allāh answer it. Abū 'Abd Allāh later incorporated the answer into both his manual of *uṣūl al-fiqh* and *Naqd al-futyā*.<sup>28</sup> In all likelihood, Abū 'Abd Allāh would have included a discussion of *ijtihād* in the refutation only if the original work had treated this topic. Al-Jāhiz' *Kitāb uṣūl al-futyā wa'l-ahkām* must therefore have treated *uṣūl al-fiqh*, including, at the very least, sections on consensus, legal analogy, and *ijtihād*.

Another ninth-century legal theorist, Dā'ūd b. 'Alī b. Khalaf al-Iṣbahānī (d. 270/884), the founder of the Zāhirī *madhhab*, probably wrote a comprehensive manual of *uṣūl al-fiqh*, despite the fact that his *Kitāb al-uṣūl* probably dealt with the principal questions of *fiqh* and not *uṣūl al-fiqh* per se.<sup>29</sup> In the *Fihrist*, Ibn al-Nadīm copied a catalogue of Dā'ūd's works from a fascicle written in an old hand by a certain Maḥmūd al-Marwazī, who, he guesses, was an earlier Zāhirī scholar, perhaps contemporary with Dā'ūd himself. This catalogue includes 146 titles, of which the first 118 appear to belong

<sup>26</sup> Al-Nāṭiq, *al-Mujzī*: al-Baṣrī, *Sharḥ al-'Umad*, 2:6.

<sup>27</sup> Al-Nāṭiq, *al-Mujzī*: al-Baṣrī, *Sharḥ al-'Umad*, 1:298–99, 2:6.

<sup>28</sup> Al-Qādī 'Abd al-Jabbār, *Faḍl al-'iḥzāl*, in collection *Faḍl al-'iḥzāl wa-tabaqāt al-Mu'tazilah*, ed. Fu'ād Sayyid (Tunis: al-Dār al-tūnisīyah li'l-nashr, 1974), 326.

<sup>29</sup> Ibn al-Nadīm, *al-Fihrist*, 271.

to a huge work on the points of law, following the standard chapter headings of *fiqh* compendia. That they refer to the chapters of one work is not surprising, for the term *kitāb* (“book”) often refers to a chapter in a larger work, though it can also designate a substantial independent work, a short treatise, or a letter. Indeed, it was quite common to label the chapters of *fiqh* works “books”, as evident from published *fiqh* works and from other entries in Ibn al-Nadīm’s *Fihrist* where he lists as “books” the many individual chapters of larger works.<sup>30</sup> For example, referring to Muḥammad b. Ḥasan al-Shaybānī (d. 189/805), Ibn al-Nadīm remarks, “Muḥammad authored a book (*kitāb*) known as *The Book of Pilgrimage (Kitāb al-ḥajj)*, which contains many chapters (*kutub*)”.<sup>31</sup> To the Shāfi‘ī jurist Muḥammad b. al-Ḥusayn al-Ājurrī (d. 360/970) he attributes *The Book of Advice (Kitāb al-naṣīḥah)*, which contains a number of chapters (*kutub*) on the points of law”.<sup>32</sup> He reports that al-Ṭaḥāwī’s (d. 321/933) unfinished *Kitāb al-ikhtilāf bayn al-fuqahā’* (“*The Book of Disagreement among the Jurists*”) contained eighty chapters (*kutub*).<sup>33</sup> Dā’ūd’s *fiqh* work must have been very large indeed, for some of the individual chapters are reported as comprising 300, 400, 600, or 1,000 folios.<sup>34</sup> For this reason, apparently, al-Ṭabarī referred to Dā’ūd as *dhū al-asfār* “the man of many tomes” or “the bearer of books” in a treatise directed against him.<sup>35</sup> As Hallaq notes, Ibn al-Nadīm attributes another work to the later Zāhirī scholar Ibn Raqqī (fl. 4th/10th c.), stating that it contains one hundred chapters and follows the organization of *al-Uṣūl*, so that it is not necessary for him to list here all the chapter headings.<sup>36</sup> This suggests that the long list of “books” at the beginning of al-Marwazī’s catalogue of Dā’ūd’s works is indeed an index of the *Kitāb al-uṣūl* Ibn al-Nadīm had mentioned just above.<sup>37</sup>

<sup>30</sup> See, for example, the entries on Muḥammad b. Mas‘ūd al-‘Ayyāshī, Abū Yūsuf, and Muḥammad b. al-Ḥasan al-Shaybānī: Ibn al-Nadīm, *al-Fihrist*, 244–46, 256–57, 257–58.

<sup>31</sup> *Ibid.*, 258.

<sup>32</sup> *Ibid.*, 268.

<sup>33</sup> *Ibid.*, 260.

<sup>34</sup> These indications of length might, however, be referring not simply to the immediately preceding titles but to the series of (chapter) titles preceding them. The phrase *dhū ‘l-asfār* may be interpreted as a reference to Q 62:5, which compares Jewish scholars who transmit the Torah to a donkey bearing books (*ka-mithli ‘l-ḥimārī yahmalu asfāran*). In other words, al-Ṭabarī is calling Dā’ūd a donkey, accusing him of transmitting loads of religious writings without understanding them.

<sup>35</sup> Yāqūt al-Ḥamawī, *Muḥjam al-buldān*, 18:78.

<sup>36</sup> Ibn al-Nadīm, *al-Fihrist*, 273.

<sup>37</sup> Hallaq, “Shafi‘ī”, 589–90.

This does not prove, however, that Dā'ūd did not write on *uṣūl al-fiqh*. Another series of "book" titles included in al-Marwazī's catalogue bears a strong resemblance to the chapter headings of a manual of *uṣūl al-fiqh*. It seems probable that here, as in the case of the *fiqh* titles, the catalogue is presenting the chapter titles of a comprehensive, systematic work on jurisprudence. The work seems to be organized in the following manner:

1. Chapter on Consensus.
2. Chapter Demonstrating the Invalidity of the Blind Adoption of Opinions (*taqlīd*).
3. Chapter Demonstrating the Invalidity of Legal Analogy.
4. Chapter on Unitary Traditions.
5. Chapter on Traditions which Provide Certainty.
6. Chapter on Incontrovertible Proof.
7. Chapter on Specific and General Scriptural Texts.
8. Chapter on Explained and Ambiguous Scriptural Texts.<sup>38</sup>

Taken as a whole, this list includes the main topics covered by extant *uṣūl al-fiqh* works from later centuries. This, together with the fact that the titles appear contiguously, suggests that they belong to a single work. The order may seem somewhat odd in comparison with that of later texts, which usually begin with the issues of legal language that appear at the end here. This might be the case since Dā'ūd had a particularly strong polemic concern with the issues of consensus, *taqlīd*, and legal analogy, and therefore placed them first in the book, while relegating other, less controversial topics to the end. The topics which appear to be missing, if one judges from the contents of later works in the genre, are abrogation and divine commands and prohibitions. The latter might be subsumed under the chapter entitled "Incontrovertible Proof", but it is difficult to tell what the intended meaning of "proof" (*hujjah*) is here. This chapter could be an epistemological discussion of the establishment of legal knowledge, in which case one would expect Dā'ūd to uphold the need for certainty in the law and to reject the proposition that speculation (*nazar*) can lead to the truth. Perhaps most probable is that this chapter attempts to define and describe the limited set of hadith reports which can be taken as incontrovertible prooftexts. The well-known Mu'tazilī theologian Abū al-Hudhayl Muḥammad b. al-'Abdī (d. 235/849–50) wrote a work with the same title, *Kitāb al-hujjah*, in

<sup>38</sup> Ibn al-Nadīm, *al-Fihrist*, 272.

which he argued that only twenty hadiths could be considered incontrovertible proofs; other scholars, including Ibn Surayj, argued that the number of such hadiths was without limit.<sup>39</sup> Goldziher guessed that some of the titles attributed to Dā'ūd belonged to pamphlets written in response to specific Ḥanafī treatises such as *Kitāb ihbāt al-qiya's* and *Kitāb ijtihād al-ra'y* by the jurist 'Īsā b. Abān (d. 221/835–36).<sup>40</sup> While Dā'ūd's titles do imply a response to existing scholarship, it seems more likely that they represent chapters within a work on *uṣūl al-fiqh* which responds to other works with similar chapter headings. Further research may corroborate this tentative identification of an early manual of *uṣūl al-fiqh*.

The famous historian and jurist Abū Ja'far Muḥammad b. Jarīr al-Ṭabarī (d. 310/923) wrote four works which conceivably treated *uṣūl al-fiqh*. One of these, entitled *al-Ādar fī al-uṣūl*, al-Ṭabarī never completed, and the text reporting the title seems corrupt, the meaning of the word *ādar* not being at all clear.<sup>41</sup> Another work is entitled *al-Mūjaz fī al-uṣūl*, but the fact that it was prefaced by a discussion of ethics (*akhlāq*)<sup>42</sup> suggests that it might not have focused on jurisprudence. It is clear, though, that two works by al-Ṭabarī treated *uṣūl al-fiqh*. One of these was a treatise al-Ṭabarī prefaced to *Ikhtilāf al-'ulamā'* (also known as *Ikhtilāf al-fuqahā'*). A short passage describing its contents has been preserved in Yāqūt's *Irshād*: "He had made for the *Kitāb al-ikhtilāf* a treatise which he had prefaced to the book but then removed. In it, he discussed general consensus and traditions originating with single authorities of recognized probity, additions not in *Laṭīf*, as well as traditions whose chains of authority do not go all the way back to the Prophet (*marāsīl*) and abrogating and abrogated scriptural texts (*al-nāsikh wa'l-mansūkh*)".<sup>43</sup> Another was a

<sup>39</sup> Al-Qādī 'Abd al-Jabbār, *Faḍl al-ī'tizāl*, 301.

<sup>40</sup> Ignaz Goldziher, *Die Zāhīriten, Ihr Lehrsystem und ihre Geschichte* (Hildesheim: Georg Olms, 1967), 35. Hallaq endorses this assessment in "Shāfi'ī", 589, though he acknowledges that Dā'ūd represents something of an exception to the statement that the ninth century produced no works on *uṣūl al-fiqh*.

<sup>41</sup> Franz Rosenthal, trans. and annot., *The History of al-Ṭabarī, vol. I: General Introduction and From the Creation to the Flood* (Albany: State University of New York Press, 1989), 85.

<sup>42</sup> Franz Rosenthal, *General Introduction*, 113–17.

<sup>43</sup> Yāqūt al-Ḥamawī, *Mu'jam al-udabā'*, 20 vols. (Beirut: Dār ihyā' al-turāth al-'arabī, 1988), 18:73; Franz Rosenthal, *General Introduction*, 101–4, with slight modifications of the translation.

treatise prefaced to the legal work *Latīf al-qawl fī aḥkām sharā'ī' al-islām* with the separate title *al-Bayān 'an uṣūl al-aḥkām*. This treatise is cited in al-Ṭabarī's *Exegesis*, which shows that it treated general and particular scriptural texts, abrogating and abrogated scriptural texts, commands and prohibitions, and possibly consensus and legal analogy.<sup>44</sup> Another anecdote preserved in Yāqūt's *Irshād* shows that both works treated the topic of consensus.<sup>45</sup> Another passage gives a more detailed list of the topics included in the work:

1. Consensus
2. Traditions Transmitted by Single Authorities.
3. Traditions whose Chains of Authority do not Reach the Prophet.
4. Abrogating and Abrogated Texts on Legal Rulings.
5. Ambiguous and Clarified Traditions.
6. Commands and Prohibitions.
7. The Acts of the Messenger<sup>46</sup>
8. Particular and General Scriptural Texts.
9. *Ijtihād*.
10. The Invalidity of Juristic Preference (*Istihsān*).<sup>47</sup>

This work, *al-Bayān 'an uṣūl al-aḥkām*, was a manual of *uṣūl al-fiqh* as sophisticated and comprehensive as many of the extant works from later centuries. Moreover, it was one of al-Ṭabarī's earlier works, written before his other work on *uṣūl al-fiqh*, the treatise prefaced to *Ikhtilāf al-'ulamā'*. In addition, the fact that it is cited frequently in the *Tafsīr*, which he began ca. 270/883–84, suggests that al-Ṭabarī probably wrote it many years before the turn of the tenth century. Rosenthal's chronology dates it to between 255/869 and 270/883–84, before the composition of the *Tafsīr*, *Ikhtilāf*, and *Tahdhīb*.<sup>48</sup>

Further investigation draws attention to the existence of another early work on jurisprudence which scholarship to date has overlooked: *al-Wuṣūl ilā ma'rifat al-uṣūl* by Muḥammad b. Dā'ūd al-Zāhirī. Abū Bakr Muḥammad b. Dā'ūd b. 'Alī was the son of the famous

<sup>44</sup> Franz Rosenthal, *General Introduction*, 113–17.

<sup>45</sup> Cited in Franz Rosenthal, *General Introduction*, 102–3.

<sup>46</sup> The text has *af'āl al-rusul* "acts of the Messengers", perhaps for an original *al-rasūl* "acts of the Messenger (Muḥammad)", the rubric which commonly appears in later works of jurisprudence.

<sup>47</sup> Yāqūt, *Muḥjam al-udabā'*, 18:74.

<sup>48</sup> Rosenthal, *General Introduction*, 153. As Rosenthal points out, this dating is only tentative, since al-Ṭabarī worked on many of his books for a number of years, so that one cannot fix their dates precisely.

jurist Dā'ūd b. 'Alī b. Khalaf, the founder of the *Zāhirī madhhab*. Dā'ūd, the father, was born in Kufa in 202/818 but settled as a young man in Baghdad, where he lived and taught until his death in 270/883–84. Ibn Dā'ūd was born in 255/868 in Baghdad.<sup>49</sup> There, under the grammarian Niṭawayh (d. 323/935), he became accomplished in grammar, lexicography, and the literary arts. While still a youth, he wrote one of the first known Arabic works on the theory of love, *Kūtāb al-zahrah*, which is extant though incomplete. His works on law, none of which has survived intact, date from later in his career. According to al-Mas'ūdī (d. ca. 345/956), he was an exceptional jurist. He took over teaching in his father's circle upon the latter's death in 270/884, despite his mere fifteen years of age. Like the famous minister and patron al-Ṣāhib Ibn 'Abbād (d. 385/995) a century later, Ibn Dā'ūd was renowned for his infatuation with *saġ*, which he used in everyday speech. Anecdotes depict him delivering *fatwās*, utterly incomprehensible to his lay petitioners, in *saġ*. He is also famous for his lively and witty debates with Ibn Surayj, the great Shāfi'ī jurist. According to Massignon, both Ibn Dā'ūd and Ibn Surayj became assessors or advisors to the chief judge of the western section of Baghdad, the Mālikī Abū 'Umar al-Ḥammādī (d. 320/932), who had been appointed deputy to his father Yūsuf b. Ya'qūb al-Ḥammādī (d. 297/909–10). Ibn Dā'ūd is also famous for condemning al-Ḥallāj as a heretic in a *fatwā* delivered ca. 288/901. He died on 9 Ramaḍān 297/22 May 910, according to Ibn Khallikān, at the young age of 42.<sup>50</sup> According to one account, he explained

<sup>49</sup> In *Ṭabaqāt al-fuqahā'*, Abū Ishāq al-Shīrāzī reports that Ibn Dā'ūd died at the age of 42 in 297/909–10. Al-Mas'ūdī gives the date 296/908–9. Ibn Khallikān gives 297, agreeing with al-Shīrāzī. Some MSS of *Ṭabaqāt al-fuqahā'* give the date 299 A.H. The statement by J. C. Vadet, "Ibn Dāwūd", *ET*<sup>2</sup> that Ibn Dā'ūd died in 294/909, repeated by Josef Van Ess, *Theologie und Gesellschaft im 2. und 3. Jh. H.*, 6 vols. (Berlin: Walter de Gruyter, 1991–97), 4:250, is an error since 294 A.H. corresponds to 906–7 A.D. See the sources given below.

<sup>50</sup> On Ibn Dā'ūd in general, see al-Mas'ūdī, *Murūj al-dhahab wa-ma'ādin al-jawhar*, 4 vols., ed. Qāsim al-Shammā'ī al-Rifā'ī (Beirut: Dār al-qalam, 1989), 4:271–72; Ibn al-Nadīm, *al-Fihrist*, 272; Abū Ishāq al-Shīrāzī, *Ṭabaqāt al-fuqahā'*, ed. Ihsān 'Abbās (Beirut: Dār al-rā'id al-'arabī, 1970), 175–76; al-Khaṭīb al-Baghdādī, *Tārīkh Baghdād* (Beirut: Dār al-kutub al-'ilmīyah, n.d.), 5:256–63; Ibn al-Jawzī, *al-Muntaẓam fī tārikh al-mulūk wa'l-umam*, 18 vols., ed. Muḥammad 'Abd al-Qādir 'Aṭā and Muṣṭafa 'Abd al-Qādir 'Aṭā (Beirut: Dār al-kutub al-'ilmīyah, 1992), 6:93–95; Ibn Khallikān, *Wafayāt al-a'yān*, 8 vols., ed. Ihsān 'Abbās (Beirut: Dār ṣādir, 1977), 4:259–61; al-Dhahabī, *Siyar a'lām al-nubalā'*, 23 vols., ed. Shu'ayb al-Arnā'ūt and Ḥusayn al-Asad (Beirut: Mu'assasat al-risālah, 1981–85), 9:23–25; idem, *Tadhkirat al-huffāz*, 3d ed.,

to his teacher Niḡṡawayh while on his deathbed that he was dying of an unconsummated love for another man. The object of his affections, one Muḡammad b. Jāmi' al-Ṣaydalānī, was the only beloved in history to support his admirer financially, the sources claim.

In his chronicle *Murūj al-dhahab*, al-Mas'ūdī lists the following as legal works by Ibn Dā'ūd: *Kitāb al-indhār*, *Kitāb al-īdhār wa'l-ījāz*, *al-Intiṣār 'alā Muḡammad b. Jarīr wa-'Abd Allāh b. Sharshīr wa-'Īsā b. Ibrāhīm al-Ḍarīr*, and *al-Wuṣūl ilā ma'rifat al-uṣūl*.<sup>51</sup> The title *al-Wuṣūl ilā ma'rifat al-uṣūl* begs attention. It uses the key term *uṣūl* which appears often in the titles of works treating *uṣūl al-fiqh*. It is designated here as a legal work and so cannot have focused on dogmatic theology (*uṣūl al-dīn*). The rhyming title matches quite closely the titles found in other works in the genre, such as al-Ṭabarī's *al-Bayān 'an uṣūl al-aḡkām*,

rev., 2 vols. (Hyderabad: Dā'irat al-ma'ārif al-'uthmānīyah, 1955–58), 2:209; idem, *Tārīkh al-islām*, ed. 'Umar 'Abd al-Salām Tadmurī (Beirut: Dār al-kitāb al-'arabī, 1991), 22:263–67; Ibn Kathīr 'Imād al-Dīn Ismā'il b. 'Umar, *al-Bidāyah wa'l-nihāyah fī al-tārīkh*, 14 vols. (Cairo: Maṡba'at al-sa'ādah, 1939), 11:110–11; al-Yāfi'i, *Mur'āt al-janān wa-ṡirat al-yaqzān*, 4 vols. (Haydarabad: Dā'irat al-ma'ārif al-nizāmīyah, 1918–20), 2:228–30; Ṣalāh al-Dīn Khalīl b. Aybak al-Ṣafadī, *Kitāb al-waḡfī bi'l-waḡfayāt* (Wiesbaden; Franz Stayner, 1962), 3:58–61; Ibn al-'Imād al-Ḥanbalī, *Shadharāt al-shahab fī akhbār man dhahab*, 8 vols. (Cairo: Maktabat al-quḡṡī, 1932–33), 2:226; Louis Massignon, *la Passion de Husayn Ibn manṡūr Hallāj: martyr mystique de l'Islam, exécuté à Bagdad le 26 mars 922: étude d'histoire religieuse*, 4 vols. (Paris: Gallimard, 1975), 1:167–81; idem, *The Passion of al-Hallāj, Mystic and Martyr of Islam*, 4 vols., trans. Herbert Mason (Princeton: Princeton University Press, 1982), 1:338–61; Muḡammad b. Dā'ūd al-Zāhirī, *Kitāb al-zahrāh* (first part), ed. A. R. Nykl (Beirut: Maṡba'at al-'abā' al-yasū'iyyīn, 1932); J. C. Vadet, "Ibn Dāwūd", *EF*<sup>2</sup>, 3:744–45; Carl Brockelmann, *GAL*, 2nd ed., e vols., 3 supp. (Leiden: E. J. Brill, 1937–49), SI: 249–50 [Brockelmann's index also refers to GI: 520—this is apparently an error]; Fuat Sezgin, *GAS*, 9 vols. (Leiden: E. J. Brill, 1967–84), 1:521–22, 2:75; 'Umar Riḡā Kahḡālāh, *Mu'jam al-mu'allifīn*, 15 vols. (Cairo: Dār al-turāth al-'arabī, 1957–61), 9:296–97.

<sup>51</sup> Al-Mas'ūdī, *Murūj al-dhahab*, 4:272–72. In the *Fihrist*, 363, Ibn al-Nadīm lists his legal works as *Kitāb al-indhār*, *Kitāb al-īdhār*, *Kitāb al-wuṣūl ilā ma'rifat al-uṣūl*, *Kitāb al-radd 'alā Ibn Sharshīr*, *Kitāb al-radd 'alā Abī 'Īsā al-Ḍarīr*, and *Kitāb al-intiṣār min Abī Ja'far al-Ṭabarī*. The three last titles appear to belong to one and the same book. Al-Mas'ūdī evidently lists them as one work, and the *ṡaj* in the title (... *Jarīr*, ... *Sharshīr*, ... *al-Ḍarīr*) suggests this as well. The Muḡammad b. Jarīr who appears in the title of *al-Intiṣār* is of course the famous jurist and historian al-Ṭabarī (d. 310/923). Yāqūt reports several anecdotes about this refutation, claiming that it was occasioned by al-Ṭabarī's work *Kitāb al-radd 'alā dhī al-aṡṡār*, written against Dā'ūd. These accounts report that the refutation focused on three questions and was quite insulting. Yāqūt al-Ḥamawī, *Mu'jam al-udabā'*, 18: 78–80. 'Abd Allāh b. Sharshīr is probably the Mu'tazilī theologian and poet Abū al-'Abbās 'Abd Allāh b. Muḡammad b. 'Abd Allāh b. Mālik (d. 293/905–6), known as Ibn Sharshīr, al-Nāshī al-Akbar, or al-Nāshī al-Kabīr. I have not been able to identify 'Īsā b. Ibrāhīm al-Ḍarīr. The statement that it focused on three questions is perhaps another indication that all three scholars were refuted in the same work, one question each.

Abū al-Ishāq al-Marwazī's (d. 340/951) *Kitāb al-fuṣūl fī ma'rifat al-uṣūl*, al-Mas'ūdī's *Kitāb nazm al-adillah fī uṣūl al-millah* and *Kitāb nazm al-a'lām fī uṣūl al-ahkām*, or al-Jaṣṣāṣ' *al-Fuṣūl fī al-uṣūl*.<sup>52</sup> It seems quite likely that this work was a manual of jurisprudence, a full-fledged member of the *uṣūl al-fiqh* genre. In *Irshād al-arīb*, Yāqūt mentions Ibn Dā'ūd's work in his notice on Abū Ja'far Muḥammad b. Jarīr al-Ṭabarī. The account gives the title of the book as *Kitāb al-wuṣūl ilā ma'rifat al-uṣūl* and refers to a passage in the chapter on consensus (*bāb al-ijmā'*) where Ibn Dā'ūd criticizes al-Ṭabarī's discussion of consensus, claiming that he contradicts himself.<sup>53</sup> This reference confirms that *al-Wuṣūl ilā ma'rifat al-uṣūl* is a work on jurisprudence rather than the points of law and shows that it included a chapter devoted to the topic of consensus in particular.

Considerable material from what appears to be *al-Wuṣūl ilā ma'rifat al-uṣūl* is preserved in a Fatimid Shiite work from the mid-tenth century. The Ismā'īlī jurist al-Qāḍī al-Nu'mān (d. 363/974), who served as chief judge and ideologue for the early Fatimid state, wrote a refutation of Sunni legal principles entitled *Ikhṭilāf uṣūl al-madhāhib*. Composed between 343/954 and 359/969,<sup>54</sup> it is contemporary with the earliest extant works of *uṣūl al-fiqh*, such as the *Fuṣūl* of al-Jaṣṣāṣ (d. 370/980).<sup>55</sup> It may not have been the first Ismā'īlī work to respond to Sunni *uṣūl al-fiqh*: the Central Asian *dā'ī* Muḥammad b. Aḥmad al-Nasafī, executed in 332/943 in Bukhārā by the Sāmānid ruler Nūḥ I (331–43/943–54), wrote a work whose title, *Kitāb uṣūl al-shar'*, suggests that it too refuted Sunni legal principles.<sup>56</sup> Despite the fact that

<sup>52</sup> See Stewart, *Islamic Legal Orthodoxy*, 34–35.

<sup>53</sup> Yāqūt al-Ḥamawī, *Muḥjam al-udabā'*, 18:72.

<sup>54</sup> There are two editions of the work: one by S. T. Lockandwalla, Simla, India: Indian Institute for Advanced Study, 1972 (henceforth designated L) and the other by Muṣṭafā Ghālib, Beirut: Dār al-andalus, 1973 [reprint, 1983] (henceforth designated Gh). Muṣṭafā Ghālib was apparently unaware of Lockandwalla's edition. Unless otherwise noted, all citations will be to the Lockandwalla edition.

<sup>55</sup> The *Fuṣūl* probably dates to between the death of al-Jaṣṣāṣ' teacher Abū al-Ḥasan al-Karkhī in 340/952 and al-Jaṣṣāṣ' own death in 370/980. *Ikhṭilāf uṣūl al-madhāhib* was composed after 28 Rabī' I 343/30 September 954, because it includes the letter of al-Mu'izz li-Dīn Allāh (341–65/953–75) appointing al-Nu'mān chief judge on that date (p. 24). It must have been completed before al-Qāḍī al-Nu'mān's death in 363/974, and it is improbable that the work was composed either after al-Qāḍī al-Nu'mān moved from Tunisia to Egypt in 361/971 or after the Fatimid conquest of Egypt itself in 359/969, because there is no mention of that momentous event in the text. It seems most likely that the work was composed shortly after al-Qāḍī al-Nu'mān's appointment as chief judge in 343/954.

<sup>56</sup> Ibn al-Nadīm, *al-Fihrist*, 240.

it argues regularly against Sunni positions on jurisprudence, *Ikhtilāf uṣūl al-madhāhib* adopts many of the formal features of Sunni texts in the genre of *uṣūl al-fiqh*. Al-Qāḍī al-Nu'mān actually mentions very few works by title in the course of his refutation: the Koran (passim), the Torah (p. 13), the Gospels (p. 13), *Adab al-qāḍī* and *Ikhtilāf al-Shāfi'ī wa-Mālik* by al-Shāfi'ī (p. 214), and *al-Mujarrad* by al-Ḥasan b. Ziyād al-Lu'lu'ī (d. 204/819–20), a student of Abū Ḥanīfah (p. 41), none of which is devoted to jurisprudence per se. Nevertheless, the material included in *Ikhtilāf uṣūl al-madhāhib* shows that the author was arguing against a sophisticated system of jurisprudence presented in a highly developed tradition of Sunni manuals. Careful examination of the work and comparison with other sources reveals a great deal about the Sunni genre which it addresses and the history of Sunni jurisprudence between the beginning of the ninth and the mid-tenth centuries.<sup>57</sup>

Al-Qāḍī al-Nu'mān records that he wrote the *Ikhtilāf* in response to an opponent with whom he had debated the validity of *ijtihād*. He claims that he had soundly defeated his opponent but that the loser subsequently collected a treatise in one fascicle presenting the opinions of the champions of *ijtihād*, together with their arguments for its validity. Al-Qāḍī al-Nu'mān reports that he first presented in his own book all of the arguments in favor of *ijtihād* that the opponent had included in his treatise, adding any other Sunni arguments that were available to him. Then, he decided to refute all the other principles to which the Sunnis resort in their jurisprudence, and not just *ijtihād*—i.e., *taqlīd*, *ijmā'*, *qiyās*, *istiḥsān*, *istidlāl*, as evident in the completed work.<sup>58</sup> The last two statements imply, of course, that he had access to many Sunni works of *uṣūl al-fiqh*. In the course of his discussion, al-Nu'mān remarks several times that he is merely summarizing the Sunnis' arguments so as not to bore the reader, such as, for example, when he presents the arguments for the authority of consensus.<sup>59</sup> He says upon completing this section that if he had gone on at length on such topics, each chapter would require several

<sup>57</sup> Hallaq dismisses *Ikhtilāf uṣūl al-madhāhib* rather quickly as a source for the history of Sunni jurisprudence, claiming that it tells us nothing additional to what is found in the biographical and bibliographic sources—i.e., that no works in the genre were produced before the tenth century. Hallaq, "Shāfi'ī", 589.

<sup>58</sup> Al-Qāḍī al-Nu'mān, *Ikhtilāf uṣūl al-madhāhib*, 232–33.

<sup>59</sup> Al-Qāḍī al-Nu'mān, *Ikhtilāf uṣūl al-madhāhib*, 93, 105–6, 193.

volumes.<sup>60</sup> This gives us some idea of the immense material on jurisprudence available to him. Writing in the mid-tenth century, he probably had at his disposal numerous works of Sunni jurisprudence written during that century and the previous century as well.

In the work, al-Qāḍī al-Nu‘mān often quotes or paraphrases directly from Sunni works on jurisprudence. Though he mentions no *uṣūl al-fiqh* title and rarely mentions a specific author, this does not obscure the fact that he is citing specific works. At one point, when discussing *ijtihād*, he cites what must be at least four separate sources (p. 207). One passage concerning definitions of consensus cites what appear to be six distinct sources (pp. 87–89). Al-Qāḍī al-Nu‘mān mentions al-Shāfi‘ī a number of times and cites at least one passage from the *Risālah*, though without identifying the text by name (p. 162). Another author he quotes, giving his name as Aḥmad b. ‘Alī al-Ikshādh al-Baghādāī (pp. 59–60), is the Mu‘tazilī theologian and jurist Abū Bakr Aḥmad b. ‘Alī, known as Ibn al-Ikshīd (d. 326/938). The topic discussed here is consensus; the work in questions is probably Ibn al-Ikshīd’s *Kitāb al-ijmā‘*, or perhaps *Kitāb al-ma‘ūnah fī al-uṣūl*.<sup>61</sup> The author al-Qāḍī al-Nu‘mān cites most frequently is Abū Bakr Muḥammad b. Dā‘ūd, the son of the famous founder of the Zāhirī *madhhab*. It is probable that al-Qāḍī al-Nu‘mān was citing passages of Ibn Dā‘ūd’s manual of *uṣūl al-fiqh*, *al-Wuṣūl ilā ma‘rifat al-uṣūl*.

In the text of *Ikhtilāf uṣūl al-madhāhib*, al-Qāḍī al-Nu‘mān mentions Ibn Dā‘ūd three times by name. He first mentions Ibn Dā‘ūd with regard to an argument about consensus (p. 101). Later, he makes it clear that he has been citing from the work of Ibn Dā‘ūd sections of a long argument concerning the rejection of legal analogy (pp. 153–61). At another point, he states that Ibn Dā‘ūd was the author of an argument against *ijtihād* (pp. 199–202). Other passages which may be citing Ibn Dā‘ūd concern the rejection of *ijtihād* again (pp. 205–6), the rejection of *istihsān* (pp. 183–86), and *istidlāl* “inference”, the Zāhirīs’ answer, in effect, to *qiyās* (pp. 186–87). All told, I have identified ten passages where I believe al-Qāḍī al-Nu‘mān is citing material by Ibn Dā‘ūd.

<sup>60</sup> Al-Qāḍī al-Nu‘mān, *Ikhtilāf uṣūl al-madhāhib*, 105–6.

<sup>61</sup> Ibn al-Nadīm, *Kitāb al-fihrist*, 220–21.

- I. pp. 100–101 on consensus
- II. pp. 142–44 against legal analogy
- III. pp. 151–52 against legal analogy
- IV. pp. 153–54 against legal analogy
- V. pp. 156–61 against legal analogy
- VI. pp. 171–75 against legal analogy
- VII. pp. 183–86 against *istiḥsān*
- VIII. pp. 186–87 on *istidlāl*
- IX. pp. 199–202 against *ijtihād*
- X. pp. 205–6 against *ijtihād*

As just mentioned, Ibn Dā'ūd's name appears explicitly only three times, in connection with passages I, V, and IX. There are, however, indications that all of these passages are attributable to him. Passage II is introduced as the speech of a Sunni jurist who rejects legal analogy, and ends with a statement that this is the opinion of a jurist "who rejects legal analogy and upholds *istidlāl*" (pp. 142, 144). Passage III is introduced in the same manner as passage II (p. 151). Passage IV is introduced as the speech of a certain jurist who denies legal analogy and professes *istidlāl* (p. 153). Passage V begins with the statement, "The denier of legal analogy said, . . ." (p. 156). At the end of passage V appears a statement which makes it clear that the preceding four passages, II–V, all represent the work of Muḥammad b. Dā'ūd al-Zāhiri: "This speaker whose opinion we have quoted is one of the critics of legal analogy among the jurists of Baghdad among the Sunnis, the well-known Muḥammad b. Dā'ūd b. Alī. He and his father, Dā'ūd, were among those who used to deny legal analogy, respond to those who professed it, adopt opinions contrary to those of the jurists of Iraq and others who accepted it, express scorn for their opinions, and profess, as they claimed, *istidlāl*" (p. 161). Passage VI is attributed to a certain Sunni jurist who rejected legal analogy (p. 171). It ends with a statement that these have been some of the rebuttals of a Sunni opponent of legal analogy to those who champion it (p. 175). Passage VII is attributed to a Sunni opponent of *istiḥsān*: "There responded to those Sunnis who professed *istiḥsān* a certain Sunni who rejected it as we have, even though he professed something similar to it in meaning" (p. 183). This is clearly a reference to Muḥammad b. Dā'ūd; the method he adopted that al-Qāḍī al-Nu'mān considers equivalent to *istiḥsān* is *istidlāl*. This is confirmed in the section on *istidlāl*, primarily, it seems, a commentary on a discussion of *istidlāl* by Ibn Dā'ūd. In the course of this

discussion, al-Qāḍī al-Nu‘mān states, “with statements like this and similar things, you [i.e., the Zāhirīs] have produced proofs and argued against those who profess *ra’y*, *qiyās*, *istihsān*, and *ijtihād*, but then you have adopted the like of what you have denied” (p. 193). Ibn Dā‘ūd and the Zāhirīs rejected *istihsān* while adopting *istidlāl*, and al-Qāḍī al-Nu‘mān considers the latter equivalent to the former. Passage VIII is attributed to those who uphold *istidlāl* (p. 186). Passage X presents the argument of a Sunni jurist against the reasoning of al-Shāfi‘ī on a question of *ijtihād* (p. 205). The fact that the speaker rejects *ijtihād* and claims that one must seek evidence rather than resorting to arbitrary personal opinion makes it seem likely that the man in question is Muḥammad b. Dā‘ūd.

In four other instances, al-Qāḍī al-Nu‘mān refers to “a certain Baghdadi” or “some Baghdadis” (*ba’d al-baghdādiyīn*) (pp. 87, 89). This might, on the face of it, include or designate Ibn Dā‘ūd, but the opinions reported there seem to reflect positions Ibn Dā‘ūd would not have held. These include the opinions that a consensus reached on the basis of a transmitted report is an incontrovertible proof; that all believers must agree in order for consensus to exist; and that a dissenting opinion on the part of one or a small group does not render consensus invalid. It seems most probable that al-Qāḍī al-Nu‘mān is citing other Sunni jurists from Baghdad here.

It is clear that al-Qāḍī al-Nu‘mān is citing an actual text and is not just presenting Ibn Dā‘ūd’s opinions reported in intermediate sources. He writes, “This is the verbatim text (*naṣṣ*) of the opinion of Muḥammad b. Dā‘ūd” (p. 101). The passage in question cannot be a summary of his doctrine from a later source. The amount of material quoted also suggests that he was citing directly from a text at his disposal. The work cited was almost certainly a single book, for Ibn Dā‘ūd refers to it as such three times in the excerpts quoted. In a passage treating consensus, he remarks, “One could go on at length about such things [obvious matters of consensus, such as the location of the Ka‘bah], but by listing them *this book* would grow too long” (p. 100). In a passage arguing against legal analogy, he writes, “(And he should be asked) about many similar cases, the exposition of which would render *the book* lengthy” (p. 159). In the discussion of *istihsān*, he warns, “There therefore applies to them what we presented above *in the introduction to this book* (*fi ṣadri hādhā ‘l-kitāb*)” (p. 185). The fact that these remarks show up in sections treating different topics, consensus and legal analogy, suggest that the pas-

sages cited derive from one book and not several independent treatises. In addition, while the excerpts preserved here do not show an exaggerated penchant for *ṣajʿ*, short passages of *ṣajʿ* do appear in the text (e.g., pp. 158, 172, 173, 187, 202), and their occurrence in tightly argued forensic passages suggests that they conform to Muḥammad b. Dā'ūd's style.

Though the reconstruction of lost sources is fraught with difficulties,<sup>62</sup> one can argue that in this case the evidence justifies assigning the material included in *Ikhtilāf uṣūl al-madhāhib* to *al-Wuṣūl ilā ma'rifat al-uṣūl*. We know that Ibn Dā'ūd wrote a legal work entitled *al-Wuṣūl ilā ma'rifat al-uṣūl*. We know that this work included a chapter on consensus (*bāb al-ijmā'*), confirming that it was indeed a manual of *uṣūl al-fiqh*. It is clear that al-Qāḍī al-Nu'mān is citing material authored by Ibn Dā'ūd which treats various topics normally included in *uṣūl al-fiqh*. Furthermore, the amount of material cited, together with the fact that the excerpts themselves refer to a book, suggests that al-Qāḍī al-Nu'mān had a manual of *uṣūl al-fiqh* by Ibn Dā'ūd at his disposal. Since *al-Wuṣūl ilā ma'rifat al-uṣūl* is Ibn Dā'ūd's best known work on the topic—indeed, we know of no other work on jurisprudence by Ibn Dā'ūd—it seems reasonable to assign the excerpts to *al-Wuṣūl ilā ma'rifat al-uṣūl*. Doing so involves a number of assumptions, but none seems unwarranted given the context.<sup>63</sup>

Al-Qāḍī al-Nu'mān apparently abridges many of the passages he cites. The occurrence of the phrases “then he said” or “then they said” a number of times in the middle of the passages cited indicates that they are composed of several non-contiguous sections of original text with intervening material omitted. Thus, passage II is composed of two sections, with the second introduced by “he said” (p. 143), passage V of two sections (pp. 156–61), passage VI of three

<sup>62</sup> Ella Landau-Tasseron, “On the Reconstruction of Lost Sources”, in *History and Historiography in Early Islamic Times: Studies and Perspectives*, ed. Lawrence I. Conrad (Princeton: Darwin Press, 1992); Lawrence I. Conrad, “Recovering Lost Texts: Some Methodological Issues”, *JAOIS* 113 (1993):258–63.

<sup>63</sup> It is conceivable, for example, that al-Qāḍī al-Nu'mān is quoting material from a manual of jurisprudence Ibn Dā'ūd wrote which does not otherwise appear in the sources. He could also be quoting from several manuals of jurisprudence by Ibn Dā'ūd, or from a manual of *uṣūl al-fiqh* together with one or more treatises on individual topics, or from other works which treat topics in jurisprudence within a larger framework but are not *uṣūl al-fiqh* manuals per se. It is simpler and more reasonable to conclude that al-Qāḍī al-Nu'mān was quoting from a single major work in his possession, and that this work was probably *al-Wuṣūl ilā ma'rifat al-uṣūl*.

sections (pp. 172–73), passage VIII of five sections (pp. 186–87), and passage IX of six sections (pp. 200–2). These frequent breaks, indicating the omission of many intervening passages, suggest that the original was more lengthy and detailed than the text al-Qāḍī al-Nu‘mān actually quotes. In addition, at the end of passage VI al-Qāḍī al-Nu‘mān writes, “This is some of the argument of the one who rejected legal analogy among the Sunnis against those of them who considered it valid”. (p. 175). The word “some” here suggests that this passage is merely part of a more detailed discussion.

The passages treating legal analogy (II–VI) appear to be presented by al-Qāḍī al-Nu‘mān in their original order and to be parts of a single comprehensive discussion. Passage II introduces the topic, providing a definition of legal analogy itself. Passage III restates part of passage II, focusing on the cause (*‘illah*) of a legal ruling and holding that other causes could always be proposed such that there would be no way to prove the superiority of one over others. Passage IV changes tactics, arguing that the authority of the principle of legal analogy depends on a circular argument, an analogy based on the inductive observation that God grants similar cases similar rulings. Ibn Dā’ūd counters this view by observing that in many instances God assigns similar cases dissimilar rulings. Passage V refers explicitly to passage IV: “Now, then, we return to him asking, after having demonstrated to him that legal analogy is proved invalid by legal analogy itself, as he himself proved, . . .” (p. 156). Passage VI appears to wrap up the discussion, arguing against claims on the part of certain Sunni jurists, on the evidence of Q 30:28, that God Himself used legal analogy. This passage again defines *qiyās*, admitting that the word designates something which actually exists, that things actually may resemble each other, and that comparisons and analogies can be made, even by God in the Koran, while denying that analogy is a legitimate method for discovery of the law. This second definition seems to close the original discussion of legal analogy. In addition, passage VII, on *istihsān*, includes a remark referring to the discussion of the cause or occasioning factor (*‘illah*) in passage IV (pp. 183, 153). This confirms that these discussions were part of a larger manual with distinct chapters and provides further evidence that al-Qāḍī al-Nu‘mān was including the excerpts from Ibn Dā’ūd’s work in something like their original order.

From the material included in *Ikhtilāf uṣūl al-madhāhib*, one cannot actually reconstruct Muḥammad b. Dā’ūd’s work, but one can

gain some idea of its original plan and contents. The work included an introduction (*sadr*) to which Ibn Dā'ūd refers in the section on *istiḥsān*. His statement there implies that the introduction presented an over-arching argument against the Zāhirīs' opponents: "They make their preference (*istiḥsān*) capable of rendering licit what God made forbidden and their aversion capable of rendering forbidden what God declared licit in the text of His Book and the sanctioned practices of His prophets. There then applies to them what we have presented above in the introduction to this book, and they, God willing, will find no way to escape this (verdict). (p. 185)" This passage makes an explicit connection between the immediate argument, against *istiḥsān*, and a more general argument made in the introduction to the work. There Ibn Dā'ūd must have stated that by using unacceptable principles for the discovery of the law, his opponents were in effect declaring forbidden what God had declared licit and declaring licit what He had declared forbidden, arrogating to themselves a crucial function of the divinity. A similar passage, referring to the opponent who adopts personal opinion, *istiḥsān*, and legal analogy as legitimate methods of determining God's law, occurs not long after the first and seems logically connected with it: "He has claimed that he is a partner of God in His affairs and rulings, but Mighty and Glorious God did not grant this even to His prophets and messengers, as we have stated and explained". (p. 186) The phrase, "as we have stated and explained", probably refers to the introduction of the book as well. The introduction thus must have put forward an argument that served as a frame for the remainder of the work. Legal analogy, *istiḥsān*, and *ijtihād* were to be rejected because they ultimately led the jurists to set themselves up as partners to God, claiming for humans legislative powers that belonged exclusively to Him. *Al-Wuṣūl* was thus a systematic, integrated work, and not merely a collection of disparate critiques of individual legal methods.

The passages cited verbatim in *Ikhtilāf uṣūl al-madhāhib* derive from what appear to be five distinct chapters of *al-Wuṣūl*. The first of these, in the order of presentation in *Ikhtilāf*, is consensus. As mentioned above, an anecdote in Yāqūt's *Irshād al-arīb* shows that *al-Wuṣūl* contained a chapter devoted to consensus:

When he authored his work known as *The Book of the Path to Knowledge of Jurisprudence*, Muḥammad b. Dā'ūd al-Iṣbahānī stated in the chapter on consensus, concerning Abū Ja'far al-Ṭabarī, that the (only valid) consensus, according to him, was the consensus of those eight individual

authorities mentioned above and no others.<sup>64</sup> He based this claim on phrases of Abū Ja'far such as, "They agreed unanimously" and "Proof was unanimously established on such-and-such (a ruling)". (Ibn Dā'ūd wrote), "Then (al-Ṭabarī) said in the opening of the chapter on dissenting opinion (*khilāf*), 'Then they differed, and Mālik and al-Awzā'ī professed such and such opinion, and So-and-so professed such-and-such opinion,' so that those from whom (al-Ṭabarī) had reported<sup>65</sup> unanimous agreement were the same ones from whom he reported dissenting opinion". This is an error on the part of Ibn Dā'ūd. Had he consulted what (al-Ṭabarī) wrote<sup>66</sup> in the treatise appended to *al-Latīf* and the treatise appended to *al-Ikhtilāf*, and what he included in many of his books, to the effect that consensus is the transmission by many authorities of reports on which the Companions of the Messenger of God—may God bless him and grant him peace!—agreed unanimously, and not (agreement on) an opinion arrived at by way of legal analogy, then he would have realized that what he professed on this matter was a heinous mistake and manifest error.<sup>67</sup>

This anecdote is the only one found so far which refers to a specific chapter of *al-Wuṣūl* as such—the chapter on consensus. It is quite likely, though, that the excerpts in *Ikhtilāf uṣūl al-madhāhib* derive from distinct chapters treating consensus, the invalidity of legal analogy, the invalidity of *istihsān*, *istidlāl*, and the invalidity of *ijtihād*. These passages, particularly the five passages presenting arguments against legal analogy, represent a substantial portion of the text. They are not, however, limited to one topic within jurisprudence and so are unlikely to have come merely from a treatise refuting legal analogy, for example, which would not have included consensus, *ijtihād*, or *istidlāl*.

Other passages in *Ikhtilāf uṣūl al-madhāhib* may refer to the contents of *al-Wuṣūl* without quoting it verbatim. In the chapter on *ijtihād* al-Qāḍī al-Nu'mān at one point quotes a source in support of *ijtihād* which may be responding to Ibn al-Dā'ūd: "A certain jurist who professed *ijtihād* responded to one of those who had rejected it and argued for this rejection from the fact that *mujtahids* differ in opinion. If *ijtihād* were permissible, and if what it leads to were true, then it would be possible for the truth to lie in something and its opposite, when the *mujtahids* hold different opinions. The upholder

<sup>64</sup> The eight authorities are Mālik, Abū Ḥanīfah, al-Shāfi'ī, al-Awzā'ī, Sufyān al-Thawrī, Abū Yūsuf, Muḥammad b. al-Ḥasan al-Shaybānī, and Ibrāhīm b. Khālīd al-Kalbī. Yāqūt, *Muḥjam al-udabā'*, 18:71.

<sup>65</sup> Reading *hakā* for *hukiya* in the text, twice in this sentence.

<sup>66</sup> Reading *kitābatihī* for *kitābihī* in the text.

<sup>67</sup> Yāqūt, *Muḥjam al-buldān*, 18:72.

of *ijtihād* responded . . ." (p. 215). Now it is not entirely certain that Ibn Dā'ūd is the scholar arguing against *ijtihād* here, but we would expect him to hold this opinion, and few other scholars whose work was available to al-Qāḍī al-Nu'mān would have, except Dā'ūd himself. The chapter on the invalidity of *taqlīd* (pp. 29–43) also includes what are possibly additional references to the work of Ibn Dā'ūd. In this chapter, al-Qāḍī al-Nu'mān argues against two types of *taqlīd*: first, the acceptance of the opinions of the Companions as true and correct in general, and second, the adoption of the opinions of the great jurists of the past, such as Abū Ḥanīfah, al-Shāfi'ī, and Mālik. Concerning the first type of *taqlīd*, he mentions that while many Sunnis adopt this doctrine, some have opposed it and met with vehement criticism from the majority.

We have mentioned above (the Sunnis') doctrine concerning following the opinions of the Companions and avoiding deviation therefrom to other opinions, and some Sunnis' refutation of them in their blind adoption (of these opinions). This is something which Sunni commoners consider a very grave transgression and, in their ignorance, see as equivalent to apostasy. This has led a certain Sunni (scholar) who rejects *taqlīd* not to give an explicit refutation in his rejection of their *taqlīd* of the Companions, and only to indicate this with hints and allusions. If they were only aware, (they would see) that in their *taqlīd* of those whom Mighty and Glorious God did not command us to follow is the greatest denouncement against them, but they are senseless boors. That which came before them and has attained great status in their hearts has taken the place of the Truth for them. (pp. 32–33)

It is quite likely that al-Qāḍī al-Nu'mān is referring here also to Ibn Dā'ūd. We know that Dā'ūd and Ibn Dā'ūd opposed the *taqlīd* of the Companions, the position evident here. It is also clear from the text that the thinker in question is a specific Sunni jurist who was opposed by the great majority of Sunnis. In another passage, al-Qāḍī al-Nu'mān is probably referring yet again to the same author:

Everyone among the Sunnis who holds the invalidity of *taqlīd* adopts this [the opinion that al-Qāḍī al-Nu'mān has just explained], even though he did not voice it as explicitly, because of his fear of vituperation, directed at himself, of the ignorant masses, the common people, and the rabble. [Such authors avoid doing this] out of fear for themselves from the regimes we have mentioned above,<sup>68</sup> who, having sought out and attained the trappings of this world, relinquished the faith to

<sup>68</sup> This is a reference to the Umayyads and Abbasids.