role to perspective and presupposition.[37] One is reminded as well of those 'safety-net' principles like *istiḥsān* (?equity), *maṣlaḥah* (public benefit) and *sadd al-dharā'i'* (blocking the means), whose apparent aim is to reverse the negative or unanticipated effects of a strict formalist reading. Whether or not we identify these adjustments and principles with Unger's "make-shift apologies", the fact that they exist at all reveals something important about the nature of Islamic legal theory. For it seems fairly clear that the real impetus behind the introduction of these mechanisms is the need to justify changes in doctrine and or divergence from strict formalist readings. But if justifying such change and divergence is the impetus behind these developments in theory, to continue to see theory as the cause that produces doctrine is to engage in something like seeing the cart as pushing the horse. In other words, rather than see theory as *producing* doctrine, theory might be more properly assigned the role of *validating* doctrine. This is the role assigned to theory by what has been termed the New Legal Formalism.[38]

The basic premise underlying NLF is that meaning is not discovered but rather fashioned or created by the interpreter. Such acts of creative interpretation entail, however, significant investments in the use of rhetoric. For, according to NLF, it is the force of rhetoric, and the force of rhetoric alone, that provides the interpreter with the ability to make his created meanings stick, to enlist assent to the claim that they best represent the intent of the 'interpreted' words. On one level, NLF is a rejection and a debunking of the objectivist claims of classical formalism (inasmuch as it rejects the notion of meaning autonomously 'emerging' from words). On another level, however, NLF constitutes a type of formalism. For, according to NLF, the function of theory is precisely to supply the parameters and rhetorical tools (semantic categories, technical terminology, agreed-upon sources, authorities and the like), which make up a sort of "legal master narrative",[39] on the basis of which one argues to gain

[37] See my "*Taqlīd*, Legal Scaffolding and the Scope of Legal Injuctions: *Mutlaq* and *'āmm* in the Jurisprudence of Shihāb al-Dīn al-Qarāfī", *Islamic Law and Society*, vol. 3 no. 2 (June 1996):165–92.

[38] It should be noted that I am speaking here exclusively of the NLF of Stanley Fish. Others, such as E. Weinrib, have developed what has also been referred to as a "New Legal Formalism" that differs substantially from that attributed to Fish. See Rosenfeld, "Deconstruction", 1245–56.

[39] None of the New Legal Formalists whose ideas I have read make any mention

acceptance for his or her 'created' meanings. On this understanding, *all recognized meaning*, whatever its ultimate origin, will be the result of theory, inasmuch as the only meanings that bear the possibility of gaining acceptance are those that are accompanied by enough rhetorical force to see them through. This rhetorical force, however, is, again, derived from the "legal master-narrative", together with the avoidance of any direct and apparent clashes with it.[40]

Let me see if I can provide a concrete example from Muslim legal discourse that will demonstrate the parallels between *uṣūl al-fiqh* and the role assigned to legal theory by NLF. In *Ghiyāth al-umam fi iltiyāth al-ẓulam*, the celebrated Shāfiʿī jurist, Imām al-Ḥaramayn al-Juwaynī takes his famed Shāfiʿī predecessor Abū al-Ḥasan al-Māwardī (d. 450/1057) to task for having proclaimed it permissible for non-Muslims to serve as "executive viziers" (*wazīr tanfīdh*). In rejecting this permission, al-Juwaynī adduces four proofs: 1) the verse, "Do not fill your entourage with people other than yourselves who do not forego any opportunity to cause you trouble (*lā tattakhidhū biṭānatan min dūnikum lā yaʾlūnakum khabālan*) [3:118]; 2) "Do not surrender the running of your affairs to Jews and Christians" (*lā tattakhidū al-yahūd wa al-naṣārā awliyāʾ*) [5:51]; a Prophetic hadith, "I am absolved of responsibility for every Muslim who goes out of his way to keep company with associationists (*anā barīʾ min kulli muslim maʿa mushrik lā tatarāʾā nārāhumā*); and 4) 'Umar's having rebuked Abū Mūsā al-Ashʿarī for hiring a Christian secretary. Al-Juwaynī also notes that al-Shāfiʿī had stated explicitly that judges may only hire upright Muslims as court-translators.[41]

Now, al-Juwaynī's insinuation is that these words, properly understood, lead to the unassailable conclusion that it is impermissible to allow Jews or Christians to serve as executive viziers. It is curious, however, that none of the obvious ambiguity in these words gives him reason for pause. For example, what *is* a *biṭānah*? What *is* a *walī*? And are there no contextual indicators (*qarāʾin*) that might modify

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of a "legal master-narrative". This was an idea inspired by my reading of Jerome Brunner's *Acts of Meaning* (Cambridge, Mass.: Harvard University Press, 1990).

[40] For a summary of New Legal Formalism (of Stanley Fish as opposed to that of Ernest Weinrib or others), see Rosenfeld, "Deconstruction", 1232–45.

[41] Imām al-Ḥaramayn al-Juwaynī, *Ghiyāth al-umam fi iltiyāth al-ẓulam*, ed. ʿAbd al-ʿAẓīm al-Dīb (Cairo: Maṭbaʿat Nahḍat Miṣr, 1401/1981), 155–57.

the apparent scope of words like "Jews" and "Christians?" Al-Juwaynī's response to the latter question seems to be that no such contextual indicators exist. But this seems to be so only because he sees no need to look for any. Instead, through this assembly of ostensible proofs cast in a strident and conspicuously self-assured tone, al-Juwaynī is able to amass enough rhetorical force to drown out or remove from consideration other relevant material, such as the Qur'ānic verse, "*And among the People of the Book are those who if entrusted with an entire treasure will promptly return it to you*", [3:75], or the verse, "*They are not all the same; among the People of the Book are a community who stand at night rehearsing God's verses and prostrating; they believe in God and the Last Day, they command what is good and forbid what is evil and they compete with one another in doing good. They are among the righteous*" [3:113–14]. On al-Juwaynī's presentation, the words are "Jews" and "Christians" are left with the appearance of being incontrovertibly general in scope, covering *all* Jews and *all* Christians under all circumstances. But this is clearly more the result of al-Juwaynī's combination of suppression and amplification than it is of the words themselves. Yet, it would be difficult to sustain the charge that al-Juwaynī was acting wholly arbitrarily. For he clearly appears to be proceeding on the basis of some set of rules. And in the end, it is largely this ability to give the sense that he is 'playing by the rules' that will ultimately provide his argument with enough rhetorical force to see it through.

That al-Juwaynī is engaged in an act of 'creating' meaning emerges more clearly in the case of his use of the term *awliyā'*/s. *walī*. Al-Juwaynī does not define this term, but relies on the rhetorical force produced by the context in which he places it to imply that the office of executive vizier entails *wilāyah* and that this is therefore something that Jews and Christians should not be entrusted to do.[42] But al-Juwaynī adduces this verse, "*lā tattakhidhū al-yahūd wa al-nasārā awliyā'*" on page 156. On page 155 he states that slaves are eligible for the position in question precisely because *it does not entail wilāyah*!

[42] We shall ignore, for the moment, the fact that, according to al-Māwārdī (al-Juwaynī's target) the *wizārat al-tanfīdh* entailed no authority to act on one's own and included only the ability to carry out policies already determined by some higher up, most notably the Caliph. This is what distinguished it from the *wizārat al-tafwīḍ*. See Abu al-Ḥasan al-Māwardī, *al-Aḥkām al-sulṭānīyah* (Būlāq: Maṭba'at al-Waṭan, 1298/1881), 25ff.

But if this is so, then Jews and Christians should also qualify for the office. The fact that al-Juwaynī persisted in holding that they were not, shows that neither the definition of *wilāyah* nor its relationship to the office of executive vizier were stable. And this is because they were both *created* with different ends in mind rather than *discovered* via an objective process of interpretation. Al-Juwaynī began with a set of presuppositions, among them the belief that it is not good for Jews and Christians to serve as executive viziers. From here, he would go on to validate this view by tapping into the rhetorical force supplied by *uṣūl al-fiqh* and the legal master-narrative.

This *modus operandi* is also detectable in al-Juwaynī's use of the Prophetic hadith. Here, al-Juwaynī is able to create the impression that the term *mushrikīn* (associationists) applies to the Jews and Christians. This is interesting, inasmuch as this word was generally used (certainly in the Qur'ān) as a technical term to denote a specific group, namely the pagan associationists of Arabia (and more particularly Mecca). Of course, by analogy, the term could be extended to cover all polytheists, and Muslims were known to place the Trinity within this extended construct. But this was usually in the context of theological discussions, not legal ones. As such, even jurists who might consider Christians to be *mushrikīn* in a theological context would not as a rule interpret the ban on marrying *mushrik* women to include Christian women. Moreover, even if we allow that al-Juwaynī was among those who included Christians in this *legal* category, the inclusion of Jews would seem to constitute an innovation that would require much more justification than al-Juwaynī supplies here. But, al-Juwaynī seems confident that the rhetorical frequency he has chosen to carry his message will safely deliver the association between Jews, Christians and *mushrikīn* to the minds of his readers. In a similar fashion, he relies on his rhetoric to drown out questions about how a hadith that explicity mentions "going out of one's way", could apply to Jews and Christians who live right next door.

As for the report on the authority of 'Umar, here al-Juwaynī points to the second Caliph either as an independent authority or as the representative of a tacit consensus on the part of the Companions. We may rule out the former possibility, since al-Juwaynī was a Shāfi'ī (and al-Shāfi'ī's very claim to fame was that he rejected the authority of everyone save the Prophet). As for the second possibility, it is well-known that 'Umar at times expressed views for which he was either ignored, contradicted or even corrected. Yet, al-Juwaynī appears

to rely on the force of his rhetoric to drown out these details, which results in 'Umar's view taking on the appearance of an incontrovertible proof.

This rather irreverent deconstruction of al-Juwaynī's argument should not be misunderstood. The point of my analysis has not been to show that al-Juwaynī's view was '*wrong*' or a misrepresentation of the religious law; the point was rather to show that this view was not *dictated* by *uṣūl al-fiqh*. We should keep in mind, however, that just because a view is not dictated by *uṣūl al-fiqh* does not mean that it is wrong or fraudulent, as the "practical jurists" so vividly demonstrated in the pre-*uṣūl al-fiqh* era. Indeed, in the present context, it would be unfair to say that al-Juwaynī had *no* justifiable grounds on which to argue against the permissibility of Jews and Christians serving as executive viziers. Afterall, even today, Jewish and Christian anti-Muslim bias is a reality, and it would not be unreasonable to assume that it was alive in al-Juwaynī's 5th/11th century Nishapur. Thus, on purely practical grounds, al-Juwaynī's position may have been well-founded and even consistent with the broader aims of the law. But al-Juwaynī does not present himself as arguing on practical grounds. Rather, he proceeds as if he were an objective *interpreter* of scriptural texts. The point of my analysis has been to show that what al-Juwaynī is really trying to do is translate practical concerns into a legal argument that can gain the assent of the legal community as an objective interpretation of *specific texts*. My aim has been to show how, in his effort to achieve this, al-Juwaynī availed himself of a rhetorical force supplied by *uṣūl al-fiqh* and the legal master-narrative in order to drown out certain questions, sources and inconsistencies and to engender certain associations in the mind of his reader in order to make his legal *cum* practical argument stick. *Uṣūl al-fiqh*, in other words—and this is the real point—functioned to *validate* rather than *determine* his position.

But al-Juwaynī's example is actually instructive on one final score. His choices of when, how hard and whether to look for contextual qualifiers underscores the fact that there can be different levels of assiduousness in the application of interpretive theory. This, in turn, will lead to very different interpretive results. As such, one who disagrees with al-Juwaynī on the question of Jewish and Christian executive viziers is not necessarily in need of a different set of theoretical principles; he might simply *apply* a principle that al-Juwaynī himself recognizes in a way that differs from al-Juwaynī's. In other words,

the same theory can yield radically different results, depending on how it is applied. This underscores a point alluded to earlier, namely that in order for theory to be the sole determinant of doctrine, it would require an "operator's manual" to ensure consistent and uniform application. But Islamic law, probably in common with every other legal system, never developed a formally recognized "operator's manual" for the application of its legal theory. As a result, Muslim jurists were afforded the luxury of suppressing, attenuating and modifying their application of *uṣūl al-fiqh* in order to suit their's and society's needs and interests. This, to my mind, goes a long way in explaining why all four schools are able to draw on a fairly common body of interpretive principles, why there appears to exist no exclusively Mālikī or Shāfiʿī *uṣūl*, why differences in *uṣūl* are not always reflected in *furūʿ*, and why the answers to unprecedented questions are so indeterminative, even assuming perfect mastery of *uṣūl al-fiqh*.

Conclusion

Traditional accounts of *uṣūl al-fiqh* entail two fictions: 1) that language has the ability to dictate meaning independently; and 2) that legal theory is the exclusive and causative source of legal conclusions. I have sought to expose both of these fictions and to put forth an alternative understanding of the role and function of *uṣūl al-fiqh*. Rather than dictating law, *uṣūl al-fiqh* provides the parameters within which practical, religious, ideological or other views can be validated *as law*. This understanding enlarges the field of legal possibility by doing away with the sense of finality implied by the notion of discovery. It opens the way, in other words, to other interpretations that may be equally validatable on the basis of the authoritative sources and recognized theories.

Given the limitations of space, I have had to rely on an admittedly narrow data base in seeking to demonstrate my point. I can only hope that future investigations will confirm, even as they refine, my conclusions. In the meantime, my approach may discomfit, even alarm, those who detect in it a certain "juristic nihilism", not to mention an affront and a threat to the hallowed principle of government by laws over government by men. In these our post-modern times, however, I would hope that even these critics will not be too

long in coming to recognize that ultimately all government is administered by men and the laws upon which such government is based are ultimately no better, no worse, no more and no less Islamic, than the men and women who authenticate them.

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PART THREE

CONTROVERSIES WITHIN AND BETWEEN SCHOOLS

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"LIKE THE DIFFERENCE BETWEEN HEAVEN AND EARTH:" ḤANAFĪ AND SHĀFIʿĪ DISCUSSIONS OF *FARḌ* AND *WĀJIB* IN THEOLOGY AND UṢŪL[1]

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Our own approaches to the study of Islam are defined too much by the rubrics of the Islamic sciences. Students of *kalām* are more likely to know Christian theology than students of *fiqh*, who are more likely, as this gathering at Alta demonstrated, to know Western law. This implicitly comparative approach is valuable; it gives traction sometimes in the slippery texts of these very foreign sciences. The implicit comparison—*kalām* is theology, *fiqh* is law—also deceives, however. For while the Islamic sciences do each have their own history, Meron among others has shown[2] that as the Islamic sciences develop more and more each is harmonized with the other so that gradually Islamic scholarship becomes a holistic enterprise with *kalām*, *fiqh*, *naḥw*, *tafsīr*, and all the other disciplines tightly integrated. The importance of this holism for the study of a particular science, I hope to show in this paper.

I wish to make one other small point. Due to a series of political, linguistic, and geographic accidents, the study of Islamic law, and *uṣūl al-fiqh* in particular, has been dominated by attention to Shāfiʿī and Ḥanbalī perspectives, with some attention also to the Mālikī. Yet it is the Ḥanafī school that was geographically the most wide-spread and arguably was, for much of Islamic history, the most

[1] "According to the *Baṣā'ir* the *farḍ* is like the *ījāb* but the *ījāb* expresses [that something should] occur and the *farḍ* expresses [that something has] a definitive assessment. The *Lisān* says they are equivalent for al-Shāfiʿī. I say that for Abū Ḥanīfah the difference between *wājib* and *farḍ* is like the difference between heaven and earth". Muḥammad ibn Muḥammad Murtaḍá al-Zabīdī, *Tāj*, 5:66. Aron Zysow located the following in Kasānī, Abū Bakr b. Masʿūd (587/1191), *Badā'iʿ al-Ṣanā'iʿ fī tartīb al-sharā'iʿ* (Beirut: Dār al-Kitāb al-ʿArabī, 1402/1982), 1:271 Yūsuf b. Khālid al-Simtī told Abū Ḥanīfah that he was a *kāfir* for saying *witr* (a supererogatory night prayer) was *wājib*, thinking he meant it was the same as *farḍ*. Abū Ḥanīfah said, "You can't scare me with your *ifkār*, since I know that the difference between *farḍ* and *wājib* is like the difference between heaven and earth (*al-farq bayn al-wājib wa-l-farḍ ka-farq mā bayn al-samā' wa-l-arḍ*). I'm grateful to him for finding this earlier citation.

[2] Yaʿakov Meron, "The Development of Legal thought in Hanafi Texts".