lateral, a position that is, again, diametrically opposed to the position of the Shāfi'īs, but for which no revelatory justification is given (*Bidāyah*, 5:236–37). One could argue that the positions of the Mālikīs and the Shāfi'īs are simply extensions of their respective positions on the permissibility of the sale of a debt—the Shāfi'ī position being one of prohibition while the Mālikīs taking the position of its permissibility, at least under limited circumstances. This explanation, however, ignores the truly dramatic implications the Mālikī position holds for the law of pledges.

The bedrock principle around which the entire system of pledges is organized is that the pledgee does not enjoy a property right in the collateral unless she has possession of the collateral. Only this principle claimed a consensus among Muslim jurists. The basis for this universal consensus, Ibn Rushd claimed, is the verse in *Baqara* which refers to "collateral, possessed" (*rihān maqbūḍa*). Note, however, that once it is admitted that intangible property can validly be offered as collateral a problem arises: How does one possess intangible property?[32] Given the centrality of possession to the doctrine of pledges in all the *madhhabs*, one would perhaps assume that a rule implying that a pledge can exist despite the physical impossibility of possession might give Ibn Rushd reason to pause to explain how the Mālikīs justified such a ruling. Instead, it does not appear to have caused him any embarrassment, much less have driven him to produce a justification rooted in *uṣūl al-fiqh* in support of the Mālikī position.

Mālik's reported solution to this problem is reported in the *Mudawwanah*. It is simple, elegant and, one might add, not lacking in irony. Saḥnūn reports that he asked Ibn al-Qāsim whether, in the opinion of Mālik, one could offer a debt that is owed to him by another as collateral for a debt he owes to another creditor. Ibn al-Qāsim replied that Mālik believed this was permissible. The pledgee in this case, Mālik says, takes possession of the collateral by taking possession of the writing evidencing the debt that is owed to the pledgor.[33]

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[32] Indeed, for this same reason, the Ḥanafīs did not permit the collateralization of real property held as a tenancy in common (*mushā'*).

[33] *Qāla mālik: na'am lahu an yartahina dhalika fa-yaqbiḍ dhukr al-haqq wa yushhid. Al-Mudawwanah al-kubra*, 4:176 (Beirut: Dār al-Fikr, n.d.). The irony lies in the fact that the one rule in the law of pledge which enjoys a plausible claim to revelatory authority is the requirement that the collateral be possessed for the purpose of evidencing an indebtedness in lieu of a writing. In this case, Mālik is allowing pos-

Modern narratives of Islamic legal history have generally assumed that around the beginning of the third Islamic century, or maybe shortly thereafter, the structure of Islamic legal arguments took a radical new turn, largely as the result of the independent development of *uṣūl al-fiqh*. The purpose of this essay, however, is to raise the question whether the impact of this new science on legal argumentation was necessarily as dramatic has been supposed. Accordingly, I have attempted a case-study of *uṣūl al-fiqh*'s impact by analyzing Ibn Rushd's treatment of pledges in his famous *khilāf*-work, *Bidāyat al-mujtahid*, which is self-consciously an applied *uṣūl al-fiqh* work. Ibn Rushd, for whatever reason, dealt with only a few of the issues otherwise discussed in the positive-law manuals. Moreover, *uṣūl al-fiqh* failed to provide any clear solution for those issues, such as who owns accretions to the collateral, which he discussed. Most importantly, however, Ibn Rushd was completely silent on the revelatory justification for the pledgee's priority to the collateral vis-á-vis the debtor's other creditors, despite the fact that the Qur'ān appears to authorize the use of pledges only for the purpose of evidencing an obligation when it is impracticable for contracting parties to memorialize the debt. Instead of relying on the arguments considered conclusive in *uṣūl al-fiqh*, however, Ibn Rushd's discussion of Mālikī doctrine reveals the continued vitality and centrality of *istiḥsān*—a doctrine relegated to the status of a "subsidiary source of law"[34] within the paradigm of *uṣūl al-fiqh*. Nonetheless, Mālikīs, it appeared, remained faithful to the principle of their eponym, namely, that "*istiḥsān* is nine-tenths of [legal] knowledge" to justify the centrality of empirical analysis to their analysis of revelatory texts, thereby lessening the impact of *uṣūl al-fiqh*'s linguistic formalism on the development of Mālikī legal doctrine. Further work must be done before this hypothesis can be confirmed. At any event, it should not be assumed that the development of *uṣūl al-fiqh* as a major field of legal production necessarily revolutionized legal argument or the subsequent development of legal doctrine, at least in the Mālikī school.

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session of the writing evidencing the obligation to substitute for the collateral itself, not for an evidentiary purpose, but rather to give the holder of the writing priority to payments under a debt owed to his debtor. One cannot understate the interpretive distance traveled between *Baqarah* 2:283 and Mālik's opinion in the *Mudawwanah*.

[34] Ahmad Hasan, *Analogical Reasoning in Islamic Jurisprudence* (Islamabad: Islamic Research Institute, 1986), p. 409.

FICTION AND FORMALISM: TOWARD A FUNCTIONAL ANALYSIS OF *UṢŪL AL-FIQH*

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To Turk
(Anthony Jackson)

The life of the law has not been logic:
it has been experience
—Justice Oliver Wendell Holmes

". . . the process of law engages in
a fiction of interpretation. . . ."
—Dean Roscoe Pound

I. *Introduction*

In a thought-provoking passage in *Bidāyat al-mujtahid*, the jurist *cum* philosopher Ibn Rushd intimates his recognition of a fundamental distinction between an approach to legal interpretation that aims to satisfy the demands of practicality, on the one hand, and an approach that strives to maintain consistency with an overarching prescriptive hermeneutic, on the other. The object of Ibn Rushd's observation was a conspicuously arbitrary distinction maintained by Mālik to the effect that roasted meat and broiled meat belonged to the same generic category, while boiled wheat and baked wheat constituted two distinct groups. On this taxonomy, under the rules of *ribā al-faḍl*, the meat in question could not be exchanged in unequal amounts, while the wheat in question could. Ibn Rushd notes that a number of Mālikī jurists, such as Abū al-Walīd al-Bājī (d. 495/1101) had tried to vindicate this position of Mālik, but their efforts had resulted in a disappointingly facile failure. In fact, Ibn Rushd finds himself unable to avoid the admission that the distinctions in utility (*ikhtilāf al-manāfiʿ*) upon which Mālik relied in maintaining his taxonomies of livestock, moveables and produce were hopelessly arbitrary. Such arbitrariness, however, was not the exclusive preserve of Mālik; it was a feature of all the schools. The reason for this, according to Ibn Rushd, was that all of the schools were ensconced in a perduring

effort to balance the exigencies of legal practicality with the dictates of theoretical consistency. Thus, he offers the following explanation for the difficulties posed by Mālik's taxonomies:

> When a man is asked about similar issues at different points in time, while he has no general rule (*qānūn*) via which to distinguish between apparently like specimens other than what appears to his mind at the time he is asked about these things, he will give answers that are inconsistent with each other. Then, when someone else comes after him and wants to bring these disparate responses under a consistent rule or uniform principle, they will find great difficulty in doing so. This is clear to anyone who reads the books (of the eponyms and their followers).[1]

A number of useful insights emerge from this statement. For my purposes here, however, the most important of these is that while practical considerations (arbitrary and disparate as these may be) may clearly inform the process via which legal conclusions are reached, *consistency*, or the ability to demonstrate an undifferentiated commitment to a stable and unchanging *theory* of interpretation, may emerge as the criterion on the basis of which the validity of these views is judged. When this happens, a central aim of legal science comes to reside in maintaining the appearance that every legal interpretation is the predictable result of some dutifully followed interpretive rule or principle. In other words, integrity to a *theory* of interpretation emerges as a source of authority. This authority, however, so at least I shall argue, only putatively renders theory the source of the actual content of legal interpretations. More often, theory is simply appealed to for the purpose of validating these views. In fact, the commonly accepted dictum that Islamic legal theory (*uṣūl al-fiqh*) is the exclusive determinant of the content of Islamic law constitutes the "fiction" that I hope to highlight in this paper. What I will propose in its stead is the view that, as far as the *content* of legal interpretations is concerned, *uṣūl al-fiqh* routinely amounts to little more than a sophisticated exercise in "theory talk", or what one legal scholar has referred to as "rhetorical etiquette".[2] In this capacity, its essential function is

[1] Abū al-Walīd Muhammad b. Ahmad b. Muhammad b. Ahmad b. Rushd, *Bidāyat al-mujtahid wa nihāyat al-muqtaṣid*, 2 vols. (Cairo: Dār al-Fikr, n.d.), 2:103.

[2] See M. Rosenfeld, "Deconstruction and Legal Interpretation: Conflict, Indeterminancy and the Temptations of the New Legal Formalism", *Cardoza Law Review*, vol. 11:1211 (1990): 1238.

to establish and maintain the parameters of a discourse via which views can be validated by rendering them identifiably *legal*, both in the sense of passing muster as acceptable (if not true) embodiments of scriptural intent *and* in the sense of being rendered distinct from views that are, say, scientific, ideological or simply pragmatic. In this capacity, *uṣūl al-fiqh* operates as a means of imposing constraints on the *creation* of meaning rather than as a mechanism for actually *discovering* it.

This understanding of Islamic legal theory, while contrary to standard depictions, evades a number of difficulties that have long plagued (however silently) traditional accounts. Traditionally, *uṣūl al-fiqh* has been defined (by Muslim and non-Muslim scholars) as "the theoretical and philosophical foundation of Islamic law",[3] *the* methodology for *deriving* the law from revelation. "The human scholar", according to this view, "does not in any deliberate way create . . . [legal] categories; he is but the husbandman, as it were, who facilitates their sprouting".[4] While faithful to descriptions and definitions found in traditional *uṣūl al-fiqh* manuals,[5] this understanding fails to account for a number of perplexities in the relationship between *uṣūl al-fiqh* and the *fiqh* it is supposed to produce. For example, why are disagreements in *uṣūl al-fiqh* not as clearly reflected as one might expect them to be in the area of *fiqh*, and vice-versa? And why is it so difficult to predict a jurist's response to an unprecedented question, even assuming his perfect mastery of *uṣūl al-fiqh*? Why is it that a Mālikī, like al-Qarāfī, or a Shāfiʿī, like al-Āmidī or al-Taftazānī, could write commentaries on *uṣūl al-fiqh* works by Shāfiʿīs, like al-Rāzī, or Mālikīs, like Ibn al-Ḥājib, or Ḥanafī's, like Ṣadr al-Sharīʿah al-Bukhārī, respectively, that contain so little that distinguish them as Mālikī or Shāfiʿī commentaries? Is there, in fact, such a thing as Mālikī *uṣūl* that is as distinct from Ḥanbalī or Ḥanafī *uṣūl* as Mālikī

[3] W. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl al-Fiqh* (Cambridge: Cambridge University Press, 1997), vii.

[4] B. Weiss, *The Search for God's Law* (Salt Lake City: University of Utah Press, 1992), 24.

[5] Representative definitions include: "That upon which it [i.e., *fiqh*] is based and upon which it relies" (*mā yabtanī huwa ʿalayhi wa yastanid ilayhi*). Saʿd al-Dīn al-Taftazānī, *Sharḥ al-talwīḥ ʿalā al-tawḍīḥ*, 2 vols. (Beirut: Dār al-Kutub al-ʿIlmīyah, n.d.), 1:9. "Its [*fiqh*'s] proofs that point the way to it in general" (*adillatuhu al-dāllah ʿalayhi fi al-jumlah*). Ibn Qudāmah, *Rawḍat al-nāẓir wa junnat al-munāẓir* (Beirut: Dār al-Kutub alʿIlmīyah, 1401/1981), 4.

furūʿ is from Ḥanbalī or Ḥanafī *furūʿ*? If so, are mere differences in the way these *uṣūl* are *applied* by individual Mālikīs, Ḥanbalīs and Ḥanafīs enough to explain differences *within* these *madhhab*s? What does this tell us about the causative or generative force of *uṣūl al-fiqh*? Finally, why do we find so many positive legal doctrines upheld in the *madhhab*s for literally centuries when even the most half-hearted adherence to the dictates of *uṣūl al-fiqh* would seem to be enough to dislodge them?

From its inception, Islamic legal studies in the West has been dominated by a European perspective in the context of which law receded into the shadows of a towering philosophical tradition. Elsewhere I have suggested that this has impeded our ability to analyze and understand Islamic law *as law*.[6] In America, meanwhile, virtually from the beginning of the republic, "law flourished on the corpse of philosophy".[7] This has resulted in an American intellectual tradition that is uniquely and abundantly rich in analytical tools and methods for inquiring into the nature, function, problems and possibilities of law. The present study avails itself of some of these tools and builds on a number of insights debated and refined by American legal thinkers since the rise of American Legal Realism. Chief among these is the perspective of the Critical Legal Studies Movement and its emphatic rejection of the pretensions of "classical" legal formalism. Critical Legal Studies makes clean work of exposing the fictitiousness of the claims of any hermeneutic that attributes to language alone (either in the form of scribblings on a page or phonemes flying through the air) the power to dictate meaning. As an account of what *uṣūl al-fiqh* actually does, however, the Critical Legal Studies critique is inadequate. For this I turn to what has been termed the "New Legal Formalism" of Stanley Fish,[8] which, while acknowledging the anti-formalist claims of Critical Legal Studies, goes on to attribute a more positive role to legal theory, namely, the imposition of constraints on the creation of meaning, even if such meaning should come as a product of the biases, interests or

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[6] See, e.g., my *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: E.J. Brill, 1996), 80; and "Taqlīd, Legal Scaffolding and the Scope of Legal Injuctions in Post-Formative Theory: *muṭlaq* and *ʿāmm* in the Jurisprudence of Shihāb al-Dīn al-Qarāfī", *Islamic Law and Society*, vol. 3 no. 2 (1996): 170.

[7] J. P. Young, *Reconsidering American Liberalism* (Boulder: Westview Press, 1996), 7.

[8] See Rosenfeld, "Deconstruction", esp. 1232–45.

imaginative prowess of the individual jurist. I begin with a brief historical introduction to American Legal Realism and its subsequent permutation in the form of Critical Legal Studies. This is followed by an attempt to demonstrate the applicability of the Critical Legal Studies critique of legal formalism to *uṣūl al-fiqh.* From here I attempt to highlight the extent to which *uṣūl al-fiqh* functions in a fashion that fits the description of Fish's New Legal Formalism. Finally, I comment on the usefulness of this new understanding of *uṣūl al-fiqh* for arriving at some answers to the questions I raised above about the relationship between *uṣūl al-fiqh* and *fiqh.*

II. *From Legal Realism to Critical Legal Studies*

In 1930, Jerome Frank, an appellate judge, published a now famous book entitled, *Law and the Modern Mind.*[9] Arguably the first systematic critique of American legal mythology, Frank's argument developed around a single question: Why, when asked if a particular contract or legal instrument will hold up in court, lawyers, including non-presiding judges, invariably answer, "It depends?" Clearly, lawyers (and certainly judges) know the law and the interpretive methodologies via which law is decoded. If the business of the courts were really only a matter of discovering the meaning of precedents and statutes through a recognized body of interpretive rules and procedures, the ability to predict the outcome of cases should be significantly higher. The fact that it was so low proved, according to Frank, that law could not be explained in terms of any fixed methodology of interpretation. Rather, far from simply discovering the law, judges nearly always relied on personal discretion, by dint of which they inevitably *created* law. This implosion of the myth of mechanical discovery solidified the foundation for what had come to be known as American Legal Realism. In addition to impugning the purported relationship between legal theory and law, Legal Realism sought to excavate the real, as opposed to the stated, reasons underlying judicial decisions, in order to encourage greater honesty about the inevitability, merits and dangers of judicial discretion.

By all appearances, Legal Realism was never welcomed into the legal academy, and for decades after Frank and his generation it led

[9] J. Frank, *Law and the Modern Mind* (New York: Brentano's Press, 1930).

a rather lonely existence. In the 1970s, however, a new generation, at the head of which stood Harvard Law School's redoubtable Roberto M. Unger, coalesced into what came to be known as the Critical Legal Studies Movement.[10] Like its ancestor, CLS began by declaring the claim of mechanical discovery to be a fiction. But unlike the Legal Realists, CLS saw the legal community's endorsement of this fiction to be a far more sinister affair, a consciously preserved system of defending the interests of the powerful by conflating these with the 'plain' and unavoidable results of an objective application of the interpretive theories recognized by the legal establishment. Its impatience with this situation notwithstanding, CLS's alternative was *not* to discard, discredit or overturn legal theory altogether. Rather, its aim was simply to bring the legal establishment to acknowledge the ideological element in its deliberations, that on this acknowledgment it might grant other ideological perspectives equal recognition. In other words, if the ability to substantiate itself on the basis of existing legal theory was enough to legitimize the status quo, then other views that are equally sustainable on this basis should enjoy a similar recognition.

The starting point of the CLS critique was the would-be objectivism of classical legal formalism. The basic premise of classical formalism was that meaning is a function of the interaction between the lexical meanings of words and the syntactical structure of a given language. This allows for the interpretation of sentences (or legal injunctions) in ways that are both predictable and determinant.[11] Legal formalism is further predicated, however, on the assumption that this objectively identifiable relationship between morphology, syntax and meaning provides access not simply to the meanings of words and sentences but to the actual thoughts in the minds of speakers.[12] On this understanding, the role of a judge or jurist resides

[10] This is actually a compression of a much larger and differentiated group of legal thinkers. Unger appears to represent, however, what one might call "classical" Critical Legal Studies. My characterizations in this essay are based on my understanding of readings of and about Unger, especially his *Knowledge and Politics* (New York: The Free Press, 1975) and *The Critical Legal Studies Movement* (Cambridge, Mass: Harvard University Press, 1986). The latter work actually first appeared in *Harvard Law Review* in 1983. All future references in this paper will be to the 1986 book.

[11] Rosenfeld, "Deconstruction", 1235.

[12] See, e.g., R. Kempson, *Presupposition and the Delimitation of Semantics* (Cambridge: Cambridge University Press, 1975), 30: ". . . semantic features are not themselves defined in terms of entailment, nor even in terms of 'physical properties and relations

in the simple deduction of the meanings of legal rules through the assiduous observation of the observable features of language. He or she proceeds in a benignly mechanical fashion, loyalty to which guarantees the results of his or her endeavor.

CLS vehemently attacked this theory and insisted that it concealed the fact that all interpretive activity begins from a perspective or a set of presuppositions and that it is not words but these presuppositions that determine the meanings judges and jurists impute to language. Thus, for example, from CLS's perspective, there is no objectively accessible meaning in such words as, "*Whoever shall put away his wife, except be it for fornication . . . committeth adultery*" (Mathew 19:19), or words like, "*The male and the female thief, strike off the hand of each . . .*" (Qur'ān, 5:38). Instead, what appears to be the objective or literal meaning of these words is in fact *brought to them* by the belief that the God of the Bible or the Qur'ān is strict, unwavering and salutary in His judgments. In other words, this particular belief or assumption about God eliminates, on the one hand, a wide range of interpretive possibilities, while, at the same time, imposing a specific concrete meaning on these words. By denying or concealing the role of such presuppositions, however, legal formalism in effect suppresses or disqualifies all but the perspective it chooses to recognize by sublating this into what it claims to be the plain meanings of words and sentences. It is precisely this interpretive slight-of-hand that CLS seeks to expose.

> The starting point of our argument is the idea that every branch of [legal] doctrine must rely tacitly if not explicitly upon some picture of the forms of human association that are right and realistic in the areas of social life with which it deals.[13]

But CLS does not stop here. The presuppositions or "pictures" that drive and inform interpretation are both prior *and* external to the

outside the human organism' but rather they are symbols 'for the internal mechanisms by means of which such phenomena are perceived and conceptualised'". See also, B. Weiss, "Exotericism and Objectivity in Islamic Jurisprudence", *Islamic Law and Jurisprudence*, ed. N. Heer (Seattle: University of Washington Press, 1990), 55, where after explaining the theologians' distinction between mental (*nafsī*) and verbal (*lafẓī*) speech along with the meaning (*maʿnā*) that goes along with the former and the uttered word (*lafẓ*) that goes along with the latter, he gives the widely accepted view to the effect that the uttered word makes the meaning manifest: "*al-lafẓu yadullu ʿalā maʿnan*".

[13] Unger, "Movement", 8.

statements interpreted. As such, they remain outside the realm of what one must account for when arguing the validity of one's interpretation. For, in this latter capacity, all one has to do is invoke a recognized correspondence (i.e., one that is validated by lexicographers, rhetoricians or common usage) between the words interpreted and the referent to which one claims they refer. For this is enough to lift the interpretation out of the proscribed realm of subjective eisegesis and into the sanctum of objective interpretation. In the end, however, one's presuppositions will remain outside the boundaries of any critique, because they are never included in one's account of what one is doing. This brings us to the second fiction pointed up by CLS, namely, that legal theory is the effective cause and basis for legal doctrine. According to CLS, legal theory may *justify* legal doctrine, but it is neither the effective cause nor the true determinant of it. The reason for this is, again, that legal theory is anterior and or exterior to the presuppositions that inform what and how one hears, reads and 'sees'.

According to CLS, this dissonance between legal theory and positive law is most clearly manifested in the seemingly endless concatenation of exceptions, adjustments and ad-hoc qualifications invoked in order to sustain the appearance of a continued commitment to theory, either horizontally (across disparate areas of the law) or vertically (to accomodate change in the face of an ostensibly unchanging theory). In the end, however, legal theory remains standing as a monumental but fairly empty ruin whose authority can only be sustained through a reliance upon a never-ending series of "ad hoc adjustments"[14] and "make-shift apologies".[15]

It bears reiterating, however, that it is not the aim of CLS to destroy or discard legal theory. CLS simply wants the legal establishment to acknowledge the ideological element in its own deliberations and, on this admission, grant other ideological perspectives the same recognition it affords it own. In the words of Unger:

> The implication of our critique of formalism is to turn the dilemma of doctrine [legal theory] upside down. It is to say that, if any conceptual practice similar to what lawyers now call doctrine [legal theory] can be justified, the class of legitimate doctrinal [theorizing] activities

[14] Unger, "Movement", 10.
[15] Unger, "Movement", 11.

> must be sharply enlarged. The received style of doctrine [legal theory] must be redefined as an arbitrarily restricted subset of this larger class.[16]

Even more important, however, CLS's radical critique of establishment practice does not entail a call to overturn or reject the authority of the sources and authoritative materials that constitute the object of that practice (e.g., the Constitution, the principle of *stare decisis* or statutes passed by state legislatures). Nor does CLS even aim to ban formalist claims from the realm of discussion. The objective of CLS is simply to avert the denouement of immunity and domination that traditional legal discourse always seems to manage out of the authoritative materials and recognized rules of interpretation.[17]

III. *Critical Legal Studies and Islamic Law*

Any credible attempt to apply a CLS critique to Islamic law and legal theory will have to avoid a number of pitfalls. Perhaps the most serious of these is the temptation to isolate disparate bits and peices and then claim that these represent the entire system. To show that Islamic law (or any other legal system) includes rules that are poorly accounted for by the system's theory is not necessarily the same as proving that this is characteristic of the system as a whole. A badly justified rule may be adopted and remain on the books for any number of reasons, e.g., because the issues or parties affected do not command enough attention to prompt serious investigation or review, or, in a modern context, because the linkages between law and politics make legal change and rescension far more difficult than they are often worth. While isolated examples may thus dispprove the claim that all rules are mechanically derived though a transcendent theory, they do not necessarily prove that this fiction is endemic to the system as a whole.

But where a legal system's theory of interpretation can safely be described as constituting a form of legal formalism, the CLS critique would appear not only to be relevant but to provide compelling

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[16] Unger, "Movement", 15.

[17] See, e.g., Unger's "Expanded Doctrine" theory, at "Movement", 20–21. For a related discussion on the problem of domination and managing immunity out of the authoritative sources and methods in Islamic law, see my "The Alchemy of Domination: Some Ash'arite Responses to Mu'tazilite Ethics", *International Journal of Middle East Studies*, vol. 31 (1999): 185–87.