> 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.

incentives for raising questions about the 'real' sources of the system's rules. I shall thus begin with a vindication of the claim (thus far only tacitly stated) that *uṣūl al-fiqh* constitutes, *mutatis mutandis*, a form of classical legal formalism.[18] This will be followed by a CLS critique, the aim of which will be to show the extent to which *uṣūl al-fiqh*, like all formalisms, is only putatively so. Through this combination I hope to expose both the fictitiousness of the notion that Muslim jurists are exclusively text-driven in their legal 'interpretations' and the fact that presuppositions are operative in the activity of what we shall call for now the "deduction of meaning".

A. *Islamic Law and Legal Formalism*

I first entered this study on the understanding that the *Risālah* of al-Shāfiʿī (d. 204/820) constituted the first conscious commitment to an Islamic jurisprudence founded on formalism. This assumption followed a very simple logic: al-Shāfiʿī had been credited with being the founder of *uṣūl al-fiqh*;[19] *uṣūl al-fiqh* is emphatically formalistic; al-Shāfiʿī, who laid the foundations for the development of this jurisprudence, must have been a formalist. At bottom, however, all of this rested against the backdrop of a broader question: Why, after nearly two centuries of producing practical legal solutions, should Muslims come to feel a desire or recognize a need to systematize their interpretive methods? Such an impetus, it seemed, could hardly have come from the ranks of the "practical jurists" themselves; for their accomplishments had already proved the irrelevance of any philosophical consistency or prescriptive hermeneutic to their manner of interpreting and applying the law.[20] This pressure, it seemed, must have

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[18] This also appears to be the conclusion of Professor Bernard Weiss, though he uses the term "exotericism" where I use the term "formalism". See his insightful article, "Exotericism and Objectivity in Islamic Jurisprudence", *Islamic Law and Jurisprudence* ed. N. Heer (Seattle: University of Washington Press, 1990), 53–71, esp. 58ff.

[19] This view has been successfully challenged by W. Hallaq in "Was al-Shafiʿi the Master Architect of Islamic Jurisprudence?", *International Journal of Middle East Studies* 25 (1993):587–605. For my purposes here, however, it matters little whether al-Shāfiʿī actually *founded* Islamic legal theory, or, as Professor Hallaq argues, merely *proposed* it, or, as I shall suggest, actually *provoked* it. At all accounts, al-Shāfiʿī's critical role in the early development of Islamic legal theory cannot be gainsaid.

[20] There is of course a tendency among scholars to assume that all communities are naturally inclined toward philosophical systemization. But I think this tendency should be resisted and forced to justify itself on more substantive grounds. For as one noted legal scholar has noted, there is no necessary connection between philo-

come, therefore, from without, presumably from the majority non-Muslim territories where philosophically oriented non-Arabs steeped in the religious and intellectual traditions of Late Antiquity were increasingly joining the ranks of the Muslims. This suspicion drew additional strength from the fact that, based on the record that has come down to us thus far, *all* of the early theoreticians (with the lone qualified exception of al-Shāfiʿī, who studied for a time with Mālik in Medina) operated in the so-called conquered territories, mainly greater Iraq. By contrast, Arabia itself produced *none* of these theoreticians, a fact in keeping with Professor Schacht's assertion that, prior to al-Shāfiʿī, Iraq was the real home of technical legal reasoning.[21] In this context, Professor George Makdisi's conclusion to the effect that *uṣūl al-fiqh* had been 'contaminated' with rationalist theology took on an added significance.[22] For this rationalist theology was heavily indebted to Christian, Greek and Iranian patterns harboring back to Late Antiquity. This suggested, to my mind, the likely source of the aforementioned philosophizing trends that seemed otherwise so anomolous.

On these facts and ruminations, I gradually came to see al-Shāfiʿī's efforts in a different light. Al-Shāfiʿī's campaign now appeared to be a somewhat frantic attempt to preempt the influence of these philosophizing trends, based on his view that the primordial linguistic idiosyncracies of the Arabs were the *sine qua non* of a proper understanding of scriptural intent, and that not only did these native idiosyncracies defy efforts at systemization, such systemizing efforts were

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sophical systemization and professional competence: "It is hard to imagine why agents genuinely committed to a practice would hand over responsibility for judging it to some other practice, especially to a practice that takes place almost exclusively in college classrooms. It is quite easy to imagine why philosophers would think that an abdication in their direction makes perfect sense. Philosophers, after all, are like everyone else; they want people who don't do what they do to believe that what they do is universally enabling. They want us to believe that the only good king is a philosopher-king, and that the only good judge is a philosopher-judge, and that the only good baseball player is a philosopher-baseball player. Well, I don't know about you, but I hope my kings, if I should ever have any, are good at being kings, and that my judges are good at being judges, and that the players on my team throw strikes and keep 'em off the bases". See S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham and London: Duke University Press, 1989), 398.

[21] See his *Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950), 275, 311.

[22] "The Juridical Theology of Shāfiʿī: Origins and Significance of *Uṣūl al-Fiqh*", *Studia Islamica* 59 (1984):5–47.

likely to corrupt or undermine them, either by omitting aspects that could not be accounted for by theory or by attributing to them qualities extrapolated from theory but baseless in reality.[23] On this understanding, my initial assumptions about the role of *al-Risālah* seemed to call out for revision. For, on this understanding, as ironic as it seemed, it became increasingly difficult to resist the conclusion that the man credited with being the founder of *uṣūl al-fiqh* was not in the least committed to the formalism that ultimately came to define and dominate that discipline.

We may recall that al-Shāfiʿī went to great lengths to remind his readers that revelation was sent down in the language of the Arabs and that only those versed in the linguistic conventions of the Arabs could hope to navigate their way successfully through revelation. While at times al-Shāfiʿī gives the impression that he favors a formalistic approach, closer examination reveals that his prescriptions fall significantly short of the dictates of formalism. For while al-Shāfiʿī raises and treats in an ostensibly formalistic fashion all kinds of issues, from countermands (*nawāhin*/sg. *nahy*) to general (*ʿāmm*) and restricted (*khāṣṣ*) injunctions to injunctions that appear to be general but are in fact restricted, none of this entails the kind of systematic morphemics that later became common to *uṣūl al-fiqh*. In fact, on com-

[23] There are numerous later examples of this argument. For example, in his *al-Radd ʿalā al-nuḥāt* [*Refutation of the Grammarians*] ed. S. Ḍayf (Cairo: Dār al-Maʿārif, n.d.), Ibn Maḍāʾ (d. 592/1196) argues that the theory of the regent (*ʿāmil*), which stood at the heart of systematized grammar, corrupted and bred misunderstanding of the language. Similarly, the literary critic Ḍiyāʾ al-Dīn Ibn al-Athīr (d. 637/1240), whose "sound symbolism" designates certain sounds of the Arabic alphabet as feminine and others as masculine, argues that the beauty and rhetorical effect of the Qurʾān is tied to its proper use of these feminine and masculine sounds. (For example, masculine sounds, like *qāf* and *ghayn*, are used to depict the gravity of the Last Day, while feminine sounds, like *hāʾ* and *sīn*, are used to console the Prophet.) Knowledge, however, of which sounds are masculine and which feminine and why is virtually closed to the non-Arab and can be answered by the Arab only on the basis of his primordial *fiṭrah*. Thus, at one point in response to an unnamed Grecophone critic, Ibn al-Athīr retorts: "[T]here are secrets to the use of expressions (*istiʿmāl al-alfāẓ*) of which neither you nor your masters, like Ibn Sīnā and al-Farābī, nor those who led them astray, like Aristotle and Plato, possess any knowledge". See *al-Mathal al-sāʾir fī adab al-kātib wa al-shāʿir*, 3 vols. ed. A. al-Hūfī and B. Tabānah (Riyāḍ: Dār al-Rifāʿī, 1403/1983), 1:245–304, esp. 1:264 for the quote cited. See also A.M. al-Anṣāri *al-Difāʿ ʿan al-qurʾān ḍidd al-nahwīyīn wa al-mustashriqīn* [*Defending the Qurʾān Against the (Arab) Grammarians and the Orientalists*] (Cairo: Dār al-Ittihād al-ʿArabī li al-Tibāʿah, 1303/1973), where the author rages against the early grammarians (e.g., Sibawayh (d. ca. 180/796)) who impugned and or rejected variant readings of the Qurʾān whenever these appeared to violate their grammatical theories.

paring al-Shāfiʿī with authors like Ibn al-Qaṣṣār al-Baghdādī (d. 397/1006),[24] Abū al-Ḥusayn al-Baṣrī (d. 436/1044), or Imām al-Ḥaramayn al-Juwaynī (d. 478/1085) it becomes easy to see how this kind of formalism could have been part of what *al-Risālah* was designed to preempt. For al-Shāfiʿī's whole point appears to be that meaning is conveyed not simply by words but by linguistic conventions and that it is only by possessing a psychological at-homeness with these conventions that one can assume proficiency in the Arabic language (*lisān al-ʿarab*). This entails, however, a culture and a history that engenders a certain psychological predisposition which is lost when words and phrases are abstracted and treated as self-contained entities. Viewed from another perspective, one might say that these extra-linguistic elements are what endows one with the kind of presuppositions that al-Shāfiʿī would deem essential to a proper understanding of scripture. Assuming, meanwhile, as I have, that formalism was a trend initiated and promoted by Arabic-speaking non-Arabs, it becomes easy to understand the significance and urgency of al-Shāfiʿī's insistence that the *ʿajam* (non-Arabs) follow, not lead, the Arabs.

> The most preeminent of people in terms of language are those whose language is that of the Prophet. And it is not permissible—and God knows best—for the people of his language to be followers of the people of another language in a single letter. On the contrary, all other languages are to take their place of subservience to his language.[25]

By language, however, al-Shāfiʿī appears, again, to have in mind something significantly broader than vocabulary and syntax. Indeed, he seems to be referring to certain non-reflexive ways of knowing and communicating that accrue to the Arabs simply by virtue of the fact that they are Arabs. In other words, even where they are incapable of expressing why or how they understand an expression in a particular way, the Arab understanding is to be accepted and trusted by virtue of a certain inscrutable insight they have into their language. This is apparently what al-Shāfiʿī has in mind in those places in *al-Umm* (on positive law) where he reminds his readers, who are obviously Arabic-speaking: "This is the language of the Arabs (*wa huwa lisān ʿarabī, wa hādhā kalām ʿarabī*)".[26] In other words, on opaque,

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[24] See, e.g., his *al-Muqaddimah fī uṣūl al-fiqh*, ed. M. Esslimani (Beirut: Dār al-Gharb al-Islāmī, 1996).

[25] *al-Risālah*, 46.

[26] See *al-Umm*, 4:134, 4:141 and passim.

controversial or multivalent words and phrases, the insights of the Arabs are simply to be deferred to, regardless of whatever linguistic possibilities might be represented by the words themselves. For, again, according to al-Shāfiʿī,

> God addressed revelation to the Arabs in their language according to what they understood of the meanings imparted by that language. And among those things they knew of their language was the multiplicity of ways in which meaning was imparted. And it was part of their primordial nature (*fiṭrah*) that . . . they might speak of a thing and identify it only in terms of the meaning that attaches to it, without resorting to a specific word for it, just as people do with physical gestures. And this could be the highest form of speech among them, due to the fact that only those who are versed in this could engage in it, to the exclusion of those who are ignorant of it.[27]

In sum, from al-Shāfiʿī's perspective, words alone are not—and cannot tell—the whole story. As such, he can be said to have seen no particular advantage in formalism. Nor was he at all discomfitted by the fact that presuppositions inform interpretive processes and results. In fact, his interest appears to have been precisely in ensuring that the primordial presuppositions of the Arabs, to the exclusion of those brought by the Arabic-speaking but still non-Arab heirs to Late Antiquity, would continue to inform the community's understanding of scripture. Indeed, his greatest fear was of the primordial presuppositions of the Arabs loosing their pride of place, which would result in a veritable interpretive free-for-all among all those who *spoke* (but not necessarily '*knew*') Arabic. In this context, one might go so far as to say that al-Shāfiʿī was decidedly anti-formalist. But, as the subsequent history of Islamic law would show, al-Shāfiʿī was fighting a loosing battle. Formalism would ultimately triumph under the auspices of the new *uṣūl al-fiqh*.[28]

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[27] *al-Risālah*, 52: ". . . *wa takallamu bi al-shay' tuʿarrifuhu bi al-maʿnā dūna al-iḍāḥ bi al-lafẓ kamā tuʿarrifu al-ishārah thumma yakūnu hādhā ʿindahā min aʿlā kalāmihā li infirādi ahli ʿilmihā bihi dūna ahli jahālatihā*".

[28] I should note in this context that I agree with Professor Makdisi's view that", *Shāfiʿī's purpose was to create for traditionalism a science which could be used as an antidote to kalām*". "Juridical Theology", 12 (emphasis not added). But this is only if *kalām* is understood here as the proponent of classical formalism, as its name, lit., "words", "speech" implies. Otherwise, I do not subscribe to the reason/revelation dichotomy associated with rationalism and traditionalism. For a full explication of this point, see my *The Boundaries of Theological Tolerance: Abū Ḥāmid al-Ghazālī's Fayṣal al-Tafriqah Bayna al-Islām wa al-Ẓandaqah* (forthcoming).

Formalism, as mentioned earlier, is precisely about restricting the loci of meaning to the observable features of language, such that the perspective or presuppositions of any would-be interpreter are neutralized or at least limited. This is what we find, in a clearly developed form, in *uṣūl al-fiqh* works beginning with Ibn al-Qaṣṣār, Abū al-Ḥusayn al-Baṣrī, al-Juwaynī and on. In al-Shāfiʿī's *al-Risālah*, for example, the notion of morphological patterns (*ṣiyagh*/sg. *ṣīghah*) and individual expressions (*alfāẓ*/s. *lafẓ*) imparting obligation (*wujūb*), prohibition (*taḥrīm*), generality (*ʿumūm*) or specificity (*khuṣūṣ*) is conspicuously absent.[29] From Ibn al-Qaṣṣār on, however, conventions like "*ṣīghat al-amr*" (morphological patterns that denote obligation) and "*lafẓat al-ʿumūm*" (expressions that denote generality) become standard features of legal theory. To be sure, there is a sense in which all of this bears the appearance of having been in some way *inspired* by al-Shāfiʿī. But there is a universalizing element in this new discourse whose ultimate effect would be to undermine the very nativism implied by al-Shāfiʿī. For this new approach would reduce *all* speakers and *all* listeners to the level of mechanical producers and decoders. For these *ṣiyagh* and *alfāẓ* are presumed, *ceteris paribus*, to perform their functions independently and consistently. The obvious effect of this would be to level the playing field between Arabs and (Arabic-speaking) non-Arabs. For on this scheme, access to scriptural intent is no longer contingent upon a closed set of historically determined presuppositions but upon mastery of this new science, *uṣūl al-fiqh*, which is equally accessible to all.

We may say, then, that the rise of *uṣūl al-fiqh*, as far as legal *interpretation* is concerned, represents not the implementation of what has been referred to as al-Shāfiʿī's proposal[30] but rather the establishment of a fundamentally new criterion, namely, one that ostensibly banished all presuppositions, Arab *and* non-Arab, and restricted legal interpretation to the observable features of language. With the establishment of this classical form of legal formalism, integrity to a theoretical hermeneutic emerged as an authority and the criterion on

[29] The same phenomenon is reflected in the epistle narrated by Abū Isḥāq Ibrāhīm b. Isḥāq on the authority of al-Muzanī, *Kītāb al-amr wa al-nahy ʿalā maʿnā al-shāfiʿī*, edited and translated by R. Brunschvig under the title "*Le livre de l'ordre et de la défense d'al-muzani*" *Bulletin De L'Etudes Orientales* 11 (1945–56):145–94. I am thankful to Professor Christopher Melchert for providing me with a copy of this text.

[30] See Hallaq, "Was al-Shafiʿi the Master Architect?", 601.

the basis of which all legal interpretations, past, present and future, would be judged. Ultimately, however, as we shall see, this new system would itself fall short of eliminating the impact of presuppositions. But it would succeed in sustaining its lasting appeal through its ability to speak to the community's egalitarian sentiments and to provide for an ostensibly more level playing field in the competition over legal interpretation.

B. *A Critical Legal Studies Critique*

My application of the CLS critique to *uṣūl al-fiqh* is actually quite simple. The main point it seeks to demonstrate is that the putative formalism implied by Islamic legal theory could not hope to exclude the impact of presupposition on legal interpretation. Once this is established, so too is the claim that legal theory cannot be the causative and sole source of legal doctrine, since legal theory can neither exclude nor take account of the presuppositions that inform legal interpretation.

Without exception and regardless of its author's theological or *madhhab* affiliation, manuals on *uṣūl al-fiqh* routinely include chapters on linguistic signification, or "*dalālat al-alfāẓ*". Here we find discussions of commands (*awāmir*/sg. *amr*), countermands (*nawāhin*/sg. *nahy*), injunctions that are general (*ʿāmm*) or restricted (*khāṣṣ*) in scope or of qualified (*muqayyad*) or unqualified (*muṭlaq*) signification. The aim of these chapters is to establish and define the relationship, assumed, *ceteris paribus*, to be essential, between the observable features of language (e.g., morphological patterns, syntactical structures) and the specification of meaning. Thus, for example, morphological imperatives (e.g., Do!) are generally deemed to imply obligation (*wujūb*); but they may also convey a non-binding recommendation (*nadb*) or even a simple license (*ibāḥah*). Similarly, common nouns accompanied by the definite article may denote simple definiteness (*taʿrīf*), or a generic category (*istighrāq*). Thus, "*al-rajul*" can mean either "the man", i.e., a particular man, or "mankind", in general. The same definite noun in the plural (*al-rijāl*) can denote the entire generic category, i.e., "men", or simply a subset thereof, e.g., "husbands", as in the verse", *al-rijāl qawwāmūna ʿalā al-nisāʾ* (husbands are the guardian-caretakers of their wives)". [4:34] Whether a word or phrase is interpreted according to one or another of its possible meanings will depend, according to the rules of *uṣūl al-fiqh*, on the availability of so-called "contextual indicators" (*qarāʾin*/sg.

qarīnah).[31] This has far-reaching implications for legal interpretation, as may be measured by the fact that a verse like, "Fight the unbelievers (*jāhidu l-kuffār*)", may be interpreted to include all those who do not believe in Islam, including Jews and Christians, or simply a restricted subset of the generic category, i.e., the pagan unbelievers of Arabia. Or a command like, "Marry such women as appeal to you (*fa nkihū mā tāba lakum min al-nisā'*)," [4:3] might cease to denote obligation and be taken as a simple permission, despite its use of the explicit imperative, *inkihū*. It is here that the ostensible formalism of *uṣūl al-fiqh* begins to break down and shows itself to entail an inextricably subjective element that opens the way for the influence of presuppositions, ideological visions and other extraneous factors.

The problem begins with the fact that, *uṣūl al-fiqh* provides no instruction on how hard, how long or, in some instances, even where, to look for contextual indicators. Al-Juwaynī, for example, tells us that *qarā'in* are of two types, verbal (*qarā'in maqāl*) and circumstantial (*qarā'in aḥwāl*)[32] and that circumstantial *qarā'in* "cannot be classified according to any generic type or distinguishing characteristics. . . ."[33] Similarly, in his monumental study of the 7th/13th century theoretician, Sayf al-Dīn al-Āmidī, Professor Bernard Weiss notes that "a *mujtahid* . . . would be justified in making an *ab initio* presumption in favor [of a statement's bearing] general reference . . . upon having tried *and failed* to find a contextual indicator . . ."[34] In other words, however univocal a word or phrase may appear to be, its meaning is ultimately contingent upon the presence or absence of contextual indicators. It is precisely here, however, that one feels compelled to ask: Is there really anything in the morphological composition of a word or the syntactial structure of a sentence that would tell us the precise level of assiduousness to exert in locating or eliminating the existence of relevant *qarā'in*? And are we really to believe that a jurist would exert just as much effort in searching for *qarā'in* to qualify a statement like "*damned are the conjecturers* (*qutila al-kharrāṣūn*)" [51:10] as he would for a statement like "*the male and the female thief,*

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[31] On contextual indicators, see W. Hallaq, "Notes on the Term *Qarīna* in Islamic Legal Discourse", *Journal of the American Oriental Society*, vol. 108 no. 3 (1988): 475–80.

[32] *al-Burhān fī uṣūl al-fiqh*, 2 vols. ed. 'Abd al-'Aẓīm Maḥmūd al-Dīb (Cairo: Dār al-Wafā' li al-Ṭibā'ah wa al-Nashr wa al-Tawzī', 1418/1997), 1:185.

[33] *al-Burhān*, 1:186.

[34] *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Dīn al-āmidī* (Salt Lake City: University of Utah Press, 1992), 404–05 (emphasis not added).

strike off the hand of each?" Would the Muslims of Medina in the time of the Prophet apply the same level of scrutiny to a category like "*al-majūs*", in order to determine whether it was general or restricted, as would the Muslims of Kufa or Jundishapur a few centuries later? And are Muslims in 21st century America (or Cairo or Kuala Lumpur for that matter) really going to apply the same level of assiduousness in looking for *qarā'in* to qualify statements pertaining to women or finance or politics?

My point in all of this is that these differential approaches and levels of scrutiny are reflective of a set of concerns and presuppositions about the relative importance and likely consequences of various interpretations. And while the meaning ultimately assigned to any statement is clearly contingent upon the results of this search for *qarā'in*, this is a search for which *uṣūl al-fiqh* itself provides virtually no rules. Thus, at a most basic level, the 'deduction' of meaning from legal texts can be seen to transcend the would-be generative dictates of *uṣūl al-fiqh*. And on this recognition, the notion that theory alone produces doctrine must also be recognized as a fiction.

IV. *Islamic Legal Theory and the New Legal Formalism*

Legal formalism was the product of a process of systemization that established consistency to theory as a criterion for judging legal views. This gave rise, in turn, to the need to maintain the appearance that every legal interpretation was dictated by the sources in accordance with a faithful application of legal theory, whence the fiction that theory—and theory alone—produces doctrine. Maintaining this fiction would entail constant adjustment, readjustment and on occasion some fairly dazzling calesthenics. One thinks, for example, of the Ḥanafī position allowing *bayʿ al-wafā'* after having forbade it for literally centuries.[35] Or the Mālikī Shihāb al-Dīn al-Qarāfī's introduction of a speaker-based approach to prophetic statements[36] alongside his continued adherence to a classical formalism that ostensibly denied any

[35] See, e.g., Muṣṭafā al-Zurqā, *Fatāwā muṣṭafā al-zurqā*, ed. M.A. Makkī (Damascus: Dār al-Qalam, 1420/1999), 405.

[36] See my "From Prophetic Actions to Constitutional Theory: A Novel Chapter in Medieval Muslim Jurisprudence", *International Journal of Middle East Studies* 25, no. 1 (1993): 71–90.

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