bring Ḥanafism closer to that synthesis about which I have been speaking. This endeavor involved a significant increase in the use of *ḥadīth*. Thaljī wanted to join in this synthesis. The traditionalists, on the other end of the spectrum, tried but did not manage to join and therefore ended up extinct or outside the pale of Sunnism. The Ẓāhirīs and the Ḥashwīyah are two examples. The Ḥanafīs managed to do this and that was part of the success that they had achieved. So it is in these terms that I would like to define *uṣūl al-fiqh*—in a specifically Sunnī context of rationality and traditionalism coming together.

STEWART: You're defining *uṣūl al-fiqh* as what was the result of a battle. And I think that *uṣūl al-fiqh* preceded the battle or was the battlefield itself. It ended up looking a certain way, and then you say, *uṣūl al-fiqh* is what looks like this. Well, it looked like that later. But during the early time when you have someone like al-Ẓāhirī writing a book on *uṣūl al-fiqh*, that was *uṣūl al-fiqh*, even though according to the later standards it doesn't fit any more; but during the earlier time it fit.

HALLAQ: Fine. Dā'ūd's work dealt with issues of *uṣūl* but I still do not consider it an *uṣūl* work, strictly speaking. *Uṣūl al-fiqh* is not simply a body of writings. It is, first and foremost, a methodology, a theory of law. It is a highly structured theory that consists of the total sum of its elements. And however legal theoreticians may differ about these constitutive elements, the desiderata of their discourse remains one and the same. One of the cardinal features of Sunnī *uṣūl* is the synthesis I have already spoken about. Dā'ūd was writing outside this synthesis, and this is in good part why his school never managed to survive.

STEWART: We're in a box. All that we have to go on is backward projection. There's a basic problem here. We have a hole. There are a lot of books that were written but have not survived. Until you find the book you are making a case for you can't say anything with one hundred per cent certainty. But I think you can go ahead and make arguments.

REINHART: This discussion has brought into sharper focus a question that has been in the back of my mind. Let's say that Ibn Surayj didn't write a work of the sort we are talking about, a comprehensive work. How much does that matter? There's no doubt from the way he is cited in later sources that he is crucial to the development of a body of thought—which is later embodied in a genre of literature—called *uṣūl al-fiqh*. So it may be worth thinking about the extent to which our question as to what went on in the ninth century is a question about books we can point to that can be called *uṣūl al-fiqh* or about nascent ideas that come to constitute *uṣūl al-fiqh* as such.

STEWART: I agree with you entirely. The only thing I would say is that the sources are heavily skewed toward Shāfi'īs because of Shirāzī's work, because of Subkī's work; so we know a lot more about people in the Shāfi'ī tradition than we know about people in the Ẓāhirī tradition who may have been extremely important in the third century or early fourth century, but who, because their opinions were not so popular later on, have fallen out of the discussion to a greater extent. Of that I'm pretty

sure. And the Mu'tazilīs, too, seem to have played a very important role in the development of *uṣūl al-fiqh* and in the shaping of the argumentation that you see in *uṣūl al-fiqh*, but we know very little about their precise contributions. We may say that Ibn Surayj was important, but I think that there were others who were important whom we know much less about.

LOWRY: I'm wondering whether in our discussions of the question of when the genre *uṣūl al-fiqh* came into being we do not need to be careful to distinguish between origination of the genre and preservation of works belonging to the genre so that it is always clear to us which of these we are trying to explain.

ZYSOW: I'm not particularly interested in the notion of genre. I think it's a red herring. One reason for my saying this is that there are works that are sometimes said to be *uṣūl* works—Isfarā'īnī's work, Ṭabarī's—but when you look more closely what you find may be, for example, a commentary on the *Risālah* of Shāfi'ī. Is it *uṣūl al-fiqh*? Is it a commentary? You end up with all kinds of possibilities that make the whole distinction between an *uṣūl* genre and works outside the genre untenable. Ibn Surayj wrote a huge book on *qiyās*. That to me is a work in legal theory. I can't believe it would not be clear, if we had it, that it belongs to the literature of *uṣūl al-fiqh*. And that style of writing specialized books is actually revived later on in the history of *uṣūl*.

STEWART: I didn't talk about works of that sort specifically because it would be tougher to tell what's in and what's out, but I don't think it's a red herring. The existence of the genre has to do with sacred epistemology.

WEISS: I'm wondering how a classical writer on *uṣūl al-fiqh* like Āmidī would respond if he were here with us and we asked him, "Is *uṣūl al-fiqh* a genre?" I'm sure he'd be puzzled and would think we were focused a bit too much on books. For him, *uṣūl al-fiqh* would be an *'ilm*, and for him that would mean something scholars do, *munāẓarah*, dialectic. The classical literature of *uṣūl al-fiqh* reflects that in its format, the *mas'alah* format.

STEWART: One of the reasons I think that genre is an important topic for discussion is exemplified by al-Qāḍī Nu'mān. When he wrote his *Ikhtilāf uṣūl al-madhāhib*, he was writing a particular kind of book for a particular reason—he was responding to pressure from the Sunnī legal community. By writing a book of this particular genre, the *uṣūl al-fiqh* genre, he's arguing that he belongs to the club of acceptable legal scholars, even though he's going against what all the others are saying. Just writing the work is an important statement.

WEISS: I wonder if we may go back to the question that Wael raised a few moments ago: What do we mean by *uṣūl al-fiqh*? Perhaps we should spend a bit of time on this question. How is *uṣūl al-fiqh* to be defined? We have discussed the question of its origin and development but without reflecting on what it is, exactly, that we are discussing the origin and development of? Devin has suggested it is a genre of writing and that we trace its development by looking for evidence of works that fall into this genre? Kevin preferred to put the emphasis on *uṣūl al-fiqh* as something that exists in the realm of thought, so that it wouldn't matter to our writing of its history whether Ibn Surayj, for example, wrote a comprehensive

work on *uṣūl al-fiqh* or not. Wael has indicated that in his work on the origin of *uṣūl al-fiqh* the term has meant for him the classical *uṣūl al-fiqh* of the four schools.

MELCHERT: Which means that it is *uṣūl al-fiqh* when Imām al-Ḥaramayn or Ghazālī do it, but not when Karābīsī or Dā'ūd al-Ẓāhirī do it, although what the latter two do might be called in some sense legal theory. Should we agree to give the term legal theory a broad application and the term *uṣūl al-fiqh* a more restricted application?

ZYSOW: I don't see a need for us to follow any such rules. I don't see why each of us can't proceed on the basis of his own understanding of where the problems lie. I don't see a need for uniformity at this point as long as each paper is clear enough about what is being discussed.

BROCKOPP: Rigid uniformity is not necessary, but what is helpful is to have some sort of baseline against which we can situate ourselves in our discussions. That way, when we're speaking about what we see in a text we will be better able to make sensible comparisons with what others may be doing. This will help assure that we'll talking with each other and not past each other.

ZYSOW: I think we can talk with each other as long as we indicate the Arabic terms behind whatever English terms we use and the sources we're using. If we use an ordinary system of documentation, there shouldn't be any great problems . . .

GLEAVE: One of the problems is that there isn't an Arabic term for pre-*uṣūl al-fiqh* legal theory.

REINHART: The point of the discussion is not necessarily to oppose but simply to clarify, and I might suggest for example that Bernie offered us a *qā'idah* when he said that *uṣūl al-fiqh* is constituted by its controversies. There *is* a set of issues that we all know show up more in *uṣūl al-fiqh* than elsewhere. So one way of deciding whether Ibn Dā'ūd, or for that matter Dā'ūd, is doing *uṣūl al-fiqh* is to ask: are the issues he's addressing something we all recognize, something that might show up, say, in the *Burhān*.

ZYSOW: Well, let's put it this way. Zarkashī says that the *masā'il* of *uṣūl al-fiqh* are in the thousands, if not tens of thousands—huge figures. Defining *uṣūl al-fiqh* by its *masā'il* is fine with me, because that way of doing it is so encompassing I have no problems with it. I don't want restrictive definitions, and if it's good enough for Zarkashī, it's good enough for me. That's all I can say. It's very simple for me.

JACKSON: There might be a difference in what we're talking about. If we're talking about *uṣūl al-fiqh* as a discipline unto itself, we're talking about one thing, and if we're talking about *uṣūl al-fiqh* as it relates to *fiqh*, we're talking about quite another thing. In the first case we are talking about definition, in the second case about function. I think we need to be clear about which of these we are talking about.

REINHART: It's important to recognize that the term carries both kinds of freight in the tradition.

BERNARD HAYKEL: I think part of what Aron is getting at may be stated as follows. Are we going to think of *uṣūl al-fiqh* as a genre and a discipline that leads to *furū'*, or at least in theory leads to *furū'*. Or, are we

going to think of it as a set of conceptual problems and issues. If you think of it as issues, then we can't adopt a genre definition of it. We have to think of it in much broader terms.

WEISS: Judging from Āmidī, when the task of defining *uṣūl al-fiqh* emerged among Muslims, to the extent they were influenced by Aristotelian tradition, they emphasized that a discipline is defined by its questions—its *masā'il*—and its subject matter. And, I think that in the minds of those who were involved in the defining process the *furūʿ* were always there, and there was no use in having such a thing as *uṣūl* if it doesn't relate to *furūʿ*. So, there is still the important question of how exactly *does* it relate to *furūʿ*, which I think follows the question of definition and is distinct from it.

ZYSOW: Well, let me try to clarify that with a very simple example. We all would say there are works of Ashʿarī *uṣūl al-fiqh*, right? Is there such a thing? Is there any controversy on that? Okay, is there a book of Ashʿarī *furūʿ* that anyone can show me? That's important, that's crucial.

HALLAQ: Aron, I think you just now put your finger on an important dimension of the problem when you said that instead of attempting to define *uṣūl* narrowly—and I agree with some statements that were made—we should use the term broadly. I think we need to concern ourselves with the definition of *uṣūl al-fiqh plus*. That is to say, we should have an understanding that we are talking about the functions of *uṣūl al-fiqh, not* what it is constituted of. What it is constituted of can vary according to the author. We know that according to Ghazālī all sorts of theological and logical issues go into *uṣūl al-fiqh* that others wouldn't agree to, and I don't want to get into that. It's not something that we can fruitfully discuss here. It may be fruitful to do so at some point, but here we must prioritize. The priority here, I think, goes to the *function* of *uṣūl al-fiqh*, something that most of the papers have touched on in one way or another. It is important, I think, that we focus on the connection between *uṣūl al-fiqh* and the mundane world of the law.

ZYSOW: Alright, that's a very interesting question, but from the paper of Bernard [Weiss], we see that by focusing on the connection between *uṣūl al-fiqh* and the law we're leaving a lot aside. Āmidī's is a classic work. He's quoting the view of the Jews, the view of the Thanawīyah—they're not groups involved in the development of Islamic law. So, let's admit that we're creating a very narrow problem for ourselves if we focus on that particular question. It's fine, it's an important question, but it's a very narrow one that doesn't take into account a lot of what has taken place in this symposium.

HALLAQ: I do, however, think that the connection between *uṣūl al-fiqh* and positive law in more than just a rhetorical manner is something that has eluded us as scholars and that if we spend a substantial amount of our remaining time on that particular question we will have accomplished something very important.

WEISS: I'm certainly willing to do that if we all agree, although I hope there will still be some time, when we are done with this topic, for other

topics. So let's have a go at it. I think the place to start might be with Mohammad Fadel's contention that, judging from the section on pledges in the younger Ibn Rushd's *Bidāyat al-mujtahid, uṣūl al-fiqh* seems to have very little impact on *fiqh*, at least in the Mālikī tradition. He called our attention to aspects of the law of pledge for which the revelatory sources enumerated in *uṣūl al-fiqh* are simply not helpful and has shown us how the jurists turn for the most part to what he has called practical reasoning.

HALLAQ: Well, my view of the relationship of *uṣūl al-fiqh* to the *furūʿ* is rather different from Mohammad's, but I think I can best explain it by telling you about karate. In karate there are eleven basic routines, called *katas*, which every student of karate must master in order eventually to receive the black belt. Each *kata* consists of about twenty to fifty moves, which are ordered in a very systematic way and from which one is not allowed to deviate in the slightest degree. One practices these *katas* for about six years, always in an encounter with a purely hypothetical opponent. Only when all eleven *katas* have been perfected has one earned the black belt. Each *kata* is designed to protect against a certain fixed number of attackers. The first *kata*, for example, is designed to protect against four attackers that come from the front and back and the two sides. Now let us suppose that I have mastered this *kata* perfectly and can easily handle attackers coming at me from front or back or either of the two sides. What do I do if someone attacks me from an angle of 45 degrees, which is not an angle of attack that the first *kata* is designed to deal with. What do I do? If the first *kata* is all I have mastered, I cannot defend myself against the simplest attack to my ribs. The point is that in the real world an attack is completely unpredictable; you don't know where it is coming from until the very last second. But if I am holder of a black belt and have mastered all eleven *katas*, I always know what to do. you don't know who's the attacker, where he comes from, until the last second. I might, for example employ the seventeenth move of the first *kata* followed immediately by the thirty-first move of the seventh *kata* and then the fiftieth move of the eleventh. I must in other words put moves from different *katas* together in order to defeat my opponent. Now that is exactly *uṣūl al-fiqh*'s story, in my opinion. *Uṣūl al-fiqh* is, like the *katas*, an array of routines or methods which one masters through hypothetical encounters before going out into the real world—out into the streets—and facing the unpredictable. Like the karate man who has thoroughly mastered all the *katas*, the scholar who has thoroughly mastered *uṣūl al-fiqh* is prepared for the worst. Once he is out on the streets, he might, like the karate man, be attacked from any direction by anybody, and he must respond by combining various appropriate moves from the store of moves that he has mastered. Karate in fact allows one to go beyond the fixed moves contained in the *katas* and, if he finds it necessary to do so, employ moves that are not found in the eleven *katas*. Here is where, for the jurist fighting in the street, such things as *istiḥsān, munāsabah*, and *maṣlaḥah mursalah* come into the picture. These are ways of getting to the law in cases not regulated by revelation. *Uṣūl*

al-fiqh is that formal entity that is supposed to first describe a historical process that gave rise to the law presently in force and then prescribe, on the basis of that process, a continuing process for future generations. It doesn't tell you how to deal with all the specifics. Rather, it lays out the sources and basic methodological concepts, such *majāz*, for example. The jurist doesn't deal with these in any particular order. He might extract any bit or piece from here and there and put them together to arrive at his goal. I have one last point, and now this has nothing to do with karate. Ibn Rushd's *Bidāyat al-mujtahid*, which is the main source you used for your paper, is not necessarily the best source to use in writing on this issue. The great compendia, such as *al-Bayān wa'l-taḥṣīl* of the elder Ibn Rushd (grandfather of the philosopher) would be a better source to look at the problem if you are determined to create this problematic. I think it is a legitimate undertaking and that the topic should be investigated, but I don't think you are seeing the full picture.

FADEL: I agree that I wouldn't see the full picture just from the *Bidāyat al-mujtahid*. I did happen to look at *al-Bayān wa'l-taḥṣīl*, but it strikes me as purely *madhhab* work since he's commenting on the first transmissions of Mālik's students on the authority of Mālik of Mālik's *ra'y*. There's no systematic attempt in this work to relate the *aḥkām* of the Mālikī school to the *adillah*. But I think more generally that when Mālikī says, or is reputed to have said, *tisʿat aʿshār al-ʿilm istiḥsān* he seems to be going against the actual rhetorical structure, which treats *istiḥsān* as a throwaway, as a sort of default category. As you said in your remarks on karate, it's really your last resort—the last resort of a scoundrel, as it were. But what I was trying to say was that it seems that the ancillary sources—the sources that are rhetorically ancillary—are really functionally primary.

HALLAQ: In *bāb al-ruhūn*, perhaps. But I'm not willing to accept that as being the case in all other *bābs*.

FADEL: I agree with what you're saying.

ZYSOW: I don't know if the question should be posed as one of *uṣūl al-fiqh*'s inadequacy. Which is a problem: it doesn't determine *furūʿ* in some simple fashion. You can look through a lot of Islamic legal literature without coming across very important categories of *uṣūl al-fiqh*. In the case of *rahn* we are dealing with a pre-Islamic practice. It was not changed by Islamic law in significant ways. It was taken over, and people have been transacting pledges for hundreds of years. The same is true of sales and other transactions. The *ʿibādāt* are quite different, because there is in them a kind of continuity, at least in the minds of some jurists. So some of the answers to the question of the impact of *uṣūl al-fiqh* on positive law are there, whether they are satisfactory or not, but obviously this impact is not always at the surface, and that, I think, is the important point.

FADEL: I'm perfectly willing to accept the notion of continuity with pre-Islam. That's no problem for me. I think, though, that *uṣūl al-fiqh* tries to create rhetorically the idea that Islamic law is a comprehensive legal doctrine derived from the historical event of revelation. You have *sharʿ man qablanā* but that's hardly considered a source from which the law is derived.

ZYSOW: But you have part of the Sunnah as *taqrīr/iqrār*—confirmation of what is already there.

FADEL: But in that case you would think, if it's just *taqrīr* the question would be, well, we have to stick to it as it was at the time of revelation. It alone is the thing that revelation authenticates. That doesn't seem to be a true exception to what I was saying.

ZYSOW: But the Qur'ānic wording could be used to argue that you don't need *taqrīr*. *Rahn* presupposes what the Qur'ān has made explicit.

HAYKEL: Just to follow up on Aron. The question that you pose is a question that many jurists have asked themselves about the *furūʿ*. People like Ibn al-Amīr al-Ṣanʿānī and Shawkānī have gone systematically through a *furūʿ* work and have swept the deck and said that much of it—especially in the *muʿāmalāt*—has no validity so let's just get rid of it. The law has nothing to say about it. And if you look at the *Subul al-salām*, a large section of which is devoted to the *ʿibādāt*, you find a lot of *adillah* in that section; in the section on the *muʿāmalāt* you don't have as many. And that's a problem, within the tradition itself.

FADEL: It's more problematic for people who claim that you need *adillah*. It's one thing to be a Ẓāhirī and say, well, let's just get rid of all of this. But that's not what the Mālikīs are doing. They're writing *uṣūl al-fiqh*, they accept *uṣūl al-fiqh* as a paradigm; but at the same time, in their internal discourse, which is not the face they present to the public world, they seem to ignore it. That's all I'm saying. They don't seem to take it s seriously in their practice as *fuqaha*.

ZYSOW: We can, I suppose, invoke the "Great Shaykh" theory we heard about earlier. That perhaps explains what *is* going on in Mālikī *fiqh*.

BROCKOPP: Well, if I can pick up on that. You have, at the same time all this is going on, these figures such as Mālik surrounded by a special aura and associated with a special place called Medina. The authority that these figures wield, though not recognized formally in *uṣūl* works, is finding formal recognition elsewhere as a source of revelation. There's nothing about that that contradicts our understanding of *uṣūl*.

FADEL: I think there is, because when Mālik gives a *fatwā* which is not the *ʿamal* of *ahl al-madinah*, then it's Mālik's *ijtihād*, and when he says you can take possession of a debt simply by taking possession of the instrument evidencing the debt, that's just Mālik speaking. So the question is, why does Mālik's opinion on this point create a property right that's enforceable by the power of the state?

BROCKOPP: All the lore about Mālik shows that he was not an ordinary person like you and me.

FADEL: I disagree with that, because plenty of Mālikīs are all the time disagreeing with what Mālik said based on his *ijtihād*, and say that he was all wrong here.

HALLAQ: That doesn't take away from Jonathan's statement. There's a difference between holding the Imām to be the Imām of the school and its ultimate umbrella authority and disagreeing with him all the time.

JACKSON: But Mohammad is saying, what does that have to do with *uṣūl al-fiqh*. *Uṣūl al-fiqh* doesn't justify that move.

HAYKEL: Just to interject a point. From a purely sociological point of view, *uṣūl al-fiqh* is a prestigious science. Mohammad, you and several others here went to law school. Much of what you studied in law school you'll never encounter in your real life as a lawyer, but you still have to go to law school, you still have to get that degree. And I think that has to be borne in mind. There was a facade to *uṣūl al-fiqh* that had to be maintained by jurists because it was a prestigious facade to maintain.

FADEL: I guess that what I wanted to say is that I don't think that the internal legitimacy of a ruling in a particular case is to be judged by its fidelity to the *uṣūl al-fiqh* method. That's my personal opinion, and I think that's the empirical reality of it. If you look at the *furūʿ* works, you see rules that people no doubt thought were legitimate, yet they don't seem to be legitimated by the *uṣūl al-fiqh* paradigm, at least in some cases, maybe lots of cases.

MATTSON: Mohammad, your talking furthers my feeling from my own work that there isn't a creative relationship between *uṣūl* and *furūʿ* and that maybe *uṣūl al-fiqh* should be more properly taught as theology or as political science than as law in the sense of positive law. I think it has a purpose which has to do not so much with prestige as with authority, that it provides a way of saying that there is a certain class of people that have the authority to make these rules (I exclude here the absolute authority of a Shīʿī Imām). The whole construction of Sunnī *uṣūl al-fiqh* is a way to create this world, and that is the purpose it serves. The purpose is not to be a source from which positive law is derived.

FADEL: If I could follow up on that. What started getting me interested in this subject was that I found as I was doing my dissertation that lots of the arguments can be only described as grounded in practical reason. This may have been a function of the fact that I was trying to study judicial decision-making and evidence. But the fact is that you just have a naked appeal to practical reason all the time. If that can work as a satisfactory basis for *furūʿ*, well, then lots of people can exercise their practical reason and have something to say about what the rules should be, whereas if they must exercise the kind of reasoning described in *uṣūl al-fiqh*, yes, the process of working out the *furūʿ* then becomes much more elitist.

REINHART: Of course, the relation between *furūʿ* and *uṣūl* has been one of the big discussion points for a long time. It seems to me that you do want to be cautious about the way you throw away *uṣūl. Istiḥsān*, for example, may seem to be not all that important. Well, it can't be that important in and of itself precisely because it doesn't have a positive content. And there's not a lot you can say on the basis of *uṣūl* works because they don't talk much about hypotheticals and so on. In many cases, what you will be appealing to is the expertise of a particular person. This makes perfect sense. If you're talking about a building and wondering if it was badly built, it's perfectly reasonable to go to an architect about it. Or in poker: if you say, the cards will have their face value but we're going to stipulate that the dealer can pick a wild card, that's as much a part of the rules of the game as anything else. Similarly, *istiḥsān*, and

to some extent *istiṣḥāb*, although they don't get a lot of space in the *uṣūl* literature, nonetheless *uṣūl al-fiqh* is able through them to maintain a kind of control over what goes on in *fiqh*. So the relationship between *uṣūl* and *furūʿ* doesn't strike me as quite so problematic. And I would join in my colleagues' observations in saying that I found Mālikī *uṣūl* to be less developed than that of the other schools, and *rahn* strikes me as one of the least fruitful of the domains in which you have extensive sources to work from. Beyond *rahn* we still have an immense space in which to work on this problem.

FADEL: But *uṣūl al-fiqh* claims to be comprehensive.

STEWART: It shouldn't be so surprising that it isn't. It does claim to be and that bothers us. But as we see in many aspects of life in general, the theory doesn't actually tell us what's really going on.

BROCKOPP: That's all he's saying.

STEWART: That's all he's saying, and I'm agreeing.

REINHART: I'm not accepting this. What I'm saying is this. If I say, here are a whole bunch of rules for how to play Monopoly, and for new cases that are not covered by those rules it's whatever Mohammad Fadel says. Well, this blanket provision is still part of the rules of monopoly. If it just so happens that there are a lot of new cases, Mohammad will rule on them no matter how many, and that will be fine because everything is still in conformity with the rules of monopoly.

JACKSON: But then you can't claim that the rules of Monopoly are comprehensive.

REINHART: Yes you can, because you have this meta-rule that says that when your rulebook is silent on a particular case then you can do this other thing.

JACKSON: But that is an apology for the inadequacy of the rules to cover all the things that you claim they cover.

STEWART: Look at the tenure system in the United States. The theoretical rules say something like: you have to establish an international reputation, you have to expand the bounds of knowledge. Right? So you can go to the secretary in the college office and she can tell you what this all really means: it means seven and a half articles. Practice is completely different from theory, but that's how things work in any field. People study the theory of education, but that doesn't tell you what they actually do in a classroom.

FADEL: It can all be politically pernicious.

STEWART: Well, that's why people are complaining all the time that the *furūʿ* are just riddled with rules that are based on errors.

HAYKEL: And that's why you get people every once in a while who just sweep the decks.

FADEL: [Responding to Stewart] Not necessarily errors.

MATTSON: Isn't it that if you make the point clear then you won't have to deal with all the people who will sweep away the litter.

LOWRY: I think you're asking *uṣūl al-fiqh* to do too much work. The point of writing theory, especially in the Middle Ages when everybody is a

metaphysician, is to build a system in the abstract that is beautiful and aesthetically appealing. But let me add a further remark. Shāfi'ī is greatly troubled by precisely this problem which you've raised, and this is a major difference between the *Risālah* and later *uṣūl al-fiqh*. The *Risālah* has about sixty, not counting repetitions, example problems which show how one does legal reasoning, and the point of these exercises is precisely to tie the results to revelation. This very concrete problem that Shāfi'ī is wrestling with seems not to have interested the later writers on *uṣūl al-fiqh*. They were more interested in metaphysics.

FADEL: In modern times, the question of the relationship between *uṣūl* and *furūʿ* is, from my perspective, not just a theoretical question. Lots of changes that could be positive are blocked because of people who think that these changes are violating Islam; and they think this way because they have this notion that a legitimate rule in Islam is derived from *uṣūl al-fiqh*. This is a serious modern problem. Maybe it wasn't a problem in the Middle Ages. But people take *uṣūl al-fiqh* as though it really means something in terms of positive law, and as Ingrid was pointing out it creates a situation in which only certain people have a right to talk about things, whereas if you look at *furūʿ* it looks like people—at least Mālikīs—are making appeals to practical reason all the time. This is something that in principle any one of us can participate in.

GLEAVE: Now, now. I'm sorry. The reasoning which is involved in *furūʿ* is just as exclusive as the sort of reasoning that's required for *uṣūl al-fiqh*. It's just as elitist and appeals just as much to a certain stratum of society that are qualified in the tradition to work within those rules of practical reason.

FADEL: Everyone has the faculty of practical reason, though the extent to which it is developed differs; but it doesn't require specialized knowledge; it just requires experience. And so in theory anyone can participate in a discourse that requires nothing more than practical reason.

WEISS: You said in your paper that rights that have no *dalīl* are taken for granted—I think that was how you put it. I wonder how can rights be taken for granted. You seem to be saying that the question of how legal principles are justified—rights and so on—is simply ignored, that some kind of cop out is preferred in the interests of getting on with the case. It seems to me that somehow those rights have to be grounded in some kind of theory, be it natural law, *ʿaql*, or something else. Even *ʿaql* is a *dalīl*. Raw experience is of no value unless validated by some sort of theory. To say that the text skips the question of what the *dalīl* is is not to say that *dalīl*s are considered irrelevant. If you ask the jurists who are involved in these cases, "Do you have a justification?" they're going to have to respond somehow with some notion like *dalīl*.

FADEL: I agree with you. I'm sure they must. I'm just saying that Ibn Rushd didn't for questions he was dealing with in connection with *rahn*.

WEISS: But if he's pressed. I mean, let's say you're a Muslim jurist. How do you justify in the final analysis? You're going to have to turn to something on the order of a *dalīl*.

FADEL: Well, let me explain how I proceeded. I have a CD of *al-Kutub al-tis'ah.* I did a root search under *r-h-n.* There were essentially two *ḥadīth*s that came up, not counting a third one that was clearly not germane. One of the two related that the Prophet had died and his armor was pledged to a Jew that he had given it to in exchange for food that he bought on credit. That's pure *sunnah taqrīrīyah.* It doesn't have anything to say about the issue of *ikhtiṣāṣ.* In the second one, the Prophet says *al-rahn markūb wa'l-maḥlūb* or something like that. There's just not much there, which is not surprising to me. Medina was not a very complex economy. I don't think it was a problem for Mālik either. He just said, this is what we're going to do. He says specifically in the *Muwaṭṭa'* when dealing with the question of *ni'mah,* well, people will pledge the trees but not the fruit. But you never see anyone pledging an animal fetus in the stomach of his mother. That's his argument for separating between fruit and the offspring of livestock. But that's just an appeal to practical reasoning.

ZYSOW: You could tease more out of it—with force.

MATTSON: Isn't that the point? Why force? The people who are trying to force are missing the point that they shouldn't have to force things.

ZYSOW: Let me just say that your notion of practical reasoning is interesting because it's responsible. However, there are notions of authority here that are unlikely to produce a legal system since everybody's reasoning would be practically equal to everyone else's. It's not just an Islamic problem. Some years ago I did some work on a rule of American commercial law. I traced it back—so I think, though I didn't publish the work—to a Prussian code, written in a natural law environment. Despite this natural law setting, the rule imposed an arbitrarily drawn period of time on a certain right. The authors of the code really had no choice; if they were going to make these rules they had to specify some sort of fixed period of time. In Islam specification of such periods in theory belongs only to the Prophet. We have this rule in some of the *madhhabs* that states that if a companion of the Prophet would pour at some particular point in time or measure this practice must go back to prophetic revelation. In American law the classic case would be the issue of abortion and the trimester. How does the Supreme Court according to our legal theory have the right to figure out when a fetus is a fetus. That's not what it's supposed to be doing. But there was a vacuum that had to be filled in that period, and so the justices started doing all this line drawing. And it's not surprising that it's being done. But I think that the notion that it can be done by the whole society seems unrealistic.

FADEL: I agree, but that's a practical problem. It's not an ontological problem. I guess that's the way I would respond.

BROCKOPP: I think the disconnect between what *uṣūl* demands and what *furū'* actually offers is important. It seems to me that the point is quite right that *uṣūl* is the development of theory for its own sake. So also is the point about elitism. But I'm still not convinced that the fact that you don't find *dalīl* makes a difference, because if you look at those chapters that have plenty of *adillah,* you're going to find all kinds of disputes there.