mining the extent, and then the significance, of those issues that give rise to inter-*madhhab* debate. For this purpose the *Iḥkām*, given its comprehensiveness, is a good starting point. I take cognizance of certain methodological difficulties that this project entails, making quantitative research problematic. Notwithstanding these difficulties, however, I conclude at the end of my study that while the *Iḥkām* does present us with a fairly broad array of *madhhab* differences (I examine in particular the Hanafī-Shāfiʿī differences) the amount of space devoted to such differences is surprisingly little—too little, certainly, to regard *madhhab* differences and distinctive *madhhab* positions as a major preoccupation of this important work, too little to warrant considering the *Iḥkām* an exposition of Shāfiʿī *uṣūl*. *Uṣūl al-fiqh* emerges from the *Iḥkām* as an ecumenical discipline useful to jurists of all schools who wish to hone their dialectical skills.

Wael Hallaq takes us to the heart of *madhhab* formation and identity as worked out along theoretical lines. If the attempt to ferret out of *uṣūl al-fiqh* literature a set of foundational principles or methods distinctive of each school leads to no result, it may be that we are imputing to *uṣūl al-fiqh* a function that it cannot sustain (notwithstanding the inter-*madhhab* debates that do fill some of the pages of the literature). Hallaq calls our attention to a more fruitful approach, one that emphasizes pedigree rather than content of legal reasoning as the basis of *madhhab* formation. Pedigree requires a structure of authority, what Hallaq calls a "hierarchical taxonomy" of jurists within a given school. Such a structure depends upon an eponymic figure who is not only an absolute (unrestricted) *mujtahid* but is able to effect a break with all antecedent opinions as the one who stands at the absolute starting point of the *madhhab*'s formation. The subject of authority figures takes us back to the notion of a "Great Shaykh" theory broached by Jonathan Brockopp. However, whereas Brockopp has in mind a figure whose greatness is due to his actual accomplishments and whose authority is rooted in popular culture, Hallaq is concerned with a figure whose greatness and authority are constructed generations later and are rooted in the elite culture of scholars. The actual construction of this authority figure takes place through a process called *takhrīj*, the attribution to the authority figure of teachings and opinions not originally his own. At earlier stages of a *madhhab*'s formation material from another *madhhab* may be attributed to the eponym. Eventually, however, only doctrine emanating

from within the *madhhab* will be attributed to him, until finally the process of attribution will cease and the corpus of doctrine associated with the eponym will be considered complete.

Against the background of all the essays considered thus far, the case of Shawkānī—the subject of Bernard Haykel's essay—becomes most remarkable. To begin with, whatever we may as contemporary scholars say about the effectiveness or ineffectiveness of *uṣūl al-fiqh* in the actual formation of the law, Shawkānī was clearly convinced of its effectiveness and for that reason made it the foundation of a program of reconstruction of Islam. On the other hand, he did not merely adopt the *uṣūl al-fiqh* inherited from the classical jurists. Instead, he offers, as Haykel shows, his own reconsidered *uṣūl al-fiqh*, which is predicated upon a literalist approach to interpretation and a rejection of both *ijmāʿ* and *qiyās*. This kind of *uṣūl*, he believes, will put an end to the surmise and supposition that have historically given rise to the several *madhhabs*. In other words, in the new Muslim society envisioned by Shawkānī unity will prevail and the *madhhabs* will eventually wither away. Although Shawkānī's disillusionment with *madhhabs* originated from his experience with the Zaydī-Hadāwī *madhhab*, it soon extended to the larger world of Islam. Unity is a common theme among Muslim reformers. Haykel illuminates Shawkānī's particular way of pursuing it through a reconstructed and reformulated *uṣūl al-fiqh*.

Finally, Wolfhart Heinrichs invites us to explore a topic that hitherto has been rather neglected by scholars of Islamic law despites its undeniable importance within Muslim legal thought and its close connection with *uṣūl al-fiqh*, and that is the *qawāʿid*, the general principles of positive law, sometimes taking the form of easy-to-remember pithy statements or maxims, that serve to facilitate the application of the law to particular cases. Heinrichs quotes Ibn Nujaym as saying of the *qawāʿid*, "They are the real *uṣūl al-fiqh*." Other jurists, reluctant to go that far, nonetheless saw a resemblance between the *qawāʿid* and *uṣūl al-fiqh* and applied the terms *uṣūl* or *uṣūl al-madhhab* quite freely to the former. That they did so arises from the fact that the general principles that were subsumed under the rubric *qawāʿid* functioned as a sort of source of rulings on particular cases. From these principles *aḥkām* could be derived through a process of deliberation that Ibn Nujaym, as Heinrichs points out, was willing to call *ijtihād*.

The *qawāʿid* were jurist-generated, and their authority rested upon the presumption of their having been drawn inductively from a mul-

tiplicity of previous rulings on particular cases. As abstract statements of the law based on deliberations of a particular school's past jurists, the *qawā'id* offered a way of getting at the school's distinctive doctrine. Needless to say, the *qawā'id* attributed to a school's eponymic founder became especially definitive, as the story, mentioned by Heinrichs, of Abū Ṭāhir al-Dabbās's attempt to reduce the entire doctrine (*madhhab*) of Abū Ḥanīfa to seventeen *qawā'id* bears out. It is clear from Heinrich's account that his utilization of *qawā'id* to reduce school doctrine to its basics must be given serious consideration in contemporary scholarly discussions of school self-definition.

Heinrichs' paper calls our attention to the need for increased attention to legal literatures distinct from the literature of *uṣūl al-fiqh* but closely related to it. These include, in addition to the *qawā'id* literture, the literatures dealing with the cognate subjects of the *furūq* and the *ashbāh wa-naẓā'ir*, on which Heinrichs has written elsewhere. Only by studying all these literatures side by side will we gain a full appreciation of the complementary relationship that existed between them and the role of each within the larger complex of Muslim legal disciplines.

At Alta each paper was followed by discussion, and the final session was devoted entirely to an open discussion. In this volume, the shorter discussions that followed the papers have been integrated into the basic framework of the longer final discussion in the hope that the resulting unified account will bring out more clearly the underlying interrelatedness of ideas and arguments that were broached by the participants. Furthermore, this procedure made it possible to eliminate a certain amount of overlap that existed between discussions. Since papers were referred to at various points during the final discussion and since the discussions that followed the papers sometimes turned to topics that lay beyond the subject matter of the papers, the synthesizing of the various discussions into a single account did not entail a juxtaposition of incongruous elements.

Although the discussions touched on a wide range of topics, certain topics received the lion's share of attention. In the first twelve or so pages of the discussion section, the focus is on the development of legal theory prior to the establishment of classical *uṣūl al-fiqh*. First to be discussed is the question of whether, in the case of texts in which a great master-jurist is cast in the role of final authority on matters of law, one may predicate a distinct conception of authority distinct from other conceptions and thus postulate a multilinear (or polythetic) development of legal theory in the early period

in place of the unilinear development implicit in the work of Schacht, Wansbrough, Crone, Calder and others. Also discussed is the place of Shāfiʿī's *Risālah* in the development of legal theory and in particular the question of whether or not this renowned work was a harbinger of classical "four sources" theory, as has been commonly thought, or an essentially pre-classical work with hermeneutic issues as its primary concern. Thereafter follows a discussion of developments during the ninth century C.E. with special attention being given to the question of whether the emergence of *uṣūl al-fiqh* can be traced back to some point in that century. It is in the course of this discussion that the problem of how to define *uṣūl al-fiqh* comes to the foreground—whether the term should be confined to mainstream classical theory or applied more broadly, whether it should be defined as a literary genre, a genre of legal writing, or as a discipline concerned with a particular body of questions.

This discussion of the problem of definition quickly develops into a discussion of the related but, in the view of several discussants, essentially distinct subject of the *function* of *uṣūl al-fiqh*, a subject that takes up the lion's share of attention in the remaining pages. First the function of *uṣūl al-fiqh* in relation to positive law (*furūʿ*, *fiqh*) is debated at considerable length, as discussants find themselves divided over the question of whether *uṣūl al-fiqh* has any role in the creation of law or is confined to the validation of existing law. The larger question that looms in the background of this discussion is: what are the real determinants of the law—arguments that follow the *uṣūl al-fiqh* paradigm, or "practical reason," or culturally conditioned presuppositions. Several participants considered it too limiting to restrict the function of *uṣūl al-fiqh* to the realm of positive law. Other approaches mooted sought to take into account theological, educational, legal-institutional (*madhhab*-related), sectarian, reformist, elitist, esthetic or broadly sociological purposes (e.g. determining community boundaries). Toward the end of the discussion the subject of construction of eponymic authority as an integral part of *madhhab* formation is explored. Here the question of the personal authority of great master-jurists, broached in the early part of the discussion, is revisited but with a focus on such authority as retrospectively constructed.

As Heinrichs notes at the beginning of his essay, the study of *uṣūl al-fiqh* had not received a great deal of scholarly attention until recent times. Even now, with scholarly attention at an all-time high, there is still much to be done in this imporant branch of Islamic studies.

There are yet further sources to be consulted, fresh questions to be raised, new connections to be discovered, untried methods to be considered, a larger picture to be drawn. The essays in this volume can thus hardly be regarded as the last word on any topic that was broached at Alta. If, however, through the diversity of perspectives reflected in them, these papers stimulate further research and help to clarify the agenda of that research, thus moving the study of Islamic legal theory forward in significant ways, the Alta project will have served the purpose to which it was originally devoted.

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PART ONE

EARLY DEVELOPMENTS IN MUSLIM LEGAL THEORY

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COMPETING THEORIES OF AUTHORITY IN EARLY MĀLIKĪ TEXTS[1]

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In the classical period of Islamic law the science of *uṣūl al-fiqh* fulfilled many different functions, among them the desires of an intellectual elite to create a perfect, theologically sound system for explaining the genesis of law. In the formative period, however, the theoretical concerns of the jurists were restricted to more pragmatic issues of authority and teaching. Their solutions to these problems were not yet expressed in treatises on *uṣūl al-fiqh* and that science did not yet exist as a separate branch of intellectual endeavor. It is possible, however, to discover something of their thought on these matters, both in isolated statements and in the patterns by which they organized their legal works. Mālik's *Muwaṭṭaʾ*, for example, is not a book of *uṣūl*, but I believe we can learn about Mālik's ideas of theory of law by studying the *Muwaṭṭaʾ* and similar texts from the second and third Islamic centuries.[2]

After briefly surveying the methods which some other scholars have used to identify patterns of authority within early legal texts, I will demonstrate that analysis of early Mālikī literature presents some

[1] Author's note: This paper was written at the Institute for Advanced Study at the Hebrew University of Jerusalem. I am grateful to the Institute for providing an ideal working environment, and to Bard College for granting me a leave of absence from teaching duties. My colleagues at the Institute and at Alta were very generous with their comments on earlier drafts of this paper, particularly Nimrod Hurvitz, Christopher Melchert, Miklos Muranyi, Kevin Reinhart and Bernard Weiss.

[2] While this paper focusses on the early period, the connection between works of *uṣūl* and works of *furūʿ* in the classical period is also disputed and often simply absent. Clearly even the establishment of a fully recognized science of legal reasoning, and of large areas of agreement among scholars from different schools of law did not result in works being organized along the lines of classical *uṣūl* theory (see, for instance, Muhammad Fadel's paper in this volume). Yet this only begs the question of what operating principles function within these texts of *furūʿ*; classifying and identifying these principles will allow us to separate these works more carefully into genres of writing, and to understand something of the differing claims to authority operating among the jurists as well as the function of these *furūʿ* texts in society and teaching institutions.

serious problems for their arguments. In fact, instead of a single, linear development toward an idealized notion of *uṣūl al-fiqh*, my analysis of five early legal texts reveals a surprising variety of legal drafting from the eighth and ninth century. While some of these texts seem to privilege Prophetic Sunnah, others depend on the juristic dicta of famous scholars, and still others make no explicit claim to authority. Furthermore, most of these early texts use a combination of legal drafting styles. It seems to me that each of these styles is the result of divergent conceptions of legal authority in this period. In my opinion, this variety demands that we reject simple, monothetic definitions of *uṣūl al-fiqh*, in favor of a complex polythetic definition, one which can account the multiplicity of styles in this early literature.[3]

As background, I would like to address the writings of three theorists who have worked on the question of authority in early legal texts: Norman Calder, Patricia Crone, and John Wansbrough. I believe that all three of these scholars have been led astray in their analysis by the assumption that Islamic legal thinking was inexorably moving toward an ideal formulation of dependence on Qur'ān, followed by the Sunnah of the Prophet, followed by consensus and reasoning by analogy. Along with Wansbrough, I shall call this the "Salvation History" theory, since religious authority ultimately derives from the historical account of God's interaction with His Prophet.[4] For Calder, this theory of religious authority causes him to date the *Muwaṭṭa'* after the *Mudawwanah*, since "The *Muwaṭṭa'* clearly represents a later stage in the development of Islamic juristic theory than the *Mudawwanah*."[5] In other words, Calder finds that the *Muwaṭṭa'* is largely based on Prophetic Sunnah, while the *Mudawwanah* is based

[3] Polythetic definitions are useful for classifying phenomena that are broadly similar, but may share no single taxon. See Jonathan Z. Smith, *Imagining Religion* (Chicago: University of Chicago Press, 1982), 3–7. Smith argues for a polythetic definition for "religion", but his quotation of Edwards ("There are many sufficient, but no necessary conditions for calling something a religion," p. 7) could just as easily apply to *uṣūl al-fiqh*.

[4] John Wansbrough, *The Sectarian Milieu: Content and Composition of Islamic Salvation History* (Oxford: Oxford University Press, 1978). In his preface, Wansbrough understands his work as literary and not strictly historical, distancing himself from any historical conclusions dependent on his method. Rather, he sees Salvation History as the common work of Christian, Jewish and Islamic texts which argue the truth of their claims on the basis of significant events which occurred in time. Wansbrough argues that it is "the creation and perpetuation of [salvation history] which distinguishes the monotheist confessions from other religious communities" (p. ix).

[5] Norman Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Clarendon Press, 1993), 24.

on authoritative statements by Mālik. If there had been a linear development from dependence on an individual shaykh to dependence on God's Prophet, then Saḥnūn's text must be a survival of an older, more primitive form of legal drafting.[6] A similar set of assumptions causes Crone to argue that the Qur'ān could not have been composed before 700 C.E.[7] Since it is evident that some legal decisions before that date were made without recourse to Qur'ānic precedent, she argues that the Qur'ān could not have existed. It is not possible, according to Crone, that Muslim jurists "could have had a scripture containing legislation *without* regarding it as a source of law" (14). Finally, Wansbrough sees in the arrangement of material in Mālik's *Muwaṭṭa'* "not so much a commentary upon scripture as a refinement of salvation history" (75). That is, by the end of the second Islamic century, legal authority resided in a clear conception of the Prophetic story, but not yet in the Qur'ān.

For all of these scholars, early legal literature presents examples of "stages" on the way toward a full-fledged theory of the four roots of law. The power of this linear development is such that "traditional" dating of Qur'ān, *Mudawwanah* or *Muwaṭṭa'* must be cast aside (in Calder's words [p. 20], as "a fact inferred from, or created to promote, the status of the work") in order to protect the linear development. Since I have already responded elsewhere to Calder and Crone, let me only say here that Calder was unfamiliar with the manuscript base of Mālikī legal texts and so did not take into account the physical evidence of colophons, *samā'*-remarks, and marginalia.[8] For Crone, I find that a distinction between compilation and canonization of the Qur'ān better explains the evidence she presents.[9]

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[6] Calder writes: "It is inconceivable that this hadith could have been made available by Mālik, in or before 179, with the backing of Prophetic authority and in a situation where Prophetic authority counted, and yet not have affected the text of the *Mudawwanah*, which exhibits after all not only a need for authority on this matter but also a broad concern to gather all relevant material." *Studies*, 26.

[7] Patricia Crone, "Two Legal Problems bearing on the Early History of the Qur'ān," *Jerusalem Studies in Arabic and Islam* 18 (1994), 36–37. Emphasis in original.

[8] See my "Early Islamic Jurisprudence in Egypt: Two Scholars and their *Mukhtaṣar*s," *International Journal of Middle East Studies* 30 (1998), 167–182; and also my "Literary Genealogies from the Mosque-Library of Kairouan," *Islamic Law and Society* 6 (1999), 393–402 (Review article of Miklos Muranyi's *Beiträge zur Geschichte der Ḥadīṯ und Rechtsgelehrsamkeit der Mālikiyya in Nordafrika bis zum 5. Jh. d.H.*). In March, 2000, Muranyi showed me a fragment of the *Mudawwanah* in Kairouan dated to A.H. 235, Calder had speculated that it was not compiled before 250.

[9] See my *Early Mālikī Law: Ibn 'Abd al-Ḥakam and his Major Compendium of Jurisprudence.* Studies in Islamic Law and Society, vol. 14 (Leiden: Brill, 2000), 119–124.