EDITOR'S INTRODUCTION

Within the field of Islamic legal studies, increasing attention has been given in recent times to that branch of legal learning known in Arabic as *uṣūl al-fiqh*. It is frequently called in English "legal theory." Although it would be rash to suppose that *uṣūl al-fiqh* subsumes everything that may be regarded as Muslim legal theory in the broadest possible sense of that term, nonetheless there can be no denying that it constitutes, or came over time to constitute, the mainstream of legal-theoretical thought in Islam. It may in fact not be incorrect to say that legal theory in late pre-modern Islam is more or less identical with *uṣūl al-fiqh*, for eventually questions relating to the sources of legal knowledge (legal epistemology), the nature and locus of legal authority, the hermeneutical processes involved in the determination of the law and similar topics were discussed almost exclusively within *uṣūl al-fiqh*.

On the other hand, *uṣūl al-fiqh* does not lend itself easily to definition. For many scholars working on Islamic law, the term *uṣūl al-fiqh* conjurs up what has come to be widely called the classical Sunni theory of law. According to this theory, the law has four fundamental "roots": the Qur'ān, the Sunnah (sayings and deeds of the Prophet Muḥammad) , the consensus of Muslim jurists, and analogical reasoning. The history of this particular stream of *uṣūl al-fiqh*—especially its origins and early development—is certainly fascinating and worth pursuing. Of special interest is the pressure it was able to exert upon the juristic community at large, including some Shī'ī jurists, to conform to its main principles. If one turns, however, to the period before the establishment of the classical Sunnī *uṣūl al-fiqh*, one finds oneself facing a much more fluid world of legal thought such that the task of determining precisely what constitutes *uṣūl al-fiqh* becomes highly problematic. But even within the context of the later "four sources" theory one finds considerable diversity of styles of presentation, of terminologies, of agendas, of methods of organization, and of literary forms. Furthermore, throughout the history of Muslim legal thought, the term *uṣūl al-fiqh*, as well as the abbreviated form *uṣūl*, is sometimes used to refer to something that is altogether distinct from legal theory as such, though closely related to it, namely

the general principles or maxims (*qawāʿid*) of positive law. As the final paper in this volume notes, at least one Muslim scholar described these principles as "the real *uṣūl al-fiqh*."

The essays in this volume, as well as the discussion at the end, take on a fairly broad spectrum of topics and issues relating to the development of Muslim legal theory both before and after the establishment of the classical "four sources" version of *uṣūl al-fiqh* (the dating of which is itself a problem addressed in this volume). Most of the essays were originally presented as papers at a symposium on Islamic legal theory held in September, 1999, in Alta, Utah, a small town located in the upper reaches of Utah's Little Cottonwood Canyon. The setting was one of blazing autumn colors and crisp mountain air. The authors, with one exception, are North American, and all are scholars who have worked extensively in the area of Muslim legal theory. Budgetary limitations prevented the convening of a larger international body of scholars, and in any case it was the wish of the planners to maintain an atmosphere of closely knit collegiality such as is possible only at relatively small gatherings. This goal was facilitated by the fact that most of the participants had already formed ties of collegiality through participation together, over the past dozen or so years, in panels on Islamic law at meetings of the American Oriental Society. The good-spirited ambiance that prevailed at Alta, the liveliness of the discussions (a synthesized version of which appears at the back of this volume) owed much to this background. At the same time, the Alta symposium was convened with full awareness that a number of outstanding scholars from a variety of countries who have worked on *uṣūl*-related topics were not present, many of whom would have added their share of collegiality and warmth to the gathering.

The first five essays that appear in this volume (Brockopp, Lowry, Spectorsky, Melchert, Stewart) form a cluster inasmuch as they all grapple with questions relating to the origin and early development of *uṣūl al-fiqh*. Jonathan Brockopp's study goes back the furthest in time, concentrating upon a period that extends roughly from 750 to 850 C.E. and encompasses four prominent Medinan-Mālikī jurists (Mājishūn, Mālik, Abū Muṣʿab and Ibn ʿAbd al-Ḥakam). He discovers, upon examining the writings of these jurists, certain differences in styles of presentation that reflect different theoretical postures, different ways of substantiating rules. The fact that these different postures could exist side by side leads him to the conclusion that

the development of legal theory in the period of his research was polythetic, rather than monothetic. In elaborating this point, Brockopp takes issue with what he sees as the dominant trend among certain contemporary scholars of Islam, which is to see legal thought as moving unilinearly and inexorably in the direction of the classical *uṣūl al-fiqh*, which, using a term especially prominent in Wansbrough's work, he regards as an outworking of "salvation history." Against this monothetic or unilinear approach, he argues for the presence, incipient at least, of a contrasting theoretical conception, one that sees legal authority as residing in "great shaykhs," individuals who were believed to have direct contact with God and could therefore make authoritative statements of the law without recourse to sayings of the Prophet or verses of the Qur'ān, which they in fact sought to efface. Brockopp calls this the "Great Shaykh" theory of authority and suggests that it derives largely from popular culture. His study raises the question whether the deference shown toward the eponymic "founders" of the schools of law (*madhāhib*) might not be a legacy of the "Great Shaykh" theory, even though the ultimately predominant *uṣūl* theory bound them to the revelatory texts by conferring on them the status of mujtahids.

Joseph Lowry complements Brockopp's essay with a study of the famous *Risālah* of Shāfiʿī, who lived within the period studied by Brockopp. Although Lowry does not explicitly deal with the issue of dating and authorship as raised by Norman Calder in recent times, his analysis of the *Risālah* lends credence to the traditional attribution of the work to Shāfiʿī. The *Risālah*, according to Lowry's argument, is not a work of *uṣūl al-fiqh* as that term came to be understood classically. It fits clearly into the pre-*uṣūl* scholarly milieu described by Brockopp, a milieu not yet dominated by an orthodox or classical notion of four sources. The thrust of Lowry's argument is that it is not Shāfiʿī's purpose in the *Risālah* to expound the notion of "four sources" of law, that a "four sources" theory, as that concept came later to be understood, is not even to be found in the *Risālah*. What might appear to some to be listings of sources of law turn out under careful scrutiny to be listings, not of sources of substantive rules of law as such, but of sources of authority which can be used to corroborate rules already under consideration. According to Lowry we do much greater justice to Shāfiʿī if we see him as the propounder of a hermeneutic focused mainly on the two revealed source-texts, the Qur'ān and the Sunnah, and predicated upon a firm belief in

the essential unity of what is found in them. Where there seems to be contradiction, this hermeneutic supplies the interpretive techniques that enable the interpreter to realize that the contradiction is illusory. God's law reflects the perfection of God Himself. It reveals itself through the Qur'ān and the Sunnah as the embodiment of an overarching divine legislative intent, one that is always accessible to the jurist who employs the appropriate hermeneutic techniques.

Susan Spectorsky continues the study of early Muslim legal thought, focusing on the use of the term *sunnah* in the responses of Ibn Rāhwayh, a jurist who flourished during the decades of the ninth century immediately following the death of Shāfiʿī (820–850). Taking as a framework for her study Schacht's thesis that Shāfiʿī altered the course of Muslim legal thought by narrowing the meaning of *sunnah* to include only the *sunnah* of the Prophet as contained in orally transmitted *isnād*-bearing traditions (*aḥādith*), Spectorsky argues on the basis of evidence mustered from Ibn Rāhwayh's responses that Shāfiʿī's redefinition of the term *sunnah* had little if any impact on juristic circles of his time or of the generation immediately following him (Ibn Rāhwayh's generation). She thus finds herself in agreement with the position taken by Wael Hallaq in an article published in 1993. Through close examination of seven responses of Ibn Rāhwayh relating to marriage and divorce, she finds that Ibn Rāhwayh's use of the term *sunnah* embraces all those meanings which, in Schacht's account, had been current in the "ancient schools" and against which Shāfiʿī contended. It thus could, in his usage, refer to a saying or course of action either of the Prophet or of a Companion or of a Successor; or it might refer to the ongoing practice of the community. A *sunnah* of the Prophet had no necessary pride of place among these possibilities and in any case, whenever referred to, was not tied to a orally transmitted tradition with an *isnād*. In short, Ibn Rāhwayh, living in the generation after Shāfiʿī, deals with the *sunnah* in the very same way that jurists before Shāfiʿī had dealt with it. We find in his responsa no trace of influence of Shāfiʿī's methodology.

Spectorsky finds especially significant the persistence, in Ibn Rāhwayh's responses, of reference to Companions and Successors, who appear, along with the Prophet, as authority figures. She calls the reader's attention to Bravmann's seminal study in which he mustered evidence from a variety of early sources to show that in the pre-Islamic Arabian context *sunnah* referred, not to an evolving community practice later placed under the authority of an eminent figure,

but to practice as instituted by such a figure. While the Prophet was from the beginning of Islam counted as such a figure, in early Islam other authority figures—Companions, Successors—were also prominent in juristic discourse. What they said carried weight simply because it was they who said it. We perhaps can see here an adumbration of the "Great Shaykh" phenomenon discussed by Brockopp.

Christopher Melchert uses the example of theories of abrogation to trace the development of legal theory across the ninth century. Although three of the four authors he works with (Abū ʿUbayd, Muḥāsibī, and Ibn Qutaybah; Shāfiʿī is the fourth) are famous today for accomplishments outside the field of jurisprudence, they were all learned in jurisprudence and their discussions of topics such as abrogation should reflect jurisprudential developments in their time. Melchert's analysis of these developments leads him to the conclusion that the *Risālah* attributed to Shāfiʿī belongs, *by virtue of the way it frames the essential problems*, to the later ninth century. The ninth century thus emerges from Melchert's discussion as a period of significant maturing of legal theory in the direction of what would become *uṣūl al-fiqh*.

Devin Stewart goes a step further in his account of developments going on in the ninth century. Working with the notion of *uṣūl al-fiqh* as a genre of scholarly writing, he finds that the genre exists fully formed by the later ninth century. His evidence consists of the mention of a work by Ibn Dāʾūd al-Ẓāhirī entitled *al-Wuṣūl ilā maʿrifat al-uṣūl* in biobibliographic works and citations from Ibn Dāʾūd's work found in al-Qāḍī al-Nuʿmān's *Ikhtilāf uṣūl al-madhāhib*, translations of which appear in an appendix. From the citations Stewart is able to determine that the content of the *Wuṣūl* is of the sort found in later *uṣūl al-fiqh* works and that, given the additional evidence of the title itself, the *Wuṣūl* could only have been a fully fledged *uṣūl al-fiqh* work. He further surmises that if Ibn Dāʾūd wrote a work in the *uṣūl al-fiqh* genre he must not have been the only one and that Ibn Surayj in particular, the leading Shāfiʿī jurist of the time, must have written one, as must have others. Ibn Dāʾūd was, in other words, drawing upon an already well-established genre. The ninth century thus becomes, in Stewart's assessment, the period to look at carefully in investigating the origins of the genre.

From the essays of Brockopp, Lowry, Spectorsky, Melchert and Stewart a general picture of the early development of Muslim legal theory may be pieced together according to which *uṣūl al-fiqh* as a

distinct discipline and associated genre of writing first emerge in the ninth century, probably late in that century, and whatever legal theory existed before then was either moving in the direction of *uṣūl al-fiqh* (proto-*uṣūl* theory) or in another direction that over time became eclipsed by the supremacy of *uṣūl al-fiqh*. As far as Mālikīs are concerned, works devoted exclusively to *uṣūl al-fiqh* are clearly nonexistent throughout the period Brockopp deals with, although elements that would will go into the making of *uṣūl al-fiqh* are there. Shāfiʿī's *Risālah*, as represented in Lowry's study, fits this picture. Some of its concerns are also those of classical works of *uṣūl al-fiqh*, but its approach to them markedly differs from later convention. Even as late as the mid-ninth century—the period immediately after Shāfiʿī—a prominent jurist, Ibn Rāhwayh, reflects, as Spectorsky shows, a preclassial conception of *sunnah* that embraces the *sunnah* of authority figures other than the Prophet along with that of the Prophet himself without according pride of place to the latter. Melchert portrays the ninth century as a time of maturing of legal theory and increase of sophistication of legal argumentation, although he locates Shāfiʿī in the chronology of that maturing differently from Lowry. Stewart, finally, offers evidence of the existence of *uṣūl al-fiqh* as a genre of scholarly writing in the late ninth century and concludes that the origin of the genre must be sought at some earlier point in that century.

The essays of Mohammad Fadel and Sherman Jackson take us into a different arena of discussion, one concerned with the function of *uṣūl al-fiqh*, particularly in relation to the actual law (*furūʿ*) articulated in *fiqh* books, but also in relation to the scholarly community and its institutions and in relation to society. Fadel offers evidence from the discussion of pledges (*ruhūn*) in Ibn Rushd's *Bidāyat al-mujtahid* to suggest that the actual impact of *uṣūl al-fiqh* on the working out of the law may have been quite minimal. He shows that, although the revelatory sources of the law are cited, they actually contribute very little to the actual arguments. What prevails in these arguments is a sort of reasoning best called, according to Fadel, "practical reasoning." Practical reasoning steps in to fill the gap left by the revelatory sources, which are very limited in what they are able to contribute to the fleshing out of the law of pledges. The question that must be addressed as a result of Fadel's findings is whether what he has observed with respect to the law of pledges obtains throughout the other areas of the law. If it does, then *uṣūl al-fiqh* can hardly be said to have, or to have had, the function of

engendering actual law. *Uṣūl al-fiqh* in this event becomes an ideal way of producing law that has little to do with actual legal reality. Fadel notes as pertinent to this question that in the *Bidāyat al-mujtahid* Ibn Rushd was intentionally dealing only with cases the discussion of which entailed reference to the revelatory sources and that according to Ibn Rushd himself there were in the *fiqh* literature many cases in regard to which no recourse was had to the revelatory sources.

Sherman Jackson utilizes notions drawn from contemporary critical movements to advance a similar general point of view on the function of *uṣūl al-fiqh* in relation to law, He sees *uṣūl al-fiqh* as a kind of formalism and applies to it the criticisms of formalism launched by the Critical Legal Studies movement. The formalism of *uṣūl al-fiqh* consists centrally of its view of language as a bearer of objective meaning thanks to which the law as an entity rooted in the meaning of texts can be regarded as itself having an objective existence well beyond the realm of human predilection and presupposition. Critical legal studies, Jackson reminds us, insists that human presuppositions and preconceptions are the real determinants of the law since they are the determinants of the meaning of the texts from which the law is theoretically (but only theoretically!) derived. Language thus does not itself dictate meaning; rather, meaning is created by the interpreter and reflects the interpreter's presuppositions and preconceptions. Legal theory sets up the fiction of derivation from recognized authoritative sources, a necessary fiction in that through it the law is validated, but a fiction nonetheless. From the point of view of Critical Legal Studies, therefore, the function of *uṣūl al-fiqh* is, not to create the law, but to validate it. But Jackson is able at the same time to attribute to *uṣūl al-fiqh* a somewhat broader function by drawing upon the perspective of a more recent movement in legal thought, the New Legal Formalism. While sharing with Critical Legal Studies the denial that a body of theory such as *uṣūl al-fiqh* creates or determines the law, the New Legal Formalism is able to accord to such theory the function of imposing constraints on the interpretive process, that is to say, upon the creation of meaning and of law. These constraints take the form of rhetorical tools that must be employed in order to convince others of the truthfulness and acceptability of one's interpretation. Interpretation is thus not an entirely free and individualistic activity but is confined to those possibilities that the tools of rhetoric allow.

An interesting point of difference between Fadel's and Jackson's essays has to do with Shāfiʿī. For Fadel, Shāfiʿī remains the founder of *uṣūl al-fiqh*. Jackson takes a view closer to that of Joseph Lowry in that like Lowry he distances Shāfiʿī from *uṣūl al-fiqh*. But Jackson has a unique take of his own on Shāfiʿī's thought. He sees Shāfiʿī as representing a sharp contrast to the formalism of classical *uṣūl al-fiqh* in that he (Shāfiʿī) sees the meanings of the Arabic scriptures as determined, not simply by lexical and syntactic givens stored in books, but by the experiences that the Arabs to whom the scriptures were first addressed had *as Arabs* with all the presuppositions and preconceptions that those experiences entailed.

However we view the function of *uṣūl al-fiqh* in relation to the substantive law that we find in the pages of the *fiqh* books and in *fatwās* (legal opinions on specific cases), it is clear that countless Muslim jurists down through the centuries have studied it as part of their legal education, have written books and treatises on it, and have expended considerable energy pondering and debating the host of issues which it raises. As the essays of Kevin Reinhart, Aron Zysow and Robert Gleave show, these issues could become bones of contention between *madhhabs*, or between factions within a *madhhab*, or between sectarian communities. As one considers these *uṣūl*-related controversies, however, one may ask whether they do not provide further evidence of the unrelatedness of *uṣūl al-fiqh* to the actual working of the law in the real world as discussed by Jackson and Fadel. Sometimes the controversies could have theological ramifications which set them apart all the more from the realm of the truly legal.

Reinhart presents us with an especially telling example of a difference between *madhhabs* on an issue in *uṣūl al-fiqh*. The *madhhabs* are the Ḥanafī and the Shāfiʿī, and the issue concerns the categories *farḍ* and *wājib*, the Ḥanafī position being that the two categories are distinct from one another and the Shāfiʿī being that they represent a single category. For the Ḥanafīs, a duty is *farḍ* if it is known to be a duty with absolute certainty and *wājib* if its status as a duty is merely probable and thus subject to a degree of doubt. The Shāfiʿīs find the distinction disruptive of their method of classification of human acts, which ties the basic categories of human acts directly to the divine imperative (*ṣighat al-amr*). As there is no way to distinguish *farḍ* from *wājib* as significata of the divine imperative, no matter what fine semantic differences may exist between them, they must, from the Shāfiʿī point of view, be seen as essentially one and

the same. The Ḥanafis, however, have theological interests at stake in the issue. For them the difference between *farḍ* and *wājib*, though in nature epistemological, constitutes a dividing line between duties that lie at the core of one's Islam denial of which makes one an unbeliever, placing one outside the community of believers, and all other duties. Among the duties counted as *farḍ* is faith itself. Duties that fall into the category of *wājib* have nothing of this awesome quality. Since their epistemological status is one of uncertainty, an individual may even refuse to recognize the existence of a particular *wājib* duty without jeopardizing his believerhood.

Aron Zysow develops the notion of theological ramifications even further. He notes how issues in *uṣūl al-fiqh* can pit factions *within* a *madhhab* against each other along theological lines. His particular focus is upon Ḥanafīs of Central Asia and Iraq during the tenth to the twelfth centuries. This regional differentiation corresponded with an important theological cleavage: the Iraqi Ḥanafīs were largely Muʿtazilī, while the Central Asian Ḥanafīs were seeking to forge an "orthodox" identity that would, despite their wavering between Ashʿarism and Māturīdism, bring them together in an effort to rid legal theory of all traces of Muʿtazilism. For example, infallibilism (*taṣwib*)—a doctrine which states that in situations of conflicting legal opinions among qualified scholars (*mujtahids*) all opinions must be considered correct—was seen as a corollary of the Muʿtazilī notion that God must do what is best for the creature. That is to say, God would not allow his creatures to be left in a state of error despite their best efforts to arrive at the truth. The doctrine of the "specialization of the cause," which allowed the cause (*ratio*) of a rule to exist in some instances without the rule's coming into effect, was thought to be a reflection of the Muʿtazilī tendency to limit the effectiveness of the divine will, a tendency that was especially evident in the Muʿtazilī notion of the human capacity to act one way or another rather than solely in a manner predetermined by the divine will. Similarly, overtones of Muʿtazilī theology were seen in the doctrine of the general term (the notion that there are within the Arabic language terms that signify generality) and in the doctrine of "occasions" (the notion that the obligation to actually perform a duty such as the ritual prayer is contingent upon a natural event, in the case of the ritual prayer the sun's daily passing of its zenith). Although some such doctrines thought to be vestiges of Muʿtazilism came to be accepted by certain orthodox authors (for

example, infallibilism was accepted by Ghazali), for a time a number of noted Central Asian Ḥanafī jurists expended considerable effort on refuting them so as to purge legal theory of Muʿtazilī contaminations.

With the studies of both Reinhart and Zysow we seem to be confronted with functions of *uṣūl al-fiqh* that are either entirely unrelated to law in our usual understanding of that term or are related to it only vaguely and indirectly. *Uṣūl al-fiqh*, in these studies, appears to serve as a instrument of theological polemics of a kind that bears in some way on legal theory but is clearly not primarily concerned with legal issues in their own right. In Reinhart's study, *uṣūl al-fiqh* also seems to serve to some extent as a means of line-drawing between *madhhabs*.

Robert Gleave's essay takes us into the sphere of sectarian polemics. As is well known, Shiʿi jurisprudence rejects the use of analogical reasoning (*qiyās*). Gleave argues that the eventual Shīʿī rejection of *qiyās* was purely polemical, the concern behind it being entirely to define the boundary between Shīʿīsm and Sunnism. He traces Shīʿī thinking about *qiyās* across a span of time extending from Shaykh Mufīd to ʿAllāmah al-Ḥillī and including Sayyid Murtaḍā, Ṭūsī and Muḥaqqiq and arrives at the conclusion that over time the Shīʿī definition of *qiyās* was so narrowed down as to permit Shīʿī jurists to incorporate most types of *qiyās* practiced by Sunnīs under a different rubric. Rejection of *qiyās* had to remain a hallmark of Shiʿi theory because of a tradition going back to Imam Jaʿfar al-Ṣādiq which condemned *qiyās*. Through an ever more restricted definition of *qiyās*, the polemic imperative could remain intact while the exigencies of interpretation could be satisfied. Again, *uṣūl al-fiqh* has become an instrument of boundary-setting and self-definition while affecting hardly at all the actual content of the law.

My own contribution to this collection of essays takes a look at Āmidī's *al-Iḥkām fi uṣūl al-aḥkām* with yet another aspect of the question of function in mind. To what extent does *uṣūl al-fiqh* (at least in the post-formative period) serve as a forum for inter-*madhhab* debate through which differences between *madhhabs* at the level of theory and methodology are articulated and distinctive *madhhab* positions are forged? To what extent does *uṣūl al-fiqh* set forth the principles that constitute the framework of *ijtihād fi-l-madhhab?* I suggest in my study that to answer these questions requires looking at the full spectrum of issues debated in *uṣūl al-fiqh* literature for the purpose of deter-

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