"*ISTIḤSĀN* IS NINE-TENTHS OF THE LAW": THE PUZZLING RELATIONSHIP OF *UṢŪL* TO *FURŪ'* IN THE MĀLIKĪ *MADHHAB*

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The "conventional wisdom" in the study of Islamic legal history goes something like this: for approximately the first two centuries following the death of the Prophet Muḥammad, the nascent Islamic community had yet to develop a self-consciously Islamic jurisprudence that was conceptually distinct from the customs of the early Arab Muslims themselves.[1] This formative period of Islamic jurisprudence was characterized by direct appeals to informal practical reason, i.e., *ra'y*, as well as to custom. The latter was generically termed *sunnah*. What this proto-Islamic jurisprudence lacked in self-conscious theoretization and universality, however, it made up for in flexibility, adaptability and pragmatism.

The arrival of al-Shāfi'ī in the last quarter of the second Hijrī century, however, put this all to an end: Unlike the members of the "ancient schools" of law whose concerns were relatively parochial, al-Shāfi'ī attempted a great synthesis, to wed the proto-rationalism of 'Irāqī jurisprudence with the conservative "*sunnah*-centered" approach of the Ḥijāzīs. The product of this great synthesis was al-Shāfi'ī's *Risālah*, a work that is commonly considered the first in *uṣūl al-fiqh*. The breakthrough of al-Shāfi'ī, the conventional account tells us, is that legal reasoning, viz., the logic that was to guide a jurist in explicating rules for unprecedented situations, no longer was to depend upon the seemingly arbitrary justifications of the "ancient schools", namely, "*ra'y*" and "*sunnah*", but rather, would rest on the more objective formal grounds of a hierarchy of material legal sources, beginning first with the Qur'ān, then the Sunnah of the Prophet, but only if authoritatively documented, consensus (*ijmā'*) and finally,

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[1] See, for example, N. J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964); Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1964).

analogy (*qiyās*). Furthermore, the Qur'ān and Sunnah, being textual, had to be understood according to the objective rules of interpretation derived from a scientific study of the Arabic language.[2]

Presumably, al-Shāfi'ī's objective method would render legal reasoning more transparent and hence, more public, universal and therefore, accountable. Although the "ancient schools" did not abandon their particular doctrines, their informal—and in comparison to al-Shāfi'ī—almost naive approach to legal problems, gave way to his more rigorous method. Henceforth, all jurists would be forced to use either al-Shāfi'ī's method, or some variation thereof, or risk being castigated as one who followed mere habit (*muqallid*) or, worse, capricious desire (*hawā*). In the opinion of the conventional wisdom, then, al-Shāfi'ī is fundamental because he defined, or helped define, the structure of what counts as an argument within Islamic law—one that is based on evidence drawn from an authoritative source and is consistent with the logical implications of the hierarchy of legal sources—and at the same time what is not an Islamic argument at all, but rather is something else, e.g., blind adherence to unsubstantiated "custom" (*sunnah*) or pursuit of "capricious desire" (*hawā*).

At first blush, this account of the structure of legal argument seems irrefutable: More and more of the great minds of Islamic jurisprudence indubitably became preoccupied with questions of method and ascertaining the formal structure of a proper Islamic legal argument. Even the Mālikī school, which has been accused of being relatively indifferent to the discipline of *uṣūl al-fiqh*, produced important works of *uṣūl al-fiqh* that seem to owe more to al-Shāfi'ī than they do to Mālik b. Anas. These authors include such notable Mālikīs as Ibn al-Ḥājib (d. 646/1248),[3] author of the famous *mukhtaṣar* in *uṣūl al-fiqh*; al-Bājī (d. 474/1081), author of *Iḥkām al-fuṣūl fī aḥkām al-uṣūl*;[4] and, al-Qarāfī's (d. 684/1285) *Tanqīḥ al-fuṣūl*.[5] Structurally, these works do

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[2] In recognition of al-Shāfi'ī's critical role in the development of Islamic jurisprudence, he is often dubbed the "Master Architect" of Islamic jurisprudence. This view of al-Shāfi'ī's role, however, has not gone unchallenged in recent scholarship. See Wael Hallaq "Was al-Shāfi'ī the Master Architect of Islamic Jurisprudence?" *International Journal of Middle East Studies*, 25 (1993), 587–605.

[3] Jamāl al-Dīn 'Uthmān b. 'Amr b. Abī Bakr.

[4] Abū al-Walīd Sulaymān b. Khalaf al-Bājī, *Iḥkām al-fuṣūl fī aḥkām al-usūl*, ed. 'Abdallah Muḥammad al-Jabūrī (Beirut: Mu'assasat al-Risālah, 1409/1989).

[5] Abu al-'Abbas Shihāb al-Dīn Aḥmad b. Idrīs al-Qārafī, *Sharḥ tanqīḥ al-fuṣūl fī ikhtiṣār al-maḥṣūl fī al-uṣūl*, ed. Ṭāhā 'Abd al-Ra'ūf Sa'd (Cairo: Maktabat al-Kullīyāt al-Azharīyah, 1414/1993).

not seem to differ significantly from the works of their Shāfiʿī colleagues. Pride of place is given to the textual sources of revelation, and much of the work is devoted to hermeneutical questions.[6]

Mālikī works of *uṣūl* seem to share the fundamental premise of al-Shāfiʿī, namely, that Islamic law in the first instance means rules derived from revelation. Thus, the pedigree of a rule depends on its affiliation to revelation. This leads to a natural hierarchy of sources (s. *dalīl*/pl. *adillah*) into those that are strictly revelatory, i.e., Qurʾān, Sunnah and Ijmāʿ, and those that are derivative, e.g., *qiyās, istiḥsān, maṣlaḥah* and *istiṣḥab al-ḥāl*.[7] Despite substantial disagreements on the details of what constitutes Sunnah and Ijmāʿ, or whether *maṣlaḥah* and *istiḥsān* constitute valid alternatives to analogy, Mālikī works of *uṣūl al-fiqh* apparently agree with Shāfiʿī works that the rules of Islamic law need to be derived from authentic historical sources in a manner consistent with the ontological priority of revelatory sources to ancillary ones.

This bias toward textual sources manifests itself in some *khilāf*-works, such as Ibn Rushd the Grandson's (d. 595/1198) *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid* (hereafter, *Bidāyah*).[8] Ibn Rushd himself

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[6] Compare the previous Mālikī works to those authored by the Shāfiʿī authors Abū Ḥāmid Muḥammad b. Muḥammad b. Muḥammad al-Ghazālī, *al-Mustaṣfā fī ʿilm al-uṣūl* (Beirut: Dār al-Kutub al-ʿIlmīyah, 1414/1993); Abū al-Ḥasan Sayf al-Dīn ʿAlī b. Abī ʿAlī b. Muḥammad al-Āmidī, *al-Iḥkām fī uṣūl al-aḥkām* (Beirut: Dār al-Kutub al-ʿIlmīyah, 1403/1983), 4 vols.; Fakhr al-Dīn Muḥammad b. ʿUmar b. al-Ḥasan al-Rāzī, *al-Maḥṣūl fī ʿilm uṣūl al-fiqh* (Beirut: Maʾassat al-Risālah, 1312/1992), 6 vols. I do not wish it to be understood that the works of these various authors are indistinguishable. Obviously, they are. The point I wish to make, however, is simply that affiliation to a particular school of *fiqh* did not "translate" into a particular approach to *uṣūl al-fiqh*. Instead, authors in the *uṣūl al-fiqh* tradition appear to analyze a discrete set of problems as problems of *uṣūl al-fiqh*, rather than analyzing problems particular to the rules of their madhhab. The generic independence of *uṣūl al-fiqh* from the particular rulings of a school of positive law is perhaps best demonstrated by the fact that al-Qārafī, a Mālikī, chose the *uṣūl*-work of a Shāfiʿī, Fakhr al-Dīn al-Rāzī, as the text which he would first summarize, and then, upon which he would compose a commentary, as is evident from the title of his *Tanqīḥ*. Conversely, many Shāfiʿīs wrote commentaries on the text of Ibn al-Ḥajib's *Mukhtaṣar*.

[7] Thus, al-Bājī, for example, divides the proofs of the revelation into three categories. The first he terms *aṣl*, the second he terms *maʿqūl al-aṣl* and the third he terms *istiṣḥāb al-ḥāl*. *Aṣl*, in turn, includes the Qurʾān, the Sunnah and Ijmāʿ. *Maʿqūl al-aṣl* refers to certain hermeneutic techniques, e.g., *faḥwā al-khiṭāb*, and includes *qiyās*, referred to obliquely in the introduction as *maʿnā al-khiṭāb*. *Al-Iḥkām*, p. 69, 456.

[8] Abū al-Walīd Muḥammad b. Aḥmad b. Muḥammad Ibn Rushd al-Ḥafīd, *Bidāyat al-mujtahid wa-nihāyat al-muqtaṣid*, ed. ʿAlī Muḥammad Muʿawwaḍ and ʿĀdil Aḥmad ʿAbd al-Mawjūd (Beirut: Dār al-Kutub al-ʿIlmīyah, 1416/1996), 6 vols. Citations to *Bidāyah* will be made in the text.

is aware of the limited scope of his book, and in his (very brief) introduction he reminds his readers that the purpose of his book is limited to "cases having a textual basis in revelation or are closely related thereto" (*wa hādhihi al-masāʾil fī al-akthar hiya al-masāʾil al-manṭūq bihā fī al-sharʿ aw tataʿallaq bi al-manṭūq bihi taʿalluqan qarīban*) (*Bidāyah*, 1:325). While not surprising, his failure to explain rules that are not "closely related" to revelatory sources is disappointing because it certainly must be the case that, at least in purely quantitative terms, rules derived from non-revelatory sources make up the vast majority of actual Islamic law, viz., the rulings found in the *furūʿ* manuals, at least in the Mālikī school. Indeed, Mālik is reported as having said, "*Istiḥsān* is nine-tenths of [legal] knowledge (*Al-istiḥsān tisʿat aʿshār al-ʿilm*)".[9]

Interestingly, the Mālikī *uṣūlīs* such as al-Qarāfī, al-Bājī and Ibn al-Ḥājib were also masters of Mālikī *furūʿ*, each one having authored an important work on Mālikī *furūʿ*: Ibn al-Ḥājib authored his *mukhtaṣar* in *fiqh*, *Jāmiʿ al-ummahāt*, which served as the basic *matn* of Mālikī *fiqh* until the *mukhtaṣar* of Khalīl;[10] al-Bājī authored the, *Muntaqā*, which is really a work of Mālikī *furūʿ* in the guise of a commentary on the *Muwaṭṭaʾ*; and, al-Qarāfī published the monumental *al-Dhakhīra*. The persistent interest of Mālikī *uṣūlīs* in *furūʿ* appears in stark contrast to the careers of two of their prominent Shāfiʿī *uṣūlī* colleagues, Fakhr al-Dīn al-Rāzī (d. 606/1209) and Sayf al-Dīn al-Āmidī (d. 631/1233). I do not mean to suggest that Shāfiʿīs were more "theoretical" than Mālikīs or that the Mālikīs were more "practical" than the Shāfiʿīs. The contrast is useful, however, to the extent that it reveals that a scholar could be a master of *uṣūl al-fiqh* without being a recognized expert in *furūʿ*. Likewise, one could also be recognized as a master of *furūʿ* without gaining such recognition in *uṣūl al-fiqh*. Of course, as the three Mālikī authors demonstrate, it was possible to be accomplished in both, but it was by no means necessary. Yet,

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[9] Aḥmad b. Muḥammad al-Ṣāwī, *Bulghat al-sālik li-aqrab al-masālik* (hereafter, *al-Bulghah*), on the margin of Abū al-Barakāt Aḥmad b. Muḥammad b. Aḥmad al-Dardīr, *al-Sharḥ al-ṣaghīr* (hereafter, *Sharḥ*), ed. Muṣṭafā Kamāl Waṣfī (Cairo: Dār al-Maʿārif, n.d.), 4 vols. 3:638.

[10] See Mohammad Fadel, "Adjudication in the Mālikī Madhhab: A Study of Legal Process in Medieval Islamic Law" (Ph.D. diss., University of Chicago, 1995), 237–42. Ibn al-Ḥājib's important work has recently been published. Jamāl al-Dīn ʿUthmān b. ʿAmr b. Abī Bakr, *Jāmiʿ al-ummahāt*, ed. Abū ʿAbd al-Raḥmān al-Akhḍar al-Akhḍarī (Beirut: Dār al-Yamāmah, 1418/1998).

if there is no necessary relationship between mastery of *uṣūl al-fiqh* and mastery of *furū'*, one is tempted to question whether al-Shāfi'ī's insistence on adherence to a rigorous method had the impact on legal argument that is commonly supposed. What if legal reasoning within the "ancient" schools continued by developing their own criteria for legitimate argumentation, but one whose validity did not transcend the limits of a particular school?

This essay raises, but does not seek to answer that question. Instead, it desires to explore the impact of *uṣūl*-based legal argumentation on the *furū'* doctrine of the Mālikī school through Ibn Rushd the Grandson's famous *khilāf* work, *Bidāyat al-mujtahid*. Specifically, I will focus on an innocuous topic, that of pledges (*ruhūn*). The goal is to show that an *uṣūl*-inspired work such as that of Ibn Rushd not only is incapable of explaining the actual corpus of what constitutes the law of pledges, but also that the portion of the corpus that it does explain can only be described as marginal.

Ibn Rushd begins his discussion of this topic by noting its revelatory source, namely, *Baqarah* 283, which states, "If you are on a journey and find not a scribe [to record the debt], then pledges, possessed" (*Bidāyah*, 5:236). Leaving aside the fact that the pledges referred to in this verse seem to refer exclusively to evidentiary problems arising from contracting far away from urban centers, the verse is utterly silent on the rights and obligations of the pledgor (*al-rāhin*) and the pledgee (*al-murtahin*).[11] It is also silent as to what types of property can be pledged by a debtor as collateral.

Nonetheless, Ibn Rushd notes that the principal right the pledgee obtains by virtue of his agreement with the pledgor is the right to retain possession of the pledge until the pledgor repays his debt to the pledgee. Furthermore, when the pledgor fails to repay his debt in a timely fashion, the pledgee has the right, with the pledgor's permission, to sell the collateral and satisfy his debt from the proceeds of that sale. If the pledgor refuses to permit the sale of the collateral, the pledgee has the right to seek a judicial sale of the collateral. The

[11] Part of the difficulty of this area of the law is the ambiguity of the terms used, especially in the early sources. Later sources consistently use *rāhin* to mean pledgor and *murtahin* to mean the pledgee. Early sources, however, might use the terms interchangeably, viz., *rāhin* and *murtahin* may mean either pledgor or pledgee. For that reason, one has to be very sensitive to the linguistic context in the early sources to determine whether the text is discussing a pledgor or a pledgee.

issue of the pledgor's permission to foreclose on the collateral can be avoided if the pledgor agrees to make the pledgee his agent for purposes of sale of the collateral, although Ibn Rushd reports that Mālik discouraged (*kariha*) that arrangement (*Bidāyah*, 5:241).

Interestingly, Ibn Rushd cites no revelatory authority for these propositions. He explicitly refutes the possibility that consensus can be a revelatory *aṣl* in the absence of a specific revelatory text or valid analogy based on such a text: "As for consensus, it rests on one of these four[12] means [of establishing a legal ruling]. When a rule is established by means of one of [these four], however, and that ruling is not conclusive, consensus will elevate it from a probable [judgment] to a conclusive one. Consensus is not an independent source in itself, but rather necessarily depends on other sources, for were it otherwise, that would necessitate admitting revelation subsequent to the Prophet (S)" (*Bidāyah*, 1:328–29). We can thus exclude Ijmāʿ as the legal source for these propositions.

Another important right of a pledgee is only implicit in Ibn Rushd's treatment of pledges: A pledgee has prior claim to the value of the collateral—as against the pledgor's other creditors—in the event of bankruptcy. One can deduce this rule from Ibn Rushd's discussion of possession of the collateral in conjunction with the right of the pledgee to foreclose on the collateral in the event of the debtor's default. Thus, he states that according to Mālik, possession of the collateral is only a condition of perfection (*sharṭ al-tamām*), not a condition of contractual validity (*sharṭ al-ṣiḥḥa*) (*Bidāyah*, 5:239).[13] Essentially, the position he ascribes to Mālik is this: As between the pledgor and the pledgee, the pledge is a valid contract binding the two regardless of possession. The pledge contract, however, becomes void if the pledgee fails to take possession (*ḥiyāza, qabḍ*) of the collateral prior to the death, mortal illness or bankruptcy of the pledgor. If the pledgee has failed to "perfect" her pledge by possession in any of these three contingencies, her only recourse is a claim based on the

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[12] In other words, either a spoken utterance (*lafẓ*) of the Lawgiver, an act (*fiʿl*) of the Lawgiver or the tacit approval (*iqrār*) of the Lawgiver. The fourth means is analogy (*qiyās*), but it is controversial, and it is restricted to those areas for which the Lawgiver was silent (*Bidāyah*, 1:325).

[13] I have chosen to translate *tamām* in this context as "perfection" rather than "completion" to emphasize its precise equivalence to the term "perfection" in Anglo-American jurisprudence, as that term is used in secured transactions, which includes pledges.

debt (*dayn*) owed to her by the pledgor; her claim to the particular asset pledged by the pledgor disappears.[14]

The term of art used by the Mālikīs for the pledgee's priority with respect to the collateral is *ikhtiṣāṣ*, viz., the priority of the creditor's claim over that of other creditors to the value of the asset. The effect of *ikhtiṣāṣ* is dramatic. In its absence, the value of the pledged collateral is shared proportionately by all the creditors of the pledgor (*uswat al-ghuramā'*).

Ibn Rushd again refers to *Baqarah* 283 as the revelatory source for the "requirement" of possession, whether for purposes of validity or for perfection (*Bidāyah*, 5:239–40). At the risk of sounding overly critical, however, I wish to note that the verse does not speak at all to the issue of a pledgee's priority in the pledged collateral. Furthermore, the verse seems to be addressing the use of pledges to solve an evidentiary problem that arises as a consequence of the parties' inability to record their contract. In other words, while the Qur'ān expressly contemplates the parties' use of collateral *in lieu* of a writing evidencing the debtor's obligation, it does not appear that the plain language of the verse has any relevance to the question of whether the pledgee also enjoys priority to the value of the pledged asset in the event his debtor is unable to pay his debt, whether because of death or bankruptcy. Thus, Ibn Rushd's treatment of pledges fails to provide a ground in revelation for the central property right created by the pledge: Perfection of the pledge by possession gives the pledgee priority against the entire world in the pledged asset.

To the extent that Ibn Rushd provides texts from the Sunnah, they are inconclusive and deal with secondary issues. The first such issue is whether accretions (*namā'*) to the collateral are considered part of the collateral, or belong outright to the pledgor, e.g., whether the fruit of a tree pledged as collateral is part of the collateral, or whether it is a separate item of property such that the pledgee has no rights in it (*Bidāyah*, 5:243–49). The Shāfi'īs took the position that accretions belonged to the pledgor whereas the Ḥanafis argued that accretions became part of the collateral. Mālik's position was more nuanced, depending upon the nature of the collateral at issue. Thus, he held that the offspring of humans and livestock were an

[14] *Sharḥ*, 3:306.

extension of the mother that was the collateral and hence were part of the collateral, whereas the output of trees, the rents of property and the earnings of a slave were independent of the collateral and thus belonged to the pledgor. The criterion Ibn Rushd claims Mālik used to distinguish one class from the other is the following: When the accretion is separate, but its appearance resembles the collateral, it is treated as though it is part of the collateral (*mā kāna min namā' al-rahn al-munfaṣil ʿalā khilqatihi wa ṣūratihi fa-innahu dākhil fī al-rahn*); where the accretion differs in form from the collateral, whether it is a natural product of the collateral or not, it is not part of the collateral, but rather forms an entirely distinct item of property (*mā lam yakun ʿalā khilqatihi fa-innahu lā yadkhul fī al-rahn kāna mutawallidan ʿanhu ka-thamr al-nakhl aw ghayr mutawallid ka-kirā' al-dār wa kharāj al-ghulām*) (*Bidāyah*, 5:245).[15]

Mālik, Ibn Rushd explains, distinguished between the offspring of humans and livestock, on the one hand, and agricultural products, on the other, because the law of sales distinguishes between them (*Bidāyah*, 5:249: *wa-farraqa bayna al-thamar wa al-walad fī dhālika bi al-sunnah al-mufarriqa fī dhālika*). Mālik reported in the *Muwaṭṭa'* that the Prophet (S) said "Whoever sells date-palms that have been pollinated is entitled to their fruit unless the seller stipulates otherwise".[16] Mālik also reported subsequent to that *ḥadīth* that "There is no difference among us [in Madīna] that whoever sells a pregnant slave-girl or livestock that is pregnant, he has also sold the fetus to the purchaser, whether or not the [purchaser] stipulates it". If we assume that Mālik's logic is driven by the rigor of *uṣūl al-fiqh*, his rule distinguishing what types of accretions naturally belong to the collateral and what does not appears to be a generalization based on the *ḥadīth* he cited in the *Muwaṭṭa'*. Yet, Mālik concludes his discussion of this question in the *Muwaṭṭa'* with the observation that "What clarifies

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[15] While the distinction Ibn Rushd appears at first glance to explain Mālik's rulings, the explanation is not very convincing, especially with regard to accretions that are "natural", for in their case, whether the "accretion" resembles the collateral is a function of the time at which one chooses to make the comparison. Thus, fruits will eventually "resemble" the trees that bore them, just as a fetus will eventually become a human being if born alive. With regard to this rule's applicability to a human fetus, the more likely explanation is the prohibition of separating a slave woman from her minor offspring, whether that is by sale or by pledge.

[16] Mālik b. Anas, *Mawaṭṭa' al-imām mālik*, with the commentary of Jalāl al-Dīn al-Suyūṭī, *Tanwīr al-ḥawālik* (Cairo: Maktabat Muṣṭafā al-Bābī al-Ḥalabī, 1369/1950), 2 vols., 2:112–13.

this is that people customarily pledge the dates of their palm trees without pledging the trees [themselves], but no one pledges a fetus in the belly of its mother, whether a slave or livestock".[17]

The Shāfi'īs, according to Ibn Rushd, also based their position on a *ḥadīth* which attributes to the Prophet (S) the saying that "Pledges are milked and ridden (*al-rahn maḥlūb wa markūb*)" (*Bidāyah*, 5:245–46). The Shāfi'īs read this to mean that in the absence of a stipulation providing otherwise, accretions belong to the pledgor. They also cite the *ḥadīth* in which the Prophet says "[Destruction] of the collateral is [borne] by the one pledging it as collateral. To him belongs its profit and he suffers its loss (*al-rahn mimman rahanahu lahu ghunmuhu wa 'alayhi ghurmuhu*)" in order to strengthen their position (*Bidāyah*, 5:246).[18] The Ḥanafīs argue for their position, according to Ibn Rushd, based on what appears to be a common sense principle: just as the "branch" is a derivative of the "root" (*al-furū' tābi'a li 'l-uṣūl*), so the accretion of the collateral is also a part thereof (*Bidāyah*, 5:248). Thus, any increase in the collateral is part of the collateral and therefore goes to the benefit of the pledgee unless the pledge is redeemed by payment of the debt.

A casual glance at these three different positions might lead to the conclusion that the differences among the three legal schools are significant. Such a conclusion, however, would be premature, for the schools have a deeper agreement that renders their particular position on this question relatively unimportant—whatever the rule of each school might be, they all agree it is only a default rule that applies in the *absence* of an agreement between the pledgor and the pledgee.

The Mālikīs, Shāfi'īs and Ḥanafīs also dispute who bears the risk of loss (*ḍamān*) in the event of the destruction of the collateral while in the possession of the pledgee in much the same manner that they dispute whether accretions belong, as an initial matter, to the pledgee or to the pledgor. Thus, the Shāfi'īs place the risk of loss on the

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[17] This apparent reticence of the Medinese to pledge a fetus cannot be attributed to the prohibition on *gharar*, for the Mālikīs allowed other contingent property interests, such as a runaway slave, or fruit that had yet to ripen, to serve as collateral, despite the *gharar* inhering in the ultimate existence of the collateral at the time the debt matured. *Sharḥ*, 3:305.

[18] According to the editors of *Bidāyah*, this ḥadīth was attributed in one version to the Prophet by the companion Abū Hurayra (*mawṣūl*), and in another, although it is attributed to the Prophet, its chain of transmission ceases at the successor, Sa'īd b. al-Musayyab (*mursal*). For the details of this text's transmission, see *Bidāyah*, 5:246, n. 1063.

pledgor, on the theory that the contract between the pledgor and the pledgee creates a bailment (*Bidāyah*, 5:250).[19] The Ḥanafīs, on the other hand, treat the collateral as though it were the property of the pledgee, and accordingly, force the pledgee to bear the risk of its loss. Mālik, just as he did regarding the question of who benefits from "accretions" to the collateral, refused to adopt a categorical rule, and instead adopted a rule that looked to the nature of the collateral to determine which party bore the risk of its loss. Thus, where the collateral was personal property that could be easily hidden (*mā yughāb ʿalayhi*), e.g., gold, clothing, or other fungible commodities, Mālik placed the risk of loss on the pledgee, but where the collateral was nonmoveable real property (*mā lā yughāb ʿalayhi*) or property whose destruction would be obvious (*mā lā yakhfā halākuhu*), e.g., land, homes, or animals, the risk of loss remained on the pledgor (*Bidāyah*, 5:251).

The Shāfiʿī's relied for their proof-text, according to Ibn Rushd, on the same *ḥadīth* they cited for the proposition that accretions belong to the pledgor, namely, "[Destruction] of the collateral is [borne] by the one pledging it as collateral. To him belongs its profit and he suffers its loss" (*al-rahn mimman rahanahu lahu ghunmuhu wa ʿalayhi ghurmuhu*) (*Bidāyah*, 5:250). Ibn Rushd provides two arguments for the Ḥanafīs, one derived from analogy, and the other based on a proof-text. As for the analogy, the Ḥanafīs take as the principal case (*al-aṣl*) the rule governing who bears the risk of loss when the seller retains possession of a sold item (*al-mabīʿ*) until the purchaser pays its purchase price in full. Here, the majority of scholars agree that the seller bears the risk of loss, because he is maintaining possession for his own benefit. Likewise, the pledgee is holding the pledge for his own benefit, and therefore, he should bear the risk of loss in this case just as he does in the principal case (*Bidāyah*, 5:251). Their proof text consists of a *mursal*-report where a man pledged a horse as collateral. That horse subsequently perished while in the possession of the pledgee. When the Prophet was made aware of the situation, he is said to have stated to the pledgee "Your right has departed [with the departure of the pledge]" (*dhahaba ḥaqquka*) (*Bidāyah*, 5:251).

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[19] Ibn Rushd also attributes this position to Aḥmad b. Ḥanbal, Abū Thawr and the majority of the scholars of *ḥadīth*.

Mālik, according to Ibn Rushd, reached his conclusion by means of *istiḥsān*, which Ibn Rushd defines as "the harmonization of contradictory [revelatory] proofs" (*jamʿ bayna al-adillah al-mutaʿāriḍah*) (*Bidāyah*, 5:251). Mālik's "harmonization", however, does not attempt to reconcile the language of the contradictory reports alternatively cited by the Shāfiʿīs and the Ḥanafīs; instead, the basis of Mālik's distinction between collateral that may be secreted away (*mā yughāb ʿalayhi*) and that which cannot (*mā lā yughāb ʿalayhi*) is the notion of "suspicion (*tuhmah*)".[20] Thus, Ibn Rushd states that destruction of collateral that may be squirreled away (*mā yughāb ʿalayhi*) raises suspicion (*al-tuhmah talḥaq*) as to whether in fact it was destroyed or simply misappropriated, while the destruction of collateral that cannot be so easily hidden (*mā lā yughāb ʿalayhi*) raises no such suspicion (*Bidāyah*, 5:251).[21]

Two general observations are in order with regard to the competing rules governing the allocation of property rights to the accretions of collateral and which party bears the risk of the collateral's destruction. First, it does not appear that the controversies among the fuqahāʾ regarding these two questions, while real enough, could have had any appreciable impact upon the debtor-creditor relationship. This "irrelevancy" hypothesis is not based on the cliché that Islamic law is "idealistic" and therefore irrelevant to social practice. Rather, it is based on the observation that, with respect to determining the property rights of the parties to the collateral's accretions, the *fuqahāʾ* apparently agreed that the pledgor and pledgee

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[20] *Tuhmah* is a term of art in Islamic law. In this context, it closely corresponds to the notion of "moral hazard" used by contemporary economists.

[21] Ibn Rushd the Grandfather's analysis of Mālik's reasoning is especially lucid. He states expressly that the basis of Mālik's distinction is that in the case of collateral that is easily hidden, the truth of what happened can be obtained *only* from the pledgee. Because the pledgee is in exclusive possession of the evidence necessary to resolve the question of how the pledge perished, a moral hazard exists, viz., the temptation on the part of the pledgee to claim the destruction of the collateral while keeping it for himself or selling it and keeping its price. Accordingly, it is necessary to hold him liable for its destruction unless he can produce objective evidence (*bayyinah*) that he was not responsible for its destruction. On the other hand, where the collateral is property that cannot be easily hidden, e.g., a home, land, or an animal (*mā lā yakhfā halākuhu*), no moral hazard exists because the obvious nature of the property allows a judge to ascertain what happened to the collateral independently of the pledgee's potentially self-serving statements. Abū al-Walīd Muḥammad b. Aḥmad Ibn Rushd al-Jadd, *al-Muqaddimāt al-mumahhidāt*, ed. Saʿīd Aḥmad Aʿrāb (Beirut: Dār al-Gharb al-Islāmī, 1408/1988), 3 vols., 2:397–98.

could stipulate by agreement which party would benefit in the appreciation of the collateral. In other words the *fuqahā'* were arguing about a default rule that applied *only* in the absence of the parties' agreement. Assuming that contracting parties are well-informed of their legal rights, and there are no unusual obstacles preventing them from bargaining over which of the parties will benefit from the appreciation of the collateral, one can assume that they will bargain to the result that is most consistent with their interests. The same point applies with respect to the various rules regarding which party bears the risk of the collateral's loss: So long as the pledge is to secure contractual indebtedness,[22] the price of the debt will reflect which party bears the risk of the collateral's loss. In these contexts, where a legal system has an option of adopting one of several plausible rules, the most important function of law is to specify which of the plausible rules will be the applicable rule in the absence of an agreement, thereby creating a basis from which the parties' bargaining may proceed.[23]

The second point is that even if one believes that these disputes were of major doctrinal significance, it is significant that Ibn Rushd is unable to produce any conclusive evidence—from the viewpoint of the *uṣūl al-fiqh* paradigm at least—for the positions of any of the parties. It is not only the relative paucity of revelatory material that poses a problem for the effective functioning of the *uṣūl al-fiqh* paradigm; rather, it is the ambiguity of the reported proof-texts themselves that ultimately render the formalistic method of *uṣūl al-fiqh* of scant utility in deriving rules in this area of the law.[24]

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[22] Of course, the applicable liability rule would carry more significance where the pledge is given as security for a debt arising from a tort (*jināyah*), because in this case the creditor would not have the freedom to vary the credit terms to reflect the costs associated with bearing the risk of loss. On the general relationship of legal rules to social behavior, see Ronald H. Coase, "The Problem of Social Cost", *Journal of Law and Economics*, 3 (1960).

[23] This is another justification for *taqlīd*: where parties can bargain to their own solution, it is less important that the legal rule be correct, than it is for it to be precise. Ambiguity in such circumstances decreases the possibility that the parties will be able to reach their own agreement.

[24] Take, for example, the *ḥadīth* text cited repeatedly by the Shāfi'īs: *al-rahn mimman rahanahu lahu ghurmuhu wa 'alayhi ghurmuhu*. While in the usage of later jurists the verb *rahana* and its cognates denote the pledgor and the verb *irtahana* and its cognates denote the pledgee, earlier texts use the two verbs and their cognates interchangeably. Thus, one could also cite that *ḥadīth* for precisely the opposite meaning advanced by the Shāfi'īs.

Much more significant than these two issues, however, is first, what type of property the law recognizes as being amenable to collateralization; and, second, what acts of the creditor are necessary to satisfy the requirement of possession.[25] Ibn Rushd mentions, briefly, the profound difference of opinion between the Mālikīs and the Shāfi'īs in this regard, but fails to explain either position in detail, or the "proof" either party held out in favor of its opinion. The main point of contention separating the Mālikīs from the Shāfi'īs with regard to the first question is whether the restrictions on the consideration (*'iwaḍ*) in a contract of sale also apply to the collateral in a contract of pledge. Mālikīs argued that they did not. Accordingly, they allowed contingent property rights to be pledged as collateral. Shāfi'īs on the other hand argued that collateral is akin to consideration in a contract of sale. Therefore, collateral must not run afoul of the legal restrictions applicable to consideration, thereby effectively foreclosing the collateralization of contingent property rights.

Some Mālikīs distinguished a contract of pledge from a contract of sale on the purely formal grounds that, in contrast to a sale, which transfers title to the property exchanged, a pledge contract does not.[26] On this basis they concluded that the conditions regulating a contract of sale that effects an immediate transfer of title should not apply to a pledge contract that does not. Nonetheless, they required that collateral must satisfy the minimal conditions of property, viz., it must have monetary value (*mutamawwal*).[27] Furthermore, it must act as security for a lawful debt. Thus, al-Dardīr defines a pledge as "[Something] having monetary value taken [from its owner] in order to gain security thereby for a binding debt or for [one] maturing into a binding [debt]" (*al-rahn mutamawwal ukhidha tawaththuqan bihi fī dayn lāzim aw ṣā'ir ilā al-luzūm*).[28] Because the debt is already in legal existence prior to the pledge contract, al-Dardīr can take the position that any *gharar*[29] involving the collateral is irrelevant

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[25] Accordingly, the jurists are not differing over a default rule in this context, and thus, the choice of rule will have an impact on social behavior because the options of parties will be constrained by the legal regime's choice of rule.

[26] Al-Dardīr, 3:304; *al-Ṣāwī*, 3:304.

[27] Al-Dardīr, 3:305. This is a perplexing requirement in light of the prohibition on the sale of contingent property rights. It is hard to conceive that such a right could be viewed as having any value such as to constitute property (*mutamawwal*) because it could not be sold and thus no value could be realized from it.

[28] *Id.*, 304.

[29] While the concept of *gharar* is complex and highly-nuanced, in this context, it

because "The pledge of collateral [suffering from] *gharar* is valid because it is permissible not to have a pledge at all; therefore, having some security is better than nothing" (*fa-innahu yaṣiḥḥu rahnuhu li-jawāz tark al-rahn min aṣlihi fa-shay' yutawaththaq bihi khayr min 'adamihi*).[30]

While later Mālikīs seemed to have no problem with accepting the validity of a contingent property right serving as collateral—despite the fact that such a contingent right could not be the object of a valid contract of sale—earlier Mālikīs were troubled by the notion. Al-Ḥattāb (d. 954/1547) reported that while all Mālikīs agreed that such a pledge would be permissible if it were independent of and subsequent to the contract creating the debt, if the pledge were part and parcel of the debt agreement, some Mālikīs objected for the cogent reason that in this latter case, part of the purchase price is for collateral, an outright sale of which would be invalid.[31] Despite the economic soundness of this criticism, the Mālikī school nevertheless adopted the position that contingent property rights could serve as collateral.

More importantly for our purposes, however, Ibn Rushd does not explain why this rule was adopted instead of the one proposed by the dissenters. Nor does Ibn Rushd attempt to ground the Mālikīs distinction between the requirements of lawful consideration and lawful collateral in any revelatory source. Instead, he just reports the difference of opinion regarding the issue without any reference at all to sources that would be considered authoritative within the *uṣūl al-fiqh* paradigm (*Bidāyah*, 5:237).

Just as the Mālikīs allow contingent property rights to serve as collateral, they also allow intangible property rights to serve as col-

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is helpful to consider *gharar* as the equivalent of a contingency affecting the existence or non-existence of some item of property.

[30] *Id.*, 305.

[31] Muḥammad b. Muḥammad al-Ḥaṭṭāb, *Mawāhib al-jalīl*. 6 vols. (Beirut: Dār al-Fikr, 1412/1992), 5:3. When a seller sells on credit, and in the same contract of sale obtains a pledge consisting of a contingent property right from the purchaser—fruit that has yet to ripen, for example—the purchase price is a function of the value of the actual property that is the object of the contract of sale less the value of the contingent property right the debtor gives the seller to secure the debt. In other words, when a seller sells on credit to Purchaser 1 and receives from her collateral in the form of a contingent property right, and also sells to Purchaser 2 on credit but receives no collateral, the seller—all things being equal—will charge Purchaser 2 more for the sale than he will charge Purchaser 1. For this reason the Mālikī dissenters argued that to allow a contingent property interest to serve as collateral in these circumstances was tantamount to allowing the sale of a contingent property interest, something that was strictly prohibited on the grounds of *gharar*.

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

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

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

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

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

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

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

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