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The Islamic penalty for adultery in the third century AH and Al-Shāfiʿī's *Risāla**

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Abstract
At the end of the second century AH al-Shāfiʿī (d. 204/820) advocated stoning as the sole penalty for adultery instead of an earlier rule that combined flogging with stoning. Al-Shāfiʿī's innovative doctrine was barely noticed by the jurisprudents, exegetes and *ḥadīth* collectors during the first half of the third century AH, but apparently provoked a legal debate shortly thereafter. This article explores the development of the third-century dual- vs. single-penalty dispute and its implications for the chronology of al-Shāfiʿī's *Risāla*.
Keywords: al-Shāfiʿī, *Risāla*, penalty, adultery, dispute, dating

Introduction: The controversial chronology of al-Shāfiʿī's *Risāla*

Since the 1990s Western students of al-Shāfiʿī's *Risāla* have observed that this pioneering work of Islamic jurisprudence barely influenced the development of legal theory for much of the third century AH. Several interpretations of this phenomenon have been put forward.

Norman Calder devoted his *Studies in Early Muslim Jurisprudence* to reconsidering the chronology of a number of second-century works of jurisprudence. Calder's conclusions led to a scholarly debate that centred on his treatment of Mālik's *Muwaṭṭa'*. Considerably less attention has been paid to Calder's claim that al-Shāfiʿī's *Risāla* was composed towards the end of the third century, that is, almost one hundred years after the death of its putative author.[1] Calder drew conclusions from a comparison between the hermeneutic approaches of al-Shāfiʿī and Ibn Qutayba; the latter's *Ta'wīl Mukhtalif al-Ḥadīth* is, according to Calder, less sophisticated than the former's *Risāla*, and must therefore predate its composition.[2]

According to Wael Hallaq, the discontinuity between the *Risāla* and other third-century legal works stems from the innovativeness of al-Shāfiʿī's theory, which stands half way between the rationalists (*ahl al-ra'y*), who dismissed prophetic *ḥadīth* as a legal source, and the traditionalists, who shunned human

* I wish to express my gratitude to the anonymous readers of the initial draft of this paper for their helpful criticism.
1 N. Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Clarendon Press, 1993), 223–43. For a list of reviews treating Calder's *Studies*, see J. E. Lowry, "The legal hermeneutics of al-Shāfiʿī and Ibn Qutayba: a reconsideration", *Islamic Law and Society* 11/1, 2004, 2, n. 2.
2 Calder, *Studies*, 223 ff.

reasoning in all religious and legal matters.[3] Al-Shāfiʿī's allowing for a disciplined rational interpretation (*qiyās* and *ijtihād*) of the divinely revealed sources of law (the Quran and the Sunna) could hardly have attracted either the rationalists or the traditionalists in the third century.[4] At the beginning of the fourth century, the nascent science of *uṣūl al-fiqh* brought together revelation as the source of law, and systematic human reasoning as a tool for its interpretation. Consequently, the *Risāla* came to be regarded as the earliest *uṣūlī* source.[5]

Christopher Melchert initially accepted the year 300 AH as the approximate date of the *Risāla*'s composition.[6] Subsequently, however, he found tangible similarities between Ibn Qutayba's *Ta'wīl* and the *Risāla*, after which he considered them as roughly contemporaneous works.[7] Melchert is sceptical about Hallaq's neglect-and-revival theory. In the former's view, it makes more sense to posit a gradual development of the legal theory from Abū ʿUbayd to al-Muḥāsibī to al-Shāfiʿī than to concede a process wherein the *Risāla* had been ignored for decades before coming to the jurisprudents' attention in the fourth century AH.[8]

Pace Calder, Joseph Lowry emphasizes the tangible differences that set apart the *Risāla* and the *Ta'wīl* in terms of methodology[9] and intended purpose.[10] Compared with the *Risāla*, the *Ta'wīl* stands closer to the tenets of the classical *uṣūl al-fiqh*, a peculiarity which confirms the traditional chronology and ascription of the two works.[11] Unlike Hallaq, who describes the work of al-Shāfiʿī as "rudimentary" and "erratic",[12] yet "connected inextricably with the emergence of *uṣūl al-fiqh*",[13] Lowry maintains that the *Risāla* rarely came to be the

3 W. Hallaq, "Was al-Shafiʿi the master architect of Islamic jurisprudence?", *International Journal of Middle East Studies*, 25/4, 1993, 593, 597 ff.
4 Hallaq, "Was al-Shafiʿi", 592–3.
5 Hallaq, "Was al-Shafiʿi", 594–5, 600–01.
6 C. Melchert, *The Formation of the Sunni Schools of Law, 9th–10th Centuries C.E.* (Leiden: Brill, 1997), 68.
7 C. Melchert, "Qur'ānic abrogation across the ninth century: Shāfiʿī, Abū ʿUbayd, Muḥāsibī and Ibn Qutaybah", in Bernard G. Weiss (ed.), *Studies in Islamic Legal Theory* (Leiden: Brill, 2002), 96.
8 Melchert, "Qur'ānic abrogation", 95–6.
9 Both Calder and Lowry elaborate on al-Shāfiʿī's dichotomy between general (*khāṣṣ*) and particular (*ʿāmm*) as a means of solving legal and exegetical ambiguities. With regard to Calder, in whose view Ibn Qutayba was not familiar with al-Shāfiʿī's application of the rubric *ʿāmm*/*khāṣṣ*, Lowry observes that Ibn Qutayba does occasionally speak of *khāṣṣ*. There is, however, an important difference between the use of the root *kh-ṣ-ṣ* in the legal hermeneutics of Ibn Qutayba and al-Shāfiʿī, which explains why the former never opposes *khāṣṣ* to the notion of *ʿāmm*. Al-Shāfiʿī seeks to harmonize contradictory rules by constructing a hierarchy of general principles (*ʿāmm*) and their specific implementation (*khāṣṣ*); for Ibn Qutayba *khāṣṣ* serves to define the specific circumstances of a linguistic application. It was the latter approach, which does not require any category as a complement of *khāṣṣ*, and not al-Shāfiʿī's "(unusual) technique", that was adopted by the science of *uṣūl al-fiqh* (Lowry, "Legal hermeneutics", 18–9).
10 Whereas the *Risāla* is a consummate work of legal epistemology, the *Ta'wīl* aims mainly at defending individual traditions from their unorthodox assailants (Lowry, "Legal hermeneutics", 4–6, 38).
11 Lowry, "Legal hermeneutics", 39–41.
12 Hallaq, "Was al-Shafiʿi", 592.
13 Hallaq, "Was al-Shafiʿi", 600.

epistemological basis of the classical *uṣūl al-fiqh*.[14] In his major study of the *Risāla*, Lowry points to five broad areas in which al-Shāfiʿī's work is epistemologically and functionally disconnected from the (subsequently) established legal-theoretical tradition.[15] Admittedly, by positing the uniqueness of the *Risāla*, Lowry has eliminated the chronological rupture inherent in Hallaq's interpretation, but his theory raises other questions. Why would later Muslim jurisprudents heed the *Risāla*, if in their legal hermeneutics they stood so close to Ibn Qutayba's relatively unsystematic *Taʾwīl*? And what were the stages of the process that drove the classical legal theory away from al-Shāfiʿī's founding theory?

To outline the historical context of the *Risāla*, one needs to retrace the early history of *uṣūl al-fiqh*, but this task is hindered by the paucity of third-century evidence.[16] Alternatively, one may follow a problem of interest to a wider range of disciplines. The dispute over whether adultery incurs stoning alone or a combination of flogging and stoning (henceforth the DVSP [dual-versus-single-penalty] dispute) is an example of such an interdisciplinary issue. Although formally pertaining to the realm of positive law (*furūʿ*), it engages important *uṣūlī* and exegetical subjects such as the sources of law and the theory of abrogation, thereby appealing to jurisprudents, *ḥadīth* collectors and exegetes alike.

That adulterers incur the single penalty of stoning (henceforth SPA) was the opinion of several second-century jurists; nevertheless, it was al-Shāfiʿī who endorsed SPA at the level of theory. Without contending that Islamic jurisprudence is necessarily a sustained evolutionary system, I nevertheless presume that its constituents are both synchronically interactive and diachronically dynamic. Consequently, given the prominence of the SPA advocacy in al-Shāfiʿī's works, it is expected to have influenced his contemporaries and followers, but also a wider circle of third-century scholars, irrespective of their epistemological premises. Admittedly, the dating of early texts that have survived in (much) later recensions faces the formidable challenge of avoiding the pitfall of possible interpolations, while inferences from silence may give way to new evidence. To my mind, however, if multiple texts attest to the

14 ". . . Shāfiʿī's is not the epistemology of later *uṣūl al-fiqh*" (Lowry, "Legal hermeneutics", 38; see also 18–19, 38–41).

15 J. E. Lowry, *Early Islamic Legal Theory: The Risāla of Muḥammad b. Idrīs al-Shāfiʿī*, (Leiden: Brill, 2007), 17–18, 51–9, 359–68, especially 360.

16 According to Devin Stewart, the third century AH saw the intensive development of Islamic legal theory. *Pace* Hallaq, Stewart points out that al-Shāfiʿī's *Risāla* was discussed by a number of third-century jurisprudents (D. Stewart, "Muḥammad b. Dāʾūd al-Ẓāhirī's Manual of Jurisprudence, *Al-Wuṣūl ilā Maʿrifat al-Uṣūl*", in Bernard G. Weiss (ed.), *Studies in Islamic Legal Theory* (Leiden: Brill, 2002), 113, 130, 136). Murteza Bedir has observed that Stewart's conclusions should be treated with caution because we do not know the content of these texts; the later sources make little, if any, reference to them; and (following Makdisi and Hallaq) the term *uṣūl al-fiqh* was used inconsistently in the third century AH (M. Bedir, "An early response to Shāfiʿī: ʿĪsā b. Abān on the prophetic report [*Khabar*]", *Islamic Law and Society,* 9/3, 2002, 286–7). Bedir's insightful analysis, however, does not convince me that ʿĪsā b. Abān's excerpts quoted by al-Jaṣṣās belong to a work which was conceived as a contemporary response to al-Shāfiʿī.

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elaboration of a common doctrine, or, conversely, fail to record it, this would serve as an important indicator of relative chronology. In addition to this historical factor, another, dialectical, element comes into play: direct references to the polemical arguments elaborated by the parties in the DVSP dispute are an important chronological marker to reckon with.

In the present essay, I focus on third-century Sunnī sources, without, however, neglecting useful evidence of later origin. I begin with a summary of the penalty for adultery in the Quran and the Sunna, followed by a survey of second-century views on this topic. Then I discuss al-Shāfiʿī's justification of SPA and its influence on the third-century Shāfiʿīyya. Next I explore a number of late-second- and third-century works of jurisprudence and exegesis, followed by the major third-century *ḥadīth* collections. In the closing section of this essay, I try to establish the historical context of the *Risāla* by identifying the roots of the DVSP polemic.

The penalty for *zinā* in the Quran and the Sunna

Since the present study draws on several Quranic and sunnaic passages dealing with the penalty for sexual transgressions (*zinā*), a brief review thereof is in order.[17]

Quran 4:15 provides that the female perpetrators of abomination (*fāḥisha*), a euphemism interpreted by later Muslim exegetes as *zinā*, must be detained "until death takes them, or Allah appoints for them a way", whereas the following verse (4:16) prescribes an unspecified corporal punishment or/and verbal rebuke (*adhā*) for offenders. These two verses are considered to have been abrogated, or amended, by Q. 24:2, which imposes on the offenders (*al-zānī wa-'l-zāniya,* pl. *zunāt*) the penalty of one-hundred lashes. Since none of the Quranic verses provide for stoning (*rajm*) as part of the penalty for *zinā*, Muslim exegetes and legal theorists sought justification of *rajm* in two main directions. Some scholars would assert that there was a "stoning verse" in the Quran, according to which the mature (*shaykh*) *zunāt* should be stoned unconditionally. The text of the verse was somehow removed (*rufiaʿ*), or intentionally omitted by ʿUmar, from the Quran, but its rule remained effective. Others justified *rajm* by the prophetic Sunna. To that end they would frequently use a tradition on the authority of the Companion, ʿUbāda b. al-Ṣāmit (henceforth "the ʿUbāda tradition"), couched as a complement to Q. 4:15:

> Take it from me! Take it from me! Allah has appointed a way for them. A virgin with a virgin and a non-virgin with a non-virgin. The virgin should be flogged and banished; the non-virgin should be flogged and stoned.

Unlike the Quran, which treats the *zunāt* as a single category of offender, the ʿUbāda tradition divides them into two groups, both incurring dual penalties (henceforth DPA) for their offence. Specific aspects of the penalty for *zinā*, including the SPA rule, are governed by the vast group of traditions about the

17 For a list of works which discuss the Islamic penalty for *zinā* in detail, see note 24.

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stoning of an adulterer who confessed voluntarily, who came to be identified as Māʿiz b. Mālik (henceforth "the Māʿiz tradition"), and the stoning of a woman who committed *zinā* with one of her husband's slaves (henceforth "the woman's-servant tradition").

The penalty for *zinā* in the second century AH

The effort to justify stoning as the penalty for adultery dominated Islam's legal and exegetical agenda during the second century AH. At the beginning of the century, al-Ḥasan al-Baṣrī (d. 110/728) insisted on the binding force of what is presently known as Q. 4:15.[18] A few decades later the scriptural rule was amended by means of the prophetic Sunna: Shuʿba b. al-Ḥajjāj (d. 160/776), Hushaym b. Bashīr (d. 183/799) and Yaḥyā b. Saʿīd al-Qaṭṭān (d. 198/813) circulated versions of the ʿUbāda tradition which introduce stoning as a penalty for adultery alongside the Quranic requirement of flogging.[19] Another important DPA tradition records ʿAlī imposing a dual punishment on an adulteress in Kūfa. My initial research of this tradition's transmission lines points to Shuʿba b. al-Ḥajjāj and Hushaym b. Bashīr as its most salient disseminators.

Unlike the DPA rule, there are no exclusive SPA traditions traceable to the second century AH. In most cases the SPA doctrine is attached to extraneous traditions, even though it may have originated in the personal opinions of Abū Ḥanīfa (d. 150/767) and Mālik b. Anas (d. 179/795).

The earliest repositories of Abū Ḥanīfa's teachings are the works of his students Abū Yūsuf (d. 182/798) and al-Shaybānī (d. 189/804). They never mention the possibility of DPA, and, at times, seem to assume that the adulterer incurs only stoning.[20] The first Ḥanafī jurisprudent to expound on the DVSP issue is al-Ṭaḥāwī (d. 321/933),[21] but his treatment, which shows a thorough acquaintance with the Shāfiʿī SPA doctrine, is hardly informative about the development of Ḥanafī teaching in the second century AH.

Mālik b. Anas (d. 179/795) knows the Māʿiz tradition (still anonymous) and the woman's-servant tradition, but is apparently unaware of their use as a vindication of a doctrine that rejects flogging as part of the penalty for adultery. Shortly after Mālik's death, the Qayrawānī jurist, Saḥnūn (d. 240/854), reportedly asked whether, in Mālik's view, a dual penalty should be inflicted upon the adulterers. The answer of Saḥnūn's teacher, Ibn al-Qāsim (d. 191/806), does not indicate that Mālik ever considered such a possibility before his

18 P. Pavlovitch, "The ʿUbāda b. al-Ṣāmit tradition at the crossroads of methodology", *Journal of Arabic and Islamic Studies*, 11, 2011, 209–18.

19 Pavlovitch, "The ʿUbāda b. al-Ṣāmit", 164–89.

20 According to Abū Yūsuf, "if [the witnesses] testify against a *muḥsan* and a *muḥṣana* and declare that they committed an abomination (*afṣaḥū bi-'l-fāḥisha*), the imam should order their stoning" (Abū Yūsuf, *Kitāb al-Kharāj* (Bayrūt: Dār al-Maʿrifa, 1399/1979), 162). Al-Shaybānī states: "[if] four [witnesses] testify against a man that he committed adultery, but he denies [his being in a state of] *iḥṣān*, while he has a wife who has an offspring from him (*waladat min-hu*), he is stoned" (Al-Shaybānī, *al-Jāmiʿ al-Ṣaghīr* (Karātshī: Idārat al-Qur'ān wa-'l-ʿUlūm al-Islāmiyya, 1411/1990), 279).

21 Al-Ṭaḥāwī, *Sharḥ Maʿānī al-Āthār*, eds. Muḥammad Zahrī al-Najjār, Muḥammad Sayyid Jād al-Ḥaqq, 4 vols. (1st ed., Bayrūt: ʿĀlam al-Kutub, 1414/1994), 3, 138–41.

students. In an expression couched more like a personal opinion, Ibn al-Qāsim rejects the combined penalty. The adulterer incurs stoning alone, he maintains, whereas the fornicator is flogged and banished, for this is the ancient practice (*bi-dhālika maḍat al-sunna*).[22]

Neither Saḥnūn nor Ibn al-Qāsim indicate that they witnessed a dispute about the penalty for adultery. Unlike al-Shāfiʿī, they do not take advantage of specific traditions to support the SPA rule but justify it only by the practice of the Medinese jurists. It stands to reason, therefore, that ancient Medinese custom, and possibly the Ḥanafī teaching, were the forebears of the SPA doctrine.

Al-Shāfiʿī and the Shāfiʿīyya

Al-Shāfiʿī (d. 204/820) is the first jurist to advocate SPA as opposed to DPA in his works.[23] His insistence that the adulterer should be stoned without prior flogging is part of an elaborate doctrine about the punishment for *zinā*.[24] Briefly, according to al-Shāfiʿī, by imposing the punishment of one hundred lashes, Q. 24:2 rescinded the earlier rule of Q. 4:15–6. Since none of the Quranic verses that treat the penalty for *zinā* explicitly provides for stoning, or divides the *zunāt* into groups incurring different penalties, al-Shāfiʿī finds the apposite rule in the ʿUbāda DPA tradition, which, according to him, modified the rule of Q. 4:15. Then he moves on to invalidate ʿUbāda's DPA requirement by asserting that it was repealed by the traditions about Māʿiz and the woman's servant. Although neither tradition deals specifically with SPA, their mere silence on flogging suffices for al-Shāfiʿī to assert that flogging was abolished as a penalty for adultery. Occasionally, al-Shāfiʿī derives a similar argument *ex silentio* from traditions about the putative "stoning verse" in the Quran.[25]

Al-Shāfiʿī's student, al-Muzanī (d. 264/878),[26] may have shared his master's interest in *rajm* as an *uṣūlī* issue concerning the sources of law[27] but hardly

22 Saḥnūn, *al-Mudawwana al-Kubrā*, 4 vols. (1st ed., Bayrūt: Dār al-Kutub al-ʿIlmiyya), 4:504.

23 Al-Shāfiʿī, *Risāla*, ed. Aḥmad Muḥammad Shākir (Bayrūt: Dār al-Kutub al-ʿIlmiyya, n.d.), 128–32; 245–8; Al-Shāfiʿī, *Kitāb al-Umm*, ed. Rifʿat Fawzī ʿAbd al-Muṭṭalib, 11 vols. (1st ed., al-Qāhira: Dār al-Wafāʾ li-ʾl-Ṭibāʿa wa-ʾl-Nashr wa-ʾl-Tawzīʿ, 1422/2001), 7: 336–7, 8: 189–90; Al-Shāfiʿī, *Ikhtilāf al-Ḥadīth*, at *al-Umm*, 10: 203–06.

24 For a more detailed discussion of al-Shāfiʿī's theory of abrogation in relation to the penalty for *zinā* see J. Burton, *The Sources of Islamic Law* (Edinburgh: Edinburgh University Press, 1990), 122–64; J. Burton, "The penalty for adultery in Islam", in G. R. Hawting and Abdul-Kader A. Shareef (eds), *Approaches to the Qur'ān* (London and New York: Routledge, 1993), 269–84; Melchert, "Qur'ānic abrogation"; Lowry, *The Risāla*, 93–104.

25 *Al-Umm*, 7:336; *Ikhtilāf*, at *al-Umm*, 10:203–4. In the latter case al-Shāfiʿī's intention is unclear. The reference to the "stoning verse" seems to be an attempt to justify the stoning penalty *per se*, and not to endorse the SPA.

26 Al-Muzanī may have been too young to have had reliable audition from al-Shāfiʿī (C. Melchert, "The meaning of *Qāla ʾl-Shāfiʿī* in ninth century sources", in James E. Montgomery (ed.), *Abbasid Studies* (Leuven: Peeters, 2004), 296–7).

27 This is indicated in *al-Sunan al-Maʾthūra*, a collection of al-Muzanī's traditions on the authority of al-Shāfiʿī compiled by al-Ṭaḥāwī. There, al-Muzanī twice quotes the woman's-servant tradition and once the tradition about the Prophet's punishment of two Jews taken in adultery (Al-Shāfiʿī, *al-Sunan al-Maʾthūra*, ed. ʿAbd al-Muʿṭī Amīn

recognized it as a legal problem involving the exact penalty for adultery. In the chapter on the penalty for *zinā* in his *Mukhtaṣar*, al-Muzanī states that the Prophet stoned two *muḥṣan* Jewish adulterers, and ʿUmar stoned a *muḥṣan* adulteress.[28] By not mentioning *jald*, al-Muzanī may be implying that adulterers incur only stoning. One notes immediately, however, that the story about the two Jews is far from being al-Shāfiʿī's primary argument in favour of SPA,[29] whereas the invocation of ʿUmar's practice as a legal precedent is inconsistent with al-Shāfiʿī's preference of prophetic traditions over those associated with the Companions. Al-Muzanī does mention the woman's-servant tradition,[30] but not as a refutation of the DPA rule in a Shāfiʿī fashion. Al-Shafiʿī comes to mind, nonetheless, when, in *Kitāb al-Amr wa-l-Nahy*, al-Muzanī argues that in Q. 24:2, the meaning of *zinā* encompasses free persons and slaves alike, whereas Q. 4:25 rules that only half of the penalty incumbent upon free virgins (*al-bikr al-ḥurr*) is due to slaves.[31] Al-Muzanī's mention of "free virgins" might be construed as a reference to al-Shafiʿī's DPA rule, but, given the scanty context, one must beware of the implicit arbitrariness of such an inference; while al-Muzanī's silence on a dissenting view deserves some note. Altogether, even if al-Muzanī did consider stoning as the sole penalty for adultery, his justification departs from al-Shāfiʿī's, and does not indicate an engagement with a party of opponents.

The earliest work of a Shāfiʿī jurist that records the DVSP dispute is the *Sunna* of al-Marwazī (202–94/817–907):

> A group of scholars from our age and its proximity (*ṭā'ifat*^{un} *min ahl*^{i} *ʿaṣr*^{i}*-nā wa-qurb*^{i}*-hi*) came to demand that the ʿUbāda tradition be applied at face value (*ʿalā wajh*^{i}*-hi*). They demanded that the fornicators be flogged according to the Book of Allah and banished for a year according to the Sunna of the Messenger of Allah; they also demanded that the adulterers be flogged according to the Book of Allah and stoned according to the Sunna of the Messenger of Allah. They said: "This was the practice of ʿAlī b. Abī Ṭālib and the precept of Ubayy b. Kaʿb. They also said: "The reports from which al-Shāfiʿī and his likes inferred that flogging is abolished with regard to the non-virgins are void of a textual proof that necessitates the revocation of flogging with regard to them [just] because flogging is never mentioned therein. It may be that the Prophet (ṣ) flogged them [the

Qalʿajī (Bayrūt: Dār al-Maʿrifa, 1986), 394, no. 551; 397, no. 554; 398, no. 555). In each case al-Muzanī seems preoccupied with the scriptural provenance of the stoning penalty.

28 Al-Muzanī, *al-Mukhtaṣar fī Furūʿ*^{i} *'l-Shāfiʿiyya* (1st ed., Bayrūt: Dār al-Kutub al-ʿIlmiyya, 1419/1998), 342.

29 As a rule, al-Shāfiʿī cites the story about the two Jews while considering the possibility of a Muslim judge's adjudication between *dhimmī*s (*al-Umm*, 5:447–8, 503; 7:354; 8:80). Once, in the *Risāla*, al-Shāfiʿī mentions the same story in the context of his SPA advocacy, but as a secondary argument that is only tangentially related to his primary evidence derived from the traditions about Māʿiz and the woman's servant (*Risāla*, 250).

30 Al-Muzanī, *Mukhtaṣar*, 342.

31 Robert Brunschvig, "'Le Livre de l'Ordre et de la Défense' d'al-Muzani", *Bulletin d'Études Orientales*, 11, 1945–46, 154.

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> adulterers], even though this is not mentioned in the *ḥadīth*. They [the transmitters] may have omitted (*ikhtaṣarū*) its mention [flogging] from the *ḥadīth* because they saw it firmly established in the Book of Allah with regard to sexual offenders. Thus, by [recourse to] the Book of Allah, they dispensed with its mention [flogging] in the Sunna; but they mentioned stoning, of which there is no mention in the Book of Allah, in order to spread it among the common people, who should know that it [stoning] is a *sunna* from the Messenger of Allah (ṣ), so they would not be able to reject it, although some people of fancy and [heretical] innovation had rejected it."[32]

By mentioning "a group of scholars from our age and its proximity", al-Marwazī indicates that the upholders of DPA flourished both during his lifetime and shortly before his birth in 202/817, which, incidentally, almost coincides with al-Shāfiʿī's death in 204/820. But how could such a statement be aligned with al-Muzanī's apparent lack of awareness of the DVSP dispute? Conceivably, by mentioning scholars from the immediately preceding age, al-Marwazī means second-century traditionists like Shuʿba b. al-Ḥajjāj, Hushaym b. Bashīr and Yaḥyā b. Saʿīd al-Qaṭṭān, who transmitted variants of the DPA tradition. Even though these traditionalists did not recognize two rival doctrines on the penalty for adultery, in al-Marwazī's lifetime their traditions came to be used as arguments against the proponents of SPA, whom al-Marwazī associates with al-Shāfiʿī. The DPA advocates sought justification in the prophetic Sunna (the ʿUbāda tradition) and the Companions' practice and precept (ʿAlī and Ubayy b. Kaʿb). Furthermore, the transmitters of the traditions concerning Māʿiz and the woman who had an illicit sexual relation with her servant would have omitted the mention of flogging because it is imposed by a general scriptural rule. It was al-Shāfiʿī's fallacy, his opponents claimed, to insist that by not mentioning flogging these traditions abolished it as part of the penalty for adultery.

Christopher Melchert has observed that while expounding al-Shāfiʿī's arguments in favour of the SPA rule, al-Marwazī is far from turning a deaf ear to the objections set forth by the DPA party.[33] Al-Marwazī's impartiality need not necessarily be construed as an indication that the DVSP issue had become moot by the time the *Sunna* was composed. That the polemic continued well into the second half of the third century is attested by Ibn al-Mundhir's DPA justification. Ibn al-Mundhir (*c*. 241–318/*c*. 855–930), who may have been loosely associated with the Shāfiʿīyya,[34] presents an elaborate version of the DPA arguments articulated in the above-mentioned al-Marwazī tradition. In contrast to al-Shāfiʿī, Ibn al-Mundhir asserts that under the formal Quranic injunction (*bi-ẓāhir*^{i} *kitāb*^{i} *l-lāh*), all kinds of *zunāt* incur flogging, which, therefore, cannot be repealed by unwarranted inferences (*tawahhum*) from the ʿUbāda and the woman's-servant traditions.[35]

32 Al-Marwazī, *al-Sunna*, ed. ʿAbd Allāh b. Muḥammad al-Buṣayrī (al-Riyāḍ: Dār al-ʿĀṣima li-'l-Nashr wa-'l-Tawzīʿ, 1422/2001), 244–5.

33 Melchert, "The meaning of *Qāla 'l-Shāfiʿī*", 290.

34 Al-Dhahabī, *Siyar*, ed. Shuʿayb al-Arna'ūṭ, 29 vols. (2nd ed., Bayrūt: Mu'assasat al-Risāla, 1402/1982), 14:491.

35 Ibn al-Mundhir, *al-Awsaṭ*, ed. Khālid al-Sayyid and Ayman ʿAbd al-Fattāḥ (2nd ed., al-Fayūm: Dār al-Falāḥ, 1431/2010), 12:430–2.

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The vacillation of the third-century Shāfiʿīyya with regard to the exact penalty for adultery may be explained by their following al-Shāfiʿī's dismissal of legal conformism (*taqlīd*),[36] by the absence of a continuous Shāfiʿī school of law,[37] or by rival attempts to define Shāfiʿī doctrine.[38] No matter how far-reaching they were, the differences between the individual doctrines do not account in a satisfactory way for the shift from al-Muzanī's silence about the DVSP dispute to al-Marwazī's and Ibn al-Mundhir's pronounced exposition thereof. Al-Muzanī can hardly have discounted such an important debate involving both *uṣūl* and *furūʿ*; hence his death in 264/878 is better seen as the *terminus post quem* for the unfolding of the DVSP controversy.

Abū ʿUbayd, al-Muḥāsibī and Ibn Qutayba

Abū ʿUbayd (d. 224/839), often associated with the Shāfiʿī school,[39] and al-Muḥāsibī (d. 243/857–58), an ascetic *mutakallim* and *uṣūlī*,[40] are primarily interested in the provenance of the penalty for *zinā*. They treat in some detail the relationship between scripture and the Sunna in the case of stoning,[41] but do not discuss whether or not flogging should be part of the punishment for adultery. On one occasion, Abū ʿUbayd states that the adulterer is punished more severely (*ajall*) because his offence is more serious (*aʿẓam*) than that of the fornicator,[42] but does not specify the exact penalty for either group.

Both Abū ʿUbayd and al-Muḥāsibī cite the ʿUbāda tradition, but neither cares to indicate whether its DPA prescription was abolished. Although Abū ʿUbayd knows variants of the Māʿiz tradition, which is paramount to al-Shāfiʿī's advocacy of SPA, he does not relate them to the DVSP issue.[43] Thus, Abū ʿUbayd and al-Muḥāsibī seem to have considered DPA self-evident, or at least irrelevant to the topics of their works. The latter possibility is less likely, since Abū ʿUbayd and al-Muḥāsibī were interested in jurisprudence[44] and would hardly have disregarded a *fiqhī* dispute as important as that involving the penalty for *zinā*.

36 On the issue of *taqlīd* in the early Shāfiʿī teaching, see Ahmed El Shamsy, "Rethinking Taqlīd in the early Shāfiʿī school", *Journal of the American Oriental Society*, 128/1, 2008, 1–23.

37 J. E. Brockopp, "Early Islamic jurisprudence in Egypt: two scholars and their *Mukhtaṣars*", *International Journal of Middle East Studies*, 30/2, 1998, 168; Melchert, *Formation*, 68–86, 87.

38 Melchert, "The meaning of *Qāla 'l-Shāfiʿī*", 290.

39 Melchert, *Formation*, 76; Melchert, "Qur'ānic abrogation", 78.

40 Melchert, "Qur'ānic abrogation", 79. Al-Muḥāsibī is sometimes counted among the Shāfiʿīyya, although this association is difficult to prove (Melchert, *Formation*, 75).

41 Pavlovitch, "The ʿUbāda b. al-Ṣāmit tradition", 152–5, 158.

42 Abū ʿUbayd, *Kitāb al-Īmān*, ed. Muḥammad Nāṣir al-Dīn al-Albānī (1st ed., al-Riyāḍ: Maktabat al-Maʿārif li-'l-Nashr wa-'l-Tawzīʿ, 1421/2000), 99.

43 Abū ʿUbayd, *Gharīb al-Ḥadīth*, ed. Muḥammad Muḥammad Sharaf, 5 vols. (al-Qāhira: al-Hay'a al-ʿĀmma li-Shu'ūn al-Maṭābiʿ al-Amīriyya, 1404/1984), 1:438–9; 4:83–5; 5:77.

44 Melchert, *Formation*, 74–5, 76–7; Melchert, "Qur'ānic abrogation", 78–9; Gavin Picken, "Ibn Ḥanbal and al-Muḥāsibī: a study of early conflicting scholarly methodologies", *Arabica* 55/3–4, 2008, 361.

A similar lack of interest in the DVSP issue is observed in Ibn Qutayba's (213–76/828–89) last work, *Ta'wīl Mukhtalif al-Ḥadīth*. Probably begun not long after 256/869–70,[45] the *Mukhtalif* defends Islamic doctrines against rationalistic critique of their dependence on contradictory *ḥadīth* material. Although Ibn Qutayba explicitly mentions the ʿUbāda tradition, like Abū ʿUbayd and al-Muḥāsibī he is preoccupied with the relationship between the Quran and the Sunna while paying no attention to the DVSP issue.[46] Ibn Qutayba is also familiar with the Māʿiz tradition, but uses it to discuss the number of voluntary confessions that incur *rajm*.[47]

Ibn Qutayba may have disregarded DVSP because it was a *fiqhī* dispute within the orthodox realm, but so were the number of voluntary confessions required for the imposition of *rajm*, which Ibn Qutayba discusses at length. Moreover, Ibn Qutayba's neglect of the DVSP dispute was not an isolated phenomenon in the first half of the third century and beyond. It is very likely, therefore, that the contention started after the *Mukhtalif* had been completed, and this seems to support our dating of the DVSP to before al-Muzanī's death in 264/878.

Quranic exegesis

To al-Dārimī (d. 255/869), the ʿUbāda tradition apparently modified the rule of Q. 4:15 on *zinā*.[48] To Ibn al-Mundhir, Q. 24:2 abrogated Q. 4:15 whereupon the ʿUbāda tradition imposed the DPA rule.[49] Whereas al-Dārimī's treatment of *zinā* clearly brings to mind the second-century approach, Ibn al-Mundhir is familiar with the Shāfiʿī train of thought. Nevertheless, as a DPA advocate he, as would be expected, stops short of endorsing the SPA doctrine.

Al-Ṭabarī follows a similar line of reasoning. At Q. 4:15 he mentions a number of authority statements according to which the said verse was abrogated by the penalty (*ḥadd*), variously described as Q. 24:2 and stoning of the adulterers (one instance), flogging and stoning of the adulterers and flogging and banishment of the fornicators (one instance), flogging, without specifying the offenders (two instances), and flogging and stoning, without specifying the offenders (three instances).[50] To remove the ambiguity, al-Ṭabarī extensively quotes the ʿUbāda tradition in a manner reminiscent of al-Dārimī and Ibn al-Mundhir.[51] Compared with the other traditions in this chapter, al-Ṭabarī's emphasis on

45 Melchert, "Qur'ānic abrogation", 80, quoting *Le traité des divergences du ḥadīṯ d'Ibn Qutayba*, trans. Gérard Lecomte (Damascus: Institut Français de Damas, 1962), viii.

46 Ibn Qutayba, *Ta'wīl Mukhtalif al-Ḥadīth*, ed. Muḥammad ʿAbd al-Raḥīm (Bayrūt: Dār al-Fikr, 1995/1415), 88–90.

47 Ibn Qutayba, *Ta'wīl Mukhtalif,* 175–7.

48 Al-Dārimī, *Sunan*, ed. Fawwāz Aḥmad Zamarlī and Khālid al-Sabʿ Al-ʿAlamī, 2 vols. (Bayrūt: Dār al-Kitāb al-ʿArabī, 1987), 2:236, nos. 2327–8. There is a scent of arbitrariness in the link between the Quran and the Sunna, which is imposed by the chapter heading alone (*Bāb*^{un} *fī tafsīr*^{i} *qawl*^{i}*-hi taʿālā ʿAw yajʿala 'l-lāh*^{u} *la-hunna sabīl*^{an}).

49 Ibn al-Mundhir, *Tafsīr*, ed. Saʿd b. Muḥammad al-Saʿd, 2 vols. (al-Madīna: Dār al-Ma'āthir, 1422/2002), 2:601–2.

50 Al-Ṭabarī, *Tafsīr*, 6:494–6.

51 Al-Ṭabarī, *Tafsīr*, 6:496–8.

the ʿUbāda tradition is so pronounced that he seems to endorse DPA unhesitatingly. In the concluding summary, however, al-Ṭabarī takes an unexpected turn: without going into detail, he now merely states that the "way" mentioned in Q. 4:15 is flogging and banishment for the fornicators and stoning for the adulterers, "because of the validity of the report that the Messenger of Allah (ṣ) stoned and did not flog".[52]

Al-Ṭabarī's surprising shift from an apparent acceptance of DPA to an unambiguous endorsement of SPA suggests that he once subscribed to the DPA doctrine but subsequently espoused the opposite view. Do we have any indication that al-Ṭabarī's opinion on the penalty for adultery changed over time? According to al-Khaṭīb al-Baghdādī, al-Ṭabarī frequented the lessons of Dāwūd al-Ẓāhirī (a leading exponent of the DPA rule), but then, perhaps owing to a disagreement, he left Dāwūd's circle.[53] Al-Khaṭīb does not reveal the reason for al-Ṭabarī's decision, and we can only guess as to whether the penalty for adultery had contributed to it. If this was the case, al-Ṭabarī would have embraced SPA some time before Dāwūd's death in 270/884. Note that the *Commentary*, which was begun shortly after that date, bears witness to al-Ṭabarī's change of opinion being a recent development; hence, the year 270/884 is a reasonable *terminus ad quem* for al-Ṭabarī's adoption of the SPA doctrine.

Al-Ṭabarī never mentions al-Shāfiʿī as a proponent of SPA. Although, in the *Commentary*, he states that the Prophet stoned but did not flog, it is unclear from which traditions he drew arguments. In *Tahdhīb al-Āthār*, al-Ṭabarī cites the Māʿiz tradition as proof that the Prophet stoned without flogging[54] but, again, without recognizing this as a Shāfiʿī tenet. A plausible explanation of this phenomenon lies in the absence of a discrete Shāfiʿī school in the third century AH. Al-Ṭabarī, though familiar with the Shāfiʿī teaching, preferred to synthesize different legal and exegetical opinions.[55] His indebtedness to the Shāfiʿī doctrine with regard to the penalty for *zinā* was probably combined with the influence of other legal teachings, some of which predated al-Shāfiʿī.

Al-Ṭabarī's drift towards the SPA rule is indicative of the history of the DVSP dispute. *Tahdhīb al-Āthār* was reportedly composed between 255/868 and 270/883, and the *Commentary* was begun *c*. 270/883–4.[56] This would indicate that the DVSP dispute would have unfolded in the third quarter of the third century AH.

The third-century traditionists

Abū Dāwūd al-Ṭayālisī (d. 203/818) and Ibn Abī Shayba (d. 235/849) have recorded an important clue in the DVSP dispute:

52 Al-Ṭabarī, *Tafsīr,* 6:498.
53 Al-Khaṭīb al-Baghdādī, *Tārīkh Baghdād*, ed. Bashshār ʿAwwād Maʿrūf, 17 vols. (1st ed., Bayrūt: Dār al-Gharb al-Islāmī, 1422/2001), 9:346.
54 Al-Ṭabarī, *Tahdhīb al-Āthār*, *Musnad ʿUmar b. al-Khaṭṭāb*, 2:878.
55 Melchert, *Formation*, 191.
56 C. Gilliot, "Le traitement du *Ḥadīṯ* dans le *Tahḏīb al-Āṯār* de Tabari", *Arabica*, 41/3, 1994, 348.

Ḥammād b. Salama ʿ*an* Simāk b. Ḥarb ʿ*an* Jābir b. Samura (1) anna rasūl[a] ’l-lāh[i], ṣ, rajama Māʿiz[an] (2) wa-lam yadhkur jald[an].
Ḥammād b. Salama *from* Simāk b. Ḥarb *from* Jābir b. Samura: (1) that the Messenger of Allah (ṣ) stoned Māʿiz, (2) and [?] did not mention flogging.[57]

Clause 1 summarizes the case of Māʿiz; clause 2 adds the comment of an unidentified authority that by not mentioning flogging, the Māʿiz tradition has excluded it from the punishment for adultery. ʿAbd al-Razzāq (d. 211/827) provides the only hint at the identity of the nebulous SPA advocate:

(1) ʿ*An* Maʿmar ʿ*an* al-Zuhrī anna-hu kāna yankuru ’l-jald[a] ma’a ’l-rajm[i] wa-yaqūlu: “Qad rajama rasūl[u] ’l-lāh[i], ṣ” (2) wa-lam yadhkur al-jald.
(1) *From* Maʿmar *from* al-Zuhrī that he used to renounce [the combination of] flogging with stoning. He would say: “The Messenger of Allah (ṣ) did stone”, (2) and he [al-Zuhrī] would not mention flogging.[58]

Although al-Shāfiʿī may seem the most fitting choice, ʿAbd al-Razzāq is of a different opinion. His mention of al-Zuhrī may have been driven by the latter’s prominence in the *isnād*s of the Māʿiz tradition. There being no indications that al-Zuhrī contributed to promoting SPA, ʿAbd al-Razzāq’s third-person statement, “and he would not mention flogging”, looks more like a back-projection of a later doctrine onto an early authority. This brings us back to the identity of the nebulous advocate of SPA in the aforementioned traditions. Once again, al-Shāfiʿī lurks in the background, but one should note the chronological limitations of this suggestion. The above traditions are hermeneutically deficient; to be understood, they must be set against the background of the SPA doctrine and, most likely, of the entire DVSP dispute, which they apparently postdate. It is highly unlikely, therefore, that the dispute unfolded in the short span between the first recension of the *Risāla* (*c.* 195–7/811–13)[59] and the death of al-Ṭayālisī in 203/818; even less so between the second recension of the *Risāla* and al-Ṭayālisī’s death. The same holds for ʿAbd al-Razzāq: although he died about fifteen years after the first recension of the *Risāla*, by the turn of the second century he had lost his sight, and his mnemonic abilities were reportedly impaired.[60] It is hard to imagine how, in the last decade of his life, ʿAbd al-Razzāq would learn about al-Shāfiʿī’s SPA doctrine and engage in the DVSP dispute. In all likelihood he knew only the second-century views on the penalty for *zinā*.[61]

57 Al-Ṭayālisī, *Musnad*, ed. Muḥammad b. ʿAbd al-Muḥsin al-Turkī, 4 vols. (1st ed., al-Qāhira: Hajar li-’l-Ṭibā’a wa-’l-Nashr wa-’l-Tawzīʿ wa-’l-Iʿlān, 1999/1420), 2:128, no. 805; Ibn Abī Shayba, *Muṣannaf*, ed. Ḥamad b. ʿAbd Allāh al-Jumʿa, Muḥammad b. Ibrāhīm al-Laḥīdān, 16 vols. (1st ed., al-Riyāḍ: Maktabat al-Rushd Nāshirūn, 2004), 9:421, no. 29269.

58 ʿAbd al-Razzāq, *Muṣannaf*, ed. Ḥabīb al-Raḥmān al-Aʿẓamī, 12 vols. (2nd ed., al-Majlis al-ʿIlmī; Bayrūt: al-Maktab al-Islāmī, 1403/1983), 7:328–9, no. 13358.

59 *EI*[2], s.v. al-Shāfiʿī (E. Chaumont).

60 Ibn ʿAsākir, *Tārīkh Madīnat Dimashq*, ed. Muḥibb al-Dīn Abī Saʿīd ʿUmar b. Gharāma al-ʿAmrawī, 80 vols. (Bayrūt: Dār al-Fikr, 1415/1995), 36:169, 180.

61 Towards its end, where two SPA traditions are recorded, ʿAbd al-Razzāq’s *Bāb al-rajm wa-’l-iḥṣān* (7:315–32, nos. 13329–69) is erratic. The *bāb* opens with the justification of

Chronologically, Ibn Abī Shayba (d. 235/849) had every chance to become acquainted with al-Shāfiʿī's SPA doctrine and the DVSP dispute. Although this possibility appears to gain credence from Ibn Abī Shayba's citing the above-mentioned Māʿiz tradition, and another tradition advocating SPA,[62] the composition of his *bāb* entitled *Fī 'l-bikr*^{i} *wa-'l-thayyib*^{i} *mā yuṣna'u bi-himā idhā fajarā* (On the virgin and the non-virgin and what is done to them in the case of [sexual] transgression)[63] points in a different direction. Ibn Abī Shayba cites a series of six traditions that endorse the DPA rule (nos. 29259–64), followed by a harmonizing tradition (no. 29265), an SPA tradition (no. 29266), a tradition about fornication (no. 29267), a DPA tradition (no. 29268), the tradition *rajama Māʿiz*^{an} *wa-lam yadhkur jald*^{an} (no. 29269), and another about fornication (no. 29270). Clearly, the coherent structure of the chapter, which advocates the second-century DPA rule, is disrupted by the insertion of the SPA traditions and the attempted harmonization of the two conflicting doctrines. The chapter's opening tradition, about the woman's servant, reinforces the impression of inconsistency.[64] Probably intended to endorse the stoning penalty as part of the Book of God, it is reminiscent of second-century developments.

Like al-Ṭayālisī, ʿAbd al-Razzāq, and Ibn Abī Shayba in his *Musnad*, Aḥmad b. Ḥanbal cites the ʿUbāda tradition and the tradition *rajama rasūl*^{u} *'l-lāh*^{i} *Māʿiz*^{an} *wa-lam yadhkur jald*^{an}. But which of the two contradictory traditions represents Aḥmad's opinion? The evidence of the *Masā'il* collections composed by several of his followers is enlightening, yet ambiguous. Aḥmad's son, Ṣāliḥ (d. 266/879–80), reports his father's counsel that the *muḥṣan* adulterer should be stoned but not flogged.[65] Al-Kawsaj (d. 251/853), who is acquainted with the harmonizing traditions that divide the *zunāt* into fornicators, young adulterers and *shaykh*-adulterers, asks Aḥmad whether the virgins should be flogged and banished, while the (young) non-virgins (*thayyib*) should be stoned, and the *shaykh*-adulterers should be flogged and stoned.[66] Aḥmad's answer, "stoned and not flogged" (*yurjam wa-lā yujlad*), is ambiguous. If he means both the

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rajm (nos. 13329–33), then treats extensively the voluntary confession of adultery by a male (13334–44) and a female (13345–9), then moves to ʿAlī's stoning and flogging of an adulteress (13350, 13353–6) and some related issues (13351–2). This sequence of issues, which reflects second-century exegetical and legal priorities concerning *zinā*, is followed by a cluster of five polemical traditions: the first two (13357–8) endorse DPA, the next two (13359–60) insist on SPA, while the fifth (13361) seeks to harmonize DPA with SPA. These traditions clearly refer to a post-Shāfiʿī polemic that could not have been witnessed by ʿAbd al-Razzāq for chronological reasons. There follows another series of traditions that justify the *rajm* penalty (13363–4) which, again, is inconsistent with ʿAbd al-Razzāq's sequence of arguments.

62 Ibn Abī Shayba, *Muṣannaf*, 9:421, no. 29266.

63 Ibn Abī Shayba, *Muṣannaf*, 9:419–21, nos. 29258–70.

64 Ibn Abī Shayba, *Muṣannaf*, 9:419, no. 29258.

65 *Masā'il al-Imām Aḥmad b. Ḥanbal. Riwāyat*^{u} *Ibn*^{i}*-hi Abī 'l-Faḍl Ṣāliḥ*, ed. Ṭāriq b. ʿAwḍ Allāh b. Muḥammad (1st ed., al-Riyāḍ: Dār al-Waṭan li-'l-Nashr, 1420/1999), 310, no. 1163.

66 *Masā'il al-Imām Aḥmad b. Ḥanbal wa-Isḥāq b. Rāhwayh. Riwāyat*^{u} *Isḥāq b. Manṣūr al-Kawsaj*, ed. Abū 'l-Ḥusayn Khālid b. Maḥmūd al-Rabāṭ, Wi'ām al-Ḥawshī and Jumʿat Fatḥī, 2 vols. (1st ed., al-Riyāḍ: Dār al-Hijra li-'l-Nashr wa-'l-Tawzīʿ, 1425/2004), 2:250.

young- and the *shaykh*-adulterers, or the *shaykh*-adulterers alone, then he is calling for SPA. If his statement is restricted to the young adulterers, then a different penalty would seem incumbent upon the *shaykh*s. The latter possibility is highlighted by Ibn Hāni' (d. 275/888–9), who tells us that Aḥmad based his opinion on the tradition of Masrūq b. al-Ajdaʿ → Ubayy b. Kaʿb that divides the adulterers into young persons and *shaykh*s. Aḥmad would say that the *shaykh*-adulterer incurs flogging and stoning "for his offence is graver" (*huwa aʿẓam^{u}-humā jurm^{an}*).[67]

Recent research on the *Masā'il* has shown that, when facing contradictory traditions, Aḥmad would try to find a solution according to the principles of tradition criticism; if unable to do so, he would withhold his opinion lest it become authoritative.[68] This seems only partly true with regard to the penalty for adultery. Whereas in the *Musnad* Aḥmad cites contradictory prophetic and Companion traditions about the issue, in each separate *Masā'il* collection he voices an unequivocal opinion as if he is unaware of any contradictions. In aggregate, these opinions are inconsistent and fairly independent of the *ḥadīth* material in the *Musnad*. Thus the *Musnad* attests that Aḥmad knew the tradition *rajama rasūl^{u} 'l-lāh^{i} Māʿiz^{an} wa-lam yadhkur jald^{an}*, which reflects the Shāfiʿī SPA doctrine; the same tradition is never deployed as an argument in the *Masā'il*. Aḥmad's son, Ṣāliḥ, asserts that his father upheld SPA based on an account according to which ʿUmar stoned but did not flog. Although formally endorsing SPA, this opinion seeks vindication in the Companion practice, an approach that contrasts sharply with al-Shāfiʿī's preference for prophetic *ḥadīth*. No trace of Ṣāliḥ's tradition is found in the *Musnad*, where ʿUmar traditions are used mainly to argue that the Prophet did stone. As attested by the *Musnad*, Aḥmad knew the ʿUbāda tradition. Its grave legal and exegetical implications notwithstanding, this tradition is not part of any deliberation in the *Masā'il*.

There is no evidence that Aḥmad ever justified the SPA doctrine in the way that Shāfiʿī did: the tradition *rajama rasūl^{u} 'l-lāh^{i} Māʿiz^{an} wa-lam yadhkur jald^{an}*, which is intended to vindicate the Shāfiʿī opinion, seems foreign to the *Musnad*. The same is true for the Ubayy b. Kaʿb tradition: it is an attempt to harmonize the clashing views in the course of the DVSP dispute. Barely aware of that dispute, Aḥmad is even less likely to have propounded a compromise between the two opposing poles of legal opinion. The above traditions discarded, we are left with the ʿUbāda tradition, which defined the penalty for *zinā* during the second century AH, and the ʿUmar tradition which, to Aḥmad, is a means to justify the very existence of the stoning penalty in Islam. Thus, Aḥmad seems much like a second-century traditionist-jurisprudent who does not know about al-Shāfiʿī's SPA doctrine. Aḥmad's attitude indicates that the

67 *Masā'il al-Imām Aḥmad b. Ḥanbal. Riwāyat^{u} Isḥāq b. Ibrāhīm b. Hāhi' al-Naysābūrī*, ed. Zuhayr al-Shāwīsh, 2 vols. (Bayrūt: al-Maktab al-Islāmī, 1300/1980), 2:90, no. 1566.

68 S. A. Spectorsky, "Aḥmad ibn Ḥanbal's *Fiqh*", *Journal of the American Oriental Society*, 102/3, 1982, 463 ff.; Melchert, *Formation*, 14; Melchert, "Traditionist-Jurisprudents and the framing of Islamic law", *Islamic Law and Society* 8/3, 2001, 389; Melchert, *Ahmad Ibn Hanbal* (Oxford: Oneworld Publications, 2006), 72.

DVSP dispute would have unfolded, or at least reached its pinnacle, after his death in 241/855. Given that al-Kawsaj, who died a decade later, appears to know of a tradition that tries to harmonize the clashing views, the dispute must have begun some time around Aḥmad's date of death.[69] Consequently, the *terminus post quem*, which I derived from al-Muzanī's date of death (264/878), would have to be revised backwards by approximately two decades.

Unlike the collections I discussed previously, the Six Books do not record the tradition *rajama rasūl*^{u} *'l-lāh*^{i} *Mā'iz*^{an} *wa-lam yadhkur jald*^{an}. A more detailed review will help us to determine which of the collectors was acquainted with al-Shāfiʿī's SPA doctrine and the DVSP dispute.

In an apparent endorsement of the SPA rule, al-Bukhārī (d. 256/870) does not cite DPA traditions. Likewise, the chapter heading *Rajm*^{u} *'l-muḥṣan* (The stoning of the adulterer) may indicate support for SPA, but a closer inspection shows that the chapter's rambling contents are hardly instructive concerning al-Bukhārī's stance on the way to punish adulterers.[70] Furthermore, though extensively quoting the Māʿiz and the woman's-servant traditions throughout the *Ṣaḥīḥ*, al-Bukhārī is unfamiliar with their applicability as SPA arguments. It is more likely, therefore, that his opinion coincided with the second-century Mālikī and Ḥanafī SPA doctrine.

Unlike al-Bukhārī, who tellingly avoids the DPA traditions, Muslim (d. 261/875) puts the ʿUbāda tradition at the cenre of his discussion of *zinā*.[71] Regarding

69 The harmonizing tradition seems anomalous in the collections of al-Kawsaj and Ibn Hāni'. Al-Khiraqī (d. 334/945–6) points out that according to one tradition from Ibn Ḥanbal, the adulterers are flogged and stoned, but according to another they are stoned but not flogged (Al-Khiraqī, *Mukhtaṣar*, ed. Muḥammad Zuhayr al-Shāwīsh (Dimashq: Mu'assasat Dār al-Salām, 1378), 190). Al-Khiraqī is unaware of Aḥmad's alleged support for the harmonizing doctrine and the attendant tradition via Masrūq b. al-Ajdaʿ; its presence in some of the *Masā'il* collections may, therefore, signal a later interpolation.

70 Al-Bukhārī, *al-Jāmiʿ al-Ṣaḥīḥ*, ed. Muḥammad Zuhayr b. Nāṣir al-Nāṣir, 9 vols. (Jidda: Dār Ṭawq al-Najāt, 1422), 8:164–5. The section opens with the opinion of al-Ḥasan al-Baṣrī that whoever *z-n-y* with his sister incurs the penalty for *zinā*. Then al-Bukhārī cites only the second part of the tradition in which ʿAlī says that: 1) he had flogged an adulteress according to the Book of Allāh and; 2) stoned her according to the Sunna of the Messenger of Allah. It is strange, though, that al-Bukhārī, had he known al-Shāfiʿī's SPA doctrine, would have chosen to endorse it by tampering with a widely-known DPA tradition while, at the same time, ignoring al-Shāfiʿī's more persuasive evidence. By citing only the second part of the ʿAlī tradition, al-Bukhārī clearly emphasizes the sunnaic provenance of the *rajm* penalty. Thus he addresses an important second-century exegetical problem, which is, nevertheless, irrelevant to the DVSP dispute. The issue of abrogation between scripture and the Sunna is addressed in the following tradition, which asks whether Q. 24:2 (which prescribes flogging of the *zunāt*) was revealed before or after the Prophet had stoned. The last tradition in the chapter deals with the number of voluntary confessions needed for the imposition of *rajm*. Topically untidy as it is, this *bāb* may have been the work of a later redactor: admittedly, the earliest version of the *Ṣaḥīḥ*, which was in the possession of al-Firabrī, included topic headings with nothing after them and *ḥadīth* without topic headings (Melchert, "Bukhārī and his *Ṣaḥīḥ*", 445; J. Brown, *The Canonization of al-Bukhārī and Muslim: The Formation and Function of the Sunnī Ḥadīth Canon* (Leiden and Boston: Brill, 2007), 385–6).

71 Muslim, *Ṣaḥīḥ*, ed. Muḥammad Fu'ād ʿAbd al-Bāqī, 5 vols. (1st ed., al-Qāhira, Bayrūt: Dār Iḥyā' al-Kutub al-ʿArabiyya, Dār al-Kutub al-ʿIlmiyya, 1412/1991), 3:1316–7, no. 1690.

the DPA rule, one would expect that if Muslim disagreed with the respective part of the ʿUbāda tradition, he would refute it in the following chapter, entitled *Rajm*^{u} *'l-thayyib*^{i} *fī 'l-zinā* (The stoning of the non-virgin for (his/her) sexual offence). Contrary to expectation, the chapter includes a single tradition by which there was a stoning verse in the Quran.[72] Thus, unlike al-Bukhārī, who points to the sunnaic provenance of *rajm*, Muslim derives this penalty from scripture. Neither of the two, however, is concerned with the DVSP issue.

Abū Dāwūd (d. 275/889) treats the issue of *rajm* in a systematic way that calls to mind al-Shāfiʿī's approach. First, he cites an Ibn ʿAbbās tradition according to which Q. 24:2 abrogated Q. 4:15–6;[73] then he moves to the ʿUbāda tradition which introduces dual penalties for adultery and fornication.[74] Unlike al-Shāfiʿī, Abū Dāwūd stops short of citing traditions that abrogate ʿUbāda, and proceeds, instead, to other aspects of the penalty for *zinā*.[75] Melchert has likened Abū Dāwūd's apparent support of DPA to the Ḥanbalī doctrine[76] but, as shown above, Aḥmad's position is elusive. Despite being closer to Aḥmad than the other authors of the Six Books,[77] Abū Dāwūd does not cite the tradition *rajama rasūl*^{u} *'l-lāh*^{i} *Mā'iz*^{an} *wa-lam yadhkur jald*^{an}. This is strange if Abū Dāwūd was aware of the DVSP issue, but it is possible that he shunned the *ḥadīth* on account of its being a secondary opinion about the prophetic practice.[78]

In his chapter *Ḥadd al-zinā* (The punishment for *zinā*), Ibn Māja (d. 273/887) cites the woman's-servant tradition, which is one of al-Shāfiʿī's SPA arguments, followed by the ʿUbāda tradition, which demands DPA.[79] It is tempting to consider this arrangement to be an indication of *naskh* whereby the latter ruling rescinds the former, but such a hypothesis is hard to sustain given that Ibn Māja's collection does not present any other clues about his commitment to either SPA or DPA.[80] Compared with Abū Dāwūd's systematic treatment of the penalty for *zinā*, Ibn Māja's approach is less advanced; it betrays an interest in the piling up of (contradictory) traditions without fully considering their legal implications.

Like Ibn Māja, al-Tirmidhī (210–79/825–92) opens the chapter devoted to the punishment for adultery (*Mā jā'a fī rajm*^{i} *'l-thayyib*) with the woman's-servant

72 Muslim, *Ṣaḥīḥ,* 3:1317, no. 1691.

73 Abū Dāwūd, *Sunan*, ed. ʿIzzat ʿUbayd al-Daʿʿās, ʿĀdil al-Sayyid, 5 vols. (1st ed., Bayrūt: Dār Ibn Ḥazm, 1418/1998), 4:370, nos. 4413–4.

74 Abū Dāwūd, *Sunan*, 4:370–2, nos. 4415–7.

75 Nothing suggests that Abū Dāwūd means to uphold SPA when he cites numerous variants of the Māʿiz tradition (*Sunan*, 4:373–81) and the woman's-servant tradition (ibid., 4:383–4).

76 Melchert, "Life and works", 40.

77 C. Melchert, "The *Musnad* of Aḥmad b. Ḥanbal: how it was composed and what distinguishes it from the six books", *Der Islam*, 82/1, 2005, 43; Melchert, "The life and works of Abū Dāwūd al-Sijistānī", *al-Qanṭara*, 29/1, 2008, 38–9.

78 Abū Dāwūd prefers the prophetic traditions; almost 90 per cent of the traditions in the *Sunan* go back to the Prophet (Melchert, "Life and works", 31).

79 Ibn Māja, *Sunan*, ed. Muḥammad Fu'ād ʿAbd al-Bāqī, 2 vols. (al-Qāhira: Dār Iḥyā' al-Kutub al-ʿArabiyya, 1952–53), 2:852, nos. 2549–50.

80 In the chapter devoted to *rajm* (*Bāb al-rajm*) Ibn Māja is concerned with the existence of a stoning verse in the Quran, the number of voluntary confessions that incur *rajm* and the imam's prayer over the adulterer who was stoned (*Sunan*, 2:853–4, nos. 2553–5).

tradition, followed by the case of a slave girl who commits adultery, and the ʿUbāda tradition.[81] Unlike the other third-century *ḥadīth* collectors, al-Tirmidhī closes the chapter with an exposition of the DVSP dispute:

> Abū ʿĪsā [al-Tirmidhī] said: "This [viz. ʿUbāda] is a fairly sound tradition (*ḥasan*^{un} *ṣaḥīḥ*) that should be acted upon according to several people of knowledge among the Companions of the Prophet (ṣ), like ʿAlī b. Abī Ṭālib, Ubayy b. Kaʿb, ʿAbd Allāh b. Masʿūd and their likes, who said: 'The non-virgin is flogged and stoned'. The same was upheld by several [later] people of knowledge; it is the opinion (*qawl*) of Isḥāq [b. Rāhwayh]. And several people of knowledge among the Companions of the Prophet (ṣ), like Abū Bakr, ʿUmar and their likes said that he [viz. the adulterer] should be stoned but not flogged. It was reported from the Prophet (ṣ) in more than one tradition about the story of Māʿiz and his likes that he (viz. the Prophet) ordered stoning and did not order that he be flogged beforehand. This should be acted upon according to several [later] people of knowledge; it is the opinion (*qawl*) of Sufyān al-Thawrī, Ibn al-Mubārak, al-Shāfiʿī and Aḥmad."[82]

Along with al-Marwazī and Ibn al-Mundhir, al-Tirmidhī's exposition is the earliest third-century attestation of the DVSP dispute. Among the three scholars, Ibn al-Mundhir articulates the most consummate justification of DPA, and produces a detailed list of its proponents and opponents (see Table 1). Unlike al-Marwazī and al-Tirmidhī, Ibn al-Mundhir is familiar with the variant tradition of Ubayy b. Kaʿb which sought to harmonize DPA with SPA: the young adulterers incur flogging alone, while the *shaykh*-adulterers incur the combined penalty of flogging and stoning. Consequently, Ibn al-Mundhir's exposition attests to a later stage of polemic accomplishment, possibly attained around or after al-Marwazī's death in 294/907.

Both parties described by al-Marwazī, al-Tirmidhī and Ibn al-Mundhir would bolster their opinions by the Companion practice and the prophetic Sunna. Their emphasis on the Companion practice is so pronounced, indeed, that it relegates the prophetic Sunna to a secondary position. Such treatment of the Sunna is at variance with al-Shāfiʿī's endorsement thereof as a paramount source of legal norms coequal with the Quran. Note also the nuanced attitude towards al-Shāfiʿī's SPA doctrine. Al-Marwazī's apparent assent thereto is balanced by an exposition of the DPA arguments that is far from dismissive. Similarly, al-Tirmidhī does not divulge his opinion about the conflicting doctrines, but he describes the arguments of the SPA party in a way that might be construed as a careful endorsement of that view. Conversely, Ibn al-Mundhir is a staunch advocate of DPA. Such varied opinions indicate that by the last quarter of the third century AH, the DVSP dispute (and efforts to define Shāfiʿī doctrine) would have been still ongoing.

81 Al-Tirmidhī, *al-Jāmiʿ al-Ṣaḥīḥ*, ed. Aḥmad Muḥammad Shākīr, 5 vols. (2nd ed., al-Qāhira: Sharikat Maktabat wa-Maṭbaʿat Muṣṭafā al-Bābī al-Ḥalabī wa-Awlādihi, 1398/1978), 4:39–42, nos. 1433–4.

82 Al-Tirmidhī, *Jāmiʿ*, 4:41–2.

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Table 1. Sources for the chronology of the DVSP dispute

According to:	Proponents of DPA		Proponents of SPA	
	Among the Companions	Among the later jurisprudents	Among the Companions	Among the later jurisprudents
Al-Marwazī (202–94/ 817–907)	ʿAlī, Ubayy b. Kaʿb	*Ṭā'ifat*^{un} *min ahl*^{i} *ʿaṣr*^{i}*-nā wa-qurb*^{i}*-hi*	Abū Hurayra, Zayd b. Khālid, Shibl[83]	Al-Shāfiʿī, *ʿāmmat*^{u} *ahl*^{i} *'l-futyā min-ahl*^{i} *'l-Ḥijāz*^{i} *wa-'l-'Irāq*^{i} *wa-'l-Shām*^{i} *wa-Miṣr*^{a} *wa-ghayr*^{u}*-hum min ahl*^{i} *'l-athar*
Al-Tirmidhī (210–279/ 825–892)	ʿAlī, Ubayy b. Kaʿb, Ibn Masʿūd *wa-ghayr*^{u}*-hum*	Ibn Rāhwayh *wa-ba*^{ʿa}*ḍ*^{u} *ahl*^{i} *'l-*^{ʿ}*ilm*	Abū Bakr, ʻUmar wa-*ghayr*^{u}*-humā*	Al-Thawrī, Ibn al-Mubārak, al-Shāfiʿī, Aḥmad
Al-Ṭabarī (224–310/ 839–923)[84]	ʿAlī, Ubayy b. Kaʿb		*Jamā*^{ʿa}*t*^{un} *min al-salaf*	*Wa-*^{ʿ}*āmmat*^{un} *min al-khalaf*
Al-Ṭaḥāwī (d. 321/933)[85]	ʿAlī		ʿUmar	Abū Ḥanīfa, Abū Yūsuf, al-Shaybānī. (Ibn Abī Laylā, Mālik, al-Awzāʿī, al-Thawrī, al-Ḥasan b. Ḥayy, al-Shāfiʿī)[86]
Ibn al-Mundhir (*c.* 241–318/ *c.* 855–930)	ʿAlī	Al-Ḥasan al-Baṣrī, Ibn Rāhwayh		Al-Nakhaʿī, al-Zuhrī, Mālik, al-Awzāʿī, al-Thawrī, al-Shāfiʿī, Aḥmad, Abū Thawr
Ibn al-Farrā' (380–458/ 990–1066)[87]		Aḥmad		
Ibn Ḥazm (384–456/ 994–1064)[88]	ʿAlī, Ubayy b. Kaʿb.	Al-Ḥasan al-Baṣrī, al-Ḥasan b. Ḥayy, Ibn Rāhwayh, Dāwūd al-Ẓāhirī	Abū Bakr, ʿUmar	Al-Nakhaʻī, al-Zuhrī, al-Awzāʻī, al-Thawrī, Abū Ḥanīfa, Mālik, al-Shāfiʻī, Abū Thawr, Aḥmad.

Continued

83 Al-Tirmidhī, *Jāmi*^{ʿ}, 242.
84 Al-Ṭabarī, *Tahdhīb al-Āthār*, *Musnad* ^{ʿ}*Umar b. al-Khaṭṭāb*, 2:877, no. 1233.
85 Al-Ṭaḥāwī, *Sharḥ Maʿānī al-Āthār*, 3:138–41.
86 The group in parentheses is according to al-Ṭaḥāwī, *Mukhtaṣar Ikhtilāf al-*^{ʿ}*Ulamā'*, ed. ʿAbd Allāh Nadhīr Aḥmad, 5 vols. (1st ed., Bayrūt: Dār al-Bashā'ir al-Islāmiyya, 1416/ 1995), 3:277.
87 Ibn al-Farrā', *al-*^{ʿ}*Udda*, ed. Aḥmad b. ʿAlī Sayr al-Mubārakī, 5 vols. (2nd ed., al-Riyāḍ, 1990), 3:886, 1044.
88 Ibn Ḥazm, *al-Muḥallā*, ed. Aḥmad Muḥammad Shākir, 11 vols. (al-Qāhira: Idārat al-Ṭibāʿa al-Munīriyya, 1347–52/1928–33), 11:234–5.

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Table 1. Continued

According to:	Proponents of DPA		Proponents of SPA	
	Among the Companions	Among the later jurisprudents	Among the Companions	Among the later jurisprudents
Al-Khaṭṭābī (d. 388/998)[89]	ʿAlī	Al-Ḥasan al-Baṣrī, Ibn Rāhwayh, Dāwūd al-Ẓāhirī *wa-ahl" l-ẓāhir*	ʿUmar	Al-Shāfiʿī, *ʿāmmat" 'l-fuqahā'*
Ibn ʿAbd al-Barr (368–463/ 978–1070)[90]	ʿAlī	Al-Ḥasan al-Baṣrī, Ibn Rāhwayh, Dāwūd al-Ẓāhirī		Mālik, Abū Ḥanīfa, al-Shāfiʿī, al-Thawrī, al-Awzāʿī, al-Layth b. Saʿd, al-Ḥasan b. Ḥayy, Ibn Abī Laylā, Ibn Shubruma, Aḥmad, Isḥāq, Abū Thawr, al-Ṭabarī *Jamīʿ al-fuqahā'*.
Al-Ṭūsī (d. 460/1067)[91]	ʿAlī	Dāwūd *wa-ahl" 'l-ẓāhir*		
Al-Baghawī (d. 516/ 1122)[92]	ʿAlī, Ubayy b. Kaʿb, Ibn Masʿūd	Al-Ḥasan al-Baṣrī, Ibn Rāhwayh, Dāwūd al-Ẓāhirī	Abū Bakr, ʿUmar *wa-ghayr"-humā min al-ṣaḥāba*	Al-Thawrī, Ibn al-Mubārak, al-Shāfiʿī, Aḥmad *wa-aṣḥāb" 'l-ra'y*.
Al-Ḥāzimī (d. 584/ 1188–9)[93]		Ibn Rāhwayh, Aḥmad, Dāwūd al-Ẓāhirī, Ibn al-Mundhir	ʿUmar	Al-Nakhaʿī, al-Zuhrī, Mālik, al-Awzāʿī, Sufyān, Abū Ḥanīfa, al-Shāfiʿī. *Al-jumhūr*
Ibn Rushd (d. 595/1198)[94]	ʿAlī.	Al-Ḥasan al-Baṣrī, Ibn Rāhwayh, Aḥmad, Dāwūd al-Ẓāhirī		
Ibn Qudāma (d. 620/ 1223)[95]	ʿAlī, Ubayy b. Kaʿb, Ibn ʿAbbās, Abū Dharr	Al-Ḥasan al-Baṣrī, Ibn Rāhwayh, Dāwūd al-Ẓāhirī, Ibn al-Mundhir	ʿUmar, ʿUthmān, Ibn Masʿūd	Al-Nakhaʿī, al-Zuhrī, al-Awzāʿī, Mālik, al-Shāfiʿī, Abū Thawr, *aṣḥāb" 'l-ra'y*, al-Jūzajānī, al-Athram

Continued

89 Al-Khaṭṭābī, *Maʿālim al-Sunan*, ed. Muḥammad Rāghib al-Ṭabbākh, 4 vols. (1st ed., Ḥalab: al-Maṭbaʿat al-ʿIlmiyya, 1351/1932), 3:316–7.

90 Ibn ʿAbd al-Barr, *Tamhīd*, ed. Muṣṭafā b. Aḥmad al-ʿAlawī et al., 26 vols. (al-Ribāṭ: Mudīriyyat al-Shu'ūn al-Islāmiyya, 1387–1412/1967–1992), 9:78–9.

91 Al-Ṭūsī, *al-Khilāf*, ed. al-Sayyid ʿAlī al-Khurāsānī, al-Sayyid Jawād al-Shahristānī and al-Shaykh Mahdī Najaf, 6 vols. (2nd ed., Qumm: Mu'assasat al-Nashr al-Islāmī al-Tābiʿa li-Jamāʿat al-Mudarrisīn bi-Qumm al-Musharrafa, 1420/1999), 5:367.

92 Al-Baghawī, *Sharḥ al-Sunna*, ed. Shuʿayb al-Arna'ūṭ and Muḥammad Zuhayr Shāwīsh, 16 vols. (2nd ed., Bayrūt: al-Maktab al-Islāmī, 1403/1983), 10:276–7.

93 Al-Ḥāzimī, *al-Iʿtibār fī Bayān al-Nāsikh wa-l-Mansūkh min al-Āthār* (2nd ed., Ḥaydarābād: Dā'irat al-Maʿārif al-ʿUthmāniyya, 1359), 201.

94 Ibn Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*, 2 vols. (6th ed., Bayrūt: Dār al-Maʿārif, 1982/1402), 2:435.

95 Ibn Qudāma, *al-Mughnī*, ed. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī and ʿAbd al-Fattāḥ Muḥammad al-Ḥulw, 15 vols. (3rd ed., al-Riyāḍ: Dār ʿĀlam al-Kutub, 1417/1997), 12:313.

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Table 1. Continued

According to:	Proponents of DPA		Proponents of SPA	
	Among the Companions	Among the later jurisprudents	Among the Companions	Among the later jurisprudents
Ibn Ḥajar (d. 852/1449)[96]	ʿAlī, Ubayy b. Kaʿb	Al-Ḥasan al-Baṣrī, Ibn Rāhwayh, Aḥmad, Dāwūd al-Ẓāhirī, Ibn al-Mundhir		Al-Shāfiʿī, *al-jumhūr*

In summary, the third-century evidence attests to the wide circulation of the second-century DPA doctrine before Ibn Ḥanbal's death in 241/855. After that date awareness of the SPA doctrine increases steadily, and in the third quarter of the century, al-Shāfiʿī is mentioned as an SPA advocate. By the turn of the third century, both parties' arguments appear in a state of polemic accomplishment that would preclude substantial changes over the ensuing centuries.

Who were the parties to the DVSP polemic?

Important clues to the chronology of the DVSP dispute can be gleaned from the lists of authorities who were reportedly engaged in the DVSP polemic. Table 1 summarizes the source accounts.

The proponents of DPA are:

1. Of the Companions, ʿAlī is always mentioned; when further names are added, he is always accompanied by Ubayy b. Kaʿb. Ibn Masʿūd is mentioned twice; Ibn ʿAbbās and Abū Dharr each appear once.
2. The earliest proponent of DPA among the third-century *fuqahā'* is Isḥāq b. Rāhwayh. The later sources always add Dāwūd al-Ẓāhirī and (apart from al-Ṭūsī and al-Ḥāzimī) al-Ḥasan al-Baṣrī. Aḥmad and Ibn al-Mundhir are mentioned three times, and al-Ḥasan b. Ṣāliḥ b. Ḥayy once.

Those who distinguished between *shaykh*-adulterers and young adulterers (not included in the table) are:

1. Among the Companions: Ubayy b. Kaʿb.
2. Among the later *fuqahā*' no specific names are mentioned, but according to al-Kawsaj and Ibn Hāni', this was Aḥmad's precept.

The proponents of SPA are:

1. Whenever Companions are named, ʿUmar is invariably mentioned. Abū Bakr accompanies him when more than one Companion is listed. Ibn Qudāma's mention of ʿUthmān and Ibn Masʿūd along with ʿUmar, and al-Marwazī's list of Companions, are anomalous.

96 Ibn Ḥajar, *Fatḥ al-Bārī*, ed. Abū Qutayba Naẓar Muḥammad al-Fāryābī, 17 vols. (Dār Ṭayba, n.d.) 15:605.

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2. Among the later *fuqahā'*, al-Shāfiʿī is the unmistakeable master of the SPA doctrine. Sufyān al-Thawrī is mentioned seven times; al-Awzāʿī and Mālik six times; Aḥmad five times; Abū Ḥanīfa, Abū Thawr, al-Nakhaʿī and al-Zuhrī four times; Ibn al-Mubārak, Ibn Abī Laylā and al-Ḥasan b. Ḥayy twice; Abū Shubruma, Abū Yūsuf, al-Shaybānī, al-Layth b. Sa'd and al-Ṭabarī once.

Upon comparison, one notes contradictions in the views attributed to specific Companions and jurisprudents. Thus:

1. Ubayy b. Kaʿb now calls for DPA and now distinguishes between *shaykh*-adulterers and young adulterers, in which case only the *shaykh*s incur DPA.
2. Al-Tirmidhī and al-Baghawī count Ibn Masʿūd among the supporters of the DPA rule; Ibn Qudāma considers him an advocate of SPA.
3. According to Ibn Ḥazm, al-Ḥasan b. Ḥayy supported DPA, but according to Ibn ʿAbd al-Barr and al-Ṭaḥāwī he held that adulterers incur only stoning.
4. Aḥmad's alleged support for all possible doctrines on the penalty for adultery indicates multiple back-projections obfuscating his original opinion.

Having eliminated all controversial names from the list, we are left with only few DPA advocates: ʿAlī b. Abī Ṭālib among the Companions, and al-Ḥasan al-Baṣrī, Isḥāq b. Rāhwayh, Dāwūd al-Ẓāhirī and Ibn al-Mundhir among the later *fuqahā'*.

Likewise, the apparently large number of SPA advocates decreases to only a few on closer consideration. Among the Companions, ʿUmar and Abū Bakr are predominant. Among the *fuqahā'*, the SPA doctrine is attributed to anonymous bodies of jurisprudents (*ʿāmmatᵘ 'l-fuqahā'*, *ahl al-ra'y*, etc.); to jurisprudents who held that adultery incurs stoning before the advent of the classical SPA doctrine (Abū Ḥanīfa, Mālik, Abū Yūsuf, al-Shaybānī); and to persons who, though frequently found in the *isnād*s of traditions dealing with *zinā*, cannot be proven to have held opinions regarding SPA or DPA (al-Zuhrī, al-Thawrī, Ibn al-Mubārak). If we further remove from the list al-Ḥasan b. Ḥayy, on account of the contradictory statements about his opinions, and al-Nakhaʿī, whose DPA opinion is a later back-projection,[97] al-Shāfiʿī would stand out as the most salient SPA champion. Aḥmad's presence in the list is also important, on which more later.

Whether Companions contributed to the promulgation of each doctrine is impossible to verify; even a less sceptical Western student of Muslim traditions would be reluctant to attach much weight to contested *fiqhī* issues being associated with such early authorities. A considerable number of the ʿAlī traditions were circulated by Shuʿba b. al-Ḥajjāj (d. 160/776–7) and Hushaym b. Bashīr (d. 183/799), their main point being not to impose the DPA rule as much as to justify the stoning penalty against those who stuck to the ordinance of Q. 4:15–16. Since al-Ḥasan al-Baṣrī belonged to the latter group,[98] he cannot be considered a proponent of DPA.

Thus, we are left with two principal third-century DPA advocates: Isḥāq b. Rāhwayh (161–238/778–853) and his student, Dāwūd b. Khalaf al-Ẓāhirī

97 Just as the doctrine that rejected banishment as part of the punishment for fornication, on which see J. Schacht, *Origins* (Oxford: Clarendon Press, 1950), 209.

98 Pavlovitch, "The ʿUbāda b. al-Ṣāmit tradition", 209–18.

(*c*. 202–279/*c*. 817–884). Regrettably, the extant *Musnad* of Ibn Rāhwayh does not record DPA or SPA traditions, whereas there are no extant works of Dāwūd b. Khalaf.

The earliest surviving work that mentions Ibn Rāhwayh's support of DPA is the *Masā'il* collection of al-Kawsaj (d. 251/853).[99] By al-Kawsaj's testimony, Ibn Rāhwayh would justify DPA by the Companion tradition about ʿAlī's punishment of Shurāḥa. He would further assert that the woman's-servant tradition is not clear proof,[100] thus indicating that it was an argument set forth by the SPA advocates, none of whom, however, is identified by name. Ibn Rāhwayh does not consider the Māʿiz tradition which, were it known to him as an SPA argument, would have been susceptible to the same rebuttal as the woman's-servant tradition. Ibn Rāhwayh's defence of DPA indicates that in his lifetime the opposing party relied on arguments that were below the level of maturity observed in the *Risāla*. Unlike al-Shāfiʿī, who favours prophetic *ḥadīth*, Ibn Rāhwayh supports his opinion by the Companion practice alone. Thus, to use Susan Spectorsky's qualification, he acts "much more as a scholar of the second century … than as a prominent third-century collector and disseminator of traditions".[101]

The first explicit attribution of the DPA doctrine to Dāwūd b. Khalaf is found in the commentary of Abū Dāwūd's *Sunan* composed by al-Khaṭṭābī (d. 388/998). According to him, DPA was the opinion (*qawl*) of Dāwūd and his followers.[102] Note, however, that a century earlier, al-Marwazī attributes to an anonymous group of DPA advocates the statement that the ʿUbāda tradition should be interpreted "at face value" (*ʿalā wajhⁱ-hi*), a locution that immediately calls to mind *ʿalā ẓāhirⁱ-hi*, that is, "according to its outward meaning". This analogy coincides with the contemporary remark by Ibn al-Mundhir that the proponents of DPA relied on the outward meaning (*ẓāhir*) of scripture. Both references apparently point to the early *ẓāhiriyya*, perhaps even before their group became distinguished by this name.

Al-Khaṭṭābī does not set forth Dāwūd b. Khalaf's arguments, but, arguably, they concur with the view of the anonymous DPA group described by Dāwūd's contemporary, al-Marwazī. These jurists insisted on the literal reading of the ʿUbāda, Māʿiz and the woman's-servant traditions in conjunction with the Quranic ordinance for flogging the *zunāt*. Such an adherence to the textual sources of law accords with the *ẓāhirī* concept of *uṣūl al-fiqh*, which rejects analogical reasoning and does not rely on authorities other than scripture and the Sunna.[103] The listing of a number of Companions as DPA exponents brings to mind al-Ẓāhirī's doctrine which confined consensus (*ijmā'*) to the generation of the Companions.[104]

Compared with what we know about Ibn Rāhwayh's doctrine, Dāwūd b. Khalaf wields the DPA arguments in a more detailed and skilful manner. Whereas Ibn

99 Al-Kawsaj, *Masā'il*, 2:250.
100 Al-Kawsaj, *Masā'il*, 2:250.
101 Spectorsky, "Ḥadīth in the responses of Isḥāq b. Rāhwayh", 409.
102 Al-Khaṭṭābī, *Maʿālim*, 3:316.
103 *IE²*, s.v. *Ẓāhiriyya* (Abdel-Magid Turki); I. Goldziher, *Die Ẓâhiriten* (Leipzig: Otto Schulze, 1884), 30 ff.; Melchert, *Formation*, 179.
104 Melchert, *Formation*, 180.

Rāhwayh appeals to Alī's practice alone, Dāwūd adds the ʿUbāda tradition. Likewise, Dāwūd rebuts both the woman's-servant tradition and the Māʿiz tradition, whereas Ibn Rāhwayh deals only with the former. Dāwūd's arguments are set out clearly and convincingly; conversely, Ibn Rāhwayh is content with the ambiguous statement that the woman's-servant tradition is not a clear proof. Dāwūd's more advanced deliberation indicates that both the DPA and SPA parties had refined their arguments after the death of Ibn Rāhwayh in 238/853.

If the third-century DPA doctrine was elaborated by Ibn Rāhwayh and Dāwūd b. Khalaf, then, of course, the legitimate question arises as to who their opponents were. The list of SPA proponents, as shown in Table 1, is amorphous; when examined in more detail it can be limited to al-Shāfiʿī and Ibn Ḥanbal. Ibn Rāhwayh's cruder reasoning being no match to al-Shāfiʿī's refined SPA doctrine, one expects that Aḥmad, if he ever subscribed to SPA, ought to have relied on arguments mirroring those advanced by Ibn Rāhwayh. This is indicated by Aḥmad's son Ṣāliḥ, who asserts that his father justified SPA by a companion tradition going back to ʿUmar. Ibn Rāhwayh's response with an ʿAlī tradition seems reciprocal.

Although a late addition to the list of SPA exponents, the Baghdadi transmitter of al-Shāfiʿī's old teaching (*qadīm*), Abū Thawr (d. 240/854), may have subscribed to the primitive Baghdadi SPA doctrine. Reportedly, Aḥmad praised Abū Thawr as a traditionalist, but eventually condemned him for his heretical tenets in exegesis.[105]

As time went on, Aḥmad's opinion came to be associated with the classical SPA doctrine. According to the Ḥanbalī jurisprudent Ibn Qudāma (d. 620/1223), Abū Bakr al-Athram (d. 273/886–7), a student of Aḥmad from whom he later distanced himself,[106] cited his teacher's opinion that the ʿUbāda tradition "was the first *ḥadd*-penalty that was revealed, while the Māʿiz tradition is later; the Prophet (ṣ) stoned him (viz. Māʿiz) but did not flog him, and ʿUmar stoned and did not flog".[107] As this statement is not present in the extant works of al-Athram, one wonders whether Ibn Qudāma, who was influenced by al-Shāfiʿī's works to the point of plagiarism,[108] may have altered al-Athram's words. That this was not the case is suggested by Ibn Qudāma's reluctance to entertain the arguments of al-Athram and his like: Ibn Qudāma avoids considering Aḥmad either as a proponent of SPA or an opponent thereof; and his own opinion leans towards the DPA rule.[109] This attitude probably reflects Ibn Qudāma's realization that it was the generation after Aḥmad that cast his original concepts in a Shāfiʿī mould. It also aligns with the established Ḥanbalī doctrine, which eventually abandoned SPA, probably owing to the equivocal status of some of its third-century exponents with regard to Aḥmad and the later orthodoxy.

If the early stages of the DVSP dispute did occur in Ibn Rāhwayh's era, then our suggested *terminus post quem*, the death of Ibn Ḥanbal in 241/855, should

105 Melchert, *Formation*, 72–3, 147.
106 Melchert, *Formation*, 24–5.
107 Ibn Qudāma, *al-Mughnī*, 12:313. According to Ibn Qudāma, Abū Isḥāq al-Jūzajānī (d. 256/870) was of a similar opinion.
108 Melchert, *Ahmad Ibn Hanbal*, 80–1.
109 Ibn Qudāma, *al-Mughnī*, 12:314.

be moved back to an earlier date, some time in the first decades of the third century AH. Hence the traditional dating of the *Risāla* would seem quite feasible. Nothing in Aḥmad's tentative support for SPA, however, indicates familiarity with al-Shāfiʿī's SPA doctrine. Nor does Ibn Rāhwayh respond to opponents who seem to have wielded Shāfiʿī arguments. The first jurist to argue explicitly against SPA as a Shāfiʿī doctrine is Dāwūd b. Khalaf. Unlike Ibn Rāhwayh's crude anti-SPA reasoning, Dāwūd's arguments are as detailed and refined as the arguments in the *Risāla*. But Dāwūd died in 279/884, which brings us again to the death-date of al-Muzanī (d. 264/878) as the *terminus post quem* of the classical DPA doctrine.

Conclusion

In rejecting the DPA rule of the ʿUbāda tradition, al-Shāfiʿī may have appealed to the practice of the ancient Mālikī school, which, nonetheless, he adapted to his theory of abrogation within the corpus of the prophetic Sunna. In so doing al-Shāfiʿī distanced himself from the ancient-school tradition, and sought to put the Islamic penalty for *zinā* on a firm sunnaic basis. Hence, though formally concurring with a previously existing practice, al-Shāfiʿī's SPA doctrine would be better seen, at the level of theory, as having no precedent in the history of Islamic jurisprudence.

In the present study, I argue that the SPA doctrine as found in the *Risāla* (and other works attributed to al-Shāfiʿī) is not without precedent. It concluded a prolonged polemic between rival parties who continuously sharpened their arguments. This process is significant in two ways: it demonstrates the undisrupted development of an important facet of the Islamic positive law before it made its way into the *Risāla*; and it postdates al-Shāfiʿī.

Our historical survey has shown that al-Shāfiʿī's contemporary traditionists and jurisprudents are surprisingly unfamiliar with his SPA doctrine. Although a single tradition which corresponds to the Shāfiʿī SPA doctrine is present in the collections of al-Ṭayālisī, ʿAbd al-Razzāq and Ibn Abī Shayba, its intrusive character is clear. The situation does not change much in the generation following al-Shāfiʿī. None of Ibn Ḥanbal's contradictory statements on the penalty for adultery presupposes an acquaintance with the SPA arguments as set forth in the *Risāla*, and neither does the discussion of adultery found in the works of al-Muzanī, Abū ʿUbayd, al-Muḥāsibī, Ibn Qutayba, al-Bukhārī and Muslim.

The earliest jurist to engage in polemic against SPA is Ibn Rāhwayh, but his crude advocacy of DPA indicates that he faced few opponents inspired by the classical Shāfiʿī doctrine. A generation later, Ibn Rāhwayh's student, Dāwūd b. Khalaf, presents exactly the kind of arguments that one expects from an exponent of the ripe SPA doctrine; it is not surprising therefore that its first explicit attribution to al-Shāfiʿī belongs to the same period. Al-Tirmidhī is familiar with al-Shāfiʿī's arguments, and with those advanced by his opponents. The same holds for al-Marwazī, who is the principal source of information about the early *ẓāhirī* doctrine on the penalty for adultery. Al-Ṭabarī's treatment of the issue indicates that he changed his opinion from an endorsement of DPA to its rejection, the turning point being roughly coterminous with Dāwūd b. Khalaf's death in 279/884. Ibn

al-Mundhir's exposition of the DVSP dispute shows that by the end of the third century, the refinement of both doctrines had been almost accomplished.

The members of the early third-century SPA party are more difficult to identify due to the arbitrary and often anonymous ascriptions of this doctrine. One may think, nevertheless, that Ibn Rāhwayh and Dāwūd b. Khalaf were responding to SPA arguments expressed by Ibn Ḥanbal and Abū Thawr, and refined by al-Jūzajānī and al-Athram.

The gradual unfolding of the DVSP dispute is hardly compatible with Lowry's positing of the *Risāla*'s uniqueness and Hallaq's neglect-and-revival theory, both of which, in our case, would presuppose the existence of the classical SPA doctrine by the end of the second century AH. We have seen that Ibn Rāhwayh's rebuttal of the DPA arguments reflects a pre-Shāfiʿī treatment of the penalty for adultery; Dāwūd b. Khalaf's critique, however, is apparently evoked by the fully-fledged Shāfiʿī teaching on the issue. If Dāwūd b. Khalaf built upon Ibn Rāhwayh's doctrine, then such a process would essentially preclude a Shāfiʿī influence. For otherwise one must concede that Ibn Rāhwayh argued against an undeveloped Shāfiʿī doctrine of obscure origin, without (together with his opponents!) being familiar with its better original; then, all of a sudden, Dāwūd b. Khalaf refuted the original Shāfiʿī view, while at the same time improving Ibn Rāhwayh's cruder arguments. Instead of a period of neglect, one may think of the SPA doctrine as being related to al-Shāfiʿī only at an advanced stage of its development. Thus Ibn Rāhwayh would have argued against an SPA rule whose association with al-Shāfiʿī was still unaccomplished, whereas Dāwūd b. Khalaf faced opponents who were conscious of the Shāfiʿī origins of their doctrine.

The gradual development of the DPA doctrine in conjunction with its SPA counterpart does not rule out Melchert's re-dating of the *Risāla* as we know it to the third quarter of the third century AH. To my mind, this is the period when the association of the DPA doctrine with al-Shāfiʿī was completed. This is not to say that the *Risāla* had not existed before, only that certain parts thereof were amended so as to respond to changing third-century legal concepts.